

# LAND, CULTURE, AND COMMUNITY: REFLECTIONS ON NATIVE SOVEREIGNTY AND PROPERTY IN AMERICA

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God created this Indian country and it was like He spread out a big blanket. He put the Indians on it. They were created here in this country, truly and honestly, and that was the time this river started to run. Then God created fish in this river and put deer in these mountains and made laws through which has come the increase of fish and game. Then the Creator gave us Indians life; we awakened and as soon as we saw the game and the fish we knew they were made for us . . . I was not brought from a foreign country and did not come here. I was put here by the Creator.<sup>1</sup>

## INTRODUCTION

Chief Meninock's words describe a world in which the Native people, the land and its resources interact under a Divine plan created for a particular place on earth. The people exist under the same set of laws that governs all other living things, which results in order, balance, and abundance. Contemporary American society, of course, is governed by a system of man-made laws that has created an *imbalance* of resources, whether measured in tangible ways (e.g., land) or intangible ways (e.g. equality of opportunity). This Symposium addresses that problem by evaluating the continuing inequalities in wealth and property that exist in America.

"America" symbolizes many things, among which are a geographical territory, a robust pluralism that highlights values of tolerance and respect for diversity, and a constitutional democracy that has become one of the major world powers. Each of these aspects informs the dialogue on property, wealth and inequality. But for the indigenous peoples of this land, "America" has a different meaning. Acoma poet Simon Ortiz says that, "[N]ative culture is at the heart of everything that is America."<sup>2</sup> Indigenous identity is formed by the intersection

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\* Lincoln Professor of Native American Law & Ethics; Executive Director, Indian Legal Program, Arizona State University College of Law. This Article is based on the remarks I made at the AALS Workshop on Property, Wealth and Inequality at the 2001 annual meeting in San Francisco, California. My thanks to Dean Stuart Deutsch for inviting my participation, and to the editorial staff of the *Indiana Law Review* for their great patience and dedication to this Symposium. The Symposium sparked an abundance of intriguing ideas, complex problems and areas for further inquiry. This Article is intended merely to highlight some of these ideas, issues and problems, as they relate to Native peoples. I leave their further exploration for another day and a more comprehensive analysis.

1. Testimony of Chief Meninock (Yakima) During a 1915 Trial for Violating a Washington State Code on Salmon Fishing, in *GREAT DOCUMENTS IN AMERICAN INDIAN HISTORY*, 297-98 (Wayne Moquin & Charles Van Doren eds., 1973).

2. Simon Ortiz, Presentation at American Indian Studies Director's Conference, Arizona

of land, culture, and community, and the way we respond to those critical elements of our existence defines the meaning of "sovereignty" and "property" for the First Nations of this land.

The discussion of "property, wealth and inequality" for Native people is one that depends upon an understanding of how Native sovereignty and land rights have been adjudicated in this country. Indian Nations within the United States exist as "nations within a nation." Native peoples' survival in America depends upon their ability to maintain their unique cultural identity as well as their separate political status. As separate cultures, Native peoples maintain distinctive world views, containing a composite of values and norms, that guide the ways in which the people relate to their ancestral lands and resources. As separate governments, they maintain a measure of autonomy over their lands and exert ownership over natural resources such as water, fish and game, timber, and minerals. However, the federal government serves as the "trustee" for reservation lands and resources. Thus, although the Native people have beneficial use of these lands and resources, the title is held in trust for them by the United States government.

As trustee, the United States has certain powers of control and disposition that have not always been used for the best interests of Indian people. That fact has been vindicated in a number of important lawsuits brought by Indian nations and tribal members to force the federal trustee to account for its mismanagement of these interests.<sup>3</sup> The trust doctrine, which highlights the fact that Native people own a great deal of "property," though they often lack control over these resources, has been the basis of much of what has been written about property, wealth and inequality for Native people.<sup>4</sup> I will not duplicate those important works but will focus on a much less obvious problem: the distinctive normative basis for the rights to land and autonomy, which are at the heart of the debate over "property, wealth and inequality" for Native people.

For the many Nations indigenous to these lands, the concepts of "wealth" and "property" that we apply to discussions of land and other natural resources, are

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State University (Feb. 16, 2001) (on file with author).

3. See, e.g., *United States v. Mitchell*, 463 U.S. 206 (1983) (holding federal government liable for mismanagement of timber resources); *Seminole Nation v. United States*, 316 U.S. 286 (1942) (holding that the federal government breached its fiduciary duty to the Seminole Nation by paying treaty annuities to a tribal treasurer, who misappropriated funds, rather than to tribal members, as called for by the treaty); *Cobell v. Babbitt*, 91 F. Supp. 2d 1 (D.D.C. 1999), *aff'd sub nom. Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001) (class action suit by individual beneficiaries of Individual Indian Money Accounts for mismanagement of accounts). Through several rounds of litigation, the plaintiffs in the *Cobell* case have prevailed in the district court and in the Court of Appeals. See also Bill Miller, *Court: \$10 Bil. Owed Indians; U.S. "Has Failed Time and Again,"* ARIZ. REPUBLIC, Feb. 24, 2001, at A28.

4. See, e.g., Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471; Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Tribal Lands and Resources*, 1995 UTAH L. REV. 109.

quite distinctive. This essay is intended to highlight some of those features and to respond to the themes of this Symposium on "Property, Wealth, and Inequality," in this multicultural and pluralistic society that we call "America." Part I offers an historical overview of the relationship between property and sovereignty for Native peoples in this country. Part II describes the contemporary conflicts that Indian nations face as they exert their rights to property and sovereignty. Part III highlights the normative differences that underlie intercultural conflicts over land and autonomy, offering a conceptual framework for the debate. Part IV builds on this conceptual framework by proposing a mode of analysis for further development of this subject.

### I. PROPERTY AND SOVEREIGNTY IN AMERICA: AN HISTORICAL OVERVIEW

The history of the United States is, at a very basic level, a history of conflict over two things: property and sovereignty. Nowhere is this conflict better illustrated than in the history of conflicts over land and governance between Indians and non-Indians. The federal government's policies were directed at nation-building and, hence, the acquisition of maximum amounts of territory and governmental autonomy. Unfortunately, despite the treaty paradigm, which should have brought about intercultural and bilateral negotiations of rights to sovereignty and property, Native people have been placed in the position of *reacting* to federal policy. Thus, while the federal government's purported policy was to enter into treaties with Indian nations to gain rights to land, its "real" policy was to gain the maximum amount of land for white settlers (who would "efficiently" use the land) at the least possible cost, in terms of warfare and lives.<sup>5</sup>

In 1783, President George Washington articulated the country's first "Indian policy":

[P]olicy and [economy] point very strongly to the expediency of being upon good terms with the Indians and the propriety of purchasing their Lands in preference to attempting to drive them by force of arms out of their Country; which as we have already experienced is like driving the Wild Beasts of the Forest which will return as soon as the pursuit is at an end and fall perhaps on those that are left there.<sup>6</sup>

Of course, Washington was confident that this policy would placate the Indians and that the growing numbers of American settlers would encroach upon the diminishing numbers of Indians until they were no more. He wrote that, "the gradual extension of our Settlements will as certainly cause the Savage as the

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5. See, e.g., Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065 (2000) (arguing that the laws and policies that appropriated Indian lands for non-Indian use and enjoyment were designed to promote "efficiency," i.e., the most cost-effective expropriation).

