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Authors

Carpenter, Kristen A

Katyal, Sonia K

Riley, Angela R

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KRISTEN A. CARPENTER, SONIA K. KATYAL, AND ANGELA R. RILEY

In Defense of Property

ABSTRACT. This Article responds to an emerging view, in scholarship and popular society, that it is normatively undesirable to employ property law as a means of protecting indigenous cultural heritage. Recent critiques suggest that propertizing culture impedes the free flow of ideas, speech, and perhaps culture itself. In our view, these critiques arise largely because commentators associate “property” with a narrow model of individual ownership that reflects neither the substance of indigenous cultural property claims nor major theoretical developments in the broader field of property law. Thus, departing from the individual rights paradigm, our Article situates indigenous cultural property claims, particularly those of American Indians, in the interests of “peoples” rather than “persons,” arguing that such cultural properties are integral to indigenous group identity or peoplehood, and deserve particular legal protection. Further, we observe that whereas individual rights are overwhelmingly advanced by property law’s dominant ownership model, which consolidates control in the title-holder, indigenous peoples often seek to fulfill an ongoing duty of care toward cultural resources in the absence of title. To capture this distinction, we offer a stewardship model of property to explain and justify indigenous peoples’ cultural property claims in terms of nonowners’ fiduciary obligations toward cultural resources. We posit that re-envisioning cultural property law in terms of peoplehood and stewardship more fully illuminates both the particular nature of indigenous claims and the potential for property law itself to embrace a broader and more flexible set of interests.

AUTHORS. Kristen A. Carpenter is Associate Professor of Law, University of Denver Sturm College of Law. Sonia K. Katyal is Associate Professor of Law, Fordham School of Law. Angela R. Riley is Professor of Law, Southwestern Law School. The authors would like to thank Nestor Davidson, David Fagundes, Martin Flaherty, Matthew L.M. Fletcher, Carole Goldberg, Tracy Higgins, Neal K. Katyal, Esther Lucero, Kevin Noble Maillard, Hiroshi Motomura, Stephen Munzer, Eduardo Peñalver, Gowri Ramachandran, Kal Raustiala, Russell Robinson, Susan Scafidi, Joseph William Singer, Alex Tallchief Skibine, Madhavi Sunder, Josh Swartz, Christine Tan, Molly Van Houweling, Robert A. Williams, Jr., Thatcher Wine, and participants at the University of Colorado Property Works in Progress Symposium, the Center on Property, Citizenship, Society, and Entrepreneurship at Georgetown Law School, and faculty workshops at Michigan State Law School, University of California Hastings College of the Law, University of California Irvine School of Law, UCLA School of Law, Santa Clara Law School, Southwestern Law School, University of New Mexico School of Law, and Cornell Law School, for helpful comments.



ARTICLE CONTENTS

INTRODUCTION	1024
I. CONCEPTIONS OF CULTURAL PROPERTY	1030
A. An Indigenous Legacy of Cultural Property	1032
B. Critiques of Cultural Property	1038
1. A View from the Marketplace of Goods	1039
2. A View from the Cultural Commons	1041
3. A View from Cosmopolitanism	1044
II. PEOPLEHOOD AND CULTURAL STEWARDSHIP	1046
A. From Personhood to Peoplehood	1046
1. Conceptualizing Peoplehood from Personhood	1050
2. Indigenous Peoplehood and Cultural Property	1060
B. From Ownership to Stewardship	1065
1. Introducing Cultural Stewardship: Views from Indigenous, Corporate, and Environmental Theory	1067
2. Liability Rules, Governance, and Stewardship	1079
3. Dynamic and Static Stewardship: Fungibility and Inalienability	1083
III. INDIGENIZING CULTURAL PROPERTY	1088
A. Tangible Cultural Property	1089
B. Intangible Cultural Property	1097
C. Real Cultural Property	1112
CONCLUSION	1124

INTRODUCTION

There is a quiet—and somewhat ironic—revolution underway in property law today. Though property law historically has been used to legitimize the conquest of indigenous lands, indigenous groups worldwide are now employing this same body of law to lay claim to their own cultural resources. In the United States, for example, Indian tribes have sought trademark rights in tribal symbols,¹ the return of Indian burial and ceremonial objects from museums,² easements in sacred sites,³ and ongoing title to aboriginal lands.⁴ American Indian tribes increasingly bring such claims, grounded in property law, to advance tribal sovereignty, self-determination, and cultural survival. Internationally, indigenous groups in places as diverse as Belize⁵ and Australia⁶

1. See Phil Patton, *Trademark Battle over Pueblo Sign*, N.Y. TIMES, Jan. 13, 2000, at F1 (discussing Zia Pueblo's request that the State of New Mexico pay the tribe \$74 million for the use of the Zia sun symbol, a sacred tribal image also used on the state flag and license plates).
2. See KATHLEEN S. FINE-DARE, GRAVE INJUSTICE: THE AMERICAN INDIAN REPATRIATION MOVEMENT AND NAGPRA 91-97 (2002) (discussing the repatriation of Wampum Belts to the Six Nations and the return of Zuni War Gods to Zuni Pueblo). The case of the Wampum Belts, in particular, points to a long history of indigenous attempts to recover cultural property. See, e.g., *Onondaga Nation v. Thacher*, 189 U.S. 306, 309-11 (1903) (holding that federal courts lacked jurisdiction to hear a tribal appeal of a state court ruling against tribes seeking to recover from the defendant four wampum belts, to which the defendant asserted ownership by purchase but which were averred by the plaintiffs to be the property of a league of Indian tribes).
3. See *United States v. Platt*, 730 F. Supp. 318 (D. Ariz. 1990) (granting Zuni Pueblo a "prescriptive easement" over the lands of a private rancher and allowing religious leaders to conduct a sacred pilgrimage to Zuni heaven); Plaintiffs' Third Amended Complaint, *N. Cheyenne Tribe v. Martinez*, No. 03-5019 (D.S.D. May 23, 2003) (asserting easement and other property interests against development of sacred Bear Butte in South Dakota).
4. See *United States v. Dann*, 470 U.S. 39, 44, 50 (1985) (rejecting a tribal aboriginal title defense to the United States's trespass claim against the Western Shoshone, although leaving open claims of individual aboriginal title); *Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 5 rev. 1 ¶ 139 (2002) (finding that the United States had unlawfully deprived the Dann sisters of their rights, through actions that "were not sufficient to comply with contemporary international human rights norms, principles and standards that govern the determination of indigenous property interests").
5. See, for example, *Maya Indigenous Cmty. of the Toledo Dist. v. Belize*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 ¶¶ 5-6 (2005), which affirms the existence of a system of customary communal land tenure among the Maya villages of southern Belize. A similar decision affirming Maya property rights was subsequently issued by the Belize Supreme Court. See *Aurelio Cal ex rel. Maya Vill. of Santa Cruz v. Att'y Gen. of Belize* (Sup. Ct. Belize Oct. 18, 2007) (unreported), available at https://www.law.arizona.edu/Depts/iplp/advocacy/maya_belize/documents/ClaimsNos171and172of2007.pdf.

have also turned to property law to challenge the expropriation of their lands, medicines, ceremonies, artwork, and natural resources.⁷

These examples are not isolated; rather, they reflect the emergence of a distinct area of law that focuses on land, traditional knowledge, and other interests often associated with the cultural heritage of indigenous groups. This body of cultural property law is unique because it traverses not only the boundaries between properties—real, personal, and intellectual—but also the boundaries between international, domestic, and tribal law. Indeed, on September 13, 2007, after twenty-five years of negotiation, the United Nations adopted the Declaration on the Rights of Indigenous Peoples,⁸ which contains numerous provisions explicitly recognizing the collective property rights of indigenous peoples to both tangible and intangible resources.⁹

Yet just as the international community begins to reckon with protecting indigenous cultural heritage, many scholars, often from diverse disciplines, are intensely critical of the concept. In a recent *New York Times* column, Edward Rothstein complained that cultural property laws had engendered “a new form

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6. See, e.g., *Yumbulul v. Reserve Bank of Austl.* (1991) 21 I.P.R. 481, available at <http://www.austlii.edu.au/au/cases/cth/FCA/1991/332.html> (rejecting a challenge by an Australian Aboriginal artist to a bank’s reproduction on a \$10 note of one of his designs of the Morning Star Pole, with the artist asserting that his right to make the Morning Star Pole was subject to the traditional norms and custodial management of the Galpu clan).
 7. For one provocative survey of indigenous cultural property claims, see WINONA LADUKE, *RECOVERING THE SACRED: THE POWER OF NAMING AND CLAIMING* 11 (2005), which situates indigenous claims to religious sites, natural resources, funerary remains, human tissue, symbols, artwork, mascots, songs, ceremonies, and food sources in the context of indigenous struggles to “heal . . . from the ravages of the past” by “recovering that which is ‘sacred’” through a process that is “essential to our vitality as Indigenous peoples and ultimately as individuals.”
 8. See Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007). While many of this U.N. Declaration’s specific provisions are potentially useful in indigenous property claims, we call particular attention to Articles 10, 26, 27, and 28 (involving various land rights, both substantive and procedural); Articles 11 and 12 (involving the right to practice indigenous cultures, religions, and ceremonies); Article 25 (involving the right to strengthen spiritual relationships with traditional territories); Article 31 (involving the right to their cultural heritage, traditional knowledge, and cultural expressions); and Article 34 (involving the right to their institutions, including spiritual and cultural institutions).
 9. For earlier international instruments protecting cultural property, see U.N. Educ., Scientific and Cultural Org. (UNESCO), Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 96 Stat. 2350, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention]; and Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Hague Convention].

of protection, philistinism triumphing in the name of enlightened ideas.”¹⁰ Legal scholars in particular—including those who typically align themselves with progressive causes—strongly criticize indigenous peoples’ efforts to assert ownership and autonomy over their tangible and intangible traditional resources, arguing that culture is and must remain part of an entitlement-free commons. In one recent article, for example, Naomi Mezey contends that “the idea of property has so colonized the idea of culture that there is not much culture left in cultural property.”¹¹ For Mezey, the notion of indigenous cultural property raises the likelihood that once indigenous peoples obtain title to cultural property, they will use it to exclude others—a practice that would inevitably limit the free flow of culture.

In our view, these critiques arise, in part, because of the absence of a coherent rationale that undergirds the protection of indigenous cultural property. Without a viable framework, scholars tend to link cultural property protections to a narrow paradigm of property itself, associating property with traditional rights of alienability, title, and exclusion, and norms of commodification and commensurability. Underlying many of these critiques is a deep and pervasive assumption that in order to obtain protections for cultural goods outside of the market, the law must create exceptions for certain groups.¹² Such views are evident in contemporary legal opinions, including the Ninth Circuit’s recent en banc decision in *Navajo Nation v. U.S. Forest Service*.¹³ In *Navajo Nation*, several tribes claimed that the Forest Service’s decision to allow the use of recycled water containing human waste for snowmaking on the San Francisco Peaks would violate the Religious Freedom Restoration Act by desecrating one of their most sacred sites and burdening numerous religious practices and belief systems.¹⁴ The Ninth Circuit’s opinion, rejecting the tribes’

10. Edward Rothstein, *Antiquities, the World Is Your Homeland*, N.Y. TIMES, May 27, 2008, at E1. For an eloquent articulation of a related view—that all cultures are the result of interaction across groups over time and therefore no culture should be empowered to own or possess its own productions—see Kwame Anthony Appiah, *The Case for Contamination*, N.Y. TIMES, Jan. 1, 2006 (Magazine), at 34.

11. Naomi Mezey, *The Paradoxes of Cultural Property*, 107 COLUM. L. REV. 2004, 2005 (2007).

12. See Eric A. Posner, *The International Protection of Cultural Property: Some Skeptical Observations*, 8 CHI. J. INT’L L. 213 (2007); cf. Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431 (2005) (discussing the unique and often complex nuances in the application of American law to Indian nations); Carole Goldberg, *American Indians and “Preferential” Treatment*, 49 UCLA L. REV. 943 (2002) (explaining the basis for a differentiated treatment of Indians under American law).

13. 535 F.3d 1058 (9th Cir. 2008). For more extensive discussion of this case, see *infra* Section III.C.

14. 535 F.3d at 1062–63.

claims, evinces the familiar fear that if the law were to protect Indian religious and cultural interests, Indians effectively would acquire “ownership” of the public lands.¹⁵

In reality, indigenous cultural property transcends the classic legal concepts of markets, title, and alienability that we often associate with ownership, making it all the more important for property scholars to evaluate its parameters. By challenging these classic property constructs, indigenous cultural property claims force us to contemplate the intellectual divide between two competing visions of property. The classic view of property law focuses on the predictability and certainty of protecting the individual owner’s rights of exclusion¹⁶ and alienation primarily for wealth-maximization purposes.¹⁷ Yet a more relational vision of property law honors the legitimate interests of both owners and nonowners, in furtherance of various human and social values, potentially including nonmarket values.¹⁸ Accordingly, the classic view focuses on property’s stabilizing force, whereas the relational view emphasizes its fluidity and dynamic character.¹⁹ Perhaps most problematic for indigenous

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15. See *id.* at 1072. In this portion of the opinion, the Ninth Circuit cites *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 453 (1988), for the point that “[n]o disrespect for these [American Indian religious] practices is implied when one notes that such beliefs could easily require *de facto* beneficial ownership of some rather spacious tracts of public property.” *Navajo Nation*, 535 F.3d at 1072. In *Lyng*, the Supreme Court held that Indian interests in preventing the desecration, and indeed destruction, of sacred sites on public lands did not violate the First Amendment, in part because “[w]hatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, its land.” 458 U.S. at 453.
 16. See Thomas W. Merrill, *Property and the Right To Exclude*, 77 NEB. L. REV. 730, 730 (1998) (calling the right of exclusion the “*sine qua non*” of property).
 17. See, e.g., RICHARD PIPES, PROPERTY AND FREEDOM, at xv (1999) (“*Property* refers to the right of the owner or owners, formally acknowledged by public authority, both to exploit assets to the exclusion of everyone else and to dispose of them by sale or otherwise.”); see also RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 57 (4th ed. 1992) (“[T]he law should require the parties to transact in the market; it can do this by making the present owner’s property right absolute (or nearly so), so that anyone who thinks the property is worth more has to negotiate with the owner.”).
 18. See JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 95-139 (2000) (proposing, as an alternative to the “ownership model,” that property be conceived instead as a “system” of “social relations” that takes into account the rights of owners and nonowners in furtherance of “human values”); see also Stephen R. Munzer, *Property as Social Relations*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 36-37 (Stephen R. Munzer ed., 2001) (surveying the works of Felix S. Cohen, Robert L. Hale, Joseph William Singer, Duncan Kennedy, C.B. Macpherson, and Jennifer Nedelsky).
 19. See Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 578-80 (1988) (commenting on the relationship between property rules that are “crystalline” and those that are “muddy”). Compare Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90

cultural property claims, the classic view of property law, including its ownership model, is intimately tied to a paradigm of liberal individualism. Current theories of property acquisition grounded in this tradition, whether economic or noneconomic, fail to take into account the prospect of group-oriented claims of custody and control that are so critical to the protection of indigenous cultural property.

Responding to this omission, and building on the foundational work of Margaret Jane Radin, this Article develops a model of property and peoplehood, and in so doing articulates a justification for group-oriented legal claims to indigenous cultural property. Peoplehood, we argue, dictates that certain lands, resources, and expressions are entitled to legal protection as cultural property because they are integral to the group identity and cultural survival of indigenous peoples. We develop this argument in reference to specific examples, such as the case of *Navajo Nation* and the protection of the San Francisco Peaks, demonstrating that some cultural resources are so sacred and intimately connected to a people's collective identity and experience that they deserve special consideration as a form of cultural property.

Our focus on peoplehood vis-à-vis personhood inspires us to look beyond the static forbearance of possessive individualism that finds such forceful expression in traditional models of property. Classic ownership theory tends to overlook the possibility of nonowners exercising custodial duties over tangible and intangible goods in the absence of title or possession. Yet indigenous peoples have historically exercised such custodial duties, both as a matter of internal community values that emphasize collective obligations to land and resources, and as a matter of practical necessity following the widespread divestiture of title and possession. Indigenous cultural property claims, and programs meant to effectuate them, thus reflect a fiduciary approach to cultural property that takes into account indigenous peoples' collective obligations toward land and resources. A wealth of literature has analyzed the notion of fiduciary duties, existing in either the presence or absence of title, in indigenous, corporate, and environmental theories of "stewardship." Drawing on this literature, we identify a similar fiduciary paradigm in the context of cultural property. To the extent that indigenous peoples' cultural property claims are premised on custodial duties toward specific properties, we argue that such claims are more appropriately characterized through the paradigm of

CORNELL L. REV. 531, 538 (2005) (arguing that "property . . . is organized around creating and defending the value inherent in stable ownership"), with GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776-1970*, at 5-7 (1997) (arguing that property rights depend on their contingency and malleability).

stewardship rather than ownership. Because they often act in the absence of title, such accommodations tend to fall outside the paradigms of individuality and alienability upon which classic property law is premised. Thus, without rejecting the force or utility of ownership, we propose that cultural property claims are often better explained and justified through a stewardship model that effectuates the dynamic pluralism of group-oriented interests.

Ultimately, our Article advances two central arguments: first, we assert that cultural property critics inappropriately ground their critiques in a narrow set of assumptions about property that are based principally on a presumptive model of individual ownership. We then draw extensively upon the unique historical relationship between indigenous peoples and property law, and upon established property theory, to advance our next claim. We contend that even where the law creates specific protections for indigenous peoples' cultural property, such protections are not always anathema to established property rules. Contrary to prominent critiques, cultural property law, in such contexts, is part and parcel of a system that seeks to distribute entitlements along a spectrum so as to accommodate both the ownership and stewardship interests that attach to owners and nonowners. We contend that indigenous cultural property claims can be both explained and justified by this more expansive understanding of property, which we articulate through peoplehood and stewardship.

Our Article proceeds as follows. In Part I, we lay the groundwork for a fuller understanding of the critiques that are often launched at indigenous cultural property claims. Here, we pay special attention to critiques that focus specifically on the role of the market, culture, and cosmopolitanism in the law, respectively, and the relationship that these arenas have to indigenous peoples' interests in preserving their cultural heritage. In Part II, we offer a model of property and peoplehood—one that takes into account the utility and significance of indigenous group identity in property claims and argues that such claims can be effectuated through a model of stewardship (a model which neither forecloses collective claims of ownership nor discounts the often overlapping nature of ownership and stewardship). Finally, in Part III, drawing on case studies from American Indian law, we apply our approaches of peoplehood and stewardship to the categories of tangible, intangible, and real cultural property. We explicate these claims with attention to indigenous peoples' particular relationships with land and a much larger body of property theory, taking this opportunity to defend property as a dynamic social institution with the power to transcend narrower visions espoused by critics.

I. CONCEPTIONS OF CULTURAL PROPERTY

In 1897, famed explorer Robert Peary brought six Inuit individuals of varying ages to the United States from Greenland. Peary reportedly was responding to pressure from the American Museum of Natural History, which had suggested that he bring back “living specimens” from his multiple trips.²⁰ Once the Inuit people arrived, they were put on display: it is claimed that thirty thousand New Yorkers paid twenty-five cents each to view them just two days after their arrival. Although Peary had promised the Inuit people that they would be able to return home, he shortly abandoned them to the museum, leaving no plans in place for their care, let alone their return. They remained housed there—first within the basement of the museum itself, and later at the home of the museum’s caretaker. Unfortunately, the cold and dank climate of the museum’s quarters proved too much for the small group, which had no resistance to the diseases they encountered.

A few months after their arrival, four of the Inuit died of tuberculosis. One of them was a man named Qisuk, who had come to America bringing his only living relative: his bright-eyed eight-year-old son Minik.²¹ Devastated by his father’s death, Minik pleaded with the museum to relinquish his father’s body so that he could perform the traditional burial rites required by his culture. To appease the distraught child, the museum staff performed an elaborate mock funeral—filling a coffin with stones, creating a covered “body,” and “burying” Qisuk by lamplight—all to convince Minik that he had met his goal of providing his father with a proper burial. In reality, instead of burying Qisuk, the body was turned over to the museum superintendent, who then defleshed, preserved, and prepared Qisuk’s skeleton for display at the museum.²²

When Minik reached his teenage years, still living in the United States, he discovered the horrifying truth: that the bones of his father had been mounted and preserved in the museum as the bones of a nameless, faceless Polar Eskimo.²³ Although Minik had many allies, including the superintendent himself (who, deeply regretting his role, later adopted Minik), he spent years

20. See KENN HARPER, *GIVE ME MY FATHER’S BODY: THE LIFE OF MINIK, THE NEW YORK ESKIMO* 24-25 (2000); see also Jo Carrillo, *The Repatriation of Cultural Property*, in *READINGS IN AMERICAN INDIAN LAW: RECALLING THE RHYTHM OF SURVIVAL* 153, 155-56 (Jo Carrillo ed., 1998) (discussing the story of Minik Wallace).

21. Qisuk’s story is not unique. See LADUKE, *supra* note 7, at 67-72 (discussing “Ishi,” a “living [Indian] specimen,” whose brain was sent to the National Museum for study after he succumbed to tuberculosis).

22. See HARPER, *supra* note 20, at 85.

23. *Id.* at 83-84.

locked in a painful struggle with the museum to give his father a proper burial. His efforts ultimately failed. Minik Wallace died at the age of twenty-eight, never having recovered his father's remains.²⁴ It was not until the subsequent passage of the Native American Graves Protection and Repatriation Act (NAGPRA) in 1990 that the museum quietly negotiated with the tribe for the repatriation of Qisuk's remains.²⁵

Minik's story highlights the dilemma of classifying something as incommensurate as a family member's remains as a type of property.²⁶ It seems patently unthinkable that property law should govern such an intimate domain.²⁷ Nevertheless, property law indisputably played a critical role in directing the disposition and fate of Minik's deceased father. Because Native Americans had no property rights in the burial remains of their people, they were unable to direct what happened to the artifacts and remains housed within museums.²⁸ NAGPRA changed the legal landscape in this regard. It required that federally funded museums with indigenous human remains, associated funerary objects, or objects of cultural patrimony within their possession or control must consult with the appropriate tribal groups and provide for repatriation upon the tribes' request.²⁹ Thus, NAGPRA employs the language of property to facilitate the return of items typically thought to transcend property concepts.

In this sense, NAGPRA and other cultural property laws raise a theoretical dilemma for both advocates and critics who grapple with core conceptual concerns about what cultural property comprises and about its relationship to property law more generally. In Section I.A, we explain briefly the roots of

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24. Minik's story was the subject of a bestselling book that ultimately inspired a movie based on his life. *Id.* at 83-85.
 25. *Id.* at 226-29. For a full discussion of NAGPRA, see *infra* Part III.
 26. As of 1990, it came to light that the Smithsonian Institute possessed about 18,500 Native American skeletons and that the Tennessee Valley Authority had about 10,000. Add to this the collections of other museums and the number may reach as high as two million. See Elizabeth M. Koehler, *Repatriation of Cultural Objects to Indigenous Peoples: A Comparative Analysis of U.S. and Canadian Law*, 41 INT'L LAW. 103, 111 (2007); Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 39 (1992).
 27. *Cf.* Janicki v. Hosp. of St. Raphael, 744 A.2d 963, 967-69 (Conn. Super. Ct. 1999) ("English law for a very long time recognized the anomalous rule that there can be no property in a corpse.").
 28. See Suzianne D. Painter-Thorne, Comment, *Contested Objects, Contested Meanings: Native American Grave Protection Laws and the Interpretation of Culture*, 35 U.C. DAVIS L. REV. 1261, 1270 (2002).
 29. 25 U.S.C. § 3005(a) (2000).

cultural property and lay forth its historical and contemporary genesis in the indigenous context. In Section I.B, we situate cultural property within the body of property law that affects indigenous peoples in particular, and outline some of the theoretical critiques that have been launched at its framework.

A. An Indigenous Legacy of Cultural Property

Cultural property has been referred to as property's "fourth estate"—the other three arenas being real property, intellectual property, and personal property.³⁰ Traditionally, cultural property referred to tangible resources bearing a distinct relationship to a particular cultural heritage or identity.³¹ Because of their cultural significance, these tangible resources—including documents, works of art, tools, artifacts, buildings, and other entities that have artistic, ethnographic, or historical value—were thought to transcend ordinary property conceptions and to merit special protection.³²

Consider a paradigmatic example. Sometime between the years 1801 and 1812, Thomas Bruce, the Earl of Elgin, physically removed about half of the surviving sculptures from the Greek Parthenon and sold them to the British

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30. Steven Wilf, *What Is Property's Fourth Estate? Cultural Property and the Fiduciary Ideal*, 16 CONN. J. INT'L L. 177, 177 (2001). There is a vast amount of literature on cultural property. For discussions of various perspectives, see, for example, SUSAN SCAFIDI, WHO OWNS CULTURE?: APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW (2005); WHO OWNS THE PAST?: CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW (Kate Fitz Gibbon ed., 2005) [hereinafter WHO OWNS THE PAST?]; Alexander A. Bauer, *New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates*, 31 FORDHAM INT'L L.J. 690 (2008); Sarah Harding, *Defining Traditional Knowledge—Lessons from Cultural Property*, 11 CARDOZO J. INT'L & COMP. L. 511 (2003); John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831 (1986), which describes national and international paradigms of cultural property; Lyndel V. Prott & Patrick J. O'Keefe, "Cultural Heritage" or "Cultural Property"?, 1 INT'L J. CULTURAL PROP. 307 (1992), which compares the two terms "cultural heritage" and "cultural property"; and Susan Scafidi, *Introduction: New Dimensions of Cultural Property*, 31 FORDHAM INT'L L.J. 684 (2008), which briefly discusses changes in cultural property over time. In the indigenous context, see U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on the Promotion & Prot. of Human Rights, *Report of the Seminar on the Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People*, U.N. Doc. E/CN.4/Sub.2/2000/26 (June 19, 2000) (prepared by Erica-Irene Daes).
31. See JOHN HENRY MERRYMAN, THINKING ABOUT THE ELGIN MARBLES (2000).
32. See LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 110 (2003); see also 1970 UNESCO Convention, *supra* note 9, art. 1, 96 Stat. at 2351, 823 U.N.T.S. at 234, 236 (defining cultural property as "specifically designated by each State as being of importance for archeology, prehistory, history, literature, art or science and which belongs to" one of a list of eleven categories). See also the implementing legislation enacted in 1983, Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, 96 Stat. 2350 (codified at 19 U.S.C. §§ 2601-2613 (2000)) (relying on a similar definition).

Museum for a substantial sum.³³ Almost two hundred years later, after numerous requests, the British Museum continues to refuse calls from the Greek government to repatriate the sculptures.³⁴ In response to the museum's refusal, one prominent Greek minister, Melina Mercouri, explained,

[T]hey are the symbol and the blood and the soul of the Greek people. . . . [W]e have fought and died for the Parthenon and the Acropolis. . . . [W]hen we are born, they talk to us about all this great history that makes Greekness. . . . [T]his is the most beautiful, the most impressive, the most monumental building in all Europe and one of the seven miracles of the world.³⁵

To this day the Elgin Marbles remain in the British Museum, where they are kept on display despite repeated requests for repatriation.

The case of the Elgin Marbles demonstrates that, notwithstanding the myriad statutes and international declarations that honor the right to culture, cultural property remains a politically complicated fixture. Unlike real, intellectual, and personal property, each of which has substantial prominence in the classic annals of property theory, cultural property falls into the grey area between these other realms. As Patty Gerstenblith has observed, cultural property is “composed of two potentially conflicting elements”: “culture,” which embodies group-oriented notions of value, and “property,” which traditionally has focused on individual notions of ownership.³⁶ Partly as a result, cultural property is often considered anathema to traditional property constructs and accordingly is afforded scant treatment in property theory. Today, because cultural property is partially intended to repair the ruptures associated with a history of colonization and capture, it also raises questions about the utility and appropriateness of property law as a remedy for harms suffered by indigenous peoples.

In the past several years, revolutionary changes in the cultural property field have contributed both to the salience of indigenous peoples' claims and to the arguments of theorists in opposition. The first major shift in the field involves a tremendous expansion of subject matter, loosening the requirements of materiality outward from “cultural property” and into the domain of

33. See MERRYMAN, *supra* note 31, at 24.

34. See *id.* at 24-25.

35. *Id.* at 25-26 (alterations in original) (quoting Melina Mercouri).

36. Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 567 (1995).

“cultural heritage.”³⁷ As a result, cultural property has expanded from the domain of the tangible into the domain of the intangible.³⁸ Contemporary legal instruments now include both long-recognized tangible resources (for example, land, water, and timber) as well as intangible ones (for example, medicinal knowledge, folklore, and Native religion).³⁹ Furthermore, by some definitions, the concept also now encompasses collections of fauna, flora, minerals, or other goods that may be of interest to paleontologists, anthropologists, and researchers in other specialized fields of knowledge,⁴⁰ in addition to property that relates to history and events of national importance.⁴¹

A second shift involves the increased visibility of indigenous peoples generally and a burgeoning movement to protect indigenous cultural existence. While the body of law known as cultural property affects all peoples (and likewise all nations), it carries a particular potency when situated alongside the interests of indigenous peoples. Though the term “indigenous” continues to be contested,⁴² every prevailing definition considers a people’s deep, historical,

37. Manlio Frigo, *Cultural Property v. Cultural Heritage: A “Battle of Concepts” in International Law?*, 86 INT’L REV. RED CROSS 367, 369 (2004); see also ECOSOC, *supra* note 30, ¶ 12, at 5.

38. See Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793, 812-13 (2001) (quoting Gerstenblith, *supra* note 36, at 562); U.N. Educ., Scientific and Cultural Org. (UNESCO), *Convention for the Safeguarding of the Intangible Cultural Heritage* (2003), available at <http://www.unesco.org/culture/ich/index.php?lg=EN&pg=home> (last visited Dec. 6, 2008).

39. See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 131-41 (2d ed. 2004) (reviewing international legal instruments, including the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), International Covenant on Civil and Political Rights (ICCPR), UNESCO Declaration of the Principles of International Cultural Cooperation and Universal Declaration on Cultural Diversity, and others that protect indigenous “cultural integrity”); *supra* note 8 (enumerating indigenous cultural heritage protections under the U.N. Declaration on the Rights of Indigenous Peoples); see also Tatiana Flessas, *Cultural Property Defined, and Redefined as Nietzschean Aphorism*, 24 CARDOZO L. REV. 1067, 1072-73 (2003) (describing the expansion of cultural property).

40. Flessas, *supra* note 39, at 1072.

41. *Id.*

42. See, e.g., Erica-Irene A. Daes, *An Overview of the History of Indigenous Peoples: Self-Determination and the United Nations*, 21 CAMBRIDGE REV. INT’L AFF. 7, 9 (2008) (“[T]here is not an international consensus on who indigenous peoples are: the term cannot be defined precisely or applied all-inclusively.”). Nevertheless, a working definition of “indigenous peoples” exists in the U.N. system:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non dominant [sic] sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their

ancestral roots to traditional lands as integral to indigeneity.⁴³ Numerous instruments and principles of international law have long provided potential protection for indigenous interests in cultural property.⁴⁴ Such international law instruments, including the American Convention on Human Rights and the American Declaration on the Rights and Duties of Man, recognize indigenous rights to property, religion, culture, association, and resources.⁴⁵

ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

Id. (quoting ECOSOC, Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, ¶ 379, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 (1987) (prepared by José R. Martínez Cobo).

For further commentary on the definitional challenges associated with the term “indigenous peoples” in both the domestic and international context, see, for example, *Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1143-44 (D. Or. 2002), *aff'd*, 367 F.3d 864 (9th Cir. 2004), which examines whether a 9000-year-old human skeleton was properly described as “Native American” in origin; WILL KYMLICKA, *THE INTERNATIONALIZATION OF MINORITY RIGHTS* (2007), which details problems that arise in applying burgeoning international collective rights standards to indigenous peoples as opposed to either national minorities or immigrant groups; Karin Lehmann, *To Define or Not To Define—The Definitional Debate Revisited*, 31 AM. INDIAN L. REV. 509 (2007), which discusses the question of whether the term “indigenous” applies to African groups; and Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CAL. L. REV. 801, 804 n.14 (2008), which describes challenges associated with defining the term “indigenous” in various political and legal settings.

