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Article

***1022 IN DEFENSE OF PROPERTY**

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

***1024 INTRODUCTION**

There is a quiet--and somewhat ironic--revolution underway in property law today. Though property law historically has been used to legitimize the conquest of indigenous lands, indigenous groups worldwide are now employing this same body of law to lay claim to their own cultural resources. In the United States, for example, Indian tribes have sought trademark rights in tribal symbols, [FN1] the return of Indian burial and ceremonial objects from museums, [FN2] easements in sacred sites, [FN3] and ongoing title to aboriginal lands. [FN4] American Indian tribes increasingly bring such claims, grounded in property law, to advance tribal sovereignty, self-determination, and cultural survival. Internationally, indigenous groups in places as diverse as Belize [FN5] and Australia [FN6] *1025 have also turned to property law to challenge the expropriation of their lands, medicines, ceremonies, artwork, and natural resources. [FN7]

These examples are not isolated; rather, they reflect the emergence of a distinct area of law that focuses on land, traditional knowledge, and other interests often associated with the cultural heritage of indigenous groups. This body of cultural property law is unique because it traverses not only the boundaries between properties--real, personal, and intellectual--but also the boundaries between international, domestic, and tribal law. Indeed, on September 13, 2007, after twenty-five years of negotiation, the United Nations adopted the Declaration on the Rights of Indigenous Peoples, [FN8] which contains numerous provisions explicitly recognizing the collective property rights of indigenous peoples to both tangible and intangible resources. [FN9]

Yet just as the international community begins to reckon with protecting indigenous cultural heritage,

many scholars, often from diverse disciplines, are intensely critical of the concept. In a recent New York Times column, Edward Rothstein complained that cultural property laws had engendered “a new form *1026 of protection, philistinism triumphing in the name of enlightened ideas.” [FN10] Legal scholars in particular—including those who typically align themselves with progressive causes—strongly criticize indigenous peoples’ efforts to assert ownership and autonomy over their tangible and intangible traditional resources, arguing that culture is and must remain part of an entitlement-free commons. In one recent article, for example, Naomi Mezey contends that “the idea of property has so colonized the idea of culture that there is not much culture left in cultural property.” [FN11] For Mezey, the notion of indigenous cultural property raises the likelihood that once indigenous peoples obtain title to cultural property, they will use it to exclude others—a practice that would inevitably limit the free flow of culture.

In our view, these critiques arise, in part, because of the absence of a coherent rationale that undergirds the protection of indigenous cultural property. Without a viable framework, scholars tend to link cultural property protections to a narrow paradigm of property itself, associating property with traditional rights of alienability, title, and exclusion, and norms of commodification and commensurability. Underlying many of these critiques is a deep and pervasive assumption that in order to obtain protections for cultural goods outside of the market, the law must create exceptions for certain groups. [FN12] Such views are evident in contemporary legal opinions, including the Ninth Circuit’s recent en banc decision in *Navajo Nation v. U.S. Forest Service*. [FN13] In *Navajo Nation*, several tribes claimed that the Forest Service’s decision to allow the use of recycled water containing human waste for snowmaking on the San Francisco Peaks would violate the Religious Freedom Restoration Act by desecrating one of their most sacred sites and burdening numerous religious practices and belief systems. [FN14] The Ninth Circuit’s opinion, rejecting the tribes’ *1027 claims, evinces the familiar fear that if the law were to protect Indian religious and cultural interests, Indians effectively would acquire “ownership” of the public lands. [FN15]

In reality, indigenous cultural property transcends the classic legal concepts of markets, title, and alienability that we often associate with ownership, making it all the more important for property scholars to evaluate its parameters. By challenging these classic property constructs, indigenous cultural property claims force us to contemplate the intellectual divide between two competing visions of property. The classic view of property law focuses on the predictability and certainty of protecting the individual owner’s rights of exclusion [FN16] and alienation primarily for wealth-maximization purposes. [FN17] Yet a more relational vision of property law honors the legitimate interests of both owners and nonowners, in furtherance of various human and social values, potentially including nonmarket values. [FN18] Accordingly, the classic view focuses on property’s stabilizing force, whereas the relational view emphasizes its fluidity and dynamic character. [FN19] Perhaps most problematic for indigenous *1028 cultural property claims, the classic view of property law, including its ownership model, is intimately tied to a paradigm of liberal individualism. Current theories of property acquisition grounded in this tradition, whether economic or noneconomic, fail to take into account the prospect of group-oriented claims of custody and control that are so critical to the protection of indigenous cultural property.

