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In Defense of Property

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IN DEFENSE OF PROPERTY

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This Article advances a comprehensive theory to explain and defend the emergence of indigenous cultural property claims. In doing so, it offers a vigorous response to an emerging view, in scholarship and popular society, that it is normatively undesirable to employ property law as a means of protecting indigenous culture and ideas. In our view, cultural property critiques arise largely because of the absence of a comprehensive and countervailing theory of indigenous cultural property. To remedy this absence, this Article articulates a robust theory of indigenous property that challenges the individual rights paradigm animating current property law. Specifically, this piece makes two broad contributions to existing property theory. First, it draws on but departs significantly from Margaret Jane Radin’s groundbreaking work linking property and ‘personhood,’ and defends cultural property claims, in contrast, within a paradigm of ‘peoplehood.’ Second, this piece posits that, whereas individual rights are overwhelmingly advanced by property law’s dominant ownership model, the interests of peoples, particularly indigenous peoples, are more appropriately and powerfully effectuated through a theory of property characterized most aptly by stewardship.

As this Article demonstrates, our stewardship paradigm suggests a theory of property that goes far beyond the cultural property context, with implications for property law generally. By introducing a fundamental paradigm shift that locates the metaphorical bundle of rights within non-owners as well as owners, we highlight non-owners’ duties and rights to tangible and intangible goods, even in the absence of title or possession. This Article draws on a wealth of literature from the corporate, environmental, and indigenous contexts to introduce an innovative framework for rethinking ownership altogether. Ultimately, our stewardship theory of property makes a significant contribution to the field, filling an existing void in

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property theory and adding a much-needed perspective to the ongoing debate over cultural property protections.

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INTRODUCTION

There is a quiet—and somewhat ironic—revolution underway in property today. Though property law has historically 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 cultural resources. In the United States, for example, Indian tribes have sought trademark rights in tribal symbols,1 return of Indian burial and ceremonial objects from museums,2 easements in sacred sites,3 and ongoing title to aboriginal lands.4

1 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 FEDERAL INDIAN LAW (Getches, et. al, eds., 2005) (discussing the return of the Wampum Belts to the Onondaga Nation).
American Indian tribes increasingly bring such claims, grounded in the language of property, to advance tribal sovereignty, self-determination, and cultural survival. Internationally, indigenous groups in places as diverse as Belize and Australia have also turned to property law to challenge the expropriation of their lands, medicines, ceremonies, artwork, and natural resources.

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

4 See United States v. Dann, 470 U.S. 41 (1985) (rejecting tribal “aboriginal title” defense to United States’ trespass claim against Western Shoshone, although leaving open claims of individual aboriginal title); Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 7/5/02, OEA/Ser.L./V/II.117, doc. 5 rev. P 1 (2002) (finding 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 For a sampling of these cases, see, e.g., Maya Indigenous Communities of the Toledo District v. Belize, Case 12.053, Merits, Report No. 40/04 (2004); 13 IHRR 553 (2006)(affirming the existence of a system of customary land tenure among the Maya villages of southern Belize). A similar decision affirming Maya property rights was subsequently made by the Belize Supreme Court. Cal (on behalf of the Maya Village of Santa Cruz) and Others & Cay (on behalf of the Maya Village of Cenpaj) and Others v. Attorney-General of Belize and Minister of Natural Resources and Environment Claims Nos. 171 and 172 of 2007, Supreme Court of Belize, Judgment of 18 October 2007, unreported.

6 See, e.g., Yambulul v. Reserve Bank of Australia, 21 I.P.R. 481 (1991) (rejecting challenge by Australian Aboriginal artist to bank’s reproduction of one of his works on a ten dollar note, asserting that ownership of the design was a collective right of the Galpu people, “managed on a custodial basis under Aboriginal tradition.”).


8 See Declaration on the Rights of Indigenous People, U.N. Doc. A/61/L.67 (Sept. 13, 2007), http://www.un.org/esa/socdev/unpfii/en/dip.html. While many of the U.N. Declaration’s specific provisions are potentially useful in indigenous property claims, we call particular attention to Articles 10, 26, 27, and 28 (various land rights, both substantive and procedural); Articles 11 and 12 (right to practice indigenous cultures, religions, and ceremonies), Article 25 (right to strengthen spiritual relationships with traditional territories), Article 31 (right to their cultural heritage, traditional knowledge, and cultural expressions), and Article 34 (right to their institutions, including spiritual and cultural institutions).

Yet just as the international community begins to reckon with protecting indigenous cultural heritage, many are intensely critical of the concept. In a recent *New York Times* editorial, for example, Edward Rothstein complained that cultural property laws were “a new form of protection, philistinism triumphing in the name of enlightened ideas.”10 Today, a growing legion of scholars from diverse disciplines increasingly critique indigenous peoples’ cultural property claims. 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 in the *Columbia Law Review*, for example, Naomi Mezey contends that cultural property has been so colonized by property that “there isn’t much culture left.”11 For Mezey, the notion of indigenous cultural property raises the likelihood that once indigenous peoples have obtained title to cultural property, they will use it to exclude others, a practice which would surely limit the free flow of culture.

In our view, these critiques arise because of the absence of a comprehensive theory of indigenous cultural property. Without such a theory, scholars tend to reduce cultural property to its narrowest theoretical paradigm, associating property rights with traditional concepts of title, exclusion, and transactional efficiency. Underlying many of these critiques, we think, is a deep and pervasive belief that in order to obtain title to cultural goods outside of the market, the law must create ‘exceptional’ legal rights for certain groups.12 While some of these critics might support such line-drawing in the context of civil rights protections, many are far less supportive of enacting parallel protections in the context of property law, which is often dominated by an unswerving belief in the value of alienability and the power of an efficient market to resolve the problems faced by indigenous groups.

In reality, indigenous cultural property transcends each one of these classic legal constructs—markets, title, alienability—and that is why it is so important for property scholars to interrogate it. By challenging classic property theory, indigenous cultural property claims have unearthed one of property law’s most complex conceptual dilemmas, forcing us to contemplate the intellectual divide between two competing visions of property law itself. The classic view focuses on the predictability and certainty of protecting the

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individual owner’s rights of exclusion\(^{13}\) and alienation,\(^{14}\) whereas a more relational vision honors the importance of ensuring access to non-owners and other particular groups.\(^{15}\) Accordingly, the classic view focuses on property’s stabilizing force; whereas the relational view emphasizes its fluidity and dynamic character.\(^{16}\) Perhaps most problematic for indigenous 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, whether economic or non-economic, 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 theory of peoplehood, and, in doing so, articulates a justification for group-oriented claims to indigenous cultural property. Using peoplehood as a lens, we argue that certain lands, resources, and expressions are entitled to heightened legal protection because they are property that is integral to the group identity and cultural survival of indigenous peoples.

Our focus on peoplehood versus personhood allows us to look beyond the static forbearance of possessive individualism expressed so forcefully in notions of ownership. As a result, we see the emergence of a novel alternative to ownership altogether. Here, we introduce a new paradigm for reconceiving cultural property -- a stewardship model that effectuates the dynamic pluralism of group-oriented interests. Classic property theory tends to overlook the possibility of non-owners exercising custodial duties over tangible and intangible goods in the absence of title or possession. Yet, indigenous peoples have historically exercised such duties, both as a matter of

\(^{13}\) See Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998) (calling the right of exclusion the “sine qua non” of property).

\(^{14}\) See, e.g., Richard Pipes, *Property and Freedom* xv (1999) (“[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.”); see 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.”)


internal community values that emphasize collective duties to land and resources and as a matter of legal necessity following the widespread divestiture of title and possession

Moreover, this concept of stewardship in the absence of title is not limited to indigenous peoples. A wealth of literature has analyzed similar intricacies in the context of the modern corporation, demonstrating a vast array of duties and responsibilities held by parties who lack ownership entitlements. 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 or fiduciary duties toward specific properties, we argue that such claims are more appropriately characterized through the paradigm of stewardship rather than ownership. Here, indigenous peoples seek accommodations that are distinguishable from the rights of exclusion and development associated with ownership, largely because they focus on fiduciary obligations to a tribe, and thus tend to fall outside of the paradigms of individuality and alienability that classic property law is premised upon. These may include custodial interests in accessing cultural property that is linked to the land, performing specific rites, or preventing desecration-- interests that are typically effectuated more through a fiduciary model of stewardship than ownership. In fact, there are very few cultural property laws that transfer title from non-indigenous to indigenous parties, a point that has largely escaped scholars.17

In short, our paper makes two bold claims. First, we address cultural property's critics, demonstrating that their misgivings about cultural property are based on the faulty notion that property law is only (or overly) concerned with owners’ rights to exclude, develop, and transfer. We then draw extensively on the unique historical relationship between indigenous peoples and property law as well as established property theory to advance our next claim. Here, we contend that even where law creates specific protections for indigenous peoples’ cultural property, such protections are not anathema to established property rules. Rather, indigenous cultural property claims, and programs meant to effectuate them, are reflective of a stewardship model of property law that takes into account indigenous peoples' collective obligations toward land and resources. 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.

17 This Article focuses primarily on the law of the United States. Our discussion references the terms “American Indian”, “Native American”, and “Indian” interchangeably, as is common in Indian communities.
Our paper proceeds as follows. In Part I, we lay the groundwork for a fuller understanding of the critiques that are often launched at indigenous property claims. Here, we focus on generally situating “cultural property” law alongside other property theories. We pay special attention to critiques that focus specifically on the role of culture and property in the law, and the relationship that these arenas have to indigenous peoples’ rights. In Part II, we offer our normative theory of property and peoplehood that takes into account the utility and significance of indigenous group identity in property claims and argues that such claims are best effectuated through a model of stewardship, rather than ownership. Finally, in Part III, we turn to the implementation of the theories of both peoplehood and stewardship that we have set forth. Using categories of real, tangible and intangible cultural property, and drawing on case studies from American Indian legal history, we analyze the many ways in which indigenous peoples’ claims to cultural property are situated along a spectrum of entitlements reflecting the power and utility of our stewardship model.

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 was reportedly responding to pressure from the American Museum of Natural History, which had long implored him to bring back a “live specimen” from his multiple trips. Once the Inuit people arrived, they were put on display: it is claimed that 30,000 New Yorkers paid 25 cents each to view them just two days after their arrival. Although Peary had promised the Inuit 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. So they were 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, who soon found that they had no resistance to the diseases that 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 along his only living relative, his bright-eyed eight year old son named Minik. Devastated by his father’s death, Minik pleaded with the museum to reclaim 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 display of a 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 quietly defleshed, preserved, and prepared Qisuk’s skeleton for display at the museum.20

When Minik turned fifteen, still living in the United States, he discovered the horrifying truth: that the bones of his beloved father had been mounted and preserved in the museum as the bones of a nameless, faceless Polar Eskimo. Although Minik had many allies, including the superintendent himself (who later adopted Minik, deeply regretting his role), he spent years locked in a painful struggle with the museum to give his father a proper burial. But his efforts ultimately failed. Minik Wallace tragically died at the young age of twenty-eight, never having recovered his father’s remains.21 It wasn’t until the subsequent passage of the Native American Graves Protection and Repatriation Act (NAGPRA)22 that the museum quietly negotiated with the tribe for the repatriation of Qisuk’s remains.

Minik’s story highlights the dilemma of classifying something as incommensurate as a family member’s remains as a type of museum property.23 It seems patently unthinkable that property law could ever enter into such an intimate domain. At the same time, property law indisputably played a critical role in directing the disposition and fate of Minik Wallace’s deceased father. Simply put, because Native Americans had no property rights in the burial remains of their people, they were unable to control what happened to the artifacts and remains housed within museums.24 Thus, the Native American Graves Protection and Repatriation Act (NAGPRA), which, *inter alia*, allows for the repatriation of indigenous human remains from museums, embodies this unique irony: by propertizing indigenous human remains, NAGPRA ultimately facilitated repatriation on a massive scale because it employs property theory and articulates specific property rights. In

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20 See Harper, supra note 18, at 85.
21 Minik’s story became a best-selling book that ultimately inspired a movie based on his life. *Id.*
22 *Id.* For a full discussion of NAGPRA, see *infra* at PART III.
this sense, NAGPRA’s success as a property statute illuminates the paradox of employing property law to reconcile cultural property disputes.

The growing phenomenon of the concept of cultural property has caused a somewhat existential dilemma for its advocates and its critics, who grapple with some core theoretical concerns over what cultural property comprises and its relationship to property law more generally. In Part A of this Section we explain briefly the roots of cultural property and lay out its historical and contemporary genesis in the indigenous context. In Part 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. Traditionally, cultural property referred to tangible resources bearing a distinct relationship to a particular cultural heritage or identity. Because of their cultural significance, such objects, 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 thus merit special protection.

Consider a paradigmatic example. Sometime between the years of 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 Museum for a substantial sum. Almost two hundred years later, after numerous requests, the British Museum has steadfastly refused a request from the Greek government to repatriate the sculptures. 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

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28 See Merryman, supra note 26.
29 See id.
most impressive the most monumental building in all of Europe and one of the seven miracles of the world.\textsuperscript{30} Today, over two hundred years after their removal, 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, despite the myriad of statutes and international declarations that honor the right to culture, cultural property remains a politically complicated fixture. In the United States, for example, private property advocates “historically … balked at this concept.”\textsuperscript{31} Unlike other areas of property, each which has a substantial pride of place in the classic annals of property theory, cultural property falls in the grey area between these other realms. As a result, it is often considered anathema to traditional property constructs, and, accordingly, afforded scant treatment in property theory. Moreover, because cultural property is perceived to repair the ruptures associated with the harms of colonization and capture, it raises questions about the utility of property rights as a remedy.

