Book Review

Frank Pommersheim, *Broken Landscape: Indians, Indian Tribes, and the Constitution*. New York: Oxford University Press, 2009, pp. 424, $35.00.

Reviewed by Angela R. Riley

The colonial domination over the original inhabitants of the continent has been a subject of debate and consternation since the time of first contact. After a visit in the early 1800s to the United States, French theorist Alexis de Tocqueville famously wrote in *Democracy in America* that "[t]he expulsion of the Indians often takes place at the present day in a regular and, as it were, a legal manner," characterized by what he called, "great evils" that are "irremediable."[1] Almost one hundred years later, the legal realist scholar Felix Cohen—widely recognized as a defining figure in the field of American Indian law—reminded us that, "[l]ike the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere, and our treatment of the Indian… marks the rise and fall in our democratic faith" (237).[2]

There remains today deep concern over Indians and Indian nations within the United States. The recognition that Indian nations possess "certain rights, including rights of self-governance and self-determination," as Cohen wrote in the first edition of the seminal *Handbook of Federal Indian Law*, has long been the cornerstone of this country's understanding of Indian tribes' continued desire for "measured separatism"[3] and self-governance.[4] However, that self-governing authority is currently under siege. While certain demographic and social indicators of Native status have improved in the last few decades,

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1. Alexis De Tocqueville, Democracy in America 340, 342 (Phillips Bradley ed., Vintage Books 1990) (Henry Reeve trans., Francis Bowen rev. 1835).
2. Citing Frank Pommersheim, Braid of Feathers: American Indian Law and Contemporary Tribal Life, 55–56 (Univ. of California Press 1997) [hereinafter Braid of Feathers]. As Pommersheim himself writes, "No discussion of modern Indian law is complete without consideration and acknowledgement of the seminal contribution of Felix Cohen." (234).
3. Charles F. Wilkinson, American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy 14 (Yale Univ. Press 1987).
4. Felix S. Cohen, Cohen's Handbook of Federal Indian Law, at ix (LexisNexis 2005).

these advances have been directly contraverted by what is widely seen as a judicial assault on the core, foundational principles that undergird tribal governing authority in Indian country. This so-called "judicial termination"[5]—the parameters of which have been largely defined by a string of devastating Supreme Court opinions—has spawned a niche subset of scholarly works highly critical of the Court's Indian law jurisprudence.[6]

In one sense, prominent legal scholar Frank Pommersheim's latest book, *Broken Landscape: Indians, Indian Tribes, and the Constitution* is well-situated in this vein of contemporary critique. Breaking from the more aspirational tone taken just fifteen years ago in his highly proclaimed, *Braid of Feathers: American Indian Law and Contemporary Tribal Life*,[7] *Broken Landscape* grapples directly with the devastating consequences of reduced tribal autonomy. The project is driven by the pressing concern, shared by many in the field, that unprincipled exercises of federal power—exerted modernly through the courts more so than the other branches of government—will ultimately destroy Indian tribal sovereignty.

In *Broken Landscape*, Pommersheim delivers a beautifully written, detailed account of the complicated nature of Indian nations within the federal system and provides a roadmap for understanding how tribal sovereignty has been situated—directly or indirectly—in the American constitutional framework since the nation's founding. In doing so, Pommersheim recounts the history of the American Indian nation as colonized sovereign within the bounds of America's consuming borders. The sweeping project chronicles a history that is, for scholars in the field, comfortably familiar, yet Pommersheim sheds new light on historical events and policies that shaped the founding of the United States, and, accordingly, its relationship with the indigenous nations it encompasses.