6. Letter from George Washington to James Duane (Sept. 7, 1783), in *FEDERAL INDIAN LAW* 84-85 (David H. Getches et al. eds., 4th ed. 1998).

Wolf to retire; both being beasts of prey tho' they differ in shape."<sup>7</sup>

In 1817, President James Monroe stated, in his first annual message to Congress, that the Indian nations should be forced to open their lands to settlement by non-Indians.<sup>8</sup> "No tribe or people," he explained, "have a right to withhold from the wants of others more than is necessary for their support and comfort."<sup>9</sup> This statement became the philosophical justification for the government's policy of divesting Native peoples of their lands, through treaty and outright warfare. President Grant's Indian policy reflected a tenuous balance between "war and peace."<sup>10</sup> If Indian Nations, such as the Lakota Sioux, would "peacefully" submit to land cessions, this was the government's preference; if not, the "iron fist" of federal Indian policy—the U.S. Cavalry—stood ready. It is no accident that the administrative agency charged with "management" of Native peoples, the Bureau of Indian Affairs, began its existence in the Department of War, not the Department of Interior. President Monroe established the Office of Indian Affairs within the Department of War, in March of 1824.<sup>11</sup>

Not surprisingly, with the loss of their traditional lands, Native people also lost a great deal of their autonomy. The reservation system was designed to curb Native sovereignty over the relatively large areas of their aboriginal territory, and the federal government used its land policies to fragment the political authority of Indian nations. For example, the government broke down powerful alliances of Native people, such as that among the Lakota, Dakota and Nakota peoples that comprised the Sioux Nation, by separating them onto small and dispersed reservations. In other cases, the federal government removed "hostile" factions of Indian tribes to geographically distinct locations, where their ability to mobilize the tribe against the federal government would be minimized. This is what happened, for example, to the Chiricahua Apache resisters, who fought the United States, under the leadership of Geronimo, and were subsequently shipped from their ancestral lands in the Southwest to Florida and then to Oklahoma.<sup>12</sup>

The Reservation and Removal policies eroded the treaty-based paradigm of

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7. *Id.*

8. See Joseph William Singer, *Legal Theory: Sovereignty and Property*, 86 NW. U. L. REV. 1m 1 n.3 (1991) (citing 1 FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 149 (1984)).

9. *Id.* at 1 (quoting PRUCHA, *supra* note 8, at 149).

10. See ROBERT M. UTLEY, *THE INDIAN FRONTIER OF THE AMERICAN WEST: 1846-1890* 132 (1984) (discussing President Grant's "Peace Policy" toward American Indians, as well as his alternative plan: "Those [Indians] who do not accept this policy will find the new administration ready for a sharp and severe war policy").

11. Kevin Gover, Assistant Secretary, Indian Affairs, Dep't of the Interior, Remarks at the Hall of Tribal Nations ceremony (Sept. 8, 2000) (on file with author); see also BUREAU OF INDIAN AFFAIRS, *SHORT HISTORY OF THE BIA*, available at <http://www.doi.gov/bia/shorthist.html> (last visited June 1, 2001).

12. See H. HENRIETTA STOCKEL, *WOMEN OF THE APACHE NATION* 7 (1991).

tribal sovereignty, but the Dawes Allotment Act was even more devastating.<sup>13</sup> The Dawes Act of 1887, which broke up collective tribal landholdings on many reservations in order to grant individual land allotments to tribal members, was passed absent any consultation with the Indian Nations. The Dawes Act followed an 1871 rider to a Congressional appropriations bill, which “officially” ended treaty-making with Indian Nations. However, it did not explicitly extinguish existing Indian treaty rights; nor did it contain explicit limitations on tribal sovereignty. Rather, it suggested that the purpose of allotment was quite benevolent: to grant individual Indians property rights comparable to those of “civilized” people and, therefore, facilitate their integration into American society. Of course, the Dawes Act was also responsible for the loss of nearly 100 million acres of tribal treaty lands, which were designated as “surplus lands” and opened for settlement by non-Indians.<sup>14</sup>

The Dawes Act was later interpreted, by the United States Supreme Court, to allow the allotment of Indian lands and sale of surplus lands, in violation of treaty provisions forbidding the acquisition of Indian lands without tribal political consent.<sup>15</sup> In fact, the only qualification was that the Indian tribe, as ward, had to be given equivalent compensation for the land taken by its federal “trustee.”<sup>16</sup> Although the Indian Reorganization Act of 1934<sup>17</sup> officially ended the allotment policy, the Dawes Act left a severe and traumatic legacy for Indian nations. Many Indian people lost their allotments after they were released from trust status through tax foreclosures and sales under economic duress. Reservation communities continue to suffer jurisdictional problems administering “checkerboard lands,” which are areas on the reservation where tribal trust allotments are interspersed with parcels owned in fee by non-Indians. Additionally, in some cases, this pattern of ownership has inspired the federal courts to find that the external boundaries of the reservation have been “diminished” or even that the reservation has been “disestablished.”<sup>18</sup> In such cases, the Indian nation can only exercise jurisdiction over those parcels still held by the tribe or its members, and the state regulates the balance of the land.

Most significantly, however, several modern opinions of the United States Supreme Court have created a doctrine giving preference to the rights of non-Indian property owners on the reservation over the rights of tribal governments

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13. Dawes Allotment Act, 25 U.S.C. §§ 331-334 (1994).

14. Under the Allotment Policy, Indian landholdings were reduced from 138 million acres in 1887 to 48 million acres in 1934. See VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 10 (1983). For general background on the Allotment Policy, see *id.* at 8-12.

15. See *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

16. See *id.* at 566-68.

17. 25 U.S.C. §§ 461-479 (1994).

18. See, e.g., *South Dakota v. Yankton Sioux Tribe*, 118 S. Ct. 789 (1998) (finding that Yankton Sioux Tribe’s Reservation was diminished by allotment act); *Hagen v. Utah*, 510 U.S. 399 (1994) (finding that Uintah Indian Reservation was diminished by congressional act opening reservation to non-Indian settlement).

to effectively regulate reservation lands.<sup>19</sup> Professor Singer has described this doctrine as one whereby the Court abdicates its responsibility to protect tribal property rights by treating tribal property and restricted trust allotments owned by tribal members as a “commons available for non-Indian purposes when needed by non-Indians.”<sup>20</sup>

## II. CONTEMPORARY CONFLICTS OVER PROPERTY AND NATIVE SOVEREIGNTY

The meaning of tribal sovereignty, as it relates to property rights, is particularly compelling in a public policy era focused on protecting the vested property rights of American citizens. The debate over water rights in the many on-going Western stream adjudications, which involve the application of the prior appropriation doctrine, provides a good example of this. In the arid climates of the West, a landowner’s “wealth” is often best measured by the water rights that support his or her use of the land resource. Although the priority dates of the Indian tribes are generally the earliest in time, often their rights have not been recognized with respect to water projects. In the minds of most non-Indians, the rights of Indians to available water are secondary to those of private citizens, whose property rights are “perfected” and have become “vested.” The idea, that tribal interests in water should not be recognized in the face of the vested property interests of individual citizens, became one of the policy underpinnings for Chief Justice Rehnquist’s opinion in *Nevada v. United States*.<sup>21</sup> In *Nevada*, the Court applied *res judicata* to bar the Pyramid Lake Paiute Tribe’s challenge to a 1944 adjudication of their water rights, which failed to provide water for fisheries, though the fisheries were critical to the tribe, and despite the fact that the tribe had not been effectively represented in the proceeding because of the federal government’s conflicting duty to the non-Indian beneficiaries of the reclamation project.<sup>22</sup>

