NEW MEXICO LAW REVIEW

Volume 19
Issue 2 *Spring 1989*

Spring 1989

Of Tribes and Courts: The Long Road Back From Wounded Knee (Review of Wilkinson: American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy)

Allen Boyer

OF TRIBES AND COURTS: THE LONG ROAD BACK FROM WOUNDED KNEE

AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY. By Charles F. Wilkinson.* New Haven: Yale University Press, 1987. Pp xi, 225. $18.50.

*Reviewed by Allen Boyer***

The passage of time, Charles Wilkinson finds, is a concern which colors all aspects of American Indian law. "The recurring theme during the modern era," he writes, in *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy*, "is whether and to what extent old promises should be honored today."[1] Time has passed, times have changed—but this does not mean that aboriginal and treaty rights have sunk into desuetude. If Indian law is one of the oldest areas of federal jurisprudence, it is also one of the most rapidly developing. Wilkinson's thesis is that, in the last thirty years, the Supreme Court has made new law, and revived Indian culture, by reshaping treaty rights to fit modern realities.

During the last century, as many Indians blended with white society, and settlement blurred the borders of Indian country, tribes seemed to have faded into oblivion. Since 1959, however, with its decision in *Williams v. Lee*,[2] the Court has brought the tribal system to life. The Court has recognized tribes as sovereign entities, with powers which existed before white settlement and which have not lapsed with the passage of time. Decisions on natural resource rights have given Indians the financial basis for effective self-government; other rulings have swept state law from the reservations, so that tribal councils can levy taxes and set up their own courts.

> [T]he net result . . . has been to allow [a] measured separatism to proceed. . . . The tribes will be able to obtain sufficient fish and game for subsistence, religious, and commercial purposes. Water—the sine qua non of any society in the dry West—will be available in sufficient quantities for nearly all tribes. The state-tribal tax and

*Professor, University of Colorado School of Law. Prof. Wilkinson served from 1971 to 1975 as a staff attorney with the Native American Rights Fund, to which he is currently of counsel. His publications include works on Indian and resources law, and he is associated with Watershed West and the Northern Lights Institute.

**Visiting Associate Professor, New York Law School; B.A. Vanderbilt 1978; J.D. University of Virginia 1982; Ph.D. University of St. Andrews 1984.

1. C. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 4 (1987). References made to this work will appear in textual parenthesis.

2. 358 U.S. 217 (1959).

> business development cases . . . will protect Indian enterprises and entice some non-Indian business to Indian country. . . . Tribes can exert control over many aspects of law and order on their reservations. At long last they can also control the education and custody of their young people (pp. 120-21).

Thanks to the Court—and to Indian activists, working within this new-model federalism—tribes have become "a third level of government in this constitutional democracy," able "to build traditional and viable homelands for their people" (pp. 31, 122).

I. LEGAL COMPLEXITY AND THE WEIGHT OF TIME

Many factors have contributed to the complexity of Indian law. The allotment system of land distribution, coupled with white homesteading, has produced a crazy quilt of land rights. "Indian country today contains in addition to tribal land, allotted trust land held by individual Indians, fee land held by individual Indians, fee land held by non-Indians, federal public land, and state and county land" (pp. 8-9).

The legal background is equally complicated. Many federal treaties and statutes apply only to individual tribes. Other statutes, dealing with specific subject areas, apply to all tribes: an example is the Indian Child Welfare Act of 1978, which provides nation-wide rules on adoption and child custody. Still other laws declare federal policy on an issue, but leave implementation to later Congresses, federal agencies, or even to the states.

When it comes to deciding individual cases, the race of the litigants may prove decisive; so too may the precise nature of the state or tribal power involved. Another problem, for judges reviewing treaties made in previous centuries, is the very age of the rights and precedents at issue. "Indian law, more than any [other] body of law that regularly comes before the Supreme Court, is a time-warped field" (p. 13). In *County of Oneida v. Oneida Indian Nation*,[3] decided in 1985, the Supreme Court had to pass judgment on a claim which arose out of an agreement signed in 1795. Between 1970 and 1981, futhermore, "Indian laws constituted close to one-fourth of the Court's interpretations of laws enacted during the nation's first century" (p. 14).

