

## BOOK REVIEW

### RECOVERING HOMELANDS, GOVERNANCE, AND LIFEWAYS: A BOOK REVIEW OF *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS*

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*Blood Struggle: The Rise of Modern Indian Nations.* By Charles Wilkinson.  
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#### I. INTRODUCTION

When scholars write about Indians and property, they often focus on property losses.<sup>1</sup> This scholarship is, of course, inspired by the staggering dispossession of Indian lands. Between 1492 and 1960, tribes lost most of North America to white settlers and their governments. Charles Wilkinson's new book, *Blood Struggle: The Rise of Modern Indian Nations*, notes, however, that since the 1960s, American Indian tribes have acquired about 7.5 million acres of land—an area measuring “one and a half times the size of Massachusetts.”<sup>2</sup> This figure represents an increase of fifteen percent over 1960s figures, and takes the total Indian land base in the lower forty-eight states to fifty-eight million acres.<sup>3</sup> Tribal land ownership is a key factor in community revitalization, allowing tribes to foster tribal jurisdiction, economic development, housing, environmental health, subsistence patterns, and spirituality.<sup>4</sup> Thus, the recovery of

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1. Indian nations lost tens of millions of acres of land during federal “removal” policies of the 1800s. See e.g. Vine Deloria, Jr. & Clifford M. Lytle, *American Indians, American Justice* 7 (U. Tex. Press 1983). During the federal “allotment” policy of 1887 to 1934, Indian nations lost approximately ninety million acres of land. See e.g. Judith V. Royster, *The Legacy of Allotment*, 27 *Ariz. St. L.J.* 1, 13, 13 n. 59 (1995); see generally Sarah Krakoff, *City of Sherrill v. Oneida Indian Nation of New York: A Regretful Postscript to the Taxation Chapter in Cohen's Handbook of Federal Indian Law*, 41 *Tulsa L. Rev.* 5 (2005); Stacy L. Leeds, *By Eminent Domain or Some Other Name: A Tribal Perspective on Taking Land*, 41 *Tulsa L. Rev.* 51 (2005); Wenona T. Singel & Matthew L.M. Fletcher, *Power, Authority, and Tribal Property*, 41 *Tulsa L. Rev.* 21 (2005).

2. Charles Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* 207 (W.W. Norton & Co. 2005).

3. *Id.*

4. Padraic I. McCoy, *The Land Must Hold the People: Native Modes of Territoriality and Contemporary Tribal Justifications for Placing Land into Trust Through 25 C.F.R. Part 151*, 27 *Am. Indian L. Rev.* 421, 422

Indian property represents a dramatic turn of events, given both the overwhelming history of land loss and importance of a growing land base to contemporary survival.

While the story of how tribes began to reclaim their property is a dramatic one, it is just one of many tribal sovereignty success stories recounted in Wilkinson's latest book.<sup>5</sup> Indeed, the most immediately striking thing about *Blood Struggle* is that, in an era when many Indian law scholars lament tribes' overwhelming losses before the United States Supreme Court,<sup>6</sup> Wilkinson is positive about, even uplifted by, the state of Indian law and policy. *Blood Struggle*'s optimism seems to come from its focus on the human stories underlying the law and policy. While Wilkinson acknowledges the institutional power of the federal government, he credits Indian people and their modern sovereignty movement as a collective force in their own right. On their own initiative, tribes have significantly restored their land bases, cultures, economies, and governing institutions. Challenges remain, such as the Supreme Court's ongoing reluctance to recognize the foundational principles or realities of Indian law, but *Blood Struggle* suggests that the tribal sovereignty movement will ultimately prevail.

## II. THE ABYSS AND THE EMERGENCE

*Blood Struggle* begins in a dark period of Indian history. The year is 1953 and Congress has passed various acts to "terminate" tribes.<sup>7</sup> Federal lawmakers intended to assimilate Indians into mainstream society by ending federal programs and derecognizing tribes. Wilkinson details how termination "[liquidated Indian] homelands and cut off lifelines of federal support."<sup>8</sup> While other scholars have also written about the Termination Era,<sup>9</sup> Wilkinson distinctively recounts the effects of termination on the people who lived through it, offering personal remembrances of his meetings with tribal peoples over several decades.

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(2003).

