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CONTEXT AND LEGITIMACY IN FEDERAL INDIAN LAW

*Philip P. Frickey**

BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE. By *Frank Pommersheim*. Los Angeles: University of California Press. 1995. Pp. x, 267. \$30.

Federal Indian law is perhaps the least respected and most misunderstood area of public law. Although the field produces a steady diet of cases for the Supreme Court, the Justices have little love for the topic.¹ The work of Indian-law scholars and practitioners seems isolated from the more general span of public law scholarship and practice. Indeed, the mere mention of the field is a conversation stopper for public law generalists of either the academy or the practicing bar.

There are probably many reasons why federal Indian law is out of the mainstream. Some of them involve fairly typical problems of public law: unclear — indeed, largely nonexistent — constitutional text,² murky doctrines of case law,³ the hydraulic pressure upon doctrine of evolving social circumstances, and so on. In addition, there may be some sense on the part of the dominant community that the issues involved in federal Indian law are relatively unimportant in the great scheme of things.

Other factors that contribute to the marginalization of the field are, however, more unusual. Issues concerning the rights of Native Americans are quite different from those involving other minority groups defined by race or ethnicity. Indians had sovereignty, land, and other group rights before their contact with colonizing Europe-

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For purposes of full disclosure, I should mention that Frank Pommersheim and I have had many discussions about federal Indian law and once considered combining our efforts to produce a book in the field.

1. See Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 382-83 (1993).

2. The Constitution mentions Indians only three times: once to grant Congress the authority to regulate commerce "with the Indian tribes," U.S. CONST. art. I, § 8, cl. 3, and twice to exclude "Indians not taxed" from the apportionment formula for the House of Representatives, U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. amend. XIV, § 2.

3. For a brief description of the doctrines the courts have applied to federal Indian law, see Frickey, *supra* note 1, at 418 n.158.

ans, and they continue to have sovereignty, land, and other group rights today. The wrongs colonization perpetrated were group wrongs rather than individuated injuries. The status of Indian tribes today, which involves collective land ownership, self-government, some aspects of territorial sovereignty, and government-to-government relations with the United States, is unlike anything else in domestic American public law.

Indeed, a fundamental reason for the inscrutability of federal Indian law is that analogies to other areas of public law turn out to be false. Mainstream public law attempts to protect politically powerless members of minority groups from being treated differently from similarly situated persons who are in the majority.⁴ These individualistic and integrationist qualities spring from American domestic norms of equal protection associated with *Brown v. Board of Education*.⁵ In contrast, federal Indian law seeks to protect Indians as groups — as peoples, not as people⁶ — from forced assimilation and destruction of their separate status. These collectivist and separatist qualities spring, remarkably, from international law notions of sovereignty, which were incorporated into American domestic law in the early nineteenth century by the Marshall Court.⁷ Surely this head-spinning contrast between the familiar equal-protection narrative and the unfamiliar Indian law one is a major reason why federal Indian law is sealed off from the public law mainstream.⁸

This exclusive focus on law is, however, highly deceiving. For I think it is the *context* of federal Indian law, even more than its murky doctrines and qualities, that leads to its marginalization. It is plain to anyone who will look that federal Indian law is the law governing the colonization and displacement of the indigenous peoples of this continent by Europeans. The justifications for those colonial acts — acknowledged by our Supreme Court to turn on Christianizing the heathen and confiscating natural resources to use them more efficiently⁹ — now seem hollow. The cross-continental march of European-Americans, the brutality of the Indian wars and

4. See, e.g., *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

5. 347 U.S. 483 (1954).

6. This phrase is borrowed from the evocative title of David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759 (1991).

7. See Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. (forthcoming 1996).

8. Of course, both fields have been forced to deal with racism, and the "sameness" required by the one and the "difference" protected by the other have sometimes met with massive resistance. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 11 (1958); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc.*, 843 F. Supp. 1284, 1286 (W.D. Wis. 1994).

9. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 542-43 (1832); 31 U.S. (6 Pet.) at 579 (McLean, J., concurring); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 572-73, 590 (1823).

their aftermaths, and the removal westward and ultimate isolation of Indians on reservations is a story painful to contemplate in a society supposedly premised upon a Constitution that protects against governmental abuse and embodies a social contract based on consent. The unattractiveness of this narrative, its tension with our dominant American narrative of faith in the rule of law, and the difficulty in knowing how to fuse these narratives into lessons of contemporary significance all contribute to the marginal status of federal Indian law.¹⁰

Turning to the current context, contemporary federal Indian law, "on the ground," happens far away from the District of Columbia, on isolated lands called Indian reservations. The people it primarily affects have a third layer of citizenship — membership in the tribe as well as citizenship in the United States and in the state in which they reside — and may consider tribal membership the most significant of the three. They may also adhere to some traditional beliefs and ways of life inconsistent with western, capitalist values. Indeed, it is no small irony that Native Americans are essentially foreigners in their own country,¹¹ both culturally and legally.¹²

Traditional public law scholarship has its difficulties in coming to grips with such far-flung and foreign factors. Frank Pommersheim has sought to identify these deficiencies and to begin to remedy them in his new book, *Braid of Feathers: American Indian Law and Contemporary Tribal Life*. Pommersheim brings a wealth of experience to the task. He spent over ten years living and working on the Rosebud Sioux Reservation in South Dakota. Now a law professor at the University of South Dakota, Pommersheim sits as an appellate judge for both the Rosebud Sioux Tribe and the Cheyenne River Sioux Tribe.

Pommersheim approaches the subject as much with his heart as his head. He acknowledges that his experiences in Indian country have been highly rewarding, both personally and professionally (p. 6). Indeed, he speaks frankly of his friendship toward and obligations to "people and communities who have done so much, with

10. Consider a historian's perspective on why Indian-white history "occupies a backwater status" in that profession:

The majority of American historians seem to regard the whole issue as an endless tale of woe and atrocity committed mostly against Indians, a litany many find redundant, tiresome, and depressing. More pointedly, the Indian experience is viewed, and so treated, as a curious, even quaint sideshow within the larger panorama of Anglo-American performance and achievement in North America.

Calvin Martin, *An Introduction Aboard the Fidèle*, in *THE AMERICAN INDIAN AND THE PROBLEM OF HISTORY* 3, 9 (Calvin Martin ed., 1987).

11. The point is made well by the title of Robert N. Clinton's excellent article defending tribal sovereignty, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 *STAN. L. REV.* 979 (1981).