In the past several years, there have been some revolutionary changes in the cultural property field that have simultaneously contributed to both the salience of indigenous peoples’ claims and to the arguments of theorists in opposition. The first major shift involves a tremendous expansion of subject matter, loosening the requirements of materiality outward from “cultural property” and into the domain of “cultural heritage.”\textsuperscript{32} As a result, cultural property has expanded, from the domain of the tangible, into the domain of the intangible, raising a number of questions about the appropriateness of exclusionary rights in these circumstances.\textsuperscript{33} Contemporary scholars and theorists are engaging in a foundational reshaping and broadening of property to include not only long-recognized tangible resources (land, water, timber, etc.) but also more contemporary rights to intangible resources (medicinal knowledge, folklore, native religion, etc).\textsuperscript{34} Further, the concept of cultural property has been extended to other areas, to collections of fauna, flora, minerals, or other goods that may be of interest to paleontologists, anthropologists, or other specialized fields of knowledge,\textsuperscript{35} in addition to property that relates to history and events of national importance.\textsuperscript{36}

\textsuperscript{30} See id. (quoting Mercouri).
\textsuperscript{31} GETCHES, supra note 2, at 1172.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
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, every prevailing definition considers peoples’ deep, historical ancestral roots to traditional lands to be integral to indigeneity. Numerous instruments and principles of international law have long provided potential protection for indigenous interests in cultural property. These include recognition of indigenous rights to property, religion, culture, association, and resources found, for example, in the American Convention on Human Rights and American Declaration on the Rights and Duties of Man.

Despite the varying statutory applicability to the circumstances of particular countries, these instruments create a series of normative expectations regarding the treatment of indigenous peoples, their lands and cultures by nation-states and their citizens. And just a few months ago the U.N. General Assembly finally adopted the U.N. Declaration on the Rights of Indigenous Peoples with only four nations – including the United States (which has long contested recognition of Indian tribes as “peoples” under international law) – in opposition. The Declaration specifically provides that indigenous peoples have the collective right “not to be subjected to . . . destruction of their culture” 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

37 Wilf, supra note 25, (quoting Daes: “There is not an international consensus on who indigenous peoples are: the term cannot be defined precisely or applied all-inclusively.”).
38 See, e.g., S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 3, 100-06 (2004) (“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.”); Daes, citing E/Cn.4/Sub.2/1986/7 Add.1-4, paragraph 379 (also defining indigenous peoples).
40 See Carpenter, Property Rights, supra note 39, at 1132-33.
43 Id. at Article 8.
archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature.”

Somewhat different cultural property protections in the United States have emerged, not through the language of human rights, but rather, through the lens of property law. Some of these protections preserve American cultural property generally (which can include indigenous properties), and some -- like the Indian Arts and Crafts Act and NAGPRA -- are specifically directed towards Indian cultural property. The breadth of both regulation and the property interests in question has paved the way for a wide divergence of cases. Consider some examples of how cultural property considerations have been utilized to address the concerns of indigenous peoples:

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

• In 2005, the National Collegiate Athletic Association decided to ban the use of Native American mascots on uniforms, clothing, or logos by sports teams during postseason tournaments, deeming the use of such mascots to be “hostile” and “abusive” forms of speech, stating: “[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.”

44 Id. at Article 11.1.
Sometime in the nineteenth century, the New York State Museum acquired twenty-six belts of ‘wampum’ (colored clam and conch shells) from the Onondaga Nation, used for trade and recording significant community events. The Museum refused to return the belts. Although the tribe sued, and lost the case, the public outcry against the decision was so strong that the New York legislature passed an act requiring repatriation as long as the tribe preserved the belts at museum-grade standards.49

In 2004, seventy-two members of the Havasupai tribe, a geographically isolated tribe based at the foot of the Grand Canyon, filed suit against the University of Arizona for performing unauthorized genetic research on four hundred blood samples that they had gathered, allegedly for the purpose of testing for diabetes. The researchers regarded the blood samples a virtual “gold mine,” given the tribe’s geographic isolation, and used them to perform research on schizophrenia, inbreeding, and to explore the ‘Bering Strait Theory’ of human migration. The tribal members regarded their blood as deeply sacred, and after discovering the deception, decided to place a moratorium on biomedical research on their reservation. Their reaction was characterized as “hysterical” and “hypersensitive” by experts in the science field.50 The case is still ongoing.

As these examples illustrate, indigenous groups have, at times, been successful in their claims to control cultural property and resources. In each case the cultural concerns of indigenous tribal members—as a plurality—motivated a central, legal shift in access, title, or custodial protection. Some of these examples have raised cultural property considerations in the context of intangible expressions (like trademarks, as in the NCAA example), others in the context of tangible artifacts and remains, and still others in the context of one’s bodily property.

The response from legal scholars, in contrast, has been mixed. Cultural property’s uncertain legacy, it may be said, flows partly from the inadequacy of traditional property theory to embrace the unique vision it

49 See GETCHES, supra note 2, at 1186.
50 See Debra Harry and Le’a Mala Kanahe, Asserting Tribal Sovereignty Over Cultural Property, 5 SEATTLE J. FOR SOC. JUST. 27, 28 (2006).
offers. Because its definition relies on a presumption of incommensurability, it introduces a significant rupture in classic economic theories of property that are premised on a presumption of fungibility. On this level, cultural properties reflect several layers of fundamental incompatibilities from within: at the same time that they are often considered to reflect group identities and values that are incommensurable, they often command high prices on the private market. Our classic language of property, as Margaret Radin has noted, lacks the ability to take into account forms of value that are incommensurable. As a result, cultural properties are often caught between their attractiveness as high-value objects and their integral role in the formation of group identity and community.

While indigenous groups have been able to develop a theory of cultural property through the lens of particularism, and to often sidestep the formalist claims of title in the process, there is still a distinct void regarding a comprehensive theory that undergirds all of these examples. Perhaps as a result, cultural property’s theoretical fragility has also generated a number of powerful critiques, some who focus on the role of culture, and others who critique the viability of property law, to address the concerns raised by indigenous peoples.

B. Critiques of Cultural Property

Undoubtedly, cultural property’s inherent indeterminacy adds to the difficulty of situating cultural property alongside other areas of property’s subject matter. Because the notion of cultural property potentially spans an almost imperceptible width of boundaries -- crossing from the most tangible to the most intangible, from the most cerebral and creative fruits of artistic labor to those naturally found in nature – critics contend that cultural property does not fit within existing property law or theory. Specifically, some argue that cultural property should be subject to the market, like all other forms of property. Others assert that indigenous cultural property claims are antithetical to the circulation of culture, unfettered expression, and the free circulation of ideas. We will consider each in turn.

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 what is needed is more property, not less. Eric Posner, for example, argues that property rights are necessary

for the protection of individual rights and to safeguard resources from
depletion. But cultural property is just another form of property, he argues,
and is not entitled to differentiated treatment. According to this view,
cultural considerations should not affect the market-based, free exchange of
property. Taken to its extreme, this view implicitly suggests that indigenous
peoples’ claims to tangible cultural property such as land, artifacts, and
funerary objects may deserve no particular legal consideration where the
indigenous group lacks title.

For Posner, cultural property is, first and foremost, property; thus,
the law should not attach any “special” premium to items of cultural heritage.
This view of property is driven by efficiency concerns, which place a powerful
premium on alienability. Unfettered rights to transfer, according to this view,
enable owners to develop property free from legal limitations and claims of
consent. Consequently, Posner contends that cultural property should not be
treated any differently from any other type of valuable property, including art,
oil, or natural resources, contending that those who value it most will simply
buy it.

Posner concludes by comparing cultural property to the unregulated
market in modern artworks. 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.” Thus, Posner posits, if the market
functions efficiently in regards 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. In this sense, he concedes that cultural property is distinguishable
from other natural resources because it has scholarly and aesthetic value,
provides a window into the past, and its continued value depends on its

careful care and handling. Yet these considerations, for Posner, are largely
emotive, and fail to justify any kind of “moral claim” by peoples to cultural
property. Ultimately, his deepest belief is in the market. At end, he
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.”

ALTHOUGH POSNER’S CRITIQUE APPLIES TO CULTURAL PROPERTY LAW GENERALLY, HIS OBSERVATIONS OFFER PARTICULAR INSIGHT INTO THE COMMON EFFICIENCY CRITIQUES THAT MIGHT BE LEVERAGED AGAINST INDIGENOUS PEOPLES’ CULTURAL PROPERTY CLAIMS. POSNER’S CENTRAL QUESTION – WHY SHOULD ANY SORT OF PROPERTY BE AFFORDED DIFFERENTIATED TREATMENT, WHEN THE MARKET IS THE MOST EFFICIENT TOOL FOR ORDERING PROPERTY? – CALLS INTO QUESTION INDIGENOUS CULTURAL PROPERTY CLAIMS. BUT, MORE IMPORTANTLY, IT REVEALS THE THEORETICAL PAUCITY OF ECONOMIC THEORY TO GRAPPLE WITH HEAVILY CONTESTED CLAIMS TO INDIGENOUS CULTURAL RESOURCES.

2. A VIEW FROM THE CULTURAL COMMONS

IN HIS BOOK, WHO OWNS NATIVE CULTURE?, ANTHROPOLOGIST MICHAEL BROWN EXPLORES CRITICAL QUESTIONS REGARDING RIGHTS TO NATIVE CULTURAL PROPERTY. IN DOING SO, HE DECONSTRUCTS THE VIABILITY OF EMPLOYING PROPERTY RIGHTS TO ADDRESS CULTURAL PROPERTY’S COMPLICATED DOMAIN. WHILE OFFERING SOME MEASURED RECOGNITION OF THE VALUE OF CULTURAL AUTONOMY IN PRESERVING CULTURAL HERITAGE, HIS GENUINE SKEPTICISM OF PROPERTY RIGHTS PERVERDES MUCH OF HIS ANALYSIS. THUS, IN CONTRAST TO POSNER, HE ARGUES THAT WHAT IS NEEDED IS LESS PROPERTY, AND MORE CULTURE.

RELYING ON THE WORK OF LAWRENCE LESSIG, BROWN BEGINS BY DRAWING PARALLELS BETWEEN CULTURE AND INTELLECTUAL PROPERTY. ACCORDING TO BROWN, BOTH ARE INHERENTLY NONRIVALOUS AND THEREFORE OPEN TO HYBRIDITY. Thus, since culture is fluid and available to all, to ‘propertize’ it suggests affording its ‘owners’ an unwarranted right of exclusion as to the rest of the world. As a result, Brown contends, it is the “intellectual and artistic commons” – not the cultural survival of indigenous peoples – that is under attack.

PERMEATING BROWN’S CRITIQUE IS HIS DISCOMFORT WITH THE IDEA OF USING LAW—OR THE LANGUAGE OF “RIGHTS”–TO GOVERN CULTURAL DISPUTES AT ALL. While his approach offers a select recognition of some rights over some cultural resources, his work demonstrates a deep underlying normative skepticism of

58 Id. at 224.
59 Brown, supra note 7.
60 Intellectual property, unlike tangible property, is characterized by non-rivalrous consumption, which means that with information and ideas, one person’s possession does not automatically exclude others. This non-rivalrousness plays a powerful role in distinguishing the theory of intellectual property from the traditional justifications that support for tangible property rights. See LAWRENCE LESSIG, THE FUTURE OF IDEAS (2001).
61 Brown, supra note 7 at 213.
62 Id.
the overall project of rights. Thus, while Brown is comfortable with the idea of rights governing education and language policies for Native groups, he contends that cultural heritage protections “force[] the elusive qualities of entire civilizations—everything from attitudes and bodily postures to agricultural techniques—into ready-made legal categories…” Therefore, he argues, culture is far too abstract to explore through the lens of property, because its boundaries, unlike those of tangible property, are so contested and evanescent.

Relatedly, Brown is skeptical of indigenous peoples’ efforts to control, in particular, the intangible aspects of Native culture. In his book, Brown explores a variety of episodes relating to indigenous cultural property, pointing out that indigenous peoples “properly insist on their right to determine who conducts research among them and to what end.” But he highlights his primary concern: that is, “the difficulty—the near-impossibility of recapturing information that has entered the public domain.” Brown notes, in particular, Native peoples’ resistance to the unfettered dissemination and commodification of Native culture, particularly through the internet. In making his argument, he references Native people’s concerns that, as culture becomes further commodified, Native people lose control over their cultural resources, diluting the rich history that flows from indigenous traditions. Brown offers a quote from a member of Oregon’s Klamath Tribe who, tellingly, reveals a deep discomfort with the idea of open access to sacred information:

All this information gets shared, gets into people’s private lives. Its [sic] 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.

For critics of cultural property protections, the spiritual or cultural harm that the elder identifies is merely part and parcel of a digitized world that has enabled culture, for better or worse, to be open for access to all. For Brown, among others, this type of open access is something to be celebrated, instead of vilified, despite the costs to indigenous culture.

