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## American Indians, Time, and the Law

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## Book Review

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 Erik M. Jensen\*\**

Even for most people with legal training, American Indian law is a curiosity.<sup>1</sup> It has a formal definition that sounds suitably intellectual<sup>2</sup>—the “body of jurisprudence . . . defining and implementing the relationship among the United States, Indian tribes and individuals, and the states”<sup>3</sup>—but what is it? Indians are American citizens after all,<sup>4</sup> and it is peculiar, to say the least, to have a body of law that facilitates the separation of one racial or ethnic group from the rest of American society.<sup>5</sup>

Indian law does not fit within the usual legal-academic pigeonholes.<sup>6</sup> It is not simply a subset of constitutional law, although the provisions dealing with Indians,<sup>7</sup> the only references in

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1. A brief, unscientific survey suggests that Case Western Reserve's *Law Review* has not published an article on Indian law in its nearly forty-year history, and this law school has at no time offered a course in the subject.

2. As compared, say, to administrative law or property.

3. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 1 (R. Strickland ed. 1982) [hereinafter 1982 COHEN HANDBOOK].

4. The Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified at 8 U.S.C. § 1401(b) (1982)) provided that all American Indians “born within the territorial limits of the United States” are U.S. citizens. Prior to that time, Indians could become citizens generally only through naturalization. See 1982 COHEN HANDBOOK, *supra* note 3, at 142-43.

5. On the difficulty of justifying a policy of separation for the American Indian, see Jensen, *Monroe G. McKay and American Indian Law: In Honor of Judge McKay's Tenth Anniversary on the Federal Bench*, 1987 B.Y.U. L. REV. — (in press).

6. If law students are exposed to any aspect of Indian law in a typical curriculum, it is in a course considering the nature of “property.” See, e.g., C. HAAR & L. LIEBMAN, PROPERTY AND LAW ch. 1 (2d ed. 1985); C. DONAHUE, T. KAUPER & P. MARTIN, PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION 30-48 (2d ed. 1983).

7. Congress is given power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3 (emphasis added). In addition, “Indians not taxed” are excluded from the population count for purposes of apportioning representatives and direct taxes. *Id.* art. I, § 2, cl. 3; amend. XIV, § 2. The typical constitutional law casebook makes mention of Indian law fleetingly, if at all. For

the Constitution that are arguably racial or ethnic in character,<sup>8</sup> are fundamental components of the field. International law provides no better fit: Indian tribes are "nations" and were often dealt with by treaty,<sup>9</sup> but they are not *foreign* nations.<sup>10</sup> History is more important here than in nearly all other legal disciplines<sup>11</sup>—Indian law necessarily is concerned with old cases, statutes, and treaties<sup>12</sup>—but historical understanding merely begins the legal analysis in any particular case. And, while Indians have been among this nation's most oppressed minorities, the civil rights laws generally do not apply to Indians in the same way that they apply to members of other minority groups.<sup>13</sup>

The list of subjects to which Indian law has connections could be extended, but the point, I hope, has been made: in its scope and in its primary materials, Indian law is *sui generis*. It has become a

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example, a reader may not be able to tell from the editing or the synopsis that *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), had anything to do with Indians. See, e.g., W. LOCKHART, Y. KAMISAR, J. CHOPER & S. SHIFFRIN, *CONSTITUTIONAL LAW* 380 (6th ed. 1986). Tribe (who else?) gives space to Indian law in his monumental treatise, L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1012-19 (1978), but he is unusual in that regard. See C. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 206-07 n.88 (1987).

8. Although three constitutional provisions relate to slavery, none uses the term "slave" or "slavery," and none makes reference to any racial group. U.S. CONST. art. I, § 2, cl. 3; art. I, § 9, cl. 1; art. IV, § 2, cl. 3. Even the special legal treatment of the Indian is generally not viewed for legal purposes as racial in nature; rather, it is seen as the outcome of one government's dealing with another. See *Washington v. Confederated Bands & Tribes*, 439 U.S. 463, 500-01 (1979) ("It is settled that 'the unique legal status of Indian tribes . . . permits the Federal Government to enact legislation singling out tribal Indians'"); *United States v. Antelope*, 431 U.S. 641 (1977) (federal regulation of Indians not based on race); C. WILKINSON, *supra* note 7, at 85-86.