43. See, e.g., ANAYA, *supra* note 39, at 3, 100-06 (“They are *indigenous* because their ancestral roots are embedded in the lands in which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity.”); see also *supra* note 42.
44. See Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1131-38 (2005); see also Memorandum from Robert T. Coulter, Executive Dir., Alexandra Page & Leonardo Crippa, Indian Law Res. Ctr., on International Human Rights Law Relating to Indigenous Sacred Sites (Oct. 16, 2006), available at http://www.indianlaw.org/sites/indianlaw.org/files/resources/hr_sacredsites.pdf.
45. See Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Ninth International Conference of American States, American Declaration of the Rights and Duties of Man, 1948, O.A.S. Res. XXX, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L/V/II.82, doc. 6 rev. 1 (1992). The implementation of these instruments is overseen by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. See also S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples’ Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 33 (2001) (reviewing cases that analyze indigenous land and resources claims under several legal instruments).

Despite their varying statutory applicability to the circumstances of particular countries, these international law instruments create normative expectations regarding the treatment of indigenous peoples, their lands, and their cultural resources by nation-states and their citizens.⁴⁶ Notably, in 2007, the U.N. General Assembly finally adopted the U.N. Declaration on the Rights of Indigenous Peoples. Though the United States—along with Australia, New Zealand, and Canada—opposed the Declaration, the document nevertheless stands as a powerful statement of indigenous cultural rights.⁴⁷ For example, the Declaration specifically provides that indigenous peoples have the collective right “not to be subjected to . . . destruction of their culture”⁴⁸ and to “practise and revitalize their cultural traditions and customs,” including “the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature.”⁴⁹

Somewhat different cultural property protections have emerged in the United States, not through the language of human rights, but through the vehicle of property law. Some of these protections preserve American cultural property generally (which can include indigenous cultural property but is not specific to it)⁵⁰ and some, such as NAGPRA and the Indian Arts and Crafts Act (IACA), are specifically directed at Indian cultural property.⁵¹ The breadth of

46. See Lorie M. Graham, *The Racial Discourse of Federal Indian Law*, 42 TULSA L. REV. 103, 120 (2006) (reviewing ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS AND THE LEGAL HISTORY OF RACISM IN AMERICA* (2005)) (debating the applicability of international human rights norms to cases involving American Indian property rights).

47. Declaration on the Rights of Indigenous Peoples, *supra* note 8; see Press Release, Gen. Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples; ‘Major Step Forward’ Towards Human Rights for All, Says President, U.N. Doc. GA/10612 (Sept. 13, 2007), <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>. The United States’s opposition focused primarily on its longstanding opposition to the recognition of indigenous groups as “peoples” under international law.

48. Declaration on the Rights of Indigenous Peoples, *supra* note 8, art. 8.1.

49. *Id.* art. 11.1.

50. See National Historic Preservation Act, 16 U.S.C. § 470 (2000); Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa-470mm.

51. See Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013; Indian Arts and Crafts Act of 1990, 25 U.S.C. § 305. For a discussion of NAGPRA and IACA, see *infra* Part III. In addition, tribal common law, legislative codes, and customary law may impose limits on alienability, proper care, and custodial guidelines for the cultural property of a specific tribe. See Angela R. Riley, “Straight Stealing”: Towards an Indigenous System of Cultural Property Protection, 80 WASH. L. REV. 69, 95-100 (2005).

the regulation and of the property interests in question has paved the way for a wide divergence of cases. Consider the following.

Sometime in the nineteenth century, the New York State Museum acquired from the Onondaga Nation twenty-six belts of “wampum” (colored clam and conch shells), which are used for trade and for recording significant community events. When the tribe sought repatriation, the museum refused to return the belts.⁵² Although the tribe initially lost the case, public outcry against the decision was so strong that the New York legislature passed an act requiring repatriation so long as the tribe preserved the belts at museum-grade standards.⁵³

In 1998, while visiting a storeroom at the American Museum of Natural History in New York, a Tlingit clan elder heard an “inner voice” calling him to a particular shelf.⁵⁴ When he reached the shelf, he was astonished to see a central part of Tlingit culture—an intricately carved wooden beaver—staring back at him. The carving had been sold by a clan member and had been missing since 1881. Under NAGPRA, the carving was returned to the Tlingits at their request.⁵⁵

In 2004, seventy-two members of the Havasupai tribe, a geographically isolated tribe based at the foot of the Grand Canyon, filed suit against Arizona State University for performing allegedly unauthorized genetic studies on four hundred blood samples that researchers had gathered, allegedly for the purpose of testing for diabetes. The researchers regarded the blood samples as a virtual “gold mine,” given the tribe’s geographic isolation, and used them to conduct research on schizophrenia and inbreeding and to explore the Bering

52. The belts were sold without permission from the tribal government in 1891. Seven years later, when the Onondaga realized their loss, they were advised to appoint the New York State Board of Regents as the belt’s official custodian, so that the Board could sue on the tribe’s behalf. The historical evidence showed that the tribe had very little command of the English language or of Anglo-American systems of property law, and thus were unlikely to have given an informed consent to the custodial transfer to the Board. See MOIRA G. SIMPSON, *MAKING REPRESENTATIONS: MUSEUMS IN THE POST-COLONIAL ERA* 193 (1996).

53. During the dispute, concerned curators wrote to the governor of New York, then Nelson Rockefeller, in protest, arguing, “[S]tate property should not be legislated away lightly in the illusion of religiosity or as capital in the civil rights movement.” KAREN COODY COOPER, *SPIRITED ENCOUNTERS: AMERICAN INDIANS PROTEST MUSEUM POLICIES AND PRACTICES* 71–72 (2008) (summarizing the dispute and resolution). Nevertheless, the belts were eventually repatriated. See *id.* at 72–73.

54. Stephen Kinzer, *Homecoming for the Totem Poles*, *UNESCO COURIER*, Apr. 2001, at 28, available at http://www.unesco.org/courier/2001_04/uk/doss23.htm.

55. See *id.* at 28–29.

Strait migration theory.⁵⁶ After discovering the deception, the tribe decided to place a moratorium on biomedical research on their reservation.⁵⁷

In 2005, the National Collegiate Athletic Association (NCAA) instituted a policy against the use of Native American mascots on uniforms, clothing, and logos by sports teams during postseason tournaments, calling the use of such mascots “hostile” and “abusive” forms of speech. A representative for the organization explained, “[A]s a national association, we believe that mascots, nicknames or images deemed hostile or abusive in terms of race, ethnicity or national origin should not be visible at the championship events that we control.”⁵⁸

As these examples illustrate, indigenous groups have, at times, successfully raised cultural property claims. Yet these claims have generated a number of powerful critiques in legal scholarship and anthropology, with some focusing on the role of culture and cosmopolitanism, while others question the ability of property law to address the incommensurable concerns raised by indigenous peoples. Cultural property’s uncertain place in the property literature flows partly from the inadequacy of traditional property theory to embrace the unique vision it offers. Because its definition is partly grounded in theories of incommensurability, cultural property introduces a significant rupture in classic economic theories of property that are premised on a presumption of fungibility. Cultural properties therefore reflect several layers of incompatibility from within: at the same time that they reflect group identities and values that are incommensurable, some cultural artifacts and goods command high prices on the private market. Thus, some kinds of cultural properties are often caught between their attractiveness as high-value objects and their integral role in the formation of indigenous group identity and community.

B. Critiques of Cultural Property

The inherent indeterminacy of cultural property adds to the difficulty of situating it alongside other areas of property law. Because the notion of cultural property is potentially capacious—crossing from the tangible to the

56. Debra Harry & Le’ a Malia Kanehe, *Asserting Tribal Sovereignty over Cultural Property: Moving Towards Protection of Genetic Material and Indigenous Knowledge*, 5 SEATTLE J. SOC. JUST. 27, 28 (2006).

57. *Id.* (noting that the Indian reaction was characterized as “hysterical” and “hypersensitive” by experts in the scientific field).

58. Robyn Norwood, *NCAA To Crack Down on “Hostile” Nicknames*, L.A. TIMES, Aug. 6, 2005, at A1.

intangible—critics contend that cultural property does not fit within existing property law or theory. Specifically, some critics argue that cultural property should be governed by the market rather than by specific legal protections, like all other forms of property. Others assert that indigenous cultural property claims are antithetical to the free flow of culture, to the cosmopolitan vision that binds humanity as a whole, and to the unfettered circulation of ideas.

1. *A View from the Marketplace of Goods*

In contrast to those who want to disaggregate culture and property, some law and economics theorists posit that more property is needed, not less. Eric Posner, for example, argues that property rights are necessary to protect individual rights and to safeguard resources from depletion. Yet cultural property is just another form of property, he argues, and is not entitled to different treatment.⁵⁹ According to Posner, cultural considerations should not affect the market-based free exchange of property.

For Posner, cultural property is, first and foremost, property; thus, the law should not attach any special premium to items of cultural heritage. In this way, Posner expresses some skepticism about the subjective nature of cultural property—highlighting the difficulty of distinguishing valuable from valueless cultural property, and questioning the efficacy of carving out a special classification for cultural property. Although Posner recognizes that one of the more powerful arguments for its protection is its linkage to the dignity of a particular group of people, this view, he argues, fails to justify possession of cultural property by a people in its place of heritage. Instead, Posner attributes the phenomenon of protecting (or repatriating) cultural property to a “moral error”:

A starting point is that cultural property, like any form of property, is valuable to the extent that people care about it and are willing to pay to consume or enjoy it. If cultural property is normal property, then there is no reason to regulate it, or to treat it as different from other forms of property. In an unregulated market, the people who value it most will buy it.⁶⁰

59. See Posner, *supra* note 12, at 222. Although Posner’s critique is directed toward international cultural property generally, many of his critiques may be applicable to indigenous cultural property claims as we discuss in this section.

60. *Id.* at 222, 224.

This view of property is driven by efficiency concerns, which place great emphasis on alienability. Consequently, Posner argues that cultural property should not be treated any differently from other types of valuable property, including art, oil, or natural resources, contending that those who value it most will simply buy it.⁶¹

Posner concludes by comparing cultural property to the unregulated market in modern artwork. He points out that many valued artistic works wind up in private collections, but the most highly valued can be found in museums: “[W]hen art is significant enough on cultural grounds, it will usually be purchased by, or given to, museums.”⁶² Thus, Posner posits, if the market functions efficiently with respect to highly valued art, why should cultural property be treated any differently? In answering his own question, he recognizes one of the more powerful arguments to support cultural property protection: that it is inextricably linked to the dignity of a particular group of people.⁶³ In this sense, he concedes that cultural property is distinguishable from other natural resources because it has scholarly and aesthetic value, because it provides a window into the past, and because its continued value depends upon its careful maintenance.⁶⁴ Yet these considerations for Posner are largely emotive and fail to justify any kind of “moral claim” by peoples to their cultural property.⁶⁵ Ultimately he places greater faith in the market and contends that if peoples seek possession of their cultural property, “they can always purchase it through a government or museum. They do not have any moral right to possession.”⁶⁶

Although Posner’s critique applies to cultural property law generally, his observations offer particular insight into the efficiency critiques that can be leveraged against indigenous peoples’ cultural property claims. Posner’s central skepticism—why should cultural property be afforded different treatment when the market is the most efficient tool for ordering property rights?—calls indigenous claims into question. But more importantly, it reveals the theoretical paucity of current law and economics theory to grapple with heavily contested claims to indigenous cultural resources.

61. *Id.* at 221–25.

62. *Id.* at 225.

63. *Id.* at 222.

64. *Id.* at 225.

65. *Id.* at 223.

66. *Id.* at 224.

2. *A View from the Cultural Commons*

In his book *Who Owns Native Culture?*, anthropologist Michael F. Brown explores specific questions regarding rights to indigenous cultural property.⁶⁷ Unlike Posner, Brown calls for more culture, and less property, to address the complicated domain of cultural disputes, and remains skeptical of property law as a remedy for resolving such disputes. While offering a measured recognition of the value of group autonomy in preserving cultural heritage, Brown advances two specific concerns. First, he argues that the very use of law in cultural disputes inappropriately “forces the elusive qualities of entire civilizations—everything from attitudes and bodily postures to agricultural techniques—into ready-made legal categories.”⁶⁸ Culture defies and transcends available legal claims, he asserts. Second, Brown argues that the tendency to express legal entitlements in terms of fixed “rights”⁶⁹ limits opportunities to negotiate cultural interests that are relative and shared among people.⁷⁰ Brown prefers instead cultural property programs that facilitate limited access among competing groups (such as programs asking for recreational users of the public lands to voluntarily avoid Indian sacred sites) over measures that would grant title to one particular group (such as allocating copyright for a sacred song or image).

Animating these arguments is Brown’s keen interest in the world community’s access to information and culture. He suggests that it is the “cultural and intellectual commons”—and not the cultural survival of indigenous peoples—that is under attack.⁷¹ Here Brown relies on the work of Lawrence Lessig to argue that both culture and intellectual property are inherently nonrivalrous and therefore open to hybridity.⁷² Since culture is fluid

67. MICHAEL F. BROWN, *WHO OWNS NATIVE CULTURE?* (2003).

68. *Id.* at 217.

69. *See id.* at 214 (“[A]s soon as indigenous heritage is folded into comprehensive regimes of protection it becomes another regulated sphere of activity, something to be managed, optimized, and defined by formal mission statements.”).

70. *See* Carpenter, *supra* note 44, at 1067–68, 1142–47 (identifying and responding to criticism of indigenous “rights” arguments in sacred sites cases).

71. BROWN, *supra* note 67, at 212–13.

72. *See* LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2002). *See generally* Lorie Graham & Stephen McJohn, *Indigenous Peoples and Intellectual Property*, 19 WASH. U. J.L. & POL’Y 313, 326–37 (2005) (situating Brown’s skepticism of rights-based arguments within intellectual property discourse). Intellectual property, unlike tangible property, is characterized by nonrivalrous consumption, which means that with information and ideas, one person’s possession does not automatically exclude others. This nonrivalrous feature plays a powerful role in distinguishing intellectual

and available to all, to “proptertize” it suggests affording its “owners” an unwarranted right of exclusion with respect to the rest of the world.

Brown thus offers both descriptive and normative critiques of indigenous peoples’ efforts to control the intangible aspects of Native culture. As a practical matter, he points to “the difficulty—the near-impossibility . . . of recapturing information that has entered the public domain.”⁷³ He notes Native peoples’ resistance to the unfettered dissemination and commodification of Native culture, particularly through the Internet, by quoting a member of Oregon’s Klamath Tribe: “All this information gets shared, gets into people’s private lives. It’s upsetting that the songs of my relatives can be on the Internet. These spiritual songs live in my heart and shouldn’t be available to just anyone. It disturbs me very much.”⁷⁴ For critics of cultural property protections such as Brown, the spiritual or cultural harm that the Klamath Tribe member identifies is merely part of a digitized world that has enabled culture, for better or for worse, to be open for access to all. Such critics contend that open access to culture is something to be celebrated rather than vilified, despite the costs to indigenous culture.

Naomi Mezey’s recent article, *The Paradoxes of Cultural Property*, follows closely in Brown’s footsteps.⁷⁵ Like Brown, Mezey sharply criticizes the use of law to grant ownership or entitlements over cultural property based on identity. Employing a “cultural critique” similar to Brown’s, Mezey contends that “[t]he problem with using ideas of cultural property to resolve cultural disputes is that cultural property uses and encourages an anemic theory of culture so that it can make sense as a form of property.”⁷⁶ According to Mezey, this theoretical dissonance creates an irresolvable paradox for two reasons. First, “[p]roperty is fixed, possessed, controlled by its owner, and alienable. Culture is none of these things.”⁷⁷ As a result, “cultural property claims tend to fix culture, which if anything is unfixed, dynamic, and unstable.”⁷⁸

Further aligning herself with Brown, Mezey fears that indigenous claims to cultural property will stagnate cultural fusion and hybridity. She claims that “[i]t is the circulation of cultural products and practices that keeps them

property from the traditional justifications for tangible property rights. See LESSIG, *supra* (criticizing intellectual property law and policy that allows private companies—particularly in the internet, media, and software arenas—to threaten innovation).

73. BROWN, *supra* note 67, at xi.

74. *Id.* at 6 (quoting a member of the Klamath Tribe).

75. Mezey, *supra* note 11.

76. *Id.* at 2005.

77. *Id.*

78. *Id.*

meaningful and allows them to acquire new meaning, even when that circulation is the result of chance and inequality.”⁷⁹ Thus, cultural property will have a negative effect on the free dissemination of culture, because “[a]s groups become strategically and emotionally committed to their ‘cultural identities,’ cultural property tends to increase intragroup conformity and intergroup intransigence in the face of cultural conflict.”⁸⁰

Mezey ultimately asserts that cultural property’s preservationist stance offers a static and conceptually impoverished formulation of culture itself.⁸¹ Thus, she argues,

[T]he idea of property has so colonized the idea of culture that there is not much culture left in cultural property. What is left are collective property claims on the basis of something we continue to call culture, but which looks increasingly like a collection of things that we identify superficially with a group of people.⁸²

Mezey’s argument, and that of other scholars concerned with the proprietization of culture, seems to operate from an unstated premise: because property fundamentally concerns the right of owners to exclude others, any cultural property claim will inappropriately stymie the natural, participatory, and free movement of culture.⁸³

Both Brown and Mezey demonstrate this reason for distrusting cultural property law from the perspective of culture. They contend that culture is essentially comprised of anything and everything that touches human existence,⁸⁴ and to commodify it may shrink the public domain, stultify dynamic processes of cultural hybridity, and entrench peoples into abstract and paradigmatic conceptions of their culture.

79. *Id.* at 2007.

80. *Id.*

81. *Id.* at 2007–08.

82. *Id.* at 2005.

83. *Id.*

84. *See id.* (“[C]ultural property claims tend to fix culture, which if anything is unfixed, dynamic, and unstable. They also tend to sanitize culture, which if it is anything is human and messy, and therefore as ugly as it is beautiful, as destructive as it is creative, as offensive as it is inspiring.”).

3. *A View from Cosmopolitanism*

Another significant critique is offered by philosopher and cultural theorist Kwame Anthony Appiah, who (among others) takes a slightly more mediated position on protecting international cultural property.⁸⁵ While his view is admittedly from a global, cosmopolitan vantage point, Appiah balances concern for cultural patrimony with a desire to preserve cultural goods for all of humanity, rather than just specific groups. Appiah reminds us that the international underground market for cultural artifacts, when coupled with a localized absence of legal enforcement to protect archaeological sites, made it possible for high-value cultural goods to find their way to other parts of the globe, much like the Elgin Marbles. In some of these cases, Appiah suggests, international cultural property was acquired (perhaps illegally) not out of a desire to loot cultures of these sacred objects, but to collect the objects for further study and preservation for all of humanity.⁸⁶

Many of these works of cultural significance are described today through the lens of “cultural patrimony” as belonging to a specific group.⁸⁷ Appiah argues, however, that with the passage of time and the changes wrought by globalization, it becomes increasingly difficult to claim that a work “belongs” to a specific group or people:

When Nigerians claim a Nok sculpture as part of their patrimony, they are claiming for a nation whose boundaries are less than a century old, the works of a civilization [formed] more than two millennia ago, created by a people that no longer exists, and whose descendants we know nothing about. We don't know whether Nok sculptures were commissioned by kings or commoners; we don't know whether the people who made them and the people who paid for them thought of them as belonging to the kingdom, to a man, to a lineage, to the gods. One thing we know for sure, however, is that they didn't make them for Nigeria.⁸⁸

Like many, Appiah clearly decries some involuntary transfers, and favors allowing the national government where the object originated to have a key

85. See KWAME ANTHONY APPIAH, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS* 115-35 (2006).

86. *Id.* at 115-16.

87. *Id.* at 118.

88. *Id.* at 119.

role in ensuring its repatriation. Yet, in an important insight, he emphasizes that the national governments in question act not as property owners, but instead as “trustees for humanity.”⁸⁹ “While the government of Nigeria reasonably exercises trusteeship,” Appiah writes, “the Nok sculptures belong in the deepest sense to all of us.”⁹⁰ Here, Appiah stresses the cosmopolitanist ethic underlying the protection of cultural property by construing cultural property not as a national issue but “as an issue for *all* mankind.”⁹¹

In addition to his discomfort with a group-specific notion of cultural property, Appiah, much like Brown and Mezey, evinces an even greater suspicion over the notion of propertizing intangible objects, particularly in an indigenous context. When we move from tangible objects to intellectual property, folklore, images, and the like, Appiah writes, “[i]t’s no longer just a particular object but any reproducible image of it that must be regulated by those whose patrimony it is. We find ourselves obliged, in theory, to repatriate ideas and experiences.”⁹² By propertizing culture, Appiah argues, we change the nature of culture itself: we reduce ourselves to a circle of “mine-and-thine reasoning” that prevents the inevitable hybridity of cultural exchange. Further, since intellectual property laws tend to honor owners, they can overlook the interests of consumers—“audiences, readers, viewers, and listeners.”⁹³ In the end, Appiah warns, cultural patrimony evinces a “hyper-stringent doctrine of property rights”—a kind of property fundamentalism that has served us so poorly in the past.⁹⁴ Consequently, while Appiah declares a measured approval for some kinds of repatriation, he is careful to remind us that what motivates him is a desire to preserve art for everyone, not just for a certain group: a connection “not *through* identity but *despite* difference.”⁹⁵ The only way to “fully respond to ‘our’ art [is] only if we move beyond thinking of it as ours and start to respond to it as art.”⁹⁶

These critical perspectives espoused by Posner, Brown, Mezey, and Appiah certainly differ in some respects, but they all converge on a similar underlying view of property itself as fundamentally defined by ownership—with its rights of alienability and exclusion and its norms of commodification and

89. *Id.* at 120.

90. *Id.*

91. *Id.* at 121.

92. *Id.* at 129.

93. *Id.* at 130.

94. *Id.*

95. *Id.* at 135.

96. *Id.*

commensurability. Thus a tension emerges between traditional property law, which focuses on the utility of markets, exclusion, and commodities, and cultural property, which necessarily includes interests that are sometimes inexplicable in market terms. What is needed, therefore, is a property model capable of reconciling these competing concepts. In Part II, we attempt to articulate a cohesive approach to span this divergence, under the aegis of peoplehood and stewardship.

II. PEOPLEHOOD AND CULTURAL STEWARDSHIP

Previously we suggested that indigenous groups require a robust conception of property to help them secure rights to land and related cultural products and expressions. Yet it is precisely on that ground, the use of property law, that cultural property critics mount their most vociferous challenges. As these critiques indirectly suggest, putting cultural property alongside other forms of property raises an important question of whether cultural property is really property at all. At the same time, there is something disconcerting about placing the wide breadth of entitlements sought by indigenous peoples in the singular box of “cultural property.”

We believe that cultural property is, at heart, a form of property, but that the existing theoretical framework for cultural property is insufficient to capture its normative and doctrinal possibilities. In that spirit, we draw upon our recent work regarding property and peoplehood to establish a framework for reconceptualizing and justifying indigenous cultural property claims.⁹⁷ Section II.A argues that certain property deserves legal protection because it is integral to the collective survival and identity of indigenous groups. After establishing this background on the concept of peoples and its role in international and domestic law, we turn our focus in Section II.B to the connection between peoplehood and property claims, showing how some cultural property considerations are motivated not by ownership but rather by stewardship concerns.

A. *From Personhood to Peoplehood*

Margaret Jane Radin’s theory linking property and personhood⁹⁸ altered the way many think about property. Put simply, Radin argued that some property deserves a higher level of legal protection because it expresses

97. See, e.g., Kristen A. Carpenter, *Real Property and Peoplehood*, 27 STAN. ENVTL. L.J. 313 (2008).

98. See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1013-15 (1982).

individual personhood⁹⁹ and should be nonfungible.¹⁰⁰ Nearly three decades after the publication of *Property and Personhood*, Radin's widely applied¹⁰¹ proposition hardly seems radical, yet it has been instrumental in challenging the ubiquitous assumption that property loss can, in every instance, be remedied in monetary terms. Radin rejected the then-prevailing view in our legal system that property is universally "commensurable," "commodifiable," or "alienable."¹⁰² Instead, she postulated that property that is constitutive of personhood should be regulated to protect against private market incursions and governmental interference.¹⁰³ In such varied contexts as family heirlooms, the donation and sale of human organs, adoption, reproductive freedoms, takings, criminal justice, and the regulation of cyberspace, Radin has persuasively argued that the personal nature of some property requires specialized consideration.¹⁰⁴ The ultimate aim of legal protections should be to further Radin's concept of "human flourishing," which she offers as an alternative, or complement, to wealth-maximization rhetoric.¹⁰⁵

99. *Id.* at 959 (arguing, on an "intuitive" level, that most individuals possess certain objects that are "almost part of themselves," including wedding rings and family heirlooms).

100. *See id.* at 959-61, 986-88.

101. *See, e.g.,* Carpenter, *supra* note 97, at 345 n.192 (identifying scholarship that applies Radin's theory to the cultural property context); Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood*, 45 STAN. L. REV. 347, 349 n.10 (1993) (surveying the influence of Radin's theory of property and personhood).

102. MARGARET JANE RADIN, *CONTESTED COMMODITIES* 8-15 (1996).

103. Radin, *supra* note 98, at 1014-15 (arguing that personal property rights "should be protected to some extent against invasion by government and against cancellation by conflicting fungible property claims of other people," and fungible property rights "should yield to some extent in the face of conflicting recognized personhood interests").

104. Radin has authored dozens of articles and several books exploring these themes. This Article relies primarily on RADIN, *supra* note 102; MARGARET JANE RADIN, *REINTERPRETING PROPERTY* (1993); Margaret Jane Radin, *Contested Commodities*, in *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE* 81 (Martha M. Ertman & Joan C. Williams eds., 2005); Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667 (1988); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) [hereinafter Radin, *Market-Inalienability*]; and Margaret Jane Radin, *Property Evolving in Cyberspace*, 15 J.L. & COM. 509 (1996).

105. Radin, *Market-Inalienability*, *supra* note 104, at 1851 (arguing that it is wrong to treat certain property, such as the human body, as either universally alienable or universally inalienable and that society should address underlying social problems first). Recent scholarship has advanced this idea of "human flourishing." *See, e.g.,* Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. (forthcoming May 2009) (arguing that property law promotes human flourishing and dignity by encouraging reciprocity and community in social relationships).

The personhood model offers a striking vehicle for bringing into legal discourse indigenous conceptions of property.¹⁰⁶ Indian leaders have long tried to explain their own land use traditions to the majority society. Unfortunately their statements have been reduced, and sometimes mistranslated, into stereotypical rhetoric, such as “[h]ow can you buy or sell the sky[?]”¹⁰⁷ The majority society often treats such sentiments as quaint anachronisms at best, and as justifications for denying Indian property rights at worst.¹⁰⁸ But Radin’s account of personhood captures precisely the meaning that cultural property may carry for indigenous people: that some properties are so constitutive of one’s identity that they demand treatment that transcends—and surpasses—that of an ordinary market transaction. It is quite legitimate, in Radin’s view, to make exceptions to the prevailing “universal commodification” standard for property that is nonfungible, incommensurable, and inalienable, as some indigenous cultural properties surely are.

As Sarah Harding’s work has so convincingly demonstrated, Radin’s model linking property and personhood is inestimably valuable to indigenous peoples seeking a way to talk about Indian property claims that previously have been deemed unintelligible to the majority society and incognizable in Anglo-American property law.¹⁰⁹ Radin’s model also reveals the particular

106. This point is not merely academic. David Getches has argued, for example, that the Supreme Court’s tendency to decide certain cases against Indian tribes may be attributable in part to its failure to appreciate the particular relationship between tribes and the land. See David H. Getches, *Beyond Indian Law: The Rehnquist Court’s Pursuit of States’ Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 342-43 (2001) (“Ultimately, land and nature provide the nexus for all Indian social, political, and religious values. Without a basic acceptance, if not understanding, of this reality, the Court is less likely to consider Indian law very ‘important.’”).

107. E.g., Jerry L. Clark, *Thus Spoke Chief Seattle: The Story of an Undocumented Speech*, PROLOGUE MAG., Spring 1985, at 60, available at <http://www.archives.gov/publications/prologue/1985/spring/chief-seattle.html> (discrediting the attribution of a famous speech and letter to Chief Seattle).

108. See WILLIAMS, JR., *supra* note 46, 48-49 (arguing that the Supreme Court has long used, and continues to use, racial stereotypes to legitimize the expropriation of Indian land).

109. See Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 IND. L.J. 723, 725, 749-53 (1997); see, e.g., MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 176 (1991) (“We have much to learn from [N]ative Americans who have long known that there is a way in which the land owns us, even as we pretend to own the land, and that we ignore that fact at our own peril.”); Charles Wilkinson, *Listening to All the Voices, Old and New: The Evolution of Land Ownership in the Modern West*, 83 DENV. U. L. REV. 945, 960 (2006) (“[T]he majority society can benefit from an understanding of the way Native people conceive of the natural world.”).

insidiousness of federal Indian law's treatment of Indian land.¹¹⁰ Historically, the law not only failed to protect Indian land from governmental interference, but in many instances enabled the government to take Indian property without just compensation.¹¹¹ Through these approaches, courts largely legitimized the conquest of large swaths of North America, in which Indians lost most of their lands in transactions of questionable voluntariness.¹¹² Radin's theory further helps us to understand exactly why, even in cases where American Indian land claims were later vindicated, particularly in cases that required compensation for the taking of treaty-recognized lands,¹¹³ the tribes refused to accept payment.¹¹⁴

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110. See, e.g., CAROL M. ROSE, *Possession as the Origin of Property*, in PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 11, 19 (1994) [hereinafter PROPERTY AND PERSUASION] (suggesting that American property law's failure to protect Indian land stems from the common law's exclusion of Indians, or "any nomadic population," from a legal narrative of first possession aimed toward "an agrarian or a commercial people").
111. See, e.g., *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 284-85 (1955) (holding that lands held by "unrecognized" or "aboriginal title" are not compensable under the Fifth Amendment). The law also prevents Indian tribes from alienating their land without federal approval. See, e.g., *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).
112. See generally STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* 3-4 (2005) (arguing that the dispossession of Indian lands involved varying degrees of coercion and consent, depending on the particular circumstances, time frame, culture, and region of the tribes and Europeans or Americans involved).
113. See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 423-24 (1980) (upholding the award of \$17.1 million, plus interest, as compensation owed to the tribe under the Fifth Amendment). As Nell Newton has argued, despite the *Sioux Nation* holding, "the fifth amendment takings clause affords less protection for Indian land than for other land." Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 255 (1984). This is because *Sioux Nation* "reaffirmed that Congress's trust relationship may shield it from fifth amendment liability when it takes Indian property without tribal consent if it does so as a guardian 'transmut[ing] land into money' rather than as a sovereign exercising eminent domain." Nell Jessup Newton, *Enforcing the Federal-Indian Trust Relationship After Mitchell*, 31 CATH. U. L. REV. 635, 682 (1982) (quoting *Sioux Nation*, 448 U.S. at 409); see also *Sioux Nation*, 448 U.S. at 416 (holding that no liability attaches if the government "attempts to provide his [Indian] ward with property of equivalent value"). Tribes can also bring Fifth Amendment cases in the Federal Court of Claims, whose jurisdiction over, and ability to award damages in, Indian land claims is largely defined by various federal statutes. See Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753 (1992) [hereinafter Newton, *Indian Claims*].
114. See, e.g., Alexandra New Holy, *The Heart of Everything That Is: Paha Sapa, Treaties, and Lakota Identity*, 23 OKLA. CITY U. L. REV. 317, 352 (1998) (commenting on Lakota refusals to accept compensation for the taking of Black Hills).