63 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…..”.
64 Id. at 217.
65 Id. at xi.
66 Id. at 6.
Naomi Mezey’s recent article, The Paradoxes of Cultural Property, discussed at greater length in PART III, follows closely in Brown’s footsteps.67 Like Brown, Mezey sharply criticizes the use of law to grant ownership or entitlements over cultural property based on identity. Employing a similar “cultural critique” as Brown, Mezey contends that “[t]he problem of 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.”68 According to Mezey, this 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.”69 As a result, “cultural property claims tend to fix culture, which if anything is unfixed, dynamic, and unstable.”70

Further aligning herself with Brown, Mezey fears that indigenous claims to cultural property will stagnate cultural fusions and hybridities. She claims “it is the circulation of cultural products and practices that keeps them meaningful and allows them to acquire new meaning, even when that circulation is the result of chance and inequality.”71 Thus, cultural property will have a negative affect, she asserts, on the free dissemination of culture because “as 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.”72

Ultimately, Mezey asserts that cultural property’s preservationist stance offers us a static and conceptually impoverished formulation of culture itself.73 Thus, she argues, cultural property is merely the connection between “collective property claims” based on what we call culture, “but which looks increasingly like a connection of things that we identify superficially with a group of people.”74 Mezey’s argument, and that of other scholars concerned with “culture,” seems to operate from an unstated premise that, because property is about the right of owners to exclude others, any cultural property claim will inappropriately stymie the natural, participatory, and free movement of culture.75

Both Brown and Mezey reveal the reason for distrust of cultural property law from the perspective of culture. In essence, they contend, culture is really anything and everything that touches human existence. To
commodify and/or propertize it will ultimately shrink the public domain, stultify culture, and entrench peoples into inauthentic lives that are dictated – not by individual autonomy and genuine volition – but by an abstract and paradigmatic conception of their culture mandated by cultural property.

All three perspectives, while somewhat different, tend to converge on a similar view of property characterized by ownership, alienability, exclusion, and commodity. These considerations, however, conflict with the nature of indigenous cultural property protections. Because cultural property often times cannot be conceived of in monetary terms because it is incommensurable, a conflict emerges between property law, which focuses on the utility of markets and commodities, and cultural property, which necessarily includes interests that are inexplicable in market terms. What is needed, therefore, is a theory to reconcile these competing ideas. In the following section, drawing on nonmarket theories of value, we attempt to articulate a cohesive theory to span this divergence under the aegis of peoplehood.

II

PEOPLEHOOD AND CULTURAL STEWARDSHIP

Previously we suggested that indigenous groups require a robust theory of property law 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 we argued above, however, we believe that such criticism from both the “culture” and “property” perspectives rests on a narrow view of property law that is largely focused on owners’ interests in exclusion, alienability, and efficiency. At the same time, we admit there is something quite disconcerting about placing the harms and the hopes faced by indigenous peoples in the singular box of “cultural property.” As Posner’s critique indirectly suggests, putting cultural property alongside other forms of property raises an important question of whether cultural property is really property at all.

We believe that cultural property is, at heart, a form of property, but there is something that is missing in the theory and context that surrounds it in the property context. In that spirit, we draw upon our recent work articulating a theory of property and peoplehood as a framework for conceptualizing and justifying indigenous cultural property claims. Thus subsection A below argues that certain property deserves legal protection.

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76 See, e.g., Kristen A. Carpenter, Real Property and Peoplehood, 27 STAN. ENV. L. J. 313 (2008).
because it is integral to the collective survival and identity of indigenous groups as peoples. After establishing this background on the concept of peoples and their roles in international and domestic law, we turn our focus in Section B to the connection between peoplehood and property claims by showing how cultural property considerations are motivated, not out of ownership, but rather stewardship, concerns. Informed by indigenous, corporate, and environmental theories, the notion of stewardship bears a greater resemblance to fiduciary responsibilities rather than the bundle of rights metaphor that has been so pervasive in property theory regarding ownership. In our view, the model of stewardship both explains and justifies many examples of indigenous cultural property claims.

A. From Personhood to Peoplehood

Professor Margaret Jane Radin changed the way we think about property when she introduced the idea that some property is deserving of a high level of legal protection because it expresses individual “personhood.” If previously we envisioned property as any thing—whether chattel, land, or music—whose value could be translated into monetary terms, Radin encouraged us to make a finer set of distinctions. She argued that most individuals possess certain objects that are “almost part of themselves.” Because of this inextricable relationship between the object and the self, the loss of such property “causes pain that cannot be relieved by the object’s replacement.” In Radin’s view, items such as wedding rings, portraits, and heirlooms are “personal” property distinguishable from “fungible” property that can be replaced or compensated monetarily.

In her more recent work, Radin applied these concepts to topics such as prostitution, organ and tissue sale, surrogate motherhood, and stem cell research. In these varied contexts, Radin rejects the view, so dominant in our legal system, that property is universally “commensurable,” “commodifiable,” or “alienable.” Because the value of some things cannot be translated into a monetary figure, they should not be traded, at least with complete freedom, on the open market. Nor should they be subjected to government interference, at least not without special protection. Instead the law should treat these forms of property carefully. When dealing with property that is reflective of personhood, Radin proposed that we transcend market-based

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78 Id. at 959.
79 Id.
80 See id. at 959-61, 986-88.
rhetoric and instead adopt a concept of “human flourishing.” More specifically she argues: (1) some property rights should be “recognized and preserved as personal;” (2) 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 (3) fungible property rights “should yield to some extent in the face of conflicting recognized personhood interests.”

Radin’s “personhood” model offers a striking vehicle for bringing into legal discourse indigenous conceptions of property. 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 such stereotypical rhetoric as “the earth is our mother” and “you can’t sell the sky.” Unsurprisingly, perhaps, the majority society often treats such sentiments as quaint anachronisms. But Radin’s account of personhood captures precisely this essence: that some properties are so deeply illustrative 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 non-fungible, incommensurable, and inalienable as some indigenous lands surely are.

Radin’s model is inestimably valuable to indigenous peoples seeking a way to talk about Indian property claims that have previously been deemed incomprehensible to the majority society and uncognizable in Anglo-American property law. Yet, beyond their potential utility in legitimizing Indian sentiments about land, Radin’s model also reveals the particular insidiousness of federal Indian law’s treatment of Indian land: in many instances, Indian property can still be legally taken without just compensation and in all instances, Indian tribes can only sell tribal land to the federal government or a party approved by it. These doctrines and related policy decisions explain the conquest of much of North America, in which Indians lost most of their lands in transactions of questionable voluntariness. And, her theory also helps us to understand precisely why,

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82 Radin, Market-Inalienability, supra note 51, at 1851 (arguing that it is wrong to treat certain property, such as the human body, as either universally alienable or universally non-alienable; rather, society should address underlying social problems first).
83 Id. at 1014-1015.
87 See generally, STUART BANNER, HOW THE INDIANS LOST THEIR LAND (2005). In many of those cases, the perception widely circulated that Indians have never “valued” monetarily their own property, in stark contrast to the great, unrealized monetary value for the potential non-Indian owners and developers who

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even in cases where American Indian land claims were later vindicated, particularly in takings cases which required the payment of just compensation—the tribes refused to accept payment. 88

1. Conceptualizing Peoplehood from Personhood

In these ways, Radin’s model is potentially transformative for indigenous property theory. But Radin’s personhood theory is also limited by its foundation in, and adherence to, the individual rights paradigm. In her model, personal property is an important aspect of human “individuation” and its loss is particularly tied to the individual’s growth and identity. Radin acknowledges, but does not examine in any detail, the particular kinds of losses that groups of humans may suffer through the alienation of property.89 Indian cultural property claims are not usually made on grounds of individual attachment to property. 90 Rather, Indians bring cultural property claims to protect tribal relationships with property. Consider the testimony of Cherokee litigants who explained, in litigation over a sacred site: “When this place is destroyed, the Cherokee people cease to exist as a people.” They did not necessarily mean 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 worldviews and lifeways.91 The loss of the sacred site would destroy the collective experience of Cherokee culture. This kind of relationship with land that is deeply experienced on a collective level is not widely reflected in domestic property theory with its emphasis on individual rights.

Into this void, we propose injecting the terminology of peoples and peoplehood to identify group interests that have a role to play in contemporary law and policy, including property issues.92 Much in the way hoped to gain title as a result. Even assuming that the above perception carried a grain of truth (an idea which has been discredited in some situations), Radin’s theory would dictate the opposite treatment: Indian property should be extra-insulated (not under-insulated) from takings precisely because its value to the tribe often cannot be compensated monetarily.

89 Radin, Personhood, supra note 77, at 1012 (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.”)
92 Of course the “glaring omission of groups from dominant legal theory” is not just a problem for American Indians but for all sub-national groups who find that the individual rights-based legal system fails to afford them any framework for legal claims. See AVIAM SOIFER, LAW AND THE COMPANY WE KEEP 1
that Radin’s discussion of personhood invokes what is most essential to the individual human condition, “peoplehood” refers to the qualities that define a group and inspire individuals to participate in the collective. In common parlance, the term “people” connotes a collective association of individuals based on political affiliation, religion, culture, language, or other factors, while “peoplehood” is the state of being a people or the sense of belonging to a people. This broad definition suggests 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.

American Indian experiences reflect many of the attributes of peoplehood identified by scholars. Like the experiences of other peoples, Navajo, Hopi, or Cherokee peoplehood is also characterized by “common descent—a shared genealogy or geography” as well as “contemporary commonality, such as language, religion, culture, or consciousness.” Conceptualizing American Indian tribes as peoples is also consistent with their self-definition and status under domestic and international law. The U.S. Supreme Court has held that Indian tribes are “a separate people” within the larger American polity. As a political matter, American Indian peoplehood includes governing authority over tribal members and territory, and a nation-to-nation relationship with the United States. Federal law recognizes, to some extent, that the legal protection of American Indian peoplehood is crucial to the operation of a just, democratic society. An entire body of statutory and common law is devoted to the definition and protection of American Indians as peoples from the encroachments of the majority society – and it is from within this body of law that many cultural property laws emerge.

This recognition of Indian peoplehood, which is at the foundation of indigenous property claims and remedies—provides an important

(1995) (surveying existing basis for group rights in U.S. law and calling for additional legal protection of groups).

This broad definition suggests national groups like the American, Iraqi, or Israeli people. It also includes subnational groups like the Mormon, Orthodox Jewish, or Navajo people within the United States. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 860 (10th ed. 1993).

See WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 871 (1989).


foundational response to the questions raised by Brown, and to some extent, Mezey, about whether line-drawing between indigenous and non-indigenous groups is necessary or justified in the context of cultural property. On this point, a foundational principle of federal Indian law is that the United States has an imperative obligation to protect Indian tribes against other governments and individuals. In short, this “trust responsibility” embodies the national obligation to exercise the highest duty of care for Indian tribes, and thus, line-drawing between indigenous and non-indigenous can sometimes not only be justified, but necessary. That is why the federal government has specific statutory duties to care for Indian health, education, child welfare, cultural patrimony, natural resources, economic development, language retention, lands, and religious freedom—many of the aspects comprising tribal peoplehood. The body of federal Indian law suggests that the just treatment of American Indian peoples is important as both a matter of Indian survival and as a reflection of broader American values in favor of cultural pluralism and minority rights.

Indian nations within the United States also use law to facilitate their collective identities and protect their cultural resources. Many of these protections, similarly, arise out of their own conceptions of themselves as peoples. When unconstrained by dominant property regimes, tribes are free to develop and codify tribal customary law that reflects their own cultures and traditions. The collective nature of tribal law-making and tribal mores, particularly in regards to tribal cultural property, is core to principles of self determination and also has been acknowledged by the United States government virtually since contact.

2. Indigenous Property and Peoplehood

These tribal principles, which honor notions of group claims of ownership, to some extent, are often challenged by traditional notions of property ownership and alienability. As Patty Gerstenblith reminds us, the

100 See Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831).
101 Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942) (maintaining that in establishing a treaty with the Indians the 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”).
103 Id. at v (“The 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 of our democratic faith.”)
104 See Riley, “Straight Stealing”, supra note 46, at 105-7 (discussing the grave protection laws of the Chickasaw Nation of Oklahoma, the Mille Lacs Band of Ojibwe Indians, and the Hopi Nation, among others).
105 See, e.g., Journeycake v. Cherokee Nation, 155 U.S. 196 (1894) (noting the distinctive character of indigenous communal property).
concept of cultural property is composed of two conflicting elements—
‘culture’ that suggests a relationship between group identity and the objects it
considers important, and ‘property’ which usually focuses on an individual
rights paradigm.106 Once items are designated as cultural property, however,
they take on a powerful intersection between group identity and property
ownership for two reasons. First, because the identity of a people is
inextricably linked to an object, Gerstenblith reasons, a group might acquire
ownership rights over the object. Second, precisely because the property is
intimately tied to the identity of a group, it is more often viewed as an
inalienable because future generations are unable to consent to transactions
that may wind up affecting their construction of group identity.107

How, then, do we apply this theory of group identity to cultural
properties? Our view is that it is impossible to protect indigenous
peoplehood without protecting indigenous relationships with tribal lands and
the culture that grows out of those lands. The close relationship between
indigenous peoples and land is so well-known and so often repeated by
scholars, advocates, and indigenous peoples themselves that it may begin to
sound like an empty cliché. Indeed, the contention that a relationship with
the land is a definitional element of what it means to be indigenous108—invites
charges of essentialism or romanticism. We, too, recognize the diversity of
indigenous groups and do not assert that all indigenous people, on an
individual basis, maintain a special attachment to land. We do, however,
contend that an inextricable connection between land and identity is a
defining and ongoing element of indigenous peoplehood.

Particularly in the United States, which we focus primarily on in this
Article, American Indians have experienced a unique legacy of dispossession,
the taking of the very land that is so critical to their cultures. In our view, the
loss of tangible property is inextricably linked to the formation of cultural
property claims. While the history of dispossession has been well
documented,109 few legal scholars have recognized the link between this
history and the existence of cultural property claims.110 Millions of acres of
traditional tribal lands are now owned and controlled by non-Indians as a result of European and American colonization.111

As discussed fully in PART III, infra, it is the loss of land through colonization that necessitates contemporary cultural property protections.112 Consider NAGPRA, for example. The repatriation statute was necessary, not to secure Indians’ special rights, but to counter 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.113 Other cultural property directives – such as the National Park Service’s cooperation agreement concerning Indians and rock climbers at Devil’s Tower National Monument – similarly seek to protect the religious rights of Native peoples that have been undermined by the dispossession of Indian lands.114 The Lakota reserved the Black Hills – and Devil’s Tower— in the Treaty of Fort Laramie because of their central importance to Lakota religion. Shortly thereafter, the U.S. government repudiated the Treaty and invaded Lakota territory, placing Mato Tipila squarely onto what is now federal land.115 Given this devastating loss, tribes now employ the language of cultural property to ensure their continued access to and ceremonial use of the sacred site in the absence of ownership.