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

Our focus on peoplehood vis-à-vis personhood inspires us to look beyond the static forbearance of possessive individualism that finds such forceful expression in traditional models of property. Classic ownership theory tends to overlook the possibility of nonowners exercising custodial duties over tangible and intangible goods in the absence of title or possession. Yet indigenous peoples have historically exercised such custodial duties, both as a matter of internal community values that emphasize collective obligations to land and resources, and as a matter of practical necessity following the widespread

divestiture of title and possession. Indigenous cultural property claims, and programs meant to effectuate them, thus reflect a fiduciary approach to cultural property that takes into account indigenous peoples' collective obligations toward land and resources. A wealth of literature has analyzed the notion of fiduciary duties, existing in either the presence or absence of title, in indigenous, corporate, and environmental theories of "stewardship." Drawing on this literature, we identify a similar fiduciary paradigm in the context of cultural property. To the extent that indigenous peoples' cultural property claims are premised on custodial duties toward specific properties, we argue that such claims are more appropriately characterized through the paradigm of *1029 stewardship rather than ownership. Because they often act in the absence of title, such accommodations tend to fall outside the paradigms of individuality and alienability upon which classic property law is premised. Thus, without rejecting the force or utility of ownership, we propose that cultural property claims are often better explained and justified through a stewardship model that effectuates the dynamic pluralism of group-oriented interests.

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

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

***1030 I. CONCEPTIONS OF CULTURAL PROPERTY**

In 1897, famed explorer Robert Peary brought six Inuit individuals of varying ages to the United States from Greenland. Peary reportedly was responding to pressure from the American Museum of Natural History, which had suggested that he bring back "living specimens" from his multiple trips. [\[FN20\]](#) Once the Inuit people arrived, they were put on display: it is claimed that thirty thousand New Yorkers paid twenty-five cents each to view them just two days after their arrival. Although Peary had promised the Inuit people that they would be able to return home, he shortly abandoned them to the museum, leaving no plans in place for their care, let alone their return. They remained housed there--first within the basement of the museum itself, and later at the home of the museum's caretaker. Unfortunately, the cold and dank climate of the museum's quarters proved too much for the small group, which had no resistance to the diseases they encountered.

A few months after their arrival, four of the Inuit died of tuberculosis. One of them was a man named Qisuk, who had come to America bringing his only living relative: his bright-eyed eight-year-old son Minik. [\[FN21\]](#) Devastated by his father's death, Minik pleaded with the museum to relinquish his father's

body so that he could perform the traditional burial rites required by his culture. To appease the distraught child, the museum staff performed an elaborate mock funeral--filling a coffin with stones, creating a covered "body," and "burying" Qisuk by lamplight--all to convince Minik that he had met his goal of providing his father with a proper burial. In reality, instead of burying Qisuk, the body was turned over to the museum superintendent, who then defleshed, preserved, and prepared Qisuk's skeleton for display at the museum. [\[FN22\]](#)

When Minik reached his teenage years, still living in the United States, he discovered the horrifying truth: that the bones of his father had been mounted and preserved in the museum as the bones of a nameless, faceless Polar Eskimo. [\[FN23\]](#) Although Minik had many allies, including the superintendent himself (who, deeply regretting his role, later adopted Minik), he spent years *1031 locked in a painful struggle with the museum to give his father a proper burial. His efforts ultimately failed. Minik Wallace died at the age of twenty-eight, never having recovered his father's remains. [\[FN24\]](#) It was not until the subsequent passage of the Native American Graves Protection and Repatriation Act (NAGPRA) in 1990 that the museum quietly negotiated with the tribe for the repatriation of Qisuk's remains. [\[FN25\]](#)

