

2006

The "Actual State of Things": Teaching About Law in Political and Historical Context

David E. Wilkins

University of Richmond, dwilkins@richmond.edu

Follow this and additional works at: <https://scholarship.richmond.edu/jepson-faculty-publications>



Part of the [Indian and Aboriginal Law Commons](#), and the [Leadership Studies Commons](#)

Recommended Citation

Wilkins, David E. "The 'Actual State of Things': Teaching About Law in Political and Historical Context." *North Dakota Law Review* June 2006: 903-914.

This Article is brought to you for free and open access by the Jepson School of Leadership Studies at UR Scholarship Repository. It has been accepted for inclusion in Jepson School of Leadership Studies articles, book chapters and other publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

THE “ACTUAL STATE OF THINGS”: TEACHING ABOUT LAW IN POLITICAL AND HISTORICAL CONTEXT

DAVID E. WILKINS*

Vine Deloria, Jr., the most prolific Native writer and one of the most gifted intellectuals in American history, left a deep imprint in many of the fields he so artfully plowed, including: education, religion, politics, cultural critic, history, and indigenous knowledge. His scholarship on specific subjects came in waves, with each wave building upon the previous one before reaching its remarkable crest.

Deloria's scholastic and pragmatic legacy in federal Indian law and policy and indigenous governance is one that has produced several major books¹ and numerous articles,² which, in the pantheon of Deloria's prodigious body of works, rank highly in terms of their quality, clarity, and importance. He has influenced a wide body of legal works including treaties,

*Professor of American Indian Studies, Adjunct Professor of Political Science, Law, and American Studies, University of Minnesota; Ph.D., 1990, University of North Carolina/Chapel Hill. I want to thank Matthew Fletcher for the invitation to participate in the conference and Kara Gansmann for her excellent editorial skills in getting my article in shape for publication.

1. See, e.g., THE INDIAN REORGANIZATION ACT: CONGRESSES AND BILLS (Vine Deloria, Jr. ed., Univ. of Okla. Press 2002); 1 & 2 VINE DELORIA, JR. & RAYMOND J. DEMALLIE, DOCUMENTS OF AMERICAN INDIAN DIPLOMACY: TREATIES, AGREEMENTS, AND CONVENTIONS, 1775-1979 (Univ. of Okla. Press 1999) [hereinafter 1 & 2 DELORIA & DEMALLIE, DOCUMENTS OF AMERICAN INDIAN DIPLOMACY]; VINE DELORIA, JR. & DAVID E. WILKINS, TRIBES, TREATIES, AND CONSTITUTIONAL TRIBULATIONS (Univ. of Tex. Press 1999); VINE DELORIA, JR., AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY (Univ. of Okla. Press 1985); THE AGGRESSIONS OF CIVILIZATION: FEDERAL INDIAN POLICY SINCE THE 1880S (Vine Deloria, Jr. & Sandra L. Cadwalader eds., Temple Univ. Press 1984); VINE DELORIA, JR. & CLIFFORD M. LYTLE, THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY (Pantheon Books 1984); VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE (Univ. of Tex. Press 1983).

2. See, e.g., Vine Deloria, Jr., *The Application of the Constitution to American Indians, in EXILED IN THE LAND OF THE FREE* 281-315 (Oren R. Lyons & John C. Mohawk eds., Clear Light Publishers 2002); Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203, 203-23 (1989) [hereinafter Deloria, *Laws Founded in Justice and Humanity*]; Vine Deloria, Jr., *Beyond the Pale: American Indians and the Constitution, in A LESS THAN PERFECT UNION: ALTERNATIVE PERSPECTIVES ON THE U.S. CONSTITUTION* 249-268 (Jules Lobel ed., Monthly Review Press 1988); VINE DELORIA, JR., AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 239-256 (Vine Deloria, Jr. ed., Univ. of Okla. Press 1985); Vine Deloria, Jr., *The Distinctive Status of Indian Rights, in THE PLAINS INDIANS OF THE TWENTIETH CENTURY* 237-48 (Peter Iverson ed., 2d prtg. 1985); VINE DELORIA, JR., THE AGGRESSIONS OF CIVILIZATION: FEDERAL INDIAN POLICY SINCE THE 1880S 105-30 (Sandra L. Cadwalader & Vine Deloria, Jr. eds., Temple Univ. Press 1984); Vine Deloria, Jr., *Felix S. Cohen's Handbook of Federal Indian Law, 1982 Edition*, 54 U. COLO. L. REV. 121, 121-42 (1982) (book review).