II. TRIBALISM AND THE SUPREME COURT

Worcester v. Georgia,[4] an 1832 decision in which Chief Justice Marshall delivered the opinion of the Court, enunciated a doctrine which has endured into the present. Marshall held that tribes were "extraterritorial"

3. 470 U.S. 226 (1985).
4. 31 U.S. (6 Pet.) 515 (1832).

to the states. "Tribes are sovereign nations with broad inherent powers that, almost without exception, exist by dint of inherent right, not by delegation" from the federal government (p. 30). The case remains one of the Court's most monumental decisions, constantly drawn upon by modern state and federal courts.

At the time it was decided, *Worcester* clearly reflected the status quo which existed between Indians and white men. Because most tribes lived beyond the frontier of white settlement, "extraterritorial" was as much a geographic description as a judicial conclusion. Furthermore, tribes functioned as independent states—particularly groups like the Iroquois federation and the Five Civilized Tribes of the Southeast. "Indian tribes set norms, adjudicated disputes, inflicted punishments, and dealt with European and other tribal governments" (p. 100).

This status quo changed over the rest of the century, as western expansion broke tribal power. The years bracketing 1900 saw a trio of cases—*McBratney v. United States*,[5] *United States v. Kagama*,[6] and *Lone Wolf v. Hitchcock*[7]—which marked the nadir of Indian rights.

> *Kagama* upheld congressional power to enact the Major Crimes Act and thus infringe upon internal tribal resolution of disputes. *McBratney* allowed state court jurisdiction over a murder of a non-Indian by a non-Indian within Indian country even though there was no congressional grant of authority to the states. *Lone Wolf* announced the unilateral power of Congress to abrogate Indian treaties and to transmute tribal property rights into individual allotments (p. 24).

Tribes, technically, are sovereign but dependent nations. This *McBratney-Kagama-Hitchcock* trilogy treated them as "lost societies without power, as minions of the federal government" (p. 24).

For the first half of the twentieth century, tribalism languished in this jurisprudential dead zone. Courts and scholars concluded that the tribes were defunct institutions, devoid of any former sovereignty. State jurisdiction expanded to fill this perceived vacuum.[8] Felix Cohen, Legal Realist and author of the 1942 *Handbook of Federal Indian Law*, stood virtually alone in defending tribal sovereignty.[9]

---

5. 104 U.S. 621 (1882).

6. 118 U.S. 375 (1886).

7. 187 U.S. 553 (1903).

8. Wilkinson surveys the various theories which were used to explain this result. Some cases rested on the grant of United States citizenship to Indians in 1924; some held that tribes owed their powers to the federal government, which had delegated none; some held, more ingeniously, that the federal government had failed to oust state law from control over reservation life. *See* C. WILKINSON, *supra* note 1, at 26-27.

9. *See* C. WILKINSON, *supra* note 1, at 57-59. "Cohen's position, set out in 1942, was cited repeatedly by the courts and attained something of the weight of a Supreme Court opinion. Cohen's forceful writing style and his reputation help account for the significance his views attained." *Id.* at 58.

The vindication of tribal sovereignty began with *Williams v. Lee*. The facts of *Williams* were surprisingly homely. A licensed Indian trader, who ran a general store on the Navajo reservation, sought to collect from an Indian couple for goods he had sold on credit. He sued in state court, overcoming arguments that the Navajo tribal court was the proper forum. But when the case reached the highest level of appeal, the Supreme Court curtly rejected arguments for state jurisdiction in such cases. It held that a contract between an Indian and a non-Indian, entered into on the reservation, could be sued on only in tribal courts. "To allow the exercise of state jurisdiction here," the Court ruled, "would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves."[10]

During the next two decades, decisions gradually expanded tribal powers and moved closer to a recognition of absolute tribal sovereignty. Progress was fitful: even in the mid-1970's, the Montana Supreme Court fought an obstinate rear-guard action against the modern era, decrying "the myth of Indian sovereignty."[11] In 1978, however, *United States v. Wheeler*[12] endorsed "the tribal sovereignty doctrine in such ringing terms that the existence of the doctrine . . . now seemed irrevocably to be established as part of the nation's constitutional and political system" (p. 61).