Another dominant theme in the Supreme Court’s current jurisprudence is the idea that tribal interests in uniform regulation of land, within the exterior boundaries of the reservation, should be subordinated to the interests of non-Indian owners of “fee land” within the reservation. Rather than trying to facilitate the efficient administration of reservation lands by Indian tribes, the Court’s opinions have increasingly determined that Indian nations retain very limited jurisdictional authority over non-Indians on fee lands.<sup>23</sup> These opinions

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19. See, e.g., *Brendale v. Confederated Tribes and Bands of Yakima*, 492 U.S. 408 (1989) (holding that Yakima Nation did not have jurisdiction to regulate land use on non-Indian fee land within the “open” area of the reservation); *Montana v. United States*, 450 U.S. 544 (1981) (holding that Crow Tribe did not have the jurisdiction to regulate hunting and fishing by non-members on fee land within the reservation).

20. Singer, *supra* note 8, at 3.

21. 463 U.S. 110 (1983).

22. See *id.* at 145.

23. See, e.g., *Atkinson Trading Co., Inc. v. Shirley*, 121 S. Ct. 1223 (2001) (holding that Navajo Nation did not have jurisdiction to impose a hotel occupancy tax upon nonmembers on non-

are supported by the Court's belief that the "diminished sovereignty" of Indian tribes over their reservation impairs their ability to regulate non-Indians.<sup>24</sup> So, to the extent that the tribe has lost its treaty "right to exclude" non-Indians from the reservation (through the federal government's allotment of the reservation and sale of land to non-Indians), it has also lost its right to regulate. If the Tribe seeks to regulate non-Indian property owners, under its inherent sovereignty, the Court finds that the "dependent" status of the Indian tribes conflicts with their ability to limit the vested property interests of non-Indian landowners.<sup>25</sup>

In *Montana*, for example, the Court held that Indian tribes had been implicitly divested of their inherent sovereign authority to regulate non-Indian hunting and fishing on non-Indian fee lands within the reservation.<sup>26</sup> The Court reasoned that the "exercise of tribal power beyond what is necessary to protect tribal self-government or control internal relations is inconsistent with the dependent status of the Indian tribes and so cannot survive without express congressional delegation."<sup>27</sup> In *Brendale*, the plurality opinion of the Court decreed that the tribe had been divested of zoning authority over non-member fee land in the "open" area of the reservation, although the tribe retained such authority over fee land held in the "closed" area of the reservation (an area of the reservation where there was a minimal amount of fee land and which was closed to nonmembers who were not residents and where the tribe held cultural activities).<sup>28</sup> Despite the fact that "checkerboard" zoning jurisdiction, like "checkerboard" wildlife management, is inherently unworkable, the Court opted to protect the liberty interests of the non-Indian landowners over the tribe's interests in effective governmental regulation. The subtext of these cases emerges in Justice Stevens' separate opinion in *Brendale*, which expresses his belief that Tribes may enforce discriminatory rules that would be intolerable in a non-Indian community and that nonmembers have no opportunity to participate in tribal government.<sup>29</sup>

Cases like *Montana* and *Brendale* demonstrate the Court's current belief that tribal jurisdiction over non-Indian property owners on the reservation has been severely curtailed. Most recently, the Court's opinion in *Strate* further narrows the two exceptions set forth in *Montana*, which supported the inherent right of tribes to regulate non-Indian activities which have a direct effect on important tribal interests or where the non-Indian party is in a consensual relationship with the tribe or its members.<sup>30</sup> Not surprisingly, the boundaries of tribal

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Indian fee land within the reservation); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), *Montana v. United States*, 450 U.S. 544 (1981).

24. See *Montana*, 450 U.S. at 565.

25. See *id.* at 563-64.

26. See *id.*

27. *Id.* at 564.

28. See *Brendale*, 492 U.S. at 422-32, 443-44, 456-59.

29. See *id.* at 434-36 (Steven, J., concurring).

30. See *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (holding that a tort action against non-

jurisdictional authority are currently under further attack in the federal courts.<sup>31</sup>

The Supreme Court's recent jurisprudence jeopardizes remaining tribal rights to land and political autonomy. While the Court seems satisfied that Indian nations possess sovereignty over their trust lands and tribal members, it has severely limited the ability of tribal governments to protect their lands and resources through effective, uniform regulation. By granting priority to the interests of non-Indian landowners, the Court disregards the responsibility to protect the tribes' interests. As Professor Singer's comprehensive article on this problem notes, these cases "teach us a great deal about both the social meaning of property rights and about the just and unjust exercise of governmental power."<sup>32</sup>

Indeed, Professor Singer highlights several features of recent jurisprudence, that stand in direct contravention of "some of the most cherished truisms about the meaning of private property in America."<sup>33</sup> First, these cases show that the Court's protection of property interests is not uniform. The Court gives stringent protection to non-Indian owners of fee land on the reservation, while it treats the group rights of Indian nations to their trust lands as a social anachronism of "communal property," that can be made secondary to non-Indian interests. Interestingly enough, when the debate is between Indian and non-Indian property interests, the Court lumps individual Indian allottees along with the tribe, without much thought as to why individual property rights should be treated differently depending upon whether the holders are Indian or non-Indian.<sup>34</sup> However, when the debate over property rights is between an individual Indian allottee and his or her Nation, the Court tends to side with the individual property owner.<sup>35</sup>

Second, the Court assumes that non-Indian property owners on the

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Indians, with respect to an accident occurring on a public highway that ran through an Indian reservation, could not be brought in a tribal court because the action failed to qualify under the *Montana* exceptions).

31. Earlier this Term, the Supreme Court heard arguments in *Nevada v. Hicks*, 196 F.3d 1020 (9th Cir. 1999), cert. granted, 121 S. Ct. 296 (2000). The Court is reviewing the Ninth Circuit's opinion upholding the jurisdiction of the Fallon Paiute-Shoshone Tribal Court over a claim by a tribal member against state law enforcement officers for alleged tortious conduct and civil rights violations arising on a trust allotment owned by the member within the reservation. Another case to monitor is *Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210 (9th Cir. 2000), reh'g en banc granted, 240 F.3d 1215 (9th Cir. 2001), in which the Ninth Circuit held that the Hoopa Valley Tribe does not have authority to regulate timber harvest on non-Indian owned fee land within the reservation located within a "buffer zone" designated by the tribe as necessary for preservation of a protected cultural site.

32. Singer, *supra* note 8, at 3.

33. *Id.*

34. *See id.* at 3-4.