12. Oddly, the field of public law most similar to federal Indian law is immigration law. See Frickey, *supra* note 7.

lasting good humor, to highlight the issues and enhance the choices in my own life and those of my family" (p. 13). He recognizes that his view "is not detached nor neutral but engaged and committed" (p. 5), a product of his experiences "in the particular western landscape of Indian country in South Dakota" (p. 6).

This abandonment of any pretense of objective, neutral analysis, however, does not undermine his contribution. Indeed, it seems to me that it greatly enhances it, for it replaces the typical, and misleading, "view from nowhere"¹³ with the actual context of relevance. For as Pommersheim notes, most federal Indian law scholarship focuses almost exclusively on "the pervasive role of Congress and the Supreme Court" (p. 1), failing to acknowledge "the counterweight of tribal sovereignty and authority" (p. 1) and "the understanding and implementation of the indigenous vision that develops in its localized institutional settings" (p. 2).

This, then, is a self-proclaimed "inside-out view from the grass-roots, reservation level rather than the traditional top-down view that permeates most Indian law writing" (p. 2). What Pommersheim seeks for tribes is legitimacy in law running in both directions. Tribal governmental institutions, particularly tribal courts, must have "tribal authenticity," and this "'inside-out' authenticity, in turn, must meet the potential constraints of [federal] judicial and congressional review that is necessary to achieve a complementary 'top-down' authenticity" (p. 134). "In many ways," Pommersheim says, "tribal courts are ideally situated to serve as a bridge between local tribal culture and the dominant legal system" (p. 194). Bi-directional connectedness and legitimacy, in turn, could lead to a "true tribal-federal (judicial) dialogue on tribal sovereignty" that seeks "justice [as] a product of conversation rather than unilateral declaration."¹⁴ Ultimately, this institutional dialogue is the vehicle by which Pommersheim hopes to achieve what he sees as "the two most important — indeed, complementary — projects in the field of federal Indian law . . . the decolonization of

13. See THOMAS NAGEL, *THE VIEW FROM NOWHERE* (1986).

14. P. 193. It is for these reasons that Pommersheim focuses on tribal courts rather than other tribal institutions, such as tribal councils. The linkage between tribal sovereignty and tribal courts, on the one hand, and federal courts and the broader national government, on the other, is by no means obvious, however. As I understand it, and as I shall explain in the remainder of this review, Pommersheim's argument is that tribal courts are the tribal institutions best situated to perform a translational role, articulating the nature of tribal sovereignty and other interests so that non-Indian authorities can understand them; a justificatory role, articulating tribal sovereignty and interests in ways that provide persuasive reasons why non-Indian authorities should not interfere with them; and a legitimating role, upholding important, shared national values through appropriate judicial processes so that federal courts will not second-guess tribal court adjudicative results and will trust tribal courts to review the actions of tribal councils and executive officials. Each of these tasks is part of the tribal-federal judicial dialogue in the pursuit of justice that Pommersheim seeks to foster.

federal Indian law and the simultaneous construction of an indigenous version of tribal sovereignty and self-rule."¹⁵

Heady stuff, this. Openly utopian and yet concretely contextual, Pommersheim asks us to imagine a decolonized federal Indian law and a flourishing tribal life, all with the support of the dominant society. True to his "inside-out" approach, he first considers the reservation context, places the reservation within its broader context in the western United States, and then uses these contextual understandings as the bases for crafting the legal context to achieve the two goals he identifies. I will consider each in turn.

I. A CONTEXT FOR CARING

Pommersheim is explicit in his rationale for examining the context of federal Indian law:

I seek to develop a sense of context — cultural, spiritual, and physical — to help explain why Indian people are committed to reservation life and why non-Indians need to honor and respect that commitment. For it is this commitment to the reservation as place that undergirds all the central legal struggles in Indian country about land, water, natural resources, and jurisdiction. Unless we understand this context, there is little chance that we can forge a commitment to eradicate the stigma of invidious difference while at the same time preserving an enduring pride of difference. Without the human and cultural specifics, the field of Indian law is hopelessly abstract and disconnected from the reality and aspiration of contemporary tribal life. The thick description of the reservation as place provides a context for caring as well as a firm grounding for understanding the pain and promise of law in contemporary Indian life. [p. 8]

In my judgment, the major contribution of this book lies in the identification and substantial satisfaction of these aspirations.

By its very nature, federal Indian law is the law of colonial power — case law from what John Marshall once revealingly called "the Courts of the conqueror,"¹⁶ statutes from the centralized legislature of the colonial government, and so on. It is law made by others and imposed upon indigenous peoples. It is both unsurprising and disturbing, then, that, as Vine Deloria once wrote, "what is missing in federal Indian law are the Indians."¹⁷

15. P. 193. One problem inherent in this project is that federal law will necessarily structure this institutional relationship, and federal lawmakers will have the usual presumptions that federal law is nationwide and uniform. Indian tribes and their members have great diversity across this country, and yet it seems inevitable that tribal institutions and tribal law will have to bend in somewhat similar ways to fit such a national, federal framework. Whether these centripetal and centrifugal forces can be adequately harnessed by working institutions is, thus, a major question.

16. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 588 (1823).

17. Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203, 205 (1989).

Law created by judges and legislators this far removed from its context is not likely to be functional, attractive, or legitimate in the eyes of those it most directly affects. Similarly, the legal scholars' penchant for analysis generated within the four walls of their offices, grudgingly supplemented by occasional forays into the law library, cannot possibly produce a fully useful examination of law in this context. To be sure, high-level theory, as well as the careful parsing of precedent and other basic legal-process skills, have their role in federal Indian law, as in all other law. The problem remains, however, that under legal-process assumptions "[l]aw is a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living."¹⁸ It is self-evident that law cannot perform this function without an appreciation of the social setting in question and the values and aspirations of the people the legal regime most directly affects. More specifically, Native Americans, who are full-fledged citizens of the United States, and Indian tribes, which are bona fide sovereigns under domestic American law, deserve equal concern and respect in the process by which our national government, through law, carries out its responsibility of "establishing, maintaining and perfecting the conditions necessary for community life to perform its role in the complete development of [people]." ¹⁹

The centerpiece of Pommersheim's contextual presentation is Chapter One, which is a slightly modified version of a law review article he published some years ago.²⁰ The title, *The Reservation as Place*, bespeaks the sort of dignity he seeks to bestow upon locales often viewed "as islands of poverty and despair torn from the continent of national progress" (p. 11). Pommersheim attempts to convey the

[h]idden . . . notion of the reservation as place: a physical, human, legal, and spiritual reality that embodies the history, dreams, and aspirations of Indian people, their communities, and their tribes. It is a place that marks the endurance of Indian communities against the onslaught of a marauding European society; it is also a place that holds the promise of fulfillment. [p. 11]

He writes "from two overarching assumptions. One is that, despite grinding poverty and widespread despair, there is nevertheless a flame of hope and a broadening range of choices in almost all aspects of reservation life" (p. 13). The other "is that, whatever the

18. HENRY M. HART, JR. & ALBERT A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 148 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

19. *Id.* at 102 (quoting Joseph M. Snee, *Leviathan at the Bar of Justice*, in *GOVERNMENT UNDER LAW* 91, 96 (Arthur Sutherland ed., 1968)).

