

BEFORE *MINE!*: INDIGENOUS PROPERTY RIGHTS FOR JAGENAGENON

MINE!: HOW THE HIDDEN RULES OF OWNERSHIP CONTROL OUR LIVES. By Michael Heller and James Salzman. New York, N.Y.: Doubleday. 2021. Pp. 322. \$17.00.

*Reviewed by Angela R. Riley**

INTRODUCTION

Many of our most basic rights and fundamental freedoms — securing bodily autonomy, patenting inventions, maintaining authority over who (and what) can live inside our homes — are shaped by property law. In a new book by Professors Michael Heller and James Salzman, *Mine! How the Hidden Rules of Ownership Control Our Lives*, the authors set out to show that property is, in fact, everywhere.

Even a cursory review of civil dockets — a good starting place for lawyers and law students to get a snapshot of the state of the legal landscape — reveals that courts across the country, including the Supreme Court, are consistently presented with an unending bevy of cases centered on property disputes.¹ These conflicts help shape the laws that define and refine the metes and bounds of what can be owned, by whom, and pursuant to what limitations (if any) under American law. *Mine!* astutely takes the reader from commonly held and seemingly facile understandings about property — *of course, it is my choice as to whether to have a cat in the home that I own!* — through a labyrinthine set of laws and policies that complicate the notion of ownership in America today. Page by page, the book unravels a central truism: America is a country replete with laws governing property and, concomitantly, we are a society filled with owners (and, increasingly but not evenly, nonowners). Virtually everything, including the space between the back of your airplane seat and the tips of the passenger’s knees behind you, can be “owned,” at least insofar as individuals stake a claim to it that they expect to be enforced in their favor.

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¹ See, e.g., *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 36–52 (2d Cir. 2021), *cert. granted*, 142 S. Ct. 1412 (2022) (contemplating scope of copyright protection under the Copyright Act); *Sackett v. EPA*, 566 U.S. 120, 125–31 (2012) (considering whether the federal government can extend its regulatory authority under the Clean Water Act to wetlands owned by private property owners).

Heller and Salzman are exceedingly well situated to write this book. Both law professors, at Columbia University and the University of California, Los Angeles (UCLA), respectively, the authors are experts in the field of property. Heller has explored contemporary property laws and considered their impacts on society in an earlier book, *The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives*.² Salzman has taken a deep dive into the ownership of life's most basic resource in *Drinking Water: A History*.³ And both are nationally renowned property law scholars.

My primary objective in this Review is to use *Mine!* as a jumping-off point to introduce and then contrast its central tenets with an Indigenous property perspective.⁴ In doing so, I seek both to show how the property rules articulated in *Mine!* have historically been used and misused to justify the mass dispossession of Indigenous lands in the United States and, further, to demonstrate how the underpinning of those property theories stands in sharp relief to property systems found in many Indigenous communities.

Thus, taking the book as inspiration, I begin Part I by discussing *Mine!* and highlighting its many contributions to the property literature. Building on Part I, the next Part takes a decided pivot, delving into the ways in which property dispossession and the legal rules that justified it have had devastating — and continuing — impacts on Native peoples in the United States. Part II further highlights three contemporary property disputes that threaten the ongoing cultural existence of Indigenous Peoples. Part III then turns to the future of Indigenous property rights. It details numerous ways in which Native people in the United States are attempting to reclaim lands, religious practices, and resources that were lost pursuant to property regimes — many at the core of *Mine!* — that justified and advanced dispossession. The Review concludes with a discussion of international human and Indigenous rights law, and it explores ways in which we may conceive of property in more just ways in the future.

I.

As a fellow property professor,⁵ I found *Mine!* a delightful and provocative read. It covers some of the seminal cases in the American legal canon, many of which will be familiar to most U.S.-trained lawyers and

² MICHAEL HELLER, *THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES* (2008).

³ JAMES SALZMAN, *DRINKING WATER: A HISTORY* (2012).

⁴ When referring to the Indigenous Peoples of the United States, this Review uses the terms “Native American,” “American Indian,” “Indigenous,” “Native,” and “Indian” interchangeably.

⁵ I have taught first-year Property Law at the UCLA School of Law for over a decade.

law students.⁶ From *Pierson v. Post*⁷ (who can assert a property right in a wild fox?) (pp. 27–29) to *Moore v. Regents of the University of California*⁸ (who owns cells once they are removed from the human body?) (pp. 180–87), the book is a stellar companion to a first-year property course and an intriguing foray into property theory for the inquisitive nonlawyer. With humor and a compelling, narrative style, the book succeeds in demonstrating how property law impacts virtually every facet of our lives. Using deft storytelling to offer little-known background behind several pivotal cases, the authors paint a complex and detailed picture of some of the most defining — and befuddling — disputes in Anglo-American property law today.

Much of the patchwork of legal rules and property puzzles described in *Mine!* has a rather straightforward origin. The complexity arises, not so much because of incomprehensible and mind-bending irregularities, but as a result of constitutional federalism. That is, outside of a few areas where the federal government has either constitutional authority or a duty to define or defend property rights (such as the Constitution's Takings Clause⁹ or Intellectual Property Clause¹⁰), most property law in the United States is established at the state level. The resulting system of competing rules, then, is oftentimes merely a reflection of states asserting — ostensibly through their own democratic processes — what is property, how it should be protected (if at all), and who should benefit.

Using this state-level comparative approach allows the authors to show how a right to property in State *A* may be only partially protected in State *M* and entirely absent from the laws of State *Z*. The authors select provocative topics to illustrate the diversity of property rules, frequently focusing on areas that many Americans might think of as well settled (see above regarding pet ownership, for example), but that are anything but. This approach allows *Mine!* to delve into questions such as: Why is it that in California you can sell your eggs (p. 168), but not your kidneys (pp. 173–77)? Or legally sell your bone marrow in Montana, while the practice is illegal in neighboring Wyoming (p. 163)? Or, if you can rent your womb for surrogacy in Illinois, why can't you do the same when you cross state lines into Michigan (p. 163)? The variation in such property laws from state to state has no simple answer. As the authors point out, these differences are rarely explained by religion, race, or geographic coordinates (p. 163). But, through historical

⁶ In one review of the book, a reviewer bemoaned having attended law school instead of having the option of just reading books like *Mine!*. Canon, Comment to *Mine!: How the Hidden Rules of Ownership Control Our Lives*, GOODREADS (Nov. 29, 2021), <https://www.goodreads.com/en/book/show/54226795-mine> [<https://perma.cc/LG7L-E8FG>] (“This is one of several books that I sometimes think, rather glumly, I could’ve just read instead of going to law school . . .”).

⁷ 3 Cai. 175 (N.Y. Sup. Ct. 1805).

⁸ 793 P.2d 479 (Cal. 1990).

⁹ U.S. CONST. amend. V.

¹⁰ *Id.* art. I, § 8, cl. 8.

analysis and pithy, firsthand accounts, *Mine!* shows how and why the patchwork of ownership laws operates in the United States today and how it impacts our lives, oftentimes in surprising and novel ways.

The tool of multistate comparison allows the authors to highlight other core legal concepts that help to explain not only heterogeneity in property laws but also how legal entitlements are set, adjusted, or destroyed in the lawmaking process. Of these, the most useful tool the authors employ is the concept of the “dimmer switch” (pp. 173–79). That is, they contend that rather than looking at property rights through a harsh on-off lens — for example, you either have the absolute right to commodify your body parts or you have no such rights at all — we should understand property rights as situated on a continuum. In other words, rights can be relative and nuanced, and more or less robust, depending on their positioning along the dimmer-switch continuum. Society may then choose to push the dimmer up or down to achieve optimal results. The authors show how this approach can produce more efficient and just outcomes across a range of topics (pp. 173–200).

In the opening pages, the authors use a relatable property dispute to illustrate the difficulty in setting legal rules and placing initial entitlements: Who owns the triangle of space between a seated passenger on an airplane and the knees of the passenger behind him (pp. 2–7)? The authors contend there is not one clear rule of ownership to solve these types of disputes. Rather, there are competing stories of ownership (pp. 14–15), and the role of law is to set the baseline entitlement to achieve the desired result.

But where is the baseline entitlement set, and how is it determined? In answering this question, the authors explicate six foundational property axioms that serve as the basis for establishing initial entitlements. They are a combination of commonsense notions about property — that is, familiar property maxims that largely go unquestioned — and concepts deeply rooted in Anglo-American property theory. They are as follows:

First, *first come, first served* (pp. 21–42). Pursuant to this theory, property rights are allocated according to who was there first (p. 24). Its approach is straightforward: it preferences those with temporal primacy. But, as discussed more fully in Part II, the authors freely concede the concept falls apart quickly when the application of the rule does not comport with the Anglo-American worldview of ownership or the interests of those setting the initial entitlement (pp. 40–42).

Second, *possession is nine-tenths of the law* (pp. 43–79). Possession is a popular and commonly used property concept, and it is quite simple. I have it; therefore, it is mine (p. 47). If you want it, you must demonstrate somehow that it is not mine. Here, the authors trouble the idea of “possession,” and they demonstrate that it is a more complex property concept than one might conceive initially (pp. 57–79).

Third, *you reap what you sow* (pp. 80–119). Based on the writings of theorist and philosopher John Locke,¹¹ this is also known as the “sweat of the brow” theory of property. That is, property entitlements are allocated to those who mix their labor with property to produce an ownership right (p. 82).

Fourth, *my home is my castle* (pp. 120–60). Pursuant to this ideology, something is yours because it is attached to something else that is yours (p. 121). You own what is buried in your backyard, for example, because it is connected to the home you own (pp. 126–28).

Fifth, *our bodies, ourselves* (pp. 161–200). Bodily autonomy is central to civil and human rights. Based on this theory, what is attached to your body — blood, sperm, kidneys, and so forth — belongs to you (p. 164). However, as discussed more below, as with the primacy theory, the authors acknowledge the enormous deficit in U.S. law with regard to bodily autonomy: namely, centuries of chattel slavery that stand as a stain on American property law (pp. 164–65).

And, finally, *the meek shall inherit the earth* (pp. 201–39). Here the authors discuss the deeply ingrained idea of familial property, or the laws of inheritance. Put simply, if something belongs to your family, it therefore belongs to you. This reflects the view that one has an entitlement to property that passes through the bloodline from one family member to subsequent owners (p. 201).

Mine! ultimately mirrors, somewhat self-consciously, a distinctive American view of property law, one that is predominantly driven by individual interests. Although many ownership forms in the United States involve multiple owners — such as shareholders, condominium associations, and corporations, among others — the structures are developed, maintained, and defined by laws and legal rules that still necessarily focus on individual rights, allocating benefits to defined owners (pp. 12–13). Collective ownership rights, to the extent they appear in U.S. law, are formations created by legal structures and systems, rather than fluid, malleable understandings of group or collective rights.¹²

American property laws reflect American culture and society, which the book’s authors illustrate even in their choice of title, *Mine!*. What resonated most with me when reading the book was the extent to which the legal regime described felt so uniquely American.¹³ The authors describe a system that is designed to serve a fiercely individualistic

¹¹ See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 285–302 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

¹² See Barry A. Stein, *Collective Ownership, Property Rights, and Control of the Corporation*, 10 J. ECON. ISSUES 298, 303 (1976); see also Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL’Y REV. 191, 210 n.6 (2001).