Minik's story highlights the dilemma of classifying something as incommensurate as a family member's remains as a type of property. [\[FN26\]](#) It seems patently unthinkable that property law should govern such an intimate domain. [\[FN27\]](#) Nevertheless, property law indisputably played a critical role in directing the disposition and fate of Minik's deceased father. Because Native Americans had no property rights in the burial remains of their people, they were unable to direct what happened to the artifacts and remains housed within museums. [\[FN28\]](#) NAGPRA changed the legal landscape in this regard. It required that federally funded museums with indigenous human remains, associated funerary objects, or objects of cultural patrimony within their possession or control must consult with the appropriate tribal groups and provide for repatriation upon the tribes' request. [\[FN29\]](#) Thus, NAGPRA employs the language of property to facilitate the return of items typically thought to transcend property concepts.

In this sense, NAGPRA and other cultural property laws raise a theoretical dilemma for both advocates and critics who grapple with core conceptual concerns about what cultural property comprises and about its relationship to property law more generally. In Section I.A, we explain briefly the roots of *1032 cultural property and lay forth its historical and contemporary genesis in the indigenous context. In Section I.B, we situate cultural property within the body of property law that affects indigenous peoples in particular, and outline some of the theoretical critiques that have been launched at its framework.

A. An Indigenous Legacy of Cultural Property

Cultural property has been referred to as property's "fourth estate"--the other three arenas being real property, intellectual property, and personal property. [\[FN30\]](#) Traditionally, cultural property referred to tangible resources bearing a distinct relationship to a particular cultural heritage or identity. [\[FN31\]](#) Because of their cultural significance, these tangible resources--including documents, works of art, tools, artifacts, buildings, and other entities that have artistic, ethnographic, or historical value--were thought to transcend ordinary property conceptions and to merit special protection. [\[FN32\]](#)

Consider a paradigmatic example. Sometime between the years 1801 and 1812, Thomas Bruce, the Earl of Elgin, physically removed about half of the surviving sculptures from the Greek Parthenon and sold them to the British *1033 Museum for a substantial sum. [\[FN33\]](#) Almost two hundred years later, after numerous requests, the British Museum continues to refuse calls from the Greek government to repatriate the sculptures. [\[FN34\]](#) In response to the museum's refusal, one prominent Greek minister, Melina Mercouri, explained,

[T]hey are the symbol and the blood and the soul of the Greek people. . . . [W]e have fought and died for the Parthenon and the Acropolis. . . . [W]hen we are born, they talk to us about all this great history that makes Greekness. . . . [T]his is the most beautiful, the most impressive, the most monumental building in all Europe and one of the seven miracles of the world. [\[FN35\]](#) To this day

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

The case of the Elgin Marbles demonstrates that, notwithstanding the myriad statutes and international declarations that honor the right to culture, cultural property remains a politically complicated fixture. Unlike real, intellectual, and personal property, each of which has substantial prominence in the classic annals of property theory, cultural property falls into the grey area between these other realms. As Patty Gerstenblith has observed, cultural property is “composed of two potentially conflicting elements”: “culture,” which embodies group-oriented notions of value, and “property,” which traditionally has focused on individual notions of ownership. [\[FN36\]](#) Partly as a result, cultural property is often considered anathema to traditional property constructs and accordingly is afforded scant treatment in property theory. Today, because cultural property is partially intended to repair the ruptures associated with a history of colonization and capture, it also raises questions about the utility and appropriateness of property law as a remedy for harms suffered by indigenous peoples.