Broken Landscape proceeds in three parts: "The Early Encounter," "Individual Indians and the Constitution," and "The Modern Encounter." "The Early Encounter" recounts the well-known history of contact, war, colonialism, and treaty making, but with thoughtful analysis as to how the legal and political movements of the particular time intersected with the existence of Indian nations (1–154). The insightful and provocative middle section, "Individual Indians and the Constitution," focuses uniquely on the status of individual Indians and their dynamic relationship to both their tribal nations and the United States, tackling delicate questions of citizenship, religious freedom, and civil rights (155–210). But it is the book's final part, "The Modern Encounter," where Pommersheim really breaks new ground (211–312). Here,

5. Ralph W. Johnson & Berrie Martinis, Chief Justice Rehnquist and the Indian Cases, 16 Pub. Land L. Rev. 1, 24 (1995).

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 (Univ. of Minnesota Press 2005); David E. Wilkins, American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice (Univ. of Texas Press 1997); Frank Pommersheim, Haiku for the Birds (and Other Related Stuff) (Rose Hills Books 2002).

7. Pommersheim, Braid of Feathers, *supra* note 2.

Broken Landscape traverses standard terrain, particularly in Chapter 8, wherein Pommersheim discusses several—now infamous—Supreme Court opinions of the modern era. But, despite this almost obligatory critique, Pommersheim closes with the book's heart, an ambitious proposal to amend the United States Constitution to concretize the status of Indian tribes in the federal system with the hope of, once and for all, "guaranteeing a meaningful and enduring tribal sovereignty" (6). Pommersheim cabins the grandiosity of this endeavor in caveats and qualifiers, but the book's ultimately inspiring objective—cloaked in an overarching tone of hopefulness—nevertheless shines through.

"The Early Encounter" sets out principally to educate the reader as to the colonial mindset that undergirded the colonization process and concretely link it up to the relationship between the government and the indigenous nations that survived it. Reminiscent of Robert A. Williams, Jr.'s, *The American Indian in Western Legal Thought: The Discourses of Conquest*—upon which Pommersheim heavily draws—Part I relies on a rich, historical record to paint a picture of the dynamic between colonizer and colonized. This history reveals the Indian as savage, heathen, and uncivilized (24–27), as depicted in the colonial imagination. In poetic prose fitting of the author,[8] Pommersheim demonstrates how colonizers' beliefs about Indian character provided the rationale necessary to dismiss their culture, law, and religion, and, ultimately, take their land. The dismissal of the Indian as sub-human and incapable of appreciating private property rights (14–18) justified subjecting them to the 'doctrine of discovery,' which established that "whichever European nation got to a portion of the New World first had prior claim" to that territory (90) as against other European powers and, of course, vis a vis the "natives" (89–97). And with the doctrine came the dispossession of the continent.

Part I draws extensively on some of the earliest Supreme Court cases that defined the discovery doctrine, as well as more recent works of scholarship that provide a detailed, historical account of the taking of Native lands.[9] Here Pommersheim spends considerable time discussing the "Marshall trilogy" (87–124)—*Johnson v. M'Intosh*,[10] *Worcester v. Georgia*,[11] and *Cherokee Nation v. Georgia*[12]—three early cases penned by Chief Justice John Marshall, which are now firmly (if controversially) situated in the core Indian law canon. *Lone Wolf v. Hitchcock*[13] (125–151), which upheld Congress' virtually unbridled plenary authority over Indian affairs and denounced as unnecessary judicial scrutiny over the government's unilateral (and duplicitous) abrogation of an Indian treaty, gets a chapter all its own. As Pommersheim notes, even though the "sharpest

8. As his friends know, Frank is a poet as well as a law professor and has published several books of poetry.

9. *See, e.g.*, Stuart Banner, How the Indians Lost Their Land (Harvard Univ. Press 2005).

10. Johnson v. M'Intosh, 1 U.S. (8 Wheat.) 543 (1823).

11. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

12. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

13. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

edges" of *Lone Wolf* "have been modified" by subsequent Supreme Court cases which "essentially did away with the political question doctrine in Indian law and replaced it with the rational basis test," *Lone Wolf* nevertheless stands as a stark reminder of bare assertions of federal power over Indian tribes and its consequences (71).

Part I's historical account foretells Pommersheim's reasoning in seeking a constitutional amendment as the preferred mechanism to protect tribal sovereignty. He identifies the resulting problem: "[I]t remains unclear how much of the Marshall trilogy is truly constitutional in nature and how much of it is essentially a mélange of statutory and common law doctrine" (114). Thus, Part I serves dual purposes for Pommersheim. He employs this history not only to tell the story of Indian nations at the time of contact and their resulting relationship with the United States, but also to begin to make the case for why—in his view—a constitutional amendment is necessary to safeguard Indian tribal sovereignty.