¹³ Although, to be sure, the United States shares many commonalities with other countries, particularly those in the British tradition. See generally A.W.B. SIMPSON, A HISTORY OF THE LAND LAW (2d ed. 1986).

culture, one that has its roots in a particular worldview that situates man at the top of the hierarchy of all living things.¹⁴ The fact is, America is one of the most (if not the most) individualistic countries in the world. The renowned Dutch psychologist Geert Hofstede created a six-factor test to chart various aspects of cultures around the world.¹⁵ On Hofstede's 6-D Model of National Culture, rabid individualism is one of the most defining characteristics of American culture, making the United States a true global outlier.¹⁶ This has many consequences for American society, good and bad. But, certainly, individualism is a key feature of our private property system. Even group ownership is tightly circumscribed and ultimately highly individualistic in terms of rights and remedies.¹⁷

Mine! situates itself around these baseline principles. It does not question or trouble the consequences of such extreme individualism but takes it as a given when explaining — rather agnostically — the way property law works to define so much of life in the United States today. To be fair, the authors did not set out to write a critique of American property law.¹⁸ For the most part, *Mine!* is not particularly normative in its approach and the authors take the law as they find it. Though the authors reflect slight preferences on occasion — kidney sales, for example (pp. 161–62) — for the most part, they adhere rather firmly to a strategy of merely unpacking current legal rules and explaining how they impact our lives.

However, there are (at least) two fundamental — and quite uncomfortable — property truths that underlie the entire system of property in America, neither of which can simply be ignored, and which the authors address and acknowledge, if briefly. Quite plainly, colonizers stole the continent from Indigenous Peoples, ignoring virtually any property theory that would dictate a different result, and they used similar tactics to justify enslaving Black people to create enormous wealth for whites through free labor. *Mine!* addresses these issues throughout

¹⁴ See Raymond R. Coletta, *The Measuring Stick of Regulatory Takings: A Biological and Cultural Analysis*, 1 U. PA. J. CONST. L. 20, 69–74 (1998). A biblical parable starts off the book (p. 1), and biblical references are employed throughout (pp. 24, 83, 210).

¹⁵ *The 6-D Model of National Culture*, GEERT HOFSTEDE, <https://geerthofstede.com/culture-geert-hofstede-gert-jan-hofstede/6d-model-of-national-culture> [https://perma.cc/VP6G-S6J7]. Hofstede's work, of course, is not without its critics. See, e.g., Barry Gerhart & Meiyu Fang, *National Culture and Human Resources Management: Assumptions and Evidence*, 16 INT'L J. HUM. RES. MGMT. 971, 977 (2005) (arguing that Hofstede's work does not explain individual-level behavior or actions).

¹⁶ See *The 6-D Model of National Culture*, *supra* note 15; see also Stephen J. Dubner, *The Pros and Cons of America's (Extreme) Individualism*, FREAKONOMICS RADIO NETWORK, at 13:12–13:40 (July 21, 2021), <https://freakonomics.com/podcast/the-pros-and-cons-of-americas-extreme-individualism-ep-470-2> [https://perma.cc/8MM5-8GD9].

¹⁷ See Stein, *supra* note 12, at 303–04.

¹⁸ The authors do, however, pay attention to Indigenous dispossession, discussing *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) (pp. 24–25, 39, 83–84), removal policies (p. 55), and land fractionalization (pp. 208–10, 212).

the book to varying degrees, though they are not a core feature of the book's message.

Mine!'s largely uncritical presentation of Anglo-American property law inspired me to examine just how different Indigenous property systems are by contrast. It further motivated me to consider the enormous consequences that the collision of these competing worldviews continues to have on Indigenous Peoples. To that end, this Review uses *Mine!* as a jumping-off point to discuss the ways in which Indigenous property systems differ from those of mainstream American law. After all, there are 574 federally recognized Indian tribes and Alaskan Native villages in the United States, which control around sixty million acres of land in the lower forty-eight.¹⁹ Numerous conflicts around property continue to arise, as Indigenous Peoples attempt to stave off further encroachment of their lands and resources.²⁰ But the principles underlying these relationships to land and personal property predate Anglo-American societies. Thus, this Review does not pick up where *Mine!* leaves off; rather, it serves as a prequel of a sort, offering insights based on Indigenous property formations that far predate the concepts discussed in *Mine!* and then drawing a through line to contemporary life and to future generations.

So, how are Indigenous conceptions of property so different from those embedded in the Anglo-American worldview and, relatedly, what consequences do these differences have for contemporary rights and remedies? Here, I make three key points in contrasting Indigenous property systems with Anglo-American law. First, Indigenous cultures are as exceptionally collectivist as American culture is individualistic. This sets up a curious and challenging binary for Indian nations situated within the boundaries of the United States. Second, Indigenous Peoples' property conceptions are not identical to those found in Western legal systems. For example, in Indigenous property systems, the earth is imbued with sacred elements that are entirely nonfungible, a fact that stands in stark contrast to the "everything has a price" view contained in *Mine!* Finally, Indigenous property conceptions reflect Indigenous belief systems, which are rooted in the divine interconnectedness of all things in the universe. This concept is referred to in Potawatomi as "Jagenagenon" ("for all my relations," literally) and is similarly captured in Indigenous theologies across the continent and the globe.

¹⁹ U.S. Dep't of the Interior, *About Us*, INDIAN AFFS., <https://www.bia.gov/about-us> [<https://perma.cc/HUS3-FKVV>].

²⁰ Debra Utacia Krol, *How Legal and Cultural Barriers Keep Indigenous People from Protecting Sacred Spaces off Tribal Land*, USA TODAY (Nov. 24, 2021, 3:03 PM), <https://www.usatoday.com/in-depth/news/nation/2021/08/17/indigenous-people-legal-barriers-protect-sacred-spaces/8152992002> [<https://perma.cc/W9NS-V5L8>]; see also, e.g., *Apache Stronghold v. United States*, 38 F.4th 742 (9th Cir. 2022).

A. Indigenous Property Systems Are Uniquely Collectivist

Returning to the Hofstede scale for a moment, Professor Gert Jan Hofstede, son and collaborator of Geert Hofstede, observes that America is characterized by extreme individualism. Hofstede contrasts this with “Amer-Indian” or Indigenous cultures, which he describes as situated on the opposite end of the spectrum.²¹ According to the Hofstede scale, Indigenous Peoples maintain cultures that are far more collectivist and communitarian than Western cultures. The type of rabid individualism that is at the heart of the property disputes set forth in *Mine!* is anathema to many Indigenous worldviews. This is in part because property itself — particularly land — is oftentimes believed to be nonfungible in Indigenous communities.²²

I don’t mean to suggest that tribal cultures in the United States today do not include aspects of individualism. Of course, they do. Many Indigenous scholars, like Dean Stacy Leeds, have written about private property rights in Native communities.²³ And the misconception that Native people did not or could not understand property rights was historically used as a justification for mass removal and dispossession of Native people.²⁴

Nevertheless, while there is great variation among and between Indian tribes, many Indigenous cultures remain largely communitarian, with complex obligations to care for others across families, villages, clans, and tribes. In fact, the communitarian aspects of Indigenous cultures in the United States were found to be so threatening that they were often used as a basis for denying Indians essential rights. For example, the United States criminalized Indian religious practices, such as the Potlatch ceremony, because by celebrating those with bountiful resources who gave away their possessions, tribes eschewed a commitment to acquire and selfishly guard personal property.²⁵ The allotment acts were “mighty pulverizing engine[s]” to destroy communal land bases and make Indians more individualistic and less “tribal.”²⁶ Congress terminated more than a hundred tribes in the 1950s at the height of the Cold War because Indian collectivism was viewed as being too closely aligned

²¹ Dubner, *supra* note 16.

²² See Kristen A. Carpenter & Angela R. Riley, *Privatizing the Reservation?*, 71 STAN. L. REV. 791, 802–04 (2019).

²³ See, e.g., Stacy L. Leeds, *The Burning of Blackacre: A Step Toward Reclaiming Tribal Property Law*, 10 KAN. J.L. & PUB. POL’Y 491, 492 (2000).

²⁴ See, e.g., *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 590 (1823).

²⁵ See, e.g., MICHAEL D. MCNALLY, *DEFEND THE SACRED* 40–45 (2020); Kristen A. Carpenter, *Living the Sacred: Indigenous Peoples and Religious Freedom*, 134 HARV. L. REV. 2103, 2116 (2021) (book review).

²⁶ See Theodore Roosevelt, Annual Message of the President Transmitted to Congress (Dec. 3, 1901), in 10 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1902, at 417, 450 (James D. Richardson ed., 1902).

with communism.²⁷ And the list goes on. Historically, U.S. law not only failed to respect the collectivist worldviews of Indigenous Peoples, but virtually since inception it has also been hellbent on destroying any and all communal beliefs that are integral to indigeneity.

B. Sacred Property Is Nonfungible

A second feature of Indigenous worldviews is the way in which Indigenous Peoples conceive of themselves in relation to the earth and all other living things.²⁸ Indigenous Peoples oftentimes maintain deeply constitutive relationships with the natural world, characterized by reciprocity and spirituality.²⁹ From this perspective, the earth and its resources are not merely there to be “extracted and exploited” but are to be “nurtured” and stewarded “as a living relative.”³⁰ As one Gwich’in chief put it: “We believe in the wild earth, because it’s the religion we’re born with.”³¹

I do not mean to suggest that Indigenous Peoples are monolithic or homogenous in their cultural views or experiences. With hundreds of tribes in the United States alone, and millions of Indigenous Peoples around the world, there is enormous diversity among and between Indigenous groups. Nevertheless, in my experience as a tribal member who has lived in Indian country and has worked with Indigenous Peoples from across the globe, there is a shared culture and belief system in Indigenous communities that holds the earth and all living things as sacred. This manifests in numerous ways, but with regard to property law, it has several consequences. First, Indian religions are land-based and rely on the natural world — and specific places of real power — for their continued vitality. Tribes’ creation stories root them in this continent, Turtle Island,³² marking their places of creation. This is in sharp contrast to Western religions, which are often siloed off from day-to-day

²⁷ See Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299, 345 (2002).

²⁸ Cf. Rebecca Tsosie, *Tribal Data Governance and Informational Privacy: Constructing “Indigenous Data Sovereignty,”* 80 MONT. L. REV. 229, 236 (2019) (“[T]ribal customary law frequently reflects different rules than western intellectual property-rights systems, such as copyright and patent.”).

²⁹ See Carpenter & Riley, *supra* note 22, at 807.

³⁰ *Id.* at 853. The relationship of Indian tribes to property is also complex and should not be oversimplified. For example, some tribes use tribal law to set forth which lands and resources are sacred, versus those that may be used for housing or development. See, e.g., *id.* at 854–55; EZRA ROSSER, *A NATION WITHIN: NAVAJO LAND AND ECONOMIC DEVELOPMENT* 141 (2021). Further, because colonization forced the removal of so many tribes, some Indian nations are situated not on their aboriginal lands but in places where they are relative newcomers, such as my own tribe, which was removed to a reservation in Oklahoma in the late 1800s. See R. DAVID EDMUNDS, *THE POTAWATOMIS: KEEPERS OF THE FIRE* 275 (1978).

³¹ ARCTIC REFUGE: A CIRCLE OF TESTIMONY (comp. by Hank Lentfer & Carolyn Servid, 2001) (epigraph) (statement of Trimble Gilbert, Chief of Arctic Village).

³² See DUANE CHAMPAGNE, *NOTES FROM THE CENTER OF TURTLE ISLAND* viii–ix (2010).

life, centered around man-made institutions (churches, temples, and others) that are not integral to the belief system itself.³³ In this worldview, everything, including property, has a price. Even the Constitution's Takings Clause exemplifies this view. The power of eminent domain possessed by the sovereign exists hand in hand with a core belief that all property, ultimately, is fungible and its loss can be adequately compensated for with money.³⁴

But for Indigenous Peoples, as discussed more fully in Part II, holy land is nonfungible. Money simply cannot make up for these losses, which go far beyond the destruction of a patch of grass or a pile of dirt. The relationship of Indigenous Peoples to the earth and, concomitantly, to their spiritual commitments is another area where Indigenous and Western worldviews collide.

