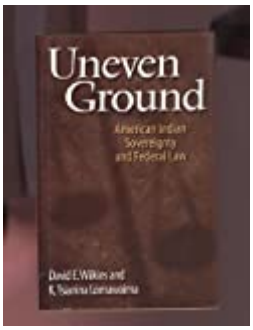
H-Net Reviews
in the Humanities & Social Sciences



David E. Wilkins, K. Tsianina Lomawaima. *Uneven Ground: American Indian Sovereignty and Federal Law.* Norman: University of Oklahoma Press, 2001. vi + 326 pp. $24.95 (paper), ISBN 978-0-8061-3395-9; $39.95 (cloth), ISBN 978-0-8061-3351-5.

Reviewed by Steve Russell (Department of Criminal Justice, Indiana University, Bloomington)

Published on H-AmIndian (January, 2003)

Leveling Ground in the Classroom

Leveling Ground in the Classroom

Why another book on Indian law and policy? There are several reasons. Indian law and policy have been moving targets (law and policy often moving at different speeds) since Europeans first set foot in the Americas, and nothing in current events indicates that is likely to change.

Indian law and policy are complicated and difficult subjects, for writers as well as for teachers. Felix S. Cohen's *Handbook of Federal Indian Law* (1982) has canonical stature, but it is organized for lawyers who want questions answered.[1] Ward Churchill's works bubble with the anger appropriate to the subject, but offer little that could be successfully taken into a courtroom unless the object is a contempt sentence. These tend to indulge too much overstatement to take into the classroom without leavening.

Much of the writing on Indian law and policy takes the colonial canon as a fundamental assumption rather than a subject for analysis, or at least it did before Vine Deloria, Jr. and many following in his path started firing back. Critical scholarship is easier to find in these times, but it is also often extremely esoteric.

Indian law is, even more than other fields of law, incomprehensible without reference to history, as encroachments upon Indian legal options mirrored the encroachments upon Indian lives and property. Indian law is usually an upper-level course in law schools for good reason. It helps to understand constitutionality and unconstitutionality before addressing extra-constitutionality. It helps to understand the dual sovereignty doctrine before introducing Indian nations as additional sovereigns located on the same real estate. Or does it?

I have always wanted to teach an undergraduate course on Indian law and policy, on a regular basis, as a vehicle for clarifying ideals of justice and debunking the myth of American exceptionalism, which threatens dire consequences now that we are the only standing superpower. The pedagogical obstacles to presenting this material to undergraduates are formidable. Most undergraduate students come to us with little understanding of law or policy formation along with a view of Indian

history that is, to put it charitably, incomplete.

John Wunder's legal history (1994) is accessible for a chronological picture.[2] It was written, however, just when the Rehnquist Supreme Court began its lurch toward a peculiar ahistorical federalism that might more accurately be called "states' rights," since state power trumps tribal power even though Indian relations is the exclusive prerogative of the federal government. Much of Indian sovereignty has swept down the Potomac since 1994.

Wilkins and Lomawaima have done two things that, in combination, will make this book very attractive to people who dare to approach this subject with undergraduates. First, they write in a manner that is accessible to non-lawyers. Second, they organize the book doctrinally rather than chronologically. They give short shrift to the alternative rationales for the doctrine of "discovery," but whether it is based on religion, race, or power politics, discovery could confer absolute ownership or something less. If the purpose is to discuss law and policy, it makes sense not to dwell on the absurdity of "discovering" a land that is already occupied but rather to consider the alternative meanings attached to that notion. In discussing "discovery," the trust doctrine, "plenary powers," reserved rights, and implied repeals, the authors take an unabashedly pro-Indian position. If it is possible and desirable to be neutral about theft and homicide, a teacher reaching for that position will want to assign some additional readings to rationalize the colonial enterprise. That is a journey I do not care to undertake.

Chapter 6 deals with a doctrinal matter to which I have given little thought nor seen emphasized to this degree in the extant literature. Western territories, state enabling acts, and even some state constitutions contain disclaimer clauses guaranteeing Indian rights as against territorial or state jurisdiction and/or acknowledging federal power in Indian affairs. These disclaimers are the reason why some states need a constitutional amendment to accept the jurisdiction over Indians offered by Congress in PL 280. The federal power is vested by the Indian Commerce Clause, not by these disclaimers, but the authors may be correct that the disclaimer clauses are an underutilized tool for the Indian rights advocates, in some cases, and not just a clarification to the new states regarding the number of acres in their tax base. This is an analysis worth writing. It may not be worth as much teaching time as the other chapters, except that it does underscore the departures and the activism of the Rehnquist Court when it upholds state power over Indian nations.

The seventh and penultimate chapter discusses sovereign immunity, once more in a manner understandable without prior legal knowledge. Since the authors focus on the task of supporting tribal sovereign immunity, they elide the degree to which federal and state sovereign immunity has been eroded by tort claims acts, contract provisions, and civil rights litigation. Without these erosions, it seems unlikely the public would support the doctrine of sovereign immunity for federal and state governments, let alone tribes. However, the authors do press home the parity argument as between tribal governments and other governments.

Any book of this scope contains nits to pick. Wilkins and Lomawaima describe the Spanish *requerimiento* as "a formal document of conquest" (p. 27). Perhaps it was that, in a religious sense. The visual image, however, of a conquistador (who presumably was more interested in the gold hunt) reading the *requerimiento* at the gates of a pueblo to people innocent of the language is something a teacher should not relinquish to such extreme brevity.

A more robust grievance is the assertion that the Indian Gaming Regulatory Act of 1988 (among other acts) was "designed to articulate, assert, and enforce tribal rights and privileges against aggressive and illegal actions taken by the states" (p. 179). IGRA, at the behest of the states, *limited* Indian gaming, an activity that was outside of state regulation because of inherent sovereignty. That sovereignty explicitly was recognized by the Supreme Court in *Cabazon Band of Mission Indians v. California*, 480 U.S. 202 (1987), and it took Congress only one year to respond to the states' pleas for relief and demands to be cut in on the action. This is important because of the myth that IGRA created Indian gaming and inexplicable because the authors themselves say that "states would have no say in Indian gaming without IGRA" (p. 215).

Nits picked, I now offer this book the highest praise a teacher can offer: I intend to adopt it as a text even though I will have to create a course to do so.

Notes

[1]. Felix S. Cohen, *Handbook of Federal Indian Law*. Revised ed. Edited by Rennard Strickland, et al. (Albuquerque: University of New Mexico Press, 1982).

[2]. John R. Wunder, *"Retained by the People": A History of American Indians and the Bill of Rights* (New York: Oxford University Press, 1994).

Citation: Steve Russell. Review of Wilkins, David E.; Lomawaima, K. Tsianina, *Uneven Ground: American Indian Sovereignty and Federal Law*. H-AmIndian, H-Net Reviews. January, 2003.

URL: http://www.h-net.org/reviews/showrev.php?id=7115