Part II, Individual Indians and the Constitution, detours somewhat from the author's more cohesive book-end parts. Here Pommersheim largely switches focus away from tribal sovereignty and group rights and towards the dynamic status of individual Indians as part of the changing polity of the United States. Of course, the rights of individual Indians are a central feature of *Broken Landscape*. Nevertheless, the book's core mission—advancing an argument for a constitutional amendment to protect tribes—necessarily stands at least in partial contrast to this individual rights discourse. Pommersheim attempts to finesse this disjuncture by carefully linking Indians' individual rights to the absence of constitutional protections for Indian nations more broadly. This move is largely successful, though could benefit from the inclusion of other theoretical works—such as those of Will Kymlicka—which more expressly explain how liberal ideals can only be effectuated when exercised through the individual's religious and cultural commitments to and with groups.[14]

Quite logically, Pommersheim begins this part with a discussion of United States citizenship, which was not formally extended to all Indians until 1924 and even then only via statute (156).[15] Pommersheim gives a thoughtful analysis of the complicated nature of citizenship for American Indians, explicating how they struggle to integrate the "tripartite nature of [their] citizenship" as "federal, state, and tribal citizens" (181). He spends considerable time with the 1884 case of *Elk v. Wilkins*,[16] in which John Elk, an Indian man, sought to renounce his tribal citizenship and become a citizen of the United States. The Supreme Court denied him the right to U.S. citizenship, ultimately ruling that "[w]ardship was an impediment to citizenship and could be changed only

14. *See e.g.*, Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights (Oxford Univ. Press 1995); Will Kymlicka, Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship (Oxford Univ.Press 2001).

15. Indian Citizenship Act of 1924, 43 Stat. 253. *See also* Frank Pommersheim, At the Crossroads: A New and Unfortunate Paradigm of Tribal Sovereignty, 55 S.D. L. Rev. 48 (2010).

16. Elk v. Wilkins, 112 U.S. 94 (1884).

by the guardian federal government and not by the individual Indian ward himself" (166). This case provides the framework within which Pommersheim reminds us that both colonizer and colonized, at various points, struggled to reconcile Indian nation citizenship with Indians' inclusion in the larger polity.

One fascinating component of Pommersheim's discussion of Indian citizenship is in the way in which he addresses notions of consent. That is, as members of pre-constitutional sovereign nations, many individual Indians conceived of themselves—and still do—as members of their tribe first, and as citizens of the United States secondly, if at all. Legal challenges to the U.S. Citizenship Act of 1924, as Pommersheim notes, have all been brought on the grounds that tribes did not consent to American citizenship and that the defining legal relationship of tribes to the federal government was established by and explicated through treaties (170). Thus, this discussion of citizenship makes clear that "[o]n one hand, citizenship may be seen as a badge of inclusion and respect; on the other hand, it may be seen as advancing undue assimilation and even colonialism. This is especially true in the Native American context, where very often inclusion demanded the surrender of tribal membership, that citizenship of the heart" (171). The issue of Indian consent to the democratic project that is America resonates in both the context of citizenship, and later, in the debate over constitutional inclusion.

Pommersheim also devotes considerable space to the issue of religious freedom—or lack thereof—for American Indians under the U.S. Constitution. Part II describes how the federal government waged an all-out war on indigenous religions, criminalizing ceremonies such as the Sun Dance (187) and Ghost Dance (188), prosecuting ceremonial uses of peyote (197), declining to protect the use of eagle feathers in religious practice (201), and viewing the Constitution itself as a barrier to protecting Indians' access to their sacred, religious sites (189). Linking this up to his larger, constitutional project, Pommersheim writes:

> As in the beginning, Native Americans are welcome to become Christians and have their religious rights fully protected. Yet the norm of actual and potential constitutional exclusion of non-Christian Native American free exercise claims remains pervasive and threatening in the context of sacred sites in the public domain, the use of peyote (and other controlled substances), the possession of eagle feathers for religious purposes, and incarceration. Despite some positive statutory and executive branch policy changes, the Constitution has failed to keep up (208).