35. *See, e.g., Hodel v. Irving*, 481 U.S. 704 (1987) (holding unconstitutional a provision of the Indian Land Consolidation Act which permitted forfeiture to the tribe of minute fractionated heirship interests in allotted parcels belonging to tribal members when the decedent failed to specify an alternative disposition by will).



reservation have the right to be free from political control by Indian nations.<sup>36</sup> According to Justice Stevens' separate opinion in *Brendale*, it would not be fair to subject such property owners to the control of a tribal government which does not allow non-Indian participation. On the other hand, the Court has little difficulty in finding that Indian nations are subject to the political sovereignty of non-Indians.<sup>37</sup> As Singer notes, this disparate treatment of both property and political rights is not the result of neutral rules being applied unfairly; it is the result of "formally unequal rules."<sup>38</sup> Singer asserts that this implies an uncomfortable truth: "both property rights and political power in the United States are associated with a system of racial caste."<sup>39</sup>

Although some may find Singer's comment a bit polemical, it finds a great deal of support in the history of treaty relations in the United States for two distinctive groups: American Indian Nations and Mexican-Americans. Despite a very different historical context, the contemporary claims of Mexican-Americans to justice, under the Treaty of Guadalupe Hidalgo, are analogous to American Indian treaty claims because they are group-based and emphasize both the cultural rights of Mexican people within the dominant society and the need for the United States to admit its history of injustice, which has caused their dispossession from their lands.<sup>40</sup> Mexican-Americans view the Treaty as imposing a moral obligation upon the United States to respect the property rights and human rights that were guaranteed to the Mexican nationals who were incorporated into the United States.<sup>41</sup> The courts, however, have largely disregarded this perspective, viewing the Treaty as an agreement between sovereigns, unsuitable for analysis in a domestic dispute between U.S. citizens and their government.<sup>42</sup>

The Court's interpretation of Indian treaties is often inconsistent. Sometimes the Court has interpreted the treaties as agreements between sovereign powers, which guaranteed the Indian nations their continued right to govern their lands and resources.<sup>43</sup> In other cases, the Court has used a much more restrictive reading of treaties, finding that they, in fact, *created* tribal rights to their resources,<sup>44</sup> and that those rights can be unilaterally abrogated by the action of

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36. See Singer, *supra* note 8, at 4-5.

37. See *id.*

38. *Id.* at 5.

39. *Id.*

40. See Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1635 (2000).

41. See *id.*

42. See *id.* at 1631-32 (discussing *Botiller v. Dominguez*, 130 U.S. 238 (1889), which upheld an interpretation of a statute that resulted in the dispossession of many Mexicans from their treaty-guaranteed land rights).

43. See, e.g., *United States v. Winans*, 198 U.S. 371, 381 (1905) (upholding the Tribe's off-reservation fishing rights on the basis that "the treaty was not a grant of rights to the Indians, but a grant of rights *from* them—a reservation of those not granted").

44. See, e.g., *Montana v. United States*, 450 U.S. 544, 559 (1981) (noting that, if the Crow

the federal government, as a "superior" sovereign exerting authority over the "dependent" Indian tribes.<sup>45</sup> Not surprisingly, the Court's restrictive reading of Indian treaties is generally applied to protect and enhance *non-Indian* property interests.<sup>46</sup>

This discussion highlights the need to identify the conceptual basis for the conflict between land and autonomy that informs the debate over "property, wealth, and inequality."

### III. THE CONCEPTUAL BASIS FOR THE CONFLICT OVER LAND AND AUTONOMY

Where do Native peoples fit within the debate over "property, wealth, and inequality"? In order to formulate a response to this key question, we must first have a working definition of property, wealth, and inequality. But even at this most fundamental level, the conceptual disjunction between Native and non-Native cultures is apparent. Most importantly, do Native and non-Native people even share a common understanding of "property"? Even if we all agree to a standard definition of "property" as the rights, powers, and interests that individuals and groups have with respect to a variety of resources (e.g., water, fish, plants, cultural objects), there remains a fundamental problem with our understanding of how those rights, powers and interests come into being. Professor Laura Underkuffler-Freund offers an important insight into the problem, when she writes:

Property rights are, by nature, social rights; they embody how we, as a society, have chosen to reward the claims of some people to finite and critical goods, and to deny the claims to the same goods by others. Try as we might to separate this right from choice, conflict, and vexing social questions, it cannot be done.<sup>47</sup>

Property, then, depends upon the *relationships* among people in a society. This appears to make sense for individuals, who collectively comprise a unitary society. The debates among those individuals may rationally relate to other social ideals, such as equal access, distributive justice, and fairness in the

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Tribe's 1868 Treaty with the United States "created tribal power to restrict or prohibit non-Indian hunting and fishing on the reservation, that power cannot apply to lands held in fee by non-Indians").

45. See, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903) (holding that the United States could unilaterally abrogate a treaty provision, when "in the interest of the country and the Indians themselves").

46. In *Montana*, the Court's interpretation supported the private property rights of non-Indian landowners on the reservation; in *Lone Wolf*, the Court's interpretation supported the forcible allotment of the Treaty reservation of the Apache, Comanche, and Kiowa Nations, and the subsequent sale of a large portion of those lands to non-Indian settlers.

47. Laura S. Underkuffler-Freund, *Property: A Special Right*, 71 NOTRE DAME L. REV. 1033, 1046 (1996) (footnote omitted).

adjudication of their respective rights to land and other resources.<sup>48</sup> However, this understanding is problematic when dealing with the rights of distinctive *peoples*, who preexisted the formation of the society and who were involuntarily annexed (as sovereign groups) into that society through acts of colonialism. The question of intercultural justice is at the heart of this relationship and the way we conceptualize the institution of property can continue to strip Native peoples of their lands and autonomy.

Moreover, our normative foundation of property involves the values that we attach to the idea of "ownership." Joseph Singer commented that "[o]wnership entails not only the granting of rights but also the adoption of obligations."<sup>49</sup> As a society, we grant rights to protect individuals' interests in liberty, autonomy, and self-determination. As a society, we must agree on the obligations that such ownership entails, such as the obligation to refrain from harming one's neighbor, which is at the heart of the ancient maxim "sic utere." In some cases, such obligations are reciprocal. For example, as zoning law illustrates, it may only be through agreeing to have one's rights *limited* that one's ultimate enjoyment of property rights is guaranteed.

Again, however, this entire structure depends upon some uniform notion of the values inherent in the institution of property. It is entirely possible, for example, that the questions of justice that inform the relationship among individual property owners in a society are quite different from those implicit in relationships among separate sovereign governments and the Nation that involuntarily incorporated them. To simplify a very complex point, if property law as an institution is to be just in its application to Native peoples, it must at least attempt to respect their unique claims to land and resources. The existing framework, unfortunately, does not.

As the discussion in Part II demonstrates, the courts have largely upheld Indian Nations' use and enjoyment of *tribal trust lands* within the reservation. Thus, tribes can use those lands for economic development, including gaming facilities, timber harvesting and mining, so long as they do not offend any contrary provisions of federal law. As noted, however, their efforts to maximize the value of these lands, through effective regulation, have often been frustrated by the Court's determination to protect non-Indian owners of fee land on the reservation.<sup>50</sup> These frustrations are compounded by the history of devastating loss and displacement which has resulted in reservation trust lands comprising only a small portion of Indian Nation's aboriginal homelands. Moreover, many tribes were removed from their aboriginal territory altogether and settled in distant locations.<sup>51</sup>

Despite the fact that some Tribes have received monetary compensation for

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48. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999).