5. For previous works, see e.g. Charles F. Wilkinson, *American Indians, Time and the Law: Native Societies in a Modern Constitutional Democracy* (Yale U. Press 1987) [hereinafter Wilkinson, *American Indians, Time and the Law*]; Charles F. Wilkinson, *Crossing the Next Meridian: Land, Water, and the Future of the West* (Island Press 1992); Charles Wilkinson, *The Eagle Bird: Mapping a New West* (Johnson Bks. 1992); Charles Wilkinson, *Fire on the Plateau: Conflict and Endurance in the American Southwest* (Island Press 1999); Charles Wilkinson, *Messages from Frank's Landing: A Story of Salmon, Treaties, and the Indian Way* (U. Wash. Press 2000). Wilkinson is also the co-author of a leading Indian law treatise, David H. Getches, Charles F. Wilkinson & Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law* (5th ed., West 2005), and numerous law review articles.

6. See e.g. Robert A. Williams, Jr., *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (U. Minn. Press 2005); David E. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 Minn. L. Rev. 267 (2001) [hereinafter Getches, *Beyond Indian Law*]; David E. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 Cal. L. Rev. 1573 (1996); Ralph W. Johnson & Bernie Martinis, *Chief Justice Rehnquist and the Indian Cases*, 16 Pub. Land L. Rev. 1 (1995); Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 Am. U. L. Rev. 1177 (2001); Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. Pa. J. Const. L. 405 (2003).

7. Wilkinson, *supra* n. 2, at 3.

8. *Id.*

9. See e.g. Kenneth R. Philp, *Termination Revisited: American Indians On The Trail To Self-Determination, 1933-1953* (U. Neb. Press 1999); Michael C. Walch, *Terminating The Indian Termination Policy*, 35 Stan. L. Rev. 1181 (1983).

Roger Jourdain, tribal chairman at Red Lake for three decades beginning in 1958, is one who bears witness to the effects of termination in his community. Recalling that in 1953 only one hundred of two thousand five hundred tribal members had work on the reservation, and the average annual family income on the reservation was \$1,250, Jourdain remembers termination with a touch of Indian humor: “Yeah . . . we had running water. Every morning I had to get up and run down to the stream with a bucket.”<sup>10</sup> Jourdain’s stories of the Bureau of Indian Affairs and Catholic Church’s control over the reservation are a testament to the demoralizing power of these institutions during the Termination Era when federal officials sold off Indian lands, and religious leaders drove Indian ceremonies underground.<sup>11</sup> At the same time, tribes lost many governing powers to states, Indian children were adopted into white families at record rates, tribal forests were clear cut, and many Indian people lacked basic necessities like medical care and even food.<sup>12</sup>

In another story, Wilkinson similarly evokes an immediate and personal approach to federal policy. He writes about Menominee termination and Ada Deer, the Menominee leader who resisted termination and later became Assistant Secretary for Indian Affairs. But instead of rattling off statutory provisions and judicial decisions that marked the Menominees’ legal experience with termination, Wilkinson first talks about visiting tribal lands and meeting Deer’s mother:

In the summer of 1973 I made one of many trips to Menominee County, in Wisconsin. At the time I was an attorney with the Native American Rights Fund, . . .

We . . . arrived at Ada’s family cabin, set in a small meadow in a bend of the Wolf River, with the birch and white pine forest spreading out beyond.

The cabin was located in Menominee County because in 1954 Congress had “terminated” the former Menominee Reservation. Termination had been an outright disaster for the Menominees, bringing social and economic ills, forcing many to depart their ancestral woods for the cities, and pushing them to the brink of selling off their magnificent homeland.<sup>13</sup>

Wilkinson recounts how Ada Deer successfully led a grassroots effort to reverse Menominee termination. The seeds of that movement seemed to come from a bedrock of belief emanating from Deer’s little cabin in the woods. When Wilkinson offered his legal opinion that Congress had the power to break Indian treaties, Deer’s mother, “Ma Deer,” responded indignantly: “Break an Indian treaty! What a ridiculous proposition! How can you come out here and tell people things like that? What possesses you to do that?”<sup>14</sup> Fortunately, the Supreme Court recognized the Menominees had reserved

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10. Wilkinson, *supra* n. 2, at 4.

11. *Id.* at 3–7.

12. *Id.* at 57–86.

13. *Id.* at ix.