In the past several years, revolutionary changes in the cultural property field have contributed both to the salience of indigenous peoples' claims and to the arguments of theorists in opposition. The first major shift in the field involves a tremendous expansion of subject matter, loosening the requirements of materiality outward from “cultural property” and into the domain of ***1034** “cultural heritage.” [\[FN37\]](#) As a result, cultural property has expanded from the domain of the tangible into the domain of the intangible. [\[FN38\]](#) Contemporary legal instruments now include both long-recognized tangible resources (for example, land, water, and timber) as well as intangible ones (for example, medicinal knowledge, folklore, and Native religion). [\[FN39\]](#) Furthermore, by some definitions, the concept also now encompasses collections of fauna, flora, minerals, or other goods that may be of interest to paleontologists, anthropologists, and researchers in other specialized fields of knowledge, [\[FN40\]](#) in addition to property that relates to history and events of national importance. [\[FN41\]](#)

A second shift involves the increased visibility of indigenous peoples generally and a burgeoning movement to protect indigenous cultural existence. While the body of law known as cultural property affects all peoples (and likewise all nations), it carries a particular potency when situated alongside the interests of indigenous peoples. Though the term “indigenous” continues to be contested, [\[FN42\]](#) every prevailing definition considers a people's deep, historical, ***1035** ancestral roots to traditional lands as integral to indigeneity. [\[FN43\]](#) Numerous instruments and principles of international law have long provided potential protection for indigenous interests in cultural property. [\[FN44\]](#) Such international law instruments, including the American Convention on Human Rights and the American Declaration on the Rights and Duties of Man, recognize indigenous rights to property, religion, culture, association, and resources. [\[FN45\]](#)

***1036** Despite their varying statutory applicability to the circumstances of particular countries, these international law instruments create normative expectations regarding the treatment of indigenous peoples, their lands, and their cultural resources by nation-states and their citizens. [\[FN46\]](#) Notably, in 2007, the U.N. General Assembly finally adopted the U.N. Declaration on the Rights of Indigenous Peoples. Though the United States-- along with Australia, New Zealand, and Canada--opposed the Declaration, the document nevertheless stands as a powerful statement of indigenous cultural rights. [\[FN47\]](#) For example, the Declaration specifically provides that indigenous peoples have the collective right “not to be subjected to . . . destruction of their culture” [\[FN48\]](#) and to “practise and revitalize their cultural traditions and customs,” including “the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature.” [\[FN49\]](#)

Somewhat different cultural property protections have emerged in the United States, not through the language of human rights, but through the vehicle of property law. Some of these protections preserve American cultural property generally (which can include indigenous cultural property but is not specific to it) [\[FN50\]](#) and some, such as NAGPRA and the Indian Arts and Crafts Act (IACA), are specifically directed at Indian cultural property. [\[FN51\]](#) The breadth of ***1037** the regulation and of the property interests in question has paved the way for a wide divergence of cases. Consider the following.

Sometime in the nineteenth century, the New York State Museum acquired from the Onondaga Nation twenty-six belts of “wampum” (colored clam and conch shells), which are used for trade and for recording significant community events. When the tribe sought repatriation, the museum refused to return the belts. [\[FN52\]](#) Although the tribe initially lost the case, public outcry against the decision was so strong that the New York legislature passed an act requiring repatriation so long as the tribe preserved the belts at museum-grade standards. [\[FN53\]](#)

In 1998, while visiting a storeroom at the American Museum of Natural History in New York, a Tlingit clan elder heard an “inner voice” calling him to a particular shelf. [\[FN54\]](#) When he reached the shelf, he was astonished to see a central part of Tlingit culture--an intricately carved wooden beaver-- staring back at him. The carving had been sold by a clan member and had been missing since 1881. Under NAGPRA, the carving was returned to the Tlingits at their request. [\[FN55\]](#)

In 2004, seventy-two members of the Havasupai tribe, a geographically isolated tribe based at the foot of the Grand Canyon, filed suit against Arizona State University for performing allegedly unauthorized genetic studies on four hundred blood samples that researchers had gathered, allegedly for the purpose of testing for diabetes. The researchers regarded the blood samples as a virtual “gold mine,” given the tribe's geographic isolation, and used them to conduct research on schizophrenia and inbreeding and to explore the Bering *1038 Strait migration theory. [\[FN56\]](#) After discovering the deception, the tribe decided to place a moratorium on biomedical research on their reservation. [\[FN57\]](#)