Wheeler involved a double-jeopardy question: whether a Navajo could be tried in federal court when he had previously been convicted, in a Navajo tribal court, of a lesser included offense arising from the same incident. Lower federal courts had accepted the defendant's argument that "Indian tribal courts and United States district courts [were] not arms of separate sovereigns." The Supreme Court, however, reversed. Quoting Cohen, it held that "[t]he powers of Indian tribes are, in general, '*inherent powers of a limited sovereignty which has never been extinguished.*'"[13]

III. THE VINDICATION OF TRIBALISM

A key attribute of sovereignty is self-definition, the inalienable quality of independent existence. The decisions have made it clear that tribal existence does not depend upon external factors; a tribe's existence depends upon the will of the Indians who comprise it. Termination of tribal recognition, by the Bureau of Indian Affairs, is not the legal death knell

10. 358 U.S. at 223.

11. Bad Horse v. Bad Horse, 163 Mont. 445, 449, 517 P.2d 893, 897, *cert. denied*, 419 U.S. 847 (1974), *overruled in* In re Marriage of Limpy, 195 Mont. 314, 636 P.2d 266 (1981).

12. 435 U.S. 313 (1978).

13. *Id.* at 322 (citing F. COHEN, HANDBOOK OF INDIAN LAW 122 (1945)) (emphasis in original, and not deleted by the Court).

it was once considered. Tribal existence survives termination; "termination may sever all or part of the federal-tribal relationship but . . . does not literally bring to an end the existence of the tribe."[14]

After the BIA ceases to recognize a tribe, its individual members may continue to enjoy the privileges which the group held under treaty. Even then, the tribe "can fight back from a denial of federal support," perhaps eventually regaining recognition (p. 77). This accounts for the number of tribes which have resurfaced in non-Western areas: the North Carolina Cherokees, Florida Seminoles, Mississippi Choctaws, even a band of Kickapoo which had spent most of the last century in Mexico.

To understand tribes as institutions, one must look into the powers Indian nations exercised when independent—looking centuries into the past, if necessary.Tribal authority, Wilkinson concludes, is "both pre-constitutional and extra-constitutional. . . . American Indian governments can be, for example, theocratic, hereditary, and race-based in citizenship" (p. 112). Furthermore,

> [T]he courts must turn away from modern realities as a setting and toward an almost mechanical, linear analysis of whether relevant aspects of pre-Columbian status have been abridged by the United States. If not, the pre-Columbian status continues. Damn the anomaly, damn the logic of seating a nearly "foreign" government in rural Minnesota, South Dakota, or, for that matter, downtown Tacoma, Washington (pp. 29-30).

Wilkinson sorts out the implications of tribal sovereignty in a passage which deserves full quotation.

> First, tribal powers are defined initially by looking to the entire store of authority possessed by any nation, not by searching for federal statutes establishing tribal prerogatives. Second, Indian tribes possess sovereign immunity. Third, tribes can exert regulatory authority over landowners within tribal territory because tribes are governments, not just proprietors. Fourth, limits on the powers of states and the United States in the Constitution do not restrict Indian tribes. Fifth, tribal existence depends on the tribes' own will, not on recognition by the United States. Sixth, since tribes are separate sovereigns, general grants of federal jurisdiction do not allow for judicial review of tribal actions. Seventh, tribes possess the inherent authority to adopt regulatory laws without the approval of the Department of the Interior. Eighth, tribal courts, as the judicial arms of the local sov-

14. C. WILKINSON, *supra* note 1, at 76; *see* Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968) *and* United States v. John, 437 U.S. 634 (1978).

> ereigns in Indian country, are the proper courts to develop the factual records in the first instance when the extent of tribal authority is challenged in federal court. Ninth, tribal resource rights are measured in part by looking to the intent of the tribes—as inherent sovereigns possessing such rights before relations with the United States—at the time treaties or agreements were negotiated with the United States. Last, the fact of independent governmental authority allows courts to draw analogies between tribes and cities, states, and even the United States in order to justify exercises of tribal powers.[15]

Hand-in-hand with the issue of tribal authority goes the issue of tribal finances. The federal courts have protected Indian claims to natural resources against arguments based on implied preemption by federal law, or non-user of tribal rights. (Water disputes, however, may represent an exception; state jurisdiction still holds hegemony over this area.)[16] As sovereign entities, tribes can levy taxes as part of their power "to control economic activity within [their] jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction."[17]

Once one has recognized tribes as the oldest government structures on the American continent, a new question arises: Are they restricted to being anachronisms, institutions frozen in their historical form? Wilkinson finds that tribes' sovereign status resolves this issue as well. The power to revive tribal institutions is in itself is part of the power to change, and the right to self-government includes the future power to alter government structures. Giving broad recognition to tribal powers, furthermore, assures that tribes will be able to adapt.