Ultimately, Part II makes points that are critical to understanding the history and rights of Indians in America today, even if it reads as symptomatic of, rather than defining as to, the relationship of Indian nations to its colonizer. In one critical sense, however, Part II is wholly consistent and reflective of the remainder of the book. In pitch and tone, Part II—like *Broken Landscape* as a whole—is always forward looking. Departing from some of the cynicism reflected in other contemporary writings, Pommersheim continuously tries to

build bridges through his work, emphasizing, again, that "[m]utual respect, dialogue, and a commitment to problem solving are the necessary guideposts for a meaningful future for all" (181).

It is in Part III, The Modern Encounter, where Pommersheim really breaks new ground. Reminiscent of other scholars writing in the field, Pommersheim's concerns over the fate of Indian nations are rooted in the judicial dissolution of Indian sovereignty.[17] He laments that the Indian law jurisprudence in the Supreme Court "has become wholly a field of 'ought,' to be filled not by constitutional and statutory dictates, but rather by what the Court thinks is best for all concerned" (229).

Thus, he ultimately advocates for an amendment to the U.S. Constitution, seeking to secure the status of Indian tribes in the federal system and affirm tribal sovereignty. He proposes this language:

> The inherent sovereignty of Indian tribes with these United States shall not be infringed, except by powers expressly delegated to the United States by the Constitution.
>
> The Congress shall have power to enforce, by appropriate legislation, the provisions of the Article (307).

He insists that "[c]onstitutional status is paramount to ward off the notions of dependency and 'implied divestiture,' which hold tribal sovereignty hostage to the whims and sufferance of a Congress and Supreme Court untethered to the Constitution" (308).

With intense focus on the troublesome "federal common law" of federal Indian law that threatens to destroy its subject, Pommersheim makes the case, if trepidatiously, for constitutional reform to ameliorate—or at least stymie—the destructive effects of judicially imposed limitations on Indian sovereignty. He does so with some recognition that he is, perhaps, on shaky political ground, acknowledging that "there has been little or no push from Indian tribes or national Indian organizations for such constitutional reform" (308). He attributes this to "the fact that the pressing issues of day-to-day governance effectively deny sufficient time to thoroughly consider reform beyond focus on the elusive government-to-government relationship" (308). Thus, while he unequivocally asserts that "[a] constitutional amendment is the surest footing to advance and uphold tribal sovereignty in this newest of eras in Indian law," at the same time he proceeds cautiously, indicating that his proposals are meant to incite, modestly, a "discussion about a (potential) way forward" (309).

Because *Broken Landscape* advocates for a constitutional amendment—an ambitious project by any measure—it necessarily begs the question: why now? In a recent public address,[18] Pommersheim shed some light on this question,

17. *See e.g.*, Williams, *supra* note 6; Wilkins, *supra* note 6.

18. Frank Pommersheim, Professor, University of South Dakota, Remarks at the 35th Annual Federal Bar Association/Native American Bar Association Conference, Santa Fe, New Mexico (Apr. 8, 2010). Responses were provided by Professor Carole Goldberg, UCLA

expounding on concepts contained in *Broken Landscape*. He attributed motivation for his proposal, in large part, to the fact that Indian nations today are doing more and more, but without constitutional protection. Tribes enjoyed some successes in the Court in the modern era, but mostly when they were operating in a "defensive tribal sovereignty" mode, merely trying to stave off state aggression. But when tribes attempted to do more—and particularly where they have attempted to assert criminal or civil jurisdiction over non-Indians within reservation borders—the tide began to turn. This move, from "defensive" to "offensive" tribal sovereignty, according to Pommersheim, has placed tribal sovereignty at a crossroads. "The 'defensive' sovereignty deployed in the past to contain state aggression in Indian country," he wrote, "may be an inadequate framework to support the new 'offensive' sovereignty, which tribes seek to realize in their attempt to govern all those found within reservation borders" (309).