C. *Jagenagenon: Everything Is Connected*

Finally, in many Indigenous cultures, tribes' spiritual beliefs do not afford two-leggeds (humans) dominion over animals and all other living things on the planet (including the planet itself), as contrasted with Western religion and philosophy. To the contrary, Indigenous cosmologies place humans in relation to all other living things, viewing everything in the universe as intricately connected. Thus, rather than a focus on individual ownership, the worldview is often understood as a commitment to connection and mutual symbiosis. In fact, most Indigenous languages have a word or phrase to capture this concept. In my own tribe's language (Potawatomi), this word is "Jagenagenon," which, translated into English, means, "for all my relations." In Lakota, it is spoken as "Mitákuye Oyás'ıñ," and in Cherokee, the phrase is "Nigada gusdidadadvhni."³⁵ You will find similar concepts in other Indigenous languages all across Indian country.

The sentiment is probably most famously conveyed in a quote that is (likely incorrectly³⁶) attributed to Chief Seattle, which now appears

³³ Many Indigenous Peoples, most of whom have a land-based culture, commonly share a deep sense of respect for and spiritual connection with the earth. See Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 274 (1996) ("A central feature of many indigenous world views is found in the spiritual relationship that Native American peoples appear to have with the environment."). Compare this view with the one described in William Blackstone's *Commentaries on the Laws of England*, where Blackstone asserted that "[t]he earth . . . , and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator." 2 WILLIAM BLACKSTONE, COMMENTARIES *3.

³⁴ Some states have recognized that not all property is valued by the market in pure terms, allowing for, for example, increased payments if the property taken is the family homestead. JOSEPH WILLIAM SINGER ET AL., PROPERTY LAW: RULES, POLICIES, AND PRACTICES 1147 (8th ed. 2022).

³⁵ See, e.g., THOMAS CONSTANTINE MAROUKIS, PEYOTE AND THE YANKTON SIOUX: THE LIFE AND TIMES OF SAM NECKLACE 160 (2004).

³⁶ See Denise Low, *Contemporary Reinvention of Chief Seattle: Variant Texts of Chief Seattle's 1854 Speech*, 19 AM. INDIAN Q. 407, 407 (1995).

on inspirational journals, memes, and posters in college dorms across the United States: “Humankind has not woven the web of life. We are but one thread within it. Whatever we do to the web, we do to ourselves. All things are bound together.”³⁷

Indigenous cosmologies are backed by science. Consider Professor Carl Sagan’s famous quote: “[T]he cosmos is . . . within us. We’re made of star-stuff. We are a way for the cosmos to know itself.”³⁸ And, as Professor Alan Lightman, Massachusetts Institute of Technology physicist, wrote recently in his *Atlantic* article *The Transcendent Brain*, as humans “we . . . have spent more than 99 percent of our 2-million-year history living outdoors,” such that a “connection to nature” and to the cosmos should be unsurprising.³⁹ From an evolutionary perspective, for most of human history, belonging to a group and to something larger than the self was likely essential for survival.⁴⁰

When Indigenous Peoples say that everything is connected, that we are literally linked to our ancestors before us and to the seven generations that will come after us, such ideas have oftentimes been dismissed as primitive, superstitious, or fanciful.⁴¹ But this is a place where Indigenous knowledge has led Western knowledge. As Lightman asserts — consistent with Sagan’s contentions — we are made of stardust, and “[i]f you could tag each of the atoms in your body and follow them backwards in time . . . , you could trace each of your atoms, those exact atoms, to *particular* massive stars in our galaxy’s past.”⁴² This leads Lightman to a very *Indigenous* conclusion: “So, we are literally connected to the stars, and we are literally connected to future generations of people. In this way, even in a material universe, we are connected to all things future and past.”⁴³

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Though I have established the sharp contrast between Western and Indigenous views of property and also shown potential points of intersection, questions remain. In the following Part, I discuss how Western property systems were employed to justify denying Indigenous Peoples’

³⁷ See, e.g., *Quotable Quote: Chief Seattle*, GOODREADS, <https://www.goodreads.com/quotes/7362241-humankind-has-not-woven-the-web-of-life-we-are> [<https://perma.cc/GZ5V-XGNH>] (listing one such reproduction of the quotation).

³⁸ *Cosmos: The Shores of the Cosmic Ocean* (PBS television broadcast Sept. 28, 1980).

³⁹ Alan Lightman, *The Transcendent Brain*, THE ATLANTIC (Dec. 5, 2022), <https://www.theatlantic.com/science/archive/2022/12/how-the-human-brain-is-wired-for-beauty/672291> [<https://perma.cc/5GQL-JHQ2>].

⁴⁰ *Id.*

⁴¹ George Nicholas, *When Scientists “Discover” What Indigenous People Have Known for Centuries*, SMITHSONIAN MAG. (Feb. 21, 2018), <https://www.smithsonianmag.com/science-nature/why-science-takes-so-long-catch-up-traditional-knowledge-180968216> [<https://perma.cc/YRA9-XDSF>].

⁴² Lightman, *supra* note 39.

⁴³ *Id.*

property rights and, further, to destroy Indigenous lifeways altogether where they were too far afield from the American model. Additionally, I offer three contemporary examples of places where continued disputes over property threaten Indigenous Peoples' continued cultural existence.

II.

In this Part, this Review pivots significantly, delving into the ways in which property dispossession and the legal rules that justified it have had devastating — and continuing — impacts on Native people in the United States. After giving a brief overview of historical dispossession, this Part then highlights three contemporary property disputes that threaten the ongoing existence of Indigenous Peoples as such.

The property theories set forth in *Mine!* did very little to protect the rights of the continent's original Indigenous owners. That history has been well trodden, and this Review will not cover all that terrain again. But there are a few key points worth revisiting.

At the point of contact with Europeans, there were hundreds of Indigenous nations on Turtle Island, organized around unique cultures, traditions, beliefs, and languages.⁴⁴ From the beginning, the colonizing powers — and, subsequently, the United States — treated Indian nations as sovereign governments, with whom the United States established nation-to-nation relationships.⁴⁵ Given tribes' sovereign status, United States policy from very early on reflected the practical reality that it was more efficient to enter into treaties with Indian nations than to go to war with them. Therefore, as pressure for lands increased, the United States made hundreds of treaties with Indian nations,⁴⁶ the purpose of which was to secure Native lands, oftentimes with an exchange of peace, protection from settlers, and the United States' earnest promise that Indian tribes would be free to continue to live apart from white society in a state of "measured separatism."⁴⁷ Tragically, of course, many of these treaties were broken, some within minutes of being signed. And Congress ended treaty-making with tribes altogether in 1871.⁴⁸ Nevertheless, despite issues of coercion, duress, and others, the treaties

⁴⁴ Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 869 (2016).

⁴⁵ See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832), *abrogated by Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022) ("The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union.")

⁴⁶ *Indian Treaties and the Removal Act of 1830*, U.S. DEP'T STATE., OFF. HISTORIAN, <https://history.state.gov/milestones/1830-1860/indian-treaties> [https://perma.cc/V46S-DTU2].

⁴⁷ CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 14 (1987).

⁴⁸ Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71); see also WILKINSON, *supra* note 47, at 19 ("Congress's decision in 1871 to bring treaty making with tribes to an end signaled a downgrading in the political status of tribes.")

represent solemn promises that bind both the United States and the Indian tribes, and they endure until this day.⁴⁹

Despite property theories — such as first in time, among others — that would seemingly dictate protection of Indigenous Peoples' property rights, Anglo-American property law utterly failed to ensure Native land rights. In fact, as the authors discuss in *Mine!*, the dispossession of the continent was largely legitimized and given a lasting legal rationale when the Supreme Court applied the doctrine of discovery to justify the taking of Indian lands in *Johnson v. M'Intosh*⁵⁰ in 1823 (pp. 24–25).⁵¹

In *Johnson*, two landowners with purportedly overlapping tracts of land brought an action to “quiet title”; that is, to have the Court provide a definitive determination as to which party was the proper owner. What made this an infamous “Indian law” case — the first of the “Marshall trilogy” — is that Johnson had purchased the land from the chiefs of the Illinois and Piankeshaw Indians, whereas M'Intosh had received title from the United States.⁵² The stakes could not have been higher. Land speculators purchased massive tracts of land from the tribes in the late eighteenth century.⁵³ They did so in violation of the Royal Proclamation of 1763, which forbade the purchase of Indian land from the tribes by anyone except the federal sovereign.⁵⁴ The speculators were betting that the Proclamation would not be enforced and that the land purchases would become lawful in the future.⁵⁵

The motivation for the Proclamation was tripart.⁵⁶ In the early years, the federal government did not want either states of the Union (like Georgia) or foreign nations to buy up land from the tribes and present an obstacle to the formation of the United States or challenge the nascent central government.⁵⁷ Additionally, there were genuine concerns that the tribes were being taken advantage of in the sale of their lands, so federal law also purported to protect them from unscrupulous purchasers.⁵⁸ But most of all, perhaps, the United States wanted a good

⁴⁹ Robert A. Williams, Jr., “*The People of the States Where They Are Found Are Often Their Deadliest Enemies*”: *The Indian Side of the Story of Indian Rights and Federalism*, 38 ARIZ. L. REV. 981, 995–96 (1996).

⁵⁰ 21 U.S. (8 Wheat.) 543 (1823).

⁵¹ The Vatican recently repudiated the doctrine of discovery. See Elisabetta Povoledo, *Vatican Repudiates “Doctrine of Discovery,” Used as Justification for Colonization*, N.Y. TIMES (Mar. 30, 2023), <https://www.nytimes.com/2023/03/30/world/europe/vatican-repudiates-doctrine-of-discovery-colonization.html> [<https://perma.cc/E2ME-J5BL>].

⁵² See *Johnson*, 21 U.S. (8 Wheat.) at 560, 562, 572.

⁵³ STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER 85 (2005).

⁵⁴ *Id.* at 88.

⁵⁵ See *id.* at 92–93.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See *id.* at 87, 94.

price for the lands.⁵⁹ If the United States had a monopoly on purchase of Indian lands, the price would be artificially depressed to the benefit of the federal sovereign.⁶⁰ Despite the myth that many Americans believe today — that Indian lands were simply stolen after Indians were killed or driven away — as Felix Cohen emphasized in his career advocating for tribes, most Indian lands were passed from tribal to federal hands through the enactment of treaties (or treaty substitutes after 1871).⁶¹ Though flawed, steeped in racism and paternalism, and often entered into under duress, the treaties nevertheless set the stage for government-to-government relations between the United States and the Indian tribes.⁶² They also manifested a commitment — though haphazardly and insufficiently adhered to — to compensate Native people for the loss of land and resources.⁶³

As *Mine!* recounts, the Court in *Johnson* could have recognized Indian property rights on a variety of theories, most relevant being the first-in-time approach (p. 25). After all, there was no doubt that Indian nations occupied all of the continent at the time that Europeans arrived.⁶⁴ The Court created the legal fiction of “occupancy” as opposed to “ownership” in order to make the counterintuitive claim that Europeans had, in fact, “discovered” the land.⁶⁵ The Court denied tribes’ first-in-time rights, despite the obvious existence of hundreds of well-established Indian nations that already possessed the same lands.⁶⁶

There are other property theories that similarly would have dictated a result in favor of the tribal nations. Recall the writings of John Locke and the “sweat of the brow” theory for establishing property rights discussed extensively in *Mine!* (pp. 82–86). Yet Locke famously wrote: “[I]n the beginning all the World was *America*.”⁶⁷ In other words, America was uninhabited because the “character” of the primitive and “savage” people who lived there was so inapposite to that of white, Christian colonizers, the tribes could not possibly perfect property rights in their lands.

In reality, however, as the historical record demonstrates, many tribes had already developed sedentary, agricultural-based ways of living

⁵⁹ See *id.* at 89.

⁶⁰ See *id.*

⁶¹ WILKINSON, *supra* note 47, at 8, 14–15, 213 n.119 (discussing treaty substitutes utilized after 1871).

⁶² See BANNER, *supra* note 53, at 212; Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 695 (2003).