The Court has been particularly willing to allow for technological adaptation. Where treaties contemplated that Indians would fish with spears, dip nets, and fishing weirs, the Court has allowed tribes to use monofilament gillnets (p. 72). This was hardly a minor issue. State courts had ruled that Indians could use only aboriginal technology, a position which would have gutted the economic guarantees made by treaties.

---

15. C. WILKINSON, *supra* note 1, at 62-63. A threshold question is whether *all* tribes have equivalent powers, or whether tribal power varies with the way in which the tribe was recognized. (Until 1871 tribes were recognized by treaties; more recently, recognition has been by federal executive order.) Wilkinson finds that the Court has not made such distinctions. As the Court ruled in Merrion v. Jicarilla Apache Tribe, "The fact that [a] [r]eservation was established by Executive Order rather than by treaty or statute does not affect our analysis; the Tribe's sovereign power is not affected by the manner in which its reservation was created." *Id.* at 67 (quoting *Merrion*, 455 U.S. 130, 134 n.1 (1982)).

16. *See, e.g.*, Nevada v. United States, 463 U.S. 110 (1983) *and* Arizona v. California II, 460 U.S. 605 (1983).

17. C. WILKINSON, *supra* note 1, at 73 (quoting Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982)).

IV. INDIAN LAW FOR INDIAN COUNTRY: FREEDOM FROM THE STATES' CONTROL

The presence of controlling federal statutes—in such "discrete substantive areas of regulation such as commerce, criminal jurisdiction, health, and education, and resource management"—keeps certain kinds of state legislation from applying on reservations (p. 93). Comprehensive federal regulation of Indian traders means that trading posts on reservations, or tribal purchases of farm equipment, are not subject to state gross proceeds taxes. State taxes do not apply to contractors building reservation schools or logging timber on Indian lands, because of federal laws on Indian education and Indian timber sales.[18] Nor does state wildlife regulation supplant federally-sponsored tribal wildlife management programs. Only in the area of liquor licensing are states allowed to stack their regulation atop tribal laws.

In sharp contrast to general preemption analysis, state law can be implicitly preempted by federal laws on Indian matters; preemption need not be expressly established. As read by Wilkinson, the decisions establish a presumption that state law does not apply in Indian country.Outside the reservation, however, a different standard applies. State jurisdiction is presumed unless a federal statute explicitly preempts it (pp. 94-99).

Subject-matter preemption is supplemented by a second rationale which restricts state jurisdiction over Indian matters. Wilkinson terms this "geographic preemption," drawing on the historical concept of "Indian country." The phrase dates to George III's Royal Proclamation of 1763, limiting colonial settlement to the eastern seaboard; now as then, it refers to the lands owned and occupied by the tribes.

Constructing a doctrine of geographic preemption (because the courts have relied upon subject-matter preemption) is the greatest challenge which Wilkinson faces. Because Indian country is established by treaty, he reasons, the policies which informed these agreements help define the extent of geographic preemption.

One intention of the tribes and the federal government was to finalize property rights—to clear some lands for white settlement, to set other areas aside for Indian self-determination. The tribes "would be left alone to govern themselves in most respects but would receive federal protection against intrusions by outsiders and government support in the form of goods and services" (p. 101). Another intention was "to define the nature of the governmental relationship between the signatories." The tribes negotiated "as governments, as well as possessors of interests in land."

18. Transactions in Indian country, as Chief Justice Rehnquist recognized, are shielded against state taxation more strongly than are transactions on federal territory. Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832, 856-57 (1982) (dissent of then-Justice Rehnquist).

The treaties, thus, contemplated the continued existence of tribal government (p. 100).

Tribal isolation—within certain limits—was the ultimate objective. "The reservations would be islands, first within federal territories, later within states. . . . [T]he shared intent of the United States and the tribes to establish a measured separatism on the islands [is] the core concept in resolving questions of geographic preemption" (pp. 101-102). Thus, geographic preemption entails a special concern for Indian rights to self-government and self-sufficiency.

