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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, 219. $18.50.

Professor Charles F. Wilkinson,[1] author of a new book on federal Indian law entitled *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy,* is already one of the field's most accomplished and widely cited scholars. Besides numerous influential law review articles[2] and coauthorship of a leading law school casebook, now in its second edition,[3] Wilkinson served as managing editor of the recently revised Felix Cohen *Handbook of Federal Indian Law,* the only treatise in the field and one of the most influential works of modern American legal scholarship.[4] (Wilkinson rightly states that Cohen's revival of the tribal sovereignty doctrine in the original 1942 work "was cited repeatedly by the courts and attained something of the weight of a Supreme Court opinion" (p. 58).) Wilkinson thus brings a unique set of qualifications and a comprehensive scholarly perspective to the task he sets for himself in this book of identifying and assessing "the central ideas — the undercurrents of doctrine" (p. 3) that have animated and informed the Supreme Court's contemporary Indian law jurisprudence.

Wilkinson's long labors in the field of Indian law have reaped the rich reward of a book that promises to have a substantial impact on the way Indian law is perceived and conceptualized. *American Indians, Time, and the Law* succeeds in planting the principled and comprehensive set of justifications for Indian law promised by its author in such a convincing and powerful fashion that those concerned about

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2. *See, e.g.,* Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or Grass Grows Upon the Earth" — How Long A Time Is That?,* 63 CALIF. L. REV. 601 (1975); Wilkinson & Biggs, *The Evolution of the Termination Policy,* 5 AM. INDIAN L. REV. 139 (1977).

3. D. GETCHES & C. WILKINSON, CASES AND MATERIALS ON FEDERAL INDIAN LAW (2d ed. 1986).

4. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (rev. ed. 1982). Cohen's original 1942 edition was called by Justice Felix Frankfurter "an acknowledged guide for the Supreme Court in Indian litigation." F. FRANKFURTER, OF LAW AND LIFE AND OTHER THINGS THAT MATTER 143 (1965); *see also* R. BARSH & J. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 112 (1980).

the future of America's Indian nations can only hope that it too will come to fulfill a role similar to that played by Cohen's famous treatise; that is, to tell the Court what the law is, and even more important, to tell the Court what the law should be.

As its title implies, the framing, thematic device of *American Indians, Time, and the Law* is the passage of time and its impact on Indian jurisprudence. Wilkinson identifies four great occurrences which dominate American Indian law, history, and policy:

> [T]hey are the existence of aboriginal culture and sovereignty during pre-Columbian times; the location of separate Indian societies on reservations; the imposition of assimilationist policies, including the opening of most reservations to settlement by non-Indians; and the efforts of Indians during the last quarter century to reverse the press of assimilation by reestablishing viable, separate sovereignties in Indian country. [p. ix]

Wilkinson's primary concern is with the Supreme Court's work in the Indian law field during this last time period, the past twenty-five years during which tribes have sought to revive their sovereignty. His thesis is that the Supreme Court's most recent decisions in Indian law can only be understood and assessed against the background of each of these zones of time, "of the relationship of each to the other, and of their relationship to the larger constitutional democracy" (pp. ix-x). "Indian law," says Wilkinson, "encompasses not only Indians and law but also time" (p. x).

Wilkinson demarcates the modern era in Indian law as beginning with the Supreme Court's 1959 decision in *Williams v. Lee.*[5] In that case, the Court upheld exclusive tribal judicial jurisdiction (thereby denying the state court's jurisdiction) over actions involving contracts entered into on an Indian reservation between a non-Indian plaintiff and an Indian defendant. *Williams'* significance was in its requirement that the debt action be heard exclusively within the tribal court system in order to promote and protect tribal self-government (p. 1). Prior to 1959, no twentieth-century Supreme Court ruling had ever posited the value of protecting and promoting tribal self-government as a principled basis for decision. In fact, prior to *Williams,* there did not even exist a twentieth-century legal grammar that recognized tribal sovereignty as a viable concept to guide decisionmaking. Tribes as cultural entities were regarded as historical anomalies which had somehow survived the ravages of progress. Tribes as significant governmental entities had not survived (pp. 1-5).