international law, and legal analysis as a whole. Deloria's scholarship provides crisp analysis of the convoluted political and legal dimensions of indigenous status, while simultaneously exploring the intergovernmental relationship of tribal nations and their status as original sovereign governments of the Americas.

Deloria received formal academic training in general science (B.S. 1958), theology (L.L.B. 1963), and law (J.D. 1972). As anyone familiar with his work knows, he fluidly employed elements of each of these intellectual frameworks and methodologies along with his own self-education in numerous other fields throughout the rest of his days. For purposes of this essay, however, I want to focus on his understanding of how the law is taught, how it should be taught, and how his profound influence affects the way I teach my courses in indigenous politics and governance and the U.S. Supreme Court.³

Deloria opted not to consistently practice law,⁴ but instead he liberally critiqued legal decisions, reviewed popular federal Indian law casebooks, and taught a number of courses at the University of Arizona and later the University of Colorado at Boulder in the departments of History and Political Science. In addition, at various times, he taught in the law schools of both institutions as well. When I entered the special M.A. degree program in 1980, a terminal Master's degree called American Indian Policy Studies that Deloria had created in the political science department at the University of Arizona in 1979, I quickly discovered that Deloria had designed a curriculum that was equal parts politics, policy, law, and history. He emphasized in each of the classes I had with him that in order to understand the contemporary status of indigenous nations, students needed a deep, unvarnished, and unrelenting exposure and immersion in each of these four fields. Furthermore, Deloria placed special importance on history, along with a liberal dose of geography, education, anthropology, and economics. The justification for this unique program under the rubric of political science, as opposed to law, was outlined by Deloria in the department's graduate student handbook in 1981:

3. Of course, as a student of Deloria's in the early 1980s, and as one who maintained a relationship with him throughout the years, his influence, in fact, colors all the courses that I teach, whether in United States or American Indian politics, federal Indian policy, comparative indigenous peoples, tribal government, minority peoples, etc.

4. Deloria was a vital expert witness during the trials that followed the American Indian Movement's takeover of Wounded Knee, South Dakota, in 1973. *E.g.*, *United States v. Banks*, *Unites States v. Means*, 383 F. Supp. 368 (D.S.D. 1974). He was also a plaintiff in the trademark case against the Washington Redskin's football team, *Pro-Football, Inc., v. Harjo*, 284 F. Supp. 2d 96 (D.D.C. 2003).

Political Science offers the most comprehensive context in which federal Indian policy can be explored and understood. No law school in the United States has more than one or two courses in the field of Indian law. Most of these courses are experimental or deal with complex issues in a generalized survey that cannot possibly deal adequately with the history and development of the major concepts now defining and influencing the field of Indian Affairs. Political Science combines the insights and knowledge of history, law, political philosophy, and comparative systems and thus enables the student to understand the complexity of issues by using a wide and significant variety of tools for analysis. Tribal governments have traditionally called upon the professional anthropologist, sociologist, educator, and economist for their information, forgetting that the basic relationship of their governments and programs to the federal government is a *political relationship formed historically according to certain basic interpretations of the nature of society and government*. Political Science deals precisely with these topics and thus presents the most comprehensive and intelligible context for discussing both problems and solutions.⁵

Deloria stressed that a new kind of academic was being groomed via this unique program: the Policy Specialist. Those who successfully finished the two-year program, Deloria argued, would be well trained to navigate multiple academic fields and would therefore become useful employees of tribal governments or other governments or organizations. This new "Policy Specialist" would be capable of conducting such tasks as preparing reports for land disputes, solving boundary problems, resolving fishing rights controversies, interpreting treaty rights, and developing tribal sovereignty concepts and programs, among other topics.

