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# Owning *Red*: A Theory of Indian (Cultural) Appropriation

Angela R. Riley\* & Kristen A. Carpenter\*\*

*In a number of recent controversies, from sports teams' use of Indian mascots to the federal government's desecration of sacred sites, American Indians have lodged charges of "cultural appropriation" or the unauthorized use by members of one group of the cultural expressions and resources of another. While these and other incidents make contemporary headlines, American Indians often experience these claims within a historical and continuing experience of dispossession. For hundreds of years, the U.S. legal system has sanctioned the taking and destruction of Indian lands, artifacts, bodies, religions, identities, and beliefs, all toward the project of conquest and colonization. Indian resources have been devalued by the law and made available for non-Indians to use for their own purposes. Seeking redresses for the losses caused by these actions, tribes have brought claims under a variety of laws, from trademark and copyright to the First Amendment and Fifth Amendment, and some have been more successful than others. As a matter of property law, courts have compensated—albeit incompletely—the taking of certain Indian lands and have also come to recognize tribal interests in human remains, gravesites, and associated artifacts. When it comes to intangible property, however, the situation is more complicated. It is difficult for legal decision makers and scholars alike to understand why Indian tribes should be able to regulate the use of Indian names, symbols, and expressions. Indeed, non-Indians often claim interests, sounding in free speech and the public domain, in the very same resources. To advance understanding of this contested area of law, this Article situates intangible cultural property claims in a larger history of the legal dispossession of Indian property—a phenomenon we call "Indian appropriation." It then evaluates these claims vis-à-vis prevailing legal doctrine and offers a normative view of solutions, both legal and extralegal.*

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\*\* Professor of Law and Associate Dean for Research, University of Colorado. We extend our sincere appreciation to friends and colleagues who graciously hosted us during our travels through Indian country. We would also like to thank the following colleagues for their inspiration, comments, and conversations about these topics: Richard Allen, Greg Ablavsky, Jim Anaya, Stuart Banner, William Boyd, Devon Carbado, Rick Collins, Matthew Fletcher, Carla Fredericks, Carole Goldberg, Lorie Graham, Ray Halbritter, Cheryl Harris, Sonia Katyal, Sarah Krakoff, Leigh Kuwanwisiwma, Ben Madley, Marshall McKay, Terry Mogart, Addie Rolnick, Wenona Singel, Joe Singer, Amie Tah-bone, Rebecca Tsosie, Eugene Volokh, Charles Wilkinson, Rob Williams, and Bill Wood. With additional gratitude to our deans, Rachel Moran and Phil Weiser, for research support and to participants in workshops and conferences at Harvard Law School, Suffolk University Law School, Yale Law School, UCLA Law School, and the University of Colorado, for helpful comments. We greatly appreciate the research assistance of Karen Kwok and Addie Rockwell.

The State reward for dead Indians has been increased to \$200 for every red-skin sent to Purgatory. This sum is more than the dead bodies of all the Indians east of the Red River are worth.<sup>1</sup>

—Winona Daily Republican, Sept. 25, 1863

## I. Introduction

In July 2015, a federal court upheld cancellation of the Washington “Redskins” trademarks—depictions of a red-skinned Indian head in feathers, along with the “Redskins” moniker that serves as the NFL team’s name and mascot—on the grounds that the marks were “disparaging” under the Lanham Act.<sup>2</sup> American Indians have challenged the marks for decades, pointing to the origins of the term *Redskin*,<sup>3</sup> which was widely used in the

1. WINONA DAILY REPUBLICAN, Sept. 25, 1863, at 2, <http://digital.olivesoftware.com/Olive/APA/Winona/default.aspx#panel=home> [<http://perma.cc/RNX6-DL9C>] (enter “State reward for dead Indians” into the search field; then select the search result that is dated September 25, 1863).

2. *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439, 490 (E.D. Va. 2015) (upholding the Trademark Trial and Appeal Board’s decision to cancel registration of the marks using the *R-skins* term and imagery pursuant to the Lanham Act, 15 U.S.C. § 1052(a) (2012), which allows marks that “may disparage” persons living or dead to be refused registration). As this Article is going to print, the case is on appeal in the Fourth Circuit, where the parties are arguing myriad issues including the constitutionality of the Lanham Act’s disparagement provision. The briefs in the case are available on the website of the Native American Rights Fund. *Pro-Football v. Blackhorse*, NARF: TRIBAL SUP. CT. PROJECT, [http://sct.narf.org/caseindexes/pro\\_football\\_v\\_blackhorse\\_4th\\_circ.html](http://sct.narf.org/caseindexes/pro_football_v_blackhorse_4th_circ.html) [<http://perma.cc/8JN8-8L8D>]. For an earlier lawsuit attempting to cancel the R-skins marks on disparagement grounds, see *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d (BNA) 1705, 1748–49 (T.T.A.B. 1999), which cancelled the marks on grounds that they were disparaging under the Lanham Act. The opinion of the Trademark Trial and Appeal Board (TTAB) was reversed by a district court based on the equitable doctrine of laches. *Pro-Football, Inc. v. Harjo*, 567 F. Supp. 2d 46, 62 (D.D.C. 2008). For a thoughtful discussion of the value of trademarks as “public goods” that play a role in questions of discrimination and equality, particularly in the context of the R-skins, see Sonia K. Katyal, *Trademark Intersectionality*, 57 UCLA L. REV. 1601, 1632–38 (2010).

3. We use the full name of the team here at the beginning of this Article, for clarity’s sake. For subsequent references, however, we adopt the abbreviation “R-skins,” following the practices of media outlets and others that have stopped using the term based on their understanding that it is a racial epithet. David Uberti, *Journalism Says Goodbye to Redskins: A List of News Organizations That No Longer Use the Team Name*, COLUM. JOURNALISM REV., Nov./Dec. 2014, [http://www.cjr.org/currents/journalism\\_says\\_goodbye\\_to\\_red.php](http://www.cjr.org/currents/journalism_says_goodbye_to_red.php) [<http://perma.cc/93H5-VPSS>]; see also Sarah Kogod, *Bob Costas on Redskins Name: ‘It’s an Insult, a Slur,’* WASH. POST (Oct. 13, 2013), <http://www.washingtonpost.com/blogs/dc-sports-bog/wp/2013/10/13/bob-costas-on-redskins-name-its-an-insult-a-slur/> [<http://perma.cc/FK6Q-6GAP>] (reporting the text of an on-air speech given by Bob Costas about the controversy over the use of the R-skins term as the Washington football team’s mascot); *Judge Refuses to Use Redskins Name in Ruling*, WASH. TIMES (July 15, 2014), <http://www.washingtontimes.com/news/2014/jul/15/judge-refuses-to-use-redskins-name-in-ruling/> [<http://perma.cc/GZP8-PSN8>] (“U.S. District Judge Peter J. Messitte issued a pretrial ruling last week in a lawsuit against the team in which he explicitly refused to use the Redskins name.”); Brent Axe, *California Becomes First State to Ban Redskins Nickname*, SYRACUSE.COM (Oct. 12, 2015, 12:29 PM), [http://www.syracuse.com/axeman/index/ssf/2015/10/california\\_becomes\\_first\\_state\\_to\\_ban\\_redskins\\_nickname.html](http://www.syracuse.com/axeman/index/ssf/2015/10/california_becomes_first_state_to_ban_redskins_nickname.html) [<http://perma.cc/JDY8-KVM6>] (reporting on California’s recently passed law that prohibits public schools from adopting the R-skins term as a mascot); Mike Florio, *King Drops Use of ‘Redskins’ Name*, NBC SPORTS: PRO FOOTBALL TALK (Sept. 7, 2013, 2:24 PM), <http://profootballtalk.nbcsports.com/2013/09/07/king-drops-use-of->

nineteenth century to describe the ostensibly red skins of Indians, for which various governments offered and paid bounties.<sup>4</sup> Through both lawsuits and social commentary, many in the American Indian community contend that the term has developed into an enduring racial slur used to intimidate, humiliate, and harm contemporary American Indians and should not be protected by federal trademark laws.<sup>5</sup> On the other hand, supporters of the marks have defended them vigilantly.<sup>6</sup> Washington team owner Dan Snyder insists, for example, that the R-skins name is meant to “honor” Native Americans<sup>7</sup> and will, in any event, “never” be changed.<sup>8</sup>

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redskins-name/ [http://perma.cc/PT4P-GA4V] (describing the decision of one of the hosts of NBC’s *Football Night in America* to no longer use the R-skins term on air).

4. WINONA DAILY REPUBLICAN, *supra* note 1; see also Baxter Holmes, *Update: Yes, a ‘Redskin’ Does, In Fact, Mean the Scalped Head of a Native American, Sold, Like a Pelt, for Cash*, ESQUIRE (June 18, 2014), <http://www.esquire.com/blogs/news/redskin-name-update> [http://perma.cc/7EV2-N8UB] (describing the meaning and history of the term *r-skin*).

5. See *Redskin*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003) (defining *r-skin* as a usually “offensive” noun meaning “American Indian,” originating in 1699); Ken Belson, *Redskins’ Name Change Remains Activist’s Unfinished Business*, N.Y. TIMES (Oct. 9, 2013), [http://www.nytimes.com/2013/10/10/sports/football/redskins-name-change-remains-her-unfinished-business.html?\\_r=0](http://www.nytimes.com/2013/10/10/sports/football/redskins-name-change-remains-her-unfinished-business.html?_r=0) [http://perma.cc/6AW5-T73U] (recounting Cheyenne activist Suzan Shown Harjo’s forty-year involvement in the movement to change the Washington football team’s name); Erik Brady, *Native American High School Student Gives Emotional Speech on Impact of Indian Team Names*, USA TODAY SPORTS: FOR THE WIN (July 23, 2014, 6:16 PM), <http://ftw.usatoday.com/2014/07/native-american-student-speech-center-american-progress> [http://perma.cc/D6YU-RTFZ] (describing American Indian youth’s experiences with mascots in high schools); Erik Brady, *New Generation of American Indians Challenges Redskins*, USA TODAY SPORTS (May 10, 2013, 8:13 AM) [hereinafter Brady, *New Generation*], <http://www.usatoday.com/story/sports/nfl/redskins/2013/05/09/native-americans-washington-mascot-fight/2148877/> [http://perma.cc/6CB5-YGWB] (reporting on contemporary iterations of the anti-mascot campaign); Jacqueline Keeler, *The NFL Perpetuates Stereotypes that Fuel Racism, Domestic Abuse*, INDIAN COUNTRY TODAY MEDIA NETWORK (Feb. 2, 2015), <http://indiancountrytodaymedianetwork.com/2015/02/08/nfl-perpetuates-stereotypes-fuel-racism-domestic-abuse> [http://perma.cc/9NVB-LL3G] (linking violence against women and intimate partners to stereotyping); Ariel Sabar, *The Anti-Redskin*, ATLANTIC (Oct. 2015), <http://www.theatlantic.com/magazine/archive/2015/10/the-anti-redskin/403213> [http://perma.cc/5DG9-9QPQ] (telling the story of Oneida Indian Nation Chief Ray Halbritter’s opposition to the Washington football team’s name). *But cf.* VINE DELORIA, JR., *GOD IS RED: A NATIVE VIEW OF RELIGION* 3, 292 (1992) (arguing for an understanding of religion through the ideas of Native peoples and attempting to reclaim *Red*).

6. See, e.g., Eugene Volokh, *Freedom of Speech, Cyberspace, and Harassment Law*, 2001 STAN. TECH. L. REV., art. no. 3, at 17–18 (warning against broad speech restrictions based on claims of harassment and hostile environment and referencing the R-skins and other Indian mascot names).

7. Daniel Snyder Defends ‘Redskins,’ ESPN (Aug. 6, 2014), [http://espn.go.com/nfl/story/\\_/id/11313245/daniel-snyder-R-Skins-term-honor-respect](http://espn.go.com/nfl/story/_/id/11313245/daniel-snyder-R-Skins-term-honor-respect) [http://perma.cc/J4B8-HSFA] (quoting Dan Snyder as saying, “[T]he name really means honor, respect” and “We sing ‘Hail to the Redskins.’ We don’t say hurt anybody. We say ‘Hail to the Redskins. Braves on the warpath. Fight for old D.C.’ We only sing it when we score touchdowns”); see also Mark Leibovich, *Roger Goodell’s Unstoppable Football Machine*, N.Y. TIMES MAG. (Feb. 3, 2016), <http://www.nytimes.com/2016/02/07/magazine/roger-goodells-unstoppable-football-machine.html> [http://perma.cc/WW93-6AFZ] (describing the power of NFL team owners, including Snyder, with respect to the R-skins name and other controversial issues).

8. See Erik Brady, *Daniel Snyder Says Redskins Will Never Change Name*, USA TODAY (May 10, 2013), <http://www.usatoday.com/story/sports/nfl/R-Skins/2013/05/09/washington-R>

When non-Indians use Indian names, imagery, iconography, and other symbols—particularly for commercial purposes and without Indian input—Indian tribes and individuals increasingly claim that such usages constitute “cultural appropriation.”<sup>9</sup> Wide-ranging examples include Victoria’s Secret models walking the runway in Indian headdresses,<sup>10</sup> Urban Outfitters marketing “Navajo Print Wrapped Flasks” and “Navajo Hipster Panties,”<sup>11</sup> Boy Scout Troops mimicking Pueblo Indian dances,<sup>12</sup> and the many sports teams with Indian mascots.<sup>13</sup> These examples and a multitude of others just like them are seemingly such a part of mainstream American society that they are often overlooked.

While the law hasn’t fully grappled with issues of cultural appropriation, scholars in Native studies, led by Philip Deloria and Shari Huhndorf, offer important insights. They argue that for centuries non-Indians have appropriated Indian culture for their own purposes, largely concerned with identity formation. Deloria, for example, locates the practice of “playing Indian” deep in the country’s origins, examining the way in which newcomers sought to forge a uniquely “American” identity that variously embraced or rejected images of Indianness.<sup>14</sup> While Americans relished the idea of the Indian as

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-Skins-daniel-snyder/2148127/ [http://perma.cc/AB8Y-7NLR] (“‘We’ll never change the name,’ [Daniel Synder] said. ‘It’s that simple. NEVER—you can use caps.’”). In any case, the Lanham Act does not require the name to change; it only removes intellectual property protection for the name, thus defeating the monopoly rights of the mark holder. 15 U.S.C. § 1052 (2012).

9. See MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? 2–3 (2003) (identifying emergence of the term “cultural appropriation” as part of the “rhetoric” of a “social movement” to address “the flow of cultural elements from indigenous societies to the larger world”). *But see* Lorie Graham & Stephen McJohn, *Indigenous Peoples and Intellectual Property*, 19 WASH. U. J.L. & POL’Y 313, 314 (2005) (critiquing Brown’s book and arguing for ways “in which intellectual property law, negotiation, and human rights precepts work together to address indigenous claims to heritage protection”).

10. *Victoria’s Secret Apologizes After Use of Native American Headdress in Fashion Show Draws Outrage*, FOX NEWS (Nov. 13, 2012), <http://www.foxnews.com/us/2012/11/13/victoria-secret-apologizes-after-use-native-american-headdress-in-fashion-show/> [http://perma.cc/42WM-L2U4].

11. See Sasha Houston Brown, *An Open Letter to Urban Outfitters on Columbus Day*, RACIALICIOUS (Oct. 10, 2011), <http://www.racialicious.com/2011/10/10/an-open-letter-to-urban-outfitters-on-columbus-day/> [http://perma.cc/DAU6-3YHF] (describing the company’s mass marketing of “distasteful and racially demeaning apparel and décor”).

12. See, e.g., KOSHARE MUSEUM, <http://www.kosharehistory.org> [http://perma.cc/G4FC-WKUG] (describing a troop of Boy Scouts that would perform interpretations of dances done by Hopi and Pueblo Indians and explaining that the troops refrained from performing the dances in 2015 at the request of the Cultural Preservation Office of the Hopi Nation).

13. CAROL SPINDEL, DANCING AT HALFTIME: SPORTS AND THE CONTROVERSY OVER AMERICAN INDIAN MASCOTS 13–17 (2000).

14. See PHILIP J. DELORIA, PLAYING INDIAN 20 (1998) (positing that American colonists developed a revolutionary identity through adopting deeply rooted Native American ideologies); SHARI M. HUHNDRORF, GOING NATIVE: INDIANS IN THE AMERICAN CULTURAL IMAGINATION 6, 14 (2001) (suggesting that mainstream Americans have idealized Native Americans as symbols of Western virtues while simultaneously “attempt[ing] to obliterate Native peoples, cultures, and histories”).

an emblem of “freedom,” they were careful to distinguish their own behavioral mores from Indian “savagery.”<sup>15</sup> Later, those very same stereotypes made their way into laws that discriminated against and even authorized the oppression of Indians. As Robert A. Williams Jr. has argued, foundational Supreme Court jurisprudence invoked images of the Indian as “savage” to deny Indian land rights, thereby setting in motion a regime that would legalize the dispossession of Indian property.<sup>16</sup>

Today, non-Indians continue to adopt images and representations of Indians and Indian iconography, with little regard for the experience of contemporary Native people. Like with the historical examples, these instances also reflect the glorification of Indian imagery, often by and for the benefit of non-Indians, but they simultaneously subordinate Indian people. As fashion icons use Indian feathers in photo shoots, Indian religious leaders cannot obtain eagle feathers for ceremonies. Rock stars seductively portray the ravished Indian maiden, while real Indian women experience extreme rates of domestic violence and sexual assault. Multinational companies secure patents on genetically modified “Indian wild rice,” while Indians cannot protect their own varieties from cross-contamination. And as the NFL defends the R-skins mascot, Indian teenagers suffer discrimination in schools that employ the same term for sports teams.<sup>17</sup>

Many advocates describe the use of Indian resources, whether names, images, symbols, or knowledge, in these examples as cultural appropriation and seek to remedy them through legal and other means. Strategies to address cultural appropriation are fraught, partly because, as a recent debate in the *New York Times* suggests, the term itself is imprecise and deeply contested.<sup>18</sup> In their leading work on the topic, Bruce Ziff and Pratima Rao have defined cultural appropriation as “the taking—from a culture that is not one’s own—of intellectual property, cultural expressions or artifacts, history and ways of knowledge.”<sup>19</sup> Cultural appropriation may reference practices of “adapta-

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15. See HUHNDORF, *supra* note 14, at 5–6 (arguing that Americans have “envisioned Native peoples as . . . embodiments of virtues lost in the Western world” and have used representations of Indians as “bloodthirsty, man-eating” savages as a way of distinguishing themselves from Indians).

16. ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 33–36 (2005).

17. See *infra* Part III for more detail on the specific examples described in this paragraph.

18. The *New York Times* debate forum recently took up the controversial issue of cultural appropriation, including the appropriation of Indian culture. *Whose Culture Is It, Anyhow?*, N.Y. TIMES (Aug. 4, 2015), <http://www.nytimes.com/roomfordebate/2015/08/04/whose-culture-is-it-anyhow> [<http://perma.cc/MZ2W-KS72>].

19. Bruce Ziff & Pratima V. Rao, *Introduction to Cultural Appropriation: A Framework for Analysis*, in BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION 1 (Bruce Ziff & Pratima V. Rao eds., 1997); see also Cathryn A. Berryman, *Toward More Universal Protection of Intangible Cultural Property*, 1 J. INTELL. PROP. L. 293, 296 & n.9 (1994) (discussing the protection, on international and national levels, of “intangible cultural property,” defined as “elements of expression, thought, or actions embodied in the physical cultural object”).

tion” and “borrowing” prevalent in expressive contexts from literature<sup>20</sup> to music<sup>21</sup> with benefits of collaboration and innovation.<sup>22</sup> As Rebecca Tsosie and others have explained, when it comes to minority groups, cultural appropriation often occurs in a societal context of power imbalance, racism,<sup>23</sup> and inequality, rather than in an atmosphere of fair, open, and multilateral exchange.<sup>24</sup> This is particularly true when the creations and products of the “source culture” are taken under oppressive conditions<sup>25</sup> or are not adequately protected by law or respected by society.<sup>26</sup> In some instances,

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20. See, e.g., JULIE SANDERS, ADAPTATION AND APPROPRIATION 1–2 (2006) (investigating how “literature is made by literature” and the intertextual quality of adaptation and appropriation among literary works); Pascal Nicklas & Oliver Lindner, *Adaptation and Cultural Appropriation*, in ADAPTATION AND CULTURAL APPROPRIATION: LITERATURE, FILM, AND THE ARTS 4–5 (Pascal Nicklas & Oliver Lindner eds., 2012) (discussing the interplay between adaptation and cultural appropriation in literature); Susanne Scholz, *Introduction*, in TRAVELLING GOODS, TRAVELLING MOODS: VARIETIES OF CULTURAL APPROPRIATION (1850–1950), at 103 (Christian Huck & Stefan Bauernschmidt eds., 2012) (discussing how “books function as both objects and subjects of cultural appropriation”).

21. See, e.g., SANDERS, *supra* note 20, at 3–4 (comparing the act of sampling music to the creation of a collage in that both adapt existing materials into a wholly new aesthetic); Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 550 (2006) (describing challenges of applying copyright law in music, especially across differing cultural norms about borrowing, sampling, privacy, and authorship); Jeff Chang, *Azealia Banks, Iggy Azalea and Hip-Hop’s Appropriation Problem*, GUARDIAN (Dec. 26, 2014, 10:25 AM), <http://www.theguardian.com/music/2014/dec/24/iggy-azalea-azealia-banks-hip-hop-appropriation-problem> [<http://perma.cc/DX6C-DXAC>] (discussing the cultural appropriation problem in hip-hop music).

22. Rosemary J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 6 CANADIAN J.L. & JURIS. 249, 268 (1993) (comparing the problems African-Americans and Native Americans face in claiming ownership of the representations of their respective cultures).

23. For articles discussing the divide between thinking of Indianness as a political class versus a racial one, in which Indians are subject to racial discrimination, see Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 597–98 (2009), which explains how the racialization of American Indians helped shape law and policy; Carole Goldberg, *Descent into Race*, 49 UCLA L. REV. 1373, 1388–94 (2002), which argues against a purely racial or purely political view of Indian identity; Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041, 1051 (2012), which demonstrates the political dimensions of Indian identity; and Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 964–65 (2011), which explores why the racialization of American Indians is understudied.

24. Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299, 311–14 (2002) (explaining the harm caused by cultural appropriation).

25. Cf. Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564, 1583–84 (2006) (contrasting governments like the United States, which has largely been free to make its own laws without colonial interference, with those that have changed under oppressive conditions).

26. See PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW 3–20 (3d ed. 2012) (describing the rapidly emerging fields of art and cultural heritage law).

cultural symbols have even been borrowed and used by segments of majority societies not only for their own enjoyment or profit, but also expressly to harm minorities.<sup>27</sup>

In the American Indian context, attempts to address cultural appropriation through legal strategies can be challenging. The experience of cultural appropriation is broad and nuanced, while the law is typically narrow and obtuse. As an initial matter, American law contains numerous vestiges of racial injustice against Native peoples that directly bear on the protection of real and tangible properties, like lands, as well as intangible cultural resources, like ceremonies and religions. The Supreme Court has held, for example, that sacred sites and attendant ceremonies on federal lands are not protected by the First Amendment and that aboriginal title is not protected by the Fifth Amendment.<sup>28</sup> Because tribal cultures are inextricably linked to lands and other natural features, virtually all components of cultural life—material and intangible—link back to place. Thus, Indian cultural resources—such as sacred lands, religious artifacts, rituals, and songs—may traverse established legal doctrines defined by bounded definitions as real, personal, or intellectual property, respectively.<sup>29</sup> These rigid categories are counterintuitive for some tribal peoples who take a more holistic approach to cultural resources.<sup>30</sup>

While the law has begun to recognize Indian interests in real and personal property—albeit with less than satisfactory rights or remedies from the perspective of tribes—Indian claims to intangible property remain particularly fraught. As scholars have noted, indigenous expressions, symbols, and ideas often constitute collective, intergenerational, religious, and spiritual properties which, by their nature, exclude them from protection under pre-

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27. See, e.g., DELORIA, *supra* note 14, at 5 (noting mainstream America's struggle in dealing with the Indian people, simultaneously desiring a natural affinity for the continent through Indian culture and needing to destroy the inhabitants in order to control the land); Michael W Twitty, *Cultural Appropriation in America Can Be Audacious. Just Look at the Ku Klux Klan*, GUARDIAN (July 18, 2015), <http://www.theguardian.com/commentisfree/2015/jul/18/ku-klux-klan-history-african-tradition-terrorize-black-americans> [<http://perma.cc/QZ2K-VY94>] (summarizing work of historians William D. Pierson and Elaine Parsons by arguing that “the Klan unashamedly co-opted and perverted African spirituality, aesthetics and culture in their mission of restoring white supremacy to the American South”).

28. See *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451–53 (1988) (stating that the traditional ceremony sites used for Indian religious ceremonies could not be protected from government development on the basis of a First Amendment claim); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 284–85 (1955) (stating that the taking by the United States of land subject to unrecognized Indian title is not compensable under the Fifth Amendment).

29. See Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1033 (2009) (arguing that cultural property falls into the “grey area” between these other realms).

30. Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 224 (2000).



vailing intellectual property laws.<sup>31</sup> For indigenous peoples, then, there is little protection against the appropriation of intangible cultural “goods,” even if the appropriation is experienced by tribes as distortion, theft, offense,<sup>32</sup> or misrepresentation,<sup>33</sup> each with an attendant set of legal, social, and ethical issues.

Focusing specifically on the contested nature of cultural appropriation in the American Indian context, in this Article we make two central claims: one descriptive and one normative. First, we draw on Indian history and American Indian law to situate cultural appropriation in the larger frame of the legal dispossession of Indian property generally—a phenomenon we call “Indian appropriation.” As we describe, Indian appropriation is the process by which the U.S. legal system has historically facilitated and normalized the taking of *all* things Indian for others’ use, from lands to sacred objects, and from bodies to identities.<sup>34</sup> Indian appropriation, according to Native peoples, has deep and long-lasting impacts, with injuries ranging from humiliation and embarrassment to violence and discrimination.<sup>35</sup> On a collective basis, it makes it difficult for tribes to foster religions, economies, and

31. See, e.g., MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE 32 (2012) (discussing how intellectual property laws may assist in promoting human freedom as well as economic development); Margaret Chon, *Intellectual Property ‘from Below’: Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803, 806–08 (2007) (discussing the social justice implications of copyright in the education context); Shubha Ghosh, *Traditional Knowledge, Patents, and the New Mercantilism (Part II)*, 85 J. PAT. & TRADEMARK OFF. SOC’Y 885, 886 (2003) (noting the poor fit between intellectual property protections and traditional knowledge); Richard A. Guest, *Intellectual Property Rights and Native American Tribes*, 20 AM. INDIAN L. REV. 111, 112 (1996) (discussing this difficulty in regards to intellectual property); Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971, 975 (2007) (discussing the link between human rights and intellectual property laws); Kal Raustiala, *Density and Conflict in International Intellectual Property Law*, 40 U.C. DAVIS L. REV. 1021, 1030 (2007) (contemplating international regimes and intellectual property laws); Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793, 816 (2001) (discussing how “cultural products” have no legal protection because of their inability to meet the criteria for intellectual property protection); Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039, 1041 (2007) (discussing the link between human rights and intellectual property laws).