49. JOSEPH WILSON SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 17 (2000).

50. See *supra* notes 18, 26 and accompanying text.

51. For example, many of the Southeastern tribes, such as the Cherokee, Choctaw and Chickasaw were relocated to the Oklahoma Indian Territory.

the forcible dispossession of their lands,<sup>52</sup> they continue to suffer in ways not amenable to financial redress. To illustrate this problem, I will discuss several cases that highlight the *value* of land to Native people, reflecting a different view about property as “wealth,” and explain how that value is adjudicated within modern conflicts over the appropriate use of “public lands.”

### A. *Land as Sacred Geography*

There is a dynamic and on-going relationship between Native peoples and the land. Although this relationship is often misunderstood by non-Indians and depicted as “nature worship” or something similar, the land carries a critical significance to indigenous peoples. Professor Frank Pommersheim described the significance, writing: “Beyond its obvious historical provision of subsistence, it is the source of spiritual origins and sustaining myth which in turn provides a landscape of cultural and emotional meaning. The land often determines the values of the human landscape.”<sup>53</sup> For most Native peoples, land is constitutive of cultural identity.<sup>54</sup> Many Indian nations identify their origin as a people with a particular geographic site, often a mountain, river or valley, which represents an integral part of the tribe’s religion and cultural world view.<sup>55</sup> This is the case for the Lakota, who believe that they emerged from caves within the Black Hills, which they call “Wamaka Og’naka Icante”—the “heart of everything that is.”<sup>56</sup>

Land is also a way to identify the cultural universe of a particular tribe.<sup>57</sup> For example, the Navajo Nation identifies four sacred mountains which mark the boundaries of their universe. This understanding requires the people to undertake many ceremonial obligations and also orients the people in understanding how to meet their responsibilities to each other and to the land. Many tribes share the belief that the people must look after the land. However, such relationships are also seen as reciprocal. So, for example, the Western Apache say: “The land makes people live right. The land looks after us. The land looks after the people.”<sup>58</sup> Among the Western Apache, place names are used very specifically to tell stories about events that took place at these sites. These

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52. The Indian Claims Commission Act, ch. 959, § 1, 60 Stat. 1049 (repealed 1978), for example, provided statutory claims for compensation of grievances relating to land rights, including involuntary extinguishment of aboriginal title. Many tribes have prevailed in such claims but are typically awarded only monetary compensation. In other cases, tribes have successfully sued state governments, who acted without federal authority (in violation of the Nonintercourse Acts) to appropriate tribal lands.

53. Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D. L. REV. 246, 250 (1989).

54. See Tsosie, *supra* note 40, at 1640-41.

55. See *id.*

56. William Greider, *The Heart of Everything That Is*, ROLLING STONE, May 7, 1987, at 37, 62.

57. See Tsosie, *supra* note 40, at 1640.

58. KEITH H. BASSO, WISDOM SITS IN PLACES: LANDSCAPE AND LANGUAGE AMONG THE WESTERN APACHE 38 (1996).

stories provide a code of appropriate moral behavior to guide the people. Thus, the place name evokes not only a picture of the place but a story to “make you live right.”<sup>59</sup>

In fact, the meaning, origin, and significance of the land resides in the stories, songs, and prayers of the Native peoples and communities that belong to these lands. The land is a source of sustenance and abundance, but the cultural knowledge that comes from the land is also a form of “wealth” for Native peoples. As Joy Harjo, a Creek poet, says: “Stories are our wealth.”<sup>60</sup> Leslie Silko, Laguna novelist, agrees, noting that through those stories, Pueblo culture is transmitted across generations, inclusive of the strategies, beliefs, norms, and values necessary to ensure cultural and physical survival within a specific geographic location.<sup>61</sup> Thus, the value of these resources to Native people is measured in both tangible and intangible ways.

The land that we now call “America” in fact represents a “sacred geography” of mountains, forests, rivers, canyons, and deserts. Deward Walker identifies many sacred sites that are actively used by Native religious practitioners and discusses several “functions of sacred geography” for Native peoples, including the fact that they identify fundamental cultural symbols and patterns, provide an image of social order, and, perhaps most importantly, are a tangible link between the world of human beings and the sacred, “where spiritual power” can be accessed.<sup>62</sup> Thus, “[u]nless rituals are performed at the proper locations, they have little or no efficacy.”<sup>63</sup> Notably, many of these sites are located on what are now considered to be “public lands”: National Parks, National Monuments, and land owned by the federal government and managed by agencies such as the Bureau of Land Management.

### *B. Public Lands: The Property of “Americans”*

Normally, Americans are quite protective of their attachment to private property rights. Private property rights are exalted under American jurisprudence for serving the values of efficiency and productivity and because they enhance an individual’s basic rights, including liberty and autonomy. A strange counter-example exists, however, in the concept of “public lands” which are perceived to belong to *all* Americans collectively and which are managed for the “greater public good” by the national government. Multiple use policies governing public lands emphasize the necessity to use the lands efficiently, for commercial and economic benefit as well as recreational use.<sup>64</sup> Federal public land policy has

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59. *See id.*

60. JOY HARJO, *SECRETS FROM THE CENTER OF THE WORLD* 24 (1989).

61. *See* Leslie Marmon Silko, *The Indian with a Camera, Foreword to A CIRCLE OF NATIONS: VOICES AND VISIONS OF AMERICAN INDIANS* 7 (John Gattuso ed., 1993).

62. Deward E. Walker, Jr., *Protection of American Indian Sacred Geography, in HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM* 110, 110-11 (Christopher Vecsey ed., 1991).

63. *Id.* at 110.

64. *See, e.g.*, The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1702(c),

often vacillated between ideals of preservation, conservation, and sustainable use. The operative principle in most cases appears to be the need to balance development interests (inclusive of economic values) with preservation interests (inclusive of aesthetic values). Regardless of this debate, however, most Americans value their collective interest in public lands and routinely resist attempts, for example, to privatize the National Parks, although they perceive the value of certain private property interests (e.g. leaseholds) in public lands.

Where did these public lands come from? Our contemporary National parks and National monuments are the same lands that were appropriated from Native people by military force during the "Indian Wars" of the 19th Century. The public land laws of the late 19th and early 20th centuries, whether geared toward development, conservation, or preservation, served the interests of American citizens and not Native peoples. Native lands were appropriated for homesteading, grazing, mining, railroads, National Parks, and military installations. These lands are no longer "Indian Country" although the tribes retain important connections to these ancestral lands within their own traditions.