The curriculum included many courses, but the crux of the program was a two-semester core course, Politics 484a-484b titled "Development of Federal Indian Policy," which was required of all students. This two-part course's principal purpose was to "provide a chronological framework and theoretical context in which policies, programs, and events can be seen interacting with each other to produce the cumulative body of treaties, statutes, and court decisions which define the present configuration of the

5. DEP'T OF POLITICAL SCI., UNIV. OF ARIZ., GRADUATE STUDENT'S HANDBOOK 27 (1981) (unpublished, copy on file with author) (emphasis added).

federal-Indian relationship.”⁶ Additionally, the two sequential courses also functioned to provide a setting:

[I]n which the role, task, and scope of capability of the Policy Specialist is explored; to give students a fundamental knowledge of federal Indian policy as it has developed historically and conceptually; to demonstrate the variety of research sources which policy questions require; and to encourage the student to construct models in which policies can be studied and evaluated.⁷

The first semester of the course focused on the origin and development of the various legal, political, and philosophical concepts that overarch and underlay the policies developed first by the competing European colonial powers and later developed by the United States to the year 1871—the year Congress enacted the treaty termination measure. Concepts such as the “doctrine of discovery, papal authority, the trust doctrine, [and] the role of federalism,” were critiqued and analyzed. The second semester addressed the policies, laws, and political machinations of the federal and state governments from 1871 to the present time, with an emphasis on the post-World War II period.

Besides this important pair of courses, Deloria and the other faculty he helped assemble⁸ taught a bevy of seminars, many of which he created, that dealt with specific topics of historical and contemporary importance to tribal nations. Some course titles included: “Congress and the American Indian,” “Indian Educational Policies,” “American Indians & the Supreme Court,” “Tribal Governments, Indians and the Judicial Process,” “Indian Water Rights,” “Indian Claims,” and the course that left the deepest impression on me, “Indian Treaties.”

The Treaties course critically examined the historical, political, cultural, and legal evolution of these vital documents from pre-colonial times to the present. And while Indian treaties constituted the core of the course, what I obtained from the course was so much more than just the documents themselves. It was an intense, comprehensive, yet historically and legally detailed course that was by far the most intellectually challenging and emotionally demanding course I had ever had, or would ever have, including my Ph.D. years in political science at the University of North Carolina at Chapel Hill.

6. *Id.* at 29.

7. *Id.*

8. Among the faculty he recruited for the program were historian Thomas Holm (Cherokee-Creek) and Robert K. Thomas (Cherokee), a well known anthropologist. Professor Clifford Lytle, a specialist in constitutional law and American institutions, was already well entrenched in the department. He and Deloria would later author several books together.

For Deloria, history, culture, philosophy, and politics created the broad canvas on which the various diplomatic and treaty arrangements between indigenous nations and foreign powers, including the United States, were developed. For Deloria, it was this diverse body of diplomatic accords, rooted in the political, not legal, concept of "consent," that formed the exquisite intergovernmental, intercultural, and interracial relations tapestry that make the study of Native politics and law so fascinating.⁹ Thus, the Treaties seminar entailed a comprehensive assessment of the history of treaty-making, from traditional practices between tribal nations to colonial arrangements between European powers (e.g., France, Spain, and England) and tribal peoples, to Revolutionary War treaties, early state treaties, Removal treaties, Western trade treaties, Civil War treaties, Peace Commission documents, the "end" of treaty making in 1871,¹⁰ railroad agreements, General Allotment agreements, Claims Commission adjustments, and many negotiated settlements of the 1970s to the present.