Since *Williams'* recognition of the viability of tribal sovereignty, however, the Court has found itself frequently adjudicating legal issues involving Indian tribes and Indian sovereignty. In the 1980s alone, the Court has handed down more than two dozen Indian law opinions,

5. 358 U.S. 217 (1959).

a greater number than in many other fields such as securities, bankruptcy, pollution control, or international law (p. 2).

With *Williams* as his boundary, Wilkinson attempts to assess the Court's contemporary Indian law jurisprudence against the background of the major historical occurrences identified at the beginning of the book. His intent is to explore the "undercurrents of doctrine" (p. 3), describing what in fact has occurred in the past twenty-five years of Supreme Court Indian law jurisprudence. His methodology is to use history to decipher "a principled and comprehensive set of justifications" (p. 3) for the field.

This is no easy task, as Wilkinson himself admits. His first chapter is in fact devoted to identifying the obstacles to the development of consistent doctrine in Indian law. These "scattering forces," as he calls them,

> have the potential of creating a body of law almost without precedent, of reducing each dispute to the particular complex of circumstances at issue — the tribe, its treaty or enabling statute, the races of the parties, the tract-book location of the land where the case arose, the narrow tribal or state power involved, and other factors. [pp. 3-4]

These scattering forces present barriers to the development of unitary doctrine that are difficult to appreciate unless examined closely. There are over 500 tribes in the United States that can make some sort of legal claim to special status or governmental authority under United States law. These tribal units range from the modern, relatively sophisticated Navajo Nation, with its own government, police force, and statutory laws and taxing codes, to small two- or three-dozen member bands of Alaskan natives whose primary activity is subsistence hunting and fishing. Each tribe has its own governing principles. Some embody these principles in Anglo-style written constitutions; others govern themselves by more traditional means and do not rely on written charters. Some tribes hold lands recognized by treaties with the United States. Others have had reservations created by executive order. In many Indian nations the effects of past federal policies such as the General Allotment Act of 1887 have encouraged large numbers of non-Indians to settle within reservation boundaries. For other Indian nations, the term "Indian Country" defines not only the geographical but racial reality of the reservation community. Such diversity among tribes, their governing structures, and their geographical and political landscapes could easily press judicial decisionmaking toward ad hoc resolution. The lack of congressional resolutions of many of the essential questions respecting the scope of federal, state, and tribal powers in Indian Country only increases the enormity of the judiciary's task in carving out clear rules and principles of broad and consistent applicability in spite of these "scattering forces" (pp. 7-13).

There exists, however, even a further factor which complicates the judiciary's task of crafting doctrine in the Indian law field. As Wilkin-

son notes, "Indian law, more than any body of law that regularly comes before the Supreme Court, is a time-warped field" (p. 13). While this particular insight that the legacy of time plays a critical role in Indian jurisprudence is certainly not new,[6] Wilkinson's use of time itself as a normative hermeneutic device in assessing the Court's development of doctrine in the field is not only original, but represents a significant theoretical advance for Indian law scholarship.

Wilkinson argues that each of the first three great occurrences in Indian law, history, and politics — pre-Columbian sovereignty, the measured separatism achieved by the establishment of the reservation system, and the Allotment Era's modification of that separatism in opening up the reservations and creating equities in non-Indian settlers and businesses — creates in its own right a set of considerations that are properly part of modern Supreme Court decisionmaking. Wilkinson, in other words, has developed a hermeneutics of Indian law jurisprudence which derives its interpretive norms from history.

The key historical occurrence within this hermeneutical framework is the establishment of the reservation system, mostly by treaties and treaty substitutes, during the nineteenth century. The treaty negotiations were normally conducted through interpreters, between peoples with radically different world views often on the verge of violent conflict (and often having only recently survived violent conflict). Their immediate goal was the securing of peace and the transfer of large amounts of Indian land. These were thus highly significant events in the collective lives of the two signatory nations, Indian and White. Given these facts, Wilkinson feels justified in deriving "the existence and meaning of certain first principles" from what was said and what was memorialized during the treaty ceremonies (p. 15). From his survey of the minutes and final documents produced by these negotiations, Wilkinson demonstrates that isolation of Indian societies on reservations of land was the common policy goal of both the tribal and federal negotiators. And, as Wilkinson shows, this first principle of a "measured separatism" (p. 14), together with its implementing and sustaining requirements of federal protection and provision of services guaranteed in the treaties, has been embodied in Supreme Court Indian jurisprudence from the beginnings of the nation. The principle of "measured separatism" thus provides a grounding normative foundation for Wilkinson's subsequent doctrinal analysis.[7]