9. Treating with Indian tribes was ended in 1871, but the treaties in effect at that time continue in force unless they have since been abrogated. Act of March 3, 1871, ch. 120, § 1, 16 Stat. 566 (codified at 25 U.S.C. § 71 (1982)).

10. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (tribes are "domestic dependent nations," not foreign states; Cherokee Nation suit in Supreme Court against state of Georgia therefore dismissed for lack of jurisdiction). Perhaps international law should be important in Indian law analysis, but "Indian law today is mainly a body of domestic law." C. WILKINSON, *supra* note 7, at 81.

11. "[Indian legal history] is . . . the contemporary life blood out of which current Indian law problems are often resolved by the courts." Clinton, *The Curse of Relevance: An Essay on the Relationship of Historical Research to Federal Indian Litigation*, 28 ARIZ. L. REV. 29, 31 (1986); see C. WILKINSON, *supra* note 7, at 13 ("Indian policy is one of the few threads of federal activity that is continuous from the founding of the Republic, when Indian relations was one of the most pressing federal issues.").

12. The continuing vitality of old Indian law cases is demonstrated by the fact that Chief Justice Marshall's opinion in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), the foundation for jurisdictional law in this area, C. WILKINSON, *supra* note 7, at 30 & 96, has been cited more often by federal and state courts since 1970 than all but three other antebellum Supreme Court opinions. *Id.* at 30 & 158 n.126.

13. For example, the Equal Employment Opportunity Act specifically excludes Indian tribes from its application. 42 U.S.C. § 2000e(b) (1982). A tribe may therefore give preference in hiring to its own members without liability under the Act. See *Wardle v. Ute Indian Tribe*, 623 F.2d 670 (10th Cir. 1980).

specialty recognized (by a few people, anyway) both in academia<sup>14</sup> and in practice. But will anyone other than the few specialists care about Professor Wilkinson's new book? National attention is attracted every once in a while when an Indian tribe seeks to reclaim, or be compensated for, land that long ago passed into other hands,<sup>15</sup> or when an Indian is prosecuted for a religiously motivated killing of an animal protected under an endangered species statute.<sup>16</sup> In general, however, because the Indian population is small<sup>17</sup> and because it is concentrated in enclaves far from major population centers,<sup>18</sup> Indian law seems irrelevant to most Americans, including most law professors. The white man's contradictory images of the Indian, the noble savage and the warring barbarian, may appear everywhere,<sup>19</sup> but the Indian himself does not.

Charles Wilkinson, one-time staff attorney with the Native American Rights Fund and long-time legal academic at the Universities of Oregon and Colorado, has been a leader in the study of Indian law, and his work appears to be having an effect: there are hints of increasing interest in the field. Wilkinson neither claims nor deserves all of the credit for this, of course. He is riding a wave that would have arisen in any case; the black civil rights movement, to which the post-1960 fervor in the Indian movement can be traced,<sup>20</sup> has been too strong to expect otherwise. Nevertheless, Wilkinson has been a significant force. *American Indians, Time, and the Law* is this prolific writer's latest attempt to bring order out of jurisprudential chaos; it is a major contribution to our understanding of what Indian law is and why it matters.

As Wilkinson demonstrates, there are many reasons for all of us to care. First and foremost, Indian law is a subject of great moral importance, and it would be so even if the nation had made no

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14. Two casebooks exist, one coedited by Professor Wilkinson. M. PRICE & R. CLINTON, *LAW AND THE AMERICAN INDIAN* (1983); D. GETCHES & C. WILKINSON, *FEDERAL INDIAN LAW* (2d ed. 1986); see also W. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* (1981).

15. See *County of Oneida v. Oneida Indian Nation*, 105 S. Ct. 1245 (1985) (holding that no legal doctrine bars tribal suit for damages for occupation and use of tribal land allegedly conveyed illegally in 1795).

16. See *United States v. Dion*, 106 S. Ct. 2216 (1986) (tribal treaty rights to hunt eagles held to have been expressly abrogated by Bald Eagle Protection Act and Endangered Species Act); Shabecoff, *Panther Case: Indian Rights vs. Wildlife Law*, N.Y. Times (nat'l ed.), Apr. 15, 1987, at 1 (Department of Justice charges chairman of Seminole tribe with killing panther in violation of Endangered Species Act).

17. The 1980 census showed 1,418,195 Indians (a figure that may be too high), about 0.5 percent of the United States population. D. GETCHES & C. WILKINSON, *supra* note 14, at 6.