These examples underscore the linkage between real and cultural property. But the loss of land reaches further, expanding to the realm of intangible property, as the following discussion regarding the Dine (Navajo) illustrates.

The Navajo people define themselves, in many respects, by their relationship with Dinetah, the sacred Navajo homeland, whose boundary is marked by four mountain peaks.116 Navajo culture grows out of Dinetah.117

112 See, e.g., Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439, 447-51 (1988) (holding that federal government's ownership of federal public lands was a basis for denying Indian Free Exercise Clause challenge to Forest Service plan to build road through traditional Indian sacred sites, even if that action that would "virtually destroy" the Indians' religion).
114 See Bear Lodge Multiple Use Act v. Babbitt, 175 F.3d 814, 815 (10th Cir. 1999).
115 See Carpenter, Property Rights, supra note 39 (discussing American Indians' loss of title to sacred sites).
116 Today, approximately 180,000 (of 225,000 total Navajo citizens) 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.
117 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
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 mountains.118 Yet the loss of the Navajo land base in the nineteenth century radically severed this connection between the land and their tribal identity. 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,” where hundreds perished along the way, longing to return to the traditional homeland cradled by the four sacred mountains.119 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.120 Four years later, the federal government reversed itself, and in 1868 negotiated a treaty restoring to the Navajo the rights to return home to occupy, govern, and live on a reservation that is within, although much smaller than, their traditional territory.121

Contemporary obstacles to Navajo peoplehood remain, largely as an outgrowth of this period, which markedly reduced the size of the Navajo land base, and which also paved the way for other forms of land development that deeply conflicts with the sacred character of the area.122 In such cases, the individual desires of the title holder often conflict with the more ephemeral interests of the people that hold the land as sacred, producing a conflict between real property and cultural property interests. Recently, for example, in a widely watched en banc case before the Ninth Circuit, the federal government, as the owner of the San Francisco Sacred Peaks, has developed the sacred mountain as a ski resort and, most recently, authorized the use of reclaimed water—sewage—in snowmaking. (We discuss the recent litigation surrounding this case in PART III). To the Navajos -- particularly those who

Navajo Nation necessitates an understanding of the interconnectedness between the Dine and their land base.”).

118 The Navajo writer Luci Tapahonso said 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).

119 See RUTH ROESSEL, NAVAJO STORIES OF THE LONG WALK PERIOD at 40-41 (1973) (quoting Navajo elder Howard W. Gorman). To the extent that many sacred sites are identified in tribal origin stories and form a crucial part of the tribe’s “homeland,” an interesting project might be to conceptualize sacred sites as “homes” for tribal cultures. As a number of scholars have noted, our legal system offers solicitous treatment of homes, and people’s related interests in security, privacy, and liberty. See, e.g., D. Benjamin Barros, Home as a Legal Concept, 46 SANTA CLARA L. REV. 255 (2006).

120 ROESSEL, supra note 119, at 153 (quoting Navajo elder Frank Goldtooth).

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

122 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 taken away from us by the white people.” See ROESSEL, supra note 119, at 153 (quoting Navajo elder Frank Goldtooth).
revere both its purity and role in Navajo creation stories – the application of treated sewage water is a desecration of this sacred place. And while this case is still before the federal courts, it is possible or even likely that the law will favor the government’s right, as an owner, to develop and exploit its lands, despite the religious interests at stake.

Other Navajo cultural properties are similarly threatened today as a result of the loss of land to the federal government. For one, while the Navajo have their own tribal laws to protect their cultural properties, federal law severely limits tribal jurisdiction over non-members acting beyond the tribal land base. So, for example, even though the Navajo’s tribal code regarding the rights of tribal weavers indicates that “[a]ny design woven by a Navajo weaver within the four sacred mountains is sacred”, and should, therefore, be treated accordingly by the Dine 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. These limitations were confronted recently when the Navajo’s sacred “Beauty Way” song was incorporated into Outkast’s performance of “Hey Ya!” at the televised 2004 Grammy Awards without consent, acknowledgment, or attribution. The intricate web of federal intellectual property laws that would normally preclude such appropriation are inapplicable to the “Beauty Way” song because it – like most indigenous oral creations -- is believed to be in the public domain and ineligible for protection under federal copyright law. And, as with the unlawful copying of Navajo rug designs, tribal jurisdiction did not extend to OutKast’s actions.

It is impossible to survey in this piece all the various ways in which American Indian peoplehood is tied to property. But the Navajo example highlights the close relationship between tribal cultural property -- real, tangible, and intangible -- and peoplehood, as well as the difficulty that tribal peoples face in protecting such property today. For the Navajo, appropriation of their intangible expressions—songs, dances, and folk knowledge—all stem from the loss of Dinetah. And this phenomenon is common to the colonized, indigenous experience. As we discuss in greater detail in Part III, infra, some of the federal cultural property laws, much maligned by cultural property

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123 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 and Carol Snyder Halberstadt, The Fleecing of Navajo Weavers, CULTURAL SURVIVAL QUARTERLY, Issue 29:3, September 19, 2005, http://209.200.101.189/publications/csq/csq-article.cfm?id=1851.


125 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) [hereinafter Riley, Recovering].
critics, at least partially fill the void left by limited tribal powers over appropriation.

B. From Ownership to Stewardship

As we suggested in the previous section, a vision of peoplehood courses through conceptions of cultural property, both in a descriptive sense and a normative one. The lens of peoplehood not only reframes our relationship to cultural property, but it also forces us to grapple with the creation of an alternative system of property that challenges the basic perception of property as ownership.

The belief that property is about the absolute rights of owners to do whatever they want with their possessions has long influenced the development of property law and it seems to continue to influence cultural property critics. Anglo-American property law springs from a vision of property as “that domination which one man claims and excludes over the external things of the world, to the exclusion of every other individual.” More modernly, Richard Pipes has surmised, “property refers to the right of the owner or owners, formally acknowledged by public authority, to exploit assets to the exclusion of everyone else and to dispose of them by sale or otherwise.” These rights seem to allow the owner even to destroy his property or “us[e] it all up.”

Viewed through the prism of owners’ rights, cultural property would understandably seem like a threatening legal device to scholars who appreciate culture as a collaborative enterprise developed and shared among multiple members of society. Fortunately, the ownership model of property is neither the only, nor the leading, approach to property today. We believe that cultural property law reflects the now pervasive legal realist point that property is a bundle of relative entitlements, including limited rights to use, alienate, and exclude others. In its disaggregation of these rights among individuals and groups, property law functions as a system of social relations, structuring relationships among persons with respect to things.

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128 See PIPES, supra note 14, at xv.
131 Felix 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
As we discuss further below, many cultural property programs attempt to reconcile the interests of owners and non-owners in drawing on a particular resource. Again, contrary to the presumptions made by many critics, these considerations and compromises often take place in the absence of title belonging to a particular tribe. Instead of rights over property delineated by title – indigenous peoples often hold obligations to property irrespective of title. And that principle—in essence—lies at the heart of stewardship. As Rebecca Tsosie has explained, “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.”132

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

While specific traditions vary widely, many indigenous communities exhibit a strong duty of care toward the land and related resources. Consider several examples. In the Navajo Nation case the Hopi testified that their tribal interest in protecting San Francisco Peaks from desecration and pollution stemmed from obligations dating back to the Hopis’ own origins. According to this tradition, the Hopi clans emerged into this world and then journeyed to the San Francisco Peaks where they entered into a spiritual covenant with Ma’asaw, a holy presence that directed them to care for the land.133 Hopis uphold this covenant by directing prayers and conducting pilgrimages to the Peaks, maintaining shrines there, and holding ceremonies when the kachinas leave their home on the Peaks to visit Hopi villages.134 These practices reflect the Hopi ceremonial and planting cycles, Hopi values and responsibilities, and Hopi reliance on rain and corn for survival.135 Such practices and beliefs are common among indigenous peoples. In regards to disputes over water on the Great Lakes, for example, a Haudenosaunee member explained that the nation’s relationship to water was one characterized by responsibilities, not rights, and that Haudenosaunee law dictates that water is “a sacred element” that must not be abused.136 As in the

of everyone with legitimate claims” to the land or other resource at issue. SINGER, ENTITLEMENT, supra note 15, at 91 (Singer calls this approach to property an “entitlement model”).


133 See id.

134 Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024 (9th Cir. 2007). The kachinas, in turn, “bring water, snow, and life to the Hopi people.”

135 See id. at 1034-35.

Hopi example, Haudenosaunee duties to the natural world are expressed in tribal law, custom, and ceremonial practices.\textsuperscript{137} Other indigenous peoples similarly explain a duty of care towards all their resources, including ancestors, in culturally-specific terms.\textsuperscript{138}

But a duty of care, or stewardship, is not unique to indigenous peoples. Early Western conceptions of stewardship were deeply influenced by theology, which tended to emphasize a dual construction of ownership of property that emphasized the right of possession and the right to use property.\textsuperscript{139} Even though property was given by God to humanity for common use, the concept of ownership was thought to be contingent on the duty of mankind to use and administer property, not solely for his own purposes, but for the good of society.\textsuperscript{140} According to Thomas Aquinas, property carried with it a social responsibility—even though individuals had a right to possess resources exclusively, they also had a social responsibility that required them to use the property properly.\textsuperscript{141}

There is a fascinating, overlooked parallel between corporate management and property theory regarding the notion of stewardship. Although the concept of stewardship has existed throughout history, more recent treatments have explored the role of authority in its construction in two main areas: organizational management and environmental conservation. The basic idea of stewardship is this: “…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.”\textsuperscript{142} The notion of stewardship is closely tied, in environmental resource management, to the notion of conservation—the idea to engage in use and management of resources in such a way that protects and preserves their environmental quality.\textsuperscript{143}


\textsuperscript{138} See, e.g., Edward Haleaoha Ayau, Rooted in Native Soil, COMMON GROUND: ARCHAEOLOGY AND ETHNOLOGY IN THE PUBLIC SERVICE, Vol. 7:3 (1995) available at http://www.nps.gov/history/archeology/Cu/fil_fs_wm.1995/sum.htm (“In Hawaiian, the word \textit{kanu} means to plant, to cultivate. It comes from a native belief that from planting comes \textit{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.”)


\textsuperscript{140} See id. at 534.

\textsuperscript{141} See id.


In the context of organizational management, the concept of stewardship has been a strong underlying factor in providing a substantive theoretical alternative to classic agency theory, which focuses on a variety of ways to incentivize employees to behave productively in the absence of ownership of the company.\textsuperscript{144} Ronald Coase postulated in his famous paper on a theory of the firm that an employer had to be able to control the work of the employee by turning to \textit{ex post} sanctions, and also by coordinating activities by “fiat,” or authority when needed.\textsuperscript{145} This view later came under attack by other business law scholars who objected to Coase’s authoritarian view of the corporation.\textsuperscript{146} But in doing so, scholars introduced agency theory to postulate that professional managers, given the exigencies of bounded rationality and opportunism, would always act in their self-interest, and therefore corporations had to be careful to construct forms of governance that balanced an interest with economic growth while protecting against self-serving behaviors.\textsuperscript{147}

Traditional agency theory, like much of property law, in the context of organizational management postulates a model of a rational actor—either an agent or a principal—who seeks to maximize their utility within the context of the modern corporation, which postulates a clear separation between ownership and control of wealth.\textsuperscript{148} 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,” a model which often fails to take into account the complexities of human motivation.149

For this reason, organizational theorists often emphasize the development of stewardship theory as an alternative. Stewardship theory, in contrast to agency theory, postulates a model that is premised on the belief that executives are “motivated to act in the best interests of their principals”—the assumption is that “pro-organizational, collectivistic behaviors have higher utility than individualistic, self-serving behaviors.”150 The behavior of a steward is collective, as opposed to individualistic, and “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.”151 In short, the behavior is more akin to a fiduciary model—requiring “constant and unqualified fidelity” to the corporation, as opposed to a self-interested one.152 Often, these duties can require directors and officers to exercise the degree of care, skill, and diligence which he would normally employ in the service of his own affairs.153

Stewardship focuses on putting service to the organization or group before self-interest, and is focused on the idea of treating employees more like owners, and more like partners, than specific agents.154 While the focus is still primarily directed toward the long term maximization of economic wealth, the notion of stewardship also helps us to understand how a strategy on long term wealth creation might diverge from the interest in short term alienability.155 In the concept of property management, a vision of stewardship primarily differs from that of a traditional agent in three major ways: first, the index of identity, like the notion of peoplehood, is collective, rather than individual. Whereas agency theory presupposes a clear separation between the principal and the agent, stewardship models view the principal as part of the collective enterprise, thus blending the governance of authority. The stewardship model also recognizes, unlike traditional agency theory, that the agent views their identity as part and parcel of the organization, thereby motivated towards its success and flourishing.156

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150 See id.
151 See id. at 25.
152 See CLARK, PRINCIPLES AND AGENTS, 72-73 (quoting Judge Cardozo).
153 See also, Pepper v. Litton, 308 U.S. 295 (1939) (“He who is in such a fiduciary position cannot serve himself”).
155 See id.
156 For those who ascribe to agency theory, performance is motivated by extrinsic rewards—the acquisition of tangible, fungible commodities that have a clear market value, and thus comprise the system of reward that operates as a means of behavioral control and expectation. In contrast, for the steward, the set of

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Second, a stewardship model is similar to a fiduciary one: here, usually the tribe, respectively, is held to occupy a position of special confidence or influence, and is therefore held to a strict and non-negotiable duty of loyalty and reasonable diligence in acting on behalf of the tribe’s cultural property interests. The concept of stewardship, inextricably linked to the duty of a fiduciary responsibility—“a duty of loyalty to act loyally in the principal’s interest and a duty of care to undertake reasonable actions on the principal’s behalf.”