32. See James [Sa’ke’] Youngblood Henderson, *The Appropriation of Human Remains: A First Nations Legal and Ethical Perspective*, in THE ETHICS OF CULTURAL APPROPRIATION 55, 61 (James O. Young & Conrad G. Brunk eds., 2009) (analyzing the ethical dimensions of claims regarding the appropriation of aboriginal culture in Canada).

33. The seminal work identifying the problem of “misrepresentation” of minority groups is EDWARD W. SAID, ORIENTALISM (1978).

34. See generally LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LAND (2005).

35. See, e.g., *Summary of APA Resolution Recommending Retirement of American Indian Mascots*, AM. PSYCHOL. ASS’N, <http://www.apa.org/pi/oema/resources/indian-mascots.aspx> [<http://perma.cc/P467-M924>] (“[A] growing body of social science literature . . . shows the harmful effects of racial stereotyping and inaccurate racial portrayals, including the particularly harmful effects of American Indian sports mascots on the social identity development and self-esteem of American Indian young people.”); *infra* notes 244, 406–08 and accompanying text (describing the testimony of Dahkota Kicking Bear and Bronson Koenig on their experiences with Indian mascots).

governance systems that reflect tribal values.<sup>36</sup> All of these experiences diminish both tribal sovereignty and impede the prevailing federal policy of advancing American Indian “self-determination” in socioeconomic, political, and cultural life.<sup>37</sup> These sentiments are well understood in Indian country. As one Lakota activist put it, “Just as our traditional homelands were stolen and expropriated without regard, so too has our very cultural identity.”<sup>38</sup> But given that Indian perspectives have not broadly permeated legal discourse, one goal of this Article is to identify and situate Indian appropriation within legal doctrine and theory and to advance its salience in law and policy. Stated another way, we wish to bring the Native studies scholarship on the topic of cultural appropriation into dialogue with the Indian law scholarship on property dispossession, and to draw connections between loss and recovery of Indian lands, cultures, and identities.

Having identified and described the phenomenon of Indian appropriation, we next turn to normative arguments over cultural appropriation. In explicating the cultural harm experienced by Indian people in the face of cultural appropriation,<sup>39</sup> we engage with the doctrinal features of the law to show what it does—and does not—do to limit cultural appropriation. Briefly examining instances of appropriation of tangible lands and objects, we focus specifically here on cases of intangible cultural appropriation and take on the hard questions of whether law can or should play a role in regulating it. For example, can the law limit the use of symbols like the R-skins without running afoul of other American rights and values? Should non-Indians be allowed to wear Indian headdresses? What is so wrong with playing Indian? Can Indian-inspired designs be freely integrated into the fashion designs of non-Indians? Why do Indians themselves adopt stereotypical Indian cultural tropes? Should indigenous peoples’ traditional knowledge be treated merely as raw material that can then be utilized to create products that could benefit all of society?

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36. See *infra* notes 308–16 and accompanying text (summarizing and quoting tribal leaders regarding collective harms caused by cultural appropriation). See generally Carter Jones Meyer, *Saving the Pueblos: Commercialism and Indian Reform in the 1920s*, in *SELLING THE INDIAN: COMMERCIALIZING AND APPROPRIATING AMERICAN INDIAN CULTURES* 190 (Carter Jones Meyer & Diana Royer eds., 2001) (describing how the commercialization of American Indian culture by outsiders impacts Indian communities).

37. See generally CHARLES WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* (2005) [hereinafter WILKINSON, *BLOOD STRUGGLE*] (describing American self-determination as a political movement and federal policy); CHARLES WILKINSON, *THE PEOPLE ARE DANCING AGAIN* 334–87 (2010) (describing in detail the relationship between cultural revival and other aspects of tribal self-determination for the Siletz Indian tribe).

38. Brown, *supra* note 11.

39. Tsosie, *supra* note 24, at 310–17.

In addressing these and other tough questions, we assert as an initial matter that indigenous peoples' own laws, methodologies, and cosmologies are deeply relevant to legal discourse and should receive thoughtful treatment when it comes to understanding and redressing harms caused by cultural appropriation, including racial discrimination and interference with tribal self-determination.<sup>40</sup> We also identify specific places that federal law can intervene—in some cases, quite modestly—to protect against Indian appropriation. At the same time, we concede ground where necessary. In a multicultural society founded on free expression, we agree that federal and state laws do not and should not prevent all forms of cultural appropriation. We demonstrate, nevertheless, that it may be possible to advance tribes' interests in antidiscrimination and self-determination through other venues; therefore, in addition to emphasizing the role of law, we also highlight the efficacy of nonlegal forms of advocacy—social media, education, and activism—in addressing these claims.

The Article proceeds as follows. Part II makes the case for Indian appropriation as a continuing phenomenon of U.S. legal history. It traces the myriad ways in which colonial, and then federal, policy has sought to diminish Indian peoples' hold over their own lands, resources, religions, and even identities and make those very same things available to non-Indian individuals and entities. This Part also examines instances wherein the era of self-determination has inspired legal changes, particularly in the realms of real and personal property. Part III evaluates contemporary cultural appropriation claims against prevailing doctrines of real, personal, and intellectual property law, focusing largely on intangible property. Ultimately, we demonstrate how, as a matter of both racial justice and tribal self-determination, tribes and tribal advocates have pushed the bounds of both law and activism to address Indian appropriation.

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40. See Matthew L.M. Fletcher, *The Supreme Court's Legal Cultural War Against Tribal Law*, 2 INTERCULTURAL HUM. RTS. L. REV. 93, 97–99 (2007) (detailing how federal policy drove tribal law underground and how tribes are now revitalizing those laws).

## II. Indian Appropriation

In *Whiteness as Property*, Cheryl Harris exposed the interrelated nature of property and identity in the history of the U.S. legal system.<sup>41</sup> Through the legally sanctioned domination of black and Native peoples, she argued, “whiteness” became a highly privileged and legally protected space within American law and society.<sup>42</sup> Here we contend that, in a strange twist of U.S. legal history shaped by the features of settler colonialism,<sup>43</sup> “redness” also became property, but the property of non-Indians. In the eyes of settler societies, Indian lands, artifacts, and cultures were highly valuable resources to be acquired as expeditiously as possible, and that process was sanctioned by American law.<sup>44</sup> In this way, we argue that U.S. law and policy has long facilitated the process of non-Indians “owning *Red*”—by which we mean the widespread practice by which non-Indians claim and use Indian resources for themselves, often without attribution, compensation, or permission, causing harm and loss to Indian people.

This Part traces Indian peoples’ original occupancy of their lands and the ways in which Indian appropriation was endemic to the colonial process. We do not aim to retell all of Indian legal history, but rather to emphasize particular links between the appropriation of land, human remains, art and artifacts, religion, and finally, Indian culture and identity, over time. A deeper appreciation of these aspects of Indian appropriation is key to assessing the tribal efforts to reclaim *Red* that we discuss later in Part III.

### A. *Inhabiting Red*

At the time of European contact, the Americas were home to hundreds of preexisting, indigenous nations. These tribes represented vast diversity in terms of their respective religions, social structure, culture, language, and systems of government.<sup>45</sup> Their respective origin stories typically describe how the indigenous people came to live where they do and instruct them in practices and values that allow them to thrive in their homeland.<sup>46</sup> Thus,

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41. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1712–14 (1993).

42. *Id.*; see also Berger, *supra* note 23, at 593 n.6 (describing the “phenomena by which . . . race comes to signify innate, natural, or permanent differences between individuals or groups” and those differences “are in turn used to justify advantage or privilege”); Rolnick, *supra* note 23, at 1006–07 (discussing the process of racial construction).

43. For a discussion of “settler colonialism,” see generally Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RES. 387 (2006).

44. See Rebecca Tsosie, *The New Challenge to Native Identity: An Essay on “Indigeneity” and “Whiteness,”* 18 WASH. U. J.L. & POL’Y 55, 55–56 (2005) (drawing the link between racial identity and property).

45. Angela R. Riley, *The History of Native American Lands and the Supreme Court*, 38 J. SUP. CT. HIST. 369, 369 (2013).

46. Laura Adams Weaver, *Native American Creation Stories*, in 1 ENCYCLOPEDIA OF WOMEN AND RELIGION IN NORTH AMERICA 83, 83 (Rosemary Skinner Keller & Rosemary Rodford Ruether eds., 2006) (asserting that origin stories typically begin with an “earthdiver” or “emergence” story).

indigenous peoples define their relationship to certain places and landscapes as being of a religious or sacred nature.<sup>47</sup> It is one of mutual interdependence, with humans having obligations or covenants that they must perform in order to live in harmony with the plants, animals, waters, and mountains.<sup>48</sup>

Our previous work has explained the property component of Indian culture and demonstrated how the deprivation of land brings about losses of other attributes of collective Indian identity or peoplehood.<sup>49</sup> Homelands or aboriginal territories tie Indians to all the other components of their existence, linking cultural, philosophical, religious, and political sovereignty together.<sup>50</sup> Each tribe has its own linguistic, religious, cultural, and ancestral ties to specific lands of origin. The sacred homeland of the Navajo people, for example, is known as *Dinetah*, a place located within the four mountains that mark the traditional boundaries of Navajo territory to the east, south, west, and north.<sup>51</sup> Navajo have believed from the time of their creation that they have a spiritual obligation to stay within their homeland, nurture it, and respect the four sacred mountains.<sup>52</sup> The relationship among the land, people, and culture is deeply inscribed in all aspects of Navajo life—from the creation story to contemporary tribal law—and is reflected in worldviews, politics, and social relationships. This is true for tribes ranging from the Wampanoags of Massachusetts to the Miwoks of California. Across North

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47. See, e.g., EDWARD BERNBAUM, SACRED MOUNTAINS OF THE WORLD, at xiii (1997) (describing the ways in which diverse societies relate in religious or spiritual terms to mountains).

48. VINE DELORIA, JR., FOR THIS LAND: WRITINGS ON RELIGION IN AMERICA 211 (James Treat ed., 1999).

49. See Carpenter, Katyal & Riley, *supra* note 29, at 1064–65 (explaining that the loss of tribal property makes it difficult for the Navajo to protect their culture).

50. See Kristen A. Carpenter, *Real Property and Peoplehood*, 27 STAN. ENVTL. L.J. 313, 348–55 (2008) (explaining the interaction of colonization with Indians' cultural, philosophical, and religious aspects of existence).

51. George Blueeyes, Poem, *Sacred Mountains*, in BETWEEN SACRED MOUNTAINS: NAVAJO STORIES AND LESSONS FROM THE LAND 2 (Larry Evers ed., 1982) (situating Navajo life between the four sacred mountains). Around 180,000 Navajo (of 225,000 total) reside on their 16.2-million-acre reservation, where many maintain a traditional lifestyle, speaking the Navajo language, living in hogans, grazing sheep, weaving, and maintaining Navajo spiritual and healing traditions. Howard L. Brown & Raymond D. Austin, *The Twenty-Fifth Anniversary of the Navajo Preference in Employment Act: A Quarter-Century of Evolution, Interpretation, and Application of the Navajo Nation's Employment Preference Laws*, 40 N.M. L. REV. 17, 17, 20 (2010).

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

America, or what some Indians describe as Turtle Island,<sup>53</sup> the relationship between tribes and their lands is both pervasive and permanent,<sup>54</sup> transcending even the experience of conquest.<sup>55</sup>

### B. Colonizing Red

From the point of contact between Europeans and Indians, their relationship was fraught with a curious blend of dependence, longing, and violence. On the one hand, pilgrims famously relied on neighboring tribes for help with hunting and cultivating food in their new surroundings.<sup>56</sup> At the same time, there are documented reports that colonial governments incentivized their citizens to hunt Indian people by awarding bounties for proof of an Indian killing, thereby using the law to put a monetary value on the body of an Indian.<sup>57</sup> The first “head bounty” was put into place during the Pequot War by Connecticut militiamen in 1637.<sup>58</sup> Numerous others followed, with Massachusetts having the most of any of the colonies.<sup>59</sup> In upper New York, French officials expanded scalp bounties to include Indian women in 1694.<sup>60</sup> Massachusetts followed with yet another innovation in 1697: the Commonwealth awarded bounties for killing Indian children under the age of ten.<sup>61</sup> Eventually, “[p]olicymakers offered bounties for Native American heads or scalps in at least twenty-three states or their colonial, territorial, or Mexican antecedents.”<sup>62</sup>

53. See DUANE CHAMPAGNE, NOTES FROM THE CENTER OF TURTLE ISLAND, at viii (1996) (noting that in the Chippewa creation stories, “Turtle Island is the name given to the land”); *Turtle Island, as Reference to North America*, in ENCYCLOPEDIA OF THE HAUDENOSAUNEE (IROQUOIS CONFEDERACY) 318–19 (Bruce Elliott Johansen & Barbara Alice Mann eds., 2000) (noting that North America is frequently referred to as “Turtle Island” by the Iroquois and that the “idea of Turtle Island often was used as an environmental idea by social activists”).

54. David H. Getches, *A Philosophy of Permanence: The Indians’ Legacy for the West*, J.W., July 1990, at 58, 58.

55. See Rebecca Tsosie, *Land, Culture, and Community: Reflections on Native Sovereignty and Property in America*, 34 IND. L. REV. 1291, 1306 (2001) (“The mere fact that the land is not held in Native title does not mean that the people do not hold these obligations, nor . . . that they no longer maintain the rights to these lands.”).

56. KAREN ORDAHL KUPPERMAN, INDIANS & ENGLISH: FACING OFF IN EARLY AMERICA 195–96 (2000).

57. Benjamin Madley, *Reexamining the American Genocide Debate: Meaning, Historiography, and New Methods*, 120 AM. HIST. REV. 98, 115–16 (2015); see also Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 40 (1992) (noting that Pilgrim exploring parties returned to the Mayflower with items taken from Indian graves).

58. Madley, *supra* note 57, at 114.

59. See *id.* at 116 (listing the scalp bounties for several states).

60. *Id.* at 115 n.63.

61. *Id.* at 116.

62. *Id.* at 114.

Into the colonial period, it was religion—rather than race or color—that served as the primary distinction between colonizers and Indians.<sup>63</sup> From the perspective of Europeans, Indians’ pagan beliefs made their ascension to equality (in this life and the next) impossible.<sup>64</sup> Indians were savage infidels with whom the English did not want to become too closely associated, believing that they had a separate civilization and moral code.<sup>65</sup> Thus the savagery of the Indian was used as a proxy for inferiority, one which would only turn to skin-color differences in the mid-eighteenth century.<sup>66</sup>

Racial categories—the “simple color-coded labels” of white, red, and black—developed first in the “major slaveholding regions” of the country.<sup>67</sup> By 1740, “the notion of red Indians [began] the trajectory toward widespread acceptance.”<sup>68</sup> As the process of racialization crept along in the colonial period, the Indian as an exotic, primitive “other” piqued the curiosity of settlers, who adopted Indian identities as a show of their own rebellion from the British.<sup>69</sup> As Philip Deloria recounts, there are documented accounts of whites playing Indian as early as the 1700s, in ostensible homage to the

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63. See NANCY SHOEMAKER, *A STRANGE LIKENESS: BECOMING RED AND WHITE IN EIGHTEENTH-CENTURY NORTH AMERICA* 129 (2004) (stating that early colonists identified themselves primarily as “Christian” rather than as “white”).

64. See ROBERT A. WILLIAMS, JR., *SAVAGE ANXIETIES: THE INVENTION OF WESTERN CIVILIZATION 195–96* (2012) [hereinafter WILLIAMS, *SAVAGE ANXIETIES*] (“Reverend Samuel Purchas . . . ably catalogued the litany of stereotypes and clichés confirming that the savages of Virginia were perpetual enemies to the [English].”). See generally, ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 121–50 (1990) (chronicling how western Europeans used law and religion as an effective instrument during genocidal conquest and colonization for centuries).

65. WILLIAMS, *SAVAGE ANXIETIES*, *supra* note 64, at 195–96.

66. See SHOEMAKER, *supra* note 63, at 129 (describing how the categorization of people by skin color-based labels such as red, white, and black replaced other signifiers of difference, such as “Christian” and “non-Christian”).

67. See *id.* (suggesting that some of the earliest claims to a “white” identity appear to have come from Carolina colonists in the early 1700s, who “divided their world into ‘white, black, & Indians’”).

68. See *id.* at 130 (explaining that Carl Linnaeus’s 1740 edition of *Systema Naturae* likely popularized the notion of “red” Indians). There is a rich body of literature detailing the construction of race in early America. *E.g.*, JOYCE E. CHAPLIN, *SUBJECT MATTER: TECHNOLOGY, THE BODY, AND SCIENCE ON THE ANGLO-AMERICAN FRONTIER, 1500–1676*, at 160 (2001); THEDA PERDUE, “MIXED BLOOD” INDIANS: RACIAL CONSTRUCTION IN THE EARLY SOUTH 92–93 (2003); CIRCE STURM, *BLOOD POLITICS: RACE, CULTURE, AND IDENTITY IN THE CHEROKEE NATION OF OKLAHOMA* 3 (2002); JOHN WOOD SWEET, *BODIES POLITIC: NEGOTIATING RACE IN THE AMERICAN NORTH, 1730–1830*, at 9–10 (2003). To some extent tribes themselves participated in the racial distinctions that facilitated slavery, with for example wealthy plantation owners in the Cherokee Nation owning African-descended slaves. *E.g.*, TIYA MILES, *THE HOUSE ON DIAMOND HILL: A CHEROKEE PLANTATION STORY* 75–78 (2010) (describing the slaves and slave quarters of Cherokee plantation owner Joe Vann); see also TIYA MILES, *TIES THAT BIND: THE STORY OF AN AFRO-CHEROKEE FAMILY IN SLAVERY AND FREEDOM* 50–51 (2005) (noting the vulnerability of slave women and men who lacked a Cherokee clan for protection).

69. See DELORIA, *supra* note 14, at 12 (noting instances before the American Revolution in which colonial crowds acted out their political and economic discontent with British rule in Indian disguises).

Indians' fighting spirit and unrelenting fervor to maintain their lands.<sup>70</sup> For colonial settlers dissatisfied with British rule, Indians came to be seen as the ultimate warriors and rebels. When Samuel Adams led protesters to dump tea into the Boston Harbor in 1773, for example, they were dressed as Mohawk Indians.<sup>71</sup> Whatever the symbolism, however, colonists had come to see Indians as different in terms of race and religion, as well as socially, politically, and economically incompatible with whites.<sup>72</sup> Only a few years later, in 1776, these same rebels wrote in their Declaration of Independence from British rule that one basis for the statement was the King's failure to protect the colonies from "merciless Indian Savages."<sup>73</sup>

By the end of the colonial period, Indian tribes—still a formidable force but greatly reduced since the point of contact—were not only savage infidels but Red ones at that. Indian status was increasingly constituted not only by perceptions of religion and culture, but also through red skin, a marker of hierarchy and difference.

### C. *Acquiring Red—The Treaty Era (1776–1871)*

By the time of U.S. independence,<sup>74</sup> the Native population had been reduced by as much as 95% since the point of contact due to war, genocide, disease, and various other factors.<sup>75</sup> With such devastating reductions in the number of Native people, settlers continued to remove remaining Indians from desired territories and began to see them as symbolic of a free, pagan, and disappearing race whose land, material culture, and identity could be taken and then consumed and assumed by whites.<sup>76</sup> As Deloria has documented, by the late 1700s fraternal societies had formed in which members

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70. See *id.* at 11 (describing settlers dressed as "white Indians" forcefully resisting a British official attempting to enforce an ordinance in 1734).

71. See *id.* at 31–32 (arguing that the Tea Party represented the culmination of colonial Indian play).

72. See SHOEMAKER, *supra* note 63, at 141–43 (arguing that when European "colonists became less dependent on Indians as trading partners and more interested in accumulating Indian land, seeing Indians as different justified Indian dispossession"). For a review of important historical works tracing the development of racial concepts and identities in different regions of North America, across specific tribes and time periods, see generally, for example, Joshua Piker, *Indians and Race in Early America: A Review Essay*, 3 HIST. COMPASS 1 (2005).

73. THE DECLARATION OF INDEPENDENCE para. 28 (U.S. 1776).

74. As a wealth of literature details, Indian tribes were contemplated by the Constitution but never expressly included within it. See, e.g., Wenona T. Singel, *The First Federalists*, 62 DRAKE L. REV. 775, 785–89 (2014) (describing the place of Indian tribes outside of, but in relation to, the U.S. Constitution).

75. RUSSELL THORNTON, *AMERICAN INDIAN HOLOCAUST AND SURVIVAL: A POPULATION HISTORY SINCE 1492*, at 42–59 (1987); see also JARED DIAMOND, *GUNS, GERMS, AND STEEL: THE FATES OF HUMAN SOCIETIES* 211 (1997) (putting the population at 20 million Natives at the time of European contact).

76. See DELORIA, *supra* note 14, at 63–68 (arguing that the ongoing physical removal of Indian people led to a more nostalgic imagining of a "vanishing Indian").



dressed up as Indians—including face paint and buckskin—while carrying bows, arrows, and pipes.<sup>77</sup> Entranced by the “unknowable knowledge” possessed by the “enigmatic Indian,”<sup>78</sup> inductees of organizations like the “Society of Red Men” and the “Improved Order of Red Men” underwent initiation ceremonies and were given Indian names to mark “the passage from paleface to Red Man.”<sup>79</sup> These organizations used Indian hierarchies—sachems, chiefs, councils, squaw sachems, and warriors—all modeled on their perception of secret “Indian mysteries.”<sup>80</sup> According to Deloria, these organizations served to instantiate the Americanness of elite individuals in the new Republic, linked together through secret, fraternal organizations promoting multilayered identities of patriotism, political engagement, and service.<sup>81</sup>

Ironically, around the same time, tribes were simultaneously losing their lands in increasingly lopsided treaty negotiations, often conducted in the shadow or wake of violence.<sup>82</sup> The United States (as successor to the colonial powers) signed hundreds of treaties with Indian tribes, a power confirmed in the U.S. Constitution.<sup>83</sup> Most treaties during this period transferred Indian lands to the United States in exchange for payment in the form of goods, annuities, education, or health services, and, almost always, for the guaranteed protection of the United States so that tribes could continue to live in and control their own territory.<sup>84</sup> As states and their citizens grew ever hungrier for land, a number of important questions about the status of Indian property rights reached the courts.

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77. *Id.* at 46–47.

78. *Id.* at 60.

79. *Id.* at 59, 62–63.

80. *Id.* at 60.

81. *Id.* at 60–61.

82. *Id.* at 63–64 (noting that “[b]y the middle of the nineteenth century, most native people had . . . been made to disappear from the eastern landscape”); *see also* *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 177–80 (1999) (discussing the history of one such treaty, as well as the historical “impetus” to remove the Chippewa Indians from their land). For additional examples of some of these treaties, see *Treaty with the Chippewa*, 1820, June 16, 1820, 7 Stat. 206; *Treaty with the Wyandots, etc.*, Sept. 29, 1817, 7 Stat. 160; *Treaty with the Ottawas, etc.*, Aug. 24, 1816, 7 Stat. 146; *Treaty with the Chippewas, etc.*, Nov. 25, 1808, 7 Stat. 112; *Treaty with the Ottawas, etc.*, Nov. 17, 1807, 7 Stat. 105; *Treaty with the Wyandots, etc.*, July 4, 1805, 7 Stat. 87.

83. U.S. CONST. art. II, § 2, cl. 2; Robert N. Clinton, *A Brief History of the Adoption of the United States Constitution*, 75 IOWA L. REV. 891, 893 (1990) (relating this fact); *see also* Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1015 (2015) (arguing that the Commerce Clause does not, by itself, give Congress plenary power over Indian Affairs).

84. Most of the several hundred treaties between the United States and tribes are collected in 2 INDIAN AFFAIRS: LAWS AND TREATIES (Interland Publishing Inc. 1972) (Charles J. Kappler ed., 1904). For general background on the American Indian treaty tradition, *see generally* FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY (1994).

In the first major precedent in federal Indian law, the 1823 case of *Johnson v. M'Intosh*,<sup>85</sup> the Supreme Court was faced with the question of whether a land speculator had acquired good title from an Indian tribe. Reasoning, in part, that “the tribes of Indians inhabiting this country were fierce savages, whose occupation was war,”<sup>86</sup> the Court held that the Indians did not have a right to convey land titles cognizable in the “[c]ourts of the conqueror.”<sup>87</sup> Instead, Indians had only a right to occupy land, and this right could be extinguished by “purchase or by conquest” pursuant to the Doctrine of Discovery.<sup>88</sup> This disaggregated system of Indian title, wherein “ultimate title” is held by the United States and the Indian nations’ “title of occupancy”—which excludes the right of alienation and can be taken by purchase or conquest—“remains to this day.”<sup>89</sup>

The decision in *Johnson* was foundational to the jurisprudence of American property law and Indian law alike,<sup>90</sup> as subsequent courts built on the holding and dicta of *Johnson* to continue to diminish Indian property rights.<sup>91</sup> Immediately, the United States became the sole buyer of Indian lands, resulting in the loss of their competitive value in the market.<sup>92</sup> Additionally, as Robert A. Williams Jr. has theorized, the influence of the Lockean view of lands and Indians advanced by the defendants in *Johnson* had continuing impact.<sup>93</sup> Locke had famously written, “[I]n the beginning all the World was *America*.”<sup>94</sup> By leaving it wild, the theory went, Indians had wasted the land and therefore could not acquire the same kinds of possessory rights associated with fee ownership that whites could acquire.<sup>95</sup>

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85. 21 U.S. (8 Wheat.) 543 (1823).

86. *Id.* at 590.

87. *Id.* at 588.

88. *Id.* at 587.

89. Joseph William Singer, *Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Opportunity*, 86 IND. L.J. 763, 767 (2011); see Joseph William Singer, *Erasing Indian Country: The Story of Tee-Hit-Ton Indians v. United States*, in INDIAN LAW STORIES 229, 244–45 (Carole Goldberg et al. eds., 2011) [hereinafter Singer, *Erasing Indian Country*] (criticizing *Johnson*’s “broad language” as contributing to the Court’s treatment of “title of occupancy” as essentially illusory in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955)).

90. STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER 11–12 (2005); see also ROBERTSON, *supra* note 34, at 118–25 (chronicling events after *Johnson*).

91. See *infra* notes 152–57 and accompanying text (describing *Tee-Hit-Ton*’s extension of *Johnson* in support of holding that aboriginal title is not compensable).

92. Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1105 (2000).

93. WILLIAMS, *supra* note 16, at 93, 118–19.

94. John Locke, *The Second Treatise*, in TWO TREATISES OF GOVERNMENT § 49, at 319 (Peter Laslett ed., 1960).

95. *Id.* at §§ 43–45, at 316–17.