18. Not all Indians live on reservations, of course; about half the Indian population lives in off-reservation areas. Many Indians have been fully assimilated into the predominantly white society, and others have settled in groups in large population centers. Moreover, some reservations are close to cities of substantial size. See *id.* at 7.

19. See R. BERKHOFER, *THE WHITE MAN'S INDIAN* (Vintage ed. 1979); M. KAMMEN, *PEOPLE OF PARADOX 255-56* (Vintage ed. 1973).

20. See D. McNICKLE, *THEY CAME HERE FIRST* 274 (revised ed. 1975).

promises to the tribes.<sup>21</sup> Indian law is important morally because a multi-ethnic country defines itself, at least in part, by the way it treats its minority populations.<sup>22</sup> Just as the black civil rights movement forced a reexamination of the meaning of America and thus had its effects felt by all Americans, the moral impact of Indian law reaches each of us.<sup>23</sup>

Indian law has come to be of great practical importance as well, particularly in areas of the country with significant Indian populations. It encompasses issues as sensitive<sup>24</sup> (and as complex) as the limits on state jurisdiction within Indian country. For example, may a state impose its own hunting and fishing laws on non-Indian sportsmen within the boundaries of a reservation if the tribe has its own comprehensive regulatory system?<sup>25</sup> To answer that type of question—and jurisdiction is the great issue of modern Indian law<sup>26</sup>—may require consideration of the extent of retained tribal sovereignty,<sup>27</sup> the extent to which federal law has preempted exercises of state jurisdiction,<sup>28</sup> the prerogatives necessary for tribal self-

21. In fact, Wilkinson may overstate the extent to which the moral issues are dependent on the nation's promises to the tribes. See *infra* notes 60-67 and accompanying text.

22. "The 'Indian problem' . . . challenges the most precious assumptions about what this country stands for—cultural pluralism, equity and justice, the integrity of the individual, freedom of conscience and action, and the pursuit of happiness." SPECIAL SUBCOMM. ON INDIAN EDUCATION, SENATE COMM. ON LABOR AND PUBLIC WELFARE, INDIAN EDUCATION: A NATIONAL TRAGEDY—A NATIONAL CHALLENGE, S. REP. NO. 501, 91st Cong., 1st Sess. (1969).

23. See Cohen, *The Erosion of Indian Rights 1950-1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953) ("Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.").

24. See, e.g., Johnson, *Indian Hunting Rights Ignite a Wisconsin Dispute*, N.Y. Times (nat'l ed.), May 16, 1987, at 8 (describing ill feeling between whites and Indians after federal judge ruled, on basis of 1837 treaty, that Chippewa tribe had hunting and fishing rights extending beyond the reservation).

25. The answer was negative, at least in a case in which few tribal nonmembers owned land within reservation boundaries. See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); cf. *Montana v. United States*, 450 U.S. 544 (1981) (state permitted to enforce its game laws within a reservation on lands owned in fee simple by non-Indians, where substantial amounts of such land existed).

26. See C. WILKINSON, *supra* note 7, at 2, 87; see, e.g., *California v. Cabazon Band*, 107 S. Ct. 1083 (1987) (state may not regulate bingo games conducted on reservation); *Washington v. Confederated Tribes*, 447 U.S. 134 (1980) (state may impose tax on reservation sales of cigarettes made to tribal nonmembers). Equally sensitive questions of a tribe's power over tribal nonmembers on the reservation also arise. See, e.g., *Olyphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (tribe may not impose criminal sanctions on tribal nonmember for acts done on the reservation).

27. "Sovereignty" informs the preemption analysis, see *infra* note 28 and accompanying text, and it is the critical element in determining whether an exercise of state jurisdiction infringes on tribal self-government. See *infra* note 29 and accompanying text.

28. Wilkinson calls this issue "subject matter preemption." C. WILKINSON, *supra* note 7, at 96-99. Although apparently derived from the Supremacy Clause, U.S. CONST. art. VI, cl. 2, and the Treaty Clause, *id.* art. II, § 2, cl. 2, the preemption analysis differs from that in other areas of the law. Balancing state interests against federal and tribal interests is re-

government,<sup>29</sup> and the nature of the tribal<sup>30</sup> and state<sup>31</sup> interests at stake.