20. See Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D. L. REV. 246 (1989).

conditions, tribal members have been committed to remaining indelibly Indian, proudly defining themselves as a people apart and resisting full incorporation into the dominant society around them" (p. 13).

In my judgment, this essay largely succeeds in making the reader not only understand, but also empathize with, Indians' reasons for having a fundamental and spiritual attachment to the reservation. At the same time, it does not romanticize the reservation as some idyllic setting²¹ or engage in a self-satisfied jeremiad excoriating non-Indians.²² Achieving the former without pandering along the lines of the latter is no mean feat.

Pommersheim begins with a short explanation of the centrality of land to Indian people: "Land is basic to Indian people; they are part of it and it is part of them; it is their Mother" (p. 13). The land is simultaneously the source of cultural connectedness, "of spiritual origins and sustaining myth," (p. 14) and "a homeland where generations and generations of relatives have lived out their lives and destiny" (p. 14). He then turns to the legal genesis of reservations as the result of a bargained-for exchange. Usually through a treaty with the federal government, the tribe ceded away some aboriginal lands and agreed to cease hostilities with non-Indians in exchange for a guaranteed homeland of vital cultural significance over which the tribe would exercise significant sovereignty. He then addresses attacks upon this "measured separatism,"²³ focusing on the allotment of reservation lands to individual tribal members and the opening of remaining reservation lands to non-Indian homesteaders (pp. 19-21). He also considers the assimilative efforts of Christian missionaries, Bureau of Indian Affairs agents, and teachers in Indian country to destroy tribal culture, religion, and language. Particularizing this inquiry, he reviews the South Dakota experience,

21. See p. 34 (noting the "rupture in the relationship of the people to the land" and complaining about "disturbing utopian visions that endlessly romanticize the people and the land"). The current legal analogue to this problem of romanticism might be found in cases suggesting that tribes have more sovereignty in situations in which they are engaged in traditional ways. See, e.g., *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 441-44 (1989) (holding that tribe may zone land owned by non-Indians only in portion of the reservation traditionally closed to the public, where few non-Indian lands are located and the area approximates a pristine region retaining uniquely Indian character); *Rice v. Rehner*, 463 U.S. 713, 733 (1983) (implying that tribal sovereignty is greatest where there has been "a tradition of tribal self-government" on the subject of dispute); *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 156-57 (1980) (stating that tribal interest in raising revenue by marketing goods to non-Indians is "strongest when the revenues are derived from value generated on the reservation").

22. See p. 5 (stating that the point is "not to excoriate the 'white man'" but rather "to look to a more humane and morally coherent era that is based in the core values of respect and dignity"); p. 21 ("The point is not to assign blame — an essentially fruitless exercise — but rather to comprehend more deeply the forces at work on the reservation.").

23. P. 16 (using a term from CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 4 (1986)).

where all reservations suffered through allotment and other Indian lands were lost to Missouri River water projects.

Pommersheim concludes with a consideration of the reservation within the broader context of the American West. He argues that "[d]espite the pervasive conflict between tribes and the state and federal governments, and between Indians and non-Indians, other more unitive factors point to similarities in situation that are often not perceived and occasionally even ignored" (p. 27). Indians and non-Indians alike in the West share space, aridity, a love of their land, and a complicated relationship with the federal government. Tribes are often criticized as being too dependent on federal largesse. Pommersheim correctly points out, however, that their non-Indian neighbors are similarly dependent on the federal government and survive through farm subsidies and below-market access to grazing, water, and other public goods.²⁴ He suggests that the future for both sides is inextricably linked, and if each would "recognize the permanence and legitimacy of the other" (p. 30) and engage in dialogue, much common ground could be identified and usefully exploited. In particular, both sides might be able to develop an overlapping sense of place.²⁵

For me, this chapter is the cornerstone of the book. It speaks to me in a multitude of ways, providing factual information, cultural perspective, and normative insight. It goes a long way toward filling the yawning chasm between federal Indian law in the books and federal Indian law on the ground. Moreover, I take some solace from it. The chapter ends on a note of hope,²⁶ a commodity all too scarce in federal Indian law.

24. Yet the Westerners' fierce sense of independence and their resentment of the federal government make all this a strange mix, aptly summed up in the injunction to "[g]et out, and give us more money." P. 28 (quoting WALLACE STEGNER, *THE AMERICAN WEST AS LIVING SPACE* 15 (1987)).

25. Thus, Pommersheim's defense of tribal sovereignty builds on legal themes — preexisting rights (to sovereignty and land), unconsented deprivations of these rights (unilateral colonization and displacement of indigenous peoples, forced assimilation), and bilateral legal acknowledgment of those rights (in treaties) — and on cultural themes — the importance of the land and self-determination to Indian culture. For these reasons, in this context there is an intimate connection between sovereignty and individual and group rights. In this instance, at least, sovereignty is more than simply the rights or authority of a government.

26. Consider its final paragraph:

The breath of despair once so prevalent in Indian country seems to be yielding to the air of hope. The answers to these troubling questions about the land and its economic, cultural, and spiritual roles do not readily reveal themselves, but the questions are increasingly recognized and energetically posed. Nor are these questions confined to Indians and reservations. They also pierce with unerring aim the larger society's assumptions about cultural diversity and the use and exploitation of the earth to sustain economic prodigality and waste. The questions inevitably challenge all of us — Indian and non-Indian, tribes and states alike — to summon the honor and wisdom of ourselves, our communities, and our traditions and to apply them to these relentless and provocative issues.