After conducting a sweeping introduction of the substantial body of unique treaties, the course then focused on specific treaty concepts. For example concepts included: the nature and grounds of obligation; the power to make treaties; the duration, suspension, and termination of treaties; conflicts between treaties; constitutions; laws and ordinances; modification; abrogation; and the dissolution of treaties. Within this context, faculty lectures were structured around how these issues had been addressed in case law. Given this base, lectures centered on an assessment of special doctrines, including the status of treaties, the construction and interpretation of treaty language, the rights created by treaties, and congressional powers and limitations.

As a class, my fellow students and I next read a wide cross section of law review articles that examined specific treaties or treaty concepts. And then we moved into a case study phase that critically examined several tribes and specific treaty arrangements in detail. Case studies included: the Northern Paiute of Central Oregon, the Treaty of Fort Laramie, and the fishing rights of tribes of the Northwest. Once the case study phase was complete, we then engaged in a comparative examination of key treaty provisions involving fishing rights, educational provisions, and jurisdictional

9. Deloria, *Laws Founded in Justice and Humanity*, *supra* note 2, at 219.

10. Deloria, among others, has long argued that treaty-making did not, in fact, end in 1871, but rather was a transformed process. *See generally* 1 & 2 DELORIA & DEMALLIE, DOCUMENTS OF AMERICAN INDIAN DIPLOMACY, *supra* note 1 (containing several chapters, most notably chapter 6 in volume 1, in which they convincingly argue that the diplomatic process, while altered after 1871, still constituted ongoing political negotiations that entail diplomacy).

clauses. Finally, we read several essays that addressed treaties from a literary and cultural perspective.

By the time the course was over, we knew that we had received a thorough grounding in the distinctive diplomatic—political and moral—relationship between tribal nations and the other polities the tribes dealt with and continue to engage. Unlike the manner in which many federal Indian law classes are currently taught in law schools, the federal and state case law that we read was used largely to supplement the broad intergovernmental relationship that formed the conceptual and historical parameters of the course as Deloria had constructed it. This is critical because it confirms the extra-constitutional status of indigenous nations as the original sovereigns of the Americas and does not treat tribal nations as merely one of several ethnic groups.

As Deloria noted in another essay critiquing the current content and pedagogy of federal Indian law,

[T]he argument is that if history and treaties are sufficient to identify these groups as deserving special attention, why curtail the process—why shouldn't federal Indian law be severely restricted to a set of general doctrines based on treaty law and statutes universally applicable to all Indian nations representing deliberate efforts of Congress to fulfill its trust and/or protectorate responsibilities? After this section of articulating doctrines of universal applicability, substantial space can be allocated for the respective Indian nations and their history. There are some federal statutes that have a general applicability—the General Allotment Act, the Removal Act, the Indian Reorganization Act, and the Indian Civil Rights Act. But even within these general laws, numerous exceptions exist that are created by the separate histories of the respective tribes. As long as we emphasize the generalities, we do violence to the rights of Indians as they are articulated specifically in the history of the tribe with the federal government.¹¹

With this important intellectual and scholarly foundation, by the time I joined the academy and began offering my own courses, I had begun to develop (and I continue to add to this list) a set of overarching maxims that helped me to better understand the distinctive internal political/legal status of tribal nations and their external intergovernmental and intercultural relationships with other polities. These maxims are largely a result of

11. Vine Deloria, Jr., *Reserving to Themselves: Treaties and the Powers of Indian Tribes*, 38 ARIZ. L. REV. 963, 969 (1996).

Deloria's influence, but also because of my own training in political science and tribal political and legal histories. I begin many of my courses by setting at least some of these maxims before the students, and then I ask them to consider these as we move through the historical, legal, and political materials to be analyzed. The list, at the present time, includes the following:

As the preexisting sovereigns of the Americas, indigenous nations are, by definition, nations and have and maintain a pre-constitutional and extra-constitutional status that fundamentally separates and distinguishes them from all other groups in the United States.