Without constitutional principles to guide the courts in general, and the Supreme Court in particular, in their analysis of Indian law cases, tribes remain extremely vulnerable to the judiciary's whims and to what some scholars have labeled the "common law of colonialism."[19]

But even if Pommersheim is persuasive on the question of "why now?" a larger, looming challenge rests in the "how." The mere suggestion of amending the Constitution is radical, particularly in a country—as we are constantly reminded—that is increasingly polarized, largely informed by niche media, and less and less likely to engage others in the public forum and open our own ideas up to scrutiny and revision. Moreover, as Rebecca Tsosie has noted in responding to Pommersheim,[20] his proposal constitutes a potentially dire theoretical conundrum for America. The United States has a "unitary vision" of the nation-state that manifests in an extreme distrust of "special rights" and "special status." Thus, the idea of concretizing tribes' distinct status in the nation's governing documents is likely to arouse great opposition. Pommersheim, too, notes that much of the controversy surrounding Indian tribes' rights of self-governance "loops back to an overarching question in modern Indian law of how much normative space is available to tribes to employ tradition and custom that diverges from, and even trenches on, the dominant canon" (241). Given the nation's extreme discomfort over where and to what extent self-governing indigenous groups fit, if at all, in a multicultural, democratic America, Pommersheim's proposal initially feels at best beyond reach.

Despite these obstacles—and Pommersheim himself recognizes there are many—he has taken the time to anticipate and respond to the criticism that there might be other-perhaps even better—ways of achieving the protections

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19. Philip P. Frickey, (Native) American Exceptionalism in Federal Public Law, 119 Harv. L. Rev. 431, 443 (2005).

20. Tsosie, *supra* note 18.

for Indian sovereignty that he seeks. I characterize three threads of potential opposition as: the treaty critique, which argues that Indian nations should seek a return to treaty-making as a basis for self-governance rather than seek a constitutional amendment; the international law critique, which advances international human rights law as providing the best structural and substantive protections for indigenous peoples' self-determination; and the comparative law critique, which suggests that the experiences of other countries with constitutional amendments weigh against going down that path. All three criticisms are anticipated at least in some sense by Pommersheim and receive fair treatment in the book.

As Pommersheim notes in his telling of the government-to-government relationship of Indian nations to the United States, in the early period, "treaties were the primary form of legal interaction between the federal government and tribes" (63). This authority vested in Article II of the Constitution, which sets forth that "He [the president] shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur…"(63). From the inception of the republic until 1871, as Pommersheim points out, "the United States entered into more than 350 treaties with Indian tribes" (63). But Congress passed a law to deprive the president of this treaty-making power in 1871, thus ending the period of treaty negotiations between tribes and the United States government (64). Although the end of treaty-making was, at core, the result of a "squabble between the Senate and the House of Representatives" (64), as Philip Frickey has pointed out, "the symbolism of the action cut against the notion of tribes as sovereigns."[21]

Pommersheim anticipated the possibility that a "return to treaty making" might be preferred "as the best way to reestablish meaningful government-to-government relationships" (308). Yet, as he points out, the treaty making "approach is conceptually and practically problematic" for numerous reasons, including the fact that Indians are now citizens of the United States, presenting the "basic problem of making a treaty between the citizens of the same country." Moreover, the law that ended treaty making in 1871 still stands as a "statutory bar" against the U.S. entering into treaties with Indian tribes (308). In sum, there are such enormous practical, legal, and conceptual bars to relying on a return to treaty-making to protect Indian nations that Pommersheim—rightly, it seems—concludes that such an approach could gain little or no traction.