1. *Conceptualizing Peoplehood from Personhood*

As described above, Radin's model is potentially transformative for indigenous property rights. But in the indigenous context, her work is somewhat limited¹¹⁵ by its explicit foundation in a philosophical tradition of individual personhood.¹¹⁶ As a matter of personhood, certain forms of property are integral to human individuation: they are tied to the development of a sense of self that is separate from other people.¹¹⁷ Humans nurture their autonomy, in part, through relations with the "social and natural world."¹¹⁸ In this process, personal property, such as the family home, provides a context where individuals can flourish.¹¹⁹ While focusing on property and human relationships as a vehicle for individual personhood, Radin acknowledges that "in a given social context," individuals may find self-determination only within a group and that this may carry political consequences for group claims to certain resources.¹²⁰

In these respects, Radin is primarily concerned with property as an element of individual personhood, but leaves the door open for group claims to property, particularly as they would advance individual autonomy.¹²¹ Following Radin, we observe that some indigenous cultural property claims may well fall into these categories of property that are critical for personal development, either because the property forms the context for human individuation or

115. Radin's work has been criticized by other scholars as pragmatic, nonideal, and focused on conflict-avoidance. See, e.g., Schnably, *supra* note 101, at 348-53.

116. Radin, *supra* note 98, at 962-77, 984-86 (considering "personhood" in the tradition of Hegel, with attention to Locke, Kant, and Hume, as well as Marxist and Utilitarian permutations). While acknowledging that a "communitarian" would reject the premises of her argument altogether, Radin "confine[s] [her] inquiry to the types of the person posited by the more traditional, individual-oriented theories." *Id.* at 965. Yet she observes that "the communitarian critique reminds us that the idea of the person in the abstract should not be pushed beyond its usefulness," and calls for some "attention to the role of groups both as constituted by persons and as constitutive of persons." *Id.*

117. See RADIN, *supra* note 102, at 56; Radin, *Market-Inalienability*, *supra* note 104, at 1904.

118. Radin, *Market-Inalienability*, *supra* note 104, at 1904.

119. Radin, *supra* note 98, at 987.

120. *Id.* at 978.

121. *Id.* at 1013 (leaving the door open for a "minority group or some group outside the mainstream of American culture, [whose] claims would seem stronger because more clearly necessary to their being able to constitute themselves as a group and hence as persons within that group").

because individual rights are exercised in a collective setting.¹²² We argue, however, that indigenous cultural property claims nonetheless challenge the capacity of the personhood model precisely because they advance the interests of the group itself, and not merely as a vehicle or context for individual autonomy.¹²³ Consider, for example, Vine Deloria's statement in the Indian religious freedoms context that "[t]here is no salvation in tribal religions apart from the continuance of the tribe itself."¹²⁴ Indigenous peoples undertake cultural practices to restore relationships among tribal members, and between tribal members and the natural world; in many cases, they require access to tangible and intangible resources to conduct such practices.¹²⁵ It is for the continuance of the tribe, its norms, values, and way of life, that Indian people bring legal claims for ongoing access to sacred sites or other cultural resources – and not solely for their personal fulfillment.¹²⁶

Indian plaintiffs have forcefully articulated this relationship between the tribe and certain cultural resources in various cases. As Cherokee claimants explained in litigation over a sacred site, "When this place is destroyed, the Cherokee people cease to exist as a people."¹²⁷ They may not have meant that each individual tribal member would literally die, but rather that the loss of such sacred sites would make it difficult or impossible to maintain Cherokee

122. International human rights literature also contemplates the related categories of individual rights, individual rights exercised in a group setting, and the rights of groups themselves. See ANAYA, *supra* note 39, at 131-37 (discussing "cultural integrity" protections for individuals and groups pursuant to nondiscrimination norms elaborated in international instruments).

123. See BRIAN EDWARD BROWN, *RELIGION, LAW, AND THE LAND: NATIVE AMERICANS AND THE JUDICIAL INTERPRETATION OF SACRED LAND* 15 (1999).

124. VINE DELORIA, JR., *GOD IS RED: A NATIVE VIEW OF RELIGION* 194 (2d ed. 1992).

125. See, e.g., *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 460 (1988) (Brennan, J., dissenting) ("Failure to conduct these ceremonies in the manner and place specified, adherents believe, will result in great harm to the earth and to the people whose welfare depends upon it."); Thomas Buckley, *Renewal as Discourse and Discourse as Renewal in Native Northwestern California*, in *NATIVE RELIGIONS AND CULTURES OF NORTH AMERICA: ANTHROPOLOGY OF THE SACRED* 33, 33 (Lawrence E. Sullivan ed., 2000) (analyzing world-renewal "Jump Dance" which "is intended to cure the world's ills, and to stave off evil").

126. See *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1034 (9th Cir. 2007) ("The Hopi believe that pleasing the *Katsinam* on the [San Francisco] Peaks is crucial to their livelihood. Appearing in the form of clouds, the *Katsinam* are responsible for bringing rain to the Hopi villages from the Peaks. The *Katsinam* must be treated with respect, lest they refuse to bring the rains from the Peaks to nourish the corn crop.").

127. BROWN, *supra* note 123, at 15 (quoting Cherokee traditionalists in a sacred site lawsuit).

worldviews and lifeways.¹²⁸ The loss of the sacred sites would impair the ability of Cherokees to live as Cherokees.¹²⁹ While pervasive among indigenous peoples, this kind of constitutive relationship with the land that is deeply experienced on a collective level is not widely reflected in domestic property theory with its emphasis on individual rights.¹³⁰ Thus, we propose considering the extensive literature (political, legal, sociological, and indigenous) on

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128. Cf. JONATHAN LEAR, *RADICAL HOPE: ETHICS IN THE FACE OF CULTURAL DEVASTATION* 58 (2006) (examining the collective psychological ramifications of the Crow Nation's loss of a culture that was indelibly connected with the land, buffalo, and intertribal war).
129. Similarly, after the district court decided against the tribes in *Navajo Nation*, the Navajo Nation's President Joe Shirley was quoted as saying, "It is another sad day . . . [when] in the 21st Century, genocide and religious persecution continue to be perpetrated on Navajo people [and] other Native Americans . . . who regard the [San Francisco] Peaks as sacred." Cyndy Cole, *Snowmaking Opponents Now Targeting City Council*, ARIZ. DAILY SUN, Jan. 13, 2006, at A2. In President Shirley's bold view, the desecration of this cultural resource threatens the very survival of the Navajo people.
130. The omission of groups (as distinct from individuals) from dominant legal theory complicates the status of other subnational groups, who find that the individual rights-based legal system fails to afford them a cognizable framework for pursuing collective legal claims. See AVIAM SOIFER, *LAW AND THE COMPANY WE KEEP* (1995) (surveying existing bases for group rights in U.S. law and calling for additional legal protection of such groups). The specific omission, however, of American Indian peoples as claimants under dominant property theory is apparent throughout our Anglo-American system. As Radin notes, Locke's labor-desert theory is a core classical property conception. Radin, *supra* note 98, at 958 n.3. Locke's famous statement, "Thus in the beginning all the World was *America*," reflects the foundational presumption that at the time of European contact, the Indians of North America lived in a state of nature, and could not acquire a property interest in their lands because they lacked sufficient "labor." JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 301 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). At the same time, the lands inhabited by Indians were perceived as the "commons" from which industrious European colonists could acquire individual property rights. See Robert P. Merges, *Locke for the Masses: Property Rights and the Products of Collective Creativity*, 36 HOFSTRA L. REV. 1179, 1185-86 (2008) (summarizing the Lockean view that "true property rights . . . are held by individuals who work on things so as to justify *removal* from the primordial commons"). Thus Locke's work provided a partial justification for the dispossession of indigenous lands by colonialists. See ROBERT F. BERKHOFER, JR., *THE WHITE MAN'S INDIAN: IMAGES OF THE AMERICAN INDIAN FROM COLUMBUS TO THE PRESENT* 16-22 (1978) (tracing the image of the "bad" Indian in colonial thought to the early writings of Locke, among others); see also Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 18-19 (1991) (tracing the justification for the dispossession of Indian lands to Lockean theory); Robert A. Williams, Jr., *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. REV. 1, 3 (1983) (citing Locke and noting that "defining the red man's entitlements under the white man's law has always presented to liberal theorists questions attended with great difficulty" (internal quotation marks omitted)).

peoples and peoplehood to identify group interests that have a role to play in contemporary law and policy, especially with respect to property.¹³¹

Descriptively, the term “people” connotes a collective association of individuals based on political affiliation, religion, culture, language, race, ethnicity, history, and other factors,¹³² while “peoplehood” is the state of being a people or the sense of belonging to a people.¹³³ This broad conception contemplates national groups like the American, Iraqi, or Israeli people. It also includes subnational groups like the Mormon, Orthodox Jewish, or Amish people within the United States; the Sunni, Shiite, or Kurdish people in Iraq; and the Jewish or Arab people in Israel. Much in the same way that Radin’s discussion of personhood invokes what is most essential to the individual human condition, peoplehood refers to the qualities that constitutively define a

131. Our model of “property and peoplehood” contains both normative and descriptive elements, which we set forth in greater detail in our earlier works and briefly recount here with a sharper focus on the model’s implications for cultural property. As Radin’s work suggests, an individual rights approach to property is heavily shaped by a philosophical tradition of personhood centered on the autonomous individual. It is beyond the scope of this Article to develop a comprehensive alternative philosophy of peoplehood. In previous works, however, we have begun to consider the role of groups in debates about property, see Carpenter, *supra* note 97, at 346-51, 355-57, and governance, see Angela R. Riley, (*Tribal Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 800-07 (2007) [hereinafter Riley, *Illiberalism*]; see also Angela R. Riley, *The Human Rights Hierarchy* (Dec. 5, 2008) (unpublished manuscript, on file with authors) (contemplating the tensions that can arise between protections of collective cultural rights and human rights in the international indigenous context).

Here, our contention that certain properties are integral to the identity and survival of peoples relies on a broad, though not exhaustive, survey of the emerging literature. This literature includes leading works on the general situation of peoples and peoplehood. See, e.g., WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995); WILL KYMLICKA, *POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM AND CITIZENSHIP* (2001); JOHN LIE, *MODERN PEOPLEHOOD* (2004); JOHN RAWLS, *THE LAW OF PEOPLES* (1999); JOHN RAWLS, *POLITICAL LIBERALISM* (1993); ROGERS M. SMITH, *STORIES OF PEOPLEHOOD: THE POLITICS AND MORALS OF POLITICAL MEMBERSHIP* (2003). The literature also includes works devoted to the situation of indigenous peoples. See, e.g., ANAYA, *supra* note 39; DUANE CHAMPAGNE & ISMAEL ABU-SAAD, *THE FUTURE OF INDIGENOUS PEOPLES: STRATEGIES FOR SURVIVAL AND DEVELOPMENT* (2003); TOM HOLM, *THE GREAT CONFUSION IN INDIAN AFFAIRS: NATIVE AMERICANS & WHITES IN THE PROGRESSIVE ERA* (2005); Tom Holm, J. Diane Pearson & Ben Chavis, *Peoplehood: A Model for the Extension of Sovereignty in American Indian Studies*, 18 WICAZO SA REV. 7 (2003).

132. See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 860 (10th ed. 1993) (defining “peoples” as “a body of persons that are united by a common culture, tradition, or sense of kinship”). For a critical view of “peoplehood,” pointing out both its descriptive and normative weaknesses, see LIE, *supra* note 131, at 191-231.

133. See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, *supra* note 132, at 860 (defining “peoplehood” as “the quality or state of constituting a people”).

group and that inspire individuals to identify with and participate in the collective. As one commentator has put it, peoplehood is “an inclusionary and involuntary group identity with a putatively shared history and distinct way of life.”¹³⁴ In this broad sense, peoplehood reflects a shared consciousness and commitment to a group characterized by “common descent—a shared genealogy or geography” as well as by “contemporary commonality, such as language, religion, culture, or consciousness.”¹³⁵ Some scholars include as peoples only those groups with a “political” quality or status that contemplates special legal treatment. Rogers Smith, for example, defines “a political people” as a group that is “a potential adversary of other forms of human association, because its proponents . . . assert that its obligations legitimately trump many of the demands made on its members in the name of other associations.”¹³⁶

Other scholars, while recognizing the fact of group identity in modern life, are nonetheless critical of the idea.¹³⁷ John Lie, for example, argues that “[m]odern peoplehood creates a fiction of homogeneity, of holistic essences.”¹³⁸ The traditional categories of religion, nationality, and language break down when we admit that individual people have multiple facets, enabling a person to be simultaneously Christian, American, and German-speaking. When it comes to racial and ethnic designations, Lie contends, peoplehood becomes not only descriptively flawed but normatively fraught, as a source of discrimination, war, and even genocide.¹³⁹ Thus “modern peoplehood,” in Lie’s view, “den[ies] the full repertoire of overlapping belongings and the inevitable flux of populations” and “weighs like a nightmare on the minds of the living.”¹⁴⁰

134. LIE, *supra* note 131, at 1. Lie observes the pervasiveness of peoplehood even while critiquing it on descriptive and normative grounds.

135. *Id.*

136. SMITH, *supra* note 131, at 20-21. Under Smith’s model, a “people” would include China, the United States, Belgium, the Navajos, Puerto Rico, Ecovillages, Quebec, Wales, Antioquia, Brooklyn, Hong Kong—and even groups that we might not so readily think of as peoples, including Jehovah’s Witnesses, the AFL-CIO, Greenpeace, and Oxfam. Other groups, such as social membership clubs, would not be peoples because they lack political status. Although members might feel “great loyalty” to such groups, “neither the leaders nor members of such associations are ever likely to assert seriously that the obligations of those memberships justify them in violating governmental laws.” *Id.* at 20 (excluding as “political peoples” associations such as “football clubs, singing groups, and Girl Scout troops”).

137. See, e.g., LIE, *supra* note 131, at 98-264 (criticizing the role of ethnic, racial, and national identities in modern life).

138. *Id.* at 269.

139. See *id.* at 73-85, 183-231.

140. *Id.* at 272.

These criticisms from the peoplehood literature resound in the cultural property context where critics make similar claims. Descriptively, the human tendency to associate with, and borrow from, multiple traditions (whether religious, linguistic, or ethnic) seems to undermine distinctive claims of cultural existence; normatively, claims of cultural particularism seem to undermine opportunities for exchange and development among groups. Mezey's article, for example, rejects the cultural "essentialist" position in favor of a "hybridity" approach that eschews "cultural influence" and emphasizes "routes" over "roots."¹⁴¹ Other scholars, like Appiah, advocate a form of "cosmopolitanism" focused on the cultural concerns of humanity as a whole.¹⁴²

While we take up the cultural property ramifications of these critiques in greater detail below, we observe here that certain models of peoplehood do account for overlapping identities and allegiances, while also recognizing the persistence of cultural distinctions among groups. S. James Anaya writes, for example, that a narrow view of the term peoples is problematic in the indigenous context where groups have operated for hundreds of years "outside the mold of classical Western liberalism" with its emphasis on "exclusive, monolithic communities."¹⁴³ Indigenous peoples often maintain traditional organizations that uphold "unity among individuals, families, clans and nations while upholding diverse identities and spheres of autonomy."¹⁴⁴

Although such flexible models of peoplehood arise specifically in the indigenous context, they may offer a generally useful and flexible way of conceptualizing peoples. In this vein, Anaya argues that the definition of peoples should not be confined to any tradition of Western political experience but should reflect the "broad range of associational and cultural patterns actually found in the human experience."¹⁴⁵ Accordingly, the term should "refer to all those spheres of community, marked by elements of identity and collective consciousness, within which people's lives unfold—independently of considerations of historical or postulated sovereignty."¹⁴⁶ Moreover, in Anaya's view, the interests of peoples should be effectuated consistent with

141. Mezey, *supra* note 11, at 2039-46.

142. See APPIAH, *supra* note 85, at 115-35.

143. ANAYA, *supra* note 39, at 102.

144. *Id.* (pointing to the Iroquois and Creek Confederacies as examples of indigenous traditional governance that "does not represent singular political or national identities for the people they encompass"); see also Duane Champagne, *Beyond Assimilation as a Strategy for National Integration: The Persistence of American Indian Political Identities*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 109, 112 (1993).

145. ANAYA, *supra* note 39, at 101.

146. *Id.* at 103.

international human rights principles, such as nondiscrimination,¹⁴⁷ that could protect against the potentially oppressive manifestations of peoplehood noted by Lie.¹⁴⁸

Turning to the United States, we argue that American Indian nations satisfy both narrow and broad definitions of peoples, and that their peoplehood claims can be consistent with important national ideals of equality and democracy.¹⁴⁹ Moreover, in the cultural property context, we believe that the claims of a particular people need not obviate those of the larger world community nor violate widely accepted legal norms.¹⁵⁰ Like many other domestic minority groups,¹⁵¹ American Indians within tribes share a “common descent—a shared genealogy or geography” as well as “contemporary commonality, such as language, religion, culture, or consciousness.”¹⁵² American Indians often identify, on a tribal-specific basis, as peoples,¹⁵³ and carry on many of the distinctive traditions that give their communities cohesion and endurance against assimilation into the majority society.¹⁵⁴ Yet, unlike other American minority groups, American Indian tribes enjoy formal

147. *Id.* at 129-84.

148. See *supra* note 139 and accompanying text.

149. Internationally as well, numerous minority cultures seek recognition of their collective rights as peoples. See Will Kymlicka, *The Internationalization of Minority Rights*, 6 INT'L J. CONST. L. 1, 6-31 (2008).

150. In Part III, we describe specific ways in which cultural property laws often facilitate such accommodations.

151. Various authors have contemplated the peoplehood experiences of other minority groups within the United States. See, e.g., NABEEL ABRAHAM & ANDREW SHRYOCK, *ARAB DETROIT: FROM MARGIN TO MAINSTREAM* (2006); RICHARD K. MACMASTER, *LAND, PIETY, PEOPLEHOOD: THE ESTABLISHMENT OF MENNONITE COMMUNITIES IN AMERICA, 1683-1790* (1985); JOHN-MICHAEL RIVERA, *THE EMERGENCE OF MEXICAN AMERICA: RECOVERING STORIES OF MEXICAN PEOPLEHOOD IN U.S. CULTURE* (2006); LEE SHAI WEISSBACH, *JEWISH LIFE IN SMALL TOWN AMERICA* (2005).

152. LIE, *supra* note 131, at 1.

153. See Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 663 n.4 (“[I]ndigenous peoples have insisted on the right to define themselves.”); see also EVA MARIE GARROUTTE, *REAL INDIANS: IDENTITY AND THE SURVIVAL OF NATIVE AMERICA* (2003) (discussing attributes of tribal-specific identities); Carpenter, *supra* note 97, at 348-49 (offering examples of tribes that define themselves as “peoples”); cf. HAZEL W. HERTZBERG, *THE SEARCH FOR AN AMERICAN INDIAN IDENTITY: MODERN PAN-INDIAN MOVEMENTS* (1982) (describing modern pan-Indian identity).

154. For a persuasive discussion of ways in which American Indian tribes carry out their distinctive attributes of peoplehood, see HOLM, *supra* note 131, at xiv, xvii.

legal status as peoples or sovereigns under domestic and international law.¹⁵⁵ The U.S. Supreme Court has held that Indian tribes are “a separate people” within the larger American polity.¹⁵⁶ As both a formal and practical matter, American Indian peoples enjoy a form of sovereignty that includes governing authority over tribal members and territory, and a government-to-government relationship with the United States.¹⁵⁷

Thus, American Indian tribes and their experiences satisfy most definitions of peoples and peoplehood.¹⁵⁸ We argue, moreover, that they also deserve treatment as peoples, and legal protection for their expression of peoplehood, as a matter of reasonable pluralism and its specific expression in tribal sovereignty. Here, we are persuaded by John Rawls and others that contemporary liberal society is comprised of various groups or “peoples,” each of whom must recognize the others as legitimate—even if their values differ within acceptable limits of liberalism and decency—in order to effectuate just democratic ideals.¹⁵⁹ A fundamental principle of liberal democracy, then, is “reasonable pluralism.”¹⁶⁰ That is, free and democratic governments, by their very nature, allow for individuals and groups within their borders to espouse diverse beliefs and practices, both religious and secular.¹⁶¹

155. See Carpenter, *supra* note 97, at 348-63 (identifying domestic and international law and policy that treats American Indians as “peoples”).

156. *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

157. See generally Sarah Krakoff, *The Virtues and Vices of Sovereignty*, 38 CONN. L. REV. 797 (2006) (describing the contours of tribal sovereignty as experienced by tribal peoples and in contrast to the limited formulations of the Supreme Court).

158. See Newton, *Indian Claims*, *supra* note 113, at 776, 779 & n.142, 781 (arguing that the “right to exist as a tribe” implicates issues of peoplehood). On the other hand, we acknowledge that the notion of tribes as peoples is not entirely uncontroversial, as classic debates demonstrate. Compare David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759, 858 (1991) (discussing the relationship between Title 25 of the U.S. Code and Indian status as “peoples” or racial groups), with Carole E. Goldberg-Ambrose, *Not “Strictly” Racial: A Response to “Indians as Peoples,”* 39 UCLA L. REV. 169 (1991) (criticizing David Williams’s view on Indians as racial entities, by pointing to the unlikelihood of the Supreme Court recognizing tribes as peoples in the international law sense, and arguing that a better approach is to rely on Congress’s power to legislate in Indian affairs under the Commerce Clause).

159. See RAWLS, *supra* note 131, at 11-12.

160. *Id.* at 124.

161. *Id.* While we have examined extensively this broader question of American Indian peoplehood in previous works, our goal in this Article is to make the general case for American Indian peoplehood and then to apply it to the particular context of indigenous cultural property. See, e.g., Carpenter, *supra* note 97, at 355-57 (detailing the normative justifications for indigenous peoplehood as a matter of reasonable pluralism, democratic ideals, and equality).

To a unique extent, U.S. law recognizes the importance of preserving the “differentness” of American Indian peoples, and does so through the model of “tribal sovereignty.”¹⁶² A significant body of federal statutory and common law is devoted to the enhancement of tribal self-determination¹⁶³ and reflects, to some extent, tribal interests in maintaining a “measured separatism” within the national polity.¹⁶⁴ On this point, a foundational principle of federal Indian law has been that the United States has an imperative to protect Indian tribes against the encroachments of states and other citizens.¹⁶⁵ This principle of “responsibility and trust” embodies the national obligation to exercise the highest duty of care toward Indian tribes.¹⁶⁶ For this reason, the federal government has specific statutory duties, enacted pursuant to Congress’s plenary power in Indian affairs,¹⁶⁷ to care for Indian health, education, child

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162. Riley, *Illiberalism*, *supra* note 131, at 802, 839-48 (arguing that American Indians’ “differentness” depends in part on tribes’ legally protected status as distinct governmental entities within American society).
163. See, e.g., Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 (2000) (reporting congressional findings on the federal government’s historical and special obligation to American Indians, including their right to self-government); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61-68 (1978) (discussing cases and statutes furthering tribal self-determination).
164. CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 14 (1987). Wilkinson further describes the reservation system as a means of establishing “islands of tribalism largely free from interference by non-Indians or future state governments.” *Id.*
165. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17-18 (1831).
166. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) (maintaining that in establishing a treaty with the Indians, the U.S. government has charged itself with the “moral obligations of the highest responsibility and trust” and that its conduct should therefore be judged by “the most exacting fiduciary standards”). Given that most American Indian tribal property is currently held in trust by the United States for the tribes as beneficiaries, the stewardship model could be used to provide additional content to the federal trust obligation to tribes, and in particular to require that the federal government exercise a heightened duty of care, consistent with indigenous norms, toward Indian lands and other cultural resources. Imposing a heightened trust obligation is particularly salient in an era in which the Supreme Court narrowly construes the federal government’s trust obligations to Indian property. See *United States v. Navajo Nation*, 537 U.S. 488, 505-14 (2003) (rejecting the Navajo Nation’s claim that the Secretary of the Interior breached trust duties when he approved tribal coal leases containing below-market royalty rates in a set of transactions including private communications with a coal company).
167. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (“Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.”); *United States v. Kagama*, 118 U.S. 375, 384-85 (1886) (identifying the federal legislative “power” over Indian affairs as a basis for upholding criminal statute).

welfare, natural resources, economic development, language retention, lands, religious freedom, and cultural patrimony—many of the fundamental aspects comprising tribal peoplehood.¹⁶⁸

This legal recognition of Indian peoplehood provides an important doctrinal response to the questions raised by Brown and, to some extent, Mezey, about whether line drawing between indigenous and nonindigenous groups is necessary or justified in the context of cultural property. Legal protection for American Indian peoplehood is justifiable within the exceptional principles of federal Indian law, such as tribal sovereignty, plenary power, and the trust responsibility. But legal protection for American Indians is also fundamental to the country's larger ideals regarding religious freedoms, minority rights, and equality. As Felix Cohen famously stated,

[T]he Indian plays much the same role in our American society that the Jews played in Germany. Like the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.¹⁶⁹

American Indian peoplehood is a critical component of our nation's legal, social, and moral fabric, and is essential to democratic ideals and reasonable pluralism.¹⁷⁰ As we describe in further detail below, American Indians can only survive as distinct peoples if they enjoy legal protection of, and autonomy over, their cultural resources.¹⁷¹

168. See NELL JESSUP NEWTON ET AL., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §§ 22.01-.07 (2005) [hereinafter COHEN'S HANDBOOK OF FEDERAL INDIAN LAW].

169. Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953).

170. While we are focused on the American Indian context, we acknowledge that similar arguments about state obligations to indigenous peoples are available, to varying extents, in the international context. See, e.g., ANAYA, *supra* note 39, at 185-200 (elaborating duties of states, under international legal instruments, to secure indigenous human rights by implementing self-determination norms).

171. As Wallace Coffey and Rebecca Tsosie have argued, American Indian sovereignty, so often described in political terms, should be reconceptualized through a model of "cultural sovereignty" that "analyzes culture as a living context and foundation for the exercise of group autonomy and the survival of Indian nations." Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 209 (2001). Further defining "cultural sovereignty" as "the effort of Indian nations and Indian people to exercise their own norms and values in structuring their collective futures," *id.* at 196, Coffey and Tsosie argue that

2. *Indigenous Peoplehood and Cultural Property*

Patty Gerstenblith reminds us that once items are designated as cultural property, they assume a powerful role in linking group identity and property ownership, for a few reasons. First, because the identity of a people is inextricably linked to an object, Gerstenblith argues that a group might acquire ownership rights over the object. Second, to the extent that this property is intimately tied to the identity of a group, it is viewed as inalienable not only because of the group's contemporary norms but also because future generations are unable to consent to transactions that may affect their own identity and culture.¹⁷² In this Subsection, we examine these dynamics in the context of indigenous experiences, focusing on the land-based quality of many indigenous cultures and the challenges of cultural survival in the wake of colonization and territorial dispossession.

In the United States, American Indians have experienced a unique legacy of dispossession.¹⁷³ Millions of acres of traditional tribal lands are now owned and controlled by non-Indians as a result of European and American colonization.¹⁷⁴ In our view, the loss of real property is inextricably linked to the formation of cultural property claims, a point that has largely escaped scholars.¹⁷⁵ This problem is illustrated most poignantly by the 1988 decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, in which the Supreme Court denied several Indian tribes' Free Exercise Clause challenges to a Forest Service

cultural sovereignty contemplates a process of repatriating Native wisdom, land, and cultural identity, *id.* at 202-08, including the protection of "language, religion, art, tradition, and the distinctive norms and customs that guide our societies," *id.* at 196.

172. See Gerstenblith, *supra* note 36, at 570. A final reason stems from the Lockean premise that the property may be the product of group effort and labor. See *id.*
173. Though we focus here on American Indians (and, by extension, Native Hawaiians and Alaskan Natives), we note that the mass dispossession of lands is not unique to Indians in the United States, but is part of a particular colonial history that is shared by many of the world's indigenous populations.
174. See ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 312-17 (1990). For a sampling of recent scholarly works on the colonization of Indian lands, see, for example, BANNER, *supra* note 112; STUART BANNER, *POSSESSING THE PACIFIC: LAND, SETTLERS, AND INDIGENOUS PEOPLE FROM AUSTRALIA TO ALASKA* (2007); ROBERT J. MILLER, *NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS & CLARK, AND MANIFEST DESTINY* (2006); and LINDSAY G. ROBERTSON, *CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS* (2005).
175. Cf. Kristen A. Carpenter, *Contextualizing the Losses of Allotment Through Literature*, 82 N.D. L. REV. 605, 622-23 (2006) (detailing cultural and socioeconomic practices lost as a result of the federal "allotment" of tribal lands).

plan to build a road through traditional Indian sacred sites.¹⁷⁶ The Court held that even if the government would “virtually destroy” the Indians’ religion, it did not violate the First Amendment, in part because “[w]hatever rights the Indians may have to the use of the area . . . those rights do not divest the Government of its right to use what is, after all, *its* land.”¹⁷⁷ Even with respect to lands that the tribes retained, jurisdictional limitations have at times affected the tribes’ powers to protect cultural resources within reservation boundaries.¹⁷⁸

Of course, the close relationship between indigenous peoples and land is so well known and oft-repeated by scholars, advocates, and indigenous peoples themselves that it may begin to sound cliché. Indeed, the contention that a relationship with the land is a definitional element of what it means to be indigenous¹⁷⁹ invites charges of essentialism and romanticism. We too recognize the diversity of indigenous groups and do not assert that each indigenous person, on an individual basis, necessarily maintains special attachment to the land. We do contend, however, and illustrate through several examples below, that a connection between land and identity is a defining element of indigenous peoplehood.¹⁸⁰ In light of these ongoing collective attachments to land, it is impossible to protect indigenous peoplehood¹⁸¹

176. 485 U.S. 439, 447-51 (1988). To the limited extent that they maintain jurisdiction, tribes do implement their own cultural property laws. See Riley, *supra* note 51, at 92-130.

177. *Lyng*, 485 U.S. at 453.

178. A line of cases beginning with *Montana v. United States*, 450 U.S. 544 (1981), limits tribes’ civil jurisdiction over nonmember Indian activity to within the reservation, particularly where the activity occurs on property owned by non-Indians in fee simple, to instances in which (1) such conduct has a “direct effect on the political integrity, the economic security, or the health or welfare of the tribe,” or (2) the nonmember has engaged in consensual relations with the tribe. *Id.* at 565-66. The trend toward limited tribal government jurisdiction also has ramifications for the cultural property context. See Joseph William Singer, *Publicity Rights and the Conflict of Laws: Tribal Court Jurisdiction in the Crazy Horse Case*, 41 S.D. L. REV. 1, 1-4, 26-42 (1996) (discussing the question of tribal court jurisdiction over a publicity rights claim growing out of a corporation’s unauthorized use of the name and likeness of Lakota spiritual leader Crazy Horse in the marketing of malt liquor).

179. See ANAYA, *supra* note 39, at 3, 100-06.

180. Cf. FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 11 (1995) (“[The reservation is] a physical, human, legal, and spiritual reality that embodies the history, dreams, and aspirations of Indian people 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. As Lakota people say, ‘*Hecel lena Oyate nipikte*’ (That these people may live).”).