Historical data and the political arrangements (i.e., treaties, agreements, negotiated settlements, etc.) that emerged during cross-cultural encounters should and must be determinative of subordinate legal concepts and doctrines, and not the other way around.

Political science, history, anthropology, psychology, economics, and geography, among other fields, provide "critical" perspectives to Indian policy and intergovernmental relations that law typically appears unable or unwilling to provide.

The diplomatic record between tribal nations and the other political entities confirms the sovereign (separate) status of tribes; while the trust relationship confirms the politically connected status of tribal nations to the federal government.

Federal law, including Federal Indian law, is typically presumed to be rational, uniform, and fair, while the historical record bears out that it actually operates largely on the basis of political and economic expediency and depends largely on the personalities of key policy-making individuals.

Federal Indian law is presumed to be generalizable to all federally-recognized tribes; but there are profound exceptions that make such a presumption unrealistic, given the historic and political fact that most tribes engaged in diplomacy on a nation-to-nation relationship with the United States and other political powers. There are many examples where congressional statutes, federal regulations, and supreme court decisions are drafted in a way that they apply to single tribal nations.

American Indian law or Federal Indian law is sometimes described as: either the pre-contact organic or traditional laws and customs

of tribes; the laws developed by European powers and later the United States that directly or indirectly affect Indian nations; the ongoing legal outputs of tribal policy-makers; or some amalgam of all the above. We must be clear on how we are using the term in a particular class because when we speak of American Indian law or the “rule of law,” we must be aware of whose rules and whose laws are being invoked.

The federal government’s various branches say they support the concept of tribal sovereignty while simultaneously maintaining that the U.S. can exercise plenary (virtually absolute) power over those same sovereign tribal nations.

Along with these maxims, I have also over the years developed a set of questions, again, largely influenced by Deloria, but were also derived from my own reading and analysis of the historical, political, and legal data pertaining to Native Nations. Many of these queries spawn from the maxims described above. The questions, at the moment, include the following:

Since tribal nations are sovereign governments and had no part in the formation of the U.S. Constitution, and have never formally been incorporated via the amendment process, absent express tribal consent or specific statutory language, how can general acts of Congress be made applicable to tribal nations?

Since tribal nations have a nation-to-nation or government-to-government relationship with the U.S., based in diplomacy, why are Supreme Court decisions, like *Cherokee Nation v. Georgia*,¹² involving a specific tribal nation, considered binding precedent on all other tribal nations?

Since the Constitution under the Commerce Clause expressly reserves to the Congress the power to regulate trade with tribal nations, why are state governments, without tribal consent, increasingly getting involved in internal tribal affairs? Can Congress devolve its constitutional authority for Indian affairs to states absent tribal consent and without the accompanying treaty and trust responsibilities attached?

How can the concept of congressional plenary power (defined as virtually absolute power) over tribal nations coexist in the U.S., which fashions itself as a democratic state? Democracy, by definition, implies limited, not unlimited, power. This is further

12. 30 U.S. (5 Pet.) 1 (1831).

complicated by the fact that individual citizens of tribal nations have been declared citizens of the U.S. and the state they reside in.

Depending on the course I am teaching, once I have discussed these maxims and a number of these questions, I then move to the subject matter of the particular course: American Indian Tribal Government and Politics; Indigenous Peoples: A Global Perspective; Federal Indian Policy; American Indian law; American Indian Sovereignty, Law, & Treaty Rights; Tribal Political Economy; American Indian Diplomacy; or others. For purposes of this essay, I will narrow my discussion to how I have constructed and teach a course entitled "American Indians and the Supreme Court." This is a course that I inherited from Deloria, but one that I significantly modified given my background in political science.