Courts have recognized special tribal resource rights—specifically, off-reservation fishing and water rights. These have been limited to the amount necessary to assure Indians of "a moderate living."[19] Other restrictions apply, at least in theory. Tribal commerce should be limited to "value generated on the reservation,"[20] and tribal revenues should be linked to the amount needed to pay for public services. While these dicta speak of a ceiling on tribal revenues, they seem to amount to a caveat, not a strict standard. Legitimate tribal enterprises—as opposed to the sale of tax-free cigarettes, and, one suspects, high-stakes bingo halls—have been protected against state regulation.

Wilkinson makes a strong case for geographic preemption. One must note, however, that where metes and bounds call for preemption, Indian rights will generally be tested only against minimal state interests. Isolationism was indeed a goal of treaties, but Indian tribes are generally isolated by the vastness of the American West. State authority to govern Indians, in this landscape, could be found attenuated by sheer distance, even without the presence of reservation boundaries. Geographic preemption may well be inappropriate to an urban context—to reservation land in downtown Tacoma, for example. Courts may be tempted to insist on moderation, and to tighten the definition of what constitutes a legitimate tribal business.

V. TRIBES AND THE FEDERAL GOVERNMENT

Although these forms of preemption have removed most reservation country from state jurisdiction, the tribes remain subject to the federal government. Congressional authority to regulate Indian affairs is described with the phrase *plenary power*. As defined by such cases as *Lone Wolf v. Hitchcock*, this had become "a pejorative byword among Indians

19. C. WILKINSON, *supra* note 1, at 109 (citing Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 686 (1979)).

20. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 156-57 (1980).

and their advocates for unreviewable, and potentially autocratic, federal legislative and administrative authority."[21]

Wilkinson admits that Congress retains supreme power over Indian affairs. This has several corollaries:

> the doctrine of discovery that transmutes Indian fee title into a "right of occupancy" not protected by the Fifth Amendment at the moment an explorer's flag is tentatively planted on an isolated shore; the idea that Indian tribes are domestic dependent governments lacking direct access to the international community; the rule that Congress can order the divestiture of tribal land and then transfer it to tribal members in the form of allotments, [which] has cost Indians tens of millions of acres of land; and the notion that Indian treaties can be abrogated by Congress without agreement by, or even consultations with, the affected tribes (p. 79).

Wilkinson concludes, with a trace of acerbity, "None of these by-products of the plenary power doctrine has been shaken by the modern Court nor is any likely to be" (p. 79).

Congressional supremacy notwithstanding, Indians have succeeded in regaining many of the powers which an absolutist concept of plenary power denied them. One theme of the modern era has been the rejection of *Lone Wolf*. In 1974, in *Morton v. Mancari*,[22] Congressional legislation was scrutinized under the rational basis test of equal protection law. Here Indians won both in fact and in principle. The statute, which was upheld, granted Indians preferential-hiring status for positions in the Bureau of Indian Affairs. Despite the deference which rational-basis scrutiny pays to legislative action, the fact that *any* test was applied showed that Congressional power was not absolute. And a more promising avenue for seeking review of Congressional action was opened six years later by *United States v. Sioux Nation of Indians*.[23]

> Congress, the Court reasoned, can act . . . either as a trustee for Indians or in its role of furthering other national interests by limiting Indian rights: it cannot do both at once. When Congress acts as a trustee, its action will be upheld if it acted in good faith. If, on the other hand, Congress was exercising its power of eminent domain, full compensation is required. The courts should undertake a "thorough and impartial examination of the historical record" to determine

21. C. WILKINSON, *supra* note 1, at 78. Wilkinson observes that the phrase denotes a broad Congressional police power, "rather than only the power of a limited government with specifically enumerated powers, when legislating on Indian affairs. . . . Nonetheless, *plenary* also means absolute or total and has tended to carry that meaning in common usage in Indian policy." *Id.* at 78-79, asterisked footnote.

22. 417 U.S. 535 (1974).

23. 448 U.S. 371 (1980).

> which hat Congress was wearing. . . . *Lone Wolf* allowed for no such search, relying instead on a near-impermeable presumption of Congressional good faith (p. 80).

This refinement of trust doctrine has played an important role in the natural resource area, as tribes seek to exercise timber and water rights.[24] Although courts have been reluctant to upset long-existing expectations and property rights, these principles "compel administrators to carry out current duties with care, competence, and integrity" (p. 85).