The Allotment Era, which opened the reservations to white settlement in the late nineteenth century, irredeemably modified this grounding principle of Indian law. Under the General Allotment Act,

6. *See, e.g.*, Strickland, *The Absurd Ballet of American Indian Policy or American Indian Struggling With Ape on Tropical Landscape: An Afterword*, 31 ME. L. REV. 213 (1979).

7. On the treaty-making period in general, and related United States legislation affecting Indian affairs, see F. COHEN, *supra* note 4, at 62-127.

the tribally held land base was eroded from 138 million acres in 1887 to 52 million acres in 1934. Nearly three-quarters of the land lost was made available to non-Indian homesteaders under the surplus homesteading provisions of the legislation. The stated purpose of the Allotment Act was to "civilize" the Indian by breaking up the tribal land mass (pp. 19-20). In opening Indian reservations to white settlement, however, the federal government in effect foreclosed the prospects of any form of autonomous tribal rule in formerly separate tribal homelands:

> With the land base slashed back once again and with strange new faces within most reservations, tribal councils and courts went dormant. The BIA [Bureau of Indian Affairs] moved in as the real government. . . . Christian missionaries were able on many reservations to drive out traditional religions or at least force them underground. The 1880s marked the beginning of a half century of twilight operations by the tribes, a time when the essence of the measured separatism — tribal self-rule — was debilitated nearly to the ultimate degree. [p. 21]

Tribes have only recently and partly recovered from the economic, psychological, and spiritual devastation of the Allotment Era's modification of the measured separatism promised by the treaties. The New Deal reforms contained in the Indian Reorganization Act of 1934 reversed the policies of the Allotment Act and created the necessary conditions for the widespread revival of tribal governments in the modern era.[8]

The opening of the reservations achieved by the Allotment Era, however, represents an irreversible reality for tribes today. As a result of Allotment, non-Indians live and own businesses within these former separate areas. State and county governments provide schools, police, highway maintenance, welfare, and other benefits to Indians and non-Indians alike on many reservations. Given this state of forced integration on many Indian nations, Wilkinson argues that the federal government's breach of its treaty promises of a measured separatism mandates that "the structuring of broad principles in the field of Indian law must also account for those reservations where the presence of non-Indian citizens and state governmental apparatus is strong, even dominant" (p. 22).

In other words, the expectations of Indians derived from the treaty period may sometimes have to yield to the expectations of non-Indians, "premised upon open invitations tracing to federal law" (p. 23). While these non-Indians cannot expect to be totally free from tribal laws in Indian Country, neither can their expectations "fairly be ignored" (p. 23). The Allotment Era for Wilkinson thus constitutes another instance in history from which the judiciary should derive norms in Indian law.

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8. See F. COHEN, *supra* note 4, at 144-206.

This portion of Wilkinson's thesis, that a promise broken by a white government might somehow redound to the benefit of that government's white citizens, will most certainly give pause to most Indian people and their leaders. Wilkinson's choice of history as a normative framework for his analysis of Indian law must inevitably implicate issues of collective historical guilt for past misdeeds and breaches of trust by one race against another. The idea of what America "owes" the Indian is central to American mythic and historical consciousness. But simply talking of the need for accommodation and reconciliation between the two races in light of the realities of our present-day situation ignores the historical realities which structured the present-day situation. Within any historicized mode of normative evaluation, the ways in which equities cut must always bear witness, in some degree, to the past. Just how much the wrongs of the past should be weighed in structuring present-day equities poses the fundamental issue of Western-derived jurisprudence of race relations and the post-colonial order. The haunting antinomy of the compulsion to forget and the need to remember remains as the residue of the white man's atrocities and holocausts committed in our own century and past centuries as well. From an Indian perspective, it is simply not enough to say that the judiciary should protect the expectations of whites on the reservation whose presence is possible only because of a century of dishonor on the part of the federal government. The fact that Indians are irreversibly fated to live in a society where they will always be a minority provides a more accurate, albeit less digestible, basis for a jurisprudence which takes account of white expectations in Indian country.