⁶³ See Nell Jessup Newton, *Compensation, Reparations, & Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453, 464 (1994).

⁶⁴ See *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 534, 592 (1823). This is contrasted to systems, such as Australia’s, that used a *terra nullius* approach that depended on a belief that the land was actually empty and there were no people present when Europeans arrived. See David Ritter, *The Rejection of Terra Nullius in Mabo: A Critical Analysis*, 18 SYDNEY L. REV. 5, 5, 7–8 (1996).

⁶⁵ *Johnson*, 21 U.S. (8 Wheat.) at 574, 588, 592.

⁶⁶ *Id.*

⁶⁷ LOCKE, *supra* note 11, at 301.

and systems of governance by the time the case arose. Though there were certainly nomadic tribes in 1823, there were also numerous tribes that were situated in complex village systems, engaging in livestock management and agriculture, well before the Court decided *Johnson*.⁶⁸ But the Court framed all tribes as wandering “savages” in order to further distance its ruling from any property theory that would dictate an alternate outcome.⁶⁹ Chief Justice Marshall virtually conceded the point by rejecting an appeal to “abstract principles”⁷⁰ and focusing, instead, on the “actual state of things.”⁷¹ After all, as Chief Justice Marshall stated, “[c]onquest gives a title which the Courts of the conqueror cannot deny”⁷² The Court’s decision reads like a *fait accompli*.

Ultimately, then, the Court asserted that, by leaving the land wild and uncultivated — despite the inaccuracy of that claim — the tribes had not made proper use of the land, depriving them of fee ownership.⁷³ In this sense, *Johnson* set the foundation for the notion of split title still operating in Indian Country today, whereby tribes have rights of use and occupancy, but ultimate title — and, concomitantly, powers of alienation — reside in the federal government.⁷⁴

Johnson, of course, was only the beginning of legal authorization of Indian land theft. Even after Chief Justice Marshall wrote the next two opinions in the Marshall Trilogy — including *Worcester v. Georgia*,⁷⁵ which forbade the state of Georgia from interfering in Cherokee Nation sovereignty — Congress passed a series of Removal Acts.⁷⁶ What followed were numerous forced marches — the Trail of Tears, the Trail of Death, and others — to relocate Indian tribes to reservations far from their aboriginal lands.⁷⁷ More than 80,000 Indians marched at the end of a musket to the Indian Territory, with many dying along the way.⁷⁸

⁶⁸ See, e.g., *Our History*, MONACAN INDIAN NATION, <https://www.monacannation.com/our-history.html> [<https://perma.cc/6E7G-YHUE>]; MICH. LEGISLATURE, A BRIEF HISTORY OF MICHIGAN, <https://www.legislature.mi.gov/documents/publications/manual/2001-2002/2001-mm-0003-0026-History.pdf> [<https://perma.cc/JXM9-XKSA>].

⁶⁹ See, e.g., *Johnson*, 21 U.S. (8 Wheat.) at 590 (“But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest.”).

⁷⁰ *Id.* at 588.

⁷¹ *Id.* at 591.

⁷² *Id.* at 588.

⁷³ *Id.* at 590–91.

⁷⁴ Joseph William Singer, *Indian Title: Unraveling the Racial Context of Property Rights*, 10 ALB. GOV’T L. REV. 1, 7, 45 (2017).

⁷⁵ 31 U.S. (6 Pet.) 515 (1832).

⁷⁶ See ROBERT T. ANDERSON ET AL., AMERICAN INDIAN LAW 63–66 (4th ed. 2019).

⁷⁷ *Id.*

⁷⁸ See Jennifer Szalai, “Unworthy Republic” Takes an Unflinching Look at Indian Removal in the 1830s, N.Y. TIMES (Mar. 24, 2020), <https://www.nytimes.com/2020/03/24/books/review-unworthy-republic-claudio-saunt.html> [<https://perma.cc/SU5L-GQ94>]; EDMUNDS, *supra* note 30, at 265–71 (recounting the removal of the Potawatomi, an event that has come to be known as the

The promise of removal was that tribes would be placed onto reservations where they would be free to govern themselves, protected from white interference, on collective lands, subject to their own laws and cultures.⁷⁹ But even this was not to be.

In 1887, Congress passed a series of allotment acts to open up Indian reservations to white settlement and to force Indians from a collective, tribal way of life into an individualistic, assimilated one.⁸⁰ The land losses were devastating.⁸¹ Indians were thrust into poverty, children were stolen and taken to boarding schools, Indian religions were criminalized, and indigenous languages began to dwindle and die out.⁸² Wilma Mankiller herself, the first female chief of the Cherokee Nation, stated that allotment did more to break up and destroy tribal life and culture than the forced removals (such as the Trail of Tears) ever did. For my own tribe, we marched on the Trail of Death upon our removal from the Great Lakes region, driven south to a reservation that we took by treaty in the Indian Territory in the late 1800s.⁸³ But that was not enough. Ultimately, our reservation was opened up to allotment as well, and we lost the vast majority of our tribal lands.⁸⁴ Efforts by tribes to challenge allotment as unconstitutional failed, as the Supreme Court interpreted congressional plenary authority to be virtually limitless.⁸⁵

Trail of Death). *See generally* RENNARD STRICKLAND, *THE INDIANS IN OKLAHOMA* (1980) (discussing the process by which the tribes of the southeastern United States were removed to the Indian Territory).

⁷⁹ *See, e.g.*, ANDERSON ET AL., *supra* note 76, at 64.

⁸⁰ *See, e.g.*, Indian General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887) (codified as amended in scattered sections of 25 U.S.C.); *see also* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 10 (1995).

⁸¹ Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1566 n.429 (citing VINE DELORIA, JR., & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 8–12 (1983)).

⁸² Ned Blackhawk, *American Indians and the Study of U.S. History*, in *AMERICAN HISTORY NOW* 376, 389 (Eric Foner & Lisa McGirr eds., 2011).

⁸³ *Treaty with the Potawatomi*, CITIZEN POTAWATOMI NATION CULTURAL HERITAGE CTR., <https://www.potawatomiheritage.com/encyclopedia/treaty-with-the-potawatomi-2> [<https://perma.cc/UJU6-86PF>]; *Trail of Death*, CITIZEN POTAWATOMI NATION CULTURAL HERITAGE CTR., <https://www.potawatomiheritage.com/encyclopedia/trail-of-death> [<https://perma.cc/S5Z2-WDSU>].

⁸⁴ *See Allotment*, CITIZEN POTAWATOMI NATION CULTURAL HERITAGE CTR., <https://www.potawatomiheritage.com/encyclopedia/allotment> [<https://perma.cc/48LF-NTB2>]. Unlike the Muscogee Creek, Cherokee, Choctaw, Chickasaw, and Seminole (among a few others, like Quapaw), the Potawatomi's "reservation status" did not change as a result of the Supreme Court's ruling in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). Thus, we continue to suffer from a particularly acute land loss, as we try to govern our people and our remaining territory. *McGirt* is discussed more fully in Part III.

⁸⁵ *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903); *see* Stacy L. Leeds, *The More Things Stay the Same: Waiting on Indian Law's Brown v. Board of Education*, 38 TULSA L. REV. 73, 73–74 (2002) (commenting on *Plessy v. Ferguson's* ultimate overruling by the Supreme Court, while *Lone Wolf*, "the Indians' Dred Scott decision," *id.* at 73, remains binding law (quoting *Sioux Nation of Indians v. United States*, 601 F.2d 1157, 1173 (Ct. Cl. 1979) (Nichols, J., concurring), *aff'd*, 448 U.S. 371 (1980))).

Despite a reversal of Indian policy in 1934 with the Indian Reorganization Act,⁸⁶ attacks on tribal property rights continued. The Supreme Court issued a shocking property ruling in its 1955 case of *Tee-Hit-Ton Indians v. United States*⁸⁷ that essentially went against all established precedent in order to avoid paying a tribe of Tlingit Indians just compensation for taking their property.⁸⁸ The *Tee-Hit-Ton* holding — just one year after *Brown v. Board of Education*⁸⁹ — established that governmental seizure of Indian property was not a “taking” for purposes of the Constitution’s Fifth Amendment because aboriginal title had never been “recognized” by treaty or statute.⁹⁰

The Court did not even attempt to obscure its motivations for the decision. In deciding against the Tlingit, the Court infamously wrote: “Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors’ will that deprived them of their land.”⁹¹ *Tee-Hit-Ton* has never been repudiated or reversed.⁹² It remains good law today.

Since the 1950s, most Indigenous property claims have not been resolved in favor of tribes, though there are a few exceptions.⁹³ The taking of Indian lands for white settlement, national parks, extractive industry, and beyond has deprived Indian people of religious freedom, self-determination, and rights to language and culture.⁹⁴ Today, the federal government controls many Indigenous sacred sites, which are now situated on federal public lands, many within the country’s National Park System.⁹⁵

All along, the hope by mainstream society has been that Indians would just assimilate, give up tribal ways, and become individualistic Americans. In other words, that they would abandon their collectivist belief systems — Jagenagenon — that situate them as part of a larger whole on the planet. Private property rights have been and continue to be touted as a panacea for Indians, even though history has repeatedly

⁸⁶ Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101–5129).

⁸⁷ 348 U.S. 272 (1955).

⁸⁸ *Id.* at 288–89 (“Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation.”).

⁸⁹ 347 U.S. 483 (1954).

⁹⁰ See *Tee-Hit-Ton*, 348 U.S. at 285.

⁹¹ *Id.* at 289–90.

⁹² WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED 365 (2010).

⁹³ See, e.g., WILKINSON, *supra* note 47, at 192 n.151 (noting that in the 1970s, Congress returned the sacred Blue Lake to the Taos Pueblo).

⁹⁴ Sarah Krakoff, *Not Yet America’s Best Idea: Law, Inequality, and Grand Canyon National Park*, 91 U. COLO. L. REV. 559, 568–69 (2020).

⁹⁵ See, e.g., MARK DAVID SPENCE, DISPOSSESSING THE WILDERNESS: INDIAN REMOVAL AND THE MAKING OF THE NATIONAL PARKS 55–70 (2000) (discussing U.S. removal of Indians from Yellowstone); *Apache Stronghold v. United States*, 38 F.4th 742, 742 (9th Cir. 2022).

shown that the reverse is true. In fact, just as *Mine!* demonstrates that the absence of established private property rights poses a threat to many American property owners (pp. 265–66), the history of Indian law and policy has shown that privatization has, in fact, achieved the opposite result. Too much individualistic ownership — and privatization of collectively held resources — presents perhaps the greatest existential threat to collective tribal existence. In our piece *Privatizing the Reservation?*, Professor Kristen Carpenter and I detail the long, sordid history through which white Americans — well-meaning and otherwise — imposed private property systems onto Indian tribes in order to “help” them.⁹⁶ Repeated calls for breaking up communal tribal property continue to this day.⁹⁷

Perhaps one of the greatest points of disconnect between Indigenous property conceptions and the American view is that of nonfungibility.⁹⁸ One of the challenges of situating Indigenous property claims within the context of American property law is to refute the assumption that all property is fungible and therefore merely setting the market price correctly will ultimately get the right result.⁹⁹ This is the logical conclusion of the arguments in *Mine!*, which echo those made in law and economics (pp. 155–56). Everything has a number, and if you find the right number, the most efficient outcome results.

But for Indigenous Peoples, the land itself is imbued with sacred meaning.¹⁰⁰ Indigenous cosmologies are built on conceptions of Jagenagenon, or understanding the interconnectedness of all things in the universe. In this sense, the *nishnabe* (the people), the earth, her resources, past and future generations, place, art, and religion are all part of an interconnected universe.¹⁰¹ In land-based religions, sacred places and spiritual practice are inextricably tied. For example, ceremonies conducted at one site cannot just be exported to a different location.¹⁰² Accordingly, in such cases, money simply cannot compensate for the taking of that which is sacred or a place of creation. Concomitantly, the view underlying much of American property law — that everything has a price — is anathema to traditional, Indigenous worldviews.