At the same time, the view of the vanishing Indian supported the convenient idea that America was increasingly uninhabited, open, and free for the taking.<sup>96</sup> In reality, however, Indians had not vanished despite decades of violent pressure to do so.<sup>97</sup> But from the mid- to late-1800s, tribes could no longer halt the unquenchable thirst for their lands. Notwithstanding federal promises to protect them in their occupation of reservation lands, tribes throughout the east and upper Midwest were forcibly “removed” by the government under deplorable conditions.<sup>98</sup> The violent removal and dispossession of Indians is a story told and retold through tribal experiences of the Trail of Tears, the Trail of Death, and the Long Walk.<sup>99</sup> By the turn of the century, more than thirty Indian tribes had been “removed” from the Indian Territory to make room for white settlement in the West.<sup>100</sup>

When Indians resisted confinement to reservations or stood as a barrier to acquisition of resources by whites, governments put bounties on their “red-skins” as rewards for whites to kill Indians.<sup>101</sup> These were not unlike bounties offered for animal pelts during the same period.<sup>102</sup> An advertisement in a Minnesota newspaper in 1863 read, “The State reward for dead Indians has been increased to \$200 for every red-skin sent to Purgatory. This sum is more than the dead bodies of all the Indians east of the Red River are worth.”<sup>103</sup> The bounties on red skins expanded in number and geography, with “Indian hunting” spreading to the South and the West, sometimes funded by local militias and often by the United States.<sup>104</sup>

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96. See DELORIA, *supra* note 14, at 64 (explaining that by the mid-nineteenth century, most of the Indians had been forced out of the eastern United States, leading to a sense by whites that they had simply disappeared). This is perhaps most classically captured in JAMES FENIMORE COOPER, *THE LAST OF THE MOHICANS: A NARRATIVE OF 1757* (Signet Classic 1962) (1826).

97. See JAMES MOONEY, *MYTHS OF THE CHEROKEES* (1900), *reprinted in* JAMES MOONEY’S *HISTORY, MYTHS, AND SACRED FORMULAS OF THE CHEROKEES* 105 (1992) (recalling Governor McMinn of Tennessee informing the Cherokee chiefs that he could not protect them from encroachments of the surrounding white population and they should move to the “western paradise”).

98. See, e.g., Indian Removal Act, 4 Stat. 411 (1830) (providing the President with the power to remove Indians in the southeastern United States and force them into lands in the west); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 562–63 (1832) (holding unconstitutional a Georgia law that prohibited non-Indians from being present on Indian lands); THEDA PERDUE & MICHAEL D. GREEN, *THE CHEROKEE REMOVAL: A BRIEF HISTORY WITH DOCUMENTS* 167–68 (2d ed. 2005).

99. See R. DAVID EDMUNDS, *THE POTAWATOMIS: KEEPERS OF THE FIRE* 265–67, 327 nn.76–84 (1978) (referring to the “Trail of Death” or the removal of the Potawatomi). See generally L.R. BAILEY, *THE LONG WALK* (1964) (providing a detailed account of the “Long Walk” of the Navajo).

100. See generally RENNARD STRICKLAND, *THE INDIANS IN OKLAHOMA* (1980).

101. See WINONA DAILY REPUBLICAN, *supra* note 1 (illustrating the practice of using body parts of dead Indians as proof of killing them).

102. See Madley, *supra* note 57, at 115 (detailing various colonial policies of paying colonists for the scalps or heads of Indians and noting that at least one Canadian colony “promised ten beaver pelts for each ‘Maquae’ scalp taken along the upper Connecticut River”).

103. WINONA DAILY REPUBLICAN, *supra* note 1.

104. See Madley, *supra* note 57, at 126 (describing a state-funded Indian killing in California).

Actual Indians having been relocated or killed, the “vacancies”<sup>105</sup> on eastern lands seemed to fuel white interest in the material culture left by former Indian inhabitants. As Trope and Echo-Hawk explain in their seminal history on the subject, by the 1840s burgeoning theories of physical anthropology fueled scientists to unearth Indian graves and take the crania to prove that Indians were racially inferior and “doomed to extinction.”<sup>106</sup> Indian graves were routinely looted, with Indian goods exhumed and sold to museums and private collectors, many of them ending up in Europe.<sup>107</sup> Federal laws ultimately made Indian human remains and associated funerary objects property of the U.S. government.<sup>108</sup> In 1868, for example, the Surgeon General ordered all U.S. Army field officers to send Indian skulls to the Army Medical Museum, again, to confirm claims of racial inferiority.<sup>109</sup> Many were taken from the remains of Indians that had perished during massacres by the U.S. Army.<sup>110</sup> Not content to take Indian lands, the United States had taken Indians’ bodies and funerary objects as well.

*D. Whiting Red: Allotment and Assimilation (1871–1934)*

As the federal government consolidated power over Indian people on reservations, it quickly turned to dominating and destroying Indian lifeways through a new policy of assimilation. Lawmakers believed that the eradication of Indian cultures was a key step in “break[ing] up the tribal mass” and paving the way for political and geographic domination by states and the federal government.<sup>111</sup> Federal policy attacked the twin strongholds of tribal land and culture to further dispossession. The rough concept was that if Indians were induced to abandon subsistence cultures, they would no longer need the large tracts of land that supported those activities, which could then be made available to white settlement.

To eradicate Indian culture, the government targeted religion and education. The Commissioner of Indian Affairs claimed that encouraging Indians to “put aside all savage ways” would help them achieve “salvation” through

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105. See *Charrier v. Bell*, 496 So.2d 601, 604–05 (La. Ct. App. 1986) (noting in a contest between state and amateur archaeologists that Indians had not abandoned their grave sites).

106. Trope & Echo-Hawk, *supra* note 57, at 40.

107. *Id.* at 43–44.

108. *Id.* at 42–43.

109. KAREN COODY COOPER, *SPIRITED ENCOUNTERS: AMERICAN INDIANS PROTEST MUSEUM POLICIES AND PRACTICES* 87 (2008).

110. Trope & Echo-Hawk, *supra* note 57, at 40–41.

111. WILKINSON, *BLOOD STRUGGLE*, *supra* note 37, at 43 (quoting President Theodore Roosevelt imposing assimilation and allotment policies as “a mighty pulverizing engine, to break up the tribal mass”); see Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 *STAN. L. REV.* 773, 773–76 (1997) (describing assimilation programs that focused directly on religion).

Christianity.<sup>112</sup> At the turn of the century, the government outlawed a number of Indian ceremonies and sacraments, penalizing such practices with both incarceration and denial of treaty food rations.<sup>113</sup> Famously, the U.S. Army shot and killed several hundred Lakota people while they prayed before a Ghost Dance at Wounded Knee, South Dakota.<sup>114</sup> These efforts were meant to remove “savage ways and traditions which are effectual barriers to the uplifting of the race.”<sup>115</sup> With Indian religions criminalized, the plan was to inculcate Indians in Christian belief and practice. Toward this end, the federal government partnered with Christian denominations to fund schools that would “[k]ill the Indian in him and save the man.”<sup>116</sup> Some of these schools were on reservations, while others were purposefully located far away so as to diminish the influence of families on Indian children.<sup>117</sup> Government and religious authorities notoriously employed coercive means to convince Indian families to enroll their children; if they resisted, sometimes their children were simply taken against their will and sent away for education in English, Christianity, and manual-labor skills.<sup>118</sup> During the school year, many Indian children were subjected to sexual violence and other forms of abuse by boarding school staff; during the summers, they were often sent to white families as domestic workers.<sup>119</sup>

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112. Letter from W.A. Jones, Comm’r of Indian Affairs, to E. A. Hitchcock, Sec’y of the Interior (Feb. 19, 1902), *reprinted in* W. A. JONES, COMM’R OF INDIAN AFFAIRS, REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 13, 15 (1902).

113. *See* Kristen A. Carpenter, *Limiting Principles and Empowering Practices in American Indian Religious Freedoms*, 45 CONN. L. REV. 387, 408–10 (2012) (identifying and analyzing federal legislative programs that outlawed Indian religious practices).

114. JAMES MOONEY, *THE GHOST-DANCE RELIGION AND WOUNDED KNEE* (Dover Publications, Inc. 1973) (1896) (providing the eyewitness account of a Bureau of Ethnology official).

115. Letter from W.A. Jones, *supra* note 112, at 15–16.

116. DAVID WALLACE ADAMS, *EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875–1928*, at 52 (1995).

117. *See id.* (describing a belief that “only off-reservation schools located in civilized communities were capable of accomplishing [the desired influence on these children]”).

118. *See id.* at 21–24 (stating that the four aims of Indian schooling were to provide “the rudiments of an academic education,” teach individualization over tribal community interests, promote Christianization, and train the children in American citizenship). *See generally* TIM GIAGO, *CHILDREN LEFT BEHIND: THE DARK LEGACY OF INDIAN MISSION BOARDING SCHOOLS* (2006) (providing a firsthand account of a student’s experience at an Indian boarding school); *AWAY FROM HOME: AMERICAN INDIAN BOARDING SCHOOL EXPERIENCES 1879–2000* (Margaret L. Archuleta et al. eds., 2000) [hereinafter *AWAY FROM HOME*] (providing an historical and pictorial overview of Indian boarding schools in the nineteenth and twentieth centuries).

119. *See, e.g.*, GIAGO, *supra* note 118, at 4–6 (describing the violence and abuse that Native American students endured, including various forms of corporal punishment). For scholarly treatments of Indian boarding schools, *see generally* ADAMS, *supra* note 116; K. Tsianina Lomawaima, *Introduction*, in *AWAY FROM HOME*, *supra* note 118, at 56.

With respect to land, the General Allotment Act of 1887 authorized the Executive Branch to take the treaty-guaranteed lands owned by tribes and split them into smaller parcels (or “allotments”) to be divvied among individual Indians.<sup>120</sup> As President Theodore Roosevelt famously stated:

[T]he time has arrived when we should definitely make up our minds to recognize the Indian as an individual and not as a member of a tribe. The general allotment act is a mighty pulverizing engine to break up the tribal mass. It acts directly upon the family and the individual.<sup>121</sup>

Tribes and individuals often resisted, anticipating that the division of collective lands would bring economic, social, and cultural upheaval,<sup>122</sup> and also with an awareness among hunting and gathering tribes that they could not be turned into farmers on the harsh plains overnight.<sup>123</sup> Nevertheless, the federal government coerced allotment “agreements” with tribes.<sup>124</sup> And so-called “surplus” lands left over became available for non-Indian settlement.<sup>125</sup> The Supreme Court upheld this policy in its 1903 opinion in *Lone Wolf v. Hitchcock*,<sup>126</sup> which legitimized Congress’s decision and opened up the Kiowa–Comanche–Apache reservation to white settlement.<sup>127</sup> The Court held that allotment was merely a “change in the form of investment of Indian tribal property” and, in any event, the treaty abrogation was nonjusticiable by the courts.<sup>128</sup> There would be no limit, it seemed, to Congress’s power to act for better or worse in regards to Indians.<sup>129</sup>

120. WILKINSON, BLOOD STRUGGLE, *supra* note 37, at 18–19.

121. President Theodore Roosevelt, First Message to Congress (Dec. 1901), *reprinted in* U.S. BD. OF INDIAN COMM’RS, ANNUAL REPORT OF THE BOARD OF INDIAN COMMISSIONERS TO THE SECRETARY OF THE INTERIOR FOR 1904, at 6 (1904).

122. *E.g.*, WILKINSON, BLOOD STRUGGLE *supra* note 37, at 47–48 (recounting the attempts of one allotment agent from the Bureau of Indian Affairs to explain the forced allotment policy to the residents of the Nez Perce Reservation); *see* Kristen A. Carpenter, *Contextualizing the Losses of Allotment Through Literature*, 82 N.D. L. REV. 605, 622–24 (2006) (detailing the cultural and socioeconomic impacts of the federal government’s allotment of tribal lands).

123. *See* Angela R. Riley, *The Apex of Congress’ Plenary Power over Indian Affairs: The Story of Lone Wolf v. Hitchcock*, in INDIAN LAW STORIES, *supra* note 87, at 189, 189–90 (explaining that the *Lone Wolf* case effectively forced Indians to become failed farmers by taking away communal lands).

124. *See, e.g.*, WILLIAM T. HAGAN, TAKING INDIAN LANDS: THE CHEROKEE (JEROME) COMMISSION 1889–1893, at ix–x (2003) (describing the coercive tactics that federal commissioners used to negotiate allotment “agreements” with twenty tribes in Indian Territory that ceded 15 million acres of land and paved the way for Oklahoma statehood).

125. WILKINSON, BLOOD STRUGGLE, *supra* note 37, at 43.

126. 187 U.S. 553 (1903).

127. *See id.* at 568 (upholding the federal statute, which opened up the Kiowa–Comanche–Apache reservation to white settlement).

128. *Id.*

129. *See id.* (“We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made . . . . In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation.”). A senator from Pennsylvania said at the time of the decision:

Indian land holdings were reduced by approximately 90 million acres during the allotment period.<sup>130</sup> As Principal Chief Wilma Mankiller of the Cherokee Nation later stated, allotment had the precise impact on the Indians it was intended to have. Through the massive deprivation of property, it also came dangerously close to destroying completely Indian culture and society:

What happened to us at the turn of the century with the loss of land, when our land was divided out in individual allotments, had a profound irreversible effect on our people . . . . When we stopped viewing land ownership in common and viewing ourselves in relation to owning the land in common, it profoundly altered our sense of community and our social structure. And that had a tremendous impact on our people and we can never go back.<sup>131</sup>

Ironically, as the assault on Native religions and lifeways continued, Americans increasingly fetishized the Indian, whose culture Americans believed was on the precipice of extinction. Mainstream society in Europe and the United States had also developed an appetite for collecting Indian material culture.<sup>132</sup> Indian art, artifacts, and human remains moved from Indian ownership to white ownership. Some of these transfers were likely illegal because they happened through theft, coercion, or the alienation of communal goods by tribal members that they had no right to sell.<sup>133</sup> Indians who were

It [*Lone Wolf*] is a very remarkable decision. It is the *Dred Scott* decision No. 2, except that in this case the victim is red instead of black. It practically inculcates the doctrine that the red man has no rights which the white man is bound to respect, and, that no treaty or contract made with him is binding. Is that not about it?

Riley, *supra* note 123, at 189 (quoting the statement of Senator Matthew Quay on the Senate floor in 1903).

130. Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 12–13 & n.59 (1995) (detailing tribal land losses during the allotment era and the surplus-lands program).

131. Mishuana Goeman, *Land as Life: Unsettling the Logics of Containment*, in NATIVE STUDIES KEYWORDS 71, 78–79 (Stephanie Nohelani Teves et al. eds., 2015).

132. DOUGLAS COLE, CAPTURED HERITAGE: THE SCRAMBLE FOR NORTHWEST COAST ARTIFACTS 286–310 (1985) (“[A] staggering quantity of material, both secular and sacred . . . left the hands of their native creators and users for the private and public collections of the European world. . . . By the time it ended there was more Kwakiutl material in Milwaukee than in Mamalillikulla, more Salish pieces in Cambridge than in Comox. The City of Washington contained more Northwest Coast material than the state of Washington and New York City probably housed more British Columbia material than British Columbia herself.”); *see also* Melissa Eddy, *Lost in Translation: Germany’s Fascination with the American Old West*, N.Y. TIMES (Aug. 17, 2014), [http://www.nytimes.com/2014/08/18/world/europe/germanys-fascination-with-american-old-west-native-american-scalps-human-remains.html?\\_r=0](http://www.nytimes.com/2014/08/18/world/europe/germanys-fascination-with-american-old-west-native-american-scalps-human-remains.html?_r=0) [<http://perma.cc/YYK6-RQ68>] (describing how German art collectors and museums acquired Indian artifacts and human remains).

133. There are myriad examples throughout history. *See, e.g.*, *Chilkat Indian Village*, IRA v. Johnson, No. 90-01 (Chilkat Tr. Ct. Nov. 3, 1993), <http://www.ankn.uaf.edu/curriculum/tingit/chilkatindianvillage/> [<http://perma.cc/R9J6-PT2Q>] (hearing allegations that the sale of artifacts from the Chilkat Indian Village violated a tribal ordinance and constituted the unauthorized sale of communally owned property).

in desperate need of money likely sold other possessions to buy food and goods, as reservation conditions were all but unbearable, with numerous accounts of starvation, disease, and death by the elements.<sup>134</sup>

Non-Indians continued to be fascinated by depictions of the vanishing race and its concomitant vanishing way of life. In the wildly popular Wild West shows, cowboys and Indians played out romantic images of epic Western battles, concretizing the image of a Sioux Warrior on a horse as the definitive picture of an American Indian.<sup>135</sup> According to historians, between 1883 and 1933 hundreds of Indians “played Indian,” performing in these shows in the United States and around the world.<sup>136</sup> Similarly, as Americans “look[ed] away from Europe and toward the West to discover the uniqueness of their culture,”<sup>137</sup> turn-of-the-century filmmakers became captivated with the American West.<sup>138</sup> In many of these early films, directors filmed Indians on reservations, both to promote the West and to show the government’s “success” in containing Indians.<sup>139</sup> Relatively inexpensive and easy to produce, Westerns became a booming genre in American film in the early twentieth century.<sup>140</sup>

In addition to watching Indians in shows and movies, white Americans also played Indian in private clubs and in public displays. Author Ernest Thompson Seton’s youth group, the Woodcraft Indians, set up a structure around Indian identity and tribal roles in the early 1900s and this was extended to the youth group Camp Fire Girls as well.<sup>141</sup> One group of Boy Scouts, the Koshare troop, was founded in 1933 with a specific Indian structure.<sup>142</sup> Its hierarchy was comprised of the papoose, the brave, and the

134. *See generally* INST. FOR GOV’T RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION: REPORT OF A SURVEY MADE AT THE REQUEST OF HONORABLE HUBERT WORK, SECRETARY OF THE INTERIOR (1928) [hereinafter MERIAM REPORT] (surveying the causes and effects of the “vicious circle of poverty and maladjustment” among Indians and recommending various solutions).

135. *See* L.G. MOSES, WILD WEST SHOWS AND IMAGES OF AMERICAN INDIANS 1883–1933, at 4 (1999) (recounting how the first writers of Wild West shows drew upon “signal events” like Custer’s battle with the Lakota at the Little Bighorn to create and maintain the image of the Plains Indians, mainly the Sioux, “as the distinctive American Indian”); SPINDEL, *supra* note 13, at 108–14 (crediting William Frederick Cody, “Buffalo Bill,” as the originator of the Wild West show and describing his travelling show in detail).

136. MOSES, *supra* note 135, at 4–5.

137. ANDREW BRODIE SMITH, SHOOTING COWBOYS AND INDIANS: SILENT WESTERN FILMS, AMERICAN CULTURE, AND THE BIRTH OF HOLLYWOOD 17 (2003).

138. *Id.* at 9–10.

139. *Id.* at 16–18.

140. *Id.* at 37; *see also* JACQUELYN KILPATRICK, CELLULOID INDIANS: NATIVE AMERICANS AND FILM 36–37 (1999) (describing the stereotyped portrayals of Indians in film at the turn of the century as silent films were replaced by films with dialogue).

141. DELORIA, *supra* note 14, at 108–12 (explaining that Seton’s Woodcraft Indians and the Camp Fire Girls borrowed heavily from Indian culture, while the Boy Scouts’ founder, Lord Robert Baden-Powell, imagined instead that boys were to be as young army officers).

142. *The Koshare Indian Dancers*, KOSHARE INDIAN MUSEUM, <http://www.kosharehistory.org/dancers.html> [<http://perma.cc/EN2S-F8Q2>] (describing the troop’s structure).



chief, and it used Navajo and Sioux tribes as names for patrols.<sup>143</sup> Some of the more (in)famous Indian-inspired sports mascots were also developed during this period. For example, the Cleveland baseball team adopted the “Indians” name in 1914.<sup>144</sup> In 1926, the University of Illinois’s mascot Chief Illiniwek made his halftime show debut; shortly thereafter he started wearing a war bonnet made of turkey feathers.<sup>145</sup> In 1930, the University of North Dakota athletic teams started calling themselves the “Sioux”—the “fighting” would come later.<sup>146</sup>

In all of these ways, Indians largely had become figments of the American imagination, except that real Indians were still alive—struggling to survive allotment, assimilation, and the Great Depression—on reservations throughout the United States. Indians had insufficient lands, training, and capital to become farmers in one generation and many reservations had become extremely poor, destitute places. As the government’s own Meriam Report concluded, allotment was a resounding failure in these respects.<sup>147</sup> Just as American people were feeding off of Indian culture for sports and entertainment, federal policies were starving Indian people on reservations across the country through the 1930s.<sup>148</sup>

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143. *Id.*

144. Jack Achiezer Guggenheim, *The Indians’ Chief Problem: Chief Wahoo as State Sponsored Discrimination and a Disparaging Mark*, 46 CLEV. ST. L. REV. 211, 213 (1998).

145. Brendan S. Crowley, Note, *Resolving the Chief Illiniwek Debate: Navigating the Gray Area Between Courts of Law and the Court of Public Opinion*, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 28, 31 (2004).

146. Jason Finkelstein, Note, *What the Sioux Should Do: Lanham Act Challenges in the Post-Harjo Era*, 26 CARDOZO ARTS & ENT. L.J. 301, 302 (2008).

147. MERIAM REPORT, *supra* note 134, at 7 (“When the government adopted the policy of individual ownership of the land on the reservations, the expectation was that the Indians would become farmers. . . . It almost seems as if the government assumed that some magic in individual ownership of property would in itself prove an educational civilizing factor, but unfortunately this policy has for the most part operated in the opposite direction.”); *see also* ROSE STREMLAU, SUSTAINING THE CHEROKEE FAMILY: KINSHIP AND THE ALLOTMENT OF AN INDIGENOUS NATION 171 (2011) (explaining that the allotment process frequently resulted in Native American families being dispossessed of the land they already lived on in order to allot the land to other Native Americans).

148. BRIAN W. DIPPPIE, THE VANISHING AMERICAN: WHITE ATTITUDES AND U.S. INDIAN POLICY 308 (1982) (quoting John Collier for the statement that that allotment was the “principal tool” of the policy of destruction of tribal life and the cause of “poverty bordering on starvation in many areas, a 30 percent illiteracy rate, a death rate twice that of the white population, and the loss of more than 90 million acres of Indian land”).

*E. Red in the Eras of Reorganization and Termination (1934–1960)*

In 1934, Congress passed the Indian Reorganization Act (IRA) to end and reverse the impacts of assimilation-era policies.<sup>149</sup> Among other things, the statute halted the process of allotment, provided for the organization of tribal governments, improved and expanded federal administration of Indian affairs, and created a comprehensive scheme of land acquisition and consolidation.<sup>150</sup> The Reorganization Era also ushered in modest legal protections for Indian cultures and economies, such as the creation of the Indian Arts and Crafts Board to fund tribal artisan programs and to criminally penalize the misrepresentation of Indian arts and crafts.<sup>151</sup>

As tribes tried to navigate the new reorganization policy and programs, non-Indians ramped up their appropriation of Indian culture. Sports teams took on Indian names, as in the “Boston Braves,” who later became the “Boston R-Skins” before moving to Washington in 1937.<sup>152</sup> In movies and television, Indian themes were popular,<sup>153</sup> often with non-Indian actors playing Indian characters in shows like *The Lone Ranger* and *Gunsmoke*.<sup>154</sup>

While the cowboys and Indians filled television screens, by the 1950s the federal government employed several mechanisms to end its ongoing obligation to tribes. Driven by a Cold War fear of communism and collective property, tribal rights and tribal sovereignty again fell victim to federal policy. Congress enacted laws to settle “ancient” Indian land claims once and for all, but without offering in-kind compensation.<sup>155</sup> This left many tribes—such as the Sioux, which refused to accept money as compensation for their sacred Black Hills—with neither land nor financial compensation for property losses.<sup>156</sup>

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149. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 1.05, at 81 (Nell Jessup Newton ed., 2012) [hereinafter COHEN’S HANDBOOK].

150. *Id.* § 1.05, at 82.

151. Act of August 27, 1935, Pub. L. No. 355, 49 Stat. 891 (creating the Indian Arts and Crafts Board).

152. Suzan Shown Harjo, *Fighting Name-Calling: Challenging “Redskins” in Court*, in TEAM SPIRITS: THE NATIVE AMERICAN MASCOTS CONTROVERSY 189, 191 (C. Richard King & Charles Freuhling Springwood eds., 2001); Katyal, *supra* note 2, at 1632–33.

153. WILLIAM INDICK, THE PSYCHOLOGY OF THE WESTERN: HOW THE AMERICAN PSYCHE PLAYS OUT ON SCREEN 1–2 (2008).

154. See MICHAEL RAY FITZGERALD, NATIVE AMERICANS ON NETWORK TV: STEREOTYPES, MYTHS, AND THE “GOOD INDIAN” 14–15 (2014) (criticizing television portrayals of Indians as inaccurate, demeaning, or simply absent in Westerns and pointing out that *Walker, Texas Ranger* was the only long-running program with an American Indian in the role of official lawman).

155. Indian Claims Commission Act of 1946, Pub. L. No. 726, § 2, 60 Stat. 1050 (1946).

156. See *Sioux Nation of Indians v. United States*, 601 F.2d 1157, 1159–61 (Ct. Cl. 1979) (describing the case); Kirsten Matoy Carlson, *Priceless Property*, 29 GA. ST. U. L. REV. 685, 688–89, 701–03 (2013) (explaining the Black Hills’ centrality to Sioux spiritual beliefs and cultural identity as the basis for the tribes’ continued refusal of monetary compensation and insistence on the return of the land itself).

The Supreme Court did its part as well to facilitate further dispossession of Indian lands and property rights. In a push to exploit resources in Alaska, the federal government sold hundreds of thousands of acres of timber in the aboriginal territory of the Tlingit peoples, who had never ceded title or occupancy.<sup>157</sup> The tribe filed a takings lawsuit that reached the Supreme Court, where once again, Indian property rights were denied on racial grounds.<sup>158</sup>

In *Tee-Hit-Ton Indians v. United States*<sup>159</sup>—a case that has never been repudiated or overturned—the Supreme Court held that the United States had no obligation to pay just compensation for the tribes' aboriginal title because it was not "property" pursuant to the Fifth Amendment.<sup>160</sup> The Court's reasoning left little to the imagination as to what motivations lay at the root of their decision. In denying the Tee-Hit-Ton Indian's claim, the Court infamously wrote:

Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.<sup>161</sup>

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157. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 273 (1955).

158. *See id.* at 284–85 (citing *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, to justify the holding that "Indian occupation of land without government recognition of ownership creates no rights against taking"); *see also* Stacy L. Leeds, *The More Things Stay the Same: Waiting on Indian Law's Brown v. Board of Education*, 38 TULSA L. REV. 73, 73–74 (2002) (commenting on *Plessy v. Ferguson*'s ultimate overruling by the Supreme Court, while *Lone Wolf*, "the Indian's Dred Scott decision," remains binding law).

159. 348 U.S. 272 (1955); *see Singer, Erasing Indian Country*, *supra* note 87, at 229 (referring to the case as "one of the worst blows to civil rights in United States history").

160. *See Tee-Hit-Ton Indians*, 348 U.S. at 288–89 (concluding that "Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation").