With all that said, the chapter may not work for everyone. I have assigned the underlying law review article to my students in federal Indian law for several years running. Many students find the article worthwhile, but some have difficulty internalizing the material. For them, it may seem too sentimental, too much a matter of airy hopefulness about an environment and the people who populate it.²⁷ The hopefulness of the essay may also strike some persons as a dated indicium of a short period in South Dakota's recent history when non-Indians seemed especially receptive to conversations with Indians.²⁸ Nonetheless, the impetus to care about the context of federal Indian law, along with significant perspectives on that context, strike me as an invaluable contribution to the field.

II. CONTEXTUAL LEGITIMACY FOR TRIBAL LAW AND TRIBAL COURTS

As I understand it, one of Pommersheim's most basic goals is to persuade the broader non-Indian legal community to care enough

In a later chapter, Pommersheim proposes that tribes and states should attempt to abjure litigation and engage in dialogue to reach accords on fundamental issues. *See* pp. 153-61.

27. To be sure, these reactions may be a product of when the students read the essay. My students and I discuss it at the beginning of the course, as a way to introduce the reservation context and the importance of federal law to it. At that point, the students may be unable to synthesize legal doctrine and context sufficiently to profit optimally from the reading. Nonetheless, it seems important to begin the course with an exposure to this context that is so foreign to many students, and I know of no other writing that works as well as this essay.

Rereading the essay at the end of the course may be necessary for a fuller appreciation of it. Indeed, when I asked a policy question in my most recent federal Indian law examination, several students not only mentioned this article, but also commented on how the analysis in it had informed their perspectives.

A more fundamental problem may be that students expect doctrinal analysis when, in fact, Pommersheim is attempting to provide the context for his basically non-doctrinal, post-modern approach to federal Indian law. *See infra* text accompanying notes 47-61. Essentially, the "reservation as place" is a relational and constitutive concept — focusing on the deep relationships of Indians to the land and to each other and how that is constitutive of individual, collective, and geographical identity — more than a traditional legal concept, based on the law of property, that divorces "things" from the people who "own" them. I am grateful to Jeff Rutherford, my former student, for this insight. In future classes, I shall attempt to determine whether a more forthright confrontation between post-modern analysis and traditional legal conceptions would be fruitful.

28. *The Reservation as Place* was published in the *South Dakota Law Review* in 1989. *See supra* note 20. Chapter 5 of the book, entitled *Tribal-State Relations: Hope for the Future?*, originally appeared at 36 S.D. L. REV. 239 (1991). In that period, the state was headlong in its centennial celebration of 1989, which provoked extended discussion of the history and present-day situation of Indians in the state. Governor Mickelson declared 1990 the Year of Reconciliation, a time for attempts at meaningful state-tribal dialogue. *See* pp. 154, 251 n.89. Contrast a recent comment of the current governor, Bill Janklow, alleging that South Dakota Indian tribes have a "master plan . . . to acquire all of western South Dakota" with proceeds from Indian gaming, which was immediately attacked as exacerbating racial tensions. *Janklow Says Tribes Have "Master Plan" To Buy Western South Dakota*, Associated Press Political Service, Aug. 25, 1995, available in Westlaw, ASSOCPPS File, 1995 WL 6739295.

about the Indian context to provide tribes a breathing space for the construction of institutions, particularly tribal courts, that can develop a truly indigenous law. His message is a timely one, for tribal court jurisdiction may well now be expansive enough to create this opportunity.

Understanding this jurisdictional context requires a brief overview of the nature and limits of tribal sovereignty. One of the most basic premises of federal Indian law is that, prior to contact with Europeans, tribes had sovereignty over their members and their areas.²⁹ The European encounter locked each tribe into an exclusive sovereign-sovereign relationship with the "discovering" European country, such that the tribe could have sovereign relations and engage in land transactions only with that country.³⁰ This category of limitations on tribal sovereignty based on tribes' status as "domestic dependent nations"³¹ was more recently expanded to deny any criminal jurisdiction over non-Indians³² and to restrict civil regulatory control over non-Indians on lands within reservations that they own in fee simple.³³ In addition, of course, tribes have lost authority consensually — through treaty agreements, for example — and nonconsensually, when Congress, through the exercise of its judicially sanctioned "plenary power" over Indian affairs,³⁴ has explicitly preempted tribal power.³⁵ What all this means is that tribes retain sovereignty today so long as the particular exercise of power is not inconsistent with domestic dependent status and has never been ceded or taken away.

That reservoir of sovereignty turns out to be significant.³⁶ For tribal courts, it includes the authority to exercise criminal jurisdic-

29. See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 572-73 (1823).

30. See *Johnson*, 21 U.S. (8 Wheat.) at 573-74.

31. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

32. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978). The Court later held that tribes also lack the capacity to exercise criminal jurisdiction over nonmember Indians — that is, Indians who are members of a tribe different from the one attempting to exercise the criminal jurisdiction in question. See *Duro v. Reina*, 495 U.S. 676, 688 (1990). Congress has overturned this result by a statute that purports to recognize the tribe's inherent sovereignty in this situation, rather than to delegate federal authority to the tribes. See 25 U.S.C. § 1301(2) (1994).

33. See *Montana v. United States*, 450 U.S. 544, 566 (1981).

34. For a helpful overview, see Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984).

35. Under the canons of interpretation found in federal Indian law precedents, Congress must act clearly before courts will sanction an invasion of Indian interests. See Frickey, *supra* note 1, at 398-426. A recent example of preemption of tribal power is *South Dakota v. Bourland*, 113 S. Ct. 2309, 2319 (1993) (holding that a federal statute taking Indian lands for public recreation area that remained within reservation divested tribe of authority to regulate nonmembers in that area).

36. In addition to presumptive full legislative sovereignty over its members, tribes have been recognized as retaining certain legislative authority over nonmembers, including, for example, the power to tax nonmembers engaged in consensual economic activity in Indian

tion over members³⁷ and over nonmember Indians,³⁸ and to exclude most nonmembers from the reservation.³⁹ Tribal judicial jurisdiction in civil cases is quite extensive. State courts have no inherent jurisdiction to entertain causes of action against Indians that arise on the reservation.⁴⁰ Because such suits will rarely involve diversity of citizenship, a federal question, or the like, a federal judicial forum ordinarily will not be available, and thus they must almost always be brought in tribal court. Moreover, while tribal courts may not exercise criminal jurisdiction over non-Indians,⁴¹ entertaining a reservation-based civil cause of action against a non-Indian is not foreclosed. The Supreme Court has held that federal courts have federal-question jurisdiction to hear the non-Indian's objection that this tribal-court jurisdiction is inconsistent with domestic dependent status.⁴² Nonetheless, the non-Indian must first exhaust all tribal court remedies, including appellate ones,⁴³ and, if the matter does return to the federal district court, the only issue is whether the tribal court had jurisdiction.⁴⁴

Finally, it remains the case that the Constitution does not constrain the exercise of inherent tribal sovereignty in general or the activities of tribal courts in particular.⁴⁵ Congress applied many constitutional limitations to the tribes, however, by adopting the

country. See *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 198-200 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137-38 (1982).