VI. INDIAN GOVERNMENTS, NON-INDIAN RIGHTS

The most difficult issue in Indian law may be balancing Indians' rights to self-government against the rights of whites who fall within tribal jurisdiction. Wilkinson recognizes the interests of non-Indians, but feels that Indian claims should ultimately prevail.

> [T]he United States invited its citizens to homestead Indian land and . . . non-Indians accordingly built homes and livelihoods within reservation boundaries. . . . Many tribes were dormant as governments, under the yoke of federal suppression at its tightest, and prospective residents saw them as not much more than miscellaneous bumps on the horizon. . . .
>
> These expectations cannot harden automatically into a right to be free of all tribal laws. The tribes had expectations, too, and they were merged into treaties and treaty substitutes that protected historic tribal governmental prerogatives within reservation boundaries (p. 23).

Racism is not at issue, he argues: "Indian tribes are political, not race-based, entities."[25] He criticizes some decisions as "born of an ethnocentric reluctance to allow tribal control, however limited, over non-Indians."[26] Here Wilkinson may minimize the problem: tribes may be political entities, but their membership is defined by racial identity. It is not racist to deny tribal membership to white dwellers in Indian land. But we should scrutinize carefully any rule which bars certain people, because of their

24. C. WILKINSON, *supra* note 1, at 83-85. Wilkinson offers the examples of United States v. Mitchell, 445 U.S. 535 (1980), 463 U.S. 206 (1983), *and* Nevada v. United States, 463 U.S. 110 (1983).

25. C. WILKINSON, *supra* note 1, at 112 (citing Fisher v. District Court, 424 U.S. 382, 390 (1976) and Morton v. Mancari, 417 U.S. at 554).

26. C. WILKINSON, *supra* note 1, at 4. *See, e.g.*, Montana v. United States, 450 U.S. 544 (1981); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981); UNC Resources v. Benally, 514 F.Supp. 358 (D.N.M. 1981); UNC Resources v. Benally, 518 F.Supp. 1046 (D.Ariz. 1981).

race, from participating in government decisions which affect their lives. This is true no matter what kind of government is involved; even stricter scrutiny may be in order when the government in question is hereditary or theocratic.

Wilkinson feels that the settlers' expectations are not violated by allowing tribal taxation. To some extent, he argues, tribes may regulate outsiders in their territory because those outsiders derive economic benefit from the Indian presence. White settlers' interests as landholders cannot be treated as paramount: "Homestead patents are just deeds that involved only title to real property and carried with them no express or implied warranties as to political control" (p. 112). Furthermore—and the truth of this observation carries more weight than more theoretical arguments—the American federal system has never made representation a predicate to taxation. Tribes should be able to tax and regulate non-Indians in the same way that states can tax and regulate non-residents.

Process-based constitutional analysis, which focuses on access to the decision-making process, also supports giving tribes jurisdiction over non-tribal members.

> The non-Indian minority in Indian country may not have direct participational rights in tribal government, but non-Indians have political clout in the Department of the Interior, Congress, and state governments due to their superior numbers and economic position. Non-Indians in Indian country, then, should be treated as a majority for the purpose of process-based analysis: the courts should fulfill their traditional obligation of protecting minority rights, in this case Indian tribal rights.[27]

Beyond this, if one takes a pragmatic view, many problems are illusory. For example, tribes cannot try non-Indians for criminal offenses. In this sense, *McBratney* survives, and has been reaffirmed in *Oliphant v. Suquamish Indian Tribe*.[28] The judicial process, moreover, provides considerable safeguards. It is possible for non-Indian litigants, after exhausting

27. C. WILKINSON, *supra* note 1, at 118. Wilkinson observes, "I well appreciate the apparent irony of citing *Carolene Products* [304 U.S. 144 (1938)] and Dean [John Hart] Ely in support of the proposition that courts should broadly construe the powers of tribes over non-members." *Id.* at 117.

28. 435 U.S. 191 (1978). Wilkinson believes that the *Oliphant* decision "was based on Congress's perceived concern with the civil liberties of United States citizens, and, one can surmise, on the Justices' own visceral reaction to the issue." C. WILKINSON, *supra* note 1, at 43. He prefers to explain the continued validity of *McBratney* in terms of a balance of interests.