161. *Id.* at 289–90. This language was a pointed rejoinder to language in Felix Cohen's *Handbook of Federal Indian Law* attesting to the importance and sacred quality of tribal treaty rights. *See Riley, supra* note 45, at 377–78 (describing Cohen's work).

Although widely criticized by scholars<sup>162</sup> and rejected by international human rights tribunals,<sup>163</sup> *Tee-Hit-Ton* is still good law today and is thought to have paved the way for exploitation of Alaska's oil and other natural resources.<sup>164</sup>

As part and parcel of the same policy period, Congress also passed "termination acts" to liquidate tribal trust holdings and rid itself of obligations to tribes under federal law.<sup>165</sup> The goal was similar to that of the allotment period—focus Indian interests away from tribalism and collective property, and encourage assimilation and private property rights.<sup>166</sup> As history ultimately revealed, the federal government was also motivated to break up tribal property so that valuable resources could be exploited.<sup>167</sup>

Pursuant to this policy, 109 tribes were terminated between 1953 and 1964; approximately 2,500,000 acres of Indian land were removed from trust status; and 12,000 Native Americans lost tribal affiliation.<sup>168</sup> At the same time, Congress passed Public Law 280, which extended certain aspects of state criminal law and civil adjudicatory jurisdiction to reservations or former reservations in a number of states in an effort to minimize the federal-tribal

162. *E.g.*, Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481, 483–84 (1994) ("*Tee-Hit-Ton* amounts to a formal declaration that American Indian citizens remain, to a significant extent, outside the normal protection of the Federal Constitution and can therefore be subjected to formally unequal treatment under the law.").

163. *Cf.* Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 66, at 73–76 (Aug. 31, 2001) (holding that Nicaragua's obligation to protect property rights under Article 21 of the American Convention on Human Rights encompassed interests defined by the Awas Tingni peoples' own customary law of land tenure and that the Awas Tingni Community has communal property rights to the lands it currently inhabits); *Dann v. United States*, Case 11.140, Inter-Am. Comm'n H.R., Report No. 99/99, ¶ 7 (1999), <https://www.cidh.oas.org/annualrep/99eng/Admissible/U.S.11140.htm> [<http://perma.cc/HU9F-NEWF>] (reviewing a claim by Native Americans in Nevada that, despite their asserted aboriginal title and treaty rights, had their land confiscated by the United States government through a "grossly unfair procedure").

164. Alaska Native Claims Settlement Act, Pub. L. No. 92-203, § 2, 85 Stat. 688 (1971).

165. H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953) (declaring that "all of the following . . . Indian tribes and individual members thereof, should be freed from Federal supervision and control" and that "all offices of the Bureau of Indian Affairs in the States . . . whose primary purpose was to serve any Indian tribe . . . should be abolished").

166. Act of Aug. 15, 1953, Pub. L. No. 280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360 (2012)); DUANE CHAMPAGNE & CAROLE GOLDBERG, CAPTURED JUSTICE: NATIVE NATIONS AND PUBLIC LAW 280, at 6–7 (2012); CAROLE GOLDBERG-AMBROSE, PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280, at 1 (1997).

167. One of the first tribes targeted for the policy were the Klamaths, owners of valuable timber in Oregon; the government quickly sold the timber, distributing only a meager portion of the proceeds to tribal members. Donald Fixico, *Termination and Restoration in Oregon*, OR. ENCYCLOPEDIA, [http://oregonencyclopedia.org/articles/termination\\_and\\_restoration/#.VYMFouv4vFI](http://oregonencyclopedia.org/articles/termination_and_restoration/#.VYMFouv4vFI) [<http://perma.cc/4KLR-8X2A>].

168. *History and Culture: Termination Policy—1953–1968*, AM. INDIAN RELIEF COUNCIL, [http://www.nrcprograms.org/site/PageServer?pagename=airc\\_hist\\_terminationpolicy](http://www.nrcprograms.org/site/PageServer?pagename=airc_hist_terminationpolicy) [<http://perma.cc/A38Q-C9N4>].

relationship and normalize the idea of state interventions in Indian country.<sup>169</sup> Not unlike the government's assimilation policy decades earlier, the effects of these policies were devastating for tribal people who lost their livelihoods, assets, and very identities.<sup>170</sup>

By mid-twentieth century, from the perspective of the dominant society, conquest was nearly complete. Whites had removed, killed, and destroyed Indian people to facilitate the taking of Indian lands. With Indians pushed out of the way—either literally through removal, disease, and genocide; or metaphorically via policies of forced assimilation—whites became free to claim not only Indian lands, but Indian bodies, identities, and cultures for their own purposes. In reality, even during the darkest periods of relocation, assimilation, and termination, American Indians had neither gone extinct nor relinquished claims to their resources, and they would reemerge in the Period of Self-Determination.

#### F. *Contesting Red in the Period of Self-Determination (1960–Present)*

Indian tribes entered a period of “self-determination,” beginning roughly in the late 1960s and early 1970s, when American Indians mounted what Charles Wilkinson has called a “last stand for Native people.”<sup>171</sup> American Indians on reservations and in cities alike became engaged in a “modern tribal sovereignty movement” with a particular focus on the collective rights of tribes.<sup>172</sup> In both major court cases and through activism across the country,<sup>173</sup> tribal leaders and community members called for an end to termination and renewal of tribal self-governance; additionally, they sought the enforcement of treaty rights to hunt, fish, and gather, and to achieve both modern economic progress and revitalization of ancient cultural traditions.<sup>174</sup>

One of the notable markers of the Indian self-determination movement was that—unlike in previous eras—federal policy makers listened to tribal leaders who had, for their part, become formally educated, organized a na-

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169. Act of Aug. 15, 1953, Pub. L. No. 280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360 (2012)).

170. See NICHOLAS C. PEROFF, *MENOMINEE DRUMS: TRIBAL TERMINATION AND RESTORATION, 1954–1974*, at 15–18 (1982) (discussing the federal policy of termination and various acts, including Public Law 280, and noting that the ultimate goal was to “attain[] assimilation” of Indians).

171. WILKINSON, *BLOOD STRUGGLE*, *supra* note 37, at xiii (discussing Indian leaders' responses in the mid-1960s to Congress's termination policy that would have led to radical assimilation); *see also id.* at 58–60, 177–78, 263 (describing a governmental increase in interest in Indian affairs in the 1920s and 1930s, the modern Indian movement born in the 1970s, and modern federal legislation resulting from receptivity to tribal proposals). While subpart II(E) of this Article analyzes the self-determination era, especially from the 1970s to 2000s, the federal self-determination policy continues to this very day; thus, there is some overlap between this discussion and Part III's focus on the global human rights movement in the 2000s.

172. *Id.* at 86.

173. *Id.* at 129–49.

174. *Id.* at xiii.

tional advocacy organization, and joined forces to develop a strategy “based on history, culture, and law.”<sup>175</sup> Noting that Indians were at the bottom of every “scale of measurement—employment, income, education, health”—President Nixon made a historic speech to contrast the history of deprivation (or, in our terminology, appropriation)<sup>176</sup> to the new period of “self-determination.”<sup>177</sup> To reverse the course of federal policy, Nixon promoted tribal self-determination in the areas of education, economics, government, and culture.<sup>178</sup> The spirit of the new policy would be for “the Indian future” to be “determined by Indian acts and Indian decisions.”<sup>179</sup> Executive actions and Congressional acts sought to return sacred lands to Native peoples,<sup>180</sup> reverse the tide of federal criminalization of Indian religion,<sup>181</sup> and provide for Indian education.<sup>182</sup> The self-determination era saw legislative solutions to historical wrongs and, in some cases, provided modest recovery from Indian appropriation.<sup>183</sup>

The self-determination period also inspired renewed efforts on the part of American Indians to seek legal redress for the deprivation of lands, treaty rights, and religious freedoms. Several tribes filed lawsuits against state and local governments, alleging violations of federal laws that prohibited the purchase of Indian lands by anyone other than the federal government.<sup>184</sup> In a series of cases, tribes prevailed in the courts,<sup>185</sup> and ultimately, several Indian

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175. *Id.* at 112, 205.

176. President Richard Nixon, Special Message to the Congress on Indian Affairs (July 8, 1970), reprinted in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RICHARD NIXON, 1970, at 564, 564 (1971) (“This condition is the heritage of centuries of injustice. From the time of their first contact with European settlers, the American Indians have been oppressed and brutalized, deprived of their ancestral lands and denied the opportunity to control their own destiny.”).

177. *Id.* at 564–76.

178. See WILKINSON, BLOOD STRUGGLE, *supra* note 37, at 194–98 (explaining President Nixon’s policies toward Indian affairs and the programs started by the Office of Economic Opportunity).

179. Nixon, *supra* note 176, at 565.

180. See R.C. Gordon-McCutchan, *The Battle for Blue Lake: A Struggle for Indian Religious Rights*, 33 J. CHURCH & ST. 785, 785–96 (1991) (discussing the taking of Blue Lake from the Taos Pueblo and its restoration under special religious circumstances).

181. American Indian Religious Freedom Act, 42 U.S.C. § 1996 (2012).

182. See Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450(a) (2012) (stating the U.S. policy towards Indian self-determination in education).

183. Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013 (2012). The Native American Graves Protection and Repatriation Act (NAGPRA) was passed to give the tribes a right of consultation regarding new disruptions of Indian gravesites on federal and tribal lands, and required federally funded museums to inventory and repatriate human remains, funerary objects, and items of cultural patrimony to tribes. *Id.* §§ 3002(c)(2), 3003.

184. These federal laws include, for example, the Indian Intercourse Act of 1790, ch. 33, § 4, 1 Stat. 137, 138, which invalidates any sale of land within the United States by an Indian or Indian tribes; and the Indian Intercourse Act 1793, ch. 19, § 8, 1 Stat. 329, 330–31, which likewise invalidates any sale of land within the United States by Indians or Indian tribes and prohibited such sales, except to the extent they occurred pursuant to a treaty with the United States.

185. *E.g.*, *Cty. of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 253 (1985).

tribes pursued litigation and received settlements of both land and money through federal legislation.<sup>186</sup> In other instances, tribes have purchased on the open market some of the lands that they lost historically<sup>187</sup> or entered into land settlement agreements with the U.S. government.<sup>188</sup>

Nevertheless, despite some critical successes during this period as well as the passage of American Indian Religious Freedom Act, tribes continue to struggle for their right to religious freedom.<sup>189</sup> In *Lyng v. Northwest Indian Cemetery Ass'n*,<sup>190</sup> for example, the Court held that the Free Exercise Clause did not protect the Yurok, Karuk, and Tolowa tribes' sacred "high country" sites from timber development.<sup>191</sup> *Lyng* was remarkably transparent in articulating the relationship between conquest of the land and eradication of Indian religion.<sup>192</sup> According to Justice O'Connor, the tribes had no right to protect the sacred sites within their aboriginal territory because the United States had acquired title and thereby the legal power to destroy the site and the Indian religion too.<sup>193</sup>

While Indians were fighting battles to practice their religions, non-Indians were actively engaged in mimicking and engaging in their own version of these very same religions. Some non-Indians went so far as to bring cases claiming rights to use peyote and eagle feathers.<sup>194</sup> This was at best

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186. See David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1590–91 (1996) (discussing how the Supreme Court has interpreted federal statutes favorably to Indian tribes, focusing on the tradition of tribal self-government).

187. *City of Sherill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 213 (2005). Controversies over jurisdiction have followed, somewhat hampering opportunities to restore the tribal land base for economic, governance, and cultural purposes. See Padraic I. McCoy, *The Land Must Hold the People: Native Modes of Territoriality and Contemporary Tribal Justifications for Placing Land into Trust Through 25 C.F.R. Part 151*, 27 AM. INDIAN L. REV. 421, 442–43 (2002) (discussing the interplay between tribal governance, tribal jurisdiction, and courts' treatment of tribal jurisdiction).

188. McCoy, *supra* note 187, at 447 n.106.

189. See Carpenter, *supra* note 113, at 421–35 (describing holdings in three seminal Indian religion cases of the 1980s and 1990s).

190. 485 U.S. 439 (1988).

191. *Id.* at 452–53.

192. Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting A Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1082, 1084 (2005) (noting, for example, that "in Justice O'Connor's view, finding for the Indians would cause an inappropriate 'diminution of the Government's property rights, and the concomitant subsidy of the Indian religion'").

193. *Lyng*, 485 U.S. at 451–53 ("Even if we assume that we should accept the Ninth Circuit's prediction, according to which the G–O road will 'virtually destroy the . . . Indians' ability to practice their religion,' the Constitution simply does not provide a principle that could justify upholding respondents' legal claims. . . . Whatever rights the Indians may have to the use of the area, . . . those rights do not divest the Government of its right to use what is, after all, *its* land." (first omission in original) (citations omitted)).

194. See, e.g., Alex Tallchief Skibine, *Culture Talk or Culture War in Federal Indian Law?*, 45 TULSA L. REV. 89, 95–97 (2009) (describing line of federal cases in which non-Indians have brought Establishment Clause challenges to special legislative exemptions granting Indians rights to possess eagle feathers for religious purposes).

ironic given that the Supreme Court had held in *Employment Division v. Smith*<sup>195</sup> that states could criminalize the ritual ingestion of peyote—even when taken as a sacrament of the Native American Church, a church with 300,000 American Indian members—without violating the First Amendment.<sup>196</sup> Indeed, after *Smith*, Indian members of the Native American Church faced “arrest, incarceration, and discrimination solely because of their form of worship.”<sup>197</sup> Congress finally passed an exemption for enrolled tribal members to possess peyote,<sup>198</sup> an exemption that non-Indians continue to challenge, arguing that they too should be entitled to take the sacrament, even though peyote is severely restricted and in limited supply in the United States.<sup>199</sup>

In this latter portion of the twentieth century, the age-old phenomenon of playing Indian took on some new dimensions. Indian culture had been popularized by various social movements, including environmentalism and new-age religion.<sup>200</sup> All while tribes continued to identify and know their members, “the borders” of Indian identity became, as Deloria writes, “blurry enough to slip across.”<sup>201</sup> Indeed, some non-Indians adopted Indian clothing, sought out medicine men, and claimed Indian identities.<sup>202</sup>

Any blurriness in social and legal categories of Indianness, however, did not disrupt persistent power dynamics. Non-Indians could become Indian when it suited them, but Indians and tribes still faced ongoing challenges and discrimination. Increasingly Indians also faced the pressure to look, act, and sound like stereotypic images of Indianness.<sup>203</sup> As race scholars have argued

195. 494 U.S. 872 (1990).

196. *Id.* at 877–80. In 1965, Congress criminalized possession of peyote under the Federal Food, Drug, and Cosmetic Act. See Drug Abuse Control Amendments of 1965, Pub. L. No. 89-74, §§ 3, 79 Stat. 226, 227 (defining “depressant or stimulant drug[s]” to include any drug with “a potential for abuse because of . . . its hallucinogenic effect” and making it illegal to possess any depressant or stimulant drugs). State laws prohibiting and regulating peyote possession date back at least to the 1920s. THOMAS CONSTANTINE MAROUKIS, PEYOTE AND THE YANKTON SIOUX: THE LIFE AND TIMES OF SAM NECKLACE 142–43 (2004).

197. WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED 315 (2010).

198. American Indian Religious Freedom Act Amendments of 1994, Pub. L. No. 103-344, § 2, 108 Stat. 3125, 3125 (codified at 42 U.S.C. § 1966a (2012)).

199. *Cf.* State v. Mooney, 98 P.3d 420, 422 (Utah 2004) (overturning conviction of non-Indian who possessed peyote and claimed membership in “Oklevueha Earthwalks Native American Church”).

200. DELORIA, *supra* note 14, at 156–59.

201. *Id.* at 185.

202. MICHAEL F. BROWN, UPRIVER: THE TURBULENT LIFE AND TIMES OF AN AMAZONIAN PEOPLE 151–52 (2014); Gerald Vizenor, *Native American Indian Identities: Autoinscriptions and the Cultures of Names*, in NATIVE AMERICAN PERSPECTIVES ON LITERATURE AND HISTORY 117, 125 (Alan R. Velie ed., 1994). See generally LAURA BROWDER, SLIPPERY CHARACTERS: ETHNIC IMPERSONATORS AND AMERICAN IDENTITIES (2000).

203. See generally Kristen A. Carpenter & Ray Halbritter, *Beyond the Ethnic Umbrella and the Buffalo: Some Thoughts on American Indian Tribes and Gaming*, 5 GAMING L. REV. 311 (2001)



more broadly, hierarchies of power often impose a requirement of performative identity on members of minority groups.<sup>204</sup> This is certainly the case in modern Indian law and politics. In some instances, remedial legislation imposes expectations about Indian identity that are linked to the past, requiring showings of “traditional” practices in order to prevail on legal claims.<sup>205</sup> Scholars have argued that such legal requirements may impel tribal people to present evidence of unchanging authenticity as a strategy to prevail when Indian rights are at stake.<sup>206</sup> In the Supreme Court, tribal rights—from jurisdiction to child welfare—quite often depend on the Justices’ narrow perceptions of Indian race and identity.<sup>207</sup>

Finally, and despite all of the advances of the self-determination era, Indian appropriation continues to this very day. Oak Flat is a place of great religious and cultural significance for the San Carlos Apache. According to Apache cosmology, it has been a holy place and the site of girls’ coming-of-age ceremonies, prayers, and pilgrimages since time immemorial.<sup>208</sup> Because of its importance, Oak Flat has been under the ownership and protection of the U.S. Forest Service. Until now.<sup>209</sup> In December 2014, Congress authorized the Secretary of the Interior, by a rider to the National Defense Authorization Act, to “convey all right, title, and interest” in the sacred lands to Resolution Copper Mining LLC.<sup>210</sup> Commentators noted that “[t]he land

(describing the dynamics of Indianness, including appearance, racial makeup, and cultural authenticity in debates over entitlement to casino gaming rights).

204. See DEVON W. CARBADO & MITU GULATI, *ACTING WHITE? RETHINKING RACE IN “POST-RACIAL” AMERICA* 16 (2013) (arguing that “[d]ecision-makers . . . implicitly or explicitly demand that African Americans work their identities to satisfy decision-makers’ racial expectations”).

205. For example, NAGPRA defines “sacred objects” as “specific ceremonial objects . . . needed . . . for the practice of traditional Native American religions by their present day adherents.” 25 U.S.C. § 3001(3)(C) (2012).

206. See GREG JOHNSON, *SACRED CLAIMS: REPATRIATION AND LIVING TRADITION* 97–108 (2007) (describing Hawaiian testimony as a cultural “performance[]” in a repatriation hearing before a NAGPRA Review Committee in order to link present rituals to past tradition); S. Alan Ray, *Native American Identity and the Challenge of the Kennewick Man*, 79 TEMP. L. REV. 89, 108–11 (2006) (describing the importance of identity in NAGPRA litigation).

207. See, e.g., *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2556 (2013) (referencing a Cherokee child’s blood quantum in holding that the Indian Child Welfare Act did not bar her adoption by a non-Indian couple, over objections of her biological father).

208. See *America’s Mineral Resources: Creating Mining and Manufacturing Jobs and Securing America: Legislative Hearing on H.R. 1063, H.R. 687, H.R. 697, H.R. 761, H.R. 767, H.R. 957 and H.R. 981 Before the Subcomm. on Energy and Mineral Res. of the H. Comm. on Nat. Res.*, 113th Cong. 91 (2013) (statement of Terry Rambler, Chairman, San Carlos Apache Tribe) (describing Oak Flat as a sacred place of great power for the Apache, where the coming-of-age ceremonies and other religious activities take place).

209. See Lydia Millet, *Selling off Apache Holy Land*, N.Y. TIMES (May 29, 2015), [http://www.nytimes.com/2015/05/29/opinion/selling-off-apache-holy-land.html?\\_r=1](http://www.nytimes.com/2015/05/29/opinion/selling-off-apache-holy-land.html?_r=1) [<http://perma.cc/6EZZ-TDN7>] (explaining that in 2014, “Congress promised to hand the title for Oak Flat over to a private, Australian-British mining concern”).

210. Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 3003, 128 Stat. 3292, 3732–41; see also Save Oak Flat Act, H.R.

grab was sneakily anti-democratic even by congressional standards,” and gives the mining company 2,400 acres—including Oak Flat—to mine as private property.<sup>211</sup>

### III. Reclaiming *Red*

In the previous Parts, we have described the phenomenon of Indian appropriation as it emerged in legal history and continues to occur contemporarily. We have argued that, from the perspective of many American Indians, the U.S. legal system and facets of American society have treated all things Indian—including land, culture, and identity—as resources for non-Indians, negatively impacting the sovereignty, cultural survival, safety, and security of Indian people.

In this, the Article’s final Part, we have two central goals. First, we seek to describe indigenous peoples’ contemporary efforts to guard against Indian appropriation and their concomitant desire to do so in a way that allows them to live vibrant, free, and dynamic cultural lives. We show how they are pushing back against appropriation through tribal, domestic, and international law, but also—more than ever in history—using the tools of technology to mobilize a movement. Second, we turn our attention to recent cases of Indian appropriation. We give brief treatment to examples of ongoing appropriation of real and personal property, showing how legal advancements in recent decades, though slow in coming and still inadequate, have at least begun to address some of the devastating losses experienced by Indian people.

However, within this discussion of Indian appropriation, our primary focus is on intangible cultural property. We demonstrate why it remains exceedingly difficult for Indian tribes to situate claims of intangible cultural appropriation in legal terms. Lawyers and scholars often perceive intangible property as different—unbounded and nonrivalrous—and raise concerns of free speech and public access in response to Indians’ attempts to reign in

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2811, 114th Cong. § 2(4) (2015) (describing the inclusion of the sale of Oak Flat in the National Defense Authorization Act as “without proper legislative process and circumvent[ing] the will of the majority”).

211. Millet, *supra* note 209. Commentators have argued for the repeal of the rider and other measures to save Oak Flat and protect Apache religious practices. As this Article goes to print, Oak Flats is under consideration for inclusion on the National Register of Historic Places, a designation that would trigger the protections of the National Historic Preservation Act. Notification of Pending Nominations and Related Actions, 81 Fed. Reg. 3469 (Jan. 21, 2016) (proposing the listing of the Chi’chil Bildagoteel Historic District Traditional Cultural Property in the National Register of Historic Places); Notification of Extension of Comment Period for Pending Nomination of Chi’chil Bildagoteel (Oak Flats) Historic District, 81 Fed. Reg. 10,276 (Feb. 29, 2016) (extending the deadline for comments on the proposed listing of the Chi’chil Bildagoteel (Oak Flats) Historic District Traditional Cultural Property in the National Register of Historic Places).

instances of appropriation. Efforts to use trademark,<sup>212</sup> copyright,<sup>213</sup> and patent<sup>214</sup> to protect against appropriation have been met with significant opposition. This is the case even though, as with traditional lands and religious artifacts, intangible components of tribal cultures are extremely important to the self-determination of tribes striving to recover from conquest and colonization.<sup>215</sup>

In looking at intangible cultural appropriation, we focus first on a category of cases which, in our view, can potentially be remedied by law. These are instances wherein we contend the law has grossly failed to protect against Indian appropriation, but where it could and *should* do more. In doing so, we return to the iconic R-skins case and several others to examine where, for example, the law of trademark offers at least a partial remedy to Indian injuries. Next, we look at more difficult cases of Indian appropriation, those where law does not—and perhaps cannot or should not—intervene. From headdresses to designs to songs and ceremonies, we attempt to articulate Indian cultural harm, demonstrate the importance of tribal perspectives to inform these cases, and ultimately, highlight alternative methods of affecting change amidst the oftentimes quite proper limits of law.<sup>216</sup> We note that, whether as a complement or alternative to legal claims, Indian advocacy is as robust and impactful in expressive forums—from *The Daily Show* to national and televised ad campaigns to Facebook—as it is in legal ones.

#### A. Red Social Movements in the Law and Beyond

In the United States today, American Indians are mobilizing to build on the gains of the self-determination era to live their sovereignty, which is perhaps the most effective way to keep Native culture vital. In the last few years, tribes and individual Indians have embraced law (where available) and rallied for societal change (in law's absence) to address Indian appropriation. Targets of Native activism range from recovering real property that has been appropriated; to saving sacred sites from desecration; to repatriating art, artifacts, human remains, and other items of cultural patrimony that have

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212. In the case of the R-skins, for example, which seems to present a relatively easy case of disparagement under the Lanham Act, the American Civil Liberties Union filed an amicus brief supporting the speech interests of the Washington football team in using the mascot. Brief of Amici Curiae American Civil Liberties Union, Pro-Football, Inc. v. Blackhorse, 112 F. Supp. 3d 439 (E.D. Va. 2014) (No. 1:14-CV-01043).

213. See generally Riley, *supra* note 30 (explaining the lack of remedies for unauthorized use of an Ami origin song by the pop music group Enigma, which sold over five million copies of an album containing pirated recording of Lifvon Guo's traditional singing).

214. See Guest, *supra* note 31, at 122 (noting that the U.S. has "resisted any effort" to protect indigenous farmers' traditional seeds and folk crop varieties through patent laws).

215. More specifically, the recovery of tribal cultural values and practices is a key facet of life in Indian country, relevant to everything from updating tribal law to addressing health issues, responding to climate change, and promoting child welfare.

216. These ideas draw heavily from the definitive work on the topic, Tsosie, *supra* note 24.

been taken from Indian people through colonization; and to using existing law to end harmful, discriminatory representations of Indian people—among numerous others.<sup>217</sup> Here we describe how the robust mobilization of indigenous peoples around issues of appropriation includes not only legal advocacy,<sup>218</sup> but also related and complementary efforts in social media, technology, and activism.

*1. Reclaiming Red in Contemporary Legal Advocacy: The Confluence of International, Domestic, and Tribal Law.*—While Indian appropriation is an ongoing phenomenon,<sup>219</sup> indigenous peoples are increasingly empowered to address it through law.<sup>220</sup> Though we certainly acknowledge law’s limitations, and even potential for violence,<sup>221</sup> hard law unquestionably can and is moving the needle in regards to Indian rights. Laws articulating protections against Indian appropriation have increased, both in number and in depth in recent decades. We attribute these legal developments at international, national, and tribal levels to overlapping but distinct causes, a few of which we briefly highlight here.

As we fully explored in our recent work, in the last several decades international law has begun to recognize the rights of indigenous peoples.<sup>222</sup> This phenomenon—combined with what has been deemed a “human rights culture”<sup>223</sup>—has inspired the creation of varied and multidimensional laws that guard against appropriation in numerous ways. Such laws address rights to live collectively, rights to land and culture, rights to intangible and traditional knowledge, rights to self-determination, and rights to equality in society and education.<sup>224</sup> The 2007 adoption by the United Nations General Assembly of the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP) and its subsequent 2010 endorsement by the United States marked

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217. See *supra* Part II for a discussion of Native activism and references to a bevy of federal law addressing these harms.

218. See, e.g., WILKINSON, *BLOOD STRUGGLE* *supra* note 37, at 219, 358–59 (describing the mobilization of Siletz tribe members to support restorative legislation).

219. See, e.g., *supra* notes 209–11 and accompanying text.

220. See generally Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663 (2012) (discussing the pros and cons of social-justice advocacy through litigation and building on seminal work in “cause” lawyering).