In the following examples, I highlight three areas of ongoing contestation, where Indian tribes are seeking to protect holy and sacred lands

⁹⁶ Carpenter & Riley, *supra* note 22, at 825.

⁹⁷ See, e.g., NAOMI RILEY, *THE NEW TRAIL OF TEARS: HOW WASHINGTON IS DESTROYING AMERICAN INDIANS* 19 (2016).

⁹⁸ Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 *YALE L.J.* 1022, 1086 (2009).

⁹⁹ See Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957, 1013–15 (1982); see also Carpenter, Katyal & Riley, *supra* note 98, at 1046–47; Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 *CORNELL L. REV.* 531, 568 (2005).

¹⁰⁰ Carpenter, Katyal & Riley, *supra* note 98, at 1075.

¹⁰¹ Carpenter & Riley, *supra* note 22, at 846–47.

¹⁰² *Id.* at 855.

and have, in some instances, refused monetary payments that would “compensate” them for these losses.

A. *United States v. Sioux Nation (1980)*¹⁰³

The Black Hills are sacred to the Sioux tribes.¹⁰⁴ Though under increasing military pressure by the United States to give up the Black Hills and consent to containment on reservations, the Sioux continued to fight for their lands, which were guaranteed to them in the 1868 Treaty of Fort Laramie.¹⁰⁵ But General George Armstrong Custer violated the treaty and went into the Black Hills, looking for gold.¹⁰⁶ It was here, at the Battle of the Little Bighorn (Battle of Greasy Grass), that Custer was killed, his army defeated, and the Sioux reigned on the northern plains.¹⁰⁷

But the victory was short lived. The United States broke the Treaty of Fort Laramie and divided up the Sioux Nation, separating families and placing Sioux people on scattered reservations throughout what was once their aboriginal territory.¹⁰⁸ As a result, the Black Hills are no longer within tribal jurisdiction.¹⁰⁹

After a lengthy litigation in which the Sioux Nation claimed the Black Hills had been taken in violation of the Constitution’s Fifth Amendment, the Supreme Court finally ruled in 1980 that the United States had engaged in an unconstitutional taking and it must pay just compensation under the Fifth Amendment to the Sioux.¹¹⁰ Despite this ruling, the various Sioux tribes have continued to seek the return of the Black Hills, eschewing monetary payments.¹¹¹ They maintain that their sacred sites are nonfungible and the lawsuit can only be settled by the return of their lands.¹¹² They’ve maintained this position ever since, even though they are among the poorest people in the United States.¹¹³ To this day, they continue to reject the monetary judgment — whose

¹⁰³ 448 U.S. 371 (1980).

¹⁰⁴ Alexandra New Holy, *The Heart of Everything that Is: Paha Sapa, Treaties, and Lakota Identity*, 23 OKLA. CITY U. L. REV. 317 (1998).

¹⁰⁵ *Sioux Nation*, 448 U.S. at 374–79.

¹⁰⁶ *Id.* at 377.

¹⁰⁷ *Id.* at 371.

¹⁰⁸ *Id.* at 381–83.

¹⁰⁹ Kimbra Cutlip, *In 1868, Two Nations Made a Treaty, The U.S. Broke It and Plains Indian Tribes Are Still Seeking Justice*, SMITHSONIAN MAG. (Nov. 7, 2018), <https://www.smithsonianmag.com/smithsonian-institution/1868-two-nations-made-treaty-us-broke-it-and-plains-indian-tribes-are-still-seeking-justice-180970741> [<https://perma.cc/28GY-LCMS>]; *UN Official Calls for US Return of Native Land*, BBC (May 5, 2012), <https://www.bbc.com/news/world-us-canada-17966113> [<https://perma.cc/E4VQ-JJYB>].

¹¹⁰ *Sioux Nation*, 448 U.S. at 424.

¹¹¹ Cutlip, *supra* note 109.

¹¹² Tom LeGro, *Why the Sioux Are Refusing \$1.3 Billion*, PBS (Aug. 24, 2011, 3:57 PM), https://www.pbs.org/newshour/arts/north_america-july-dec11-blackhills_08-23 [<https://perma.cc/CB8T-9WF9>].

¹¹³ *Id.*

value is now in the billions of dollars — as it would settle their claims to the Black Hills once and for all.¹¹⁴

*B. Standing Rock Sioux Tribe v. U.S. Army
Corps of Engineers (2021)*¹¹⁵

When Energy Transfer Partners set out to construct a pipeline in North Dakota, the proposed Dakota Access Pipeline (DAPL) was met with opposition from all corners. The original plan was to locate the pipeline just north of the capital city of Bismarck, which is ninety percent white.¹¹⁶ Residents protested vociferously, fearing a pipeline leak could destroy their water supply, so the pipeline project was revamped to go in further south.¹¹⁷ The tribes of the region also expressed their opposition to the pipeline, which would cross land guaranteed to the Sioux by the Treaty of Fort Laramie.¹¹⁸ It would further be placed under a lake that has both cultural and practical meaning to the tribes, and that runs just north of the Standing Rock Sioux reservation.¹¹⁹

The Standing Rock Sioux Tribe, ultimately joined by other Sioux tribes, filed a lawsuit in July 2016 to stop the project.¹²⁰ Around the same time, tribal members — many of them young people — built a camp at the entrance to the Standing Rock Sioux Reservation, not far from the Lake Oahe pipeline site.¹²¹ Over the next several months, the camp grew significantly, as protestors engaged in more and more “direct action” protests against the pipeline’s construction.¹²² In September 2016, the United States determined that it would not authorize further construction of the pipeline, and the U.S. Army Corps of Engineers (the Corps) denied the granting of an easement that would be required for the pipeline’s completion.¹²³

Alas, the hoped-for *deus ex machina* — in the form of a Clinton electoral win in 2016 — did not come to pass. In a squeaker of an election, Donald Trump won the presidency in the fall of 2016. In January 2017,

¹¹⁴ *Id.*

¹¹⁵ 985 F.3d 1032, 1041 (D.C. Cir. 2021).

¹¹⁶ *QuickFacts: Bismarck City, North Carolina*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/bismarckcitynorthdakota/PST045221> [<https://perma.cc/7FWZ-F2KN>].

¹¹⁷ Julia Carrie Wong, *Dakota Access Pipeline: 300 Protesters Injured After Police Use Water Cannons*, THE GUARDIAN (Nov. 21, 2016, 5:07 PM), <https://www.theguardian.com/us-news/2016/nov/21/dakota-access-pipeline-water-cannon-police-standing-rock-protest> [<https://perma.cc/9P8Y-CF4B>].

¹¹⁸ CARLA F. FREDERICKS ET AL., SOCIAL COST AND MATERIAL LOSS: THE DAKOTA ACCESS PIPELINE 7 (2018), https://www.colorado.edu/program/fpw/sites/default/files/attached-files/social_cost_and_material_loss_o.pdf [<https://perma.cc/U62H-YVYX>].

¹¹⁹ *Id.* at 7–10.

¹²⁰ *Standing Rock Sioux Tribe*, 985 F.3d at 1041.

¹²¹ Saul Elbein, *The Youth Group that Launched a Movement at Standing Rock*, N.Y. TIMES MAG. (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/magazine/the-youth-group-that-launched-a-movement-at-standing-rock.html> [<https://perma.cc/3QSF-TGVJ>].

¹²² *Id.*

¹²³ *Standing Rock Sioux Tribe*, 985 F.3d at 1041.

the Corps announced that it would launch an environmental study to determine what the impacts of the DAPL pipeline would be on Lake Oahe.¹²⁴ But only a week after his inauguration, President Trump signed his first executive order to expedite the review and approval process to advance the pipeline project.¹²⁵ Following the order, the Corps terminated its environmental study and public comment period and granted the easement to Energy Transfer Partners.¹²⁶ Construction began immediately.¹²⁷

The impacted tribes — including the Cheyenne River Sioux and the Standing Rock Sioux, among others — attempted to use the legal process to stop the completion of the pipeline. And, although the protests galvanized a global Indigenous rights movement, by June 2017, oil was flowing through the pipeline, destroying sacred sites and threatening the reservation's primary water source.¹²⁸

C. Apache Stronghold v. United States (2021)¹²⁹

Nizhoni Pike danced for four days straight at “Chi’chil Bildagoteel,” or Oak Flat, in a ceremony that marked her coming of age as a young Apache woman.¹³⁰ Apache cosmology holds Oak Flat as a holy place for the San Carlos Apache people, who access the site for religious rituals, coming of age ceremonies, and the gathering of sacred plants and foods.¹³¹ Nizhoni expressed her commitment to the preservation of her tribe’s sacred place, stating, “I want to pass down my story to my children.”¹³² Naelyn Pike, another San Carlos Apache woman, similarly explained of Oak Flat, “I still feel that strong spiritual connection to mother earth . . . and to Ussen the Creator at Oak Flat. It is who I am and where I am free to be Apache.”¹³³ She shared, “My people have lived, prayed, and died in Oak Flat and Tonto National Forest for centuries.”¹³⁴

¹²⁴ *Id.*

¹²⁵ Rebecca Hersher, *Key Moments in the Dakota Access Pipeline Fight*, NPR (Feb. 22, 2017), <https://www.npr.org/sections/thetwo-way/2017/02/22/514988040/key-moments-in-the-dakota-access-pipeline-fight> [<https://perma.cc/525B-7ASK>].

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Kolby KickingWoman, *Dakota Access Pipeline: Timeline*, INDIAN COUNTRY TODAY (July 9, 2020), <https://ictnews.org/news/dakota-access-pipeline-timeline> [<https://perma.cc/P9DH-88GU>].

¹²⁹ 519 F. Supp. 3d 591, 603–04 (D. Ariz. 2021), *aff’d*, 38 F.4th 742 (9th Cir.), *vacated and reh’g en banc granted*, 56 F.4th 636 (9th Cir. 2022).

¹³⁰ Becket, *Oak Flat: A Holy Land Worth Fighting For*, YOUTUBE (Feb. 25, 2021), <https://www.youtube.com/watch?v=2aJKoTk028M> [<https://perma.cc/R5SH-2E5U>].

¹³¹ *Apache Stronghold*, 519 F. Supp. at 603–04.

¹³² Becket, *supra* note 130.

¹³³ House Natural Resources Committee Democrats, *Ms. Naelyn Pike Testimony—Resolution Copper Mining at Oak Flat*, YOUTUBE (Mar. 12, 2020), <https://www.youtube.com/watch?v=ZKmw5sqok-YY> [<https://perma.cc/38Y7-AEAS>].

¹³⁴ *Id.*

The coalition group Apache Stronghold is currently in a fraught legal battle to protect Oak Flat from certain destruction. But how could these Indigenous lands, which have been stewarded by the Apache people since time immemorial, now be so vulnerable?

The United States took the land from the Apache in the late 1800s when it imprisoned them as prisoners of war.¹³⁵ During the Eisenhower era, Oak Flat was protected from mining, but since the area is overseen by the U.S. Forest Service, it was still subject to the future decisions of the agency.¹³⁶ The current crisis finds its roots in 2014, when then-Arizona Senator John McCain added in a section to the National Defense Authorization Act that authorized 2,400 acres of land to be transferred to Resolution Copper, which is a U.S. subsidiary of two British-Australian mining firms, Rio Tinto and BHP.¹³⁷

The land swap was described in a New York Times editorial as “sneakily anti-democratic.”¹³⁸ Rio Tinto had been trying to get Oak Flat for its high-value ores for years. Arizona congressmen had tried multiple times to set up a land swap to benefit Rio Tinto, but they had repeatedly failed due to a lack of support.¹³⁹ Nevertheless, the night before the vote on the National Defense Authorization Act — seen as a “must-pass” piece of legislation — Senators John McCain and Jeff Flake slipped the language that would authorize the land swap into the bill.¹⁴⁰ By bypassing public scrutiny and avoiding transparency, the last-minute tactic was successful, and the legal pathway was open for the land swap to occur.¹⁴¹ Of course, behind the scenes, the money flowed. Rio Tinto affiliates were campaign contributors for McCain, and Flake had previously been a paid lobbyist for a Rio Tinto uranium mine in Namibia.¹⁴²

Because Resolution Copper managed to get the swap passed by federal law, the U.S. Forest Service maintained that it had no choice but to approve the land exchange, and it began the requisite procedures to do so.¹⁴³ In 2021, the Forest Service published its final draft decision for the mine and land swap five days before Trump’s presidency ended, which started a sixty-day countdown before it would be finalized.¹⁴⁴

¹³⁵ U.S. DEP’T OF AGRIC., FOREST SERV., MB-R3-12-10, FINAL ENVIRONMENTAL IMPACT STATEMENT: RESOLUTION COPPER PROJECT AND LAND EXCHANGE 841 (2021).