When looked at in this light, the Allotment Era's impact must be viewed as of that same genus of racialist legislation by which whites once imposed their will on blacks. The structural inequalities resulting from that historical power relationship may well erect significant political and economic barriers that restrain judges from radically altering present-day realities in pursuit of "fairness." But it is not a necessary corollary of that statement to say that these structural inequalities must also serve as the normative foundation for judicial decisionmaking. There is no need for a concept of a "rule of law" in a world where the outcomes of historical struggle and repression provide the definitive statement on the way equities should cut.

Thus, as Wilkinson himself suggests in his book, conceptualizing Indian law within the framework of the *Carolene Products* footnote four[9] would more clearly and accurately define the judicial role in pro-

9. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). Justice Stone, in perhaps the Court's most famous footnote, suggested that special standards of judicial review apply when scrutinizing potential prejudice against "discrete and insular" minorities. Several constitutional law scholars have made a virtual career out of the elaboration of this most obvious and fundamental human-rights principle, which at least merited a footnote in American constitutional jurisprudence. For an example of the insights generated by Justice Stone's revelation, see,

tecting the most discrete and insular of America's minorities (pp. 117-18). That the white majority once promised Indian nations a right to a measured separatism that not infrequently has caused substantial inconvenience proves the special relevance of the *Carolene Products* footnote to Indian law. The frequent breaches of the promise throughout history serve to remind us that in the absence of the "rule of law" the majority will always seek to assert its interests against a minority. Thus, American constitutional jurisprudence's stated commitment to protecting the minority from majoritarian attack would seem to be a necessary corollary to a hermeneutics of Indian law that looks to history for the derivation of norms for principled decisionmaking.

Unfortunately, the brute facts are that while Indian people may have their own conception as to what constitutes "fairness" in their treatment of non-Indians invited onto the reservation by a conqueror's policy of settler colonialism, non-Indian conceptions must inevitably dominate in a system such as ours. Thus, while Indian people might disagree with Wilkinson's balanced sense of realism in deriving normative implications from the history of Indian-White relations in the United States, his conceptual framework which seeks to generate principles for judicial decisionmaking derived from history allows substantial room for others to articulate and defend their own interpretations. The strength, as well as the considerable theoretical advance achieved by Wilkinson's thesis, is his use of history as a normative tool for shaping jurisprudential principles. Others can argue for different principles based on different interpretations of history. Wilkinson has opened up an important new frontier in Indian law. Others can now mark off their own paths.

The significance of Wilkinson's achievement can be most fully appreciated by his analysis of Supreme Court Indian law jurisprudence during the past twenty-five years. Wilkinson applies his own normative framework to what he calls "the challenge of the modern era" (p. 7). This challenge arises from the judiciary's task of reconciling the two competing sets of expectations — Indian and White — on the reservation. Through an exhaustive and insightful analysis of the Supreme Court's Indian law jurisprudence during the past three decades, Wilkinson demonstrates that while the Court has been sensitive to both Indian and non-Indian expectations, it has generally adhered to "the premise that tribes should be insulated against the passage of time" (p. 32).

The modern Court has protected tribes that have become largely assimilated in the twentieth century by refusing to hold that tribal existence can be terminated by the passage of time. Only congressional

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e.g., J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978).

action can terminate the tribe's relation to the federal government.[10] Tribal property claims have been held to be protected against state-law based defenses such as waiver, laches, forfeiture, statutes of limitations, and adverse possession.[11] And the Supreme Court has developed a particularized set of interpretive principles applying only to Indian treaties that requires Congress in most instances expressly to declare its intention to abrogate ancient, negotiated rights.[12] All these instances, Wilkinson argues, embody the principle of a measured separatism promised in the treaties which the Court itself has sought to protect in the modern era. Old rights have endured, despite the passage of time, due in large part to the Court's principled adherence to the federal government's promises to the Indians.