How does the controversy over the appropriate use of public lands affect Indian Nations? As several cases illustrate, the rights of Indian Nations to these public lands are generally considered indistinguishable from the rights of other "Americans." Indian Nations are not landowners with respect to these lands that generations of their people were born to: rather, they are considered merely "stakeholders" with a host of unique and sometimes incomprehensible (to the federal land manager) interests that they seek to assert.<sup>65</sup> In some cases, this disconnect in values results in the subordination of Native peoples' interests to the greater public good.<sup>66</sup> For example, in *Lyng v. Northwest Indian Cemetery Protective Ass'n*,<sup>67</sup> the Supreme Court failed to enjoin the government's construction of a road through a sacred site located on U.S. Forest Service land which was vital to the spiritual practice of several tribes of Indians in the Pacific Northwest. Justice O'Connor, writing for the Court, acknowledged the possibility that the road would "virtually destroy" the Native peoples' ability to practice their religion; however, she refused to apply the balancing test necessary to assess whether there had been a constitutional violation of the Indian tribes' free exercise rights, asserting that, "[w]hatever rights the Indians may have to use of the area . . . those rights do not divest the Government of its right to use what

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which defines "multiple use" as the "management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people."

65. See generally Lloyd Burton & David Ruppert, *Bear's Lodge or Devil's Tower: Intercultural Relations, Legal Pluralism, and the Management of Sacred Sites on Public Lands*, 8 CORNELL J.L. & PUB. POL'Y 201 (1999).

66. This is quite problematic due to the Federal government's trust responsibility to Indian Nations, which sets up a competing obligation in the federal land manager. That issue, however is beyond the scope of this Article.

67. 485 U.S. 439, 453 (1988).

is, after all, *its* land.”<sup>68</sup> In other cases, such as one involving the National Park Service’s management plan for the Devil’s Tower National Monument, Native peoples’ religious interests are accommodated as a “cultural use” of the lands and qualified by the rights of other parties, such as recreational rock climbers, to enjoy the resource.<sup>69</sup>

In recognition that their interests will never be adequately protected so long as these sacred lands are the “property of all Americans,” several Native peoples have sought to repatriate these lands to tribal ownership. Most of these efforts have been unsuccessful. So, for example, the Lakota Sioux still fight to repatriate the Black Hills, and they have refused to accept the court’s award of monetary compensation for the illegal appropriation of these treaty-guaranteed lands.<sup>70</sup> The Lakota are convinced that if they accept monetary damages for their claim to these sacred lands, they will forfeit their identity as Lakota people.<sup>71</sup>

One of the few success stories is the Taos Pueblo’s repatriation of Blue Lake, taken from the Pueblo in 1906 when President Theodore Roosevelt established the Taos Forest Reserve that ultimately became the Carson National Forest.<sup>72</sup> Blue Lake, regularly the site for religious pilgrimage, is an extremely sacred site to the Taos Pueblo and occupies a central place in their cosmology. For years after Blue Lake was appropriated from the Taos Pueblo, tribal elders traveled to Washington, D.C. to testify before Congress and ask for the return of these sacred lands. The Taos elders testified to the obstacles they had faced in their religious and cultural practices due to restrictive federal land management policies. Finally, in 1970, President Nixon signed House Resolution 471, which restored 48,000 acres of land, including Blue Lake, to the Taos Pueblo.<sup>73</sup> As Simon Ortiz comments, the determination of the Pueblo people was “truly epic, and their resource was the oral tradition and its mythic power to confirm

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68. *Id.* at 451, 453 (emphasis in original).

69. *See* Bear Lodge Multiple Use Ass’n v. Babbitt, 2 F. Supp. 2d 1448, 1454 (D. Wyo. 1998), *aff’d*, 175 F.3d 814 (10th Cir. 1999), *cert. denied*, 529 U.S. 1037 (2000). The district court found that the NPS’s voluntary closure policy, which sought to curtail commercial use of the monument during the month of June to protect important Native spiritual practices, was a permissible accommodation of religious worship because the purposes behind the policy “remove barriers to religious worship occasioned by public ownership of the Tower. This is in the nature of accommodation, not promotion, and consequently is a legitimate secular purpose.” *Id.* at 1455. On appeal, the Tenth Circuit held that the climbers lacked standing to make the Establishment Clause argument, and thus the court did not reach the merits of the case. *See Bear Lodge Multiple Use Ass’n*, 175 F.3d at 814.

70. *See* Greider, *supra* note 56, at 38; Tsosie, *supra* note 40, at 1644; *see also* United States v. Sioux Nation of Indians, 448 U.S. 371, 424 (1980) (upholding judgment in favor of Sioux Nation for taking without just compensation under Fifth Amendment).

71. *See* Tsosie, *supra* note 40, at 1645.

72. *See* R.C. GORDON MCCUTCHAN, THE TAOS INDIANS AND THE BATTLE FOR BLUE LAKE 12 (1995).

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

existence and continuance."<sup>74</sup>

Thus, in concluding this discussion about the conceptual basis for the conflict between ideals of property and autonomy for Native and non-Native peoples, it is important to note that both groups share a commitment to ideals of property and ideals of autonomy. They differ, however, in their interpretation of what these ideals mean. To Indian Nations, autonomy means the right to self-determination as separate peoples. They also know that their sovereignty depends upon a corollary notion of property. To the extent that property represents a system of rights, duties, interests, and obligations among people with respect to resources, both groups share a belief in the existence of such a system. Where they depart, however, is on the value structure that underlies this system. Although Native peoples, like all people, share the need to use the land for their physical sustenance, they hold different notions about the appropriate relationship and obligations people hold with respect to the land. The mere fact that the land is not held in Native title does not mean that the people do not hold these obligations, nor, as the Taos Pueblo case demonstrates, that they no longer maintain the rights to these lands. To Native people, land is vital to political identity (the idea of sovereignty implies the notion of a territory), to economic self-sufficiency, and also to cultural identity. If intercultural justice is to be achieved, the norms and values of the American property system must respond to these unique features of Native peoples' existence within the territorial boundaries of the United States.

#### IV. PERSPECTIVES ON PROPERTY, WEALTH, AND INEQUALITY: A FRAMEWORK FOR FUTURE INQUIRY

To conclude this essay, I would like to propose a framework of analysis for further thinking on how we could reach a notion of intercultural justice that would take into account Native people's unique interests in property and autonomy.<sup>75</sup> The connection between property and sovereignty is vital in constructing a theoretical framework for intercultural justice. In constructing this account of justice, Indian and Euro-American people must acknowledge their connections to the events that took place on the lands that were appropriated from Native people and lands that were retained by Native people as reservations.<sup>76</sup> In some cases, as the jurisdictional dispute over fee land demonstrates, these are the same lands. On the one hand, the reservation is integral to tribal existence: "The Reservation is home. It is a place where the land lives and stalks people; a place where the land looks after people and makes

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74. Simon Ortiz, *Speaking for Courage*, in CIRCLE OF NATIONS *supra* note 61, at 28.

75. I am drawing on some preliminary ideas on intercultural justice that I expressed in my article *Sacred Obligations*. See Tsosie, *supra* note 40, at 1658-69. I was inspired in this analysis by Eric Yamamoto's important work on interracial justice. See ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* (1999).

76. See Tsosie, *supra* note 40, at 1661.



them live right; a place where the earth provides solace and nurture.”<sup>77</sup> However, “paradoxically, it is also a place where the land has been wounded; a place where the sacred hoop has been broken; a place stained with violence and suffering. And this painful truth also stalks the people.”<sup>78</sup>

The framework that I propose has three parts: first, the need to work toward an intercultural or pluralist understanding of property; second, the need to develop a relationship between law and justice that benefits Native people in the assertion of their unique rights; and finally, the need to modify accounts of distributive justice to take into account the unique historical and political status of Native peoples.