14. *Id.* at xi.

tribal treaty rights despite the broad effects of termination,<sup>15</sup> and the Menominees successfully persuaded Congress to pass the Menominee Restoration Act.<sup>16</sup>

Through these stories, Wilkinson advances his point that termination, for all its misery, sparked the modern Indian movement.<sup>17</sup> Termination served as a startling reality check: The federal government had enormous power over tribes and would use it to try to obliterate their existence. Eager to shirk expensive treaty promises and administrative duties, the government would stand by as terminated Indian tribes lost more land, religious traditions, subsistence food sources, and governing powers. But Indian peoples were not content to stand by. Instead, termination inspired them to recover tribal sovereignty, and prevent the federal government from imposing such devastating policies in the future. From these hopes emerged the modern Indian movement, but only because certain individuals and groups of Indian people made it possible.

### III. THE MODERN INDIAN MOVEMENT

Wilkinson argues that Indians survived termination because of their simultaneous resilience and adaptability. Even during the starkest federal policies, “thousands of common people in Indian country carried on the old ways day to day, telling coyote stories, stacking cordwood, taking the salmon, cooking the stews, conducting the kiva ceremonies, singing the songs, and dancing the dances.”<sup>18</sup> At the same time, a growing group of Indian doctors, writers, historians, and other thinkers empowered Indian people through advocacy, professional, and scholarly work. Here, Wilkinson makes a very useful contribution to the legal literature, which has not typically recognized the scope and influence of Indian intellectuals.<sup>19</sup> Spanning several generations, these include Charles Eastman, the Dakota physician and author; Black Elk, the Lakota holy man; and D’Arcy McNickle, the Salish and Kootenai novelist, historian, and anthropologist.<sup>20</sup> Some of the philosophers, notably McNickle, doubled as political leaders, instrumental in the founding of the National Congress of American Indians (“NCAI”) to influence federal Indian policy. Returning veterans of World War II asserted their civil rights, and successfully challenged state laws denying Indians the right to vote.<sup>21</sup> On reservations, a group of tribal leaders including Roger Jourdain, Wendell Chino, Joe DeLaCruz, and others defended treaty rights and governmental sovereignty.<sup>22</sup> At the same time, other Indians were gaining fame as artists, novelists, actors, and athletes.

Wilkinson credits these groups and individuals—an entire generation of survivors—with stopping termination and setting Indians on a course of revitalization.

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15. See *Menominee Tribe of Indians v. U.S.*, 391 U.S. 404 (1968).

16. See *Menominee Restoration Act*, Pub. L. No. 93-197, § 3(b), 87 Stat. 770, 770 (1973) (codified at 25 U.S.C. § 903a(b) (2000)).

17. Wilkinson, *supra* n. 2, at 86.

18. *Id.* at 90–91.

19. For a non-legal work examining the history of American Indian intellectuals, see Robert Allen Warrior, *Tribal Secrets: Recovering American Indian Intellectual Traditions* (U. Minn. Press 1994).

20. Wilkinson, *supra* n. 2, at 91–102.

21. *Id.* at 103–04.

22. *Id.* at 125–27.

But he gives particular attention to Vine Deloria, Jr., Standing Rock Sioux, for his leadership in political, scholarly, and activist realms.<sup>23</sup> A lawyer and theologian, Deloria served as Executive Director of NCAI, authored the blockbuster consciousness-raising book *Custer Died for Your Sins*,<sup>24</sup> and became an academic of international notoriety.<sup>25</sup> Along with other leaders like Hank Adams, Mel Thom, and Clyde Warrior, Deloria “allowed Indians to dream their own real dreams.”<sup>26</sup> These dreams come alive in the next several chapters of *Blood Struggle*.

In the 1960s, the Red Power movement brought national attention to Indian issues through sit-ins and marches in cities and on reservations.<sup>27</sup> Battles over fishing rights in Washington affirmed the modern legal significance of treaty rights, and the ongoing importance of subsistence lifeways to tribal people.<sup>28</sup> Tribal success stories, such as the restoration of the Menominee tribe, foreshadowed the end of termination, and the Kennedy administration put an unofficial hold on the policy.<sup>29</sup> Finally, in 1970 President Nixon officially declared a new policy of fostering tribal autonomy through a federal program of “self-determination.”<sup>30</sup>

The self-determination policy affirmed the government-to-government relationship between Indian nations and the United States. Wilkinson recognizes the importance of Congressional self-determination legislation that funded Indian economic development and education, and enabled tribes to assume control of programs on reservations.<sup>31</sup> He emphasizes, however, the work of individual Indian people and groups that laid the groundwork for the programs. Consistent with his theme of grassroots empowerment, Wilkinson notes that Indians were practicing self-determination *before* President Nixon ever endorsed it.<sup>32</sup> In particular, Indian leaders were applying for and administering grants from the Office of Economic Opportunity for tribal Head Start programs, construction training, and a new tribally-run school on the Navajo reservation.<sup>33</sup> Since the 1970s, many tribes have implemented self-determination and self-governance initiatives in education and economic development, while also taking over health care, housing, environmental regulation, child welfare, and other programs on reservations.