181. Tom Holm postulates that four attributes of peoplehood have ensured the survival of Indian tribes during periods of conquest, colonization, and forced assimilation. These include (1) maintaining language, (2) understanding place, (3) keeping particular religious ceremonies

without also protecting indigenous relationships with tribal lands and the culture that grows out of those lands.¹⁸²

Consider NAGPRA, for example. The repatriation statute was necessary not to secure Indians' *special* rights, but to counteract federal and state laws that facilitated the excavation, examination, and destruction of Indian burial grounds, which were situated predominantly on lands taken from tribes by non-Indians.¹⁸³ Other cultural property directives, such as the National Park Service's cooperation agreement concerning Indians and recreationalists at Devils Tower National Monument, similarly sought to protect the religious rights of Native peoples that had been undermined by the dispossession of Indian lands.¹⁸⁴ The Lakota reserved the Black Hills—including Devils Tower—in the Treaty of Fort Laramie of 1868 because of the site's central importance in Lakota religion.¹⁸⁵ Shortly thereafter, the U.S. government repudiated the Treaty and invaded Lakota territory, placing *Mato Tipila* (Lakota for "Bear Lodge") squarely on what is now federal land where Indian religious practitioners must compete with rock climbers for time and space to conduct their ceremonies.¹⁸⁶

To conceptualize more fully the relationship between real and cultural property, consider a more detailed set of examples affecting the Navajo Nation. The Navajo people define themselves, in many respects, by their relationship with *Dinetah*, the sacred Navajo homeland, whose boundary is marked by four

alive, and (4) perpetuating a sacred history. HOLM, *supra* note 131, at xiv, xvii. Even if indigenous peoples were not necessarily framing their claims in terms of "cultural property" during the historical period that Holm references (spanning 1492-1934, with specific attention to the Progressive Era of 1900-1920), Holm's model generally suggests the importance of indigenous cultural attributes—such as language, place, religion, and history—to indigenous peoplehood.

182. Rosemary J. Coombe, *Fear, Hope, and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property*, 52 DEPAUL L. REV. 1171, 1186 (2003) ("Certain takings of cultural goods do create cultural, social and political harms to peoples for whom cultural forms are more tightly interwoven with specific forms of subsistence in local lifeworlds of meaning.").
183. See Angela R. Riley, *Indian Remains, Human Rights: Reconsidering Entitlement Under the Native American Graves Protection and Repatriation Act*, 34 COLUM. HUM. RTS. L. REV. 49, 54-55 (2002).
184. See *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 815 (10th Cir. 1999).
185. Treaty of Fort Laramie of 1868, U.S.-Sioux Indians, Apr. 29, 1868, 15 Stat. 635.
186. See Carpenter, *supra* note 44 (discussing American Indians' loss of title to sacred sites); RAY H. MATTISON, NAT'L PARK SERV., DEVILS TOWER HISTORY: OUR FIRST FIFTY YEARS (1955), available at <http://www.nps.gov/deto/first50.htm>.

mountain peaks.¹⁸⁷ Navajo culture grows out of *Dinetaah*.¹⁸⁸ From the time of their creation, the Navajo people have had a spiritual obligation to stay within their homeland, care for it, and revere the four sacred mountains.¹⁸⁹ The loss of the Navajo land base in the nineteenth century radically severed this connection between the land and their tribal identity. In 1864, the federal government forcefully relocated thousands of Navajos from their homeland to a prison camp at Bosque Redondo, a period known as the “Long Walk,” during which hundreds perished along the way, longing to return to the traditional homeland cradled by the four sacred mountains.¹⁹⁰ Indeed, the Navajos’ attachment to their sacred homeland was one of the main factors inspiring their resistance to relocation until the federal government initiated a campaign to destroy their villages, livestock, and all sources of food, thereby forcing them to relocate or perish.¹⁹¹ Four years later, the Navajos prevailed and negotiated a federal treaty restoring their rights to return home to occupy, govern, and live on a reservation that was within—although smaller than—their traditional territory.¹⁹²

Contemporary obstacles to Navajo peoplehood remain, largely as an outgrowth of the Long Walk period, which markedly reduced the size of the Navajo land base, and which paved the way for other forms of land development that directly encroached upon the sacred character of the area.¹⁹³

187. Today, approximately 180,000 Navajo citizens (of 225,000 total) reside on the 16.2 million acre reservation in the Four Corners Region. Some maintain a traditional lifestyle, speaking the Navajo language, living in hogans, grazing sheep, weaving, and maintaining Navajo spiritual and healing traditions. CLAUDEEN ARTHUR ET AL., *BETWEEN SACRED MOUNTAINS: NAVAJO STORIES AND LESSONS FROM THE LAND 2* (1982) (situating Navajo life between the four sacred mountains).

188. See Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1122 (2004) (“Place is central to Navajo culture and identity, and understanding the modern Navajo Nation necessitates an understanding of the interconnectedness between the Diné [the Navajo people] and their land base.”).

189. The Navajo writer Luci Tapahonso has written that the four mountains—Blanca Peak, Mount Taylor, Hesperus Peak, and the San Francisco Peaks—“were given to us to live by. These mountains and the land keep us strong. From them, and because of them, we prosper. . . . This is where our prayers began.” LUCI TAPAHONSO, *BLUE HORSES RUSH IN: POEMS & STORIES* 42 (1997).

190. See RUTH ROESSEL, *NAVAJO STORIES OF THE LONG WALK PERIOD 40-41* (1973) (quoting Navajo elder Howard W. Gorman).

191. *Id.* at 153 (quoting Navajo elder Frank Goldtooth).

192. Treaty Between the United States of America and the Navajo Tribe of Indians, U.S.-Navajo, June 1, 1868, 15 Stat. 667.

193. As elder Frank Goldtooth explained, “We now live within our four great sacred mountains, where our . . . [Holy People] want us to live, but most of the mountains themselves were

In cases like that of the Navajos, the individual desires of the title-holder often conflict with the collective interests of the indigenous people who hold the land base as sacred and constitutive of their peoplehood, resulting in a direct doctrinal tug-of-war between real property and cultural property interests. Recently, for example, the Ninth Circuit's en banc decision in *Navajo Nation v. U.S. Forest Service* upheld the right of the federal government, as title-holder to the San Francisco Peaks, to authorize the use of reclaimed water, or treated sewage effluent, in snowmaking on the Arizona Snowbowl, a private ski resort located on the mountain.¹⁹⁴ To the Navajos—particularly those who revere the Peaks' purity and the central role they play in Navajo creation stories and spirituality—the application of treated sewage water is a desecration of a sacred site. Along with other tribes, therefore, the Navajo Nation recently filed a petition for certiorari to the Supreme Court, asking it to review their religious freedoms claims associated with the desecration of the mountain.¹⁹⁵

Other Navajo cultural properties are similarly threatened today as a result of the loss of land to the federal government. While the Navajo, like other tribes,¹⁹⁶ have their own tribal laws to protect their cultural properties, federal common law severely limits tribal jurisdiction over nonmembers and over activities occurring outside the reservation.¹⁹⁷ For example, even though the Navajos' tribal code regarding the rights of tribal weavers indicates that “any design woven by a Navajo weaver within the four sacred mountains of the Navajo Nation is sacred” and should be treated accordingly by the *Diné* people, jurisdictional limits make it virtually impossible for the Navajo—or any Indian nation—to use tribal law and the tribal court system to prevent cultural appropriation.¹⁹⁸ These limitations were confronted, for instance, when the

taken away from us by the white people.” ROESSEL, *supra* note 190, at 153 (quoting Goldtooth).

194. 535 F.3d 1058 (9th Cir. 2008). For discussion of recent litigation surrounding this case, see Part III.

195. Petition for Writ of Certiorari, *Navajo Nation v. U.S. Forest Serv.*, No. 08-846 (U.S. Jan. 5, 2009), available at http://www.narf.org/sct/navajonationvusfs/petition_for_cert.pdf.

196. See, e.g., *Cherokee Nation v. Journeycake*, 155 U.S. 196 (1894) (noting the distinctive character of indigenous communal property).

197. See Riley, *supra* note 51, at 106-07 (discussing the grave protection laws of the Chickasaw Nation of Oklahoma, the Mille Lacs Band of Ojibwe Indians, and the Hopi Nation, among others); see also *supra* note 178 (discussing the *Montana* standard for tribal jurisdiction over nonmembers in Indian Country).

198. As a result, some Navajo weavers claim that non-Indian corporations and artists have appropriated their designs in the mass-market for “Navajo-style” rugs, driving many traditional Navajo artisans out of business or into poverty. See, e.g., Kathy M'Closkey & Carol Snyder Halberstadt, *The Fleecing of Navajo Weavers*, CULTURAL SURVIVAL Q., Fall 2005, at 43, 43-44.

Navajos' sacred "Beauty Way" song was incorporated into OutKast's performance of "Hey Ya!" at the televised 2004 Grammy Awards.¹⁹⁹ The intricate web of federal intellectual property laws that normally would govern such appropriation is likely inapplicable to the "Beauty Way" song because, like most indigenous oral creations, it is considered to be in the public domain and is ineligible for protection under federal copyright law.²⁰⁰ Furthermore, as with the unlawful copying of Navajo rug designs, tribal jurisdiction does not extend to OutKast's actions.

It is impossible to survey in this Article all the various ways in which American Indian peoplehood is intimately tied to property. But the Navajo Nation examples highlight the close relationship between tribal property—real, tangible, and intangible—and tribal culture. For the Navajos and other indigenous peoples, major losses of property and sovereignty interests in their homelands make it difficult to protect their land-based cultures today.²⁰¹ As we discuss in greater detail in Part III, some of the federal cultural property laws, although maligned by cultural property critics, at least partially fill the void left by the legacy of conquest and colonization.

B. From Ownership to Stewardship

As we suggested in Subsection II.A.2, a vision of peoplehood underlies conceptions of cultural property, both in a descriptive and normative sense. Contemplating cultural property through the lens of peoplehood redefines our understanding of cultural property claims and forces us to grapple with an emerging, alternative model of property that challenges ownership as the fundamental nexus of property interests.

The notion that property concerns the absolute rights of owners to do whatever they wish with their possessions has long influenced the development

199. Riley, *supra* note 51, at 70-72 (discussing OutKast's use of the Navajo "Beauty Way" song).

200. For a full discussion of this problem, see Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175 (2000). See also Anthony Seeger, *Ethnomusicology and Music Law*, in BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION 52 (Bruce Ziff & Pratima V. Rao eds., 1997) (exploring indigenous peoples' potential intellectual property claims in their traditional songs).

201. See Robert A. Williams, Jr., *Large Binocular Telescopes, Red Squirrel Piñatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World*, 96 W. VA. L. REV. 1133, 1136 (1994) ("In the cultural symbology of colonialism, there comes that pivotal moment when the colonizer affirms the triumph over the colonized by an unspeakable act of religious defilement; the temple is ransacked, sacred artifacts are plundered, and heathen idols are destroyed.").

of property law,²⁰² and it seems to continue to influence cultural property critics. Anglo-American property law springs from a vision of property as “that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.”²⁰³ In more contemporary terms, Richard Pipes has surmised that “[p]roperty refers to the right of the owner or owners, formally acknowledged by public authority, both to exploit assets to the exclusion of everyone else and to dispose of them by sale or otherwise.”²⁰⁴ These rights add to the perception that an owner enjoys a wide degree of autonomy over her property, enabling her to “us[e] it all up,” or even to destroy her property, depending on the context.²⁰⁵

Viewed through the classic prism of owners’ rights, cultural property would understandably appear like a threatening legal device to scholars who appreciate culture as a collaborative enterprise developed and shared among multiple members of society. Fortunately, the absolute ownership model of property is neither the only nor the leading approach to property theory today. Rather, we would argue that cultural property protection reflects, in part, the now pervasive view that property is a bundle of relative, rather than absolute, entitlements, including limited rights to use, alienate, and exclude.²⁰⁶ In its disaggregation of these rights among individuals and groups, property law

202. See generally Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 280-95 (1998) (characterizing “absolutism” as the “intuitive” view of property in Anglo-American law and politics).

203. James Madison, *Property*, NAT’L GAZETTE, Mar. 29, 1792, reprinted in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 186, 186 (Marvin Meyers ed., 1981) (summarizing Blackstone’s introduction to property). For an original account, see 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

204. See PIPES, *supra* note 17, at xv.

205. Edward J. McCaffery, *Must We Have the Right To Waste?*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY, *supra* note 18, at 76, 76 (noting, but then challenging, a broad right to waste); see also Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849 (2007) (arguing that the American system of property law is based on a conception of property rights as moral rights).

206. See CAROL M. ROSE, *Seeing Property*, in PROPERTY AND PERSUASION, *supra* note 110, at 267, 278-85 (discussing the “bundle of sticks” metaphor of property); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 21-24 (1913) (defining property as a form of relative entitlements); see also JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 48 (1996) (“To the extent there was a replacement for this Blackstonian conception [of property], it was the familiar ‘bundle of rights’ notion of modern property law, a vulgarization of Wesley Hohfeld’s analytic scheme of jural correlates and opposites, loosely justified by a rough and ready utilitarianism and applied in widely varying ways to legal interests of every kind.”).

functions as a system of “[s]ocial [r]elations,” structuring relationships among persons with respect to things.²⁰⁷

As we discuss further below, contrary to the presumptions of its critics, cultural property approaches do attempt to reconcile the interests of owners and nonowners in drawing on a particular resource. Indigenous peoples, rather than holding property rights delineated by notions of title and ownership, often hold rights, interests, and obligations to preserve cultural property irrespective of title.²⁰⁸ That is why the language used within these approaches draws upon the themes of custody, care, and trusteeship, rather than comparably more fungible conceptions of property. As Rebecca Tsosie has explained in the context of real property,

Although Native peoples, like all people, share the need to use the land for their physical sustenance, they hold different notions about the appropriate relationship and obligations people hold with respect to the land. The mere fact that the land is not held in Native title does not mean that the people do not hold these obligations, nor . . . that they no longer maintain the rights to these lands.²⁰⁹

This principle—the exercise of rights and obligations independent of title—lies at the heart of cultural stewardship.

1. *Introducing Cultural Stewardship: Views from Indigenous, Corporate, and Environmental Theory*

While specific traditions vary widely, many indigenous communities in the United States exhibit a strong duty of care toward the land and related resources as a spiritual obligation.²¹⁰ For example, the Navajo Nation Code

207. Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 361 (1954). Contemporary theorists such as Joseph Singer suggest, moreover, that in decisions about property distribution and entitlements, the law should (and often does) take into account not only the owner’s rights, but also “the conflicting interests of everyone with legitimate claims” to the land or other resource at issue. SINGER, *supra* note 18, at 91. Singer calls this approach to property an “entitlement model.” *Id.*

208. See POMMERSHEIM, *supra* note 180, at 14 (observing that the “cultural taproot connecting Indian people to the land . . . is being rediscovered and tended with renewed vigor and stewardship” after three hundred years of European contact).

209. See Rebecca Tsosie, *Land, Culture, and Community: Reflections on Native Sovereignty and Property in America*, 34 IND. L. REV. 1291, 1306 (2001).

210. See Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 274-75 (1996).

provides that the Navajo “have the sacred obligation and duty to respect, preserve and protect all that was provided for we were designated as the steward for these relatives.”²¹¹ The belief that humans maintain duties to—rather than dominion over—the earth and its Creator is common among indigenous peoples. Such concepts are often expressed in culturally specific terms that convey the interdependence between the tribe and its environment and that underscore the fiduciary obligation felt by many tribes toward their natural resources. The Hopi, for example, explained in *Navajo Nation v. U.S. Forest Service* that their tribal interest in protecting the San Francisco Peaks stems from a spiritual covenant with *Ma’saw*, a holy presence that directed them to care for the land at the time when the Hopi first emerged into this world.²¹² In other communities, tribes express specific duties to the subsistence landscapes,²¹³ water sources,²¹⁴ or ancestral remains²¹⁵ that perpetuate tribal lifeways and peoplehood.

211. NAVAJO NATION CODE tit. I, § 205(D) (2005). Such obligations arise, in part, because the Navajo people “do not own” resources such as “Mother Earth and Father Sky,” which must in turn be treated “without exerting dominance.” *Id.* § 205(E). The Code suggests that these “relatives” include (1) the four sacred elements of life—“air, light/fire, water and earth/pollen”; (2) the six sacred mountains; and (3) Mother Earth and Father Sky, animals, and marine and plant life. The Code also states that it is the Navajo duty “to protect and preserve the beauty of the natural world.” *Id.* §§ 205(A)-(G).

212. 479 F.3d 1024, 1034 (9th Cir. 2007). Hopis uphold this covenant by directing prayers and conducting pilgrimages to the Peaks, maintaining shrines there, and holding ceremonies when the *Kachinas* (spiritual beings) leave their home on the Peaks to bring rain to Hopi villages and corn crops. These practices reflect the Hopi ceremonial and planting cycles, Hopi values and responsibilities, and Hopi reliance on rain and corn for survival. *Id.*

213. See, e.g., Statement of Intent, Land Policy and Constitution of the People of Bill Moore’s Slough (1988), available at <http://thorpe.ou.edu/constitution/billmoores/index.html> (declaring intent to continue managing land “as we have always managed it in the past”).

[O]ur land and the culture of our people [are] intertwined to the point where it would not be possible to maintain our traditional values and lifestyle should our land be alienated, altered [sic] or otherwise changed from its traditional relationship with our people.

Therefore, it is our intent and the intent of this policy to maintain our land for all time forever for traditional uses.

Id.

214. See Joyce Tekahnawiiaks King, *The Value of Water and the Meaning of Water Law for the Native Americans Known as the Haudenosaunee*, 16 CORNELL J.L. & PUB. POL’Y 449, 452 (2007) (articulating, as a basis for management of the Great Lakes, Haudenosaunee law treating water as a sacred element that must not be abused); see also WILMA MANKILLER, EVERY DAY IS A GOOD DAY: REFLECTIONS BY CONTEMPORARY INDIGENOUS WOMEN 24 (2004) (quoting Cheyenne tribe member Gail Small, who describes the Cheyenne concern for “[p]rotection of the water spirits”).

Stewardship concerns—involving the fiduciary duty of care or the duty of loyalty to something that one does not *own*—are not unique to the indigenous context. There is a fascinating, overlooked parallel in corporate management with respect to the notion of stewardship.²¹⁶ In the corporate context, stewardship is conceived of as “the willingness to be accountable for the well-being of the larger organization by operating in service, rather than in control, of those around us.”²¹⁷ In the context of organizational management, the concept of stewardship has been an underlying factor in providing a substantive theoretical alternative to classical agency theory, which focused on a variety of ways to incentivize employees to behave productively in the absence of ownership of the company.²¹⁸ Traditional agency theory, like much

215. See, e.g., Edward Halealoha Ayau, *Rooted in Native Soil*, FED. ARCHEOLOGY, Fall/Winter 1995, at 30, 31, available at http://www.nps.gov/history/archeology/Cg/fd_fa_win_1995/soil.htm.

In Hawaiian, the word *kanu* means to plant, to cultivate. It is a native Hawaiian belief that from this planting comes *ulu* (growth), both physical and spiritual. The bones of our ancestors nourished the ground from which our food grows, which, in turn, nourishes our bodies. Secure in the knowledge that our ancestors are where they belong, in Hawaiian earth, free from harm, our spirits are nourished as well.

. . . By reciting the names of my ancestors, I am reminded that but for their existence, I simply would not be. I am humbled by this reminder and duty bound to care for those who came before me.

Id.

216. There is a vast literature on the concept of stewardship in both contexts. See, e.g., RAYMOND W.Y. KAO, STEWARDSHIP-BASED ECONOMICS (2007) (articulating stewardship as an alternative to ownership); STEWARDSHIP ACROSS BOUNDARIES (Richard L. Knight & Peter B. Landres eds., 1998) (collecting articles from property scholars on stewardship).
217. PETER BLOCK, STEWARDSHIP: CHOOSING SERVICE OVER SELF-INTEREST, at xx (1993).
218. See James H. Davis, F. David Schoorman & Lex Donaldson, *Toward a Stewardship Theory of Management*, 22 ACAD. MGMT. REV. 20 (1997). In the context of corporate governance, classical agency theory draws much of its indirect power from a Coasean analysis of the firm. See R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937). Ronald Coase, for example, famously postulated that an employer had to be able to control the work of the employee by turning to ex post sanctions and by coordinating activities by fiat or authority when needed. See Melvin A. Eisenberg, *The Conception That the Corporation Is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819, 820-22 (1999) (summarizing this point); Stephen Bainbridge, *Nexus of Contracts Theory*, BusinessAssociationsBlog.com, June 17, 2005, http://www.businessassociationsblog.com/lawandbusiness/comments/nexus_of_contracts_theory/ (“By creating a central decisionmaker—a nexus—with the power of fiat, the firm thus substitutes ex post governance for ex ante contract.”).

Coase’s contribution paved the way for a foundational view of employer-employee relations through the lens of agency theory, which later scholars argued deeply circumscribed the nature of the firm in explaining managerial behavior. Michael Jensen and

of property law, postulates a model of the rational actor—whether an agent or a principal—who seeks to maximize his utility within the modern corporation, which is based on a clear separation between ownership of the firm and control.²¹⁹ Given that employees do not own the corporations that they manage, agency theory directs that firms must balance their interests in maximizing profits with a studied attention to structuring employee compensation and benefits in such a way that channels the employee's self-serving behavior toward the benefit of the owners.²²⁰

Predictably, the agency model often receives substantial critique from other theorists, who point out that its baseline presumption of opportunism depicts subordinates as “individualistic, opportunistic, and self-serving”²²¹ and fails to

William Meckling, the scholars who introduced the notion of agency costs, began their groundbreaking paper with the following quotation from Adam Smith:

The directors of such [joint-stock] companies, however, being the managers rather of other people's money than of their own, it cannot well be expected, that they should watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own. Like the stewards of a rich man, they are apt to consider attention to small matters as not for their master's honour, and very easily give themselves a dispensation from having it. Negligence and profusion, therefore, must always prevail, more or less, in the management of the affairs of such a company.

Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 305 (1976) (quoting 5 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 800 (Edward Cannan ed., Modern Library 1994) (1776)). Since both principal and agent are utility maximizers, “there is good reason to believe that the agent will not always act in the best interests of the principal.” *Id.* at 308. Thus, firms were advised to focus special attention on structuring of compensation and other employee benefits. See also Cam Caldwell et al., *Ethical Stewardship—Implications for Leadership and Trust*, 78 J. BUS. ETHICS 153, 154 (2008) (drawing upon Jensen and Meckling's work).

219. See Davis et al., *supra* note 218, at 22. This view later came under attack by other business law scholars who objected to Coase's authoritarian view of the corporation. Armen Alchian and Harold Demsetz argued that the firm's authority or disciplinary power was no different than that exercised by any other two entities in a market transaction. See Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 777 (1972) (arguing that “[the firm] has no power of fiat, no authority, no disciplinary action any different in the slightest degree from ordinary market contracting between any two people”); see also Robert C. Clark, *Agency Costs Versus Fiduciary Duties, in PRINCIPALS AND AGENTS* 55, 58–59 (John W. Pratt & Richard J. Zeckhauser eds., 1985) (comparing the realm of agency theory to the concept of fiduciary obligation in the context of the modern corporation).
220. See Jensen & Meckling, *supra* note 218, at 306 (discussing why the agent will not always act in the best interests of the principal).
221. Davis et al., *supra* note 218, at 20.

take into account the complexities of human motivation.²²² As such, some organizational theorists have grown to emphasize the development of stewardship theory as an alternative. Stewardship theory, in contrast to agency theory, postulates a model that “pro-organizational, collectivistic behaviors have higher utility than individualistic, self-serving behaviors.”²²³ The behavior of a steward is motivated out of concern for the collective, as opposed to the individual, and is “constrained by the perception that the utility gained from pro-organizational behavior is higher than the utility that can be gained through individualistic, self-serving behavior.”²²⁴ In short, stewardship behavior is more akin to a fiduciary model, requiring “constant and unqualified fidelity” to the corporation, rather than a self-interested model.²²⁵ Often, these fiduciary duties require directors and officers to exercise the degree of care, skill, and diligence that each normally would employ in the service of his or her own affairs.²²⁶

The emergence of stewardship theory in the corporate context, as an alternative to classical agency theory, provides us with much more than a purely facial parallel in the indigenous cultural property context. In conceptualizing property management, a vision of corporate stewardship differs from that of a traditional agency model in three major ways. First, like the pluralistic conception of peoplehood, which diverges from a single-minded

222. *See id.* at 24.

223. *Id.*

224. *Id.* at 25.

225. Clark, *supra* note 219, at 72-73 (quoting *Globe Woolen Co. v. Utica Gas & Elec. Co.*, 121 N.E. 378, 379 (N.Y. 1918) (Cardozo, J.)).

226. *See id.* at 73. Justice Douglas offered a helpful description of the fiduciary relationship in *Pepper v. Litton*:

He who is in such a fiduciary position cannot serve himself first and his *cestuis* second. . . . He cannot by the intervention of a corporate entity violate the ancient precept against serving two masters. He cannot by the use of the corporate device avail himself of privileges normally permitted outsiders in a race of creditors. He cannot utilize his inside information and his strategic position for his own preferment. He cannot violate rules of fair play by doing indirectly through the corporation what he could not do directly. He cannot use his power for his personal advantage and to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements. For that power is at all times subject to the equitable limitation that it may not be exercised for the aggrandisement, preference, or advantage of the fiduciary to the exclusion or detriment of the *cestuis*. Where there is a violation of those principles, equity will undo the wrong or intervene to prevent its consummation.

308 U.S. 295, 311 (1939) (citation omitted).

focus on individual self-actualization, stewardship prioritizes service to the organization or group over self-interest, and is concerned with treating employees more like owners and partners than like specific agents.²²⁷ Whereas agency theory presupposes a clear separation between the principal and the agent, the stewardship model views both principal and agent as part of the collective enterprise, thus merging the governance of authority.²²⁸ Here, the index of identity, like the notion of peoplehood itself, is collective; it is organizational and pluralistic in nature, rather than individualistic.

Second, this bond of collective enterprise radically alters notions of duty and obligation, rupturing the classic distinctions at play in common agency models of responsibility and bringing to the forefront the concept of fiduciary obligation.²²⁹ In the classic agency-contractual relationship, “each party acts to benefit himself or herself in carrying out the common enterprise,” whereas a

227. See BLOCK, *supra* note 217, at 23-25 (explaining stewardship is founded upon “service over self-interest” and treating employees like “owners and partners”); Caldwell et al., *supra* note 218, at 154 (discussing stewardship theory as distinguished from agency theory).

228. For those who subscribe to agency theory, performance is motivated by extrinsic rewards: the acquisition of tangible, fungible commodities that have a clear market value and that comprise the system of rewards operating as a means of behavioral control and expectation. In contrast, under a stewardship model, the set of rewards can be intrinsic and affiliative to a far greater extent, including self-actualization, a shared organizational vision, and a sense of achievement. See Davis et al., *supra* note 218.

229. There is a vast literature on fiduciary obligations in the corporate and noncorporate contexts. See, e.g., FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 90 (1991) (detailing the concept of fiduciary obligation as a set of principles that individuals would have bargained for in the absence of transaction costs); P.D. FINN, *FIDUCIARY OBLIGATIONS* (1977); J.C. SHEPHERD, *THE LAW OF FIDUCIARIES* (1981); Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 427 (1993) (arguing that fiduciary duty plays a gap-filling role in cases of incomplete contracts); Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795 (1983) (synthesizing the concept of fiduciary duty in a variety of different contexts); Earl R. Hoover, *Basic Principles Underlying Duty of Loyalty*, 5 CLEV.-MARSHALL L. REV. 7 (1956) (outlining the concept of loyalty and its relationship to fiduciary duty); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625 (1995) (describing the legal movement toward fiduciary obligation in modern law); Jonathan R. Macey, *Fiduciary Duties as Residual Claims: Obligations to Nonshareholder Constituencies from a Theory of the Firm Perspective*, 84 CORNELL L. REV. 1266, 1273 (1999) (characterizing fiduciary duty as a “gap-filling” mechanism for unspecified contractual terms); Larry E. Ribstein, *Are Partners Fiduciaries?*, 2005 U. ILL. L. REV. 209 (characterizing fiduciary duties as a type of contract term); L.S. Sealy, *Fiduciary Relationships*, 1962 CAMBRIDGE L.J. 69, 74-79 (proposing a taxonomy of fiduciary relationships); L.S. Sealy, *Some Principles of Fiduciary Obligation*, 1963 CAMBRIDGE L.J. 119 (outlining the concept in different contexts); J.C. Shepherd, *Towards a Unified Concept of Fiduciary Relationships*, 97 L.Q. REV. 51 (1981) (summarizing and critiquing various approaches to the concept); Ernest J. Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1 (1975) (exploring the boundaries of fiduciary concepts in law).

fiduciary relationship is premised on acting only in the beneficiary's interests, and thus often precludes such opportunistic behavior.²³⁰ Lawrence Mitchell has argued that the fiduciary construct implicates a key assumption: "that persons can and will subordinate self-interest to the interests of others,"²³¹ and that the fiduciary serves largely as a surrogate to ensure that the dependent beneficiary's best interests are addressed in all relevant contexts. In the corporate law context, these duties are legally imposed in the categories of a duty of loyalty and a duty of care.²³²

In the cultural property context, while the fiduciary ethic is asserted, the neat delineations between fiduciary and beneficiary often overlap.²³³ Instead of a hierarchical separation between these parties, there are multiple levels of interactivity in the cultural property regime, as well as overlapping and sometimes opposing obligations, rights, and duties regarding fiduciaries and beneficiaries at different points along the cultural property spectrum.²³⁴ For example, regarding the repatriation of human remains and funerary objects,

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230. Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C. L. REV. 595, 624 (1997). In a classic series of articles, Victor Brudney drew a number of powerful distinctions between fiduciary obligations and contractual obligations, pointing out that "[t]he dominant school of contractarians emphasizes maximizing corporate value," an objective that can often diverge from the fiduciary obligations of managers or controllers. *Id.* at 622, 625-26; see Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403, 1407-08 (1985) (pointing out how "paternalistic" and "relational" views of contract both fail to capture the concept of fiduciary duty). This point has underlined many other moral treatments of fiduciary duty as well. See, e.g., Deborah A. DeMott, *Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences*, 48 ARIZ. L. REV. 925 (2006); Scott FitzGibbon, *Fiduciary Relationships Are Not Contracts*, 82 MARQ. L. REV. 303, 305 (1999); Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67 (2005).
231. Lawrence Mitchell, *The Death of Fiduciary Duty in Close Corporations*, 138 U. PA. L. REV. 1675, 1683 (1990) (exploring how the concept of fiduciary duty fares in a close corporation context).
232. See also Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1262 (2008) (extending the notion of fiduciary obligation to shareholders).
233. Unlike classic types of agency relationships, in which the principal's control of the agent results in an agency relationship, in a fiduciary situation the control dynamic is reversed. There, the fiduciary maintains control over the assets or affairs of the principal, and is required to act in the principal's self-interest at all times. See Arthur B. Laby, *The Fiduciary Obligation as the Adoption of Ends*, 56 BUFF. L. REV. 99, 131-32 (2008).
234. These obligations may be exercised by a wide variety of parties – tribal governments, private parties, and federal or state entities. At times, these shared obligations have enabled indigenous and environmental activists to work in concert with each other to protect environmental quality. See, e.g., *Atl. States Legal Found., Inc. v. Hamelin*, 182 F. Supp. 2d 235 (N.D.N.Y. 2001) (enabling the Environmental Protection Agency to authorize the Saint Regis Mohawk Tribe to prosecute a violation of Clean Water Act).

NAGPRA is primarily concerned with enabling a tribe (itself a beneficiary of the “trust” relationship with the federal government²³⁵) to exercise its own fiduciary responsibilities to a variety of constituencies—its current members, future generations, and past members now deceased—in reacquiring cultural property.²³⁶

In the multiple contexts where cultural property interests emerge, the tribe holds a duty of loyalty and of reasonable diligence in acting on behalf of these interests.²³⁷ In these instances, the tribe accepts responsibility even in the absence of title, and does so sometimes at odds with the divergent interests of the individual title-holder. Inherent in these tribal obligations is the concept of stewardship and its corollary of fiduciary responsibility—a duty of loyalty to act in the beneficiary’s interest, along with a duty of care to undertake reasonable actions on the beneficiary’s behalf.²³⁸ In contrast to ownership, which locates the majority of these rights and obligations within the owner’s sphere of responsibility, stewardship distributes these rights, duties, and responsibilities along a spectrum of collective or group obligations, focusing on notions of “custody” and “trusteeship” rather than on title.