Before discussing how I teach this course, I must also say that in virtually every course I teach, I include a brief but important couple of classes defining the six major concepts that overarch and suffuse Federal Indian policy and law. These concepts include: treaties, the trust doctrine, plenary power, the discovery doctrine, federalism, and sovereignty (including the "tribal" variant of that key term). Each of these terms is critical and, with the exception of federalism, does not generally apply to any other racial/ethnic/gender group in the continental United States. Each of these terms, I inform my students, must be fully interrogated both from indigenous and non-indigenous perspectives and they must be placed in historical, social, cultural, political, and legal context to see how and why they arose when they did and how and why they have been defined across time and in various intergovernmental situations.

In "American Indians and the Supreme Court," which is a senior level course, I stress in my syllabus that the decisions of the court have had and continue to have a profound effect on the status and rights of tribal nations and have deeply influenced the contours of the tribal/federal/state relationship, despite the fact that tribal nations still exist in an extra-constitutional position vis-à-vis the United States government. The purpose of the course, broadly put, is to explore the following question: what is the role and what has been the practice of the Supreme Court as a policy-making institution when dealing with indigenous nations and their citizens, who also happen to enjoy status as U.S. citizens? This broad inquiry requires the students and I to think both historically and theoretically, to ask about the origins and exercise of federal judicial power, and to examine the application of federal law to indigenous peoples and Indian citizens in various areas of law.

I stress to the students that we will be using several methods of analysis—theoretical, behavioral, institutional, and case study. The course is divided into several major sections. First, we begin by creating a philosophical and

theoretical framework through which to judge both the role of the Court and Indian law decisions. Second, we then briefly look at indigenous legal and political traditions¹³ and assess how these influenced and were in turn influenced by western legal traditions. Third, we then turn to an examination of the Supreme Court as a *political and policy-making institution*. This is most important to establish because while the Court is certainly a legal entity and writes law, it is first and most fundamentally a profoundly political institution and crafts important policy pronouncements, otherwise known as judicial opinions, as one of three co-equal branches of government. Furthermore, the court reeks of politics because the matter of who is or is not appointed to the court is political. Certainly, how the judicial nominees traverse the appointment process is political, and how the justices negotiate as they are drafting their opinions is also an intensely political process.

Fourth, we then assess the various theories which purport to explain the inter-institutional role of the Court and the Court's role in national policy-making. Much of the discussion revolves around how the Court interacts vis-à-vis with the other branches of government, as well as the question of whether the Court is primarily supposed to be deferential to the political branches or whether it is authorized by the Constitution with the power to initiate policies if the other branches fail to act. Another major question is whether the Court is supposed to primarily confer legitimacy on the laws and policies pronounced by the so-called political branches—the Congress and the President—or does the Court have the inherent authority to act largely unchecked and craft policy because the justices are life-tenured and have wide discretionary authority over which cases to decide.

Fifth, we also spend time reading about and discussing a seminal question: Whether or not indigenous nations are, in fact, an integral part of

13. Since I am not a law professor, although I have an Adjunct Appointment at the law school at the University of Minnesota, I have only taught the American Indian law course there once, after Phillip Frickey's departure. But if I were to teach it consistently, I would emphasize, as Deloria did in much of his work, that if we are to do the subject matter right, and in order to accord tribal nations the respect their national status entitles them to, that the course currently titled "federal (or American) Indian law" at most law schools should be redirected and restructured to present an indigenous oriented body of knowledge that recognizes the preexisting systems of law and governance already in place within tribes long before Europeans arrived and that also recognizes the active status of tribal nations even after sustained contact with those foreign bodies. Such a course would emphasize the retained internal sovereign powers of tribal nations in relation to domestic law, their external sovereign powers as established under ratified treaty law, and the unique natural resource and property rights that tribal governments retain. The course would also emphasize how the natural resources are recognized and sometimes exploited under tribal, federal, and state law. This structural and pedagogical arrangement for the course was elaborated on by Deloria. See Deloria, *Reserving to Themselves: Treaties and the Powers of Indian Tribes*, *supra* note 11, at 969 (emphasizing a pedagogical rearrangement of Indian law courses).