Yet while tribes in the modern era have obtained a substantial measure of judicial insulation from the negative effects of the passage of time, they have also sought to assure that their governments do not remain frozen in time. A recurrent feature of Indian law litigation in the modern era has been the efforts of tribal governments to revive and extend their sovereign powers far beyond those envisioned at the time the treaties were signed. In furtherance of their asserted right to change and grow, tribes have sought the right to tax on the reservation,[13] engage in economic development,[14] enforce law and order,[15] and perform most of the functions and services of their non-Indian governmental counterparts.[16] The inevitable result of these exercises of Indian sovereignty is interference with the expectations of non-Indians affected by tribal actions.

In resolving this set of conflicts between the tribe's right to grow and change and the settled expectations of non-Indians affected by sovereign exercises of tribal power, the Supreme Court, according to Wilkinson, has drawn from history in fashioning norms and principles to guide its decisions in the modern era. Directed principally by the Indian law scholarship of Felix Cohen during the 1940s,[17] the Court in the modern era has adopted the essential historical paradigm of inher-

10. *See, e.g.,* Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 476 (1975); *see also* Williams v. Lee, 358 U.S. 217, 223 (1959) ("The cases in this Court have consistently guarded the authority of Indian governments over their reservations. . . . If this power is to be taken away from them, it is for Congress to do it.").

11. *See, e.g.,* Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974); County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985).

12. *See, e.g.,* Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968).

13. *See, e.g.,* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

14. *See, e.g.,* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980).

15. *See, e.g.,* Williams v. Lee, 358 U.S. 217 (1959); United States v. Wheeler, 435 U.S. 313 (1977).

16. *See generally* pp. 107-10.

17. *See* note 4 *supra* and accompanying text.

ent tribal sovereignty which Cohen set out in his famous treatise on Indian law:

> Perhaps the most basic principle of all Indian law, supported by a host of decisions hereinafter analyzed, is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.*[18]

Except for minor deviations, the Court has essentially adhered to Cohen's time-bound formulation that tribes were sovereign entities prior to European contact and "conquest," and that treaties and subsequent congressional legislation diminished, but did not destroy tribal sovereignty (pp. 57-63). As Wilkinson notes, Cohen's formulation quickly "attained something of the weight of a Supreme Court opinion" (p. 58). The significance of this fact for Wilkinson is that Cohen's formulation at its core recognizes the normative role of history in Indian law jurisprudence. It explains much of the Court's post-Cohen case law in the field, and at the same time offers a principled defense of that case law which should guide future decisions:

> Cohen's conclusion that inherent tribal sovereignty is "perhaps the most basic principle of all Indian law" is right.
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> . . . It might initially appear that the powers of Indian tribes, say 400 years ago, would have contemporary relevance, if at all, only within the walls of an advanced anthropology or philosophy class. In fact . . . those times are not only relevant but controlling. The original status of complete national sovereignty, not action by any European nation or the United States, is the beginning definition of modern tribalism. . . . [I]n the cases of the modern era the exceptions have proved far less important than the remarkable and crucial premise — 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. [pp. 62-63]

The modern cases have in fact embodied and advanced the principle that tribes have as part of their inherent sovereignty the right to change. Thus, the Court has upheld tribal taxing authority on the reservation,[19] tribal civil jurisdiction over non-Indians,[20] and other important governmental powers (pp. 59-62). The Court's starting point of analysis in all these cases has been the conception of inherent tribal sovereignty. Congress, of course, as the superior sovereign recognized in treaties, statutes, and case law, could act unilaterally to limit this sovereignty. But, as Wilkinson points out, the tribes' present-day

18. P. 58 (quoting F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1942) (emphasis in original)).

19. *See, e.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980).

20. *See, e.g.*, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); Williams v. Lee, 358 U.S. 217 (1959).

political sophistication in lobbying on behalf of their interests in Washington, together with the Court's own enforcement of the special "trust" relationship existing between the tribes and the federal government, sustains important barriers of accountability that the higher sovereign must recognize and deal with before engaging in too radical a departure from the fundamental principles derived from history which shape modern Indian law (pp. 82-86).