Third, following from the fiduciary model, the proverbial ‘bundle of sticks’ within property is often disaggregated among a variety of groups, including, quite specifically, indigenous groups who may lack title to the resource. In such cases, rights of production, conservation, and use inhere within tribal groups, rather than the title holders themselves—introducing levels of responsibility that attach in the absence of ownership altogether.

There is a striking parallel between the language of stewardship in the corporate literature, and the language of stewardship in the environmental movement, much of which is indirectly inspired by American Indian approaches to the land because it unswervingly attempts to identify a fiduciary, indeed, familial, relationship between humans and the environment. Yet while the Christian tradition tends to emphasize human dominion over land, non-Western and indigenous approaches to property tend to imbue the land itself with a particular spiritual significance. Here, instead of viewing humans as dominant over nature, the stewardship view tends to consider, solely, first what is best for the planet, the idea being that “non-human life has intrinsic value unconnected to its human usefulness, and humans have no right to reduce non-human richness.”

A stewardship role does not always, or solely, relate to cultural property alone. But the “bottom line” that stewards focus on might be much more than just market wealth—it might consider economic, social, and environmental factors in their construction of success. In an unpublished 1974 essay, the great Native American legal scholar, Vine Deloria, presented

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161 Id.
“the idea of legal rights in non-human nature,” predicting that adoption of this perspective would require a total and radical shift in the traditional view of property, yet, for Deloria, and others who subscribed to the old ways, it “fit perfectly into the Indian sense of brotherhood with everything in the universe.” This language focuses on viewing humanity as agents in the service of the protection of cultural resources, rather than the opposite.

2. Liability Rules, Governance, and Stewardship

Given the description of stewardship we have offered, it becomes important to elucidate precisely why this notion of stewardship diverges from the common bundling of sticks in our conception of ownership. In traditional property law, it is axiomatic that “property rules,” as delineated by Calabresi and Melamed, are perhaps the most powerful means for protecting the owner of a certain good. 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, for Smith is a “rough but low-cost method of generating information that is easy for the rest of the world to understand.” 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 to delineate—perhaps even identify—those uses at all.” The right to exclude, for Smith, is premised upon the importance of a signal—a boundary, for example—that protects the owner’s gatekeeping right to determine how to best utilize the property in question. An exclusionary regime is low cost, but it is also much lower in precision.

Yet, in the case of cultural property, Smith’s exclusionary framework falls a bit short. Perhaps more useful in cultural property claims, Smith has outlined an alternative theory of property regulation known as a “governance” regime. In this regime, the law identifies proper and improper uses of property, and accomplishes a much finer tuning of the variables that make 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 exclude, or additional rules for

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163 See Nash, at 119 (quoting and discussing Deloria’s paper).
166 Id. at 973.
167 Id. at 978.
168 Henry E. Smith, Property and Property Rules, 79 NYU L. Rev. 1719, 1728 (2004). These types of liability regimes are much costlier for Smith, because it takes a greater degree of information to properly construct and prescribe proper uses, and then to decide on an appropriate non-market price. Id.
proper use.\textsuperscript{169} Much of this 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.

This approach demonstrates an under-theorized salience with cultural property notions, and helps us to explore how stewardship demonstrates a model that diverges from classic approaches to ownership. In the traditional model of ownership, a variety of sticks in the bundle—rights of occupancy, use, transfer, production, conservation—inhere in the formal construction of ownership. In contrast, the stewardship model supplements, rather than replaces, these traditional models of property regulation because it transfers many of these “sticks” to non-owners, who may exercise these rights in conjunction, or, at times, instead of, the traditional title holders.

In the case of cultural properties, for example, the law might transfer a number of these rights to indigenous non-owners, particularly in cases involving use, conservation, or production of cultural resources. In many of these cases, cultural property regulation—in large part, rests on something \textit{other} than a formal claim of title or ownership. This is particularly true in light of the peculiar nature of Indian property title.\textsuperscript{170} Typically, the federal government, rather than the tribes themselves, holds “title” to Indian property, in trust for tribes as beneficiaries. The government has a set of fiduciary obligations to the tribe which, in turn, carries similar duties to its members.\textsuperscript{171} In most cases involving cultural properties, therefore, the federal government’s trust responsibility undermines blanket assertions that tribes are acting under the guise of ownership. In most cases, as we have suggested, they are acting, not out of ownership \textit{per se}, but out of stewardship instead. In these cases, indigenous groups are typically trying to exercise a duty of care, in the absence of formal title, over cultural property. Even in the most successful Indian cultural property cases, such as the legislative return of the sacred Blue Lake to Taos Pueblo, for example, the federal government holds title to the lake, for the benefit of the tribe, which in turn cares for the lake as a religious area.\textsuperscript{172}

In such cases, which are largely typical of cultural property claims, tribes act as fiduciaries over a resource, rather than “owners” in the classic, market-oriented sense. Particularly with respect to cultural objects and artifacts, a tribe does not “own” the cultural resource, but often “holds” the resource as a fiduciary for the entire group. In these ways, as we show further in PART III, the notion of stewardship that is often employed in such cases

\textsuperscript{169} Smith, \textit{Community and Cautum} at 11 (unpublished draft, on file with authors).
\textsuperscript{170} See generally, \textit{COHEN’S HANDBOOK}, supra note 102.
cannot neatly follow the lines of ownership and exclusion; instead, it disaggregates them, and, in doing so, offers an alternative forms of property regulation that diverges from a traditional exclusionary model.

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 property rights, typically enjoys dynamic rights to develop or alienate property, and static rights to protect conservation of the resource, in the forms of non-development and inalienability. 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.

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. Since stewardship carries a variety of intricate differences from ownership, it reflects a much fuller sense of cultural property considerations, particularly regarding the utility of limits on fungibility and alienability, and a reformed view of owners’ rights. This conception of stewardship meshes intimately with the construction of peoplehood that we expressed above. Not only does do these trajectories draw on group-based notions of cultural property ownership, but it also draws on the language and theory of inalienability.

Yet 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 don’t 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 suggest that they should enjoy self-determination over decisions about whether to inject it into the market or not. This entrustment may not always result in an ‘efficient’ entry back into a

175 Of course in the indigenous context, the situation is that a great deal of non-fungible cultural property – from sacred lands to funerary objects – has already been involuntarily alienated from the tribal community. In these cases, we are in favor of a remedial approach to property that recognizes the particular appropriateness of repatriating cultural objects for which there is no possible monetary compensation.
marketplace—in many cases, particularly regarding burial objects and related artifacts, a cultural property entitlement results in a market inalienable result.

Dynamic Stewardship. A trajectory of dynamic stewardship involves one or more three central elements: (1) it involves rights of commodification that govern the production of downstream cultural properties, that is, goods that flow from a cultural property (like 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 non-indigenous groups for market purposes; these include “cultural tourism” operations where visitors are invited to reservation communities for recreation and may also have the opportunity to participate in an on-reservation hunt, festival, or other cultural event. Finally, it also involves (3) rights of representation, that is, the ability of indigenous peoples to partake in the commercial use and expression of their religious practices and identities in certain cases.

Typically, in such cases, tribes make careful determinations about which events are appropriate for outsiders based on norms of tribal law, allowing such revenue-generating activities only where they will not infringe on cultural privacy or religious dictates. Beyond on-reservation activities, many Indian artists market their jewelry, paintings, and other works to a broad, even international consumer audience. Some tribes distinguish between tribal lands than 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.\textsuperscript{180} 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. And, 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.

\textit{Static Stewardship.} A trajectory of static stewardship, in contrast, can focus on four other elements; (1) an interest on \textit{conserving} a sacred resource from overuse or pollution; (2) an interest in \textit{placing} an object to rest, such as funerary remains; (3) an interest in \textit{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 non-tribal members; and (4) an interest in ensuring \textit{access} to a cultural resource for prayer, like a sacred site.

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 may explain these motivations to keep their cultural property from the market. Within the domain of cultural property, restraints against alienation can comprise the lifeblood that often keeps these sacred objects within a tribe, often despite enormous economic pressure to sell objects to private collectors or museum officials. For years, for example, 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 incommensurable goods.\textsuperscript{181} On the other hand, when it comes to human remains or funerary objects, 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 non-fungibility, 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 transact (or not) with others accordingly.

III

INDIGENIZING CULTURAL PROPERTY

\textsuperscript{180} See Kathy M’Closkey and Carol Snyder Halberstadt, \textit{The Fleecing of Navajo Weavers}, CULTURAL SURVIVAL QUARTERLY, Issue 29:3, September 19, 2005, \url{http://209.200.101.189/publications/csq/csq-article.cfm?id=1851} (explaining that what weavers want is proper attribution, prices reflecting their painstaking craft, and the ability to continue to make a living through traditional weaving).

\textsuperscript{181} As a Hopi example suggests, ceremonial objects may be carefully used in ongoing religious rituals until they wear out. See discussion \textit{infra} at PART III.
Once indigenous peoples’ cultural property claims are examined within this framework of stewardship, a nuanced and dynamic conception of property emerges that belies many of the purported problems with cultural property identified by its critics. We believe that misconceptions about the relationship between indigenous peoples and their cultural property are due, in large part, to a view of property as consisting of things that are or can be owned. Within this narrow view of ownership, property rights are usually conceived of as being held by identifiable individuals or discrete groups, that can be freely alienated at will. As a result, these critics discount the possibility that property is a dynamic expression of human relationships – or that, in some settings, property law could be both essential to, and as flexible as, culture itself. 182

As we have suggested, classic property theory, which rests on a monopolistic conception of the owner, tends to offer a primary focus on the liberal, autonomous individual. This conception, however, leads to an over-determination of the rights of the owner over all others, and neglects to engage with the unique ways in which indigenous groups relate to their own cultural properties. Consider, for example, the complexities that arise when dealing with certain objects that may not be owned at all,183 are inalienable by definition,184 or whose possession is subject to shifting custodial arrangements rather than absolute rights of title. In many such cases, the custody of such items may, in fact, be situated in an ephemeral notion of collective ownership as ‘peoples’ themselves rather than in individuals or cleanly identifiable groups.

Fluid conceptions of property underlie indigenous peoples’ group claims to those items most closely and intimately tied to indigenous peoplehood and indigenous identity: indigenous cultural property.185 This Section highlights how our theory of dynamic and static stewardship – which rests on deeply embedded, currently existing property rules and regimes – is already implemented in regards to three categories of cultural properties: tangible, intangible, and real.

The following section first demonstrates that by concentrating the allocation of property entitlements along an intricate web of social relations—rather than fixating on solitary ownership – cultural property claims are

182 Sarah Harding presented this argument as one of three justifications for the repatriation of tribal cultural property under NAGPRA more than a decade ago. See Sarah Harding, Justifying Repatriation of Native American Cultural Property, 72 IND. L. J. 723 (1997).


184 Despite our reluctance to use the property moniker in this context – given that 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 and/or cultural patrimony.
revealed to be rather nonexceptional and quite commonplace within standard property theory. Moreover, we assert that critics’ claims against cultural property laws – exceptional or not – have no resonance when they are examined in light of a stewardship, rather than ownership, conception of property. At the same time, we posit that because certain lands, expressions, and products are integral to indigenous identity and group survival, they 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. But two federal laws, specifically – the 1935 Indian Arts and Crafts Act and the 1990 Native American Graves Protection and Repatriation Act – address the unique cultural property interests and concerns of Native peoples. Both statutes were motivated by cultural property concerns, but with important differences as to their respective formulations and approaches to cultural property protection. What they share, however, is a common theoretical approach – one sounding in stewardship, rather than ownership and exclusion – to the protection of cultural property.

Before the concept of cultural property had even engaged the dialogue of law and culture, Congress passed the 1935 Indian Arts and Crafts Act (IACA), making it the first federal statute to deal specifically with protecting indigenous cultural property. Responding to a flood of inauthentic products that nearly destroyed the basis of livelihood for many Indian artists, the IACA seeks to protect Native cultural property by promoting the artwork of Native artists and insulating consumers against imitations. The Act parallels general trademark law in some respects, but it is specifically geared towards Indian arts and crafts. It requires that works that are designated as Indian-made actually are, and imposes civil and criminal penalties for works that unlawfully and erroneously employ the designation. The IACA states that it is unlawful to “offer or display for sale or to sell any

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186 We recognize, of course, that real property is also tangible. But because real property raises distinct issues, we treat it separately in Part C, infra.
191 18 U.S.C. SS 1158-1159. The 1990 amendment to section 1158, Pub. L. No. 103-322, 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. S 1158. These provisions also complement a variety of state laws that accomplish similar goals. See ARIZ. REV. STAT. SECTION 44-1231-1233.
good, with or without a Government trademark, in a manner that falsely suggests it is Indian produced, an Indian product, or the product or a particular Indian tribe.” 192

In the IACA context, a non-Native producer of cultural goods does not face divestment of ownership, exclusion or even an interference with alienability per se. Instead, when functioning properly, the Act guarantees to consumers the authentic origin of the good they are purchasing (e.g., Navajo Rugs, Potawatomi Porcupine Quill Earrings, Chippewa Baskets, etc.), and also protects Native craftsmen. In this sense, the concept of cultural stewardship serves the interests of both manufacturers and consumers, clarifying the origin of products, but not shifting title in any formal manner.