221. See generally Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986) (discussing the various ways in which legal acts “signal and occasion the imposition of violence . . . [and] constitute justifications for violence which has already occurred or which is about to occur”).

222. Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173, 175 (2014).

223. Helen Stacy, *Relational Sovereignty*, 55 STAN. L. REV. 2029, 2049 (2003).

224. See, e.g., S. James Anaya, *Indian Givers: What Indigenous Peoples Have Contributed to International Human Rights Law*, 22 WASH. U. J.L. & POL’Y 107, 111–17 (2006) (explaining how Native Americans and other indigenous peoples have moved international law toward recognizing collective rights and a more developed concept of self-determination).

a significant moment for American Indians.<sup>225</sup> Since the adoption of the International Labor Organization's Convention Number 169, which was the first international articulation of robust rights of tribal peoples,<sup>226</sup> the international system has made enormous strides in terms of protections of indigenous peoples. Regional human rights systems in Africa and the Americas, too, have increasingly engaged the issues faced by the world's indigenous populations. Some of the most important indigenous rights cases have come out of the Inter-American Commission and Court of Human Rights, respectively.<sup>227</sup> The intellectual property rights of indigenous peoples are also increasingly recognized as a human rights issue, which has afforded stronger articulations for protections for traditional knowledge and traditional cultural expressions.<sup>228</sup> These can be seen in instruments such as the Convention on Biological Diversity<sup>229</sup> and have become a core feature of the work of the World Intellectual Property Organization (WIPO) in recent years.<sup>230</sup>

Several tribes have turned to international and regional forums to address instances of Indian appropriation. In March 2015, after years of unsuccessful federal litigation, the Navajo Nation filed a claim in the Inter-American Commission on Human Rights, asking the Commission to intervene to protect a mountain holy to the Navajos and a dozen other tribes from pollution by treated sewage effluent.<sup>231</sup> The Diné (Navajo) people are

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225. G.A. Res. 61/295 (Sept. 13, 2007); *see also* WALTER R. ECHO-HAWK, IN THE LIGHT OF JUSTICE: THE RISE OF HUMAN RIGHTS IN NATIVE AMERICA AND THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 5, 16 (2013) (stating that the UNDRIP may "someday be seen as the Magna Carta for the world's indigenous peoples"). The UNDRIP advances and particularizes protections for minority groups recognized in earlier instruments like the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI) (Mar. 23, 1976), and the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI) (Jan. 3, 1976).

226. International Labour Organisation Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989 (entered into force, Sept. 5, 1991), [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312314](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312314) [<http://perma.cc/DR8Y-8SRN>].

227. *See* sources cited *supra* note 163.

228. *See generally* Helfer, *supra* note 31 (explaining the importance of intellectual property rights protection to peoples in the developing world); Yu, *supra* note 31 (linking protection for intellectual property rights to human rights for the world's poor).

229. *See* Yu, *supra* note 31, at 1117–18 (noting that the concept of sustainable development of human rights by striking appropriate balances in intellectual property systems inspired the Convention on Biological Diversity).

230. *See* WORLD INTELLECTUAL PROP. ORG., WORLD INTELLECTUAL PROPERTY ORGANIZATION: AN OVERVIEW 26, 30–31 (2007), [http://www.wipo.int/edocs/pubdocs/en/general/1007/wipo\\_pub\\_1007.pdf](http://www.wipo.int/edocs/pubdocs/en/general/1007/wipo_pub_1007.pdf) [<http://perma.cc/VHL6-2TZX>] (describing the development of intellectual property law, including policy issues that touch on issues of fundamental human rights, "the rights of indigenous peoples, cultural diversity, environmental protection, and biodiversity," as a fundamental and enduring part of WIPO's activities).

231. Petition, Navajo Nation v. United States, Inter-Am. Comm'n H.R., at 3 (Mar. 2, 2015) [hereinafter Navajo Petition], <http://www.nnhrc.navajo-nsn.gov/docs/sacredsites/Navajo>

protected by the four sacred mountains; it is their home and the place from which they originate.<sup>232</sup> Caring for the mountains as a place to gather plants, medicines, and other resources for ceremony and prayer is essential to the continued vitality of the Navajo people. Thus, the current petition argues that the decision of the U.S. Forest Service to permit desecration of the sacred San Francisco Peaks violates basic human rights to religion and culture.<sup>233</sup>

Turning to national advocacy, Indian tribes have fared poorly before the federal courts in the last few decades.<sup>234</sup> Yet, they have become more powerful players in the national legislative process.<sup>235</sup> Despite being a small, relatively disempowered minority among minority cultures (Native Americans comprise about 1.6% of the total United States population and have one of the highest rates of poverty of any minority group),<sup>236</sup> American Indians continue to fight vociferously for their rights and resources. Coalition politics have undoubtedly facilitated some successes. In 2010, Indian tribes were successful in getting legislation passed that would allow for more extensive sentencing of Indian offenders in Indian country, under certain circumstances.<sup>237</sup> Tribes and their allies continued focusing on legislation concerning safety, security, and justice: in 2013 they successfully lobbied Congress for laws that recognize inherent tribal criminal jurisdiction over non-Indians who commit domestic-violence offences in Indian country in an effort to combat a culture of abuse of Native women.<sup>238</sup> Moreover, a fairly receptive Executive Branch has fostered a culture of respecting Indian rights

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%20Nation%20Petition%20to%20IACHR%20March%20202015.pdf  
[<http://perma.cc/J5FY-Y3LP>].

232. See *supra* note 51 and accompanying text.

233. Navajo Petition, *supra* note 231, at 3.

234. See David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 268–69 (2001) (discussing the reasons why, in Indian law cases under the Rehnquist Court, the “legal traditions [of Indian Law] are being almost totally disregarded”); Getches, *supra* note 186, at 1594 (“The modern era of Indian law jurisprudence has ended. The new tendency in the Court’s tests, rules, and rhetoric is to define tribal powers according to policies, values, and assumptions prevalent in non-Indian society.”).

235. WILKINSON, BLOOD STRUGGLE, *supra* note 37, at 261–63.

236. SUZANNE MACARTNEY ET AL., U.S. CENSUS BUREAU, POVERTY RATES FOR SELECTED DETAILED RACE AND HISPANIC GROUPS BY STATE AND PLACE: 2007–2011, at 13 tbl.1 (2013), <https://www.census.gov/prod/2013pubs/acsbr11-17.pdf> [<http://perma.cc/8GMT-H6D3>].

237. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 234, 124 Stat. 2261, 2279–82 (codified at 25 U.S.C. § 1302 (2012)).

238. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, sec. 904, § 204, 127 Stat. 54, 120–23 (codified at 25 U.S.C. § 1304 (2014)); Press Release, Office of the Sec’y, U.S. Dep’t of the Interior, Salazar, Washburn Commend Passage of Violence Against Women Act (Feb. 28, 2013), <http://www.bia.gov/cs/groups/public/documents/text/idc-041146.pdf> [<http://perma.cc/S326-A9R2>].

by supporting trust land acquisitions,<sup>239</sup> promulgating guidelines for Indian child welfare,<sup>240</sup> and reconsidering standards for federal tribal recognition.<sup>241</sup>

At the tribal level, significant attention to institution building and law reform empowers tribes to address Indian appropriation.<sup>242</sup> More and more, tribes establish tribal courts, amend or draft constitutions, administer land-acquisition programs, and enact cultural-preservation codes. Tribal governments work to set up legal and social structures to ensure the continuation of language, culture, identity, and sovereignty at every opportunity.<sup>243</sup>

2. *Beyond the Law: Red in Technology, Social Media, and other Activism.*—Beyond the strict structures of law creation, Native people are also addressing Indian appropriation through technology, social media, and other activism.<sup>244</sup> Indigenous peoples are, in their advocacy and daily lives, confronting head-on very difficult questions about the contested nature of property, culture, and identity in today's world and are working toward outcomes that are both meaningful and just.

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239. Press Release, Office of the Sec'y, U.S. Dep't of the Interior, Secretary Jewell Kicks Off White House Tribal Nations Conference (Nov. 13, 2013), <https://www.doi.gov/news/pressreleases/secretary-jewell-kicks-off-white-house-tribal-nations-conference> [<http://perma.cc/65T9-JUSP>] (recounting the Secretary of the Interior's announcement that the Obama Administration had set a goal of placing more than 500,000 acres of land into trust on behalf of tribes by the end of the President's term and reporting that more than 230,000 acres had been accepted into trust since 2009).

240. Regulations for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 14,880 (proposed Mar. 20, 2015) (to be codified at 25 C.F.R. pt. 23).

241. Federal Acknowledgment of American Indian Tribes, 80 Fed. Reg. 37,862 (July 1, 2015) (codified at 25 C.F.R. pt. 83).

242. See Stephen Cornell & Joseph P. Kalt, Commentary, *Sovereignty and Nation-Building: The Development Challenge in Indian Country Today*, 22 AM. INDIAN CULTURE & RES. J., no. 3, 1998, at 187, 196–205 (stating five qualities of effective tribal governing institutions and providing examples of tribal governments that exhibit those qualities).

243. See generally HARVARD PROJECT ON AM. INDIAN ECON. DEV., *THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION* (2008) (discussing Native nations' increased engagement in tribal institutional development and reform, including constitutional revitalization, tribal court development, tribal education, tribal language revitalization, and economic development, among others); INDIAN LAW & ORDER COMM'N, *A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES* (2013), [http://www.aisc.ucla.edu/iloc/report/files/A\\_Roadmap\\_For\\_Making\\_Native\\_America\\_Safer-Full.pdf](http://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf) [<http://perma.cc/67R7-ABER>] (discussing tribal justice systems and culturally relevant systems of restorative justice in Indian country).

244. See, e.g., Carpenter & Riley, *supra* note 222, at 201–17 (discussing the ways in which international human rights, increasing emphasis on self-determination, and postcolonial theory have contributed to a global, burgeoning indigenous rights movement); Kino-nda-niimi Collective, *Idle No More: The Winter We Danced*, in *THE WINTER WE DANCED: VOICES FROM THE PAST, THE FUTURE, AND THE IDLE NO MORE MOVEMENT* 21, 21–22 (Kino-nda-niimi Collective eds., 2014) (discussing the Idle No More movement in Canada and how it spread “[w]ith the help of social media and grassroots Indigenous activists”).

These phenomena are illustrated in movements like Idle No More, which had its birth in Canadian First Nations around the abrogation of treaty rights by the Canadian government.<sup>245</sup> The cause grew through social media and has spawned a global indigenous movement around key issues of unauthorized extractive industry on Native lands and violence against Native women.<sup>246</sup>

These phenomena fuel an understanding of Native cultures as living and constantly evolving. Rather than accepting static or monolithic versions of Indian identity, tribes are expressing their right to change and evolve—noting that they have the right to be traditional *and* modern<sup>247</sup>—as self-determining peoples and individuals in the contemporary age.<sup>248</sup> In these iterations, which we see as brimming with power and potential to redress Indian appropriation, “[n]ative peoples have full agency—and so full ethical responsibility—for how they choose to define and represent their cultures and identities.”<sup>249</sup> Indian artists, designers, comics, and writers push the boundaries of what it means to perpetuate “Indian culture” and “Indian arts” by being innovative, cutting edge, and relevant to today’s contemporary Indian culture. In this sense, Indian cultural sovereignty is linked to Indian claims to land, culture, and identity, which are complicated and multivalent, transcending conventional legal categories and even, in some cases, historical enmities.

Much of the contemporary effort to reclaim *Red* is occurring in the media, with Indian people taking advantage of multiple forums to identify and address cultural appropriation. Tribal members, from high school students to National College Athletic Association (NCAA) athletes, are speaking out publicly and forcefully to describe the harm, discrimination, and violence fostered by Indian mascots.<sup>250</sup> The #notyourmascot hashtag and the

245. See generally THE WINTER WE DANCED: VOICES FROM THE PAST, THE FUTURE, AND THE IDLE NO MORE MOVEMENT, *supra* note 244 (collecting voices from the Idle No More Movement and insight on the future of the movement).

246. See Tony Penikett, *An Unfinished Journey: Arctic Indigenous Rights, Lands, and Jurisdiction?*, 37 SEATTLE U. L. REV. 1127, 1127 n.1 (2014) (describing the Idle No More movement and how it was partially inspired by the hunger strike of Attawapiskat Chief Theresa Spence and was coordinated via social media).

247. See Rosemary J. Coombe, *Protecting Traditional Environmental Knowledge and New Social Movements in the Americas: Intellectual Property, Human Right, or Claims to an Alternative Form of Sustainable Development?*, 17 FLA. J. INT’L L. 115, 132–33 (2005) (crediting anthropologist Marshall Sahlins with coining the phrase “indigenization of modernity,” meaning indigenous peoples’ attempt to retain traditional ways while using tools of the modern world).

248. See Colleen O’Neill, *Rethinking Modernity and the Discourse of Development in American Indian History, an Introduction*, in NATIVE PATHWAYS: AMERICAN INDIAN CULTURE AND ECONOMIC DEVELOPMENT IN THE TWENTIETH CENTURY 1, 3 (Brian Hosmer & Colleen O’Neill eds., 2004) (challenging dichotomies of modern/traditional and culture/development as inapposite to the “lived reality” of American Indians in the twentieth century).

249. JOANNE BARKER, NATIVE ACTS: LAW, RECOGNITION, AND CULTURAL AUTHENTICITY 225 (2011).

250. See, e.g., Jeff Potrykus, *Bronson Koenig Embraces Being Role Model for American Indians*, MILWAUKEE J. SENTINEL (Feb. 2, 2015) <http://www.jsonline.com/sports/badgers/bronson->



“Proud to Be” advertisement against the R-skins have flooded Twitter, Facebook, and other social-media platforms.<sup>251</sup> *SouthPark*, *The Daily Show*, and the *New Yorker* have all lampooned the idea that the R-skins “honor” American Indians.<sup>252</sup> Meanwhile, an entire generation of American Indian bloggers, including Jessica Metcalfe of *Beyond Buckskin*<sup>253</sup> and Adrienne Keene of *Native Appropriations*<sup>254</sup> post real-time discussions, debates, and news stories, detailing ongoing instances of Indian appropriation while also highlighting stories of innovative expressions of Indian culture in fashion and best practices for non-Indians who wish to collaborate with Indian artists.<sup>255</sup> When a Lakota sacred site that was lost generations ago to treaty violations went on the open market, another Indian social-media group—Last Real Indians—sprung into activist mode, mounting an online fundraising campaign and convincing tribes to join in, toward the successful purchase of the site for \$9 million.<sup>256</sup>

Local efforts by American Indian tribes to reclaim the links among land, culture, and identity may garner less national media attention, while remaining critical to the daily well-being of Indian people and nations. In the Cherokee Nation, for example, to this very day ceremonial people tend the sacred fire brought with them across the Trail of Tears to new ceremonial grounds where they continue to practice ancient religions.<sup>257</sup> At the very same time, the tribe is entering into contracts with Apple to support language

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koenig-embraces-being-role-model-for-american-indians-b99437027z1-290605481.html [http://perma.cc/MZ7T-G8YZ] (relating how Bronson Koenig has spoken out about his personal pain fostered by Indian mascots).

251. See Jacqueline Keeler, *Inside the #NotYourMascot Super Bowl Twitter Storm*, INDIAN COUNTRY TODAY MEDIA NETWORK (Feb. 8, 2014), <http://indiancountrytodaymedianetwork.com/2014/02/08/inside-notyourmascot-super-bowl-twitter-storm> [http://perma.cc/D9AX-GAU7] (explaining the strategy behind the hashtag and claiming that 18,000 tweets used it during the Super Bowl, many of which linked to the “Proud to Be” advertisement).

252. Ian Crouch, *Redskins Forever?*, NEW YORKER (May 10, 2013), <http://www.newyorker.com/news/sporting-scene/redskins-forever> [http://perma.cc/VW44-YDPJ]; Justin Wm. Moyer, ‘*South Park’s*’ *Epic Satire of Dan Snyder, the Washington Redskins, Roger Goodell and the NFL*, WASH. POST (Sept. 25, 2014), <http://www.washingtonpost.com/news/morning-mix/wp/2014/09/25/south-parks-epic-satire-on-dan-snyder-roger-goodell-and-the-nfl/> [http://perma.cc/T6ZQ-LX6X]; *The Redskins’ Name—Catching Racism*, DAILY SHOW WITH JON STEWART (Sept. 25, 2014), <http://www.cc.com/video-clips/189afv/the-daily-show-with-jon-stewart-the-redskins--name---catching-racism> [http://perma.cc/56UE-s79D].

253. BEYOND BUCKSKIN, <http://www.beyondbuckskin.com/> [http://perma.cc/TJP7-WAY8].

254. NATIVE APPROPRIATIONS, <http://nativeappropriations.com/> [http://perma.cc/6N6P-33GG].

255. See Anna Hohag & Theodore J. Griswold, *Trust Doesn’t Mean Never Having to Say You’re Sorry*, PROCOPIO (June 10, 2015), <https://bloggingcircle.wordpress.com/2015/06/10/trust-doesnt-mean-never-having-to-say-youre-sorry/> [http://perma.cc/FNM8-28KC] (providing examples of innovative expressions of Indian culture from other cultures).

256. Chase Iron Eyes, *Sioux Tribes Purchase PeSla!*, LAST REAL INDIANS, <http://lastrealindians.com/sioux-tribes-purchase-pe%C2%92sla/> [http://perma.cc/CKN2-ZN3Z].

257. Raymond D. Fogelson, *Who Were the Aní-Kutáńi? An Excursion into Cherokee Historical Thought*, 31 ETHNOHISTORY 255, 261, 262 n.3 (1984).

revitalization, including technology that allows people to use the Cherokee syllabary on their iPhones.<sup>258</sup> These activities, occurring alongside deeply contested claims over tribal membership, marriage equality, and child welfare, serve to keep tribal values alive and available for guidance in deciding hard questions facing tribal citizens today.<sup>259</sup> Across Oklahoma, Kiowa people are trying to protect Longhorn Mountain, a place that traditional Kiowas describe as being revealed to them by the Creator during their ancient migrations and where, today, they gather cedar for prayers and ceremonies.<sup>260</sup> Originally within the tribe's treaty territory, Longhorn was later lost to allotment.<sup>261</sup> Today, the Kiowa's cedar-gathering activities are threatened by potential development of the mountain as a limestone mine.<sup>262</sup> Their approach to the problem has included developing coalitions with local non-Indian farmers, sharing their story on video, and advocacy through state regulatory bodies.

As these and other examples suggest, there is no single strategy, legal or otherwise, for reclaiming Indian properties or for pushing back against Indian appropriation. Sometimes there is success through litigation, but oftentimes indigenous peoples' claims transcend and challenge established legal categories. Moreover, there are few seamless transitions from the traditional to the contemporary amongst indigenous communities as they work to heal from the losses of the past and confront the realities of the present. In this sense, tribes are wonderfully like all nations—and Indians like all people—dealing with impossibly hard questions around issues of dissent, inertia, change, and possibility as they push forward into the future. From this perspective, tribes deal with a delicate balance of ensuring continued cultural survival while not being too wedded to a stagnant or antiquated

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258. Slash Lane, *Apple Partners with Cherokee Tribe to Put Language on iPhones*, APPLEINSIDER (Dec. 23, 2010, 12:00 PM), [http://appleinsider.com/articles/10/12/23/apple\\_partners\\_with\\_cherokee\\_tribe\\_to\\_put\\_language\\_on\\_iphones](http://appleinsider.com/articles/10/12/23/apple_partners_with_cherokee_tribe_to_put_language_on_iphones) [http://perma.cc/C2KU-9QBM].

259. See S. Alan Ray, *A Race or a Nation? Cherokee National Identity and the Status of Freedmen's Descendants*, 12 MICH. J. RACE & L. 387, 394–99 (2007) (describing the controversy of defining tribal membership according to blood, thereby excluding people who had previously been tribal members by law); *Cherokee Court Dismisses Gay Marriage Suit*, BOS. GLOBE (Aug. 4, 2005), [http://www.boston.com/news/nation/articles/2005/08/04/cherokee\\_court\\_dismisses\\_gay\\_marriage\\_suit/](http://www.boston.com/news/nation/articles/2005/08/04/cherokee_court_dismisses_gay_marriage_suit/) [http://perma.cc/9J8R-UJNR] (describing the argument of a same-sex Cherokee couple in a marriage equality case that traditional Cherokee terms for spouses, meaning “cooker” and “companion,” were not gender specific).

260. Logan Layden, *Longhorn Mountain: Sacred Kiowa Spiritual Site and Future Limestone Mine*, STATE IMPACT (Aug. 15, 2013, 6:00 AM) <http://stateimpact.npr.org/oklahoma/2013/08/15/longhorn-mountain-sacred-kiowa-spiritual-site-and-future-limestone-mine/> [http://perma.cc/ZTX3-HUGQ].

261. *Id.*

262. *Id.*

notion of cultural preservation.<sup>263</sup> And yet, given the history of Indian appropriation, tribes have a special duty and mission to carefully consider the impact of law on the persistence of Indian culture in a modern world.<sup>264</sup>

*B. The Possibilities of Law: The R-Skins and Other Cases*

Despite the innovations—and some successes—by which indigenous peoples are using multiple strategies to impact social change and protect against Indian appropriation, the law can and must do better. As this subpart strives to show, even in some hard cases, the law could facilitate stronger protections against Indian appropriation. Thus, we consider the following examples to be illustrative of a category of cases in which law holds enormous possibility, though we make that assertion cautiously and with clarification.

We recognize that even relatively modest legal interventions—either through broader interpretation of existing law or through doctrinal expansions—are controversial in an area as fraught as cultural appropriation. Given the complexity of the issues here, as in most sites of conflict in the real world, we try to suggest legal changes and solutions that are appropriately nuanced. We identify a few key challenges from the outset.

It is risky in the first instance to articulate an “Indian perspective” on any of these scenarios. American Indian tribes and Indian people are not monolithic. There remains a wide range of views on all issues involving cultural appropriation within Indian communities.<sup>265</sup> To suggest otherwise is to essentialize Indian people in a way that is neither accurate nor useful. Additionally, we recognize that doctrinal shifts that may seem minor from one vantage point will undoubtedly be viewed as radical from others. We don’t mean to suggest there are not countervailing viewpoints on these cases. And, where possible, we have attempted to flag and highlight voices in opposition.

With these caveats, the following sections examine a few cases where there appears to be emerging consensus that the law has failed indigenous peoples and where it could address and remedy these instances of appropriation and injustice.

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263. See Sam Deloria, *New Paradigm: Indian Tribes in the Land of Unintended Consequences*, 46 NAT. RESOURCES J. 301, 304–05 (2006) (discussing tribal sovereignty and the balance between ensuring survival and a realistic view of legal and political benefits and costs).

264. See *id.* at 314 (explaining tribal governments’ “responsibility to consider the impact” of public policy on Indian culture).

265. See generally SELLING THE INDIAN: COMMERCIALIZING AND APPROPRIATING AMERICAN INDIAN CULTURES, *supra* note 36 (providing a variety of American Indian experiences with and perspectives on cultural appropriation).

1. *The Hopi Katsinam.*—With only 18,000 Hopi remaining in the world, the tribe is embroiled in a struggle with the international art world around the sale of its sacred *Katsinam*.<sup>266</sup> Often described by art collectors as “masks,” *Katsinam* are to the Hopi people sacred visages, living beings who belong to clans, fed and cared for like family members.<sup>267</sup> The *Katsinam* play a role in Hopi religious dances, helping maintain a cycle of life in which water and sun bring life to the corn and the people.<sup>268</sup> Many *Katsinam* were taken from Hopi mesas decades ago, in events violating Hopi law and reflecting the disempowerment of Hopi people to ward off the acquisitive advances of outsiders, perhaps especially during times of drought and hunger.<sup>269</sup>

For decades the *Katsinam* were lost to the Hopi, who were concerned for their whereabouts. Yet several years ago they emerged on the European art market, up for auction in Paris.<sup>270</sup> As sacred objects used in a traditional tribal religion, the *Katsinam* would be eligible for repatriation under the Native American Graves Protection and Repatriation Act (NAGPRA), as a matter of U.S. law, if they were being held in a federally funded museum or institution within the United States.<sup>271</sup> But given that the *Katsinam* surfaced in France, neither NAGPRA nor any other U.S. law mandates their return.<sup>272</sup> Indeed, the French courts have decided that the *Katsinam* may be sold as a matter of French law.<sup>273</sup> Despite tacit support for the Hopi from the U.S. government,<sup>274</sup> the French Courts refused to block or stall the auction.<sup>275</sup>

In our view, the sale of Hopi ceremonial items in France may lend itself to a legal solution, albeit one that must take into account the confluence of tribal, domestic, and international law in contemporary indigenous peoples’ affairs. As journalists have noted, “[w]hile foreign nations routinely rely on

266. See Tom Mashberg, *Hopis Try to Stop Paris Sale of Artifacts*, N.Y. TIMES (Apr. 3, 2013), <http://www.nytimes.com/2013/04/04/arts/design/hopi-tribe-wants-to-stop-paris-auction-of-artifacts.html> [<http://perma.cc/9HPH-VH77>] (describing the Hopi’s request of federal officials to intervene in an auction of *Katsinam* in Paris in 2013).

267. *Id.*

268. Sheilah E. Nicholas, “*I Live Hopi, I Just Don’t Speak It*”—*The Critical Intersection of Language, Culture, and Identity in the Lives of Contemporary Hopi Youth*, 8 J. LANGUAGE, IDENTITY & EDUC. 321, 329 n.2 (2009).

269. Mashberg, *supra* note 266.

270. *Id.*

271. Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001, 3005 (2012).

272. See Mike Boehm, *Sacred Hopi Tribal Masks are Again Sold at Auction in Paris*, L.A. TIMES (June 28, 2014, 10:00 AM), <http://www.latimes.com/entertainment/arts/culture/la-et-cm-native-american-hopi-sacred-mask-auction-paris-20140627-story.html> [<http://perma.cc/J44D-CWZ5>] (noting that NAGPRA does not apply to private collections or those sold in France).

273. Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Apr. 1, 2013, N. RG 13/52880, obs. M. Bouvier (Fr.).

274. See Boehm, *supra* note 272 (explaining the U.S. Embassy’s disagreement with French authorities regarding the auction).

275. Dennis Wagner, *Foundation Buys Masks for Hopis at Paris Auction*, USA TODAY (Dec. 12, 2013), <http://www.usatoday.com/story/news/nation/2013/12/12/foundation-buys-masks-for-hopis-at-paris-auction-/4002853/> [<http://perma.cc/H39E-3MDU>].

international accords to secure American help in retrieving antiquities from the United States, Washington has no reciprocal agreements governing American artifacts abroad.<sup>276</sup> Yet, the United States *could* put such agreements in place, negotiating with France and states around the world to protect the Hopi and countless other tribes in reclaiming valuable cultural property. States can always enter into bilateral agreements with one another; the United States and France could mutually agree to the return of the *Katsinam* to the United States and repatriation to the Hopi could then occur pursuant to NAGPRA. To the extent that *Katsinam* are still being trafficked out of the United States, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, to which both France and the United States are parties, includes agreements between states to stop the illicit trafficking of cultural property.<sup>277</sup> The convention is implemented in the United States through the Convention on Cultural Property Implementation Act (CCPIA), which allows the U.S. President, on request of another state party, to enter into emergency measures to prevent the importation of archaeological or ethnological materials that are at risk.<sup>278</sup> While largely applied to the United States as an importing nation, the CCPIA could be interpreted or amended to apply in situations where indigenous and other archaeological and ethnological material—like the Hopi *Katsinam*—may be at risk of leaving the United States for international markets.