The concept of trusteeship in cultural property is often overlooked, but it is especially important to capture through the lens of stewardship, because it indirectly suggests that while a tribe may act as a fiduciary on behalf of its own tribal members, a much wider framework of beneficiaries stand to benefit from the protection of the tribe’s cultural property. As we discuss further in Part III, items can be retained by museums for the purpose of scientific study and later repatriated. Some artifacts that are repatriated can also be shared, lent, and exhibited by tribes for the benefit of future generations, indigenous and nonindigenous alike. Though a moderate critic such as Appiah might be wary of a broad application of the logic of cultural property, Appiah duly observes that there are some objects that do deserve return: “If an object is central to the cultural or religious life of the members of a community,” he writes, “there is a

235. See Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 B.Y.U. J. PUB. L. 1, 19-25 (2004) (listing sources of trust responsibility); Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355 (2003).

236. See 25 U.S.C. § 3005(a)(1) (2000) (calling for the “expeditious[] return” of “remains and associated funerary objects”).

237. Cf. Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995) (applying the concept of fiduciary duty to parental obligations).

238. See Laby, *supra* note 233 (exploring a fuller dimension of the concept of fiduciary obligation).

human reason for it to find its place back with them.”²³⁹ By arguing that cultural property should be preserved because it belongs to all of us in a cosmopolitan sense, Appiah captures how the language and work of repatriation rely on an organic, malleable notion of trusteeship.²⁴⁰ In the case of the Nok, for example, the Nigerian government ideally acts not as a property owner, but rather as a “trustee for humanity.”²⁴¹ By applying these insights to the indigenous cultural property context, Appiah’s important intercession forces us to recognize that a cosmopolitan vision can justify repatriation on the grounds that in many cases, all of us stand to benefit from careful cultural stewardship, not just one specific group.

Beyond the corporate context, stewardship is perhaps even more clearly evident in the foundational ethos of the environmental movement.²⁴² Here, the notion of stewardship is closely tied to conservation and the requirement that humans engage in use and management of resources in such a way that protects and preserves their environmental quality.²⁴³ Modern environmentalism is undoubtedly inspired in part by American Indian approaches to land, as it unswervingly attempts to identify a fiduciary—indeed, familial—relationship between humans and the environment.²⁴⁴ In contrast to the Christian tradition, which emphasizes human dominion over land, non-Western and indigenous approaches to property imbue the land itself with a particular spiritual significance.²⁴⁵ Instead of casting humans as rightfully

239. APPIAH, *supra* note 85, at 132.

240. *Id.*

241. *Id.* at 120.

242. See THE ASPEN INSTITUTE, *THE STEWARDSHIP PATH TO SUSTAINABLE NATURAL SYSTEMS* 3-4 (1999) (discussing the concept of stewardship in ecological conservation); WILLIAM J. BYRON, *TOWARD STEWARDSHIP: AN INTERIM ETHIC OF POVERTY, POWER AND POLLUTION* (1975) (articulating the stewardship concept with respect to population control and poverty); *ETHICS OF CONSUMPTION: THE GOOD LIFE, JUSTICE, AND GLOBAL STEWARDSHIP* (David A. Crocker & Toby Linden eds., 1998) [hereinafter *ETHICS OF CONSUMPTION*] (discussing the concept of stewardship in ecological conservation); ALDO LEOPOLD, *A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE* 201-26 (1949) (same); *id.* at viii-ix (“We abuse land because we regard it as a commodity belonging to us. When we see land as a community to which we belong, we may begin to use it with love and respect. . . . [T]hat land is to be loved and respected is an extension of ethics.”).

243. See E. William Anderson, *Viewpoint: Building a Stewardship Ethic*, 5 *RANGELANDS* 271 (1983) (outlining stewardship in the context of environmentalism).

244. See RODERICK FRAZIER NASH, *THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS* 117-19 (1989) (identifying the link between American environmentalism and American Indian approaches to land).

245. See Rhys H. Williams, *Constructing the Public Good: Social Movements and Cultural Resources*, 42 *SOC. PROBS.* 124, 137 (1995).

dominant over nature, the stewardship view considers first what is best for the planet, emphasizing the principle that “[n]on-human life has intrinsic value unconnected to its human usefulness, and humans have no right to reduce non-human richness.”²⁴⁶

Thus far, we have examined the concept of stewardship in varied contexts, ranging from corporate organizational management to native environmental sovereignty, suggesting that long-term fiduciary obligations can be exercised by those outside the letter of ownership. Although there are competing visions even among environmentalists as to the proper relationship between humans and the environment,²⁴⁷ adherents to the movement universally believe that the earth’s resources should not be exploited to the point of depletion.²⁴⁸ Stewardship, as opposed to ownership, plays a critical role in the environmentalists’ conception of human-nature interactions, and it also offers a different conception of the role and concept of utility in economic theory. Consider this observation, from *Stewardship-Based Economics*:

As inhabitants of Earth, we cannot claim ownership of the Earth or any part of it; we are its stewards. The Earth in its entirety has been bestowed on us for our care. More importantly, it is also meant for future inhabitants, human and otherwise. While ownership is only a legal device used to facilitate transactions among people, the purpose of stewardship is to increase the utility function for ourselves and all other living beings on the planet.²⁴⁹

While we might disagree with the author’s narrow conception of ownership, his proposition that a purely market-based system of property fails to consider the value of sustainability comports with indigenous perspectives. Consider, for example, the mission statement of the Natural Resources Defense Council, which seeks to “establish sustainability and good stewardship of the Earth as central ethical imperatives of human society” and “strive[s] to protect nature in ways that advance the long-term welfare of present and future generations.”²⁵⁰

246. *Id.* at 138.

247. See Ann E. Carlson, *Standing for the Environment*, 45 UCLA L. REV. 931, 964-67 (1998) (discussing the contrast between the “deep ecology” and “conservationist” wings of environmental activism).

248. See *id.* at 967.

249. See KAO, *supra* note 216, at 77-78.

250. Natural Resources Defense Council, About NRDC: Mission Statement, <http://www.nrdc.org/about/mission.asp> (last visited Nov. 9, 2008); see also Carlson, *supra* note 247, at 966 n.187 (discussing how the National Resource Defense Council’s statement

This statement echoes a conviction common to many indigenous belief systems that living tribal members owe duties both to their ancestors and to the coming generations. The interests of the so-called “Seventh Generation”²⁵¹ must be carefully safeguarded. As an Iroquois leader stated:

In our way of life . . . we always keep in mind the Seventh Generation to come. It’s our job to see that the people coming ahead, the generations still unborn, have a world no worse than ours—and hopefully, better. When we walk upon Mother Earth we always plant our feet carefully because we know the faces of our future generations are looking up at us from beneath the ground. We never forget them.²⁵²

Through religion, law, and culture, many indigenous communities express the duty to preserve natural resources, maintain tribal culture and lifeways, keep language alive, and ensure the continuance of ceremonies for the generations yet to come.²⁵³

embodies the modern environmental movement in adopting elements of both the “deep ecology” and “human-centered” ethos).

251. See, e.g., WINONA LADUKE, *ALL OUR RELATIONS: NATIVE STRUGGLES FOR LAND AND LIFE 198-200* (1999) (discussing the importance of protecting the environment for the Seventh Generation); Daniel Cordalis & Dean B. Suagee, *The Effects of Climate Change on American Indian and Alaska Native Tribes*, NAT. RESOURCES & ENV’T, Winter 2008, at 45, 45 (referencing calls to protect the environment for the “Seventh Generation” as a matter of “collective human responsibility”); Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437, 466 (2002) (discussing the obligation to construct tribal membership requirements in a way that serves present and future generations); Lorie Graham, *Reparations, Self-Determination, and the Seventh Generation*, 21 HARV. HUM. RTS. J. 47, 47 n.1 (2008) (noting that the “seventh generation” ethic is common to the way many indigenous nations govern, particularly in relation to the protection of the environment and natural resources); Mary Christina Wood, *Nature’s Trust: Reclaiming an Environmental Discourse*, 25 VA. ENVTL. L.J. 243, 265 (2007) (relating the importance of the “Seventh Generation” to considerations of tribal governance and spirituality).
252. HARVEY ARDEN & STEVE WALL, *WISDOMKEEPERS: MEETINGS WITH NATIVE AMERICAN SPIRITUAL ELDERS 68* (1990) (quoting Oren Lyons, spokesman for the Six Nations Iroquois Confederacy).
253. See Oren R. Lyons, *The American Indian in the Past, in EXILED IN THE LAND OF THE FREE: DEMOCRACY, INDIAN NATIONS, AND THE U.S. CONSTITUTION 13*, 33 (Oren R. Lyons & John C. Mohawk eds., 1992) (discussing the Haudenosaunee ethic of preserving the earth and tribal culture for future generations). For a discussion of how Indian nations are using treaty rights to protect natural resources, see Wenona T. Singel & Matthew L.M. Fletcher, *Indian Treaties and the Survival of the Great Lakes*, 2006 MICH. ST. L. REV. 1285.

At times, these shared obligations have enabled indigenous and environmental activists to make common cause with each other and to work in concert to achieve stewardship goals. For instance, a number of conservation land trusts have been created in response to the Native environmental sovereignty movement and the desire to correct deficiencies in environmental law.²⁵⁴ The intersection of these two interests has led to the formation of conservation trusts that demonstrate adherence to an emerging stewardship model of fiduciary duty. These conservation trusts are held by Native parties, private parties, or by the government, but each embodies some fiduciary obligation to the land.²⁵⁵ In each of these formulations, a variety of nonowning parties hold fiduciary obligations to each other and to the resource in question and, in the case of conservation easements, may independently coexist along with the individual property owner's interests.

Stewardship theory—whether rooted in indigenous, corporate, or environmental sources—facilitates an understanding of resource protection that extends beyond the traditional ownership model. The stewardship concept also embodies a notion of mutual trusteeship—enriched by a view of the interdependence between present and future generations and between different peoples—that acknowledges the fact of global cohabitation and mandates a sense of shared responsibility. Stewardship requires contemplation of natural resources as deserving of respect independent of their utility to human interests, and posits that their survival should be facilitated and that their worth exceeds their market-based monetary value.²⁵⁶ In an unpublished 1974 essay, the great Native American legal scholar Vine Deloria presented “the idea

254. Mary Christina Wood & Matthew O'Brien, *Tribes as Trustees Again (Part II): Evaluating Four Models of Tribal Participation in the Conservation Trust Movement*, 27 STAN. ENVTL. L.J. 477, 536-38 (2008) (outlining a variety of native and non-Native conservation trusts).

255. See *id.*; Mary Christina Wood & Zachary Welcker, *Tribes as Trustees Again (Part I): The Emerging Tribal Role in the Conservation Trust Movement*, 32 HARV. ENVTL. L. REV. 373, 402-20 (2008) (detailing these models).

256. See Eric T. Freyfogle, *Bounded People, Boundless Land*, in STEWARDSHIP ACROSS BOUNDARIES, *supra* note 216, at 15, 29 (“The market, to put it simply, stands opposed to any form of organic vision, whether of society or of the land.”). In contrast to the sole consideration of market interests, a stewardship model takes into account these economic, social, and environmental factors in its construction of success. See Ida E. Berger, Peggy H. Cunningham & Minette E. Drumwright, *Mainstreaming Corporate Social Responsibility: Developing Markets for Virtue*, 49 CAL. MGMT. REV. 132, 143 (2007); Tom Diana, *Doing Business the Socially Responsible Way*, BUS. CREDIT, June 2006, at 45, 48. Consider, for example, the public trust doctrine, which recognizes that the state is obligated to conserve and manage resources in the public interest. See David Wasserman, *Consumption, Appropriation, and Stewardship*, in ETHICS OF CONSUMPTION, *supra* note 242, at 537, 546-47.

of legal rights of non-human nature.”²⁵⁷ Deloria predicted that adoption of this perspective would require a total and radical shift in the classic view of property. Yet for Deloria and others who subscribed to traditional Indian ways, this perspective of natural resources already “fit perfectly into the Indian sense of brotherhood with everything in the universe.”²⁵⁸

2. *Liability Rules, Governance, and Stewardship*

Stewardship need not be the dominant model that works in conjunction with peoplehood. Within property law, there are spaces for peoplehood without stewardship, and spaces for stewardship without peoplehood. Nevertheless, given the description of stewardship we have offered, it becomes important to elucidate why this notion of stewardship diverges from the conception of ownership as a bundle of sticks, since the models can operate in conjunction with one another in complex ways.

In traditional property law, it is axiomatic that “property rules,” as delineated by Guido Calabresi and A. Douglas Melamed, are the most powerful means for protecting the owner of a certain good.²⁵⁹ As Henry Smith and others have reminded us, property rules carry implicitly a particular monopoly power for an owner to make certain decisions regarding the right to exclude others from a certain good. The right to exclude is a “rough but low-cost method of generating information that is easy for the rest of the world to understand.”²⁶⁰ Exclusionary regimes primarily involve delegating to the owner a gatekeeping right to protect his or her interests with “a wide and indefinite class of uses without the need ever to delineate—perhaps even to identify—those uses at all.”²⁶¹ The right to exclude is premised upon the importance of a signal or boundary that protects the owner’s gatekeeping right to determine how best to utilize the property in question.²⁶² An exclusionary regime is low cost, but it is also imprecise.

257. NASH, *supra* note 244, at 119 (quoting and discussing Deloria’s paper).

258. *Id.* See generally Marilyn J. Smith, *Steward Leadership in the Public Sector*, 5 GLOBAL VIRTUE ETHICS REV. 120, 134-37 (2004) (reframing the concept of stewardship from religious sermons).

259. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

260. Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 971 (2004).

261. *Id.* at 973.

262. *Id.* at 978-79.

In the case of cultural property, the exclusionary framework falls short. Perhaps more useful in cultural property claims, Smith has outlined an alternative theory of property regulation known as a “governance” regime.²⁶³ In this regime, the law identifies proper and improper uses of property, and accomplishes a much finer tuning of the variables that comprise such determinations. Rights, in this context, are determined by signals that help to select and protect individual uses and behaviors; sometimes they involve classic limitations on the right to exclude²⁶⁴ or “additional rules of proper use.”²⁶⁵ Much of this governance regime takes the form of liability rules, as opposed to property rules, and thus demonstrates the need for greater administrative or judicial oversight over their implementation.

The relevance of the governance approach to cultural property notions is undertheorized.²⁶⁶ It helps us to explore how a stewardship model echoes some of Smith’s insights regarding governance regimes. In the traditional model of exclusion, a variety of sticks in the bundle—rights of occupancy, use, transfer, production, conservation—inhere in the formal construction of ownership. The owner is both legally and culturally empowered to exercise her autonomy in deciding how to utilize her property, typically in the absence of marked intervention by the state. In contrast, the stewardship model supplements, rather than replaces, these traditional models of property regulation because it transfers many of these sticks to nonowners, who may exercise these rights in conjunction with, or at times in place of, the traditional title-holders, raising the need for regulatory oversight or mediation when title-holders and nonowners disagree. In such cases, it may be appropriate to recast these interests through a lens that captures property as a “web of interests,” rather than a discrete bundle of rights or sticks.²⁶⁷ Here, we would consider the web

263. Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. 5453 (2002).

264. See Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1728 (2004). These types of liability regimes are much costlier for Smith, because it takes a greater degree of information to construct and prescribe proper uses, and then to decide on an appropriate nonmarket price. *Id.* at 1727–31.

265. Henry E. Smith, *Community and Custom in Property*, 10 THEORETICAL INQUIRIES L. 5, 16 (2009).

266. Cf. Keith Aoki, *Weeds, Seeds & Deeds: Recent Skirmishes in the Seed Wars*, 11 CARDOZO J. INT’L & COMP. L. 247, 331 (2003). Aoki suggests as an approach to disputes over traditional plant knowledge, employing “localized institutions that are a mixture of public and private that are a ‘commons’ on the inside, and ‘private property’ on the outside.” *Id.* “These types of evolving and flexible institutions importantly shift the focus from ownership of resources to governance.” *Id.*

267. Craig Anthony (Tony) Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281 (2002).

as a set of interconnections between people and properties, requiring us to analyze the cultural object's nature and characteristics, the interests at stake, and finally the nature of the nonowners' relationships to the objects.²⁶⁸

Although we have observed that liability rules can and do characterize cultural property regulation, it is important to recognize that property rules, as broadly conceived by Calabresi and Melamed, are often the most desirable form of protection. Yet in many cases throughout the history of property law, ownership has often been out of reach for indigenous peoples. In some of these cases, the courts have used evidence of indigenous stewardship to foreclose property rights and interests. For example, when the Supreme Court first ruled that Indian property held pursuant to "aboriginal title" was not compensable under the Fifth Amendment, its reasoning was based in part on the Court's observations that Tlingit land tenure was shared among community members, reflective of subsistence practices and commemorated in customary law—in short, "wholly tribal."²⁶⁹

As *Tee-Hit-Ton* demonstrates, a stewardship model can face certain limitations when compared with the more powerful ownership model. Yet when it is utilized successfully to integrate indigenous claims, stewardship conceptions may be embodied more clearly in the employment of liability rules or governance—that is, transferring certain sticks in the bundle to indigenous nonowners, particularly in cases involving the use, conservation, or production of cultural resources. Here, cultural property regulation claims rest in large part on something other than a formal claim of title or ownership. This is particularly true in light of the peculiar nature of Indian property, much of which is actually held by the federal government in trust for tribal governments.²⁷⁰ In these cases, which are largely typical of real cultural property claims, tribes act as fiduciaries over a resource, rather than as titleholders in the classic market-oriented sense. Thus, even in the most successful

268. See *id.* at 316, 342 (suggesting these criteria for analysis).

269. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 286-87 (1955). The Court further observed that "ownership in the common property descended only through the female line, [and] the various tribes of the Tlingits allowed one another to use their lands." *Id.* Not all courts, however, have adopted the *Tee-Hit-Ton* approach. See, e.g., *Nome 2000 v. Fagerstrom*, 799 P.2d 304, 310 (Alaska 1990) ("That the Fagerstroms' objective manifestations of ownership may have been accompanied by what was described as a traditional Native Alaskan mind-set is irrelevant. To hold otherwise would be inconsistent with precedent and patently unfair.").

270. Typically the federal government, rather than the tribes themselves, holds title to Indian property in trust for the tribes as beneficiaries. The government has a set of fiduciary obligations to the tribe which, in turn, carries similar duties to its own members. See generally COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 168, § 15.03, at 965-68.

Indian cultural property cases, such as the legislative “return” of the sacred Blue Lake to the Taos Pueblo,²⁷¹ the federal government is still the title-holder, retaining significant control over the resource. The Taos Pueblo now enjoy exclusive access to the lake, but its use rights are limited, both by federal statute²⁷² and by tribal custom,²⁷³ to religious and other “traditional” purposes. In this and other examples, as we show below, a stewardship model disaggregates title, possession, and exclusion, and in so doing offers a robust form of property regulation that diverges from a traditional model of ownership.

Through the lens of stewardship, claims for cultural property protection are neither special nor exceptional, but rather part of a spectrum of property, liability, and inalienability rules that—like so many other areas of property—can embrace and theorize the rights of indigenous nonowners alongside the claims of owners. This is not to say that greater acknowledgement or increased implementation of a stewardship framework of property necessarily means that stewardship trumps ownership, or that the interests of nonowners always should prevail over those of owners. There may be cases—such as disputes over the proper use of sacred sites now located on federal public lands—where Indians believe that stewardship concerns require the absolute exclusion of non-Indians. Nevertheless, in such cases, absolute rights of exclusion as against the public or the title-holder might either be unfeasible or legally impermissible. We therefore do not assert that stewardship mandates predetermined outcomes that always favor indigenous groups. Rather, by integrating stewardship concerns alongside the common expectations that ownership often dictates, we can resituate cultural property claims within this broader spectrum of property law’s relationship with property, liability, and inalienability rules. In some cases of tribal cultural resources, integrating stewardship concerns mandates that the interests of indigenous peoples—who may lack title (and therefore the ownership-based right to exclude) largely as a

271. See generally R.C. GORDON-MCCUTCHAN, *THE TAOS INDIANS AND THE BATTLE FOR BLUE LAKE* (1991) (providing a detailed historical account of the return of Blue Lake to the Taos people).

272. When it restored trust title to Blue Lake, Congress also imposed several conditions, including that

the Pueblo de Taos Indians shall use the lands for traditional purposes only, such as religious ceremonials, hunting and fishing, a source of water, forage for their domestic livestock, and wood, timber, and other natural resources for their personal use. . . . Except for such uses, the lands shall remain forever wild and shall be maintained as a wilderness.

Act of Dec. 15, 1970, Pub. L. No. 91-550, 84 Stat. 1437, 1438.

273. See, e.g., John J. Bodine, *The Taos Blue Lake Ceremony*, AM. INDIAN Q., Spring 1988, at 91.

result of a history of land dispossession, removal, or illegal transfer—be contemplated as raising legal claims that are equal to, and in some unique cases superior to, those of title-holders.²⁷⁴

3. *Dynamic and Static Stewardship: Fungibility and Inalienability*

Law and economics scholars describe property rights in terms of their dynamic and static benefits. An owner, through the exercise of title and ownership, typically enjoys dynamic rights to develop or alienate property, and static rights to protect conservation of the resource, in the forms of nondevelopment and nontransfer.²⁷⁵ Some scholars may prefer that land and other property be used dynamically, for wealth-maximizing activities and the development of new products, technologies, or information, yet they typically recognize the static rights of owners to hold on to their property for the purposes of protecting a particular resource from overuse.²⁷⁶

Cultural property laws indirectly draw upon both of these trajectories by emphasizing the static and dynamic benefits that flow from stewardship, as opposed to ownership. The results are some overlooked paradigms that may be recast, respectively, as “static stewardship” and “dynamic stewardship.” Considerations of dynamic stewardship may militate toward a more fluid conception of integrating group identity within the marketplace of goods by drawing on property and liability rules in its regulation. In other cases, static stewardship considerations necessarily implicate the language and theory of inalienability.²⁷⁷ In either case, the frameworks of both static and dynamic stewardship can reconfigure these rights of possession, use, and production within nonowners, rather than owners. Here, since stewardship carries a variety of intricate differences from ownership, it reflects a much wider sense of cultural property considerations, particularly regarding the utility of limits on possession, use, and alienability, along with a group-oriented view of custody and trusteeship. These rights can be either descriptive or aspirational, depending on whether claims of owners oppose or complement these trajectories.

274. Cf. *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814 (10th Cir. 1999) (affirming the Secretary of the Interior’s decision to approve the National Park Service’s plan to place a voluntary ban on climbing at Devils Tower).

275. See, e.g., POSNER, *supra* note 17, at 32-35.

276. See Michael Abramowicz & John F. Duffy, *Intellectual Property for Market Experimentation*, 83 N.Y.U. L. REV. 337 (2008) (discussing static costs and market experimentation).

277. Recent scholarship has explored the concept and utility of inalienability. For an excellent account, see Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403 (2009).

a. *Dynamic Stewardship*

A trajectory of dynamic stewardship involves one or more of three central elements: (1) it involves rights of commodification that govern the production of downstream cultural properties—goods that flow from a cultural property, such as reproductions of sacred artifacts; (2) it involves rights that govern the acquisition and use of these downstream goods, including the right to determine whether to share information with nonindigenous groups for market purposes, such as in “cultural tourism” operations;²⁷⁸ and (3) it involves more limited rights of representation and attribution—that is, the ability of indigenous peoples to partake in the commercial use and expression of their religious practices, artifacts, and identities in certain cases.

Typically tribes make careful determinations about which events are appropriate for outsiders based on norms of tribal law, allowing such revenue-generating activities only when they will not infringe on cultural privacy or religious dictates.²⁷⁹ The result is a careful web of considerations regarding the context and the type of cultural property, its intended use, and the tribal

278. See, e.g., American Indian College Fund, Your Support, http://www.collegefund.org/donate/events_tours.html (last visited Dec. 23, 2008) (offering personalized tribal cultural tours to educate visitors about the cultural strengths, economic initiatives, and college programs operative in American Indian communities); The Harvard Project of American Indian Economic Development, Honoring Nations: 2000 Honoree, Wildlife and Outdoor Recreation Program, White Mountain Apache Tribe (Whiteriver, AZ), http://www.hks.harvard.edu/hpaied/hn/hn_2000_rec.htm (last visited Dec. 23, 2008) (honoring the White Mountain Apache Wildlife and Outdoor Recreation Program, which performs wildlife conservation and management activities as well as operates a self-sustaining business based on recreation and the tourism industry, as an example of “[tribal resource management] in accordance with Apache values”); Native Tourism, Featured Native Tourism Enterprises, <http://www.nativetourism.org/Featured/Featured.htm> (last visited Dec. 23, 2008) (marketing Indian tourism operations that “uphold the important values of cultural preservation, community cooperation and environmental stewardship”); White Mountain Apache Tribe, <http://www.wmat.nsn.us> (last visited Dec. 23, 2008) (welcoming visitors to the reservation for activities including cultural museum visits, guided elk hunting, and skiing).

279. Instances where a tribal medicine man accepts payment for ceremonies performed for outsiders may be met with community disapproval and charges of misconduct. By contrast, powwows have long been intercultural social venues where visitors are welcome to watch various tribal dances and songs, participate in traditional games and storytelling, and purchase tribal arts and foods. See, e.g., Jordan Dresser, *Debate Surrounds Participation of Non-Natives in Sun Dance*, LINCOLN J. STAR, Aug. 8, 2005, at 1A (discussing “medicine men charging [non-Natives]” for participation in spiritual practices); see also Arvol Looking Horse, *Looking Horse Proclamation on the Protection of Ceremonies*, INDIAN COUNTRY TODAY, Apr. 30, 2003, at A5 (reprinting the full text of a proclamation on standards for non-Indian involvement in certain Lakota ceremonies).

interest-holder's concerns. Beyond on-reservation activities, for example, many Indian artists market their jewelry, paintings, and other works to a broad, even international, consumer audience.²⁸⁰ Some tribes distinguish tribal lands that can be used for development projects, including nuclear waste storage, from other tribal lands that must be maintained as sacred sites consistent with religious and cultural dictates. And, in the case of the sacred Navajo rugs discussed earlier, even though the rugs are sacred, they are alienable pursuant to tribal law.²⁸¹ In all of these settings, indigenous peoples voluntarily inject their cultural property into the market, on their own terms, for exchange with other individuals and peoples. In some instances, laws that clearly delineate which property is alienable may make such transactions more efficient by obviating the likelihood of later disputes over title.

b. Static Stewardship

While their motivations might depart from those of law and economics scholars focused on monetary considerations of efficiency, indigenous peoples also have a variety of reasons that help explain why they may wish to keep their cultural property away from the market. Within the domain of cultural property, restraints against alienation, for example, can comprise the lifeblood that often keeps these sacred objects within a tribe, despite enormous economic pressure to sell objects to private collectors or museum officials. Thus, a trajectory of static stewardship, in contrast to dynamic stewardship, can focus on four other elements: (1) an interest in conserving a sacred resource from overuse or pollution; (2) an interest in placing an object to rest, such as funerary remains; (3) an interest in maintaining the physical and spiritual integrity of an object by imposing rules against alienability, such as tribal rules that prohibit the sale of sacred objects to nontribal members; and (4) an interest in ensuring continued access to and preservation of a cultural resource for prayer, like a sacred site.

Many of these elements rely on the underlying language of inalienability rules. Tribal courts, for instance, “reject the applicability of private property

280. For example, some tribes have created parallel sets of cultural products: traditional kachinas that are reserved for use in the tribal community, and differently designed kachina dolls intended for sale to art collectors, museums, and tourists. See, e.g., FREDERICK J. DOCKSTADER, *THE KACHINA AND THE WHITE MAN: A STUDY OF THE INFLUENCES OF WHITE CULTURE ON THE HOPI KACHINA CULT* 105 (1954).

281. See M'Closkey & Halberstadt, *supra* note 198, at 43-45 (explaining that Navajo rug weavers seek proper attribution, prices reflecting their painstaking craft, and the ability to continue to make a living through traditional weaving).

concepts with respect to the holding and transfer of cultural property.”²⁸² In general, tribal law mandates that the “cultural property is not individually owned, but is held in trust by an authorized caretaker,” either for a particular subgroup within a tribe or for the tribe as a whole.²⁸³ Tribes have long been active in enacting regulations to protect their cultural resources from market incursions, often creating a conflict between the high-priced art market for antiquities and cultural goods and the incommensurability and nonfungibility of those goods to the tribe.²⁸⁴ In such cases, cultural property trustees are bound by strict concepts of inalienability: the caretakers lack any right to sell or dispose of their cultural property; rather, they are held responsible for safeguarding it. At times, the collective obligation for protection is so strong that a tribal council will designate itself as trustee if a designated caretaker becomes incapacitated and can no longer fulfill her obligations.²⁸⁵ When it comes to human remains or funerary objects, however, the only appropriate treatment from the tribe’s perspective may be reburial. Thus, we do not argue that all indigenous cultural property should be treated as inalienable because of its universal nonfungibility, but rather, we argue that the prism of static stewardship suggests that indigenous peoples should be legally empowered to maintain culturally defined notions of alienability and fungibility and to transact (or not) with others accordingly.

In most frameworks of common law property, restraints against alienation are often considered to be anathema. Critics seem to fear that, once empowered with property rights, indigenous peoples will reclaim their cultural objects, take them back to the reservation, and allow them to ossify in isolation. But experience suggests that property rights do not automatically or uniformly transform all indigenous peoples into static hoarders. To the extent that indigenous peoples retain cultural property, the trajectories of static and dynamic stewardship enable tribal groups to enjoy self-determination over

282. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 168, § 20.01(2), at 1232; *see also* Chilkat Indian Vill., *IRA v. Johnson*, 20 Indian L. Rep. 6127, 6137 (Chilkat Tribal Ct. 1993) (rejecting the Western concept of inheritance with respect to sacred artifacts).

283. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 168, § 20.01(2), 1231.

284. *See infra* Part III. For a description of how tribes have enacted protections, *see* Riley, *supra* note 51, at 90-91.

285. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 168, § 20.01(2), at 1230; *see also* Chilkat, 20 Indian L. Rep. at 6131, 6134 (observing a ban on the sale of sacred artifacts due to their sacred nature); *In re* Guardianship and Conservatorship of William Bell, Sr., 24 Indian L. Rep. 6105, 6105-07 (Ft. Berthold Tribal Ct. 1997) (appointing the tribal council as the “holder” of the Fort Laramie Treaty Document of 1851 due to the holder’s illness).

decisions about whether to inject it into the market.²⁸⁶ This entrustment may not always result in an “efficient” entry back into a marketplace; in many cases, particularly regarding burial objects and related artifacts, a cultural property entitlement results in a market-inalienable result. In both lines of examples, however, the prisms of dynamic and static stewardship enable indigenous peoples to maintain their own culturally defined notions of alienability and fungibility and to make market decisions on that basis.

Having outlined the fluid and dynamic nature of stewardship, we now confront the difficult question of how these frameworks might respond to the conflicting interests of the title-holder. In cases of conflict between the two interests, does it always make sense to disaggregate these static and dynamic interests from the title-holder? If so, when is this disaggregation justified? This question, which we address in Part III below, lies at the heart of the discomfort that currently surrounds indigenous cultural property claims.

Part of the answer, we argue, lies in an approach that focuses on the type of property in question—that is, whether it is tangible, intangible, or real. In cases of burial or funerary remains, we advocate for the principle that static stewardship should prevail, largely due to the strong legal tradition that treats these remains as inalienable. In the case of some intangible properties, which implicate more dynamic rights, such as the right of attribution and commodification with respect to intellectual property, not every indigenous claim should win over that of a legitimate creator. We discuss such cases in the context of trademarks below.