As it has become clear that indigenous peoples have become a special subject of concern under international law, Pommersheim anticipates that human rights discourse might be viewed as the preferable avenue for solidifying the rights of Indian nations. With the adoption by the UN General Assembly of the Declaration on the Rights of Indigenous Peoples in 2007, there is undoubtedly a growing movement to turn towards international human rights law as a defender of indigenous rights, and, concomitantly, to break from the limitations of domestic, colonial law that has for so long deprived

21. Frickey, *supra* note 19, at 441.

indigenous peoples of their rights of self-determination and self governance. Undoubtedly, Pommersheim recognizes the importance of international law in advancing the cause for indigenous rights. He devotes the entirety of Chapter 9 to the subject, questioning whether international law is capable of providing for "[a] new model of indigenous nation sovereignty" (259–293). To flesh out his analysis, Pommersheim draws extensively on the groundbreaking international human rights work of S. James Anaya (266, 268–9). Tracing the growth of indigenous peoples rights in the context of international human rights law, Pommersheim makes note of perhaps the most definitive change in recent decades: a transition from a focus on individual rights towards "a concern for the collective rights of indigenous people to engage in self-governance," which has made space for an international human rights discourse focused on the rights of peoples (266).

Pommersheim freely concedes that international law's ideals are both valuable and potentially quite useful for advancing the rights of Indian nations in the U.S. context. As he points out, many of the goals of international law are articulated domestically. But as Pommersheim notes, "the rub is in the details of federal funding, the execution of the trust relationship, and judicial accountability" (292), which—in his view—creates "alarming uncertainty and asymmetry between these norms and their meaningful implementation" (292). Thus, although the theories may be consistent and aligned, the uncertainty in practical application is "aggravated in domestic Indian law when there is no constitutional (or even statutory) tether from which to discern an enduring national commitment to the program of self-determination" (292). Moreover, as is well known, the U.S. is loathe to bind itself to most international human rights instruments. And, even if bound, "[t]here is…no way to enforce these norms domestically, even when an international agency or court has so ruled" and "[s]tate sovereignty…trumps the remedial force of such international bodies" (282). Thus, for Pommersheim, international law holds promise and certainly is a place where advocates should continue to seek progress. But at least for the time being, success in international tribunals still problematically means "secur[ing] a moral victory without practical vindication" (284).

Ultimately, Pommersheim seems to vest more hope in exploring how the domestic law of similarly situated nation-states is taking shape to protect indigenous rights. He focuses, in particular, on the settler states of Canada, New Zealand, and Australia, which, he contends, have domestic laws or structures in place that comprise "a legitimate beginning" for a more robust set of protections (293). Canada provides the sharpest comparative point, as it amended its constitution in 1982 to account for indigenous rights in ways substantively quite comparable to Pommersheim's own proposal. Section 35(1) of the Constitution Act reads: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and confirmed."[22] Pommersheim recognizes these changes, of course, and discusses Canada in

22. Constitution Act, 1982, being Schedule B to the Canada Act, 1982, pt. II, § 35(1) (U.K.), reprinted in R.S.C., No. 44 (Appendix 1985).

Chapter 9, though without an extensive discussion of what affect, if any, that constitutional change has had in the lives of First Nations peoples (285-87).

But the comparison to other nations that have engaged in similar reform presses the question of whether such reform ultimately has the potential to improve indigenous nations' rights of self-determination and protections for tribal sovereignty. Carole Goldberg has questioned the efficacy of seeking a constitutional amendment as a way for tribes to secure their political position within the United States. As Goldberg remarked in a public discussion of *Broken Landscape*, her work with First Nations peoples has revealed that the constitutional change in Canada has not, in fact, had an overwhelming impact on First Nation's self-governance.[23] And she is not alone. Other scholars too have questioned whether constitutional change will produce better results in the courts for indigenous groups.[24] This work suggests that it might not be expedient for tribes to expend the political capital necessary—and undisputedly, it would take a great deal of political capital—to amend the Constitution to protect tribal sovereignty if it ultimately will have relatively scant affect on Indian nations.

Finally, although *Broken Landscape* expertly makes the case for a constitutional amendment, it does not fully engage the question of what the *consequences* would be for tribal sovereignty if such an amendment was enacted. Pommersheim states the "goal" of the project is "to provide respectful and durable constitutional recognition of inherent tribal sovereignty" "with a new sense of respect and inclusion." He emphasizes that it "would not displace treaties as the cornerstone of tribal sovereignty" but would "build on that sturdy foundation to create a modern structure that synthesizes the best of the old and the new—to create, as it were, a modern architecture of sovereignty that is best capable of preserving the past and advancing the future" (307). Though this language is appealing, it is hard to imagine, practically speaking, exactly how it would play out on the ground.