The Hopi story is just one recent example in which indigenous peoples in the United States have been denied full opportunities to practice their culture and religion and thereby flourish as peoples. Here, legal and political solutions, even if challenging to accomplish, could help to recover indigenous peoples' property.

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276. Mashberg, *supra* note 266. This is because, in cultural property terms, the United States is a “market” nation rather than a “source” nation. Historically, when “American” cultural property was transported to foreign markets, it has overwhelmingly been the cultural property of indigenous peoples, and there has never been the kind of political momentum needed for the creation of laws to prevent it. For the foundational work in the area, see John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831, 831–32 (1986) (detailing the differences between source nations and market nations regarding cultural property). For additional discussions of cultural property and legal issues around protection of cultural property, see LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND ITS POWER* 110–16 (2003).

277. Honor Keeler, *Indigenous International Repatriation*, 44 ARIZ. ST. L.J. 703, 778–79 (2012). In the Hopi case, the U.S. State Department has supported the tribe to some extent, but unlike in other instances of endangered cultural property, there are no mutual agreements preventing export and import of the *Katsinam*, pursuant to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231.

278. 19 U.S.C. § 2602(a)(1)–(2) (2012).

2. *Navajo Nation's Dispute with Urban Outfitters*.—Historical discrimination against Indians in cases of appropriation has led the federal government, pursuant to its plenary authority, to enact Indian-specific legislation to deal with inequities. Statutes such as the NAGPRA<sup>279</sup> and the Indian Arts and Crafts Act of 1990 (IACA) seek to level the playing field for American Indians to have access to the same rights to their religious and cultural properties as others.<sup>280</sup>

Increasingly, however, American Indians and Indian tribes seek to protect against Indian appropriation by employing intellectual property laws of general application. One such example—and a place where we contend the law can make a meaningful difference with a relatively modest intervention—is that of the Navajo tribe's lawsuits regarding Urban Outfitter's sale of “Navajo Panty” and “Navajo Flask.” Though the litigation is ongoing, and we therefore acknowledge there may be information gleaned in discovery to which we do not yet have access, the case seems fairly straightforward.<sup>281</sup> In response to Urban Outfitter's sale of the Navajo Panty, along with a whole line of Navajo-labeled products adorned in vaguely Indian-looking prints, the Navajo Nation filed a trademark infringement suit.<sup>282</sup> The Navajo own the trademarks to their own name, which they consistently use in the certification of goods in commerce.<sup>283</sup> These trademarks would seemingly preempt the uses by Urban Outfitters. In explaining their position, a tribal spokesman cited both economic and dignitary dimensions of the tribe's objections:

For some of our Navajo or Native artisans, that's what sells their products. Attaching the name Navajo to their item generates income. . . . To the larger world, we are Navajo, and we take pride in being Navajo. . . . We don't want our name to be associated with anything that isn't Navajo.<sup>284</sup>

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279. See *supra* note 183.

280. 25 U.S.C. §§ 305a–305f (2012). See generally William J. Hapiuk, Jr., *Of Kitsch and Kachinas: A Critical Analysis of the Indian Arts and Crafts Act of 1990*, 53 STAN. L. REV. 1009, 1048 (2001) (discussing legislation passed in 1935 to protect Indian arts and crafts that was later built upon by the Indian Arts and Crafts Act of 1990).

281. Complaint for Injunctive Relief and Damages at 1–3, *Navajo Nation v. Urban Outfitters, Inc.*, 1:12-cv-00195 (D.N.M. filed Feb. 28, 2012) (claiming that by selling goods under the “confusingly similar ‘Navaho’ and identical ‘Navajo’ names,” Urban Outfitters had misled customers as to the source of its products).

282. *Id.* at 14–19.

283. *Id.* at 2.

284. Stephanie Siek, *Navajo Nation Sues Urban Outfitters for Alleged Trademark Infringement*, CNN: INAMERICA (Mar. 2, 2012, 4:57 PM) (second omission in original), <http://inamerica.blogs.cnn.com/2012/03/02/navajo-nation-sues-urban-outfitters-for-alleged-trademark-infringement/> [<http://perma.cc/H7F8-6EZP>]; see also Jenna Sauers, *Urban Outfitters and the Navajo Nation: What Does the Law Say?*, JEZEBEL (Oct. 13, 2011, 7:00 PM), <http://jezebel.com/5849637/urban-outfitters-and-the-navajo-nation-what-does-the-law-say> [<http://perma.cc/E9VD-7NSZ>] (quoting Susan Scaffidi, stating that “[f]rom [her] personal perspective—Navajo is a people, not a pattern”).

This case is still developing and it would be premature to try to anticipate the outcome now. The information that has been disseminated thus far, however, lends itself to the inference that Urban Outfitters may have violated the trademarks of the Navajo, despite the claims of Urban Outfitters that the *Navajo* term has lost specific meaning in commerce and is a “generic” term for a particular “style or design.”<sup>285</sup> The Navajo are fighting back using American intellectual property law, as any other trademark holder would be able to do, to stake their claims over their own cultural identity and their future. Notably, of course, if the Navajo prevail it will be because the tribe has proven its case under American intellectual property law, which does not address the dignitary harms raised by the case. For the Tribe, in addition to the alleged trademark infringement, there are attendant harms that go along with the use of *Navajo* in conjunction with panties and flasks. Comparisons have been made to the marketing of malt liquor around Indian reservations in recent years using the name of the esteemed Lakota leader, Crazy Horse.<sup>286</sup> However, the Tribe is pursuing its claims in federal court under U.S. law in spite of the fact that federal intellectual property laws do not account for dignitary harms—as would any other plaintiff.<sup>287</sup>

3. *The Washington R-Skins*.—The most high profile—and undoubtedly, most controversial—case we discuss in this section is that of the effort by American Indian plaintiffs to force cancellation of federal trademark registration of the Washington football team’s mascot and some of its attendant marks. This case is playing out as much in the media as it is in the courts.

In unprecedented ways, American Indians are asserting that certain sports’ mascots are harmful to Native people. Popular culture icons, politicians, and the media have increasingly gotten on board. In what is perhaps an allegory for the entire movement, Jon Stewart devoted a segment of *The Daily Show* to the R-skins controversy.<sup>288</sup> In the segment, four fans dressed head-to-toe in R-skins gear described how much the team and its rituals mean to them and the ways in which they believe the name honors American Indians.<sup>289</sup> All of them said they were actually part Indian themselves, and all claimed they were deeply misunderstood by those who would ascribe racist motives to use of the R-skins name.<sup>290</sup> Then, correspondent Jason

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285. Felicia Fonseca, *Things to Know About Navajo Nation, Urban Outfitters Dispute*, ALBUQUERQUE J. (Feb. 2, 2016, 3:40 PM), <http://www.abqjournal.com/717136/news-around-the-region/things-to-know-about-navajo-nation-urban-outfitters-dispute.html?utm> [http://perma.cc/2TFJ-F4S2]. The Tribe has also claimed violations of the IACA. *Id.*

286. *See infra* notes 441–50 and accompanying text.

287. Dignitary harms, such as those raised in the Crazy Horse malt liquor case, would most likely be best articulated and defined by tribal law. But the jurisdictional issues prevent an expansive reach of tribal law to off-reservation, non-Indian defendants.

288. *The Redskins’ Name—Catching Racism*, *supra* note 252.

289. *Id.*

290. *Id.*

Jones brought onto the set several American Indians, giving the fans the ostensible opportunity to share their stated “respect” for American Indians and explain how the mascot communicates that respect.<sup>291</sup> Instead, some of the fans grew upset by the surprise arrival, later saying they had been ambushed by Indians and made to look racist.<sup>292</sup> The fans had thought they would be able to give their opinions on the R-skins without rebuttal.<sup>293</sup>

Indeed, the time when people can use racial slurs for American Indians without rebuttal appears to be ending. The strategy to end racist sports mascots, for example, is diffuse and pervasive, including legal and nonlegal methods. American Indians have joined the cause both as tribes and as individuals. Using social media, Indian activists have created hashtags, started petitions, and organized marches asserting that they are “Not Your Mascot” and that it is time to “Change the Name.”<sup>294</sup> Along with *South Park* and *The Daily Show*, the American Indian satire group The 1491s has lampooned the NFL, the team, its owner, and its fans for their insensitivity in continuing to use the name.<sup>295</sup> Shareholder actions and divestment campaigns are now targeted at FedEx, the owner of the stadium where the R-skins play.<sup>296</sup> In politics, President Obama, Attorney General Holder, and fifty U.S. Senators have weighed in, favoring a name change.<sup>297</sup>

291. *Id.*

292. Ian Shapira, *The Daily Show Springs Tense Showdown with Native Americans on Redskins Fans*, WASH. POST (Sept. 19, 2014), [https://www.washingtonpost.com/local/the-daily-show-springs-showdown-with-native-americans-on-redskins-fans/2014/09/19/c6c5f936-3f73-11e4-b03f-de718edeb92f\\_story.html](https://www.washingtonpost.com/local/the-daily-show-springs-showdown-with-native-americans-on-redskins-fans/2014/09/19/c6c5f936-3f73-11e4-b03f-de718edeb92f_story.html) [<http://perma.cc/N9SV-RVSW>]; *The Redskins’ Name—Catching Racism*, *supra* note 252.

293. Shapira, *supra* note 292.

294. John Woodrow Cox, *In Minnesota, Thousands of Native Americans Protest Redskins’ Name*, WASH. POST (Nov. 2, 2014), [https://www.washingtonpost.com/local/in-minnesota-native-americans-march-rally-to-protest-R-Skins-name/2014/11/02/fc38b8d0-6299-11e4-836c-83bc4f26eb67\\_story.html](https://www.washingtonpost.com/local/in-minnesota-native-americans-march-rally-to-protest-R-Skins-name/2014/11/02/fc38b8d0-6299-11e4-836c-83bc4f26eb67_story.html) [<http://perma.cc/KP98-2PXW>]; Keeler, *supra* note 251.

295. Ian Shapira, *‘Daily Show’ Airs Segment Pitting Redskins Fans Against Native Americans*, WASH. POST (Sept. 26, 2014), [https://www.washingtonpost.com/local/daily-show-air-segment-pitting-R-Skins-fans-against-native-americans/2014/09/25/f5d082da-44e3-11e4-b437-1a7368204804\\_story.html](https://www.washingtonpost.com/local/daily-show-air-segment-pitting-R-Skins-fans-against-native-americans/2014/09/25/f5d082da-44e3-11e4-b437-1a7368204804_story.html) [<http://perma.cc/QL53-S5TU>]; see also Migizi Pensoneau, *Behind the Scenes of Our Intense Segment on the Daily Show*, HUFF. POST (Nov. 30, 2014, 12:24 PM), [http://www.huffingtonpost.com/migizi-pensoneau/1491s-daily-show\\_b\\_5907244.html](http://www.huffingtonpost.com/migizi-pensoneau/1491s-daily-show_b_5907244.html) [<http://perma.cc/2NEM-PVDZ>] (describing the experience of a member of The 1491s working on the *Daily Show* segment and interacting with R-skins fans at a football game while wearing shirts making fun of the team’s name).

296. E.g., William Nikolakis et al., *Who Pays Attention to Indigenous Peoples in Sustainable Development and Why? Evidence from Socially Responsible Investment Mutual Funds in North America*, 27 *ORG. & ENV’T* 368, 379 n.4 (2014) (identifying several mutual funds that have initiated shareholder actions against FedEx to protest their sponsorship of the Washington R-skins); Mark Holan, *What Oneida Tribe of Wisconsin, FedEx Share in Common*, WASH. BUS. J. (June 24, 2014, 5:13 PM), <http://www.bizjournals.com/washington/blog/2014/06/what-oneida-tribe-of-wisconsin-fedex-share-in.html?page=all> [<http://perma.cc/UWQ2-BE4C>] (naming another investment fund that has initiated a shareholder action against FedEx).

297. Cindy Boren, *Senators Urge NFL to Act on Redskins’ Name, Citing NBA Action with Donald Sterling (Updated)*, WASH. POST (May 22, 2014), <https://www.washingtonpost.com/news/>



Though public attention is only recently focused on the controversy over the name, the fight to change it began decades ago. Suzan Harjo is a Cheyenne tribal member and was recently awarded the Presidential Medal of Freedom for her work on American Indian religious and cultural freedoms.<sup>298</sup> In her long career, she has been a radio host, advocated for the return of tribal lands, and directed the National Congress of American Indians.<sup>299</sup> Forty years ago, she was a young woman who moved to D.C. and attended a Washington R-skins football game. As the *New York Times* recently reported, “Fans sitting nearby, apparently amused that American Indians were in their midst, pawed their hair and poked them, ‘not in an unfriendly way, but in a scary way.’”<sup>300</sup> Harjo became the lead plaintiff in an early action to cancel the team’s trademarks as disparaging under the Lanham Act.<sup>301</sup> In *Harjo v. Pro-Football*,<sup>302</sup> the Trademark Trial and Appeal Board (TTAB) ruled that the marks were disparaging racial designations for American Indians,<sup>303</sup> but reviewing courts reversed on grounds that the plaintiffs had waited too long to assert their claims.<sup>304</sup> Undeterred, Harjo reached out to the next generation of Indian leaders, recruiting Amanda Blackhorse and others who had more recently reached the age of majority so that their claims would not be barred by laches.<sup>305</sup> As other leaders have acknowledged, Harjo “led this fight early” and contemporary activists “stand on her shoulders.”<sup>306</sup>

During this long struggle over the name, efforts were made to educate and explain the racially discriminatory roots of the name. An article published in *Esquire* magazine detailed the development of the name, noting that during the bloodiest periods of colonization, states actually placed a bounty on the scalps of Native Americans, inducing settlers and citizens to kill them

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early-lead/wp/2014/05/22/senators-urge-nfl-to-act-on-R-Skins-name-citing-nba-action-with-donald-sterling/ [http://perma.cc/58ZF-ET92]; Dan Steinberg, *Eric Holder Says Redskins Should Change Their Name*, WASH. POST (July 14, 2014), <https://www.washingtonpost.com/news/dc-sports-bog/wp/2014/07/14/eric-holder-says-R-Skins-should-change-their-name/> [http://perma.cc/VA3P-Z7TF]; Theresa Vargas & Annys Shin, *President Obama Says ‘I’d Think About Changing’ Name of Redskins*, WASH. POST (Oct. 5, 2013), [https://www.washingtonpost.com/local/president-obama-says-id-think-about-changing-name-of-washington-R-Skins/2013/10/05/e170b914-2b70-11e3-8ade-a1f23cda135e\\_story.html](https://www.washingtonpost.com/local/president-obama-says-id-think-about-changing-name-of-washington-R-Skins/2013/10/05/e170b914-2b70-11e3-8ade-a1f23cda135e_story.html) [http://perma.cc/P5BS-7BNA].

298. *Suzan Shown Harjo Receives Presidential Medal of Freedom in White House Ceremony*, INDIAN COUNTRY TODAY MEDIA NETWORK (Nov. 24, 2014), <http://indiancountrytodaymedianetwork.com/2014/11/24/suzan-shown-harjo-receives-presidential-medal-freedom-white-house-ceremony-157992> [http://perma.cc/2JBE-NTN6].

299. Belson, *supra* note 5.

300. *Id.*

301. *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d (BNA) 1705 (T.T.A.B. 1999), *rev’d*, 567 F. Supp. 2d 46, 62 (D.D.C. 2008), *aff’d*, 565 F.3d 880, 881 (D.C. Cir. 2009).

302. 50 U.S.P.Q.2d (BNA) 1705 (T.T.A.B. 1999).

303. *Id.* at 1749.

304. *Pro-Football, Inc. v. Harjo*, 565 F.3d at 885–86.

305. Brady, *New Generation*, *supra* note 5.

306. Belson, *supra* note 5 (quoting Ray Halbritter, a representative of the Oneida Indian Nation).

and bring in their hides for a payment.<sup>307</sup> By reducing Indians to their ostensible color and the very skin that covered their bodies, the term facilitated dehumanization, racialized dispossession and discrimination—tactics that colonizers have long used to dispossess the colonized.<sup>308</sup> With this history exposed, artists, writers, and cartoonists alike pointed out that few other minority groups remain caricatured and denigrated in the way that American Indians are by the R-skins, by the Cleveland Indians' Chief Wahoo, or by countless others across the country.<sup>309</sup>

American Indian tribes also began to put their resources behind efforts to educate and to advocate for the name change. The Oneida Indian Nation of New York and the Yocha Dehe Wintun Nation of California have invested substantial funds, raised through economic development activities, in the campaign.<sup>310</sup> During the 2014 NBA finals, Yocha Dehe paid for a short film, entitled *Proud to Be*, that ran in seven major cities during halftime.<sup>311</sup> Aesthetically appealing and deeply intoned, the ad showed sixty seconds of Native American people, in each instance “proud to be” strong, brave, or resilient; Hopi, Navajo, or Cherokee; an athlete, lawyer, or mother, but never a “Redskin.”<sup>312</sup> For its part, the Oneida Nation has worked with the National Congress of American Indians on high-level outreach to National Football League players.<sup>313</sup>

307. Holmes, *supra* note 4.

308. See WILLIAMS, *supra* note 16, at 116–17 (“[T]he language of racism organized around . . . stereotyped differences will invariably be relied upon to justify any differential treatment between colonizer and colonized groups.”). For another famous formulation, see SAID, *supra* note 33, at 70 (describing that “[t]he European encounter with the Orient . . . turned Islam into the very epitome of an outsider against which the whole of European civilization . . . was founded”). For further discussions of the interplay between race and colonization, see Rolnick, *supra* note 23, at 1026–27, which raises the significance of race in understanding historical politics; and Berger, *supra* note 23, at 600–01, which discusses the colonization of both Africans and Indians and highlights the role of racial domination in the process.

309. E.g., Thorn Little Moon, *Untitled Cartoon* (1995), reprinted in Kristan Korn, *Indian Mascot Debate Hits Home with Warriors*, TWO RIVERS TRIB. (Sept. 26, 2012), <http://www.tworivertribune.com/2012/09/indian-mascot-debate-hits-home-with-warriors/> [<http://perma.cc/KQ4Y-2N55>].

310. Theresa Vargas, *Anti-Redskins Ad Airing During NBA Finals*, WASH. POST (June 10, 2014), [https://www.washingtonpost.com/local/anti-redskins-ad-to-air-during-nba-finals/2014/06/10/9808a964-f058-11e3-bf76-447a5df6411f\\_story.html](https://www.washingtonpost.com/local/anti-redskins-ad-to-air-during-nba-finals/2014/06/10/9808a964-f058-11e3-bf76-447a5df6411f_story.html) [<http://perma.cc/8uBB-JNEA>].

311. *Id.*

312. National Congress of American Indians, *Proud to Be*, YOUTUBE (Jan. 27, 2014), <http://www.youtube.com/watch?v=mR-tbOxlhVE> [<http://perma.cc/D2N8-KLBU>].

313. See Vargas, *supra* note 310 (noting the Oneida Indian Nation “has been among the more vocal groups calling for a name change” and was “behind a recent letter that contained more than 75 signatures from Native American, religious and civil rights organizations and was sent to NFL players, asking them to stand up against a name that ‘does not honor people of color’”).

These tribes were not always economically or politically empowered. The Yocha Dehe tribe, like many tribes in Northern California, experienced genocide during the gold rush of the 1850s.<sup>314</sup> They went “nearly extinct,” and the survivors were forcibly removed from their aboriginal lands and suffered severe poverty for decades.<sup>315</sup> Only in the 1980s was the tribe restored to a small land base and able to initiate economic development.<sup>316</sup> The Oneida Nation fought in the Revolutionary War on the side of the colonists, signed treaties with George Washington, and subsequently lost all of its land (save for thirty-two acres) to illegal purchases by the state of New York.<sup>317</sup> Circumstances were so dire in the 1970s that the tribe could not take care of its members in many respects.<sup>318</sup> In the 1980s and 1990s, the Oneida Nation brought a series of legal claims and initiated economic development to begin to redress the Nation’s very severe losses.<sup>319</sup>

Why do these tribes, recovering from the worst of conquest and colonization,<sup>320</sup> now spend their precious resources to fight the R-skins?<sup>321</sup> Because, as Yocha Dehe leader Marshall McKay tells it, tribal members continue to face discrimination based on perceptions of Indian race and culture.<sup>322</sup> They cannot thrive in school, at work, or in public places when they

314. *History*, YOCHA DEHE WINTUN NATION, <http://www.yochadehe.org/heritage/history> [<http://perma.cc/UGU3-TVKE>].

315. *Id.*

316. *Id.*

317. William Sawyer, *The Oneida Nation in the American Revolution*, NAT’L PARK SERV., <http://www.nps.gov/fost/learn/historyculture/the-oneida-nation-in-the-american-revolution.htm> [<http://perma.cc/6QZW-AK82>]. For a legal account of the challenges of the Oneida to regain sovereignty and property, see *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 207–14 (2005), which held that the Oneida Nation could not re-assert jurisdiction over former reservation lands, because the “embers of sovereignty . . . long ago grew cold”. Additionally, the administrative process that was meant to provide relief has been strictly limited. See *Carcieri v. Salazar*, 555 U.S. 379, 381–83 (2009) (curbing federal authority to take land into trust for tribes to only tribes that were under federal jurisdiction in 1934).

318. Ray Halbritter & Steven Paul McSloy, *Empowerment or Dependence? The Practical Value and Meaning of Native American Sovereignty*, 26 N.Y.U. J. INT’L L. & POL. 531, 560 (1994).

319. See *Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 253 (1985) (affirming a finding of liability for and illegal purchase and subsequent occupation of the tribe’s land); *Oneida Indian Nation v. Cty. of Oneida*, 414 U.S. 661, 666–67 (1974) (reversing a lower court decision which denied federal jurisdiction to the tribe in a possessory action for land); Halbritter & McSloy, *supra* note 318, at 560, 564–66 (explaining the shift towards tribal self-empowerment through education and economic development).

320. Carpenter & Halbritter, *supra* note 203, at 321–27 (describing the emergence of Oneida Indian Nation as a key employer in central New York and as a strong voice for tribal cultural, social, and political empowerment).

321. See, e.g., Ariel Sabar, *The Anti-Redskin*, ATLANTIC (Oct. 2015), <http://www.theatlantic.com/magazine/archive/2015/10/the-anti-redskin/403213/> [<http://perma.cc/4QZN-MEUS>] (describing some of the resources spent by the Oneida Nation, in particular).

322. See Yocha Dehe Wintun Nation, *Yocha Dehe Tribal Leaders Speak Out for Change the Mascot*, YOUTUBE (June 6, 2014), <https://www.youtube.com/watch?v=wSX8XktA43Q> [<http://perma.cc/HX25-X564>] (explaining the need to confront racism against Native Americans).

are called racial epithets, denied jobs, or physically assaulted.<sup>323</sup> Tribal leaders believe that perceptions of Indian status have even contributed to the denial of basic public services like fire and police to reservation residents.<sup>324</sup> While no one wants to be perceived as the culture police, tribal leaders and members alike argue that these harms must be addressed, as much through education and awareness as through the law.<sup>325</sup> The movement to end the use of offensive Indian sports mascots is, from this perspective, part of the larger movement for tribal self-determination in all arenas of life.<sup>326</sup> Indeed, Oneida Nation representative Ray Halbritter, who has been described as having initiated the Change the Mascot campaign in 2013, cites the need to end the dehumanizing use of the *R-skins* term as critical to disrupting the cycles of “poverty, alcoholism, and suicide” that plague Indian people.<sup>327</sup> Using the proceeds from casinos and other successful economic development ventures, Halbritter’s strategy seeks to challenge the R-skins term in forums ranging from local high schools to army bases to Walmart.<sup>328</sup> He believes that “[c]hange will come . . . ‘not because of the benevolence of a team owner, but because a critical mass of Americans will no longer tolerate, patronize, and cheer on bigotry.’”<sup>329</sup>

Despite this momentum towards change, there is undoubtedly vocal opposition. Scholars have argued that in the sports context, playing Indian is so much a part of American life that Indians and Indian imagery now actually belong to white America.<sup>330</sup> As the Washington team likes to point out, not all American Indians find the R-skins and other Indian sports mascots offen-

323. See, e.g., ERIK STEGMAN & VICTORIA PHILLIPS, CTR. FOR AM. PROGRESS, MISSING THE POINT: THE REAL IMPACT OF NATIVE MASCOTS AND TEAM NAMES ON AMERICAN INDIAN AND ALASKA NATIVE YOUTH 1–8 (2014) (finding that racist names and mascots harm the self-esteem of Native American youths); Sarah Beccio, *Racism Hurts Native Americans Too*, HUFFINGTON POST (Sept. 12, 2014, 3:03 PM), [http://www.huffingtonpost.com/sarah-beccio/racism-hurts-native-ameri\\_b\\_5812452.html](http://www.huffingtonpost.com/sarah-beccio/racism-hurts-native-ameri_b_5812452.html) [<http://perma.cc/L6XD-ZYWQ>] (describing how racism and denigrating epithets negatively impact Native Americans, especially Native American youths).

324. Sabar, *supra* note 321 (recounting, as part of his inspiration for his involvement in the mascot movement, Oneida Indian Nation leader Ray Halbritter’s story of how his aunt and uncle died in a reservation fire when the local fire department reported to have orders not to enter the reservation and instead allowed tribal members to suffer and burn to death).

325. See NAT’L CONG. OF AM. INDIANS, ENDING THE LEGACY OF RACISM IN SPORTS & THE ERA OF HARMFUL “INDIAN” SPORTS MASCOTS 6 (2013) (highlighting that “ongoing education and advocacy” is a key to removing harmful terminology in sports and has successfully led two-thirds of “Indian” references in sports to be eliminated).

326. Sabar, *supra* note 321.

327. *Id.*

328. *Id.*

329. *Id.*

330. Naomi Mezey, *The Paradoxes of Cultural Property*, 107 COLUM. L. REV. 2004, 2005 (2007); cf. Christine Haight Farley, *Registering Offense: The Prohibition of Slurs as Trademarks* 6 (Wash. Coll. of Law Research Paper, No. 2014-28, 2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2443423](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2443423) [<http://perma.cc/FSG9-UYVA>] (stating that “harm occurs when someone’s cultural identity is literally, and legally, owned by another entity” and “[b]y trademarking a racial referent, the message is that the referent is owned”).

sive.<sup>331</sup> Some Indian high schools located on reservations play under these names.<sup>332</sup> Others argue that the time and resources devoted to the antimascot campaign could be better spent, and still others seem genuinely not to object to the R-skins, Chief Wahoo, or other prominent depictions.<sup>333</sup> For some people, such mascots are at least a minimal reminder to the dominant society that Indians have not disappeared, that Indians are still here.<sup>334</sup> These are opinions that the American Indian community is working out in emails and on Facebook pages, in conversations among tribal and urban community members alike—as they work on the project of healing nations and rearticulating identities.