37. See *United States v. Wheeler*, 435 U.S. 313, 322 (1978).

38. See *supra* note 32.

39. See *Duro v. Reina*, 495 U.S. 676, 696 (1990) (dictum).

40. See *Williams v. Lee*, 358 U.S. 217, 218-19 (1959). Of course, Congress may change this rule through the exercise of its plenary power, as it did in adopting Act of Apr. 11, 1968, Pub. L. No. 90-284, tit. IV, §§ 401-02, 82 Stat. 73, 78-79 (codified as amended at 25 U.S.C. §§ 1321-1322 (1994)), a statute that authorizes courts in certain states to assume jurisdiction over civil and criminal cases arising in Indian country.

41. See *supra* text accompanying note 32.

42. See *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 853 (1985).

43. See *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16-17 (1987).

44. See *Iowa Mutual*, 480 U.S. at 19. See generally Timothy W. Juranko, *Exhaustion of Tribal Remedies in the Lower Courts After National Farmers Union and Iowa Mutual: Toward a Consistent Treatment of Tribal Courts by the Federal Judicial System*, 78 MINN. L. REV. 259 (1993); Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C. L. REV. 1089 (1995); Alex Tallchief Skibine, *Deference Owed Tribal Courts' Jurisdictional Determinations: Towards Co-Existence, Understanding, and Respect Between Different Cultural and Judicial Norms*, 24 N.M. L. REV. 191 (1994).

45. This understanding is as old as *Talton v. Mayes*, 163 U.S. 376 (1896) (holding that because tribal sovereignty existed prior to the Constitution and is not derived from it, tribal action is not subject to the Constitution). Of course, if the tribe is exercising delegated federal authority rather than inherent tribal sovereignty, a strong argument can be made that the Constitution attaches. Cf. *United States v. Mazurie*, 419 U.S. 544, 553-56 (1975) (upholding federal statute authorizing tribe to regulate liquor in Indian country, including when sold by non-Indians, and conceptualizing the statute as delegating authority to the tribe rather than recognizing the tribe's inherent powers).

Indian Civil Rights Act of 1968 (ICRA).⁴⁶ Consistent with Pommersheim's comparative institutional sensitivity, however, the Supreme Court has interpreted the ICRA narrowly, holding that the statute embodies no implied private right of action for civil relief in federal court.⁴⁷ Thus, ICRA claims are the domain of the tribal courts, which therefore have the opportunity to place an indigenous interpretation on Anglo-American concepts such as due process and equal protection.

After providing an overview of this terrain (pp. 79-98), Pommersheim focuses his attention on a fundamental dilemma. Within this shared federal-tribal judicial domain, tribal courts can function well only if they have legitimacy both in the tribe and in the federal system. Without this dual legitimacy, the tribal courts are doomed to ineffectiveness, for they will be either outsider federal agencies without any tribal support or indigenous actors lacking the federal backing necessary to withstand attack within the broader legal system. Yet there is great tension in this enterprise, for the indigenous qualities that may foster legitimacy within the tribe may undercut the legal-process values necessary for legitimacy within the broader legal community as well as within some segments of the tribal community itself.

Pommersheim sees the issue essentially as an overlapping problem of the construction of legal institutions and law. Tribal courts must have the legitimacy necessary both within the tribe and the federal system to elaborate a body of law that itself will be legitimate from the dual perspectives of the tribe and the federal courts. Thus, in Chapter Three, he considers ways to foster the institutional legitimacy of tribal courts, and, in Chapter Four, he turns to how the jurisprudence of tribal courts might unfold. He speaks, of course, from the practical experience of a sitting tribal appellate judge.⁴⁸

His general prescriptions are, it seems to me, quite appropriate. He is right to suggest that, once tribal courts attain the formal legitimacy necessary under the rule of law — for example, they are duly established by a federally recognized tribe — they should concentrate on developing a contextual legitimacy running simultaneously in two directions (the tribal and the federal) more than on other, more formal institutional matters. To illustrate the problem, consider a fundamental issue of the formal and the functional: the absence of a separation of powers in many tribal constitutions, and the

46. Pub. L. No. 90-284, tit. II, §§ 201-203, 82 Stat. 77 (1968) (codified at 25 U.S.C. §§ 1301-1303 (1994)).

47. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59-72 (1978) (finding only remedy enforceable in federal court is habeas corpus).

48. See *supra* text accompanying note 12.

real possibility that the tribal government may refuse to obey a tribal court decision or might even attack the institution of tribal courts itself by seeking to remove the judge or abolish the judiciary. As a formal matter, one might attempt to remedy this situation by seeking an amendment to the tribal constitution. Presented this abstractly, however, why should tribal members support this reform? For what practical and experiential reasons might they wish to invest such faith in often untested tribal courts?⁴⁹ In place of formal reform based on abstract political theory and leaps of faith, Pommersheim seems to suggest that the tribal courts must make their legitimacy the old-fashioned way — they must earn it, through the hard, even courageous work of developing an authentic indigenous jurisprudence that nonetheless accords with the fundamental Anglo-American legal-process values expected by both the federal courts and many tribal members.

More particularly, to foster the contextual legitimacy of tribal courts, Pommersheim proposes that these courts focus on bringing together the practitioners involved with them — attorneys as well as tribal advocates without any formal legal training — “to form a community helping to carry out an important legitimating function” (p. 71). A tribal bar examination, tribal ethics code, and programs of continuing legal education would foster the development of a professional community that both actually serves the tribal and federal communities well and creates the patina of professionalism that will lend confidence to the whole operation. More generally, the tribal bar could become a unique interpretive community that could guide the difficult process of molding tribal-court adjudication to serve the twin functions of tribal and federal legitimacy.