In 2005, the National Collegiate Athletic Association (NCAA) instituted a policy against the use of Native American mascots on uniforms, clothing, and logos by sports teams during postseason tournaments, calling the use of such mascots “hostile” and “abusive” forms of speech. A representative for the organization explained, “[A]s a national association, we believe that mascots, nicknames or images deemed hostile or abusive in terms of race, ethnicity or national origin should not be visible at the championship events that we control.” [\[FN58\]](#)

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

B. Critiques of Cultural Property

The inherent indeterminacy of cultural property adds to the difficulty of situating it alongside other areas of property law. Because the notion of cultural property is potentially capacious--crossing from the tangible to the *1039 intangible--critics contend that cultural property does not fit within existing property law or theory. Specifically, some critics argue that cultural property should be governed by the market rather than by specific legal protections, like all other forms of property. Others assert that indigenous cultural property claims are antithetical to the free flow of culture, to the cosmopolitan vision that binds humanity as a whole, and to the unfettered circulation of ideas.

1. A View from the Marketplace of Goods

In contrast to those who want to disaggregate culture and property, some law and economics theorists posit that more property is needed, not less. Eric Posner, for example, argues that property rights are necessary to protect individual rights and to safeguard resources from depletion. Yet cultural property is just another form of property, he argues, and is not entitled to different treatment. [FN59] According to Posner, cultural considerations should not affect the market-based free exchange of property.

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

A starting point is that cultural property, like any form of property, is valuable to the extent that people care about it and are willing to pay to consume or enjoy it. If cultural property is normal property, then there is no reason to regulate it, or to treat it as different from other forms of property. In an unregulated market, the people who value it most will buy it. [FN60] *1040 This view of property is driven by efficiency concerns, which place great emphasis on alienability. Consequently, Posner argues that cultural property should not be treated any differently from other types of valuable property, including art, oil, or natural resources, contending that those who value it most will simply buy it. [FN61]

Posner concludes by comparing cultural property to the unregulated market in modern artwork. He points out that many valued artistic works wind up in private collections, but the most highly valued can be found in museums: "[W]hen art is significant enough on cultural grounds, it will usually be purchased by, or given to, museums." [FN62] Thus, Posner posits, if the market functions efficiently with respect to highly valued art, why should cultural property be treated any differently? In answering his own question, he recognizes one of the more powerful arguments to support cultural property protection: that it is inextricably linked to the dignity of a particular group of people. [FN63] In this sense, he concedes that cultural property is distinguishable from other natural resources because it has scholarly and aesthetic value, because it provides a window into the past, and because its continued value depends upon its careful maintenance. [FN64] Yet these considerations for Posner are largely emotive and fail to justify any kind of "moral claim" by peoples to their cultural property. [FN65] Ultimately he places greater faith in the market and contends that if peoples seek possession of their cultural property, "they can always purchase it through a government or museum. They do not have any moral right to possession." [FN66]

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

*1041 2. A View from the Cultural Commons

In his book *Who Owns Native Culture?*, anthropologist Michael F. Brown explores specific questions regarding rights to indigenous cultural property. [FN67] Unlike Posner, Brown calls for more culture, and less property, to address the complicated domain of cultural disputes, and remains skeptical of property law as a remedy for resolving such disputes. While offering a measured recognition of the value of group autonomy in preserving cultural heritage, Brown advances two specific concerns. First, he argues that the very use of law in cultural disputes inappropriately "forces the elusive qualities of entire civilizations--everything from attitudes and bodily postures to agricultural techniques--into ready-made legal categories." [FN68] Culture defies and transcends available legal claims, he asserts. Second, Brown argues that the tendency to express legal entitlements in terms of fixed "rights" [FN69] limits opportunities to negotiate

cultural interests that are relative and shared among people. [FN70] Brown prefers instead cultural property programs that facilitate limited access among competing groups (such as programs asking for recreational users of the public lands to voluntarily avoid Indian sacred sites) over measures that would grant title to one particular group (such as allocating copyright for a sacred song or image).