In still other instances involving different resources, however, the law might aim to accommodate stewardship considerations by turning to a system of liability rules instead. For example, in the case of real cultural property such as land and sacred sites, where title often rests with a nonindigenous individual, a property rule solution or a transfer of ownership might be unwarranted. In some such cases, an accommodation-style approach offers us an already functional system for reconfiguring parts of the bundle of rights and situating them in nonowners. As we see in Part III in the case of *Navajo Nation v. U.S. Forest Service*, in conflicts between a title-holder and a prospective steward of a cultural resource, the title-holder often wins. This result underscores the need for a more forceful reconciliation of the trajectories of dynamic and static stewardship in protecting indigenous cultural property.

286. Of course in the indigenous context, a great deal of cultural properties—from sacred lands to funerary objects—has already been illegally alienated from the tribal community. In these cases where an illegal taking has been shown, we favor consideration of a remedial approach to property that recognizes the particular appropriateness of repatriating cultural objects for which there is no possible monetary compensation.

III. INDIGENIZING CULTURAL PROPERTY

Classic property theory, which rests on a monopolistic conception of the owner, focuses primarily on the liberal, autonomous individual. We believe that many critics of cultural property rely in part on this narrow understanding of property law—as fundamentally defined by ownership, with its rights of alienability and exclusion and its norms of commodification and commensurability. This conception leads to a potential overdetermination of the rights of the owner over all other actors, overlooking the emergent nature of other interests along the dual trajectories of static and dynamic rights. As a result, some critics discount the possibility that cultural property is a dynamic expression of human relationships—or that in some settings, property law can be both essential to, and as flexible as, culture itself.²⁸⁷

Fluid conceptions of property underlie indigenous peoples' group claims to those items most closely and intimately tied to peoplehood and group identity: indigenous cultural property. Once indigenous peoples' cultural property claims are examined within the framework of stewardship, as opposed to ownership alone, a more nuanced conception of property emerges that captures the unique ways in which indigenous groups may exercise cultural property entitlements as nonowners.²⁸⁸ Consider, for example, the complexities that arise when dealing with certain objects that may not be owned at all, those that are inalienable by definition, or those for which possession is subject to shifting custodial arrangements rather than absolute rights of title.²⁸⁹ In many such

287. Indian tribes illustrate this principle when some choose to use their resources for purposes that may not seem to reflect a “conservation” approach to stewardship. Tribes face charges of hypocrisy when, for example, they build waste storage plants on the reservation or use their water rights for golf courses. Yet such tribes may well be exercising a nuanced approach to stewardship, making decisions appropriate for specific types of land and resources within the reservation in light of cultural values and economic needs. *See, e.g.*, Peter M. Manus, *The Owl, the Indian, the Feminist, and the Brother: Environmentalism Encounters the Social Justice Movements*, 23 B.C. ENVTL. AFF. L. REV. 249, 266-74 (1996); *see also* Alex Tallchief Skibine, *High Level Nuclear Waste on Indian Reservations: Pushing the Tribal Sovereignty Envelope to the Edge?*, 21 J. LAND RESOURCES & ENVTL. L. 287 (2001) (discussing the often complex approach of Indian tribes in employing sovereignty to engage in sometimes environmentally fraught economic development on their reservation lands).

288. Despite our reluctance to use the term property in this context—since we argue that some of the objects of which we write (human remains in particular) are not “property” at all—we refer to these tangible, inalienable goods as items of cultural property or cultural patrimony.

289. Sarah Harding has analyzed in depth the difficulty of understanding cultural property law in the context of traditional property theory in her groundbreaking work on tribal repatriation pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA). Harding, *supra* note 109; *see* Native American Graves Protection and

cases, the custody of such items may in fact be situated in the fiduciary obligations of a collective “people,” rather than rooted in claims of individual ownership.

Part III highlights how the concept of stewardship captures the allocation of cultural property interests in three categories of properties: tangible, intangible, and real property. While this Part is primarily descriptive in the sense that we aim to situate cultural property claims within a fiduciary paradigm, we also aim to provide some analysis of the conflicts that may arise between our broader conception of stewardship and a more narrow approach to ownership. Moreover, we assert that critics’ claims against cultural property laws—exceptional or not—may carry less resonance when they are examined in light of a stewardship, rather than ownership, model of property. At the same time, we posit that because certain lands, expressions, and products are integral to indigenous identity and group survival, they may merit expanded and particular legal protection in some cases.

A. Tangible Cultural Property

A host of federal, state, and tribal laws coordinate to protect the tangible cultural property of indigenous peoples in the United States.²⁹⁰ But the Native American Graves Protection and Repatriation Act (NAGPRA)²⁹¹ most quintessentially safeguards the collective, tangible cultural property interests of indigenous peoples. Hailed as a core piece of human rights legislation,²⁹² NAGPRA provides for a comprehensive framework to protect the human remains, sacred objects, and cultural patrimony of indigenous peoples. NAGPRA’s repatriation policies have garnered the most scholarly and media attention, although the statute also criminalizes the wrongful trafficking of Indian human remains and funerary items and sets up consultation procedures regarding the future excavation of Indian human remains on tribal and federal lands.²⁹³ In the repatriation context, NAGPRA requires federally funded

Repatriation Act, 25 U.S.C. §§ 3001-3013 (2000) (discussing items of cultural patrimony that are inalienable by definition pursuant to tribal customary law).

290. See, e.g., Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa-470mm; National Historic Preservation Act, 16 U.S.C. §§ 470 to 470x-6; National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370f; NISQUALLY TRIBAL CODE § 14.05.03-.04 (2003) (addressing the destruction of cultural resources); RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA CODE OF LAWS ch. 20 (1999) (addressing historic preservation and desecration).

291. 25 U.S.C. §§ 3001-3013.

292. Trope & Echo-Hawk, *supra* note 26, at 59.

293. See 25 U.S.C. § 3005 (establishing guidelines for the repatriation of indigenous remains and certain artifacts from federally funded museums); 25 U.S.C. § 3002 (setting forth

museums to provide inventory lists of the tribal property they hold, including human remains.²⁹⁴ As collectives, tribes may seek the return of human remains, funerary objects,²⁹⁵ sacred objects,²⁹⁶ and certain items of cultural patrimony that have “ongoing historical, traditional, or cultural importance” and that are, according to tribal customary law, inalienable.²⁹⁷ Focusing on group claims, NAGPRA recognizes “the right of the collectivity to file claims for objects held in museums when such objects are needed by the group and for its social and ceremonial continuity,”²⁹⁸ and stipulates that repatriated property goes to tribes but not to individual tribal members.²⁹⁹

In focusing on the role of collective claims to cultural property, NAGPRA facilitates a deeper and broader understanding of the role property rights play in defining group identity. Just as Radin’s work asserted that certain property is so integral to and constitutive of personhood that it must be given special legal protection,³⁰⁰ we have argued that certain indigenous cultural property is inextricably bound up with peoplehood, and as such is necessary to a people’s identity formation and is nonfungible. This unique relationship between

consultation procedures to govern future excavations of Indian human remains and funerary objects on tribal or federal lands); *see also* 18 U.S.C. § 1170(a)-(b) (criminalizing the trafficking of wrongfully acquired Native American human remains and cultural items, in accordance with NAGPRA).

294. NAGPRA requires museums and federal agencies to inventory their holdings of Native American cultural items and to make the inventories available for inspection. 25 U.S.C. §§ 3003-3004.
295. Funerary objects are broken down into those that are deemed “associated”—that is, “reasonably believed to have been placed with individual human remains either at the time of death or later, [where] the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum”—and “unassociated”—that is, “reasonably believed to have been placed with individual human remains either at the time of death or later,” where the objects, but *not* the associated human remains, are in the possession of a federal agency or museum. *Id.* § 3001(3)(A)-(B).
296. “Sacred objects” are defined as specific ceremonial objects needed by Indian and Native Hawaiian religious leaders for the practice of their religions. *Id.* § 3001(3)(C).
297. *Id.* § 3001(3)(D). Whether an item is “inalienable” depends on whether the object was designated as such by the tribe at the time the object left the tribe’s custody. *Id.*
298. Tressa Berman, “*As Long as the Grass Grows*”: *Representing Indigenous Claims*, in *INDIGENOUS INTELLECTUAL PROPERTY RIGHTS* 3, 12 (Mary Riley ed., 2004) (internal quotation marks omitted).
299. Riley, *supra* note 200, at 214.
300. *See* Radin, *supra* note 98, at 986-87, 990 (describing a “minimal entitlement theory of just distribution” in which “government that respects personhood must guarantee citizens all entitlements necessary for personhood” and must guarantee “that fungible property of some people does not overwhelm the opportunities of the rest to constitute themselves in property”).

property and peoplehood is recognized in NAGPRA, which affirms indigenous peoples' own conceptions of the sacred and the attendant principles of stewardship and fiduciary care.³⁰¹ But to fully appreciate the contemporary import of NAGPRA, it is critical to understand the historical circumstances from which it emerged.

The historical record about the treatment of Indian remains and funerary objects in the United States³⁰² that led to Congress's passage of NAGPRA is now well documented.³⁰³ Early grave protection laws were designed according to European conceptions of private property, which conceived of graves as clearly identified, fenced off from society, and located in private cemeteries.³⁰⁴ But many Indian graves, in contrast, were unmarked and fell outside of tribal territory due in large part to federal Indian policy. During the infamous removal period, which spanned the years 1830 to 1861, thousands of Native people were removed from their aboriginal homelands and driven across the United States to lands unwanted (at least at the time) by whites.³⁰⁵ Thousands of Native people died and were buried along the way during the infamous death marches.³⁰⁶ Consequently, Indian graves and their contents were treated as abandoned and therefore available for appropriation under American law.³⁰⁷

301. See Riley, *supra* note 183, at 55.

302. For example, in 1868, Surgeon General J.K. Barnes instructed "all Army field officers to send him Indian skeletons . . . so that studies could be performed to determine whether the Indian was inferior to the white man . . . [and] to show that the Indian was not capable of being a landowner." Koehler, *supra* note 26, at 111 (citing 136 CONG. REC. 31,937 (1990) (statement of Rep. Campbell)); see also Trope & Echo-Hawk, *supra* note 26, at 39-43 (describing how American social policy historically has treated Indian remains differently from those of other races by permitting the widespread practice of disinterring indigenous bodies for storage, study, or display by government agencies, museums, universities, and tourist attractions).

303. See Trope & Echo-Hawk, *supra* note 26, at 52-58 (discussing pre-NAGPRA legislation); see also Riley, *supra* note 183, at 52-55 (discussing the history of NAGPRA, which revealed America's policies of mistreatment and desecration of indigenous human remains and funerary objects).

304. Riley, *supra* note 183, at 54.

305. See, e.g., Act of May 28, 1830, ch. 148, 4 Stat. 411 (forcing tribes to leave their ancestral homelands in the Eastern United States for Indian territory west of the Mississippi River).

306. See, e.g., R. DAVID EDMUNDS, THE POTAWATOMIS: KEEPERS OF THE FIRE 240-72 (1978) (discussing the removal of the Potawatomis from the Great Lakes region to the Southern Plains and the number of Potawatomi who died on the journey); KATHLEEN S. FINE-DARE, GRAVE INJUSTICE: THE AMERICAN INDIAN REPATRIATION MOVEMENT AND NAGPRA 50 (2002) (describing the Trail of Tears and the Navajo Long Walk, as well as other removal efforts that, in some areas, reduced certain Native American populations by ninety-five percent or drove others to extinction).

307. Riley, *supra* note 183, at 54.

Colonizers' morbid curiosity, combined with official federal policy, resulted in a perfect storm of mass appropriation of Indian remains and ceremonial items buried with the dead.³⁰⁸ Federal laws like the Antiquities Act of 1906 – which was intended to protect American archaeological resources discovered on federal lands and which classified Indian remains as federal property³⁰⁹ – allowed the U.S. government to secure its own collection of Indian bodies and artifacts.³¹⁰ At times, U.S. policy effectively endorsed the mass excavation and looting of Indian gravesites by encouraging grave robbers to turn their contents over to federally funded museums so that studies could be done to confirm the assumed racial inferiority of Indian people.³¹¹

American museums served as repositories for the exhumed evidence of Europeans' love affair with "Indians" and the romanticized West.³¹² All of these forces converged to create a unique property phenomenon: unlike most individuals in the United States, who possessed the right to bury deceased members of their families, Native Americans found that Indian remains and the objects buried with the dead were propertized and turned into fungible goods. In the end, hundreds of thousands of Indian remains were exhumed and sent off to federally funded museums. By 1986, the Smithsonian Institute alone held the remains of almost 18,500 Indians in its collections.³¹³ Today, it is estimated that the remains of hundreds of thousands of indigenous people ultimately will be accounted for through museum inventories.³¹⁴

NAGPRA sought to reverse this history, specifically by empowering tribes, as peoples, to regain access to and custody of Indian remains and artifacts in a manner consistent with their own lifeways and beliefs.³¹⁵ NAGPRA stands as

308. Trope & Echo-Hawk, *supra* note 26, at 40-42 (describing how early interest in systematically collecting Indian body parts began before the Civil War and how the practice became official federal policy with the Surgeon General's Order of 1868, which instructed army personnel to procure Indian crania and other body parts for the Army Medical Museum).

309. See Antiquities Act of 1906, 16 U.S.C. §§ 431-433 (2000).

310. Trope & Echo-Hawk, *supra* note 26, at 42.

311. *Id.* at 40-42. This resulted in the decapitation of thousands of Indian bodies, many of whom had died in the course of massacres carried out by the federal government, their heads sent to museums for display and study. "Government headhunters decapitated Natives who had never been buried, such as slain Pawnee warriors from a western Kansas battleground, Cheyenne and Arapaho victims of Colorado's Sand Creek Massacre, and defeated Modoc leaders who were hanged and then shipped to the Army Medical Museum." *Id.* at 40-41.

312. Riley, *supra* note 183, at 52-53.

313. Trope & Echo-Hawk, *supra* note 26, at 54.

314. See Editorial, *Respect and Resting-Places*, BOSTON GLOBE, Sept. 14, 1989, at 12.

315. See RENNARD STRICKLAND, TONTO'S REVENGE: REFLECTIONS ON AMERICAN INDIAN CULTURE AND POLICY 89 (1997) ("[T]he interpretation and enforcement of NAGPRA as it

an example of how cultural property law can provide the ultimate accommodation of competing claims to disputed cultural property by thoughtfully distributing measured entitlements to property in an effort to satisfy all property claimants. Despite some initial opposition to NAGPRA, many museums have, by and large, attempted to comply with its mandate.³¹⁶ Perhaps most significantly, the plundering of American museums by Indian tribes that many feared simply has not occurred. Tribes have demonstrated cautious restraint, often leaving in museums those items they have determined they cannot properly house or care for.

But NAGPRA's salience, we contend, is most clearly embodied in stewardship conceptions of property. Consider the property consequences of repatriation under the Act. NAGPRA is primarily concerned with reconfiguring custody and possession, not title and ownership. Human remains and funerary objects, for example, cannot actually be "owned" by anyone.³¹⁷ This rule is already deeply embedded in the common law. As one author points out,

In the United States, the heir or next of kin has traditionally not had a property right in the dead body but rather *a right in the nature of a custodian* to hold and protect the body until burial, to determine its disposition, to select the place and manner of burial and, in the case of expressed wishes stated in a will, the executor has the duty of complying with the deceased's wishes pertaining to manner of disposition of remains.³¹⁸

relates to sacred objects, cultural patrimony, and unassociated funerary objects requires an understanding of the nature of traditional Native American life and lifeways, as well as the operation of traditional law and tribal courts among Native peoples.”).

316. See, e.g., Elana Ashanti Jefferson, *Museums Trying To Return Remains*, DENVER POST, Aug. 15, 2004, at 4F.
317. It is precisely because museums never could have acquired good title to human remains or funerary objects in the first place that NAGPRA has survived Fifth Amendment takings challenges. Section 3001(13) stipulates that NAGPRA does not implicate the Takings Clause because no museum will be deemed to give up property lawfully held. See Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 CARDOZO J. INT'L & COMP. L. 409, 435 (2003) (noting that “human remains and funerary objects are not subject to private ownership” and that unassociated burial objects, sacred objects, and objects of cultural patrimony subject to NAGPRA are those that were communally owned).
318. John Alan Cohan, *An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property (Part One)*, 27 ENVIRONS ENVTL. L. & POL'Y J. 349, 402-03 (2004) (emphasis added).

Thus, we posit that both the policy considerations driving NAGPRA and the Act's statutory language embody a stewardship approach to the treatment of human remains and funerary items that most nonindigenous people already possess.³¹⁹

Despite these observations, NAGPRA challenges current property regimes in ways that property law traditionalists may find either threatening or inconsistent with classic theory.³²⁰ Property law and the allocation of entitlements historically have signaled crucial shifts in the balance of power³²¹ and, as such, provide fertile ground for attacks. Despite all that has been achieved through NAGPRA, its critics remain vocal.³²² Its strongest detractors are those who find cultural property law, as well as the policy and theory behind it, fatally flawed. Mezey, for example, calls the statute "radical" and claims that associating cultural property with distinct groups will ultimately encourage stasis, destroying the process of evolution that is essential to a rich, dynamic cultural life. In general, Mezey articulates two major concerns about NAGPRA. First, repatriated objects may become so iconic in the hands of tribes as to encourage conformity and ultimately dictate extremely limited,

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319. NAGPRA is primarily concerned with repatriation, but is also used to stop the criminal trafficking of indigenous human remains and artifacts, and sets standards for dealing with the excavations of Indian human remains and artifacts on federal and tribal lands. *See supra* note 293 and accompanying text. Thus, we observe that the statute uses varying property law terms in each of these settings. *See, e.g.*, 25 U.S.C. § 3002(a) (2000) (referring to the "ownership or control" of items covered by NAGPRA in the case of the excavation of remains or cultural objects found on tribal or federal lands after November 16, 1990); *id.* § 3003(a) (referencing the "possession or control" of human remains and associated funerary objects in the context of the inventory obligations of museums and agencies). Notably, NAGPRA's repatriation provisions do not use the language of "ownership or title" in the context of human remains or funerary objects. *Id.* § 3005(a)(1). The regulations rely on the term "custody" to stipulate that "American law generally recognizes that human remains cannot be 'owned.'" COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 168, § 20.02[1][d][vi], at 1245 n.129 (quoting 60 Fed. Reg. 62,134, 62,153 (Dec. 4, 1995)).
320. *See, e.g.*, Richard A. Epstein, *No New Property*, 56 BROOK. L. REV. 747, 748 (1990) (criticizing the "new property" of *Goldberg v. Kelly*, 397 U.S. 254 (1970); Merrill & Smith, *supra* note 205, at 1867 (suggesting that the "metaphor of property as a bundle of rights is seriously misleading").
321. Charles Reich gave life to the theory of "new property," which has served as the basis for numerous arguments regarding the relationship between property entitlements, power, and status. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964); *see, e.g.*, Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).
322. *See, e.g.*, Steven Vincent, *Indian Givers*, in WHO OWNS THE PAST?, *supra* note 30, at 33, 39 ("It is the affirmation of group—or tribal—rights over the imperatives of science and the free transmission of knowledge that outrages so many critics of NAGPRA.").

“authentic” ways of performing one’s identity.³²³ Second, cultural property law may make Indians’ “cultural stuff off limits to outsiders,”³²⁴ which ultimately may stultify culture and limit the ability of non-Indians to appropriate Indian culture in the process of generating “cultural hybridity.”³²⁵

Notably, Mezey fails to distinguish human remains from various categories of tangible objects subject to repatriation under NAGPRA.³²⁶ Notwithstanding this point, Mezey’s critique of indigenous cultural property claims more generally is informed and shaped by an understanding of property as defined primarily by ownership and exclusivity. Consider, for example, her suggestion that cultural property laws create a mythical and imprisoning connection between Indians and “Indian stuff,” resulting in a preservationist stance. Although relatively little empirical evidence is available to support or deny Mezey’s claim of cultural property’s stultifying effects, anecdotal and experiential accounts weigh against her assertions of stasis. Upon NAGPRA’s passage, for example, members of the Hopi tribe openly revealed their intention to reemploy the repatriated religious objects in daily ceremonial life until they had worn them out.³²⁷ Though a single account, the Hopi plan to put their objects back into contemporary use reflects shared indigenous experience regarding repatriated objects. As the statute itself recognizes, some items are specifically desired because they “are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents.”³²⁸ Thus, the Hopi example epitomizes the kind of dynamism that facilitates cultural evolution, rather than a practice that links

323. Mezey, *supra* note 11, at 2017.

324. *Id.* at 2018; *see also id.* at 2017 (noting that NAGPRA also unjustifiably dictates that “Indian stuff belongs to Indians”).

325. *Id.* at 2018, 2026. Mezey lists other problems, or “costs,” engendered by cultural property law: that it “obscures cultural movement, hybridity, fusion, and the potential for competing claims to cultural objects . . . [and] also dissuades imitation, discussion, and critique between groups by making a group’s cultural stuff off limits to outsiders.” *Id.* at 2018.

326. Mezey does not attempt to argue in any seriousness that reburial of human remains will result in cultural stagnation. It is quite apparent that NAGPRA’s repatriation and reburial provisions merely afford Indian tribes the opportunity to employ ceremony and religion in the process of burying their dead—a right other members of American society already enjoy. Since Mezey’s claims regarding NAGPRA are so ill-suited to the context of human remains, we apply her critique only to cultural objects.

327. The revelation was “a disheartening prospect for curators who dedicate their working lives to such objects’ conservation.” BROWN, *supra* note 67, at 17.

328. 25 U.S.C. § 3001(3)(C) (2000) (defining “sacred objects”).

and then cements connections between peoples and their things, as Mezey suggests.³²⁹

In addition, Mezey's concern about limitations on the public's freedom to appropriate Native culture is also inapposite, as it fails to grapple with the fact that NAGPRA's reach is entirely limited to physical (and not intangible) objects and human remains.³³⁰ Moreover, as to tangible cultural property, NAGPRA's repatriation mandate is statutorily subject to four important limitations: scientific study, competing claims, a legitimate right of possession, and guarding against illegitimate takings of property.³³¹ These limitations suggest that Congress was deeply concerned with ensuring some reconciliation of potentially competing interests. The "scientific study" exception, for example, enables the research and study of an object when it is of major benefit to the United States, and asks that the item be repatriated after the study is completed.³³²

Finally, prior to NAGPRA's passage, the tangible cultural property affected by the statute—that is, human remains, funerary objects, and items of cultural patrimony—was within the exclusive possession of federally funded museums and institutions. Thus, the effect of NAGPRA was not to take objects from the

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329. The stagnation of indigenous culture is certainly more typified by the desire of museum curators and non-Indian patrons to peruse and view these objects hermetically sealed and lifeless behind glass. Their objectives also reveal non-Indians' well-documented fascination with preserving the myth—rather than reality—of indigenous cultures, whereby indigenous artifacts have greater resonance with non-Indians than with indigenous peoples themselves. See Berman, *supra* note 298, at 12 ("By extension, indigenous arts are often exalted at the expense of Indigenous peoples.").
330. Even Michael Brown, upon whose work Mezey heavily relies, clearly recognizes that NAGPRA does nothing to impede the borrowing of intangible cultural properties from indigenous peoples. Brown notes that NAGPRA's "reach is limited to physical objects and human remains," concluding that "its impact falls far short of the complete control over cultural symbols" that some seek. BROWN, *supra* note 67, at 214-15. It is thus difficult to conceive how the repatriation of human remains, or those objects closely associated with the remains, will in any way thwart either Indians' or non-Indians' processes of cultural evolution. *Id.*
331. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 168, § 20.02[1][c], at 1239-40 (discussing four limitations to repatriation).
332. *Id.* at 1239; see 25 U.S.C. § 3005(b); 43 C.F.R. § 10.10(c)(1) (2008). The "right of possession" limitation applies only to unassociated objects, and affords a museum or agency the opportunity to defend its right of possession by showing that the object was acquired through the voluntary consent of an individual group with the authority to alienate the object. See 25 U.S.C. § 3001(13). The "competing claims" exception protects similar interests, enabling the museum or agency to retain custody of the object until a settlement is reached. See 25 U.S.C. § 3005(e); 43 C.F.R. § 10.10(c)(2). Last, the "takings" exception defers to court-ordered determinations. See *id.* § 10.10(c)(3).

cultural commons, where they would have been generally accessible for public use and study, and place ownership with its concomitant right of exclusion in the hands of Indian tribes. For example, the vast majority of indigenous human remains were and continue to be housed in museum basements, drawers, and archives. It is thus difficult to conceive how NAGPRA's provisions, which primarily shifted possession of human remains and associated funerary items from museums to ancestors for proper reburial, diminish the public domain and cultural commons, particularly given the provisions for scientific study embedded in the Act.³³³

Insofar as we emphasize the limits of NAGPRA's reach for the purpose of refuting critics, however, we ultimately contend that NAGPRA does not in fact go far enough to protect indigenous peoples' cultural property interests. Even with the law firmly in place and mandated compliance on the part of federally funded museums, many institutions continue to balk at NAGPRA's directive with little cost or consequence. For instance, controversy has ensued at the University of California, Berkeley, where the university's Phoebe A. Hearst Museum of Anthropology continues to resist the repatriation of the remains of some twelve thousand American Indians currently stored in archives beneath the Hearst Gymnasium swimming pool.³³⁴

B. Intangible Cultural Property

Although cultural property law and theory initially encompassed only tangible property—focusing on “objects of artistic, archaeological, ethnological, or historical interest”³³⁵—contemporary definitions are far more expansive.³³⁶ Today, it is well accepted that cultural property includes the intangible effects of a culture and encompasses “traditions or histories that are connected to the

333. Though it raises a different point regarding the public interest that is not core to Mezey's piece, we recognize robust critiques that NAGPRA might prevent scientific research on human remains, which serves the public good. See, e.g., Michelle Hibbert, Comment, *Galileos or Grave Robbers? Science, the Native American Graves Protection and Repatriation Act, and the First Amendment*, 23 AM. INDIAN L. REV. 425, 438 (1999) (noting that “scientists oppose NAGPRA because of its potential to interrupt or impede ongoing research”). NAGPRA, however, contemplates such possible conflicts, and includes an exception to repatriation for those items—including human remains—that are “indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States.” 25 U.S.C. § 3005(b).

334. Richard C. Paddock, *Native Americans Say Berkeley Is No Place for Their Ancestors*, L.A. TIMES, Jan. 13, 2008, at A1.

335. Merryman, *supra* note 30, at 831.

336. See Riley, *supra* note 51, at 77.

group's cultural life," as well as "songs, rituals, ceremonies, dance, traditional knowledge, art, customs, and spiritual beliefs."³³⁷ The unique situation of indigenous peoples—whose cultural lives are inextricably intertwined with their natural, physical world—has made clear that indigenous cultural survival depends on preservation of both intangible and tangible property.³³⁸ It would not be possible, for example, to protect the traditional medicinal knowledge of indigenous groups if the physical world from which that medicine is obtained were destroyed.³³⁹

Indigenous peoples' struggles to protect their intangible cultural property are well documented and recognized as a pressing issue of concern in the globalization age.³⁴⁰ The dominant intellectual property regimes—largely developed in the West and increasingly applicable to the rest of the world through the dissemination of the World Intellectual Property Organization (WIPO) and the Trade Agreement on Intellectual Property Rights (TRIPS)—often fail to protect the intangible property of indigenous groups.³⁴¹ Legal scholars and indigenous rights activists are now well versed in the stories of commodification and appropriation that typify this dilemma for indigenous peoples. Consider, as examples, the struggle of Taiwan's indigenous Ami to protect and receive attribution for the creation and performance of a multigenerational, traditional sacred song;³⁴² the efforts of Australian Aborigines to secure rights in their indigenous designs;³⁴³ or the quest of Brazilian tribal groups to save the Amazonian rainforests, which give life to all

337. *Id.*

338. *Id.*

339. See Angela R. Riley, *Indigenous Peoples and Emerging Protections for Traditional Knowledge*, in 4 INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE 373, 382 (Peter K. Yu ed., 2007).

340. See generally Berman, *supra* note 298 (detailing the global movement to protect indigenous peoples' intellectual property).

341. See Riley, *supra* note 51, at 79 (explaining how the internationalization of intellectual property rights protections largely has followed the model set out by the United States and the developed West, providing no greater protection for the intellectual property of the world's indigenous peoples in developing countries than existed previously).

342. See Riley, *supra* note 200, at 175-76 (discussing the appropriation of the Ami's "Song of Joy," which spent thirty-two weeks as part of a "world beat" song on Billboard Magazine's International Top 100 Chart).

343. *Bulun Bulun v. R&T Textiles Proprietary Ltd.* (1998) 86 F.C.R. 244, 247 (Austl.) (protecting indigenous artwork through copyright principles).

the other intangible aspects—language, traditional knowledge, and religion, among others—of their cultural existence.³⁴⁴

Particular attention has focused on the global effects of the exportation of American intellectual property law through TRIPS.³⁴⁵ The spread of Westernized patent law, in particular, has created a fertile ground for powerful patent-holders—often multinational corporations—to secure rights in indigenous traditional knowledge.³⁴⁶ Because intellectual property rights are increasingly crucial to the economic development of countries in the developing world,³⁴⁷ national governments have incentives to allow outsiders access to indigenous traditional knowledge for commodification and sale.³⁴⁸

344. See generally Allison M. Dussias, *Indians and Indios: Echos of the Bhopal Disaster in the Achuar People of Peru's Struggle Against the Toxic Legacy of Occidental Petroleum*, 42 *NEW ENG. L. REV.* 809, 815 (2008) (discussing the similar phenomenon of indigenous peoples in Peru, many of whom also reside in the Amazonian jungle); Samara D. Anderson, Note, *Colonialism Continues: A Comparative Analysis of the United States and Brazil's Exploitation of Indigenous Peoples' Forest Resources*, 27 *VT. L. REV.* 959, 976 (2003) (discussing the particularly fraught situation of Brazilian Indians who are attempting to protect their lands, environment, and natural and cultural resources in an age of development).

345. See Doris Estelle Long, “Democratizing” Globalization: Practicing the Policies of Cultural Inclusion, 10 *CARDOZO J. INT’L & COMP. L.* 217, 220-24 (2002) (discussing how the promulgation of TRIPS and the scope of its protections highlight generally the tensions between the developed and the developing world); Madhavi Sunder, *The Invention of Traditional Knowledge*, *LAW & CONTEMP. PROBS.*, Spring 2007, at 97, 112 (asserting that TRIPS has focused on teaching the world’s poor how to protect the intellectual property of the wealthy West).

346. Cf. Russel Lawrence Barsh, *Who Steals Indigenous Knowledge?*, 95 *AM. SOC’Y INT’L L. PROC.* 153, 157 (2001) (arguing that academic researchers are actually responsible for placing a great deal of traditional knowledge in the public domain); Matthew L.M. Fletcher, *Theoretical Restrictions on the Sharing of Indigenous Biological Knowledge: Implications for Freedom of Speech in Tribal Law*, 14 *KAN. J.L. & PUB. POL’Y* 525, 530-31 (2005) (discussing the University of Minnesota’s investment in researching wild rice, which is opposed by the indigenous-run White Earth Land Recovery Project). See generally Keith Aoki, *Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection*, 6 *IND. J. GLOBAL LEGAL STUD.* 11, 47 (1998) (writing specifically about commercial plant breeders who use traditional indigenous varieties of seeds, make slight improvements on them, patent them, and then sell them back to the indigenous communities for a profit).

347. See generally Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 *U.C. DAVIS L. REV.* 971 (2007) (discussing the importance of intellectual property rights protection for people in the developing world); Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 *U.C. DAVIS L. REV.* 1039 (2007) (linking protection for intellectual property rights to human rights for the world’s poor).

348. See Riley, *supra* note 339, at 382 (discussing how national governments’ sale of indigenous lands has resulted in indigenous groups’ dependence on traditional knowledge as a commodity).