Pommersheim is surely right to seek such a cooperative effort in the construction of contextual legitimacy for tribal courts. After all, as Steven Burton has explained in a work on which Pommersheim relies,⁵⁰ it is the work of the legal interpretive community within its

49. Lest this seem a question with an obvious answer, consider whether Americans today would support the institution of *Marbury v. Madison*-style judicial review if a new Constitution were being drafted and submitted to a plebiscite. The much-debated “counter-majoritarian difficulty” that envelops much public-law scholarship is usually discussed at the level of abstract political and moral philosophy. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (1962). The people, in place of the scholars, would see the issue much more practically, I would think, and their views will depend upon their own encounters with the judiciary and their practical fears or hopes concerning a political and administrative process unconstrained by constitutional judicial review. The people’s own narrative relationship with the story of *Brown* — or the story of *Roe*, or the story of police practices in their communities, and so on — would surely have more persuasive force than a scholar’s theoretical contributions.

Similarly, when the federal government investigates the operations of tribal courts, it examines the day-to-day successes and failures, not mere abstract principles such as tribal sovereignty or the separation of powers. See p. 132.

50. See p. 223 n.49 (citing STEVEN BURTON, *AN INTRODUCTION TO LAW AND LEGAL REASONING* (1985)).

complex, controversial, but substantially overlapping web of beliefs that specifies the processes and substance of law, as well as its legitimacy, far more than formal deduction from first principles. Moreover, this linkage of education concerning the unique aspects of indigenous law and tribal courts with the role of a professional community is reminiscent of Richard Posner's suggestion concerning the most basic goals of legal education.⁵¹

Pommersheim maintains this antiformalist theme when more directly considering the substance of tribal law. Here he firmly ties himself to the mast of much postmodern legal scholarship. Based on the work of Martha Minow,⁵² he posits a dilemma of difference in this context — when should we view tribal institutions and law as different from their dominant-society counterparts in order to reflect authentic values, and when would we see such visions of differences as stigmatizing and hindering the goals of legitimating them within both the tribe and the dominant society? He posits three tribal-court tools for carving out legitimate differences: language, narrative, and the pursuit of justice (p. 103).

In essence, he posits a hermeneutical tribal approach to deploying and interpreting legal language in a manner that holds some promise of legitimate legal evolution and reform.⁵³ Narratives by tribal courts can educate the dominant society about competing cultural and moral visions, as well as demonstrate concrete reasons why these courts might give little force to some aspects of law imposed upon them from above. Pommersheim illustrates this point of tribal counternarrative by mentioning a tribal appellate opinion he wrote that skeptically viewed a provision of the tribal constitution limiting civil judicial jurisdiction over non-Indians because it

51. As Posner notes:

The most important thing that law school imparts to its students is a feel for the outer bounds of permissible legal argumentation at the time when the education is being imparted. (Later those bounds will change, of course.) What "thinking like a lawyer" means is not the use of special analytic powers but an awareness of approximately how plastic law is at the frontiers — neither infinitely plastic, . . . nor rigid and predetermined, as many laypersons think — and of the permissible "moves" in arguing for, or against, a change in the law. It is neither method nor doctrine, but a repertoire of acceptable arguments and a feel for the degree and character of doctrinal stability, or, more generally, for the contours of a professional culture — a professional culture lovable to some, hateful to others.

RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* 100 (1990).

52. See p. 235 n.1 (citing MARTHA MINOW, *MAKING ALL THE DIFFERENCE* (1990)).

53.

Reading has two faces. One is the text or source of law anchored in some time past. The second is the current situation of the reader presently seeking to understand the text and to apply it to the situation at hand. The resulting "reading," whatever it is, meshes two times, two places, and two interpretations. This process is essentially dialectic in nature and entertains (at least theoretically) the possibility of the emergence of a new synthesis that is less lethal or even nonlethal. As the legal reader must respect the text, however oppressive it might be, so too the text must respect the reader's aspiration and otherness.
P. 104.

was the result not of indigenous concerns but rather of unilateral intrusion by the Bureau of Indian Affairs (pp. 108-09). Embracing the work of James Boyd White (pp. 112-15), Pommersheim views the pursuit of justice as an act of "translation," the liberating of legal texts from any obsolete associations surrounding their origin and the transformation of meaning in light of current context. These hermeneutical, narrative, and translational moves, Pommersheim suggests, should incorporate the emerging international human rights norms concerning indigenous persons (pp. 123-26) and suggest concrete modifications of federal public law, including the abandonment of the plenary power doctrine,⁵⁴ greater respect and autonomy for tribal sovereignty, and a more coherent set of doctrines (pp. 120-22).

Although much of his analysis has the signature of recent humanistic legal scholarship, he ends this discussion with a nod to institutional imperatives in law that would make any traditional legal-process scholar proud. For Pommersheim, "all significant public values are realized through institutions. Better institutions are essential to better lives" (p. 131). The failure of federal Indian law to pay sufficient attention to this issue has "create[d] a grossly distorted picture of the relationship of law to sovereignty" (p. 131) in the field that unduly values the mere federal endorsement of the concepts of tribal sovereignty and tribal courts without concerning itself with the actual development of flourishing institutions with appropriate procedures.⁵⁵

It is in this discussion, I think, that Pommersheim himself runs into an essentially insoluble dilemma — not one of difference, but of diffusiveness. He talks about the importance of concrete context, but much of the presentation is made secondhand, through postmodern, abstract scholarly moves. This is an inevitable problem in antiformalist legal scholarship, but it is an acute one in this context, where tribal courts and law are especially foreign to readers.

I know of no way to solve this difficulty. Enlightening the abstract discussions of dilemmas of difference, narratives, justice as translation, and so on, through the use of examples is, however, surely an ameliorative technique. Pommersheim does attempt to do just that. For example, he refers to those involved in the tribal judicial system as working together in many small ways in the shared enterprise of moving tribal courts toward legitimacy (pp. 59, 127-28). He highlights a field trip his class took to the Rosebud

54. See *supra* text accompanying note 34.

55. Cf. HART & SACKS, *supra* note 18, at 3-6 (conducting a legal-process analysis of the development and operation of a system of institutionalized procedures for settling societal questions).

Sioux Tribal Court, where the chief judge told the students about his efforts to promote the legitimacy of the court by traveling throughout the small communities on the reservation and talking with tribal members about the work of the court. The class also observed the judge handle an intrafamily dispute, in which he followed tribal custom in essentially allowing the parties to speak without interruption and in their native language.⁵⁶ Pommersheim refers to various provisions of tribal law to illustrate jurisdictional issues (pp. 79, 85-87) and law reform (pp. 127-28). He uses several tribal court opinions to exemplify the application of tribal law against the backdrop of federal authority.⁵⁷ He reminds practitioners that tribal courts are the authoritative expositors of tribal law, and thus that state cases are not dispositive and decisions of other tribal courts might be persuasive (pp. 128-29).