The importance of Indian law is evidenced by its apparently disproportionate representation on the Supreme Court docket. The field would be significant if only because the Court treats it as such. Modern high court Indian litigation began quietly in the 1958 term,<sup>32</sup> but an explosion followed. Since 1980 the Court has been averaging more than *five* Indian law cases a term, more than it hears in either securities law or bankruptcy.<sup>33</sup> As the numbers have increased, so too has the importance of the issues under consideration.<sup>34</sup> And the pace shows no sign of slackening—to the dismay of some justices.<sup>35</sup>

*American Indians, Time, and the Law* measures up to the lofty subject it addresses. It is worthy of attention on many levels. It is

quired, *see* *Mescalero Apache Tribe v. New Mexico*, 462 U.S. 324, 334 (1983), and therefore a sufficiently strong state interest may be able to outweigh an otherwise preemptive federal statute. *See* Feldman, *Preemption and the Dormant Commerce Clause: Implications for Federal Indian Law*, 64 OR. L. REV. 667, 678-87, 696 (1986).

29. "Geographical preemption" is the term used by Wilkinson. C. WILKINSON, *supra* note 7, at 99-106; *see infra* note 32 (stating the test). Geographical preemption provides a theoretically independent bar to the exercise of state jurisdiction within reservation boundaries, but, as with the subject matter preemption analysis (*see supra* note 28), the Supreme Court has required weighing state interests against federal and tribal interests. The two tests may therefore have become indistinguishable. *See* Feldman, *supra* note 28, at 677-78.

30. For example, hunting and fishing, so closely tied to the past of many tribes, constitute significant tribal interests. Wilkinson suggests that a focus on the nature of the tribal interests at stake in the Supreme Court's jurisdictional cases may help reconcile the otherwise disparate case holdings. *See* C. WILKINSON, *supra* note 7, at 110-11.

31. *See supra* notes 28 & 29 (balancing tests require taking state interests into account).

32. The critical case was *Williams v. Lee*, 358 U.S. 217 (1959), which held that a tribe had exclusive jurisdiction over claims arising from a contract, entered into on the reservation, between a non-Indian plaintiff and an Indian defendant. The case stated the "infringement" test applicable to determine "geographic preemption" (*see supra* note 29): "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." 358 U.S. at 220; *see* C. WILKINSON, *supra* note 7, at 1-3.

33. *See* C. WILKINSON, *supra* note 7, at 2, 123-32. In the 1986 term alone the Court decided cases dealing with riparian rights, *United States v. Cherokee Nation*, 107 S. Ct. 1487 (1987); state regulation of bingo games on an Indian reservation, *California v. Cabazon Band*, 107 S. Ct. 1083 (1987); exhaustion of tribal court remedies, *Iowa Mutual Ins. Co. v. LaPlante*, 107 S. Ct. 971 (1987); the extent of the Interior Secretary's obligation to determine whether Alaskan oil leases would affect Alaska Natives' subsistence rights and culture, *Amoco Prod. Co. v. Village of Gambell*, 107 S. Ct. 1396 (1987); and the Indian Land Consolidation Act of 1983, *Hodel v. Irving*, 107 S. Ct. 2076 (1987).

34. The emphasis in the cases has shifted from essentially private disputes to issues of public law. C. WILKINSON, *supra* note 7, at 2.

35. *See, e.g.,* *Washington v. Confederated Tribes*, 447 U.S. 134, 176 (1980) (Rehnquist, J., concurring and dissenting) ("well-defined body of principles is essential in order to end the need for case-by-case litigation which has plagued this area [scope of Indian immunity from state taxation]"); Taylor, *Reading the Tea Leaves of a New Term*, N.Y. Times (nat'l ed.), Dec. 22, 1986, at 12 (Justice Blackmun commented that "[i]f one's in the doghouse with the Chief [Justice], he gets the crud. He gets the tax cases, and some of the Indian cases.").

in part a useful doctrinal primer, although that is not its stated purpose<sup>36</sup> and the book does considerably more than that. Wilkinson is a legal realist of sorts,<sup>37</sup> seeking the “undercurrents of doctrine” in the leading Supreme Court cases,<sup>38</sup> rather than merely explicating the principles enunciated by the Court. Because jurisdictional doctrine has become so confused<sup>39</sup> and the decisions so fact dependent,<sup>40</sup> doctrinal explication alone may paint a distorted picture of Indian law.