This process has occurred with little or no regard for the economic reality, cultural survival, or creative integrity of the indigenous people in the developing world who have facilitated the creation of such valuable products. Consequently, various sources of indigenous traditional knowledge have been mined by outsiders and used as the basis for patents in, for instance, pharmaceuticals to treat Hodgkin's disease,³⁴⁹ staple foods like beans³⁵⁰ and rice,³⁵¹ and certain seed varieties.³⁵² Scientists have even extracted indigenous peoples' genetic materials for research purposes, often without obtaining clear, informed consent.³⁵³

It would be impossible to discuss here all the ways in which a stewardship property model relates to indigenous peoples' relationships with their intangible cultural property. Certainly, claims involving the misuse of genetic human material—such as that of the Havasupai against Arizona State University researchers for nonconsensual use of blood samples³⁵⁴—will raise very different legal issues than, for example, a tribe's efforts to keep a popular music group from using its sacred ceremonial song as part of a performance

349. See BOYLE, *supra* note 206, at 128-29 (relating the story of a drug company that developed a remedy for Hodgkin's disease from vinca alkaloids derived from the rosy periwinkle of Madagascar).

350. See Gillian N. Tattray, *The Enola Bean Patent Controversy: Biopiracy, Novelty and Fish-and-Chips*, 2002 DUKE L. & TECH. REV. 0008, ¶¶ 11-12, <http://www.law.duke.edu/journals/dltr/articles/2002dltr0008.html> (explaining that Mexican farmers were prevented from exporting their traditional Enola beans to the United States because a U.S. corporation has acquired a patent on it).

351. The importance of allowing indigenous peoples to assert a form of IP claim to certain kinds of geographically specific products has been explored by scholars. See, e.g., Sunder, *supra* note 345, at 113-14 (discussing how TRIPS offers a foundation for the international recognition of GIs, or "geographical indications"—defined as "indications which identify a good as originating in the territory of a Member [state] . . . where a given quality, reputation, or other characteristic of the good is essentially attributable to its geographical origin," such as Champagne, Darjeeling tea, and Mysore silk—and arguing that GIs serve as a form of poor people's intellectual property rights because they recognize the knowledge of local weavers, farmers, and craftspeople rather than just the high-technology contributions of multinational corporations).

352. See Aoki, *supra* note 346.

353. See Fletcher, *supra* note 346, at 528 (discussing the Human Genome Project, which aspires to gather and archive indigenous peoples' DNA); Anne Minard, *Havasupai Suits Involving Blood Research Moved*, ARIZ. DAILY STAR, May 5, 2005, at B2 (describing a lawsuit alleging that blood samples intended for diabetes research were used by scientists instead for study of diseases like schizophrenia); Larry Rohter, *In the Amazon, Giving Blood but Getting Nothing*, N.Y. TIMES, June 20, 2007, at A1 (discussing scientists' taking of Amazonian Indians' blood for scientific study without obtaining full, informed consent).

354. See Minard, *supra* note 353.

that parodies Indians.³⁵⁵ Because the laws governing intellectual property are multilayered (international, national, local, and tribal) and quite complex, indigenous peoples' approaches to using law in various intangible property-related disputes undoubtedly will reflect these variances.³⁵⁶

Partially as a result of the complicated and nuanced system of laws governing intangible property, we contend that a stewardship approach to the management of indigenous peoples' intangible cultural property is both normatively desirable and legally feasible. But it is vitally important that stewardship be understood in the context of both its actual and its aspirational qualities.

As an initial matter, we argue that where critics assert freedom of speech or public domain objections to indigenous cultural property claims, such fears are frequently overstated or misplaced. For example, in the NCAA's recent ruling regarding Indian team mascots,³⁵⁷ critics often cite free speech concerns in reaction to the rule, even though it is primarily designed to allow Indian tribal participation in the dialogue over the mascots' continued use.³⁵⁸ In other cases, instances of indigenous cultural appropriation arise from thefts that could be redressed within existing intellectual property (or other) laws. The surreptitious recording, appropriation, and marketing of indigenous music, for example, can and should be legally redressed without any expansion of intellectual property law whatsoever.³⁵⁹ Likewise, legal remedies for the wrongful appropriation of indigenous peoples' DNA similarly require no expansion of existing laws at the cost of the public domain.³⁶⁰ In many instances, indigenous peoples' intangible cultural property interests would be

355. For a discussion of OutKast's performance of "Hey Ya!" at the 2004 Grammy Awards, see Riley, *supra* note 51, at 70-72.

356. See, e.g., *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087 (8th Cir. 1998) (reviewing tribal court jurisdiction over claims that a brewing company's unauthorized use of the "Crazy Horse" image in marketing of a malt liquor product violated a combination of federal and tribal laws governing intangible property).

357. See *infra* notes 383-389, 404-409, and accompanying text.

358. Moreover, the NCAA's guidelines are promulgated by a private organization without authority to make laws that, at least as a formal matter, narrow the First Amendment's free speech guarantees. We recognize, however, that the rule may raise concerns over the limitations on free speech in this context, even if not as a formal constitutional matter. Cf. Regan Smith, Note, *Trademark Law and Free Speech: Protection for Scandalous and Disparaging Marks*, 42 HARV. C.R.-C.L. L. REV. 451 (2007) (arguing that prohibitions on registering scandalous trademarks are unduly restrictive of free speech).

359. See Riley, *supra* note 200, at 175-77 (detailing the theft of the indigenous Ami's "Song of Joy," to which existing, applicable intellectual property laws should have applied but did not protect the actual audio recording of the song).

360. See Harry & Kanehe, *supra* note 57.

better protected simply by a more uniform and nondiscriminatory application of existing laws.

At the same time, we do not suggest that critics' concerns are always unfounded, or that indigenous peoples' efforts to reclaim or safeguard their intangible cultural property must always prevail against competing claims. Consider, for example, reports that Aboriginal leaders in Australia lodged a writ in the High Court to prevent the Commonwealth from using depictions of the kangaroo and the emu on Australia's coat of arms, on any state property, or in any state publication.³⁶¹ Because Aborigines consider these animals to be sacred, they perceive Australia's use of them in promoting the Australian state to be an abomination. Their claims do not include any contention, however, that they have had any role in the creation of the displayed designs, or even that they have employed traditional knowledge to ensure the perpetuation of the animal species. Thus, even where we may sympathize with particular claims, we do not assert that the stewardship model militates in favor of indigenous peoples always prevailing in obtaining their desired legal protection. In some cases, such as this one, stewardship may in fact necessitate that the scale tip against indigenous claims.

It is its unique flexibility and capacity for giving voice to claims of both owners and nonowners that make stewardship a uniquely powerful normative framework for considering indigenous peoples' intangible property claims. Moreover, as a model, stewardship aptly captures the language with which many indigenous groups already articulate their desire for intangible property protection. In pursuing claims to traditional medicinal knowledge, for instance, indigenous groups do not commonly seek the power to prevent access by the rest of the world, but rather a role in the dynamic process of developing, disseminating, and seeking compensation for the good. Commonly, this stewardship role manifests itself in indigenous peoples' desires to participate in the disclosure of sacred or confidential information that may be tied up with the medicinal knowledge. Or the group may simply seek to have access to the decision-making process that will define where and how the information will be obtained, particularly when it might affect their aboriginal territories.³⁶²

361. BROWN, *supra* note 67, at 2; Andrew Probyn, *The Roo Is Taboo, Australians Told*, HERALD SUN (Melbourne), Jan. 30, 2002, at 5.

362. See generally Rohter, *supra* note 353 (highlighting the claims of Amazonian Indians, who seek to protect their traditional lands even as they work with scientists who have gathered their blood and made undelivered promises to tender payment or extend protection).

The harsh reality is that the vast majority of the world's indigenous peoples reside in the developing world and are among the world's poorest.³⁶³ They typically live in areas that are geographically isolated but increasingly encroached upon by outside interests to facilitate the development and exploitation of natural resources, and on lands to which they do not hold formal title. They experience extraordinarily high rates of poverty, and are marked by illiteracy and very little formal protection for their languages, religions, cultures, or subsistence lifestyles.³⁶⁴ For such indigenous peoples, their intangible property—including traditional medicinal knowledge and genetic resources—may be the greatest commodifiable good they possess in a global economy. As indigenous rights scholar Rosemary Coombe argues, indigenous peoples' traditional knowledge must be protected because “most of the worlds' poorest people depend upon their traditional environmental, agricultural, and medicinal knowledge for their continuing survival, given their marginalization from market economies and the inability of markets to meet their basic needs of social reproduction.”³⁶⁵ As a result of their subordinated economic position, indigenous peoples increasingly request to share in the profits from the products that are created through the use of indigenous traditional knowledge, primarily as a matter of survival and basic equality.³⁶⁶ Thus, affording indigenous groups even minimum protections and profit-sharing rights in harvesting, collecting, organizing, disseminating, and selling their traditional knowledge is crucial, and it can be achieved without employing the absolute ownership rights or exclusive access that cultural property critics fear.³⁶⁷ Such cultural property rights, under a stewardship

363. See Robin Wright, *Tribal Groups Often Most Oppressed*, CHI. SUN-TIMES, June 13, 1993, at 34 (citing an International Labour Organization Report finding that indigenous peoples are the poorest people in the world, in both industrialized and developed countries); see also S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT'L & COMP. L. 13, 17-18 (2004) (discussing the adversity faced by indigenous peoples for centuries).

364. See generally Dussias, *supra* note 344, at 815-19 (noting that rural Peruvian Indians have rates of poverty at ninety percent, that few have formal education, and that their rights to their land, to which they have no formal title, are precarious).

365. Rosemary J. Coombe, *Protecting Traditional Environmental Knowledge and New Social Movements in the Americas: Intellectual Property, Human Right, or Claims to an Alternative Form of Sustainable Development?*, 17 FLA. J. INT'L L. 115, 115 (2005).

366. See Sunder, *supra* note 345, at 112 (“The U.N. estimates that developing countries lose about \$5 billion in royalties annually from the unauthorized use of traditional knowledge.”).

367. For an argument that robust protections for traditional knowledge cannot be fully justified by existing property or intellectual property theory, see Stephen R. Munzer & Kal Raustiala, *The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*, 27 CARDOZO ARTS & ENT. L.J. (forthcoming Apr. 2009).

approach, would install safeguards that are critically important to the survival of the world's vulnerable indigenous populations.

To the extent that American law has contemplated protection for indigenous intangible cultural property, it, too, has employed an ethic of stewardship. Before the concept of cultural property had even engaged the dialogue of law and culture in the United States, Congress passed the 1935 Indian Arts and Crafts Act (IACA), making it the first federal statute to deal specifically with protecting indigenous cultural property.³⁶⁸ Responding to a flood of inauthentic products that dramatically undermined the market for authentic Indian products,³⁶⁹ the IACA sought to protect Native cultural property by promoting the artwork of Native artists and insulating consumers against imitations. The IACA parallels general trademark law in some respects, but it is specifically geared toward Indian arts and crafts.³⁷⁰ The 1990 amendments to the IACA require that works designated as Indian-made actually fit this description and imposes civil and criminal penalties for works that unlawfully and erroneously employ the designation.³⁷¹

In the IACA context, property entitlements map onto the stewardship model. A non-Native producer of cultural goods remains relatively free to engage in her craft; the Act does not contemplate divestment of ownership, exclusion, or even an interference with alienability per se. Instead, by solely governing attribution, the IACA is intended merely to guarantee the authenticity of Native cultural products. When consumers purchase Indian goods, such as Navajo rugs, Potawatomi porcupine quill earrings, or Chippewa baskets, they are guaranteed the products' authentic origin, and the indigenous

368. Indian Arts and Crafts Act of 1935, ch. 748, § 1, 49 Stat. 891 (codified as amended at 25 U.S.C. §§ 305-305(f) (2000)).

369. See Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 50-51 (1997); Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299, 339 (2002) (noting that the legislative history of the IACA reveals that "counterfeit Indian products were responsible for an annual loss ranging from forty to eighty million dollars per year from the Indian arts and crafts industry in the United States").

370. The IACA states that it is unlawful to "offer[] or display[] for sale or sell[] a good, with or without a Government trademark, in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian tribe." 25 U.S.C. § 305e(a).

371. Indian Arts and Crafts Act of 1990, Pub. L. No. 101-644, §§ 106-107, 104 Stat. 4662, 4665 (codified at 18 U.S.C. §§ 1158(1), 1159(b)(1) and 25 U.S.C. § 305). The 1990 amendment to § 1158 increased the maximum fine for counterfeiting to \$250,000. Section 1158 already provided for a maximum prison sentence of five years, which can be imposed in conjunction with a fine. See 18 U.S.C. § 1158. These provisions also complement a variety of state laws that accomplish similar goals. See, e.g., *Fraudulent Practices in the Sale of Indian Arts and Crafts*, ARIZ. REV. STAT. §§ 44-1231 (LexisNexis 2003).

artists are granted control of the production of their own cultural property. Thus, the IACA serves the interests of both manufacturers and consumers, consistent with a stewardship model of protection, by safeguarding the interests of Native craftspeople while neither denying title to goods nor impeding artistic expression.³⁷²

Given that indigenous intangible cultural property claims touch numerous areas of law and cannot be fully canvassed here, we focus on an issue familiar to most Americans: the use of Indian mascots by American sports teams. The display of Indians as sports mascots—from the buck-toothed image of “Chief Wahoo” and the curiously named Washington “Redskins” to the highly contested “Fighting Sioux”—has caused great controversy and discord in American culture.³⁷³ Efforts to curtail the use of Indian mascots have met considerable criticism from sports fans who consider the mascots to be inseparable from their devotion to particular teams.³⁷⁴ Such devotees have been passionately insistent that it would be wrong or even un-American to deny fans the mythic images of the Indian that the mascots purportedly convey.³⁷⁵ To these devotees, the Indian as symbol embodies the mythical and fierce warrior, who is firmly situated in American lore opposite the solid and sturdy Western cowboy.³⁷⁶ In this sense, the Indian belongs to all Americans, and is part and parcel of American history and culture.³⁷⁷

Many Native peoples, however, view Indian mascots differently. For some, the mascots deny the truth about Indians: that they are active participants in dynamic and contemporary cultures that are defined by unique tribal identities, diverse across the continent. In this view, the monolithic, “mythic” Indian identity is linked to a colonizer’s attempts to make Indians disappear, facilitated by a legacy of death, removal, and assimilation.³⁷⁸ These Native peoples contend that Indian mascots portray Indians as nostalgic and anachronistic symbols of the past, and that their continued use is a

372. For a critique of the IACA and an argument that it unduly constricts contemporary Indian identity, see William J. Hapiuk, Jr., *Of Kitsch and Kachinas: A Critical Analysis of the Indian Arts and Crafts Act of 1990*, 53 STAN. L. REV. 1009 (2001).

373. See Jeff Jacoby, *Demeaning Images? Not So*, BOSTON GLOBE, Mar. 26, 2001, at A15.

374. See Liz Clarke, *In North Dakota, Controversy Has a Name: NCAA, University and Native Americans Are at Odds over “Fighting Sioux,”* WASH. POST, Nov. 6, 2005, at E01.

375. See Editorial, *Cultural Correctness*, WASH. TIMES, Mar. 16, 2001, at A18.

376. For a discussion of this phenomenon, see Riley, *supra* note 51, at 79.

377. See *id.*

378. See generally PHILIP J. DELORIA, *PLAYING INDIAN* 137 (1998) (noting that for some Americans, “the redemptive value of Indians lay not in actual people, but in the artifacts they had once produced in a more authentic stage of existence”).

manifestation of the vast power disparity faced by Indians today vis-à-vis whites and other minority groups. For critics of Indian mascots, no matter how vociferously fans contend that Indian mascots are meant to “honor” Native people, the actual caricatures and logos—which draw on stereotypes and employ sacred cultural elements such as feathers, war paint, songs, and drums—are an abomination.³⁷⁹

Although the controversy over Indian mascots has been ongoing for some time,³⁸⁰ their use became linked to cultural property in 2005. At that time, the NCAA’s Executive Committee issued its decision to “prohibit NCAA colleges and universities from displaying hostile and abusive racial/ethnic/national origin mascots, nicknames or imagery at any of the 88 NCAA championships.”³⁸¹ Under the NCAA’s policy, the twenty schools that used Indian mascots or logos could continue to use them without penalty if they sought and received consent from the relevant Indian tribe (for example, the University of Utah sought and received permission to use the name “Utah Utes”).³⁸² If the relevant tribe would not consent, the offending institution had a choice: change the mascot or logo and face no penalty, or continue to use the mascot but be prevented from hosting lucrative NCAA postseason championship events.³⁸³

The NCAA limitations on the use of Indians as mascots spurred great controversy.³⁸⁴ Loyal fans were outraged at the policy, citing school pride and tradition as central reasons for opposing the change.³⁸⁵ One of the most marked examples was the decision of the University of Illinois to discontinue its use of Chief Illiniwek, the mascot for the Illinois Illini. The “Chief” was a student who would dress up in Indian regalia—including a headdress, buckskin clothes, and moccasins—and perform on the court at halftime as a pep leader and cheerleader. When the University of Illinois announced that his February

379. See Riley, *supra* note 51, at 79.

380. See Sonia K. Katyal, Trademark Intersectionality (Sept. 15, 2008) (unpublished manuscript, on file with authors).

381. Press Release, Nat’l Collegiate Athletic Ass’n, NCAA Executive Committee Issues Guidelines for Use of Native American Mascots at Championship Events (Aug. 5, 2005), http://www2.ncaa.org/portal/media_and_events/press_room/2005/august/20050805_exec_comm_rls.html.

382. See *Head Ute’s Plea Down to Final Hours*, HOUSTON CHRON., Sept. 2, 2005, at C2.

383. Gary T. Brown, *Policy Applies Core Principles to Mascot Issue*, NCAA NEWS, Aug. 15, 2005, at 1.

384. See Jim Mashek, *New Wishy-Washy Stance Isn’t a Solution for NCAA*, AUGUSTA CHRON., Aug. 7, 2005, at 2C.

385. See Clarke, *supra* note 374.

21, 2007 performance would be the Chief's last, they retired a mascot they had used for over eighty years.³⁸⁶

Even though the NCAA is a private organization and does not have the authority to create law, its Indian mascot policy has become the target of cultural property critics. Naomi Mezey in particular devotes the bulk of her recent critique of cultural property to what she sees as the unfortunate destruction of Chief Illiniwek (and similarly situated mascots) by the NCAA. Although recognizing that the NCAA cannot and did not make “law,” she posits that they relied on and perpetuated “the *popular logic* of cultural property” in devising their mascot policy.³⁸⁷ The “logic” of cultural property is, according to Mezey, “a social common sense that cultural property law has helped to create”³⁸⁸ and which suffers from the same “flawed logic” as actual laws designed to protect cultural property.³⁸⁹

Though Mezey’s blurring of lines between “law” and “logic” is subtle, it is undoubtedly strategic. For many, there is perhaps no right more precious and distinctly American than the right to freedom of speech and the free exchange of ideas. Mezey masterfully imports into the cultural property debate those scholars who are aligned with the “free culture” movement—a group comprised primarily of academics defined by their skepticism of the propertization of intangibles.³⁹⁰ She does so by suggesting that the NCAA’s restriction on the use of Indian mascots in college sports comprises part of a larger move toward propertizing culture, ultimately limiting speech and the free flow of ideas.³⁹¹

Mezey’s substantive critique of the NCAA’s mascot rule is similar to the claims she asserts against NAGPRA: “cultural property claims tend to fix culture,” “sanitize culture,” “increase intragroup conformity,” and cause groups to “become strategically and emotionally committed to their ‘cultural

386. See *Board Retires Chief Illiniwek*, L.A. TIMES, Mar. 14, 2007, at D4.

387. Mezey, *supra* note 11, at 2006.

388. *Id.*

389. *Id.*

390. See Lawrence Lessig, *Free(ing) Culture for Remix*, 2004 UTAH L. REV. 961, 975 (arguing that change in copyright law is necessary to expand the “range of ‘creators’ who participate in the remix of culture”).

391. Mezey argues that there might be legal responses to the use of Indian mascots, but that they should not follow the language of cultural property because Indians do not “have a better property claim to white performances of Indian images.” Mezey, *supra* note 11, at 2008; see also Eugene Volokh, *Freedom of Speech, Cyberspace, and Harassment Law*, 2001 STAN. TECH. L. REV. 3, ¶ 43, http://stlr.stanford.edu/STLR/Articles/01_STLR_3 (warning against potential free speech issues raised by efforts to change Indian mascots).

identities.”³⁹² In Mezey’s view, cultural property claims of this sort are indefensible in general, but particularly as they relate to Indian mascots, which she considers to be “cultural hybrids.”³⁹³ Mezey describes their formation as resulting from whites “borrow[ing] from the iconography of various tribal cultures” and placing the mascots into “a distinctly white cultural ritual of the halftime show” which is then “invested with meaning by sports fans.”³⁹⁴ Consequently, she argues that the “offending mascots are white inventions” that “belong[] to more than one culture, or perhaps belong[] properly to the offending culture.”³⁹⁵

Yet Mezey’s critique of the NCAA’s rule is most intelligible only within the limited framework of an ownership/exclusionary model of property. Mezey’s entire critique depends on this view. She insists that culture “is unfixed, dynamic, and unstable,” whereas “[p]roperty is fixed, possessed, controlled by its owner, and alienable.”³⁹⁶ As a result, in Mezey’s view, affording property rights in culture to distinct groups creates a “paradox” by contradicting the very nature of culture.³⁹⁷ Cultural property also inflicts “damage” upon “culture in the abstract, [and] ultimately to tribes, Indians, and everyone else for whom cultural survival depends on change.”³⁹⁸

We acknowledge Mezey’s intent to distinguish her analysis of the NCAA’s rule from critiques that focus on the potential racial discrimination embedded in mascot use. We believe, however, that cultural property concerns are descriptively and normatively balanced, both inside and outside of the law, with society’s interest in preventing, rather than perpetuating, certain kinds of racialized harm. In the context of intellectual property, for example, the Patent and Trademark Office is charged with the responsibility to cancel or to refuse to register a trademark if it determines that the mark may “disparage” certain persons, a provision that led to an initial cancellation of the famous mark in the “Washington Redskins.”³⁹⁹ Particularly in the educational context (in addition

392. Mezey, *supra* note 11, at 2005, 2007.

393. *Id.* at 2008.

394. *Id.* at 2005.

395. *Id.* at 2006.

396. *Id.* at 2005.

397. *Id.*

398. *Id.* at 2009.

399. Section 2(a) of the Lanham Act provides that

[n]o trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it . . . [c]onsists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a

to the employment context), in which institutions are bound by their commitment to prevent racially hostile environments, we suggest that Mezey's work overlooks these obligations and their link to the rationale behind some cultural property protections. Consider the remarks of one former employee in the Department of Justice's Office of Civil Rights:

Now think about the reality for the Indian child who attends school where there is an American Indian mascot. . . . These images are omnipresent in the life of the Indian child while the child attends school. She does not see any other race singled out for this kind of caricature treatment. . . . The Indian child recognizes that using the Indian race as a mascot is a badge of inferiority. And, equally important is the ease with which one culture becomes safe to mock and caricature when others are not.⁴⁰⁰

Thus, even while we acknowledge Mezey's important point regarding the preservation of cultural hybridity, we posit that her concerns regarding freedom of speech at the very least overlook or understate the law's additional obligation to avoid the perpetuation of racial prejudice and misunderstanding in the educational context in particular.

In her arguments against cultural property, Mezey grasps culture with great facility, but in so doing, relies on an outmoded theory of property. Even if we accept Mezey's view of culture as "unfixed, dynamic, and unstable" as well as "human and messy,"⁴⁰¹ we reject that this necessitates a corresponding understanding of property as "fixed, possessed, controlled by its owner, and alienable."⁴⁰² Property can be as "human and messy" as culture, perhaps more so. To view it as neatly categorized into fixed, immutable categories belies its true nature: property is complicated, dynamic, and contingent. Its very nature stands as the perfect counterpoint to Mezey's critique. That is, cultural property only appears to be tragically flawed when one adopts a restrictive view

connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.

15 U.S.C. § 1052(a) (2000). This provision led to the successful cancellation of the term "Washington Redskins," although the holding was later reversed by a district court. *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d (BNA) 1705 (T.T.A.B. 1999), *rev'd* 284 F. Supp. 2d 96, 128 (D.D.C. 2003); *see also* Katyal, *supra* note 380, at 28-34 (discussing this provision).

400. *See* Lawrence R. Baca, *Native Images in Schools and the Racially Hostile Environment*, 28 J. SPORT & SOC. ISSUES 71, 76-77 (2004).

401. Mezey, *supra* note 11, at 2005.

402. *Id.*

of it as a regime placing absolute ownership and exclusionary rights into the hands of cultural groups. If, by contrast, one construes cultural property as being as dynamic, intricate, and complex as culture itself, the stewardship paradigm is illuminated and cultural property is redeemed.

If Indian nations' role in the use of mascots in college athletics does not make sense as a matter of property under an ownership theory, it most certainly makes sense in the framework of stewardship. The NCAA's policy reflects cultural property's logic, in that it affords tribes some degree of ethical stewardship and control over the depiction of the very people that they are.⁴⁰³ In contrast to Mezey, we posit that cultural property actually facilitates the dynamic process of cultural evolution, change, and survival, by allowing Native peoples to share in decisions regarding the way their indigenous cultures are displayed in the world.

Turning to the actual property consequences of the NCAA's policy, the primacy of the stewardship model of property—and, consequently, the shortcomings of an absolute ownership model—become apparent. First, despite the promise of significant penalties for offending institutions, the NCAA did not prohibit the use of Indian mascots by member schools.⁴⁰⁴ In contrast to an absolute right of property—the type of right of which Mezey seems critical—institutions that used Indian mascots prior to 2005 were allowed to continue this practice.⁴⁰⁵ Those that sought and obtained consent from the relevant Indian tribe could do so without penalty.⁴⁰⁶ Several member schools, such as the Florida State “Seminoles,” followed this model.⁴⁰⁷ Others, such as the University of North Dakota “Fighting Sioux,” are in ongoing negotiations with Indian nations to achieve consensus regarding their mascot usage.⁴⁰⁸ Neither Indian tribes nor the NCAA have any legal mechanism to prevent their continued use.⁴⁰⁹

403. See generally Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. (forthcoming May 2009), available at <http://ssrn.com/abstract=1138714> (arguing for an approach to property rooted in an Aristotelian theory of virtue ethics, emphasizing noneconomic approaches to property ownership and use).

404. See National Collegiate Athletic Association, *Native American Mascots* (Mar. 6, 2008), <http://www.ncaa.org/wps/ncaa?ContentID=915>.

405. See Press Release, Nat'l College Athletic Ass'n, *Native American Mascot Policy—Status List* (Feb. 16, 2007), available at <http://www.ncaa.org/wps/ncaa?ContentID=1232>.

406. See Neil Milbert, *Seminoles OK'd by NCAA; Illini Case Isn't Similar*, CHI. TRIB., Aug. 24, 2005, § 4, at 6.

407. *Id.*

408. See *N.D. To Sue NCAA over Sioux Nickname*, USA TODAY, June 16, 2006, at C1.

409. Although there is no legal mechanism to prevent such use, the cost of foregoing postseason tournament revenue is indisputably substantial.

Moreover, the NCAA's rule did not transfer to Indian nations the dominant sticks in the property bundle—use, exclusion, and alienability—with respect to the mascot that depicted their particular tribe.⁴¹⁰ Ownership rights to the trademarks were not conveyed to the subject tribes, so even if the tribes wanted to use the mascots for themselves, they could not.⁴¹¹ Nor did the tribes obtain a transferable or alienable property interest. That is, the interest is unique to them: for example, regardless of whether the Northern Utes consent to the use of their name and image by the University of Utah, they have no marketable property interest in the mascot. At most, the tribes' interest may be most accurately characterized as a partial veto power over the use of a particular mascot—one that is relevant only as to the subject institution, and certainly not as to the rest of the world. The public's associated rights to engage in parody or create cultural fusions similarly remain intact.

Nevertheless, at the same time that we reject Mezey's critique of the NCAA policy as creating undesirable property rights in culture, we concede that Indian nations did, in fact, receive a cognizable property interest through the NCAA's policy. That interest—though difficult to articulate in standard ownership terms—manifests a vision of indigenous property devised along the lines of a stewardship model of property that allows indigenous peoples to participate in dialogue about the representation of indigenous images, without acquiring fixed property rights. It is here that we agree wholeheartedly with Mezey: culture is a process of evolution and dynamic change. But we part ways with her assertion that cultural property impedes that evolution. Cultural property actually facilitates cultural change, particularly when the parameters of the interests recognized are thoughtful and measured, and include ethical considerations for the use of intellectual properties.

The logic of cultural property visible in the NCAA's mascot policy suggests something quite different than Mezey claims: that indigenous cultures are seriously threatened, but deeply valuable; that indigenous peoples should have some power to steward the cultural images that define them in the eyes of the dominant society; that the cultural representations of Indian nations should not automatically and necessarily become the property of the majority—particularly when those Indian nations have been greatly reduced through

410. See generally Thomas C. Grey, *The Disintegration of Property*, in *NOMOS XXII: PROPERTY* 69, 69 (1980) (“The specialist fragments the robust unitary conception of ownership into a more shadowy ‘bundle of rights.’”).

411. As noted, universities can continue to use their mascots if they want, albeit at a considerable cost. To avoid penalty entirely, they must obtain consent from the relevant tribe.

genocide, war, dispossession, and disease.⁴¹² There is no question that indigenous cultural survival is precarious in an age of globalization, as the Indians' existence is increasingly threatened by an ever encroaching world. But in the vast majority of cases, recognizing indigenous peoples' property interests in their own intangible property does not unduly advance the interests of indigenous groups at the expense of others. Rather, these contemplated cultural property protections provide the minimal tools necessary to ensure their continued cultural presence.⁴¹³

C. Real Cultural Property

For many indigenous people, every facet of culture, identity, and existence—including tribal religions, Native languages, ceremonies, songs, stories, art, and food—is tied up with the land from which they came.⁴¹⁴ While many people have deep ties to particular geographic locations, for indigenous groups, land is sacred.⁴¹⁵ This relationship between land and culture is captured in a statement by a chief of the Gwich'in: "We hurt because we see the land being destroyed. We believe in the wild earth because it's the religion we're born with."⁴¹⁶ His assertion reflects a common understanding shared by many of the world's indigenous peoples: as a people, they literally came from the land, are defined by the land, and have a responsibility to the earth that is integral to their identity as peoples.⁴¹⁷ As one scholar writes, "Tribal cultures, from the time of their creation, have been formed, shaped, and renewed in

412. Consider Mezey's reasons for justifying the use of Chief Illiniwek by the University of Illinois: Mezey suggests that whites' appropriation of Chief Illiniwek was palatable in part because the tribe for whom he was named essentially became extinct because of genocide, war, and disease. Mezey notes this is a "tragic" story but that "it worked out well for whites, in that it allowed them not only to take over the former territory of the Illinois but also to better appropriate their [the Illini] history and culture for their own purposes." Mezey, *supra* note 11, at 2032. She explains that "[t]he trope of the noble savage served the colonists well, allowing them to use their identification with the noble and free Indian to distance themselves from the British at the same time that they used the savageness of the Indian to justify dispossessing and killing them." *Id.* at 2026-27 (emphasis added).

413. See also Riley, *Illiberalism*, *supra* note 131, at 831-32 (defining the link between territorial, political, and cultural sovereignty and arguing that they are "intimately linked and mutually reinforcing").

414. Carpenter, *supra* note 44, at 1063.

415. *Id.*

416. *Epigraph* to ARCTIC REFUGE: A CIRCLE OF TESTIMONY (Hank Lentfer & Carolyn Servid comp., 2001) (quoting Trimble Gilbert, Chief of Arctic Village).