In contrast to the IACA, NAGPRA is perhaps more quintessentially directed towards safeguarding the collective, tangible cultural property interests of indigenous peoples. Hailed as a core piece of human rights legislation, 193 NAGPRA provides for a comprehensive framework to safeguard the human remains, sacred objects, and cultural patrimony of indigenous peoples. 194 NAGPRA’s repatriation policies have garnered the most scholarly and media attention, though 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. 195 In the repatriation context, NAGPRA requires federally funded museums to provide inventory lists of the tribal property they hold, including human remains. 196 As collectives, tribes may seek return of human remains, funerary objects 197, sacred objects 198 and certain items of cultural patrimony that have “ongoing historical traditional, or cultural importance” that are, according to tribal customary law, inalienable. 199

193 Trope & Echowak, supra note 23, at 123.
196 NAGPRA requires museums and federal agencies to inventory their holdings of Native American cultural items and make the inventories available for inspection. 25 U.S.C. §§ 3003-3004.
197 Funerary objects are broken down into those that are deemed “associated” – or those that are “reasonably believed to have been placed with human remains at the time of death or later where the remains and the objects are both in the possession of the museum or federal agency.” (25 U.S.C. § 3001(3)(A)) and “unassociated” funerary objects are those that are “reasonably believed to have been placed with human remains at the time of death or later where the objects, but not the associated human remains, are in the possession of the federal agency of museum” (id. at 25 U.S.C. § 3001(3)(B)).
198 “Sacred objects” are defined as specific ceremonial objects needed by Indian and Native Hawaiian religious leaders for the practice of their religions. 25 U.S.C. § 3001(3)(C)).
199 Id. at §(3)(D).
NAGPRA empowers indigenous self-determination by stipulating that tribal courts are the proper fora to adjudicate classification issues and resolve ownership disputes within or among Indian tribes. 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” and stipulates that repatriated property goes to tribes but not to individual tribal members.

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 (or depriving) group identity. In short, NAGPRA demonstrates that property rights themselves may thwart or facilitate peoplehood by contemplating peoples’ identities as inextricable from their property interests. Just as Radin’s work emphasized how individual identity must be considered in the context of property – particularly property that is so integral to personhood that it must be given special legal protection – we have asserted that peoplehood is inextricably bound up with certain of peoples’ property. Thus, in the same way that some individual private property must be considered nonfungible and a counterpart to identity, we make the same claim in regards to peoples’ cultural property. This unique relationship between property and peoplehood is exemplified in NAGPRA, which challenges Eurocentric views of private, personal property, and affirms indigenous peoples’ own conceptions of ownership and the sacred, highlighting the core concept of stewardship. But to fully appreciate the contemporary import of NAGPRA, it is critical to understand the historical circumstances from which it emerged.

The historical record detailing the deplorable treatment of Indian remains and funerary objects in the United States that led to Congress’ passage of NAGPRA is now well-documented. 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

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200 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.
202 Riley, Recovering, supra note 125, at 214.
203 See Radin, Personhood, supra note 77, at 986-87, 990 (admonishing the government to “guarantee citizens all entitlements necessary for personhood” and to guarantee “that fungible property of some people does not overwhelm the opportunities of the rest to constitute themselves in property”).
204 Riley, Indian Remains, supra note 113, at 55.
205 See Koehler, supra note __, at 111. Consider, for example, that the 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.” See Trope & Echo-Hawk, supra note 23, at 39.
206 See Trope & Echo-Hawk, supra note 23; see also, Riley, Indian Remains, supra note 113, at 52.
in private cemeteries. But many Indian graves were unmarked and outside of tribal territory due, in large part, to federal Indian policy. During the infamous Removal period, for example, which spanned the years 1830-1861, 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. Thousands of people died and were buried along the way during the infamous death marches. Consequently, Indian graves and their contents were treated as abandoned and, therefore, available for appropriation under American law.

Colonizers' morbid curiosity married with official federal policy to result in a perfect storm of mass appropriation of Indian remains and ceremonial items buried with the dead. Federal laws like the Antiquities Act of 1906—which was intended to protect American “archaeological resources” discovered on federal lands and included Indian remains as federal property—allowed the U.S. government to secure its own collection of Indian bodies and artifacts. U.S. policy actually endorsed the mass excavation and looting of Indian gravesites and encouraged grave robbers to turn contents over to federally funded museums so that studies could be done to confirm the racial inferiority of Indian people. This resulted in the decapitation of thousands of Indians, many of whom died in the course of massacres carried out by the federal government— their heads sent to museums for display and study.

American museums, therefore, served as repositories for the exhumed evidence of Europeans’ love affair with Indians and the romantic West. Ultimately, all of these forces converged to create a unique property phenomenon: Indian remains and the objects buried with the dead were

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207 Riley, Indian Remains, supra note 113, at 54.
208 See, e.g., Indian Removal Act of May 28, 1830, ch. 148, Stat. 411 (forcing tribes to leave ancestral homelands in the east for Indian Territory west of the Mississippi River).
209 See, e.g., R. David Edmunds, The Potawatomis: Keepers of the Fire 240-72 (Univ. Okla. Press 1978) (discussing the removal of the Potawatomis from the Great Lakes region to the Southern Plains and the numbers 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, the Navajo Long Walk, as well as other massacres that, in some areas, reduced certain Native American populations by 95 percent or drove others to extinction).
210 Riley, Indian Remains, supra note 113, at 54.
211 Trope & Echo-Hawk, supra note 23, at 126.
212 Id. at 127.
213 Id. at 126.
214 Id. (“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.”).
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 Institution alone held the remains of over 18,000 American Indians in its collections. Today, it is estimated that the remains of hundreds of thousands of indigenous people ultimately will be accounted for through museum inventories.

NAGPRA sought to reverse this history specifically by empowering tribes, as peoples, to regain access to and custody of Indian remains and artifacts. In allowing tribes to reclaim and properly rebury their dead, NAGPRA forces reconsideration of what property entitlements mean in the context of cultural property and peoplehood. NAGPRA stands as an example of how cultural property law can provide the ultimate accommodation of competing interests to cultural property by thoughtfully distributing measured entitlements to property in ways that satisfy all property holders. And, despite some initial opposition to NAGPRA, the statute has garnered wide support in both the museum and Native communities. Though initially resistant, many museums have, by and large, attempted to comply with NAGPRA’s mandate. Perhaps most significantly, the plundering of American museums by Indian tribes that many feared has simply not occurred. Tribes have demonstrated cautious restraint in repatriating those items they cannot properly house or care for.

But NAGPRA’s salience, we contend, is most clearly found in its embodiment of stewardship conceptions of property. Consider the property consequences of repatriation under the Act. Though the return of objects from museums to tribes may seem to create a shift in title, such is not the case, particularly in regards to human remains. We would argue that, as to all of its repatriation provisions, NAGPRA is essentially about custody and possession, not ownership. But human remains, specifically, present a special case, as they cannot actually be owned by anyone. This rule is 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

216 NAGPRA shifts, but does not create, property rights in cultural objects. See, e.g., Brown, supra note 7, at 214.
217 Trope & Echohawk, supra note 23, at 136.
219 See Berman, supra note 201, at 12.
220 See, e.g., Elana A. Jefferson, Museums Trying to Return Remains, Denver Post, August 15, 2004, at AE.
This understanding is also consistent with NAGPRA, which does not employ “title” in conjunction with the repatriation of human remains, but frames repatriation in the context of “custody.”

Though the language of ownership is employed by NAGPRA in the context of objects, those, too, should be thought of as subject to a stewardship conception of property. In fact, it is precisely because museums could never have acquired good title to funerary objects in the first place that NAGPRA has survived Fifth Amendment takings challenges. Without having any legally cognizable property interest in the objects or remains to begin with, museums were unable to claim that NAGPRA created an unlawful taking of property. Undoubtedly, NAGPRA’s repatriation provisions are first and foremost, defined by and structured according to a stewardship, not ownership, model of property.

Despite these observations, it is true that that NAGPRA challenges current property regimes in ways that property law traditionalists might either find threatening or inconsistent with classic theory. But we understand that property law – and the allocation of entitlements – historically has signaled crucial shifts in the balance of power, and as such, it provides fertile ground for attacks. Despite all that has been achieved through NAGPRA, critics remain. Its strongest detractors are those that find cultural property law, as well as the policy and theory behind it, fatally flawed. Naomi Mezey, for example, calls the statute “radical,” and claims that associating cultural property with distinct groups will ultimately stultify culture, encourage staticity and destroy the kind of cultural evolution that is essential to a rich, dynamic cultural life because it encourages conformity and suggests ‘authentic’ ways of

222 NAGPRA states “ownership and control,” in reference to human remains, but employs “control,” “ownership,” and “title” in regards to objects. 25 U.S.C. § 3002(e) (“... control over any Native American human remains, or title to or control over any funerary object, or sacred object.”).
223 25 U.S.C. § 3001(13) sets forth that NAGPRA does not implicate the Fifth Amendment 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, 436 (2003).
224 See, e.g., Merrill, Morality, supra note 129; Richard Epstein, No New Property, 56 BROOKLYN L. REV. 747 (1990) (denouncing the “new property” of Goldberg v. Kelly, and arguing that the massive dispossession of Indian lands by colonizers in America was not a top-down movement of colonial law, but, rather, a codification of customary law that treated lands possessed by indigenous peoples as unoccupied, unowned, and available for conquest).
225 Charles Reich gave life to the theory of “new property” in his seminal piece, The New Property, 73 YALE L. J. 733 (1964), which has served as the basis for numerous arguments regarding the relationship between property entitlements, power, and status. See, e.g., Cheryl Harris, Whiteness as Property, 106 HARV. L. REV. 1709 (1993).
performing one’s identity. In general, she seems to have two major concerns in regards to NAGPRA: first, repatriated objects will become so iconic in the hands of tribes as to dictate the very way in which tribal Indians define themselves and live out their culture; and secondly, that cultural property law will make Indians’ “cultural stuff off limits to outsiders” which will ultimately stultify culture generally and limit the ability of non-Indians to appropriate Indian culture in the process of generating “cultural hybridities.”

It is significant that Mezey fails to distinguish human remains from objects of cultural patrimony in her critique of NAGPRA. But Mezey’s view of cultural property – and, therefore, her corresponding fear of it – relies on an understanding of indigenous property as defined primarily by ownership, not stewardship. 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. Though there is relatively little empirical evidence to rely on, anecdotal and experiential accounts refute her claim. Upon NAGPRA’s passage, for example, members of the Hopi tribe openly revealed their intention to dynamically re-employ the repatriated religious objects in daily ceremonial life until they had worn them out. Though only one example, the Hopi’s plan to put their objects back into use epitomizes the kind of dynamism that facilitates cultural evolution, restoring their protected use of sacred objects to that already enjoyed by any other cultural group. Further, Mezey’s concern about limitations on appropriations of Native culture is also inapposite, because it fails to grapple with the fact that NAGPRA’s reach is entirely limited to physical, not intellectual objects and human remains. In this way, NAGPRA does not

226 Mezey, supra note 7, at 2017.
227 Id. (noting that NAGPRA also unjustifiably dictates “Indian stuff belongs to Indians.”)
228 Id. She lists other problems, or “costs,” of cultural property: that it “obscures cultural movement, hybridity, fusion, and the potential for competing claims to cultural objects…[i]t also dissuades imitation, discussion, and critique between groups by making a group’s cultural stuff off limits to outsiders.”
229 It is notable, for example, that Mezey does not attempt to contend in any seriousness that reburial constitutes cultural stagnation. It is quite apparent that repatriation and burial of the dead, under NAGPRA, allows Indian tribes the opportunity to employ ceremony and religion in the process of coping with the horrific experience of loss—something every society already enjoys. Since Mezey’s claims regarding NAGPRA are so ill-suited to the context of human remains, we apply her critique only to cultural objects.
230 The revelation was “a disheartening prospect for curators who dedicate their working lives to such objects’ conservation.” Brown, supra note 7, at 17.
231 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 where indigenous artifacts have greater resonance with non-Indians than do indigenous peoples themselves. Berman, supra note 201, at 12 (“By extension, indigenous arts are often exalted at the expense of Indigenous peoples.”).
232 Even Michael Brown – upon whom Mezey heavily relies – clearly recognizes that NAGPRA does nothing to impede the borrowing of intangible cultural properties from indigenous peoples. Brown notes
change the status of items from being in the cultural commons, free for use by everyone, to being owned exclusively by Indian tribes. The tangible cultural property affected by NAGPRA -- human remains, funerary objects, ceremonial items – was already in the exclusive possession of federally funded museums. NAGPRA merely shifts possession and custody over those items to society’s members who have the greatest cultural link with them and who seek access to them because of the responsibilities they are owed.