The Washington team is not giving up. Owner Dan Snyder continually reiterates that he will not willingly change the name, and he has waged his own battle by relying particularly on the economic resources of the team to try to influence sympathetic Indians in underresourced communities. Pro-Football, for example, donated the funds to build a playground on the Chippewa Cree Reservation in Montana<sup>335</sup> and worked with the Zuni Tribe to offer prizes to Zuni artists willing to incorporate the mascot into their art works.<sup>336</sup> Dan Snyder personally offered box-seat tickets to the outgoing

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331. Christian Dennie, *Native American Mascots and Team Names: Throw Away the Key; The Lanham Act is Locked for Future Trademark Challenges*, 15 SETON HALL J. SPORTS & ENT. L. 197, 212 (2005) (“One survey, taken of 425 Native American tribal leaders concerning the Washington Redskins’ use of the term ‘redskin,’ found 72.24% of the leaders were opposed to the use of the term. In contrast, another survey conducted by Sports Illustrated found 83% of Native Americans who do not live on reservations approved of the use of Native American mascots and team names. In addition, 67% of Native Americans polled who live on reservations approved of the use of Native American mascots and team names, while only 32% were opposed.”); see also Katyal, *supra* note 2, at 1604 n.6 (noting that in earlier cancellation actions against Pro-Football, the courts struggled with survey data and that there are difficulties with the empirical work in this area).

332. Ian Shapira, *In Arizona, a Navajo High School Emerges as a Defender of the Washington Redskins*, WASH. POST (Oct. 26, 2014), [https://www.washingtonpost.com/local/in-arizona-a-navajo-high-school-emerges-as-a-defender-of-the-washington-R-Skins/2014/10/26/dcf773a-592b-11e4-8264-deed989ae9a2\\_story.html](https://www.washingtonpost.com/local/in-arizona-a-navajo-high-school-emerges-as-a-defender-of-the-washington-R-Skins/2014/10/26/dcf773a-592b-11e4-8264-deed989ae9a2_story.html) [http://perma.cc/YDY7-CEAY] (referring to the Red Mesa R-skins).

333. *E.g., id.* (quoting a Red Mesa man as saying, “We have far more important issues to expend our energy on . . . . A lot of the buildings here are from the 1970s. Our grandson doesn’t even have a biology teacher. Tell [Washington R-skins owner Dan] Snyder we want a wellness center.”).

334. See Theresa Vargas & Liz Clarke, *Redskins Owner Dan Snyder Makes Visits to Indian Country Amid Name-Change Pressure*, WASH. POST (Dec. 21, 2013), [https://www.washingtonpost.com/local/redskins-owner-dan-snyder-makes-visits-to-indian-country-amid-name-change-pressure/2013/12/21/5f939266-6777-11e3-a0b9-249bbb34602c\\_story.html](https://www.washingtonpost.com/local/redskins-owner-dan-snyder-makes-visits-to-indian-country-amid-name-change-pressure/2013/12/21/5f939266-6777-11e3-a0b9-249bbb34602c_story.html) [http://perma.cc/EJ4X-EYZV] (quoting an email from a man descended from the Cherokee tribe as saying, “I love having the Redskins name on a team with such pride. We have been forgotten in so many other ways”).

335. Erik Brady, *Montana Indian Tribe Happy to Take Redskins’ Money*, USA TODAY (July 31, 2014, 4:26 PM), <http://www.usatoday.com/story/sports/nfl/2014/07/31/washington-R-Skins-original-americans-foundation-indian-tribes/13422205/> [http://perma.cc/A9EN-2TCL].

336. *Redskins Want Native-Made Redskins Art. No Drunk Artists, Please*, INDIAN COUNTRY TODAY MEDIA NETWORK (Aug. 8, 2014), <http://indiancountrytodaymedianetwork.com/2014/08/08/redskins-want-native-made-redskins-art-no-drunk-artists-please-156312> [http://perma.cc/HD2C-2Y69].

President of the Navajo Nation, much to the embarrassment of many Navajo Nation members, particularly when the tribe has protested the name.<sup>337</sup> Snyder announced the formation of its “Original Americans Foundation” to “to provide resources that offer genuine opportunities for Tribal communities.”<sup>338</sup> In each of these instances, Snyder and Pro-Football are offering what seem to be tokens—gifts of tens or even hundreds of thousands dollars here and there—to shore up their claims that American Indians support the name.<sup>339</sup> All of this occurred as the team filed in federal court to challenge the TTAB’s decision to cancel the marks.<sup>340</sup>

In July 2015, a federal court upheld the TTAB’s cancellation of the Washington R-skins trademarks on the grounds that the marks “‘may disparage’ a substantial composite of Native Americans and bring them into contempt or disrepute” pursuant to the Lanham Act.<sup>341</sup> The Court drew on “(1) dictionary evidence, (2) literary, scholarly, and media references, and (3) statements of individuals and groups in the referenced group” to conclude that “the Redskins Marks consisted of matter that ‘may disparage’ a substantial composite of Native Americans during the relevant time period (1967, 1974, 1978, and 1990).”<sup>342</sup> In all three categories, the court determined that the evidence weighed in favor of a finding of disparagement under the Act.<sup>343</sup> Moreover, the court rejected arguments by Pro-Football that the Lanham Act was unconstitutional on either Fifth Amendment or First Amendment grounds.<sup>344</sup>

Distinguishing between the registration of the marks—at issue in the case—and the marks themselves, the court found that the registration was not “property” within the meaning of the Fifth Amendment.<sup>345</sup> On the First Amendment issue, the court again clarified that the dispute was over trademark registration; accordingly, regardless of the court’s decision about registration, the marks could continue to be used in commerce and may still maintain common law trademark protection.<sup>346</sup> Additionally, the court deter-

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337. Sarah Larimer, *Navajo Nation President Says He Talked Business with Dan Snyder at Redskins Game*, WASH. POST (Oct. 14, 2014), <https://www.washingtonpost.com/news/dc-sports-bog/wp/2014/10/14/navajo-nation-president-says-he-talked-business-with-dan-snyder-at-redskins-game/> [<http://perma.cc/XTL3-5E78>].

338. *Mission Statement*, WASH. REDSKINS ORIGINAL AMERICANS FOUND., <http://www.washingtonredskinsoriginalamericansfoundation.org/> [<http://perma.cc/NLD9-SP2Y>].

339. Open letter from Daniel M. Snyder, Owner and Chairman of the Board, Washington Redskins (Mar. 24, 2014), <http://files.redskins.com/pdf/Letter-from-Dan-Snyder-032414.pdf> [<http://perma.cc/Z7CL-HQH5>].

340. Complaint at 35, *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439 (2015) (No. 1:14-CV-01043) (showing that the complaint was filed in August of 2014).

341. *Blackhorse*, 112 F. Supp. 3d at 447.

342. *Id.* at 467.

343. *Id.* at 485.

344. *Id.* at 448, 455, 464.

345. *Id.* at 464.

346. *Id.* at 453–54.

mined that the cancellation of the registration of the marks was government speech—not private speech—to which the First Amendment does not apply.<sup>347</sup>

This decision interpreting the Lanham Act builds on a relevant, and somewhat conflicted, body of jurisprudence around trademark registration. In addition to prohibiting trademarks that are disparaging, the Lanham Act also prohibits registration of trademarks that are “immoral, deceptive, or scandalous.”<sup>348</sup> In recent instances, slurs like the “n-word” and others have been denied registration,<sup>349</sup> though the jurisprudence remains mixed when it comes to other terms and images relating to subordinated groups.<sup>350</sup> Scholars examining these cases highlight the nuanced role that intellectual property law, and trademark in particular, play in regulating market and expressive concerns.<sup>351</sup> Some scholars have suggested that trademark law may not go far enough to address the discrimination experienced by minority groups in cases like the R-skins,<sup>352</sup> while still others have characterized the cancellation of the racially disparaging marks as an impermissible limitation on speech.<sup>353</sup>

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347. *Id.* at 457; *see also* Walker v. Tex. Div., Sons of Confederate Veterans, 135 S. Ct. 2239, 2253 (2015) (holding that the state, as a matter of government speech, could reject specialty license plates depicting the Confederate Flag).

348. 15 U.S.C. § 1052(a) (2012).

349. NIGGA, U.S. Trademark Application Serial No. 76/623949 (filed Dec. 10, 2004), Office Action Outgoing, July 24, 2005, <http://tsdr.uspto.gov/documentviewer?caseId=sn76623949&docId=OOA20050724190913#docIndex=3&page=1> [<http://perma.cc/BS74-PJT6>]; *see also* Katyal, *supra* note 2, at 1630–38 (reviewing the U.S. Patent and Trademark Office’s (USPTO’s) treatment of marks that appear to represent or invoke racial and sexual minorities).

350. *See, e.g.*, Todd Anten, Note, *Self-Disparaging Trademarks and Social Change: Factoring the Reappropriation of Slurs into Section 2(a) of the Lanham Act*, 106 COLUM. L. REV. 388, 419–21 (2006) (discussing inconsistent judgments as to whether particular terms are disparaging).

351. *See* Katyal, *supra* note 2, at 1606 (noting that because of their “expressive and economic dimensions,” trademarks “can operate as devices of owned property, and at other times, they can also operate as devices of expression and culture”); Farley, *supra* note 330, at 1 (“Limited as it may be, the refusal of the U.S. Trademark and Patent Office [sic] . . . to grant federal registration to offensive marks plays some role in protecting the public from racist or otherwise highly offensive trademarks. The USPTO does so even though such actions may appear to some as a form of censorship and even though such determinations may embroil the office and courts in differing standards of cultural sensitivity.”).

352. *See* Farley, *supra* note 330, at 18 (“[I]f minority groups are injured by the use of trademark . . . and the only remedy provided by trademark law is cancellation of the registration of the trademark, then the effort and expense of challenging the trademark may have been wasted.”).

353. In an interesting turn of events, the American Civil Liberties Union has entered the fray in the *Pro-Football* case, submitting an amicus brief that argues even if the contested marks are racially disparaging, the government cancellation would violate a bedrock principle of the First Amendment by prohibiting “viewpoint discrimination.” Eugene Volokh, *ACLU Argues that Cancellation of Redskins Trademark Violates the First Amendment*, WASH. POST: VOLOKH CONSPIRACY (Mar. 6, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/06/aclu-argues-that-cancellation-of-redskins-trademark-violates-the-first-amendment/> [<http://perma.cc/L68N-YZBG>]. The United States has filed to intervene for the purpose of defending the constitutionality of the Lanham Act’s disparagement clause. Notice of Intervention by the United States of America to Defend the Constitutionality of a Federal Statute at 1, *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439 (E.D. Va. 2015).

The battle over the trademarks is unlikely to end any time soon, as the case is now on appeal to the Fourth Circuit.<sup>354</sup> Among many arguments put forth, Pro-Football has challenged the constitutionality of § 2(a) of the Lanham Act on First Amendment grounds. Though this argument failed in the lower court, Pro-Football now has additional support for this claim after the Federal Circuit found § 2(a) violated the First Amendment in the recent case of *In re Tam*.<sup>355</sup> A number of scholars and others are developing free speech arguments to further challenge the Act.<sup>356</sup> We concede that, at this stage, it is impossible to predict the outcome of the litigation over § 2(a).

Setting the constitutionality of § 2(a) aside, however, we see a clear avenue for redress as to the question of disparagement under the statute. Given the remarkable history of the term itself and its use as a racial epithet against Indian people, in our view, a finding that the mark is disparaging is squarely within precedent and current interpretation of the law.<sup>357</sup> In this way, the R-skins case—much like the disputes over the Navajo Nation trademarks and the Hopi *Katsinam*—is a case that can and should be remedied by law. The doctrinal lever that must be exercised in order to prevent harmful cultural appropriation is available, applicable, and relatively straightforward.

Even if the courts continue to uphold the cancellation of trademark registration for the marks, the Washington team will still be able to use

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354. Notice of Appeal, *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439 (E.D. Va. 2015) (No. 1:14-CV-01043).

355. 808 F.3d 1321, 1328 (Fed. Cir. 2015).

356. The First Amendment arguments around the viability of the Lanham Act's § 2(a) are in flux and evolving quickly. It is beyond the scope of this Article to assess the constitutionality of the statute under the First Amendment. For more on this subject, see Volokh, *supra* note 6, at 17–18, which discusses the Washington R-skins specifically within the context of the hostile-environment doctrine as it relates to First Amendment claims; Jeffrey Lefstin, Note, *Does the First Amendment Bar Cancellation of Redskins?*, 52 STAN. L. REV. 665, 677–79 (2000), which suggests that because the denial of registration for scandalous and disparaging marks reduces the financial value of the marks, First Amendment scrutiny should be applied to § 2(a) to protect forms of expression that may be discouraged by financial disincentives; and Eugene Volokh, *The Redskins and the Slants: How an Asian American Band Name Case May Affect the Redskins Trademark*, WASH. POST: VOLOKH CONSPIRACY (July 8, 2015) [hereinafter Volokh, *The Redskins and the Slants*], <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/08/the-redskins-and-the-slants-how-an-asian-american-band-name-case-may-affect-the-redskins-trademark/> [http://perma.cc/U9FF-NS6S], which describes recent disparagement cases and their implications for the R-skins case.

357. *Contra* Brief of Amici Curiae American Civil Liberties Union, *supra* note 206, at 4 (arguing that the Lanham Act's denial of proposed trademarks as scandalous, immoral, or disparaging constitutes impermissible viewpoint discrimination).



them.<sup>358</sup> A “win” for the American Indian plaintiffs presents merely a compromise solution, but one that would, at least in some potentially significant ways, mitigate the extent to which the mark could be used to silence, intimidate, and oppress Indian people.

C. *Indian Cultural Appropriation and the Limits of the Law*

1. *Of Headdresses, Designs, and Dances.*—In a recently published conversation in the *New York Times*'s debate series, commentators from various perspectives dialogued around questions of cultural appropriation.<sup>359</sup> Scholar Adrienne Keene, a citizen of the Cherokee Nation and author of the blog *Native Appropriations*,<sup>360</sup> attempted to address questions around the appropriation of Indian intangibles, including designs and headdresses. Acknowledging the historical and racial dimensions of cultural appropriation in the Indian context,<sup>361</sup> she first cited to the lawful suppression of Indian religions, assimilationist policies, and other acts of (legal) violence against Native peoples to situate her response about contemporary instances.<sup>362</sup> In regard to non-Indians wearing headdresses, Keene explained:

[F]or the communities that wear these headdresses, they represent respect, power and responsibility. The headdress has to be earned, gifted to a leader in whom the community has placed their trust. When it becomes a cheap commodity anyone can buy and wear to a party, that meaning is erased and disrespected, and native peoples are reminded that our cultures are still seen as something of the past, as unimportant in contemporary society, and unworthy of respect.<sup>363</sup>

Even given this baseline presumption about the harm caused to Native communities by cultural appropriation—an “insidious, harmful act that reinforces existing systems of power”—Keene nevertheless conceded that non-Native

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358. *Blackhorse*, 112 F. Supp. 3d at 464. *But see In re Tam*, 808 F.3d at 1340–41 (noting the potential limitations in using terms or phrases at all once federal trademark protection has been denied).

359. *Whose Culture Is It, Anyway?*, *supra* note 16.

360. NATIVE APPROPRIATIONS, *supra* note 254.

361. Adrienne Keene, Opinion, *The Benefits of Cultural ‘Sharing’ are Usually One-Sided*, N.Y. TIMES (Aug. 4, 2015, 7:53 AM), <http://www.nytimes.com/roomfordebate/2015/08/04/whose-culture-is-it-anyhow/the-benefits-of-cultural-sharing-are-usually-one-sided> [<http://perma.cc/8GAQ-F5YF>].

362. *Id.*

363. *Id.*

designers should be allowed to incorporate Native iconography and imagery into their work.<sup>364</sup> Instead of an outright prohibition on such uses, she called for “collaboration,” “partnership,” “equal power,” and “respect.”<sup>365</sup>

Keene’s commentary highlights several themes that are deeply embedded in debates over cultural appropriation today, particularly in the indigenous context: racism, historical injustices, inequality, power imbalances, and the importance of context, to name a few. To explain Native peoples’ discomfort with non-Indians wearing headdresses, for example, it is necessary to go back to the indigenous perspective and evaluate what the headdress means specifically to the various tribes, Crow and Lakota to name two, that make and use them. Without such context, it’s impossible for non-Indians in contemporary settings to grasp the offense and harm that indigenous people feel when sacred objects and imagery are co-opted, commercialized, and commodified for non-Indians’ benefit.

At the same time, in our experience in the field and in the academy, Keene’s view is emblematic of the commonly held view of Native peoples that such representations should not be banned by federal law.<sup>366</sup> For one thing, both because of constitutional limitations and practical ones, federal law cannot, and likely should not, intervene to prevent all cases of Indian appropriation.<sup>367</sup> But beyond this, many contemporary Indian people seek, above all, respect and understanding rather than restrictive legal action. Discourse around these issues almost always focuses on the larger problems of a lack of education and exposure to Native people and to Indian country—evidenced, for example, by common Indian stereotypes of pan-Indian noble warriors or vicious savages.<sup>368</sup> Rather than insist on legal reform, Indian people desire to be gauged by respect and consideration for others.

364. *Id.*

365. *Id.*

366. For purposes of this piece, we cabin off tribal law, which is free to evolve and deal with questions of Indian appropriation as it wishes, to the extent the tribes are able to assert civil jurisdiction over offenders. Angela R. Riley, “*Straight Stealing*”: *Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 91, 118 (2005).

367. See *supra* note 356 and accompanying text (discussing the potential constitutional limits around laws that overly restrict free expression). But see Riley, *supra* note 30, at 177–78 (suggesting that a “group rights model of ownership of intangible property” would be “firmly rooted in the trust responsibility of federal Indian law, and [would be] constitutionally authorized via the Indian Commerce Clause”).

368. Hollywood has done much to further such views. KILPATRICK, *supra* note 140, at 79–82 (criticizing *A Man Called Horse*, a film “almost comically unaware” of itself, that supposedly depicts members of a Lakota tribe, but the people’s “hairstyles range from Assiniboin through Nez Perc to Comanche, [their] tipi design is Crow, and [their] Sun Dance ceremony . . . [is] Mandan”); *id.* at 124–30 (explaining that even though *Dances With Wolves* makes a “serious attempt” to treat “American Indians as fully realized human beings,” the contrast between the Lakotas as “intelligent, happy, loving people” and the Pawnees as “vicious killers” reinforces old, clichéd depictions of the “noble savage/bloodthirsty savage stereotypes”); see also FITZGERALD, *supra* note 154, at xxii (“American Indian stereotypes are ‘part and parcel’ of what Ward Churchill calls ‘colonizer

Moreover, Native people are also artists, artisans, comedians, actors, playwrights, and theorists, respectively, all of whom desire freedom themselves to speak, to criticize, and to entertain. For example, The 1491s (the group that appeared on *The Daily Show* in critique of the Washington team) use their satirical work to critique structural and institutional racism against Native people by parodying the dominant culture's concept of them. In one popular YouTube video, *I'm an Indian, Too*, 1491s member Ryan Red Corn appears without a shirt and in a headdress.<sup>369</sup> The lyrics and visuals make the point that Americans are fascinated with playing Indian and use specific tropes and iconography in order for non-Indians to claim Indianness.<sup>370</sup> Though the entire production is a critique of the dominant culture, the use of the headdress in this way may nevertheless also be seen as shocking, disrespectful, or inappropriate to some Indian people. It is not difficult to see that federal laws that completely prohibited the use of headdresses outside of specific tribal contexts (which would, also problematically, have to be defined by each tribe) could unduly inhibit the ability of even Native people to critique the dominant culture (or even their own cultures, for that matter).

Similar problems arise in the fashion industry and with Native-inspired design features. The Crow fashion designer Bethany Yellowtail, for example, has promoted her work as seeking to “embrace[] authentic, indigenous design.”<sup>371</sup> In the media, her creations have been contrasted with those of non-Indians who use Indian design features in their work, decontextualized from meaning; some have actually copied Yellowtail's own designs without attribution.<sup>372</sup> Yellowtail herself draws inspiration from multiple places, including photos of her ancestors when they began to mix traditional Crow regalia with European design. Indeed, as an artist in an industry that relies on inspiration and creativity, Yellowtail states: “For me, my mission is not about trying to combat cultural appropriation.”<sup>373</sup> Instead she says “I simply want to carve out a space where an authentic voice and an authentic

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discourse,’ used by dominant groups to denigrate other peoples, justifying their subjugation and the seizing of their resources.”)

369. the1491s, *I'm an Indian Too - The 1491s*, YOUTUBE (Sept. 21, 2012), <https://www.youtube.com/watch?v=9BHvpWP2V9Y> [<http://perma.cc/JUQ7-HTLM>].

370. *Id.*

371. *About*, B. YELLOWTAIL, <http://www.byellowtail.com/our-story/> [<http://perma.cc/AMS6-996N>].

372. *See Bethany Yellowtail 'Gutted' by Crow Design on Dress at New York Fashion Week*, INDIAN COUNTRY TODAY MEDIA NETWORK (Feb. 20, 2015), <http://indiancountrytodaymedianetwork.com/2015/02/20/bethany-yellowtail-gutted-crow-design-dress-new-york-fashion-week-159319> [<http://perma.cc/8WTY-GCA7>] (describing Yellowtail's response to seeing another designer's dress that strongly resembled her own design). Copying is a common practice in the fashion industry. KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, *THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION* 21 (2012).

373. Madelyn Chung, *Bethany Yellowtail Is Redefining Native American Fashion in a Beautifully Authentic Way*, HUFFPOST STYLE (May 14, 2015, 5:37 PM), [http://www.huffingtonpost.ca/2015/05/14/bethany-yellowtail-fashion\\_n\\_7275208.html](http://www.huffingtonpost.ca/2015/05/14/bethany-yellowtail-fashion_n_7275208.html) [<http://perma.cc/2YLE-F2G2>].

representation of Native America exists and thrives. If that means we're combating cultural appropriation while just being true to ourselves, then that's a bonus."<sup>374</sup> As Yellowtail's work with the designs of her own Crow and Cheyenne ancestors suggests, overly restrictive federal laws against appropriation could inhibit the freedom to innovate, manipulate, and modify ancient traditions even by Native people.

The problem of indigenous creations not fitting neatly into intellectual property regimes has been exhaustively documented in scholarly literature as well as in popular culture.<sup>375</sup> Though Native people attempt to explain the harm done to them (and to the world) through such actions, it is difficult for tribal members to convey the distortion of religion, the feeling of the "erasure" of identity, and the ahistorical stereotyping it produces, particularly in the language of Western law. Similar themes emerge in instances of non-Indian self-help gurus that operate for-profit sweat lodges to give tourists an "Indian religious" experience,<sup>376</sup> or bikini-clad Victoria's Secret models that walk the catwalk in Indian headdresses.<sup>377</sup>

In our experience, while Native people oftentimes feel harmed and wronged by such acts of appropriation, calls to action are primarily not for laws, but for understanding and education. This may feel like an anticlimactic resolution to a complicated issue, but it leads to several conclusions. First, Native people want understanding, respect, and equality in American society, which may not be possible through the dictates of law but should be a focus of education and media. Moreover, as discussed more fully below, tribal law has a powerful role to play here. In tribal communities, people generally know which uses of designs and emblems are permitted by custom and practice, and which are not. They learn how to ask for permission and how to handle sacred material and expressions. Because of limited jurisdictional reach, tribal law cannot go as far as necessary to prevent actions by non-Indians, but tribal members remain attentive to tribal law and to the demands and desires of their own communities.

For another example on the limits of the law and potential for education, consider the example of the Koshare Indian Museum and Boy Scout Troop 232, in La Junta, Colorado, which for generations have taught non-Indian children "Koshare Indian Dances."<sup>378</sup> These dances were copied decades ago

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374. *Id.*

375. *See, e.g.*, sources cited *supra* notes 29–33.

376. *See* Marc Lacey, *New Age Guru Guilty in Sweat Lodge Deaths*, N.Y. TIMES (June 22, 2011), [http://www.nytimes.com/2011/06/23/us/23sweat.html?\\_r=1](http://www.nytimes.com/2011/06/23/us/23sweat.html?_r=1) [<http://perma.cc/TM27-VY4Z>] (reporting on high profile case in which a "self-help guru" was held guilty of negligent homicide in the deaths of three individuals during a sweat-lodge ceremony near Sedona).

377. *Victoria's Secret Apologizes After Use of Native American Headdress in Fashion Show Draws Outrage*, *supra* note 10.

378. *See The Koshare Indian Dancers*, *supra* note 142 (elaborating on the tradition of Boy Scout Troop 232 and detailing how a boy can become a "Koshare").

from the Tewa-speaking Pueblo Indians, for whom the mimicry of sacred, secret rituals thousands of years old by people not initiated into their clan system is believed to be deeply harmful.<sup>379</sup> For the Pueblo, as with many other Indian tribes, the intergenerational transmission of knowledge and culture is what keeps the tribe vibrant and thriving as separate peoples. When cultural appropriation of stories, ceremonies, dances, and other facets deeply intertwined in cultural and religious life occurs, tribes experience this as very real harm to their identity and cultural and political sovereignty.<sup>380</sup> No U.S. intellectual property laws protect the Tewa against these forms of appropriation.<sup>381</sup> In December 2015, after years of resistance to change, the Koshare Boy Scouts cancelled their winter dances in response to a request from the Hopi Cultural Preservation Office.<sup>382</sup> The impact of this decision is not yet clear. Following the announcement, the Hopi expressed concern about the Koshares' failure to ask permission, and the Koshare Museum indicated its plan to correct Indian "misunderstandings."<sup>383</sup> As a writer for *Indian Country Today* opined, perhaps the hiatus in the performances will present an opportunity for Boy Scouts to listen to tribal voices and learn "ways to respect Native cultures without mimicry."<sup>384</sup> This may be an instance where the Indian and non-Indian parties are starting to move past a longstanding impasse on an issue of cultural appropriation, even if full understanding has not yet been achieved.

2. *The Problem of Traditional Knowledge.*—Traditional knowledge (TK) constitutes the "knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity."<sup>385</sup> Although traditional knowledge has not been a primary focus of this Article,

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379. For testimony and photos of the Koshares, in which they identify themselves as bands, chiefs, and braves of the Sioux, Kiowa, and Navajo, see *The World Famous Koshare Indian Dancers*, <http://www.angelfire.com/co2/koshare/koshare.html> [<http://perma.cc/LP4S-LR4S>]. For an account of the Koshares' relationship with the Zuni Tribe, see DELORIA, *supra* note 14, at 152.

380. See Riley, *supra* note 30, at 197–202 (describing the problem with appropriation and distortion).

381. See *id.* at 216–18 (describing how intellectual property laws generally, and copyright specifically, fail to protect the intangible, intergenerational, collective intellectual and cultural property of indigenous peoples).