Pommersheim does not supplement these firsthand South Dakota experiences with those found in tribal courts elsewhere. That choice is defensible, for a wider sweep might have diluted his focus. Nonetheless, the interested reader would profit from an examination of the literature on other tribal courts.⁵⁸ In particular, if the separation of powers and tribal court independence are major concerns, as Pommersheim (pp. 68, 73-74) and others⁵⁹ have explained, an examination of these subjects both from Pommersheim's South

56. See pp. 69-70; see also pp. 131-32 (noting that the chief judge holds week-long court open house, hosts presentations about the court, and has organized an advisory group concerning tribal court practice that is the precursor to a bar association).

57. See pp. 88-89 (observing that one tribal court adopted "minimum contacts" test of *International Shoe v. Washington*, 326 U.S. 310 (1945), for due process limits on tribal court jurisdiction under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (1994)); *supra* text accompanying note 54.

58. See, e.g., Dennis W. Arrow, *Oklahoma's Tribal Courts: A Prologue, The First Fifteen Years of the Modern Era, and a Glimpse at the Road Ahead*, 19 OKLA. CITY U. L. REV. 5 (1994); Michael Taylor, *Modern Practice in Indian Courts*, 10 U. PUGET SOUND L. REV. 231 (1987); Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225 (1989); Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225 (1994); Jayne Wallingford, *The Role of Tradition in the Navajo Judiciary: Reemergence and Revival*, 19 OKLA. CITY U. L. REV. 141 (1994); Robert Yazzie, "Life Comes From It": *Navajo Justice Concepts*, 24 N.M. L. REV. 175 (1994); Frederic Brandfon, Comment, *Traditional and Judicial Review in the American Tribal Court System*, 38 UCLA L. REV. 991 (1991); Daniel L. Lowery, Note, *Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969-1992*, 18 AM. IND. L. REV. 379 (1993). On the relationship of tribal courts to the larger judicial system, see Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841 (1990); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989).

59. See, e.g., Brandfon, *supra* note 58, at 1006-09; Valencia-Weber, *supra* note 58, at 238 n.40.

Dakota perspective⁶⁰ and from elsewhere⁶¹ would seem especially useful. Pommersheim acknowledges the importance of the issue and opines that “[m]any tribes are sensitive to this problem and have moved to a policy of de facto, if not de jure, separation of powers” (p. 74). His support for this generalization, however, rests only on his own personal experiences in South Dakota and on conversations with Indian judges there (p. 225 n.71), which may leave some readers unsatisfied concerning the validity of the conclusion locally, not to mention nationally. He does note that the Cheyenne River Sioux Tribe, for which he sits as an appellate judge, recently amended its constitution to incorporate a formal separation of powers (p. 74).

Despite these efforts, and for all of his emphasis upon context, Pommersheim’s discussion of tribal courts and law seems more abstract and less intensely human than his discussion of the reservation as place. Of course, it may simply be that talking about law and legal institutions cannot be carried out with the same sense of humanity as talking about a cultural and sovereign homeland for a people. The typical lawyer’s joke is premised on precisely this notion of the disjunction between law and the profession of lawyering on the one hand and life and the needs of ordinary people on the other. For Pommersheim, of course, the problem is essentially that he has joined the other side — the perspective of life in general and tribal members in particular — while simultaneously writing descriptively and prescriptively about the law of, and the profession of lawyering in, tribal courts. I was not left disappointed with his discussion so much as left longing for more concrete examples and guidance concerning this challenging and important topic.

60. *See* *Runs After v. United States*, 766 F.2d 347 (8th Cir. 1985) (affirming federal district court’s refusal to intervene into Cheyenne River Sioux Tribe election dispute despite allegations that the tribal council had terminated a tribal judge and rescinded the tribal court’s order requiring reapportionment of tribal council in accord with results of referendum election); *LeCompte v. Jewett*, 12 ILR 6025, 6027 (Chy. R. Sx. Ct. App. 1985) (adopting *Marbury* approach to judicial review of actions of tribal council and undertaking judicial supervision of tribal elections). Presumably Pommersheim would approve of this scenario: the federal courts stayed their hand, and the tribal court mustered the authority to impose judicial review. *See also* p. 74 (stating that the recently amended Cheyenne River Sioux Tribe Constitution incorporates formal separation of powers). It would have been interesting to read a discussion by Pommersheim of this or a similar tribal legislative-judicial confrontation.

61. *See* Valencia-Weber, *supra* note 58, at 238 n.40. Perhaps the most famous tribal appellate court opinion imposing judicial review in the face of the hostility of tribal leaders is *Halona v. MacDonald*, 1 Navajo Rptr. 189 (1978), in which the Navajo Court of Appeals invoked a power of judicial review even though the Navajo have no written constitution. *See id.*

III. CONTEXT, LEGITIMACY, AND THE FUTURE OF FEDERAL INDIAN LAW

Pommersheim is not alone in his suggestion for greater attention to context in federal Indian law.⁶² His major contributions, in my view, are twofold. First, his thick description of the reservation amounts to a translation of that context into words understandable by the larger legal community. Second, his analysis of the comparative institutional competence of tribal courts and federal institutions in accurately assessing this context and working within it to create legal doctrines that are both functional and normatively attractive is a major innovation.

True to his "inside-out" mission, Pommersheim focuses on indirect routes to reform — building the tribal judicial institutions necessary for an indigenous jurisprudence — rather than on direct doctrinal evolution of federal Indian law. To the extent that he discusses those doctrines, his most basic message is that federal Indian law simply should make way for the development of tribal jurisprudence.

A good illustration is his complaint about the plenary power doctrine. Under the case law, congressional power in Indian affairs is essentially limitless.⁶³ This doctrine is subject to a fairly obvious formal critique. It seems hopelessly inconsistent with one of the most basic principles of constitutional interpretation — the *McCulloch*⁶⁴ understanding that Congress possesses only those powers delegated to it in Article I or elsewhere in the Constitution.⁶⁵ Pommersheim alludes to this criticism (pp. 40, 44, 46-50, 120-21) but it seems clear that his major objection is not formal and doctrinal, but rather pragmatic and contextual. For tribes, the problem with plenary power is its "constant destabilizing threat to their very existence and right to self-determination" (p. 122). He urges con-

62. For relatively recent commentary, see Robert N. Clinton, *Reservation Specificity and Indian Adjudication: An Essay on the Importance of Limited Contextualism in Indian Law*, 8 *HAMLIN L. REV.* 543 (1985); Deloria, *supra* note 17; Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 *CAL. L. REV.* 1137, 1207-08, 1219-22 (1990); Carole Goldberg-Ambrose, *Not "Strictly" Racial: A Response to "Indians as Peoples"*, 39 *UCLA L. REV.* 169 (1991).