> [A]bsent a highly explicit federal statute to the contrary, state laws prevail over tribal and federal laws in regard to an activity that occurs in Indian country and that is not directly involved with legitimate tribal concerns. . . . Matters among non-Indians go to the states and matters among Indians go to the tribes.

Id. at 88.

tribal remedies, to obtain judicial review of tribal decisions.[29]

It is also worth remembering that the Old West, from the James Gang's first robberies to the closing of the frontier, lasted only twenty-four years, and that only one lifetime spans the period from *McBratney* (in 1882) to *Williams* (in 1959). The grievances dealt with by Indian law must be measured not only against statutes of limitation, but also by the longer timeframe of history. Historical issues do not settle themselves within one lifetime; the modern Indian cases find they do not really reverse history so much as they resolve questions which had been in doubt.

Even where Indian victories come as upsets—*United States v. Sioux Nation of Indians*, for example, in which the Court gave the Sioux one-hundred million dollars in compensation for the Black Hills—the decisions stop short of upsetting the fundamental status quo. *Sioux Nation* "did not hold, nor did it suggest, that the Sioux are entitled to the relief they really cherish—the return of the Black Hills themselves. *Sioux Nation* is a money damages case only and did not cast doubt on Congress's ultimate authority to abrogate the treaty unilaterally by taking the land."[30] The Court has relied upon money damages—that is, upon compensatory payments within the existing social, political, and economic system. It has *not* sought to change that system, to reverse history by returning the West to Indian rule.[31]

VII. INDIAN TRIBES AND THE BURGER COURT

American Indians, Time, and the Law presupposes a federal jurisprudential model of the most traditional sort. Congress sets the parameters for Supreme Court action, and Congressional power (unexercised, but undeniable) overshadows court decisions. An unstated assumption of this work is that federal courts, however zealously they police the actions of the states, do not routinely strike down Acts of Congress, and do not legislate on their own. The very conservatism of this outlook, however, strengthens Wilkinson's case: it makes the critical point that tribal rights

29. "Respecting substantive tribal authority over non-Indians while allowing limited federal review in individual cases of alleged injustices is the best method of substantially reconciling the legitimate interests of both tribes and non-Indians." *Id.* at 113.

30. *Id.* at 81. "Further, the finding of legislative bad faith was made easy by the fact that the contemporary Congress suspected, if it was not convinced, that its nineteenth-century predecessor had in fact overstepped the bounds of good faith. There was no actual conflict between the ruling of this Court and the wishes of this Congress." *Id.*

31. Even where decisions have meant that whites have been displaced by Indians—as has happened, to some extent, in the fisheries of the Pacific Northwest—this pattern remains unchanged. Even if updating and enforcing treaty rights means that whites are forced out of the fishing industry, this Indian victory is achieved on the white man's terms. One suspects that the present Court understands Indian treaties as part of the structure of the market economy rather than as an alternative to it.

do not depend upon judicial activism. It was the Burger Court, not the Warren Court, under which Indians gained most of their victories.

The modern resurgence of tribalism, in fact, seems to be a noteworthy part of the Burger Court's structural remodeling of federalism. The Supreme Court, in a line of decisions headed by *National League of Cities v. Usery*,[32] has protected state and local governments from federal encroachment. It has steadfastly reserved to state control areas where state law had traditionally governed, reining in the Dormant Commerce Clause and the preemptive penumbrae of federal statutes.[33] The last two decades have been flush times for localized political authorities, and tribes have floated upward with this rising tide.

The federal government's Indian policy, since the early days of the republic, has fluctuated between isolationism and assimilationism as steadily as a sine curve. Given this background, and the likelihood that it will continue, the Court's policy seems wise: Indian welfare could only be fostered by a deliberate attempt to strengthen Indian institutions. In times of isolationism, tribal institutions would be the principal authorities to which Indians could turn. In times of assimilationism, effective tribal governments should ensure that Indians can participate in a white-dominated market economy. Here, particularly, union is a pre-requisite for strength. "Congress remains the font of Indian law," Wilkinson warns (p. 82).

> The higher sovereign, faced with few practical constraints, holds nearly full sway in its ability to sap or energize Indian sovereignty. The power exists to enact everything from the debilitating allotment and termination programs to the beneficent child welfare and tax status laws that offer so much promise to Indian people.[34]

The tribes' future, thus, may be decided on Capitol Hill.[35] The Court has

32. 426 U.S. 833 (1976) *overruled in* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

33. *See, e.g.*, CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987).