As suggested at the outset of this review, self-determination has also been about the recovery of tribal lands. Tribes have used several mechanisms including lobbying for Congressional legislation, land claims litigation, and more recently, the purchase of lands on the open real estate market. In one famous legislative example, tribal religious and federal political leaders joined forces to persuade Congress to return the sacred Blue

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23. *Id.* at 106–09.

24. Vine Deloria, Jr., *Custer Died for Your Sins: An Indian Manifesto* (U. Okla. Press 1988).

25. Wilkinson, *supra* n. 2, at 106–09.

26. *Id.* at 108.

27. *Id.* at 132–49.

28. *Id.* at 157–73.

29. *Id.* at 182–89.

30. Wilkinson, *supra* n. 2, at 189.

31. *Id.* at 197.

32. *Id.* at 191.

33. *Id.* at 191–94.

Lake to Taos Pueblo in 1972.<sup>34</sup> Wilkinson notes that the Yakama and Quinault Indian Nations also secured the return of thousands of acres through federal legislation.<sup>35</sup> On the east coast, a number of tribes brought litigation seeking the return of lands taken in violation of the 1790 Trade & Intercourse Acts.<sup>36</sup> Most of these suits were settled out of court in the 1980s, with Congress awarding the tribes significant acreage and monies, although often imposing a constricted vision of tribal governing powers over restored lands.<sup>37</sup> Wilkinson notes similar limitations in the earlier Alaska Native Claims Settlement Act, resolving aboriginal claims in Alaska.<sup>38</sup> In the 1990s and 2000s, tribes started using revenues on successful economic development projects to re-acquire lost lands, and again confronted the challenge of asserting sovereignty over their aboriginal territory.<sup>39</sup> As Wilkinson describes, some tribes have advanced tribal sovereignty over land and natural resources through cooperative management arrangements, including joint projects with state and federal regulatory entities.<sup>40</sup>

Other markers of the self-determination era include tribes' entry into the casino gambling industry, the strengthening of tribal courts, and the tribal college system providing on-reservation higher education. In national politics, Wilkinson notes, Indian nations have become particularly proactive in the legislative process.<sup>41</sup> Statutes passed to protect Indian rights include the Indian Child Welfare Act of 1978, the American Indian Religious Freedom Act of 1978, and the Native American Graves Protection and Repatriation Act of 1990.<sup>42</sup> Equally important, perhaps, is that Indians have successfully defended against legislative attempts to strip tribal rights. Indeed, Wilkinson asserts, "no statute of significance has been passed over Indian opposition since the end of the termination era in the early 1970s," though tribes have suffered major Congressional budget cuts.<sup>43</sup>

#### IV. ONGOING CHALLENGES

Against this compelling story of Indian self-sufficiency and revitalization, Wilkinson notes several remaining challenges for Indian tribes in the twenty-first century. One troubling question is why the U.S. Supreme Court seems to resist the notion of tribal sovereignty. As Wilkinson says, the Supreme Court "too often abdicates its traditional role as the final protector of minority rights."<sup>44</sup> In recent decades, the Supreme Court has departed from both the congressional policy of self-determination and its own precedents in a series of decisions eroding tribal jurisdiction over events

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34. *Id.* at 206–20.

35. Wilkinson, *supra* n. 2, at 219.

36. *See id.* at 220–24.

37. *Id.* at 225–31.

38. *Id.* at 231–40.

39. *Id.* at 337; *see also* McCoy, *supra* n. 4 (describing the process by which tribes can petition the Department of the Interior to take newly acquired lands into "trust" status).

40. Wilkinson, *supra* n. 2, at 310–28.

41. *Id.* at 261–63.

42. *Id.*

43. *Id.* at 267.