Despite all this, we contend that NAGPRA still does not go far enough to protect indigenous peoples’ cultural property interests. Consider, for example, that just this year The Los Angeles Times reported that California Indian tribes are seeking, but have yet been denied, permission to repatriate the remains of some 12,000 American Indians currently held by the University of California-Berkeley far beneath the Hearst gymnasium. In a battle that has gone on for years, and even with NAGPRA in place, the University refuses to turn over the remains.233

B. Intangible Cultural Property

At the same time, however, we do not mean to suggest there is no connection between indigenous groups and their cultural property or that specific peoples do not, in some sense, partially define themselves through their cultural properties. Although cultural property law and theory initially only encompassed tangible property – focusing on “objects of artistic, archaeological, ethnological, or historical interest”234 – contemporary definitions are far more expansive.235 Today, it is well accepted that cultural property includes the intangible effects of a culture, and encompasses traditions and histories that are connected to a group’s cultural life, as well as songs, rituals ceremonies, dance, traditional knowledge, art, customs, and spiritual beliefs.236 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 properties.237 It would not be possible, for

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236 Id.
237 Id. at 77.
example, to protect the traditional medicinal knowledge of indigenous groups if the physical world from which that medicine is obtained is destroyed.\footnote{See Angela R. Riley, Indigenous Peoples and Emerging Protections for TK in INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY (ED. PETER YU) 373, 382 (2007) [hereinafter, Riley, Emerging].}

Indigenous peoples’ struggle to protect their intangible cultural property is now well-documented and widely understood to be an issue of particular concern in an age of globalization.\footnote{See generally, Mary Riley, supra note 219.} It is abundantly clear today that the dominant intellectual property regimes -- largely developed in the West, and now increasingly applicable to the rest of the world through the dissemination of the WIPO and TRIPS—do not protect the intangible property of indigenous groups.\footnote{See Riley, “Straight Stealing”, supra note 46, at 79.} Legal scholars and indigenous rights activists are now well versed in stories of commodification and appropriation that typify this dilemma for indigenous peoples. Consider, for example, the struggle of the indigenous Ami in Taiwan to protect and receive attribution for the creation and performance of a multi-generational and traditional, sacred song;\footnote{See Riley, Recovering, supra note 128, at 175-76 (discussing the appropriation of the Ami’s “Song of Joy”, which spent thirty-two weeks on Billboard magazine’s Top 100 Chart).} Australian Aborigines’ efforts to secure rights in their indigenous designs;\footnote{Bulun Bulun v. R & T Textiles Proprietary Ltd (1998) 86 F.C.R. 244, 247 (Austl).} or Brazilian tribal groups’ quest to save the Amazonian rainforests, which give life to all the other intangible aspects – language, traditional knowledge, religion, etc. -- of their cultural existence.\footnote{See generally, Samara D. Anderson, 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).}

Particular attention has been focused on the global affects of the exportation of American intellectual property law through TRIPS.\footnote{See Madhavi Sunder, The Invention of Traditional Knowledge, 70 LAW & CONTEMP. PROBS. 97, 112 (2007) [asserting that TRIPS has focused on teaching the world’s poor how to protect the intellectual property of the wealthy West] [hereinafter Sunder, Invention].} The spread of Westernized patent law, in particular, has created a fertile ground for powerful patent holders -- often times multinational corporations – to secure rights in indigenous traditional knowledge.\footnote{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 using traditional indigenous varieties of seeds, making slight improvements on them, patenting them, and then selling them back to the indigenous communities for a profit.)} Because intellectual property rights are increasingly critical in the economic development of countries in the developing world -- and the South, in particular -- national governments are incentivized to allow outsiders access to indigenous traditional knowledge for commodification and sale.\footnote{See Riley, Emerging, supra note 238, at 382.} This process has occurred with little or no regard for the economic reality, cultural survival, or
creative integrity of the people in the developing world who have facilitated
the creation of such valuable products. Consequently, traditional knowledge
has been mined and used to secure patents in, \textit{inter alia}, pharmaceuticals to
treat Hodgkin’s disease,\textsuperscript{247} staple foods like beans\textsuperscript{248} and rice,\textsuperscript{249} and even
indigenous peoples’ genetic materials.

It would be impossible to discuss herein 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\textsuperscript{250} – 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 that parodies Indians.\textsuperscript{251} Because
the laws governing intellectual property itself are multi-layered (international,
national, local, and tribal) and quite complex, indigenous peoples’ approaches
to using law in various intangible property related disputes will undoubtedly
reflect these variances.\textsuperscript{252}

Nevertheless, we find that a stewardship approach to the management
of intangible property is widely applicable and already visible in indigenous
peoples’ assertions of their intangible property rights. Consider, for example,
claims to traditional medicinal knowledge, where the stewardship model is
firmly in place. Here, indigenous groups commonly seek – not absolute
ownership and the power to prevent access to the rest of the world, but -- a
stewardship role in the process of mining, developing, disseminating, and
seeking compensation for the good. Commonly, this manifests in indigenous
peoples’ desires to participate in the disclosure of sacred or confidential
information that may be tied up with the knowledge. Or, the group may seek
simply 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. Finally, given the unfortunate economic position

\textsuperscript{247} See JAMES BOYLE, SHAMANS, SOFTWARE, AND SPELEONS: LAW AND THE CONSTRUCTION OF THE
INFORMATION SOCIETY 127-29 (1996) (telling the story of a drug company that developed a remedy for
Hodgkin’s disease from vinca alkaloids derived from the rosy periwinkle of Madagascar).

\textsuperscript{248} See Gillian N. Tattray, \textit{The Enola Bean Patent Controversy: Biopiracy, Novelty and Fish-and-Chips}, 2002 DUKE L.
& TECH. REV. 0008, Para. 12-13 ( June 3, 20020) (explaining that Mexican farmers were prevented from
exporting their traditional Enola beans to the U.S. because a U.S. corporation has acquired a patent on it),

\textsuperscript{249} See Sunder, \textit{Invention}, supra note 244, at 113-14.


\textsuperscript{251} For a discussion of OutKast’s, performance of “Hey Ya!” at the 2004 Grammy Awards, see Riley,
“Straight Stealing”, supra note 46, at 70-73.

\textsuperscript{252} See, e.g., Hornell Brewing Company v. Rainbowl Sioux Tribal Court, 133 F.3d 1087 (8th Cir. 1988) (reviewing
tribal court jurisdiction over claims that brewing company’s unauthorized use of “Crazy Horse” image in
marketing of malt liquor product violated a combination of federal and tribal laws governing intangible
property).
of indigenous peoples — the vast majority of whom reside in the developing world — they also commonly request to share in the profits from the products that are ultimately created through the use of indigenous TK. Affording indigenous groups, therefore, input into the harvesting, collecting, organizing, disseminating and selling of their traditional knowledge, for example, can be achieved without employing the absolute ownership rights or exclusive access that many fear. But such rights would put in place safeguards that are critically important for the survival of indigenous groups.

This stewardship approach to the treatment of indigenous intangible cultural property can be seen in a variety of other contexts as well. Given that indigenous intangible cultural property claims touch numerous areas of law, we have elected here to focus an issue readily accessible to and easily relatable for most Americans: the use of Indian mascots in American team sports. Indians as sports mascots — from the buck-toothed image of “Chief Wahoo” to the curiously-named Washington “Redskins” to the controversial “Fighting Sioux” — has caused great controversy and discord in American culture. Not surprisingly, efforts to curtail the use of Indian mascots have been met with a great deal of criticism from sports fans who consider the mascots to be inseparable from their devotion to particular teams. 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. For them, the Indian as symbol embodies the mythical and fierce warrior, who is firmly situated in American lore opposite the solid and sturdy Western cowboy. In this sense, the Indian belongs to all Americans, and is part and parcel of American history and culture.

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, defined by unique tribal identities, spanning the continent. In this view, the “mythic” Indian identity is one devised by Whites, made possible only through colonizer’s efforts to make Indians disappear, either through death or removal. They contend

254 See Sunder, Invention, supra note 244, at 112 (noting that “The U.N. estimates that developing countries lose about $5 billion in royalties annually from the unauthorized use of traditional knowledge.”).
256 See Liz Clark, NCAA, University of North Dakota at Odds Over Mascot, Washington Post, November 5, 2005, BUS.
258 For a discussion of this phenomenon, see Riley, “Straight Stealing”, supra note 46, at 79.
259 See id.
260 See generally, PHILIP DELORIA, PLAYING INDIAN 137 (1999) (noting that, for some “the redemptive value of Indians lay not in actual people, in but in the artifacts they had once produced in a more authentic stage of existence.”).
that Indian mascots portray Indians instead as nostalgic and anachronistic symbols of the past, and their continued use is a simple manifestation of the vast power disparities 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.261

Though the controversy over Indian mascots has been going on for some time,262 their use became an issue of cultural property in 2005. At that time, the National College Athletic Association’s (the NCAA) 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.”263 Under the NCAA’s policy, the twenty schools who used Indian mascots and/or logos could continue to use them without penalty if they sought and received consent from the relevant Indian tribe (e.g., the University of Utah sought and received permission to use the name Utah Utes).264 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 NCAA post-season championship events.265

Limitations on the use of Indians as mascots spurred great controversy.266 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, moccasins, etc – and come out onto the court at halftime, performing as a pep leader/cheerleader. When the University of Illinois announced that his February 21, 2007 performance would be the Chief’s last, they retired a mascot they had used for over eighty years.267

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

264 See News Makers, Houston Chronicle, September 2, 2005, Sports.
267 See Board Retires Chief Illiniwek, Los Angeles Times, August 14, 2005, Sports.
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 “the logic of cultural property” in devising their mascot policy.268 The “logic” of cultural property is, according to Mezey, “a social common sense that cultural property law has helped to create”269 that suffers from the same “flawed logic” as actual laws designed to protect cultural property.270

Though Mezey’s blurring of lines between “law” and “logic” is subtle, it is undoubtedly strategic. After all, for Americans, 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 draws into the cultural property debate those scholars who are aligned with the “free culture” movement, a group of mostly academics defined by their skepticism of the propertization of intangibles.271 She does so by suggesting that the NCAA’s restriction on the use of Indian mascots in college sports is part of a larger movement directed towards propertizing culture, ultimately limiting speech and the free flow of ideas.272

Mezey’s substantive critique against the NCAA’s rule is similar to the claims she asserts in regards to NAGPRA (discussed supra): “cultural property claims tend to fix culture,”273 “sanitize culture,”274 “increase intragroup conformity” and cause groups to “become strategically and emotionally committed to their ‘cultural identities’.”275 In Mezey’s view, cultural property claims of this sort are indefensible in general, but particularly insofar as they relate to Indian mascots, who she considers to be “cultural hybrids”276 – the product of cultural fusion. 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.”277 Consequently, she argues that the “offending mascots are white inventions”

268 Mezey, supra note 7, at 2006.
269 Id.
270 Id.
271 See Lawrence Lessig, Freeing Culture for Remise, 2004 UTAH L. REV. 961, 974 (2004) (arguing change in copyright law is necessary to expand the “range of creators who will participate in the remix of culture”).
272 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 7, at 2008.
273 Id. at 2005.
274 Id.
275 Id. at 2007.
276 Id.
277 Id.
that “belong[] to more than one culture, or perhaps belong[] properly to the offending culture.”

Yet Mezey’s critique of the NCAA’s rule can only be understood within the limited framework of an ownership/exclusion model of property. Mezey’s entire critique depends on this view. She insists that culture “is unfixed, dynamic, and unstable”, whereas property is “fixed, possessed, controlled by its owner, and alienable.” As a result, according to Mezey, affording property rights in culture denies its very nature, thus creating a paradox. When Indians are given ownership rights over these images, “the logic of cultural property does too much damage, not just to culture in the abstract, but ultimately to tribes, Indians, and everyone else for whom cultural survival depends on change.”

In her arguments regarding cultural property, Mezey grasps culture with great facility, but, in doing so, she fatally misconstrues property. Even if we accept Mezey’s view of culture as “unfixed, dynamic, and stable” (as well as “human and messy”), we reject that this necessitates a corresponding understanding of property as “fixed, possessed, controlled by its owner, and alienable.” Property, it seems, is as “human and messy” as culture, and perhaps more so. To view it as so 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, it is only through an understanding of cultural property logic/law as placing absolute ownership and exclusion rights into the hands of cultural groups that cultural property appears tragically flawed. If one, by contrast, construes cultural property as being as dynamic, intricate and complex as culture itself, the stewardship paradigm is illuminated and cultural property 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. To the extent the NCAA’s policy reflects cultural property’s logic, it is in that it affords tribes some degree of ethical stewardship – and control – over the depiction of the very people that they are. This is a matter of ethics, in addition to stewardship. In contrast to Mezey, we posit that cultural property actually facilitates the process of cultural evolution, change, and survival by allowing

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278 Id. at 2007.
279 Id. at 2005.
280 Id.
281 Id. at 2009.
282 Id. at 2005.
283 Id. at 2005.
for Native peoples to share in decisions regarding the way their indigenous cultures are displayed in the world.

Turning to the property consequences of the NCAA’s policy, the primacy of the stewardship model of property – and, consequently, the shortcomings of an absolute ownership model -- becomes apparent. First, despite the promise of significant penalties for offending institutions, the NCAA did not prohibit the use of Indian mascots by member schools. This means that – in contrast to an absolute right of property, the type of which Mezey seems to be fearful – universities that used Indian mascots prior to 2005 can continue to do so (thus foregoing hosting post-season championship games). And some are. Neither Indian tribes nor the NCAA have any legal mechanism to prevent their continued use. Secondly, the NCAA’s decision allowed for all member universities to continue using Indian mascots without penalty as long as they sought and received the consent of the relevant Indian tribe. Several universities (such as the Florida State Seminoles) did so. Others are in the process of on-going negotiations with Indian nations to achieve consensus on mascot usage (the “Fighting Sioux” of UND).