For example, one area that remains a mystery-and that is likely to cause concern among tribes—is whether such an amendment would alter the existing relationship of tribes to the Constitution. After all, as Pommersheim points out, and as is well known: "[t]ribes predate the Constitution and are not subject to its limitations," making Indian tribes the only governments within the United States not bound by the Constitution's Bill of Rights (184).[25] In fact, tribes' extra-constitutional status was the basis for Congress' decision to extend similar provisions as those contained in the Bill of Rights to Indian tribes via the 1968 Indian Civil Rights Act. Although ICRA follows the language of the Constitution's Bill of Rights closely, it does not directly mimic it. And the

23. Goldberg, *supra* note 18.

24. *See, e.g.*, Kirsten Matoy Carlson, Does Constitutional Change Matter? Canada's Recognition of Aboriginal Title, 22 Ariz. J. Int'l & Comp. L. 449 (2005).

25. Angela R. Riley, (Tribal) Sovereignty and Illiberalism, 95 Cal. L. Rev. 799, 800-01 (2007).

Supreme Court's 1978 ruling in *Santa Clara Pueblo v. Martinez*[26] means that, save habeas corpus actions, civil rights violations must be adjudicated by tribal courts, and are not subject to federal court review. This resulting structure leaves Indian tribes to govern themselves, largely beyond the constraints of the Bill of Rights, and, sometimes to even govern illiberally. Practically speaking, this allows tribes to, for example, maintain theocratic governments, establish matriarchal or patriarchal membership rules, and banish political dissidents, among many other acts.

All of this means that tribes have been permitted to govern themselves—even when against the core tenants of liberalism—because of their pre-constitutional status. Though Pommersheim's proposal presumably relies on the full consent of Indian nations—with the concomitant understanding that tribes would not advance an amendment that did not maintain certain protections for tribal sovereignty—*Broken Landscape* does not take on directly the possibility of full application of the Bill of Rights to Indian tribes. Thus, one might expect that tribes would be extremely wary of inclusion in the Constitution if doing so could even potentially mean corresponding limits on tribal sovereignty that would thwart or destroy some core facets of tribal life and culture.

Thus, the inclusion of tribes in the Constitution presents at least one profound dilemma: that tribes will be fully incorporated and fully subject to the Bill of Rights at the expense of tribal autonomy. Though Pommersheim does not address this critique head on, he does not ignore this issue altogether. He notes that, in his work in Indian country, individual Indians often seek and desire the same panoply of rights and protections afforded to other U.S. citizens—such as due process, transparency, separation of powers, etc.—even when these rights are sought to be enforced as against tribal governments.[27] And as a staunch advocate of tribal self-determination, even he would argue that the path he has laid out would not and should not gain any ground without full tribal support.

Though traversing some familiar territory, *Broken Landscape* is a comprehensive, beautifully crafted, ambitious work that courageously breaks from the swarm of contemporary critique of the Supreme Court's Indian law jurisprudence. From my vantage point, the most promising thing about *Broken Landscape* is that it is a beginning, not an end. Pommersheim has written the book as an invitation to dialogue, and an incitement to action. Despite the cynicism surrounding events of the past two decades—and they are undoubtedly worthy of a cynical view—Pommersheim reminds us time and again that there are things that tribes can do to improve upon the current situation. He promotes transparency, education, and action, ultimately deferring to tribes as to whether change should come in the form of a constitutional amendment at all.

26. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

27. Pommersheim, *supra* note 18.

Always seeking a conciliatory way towards dignity and reconciliation, Pommersheim concludes:

> [T]his is the time to seize the initiative to advance the dialogue, with the primary goal being to ensure tribal sovereignty a place of dignity and respect in any new era, whatever it might be called…. Constitutional inclusiveness is not only about individuals but also about sovereigns who were here first…. The momentum of (modern) tribal sovereignty requires a new model of respect, dignity, and constitutional community (257).