¹³⁶ Lydia Millet, Opinion, *Selling Off Apache Holy Land*, N.Y. TIMES (May 29, 2015), <https://www.nytimes.com/2015/05/29/opinion/selling-off-apache-holy-land.html> [https://perma.cc/XNS4-E84X].

¹³⁷ Debra Utacia Krol, *Oak Flat: A Place of Prayer Faces Obliteration by a Copper Mine*, AZ CENT. (Aug. 20, 2021, 10:39 AM), <https://www.azcentral.com/in-depth/news/local/arizona/2021/08/18/oak-flat-apache-sacredresolution-copper-mine/7903887002> [https://perma.cc/7BKD-B5XZ].

¹³⁸ Millet, *supra* note 136.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Krol, *supra* note 137.

¹⁴⁴ *Id.*

However, the countdown was stopped on March 1, when the Forest Service withdrew the decision and said it would reinstate conversations with tribes.¹⁴⁵

The Apache Stronghold filed a lawsuit in federal court seeking an injunction to stop Rio Tinto from gaining control of Oak Flat while the swap was reviewed, citing violations of religious liberty.¹⁴⁶ The federal district court rejected the claim.¹⁴⁷ Even though it acknowledged that “the land in this case will be all but destroyed to install a large underground mine, and Oak Flat will no longer be accessible as a place of worship,”¹⁴⁸ the court found this did not violate the tribes’ rights to religious freedom under either the First Amendment or the Religious Freedom Restoration Act.¹⁴⁹

On June 24, the U.S. Court of Appeals for the Ninth Circuit affirmed the lower court’s decision, ruling 2–1 against the coalition of Apache and other tribal members opposing the land swap,¹⁵⁰ reasoning that the parties had “failed to show a substantial burden” to their religious practices.¹⁵¹ According to the court, “[t]he government does not substantially burden religion every time it ends a ‘governmental benefit’ that at one time went to religious beneficiaries. There must be an element of coercion”¹⁵²

But, on November 17, 2022, the Ninth Circuit ruled that it would reconsider the *Apache Stronghold v. United States* case en banc.¹⁵³ Oral arguments in the case were heard before the Ninth Circuit en banc panel on March 21, 2023.¹⁵⁴

* * *

These legal battles demonstrate the challenges Indian tribes and Indigenous Peoples continue to face to protect their sacred lands and resources. In all three cases, the United States employed a variety of tools — treaty abrogation, unlawful takings, and shady land deals — to deprive Indian tribes of their rights. Most critically, in all three cases, there were religious freedom concerns and claims of destruction of sacred sites that money could not compensate for. And the points of

¹⁴⁵ *Id.*

¹⁴⁶ *Apache Stronghold v. United States*, 519 F. Supp. 3d 591, 597 (D. Ariz. 2021), *aff’d*, 38 F.4th 742 (9th Cir.), *vacated and reh’g en banc granted*, 56 F.4th 636 (9th Cir. 2022).

¹⁴⁷ *Id.* at 611.

¹⁴⁸ *Id.* at 606.

¹⁴⁹ *Id.* at 608–09.

¹⁵⁰ *Apache Stronghold*, 38 F.4th at 748.

¹⁵¹ *Id.* at 757.

¹⁵² *Id.* at 768 (quoting *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1067 (9th Cir. 2008) (en banc)).

¹⁵³ *Apache Stronghold v. United States*, 56 F.4th 636 (9th Cir. 2022) (mem.).

¹⁵⁴ *Apache Stronghold v. United States*, BECKET (Feb. 2, 2023), <https://www.becketlaw.org/case/apache-stronghold-v-united-states> [<https://perma.cc/DYY6-TN4M>].

contestation do not end there. Currently, the case of *Haaland v. Brackeen*¹⁵⁵ is under consideration by the Supreme Court, as the Court has been asked to weigh in on the constitutionality of the Indian Child Welfare Act of 1978,¹⁵⁶ a remedial statute passed to stop the mass removal of Indian children from Indian homes.¹⁵⁷ Though *Brackeen* is not a case about land or property, it is a case about the most important resource Indigenous Peoples have: their children, who are their relatives and someday will be the ancestors to the seven generations to come. It is not lost on Native people that the taking of Indian children is a continuation of colonization as well as a manifestation of centuries of racism and a belief that all things Indian should be free and available for the taking by whites. But Indian children, like other sacred resources in Indigenous communities, are essential to tribal survival and remain particularly vulnerable within the U.S. system. These disputes are ongoing.¹⁵⁸

III.

Security in collective rights to land and natural and cultural resources is a core and essential feature of the exercise of tribal sovereignty. As Professor Joseph Singer has written, “property and sovereignty” are inextricably intertwined.¹⁵⁹ In the United States, having a protected territory or land base is essential to political and cultural sovereignty for tribes. Jurisdiction over these lands allows tribes to engage as collective entities, advancing tribal capacity to nurture and preserve ceremonies, rituals, languages, economies, governance systems, and clan relations. The destruction of Indian lands, as this Review has shown, necessarily means the destruction of Native political and cultural sovereignty.¹⁶⁰

Technological interventions, political movements, and legal transformations are paving the way for greater protection for Indigenous property rights. Part III identifies three areas that provide potential avenues for recovery of or additional protection for Indigenous lands and resources and addresses them in turn: Landback, comanagement arrangements, and cultural property legislation, respectively.

¹⁵⁵ No. 21-376 (U.S. argued Nov. 9, 2022).

¹⁵⁶ Pub. L. No. 95-608, 92 Stat. 3069 (codified as amended at 25 U.S.C. §§ 1901–1963).

¹⁵⁷ Brief for the Federal Parties at 1, 4–5, *Brackeen* (No. 21-376), 2022 WL 3449156, at *1, *4–5.

¹⁵⁸ As of this Review going to print, there has been no opinion issued in *Brackeen*.

¹⁵⁹ Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 8 (1991).

¹⁶⁰ Coffey & Tsosie, *supra* note 12, at 205.

A. Landback

The Landback movement is only a few years old, but it has already taken hold in Indigenous rights discourse.¹⁶¹ Landback, broadly speaking, encompasses art, political protests, lawsuits, and other efforts to bring attention to the continuing dispossession of lands from Native peoples.¹⁶² It has become a rallying cry for numerous political and legal movements in recent years, all designed to facilitate recovery of Native lands by Indian tribes.

Building on the momentum of Landback, the Harvard Project on American Indian Economic Development recently released a report, *Considerations for Federal and State Landback*.¹⁶³ The report, coauthored by Miriam Jorgensen and Laura Taylor, uses geographic information system (GIS) technology to identify lands in and around reservations that may be suitable targets for Landback claims.¹⁶⁴ As the report notes, much of the land that was taken from Indian tribes was ostensibly for white settlement and homesteading.¹⁶⁵ Today, however, it is apparent from GIS technology and other research sources that around one-third of the land that was previously within former reservation boundaries is now managed by the federal government, making those lands potentially prime targets for Landback.¹⁶⁶ This is, in part, because of *Johnson's* legacy: Indian land is already held in trust for Indian tribes by the federal government, making the federal government the titular "owner" of both tribal and federal public lands.¹⁶⁷ Thus, a conveyance of land from the federal government's public land holdings to tribal ownership does not impact the property tax base of states.¹⁶⁸

¹⁶¹ See, e.g., Michela Moscufo, *For These Indigenous Artists "Land Back" Is Both a Political Message and a Fundraising Opportunity*, FORBES (Sept. 29, 2020, 4:33 PM), <https://www.forbes.com/sites/michelamoscufo/2020/09/29/for-these-indigenous-artists-land-back-is-both-a-political-message-and-a-fundraising-opportunity> [<https://perma.cc/G8BH-NU66>]; Dominik W.E. Dausch, *4 Arrested After Hanging "LANDBACK" Flag from Omaha Street Grain Elevator*, KOTA (July 5, 2021, 10:35 AM), <https://www.kotatv.com/2021/07/05/4-arrested-after-hanging-landback-flag-omaha-street-grain-elevator> [<https://perma.cc/NC2Q-52TL>]; Luke Ottenhof, *Standoff at 1492 Land Back Lane*, THE WALRUS (June 8, 2021, 2:18 PM), <https://thewalrus.ca/standoff-at-1492-land-back-lane> [<https://perma.cc/63QJ-ZF3Z>]; LAURA TAYLOR & MIRIAM JORGENSEN, HARVARD PROJECT ON AM. INDIAN ECON. DEV., *CONSIDERATIONS FOR FEDERAL AND STATE LANDBACK 1* (2022), https://ash.harvard.edu/files/ash/files/land_back_policy_brief180.pdf [<https://perma.cc/66HQ-S6TZ>].

¹⁶² See, e.g., Moscufo, *supra* note 161; Dausch, *supra* note 161; Ottenhof, *supra* note 161.

¹⁶³ TAYLOR & JORGENSEN, *supra* note 161.

¹⁶⁴ *Id.* at 1.

¹⁶⁵ See *id.* at 5–6, 8.

¹⁶⁶ *Id.* at 1, 6. The report does not specify who holds title to each of these lands, however, which could greatly complicate the suggestion of a return to tribal ownership.

¹⁶⁷ Cf. Singer, *supra* note 74, at 24, 34 (noting that the United States holds tribal lands in trust and construing this as a limitation on Indian tribes' ownership rights).

¹⁶⁸ *What Is a Federal Indian Reservation?*, U.S. DEP'T INTERIOR (Aug. 19, 2017, 2:53 PM), <https://www.bia.gov/faqs/what-federal-indian-reservation> [<https://perma.cc/H3C9-3EV7>].

There are, of course, other places in which Landback is making its mark. Whether the specific term is employed or not, tribes are increasingly seeking the return of their aboriginal lands, using whatever mechanisms are available to them. For example, in recent years, a great deal of trust land was reconsolidated in tribal ownership as a result of the settlement of the *Cobell*¹⁶⁹ litigation.¹⁷⁰ And, though nothing has happened yet, there are increasing calls for return of national park land to Indian tribes as well.¹⁷¹

With sufficient resources, tribes may even buy land on the open market and request to have it brought into trust by the Secretary of the Interior. Because of nonfungibility and social justice concerns, the repurchase of Indian lands — and, particularly, sacred sites — can be quite controversial.¹⁷² For example, it took years for the Sioux tribes to reach an agreement to purchase the sacred site of Pe’ Sla on the open market in order to protect it.¹⁷³ Today, the lands are held in trust by the United States for the benefit of the Sioux people.¹⁷⁴ As Standing Rock Sioux Tribal Councilman Frank White Bull stated of the project, “Pe’ Sla has been in our hearts since the time of our creation, and by bringing the land into trust through unity among our tribes as one Sioux Nation, our children and grandchildren now have a place to prosper in our traditional ways.”¹⁷⁵

B. *Comanagement and Stewardship*

Former Assistant Secretary of Interior, and now Dean of the University of Iowa College of Law, Kevin Washburn has written extensively about how federal administrative agencies can develop comanagement plans with Indigenous Peoples for stewardship of Native

¹⁶⁹ *Cobell v. Salazar*, No. 96CV01285, 2011 WL 10676927 (D.D.C. July 27, 2011), *aff’d*, 679 F.3d 909 (D.C. Cir. 2012).