The final chapter of *American Indians, Time, and the Law* is devoted to addressing the underlying tensions which the historical principles embedded in Indian law bring into play when tribal sovereignty, insulated against time, runs headlong into modern political realities. Indian tribes' exercise of their inherent sovereign powers will inevitably affect the interests and expectations of non-Indians. The judiciary in such cases, while informed by the normative historical principles of Indian law which guarantee tribes a degree of measured separatism, must nonetheless confront a set of broader concerns. As Wilkinson asks, "How can tribalism be squared with the legal and moral dictates of equal protection and egalitarianism? What is the role of the states in Indian country and of the tribes in the constitutional democracy?" (p. 89).

To answer these questions, Wilkinson utilizes his historical, normative framework to articulate the principles that have guided and ought to guide judicial decisionmaking in the field. Focusing particularly on the crucial issue of tribal versus state civil jurisdiction on the reservation, Wilkinson explains that the Supreme Court in the modern era has erected two barriers to state jurisdiction in Indian Country. First, where Congress has preempted the field by enacting legislation relating to discrete substantive areas of regulation on the reservation, such as commerce, criminal jurisdiction, or resource management, the state is ousted from any regulatory role. Wilkinson refers to this barrier to state jurisdiction as subject matter preemption. In general, the Court has strictly construed Indian subject matter federal statutes to deny assertions of state jurisdiction, particularly with respect to the development of reservation resources (pp. 93-99).

Wilkinson refers to the second barrier to state jurisdiction on the reservation erected by the modern Court as geographical preemption. "In the cases relying on geographical preemption there is no [federal] subject matter statute, only the general provisions of a treaty or treaty substitute creating Indian country, to serve as the basis for excluding state law" (p. 99).

Because the Court, by excluding state law from the reservation, places the non-Indian state citizen under tribal jurisdiction without a clearly stated federal legislative policy to protect his or her expectations, it has used the geographical preemption barrier only "sparingly" (p. 99). Because the nature and scope of geographical preemption

have not been fully explicated by the Court, Wilkinson sets out to make "a principled examination of the manner in which Indian reservations have been created in order to determine the forces that drive the geographical preemption doctrine" (pp. 99-100).

Looking at the long history of treaty meetings and conferences between the United States and American Indian nations, Wilkinson repeats his earlier conclusion that the reservations were intended to guarantee a measured separatism to the tribes. He extends this basic thesis measurably, however, by placing these treaty negotiations guaranteeing a measured separatism within the United States' constitutional allocation of authority. Treaty negotiations, claims Wilkinson, "are parallel in concept to negotiations with representatives of prospective states over statehood" (p. 102). Both involve agreements between sovereigns over boundaries, lands, and authority. While the tenth amendment's reservation to states of those sovereign powers not relinquished to the United States does not apply to Indian tribes, the tribes nonetheless have similar protections guaranteed by the treaties and recognized in the Cohen formulation of inherent tribal sovereignty. There are of course few constitutional restraints on Congress' authority over Indian affairs. But under the commerce clause, spending and taxing clauses, and the fourteenth amendment, Congress can likewise freely encroach on state prerogatives if it has the political will to do so. Both tribes and the states must rely on the political process, as well as the courts, to assure that Congress remains accountable and circumscribed in such attempts at encroachment (pp. 102-06).

From these similarities, Wilkinson makes a strong argument for viewing treaties and treaty substitutes creating Indian reservations as organic government documents with legal characteristics similar in many respects to the tenth amendment. Tribes are an undeniable "third source of sovereignty in the United States" (pp. 103-04), and therefore, according to Wilkinson's argument, "the rule of law requires that tribes continue to be reconciled into our constitutional system" (p. 104). The treaties, together with the clear recognition of federal supremacy over state authority in Indian affairs under the Constitution's Indian commerce clause, "all point to a limited state role in Indian affairs" (p. 104).