Animating these arguments is Brown's keen interest in the world community's access to information and culture. He suggests that it is the "cultural and intellectual commons"--and not the cultural survival of indigenous peoples-- that is under attack. [FN71] Here Brown relies on the work of Lawrence Lessig to argue that both culture and intellectual property are inherently nonrivalrous and therefore open to hybridity. [FN72] Since culture is fluid *1042 and available to all, to "proptertize" it suggests affording its "owners" an unwarranted right of exclusion with respect to the rest of the world.

Brown thus offers both descriptive and normative critiques of indigenous peoples' efforts to control the intangible aspects of Native culture. As a practical matter, he points to "the difficulty--the near-impossibility . . . of recapturing information that has entered the public domain." [FN73] He notes Native peoples' resistance to the unfettered dissemination and commodification of Native culture, particularly through the Internet, by quoting a member of Oregon's Klamath Tribe: "All this information gets shared, gets into people's private lives. It's upsetting that the songs of my relatives can be on the Internet. These spiritual songs live in my heart and shouldn't be available to just anyone. It disturbs me very much." [FN74] For critics of cultural property protections such as Brown, the spiritual or cultural harm that the Klamath Tribe member identifies is merely part of a digitized world that has enabled culture, for better or for worse, to be open for access to all. Such critics contend that open access to culture is something to be celebrated rather than vilified, despite the costs to indigenous culture.

Naomi Mezey's recent article, *The Paradoxes of Cultural Property*, follows closely in Brown's footsteps. [FN75] Like Brown, Mezey sharply criticizes the use of law to grant ownership or entitlements over cultural property based on identity. Employing a "cultural critique" similar to Brown's, Mezey contends that "[t]he problem with using ideas of cultural property to resolve cultural disputes is that cultural property uses and encourages an anemic theory of culture so that it can make sense as a form of property." [FN76] According to Mezey, this theoretical dissonance creates an irresolvable paradox for two reasons. First, "[p]roperty is fixed, possessed, controlled by its owner, and alienable. Culture is none of these things." [FN77] As a result, "cultural property claims tend to fix culture, which if anything is unfixed, dynamic, and unstable." [FN78]

Further aligning herself with Brown, Mezey fears that indigenous claims to cultural property will stagnate cultural fusion and hybridity. She claims that "[i]t is the circulation of cultural products and practices that keeps them *1043 meaningful and allows them to acquire new meaning, even when that circulation is the result of chance and inequality." [FN79] Thus, cultural property will have a negative effect on the free dissemination of culture, because "[a]s groups become strategically and emotionally committed to their 'cultural identities,' cultural property tends to increase intragroup conformity and intergroup intransigence in the face of cultural conflict." [FN80]

Mezey ultimately asserts that cultural property's preservationist stance offers a static and conceptually impoverished formulation of culture itself. [FN81] Thus, she argues,

[T]he idea of property has so colonized the idea of culture that there is not much culture left in cultural property. What is left are collective property claims on the basis of something we continue to call culture, but which looks increasingly like a collection of things that we identify superficially with a group of people. [FN82] Mezey's argument, and that of other scholars concerned with the proptertization of culture, seems to operate from an unstated premise: because property fundamentally concerns the right of owners to exclude others, any cultural property claim will inappropriately stymie the natural, participatory, and free movement of culture. [FN83]

Both Brown and Mezey demonstrate this reason for distrusting cultural property law from the perspective of culture. They contend that culture is essentially comprised of anything and everything that touches human existence, [FN84] and to commodify it may shrink the public domain, stultify dynamic

processes of cultural hybridity, and entrench peoples into abstract and paradigmatic conceptions of their culture.