63. See Newton, *supra* note 34.

64. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

65. As explained earlier, the only mention of Indians in Article I provides Congress with the authority to regulate commerce with the tribes. See *supra* note 2. Far from being an express grant of unlimited power, under ordinary textual interpretation this clause creates the negative inference that Congress lacks authority to regulate Indian affairs except when commerce is concerned. Of course, other enumerated powers — the war power, the treaty power, power over federal lands and the admission of new states, and the like — may aggregate into a broad authority for Congress to engage in sovereign relations with tribes beyond the commercial context. Even when aggregated, however, Congress's authority in this area cannot be interpreted easily to be "plenary," if by that term unlimited authority is intended. See, e.g., Frickey, *supra* note 7; Newton, *supra* note 34, at 196.

gressional⁶⁶ or judicial⁶⁷ amelioration of the plenary power doctrine, but acknowledges the unlikelihood of such reforms in the immediate future.⁶⁸ He places his primary hope for reform not on the efforts of non-Indian public officials or scholars,⁶⁹ but on the tribal-federal institutional dialogue he has attempted to foster.⁷⁰

In the last analysis, for Pommersheim, the keys to reform in federal Indian law are translation, education, and a resulting empathy. Tribes are to be the primary actors, and federal and state political and judicial officials are left in a reactive posture — they are to defer rather than intrude, listen rather than command, empathize rather than colonize. He recognizes that “[t]he process of decolonization can *never* lead back to a precolonized society” (p. 99). Rather than “institutionaliz[ing] the false dichotomy of dominant versus indigenous” (p. 195), the reform must “synthesize the best of both worlds while actively seeking to achieve a sovereignty that realizes both the necessary federal deference and the normative space to make authentic and enduring tribal choices” (p. 195). He acknowledges that “[s]uch efforts flow not from mere academic inquiry but from work of the heart and mind” (p. 200). Indeed, he concludes the book as follows:

Inevitably, the feather of Indian law jurisprudence will continue to be a prominent one in the braid of tribal life, complete with the potential to advance and enrich the quality of contemporary indigenous (and majoritarian) life. This potential future is, however, by no means assured, for we must still meet the challenges of history, national diversity, and the ideal of justice. Yet we may be guided by the geography of hope, with its coordinates of commitment, respect, imagination, and engagement. [p. 200]

In a famous and eerily parallel passage, Emily Dickinson once wrote that “‘hope’ is the thing with feathers — That perches in the soul — And sings the tune without the words — And never stops

66. See pp. 189-90 (arguing that Congress should recognize perniciousness of plenary power doctrine and perhaps enact statute recognizing tribal sovereignty); see also pp. 190-91 (proposing a constitutional amendment recognizing permanence of tribes).

67. See pp. 190-93 (asking federal courts to reinvigorate tribal-sovereignty doctrine, perhaps in part by emulating the moral and ethical engagement Chief Justice Marshall demonstrated to some extent in early cases).

68. See p. 190 (concerning congressional action); pp. 144-53, 190-91 (noting that recent trends in Supreme Court have been adverse to tribal interests).

69. See p. 240 n.85 (“I believe most people in the field of Indian law, but particularly at the state and federal level, have little understanding or ‘feel’ for the real threat — used often enough in history . . . — that plenary power holds for Indian people and tribes.”).

70. Pommersheim states:

Reassertion of the sovereignty doctrine can be greatly augmented, in part, if the courts pay close attention to the articulation of tribal sovereignty as it emanates from tribal court jurisprudence. This emerging jurisprudence contributes significantly in advancing the tribal voice as part of the judicial dialogue on the parameters and contemporary meaning of tribal sovereignty.

P. 190.

— At all.⁷¹ Narratives rooted in original sin, of course, tend to generate this sort of a corresponding incarnation of hope as well as an ethic of conscience and good works. Federal Indian law, grounded as it is in a colonization based on dubious justifications,⁷² qualifies as such a narrative. Pommersheim, who acknowledges the influence of theology (p. 35), including that of the liberation variety (pp. 105-06), sees the hope for this narrative incarnate in tribal courts, whose “words and actions . . . do have their own unique ‘redemptive’ potential.”⁷³

Many readers will doubt whether those institutions, which Pommersheim admits are new and fragile, can withstand this stress.⁷⁴ No reader, however, could possibly doubt his sincerity or his engagement. For if others in the academy and elsewhere lack faith in the assurance of these things hoped for, they must respect Pommersheim’s conviction of things not seen, his courage in subjecting federal Indian law to the mirror of life, dim though the reflection may be.⁷⁵ In the end, no scholar should doubt his significant contribution to a field he rightly criticizes as removed from reality, impoverished of empathy, and lacking in the engagement “‘of our private integrity and our public duty . . . what Pascal called “the grandeur and the misery” of our common humanity.’”⁷⁶

71. Emily Dickinson, Poem No. 254, st. 1.

72. See *supra* text accompanying note 9.

73. P. 106. The relationship of law and religion is, of course, an immense topic well beyond the scope of this essay. Nonetheless, I cannot resist citing a provocative recent essay by Harold Berman on the spiritual qualities of both that seems consistent with Pommersheim’s underlying approach. See Harold J. Berman, *Law and Logos*, 44 DEPAUL L. REV. 143 (1994). One important commentator on law and religion, Milner Ball, has also published extensively on federal Indian law. See, e.g., MILNER S. BALL, *THE WORD AND THE LAW* (1993); Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1; Milner S. Ball, *Introduction to Symposium, Native American Law*, 28 GA. L. REV. 299 (1994); Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280 (1989).

74. See *supra* note 14 (summarizing the formidable tasks Pommersheim places before tribal courts).

75. Cf. *Hebrews* 11:1; 1 *Corinthians* 13:12. Hope that is seen is, after all, a contradiction in terms. Cf. *Romans* 8:24-25.

76. P. 35 (quoting the Christian commentator Jaroslav Pelikan).