Once tribes are accepted as the constitutionally recognized entities that they are, with reserved governmental rights on islands free of most state authority, it becomes relatively easy to conceptualize issues of geographical preemption in Indian country. There ought to be (and Wilkinson's analysis of the Court's cases in this area demonstrates that there already is) a presumption against state jurisdiction where the tribe can assert that a strong and legitimate tribal interest is involved in the clash over jurisdiction between the tribe and the state (pp. 106-11). The modern cases have already identified at least three areas of

legitimate tribal interests sufficient to stand as a barrier to most assertions of state jurisdiction. These include the overriding interests in economic development of the reservation, providing services to reservation residents, and setting norms as a community and adjudicating wrongs which occur in Indian Country (pp. 107-09). While the Court has imposed several limitations on these three interests, most notably the limitation on a tribe's ability to assert criminal jurisdiction over non-Indians,[21] Wilkinson asserts that the tribal interest analysis "can efficiently and fairly focus judicial" decisionmaking on the geographical preemption question (p. 111). The strength of the tribal interest analysis is its emphasis on the reason tribes and the federal government during the treaty era established Indian Country: to provide a degree of measured separatism, which, as Wilkinson notes, remains "the center point of federal Indian policy and law" (p. 111).

Here also, Wilkinson's book breaks important new ground. Commentators have been extremely critical of the modern Court's work respecting reservation jurisdictional issues.[22] Wilkinson has neatly clarified what the Court has in fact done in its many jurisdictional cases, with his insightful conceptualization of the contours of the subject matter and geographical preemption barriers to state jurisdiction in Indian Country. But he also has performed a far more valuable service by articulating a more comprehensible framework of analysis for these questions, which draws on what the Court has in fact sought to do, that is, to protect the treaty promises of a measured separatism by focusing on the legitimacy and degree of the tribal interest involved.

The measure of Wilkinson's achievement in *American Indians, Time, and the Law* must be determined in the final instance by the book's strong faith placed in the judiciary and its commitment to "the rule of law." Wilkinson argues not only that the judiciary has protected the Indian's treaty guarantees to a measured separatism, but also that this protection has proceeded upon a principled doctrinal foundation, informed by norms derived from history, which should continue to guide legal analysis. Upon this argument the book must succeed or fail. Many Indian people might feel that given their present conditions of poverty and perceived lack of self-determination rights — in spite of the fact that the old treaties seemed to have guaranteed

21. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), where the Supreme Court, in a majority opinion written by Justice Rehnquist, struck down the tribe's exercise of criminal jurisdiction over crimes committed by non-Indians on a reservation.

22. *See, e.g.*, R. BARSH & J. HENDERSON, *supra* note 4; Barsh, *The Omen: Three Affiliated Tribes v. Moe and the Future of Tribal Self-Government*, 5 AM. INDIAN L. REV. 1 (1977); Clinton, *State Power Over Indian Reservations: A Critical Comment on Burger Court Doctrine*, 26 S.D. L. REV. 434 (1981); Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984); Pelcyger, *Justices and Indians: Back to Basics*, 62 OR. L. REV. 29 (1983); *see also* Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219.

so much more — Wilkinson's faith in the judiciary and the rule of law is extremely misplaced. The judiciary's failure during the Allotment Era to enforce the treaties fully, after all, led to the breach of the promise of a measured separatism guaranteed by the treaties. The white man's judges and their rule of law might seem to many Indian people primarily responsible for their present conditions.

It could be argued, however, that this view itself is too narrowly time-bound and does not take sufficient account of the fact that, in a world of relative values, the white man's rule of law as interpreted by judges in the United States has resulted in the undeniable fact, pointed to by Wilkinson, that "the policy of the United States towards its native people is one of the most progressive of any nation. This is particularly true of judge-made law. As a result, the doctrines developed here can be instructive — and in some cases can be rallying cries — elsewhere" (p. 5; footnote omitted).

Relatively speaking, that Indian people in the United States have survived, and that their survival has been facilitated in part by a non-Indian judiciary's commitment to the concept of a rule of law, should not go unnoted. The achievement represented by Professor Wilkinson's *American Indians, Time, and the Law* is that not only is this commitment recognized, but it is put forward in such a profound and forceful manner that it should serve as a signal reminder to all those who participate in the future making of America's Indian law.