

THE CENTER FOR INDIGENOUS LAW, GOVERNANCE, & CITIZENSHIP
AT SYRACUSE UNIVERSITY, COLLEGE OF LAW



I. THE SOURCE AND SCOPE OF INDIAN LAW

- A. What is “Indian” law?
Indian law is comprised of (1) the law of the Indigenous nations, (2) federal Indian law, and (3) international law governing the rights of Indigenous peoples.
- B. What is Indigenous law?
The rules of behavior that exist within an Indigenous nation. Indigenous law includes governing documents (i.e. constitutions), statutes and resolutions, judicial decisions, and unwritten customary law.
- C. Where does the power to create Indigenous law come from?
The power comes from the Indigenous people themselves.
- D. How expansive is Indigenous law?
Indigenous law can extend over any person or matter that the Indigenous people deem appropriate. It may not be the case, however, that such assertions are fully recognized by the United States.
- E. What is federal Indian law?
The law of the United States regulating Indians and Indian nations. It includes the American Constitution, treaties, statutes (mostly contained in Title 25, U.S.C.), executive orders, judicial decisions, and administrative decisions.

II. THE RELATIONSHIP BETWEEN THE INDIAN NATIONS AND THE UNITED STATES

- A. How does the United States view the Indigenous nations and Indigenous sovereignty?
The United States recognizes Indigenous nation sovereignty, subject to considerable limitations. See *U.S. v. Wheeler*, 435 U.S. 313 (1978). Indian nations have been said by the Supreme Court to be in a “guardian/ward” relationship with the United States, and otherwise constitute “domestic dependent nations.” See *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). The United States has consistently upheld this restrictive view of sovereignty, although there have been periods when it has sought to deny recognition (e.g. Allotment Era, Termination Era).
- B. What is the meaning of the Canandaigua Treaty?
The Treaty of Canandaigua of 1794 recognizes the territories of the Haudenosaunee nations, their right to govern their affairs, and their government-to-government relationship with the United States.

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- C. What is the political status of individual Indians?
The United States recognizes individual Indians as citizens of their own nations, as wards of the federal government in a trust relationship, and as citizens of the United States. See *Morton v. Mancari*, 417 U.S. 535 (1974).
- D. What is the federal trust responsibility and what is its relationship to Indigenous nation sovereignty?
The United States has assumed a trust responsibility for the Indian nations from the beginning of its history. See *id.* *Cherokee Nation v. Georgia*. The trust responsibility is predicated upon the treaty relationship with the Indian nations in which “protection” was extended to the Indians in exchange for land and peace. The so-called Trust Doctrine has evolved to rationalize any assertion of federal power over the Indians – including purely internal matters – for the own good. See *U.S. v. Kagama*, 118 U.S. 375 (1886).
- D. What is the source of federal power over Indian affairs?
The United States cites its own Constitution, Indian treaties, and case law for the proposition that it has “plenary power” over Indian affairs. The Plenary Power Doctrine is based both on the U.S. Constitution and the Discovery Doctrine, which states that the United States obtains power over Indians and Indian land by virtue of its “discovery” and “conquest.” See *Johnson v. M’Intosh* 21 U.S. 542 (1823).
- E. Why is there great conflict between the Indian nations, the United States and the States?
The conflicts are rooted in the lack of clarity to important legal questions, as well as longstanding resentment by both Indians and non-Indians for the way in which history has evolved. Conflicts with the states and their citizens are especially intense due to the lack of state power over Indian affairs, see *Worcester v. Georgia*, 31 U.S. 515 (1832), and the political pressure from non-Indians resentful of perceived Indian benefits.

III. RECOGNITION OF INDIGENOUS SOVEREIGNTY BY THE UNITED STATES

- A. Self-government
The U.S. recognizes an absolute right for Indians to form and be governed by their own government. In reality, however, nearly 200 Indian nations have governments that require the involvement of the U.S. in their lawmaking process.

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B. Land

Indians are recognized as having a permanent right of occupancy or Indian title, which is superior to all but the sovereign. See *id.* *Johnson v. M'Intosh*. Indian land is held in trust by the U.S. for the benefit of a particular Indian nation, or restricted against alienation by federal law. See 25 U.S.C. § 177.

C. Jurisdiction in New York State

1. Overview of 232/233

2. Territorial Jurisdiction

Indian nations are recognized as having power only within Indian country, which includes reservations, allotments, and fee land within reservations.

2. Jurisdiction Over Persons

Indian nations are recognized as having power over Indians and non-Indians within their territory, subject to restrictions based upon the nature of the land title at issue.

3. Civil Adjudicatory Jurisdiction

Indian nations are recognized as having expansive power to resolve civil disputes involving Indians and non-Indians, subject to restrictions based upon the nature of the land title at issue. Section 233 granted to New York State concurrent civil adjudicatory jurisdiction to resolve civil disputes. This action is disputed by the Haudenosaunee nations as a violation of the Canandaigua Treaty.¹

4. Civil Regulatory Jurisdiction

Indian nations are recognized as having expansive power to regulate the conduct of Indians and non-Indians with their territories, including taxation, subject to restrictions based upon the nature of the land title at issue.

5. Criminal Jurisdiction

Indian nations are recognized as having criminal jurisdiction over Indians only (members and non-members), and not non-Indians. See *Oliphant v. Suquamish*, 435 U.S. 191 (1978). Power over Indians is limited by the Indian Civil Rights Act, 25 U.S.C. §§ 1301 -

¹ See, Robert Odawi Porter, *Jurisdictional Relationship Between the Iroquois and New York State: An Analysis of 25 U.S.C. §§ 232, 233*, 27 HARV. J. ON LEGIS. 497 (1990).

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1303. Section 232 granted to New York State concurrent criminal jurisdiction over crimes occurring on the Indian Territory. This action is disputed by the Haudenosaunee nations as a violation of the Canandaigua Treaty.²

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See id.