44. *Id.* at 383.

arising on the reservation. According to Wilkinson, this trend began in the 1978 case of *Oliphant v. Suquamish Indian Tribe*<sup>45</sup> where the Court held that tribal courts lack criminal jurisdiction over non-Indians who commit crimes on reservations.<sup>46</sup> An opinion with “little to recommend it,” *Oliphant* “launched an attack on long-standing basic principles of Indian law” including the foundational concept that, without a clear Congressional abrogation, tribes retain rights of self-governance.<sup>47</sup> Instead, then-Associate Justice William Rehnquist wrote that the tribes’ attempt to exercise criminal jurisdiction over non-Indians was “inconsistent with their status” as apparently established by an “unspoken assumption” in Congress.<sup>48</sup>

When it turned to the question of tribes’ civil jurisdiction over non-Indians on reservations, the Court started with what Wilkinson describes as a “promising approach.”<sup>49</sup> In its 1981 *Montana v. United States*<sup>50</sup> decision, the Court recognized tribal regulatory jurisdiction over non-Indians when their conduct “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”<sup>51</sup> This decision also departed from the Court’s earlier notion of tribes as broadly reserving self-governance rights within the reservation, unless Congress or the tribes themselves had expressly ceded such rights.<sup>52</sup> On the other hand, Wilkinson describes *Montana* as setting forth a “fair” standard that balanced contemporary circumstances of non-Indians’ on reservations with tribes’ interests in matters that “directly affect important tribal concerns.”<sup>53</sup> Unfortunately the Court subsequently used the *Montana* test to erode tribal jurisdiction in a series of decisions so anti-tribal in spirit, scope, and sheer numerosity, that some commentators started calling the period from 1986 to the present, the “judicial termination” era.<sup>54</sup> Indeed, “Indian tribal interests lost all but five of the twenty-eight Indian law cases decided by the Supreme Court in the 1991-2000 Terms.”<sup>55</sup> Wilkinson also mentions a number of cases decided against the tribes from 2001 to 2005.<sup>56</sup>

At this point, the Supreme Court seems determined to suppress nearly every major advance toward sovereignty that tribes make. There are a number of examples of this

45. 435 U.S. 191.

46. Wilkinson, *supra* n. 2, at 254–55.

47. *Id.* at 254.

48. *Id.* at 255 (quoting *Oliphant*, 435 U.S. at 203, 208).

49. *Id.* at 255.

50. 450 U.S. 544 (1981).

51. Wilkinson, *supra* n. 2, at 255 (quoting *Mont. v. U.S.*, 450 U.S. at 566).

52. Compare *Mont.*, 450 U.S. 544, with *Worcester v. Ga.*, 31 U.S. 515 (1832). The Court commented, *Worcester*, 31 U.S. at 561, that

[t]he Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress.

53. Wilkinson, *supra* n. 2, at 255–56.

54. Ralph W. Johnson & Berrie Martinis, *Chief Justice Rehnquist and the Indian Cases*, 16 Pub. Land L. Rev. 1, 24 (1995) (describing Rehnquist’s Indian law opinions as “advocating and implementing a judicial termination policy”); see also Joseph William Singer, *Canons of Conquest: The Supreme Court’s Attack on Tribal Sovereignty*, 37 New Eng. L. Rev. 641 (2003).

55. Getches, *Beyond Indian Law*, *supra* n. 6, at 280 n. 57.

56. Wilkinson, *supra* n. 2, at 256–57.

dynamic: Tribes engage in spiritual and cultural renewal, and the Supreme Court holds that the First Amendment does not protect American Indian religions.<sup>57</sup> Tribes provide education for tribal members and the Court decides tribal governments cannot regulate contractors that build schools on tribally-owned lands.<sup>58</sup> Tribes provide emergency and health services for reservation residents and the Court decides tribes cannot fund such services by taxing certain businesses within the reservation.<sup>59</sup> Tribes revitalize their court systems and the Supreme Court denies tribal court jurisdiction over public safety matters arising on the reservation.<sup>60</sup>

