

democracy, and civic participation—updated for new conditions. While Garry’s formalism evinces an almost willed amnesia, Brandeis’s penchant for pragmatism and experimentalism lead us to suspect that his interpretation of his fidelity to his professed principles might, as time goes on, prove disturbingly creative. Commonalities of principle aside, Brandeis and Garry have no choice but to translate an eighteenth-century past into a twenty-first century present, ideationally and institutionally, through a process of selective remembering and forgetting, that is, through ideology and interpretation. In the end, as Berk’s constructivism suggests, our assessment about the relationship between ideas and institutions may indeed be all (or largely) about the story.

**The Third Space of Sovereignty: The Postcolonial Politics of U.S.–Indigenous Relations.** By Kevin Bruyneel. Minneapolis: University of Minnesota Press, 2007. 320p. \$67.50 cloth, \$22.50 paper.

**Broken Landscape: Indians, Indian Tribes, and the Constitution.** By Frank Pommersheim. New York: Oxford University Press, 2009. 424p. \$35.00.  
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Frank Pommersheim explores familiar terrain in American Indian jurisprudence, the erosion of tribal sovereignty. *Broken Landscape* covers many of the Supreme Court cases commonly understood to have diminished the ability of tribes to exercise self-determination, but his intervention into this familiar problem is unique. According to Pommersheim, Native peoples were seen as being completely outside United States polity at the time the Constitution was drafted. The only mentions of Native peoples in the US Constitution presume Native nations to be foreign entities. Consequently, the various US Supreme Court decisions that attempt to domesticate the status of tribal nations do so without any constitutional basis.

Furthermore, argues Pommersheim, without a constitutional basis, federal Indian Law becomes adjudicated on the basis of common law—almost invariably to the detriment of tribes. The only decisions that seem to be less detrimental are those that involve specific congressional statutes (although, of course, not all congressional statutes are positive). Thus, it makes sense, according to the author, to counter the Supreme Court’s tendency to erode tribal sovereignty through a constitutional amendment in order to provide a check on its power. After all, he argues, United States legislators recognized that it was not possible to redress the historic legal oppression on African Americans or women without constitutional remedy.

To illustrate the distinctness of Pommersheim’s strategy, it might be helpful to compare his approach to that of Robert Williams’s *Like a Loaded Weapon* (2005). Both Williams and Pommersheim critique the Marshall Trilogy cases

for relying on the doctrine of discovery to render Native peoples as “domestic, dependent nations.” They both contend that these cases are based on racist assumptions of Native peoples. But Williams relies primarily on a critical race analysis to develop a solution based on common law. He contends that it is ironic that Native tribes often rely on the Marshall cases for their legal claims when the reasoning of these cases construct Native peoples as primitive savages. He contends that it is more appropriate to understand these cases as similar to the *Dred Scott* decision and *Plessy v. Ferguson*, and argues that the Marshall cases need to be similarly overturned. Pommersheim’s primary complaint, by contrast, is that these cases have no basis in the Constitution. Consequently, the limited protections that these Marshall cases afford Native tribes are easily eroded by subsequent Supreme Court decisions based on the preferred policy choices of the justices adjudicating that particular case. Congressional remedy through the passage of a constitutional amendment is therefore necessary.

Pommersheim identifies a central problem in federal jurisprudence is its interpretations of the Indian Commerce Clause. He notes that this clause presupposed tribal nations as foreign nations and, hence, gave Congress the sole authority to address commerce with tribal nations. However, the Supreme Court adopted an expansive and unwarranted reading of this clause to hold that Congress has plenary power over Native nations, even at the expense of treaty agreements signed between the federal government and Native nations. According to Pommersheim, the Court has delimited what counts as “commerce” for non-Native cases, such as in *United States v. Morrison*. But it has not limited its understanding of commerce with respect to the Indian Commerce Clause.

Pommersheim’s proposed constitutional amendment to address this problem: “The inherent sovereignty of Indian tribes within these United States shall not be infringed, except by powers expressly delegated in the United State by the Constitution . . . The Congress shall have the power to enforce, by appropriate legislation, the provisions of this Article” (p. 307).

The obvious counterargument against this specific amendment is that it presumes that Congress and the Supreme Court agree that congressional plenary power is not based on constitutional authority. But since the decisions that Pommersheim critique all base the constitutionality of their decisions on the Indian Commerce Clause, such an amendment would not necessarily challenge current exercises of congressional plenary power. Since his primary concern is to establish some boundaries on the Indian Commerce Clause, it is not clear how this amendment would accomplish that goal.