34. C. WILKINSON, *supra* note 1, at 86. Among current issues of concern to Indians, who remain disadvantaged by their status as "a low-income minority group with few votes at the polls" are proposals "to limit Indian hunting of endangered species for religious ceremonies and to regulate Indian bingo operations." *Id.* at 82.

35. The book's focus on judicial decisions, to some extent, obscures the legislative elements of Indian law. Just as the New Deal shaped the socio-economic framework of contemporary American life, so the Indian Reorganization Act of 1934 set the stage for modern tribalism. If tribes have assumed the powers of government, much credit must be assigned to two fairly recent statutes. The Indian Civil Rights Act of 1968 applied most of the Bill of Rights against tribal governments. If Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), strengthened tribal governments by holding that issues of individual rights would have to be decided in tribal forums, with habeas corpus as the sole federal remedy, it must not be forgotten that the case construed this statute. The Indian Self-Determination and Education Assistance Act of 1975 gave tribes bureaucratic responsibilities by

identified Indian interests—a recognition which has allowed these interests to be factored into the political process. It has allowed the creation of tribal institutions which can supplement, and in some senses compete with, the institutions and agencies of white-controlled state governments. It follows that the tribes must continue and expand their political involvement; this is the responsibility which accompanies their new position.

VIII. CONCLUSION

Many of Wilkinson's conclusions would seem extreme, were not court decisions keeping pace with them. It seems extraordinary that Indian tribes should be treated as a separate level of the federal system, or that compacts made when George Washington was president should be reopened under Ronald Reagan. Yet from this one must turn to the language of *United States v. Wheeler*, proclaiming tribal sovereignty in no uncertain terms; and when *County of Oneida v. Oneida Indian Nation* reached the Supreme Court, the Court reached back nearly two centuries to uphold the Indian claim.

"I sometimes identify concepts and employ terms not found in the opinions," Wilkinson states (p. 3). Given the splintered nature of Indian law, and the fact-specific nature of many decisions, one understands his attempt to construct a methodology. In fact, we should be grateful for it. The challenge for scholars is to elucidate how doctrines unite precedents which often seem chaotic, and Wilkinson has done this. While one may disagree with some of his conclusions, no debate can proceed until its terms are set.

With *American Indians, Time, and the Law*, Wilkinson has produced a valuable addition to the literature of Indian law—perhaps even a classic text to stand alongside *Worcester v. Georgia* and Cohen's *Handbook of Federal Indian Law*. The writing throughout this book is clear, eloquent, and beautifully persuasive.[36] It has, moreover, a virtue which most legal writing lacks: a sustained but unobtrusive appeal for justice.

> These old laws emanate a kind of morality profoundly rare in our jurisprudence. It is far more complicated than a sense of guilt or obligation, emotions frequently associated with Indian policy. Some-

allowing them to supply government services as subcontractors to federal agencies.

A useful overview of Congressional enactments affecting Indians is provided by Deloria in *"Congress in Its Wisdom": The Course of Indian Legislation*, THE AGGRESSIONS OF CIVILIZATION: FEDERAL INDIAN POLICY SINCE THE 1880S 105-30 (S. Cadwalader & V. Deloria eds. 1984).

36. It is worth studying the craft with which Wilkinson distinguishes contrary precedents and condenses objections into an introductory paragraph, brushing them aside to leave room for his own arguments. A particularly good example is furnished by Wilkinson's section on "The Higher Sovereign." *See* C. WILKINSON, *supra* note 1, at 78-86.

> how, those old negotiations—typically conducted in but a few days on hot, dry plains between midlevel federal bureaucrats and seemingly ragtag Indian leaders—are tremendously evocative. Real promises were made on those plains, and the Senate of the United States approved them, making them real laws. . . .
>
> No, this is no perfect body of law. But the thrust of it has hewed to principle in the face of agonizingly powerful forces to abandon principle in the name of societal change (p. 121).

One is also struck by how modest a stake is necessary to give Indians a role in the modern world. When financial panic and program trading can cost the economy five hundred billion dollars in one afternoon, we should hardly begrudge the Sioux the money we promised to pay for the Black Hills.