The volume serves also as a ready introduction to Indian law literature. Written in the law review tradition, its footnotes—bursting with imaginative suggestions, intriguing information, and useful citations—nearly outweigh the text. An hour’s browsing should convince the most confirmed footnote-hater that value may be found at the back of a book or the bottom of a page.

Most important, *American Indians, Time, and the Law* is an extended essay on a continuing theme: the effect of the passage of time. Indian law, more than any other American legal discipline, still looks to the early years of the Republic to resolve present disputes, and therein lies much of the subject’s complexity and unpredictability. It is, in Wilkinson’s words, a “time-warped field,”<sup>41</sup> “better understood in terms of time periods than doctrines.”<sup>42</sup> The recurring question in the modern era of Indian law, he argues, is “whether and to what extent old promises should be honored today.”<sup>43</sup> Those promises, reflected in treaties and treaty substitutes, were to preserve a “measured separatism,” a “comprehensive tribal sovereignty within reservation boundaries.”<sup>44</sup> It was understood by both the tribes and the federal government, Wilkinson convincingly maintains, that distinct tribal governments were to control distinct

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36. C. WILKINSON, *supra* note 7, at 3. That function is already well served by the recently revised 1982 COHEN HANDBOOK, *see supra* note 3, itself a product of Wilkinson’s expertise. The *Handbook* was originally prepared by Felix S. Cohen, a prominent legal philosopher, advocate for Indian rights, and high official in the Department of Interior. *See* C. WILKINSON, *supra* note 7, at 57-59; *Felix S. Cohen*, 9 RUT. L. REV. 345, 348 (1954). The Department itself prepared a heavily criticized revision of the *Handbook* in 1958, reflecting the then-prevailing assimilationist philosophy of the Eisenhower administration. The 1982 revision, undertaken by a group of Indian law scholars including Wilkinson (as managing editor), made the volume a continuingly useful reference work while retaining the flavor of Felix Cohen.

37. As was Felix Cohen. *See supra* note 36; *see also* R. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY (1982) (discussing Cohen and other proponents of instrumentalism).

38. C. WILKINSON, *supra* note 7, at 3.

39. *See supra* notes 28 & 29.

40. The lack of consistent principles is partly responsible for the unending stream of litigation. *See, e.g.*, *Washington v. Confederated Tribes*, 447 U.S. 134 (1980) (Rehnquist, J., concurring and dissenting).

41. C. WILKINSON, *supra* note 7, at 13.

42. *Id.* at ix.

43. *Id.* at 4.

44. *Id.* at 22.

tribal homelands; those governments and homelands would be largely immune from state interference but would be subject to the protection of federal plenary power.<sup>45</sup>

*American Indians, Time, and the Law* is particularly rich in demonstrating the inherent difficulties in answering the recurring question: which, if any, of the old promises should be honored? The most straightforward answer—that of course old promises should be fully honored today—is misleading in its simplicity. To begin with, the concept of a measured separatism does not emerge, fully formed, from the old documents, which were often written in the most general language.<sup>46</sup> Moreover, not only has the meaning of the language used to make the promises changed over time, but so too have conditions: new states have been created<sup>47</sup> since treaties were ratified, and, for better or for worse, no Indian tribe can return to the position it occupied before the white man's arrival.<sup>48</sup> Even if we could easily put ourselves in the interpretational shoes of those in the mid-nineteenth century, whose shoes would we occupy? How do we take account of the fact that the representatives of the federal government and the Indian tribes did not speak the same language? How do we deal with the overreaching that seriously tainted these agreements? How do we take account of the fact that promises were made to non-Indians as well and that non-Indians therefore may also have developed legitimate expectations of governmental support?<sup>49</sup>

The passage of time is confusingly felt in still another way: authority from different eras in Indian law history is in many respects irreconcilable. Federal policy toward the Indian has alternated between emphasis on assimilation of the Indian into American society and emphasis on separation,<sup>50</sup> and the present legal structure retains elements from the conflicting historical periods.<sup>51</sup> Some statutes and cases may have had their underlying purposes and

45. *Id.* at 14-19. The tribes have pressed to be "permanent institutions in national policy," *id.* at 75, and the Supreme Court cases, Wilkinson argues, are consistent with that understanding. However, because Congress can unilaterally abrogate the old treaties and because the statutory Indian law structure is also subject to congressional whim, the federal power is a two-edged sword: "It is on Capitol Hill that it all can be lost." *Id.* at 82.

46. *See id.* at 15 & 94.