417. See Carpenter, *supra* note 44, at 1062-63.

relationship with mountains, mesas, lakes, rivers, and other places that are imbued with the spirituality, history, knowledge, and identity of the people.”⁴¹⁸

Some of the world’s most remarkable natural landmarks operate as sacred sites in the lives of the indigenous peoples who have experienced and cared for them from time immemorial, including the Australian Aborigines and Uluru (Ayers Rock), the Lakota Sioux and Mato Tipila (Devils Tower), and the Peruvian Indians and Machu Pichu. In these cases and numerous others, indigenous peoples define themselves by their relation to land, and the land, in turn, thrives from the stewardship of its indigenous inhabitants. This relationship with the earth is symbiotic. Many Native peoples, for example, explain that they spend time at sacred sites conducting ceremonies to revitalize their communities and to keep the world in balance.⁴¹⁹

For indigenous peoples, accessing, experiencing, and protecting their sacred sites have become incredibly challenging. Land plays a particularly powerful role in indigenous cultural survival for reasons that are apparent: a tribal land base allows Indians to live together, in a place where they are able to speak a common language, practice traditional religions, and perform their cultures as a unified indigenous people. But the land is also more than this. It stands as the place from which indigenous peoples came, and to which they seek to return. It defines their histories, languages, cultures, arts, and continuing peoplehood. It holds all the components that define their cultural existence.⁴²⁰

Because all aspects of indigenous cultural survival relate back to the land, it is perhaps the most important—and most threatened—of all cultural properties. Although in some cases indigenous peoples still seek the return of tribal lands wrongfully taken,⁴²¹ many contemporary Native Americans’ claims primarily reflect stewardship concerns. Without ownership rights, Indians have had to fight fiercely to retain access to sites that are necessary for their worship and cultural survival.⁴²² Many sacred sites are currently owned by the

418. *Id.* at 1063.

419. *Id.* at 1063, 1067-69.

420. As one Gwich’in tribal member explains, “We are the caribou people. Caribou are not just what we eat; they are who we are. . . . Without caribou we wouldn’t exist.” Sarah James, *We Are the Ones Who Have Everything To Lose*, in *ARCTIC REFUGE*, *supra* note 416, at 3, 3.

421. The Lakota Sioux have refused to take an award of monetary compensation for the Black Hills, which were guaranteed to them by treaty. *See United States v. Sioux Nation of Indians*, 448 U.S. 371, 424 (1980) (awarding judgment to the Sioux Nation for the Black Hills). The Lakota believe they will lose their identity as a people if they accept money for their sacred lands. Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 *UCLA L. Rev.* 1615, 1644-45 (2000).

422. *See* Carpenter, *supra* note 44, at 1069.

U.S. government, which secured title to those lands either through purchase or conquest.⁴²³ In contemporary times, the way in which the government chooses to manage that land—for example, whether to allow rock-climbing on Devils Tower,⁴²⁴ tour groups and alcohol consumption at Rainbow Bridge,⁴²⁵ flooding of the Tennessee River Valley,⁴²⁶ or construction of a road through the “High Country”⁴²⁷—can have devastating effects for indigenous peoples who hold these lands to be sacred.⁴²⁸

A stewardship view of property has great currency in cultural property law. Many programs aim to secure Indian entitlements to property without transferring title from the current (non-Indian) owner. The Navajos, in a recent case discussed below, seek first and foremost to avoid desecration of the Sacred Peaks so that they can continue to fulfill their custodial responsibilities to the land through ceremonies and stewardship. Similar claims have been articulated by other tribes in relation to Taos Blue Lake, Devils Tower, and other sites.⁴²⁹ This phenomenon can be seen clearly in the sacred sites context, where Indians are commonly one of a whole host of competing user groups—including natural resource development corporations, recreationalists, and environmental constituencies—who desire access to natural places.

As we have demonstrated, American law has, in many respects, failed to recognize Indian property rights, and has gone so far as to use property law to justify the dispossession of indigenous lands.⁴³⁰ Moreover, it is difficult to use traditional, exclusionary property concepts to describe the relationship between indigenous peoples and the earth, due to their reluctance to characterize it in terms of ownership and dominion. As Jimmie Durham, a Cherokee litigant in a sacred site case, explained,

423. *Id.*

424. *Bear Lodge Multiple Use Ass’n v. Babbitt*, 175 F.3d 814 (10th Cir. 1999).

425. *Badoni v. Higginson*, 455 F. Supp. 641 (D. Utah 1977), *aff’d*, 638 F.2d 172 (10th Cir. 1980).

426. *Sequoyah v. TVA*, 620 F.2d 1159 (6th Cir. 1980).

427. *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 442–43 (1988).

428. *See* Carpenter, *supra* note 44, at 1069.

429. For a thorough treatment of the relationship between the Taos Pueblo and the Blue Lake, see generally GORDON-MCCUTCHAN, *supra* note 271, which notes the deep intergenerational commitment of the Taos Pueblo to the preservation of the sacred Blue Lake and its surrounding area.

430. Carpenter, *supra* note 44, at 1066 (highlighting how American property law principles have been employed to justify the dispossession and taking of Indian lands without just compensation).

In the language of my people . . . there is a word for land: Eloheh. This same word also means history, culture and religion. We cannot separate our place on earth from our lives on the earth nor from our vision nor our meaning as people. We are taught from childhood that the animals and even the trees and plants that we share a place with are our brothers and sisters. So when we speak of land, we are not speaking of property, territory, or even a piece of ground upon which our houses sit and our crops are grown. We are speaking of something truly sacred.⁴³¹

While Durham rejects the idea that the Cherokee relationship with land could ever be described as “property,” we believe the challenge is to push property so that it can reflect indigenous traditions.

Property is, after all, the set of legal rights that protects people’s interests in land and other resources; without property law, Indians remain unacceptably vulnerable to continuing expropriation and cultural devastation. As evidenced by the groundbreaking indigenous land claims advanced at the international level by the Mayans in Belize,⁴³² the Awas Tingi in Nicaragua,⁴³³ and the Dann Sisters of the Western Shoshone Nation,⁴³⁴ indigenous groups increasingly utilize property law to vindicate their cultural and human rights, as well as to protect their property interests. We believe that, even with its shortcomings, property law provides a necessary foundation for the recognition of indigenous peoples’ rights to land and other cultural resources.⁴³⁵

431. PETER MATHIESSEN, INDIAN COUNTRY 119 (1984) (quoting Jimmie Durham, a Western Cherokee).

432. Maya Indigenous Cmty. of the Toledo Dist. v. Belize, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2005) (detailing the Mayas’ efforts to retain their traditional lands and their subsistence way of life, even in the absence of title).

433. Case of the Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Inter-Am. C.H.R., No. 79, Ser. C (2001), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf (setting forth the court’s judgment regarding the Awas Tingni’s claims to continue to occupy, protect, and sustain their traditional, aboriginal lands).

434. United States v. Dann, 470 U.S. 39 (1985) (considering the claims of the Dann sisters of the Western Shoshone Nation for continuing in their traditional land practices, in light of their argument that they never settled or relinquished their lands claims against the U.S. government).

435. At the very least, we argue, property law should meet its own internal norms when applied to American Indian nations. Cf. Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 714 (2006) (evaluating “the federal Indian country criminal justice regime, not against norms of Indian law and policy, but against those of criminal law and policy”).

Our argument for reliance on stewardship concepts to protect the real cultural property interests of indigenous peoples is both tactical and normative. As indigenous peoples' actual experiences with sacred sites demonstrate, a hallmark of their relationship with the land is a belief that it is sacred, alive, and nonfungible. There are of course exceptions to this general principle, but an understanding of land—and sacred sites in particular—as a living thing that must be cared for and integrated into the larger balance of life is a distinctly indigenous viewpoint. Tactically, the stewardship model provides a strategic avenue for Native peoples to obtain interests in this real property even in the absence of title.

Consider, for example, how the Supreme Court's treatment of Indian religious interests ultimately prompted Indians and their advocates to pursue a stewardship model in sacred sites cases. The 1988 Supreme Court case *Lyng v. Northwest Indian Cemetery Protective Ass'n* rejected the Indians' claims that the Forest Service's plan to build a road through and harvest timber at a sacred site would violate the Free Exercise Clause by making it impossible for the tribes to practice their religion.⁴³⁶ In rejecting those claims, the Supreme Court held that even if the government activity were to "virtually destroy" the sacred site, it would still stop short of coercing religious belief.⁴³⁷ Moreover, the Court held, "Whatever rights the Indians may have to the use of the area . . . those rights do not divest the Government of its right to use what is, after all, *its* land."⁴³⁸ *Lyng* clearly focused on the primacy of title and, in so doing, authorized the federal government's near absolute management authority over the land.⁴³⁹

Yet in the years before and after *Lyng*, other branches of government have responded to Indian advocacy by attempting to accommodate tribal religious and property interests. In the process, a model has emerged with great potential to recognize Indian stewardship of sacred sites, even in the absence of title. As the American Indian Religious Freedom Act (AIRFA) directs,

436. 485 U.S. 439, 441-42 (1988).

437. *Id.* at 451-52.

438. *Id.* at 453.

439. For a time, *Lyng's* legacy—in conjunction with other Supreme Court cases limiting the religious freedom of Indians—made Indians' efforts to protect their sacred places on federal lands seem futile. See, e.g., *Employment Div. v. Smith*, 494 U.S. 872 (1990) (holding that the State of Oregon was not barred, under the Free Exercise Clause of the First Amendment, from applying a neutral law barring peyote use to a Native American practitioner of a traditional religion). Notably, the U.S. Supreme Court has evidenced its strong opposition to Indian rights in many contexts over the past few decades. See WILLIAMS, *supra* note 108; Frickey, *supra* note 12.

[I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship⁴⁴⁰

In 1992, Congress amended the National Historic Preservation Act (NHPA), making Indian sacred sites eligible for treatment as “[p]roperties of traditional religious and cultural importance” and requiring land management agencies to consult with Indian tribes on federal undertakings that may adversely affect such properties.⁴⁴¹ The executive branch also has spoken on this issue. President Clinton issued an executive order in 1996 requiring officers on federally managed property both to accommodate access to Indian sacred sites and to avoid adversely affecting the physical integrity of those sites.⁴⁴² Federal land management agencies, including the Forest Service and Park Service, have developed internal guidelines to implement these policies.

Although Indians have had limited success in cases framed largely by the ownership model of property, they have secured greater protections through negotiated agreements reflecting stewardship conceptions of property. The agency consultation process has led to the development of an accommodation model of land management.⁴⁴³ Many of the recent land management plans acknowledge the limited access interests of multiple parties—recognizing, for example, rock climbers’ interests in climbing Devils Tower National Monument, but asking them to refrain from doing so while the annual Lakota Sun Dance takes place there.⁴⁴⁴ Another management plan prevents logging on Forest Service lands around a sacred site,⁴⁴⁵ and still another requests that all visitors refrain from touching or walking under a sacred site managed by the

⁴⁴⁰. American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified as amended at 42 U.S.C. § 1996 (2000)). Though a strong statement of federal policy, AIRFA does not create enforceable rights. See *Lyng*, 485 U.S. at 455.

⁴⁴¹. 16 U.S.C. §§ 470a(d)(6)(A)-(B), 470f.

⁴⁴². See Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996).

⁴⁴³. As sovereigns, Indian tribes have even greater opportunity for shared governmental arrangements. See Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1092-93 (2007).

⁴⁴⁴. See *Bear Lodge Multiple Use Ass’n v. Babbitt*, 175 F.3d 814, 815 (10th Cir. 1999).

⁴⁴⁵. See *Wyoming Sawmills Inc. v. U.S. Forest Serv.*, 383 F.3d 1241, 1252 (10th Cir. 2004) (upholding the Forest Service’s management plan for the Medicine Wheel National Historic Landmark against Establishment Clause and National Forest Management Act challenges).

Park Service.⁴⁴⁶ Notably, none of these programs mandates a shift of title or widespread exclusion of others from the resource. They do, however, expressly recognize the interests of American Indians in the preservation and maintenance of, and continued access to, sacred indigenous places.

Nevertheless, existing U.S. federal law on sacred sites reflects a conflict between ownership (as represented by federal interests) and stewardship (as represented by tribal interests). From the perspective of tribal advocates, the legislation and administrative programs described above contain serious limitations. The NHPA, for example, grants tribes only a procedural right of consultation on sacred sites management; it does not guarantee any substantive standard of protection for sacred sites. The AIRFA similarly grants no enforceable right of religious freedom. Under these statutes, it seems, federal agencies may still be able to invoke the trump card of federal ownership as a basis for disregarding tribal religious and cultural interests at sacred sites.

This question of whether American Indians enjoy a substantive right to protect their sacred sites from desecration by the government was at the heart of the Ninth Circuit's en banc decision in *Navajo Nation v. U.S. Forest Service*.⁴⁴⁷ Reversing the court's earlier panel decision, the Ninth Circuit held that the federal government's decision to permit the use of sewage effluent in snowmaking on the San Francisco Peaks did not present a "substantial burden" to Indian religion under the Religious Freedom Restoration Act (RFRA).⁴⁴⁸ The tribes had claimed that spraying one of their most holy mountains with the sewage effluent would interfere with specific religious practices, such as Navajo healing ceremonies relying on plants and medicines collected from the mountain,⁴⁴⁹ and entire religious belief systems, such as the Hopi ceremonial cycle based on the kachinas' seasonal migrations from the Peaks to the Hopi villages.⁴⁵⁰ The Forest Service had gleaned extensive knowledge of these religious interests—and those of other tribes—through the NHPA and the National Environmental Policy Act of 1969 consultation process. Yet the Forest Service decided to approve the Arizona Snowbowl Resort Limited Partnership's snowmaking plan, citing its statutory mandate to promote "multiple uses" of the public lands and its limited responsibilities to Indian

446. See *Natural Arch & Bridge Soc'y v. Alston*, 98 F. App'x 711, 716 (10th Cir. 2004) (upholding the Park Service's management plan for Rainbow Bridge National Monument against Establishment Clause and other challenges).

447. 535 F.3d 1058 (9th Cir. 2008).

448. *Id.* at 1070.

449. *Id.* at 1063.

450. *Id.* at 1099 (Fletcher, J., dissenting).

tribes under *Lyng*.⁴⁵¹ Ultimately, the Ninth Circuit agreed with the Forest Service, holding that the “sole effect of the artificial snow is on the [Indians’] subjective spiritual experience,” which did not constitute a “substantial burden” under RFRA.⁴⁵² The majority held that “no government . . . could function” if it were subject to the “veto” power of millions of citizens holding different religious beliefs.⁴⁵³ In another powerful observation, the court cited *Lyng* for the proposition that tribal religious claims could result in “*de facto* beneficial ownership of some rather spacious tracts of public property.”⁴⁵⁴

Navajo Nation is important on a jurisprudential level because it pits the agency accommodation model described above against the requirements of RFRA.⁴⁵⁵ Unlike NHPA or AIRFA, RFRA clearly sets forth an enforceable standard of free exercise, and prevents the government from burdening a person’s religious freedom in the absence of a compelling government interest.⁴⁵⁶ In at least one Supreme Court case, RFRA has prohibited the federal government from encroaching on the free exercise rights of adherents to a minority religion.⁴⁵⁷ Reflecting Congress’s view that the Supreme Court had improperly narrowed the protections of the First Amendment, particularly in cases involving American Indians, RFRA would seem to require the substantive protection of Native religious freedoms at sacred sites, and thereby to give meaningful effect to tribal stewardship concerns vis-à-vis federal ownership powers. The Ninth Circuit’s en banc decision, however, can only be read in the other direction, as it restores the dominance of federal property rights over tribal religious and cultural interests.

451. *Id.* at 1071-73 (majority opinion); *id.* at 1107-08 (Fletcher, J., dissenting).

452. *Id.* at 1063 (majority opinion).

453. *Id.* at 1063-64.

454. *Id.* at 1072.

455. 42 U.S.C. § 2000bb (2000).

456. The Act provides that the “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability,” unless it can show the burden on religion furthers a “compelling governmental interest” and is the “least restrictive means” of furthering that interest. 42 U.S.C. § 2000bb-1(a) to (b). Although RFRA no longer constitutionally applies to state governments, *see City of Boerne v. Flores*, 521 U.S. 507, 536 (1997), the federal government is still bound by the Act.

457. *See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 418-19 (2006). Nevertheless, the scope of RFRA in protecting Indian land-based religious practices is still unclear, as courts continue to grapple with its application. *See generally* Kristen A. Carpenter, *Old Ground and New Directions at Sacred Sites on the Western Landscape*, 83 *DENV. U. L. REV.* 981, 992-96 (2006) (describing the Court’s finding of a religious freedom violation in *O Centro* as providing a “(faint) glimmer of hope” for RFRA).

There are a number of problems with the *Navajo Nation* decision. Like *Lyng*, it dramatically limits the exercise of Indian religions in several ways.⁴⁵⁸ After emphasizing that the recycled water will contain only “0.0001% human waste,” the court opines that the government is not burdening religion when it pollutes a sacred mountain such that Indian religious practitioners will face the choice either to forego religious ceremonies or to use tainted plants and waters in those ceremonies.⁴⁵⁹ This is because, in the court’s view, a “substantial burden” occurs only where the government “denies . . . a benefit” or “conditions receipt of an important benefit” based on religious belief.⁴⁶⁰ Here, the government is doing neither when it allows snowmaking using sewage

458. Writing for the majority, Judge Bea notes that some Navajo religious practitioners believe that previous desecration of the San Francisco Peaks caused the terrorist attacks of September 11, 2001, and the Columbia Space Shuttle accident. Yet none of the testimony suggests that these are commonly held Navajo religious beliefs or that they inform the question of whether the use of sewage effluent in snowmaking will substantially burden religious practices such as the Blessingway ceremony, which many Navajos have practiced on a regular basis for centuries. *Navajo Nation*, 535 F.3d at 1064.

The opinion also cites *Bowen v. Roy*, 476 U.S. 693, 696 (1986), in which a Native American couple claimed that the issuance of a Social Security number would “rob the spirit” of their child, as support for the notion that the government cannot possibly accommodate every American Indian religious practice. See *Navajo Nation*, 535 F.3d at 1073. Yet there is little to suggest that the religious practice in *Bowen* was widespread among American Indian people or relevant to *Navajo Nation*. As the dissenting opinion suggests, the entire majority discussion seems to overlook the general nature of Navajo religious belief and subjects Indian religions to greater skepticism than other mainstream religions might face. See *id.* at 1096–97 (Fletcher, J., dissenting) (suggesting that “[p]erhaps the strength of the Indians’ argument in this case could be seen more easily by the majority if another religion were at issue” and offering analogies to Christian and Jewish practices); cf. Frederick Mark Gedicks, Truth and Consequences: Theological Candor in Electoral Politics (2008) (unpublished manuscript, on file with authors) (probing the question of subjective belief in Mormon versus mainstream Christian churches, particularly how these questions of religious “truth” affect politics).

459. See *Navajo Nation*, 535 F.3d at 1062–63 (citing the district court’s findings that no plants would be contaminated or damaged). In fact, Native Americans have long viewed water as so sacred that they manage their own EPA-approved water quality standards, which are more stringent than existing federal standards. See *City of Albuquerque v. Browner*, 97 F.3d 415, 427 (10th Cir. 1996) (recognizing the Pueblo Indians’ successful defense of a religiously based standard for ensuring water purity that was much more stringent than the EPA standard); Daryl Fisher-Ogden & Shelley Ross Saxer, *World Religions and Clean Water Laws*, 17 DUKE ENVTL. L. & POL’Y F. 63, 108–10 (2006).

460. *Navajo Nation*, 535 F.3d at 1069 n.11 (“Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a *burden* upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless *substantial*.”) (internal quotation marks omitted).

effluent on the Peaks. The tribes are still free to access the mountain, gather plants and waters, and conduct other religious and cultural activities there.⁴⁶¹

Moreover, the majority suggests Indian religious practitioners might consider alternatives to ceremonial resources traditionally gathered on the Peaks. They could, for example, “use natural water in their religious or healing ceremonies and otherwise practice their religion using whatever resources they may choose.”⁴⁶² Yet the court fails to explain why the Indians must bear the burden of seeking alternative water sources for their religious uses, whereas the corporate parties apparently need not seek alternative water sources for their snowmaking activities. Moreover, the court’s suggestion fails to appreciate that the San Francisco Peaks play a unique role in Navajo and other tribal religions, reaching back to tribal creation stories and manifest in contemporary practices.⁴⁶³ Water and plants gathered at some other mountain do not have the same medicinal effect or religious significance as those gathered from the spiritual home of Changing Woman, the giver of life to the Navajo people.⁴⁶⁴ Given the impossibility of reconciling the court’s suggestions with Navajo and Hopi religious beliefs and practices, the three dissenting judges call the government’s proposed activity what it surely is—a substantial burden on religious exercise as defined by RFRA.⁴⁶⁵

The tribes were not claiming authority over the government’s management of the San Francisco Peaks, much less any form of ownership. Rather, their concerns were largely motivated out of a stewardship sense of obligation. Even if the tribes prevailed in the lawsuit on the issue of water sources for snowmaking, the government would still own and control the Peaks as a national forest and presumably would continue to license the ski resort and numerous other uses. The tribes’ lawsuit did not request the suspension of these existing activities or the exclusion of thousands of non-Indian recreational visitors to the Peaks every year. Rather, the tribes asked the Forest Service for a relatively modest accommodation: not to allow the Arizona

461. *Id.* at 1063.

462. *Id.* at 1078 n.25.

463. *Id.* at 1099-1100 (Fletcher, J., dissenting).

464. *Id.* at 1100. Given the Ninth Circuit’s disregard for the nonfungible quality of the Peaks to Indian religious practitioners, one wonders why the court stops (just) short of encouraging the Hopi Kachina deities to relocate from the Peaks to some other mountain more to their liking. *Cf. U.S. Argues Against Protecting Sacred Peaks in Arizona*, INDIANZ.COM, Oct. 7, 2005, <http://www.indianz.com/News/2005/010671.asp> (quoting Judge Paul Rosenblatt, the trial judge in *Navajo Nation*, as querying the federal defendants, “Surely you’re not suggesting the [Navajo] plaintiffs use another mountain?”).

465. *See Navajo Nation*, 535 F.3d at 1083-93 (Fletcher, J., dissenting).

Snowbowl to use recycled water containing human waste in snowmaking on the sacred mountain.⁴⁶⁶

466. We acknowledge, as the court did, that the Hopi plaintiffs apparently oppose any snowmaking on San Francisco Peaks. *See id.* at 1062 n.1 (majority opinion) (“It appears that some of the Plaintiffs would challenge any means of making artificial snow, even if no recycled wastewater were used.”). While the Hopis’ strong viewpoint in this regard might admittedly impede opportunities for negotiating the issue of snowmaking on the mountain, we nonetheless note that they and the other parties in the litigation specifically challenged the Forest Service’s decision to approve the use of recycled wastewater in snowmaking, along with related expansion to the ski areas, as announced in the Forest Service’s Final Environmental Impact Statement and Record of Decision issued in 2005:

The Forest Service’s ROD approved, in part: (a) approximately 205 acres of snowmaking coverage throughout the area, utilizing reclaimed water; (b) a 10 million-gallon reclaimed water reservoir near the top terminal of the existing chairlift and catchments pond below Hart Prairie Lodge; (c) construction of a reclaimed water pipeline between Flagstaff and the Snowbowl with booster stations and pump houses; (d) construction of a 3,000 to 4,000 square foot snowmaking control building; (e) construction of a new 10,000 square foot guest services facility; (f) an increase in skiable acreage from 139 to 205 acres—an approximate 47% increase; and (g) approximately 47 acres of thinning and 87 acres of grading/stumping and smoothing.

Navajo Nation v. U.S. Forest Serv., 408 F. Supp. 2d 866, 871 (2006).

At the Ninth Circuit, the Hopi brief characterized “the crux of the issue before this Court” as “the Tribe’s challenge to a Forest Service decision to approve the expansion of the [ski] activities . . . by allowing snowmaking using recycled waste water.” Brief of Appellant Hopi Tribe at 2-3, *Navajo Nation*, 535 F.3d 1058 (Nos. 06-15371, 06-15436, 06-15455). Elsewhere in their brief, the Hopis recounted that they had advised the Forest Service that “limiting development and changes on the Peaks is a primary and overriding interest of the Hopi people, and that the Hopi Tribe therefore opposed all elements of the Proposed Action.” *Id.* at 7-8. Yet even this broadly worded opposition challenged only the expansion plan approved by the Forest Service and was not a general referendum on snowmaking, skiing, recreation, or development on the mountain.

If tribes were to challenge such activities, their claims would merit case-by-case analysis, whether under our stewardship model, RFRA, or another law. *Cf. Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983) (rejecting tribes’ First Amendment challenges to earlier expansion of skiing facilities on the San Francisco Peaks). We note, however, that even a complete ban on snowmaking would still leave the Arizona Snowbowl free to run its ski operation—albeit less profitably—and the Forest Service free to approve various other uses of Coconino National Forest.

We keep open the possibility that in some cases, Indian religious and cultural uses will necessitate more significant restrictions on commercial or recreational uses. Such limitations are common on other public lands where non-Indian national and cultural interests are at stake. *See, e.g.*, 36 C.F.R. § 7.77(a) (2008) (“Climbing Mount Rushmore is prohibited.”). Finally, we acknowledge that particularly sensitive cases may merit the restoration of cultural properties to tribes, especially when the administrative process or otherwise negotiated settlements fail to protect American Indian peoplehood and stewardship

Whereas the tribe offered a vision that partners stewardship obligations with respect for government title (stewardship partnering with ownership), the majority bolstered its rejection of the Indian religious claims with a myopic view discounting the possibilities of reconciliation between stewardship and ownership. The court stated that the government cannot be constrained in activities “on its own land,”⁴⁶⁷ underscoring the power and privilege of the title-holder over those with competing interests.⁴⁶⁸ Perhaps most glaringly, this part of the opinion overlooks the fact that the San Francisco Peaks were originally within the Navajo Nation’s aboriginal territory and were taken from them by force. In his vociferous dissent, Judge William Fletcher observed the “tragic irony” of the majority’s emphasis on the rights of ownership:

The United States government took this land from the Indians by force. The majority now uses that forcible deprivation as a justification for spraying treated sewage effluent on the holiest of the Indians’ holy mountains, and for refusing to recognize that this action constitutes a substantial burden on the Indians’ exercise of their religion.⁴⁶⁹

The tribal parties in *Navajo Nation* have petitioned for certiorari to the Supreme Court, asking for clarification of the term “substantial burden” under RFRA.⁴⁷⁰ The case has great ramifications for a stewardship approach to

interests. See *supra* notes 271-273 and accompanying text (detailing the restoration of sacred Blue Lake to Taos Pueblo, with title held in trust by the federal government for the tribe).

467. *Navajo Nation*, 535 F.3d at 1063.

468. *Id.* at 1071 (citing *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 442 (1988)).

469. *Id.* at 1113 (Fletcher, J., dissenting).

470. Petition for Writ of Certiorari at 11-12, *Navajo Nation v. U.S. Forest Serv.*, No. 08-846 (U.S. Jan. 5, 2009), available at http://www.narf.org/sct/navajonationvusfs/petition_for_cert.pdf. As other sacred sites cases work their way through the courts, it appears that there is some disagreement over the meaning of “substantial burden” under RFRA. See, e.g., *Comanche Nation v. United States*, No. CIV-08-849-D, 2008 WL 4426621, at *20 (W.D. Okla. Sept. 23, 2008) (granting a preliminary injunction to prevent the federal government from constructing a “Training Support Center” on lands sacred to the Comanche people on the strength of the tribe’s RFRA and NHPA claims).

In *Comanche Nation*, the federal district court noted that the Tenth Circuit has not adopted the Ninth Circuit’s narrow test for substantial burden under RFRA and, to the contrary, seems to take a more expansive view of the statute:

Defendants urge the Court to adopt a definition applied by the Ninth Circuit Court of Appeals, which has concluded that a “substantial burden” is imposed only when individuals are “forced to choose between following the tenets of their religion and receiving a governmental benefit . . . or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions.” The Tenth Circuit has

cultural property claims. It may determine, at least in the sacred sites arena, whether or not the stewardship model retains its doctrinal vibrancy.

If tribes are able to pursue the negotiation of religious and cultural freedoms with some hope of substantive protection under RFRA, they are likely to work toward accommodation plans in the style of *Bear Lodge* and other cases.⁴⁷¹ The proper enforcement of RFRA on public lands, consistent with a stewardship model of cultural property, will allow tribes to exercise their duty of care to sacred sites, even in the absence of title. If, however, the government can always use its ownership as a shield against the meaningful recognition of tribal stewardship interests, tribes will be forced to seek alternative legal strategies, possibly including claims for the recovery of title. In these and other circumstances, gaining title to real cultural property, while practically difficult,⁴⁷² may be the only means for indigenous peoples to fulfill tribal custodial duties to the land and carry on the religious and cultural practices that are so essential to their survival as peoples.

CONCLUSION

In this Article, we have suggested that operating beneath the subtext of cultural property governance is another form of regulation that involves the evolving notion of stewardship. In many respects, we believe that the stewardship approach to property offers theoretical coherence and practical utility for cultural property law. Contrary to the suggestions of critics, cultural property considerations do not always mandate a shift in title, but rather illuminate the myriad ways in which property law can reconcile the interests of owners and nonowners. The stewardship model captures, for example, the

not adopted that definition, and the Court declines to do so in this case. The Tenth Circuit's consideration of RFRA subsequent to the 2000 amendment does not appear to signal a restrictive application of RFRA.

Id. at *3 n.5 (citations omitted) (quoting *Navajo Nation*, 535 F.3d at 1070).

471. *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 814, 819-20 (10th Cir. 1999) (describing the National Park Service's "Final Climbing Management Plan," which sought to accommodate competing religious, recreational, environmental, and tourism interests at Devils Tower National Monument). *Bear Lodge* is illustrative of the prevailing federal policy and practice that calls for the "accommodation" of American Indian religious claims to the public lands. For a discussion of this trend with specific examples, see Carpenter, *supra* note 97, at 329-35.
472. See, e.g., Sarah Krakoff & Kristen Carpenter, *Repairing Reparations in the American Indian Nation Context*, in *REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* 256-62 (Federico Lenzerini ed., 2008) (analyzing various legal forums and remedies for Indian land claims).

fiduciary or custodial duties exercised by tribes in the absence of title and ownership. It also explains why a number of key “sticks” in the proverbial bundle of property rights—rights of use, representation, access, and production—can be exercised by nonowners in the context of tangible and intangible properties. Our model is deeply grounded in lived indigenous experiences, including the collective relationships that indigenous peoples often enjoy with the land and the unique cultures growing out of those relationships. In the absence of title, stewardship becomes necessary to enable the continued cultural survival of indigenous peoples.

Admittedly, our model depends heavily on understanding property outside of a traditional ownership model, but it should not be understood as preventing it. Thus, we hasten to point out that we do not dismiss ownership theory altogether. From a practical perspective, the survival of indigenous cultures, and of indigenous peoples themselves, sometimes requires the protections that only title can provide. Ownership is necessary in some cases to safeguard the vital cultural resources of a community. In such cases, indigenous peoples may have ongoing moral or legal claims to actual ownership that they will not and should not relinquish. Nonetheless, we see great potential—in both cultural property law and practice—for a more nuanced approach to ownership that reflects both broad values of fairness and equality and indigenous legal traditions of relatedness to the land. In this way, a revised approach to ownership that takes into account indigenous peoples’ fiduciary obligations to cultural resources has the potential to reflect the best of our democratic and pluralist traditions.

We end with the story that began this Article. In 1993, Kenn Harper published an exhaustive account of Minik Wallace’s life and struggle to reclaim his father’s body. Although few were previously aware of the story, NAGPRA had been passed by this point, and given the different legal landscape, the American Museum of Natural History decided to change its position. Whereas before it had insisted that it did not possess the remains of the Inuit it had once hosted, the Museum, in a powerful reversal, decided to atone for its behavior. Embarrassed by the publicity surrounding Minik’s story, the Museum quietly agreed to repatriate the four bodies to their native Greenland. Nearly one hundred years after they had left Greenland, four of the Inuit finally returned to their burial grounds. Their funeral plaque now reads “NUNAMINGNUT UTEQIHUT,” or “They have come home.”⁴⁷³

473. See HARPER, *supra* note 20, at 228.