Pommersheim does note that there are other constitutional proposals that have more specificity. For instance, one such approach is tribal federalism whereby the constitutional amendment would more specifically give tribes

the powers and rights of states. He seems supportive of many aspects of this proposal, but ultimately feels that it would never be passed. He also rejects the strategy employed by some scholars and activists that the United States should reopen treaty negotiations with tribes. This cannot happen, he argues, since treaties presume the other body is “foreign,” which would be inconsistent with the fact that Native peoples are now recognized as US citizens. Of course, many peoples who propose that strategy are also contesting the notion that Native peoples should be US citizens, and are calling for treaties specifically in order to assert their “foreignness.” Such advocates often favor a legal approach based on international law that would call for the recognition of indigenous sovereignty. Pommer-sheim’s proposed amendment in essence forecloses any legal claims to independence. He is not unsympathetic to international legal strategies but considers them limited because federal jurisprudence does not generally recognize international law.

Kevin Bruyneel’s *The Third Space of Sovereignty* similarly analyzes the shortcomings of Indian law and policy but is not concerned so much with making legal or policy recommendations. Rather, he makes a more theoretical argument about how to understand US tribal relationships within a conceptual framework of sovereignty. As with Pommer-sheim, Bruyneel describes the tensions within Native law and policy that renders Native peoples both inside and outside US polity. He argues that most legal scholars try to address this tension by proposing the eradication of this boundary by making Native nations either more “inside” or “outside” the United States. Rather than attempt to resolve this tension, Bruyneel asks us to understand this tension as a “third space” of sovereignty. He coins the term from post-colonial theorist Homi Bhabha, although he defines the term differently. According to Bruyneel, the third space of sovereignty “resides neither simply inside nor outside the American political system but rather exists on these very boundaries, exposing both the practices and contingencies of American colonial rule” (p. xvii).

Bruyneel uses this analytic to explore some flashpoints in tribal history that illustrate the complexities of US Native colonial relationships, such as Indian removal, the settlement of “Indian country,” Red Power, and Indian gaming. To illustrate his methodology, Bruyneel’s first case study is the creation of Indian Territory. He contends that under Indian Removal, the United States sought to externalize Native tribes to the west of the Mississippi by containing them within Indian Territory. However, during the Civil War, both the North and the South fought over the tribes to gain their allegiances. In addition, as western expansion continued, treatment of Native tribes as outside US polity became undesirable. Eventually, Indian Territory became incorporated in the United States. Thus, the extent to which Native tribes are internalized or externalized within US polity becomes a matter of debate at

any moment in time, and shifts depending on the exigencies of that moment.

At the same time, preferred strategies for independence by Native nations are also complex and contested. Bruyneel notes that while Red Power activists and scholars often argued for self-determination, they did not necessarily seek complete separation from the United States. He argues that these complexities should not be seen as contradictions to be resolved so much as necessary residuals of the colonial condition. Bruyneel provides a rich analysis of some of the central conflicts between Native peoples and the federal and state governments. He takes care to demonstrate that there are not simply “two sides” in these conflicts, but that there is a complex interplay of wide-ranging and conflicting interests that determine the terrain of struggle.

Bruyneel asserts that the third space of sovereignty is “not an unqualified or unproblematic ideal” (p. 25), but, unlike Bhabha, he tends to use the term prescriptively as well as descriptively. Bhabha’s analysis addresses the conservativizing function of a third space—it functions to relieve the anxieties created by the conditions of colonialism in order to allow these conditions to continue. Bruyneel, by contract, holds the third space to be an alternative to two “false choices,” independence and assimilation. In addressing these false choices, he provides considerable space for voicing the logics of those who support Native assimilation, as well as demonstrating that those policymakers who support “assimilation” are themselves not singular in their purpose and effect. However, he gives very little space to those who would support complete decolonization and independence. There is no mention of Red Power activists who opposed capitalism and tied Native struggles to global movements for liberation. There is no space provided to those who do (did) not simply argue that the United States should leave Native nations alone, but also challenged the continued existence of the settler state itself. The one exception is his discussion of Taiaike Alfred’s work, but Bruyneel does not engage his more radical book, *Wasase* (2005). On the one hand, Bruyneel’s approach provides a helpful corrective to the presumed politics of purity that often plagues Native studies. At the same time, his approach seems to foreclose more radical political possibilities.