47. Many treaties were signed at a time when the land reserved to the tribes did not fall within state boundaries, and therefore the absence of treaty language regarding state powers within reservation boundaries is not significant in resolving jurisdictional disputes. *See id.* at 100-02.

48. "The promise of a measured separatism . . . can fairly be called into question simply because the demography of Indian country is so changed from what it was when the promises were made." *Id.* at 22.

49. For example, the ancestors of non-Indians holding land within reservation boundaries for the most part acquired the land perfectly properly. They may even have been encouraged to make the acquisition by federal policy. *Id.* at 111.

50. *See id.* at 13 ("Indian policy has been cyclic").

51. *See id.* at 29 (opinions are irreconcilable "because they base their foundations on different zones of time").



holdings strengthened by the passage of time; others have been eviscerated.

As if the passage of time did not provide sufficient difficulty, answering the recurring question is further complicated—and Wilkinson may not emphasize this enough—by the jurisprudential quicksand in which Indian law is grounded. The resolution of today's cases requires the application of western legal principles that were entirely foreign to the Indian. For example, reflecting their status as once distinct nations, tribes retain many aspects of sovereignty.<sup>52</sup> That concept continues to play an important role in determining whether federal law has preempted exercises of state jurisdiction within Indian country,<sup>53</sup> and it is a critical concern in determining whether state authority infringes upon tribal self-government.<sup>54</sup> As currently interpreted, the concept of sovereignty has served to protect Indian interests,<sup>55</sup> but tribal advocates are paradoxically forced to urge the application of a foreign doctrine to protect tribal interests.<sup>56</sup>

Riddled with theoretical complications and inconsistencies, Indian law has nevertheless survived. So too have the tribes, many of them anyway, even though the pressures to deny the continued force of ancient promises have been substantial. The Indians' resistance to assimilation has been the primary factor in tribal survival, but Wilkinson gives much credit to the Supreme Court as well.

Indeed, one of the most striking qualities of this book, written by a strong tribal supporter, is its generally optimistic tone. Much of the current Indian law literature is despairing or angry, filled with a sense of betrayal. Wilkinson, however, rejects gloom and doom. He concludes that, rather than deferring to changed circumstances, the Supreme Court has generally enforced the old promises, thereby protecting tribal existence. As a result, the Indian policy of

52. "Sovereignty," as used in the cases, has come to mean "the power of a people to make governmental arrangements to protect and limit personal liberty by social control." *Id.* at 55. *But see* *Bad Horse v. Bad Horse*, 163 Mont. 445, 517 P.2d 893, 897 (discussing "myth of Indian sovereignty"), *cert. denied*, 419 U.S. 847 (1974).

53. Sovereignty provides a "backdrop" to the subject matter preemption analysis. *See* *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973); *supra* note 28. It is not entirely accurate to say that sovereignty "continues" to play a role, in that sovereignty had largely disappeared from Supreme Court analysis until revived implicitly in *Williams v. Lee*, 358 U.S. 217 (1959), and explicitly in *McClanahan*, 411 U.S. at 172. *See* C. WILKINSON, *supra* note 7, at 57 (quoting *United States v. Kagama*, 118 U.S. 375, 379 (1886)) ("Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two.").

54. *See supra* note 29.

55. Assuming, that is, that "measured separatism" serves Indian interests. *See supra* text accompanying note 45.

56. Wilkinson suggests that social scientists have given the designation "government" to even the most primitive tribal arrangements that existed before the white man. C. WILKINSON, *supra* note 7, at 100. That, too, applies a western label to a nonwestern arrangement of power.

the United States is "one of the most progressive of any nation."<sup>57</sup> In particular, the cases have given remarkable scope to sovereignty, concluding "that tribal powers will be measured initially by the sovereign authority that an Indian tribe exercised, or might theoretically have exercised, in a time so different from our own as to be beyond the power of most of us to articulate."<sup>58</sup> And the Court, with few exceptions, has required that interpretational questions be resolved in the tribes' favor:

[T]he Supreme Court has put all who deal with Indian laws . . . on notice that this is a special field and that words may not mean what they appear to mean. If Indians are involved, you should infuse all federal laws, old and new, with the policy of the special Indian trust relationship and read those laws with a heavy bias in favor of Indian and tribal prerogatives. If the first reading does not produce a result in favor of the Indians, you should read the document again. And once again—with an inventive mind.<sup>59</sup>

Infused with scholarly passion, *American Indians, Time, and the Law* is a remarkably hopeful statement of the likelihood of tribal survival.