Though it was decided after the publication of *Blood Struggle*, the case of *City of Sherrill v. Oneida Indian Nation of New York*<sup>61</sup> also merits discussion here. *City of Sherrill* reflects the property law theme of this symposium and epitomizes tribes' attempts to recover from the process of colonization only to find that the Supreme Court will impede their progress. In the facts underlying *City of Sherrill*, the Oneida Nation had over several centuries lost all of its six million-acre traditional territory.<sup>62</sup> The federal government had, in 1794, recognized and promised to protect three-hundred thousand acres of this territory as treaty-guaranteed reservation land.<sup>63</sup> But in the 1800s, the State of New York purchased most of it in a series of transactions violating both the treaty and the 1790 Trade and Intercourse Acts that, as described above, required federal approval of any land sale by a tribe.<sup>64</sup> By the 1920s the Oneida Nation retained only thirty-two acres of its original lands.<sup>65</sup> The overwhelming dispossession of land went hand-in-hand with losses of tribal livelihood, culture, and community—and the Oneida people suffered.<sup>66</sup>

In the 1970s, the Oneida Nation embarked on a multi-pronged project to restore the

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57. See *Empl. Div. Dept. of Human Resources of Or. v. Smith*, 494 U.S. 872 (1990) (holding that the state's prohibition of the sacramental use of peyote and denial of unemployment benefits to Native American Church practitioners discharged for such use does not offend the Free Exercise Clause of the First Amendment); *Lyng v. N.W. Indian Cemetery Protective Assn.*, 485 U.S. 439, 451–52 (1988) (holding that a federal decision to build a road through sacred site of American Indians does not violate the Free Exercise Clause, even if it would “virtually destroy the . . . Indians’ ability to practice their religion” (quoting *N.W. Indian Cemetery Protective Assn. v. Peterson*, 795 F.2d 688, 693 (9th Cir. 1986))).

58. See *Alaska v. Native Village of Venetie Tribal Govt.*, 522 U.S. 520, 532–34 (1998) (denying an Alaska Native village the authority to impose tax on the business activities conducted on lands conveyed to it the under the Alaska Native Claims Settlement Act on grounds that such land is not “Indian Country”).

59. See *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 649–51 (2001) (holding that a tribe’s sovereign power to tax does not extend to a hotel located on non-Indian fee land within the boundaries of the reservation where a court determines tribal assertion of authority is based neither on “consensual relations” nor “what is necessary to protect tribal self-government or to control internal relations”).

60. See *Nev. v. Hicks*, 533 U.S. 353 (2001) (holding that the tribal court lacked jurisdiction over a civil action brought by a tribal member against state police officers who damaged his property when exercising a state warrant on the reservation); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (holding that the tribal court lacked jurisdiction over a civil action brought by a lifelong non-Indian reservation resident who sustained injuries in a car accident occurring within the boundaries of the reservation on a portion of federal highway maintained by the state under federally-granted right-of-way).

61. 125 S. Ct. 1478 (2005).

62. *Id.* at 1483.

63. *Id.*

64. *Id.* at 1483–85.

65. *Id.* at 1486.

66. See Ray Halbritter & Steven Paul McSloy, *Empowerment or Dependence? The Practical Value and Meaning of Native American Sovereignty*, 26 N.Y.U. J. Intl. L. & Pol. 531, 566 (1994).

tribal government, economy, culture, and land base.<sup>67</sup> In two lawsuits, the Supreme Court held that the Oneida Nation had a cause of action in federal court to seek damages for lands taken in violation of treaties and federal law.<sup>68</sup> Despite the legal victories, settlement talks with the State of New York proceeded slowly, and in the 1990s the Oneida Nation used funds from its successful economic development projects to purchase some of the lands that had been taken illegally.<sup>69</sup> Local governments tried to tax the re-acquired lands, and the Oneida Nation sued on grounds that the property—which was within both the tribe’s aboriginal territory and its treaty-guaranteed reservation, and to which the federal government had never extinguished title—constituted sovereign tribal territory exempt from city and county taxation.<sup>70</sup>

Earlier this year the Supreme Court held in *City of Sherrill* that “equitable considerations” of “laches, acquiescence, and impossibility” barred the Oneida Nation from asserting “the reins of government” over the re-acquired lands, which were therefore subject to the local taxes.<sup>71</sup> Justice Ginsburg wrote the majority opinion, proclaiming the Court “hold[s] that ‘standards of federal Indian law and federal equity practice’ preclude the Tribe from rekindling embers of sovereignty that long ago grew cold.”<sup>72</sup> Only one Justice dissented.<sup>73</sup>

*City of Sherrill* raises some serious questions: What does it mean when tribes do everything to embrace the Congressional policy of self-determination, and go so far as to use their own funds to reacquire lands taken illegally from them, only to find the Supreme Court sees the “equitable” concerns on the other side? Stated broadly, will much of the tribal struggle, chronicled in *Blood Struggle*, hit a brick wall when it reaches

67. See Kristen A. Carpenter & Ray Halbritter, *Beyond the Ethnic Umbrella and the Buffalo: Some Thoughts on American Indian Tribes and Gaming*, 5 Gaming L. Rev. 311, 321–27 (2001).

