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AMERICAN INDIANS, TIME AND THE LAW

Charles F. Wilkinson
Yale University Press, 1987

There is a story, probably apocryphal as most good stories are that are not Winston Churchill's or Mark Twain's, that a sculptor was asked by a novice how to carve a horse from a block of marble? The sculptor replied, "That you carefully study the block from every angle and then take your hammer and chisel and knock off the pieces that do not look like a horse."

Knocking off the parts that do not look like the modern theory of federal Indian law is the task that Professor Wilkinson has set out to do in his new book. But his task is harder than the sculpture's because not only are there other artistic representations of horses but there are horses and a general agreement about what a horse looks like. The new sculptor can have his new piece of art compared to the reality and then judged.

Professor Wilkinson's block of marble is the 80 federal Indian law cases decided by the United States Supreme Court since the Court rendered *Williams v. Lee*, 358 U.S. 217 (1959) in the 1958 term. Williams is the proper marker for the beginnings of modern Indian law. He has hewed out of this body of law a theory of federal Indian law that is in the main a lucid and readable theory. The uniqueness of this achievement can best be understood by the fact that the last comprehensive theoretical work was *Felix Cohen's Handbook of Federal Indian Law*, GPO 1941. The difficulty of the task can be illustrated by the common references to Lewis Carroll in Indian law articles. Until Professor Wilkinson wrote this wonderful short book, most scholars of the subject has come to one of two conclusions about the Supreme Court modern Indian law doctrine: its illogical through ignorance or illogical by evil intent. This book dispels both of those views and concludes that the core of tribal self-government is a viable and useful doctrine in the American legal system.

His theory rests upon two prongs: the first is that Indian tribes are part of the American society with legal status that rests upon the early treaties, agreements and statutes that the United States passed and acceded to in the conquest of the United States. These documents established Indian tribes as "islands" in the nation. These "islands" have rights of self-government and the measurement of those rights were with little exception established under the rules articulated by Chief Justice John Marshall in his three Indian cases, *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543 (1823), *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

These cases have provided tribes with insulation from time and space and within the insulated islands tribes have managed to not just remain

societies frozen in amber but societies that retain distinctive elements of Indian life while adjusting to a degree to the outside world. This power gives tribes power over resources that may be their last real trump card. The second prong is the moral force that the long history of the relationship has imprinted on the nation's consciousness. This force has allowed tribes to retain the power over internal affairs directly effecting communal life.

Education, domestic relations, business regulations, taxes, zoning and most of the other normal powers of a sovereignty. The synergism of these two prongs have created a new body of Indian law that is rooted in the past but is different from the past. The days are over when the state could screamed, "We can do it because we are sovereign," and the tribe responded as loudly, "No you can't because we are sovereign." There is a path through the cases, but the path is hard.

The 80 cases are a long journey that meander off the track, that double back on themselves, that sometimes turn into the legal equivalent of the Sud but Professor Wilkinson has charted a path through this swamp that is readable by the lawyer and the non-lawyer.

This is a rare achievement. The book fills a vital hole for scholars interested in Indian Affairs because until this book there was no book that attempted to analyze the cases to form a cohesive theory of modern law. Lawyers have concentrated on the cases and the difficulty of reconciliation while non-lawyers have concentrated on the policies to the exclusion of the cases. This book melds the two strains together.

While there is a great appreciation of the past, the book does not dwell on the past. It acknowledges with great care and detail that the modern Indian tribe faces a plethora of problems that requires the expertise of the best of the legal profession. For tribes realize that the insulation from time and space means that they also must make internal adjustment because history has moved in seismic quanta when it believes that Indian tribes have used their protection to remain too different. The Major Crimes Act of 1887 and the Indian Civil Rights Act of 1968 being the most egregious examples.

This is a book that requires study. It is not a book to read on airplanes nor to peruse for relevant quotes for papers about Indians. It is instead a 122 page essay with 100 pages of appendices and footnotes that the interested scholar should use to supplement future research once they have digested the legal theories embodied in the book. If one were to teach a course to non-lawyers about modern Indian policy I could think of no finer book, in fact, I could think of no other book.

To me the most important fact about this work is not that it is right, although I generally agree with it, but that it is a beginning for future work. It proves a challenge for scholars to unpack the many closely reasoned ideas that Professor Wilkinson has set out and examine them

in detail. To extrapolate the meaning of his theory into future strategies for tribes since it is clear to me that tribal strategic planning has been non-existent. Charles has drawn the first rough map, it is critical now that others go forth and check the accuracy of the landmarks he has named. My only real complaint with the book is that I wish I had written it.

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