Of course, one cannot recommend a book on Indian law without reservations.<sup>60</sup> A fundamental difficulty with *American Indians, Time, and the Law*, to this reader at least, is its failure to provide a persuasive philosophical justification for the policy of measured separatism. Certainly the policy has strong visceral support; the tendency in nearly all modern writing on Indian law is to take for granted the desirability of separation and, in some cases, to urge its extension.<sup>61</sup> But why?

Wilkinson does not totally ignore the issue; he recognizes the need to reconcile Indian policy "with the egalitarian and libertarian laws and traditions" of the United States.<sup>62</sup> And he purports to ask and to answer an "ultimate question, . . . how can the United States,

57. *Id.* at 5.

58. *Id.* at 63.

59. *Id.* at 52.

60. Stylistic nits can be picked. The publisher bills the book as being written in "an edifying, nontechnical style," but Wilkinson devotes an entire section to "nonuser." This reviewer, unschooled in the intricacies of property law (and grateful to be so, *see supra* note 2), could understand the important issue raised: whether tribes lose traditional sovereign powers, such as the power to tax or to regulate hunting and fishing, by not exercising those rights for a number of years. But it took several readings to realize that "nonuser" was not a misprint. Try reading this "edifying, nontechnical" sentence: "In analyzing the nonuser of a tribe's regulatory authority over non-Indian hunting and fishing, Judge Monroe G. McKay of the Tenth Circuit Court of Appeals set out the ultimate philosophical basis for the protection against nonuser due to encroachment . . ." C. WILKINSON, *supra* note 7, at 46.

61. *See, e.g.*, Comment, *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. L. REV. 507, 586-602 (1987).

62. C. WILKINSON, *supra* note 7, at ix & 89.

consistent with its democratic ideals, allow race-based Indian tribes to govern the non-Indians who have lawfully entered those lands to live and to do business over the course of ensuing generations?"<sup>63</sup> That question puts the issue of separation in one of the ways it is most likely to be litigated, and, with the issue so phrased, Wilkinson responds persuasively. Tribes are pre-constitutional as well as extra-constitutional, and they are therefore not bound by many of the same restrictions that would apply to other constitutionally recognized segments of American society. Moreover, most tribal non-members subject to tribal governance are in much the same position as noncitizen residents of another country. Finally, most such non-members are not "minorities" as that term is ordinarily used; they are part of the American racial majority and are fully able to participate in state and national political affairs.<sup>64</sup>

The underlying issue is broader, however. Even if no non-Indians lived on, or visited, Indian country, the separatist policy should still have to be justified. If we agree that tribes are based on race—and of course they are<sup>65</sup>—how can the United States countenance separation consistent with the moral principles of *Brown v. Board of Education*?<sup>66</sup>

The question I am raising is not the legality of separation. It is clear that the special status of Indians, recognized in the Constitution, permits the existence of measured separatism. However, after *Brown*, we should have doubts, moral doubts, about permitting any race-based segment of the American population to withdraw altogether from the larger polity. "Self-determination" is a very popular, generally unexamined justification these days for splintering nations into smaller and smaller fragments. But which groups are entitled to withdraw and "self-determine," as it were, and which groups are not? Is the concept of "measured separatism" available in the United States only to the American Indian—and perhaps the Old Order Amish?<sup>67</sup>

This is not to suggest that there are no answers to these questions. In the case of the Indians, the fact that promises were made in

63. *Id.* at 6.

64. *Id.* at 111-19.

65. They are largely self-defining entities, *id.* at 7, and they can be "theocratic, hereditary, and race-based in citizenship." *Id.* at 112. *But see supra* note 8 (cases concluding special treatment of Indians not based on race).

66. 347 U.S. 483 (1954). *See Jensen, supra* note 5 (discussing policy of separation).

67. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972); Garet, *Communitarity and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1029-36 (1983) (treating Indians and Amish as conceptually similar groups).

the past is certainly a factor of some moral significance, and the policy of separation is already in place. However, many race-based promises and many longstanding policies have fallen by the wayside in the era of expanding civil rights. Some promises and some policies are more worthy than others, and the desirability of a measured separatism is not a self-evident proposition. In this impressive book, Professor Wilkinson has already demonstrated wide learning in philosophy. Perhaps in his next work he will take this additional analytical step.