68. In 1974, the Court held the Oneida Nation’s claim of right to possession under federal law asserted a controversy arising under the Constitution, laws, or treaties of the United States within the meaning of federal question jurisdictional statutes. *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661. Similarly, in 1985, the Court held the Oneida Nation could maintain an action for violation of their possessory rights based on federal common law, in a suit seeking damages representing fair rental value of land presently owned and occupied by state counties. *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226.

69. The lands at issue in *City of Sherrill* were re-acquired by the Oneida Indian Nation in 1997 and 1998. *City of Sherrill*, 125 S. Ct. at 1482–83. See also Halbritter & McSloy, *supra* n. 66, at 566–68 (describing the use of economic development revenues to finance earlier re-acquisitions of tribal lands).

70. See *City of Sherrill*, 125 S. Ct. at 1488–89.

71. *Id.* at 1483, 1489–90, 1494.

72. *Id.* at 1489–90.

73. See *id.* at 1495–97 (Stevens, J., dissenting). Justice Stevens noted, *id.*, that:

This case involves an Indian tribe’s claim to tax immunity on its own property located within its reservation. . . .

. . . .

For the reasons set forth at length in the opinions of the District Court and the Court of Appeals, it is abundantly clear that all of the land owned by the Tribe within the boundaries of its reservation qualifies as Indian country. . . .

. . . .

To now deny the Tribe its right to tax immunity—at once the most fundamental of tribal rights and the least disruptive to other sovereigns—is not only inequitable, but also irreconcilable with the principle that only Congress may abrogate or extinguish tribal sovereignty.

the Supreme Court?<sup>74</sup> Are the foundational principles of Indian law, even if applied, an inadequate basis for a meaningful tribal existence in the twenty-first century?<sup>75</sup> Or will tribes somehow circumvent these legal limits to realize sovereignty anyway?<sup>76</sup>

On the question of whether the Supreme Court will ultimately respect tribal sovereignty, Wilkinson says only “Time will tell.”<sup>77</sup> The Supreme Court is not the only impediment to tribal self-determination. Some scholars argue economic realities make it a real challenge for tribes to foster the kinds of institutions and services that would realize the promise of sovereignty.<sup>78</sup> Others suggest self-determination is thwarted by ongoing interference in tribal affairs by the Executive Branch, especially through the Bureau of Indian Affairs.<sup>79</sup> Moreover “citizens groups,” comprised largely of non-Indians who live near reservations, have mounted major efforts to curtail tribal jurisdictional and regulatory authorities, and otherwise challenge federal Indian policy.<sup>80</sup> Inside some tribal communities, it remains difficult to provide members with adequate education, employment, and social services to reverse the inter-generational effects of poverty.<sup>81</sup> In short, there exist many challenges, both internal and external, to realizing the promise of tribal sovereignty in the twenty-first century.

74. *But see Cherokee Nation of Okla. v. Leavitt*, 125 S. Ct. 1172 (2005) (holding in an unanimous court decision, Rehnquist not participating, that Congress could not avoid its obligation to pay on federal-tribal contracts authorized by the Indian Self Determination Act); *Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (holding in a 5–4 decision that Indians retain certain treaty rights).

75. Some practitioners and scholars critique the foundational cases of federal Indian law as originating in the law of conquest and perpetuating its racist legacy, *see e.g.* Robert A. Williams, Jr., *Columbus's Legacy: The Rehnquist Court's Perpetuation of European Cultural Racism Against American Indian Tribes*, 39 Fed. B. News & J. 358 (1992), and advocate an international human rights approach to Indian law problems, *see generally* S. James Anaya, *Indigenous Peoples in International Law* (2d ed., Oxford U. Press 2004).