### *A. Developing an Intercultural Understanding of Property*

A key question is whether we should continue to analyze these questions within the Anglo-American framework of property or whether we should broaden that model to include intercultural notions of property. Each Indian Nation has its own philosophical structure that defines the meaning of concepts such as sovereignty, property, and justice. In many cases, without a working knowledge of Native language, it can be very difficult to even conduct an intercultural analysis of the dual frameworks, and this difficulty poses a key preliminary challenge. Moreover, since each Indian Nation is distinctive, it is unclear whether we could abstract any general or uniform concepts. Nonetheless, on the theory that some sort of intercultural dialogue about sovereignty and property is embedded in the treaties, I would argue that we ought to at least make an attempt to start a dialogue about intercultural notions of property.

Tribal concepts of property law are often quite different from Anglo-American law, and thus, may lead to a different outcome when defining land use rights, probate distribution, and distribution of marital property. For example, Navajo law uses the idea of the “customary trust” to decide who is eligible for agricultural permits and land use assignments. Traditional Navajo land tenure dictated that land occupancy be held by family groups. Thus, the family holds land in a form of communal ownership, but certain family members may have specific rights to specific areas, such as the right to graze cattle or sheep or the right to grow crops.<sup>79</sup>

Navajo custom dictates that agricultural land should not be subjected to numerous fragmented interests. Thus, in a probate case where the decedent had several children, the customary usage interest was awarded to the heir in “the best position to make proper and beneficial use of the land.” Another value of Navajo customary law, however, is the value of “equal treatment” for children. So, in this case, each of the other children received property from the estate to “equalize” their shares and prevent acrimony. These cases illustrate cultural constructs about fairness and equality which become important in an intercultural

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77. FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 15 (1995).

78. *Id.*

79. *See* *Begay v. Keedah*, 19 Indian L. Rep. 6021, 6022 (Navajo 1991).

dialogue about property rights.<sup>80</sup>

Indeed, these concepts have analogues in other tribes. For tribes along the Northwest Coast, such as the Yurok, customary laws describe the areas where families can conduct their hunting, fishing, and gathering. These use rights are passed down from generation to generation. If an outsider fishes in a customary area belonging to the family, the wronged family may demand compensation. Also, among the Northwest Coast tribes, as well as other tribes, there is a concept of "clan trust property," which includes cultural artifacts of historical and spiritual significance to the entire clan. Such artifacts are often sought after by non-Indian art collectors, but it is important to realize that individual members of the clan do not have the right to alienate these artifacts from the clan.<sup>81</sup> Again, the sense that there are group rights to the property prohibits alienation from the group. Although certain members may be designated as caretakers of the property, they do not have the right to sell the artifacts to others. Many contemporary tribes have adopted laws governing cultural property in order to protect the interests of specific clan and kinship units within the tribe.

Finally, it is apparent that many tribes employed mechanisms to ensure the equal distribution of property throughout the tribe. For example, the Tlingit, Kwakiutl and Haida Indians of Alaska maintained an elaborate Potlatch ceremonial tradition through which wealthy and influential families would redistribute their wealth among the less fortunate members of the tribe. Although they may have lost portions of material wealth through this process, these individuals and families gained social status and prestige through their acts of generosity. Amazingly enough, the Potlatch ceremony was one of the customs that the Europeans sought to eradicate, perceiving it to be heathen and wasteful. Thus, Native traditions contain a rich source of norms governing property and might well provide the foundation for an intercultural notion of property that is flexible and can address the claims of Native people in American society.<sup>82</sup>

### *B. Articulating a New Relationship Between Law and Justice*

To the extent that courts continue to adjudicate intercultural claims within the Anglo-American property structure, it becomes important to ensure that this structure is not being used to unfairly suppress and disregard Native peoples' interests. The legal system makes constant choices about which interests to define as property and also determines how to allocate power between competing claimants when interests conflict. A premier example of those conflicting interests is the debate over the appropriate use of public lands.<sup>83</sup>

Professor Singer elaborates this important point in one of his articles.<sup>84</sup>

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80. See *In re Estate of Benally*, 5 Nav. R. 174, 179-80 (1987).

81. See *Chilkat Indian Village, IRA v. Johnson*, 20 Indian L. Rep. 6127, 6131 (Chilkat Tr. Ct. 1993).

82. See COLINF. TAYLOR & WILLIAM STURTEVANT, *THE NATIVE AMERICANS* 156-57 (1991).

83. See discussion in Part III, *infra*.

84. Joseph William Singer, *Property and Coercion in Federal Indian Law: The Conflict*

Professor Singer observes that property rights are not self-defining.<sup>85</sup> According to Singer, pragmatists counsel attention to the actual workings of the law in particular settings in social life, exploring the historical and social context in which the law operates, instead of focusing on formal systems and conceptual neatness.<sup>86</sup> Thus, pragmatism is designed to focus on the human dimension of the law and promote social practices that promote human flourishing, rather than accepting social practices that create unnecessary human misery. Singer outlines the danger of “complacent pragmatism,” the tendency to rely on “common sense” to assess the consequences of certain conduct and uncritically accept the idea that we are all in agreement about the ultimate goals of society.<sup>87</sup> In particular, complacent pragmatism fails to give an adequate account of the problem of power. As Professors Minow and Spelman point out, it is necessary to look not only at the particularities of certain situations, but at the systematic power relationships in society that act as impediments to social change.<sup>88</sup>

In his article, Singer examines the *Lyng* case and argues for a “revitalized critical form of pragmatism” that examines the law’s impact on the interests of oppressed Native peoples.<sup>89</sup> In *Lyng*, the Court maintained that even if the construction of the road would virtually destroy the Indians’ ability to practice their religion, the Constitution simply did not protect those claims because this was not the type of injury to religion that the Constitution guards against.<sup>90</sup> Specifically, the Court refused to find any evidence that the government “coerced” the Indian Nations into giving up their beliefs or prohibited the Indians from practicing their religions. In the Court’s analysis, the Indians’ religious practice could not foreclose the government from managing its lands and thereby confer upon the Indians “de facto” ownership of “public lands.”<sup>91</sup>

According to Singer, the *Lyng* case is representative of “complacent pragmatism.”<sup>92</sup> Justice O’Connor’s opinion is pragmatic because it focuses on the consequences of recognizing an injury; it is complacent because she relies on her own “common sense” to judge the consequences. Within O’Connor’s frame of reference, it seems quite unlikely that the Indians need *all* of this land to practice their religion.

As Singer notes, the common law of property is not neutral with respect to

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*between Critical and Complacent Pragmatism*, 63 S. CAL. L. REV. 1821 (1990).

85. *See id.*

86. *See id.*

87. *See id.* at 1824 (citing Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1700 (1990)).

88. *See id.* at 1823 (citing Martha Minow & Elizabeth Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1605 (1990)).

89. *Id.* at 1826; *see also* *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988).

90. *See Lyng*, 485 U.S. at 453.