¹⁷⁰ U.S. Dep’t of the Interior, *Kevin Washburn Explains the Buy-Back Program*, YOUTUBE (Apr. 17, 2014), <https://www.youtube.com/watch?v=ks7UP6BEfQ4> [<https://perma.cc/MB2P-L3UX>].

¹⁷¹ TAYLOR & JORGENSEN, *supra* note 161, at 1; *see, e.g.*, David Treuer, *Return the National Parks to the Tribes*, THE ATLANTIC (Apr. 12, 2021), <https://www.theatlantic.com/magazine/archive/2021/05/return-the-national-parks-to-the-tribes/618395> [<https://perma.cc/5QMX-552M>].

¹⁷² Kerry McQueeney, *Sioux Desperately Trying to Raise \$9 Million to Buy Back South Dakota Land 150 Years After It Was Taken from Them*, DAILY MAIL (Oct. 8, 2012, 3:32 PM), <https://www.dailymail.co.uk/news/article-2214482/Pe-Sla-Sioux-tribes-9m-bid-buy-sacred-land-South-Dakotas-Black-Hills.html> [<https://perma.cc/26AN-WX66>]; *see also* Joseph Lee, *California Offers \$100 Million for Tribes to Buy Back Their Land. It Won’t Go Far*, GRIST (Apr. 5, 2022), <https://grist.org/indigenous/california-offers-100-million-for-tribes-to-buy-back-their-land-it-wont-go-far> [<https://perma.cc/H84R-H3AP>] (noting California’s attempt to financially support buy-back “has elicited mixed reactions from Indigenous leaders”).

¹⁷³ *Sacred Site Pe’ Sla Gains Indian Land Status*, SHAKOPEE MDEWAKANTON SIOUX CMTY. (Mar. 14, 2016), <https://shakopeedakota.org/sacred-site-persquo-sla-gains-indian-land-status> [<https://perma.cc/WX9G-9L62>].

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

lands.¹⁷⁶ While acknowledging that such plans fall short of all-out return of Indigenous lands — and, therefore, may not be acceptable to some tribes¹⁷⁷ — Washburn highlights numerous comanagement models for public lands that rely on the cooperation of the federal government and Indian tribes.¹⁷⁸ These innovative property arrangements present some mediated opportunities for tribes and the federal government alike. They could offer avenues for the protection of sacred sites from almost certain destruction from pipelines, copper mines, logging roads, and other projects, while still keeping large swaths of public lands at least mostly available to the general population.¹⁷⁹

Consider Bears Ears, for example. Pursuant to the Antiquities Act,¹⁸⁰ Present Obama created Bears Ears National Monument, located in Utah, in 2016.¹⁸¹ The area, which originally stretched across 1.35 million acres, has deep cultural and religious significance to numerous tribes of the region.¹⁸² The proclamation establishing Bears Ears set forth an innovative approach to its management, which includes a commission of five tribes that are empowered to give their input to federal land managers to “ensure that management decisions affecting the monument reflect tribal expertise and traditional and historical knowledge.”¹⁸³ Today, four tribes are in an active comanagement agreement with the United States, although the project has been under legal attack since it was announced. President Trump reduced the monument by roughly eighty-five percent,¹⁸⁴ and the project has been tied up in litigation ever since.¹⁸⁵ Most recently, four tribes — Hopi Tribe, Navajo Nation, Pueblo of Zuni, and Ute Mountain Ute Tribe — have been allowed to intervene in the Utah monuments litigation.¹⁸⁶

And Bears Ears is only one such example of a place where a comanagement agreement offers a unique property arrangement for tribes, short of full repatriation. Washburn has set forth a series of possibilities for the utilization of comanagement agreements to bring sacred lands

¹⁷⁶ See, e.g., Kevin K. Washburn, *Facilitating Tribal Co-Management of Federal Public Lands*, 2 WIS. L. REV. 263, 263 (2022).

¹⁷⁷ See, e.g., *id.* at 265.

¹⁷⁸ *Id.* at 283–89.

¹⁷⁹ Cf. *id.* at 267–68.

¹⁸⁰ Pub. L. No. 59-209, 34 Stat. 225 (1906) (codified as amended at 54 U.S.C. §§ 301–320) (authorizing protection of landmarks and other historic structures as national monuments).

¹⁸¹ Proclamation No. 9558, 82 Fed. Reg. 1139, 1139, 1143 (Dec. 28, 2016).

¹⁸² *Id.* at 1139–40, 1143.

¹⁸³ *Id.* at 1144; see also Carpenter, *supra* note 25, at 2146.

¹⁸⁴ Julie Turkewitz, *Trump Slashes Size of Bears Ears and Grand Staircase Monuments*, N.Y. TIMES (Dec. 4, 2017), <https://www.nytimes.com/2017/12/04/us/trump-bears-ears.html> [https://perma.cc/6RAY-VFA7].

¹⁸⁵ Bobby Magill, *Biden “Abused” Authority in Declaring Utah Monuments, State Says*, BLOOMBERG L. (Aug. 24, 2022 6:03 PM), <https://news.bloomberglaw.com/environment-and-energy/biden-abused-authority-in-declaring-utah-monuments-state-says> [https://perma.cc/3CR5-Z8TN].

¹⁸⁶ Caleb Symons, *Tribes Can Intervene in Utah Monuments Litigation*, LAW360 (Dec. 9, 2022, 4:35 PM), <https://www.law360.com/articles/1556633> [https://perma.cc/G3WJ-DAX3].

back within tribal control.¹⁸⁷ He notes that such agreements have already been made between the Yurok Tribe and Redwood National Park, the Sitka Tribe of Alaska and Sitka National Historical Park, and the Salish and Kootenai Tribes and the National Bison Range, among others.¹⁸⁸

C. Cultural Property Protection

As leading Indigenous rights scholar Professor Rebecca Tsosie has stated, “cultural restoration is essential to the task of building strong Nations in the future.”¹⁸⁹ I have explored extensively in my work the role that cultural property protection — from sacred lands to Indigenous knowledge to repatriation of ancestors — plays in contributing to strong, thriving, culturally robust Native Nations.¹⁹⁰

And cultural property protection has been one of the places that Congress has been most active in Indian rights in the United States. There are statutes in place to protect authentic Indian arts and crafts,¹⁹¹ carve-outs for Native people to possess eagle feathers for ceremonial and religious purposes,¹⁹² protections for the sacramental use of peyote,¹⁹³ and laws that mandate procedures for repatriation of ancestors and items of cultural patrimony from federally funded museums and institutions.¹⁹⁴

But, as this Review has demonstrated, the physical and intangible components of cultural property are inextricably linked together for Indigenous Peoples.¹⁹⁵ Thus, laws that are inadequate to protect the territory (property) of Indigenous Peoples are necessarily inadequate to protect the political and cultural survival (sovereignty) of Indian tribes. And the laws are demonstrably inadequate, particularly in certain arenas, such as in guaranteeing the land-based religious freedom rights of tribes.¹⁹⁶ Indigenous Peoples consider claims for cultural property protection as directly linked to the taking of Indian lands, treaty abrogation, and even acts of cultural and actual genocide.¹⁹⁷

¹⁸⁷ Washburn, *supra* note 176, at 283–88.

¹⁸⁸ *See id.* at 294–98, 305–11.

¹⁸⁹ Tsosie, *supra* note 27, at 308–09.

¹⁹⁰ *See, e.g.,* Angela R. Riley, *The Ascension of Indigenous Cultural Property Law*, 121 MICH. L. REV. 75, 101–35 (2022).

¹⁹¹ Indian Arts and Crafts Act, 25 U.S.C. §§ 305–305f.

¹⁹² 16 U.S.C. § 668a.

¹⁹³ 42 U.S.C. § 1996a.

¹⁹⁴ Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013.

¹⁹⁵ *See supra* section I.B, pp. 2082–83.

¹⁹⁶ *See Lyng v. Nw. Indian Cemetery Ass’n*, 485 U.S. 439, 455 (1988); Carpenter, *supra* note 25, at 2119.

¹⁹⁷ *See Riley, supra* note 190, at 77; *see also* Benjamin Madley, *Reexamining the American Genocide Debate: Meaning, Historiography, and New Methods*, 120 AM. HIST. REV. 98, 115–16 (2015) (describing acts of genocide against Indigenous Peoples).

But there are signs the tide could be turning. After years of pressure by Indian tribes — with the Pueblo of Acoma acting as a leader in this fight, in order to recover their sacred Acoma Shield — Congress just recently passed the Safeguard Tribal Objects of Patrimony Act of 2021¹⁹⁸ (STOP Act). The Act builds on the Native American Graves Protection and Repatriation Act's¹⁹⁹ commitment to end the trafficking of Native American remains and items of cultural patrimony.²⁰⁰ It is specifically designed to empower Indian tribes — with the assistance of the United States — to see the successful repatriation of items of cultural patrimony that are now in foreign nations, oftentimes appearing in auction houses or in national museums.²⁰¹ It affirms the authority of the President to enter into bilateral agreements with other nations to facilitate the return of tribal items to U.S. tribes.²⁰² It also creates a federal framework for the voluntary return of sacred items when the appropriate tribal owner can be identified.²⁰³ Oversight will be undertaken by a seven-member commission.²⁰⁴ Though it took years for this bipartisan legislation to be enacted,²⁰⁵ it potentially provides an important safeguard for Indigenous cultural property that has been wrongfully taken from Indian tribes in the process of conquest and colonization.

* * *

These three movements — Landback, comanagement, and cultural property legislation — provide just a snapshot of some of the ways in which Indigenous Peoples themselves are employing the language of property law to assert their rights to their continued cultural and political existence.

CONCLUSION

In many respects, *Mine!* is a book about scarcity. The authors demonstrate that legal rules allocating property rights are seldom viewed as necessary until owners-to-be see the resource as increasingly

¹⁹⁸ 25 U.S.C. §§ 3071–3079; see also Jonathan Sims, *The Safeguard Tribal Objects of Patrimony (STOP) Act Has NM Roots*, THE PAPER (Dec. 5, 2022, 11:31 AM), <https://abq.news/2022/12/the-safeguard-tribal-objects-of-patrimony-stop-act-has-nm-roots> [<https://perma.cc/V6XP-ATNW>].

¹⁹⁹ 25 U.S.C. §§ 3001–3013.

²⁰⁰ Press Release, U.S. Senate Comm. on Indian Affs., Murkowski Applauds Senate Passage of the STOP Act (Dec. 2, 2022), <https://www.indian.senate.gov/news/press-release/murkowski-applauds-senate-passage-stop-act> [<https://perma.cc/54GF-E7QC>].

²⁰¹ Felicia Fonseca, *Law Protects Export of Sacred Native American Items from US*, AP NEWS (Dec. 26, 2022), <https://apnews.com/article/biden-new-mexico-paris-366ebddedd8cd83ce238dee47fae25aa> [<https://perma.cc/HF22-ZVZD>].

²⁰² U.S. Senate Comm. on Indian Affs., *supra* note 200.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ Fonseca, *supra* note 201.

limited (pp. 4–5). Scarcity not only drives the desire to carve up property and set property entitlements but also tends to motivate those with the greatest power, money, and resources to make sure the pie is carved to their benefit (pp. 15–16). Scarcity — and the related argument deployed historically that Native people have “too much” and do not “use” all that they have — has been used to deprive Native people of property in the United States and all across the globe for centuries.²⁰⁶

And, as this Review sets forth, the concerns raised in *Mine!* about increasing scarcity of property — particularly light, air, water, land, and others — lend themselves to the creation and enforcement of property rights that are likely only to further harm Indigenous Peoples. As an example, we are seeing challenges to Indian water rights in the arid West intensify²⁰⁷ now that our capitalistic and consumeristic culture has driven the climate to a crisis point.²⁰⁸ Similarly, Indigenous lands are under threat of even more mining to produce lithium and other minerals to satisfy the increased demand for electric cars and sources of “green energy.”²⁰⁹ The climate crisis is a creature of human society’s own making, yet it is often the poorest and least resourced people — and Indigenous Peoples, in particular — who continue to face the harshest consequences of the establishment of new property rules.