76. *See* Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 Or. L. Rev. 1109, 1111–12 (2004) (offering recent experiences of the Navajo Nation as “a narrative of sovereignty” in light of “the active role that the Supreme Court is taking in defining tribal governmental powers”); *see also* Lorie Graham, *Securing Economic Sovereignty through Agreement*, 37 New Eng. L. Rev. 523, 535 (2003) (discussing tribes’ use of negotiated agreements to address “uncertainties,” created by judicial decisions, about the scope of tribal sovereignty); Angela R. Riley, “*Straight Stealing*”: *Towards an Indigenous System of Cultural Property Protection*, 80 Wash. L. Rev. 69, 118 (2005) (advocating the development of tribal laws to protect cultural property as an act of “living sovereignty” despite “[r]ecent U.S. Supreme Court Indian law jurisprudence . . . plac[ing] strict limitations on tribal jurisdiction over non-Indians”).

77. Wilkinson, *supra* n. 2, at 257. Here Wilkinson seems to evoke the theme of “time and the law” that he raised in his earlier work *American Indians, Time and the Law*. Wilkinson, *American Indians, Time and the Law*, *supra* n. 5.

78. *See generally* Deloria, Jr. & Lytle, *supra* n. 1, at 24 (noting, for example, that Reagan-era budget cuts “short-circuited much of the progress Indians had made during the postwar period”).

79. *See e.g.* Matthew L.M. Fletcher, *The Insidious Colonialism of the Conqueror: The Federal Government in Modern Tribal Affairs*, 19 Wash. U. J.L. & Policy \_\_\_, \_\_\_, (forthcoming 2006) (arguing that certain “federal bureaucratic actions have rendered meaningless critical aspects of self-determination”).

80. One such group is the Citizens Equal Rights Alliance (“CERA”). One document available on their website is a letter from Howard B. Hanson to the Office of Trust Responsibilities at the Bureau of Indian Affairs, *CERA's Letter to the BIA*, [http://www.citizensalliance.org/links/pages/articles/ceras\\_letter\\_to\\_the\\_bia.htm](http://www.citizensalliance.org/links/pages/articles/ceras_letter_to_the_bia.htm) (Oct. 12, 1999), stating:

[f]ederal policies currently deny millions of people living on or near Indian reservations their full constitutional rights. It is therefore [the Citizens Equal Rights Foundation and] CERA's mission to advocate equal protection of the law so that this nation of many cultures may be one people, living under one system of laws.

81. Wilkinson, *supra* n. 2, at 349 (commenting “poverty still stalks Indian country,” in part because Congressional budget cuts affect Indian programs, and cultural factors may make it difficult, or undesirable, to opt-in to the market economy).

A closing anecdote suggests Wilkinson's belief that tribes will not be unduly deterred by such challenges. It tells the story of four Quinault men who decided to resurrect their tribe's tradition of carving canoes, to take a historic journey—meeting other Northwest tribes to renew culture, trade, and relationships.<sup>82</sup> Building the first canoe took years of research, resource gathering, and physical labor.<sup>83</sup> Then, on its maiden voyage, the *Tso-Kapoo* succumbed to rough waters.<sup>84</sup> When the canoe “came back to [shore] in pieces. . . . [t]he people were distraught, some crying, . . . some just staring out at sea.”<sup>85</sup> But at the suggestion of a young woman tribal member, the group decided to build a second canoe.<sup>86</sup> The journey of the *May-ee* was successful, and today the Quinault tribe hosts an annual Canoe Journey, attended by over five thousand people who come “to celebrate the canoes, the ocean, [and] the salmon people.”<sup>87</sup>

## V. CONCLUSION

*Blood Struggle* focuses on the resurgence of Indian nations through the hard work of tribal people, reflecting hundreds of experiences in the daily life of Native America. It is a rich work with personal anecdotes and interviews illuminating developments in law and policy. The book is also provocative, postulating that the modern Indian movement should be recognized alongside the powerful and successful civil rights, women's, and environmental movements. In his assessment of the Indian movement's specific accomplishments, Wilkinson projects optimism with a dose of realism. While acknowledging that difficulties remain, however, *Blood Struggle* espouses the view that “Indian people have accomplished what would have been unthinkable . . . in the 1950s: They have created viable, permanent self-governed homelands.”<sup>88</sup> Wilkinson believes this accomplishment of the modern Indian movement will endure “forever.”<sup>89</sup>

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82. *Id.* at 376–80.

83. *Id.* at 377–78.

84. *Id.* at 378–79.

85. *Id.* at 379.

86. Wilkinson, *supra* n. 2, at 380.

87. *Id.*

88. *Id.* at xiv.

89. *Id.* at 383 (emphasis in original).