91. Singer, *supra* note 83, at 1832, 1835 (citing *Lyng*, 485 U.S. at 450).

92. *See id.* at 1827-28.

religion.<sup>93</sup> Rather, it developed within a particular social and historical context that explicitly took into account existing religious values and institutions. For example, "John Locke's writings explicitly discuss the relation between property and Christianity."<sup>94</sup> Thus, although existing concepts of property law could have been used in the *Lyng* case to grant the Indian people use rights on a first in time basis (e.g., a perpetual easement for cultural use), the Court scoffs at the idea that the Indians' religious practices could impose a permanent servitude on the land. Singer believes that in order to "combat the conservative nature of common sense judgments, we must subject those judgments to critical evaluation by focusing on the underlying power structures that form the context within which those judgments are made."<sup>95</sup> Presumably, this type of critical inquiry would help ensure that Native cultures are not penalized through interpretations of property law that negate their own values and traditions.

### C. *Developing an Account of Distributive Justice*

Questions of distributive justice focus on the proper patterns of ownership for a society, although often little attention is given to the particular package of rights, liberties, and powers that owners should have over the goods in their possession. There are a number of approaches to determining the correct structure of ownership. One view is that ownership is a single, monolithic bundle of rights that must be held together if individual ownership is to be recognized at all. Another view is that the bundle of rights, liberties, and powers associated with property can be fully disassembled into component parts, each of which could be allocated or traded separately for the optimal outcome. A third view, offered by philosopher John Christman, is that different aspects of property rights perform different functions and serve different individual and social interests.<sup>96</sup> Therefore, ownership rights should be divided into separate categories which combine associated rights for a particular purpose. For example, Christman would differentiate control rights (the right to use, possess, manage, alienate, consume, or modify an asset) from the right to transfer or gain income from an asset.<sup>97</sup>

Under any of these views, a pervasive question is whether and how far the government may venture in regulating property rights to achieve some optimal social goal. Distributive justice implies that all citizens are entitled to a certain minimum or threshold allocation of resources, but it is unclear whether such justice can be gained by interfering with the existing property rights of others.

Another question, drawing on Robert Nozick's analysis in *Anarchy, State and Utopia*, is whether it is relevant in assessing the justice of an existing regime

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93. *See id.* at 1830.

94. *Id.* at 1836 (citing JOHN LOCKE, SECOND TREATISE ON GOVERNMENT 29 (Oskar Piest ed., 1952)).

95. *Id.* at 1841.

96. *See* John Christman, *Distributive Justice and the Complex Structure of Ownership*, 23 PHIL. & PUB. AFF. 225 (1994).

97. *See id.* at 231-35.

to consider not only the distribution it currently embodies, but also how that distribution came about.<sup>98</sup> In other words, is historical context relevant to the determination of whether an existing distributional scheme is just? Historical arguments for property rights maintain that whether or not a holding or set of holdings is just, that is whether we have a moral right or entitlement to our holding, depends on the moral character of the history that produced the holdings. End-state arguments, on the other hand, maintain that the justice of holdings, and our rights to them, depend not on how they came about but rather on the moral character of the structure or pattern of the set of holdings of which they are a part. Under this argument, we need only a “current time slice” of the set in order to morally evaluate the set and its component holdings.

Of course, there are many related inquiries. For example, in cases of historical injustice, should we provide reparations to the victims or their descendants? Are “reparations” consistent with “compensatory justice,” in the sense that they alleviate any further inquiry into ongoing distributions of resources within society?

With respect to Native peoples, the questions are particularly troubling. The “equal justice” rhetoric often evokes the notion that all citizens are entitled to a basic set of goods and rights. If citizens have these rights—and presumably the Constitution is partly designed to provide this—then there is no further argument for special rights or different entitlements among distinct groups. This notion of equal citizenship does not address Native peoples’ desire for recognition of their distinctive status as sovereign nations, and the special rights that stem from that status. The dispossession of Native peoples from their lands was an act of colonialism designed to forcibly dismantle the Native peoples’ existing governmental systems and supplant them with those of the conquering nation. Looking back, we may be critical of certain actions taken by the politicians of that time, particularly the more grotesque acts of genocide and warfare. However, we rarely question the right of contemporary citizens to reside on the lands that were forcibly taken from Native people. In fact, citizen outcry is at its strongest when the courts recognize “ancient” property rights stemming from treaties or federal statutes such as the Nonintercourse Acts, which were illegally breached. Few non-Indians really think it would be just to give portions of New York state back to the tribes, even though the tribes may possess a legal right to such land.<sup>99</sup>

Americans have accepted a certain mythological belief about the birth of their nation, one which excuses the harsh realities of conquest in favor of a view that Indians did not really have property rights or governmental systems that were equivalent to those of the Europeans. Therefore, unlike Russia’s conquest of its neighboring countries, the conquest of American Indian people is depicted as being more of a civilization campaign. The view today is often that Indian

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98. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

99. See, e.g., *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (invalidating conveyance of land from Oneida Tribe to State of New York under a 1795 agreement that violated the Trade and Intercourse Act of 1793).

people are much better off after European conquest than they would be otherwise. The gifts of technology—the automobile, internet, television, and VCR—are more than ample compensation for the loss of rights to wander aimlessly over vast expanses of land.

This mythology is supported by philosophical accounts, such as John Locke's, that justify the superiority of individual property rights based on efficiency and productivity. It is supported by common law legal principles that elevate individual property rights over group claims to land, fish, water, and other resources. It is supported by a script that appears in countless movies, novels, and even Supreme Court opinions about how the West was won and who the good guys are. But most troubling of all, maybe it is supported by us—the scholars who are charged with teaching, thinking, and writing about these things—when we accept the existing property rights model as the norm and force ourselves to think of creative arguments for why Native peoples' rights are as deserving as non-Native peoples' rights. Maybe we have it all turned around and should adopt a different lens to analyze the justice of the Anglo-American property system.

#### CONCLUSION

As this essay has demonstrated, the debate over property, wealth, and inequality has important implications for Native people and requires a conceptual approach that highlights the need for intercultural justice and holds promise for a more flexible and fair approach to this debate. In his masterful work on Native religion, *God is Red*, Vine Deloria, Jr. writes, "Within the traditions, beliefs, and customs of the American Indian people are the guidelines for mankind's future."<sup>100</sup> It may be that some of the lessons needed to heal this country of the wounds of the past reside in Native traditions. The American institution of property has been used to dispossess Native peoples from their lands and autonomy, to disenfranchise African-Americans of their human rights and to divest Mexican-Americans from their treaty-guaranteed rights under the Treaty of Guadalupe Hidalgo. This is the time to generate an intercultural dialogue on justice which highlights the need to redress this painful past. Vine Deloria concludes his book by emphasizing the centrality of Native belief in shaping the future of this land we call America:

Who will find peace with the lands? The future of mankind lies waiting for those who will come to understand their lives and take up their responsibilities to all living things. Who will listen to the trees, the animals and birds, the voices of the places of the land? As the . . . peoples . . . rise and begin to claim their ancient heritage, they will discover the meaning of the lands of their ancestors. That is when the invaders of the North American continent will finally discover that for this land, God is Red.<sup>101</sup>

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100. VINE DELORIA, JR., *GOD IS RED* 300 (1973).

101. *Id.* at 301.