One way to distinguish Bruyneel’s argument would be to contrast it with Scott Lyon’s *X-Marks* (2010). Lyons and Bruyneel make similar arguments that Native peoples who historically collaborated in treaty-making or other governmental processes did so with an assent of sorts and should not retroactively be read as traitors or assimilationists. Under the conditions they faced, they made the best choices available in order to preserve the well-being of Native peoples in the future. But Lyons proffers a vision of decolonization that is not premised on the continuation of capitalism and the nation-state. He contends that a project of decolonization

begins with the apparatuses that we have at our disposal. However, he does not presume that the settler states will necessarily continue. Bruyneel, by contrast, gives no indication that the current colonial arrangements ever will or should change. Given the permanency of settler colonialism, not only does he recommend that we understand the third space as a necessary condition of colonialism, but he also implicitly suggests that it is the preferred space for articulating political demands.

Both of these books provide helpful analytics and strategies for addressing the continued assault on tribal sovereignty in the short term. Pommersheim directs us to practical legal strategies though constitutional remedy that can stop the US Supreme Court's erosion of tribal sovereignty. Bruyneel reframes the analytics by which we understand sovereignty struggles. He advocates that we reject simple binaries in which Native peoples must be either completely assimilated into US polity or solely outside it. Such a binary always positions Native peoples as a disappointment whenever they fail to escape colonial conditions completely. Given the continued and dire assaults on Native sovereignty brilliantly outlined by Pommersheim and Bruyneel, the strategies and analytics they proffer are critically important. To explore the writings of scholars who articulate a longer-term vision of ending settler colonialism, those of Waziyatawin, Jennifer Denetdale, Taiaiake Alfred, Glen Coulthard, Robert Nichols, Dian Million, and Jennifer Denetdale provide a helpful starting point.

**James Madison Rules America: The Constitutional Origins of Congressional Partisanship.** By William F.

Connelly, Jr. Lanham, MD: Rowman & Littlefield. 2010. 339p. \$64.95.  
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For decades, scholars have been asking what motivates members of Congress. Some of the most enduring works in this regard have tried to explain congressional action by focusing on rational choice, institutional structures, or both. For instance, in *Congressmen in Committees* (1973) and *Home Style* (1978), Richard Fenno claims that members of Congress are rational actors whose goals are shaped, in part, by congressional committee structure and the makeup of their constituencies. Another seminal work, David Mayhew's *Congress: The Electoral Connection* (1974), views reelection as the proximate goal, but how members achieve this can only be understood by examining the rules of Congress and its structure. William F. Connelly's *James Madison Rules America* synthesizes these and other traditions by claiming that rational choice and institutions both matter.

Connelly's work begins with a rather simple question: "Should the minority party in the House adopt a strategy of compromise or confrontation in seeking to advance their agenda and ambition?" (p. 1). From this, he builds

on many other questions about the best ways for members of Congress to achieve their goals, which include not just reelection but also "reputation, honor, love of the Senate or House, concern for the common good, patriotism, and even veneration for the Constitution" (p. 174). James Madison, claims Connelly, correctly identified these diverse goals. Indeed, Madison noted in *Federalist* No. 10 that the latent causes of faction are sewn into the seeds of man; these include differences of interest, opinion, and passion—meaning that more than self-interest (i.e., reelection) motivates the members. Connelly correctly understands Madison's complex, realistic view of human nature and the varied motivations that Madison believed we all possessed. Madison expressed this realism throughout his career in many works, including both before and after he penned his selections to *The Federalist*.

Connelly goes further, describing Madison and the other Founders' enduring influence. Not only are House members and Senators motivated by more than their own interests; the structure of Congress and the Constitution also mold their goals and actions. In other words, institutions matter. Connelly correctly illustrates the differences between the British parliamentary system and our system of separated powers. Each party in the British system knows if it is in the majority or the minority once a government is formed. In the United States, however, it is not that simple. The author explains that both the majority party and the minority party in Congress can be the government and the opposition at the same time. For instance, in divided government, the majority party in Congress may be acting in opposition to the president of the other party (p. 3). Likewise, even if a party holds majorities in both chambers of Congress, the House will tend to be more parochial in nature and the Senate more national in nature because of the different constituencies they have (p. 168), and this was even more the case under Madison's original design, wherein senators were selected by state legislatures (p. 240). Thus, Madison and the other Founders still influence how members of Congress act and what they need to do to be successful.

Madison's view, just like his system, was a complex one. Pluralism, the Wilsonian vision of party government, and rational choice all bring something to the table, but only if we incorporate all of these paradigms do we fully understand partisan behavior in Congress. According to Connelly, our "republican institutions balance the ambition of individuals, the pluralism of intense minorities, and the majoritarianism of party government" (p. 233). Again, he demonstrates that he grasps Madison's complex vision, one that too many, including political science giants such as Woodrow Wilson, have misunderstood. Connelly himself points this out, noting that Wilson's simplistic vision of the separation of powers as nothing more than checks and balances misses the Madisonian mark because this