the United States Constitution's framework? In other words, do tribal nations remain extra-constitutional entities, or have they become constitutionally-recognized over the years? Or, do they, in fact, enjoy both statuses? Finally, after having established the historical, theoretical, philosophical, and political context, we then read and analyze dozens of Supreme Court decisions that have left the deepest mark on indigenous rights and sovereignty. The following subfields are included within the discussion: indigenous status and federal relations; aboriginal land title and Indian Country; criminal and civil jurisdiction; taxation and regulatory jurisdiction; water rights; hunting and fishing rights; claims case appeals; and individual Indian rights, including citizenship, preference, and religion.

Course requirements for undergraduates include two in-class essay exams that typically deal with doctrines of law; policy interpretations of the court's decisions; or the intergovernmental relationship between tribes, the states, and the federal government. I assign two major writing assignments for undergraduates and three for graduates or law students. The first paper that all students are required to write is a critical analysis of a major Supreme Court decision involving aboriginal issues. The students are expected to craft a legal/political history of the case in which they detail who the parties (litigants, lawyers, interest groups) were, what the fact situation was, a description of the political and historical context, and finally, the role, if any, of the federal government.

The second paper topic for the students varies. Sometimes I ask them to select a Supreme Court justice and do a biographical treatment. Other times I ask them to select a specific treaty and do an analysis of that document, specifically addressing how its provisions have been dealt with by the court. At other times, I create a fact situation involving Indian issues and ask the students to write a decision as if they were a justice. Graduate and law students are expected to write a third paper that is a Shepard's citation analysis of a major Indian law decision.

Other requirements include a set of weekly essay questions based on the week's reading in which the students are expected to put themselves in the role of an instructor and ask questions based on the materials read. Finally, each student is expected to be the lead discussant and to write short political/legal briefs concerning several assigned articles, book chapters, and court opinions.

The students over the years have found "American Indians and the Supreme Court" to be the most challenging of the courses I teach because it demands a great deal of their time and energy, and requires them to approach the Supreme Court with an open mind. More importantly, the more astute students find that by having to examine the Court's policy outputs—

its judicial opinions—from the various disciplinary perspectives that I use, and by intensely examining who the justices are and the internal logic of their reasoning, methodology, and sometimes selective use of precedent and history, that this challenges their basic notions of the alleged fairness and impartiality of the law and of the meaning of democracy itself. The students come to see that the Court is, indeed, a richly political entity and that history, personality, economics, and culture matters and have an effect on many of the “opinions” issued by the Court’s justices.

Robert Dahl, a prominent political scientist writing in the 1950s, summarized this last issue best when he astutely said of the Court:

To consider the Supreme Court of the United States strictly as a legal institution is to underestimate its significance in the American political system. For it is also a political institution, an institution, that is to say, for arriving at decisions on controversial questions of national policy. As a political institution, the Court is highly unusual, not least because Americans are not quite willing to accept the fact that it *is* a political institution and not quite capable of denying it; so that frequently we take both positions at once. This is confusing to foreigners, amusing to logicians, and rewarding to ordinary Americans who thus manage to retain the best of both worlds.¹⁴

If we are serious about understanding and then imparting knowledge about the distinctive status of indigenous nations’ rights, then we should first ground ourselves and our students in the “actual” facts of history. We should then ground Native rights in treaty law, and we should always understand that politics, economics, and culture matters play a determinative role in the evolution or regression of the dynamic political/legal relationship between tribal nations and the latter-day governments that formed on tribal lands.

14. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker* *Policy Making in a Democracy: The Role of the United States Supreme Court*, 6 J. PUB. L. 279 (1957) (emphasis in original).