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Book Review: American Indians, Time, and the Law, by Charles F. Wilkinson

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BOOK REVIEW

American Indians, Time, and the Law, by
Charles F. Wilkinson, Yale University Press, 1987.

In my opinion, this is one of the best books a lawyer or nonlawyer interested in Indian law can read. In 122 pages of text, plus a listing of United States Supreme Court decisions on Indian law for the last twenty-seven years,[1] and with exhaustive footnotes, Wilkinson brings into focus many of the confusing and seemingly contradictory actions of the Supreme Court. He does this by utilizing history, rules of constitutional law, and the dynamics between tribal, federal, and state governments.

Although the book is targeted at what is happening in the current era, Wilkinson goes back to the beginning of the nation's relationship with various tribal governments. He describes the types of treaties and laws that were passed and why they were approved by the tribes and the federal government. He goes through a very enlightening explanation of how two divergent lines of decisions were developed by the Court. Wilkinson says that one line was developed at the height of the allottment and assimilation eras and denies tribes most governmental powers. The other begins with Chief Justice Marshall's famous decision in *Worcester v. Georgia*[2] and has as the underlying base the recognition that tribal governments were in existence before colonization and are still very much alive.

After developing this history, Wilkinson then begins the process of explaining how the modern Court has dealt with the pressures from the states calling for de facto termination, loss of rights by nonuse, and strict application of federal statutes. He points out the cases where the Court has gone against tribal interests, but explains the conflicts the Court had to balance and how the Court arrived at its decisions.

The chapter on "The Elevation of Tribalism" begins by explaining the current usage of the word "sovereignty." Wilkinson shows the changes in the Court's recognition of tribal sovereignty from its beginning in *Worcester v. Georgia*[3] to its near demise in

1. From Williams v. Lee, 358 U.S. 217 (1959), to Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, 106 S.Ct. 2305 (1986), (see Federal Recent Developments, this issue).

2. 31 U.S. (6 Pet.) 515 (1832).

3. *Id.*, which recognized tribes as distinct but dependent sovereigns separate from state governments.

United States v. Kagama,[4] to its reemergence in the modern era in *Williams v. Lee*.[5] He explains why status as a tribe is the all-important criteria, not the manner in which a particular tribe was recognized nor the manner in which a particular reservation was formed. He then shows the Court's recognition of tribes as viable, evolving entities that are permanent and not dependent on federal recognition for existence. The last portion of the chapter explains the relationship between the tribes and the higher sovereign, the United States.

The last chapter is titled "Territorial Jurisprudence" and addresses the question of jurisdiction between tribal, federal, and state courts. Just as "tribe" was the key in the previous chapter, Wilkinson explains how the determination of "Indian country" is the key in determining which court has jurisdiction.[6] The chapter contains an excellent section on tribes, states, and the United States Constitution. In this section Wilkinson identifies two barriers to the exercise of state jurisdiction in Indian country. The first barrier, which he calls subject matter preemption, involves the analysis of federal statutes dealing with discrete substantive areas of regulation of Indian country. The essence of the subject matter barrier is the regulatory field covered by the statute.

The second barrier, which is called geographical preemption, is stated to be purely territorial because it assesses the extent to which state law is ousted due solely to the creation of an Indian reservation. Wilkinson goes into an explanation of how the Court utilizes these two tests. Much of this explanation involves an analysis of constitutional law similar to that which is conducted every time the Court is faced with a constitutional question.

Wilkinson then explains how these preemption tests depend on an analysis of legitimate tribal interests. He says that the modern Court has recognized overriding tribal interests in the economic development of the reservations; in providing services to reservation residents, both Indian and non-Indian; and in setting norms and adjudicating wrongs on the reservation. He also goes into a

4. 118 U.S. 375 (1886), which recognized superior sovereignty of both federal and state governments over tribes and denied tribal sovereignty.

5. 358 U.S. 217 n.1 (1959), which upheld exclusive jurisdiction of tribes over contracts entered into on an Indian reservation between a non-Indian plaintiff and an Indian defendant.

6. Wilkinson explains how the Court had utilized the definition of Indian country found in 18 U.S.C. § 1151 (1982) for both civil and criminal cases and agrees with this utilization.

discussion of the limitations the Court has placed on those primary tribal interests.

And in the last section of the chapter, Wilkinson addresses the issue of the lack of political representation of nonmembers residing on a reservation. His justification draws upon treaty rights and the fact that tribal authority is preconstitutional and extraconstitutional. He also supports a right of review in federal courts as a means of quieting the fears of nonmembers that they will not receive a fair trial in tribal court. His position would recognize the right of tribal courts to determine the extent of their own jurisdiction. The review in federal court would then be a review of the tribal court determination of jurisdiction. This type of review has been upheld by the Court.[7]

But Wilkinson goes one step farther and supports federal court review of actions when rights given under title I of the Indian Civil Rights Act are allegedly violated by a tribal institution.[8] He would require that decisions be overturned only by a showing based on an elevated scrutiny test, a complete exhaustion of tribal remedies, and respect for tribal traditions and reservation conditions. Wilkinson supports this position by saying that a federal review of this kind would be a minor incursion on tribal sovereignty and would meet legitimate concerns about unfair treatment by tribes of both Indians and non-Indians.[9]

Wilkinson closes by stating that the settled principles of preconstitutional and extraconstitutional tribal status, combined with the promise of a viable, evolving separatism in the treaties and statutes, justify tribal governments without political representation by nonmembers. He says the Court should respect these precepts and provide latitude to tribes by generously construing tribal powers over nonmembers. He finds support for this proposition in *United States v. Carolene Products*[10] and in the writings of John Hart Ely.[11]

7. National Farmers Union v. Crow Tribe of Indians, 471 U.S. 845 (1985). *See also* Superior Oil Co. v. United States, 798 F.2d 1324 (10th Cir. 1986).

8. 25 U.S.C. §§ 1301-1303 (1982).

9. This reviewer does not agree with Wilkinson on this point. In the opinion of this reviewer, any assumption of jurisdiction by the federal courts infringes upon tribal sovereignty and is unconstitutional absent any specific action of the United States Congress.

10. 304 U.S. 144, 152 n.4 (1938).

11. J. ELY, PRESIDENT, & FELLOWS OF HARVARD COLLEGE, DEMOCRACY AND DISTRUST (1980) and Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978).

I found the entire book revealing and interesting, especially for one such as myself who worked in Indian country as a nonlawyer for several years and who was confused and concerned by the decisions of the Supreme Court. One issue that did not warrant general comment in the body of the review, but which I feel requires criticism, is the statement by Wilkinson that the courts of the Five Civilized Tribes were abolished by the Curtis Act of 1898.[12] While this is true for the Cherokee and Muscogee (Creek) nations, it is questionable for the Choctaw and Chickasaw nations, and probably not true for the Seminole Nation.[13] Overall, the book is excellent and is recommended for both lawyers and nonlawyers who work with Indian tribes and Indian law.

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12. Pg. 56 of the book. The Curtis Act is the Act of June 28, 1898, ch. 517, 30 Stat. 495.

13. *See* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 782, nn.111-113 (1982 ed.) (of which Wilkinson was the Managing Editor.)