Third, contrary to the most dominant sticks in the bundle of property — rights of use, exclusion, and transfer — no Indian Nation gained the right to use the Indian mascot that depicted their tribe. Similarly, the rule did not create – via either logic or law -- rights of exclusion in the tribes. If anything, the tribes possess a partial veto power of the use of particular mascots, but even this is limited. Even in light of the authority to withhold consent, the tribe might be said to have, at most, a limited power of exclusion as to the relevant institution, but not to the public or the rest of the world. Rights of speech, parody, other cultural fusions, etc. are not in any way affected or prohibited by the NCAA’s rule. Last, but not least, the tribes did not gain a transferable or alienable property interest. The interest is unique to

286 Id.
287 See Neil Milbert, Seminoles OK’d by NCAA, Chicago Tribune, August 24, 2005, Sports.
288 See Robyn Wood, NCAA Decision on Native American Mascots Draw Ire from Some Schools, Los Angeles Times, August 6, 2005, BUS.
290 See generally, Thomas C. Grey, The Disintegration of Property in NOMOS XXII 69 (1980) (“The specialist fragments the robust unitary conception of ownership into a more shadowy ‘bundle of rights.”’)
291 So, if, for example, the various Sioux Nations do not ultimately consent to the University of North Dakota’s use of the “Fighting Sioux” insignia, the NCAA policy in no way created in the Sioux tribes themselves any right to use the logo. In fact, if they were to use the exact logos created by UND, they would almost certainly be in violation of copyright and trademark law. Undoubtedly, there would be some fair use and free speech exceptions to this general proposition.
292 As noted, the universities can – though at considerable cost – continue to use the mascots if they want. To avoid penalty altogether, they must get consent from the relevant tribe.
them: if the Northern Utes, for example, did not consent to the use of their name and image, they still have no interest that can be alienated or transferred to another party.

Nevertheless, at the same time that we reject Mezey’s critique of the NCAA policy as creating property rights in culture, however, we argue 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. In fact, 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. In contrast, we argue that 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.

In fact, we contend that the logic of cultural property seen in the NCAA’s policy says 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 Whites, even when those nations have been greatly reduced through genocide, war, dispossession, and disease. There is no question that indigenous cultural survival is precarious in an age of globalization, as their existence is increasingly threatened by an encroaching world. Recognizing indigenous peoples’ property interests in their own intangible property does nothing to unfairly advance the cause of indigenous groups at the expense of others; rather, it is the recognition of minimal protections necessary to ensure their continued cultural existence in a rapidly changing world.

C. Real Cultural Property

293 Consider Mezey’s reasons for justifying the University of Illinois’ use of Chief Illiniwek: Mezey suggests that whites’ appropriation of Chief Illiniwek was not so bad, in part because the tribe for whom he was named essentially became extinct, due to the genocide, war and disease that killed most of its members. Mezey notes is a “tragic” story, but “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.” Id. at 2032. She explains: “The 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 need the savageness of the Indian to justify disposing and killing them.” Id. (emphasis added).
For many indigenous people, every facet of culture, identity, and existence – from tribal religions, Native languages, ceremonies, songs, stories, art, and food – is tied up with the land from which they came. While many people have deep ties to particular geographic locations, for indigenous groups, land is sacred. 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.” 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. As one scholar writes, “[t]ribal cultures, from the time of their creation, have been formed, shaped, and renewed in relationship with mountains, mesas, lakes, rivers, and other places that are imbued with the spirituality, history, knowledge, and identity of the people.”

In fact, 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 since time immemorial, such as: Australian Aborigines and Uluru (Ayers Rock), the Lakota Sioux and Mato Tipila (Devil’s Tower), or Peruvian Indians and Machu Pichu. In these cases and many more, indigenous peoples are defined by their relation to land, and the land, in turn, thrives from the stewardship provided to it by 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 keep the world in balance.

For indigenous peoples, accessing, experiencing, and protecting their sacred sites has 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, where they are able to speak a common language, practice traditional religions, and live their cultures as indigenous peoples. But land is more than this. It is the place from which they come, that defines their histories, languages, cultures, arts, and

294 Carpenter, Property Rights, supra note 39, at 1063.
295 Id.
297 See Carpenter, Property Rights, supra note 39, at 1062-63.
298 Id. at 1063.
299 Id. at 1069.
300 Id. at 1063.
301 Id.
peoplehood. It is the land they seek to return to. It holds all the components of a natural landscape that define every aspect of their cultural existence.302

Because all aspects of indigenous cultural survival relate to land, it is perhaps the most important -- and most threatened -- of all the cultural properties. Though in some cases indigenous peoples still seek the return of aboriginal lands wrongfully taken,303 most contemporary Indians desire participation in real property decisions that are much more aligned with a stewardship model. Without ownership rights, Indians have had to fight fiercely to retain access to sites that are necessary for worship and cultural survival.304 Many sacred sites are currently owned by the U.S. government, which secured title to them either through purchase or conquest.305 In contemporary times, the way in which the government chooses to manage that land – whether to allow, for example, rock-climbing on Devil’s Tower,306 tour groups and alcohol consumption at Rainbow Bridge,307 flooding of the Tennessee River Valley,308 or the construction of a road through the “High Country”309 – can have devastating affects for indigenous peoples, who hold these lands as sacred.310

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 responsibilities to the land through ceremonies and stewardship. Similar claims can be seen by tribes in relation to Taos Blue Lake, Devils Tower, and others.311 This phenomenon can be seen clearly in the sacred sites arena, where Indians are commonly just one of a whole host of competing user groups -- including natural resource development corporations, recreationalists, and environmental constituencies -- who desire access to natural places.

302 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.” Testimony of Sarah James, We Are the Ones Who Have Everything to Lose, in ARCTIC REFUGE: A CIRCLE OF TESTIMONY 3, 3 (compiled by Hank Lentfer and Carolyn Servid) (2001).

303 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 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.

304 Carpenter, Property Rights, supra note 39, at 1069.

305 Id.

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


308 Sequoyah v. Tennessee Valley Authority, 620 F.2d 1159 (6th Cir. 1980).


310 Carpenter, Property Rights, supra note 39, at 1069.

311 See generally, MCCUTCHEON, supra note 172.
Yet we have demonstrated, American law has, in many respects, failed to recognize Indian property rights, and has even gone so far as to use property law to justify the dispossession of indigenous lands. Moreover, it is difficult to use property language to describe the relationship between indigenous peoples and the earth, because of a reluctance to characterize it by ownership or dominion. As a Jimmie Durham, a Cherokee litigant in a sacred site case explained:

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.

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 ground-breaking indigenous land claims on the international plane by, for example, the Mayans in Belize, the Awas Tingi in Nicaragua, and the Dann Sisters of the Western Shoshone Nation, indigenous groups are increasingly using property law to advance their cultural and human rights, as well as protect their property interests. We believe that, even with its shortcomings, existing

312 Carpenter, Property Rights, supra note 39, at 1066.
316 Dann v. United States, supra note 4, P1.
property theory provides a sufficient foundation to accommodate and vindicate indigenous people’s rights as property holders.

Our argument for reliance on stewardship notions to protect the real cultural property interests of indigenous peoples is both tactical and normative. As Durham’s comment and indigenous peoples’ actual experiences with sacred sites demonstrate, a hallmark of indigenous peoples’ 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, stewardship provides a strategic avenue for Native peoples to obtain interests in property in the absence of title.

Consider, for example, how the Supreme Court’s treatment of Indian religious interests indirectly crafted a stewardship model. The 1988 Supreme Court case of *Lyng v. Northwest Indian Cemetery Protective Association* rejected Indians’ First Amendment religious freedom claims to a sacred site, and, in doing so, authorized the federal government to destroy the site by building a road through it and harvesting timber on it. *Lyng* clearly focused on the primacy of title, and, in doing so, authorized the federal government’s absolute management authority. Yet after the decision, other branches of government have responded differently by actively attempting to accommodate their religious and property interests, and in doing so, fashioned a vibrant notion of stewardship in the process. The American Indian Religious Freedom Act directs that “[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 worship...” The Religious Freedom Restoration Act (RFRA) of 1990 went even further, and attempted to restore First Amendment standards to a pre-*Lyng* state by precluding the government from burdening a person’s religious freedom in the absence of a compelling government interest. In at

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318 For a time, *Lyng’s* legacy—in conjunction with other Supreme Court cases limiting the religious freedom of Native Americans—made Indians’ efforts to protect their sacred places on federal lands seem futile. *See*, e.g., *Employment Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).
321 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.
least in one case, the Act has prohibited the federal government from encroaching on the free exercise rights of adherents to a minority religion. The executive, too, has spoken on this issue. President Clinton issued an Executive Order in 1996 requiring officers on federally managed property to both accommodate access to Indian sacred sites, and to also avoid adversely affecting the physical integrity of those sites.

What Indians have been unable to achieve through litigation (which is arguably based on an ownership based approach to property), they have gained through negotiated agreement-style approaches (signaling stewardship conceptions of property) to land management. Federal land management agencies now “consult” with various user groups, including American Indians, under statutes such as the National Historic Preservation Act and National Environmental Protection Act, in order to develop compromise approaches to land management. Many of the resulting management plans acknowledge 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. Notably, nothing in any of these provisions mandates a shift of title or enables a tribal right to exclude others from the resource. They do, however, expressly recognize the interests of American Indians in the preservation, maintenance, and endurance of sacred indigenous places.

Still, recent cases continue to resemble Lyng by demonstrating a conflict between ownership (as represented by federal interests) and between stewardship (as represented by tribal interests). Yet, in at least one recent, highly visible case, courts have integrated stewardship over ownership concerns in crafting religious accommodations. Consider, for example, the relationship between the Navajo (Dine) and their sacred San Francisco Peaks, discussed previously in PART II. San Francisco Peaks has been described by Navajos as the place “where the Holy Ones emerged to this world. The soil guides our people, it affects how we treat them, it’s how we treat ourselves.”


See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 126 S. Ct. 1211, 1216-17 (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 DEN. U. L. REV. 981, 992-996 (2006).

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).

See Bear Lodge, 175 F.3d 814.
Additionally, the San Francisco Peaks are integral to keeping alive a number of religious ceremonies and an entire ceremonial way of life. Navajo families keep bundles with elements collected from the four sacred mountains and use these in prayers directed toward the Peaks. Some medicine men rely on the purity of these plants for medicinal purposes, and use them in a variety of ceremonies.

A 1868 treaty, negotiated at the Ft. Sumner prison camp, transferred title to the Peaks to the United States, where they are managed by the Forest Service. As a result, the Navajo have struggled to maintain their relationship with the Peaks in the face of numerous activities that have presented deep conflicts to their sacred character. The federal government, for example, permitted the development of a ski resort, stone mining, and most recently, allowed the use of “reclaimed water” (treated waste water, or, put more directly, sewage) in snowmaking. To the Navajo these activities not only desecrate the Peaks as a pure, sacred, living being, they also pollute the medicinal plants, which they gather for ceremonial purposes.

Under Lyng, which adopted a primary value on ownership, the federal government’s power over the land, as titleholder, is virtually unfettered. But the administrative and legislative developments we outlined above partially soften Lyng, and offer a competing view of property management that opts towards a stewardship model instead. This model, most recently, has been adopted by the Ninth Circuit. In the Navajos’ recent challenge to the Forest Service’s management of the Peaks, for example, the court held that, notwithstanding its efforts to consult with affected tribes, the government was still required to show a compelling interest in activities, such as the snowmaking plan, that substantially burden tribal religions. However, the Ninth Circuit granted the government’s petition for rehearing and has not yet

327 In the Navajo creation story, the first woman, Changing Woman, lived on the Peaks and experienced her kinaalda coming-of-age ceremony there, a rite of passage the young Navajo women continue to celebrate to this day. Changing Woman then gave birth to twins who are ancestors of contemporary Navajo people who call the mountain, “mother” and “leader,” reflecting the personal nature of the relationship between the people and the place. Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1035 (9th Cir. 2007). See also PAUL ZOLBROD, DINE BAHADE: THE NAVAJO CREATION STORY 23 (1991) (arguing that references to San Francisco Peaks in Navajo creation story were “proof that it would be sacrilegious” to expand ski facilities).

328 Navajo Nation, 479 F.3d at 1035-36.

329 Id.

330 Id. at 1036.

331 Navajo Nation v. U.S. Forest Serv., 408 F. Supp. 2d 866, 871 (D. Ariz. 2006), rev’d 479 F.3d 1024 (9th Cir. 2007).

332 Id.
issued a new decision, leaving the question of whether the government’s ownership immunizes sacred site destruction unclear.333

Time, of course (and the outcome of the en banc Ninth Circuit decision) will show whether or not the stewardship model retains its vibrancy. And our analysis is not meant to suggest, of course, that stewardship precludes ownership. There are cases where ownership is not only warranted, but it is necessary and justified. In those circumstances, gaining title to real property may be the only way for indigenous peoples to protect their interests. Though a theory of stewardship contemplates and accommodates many land management approaches beyond ownership, when ownership is necessary, it is more than supported and advanced by a stewardship model of property.

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 regards we believe 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 reflect a shift in title, but rather illuminate the myriad number of ways in which property law has reconciled the interests of owners and non-owners. It captures, for example, the 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 theory is deeply grounded in 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, then, stewardship becomes necessary.

Admittedly, our theory depends heavily on understanding property outside of an 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 indigenous peoples themselves, sometimes requires the protections that only title can give. In other words, in some cases, ownership is necessary to protect the vital cultural resources of a community. In such cases indigenous peoples may have ongoing moral or legal claims to actual ownership that they

333 See Navajo Nation v. U.S. Forest Serv., 506 F.3d 717, 718 (Oct. 17, 2007) (granting rehearing en banc). This case raises the question of whether RFRA applies on the public lands, a question that the Supreme Court has not yet addressed.
will not and should not relinquish. Moreover, we see great potential, in 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 has the potential to reflect the best of our democratic and pluralist traditions.

Let us 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 had been aware of the story, by this point, NAGPRA had been passed, and, given the different 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, now decided to atone for its behavior. Embarrassed by the publicity surrounding Minik’s story, the Museum quietly agreed to return 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 QAANAAMUT, or “They have come home.”*334

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334 See Harper, supra note 18, at 228.