***1044** 3. A View from Cosmopolitanism

Another significant critique is offered by philosopher and cultural theorist Kwame Anthony Appiah, who (among others) takes a slightly more mediated position on protecting international cultural property. [\[FN85\]](#) While his view is admittedly from a global, cosmopolitan vantage point, Appiah balances concern for cultural patrimony with a desire to preserve cultural goods for all of humanity, rather than just specific groups. Appiah reminds us that the international underground market for cultural artifacts, when coupled with a localized absence of legal enforcement to protect archaeological sites, made it possible for high-value cultural goods to find their way to other parts of the globe, much like the Elgin Marbles. In some of these cases, Appiah suggests, international cultural property was acquired (perhaps illegally) not out of a desire to loot cultures of these sacred objects, but to collect the objects for further study and preservation for all of humanity. [\[FN86\]](#)

Many of these works of cultural significance are described today through the lens of “cultural patrimony” as belonging to a specific group. [\[FN87\]](#) Appiah argues, however, that with the passage of time and the changes wrought by globalization, it becomes increasingly difficult to claim that a work “belongs” to a specific group or people:

When Nigerians claim a Nok sculpture as part of their patrimony, they are claiming for a nation whose boundaries are less than a century old, the works of a civilization [formed] more than two millennia ago, created by a people that no longer exists, and whose descendants we know nothing about. We don't know whether Nok sculptures were commissioned by kings or commoners; we don't know whether the people who made them and the people who paid for them thought of them as belonging to the kingdom, to a man, to a lineage, to the gods. One thing we know for sure, however, is that they didn't make them for Nigeria. [\[FN88\]](#) Like many, Appiah clearly decries some involuntary transfers, and favors allowing the national government where the object originated to have a key ***1045** role in ensuring its repatriation. Yet, in an important insight, he emphasizes that the national governments in question act not as property owners, but instead as “trustees for humanity.” [\[FN89\]](#) “While the government of Nigeria reasonably exercises trusteeship,” Appiah writes, “the Nok sculptures belong in the deepest sense to all of us.” [\[FN90\]](#) Here, Appiah stresses the cosmopolitanist ethic underlying the protection of cultural property by construing cultural property not as a national issue but “as an issue for all mankind.” [\[FN91\]](#)

In addition to his discomfort with a group-specific notion of cultural property, Appiah, much like Brown and Mezey, evinces an even greater suspicion over the notion of propertizing intangible objects, particularly in an indigenous context. When we move from tangible objects to intellectual property, folklore, images, and the like, Appiah writes, “[i]t's no longer just a particular object but any reproducible image of it that must be regulated by those whose patrimony it is. We find ourselves obliged, in theory, to repatriate ideas and experiences.” [\[FN92\]](#) By propertizing culture, Appiah argues, we change the nature of culture itself: we reduce ourselves to a circle of “mine-and-thine reasoning” that prevents the inevitable hybridity of cultural exchange. Further, since intellectual property laws tend to honor owners, they can overlook the interests of consumers--“audiences, readers, viewers, and listeners.” [\[FN93\]](#) In the end, Appiah warns, cultural patrimony evinces a “hyper-stringent doctrine of property rights”--a kind of property fundamentalism that has served us so poorly in the past. [\[FN94\]](#) Consequently, while Appiah declares a measured approval for some kinds of repatriation, he is careful to remind us that what motivates him is a desire to preserve art for everyone, not just for a certain group: a connection “not through identity but despite difference.” [\[FN95\]](#) The only way to “fully respond to ‘our’ art [is] only if we move beyond thinking of it as ours and start to respond to it as art.” [\[FN96\]](#)

These critical perspectives espoused by Posner, Brown, Mezey, and Appiah certainly differ in some respects, but they all converge on a similar underlying view of property itself as fundamentally defined by ownership--with its rights of alienability and exclusion and its norms of commodification and ***1046** commensurability. Thus a tension emerges between traditional property law, which focuses on the utility of

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