This Review has attempted to show that Indigenous conceptions of property are not aligned with Anglo-American property concepts. Nevertheless, there are places where Anglo-American property law may be employed to develop innovative solutions for Indigenous property rights. This Review has discussed three of these — Landback, comanagement, and cultural property legislation — and has sought to demonstrate the role they are playing in ensuring the continued viability of Indian property rights.

In closing, I suggest that innovative and progressive reforms moving forward should turn more explicitly to the contributions of international law. As Kristen Carpenter has pointed out, “[i]n the search for daylight, many Indigenous people have turned to the field of human rights for new ways of addressing old problems in federal Indian law,” particularly

²⁰⁶ See, e.g., Leeds, *supra* note 23, at 493.

²⁰⁷ Pauly Denetclaw, *Tribes Along the Colorado River Navigate a Stacked Settlement Process to Claim Their Water Rights*, HIGH COUNTRY NEWS (Mar. 1, 2022), <https://www.hcn.org/issues/54.3/indigenous-affairs-colorado-river-tribes-along-the-colorado-river-navigate-a-stacked-settlement-process-to-claim-their-water-rights> [<https://perma.cc/N4XT-DWKQ>]; *Arizona v. Navajo Nation*, 143 S. Ct. 398 (2022) (granting certiorari).

²⁰⁸ Benjamin Y. Fong, Opinion, *The Climate Crisis? It's Capitalism, Stupid*, N.Y. TIMES (Nov. 20, 2017), <https://www.nytimes.com/2017/11/20/opinion/climate-capitalism-crisis.html> [<https://perma.cc/SQ75-L3JM>].

²⁰⁹ See Jack Healy & Mike Baker, *As Miners Chase Clean-Energy Minerals, Tribes Fear a Repeat of the Past*, N.Y. TIMES (Dec. 27, 2021), <https://www.nytimes.com/2021/12/27/us/mining-clean-energy-antimony-tribes.html> [<https://perma.cc/AC9V-L4JZ>].

the United Nations Declaration on the Rights of Indigenous Peoples and the American Declaration on the Rights of Indigenous Peoples.²¹⁰

Though there is still much to be done, there is precedent in numerous countries throughout the world for recognition of Indigenous Peoples' collective rights to land and resources, as well as growing international efforts to protect Indigenous rights. In addition to the Declaration on the Rights of Indigenous Peoples, the United Nations World Intellectual Property Organization (WIPO) is developing protections for folklore and traditional knowledge at the international level.²¹¹ In September 2000, WIPO established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore,²¹² which is undertaking to draft three separate treaties that would protect traditional knowledge,²¹³ traditional cultural expressions,²¹⁴ and genetic resources.²¹⁵

Regional human rights systems, such as the Inter-American Court, have also been active in protecting collective rights of Indigenous Peoples. One of the court's most groundbreaking cases involved the Awas Tingni people of Nicaragua. There, the court held that Nicaragua had a duty to protect the property rights of the tribe and had to do so

²¹⁰ Carpenter, *supra* note 25, at 2108 (citing G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007); Org. of Am. States, AG/RES. 2888 (XLVI-O/16), American Declaration on the Rights of Indigenous Peoples (June 15, 2016), <https://www.oas.org/en/sare/documents/DecAmIND.pdf> [<https://perma.cc/3H86-WKZM>]).

²¹¹ *Intergovernmental Committee (IGC)*, WORLD INTELL. PROP. ORG., <https://www.wipo.int/tk/en/igc> [<https://perma.cc/8L43-V9CY>].

²¹² Peter K. Yu, *Traditional Knowledge, Intellectual Property, and Indigenous Culture: An Introduction*, 11 CARDOZO J. INT'L & COMPAR. L. 239, 239–40 (2003). I currently serve as a member of the Indigenous Caucus, which is providing expertise and feedback on WIPO's draft text for the Intergovernmental Committee.

²¹³ For WIPO's working definition of Traditional Knowledge, see *Traditional Knowledge*, WORLD INTELL. PROP. ORG., <https://www.wipo.int/tk/en/tk> [<https://perma.cc/P67S-H95Y>], which explains that "[t]raditional knowledge (TK) is knowledge, know-how, skills and practices that are developed, sustained, and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity" and that "[t]raditional knowledge can be found in a wide variety of contexts, including: agricultural, scientific, technical, ecological and medicinal knowledge as well as biodiversity-related knowledge," *id.*

²¹⁴ For WIPO's working definition of Traditional Cultural Expressions, see *Traditional Cultural Expressions*, WORLD INTELL. PROP. ORG., <https://www.wipo.int/tk/en/folklore> [<https://perma.cc/2ERZ-XHS9>], which explains that "[t]raditional cultural expressions (TCEs), also called 'expressions of folklore', may include music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives, or many other artistic or cultural expressions"; that "[t]raditional cultural expressions: may be considered as the forms in which traditional culture is expressed; form part of the identity and heritage of a traditional or indigenous community; [and] are passed down from generation to generation"; and that "[t]heir protection is related to the promotion of creativity, enhanced cultural diversity and the preservation of cultural heritage," *id.*

²¹⁵ For WIPO's working definition of Genetic Resources, see *Genetic Resources*, WORLD INTELL. PROP. ORG., <https://www.wipo.int/tk/en/genetic> [<https://perma.cc/44T2-UTQ5>], which explains that "[g]enetic and other biological resources . . . include, for example, microorganisms, plant varieties, animal breeds, genetic sequences, nucleotide and amino acid sequence information, traits, molecular events, plasmids, and vectors," *id.*

in accordance with the Awas Tingni Peoples' own customary law of land tenure.²¹⁶ This landmark opinion has led to what has been called the "Awas Tingni effect."²¹⁷ From Belize to Paraguay to Suriname, the Inter-American Court has expanded on *Awas Tingni* to reinforce rights articulated in Article 21 of the American Convention on Human Rights.²¹⁸

And nation-states throughout the world are implementing Indigenous rights — drawing most notably on the Declaration on the Rights of Indigenous Peoples — into national law. In 2021, the Canadian Parliament adopted legislation to amend Canadian law to align with the rights articulated in the Declaration.²¹⁹ Aboriginal leaders in Australia have produced the "Statement From the Heart," which calls for Australia to modify its laws to give First Nations peoples a voice in the Australian Constitution, to allow the Makarrata Commission to supervise treaty-making, and to empower the Makarrata Commission to oversee a truth and reconciliation process, much like that seen in Canada.²²⁰ Māori Peoples in New Zealand are actively engaged in considering whether there is a similar path forward to push the New Zealand government to constitutionalize Māori rights.²²¹ The Supreme Court of Belize has famously cited to Article 26 of the Declaration in support of its holding that the collective-property traditions of the Maya, similar to the traditions of the Awas Tingni, gave rise to property rights under the Belize Constitution.²²² And there are numerous other examples from around the world.²²³

Tribes themselves have also been leaders in this arena. The Muscogee Creek Nation, for example, translated the Declaration into the Muscogee language and adopted it wholesale as the law of the Nation in 2016.²²⁴ The Pawnee Nation also adopted the Declaration

²¹⁶ *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 164 (Aug. 31, 2001).

²¹⁷ Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173, 209 (2014).

²¹⁸ *Id.* at 210. See generally Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

²¹⁹ United Nations Declaration on the Rights of Indigenous Peoples Act, S.C. 2021, c 14 (Can.).

²²⁰ *The Statement*, ULURU STATEMENT, <https://ulurustatement.org/the-statement> [<https://perma.cc/2NYZ-BN6K>]; see also TRUTH & RECONCILIATION COMM'N OF CAN., HONOURING THE TRUTH, RECONCILING FOR THE FUTURE (2015) (summarizing the final report of Canada's Truth and Reconciliation Commission).

²²¹ I participated in these discussions at the Kōrero Conference in November 2022 held at Auckland Law School in Aotearoa. See CONSTITUTIONAL KŌRERO, <https://www.constitutionalkorero.co.nz> [<https://perma.cc/E7MA-FQFH>].

²²² *Cal v. Att'y-Gen. of Belize*, 135 I.L.R. 78, 122–23 (Belize Sup. Ct. 2007).

²²³ See generally Carpenter & Riley, *supra* note 217 (discussing implementation of the Declaration and other human rights law sources into national law).

²²⁴ A Tribal Resolution of the Muscogee (Creek) Nation Adopting a Declaration on the Rights of Indigenous Peoples and Directing Said Declaration into the Mvskoke Language, Tribal Res. 16-149 (as enacted by the Muscogee (Creek) National Council, Sept. 24, 2016).

when it passed the Pawnee Nation Declaration on the Rights of Indigenous Peoples Act,²²⁵ which calls on the United States to implement and adhere to the minimum standards set forth by the United Nations Declaration.²²⁶ The Act also stipulates that all future tribal laws and regulations will conform to the United Nations Declaration.²²⁷ And tribal judges, such as Judge Bird, are going even further, penning tribal court opinions that adhere to the conceptions of Jagenagenon and the principles of *MnoBmadzewen* to ensure that *Gaagige-Inaakonigewin* (Anishinaabe law) is continued for the sake of the next seven generations.²²⁸

As Indigenous Peoples increasingly engage with the international legal system, the world is now witnessing a “jurisgenerative” moment in Indigenous and human rights.²²⁹ As my frequent coauthor Kristen Carpenter and I have written, through a dynamic system of “multiple site”²³⁰ engagement, “Indigenous rights developing at tribal, national, and international levels have produced a complex interplay of laws that have greatly expanded protections for Indigenous peoples.”²³¹ Though the United States has been particularly reluctant to engage in these exogenous systems,²³² there is optimism that tribal and international systems can have a positive impact on Indigenous rights within the United States and beyond.²³³ Within this framework, there will perhaps be sufficient room for property conceptions that deviate from those of the strictly individualistic Western view seen in the United States. There is room, it seems, to both protect private property rights and, simultaneously, navigate a bit away from *Mine!* to a broader, more malleable, and collective view of property rights. Jagenagenon.

²²⁵ Pawnee Nation Declaration on the Rights of Indigenous Peoples Act, ch. VI, ¶ 2 (as enacted by the Pawnee Business Council, May 12, 2022).

²²⁶ *Id.*

²²⁷ *Id.* p.mbl.

²²⁸ *Rios v. NHBP Election Bd.*, No. 21-181, slip op. at 2 (Nottawaseppi Huron Band of the Potawatomi Sup. Ct. Jan. 27, 2022), <https://nhbp-nsn.gov/wp-content/uploads/2022/03/Dorie-Rios-Nancy-Smit-v.-NHBP-Election-Board-Supreme-Court-Opinion-3-3-2022.pdf> [<https://perma.cc/PSM7-FJZA>]; see also Matthew L.M. Fletcher, *The Three Lives of Mamengwaa: Toward an Indigenous Canon of Construction* (Mar. 14, 2023) (unpublished manuscript), <https://ssrn.com/abstract=4380679> [<https://perma.cc/M3Y3-V8V7>].

²²⁹ See generally Carpenter & Riley, *supra* note 217 (discussing the jurisgenerative moment).

²³⁰ *Id.* at 175 (quoting Judith Resnick, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1670 (2006)).

²³¹ Riley, *supra* note 190, at 79.

²³² See Resnick, *supra* note 230, at 1582.

²³³ See Riley, *supra* note 190, at 78.