382. Tara Houska, *Houska: Boy Scout Koshare Dancers Need to Stop Stealing from Natives*, INDIAN COUNTRY TODAY MEDIA NETWORK (Feb. 12, 2016), <http://indiancountrytodaymedianetwork.com/2016/02/12/houska-boy-scout-koshare-dancers-need-stop-stealing-natives-163406> [<http://perma.cc/9BU4-FJKK>].

383. *Id.*

384. *Id.*

385. *Traditional Knowledge*, WORLD INTEL. PROP. ORG., <http://www.wipo.int/tk/en/tk/> [<http://perma.cc/UC22-MBD2>]; see also Melissa K. Nelson, *Lighting the Sun of Our Future—How These Teachings Can Provide Illumination*, in ORIGINAL INSTRUCTIONS: INDIGENOUS TEACHINGS FOR A SUSTAINABLE FUTURE 1, 12–14 (Melissa K. Nelson ed., 2008) (describing indigenous knowledge systems as practical, often ecological knowledge for survival).

the well-known interrelationship of tribal lands and medicines—and their corresponding exploitation by non-Indian companies—constitutes another example of Indian appropriation.<sup>386</sup>

Increasingly, indigenous peoples seek to protect their TK, both for their own use and against exploitation by others.<sup>387</sup> One of the challenges is that third parties have asserted intellectual property rights to TK—such as medicinal plants, cosmetics, foods products,<sup>388</sup> and even genetics—originating in Indian communities.<sup>389</sup> For example, universities and corporations have entered indigenous communities without disclosure, consent, or compensation, harvested information and materials, and used these—sometimes with little transformation or innovation—to secure information used in obtaining valuable patents.<sup>390</sup> Patent law has, in turn, become more globally pervasive through WIPO and its Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).<sup>391</sup> In some instances, parties with patents to products—wild rice for example—originating in indigenous communities have used them to exclude Indians from their own ongoing use or in a way that causes contamination with genetically modified products.<sup>392</sup>

386. See Cynthia M. Ho, *Biopiracy and Beyond: A Consideration of Socio-Cultural Conflicts with Global Patent Policies*, 39 U. MICH. J.L. REFORM 433, 446–48 (2006) (describing the relationship between traditional knowledge and biopiracy); Nick Meynen, *Recognizing Biopiracy*, ENVTL. JUST. ORGANIZATIONS, LIABILITIES & TRADE (Aug. 20, 2012), <http://www.ejolt.org/2012/08/recognizing-biopiracy/> [<http://perma.cc/RRA8-UGHJ>] (defining the phenomenon of biopiracy to be “a situation where indigenous or peasant knowledge of nature . . . is used by others for profit, without permission from and with little or no compensation or recognition to the indigenous people”).

387. See JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 128–29 (1996) (telling the story of a drug company that developed a remedy for Hodgkin’s disease from vinca alkaloids derived from the rosy periwinkle of Madagascar).

388. See WORLD INTELLECTUAL PROP. ORG., INTELLECTUAL PROPERTY NEEDS AND EXPECTATIONS OF TRADITIONAL KNOWLEDGE HOLDERS: REPORT ON FACT-FINDING MISSIONS ON INTELLECTUAL PROPERTY AND TRADITIONAL KNOWLEDGE (1998–99), at 127 (2001) (discussing allegations of bioprospecting of rice by University of Minnesota scientists on the Leech Lake Indian reservation).

389. See, e.g., Hillary Cunningham & Stephen Scharper, *Patenting Indigenous People*, SUNS – S.N. DEV. MONITOR (Feb. 16, 1996), <http://www.sunsonline.org/trade/areas/enviro/m/02160396.htm> [<http://perma.cc/2LWU-T4BD>] (discussing the controversy of genetic patents in the context of First World exploitations of indigenous populations).

390. See generally Keith Aoki, *Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection*, 6 IND. J. GLOBAL LEGAL STUD. 11, 47 (1998) (writing specifically about commercial plant breeders using traditional indigenous varieties of seeds, making slight improvements on them, patenting them, and then selling them back to the indigenous communities for a profit).

391. See Madhavi Sunder, *The Invention of Traditional Knowledge*, LAW & CONTEMP. PROBS., Spring 2007, at 97, 112 (asserting that TRIPS has “focused on teaching the poor how to protect the intellectual property of the West”).

392. *Don’t Meddle with Manoomin Say Ojibwe*, INDIAN COUNTRY TODAY MEDIA NETWORK (July 15, 2002), <http://indiancountrytodaymedianetwork.com/2002/07/15/dont-meddle-manoomin-say-ojibwe-87891> [<http://perma.cc/MDW2-ZUM3>].

One response from intellectual property lawyers is that indigenous peoples should seek their own patents (or alternatively trademarks or geographic indicators) so that they can establish and exploit their own resources.<sup>393</sup> But to prosecute a patent, the applicant must show that its invention is a patentable subject matter (as defined by Congress), useful, novel, and not previously disclosed<sup>394</sup>—factors that may be difficult to demonstrate in the context of collective, intergenerational knowledge production. Secondly, the very cultural norms that give rise to the traditional knowledge—such as collective stewardship of resources, reciprocity with the natural world, and religious privacy<sup>395</sup>—may prevent the kinds of disclosure and use required to establish a patent.<sup>396</sup>

U.S. tribes and other leaders have taken a leading role in negotiations at WIPO regarding its emerging programs, norms, and agreements on acknowledging and protecting indigenous traditional knowledge.<sup>397</sup> Through extensive research and meetings with indigenous peoples, WIPO has developed technical assistance for those who would like to document their traditional knowledge<sup>398</sup> and a set of model laws for nation states regarding the protection of folklore.<sup>399</sup> Negotiations are currently underway in WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore towards the development of an international legal instrument for the protection of traditional cultural expressions and traditional knowledge, as well as to address the intellectual property aspects of access to and benefit sharing in genetic resources. Indigenous

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393. See Erica-Irene Daes, *Intellectual Property and Indigenous Peoples*, 95 AM. SOC'Y INT'L L. PROC. 143, 145 (2001) (commenting that proposals by the World Bank, among others, to create databases to disclose indigenous peoples' intellectual property in order to protect it is "wrong-headed").

394. 35 U.S.C. §§ 101–102 (2012).

395. Daes, *supra* note 393, at 144 (noting that one of the greatest challenges for indigenous peoples is keeping sacred knowledge private).

396. See *Don't Meddle with Manoomin Say Ojibwe*, *supra* note 392 ("The method of tinkering with genetics to thus gain legal standing to patent a living organism is troublesome . . . ; it crashes directly against the whole notion of collective community knowledge, of Native peoples and natural world development of food and medicinal crops."). See generally CLINT CARROLL, *ROOTS OF OUR RENEWAL: ETHNOBOTANY AND CHEROKEE ENVIRONMENTAL GOVERNANCE* (2015) (describing Cherokee values regarding wild plants and the natural world).

397. See *Indigenous and Local Community Experiences*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/tk/en/igc/panels.html> [<http://perma.cc/WN27-QP4L>] (listing presentations given by a panel of representatives of indigenous and local communities at the beginning of sessions of the WIPO Intergovernmental Committee regarding the "protection, promotion and preservation of traditional knowledge, traditional cultural expressions, and genetic resources").

398. *Documentation of Traditional Knowledge*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/tk/en/resources/tkdocumentation.html> [<http://perma.cc/WJ4M-BLGX>].

399. UNITED NATIONS EDUC., SCI., & CULTURAL ORG. & WORLD INTELLECTUAL PROP. ORG., *MODEL PROVISIONS FOR NATIONAL LAWS ON THE PROTECTION OF EXPRESSIONS OF FOLKLORE AGAINST ILLICIT EXPLOITATION AND OTHER PREJUDICIAL ACTIONS* (1985), <http://www.wipo.int/export/sites/www/tk/en/folklore/1982-folklore-model-provisions.pdf> [<http://perma.cc/4JAT-HX6V>].

peoples have been heavily involved in these discussions, with the Tulalip Tribes from Washington state leading the effort among U.S. tribes. From the perspective of the Tulalip representatives, the Tribe's treaty rights to hunt, fish, and gather extend to the right to regulate and protect the TK associated with lands—or stated another way, the Tribe's real property rights are deeply related to its intellectual property interests.<sup>400</sup>

The WIPO discussions are considering how indigenous peoples' traditional knowledge can be meaningfully protected within the boundaries of intellectual property law, or whether special measures are necessary and possible. A number of international instruments, including the Convention on Biodiversity and the U.N. Declaration on the Rights of Indigenous Peoples, may bear on these negotiations.<sup>401</sup> UNDRIP Article 31 provides:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions . . . They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.<sup>402</sup>

Indigenous leaders have called for the UNDRIP's provisions on “free, prior, and informed consent”<sup>403</sup> to govern in transactions and relationships among indigenous peoples and states or others who seek to obtain their traditional knowledge.<sup>404</sup> Some tribes have already put in place measures that use norms of informed consent and mutual benefit to regulate relationships with outsiders around TK.<sup>405</sup>

400. WIPO Panel on “Indigenous and Local Communities’ Concerns and Experiences in Promoting, Sustaining and Safeguarding Their Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources,” WIPO/GRTKF/IC/14/INF/5(a), 4 (June 29, 2009), [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_14/wipo\\_grtkf\\_ic\\_14\\_inf\\_5\\_a.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_14/wipo_grtkf_ic_14_inf_5_a.pdf) [<http://perma.cc/V5CP-XSND>] (“Under the treaty of Point Elliott, we have reserved rights and a government-to-government relationship. In the treaty, we never surrendered our right over TK, traditional cultural expressions (TCEs) or genetic resources. As governments, we have the right to govern our own systems of knowledge, expressions and genetic resources according to our tribal and customary laws. While our approach may be related to the specific historical relationship to the United States, we believe that this approach is also supported in the rights acknowledged for all indigenous peoples in the United Nations Declaration on the Rights of Indigenous Peoples.”).

401. See *Indigenous and Local Community Experiences*, *supra* note 397 (listing a panel by Mr. James Anaya, United Nations Special Rapporteur on the Rights of Indigenous Peoples given on February 3, 2014).

402. G.A. Res. 61/295, *supra* note 225, art. 31, ¶ 1.

403. *Id.* art. 28, ¶ 1.

404. *E.g.*, INDIAN LAW RES. CTR., POSITION PAPER ON INDIGENOUS PEOPLES’ RIGHT OF FREE PRIOR INFORMED CONSENT WITH RESPECT TO INDIGENOUS LANDS, TERRITORIES AND RESOURCES; WIPO Indigenous Panel on Free, Prior and Informed Consent: Experiences in the Fields of Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions: Experiences from the United States of America, WIPO/GRTKF/IC/16/INF/5(D) (May 3, 2010).

405. For example, after the Leech Lake Tribe became aware of University of Minnesota researchers’ interest in patenting a wild rice genome and the NorCal Corporation’s application for



3. *(Other) Indian Mascots: Beyond the Beltway.*—Beyond the Washington R-skins, there are hundreds if not thousands of universities and schools with Indian mascots that present much more complicated cases,<sup>406</sup> either because the institutions are not regulated by federal law, moves to change mascots would effectively mean banning its use by the institution, or because the mascots may fall along a continuum of acceptable to offensive. Where then do we place professional teams like the Cleveland Indians, Chicago Blackhawks, and Golden State Warriors; college mascots such as the Florida State Seminoles; and high school names ranging from the Natick Redmen (in Massachusetts) to Sequoyah Indians (in Oklahoma), or even the Tecumseh Savages,<sup>407</sup> located in the heart of Pottawatomie County, Oklahoma—home to numerous federally recognized tribes?<sup>408</sup>

With respect to professional or other teams that have or are applying for federal registration of Indian mascots as trademarks, the cases will undoubtedly be shaped by the ongoing litigation regarding the constitutionality of § 2(a), as well as by the courts' varying interpretations of it.<sup>409</sup> Depending on the outcome of the Blackhorse litigation, the TTAB, as well as reviewing courts, may have to consider hard questions: Is the word

a patent on a wild rice strain, both of which Leech Lake people believed would interfere with their traditional subsistence ricing activities, the Tribal Council adopted several resolutions calling for the protection and regulation of such activities. Leech Lake's Position on Wild Rice Genetic Research and Patenting, Leech Lake Tribal Council Resolution No. 02-79 (Feb. 28, 2002), [http://www.llojibwe.org/drm/ordinances/Resolution%20No.%2002-79%20\(2-28-02\)%20B-1.pdf](http://www.llojibwe.org/drm/ordinances/Resolution%20No.%2002-79%20(2-28-02)%20B-1.pdf) [<http://perma.cc/M58R-DL9X>]; see also Protection and Preservation of Wild Rice Beds, Leech Lake Tribal Council Ordinance No. 99-01 (July 10, 1998), [http://www.llojibwe.org/drm/ordinances/Wild%20Rice%20Beds%20-%20Ordinance%20No.%2099-01%20\(July%2010%201998\)%20B-1.pdf](http://www.llojibwe.org/drm/ordinances/Wild%20Rice%20Beds%20-%20Ordinance%20No.%2099-01%20(July%2010%201998)%20B-1.pdf) [<http://perma.cc/MY5A-RGSU>] (enacting protections for wild rice beds). Tribal governments, along with national and governmental organizations, are increasingly developing standards for researchers to obtain informed consent from and share the fruits of their research with the indigenous communities who comprise their subjects. *E.g.*, ELIZABETH ESTEY ET AL., CANADIAN INSTITUTES OF HEALTH RESEARCH, ABORIGINAL KNOWLEDGE TRANSLATION: UNDERSTANDING AND RESPECTING THE DISTINCT NEEDS OF ABORIGINAL COMMUNITIES IN RESEARCH 3–5 (2009), [http://www.cihr-irsc.gc.ca/e/documents/aboriginal\\_knowledge\\_translation\\_e.pdf](http://www.cihr-irsc.gc.ca/e/documents/aboriginal_knowledge_translation_e.pdf) [<http://perma.cc/R56B-3BGQ>]; HOPI CULTURAL PRES. OFFICE, PROTOCOL FOR RESEARCH, PUBLICATION AND RECORDINGS: MOTION, VISUAL, SOUND, MULTIMEDIA AND OTHER MECHANICAL DEVICES, <http://www8.nau.edu/hcpo-p/ResProto.pdf> [<http://perma.cc/H4PJ-3KEA>].

406. NAT'L CONG. OF AM. INDIANS, *supra* note 325, at 6.

407. TECUMSEH PUB. SCHOOLS, <http://www.tecumseh.k12.ok.us> [<http://perma.cc/4NRF-DTED>].

408. Gavin Clarkson, *Racial Imagery and Native Americans: A First Look at the Empirical Evidence Behind the Indian Mascot Controversy*, 11 CARDOZO J. INT'L & COMP. L. 393, 393–96 (2003) (as of 2003, “more than 10.6 percent of the high schools across the country had Indian mascots”). The NCAA has a well-known policy requiring schools with Indian mascots to consult with relevant tribes. Gary T. Brown, *Policy Applies Core Principles to Mascot Issue*, NAT'L COLLEGIATE ATHLETIC ASS'N (Aug. 15, 2005, 3:03 PM), <http://fs.ncaa.org/Docs/NCAANewsArchive/2005/Association-wide/policy+applies+core+principles+to+mascot+issue+8-15-05+ncaa+news.html> [<http://perma.cc/27SE-RHPM>].

409. See Volokh, *The Redskins and the Slants*, *supra* note 356 (describing recent disparagement cases revolving around § 2 of the Lanham Act's constitutionality).

“Indians” on its own disparaging?<sup>410</sup> Is Cleveland’s Chief Wahoo, with his maniacally grinning Indian in “red face” disparaging? Indian people—though certainly not a homogenous group nor in perfect alignment as to which claims are worthwhile to pursue—will continue to bring claims that will be analyzed and assessed according to the standards underlying the Lanham Act as they do in other contested areas. Other forms of advocacy, from shareholder actions to protests, will help professional sports-team owners and management decide whether it is worth it for them to continue to use marks that certain segments of the population may find disparaging, degrading, and offensive. These activities and attitudes will likely evolve over time, influenced as much or more by public perception as hard law.

In college sports, momentum began to move in the direction of limiting the use of Indian mascots a decade ago. The NCAA issued a 2005 decision to “prohibit NCAA colleges and universities from displaying hostile and abusive racial/ethnic/national origin mascots, nicknames or imagery at any of the 88 NCAA championships.”<sup>411</sup> Citing its own principles of “cultural diversity and gender equity,” “sportsmanship and ethical conduct,” and “nondiscrimination,” the NCAA provided that schools with Indian mascots or logos could continue to use them without penalty if they sought and received consent from the relevant Indian tribe.<sup>412</sup> If the relevant tribe did not consent, the offending institution had to either change the mascot or continue to use the mascot but be prevented from hosting NCAA postseason championship events.<sup>413</sup>

When first announced, NCAA’s mascot policy was very controversial in some quarters. The response was quite heated, for example, at the University of North Dakota, where influential alumni deeply attached to the Fighting Sioux mascot threatened to pull funding if the University abandoned it.<sup>414</sup> At the same time, American Indian students experienced racial hostility and backlash that may have been exacerbated by national and local attention

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410. In the United States, American Indians typically refer to themselves by their tribal identification first (Potawatomi, Cherokee, etc.). In broader terms, “Native American,” “American Indian,” and “Indian” are all used interchangeably by Indian people, and in our experience, none are considered to be disparaging.

411. Press Release, Nat’l Collegiate Athletic Ass’n, NCAA Executive Committee Issues Guidelines for Use of Native American Mascots at Championship Events (Aug. 5, 2005) <http://fs.ncaa.org/Docs/PressArchive/2005/Announcements/NCAA%2BExecutive%2BCommittee%2BIssues%2BGuidelines%2Bfor%2BUse%2Bof%2BNative%2BAmerican%2BMascots%2Bat%2BChampionship%2BEvents.html> [<http://perma.cc/7MX4-X2ZU>].

412. *Id.*

413. Brown, *supra* note 408.

414. Justin Klugh, ‘Fighting Sioux’ Debate Leaves University of North Dakota Nameless in Frozen Four, PHILLY.COM (Apr. 10, 2014, 10:00 AM), [http://www.philly.com/philly/sports/colleges/University\\_of\\_North\\_Dakota\\_goes\\_nameless\\_in\\_Frozen\\_Four\\_after\\_years\\_of\\_Fighting\\_Sioux\\_debate.html](http://www.philly.com/philly/sports/colleges/University_of_North_Dakota_goes_nameless_in_Frozen_Four_after_years_of_Fighting_Sioux_debate.html) [<http://perma.cc/89S4-AFQL>].

on the issue.<sup>415</sup> Ultimately, when the University could only obtain the consent of one of two federally recognized Sioux tribes to use the “Fighting Sioux” moniker, it decided to retire the name.<sup>416</sup> But all of these developments occurred alongside charges of political correctness on the one side, and racial discrimination on the other.

By contrast, the longstanding relationship between Florida State University and Seminole Tribe of Florida appears to have been enhanced by the NCAA policy.<sup>417</sup> Meetings with the Seminole Tribe led the team to adopt uniforms with Seminole patchwork, retire a headdress (Seminoles never wore them), and change the booster club from the “Scalp Hunters” to the “Spirit Hunters.”<sup>418</sup> The team checks with the tribe regularly regarding depictions of Seminole, their history, and culture.<sup>419</sup> The relationship is ongoing and stretches beyond athletics to the rest of the university through a new Seminole history course, honorary degrees for esteemed tribal leaders, and gifts exchanged between the university and tribal council.<sup>420</sup> The university’s MBA program even highlights the Seminole’s success in business.<sup>421</sup>

Now in its tenth year, the NCAA policy appears to be fostering change but remains deeply contested in some instances. In the most promising examples, the policy has fostered relationship building and advances in education, consistent with tribal self-determination and antidiscrimination norms.<sup>422</sup>

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415. See *Backtalk: Reader Comments on ‘Fighting Sioux’ Case*, INDIANZ.COM (Sept. 30, 2005), <http://www.indianz.com/News/2005/010555.asp> [<http://perma.cc/9JC7-HXX8>] (reporting on some of the racist, anti-Indian comments that were left on a local newspaper’s story on the controversy over the mascot change).

416. See Emma G. Fitzsimmons, *North Dakota and N.C.A.A. Are at Odds Again over University’s Sioux Mascot*, N.Y. TIMES (July 21, 2011), <http://www.nytimes.com/2011/07/13/us/13sioux.html> [<http://perma.cc/9PJ7-JDKS>] (describing the state law recently passed mandating that the University keep the name only after the University had agreed to retire it).

417. See Robert Andrew Powell, *Florida State Can Keep Its Seminoles*, N.Y. TIMES (Aug. 24, 2005), <http://www.nytimes.com/2005/08/24/sports/florida-state-can-keep-its-seminoles.html> [<http://perma.cc/NHW7-J9EQ>] (noting that the NCAA initially banned Florida State from using the Seminole nickname, but reconsidered its decision after an appeal).

418. Chuck Culpepper, *Florida State’s Unusual Bond with Seminole Tribe Puts Mascot Debate in a Different Light*, WASH. POST (Dec. 29, 2014), [https://www.washingtonpost.com/sports/colleges/florida-states-unusual-bond-with-seminole-tribe-puts-mascot-debate-in-a-different-light/2014/12/29/5386841a-8eea-11e4-ba53-a477d66580ed\\_story.html](https://www.washingtonpost.com/sports/colleges/florida-states-unusual-bond-with-seminole-tribe-puts-mascot-debate-in-a-different-light/2014/12/29/5386841a-8eea-11e4-ba53-a477d66580ed_story.html) [<http://perma.cc/ZE8W-C7AH>].

419. *Id.* It should be noted that the Seminole Tribe of Oklahoma opposes the use of all sports mascots. *Id.*

420. *Id.*

421. *Id.*

422. See Sonny Skyhawk, *Why Is the Debate Over the University of North Dakota’s Fighting Sioux Mascot Important?*, INDIAN COUNTRY TODAY MEDIA NETWORK (July 2, 2012), <http://indiancountrytodaymedianetwork.com/2012/07/02/why-debate-over-university-north-dakotas-fighting-sioux-mascot-important-121802> [<http://perma.cc/5GPR-AJ55>] (voicing concerns about disrespect, disempowerment, and racism).

The use of Indian mascots by high schools, as well as middle and elementary schools raises many of the same issues mentioned above, while also triggering concerns about the particular vulnerabilities of teenagers and children.<sup>423</sup> At the secondary school level, there appears to be great diversity in the demographics of the schools with Indian mascots. A 2003 study found that “more than 10.6 percent of the high schools across the country had Indian mascots.”<sup>424</sup> Of these, 94% were racial in nature (referring to Indians generally, with names such as Indians, Warriors, Braves, and R-skins), whereas only 6% were tribal (referring to specific Indian tribes, such as Mohawks, Seminoles, and Apaches).<sup>425</sup> Some of these high schools are located on reservations, while others are in communities with small or nonexistent Indian populations.

We do not contend that every mascot that relates to Indians is offensive and ought to be changed. Undoubtedly, some high schools with large Indian populations prefer to play under these names. For many, it is a symbol they can identify with, that gives them pride, ties them to their history in a particular place, and is not a mockery or a symbol of disempowerment. For some, it is as simple as not finding the mascots offensive or feeling that time and resources should be put towards different causes.<sup>426</sup> For others, the use of the name may be evidence of a reclaiming, similar to new meaning given to terms like *queer* and *bitch* in the last few decades.<sup>427</sup>

These are not easy cases, either legally or otherwise. Miwok teenager Dakota Franklin Kicking Bear Brown has spoken prominently and from the heart about the experience of being a Native teenager on a football team that plays against another team called the R-skins.<sup>428</sup> Kids from his own school dressed up a female student as a “Pocahottie” and pretended to attack her on the field, while opposing fans chanted “Kill the R-skins.” He explained feeling fear, shame, pain, and invisibility: “All of these actions, along with many more, hurt my heart. All of these screaming fans don’t know how offensive they are. Or that they are even in the presence of a Native. Most

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423. If Indian mascots have the potential to inflict further harm on American Indian youth, they should be treated with even more scrutiny. In almost every respect, Indian youth are the most vulnerable in the United States, particularly in regards to the epidemic rates of suicide. Stephanie Woodard, *Suicide is Epidemic for American Indian Youth: What More Can Be Done?*, NBC NEWS (Oct. 10, 2016, 6:11 AM), [http://investigations.nbcnews.com/\\_news/2012/10/10/14340090-suicide-is-epidemic-for-american-indian-youth-what-more-can-be-done](http://investigations.nbcnews.com/_news/2012/10/10/14340090-suicide-is-epidemic-for-american-indian-youth-what-more-can-be-done) [<http://perma.cc/SU6C-QQJF>].

424. Clarkson, *supra* note 408, at 395.

425. *Id.* at 396.

426. *See, e.g.*, Dennie, *supra* note 331, at 212 (describing a survey in which 67% of Native American respondents living on reservations approved of the use of Native American mascots); Shapira, *supra* note 332 (quoting a Red Mesa man unopposed to the local school’s R-skins mascot as saying, “We have far more important issues to expend our energy on” than a team name).

427. *See* Alan R. Velie, *Indian Identity in the Nineties*, 23 OKLA. CITY U. L. REV. 189, 204 (1998) (noting that Indian college students formed “subgroups” and called themselves “Skins”).

428. Brady, *supra* note 5.

of the time, they don't even know that Natives still exist."<sup>429</sup> In Dakota's view, they are ignorant of the many social and educational issues Indian students face as a group.<sup>430</sup>

Of course, high schools and middle schools around the country are differently situated. Red Mesa School on the Navajo Reservation uses the R-skins as its mascot, and Navajo students have been very vocal about supporting that name.<sup>431</sup> In the capital of the Cherokee Nation, the Sequoyah Schools use the "Indians" as their mascot.<sup>432</sup> For the most part, news accounts and community attitudes suggest that students, parents, and tribal leaders alike support those teams and their names.<sup>433</sup> It may be that in a community with a significant Indian population, these issues play out differently than in other places.<sup>434</sup> Students at Red Mesa are immersed in Navajo life on a daily basis, and Navajo students are surrounded by other Navajo students. Students at the Sequoyah Schools can study Cherokee language and participate in activities of the Cherokee Nation, which is a major force in the region. As Adrienne Keene suggests, context matters, and "[w]hen your audience, team, and school is nearly 100% Native," students are less likely to see whites misrepresenting their cultures or to fear racial violence.<sup>435</sup>

While we do not have a universal judgment to offer about these schools or their mascots, we suggest that, as a matter of best practices, schools could consider a number of questions when they form policy on school mascots and that such policies should strive to enable norms of antidiscrimination and tribal self-determination. Some salient factors might include: Has the relevant Indian community or an individual student expressed harm, discrimination, or offense arising from the use?<sup>436</sup> Has the school or school system consulted with the relevant tribes, families, and students? What percentage of the surrounding population (town, county, or state) is Native American? What percentage of the student body is Native American? What is the origin

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429. *Id.*

430. *Id.*

431. Shapira, *supra* note 332.

432. *Sequoyah Fight Song*, SEQUOYAH SCHOOLS, <http://sequoyah.cherokee.org/Athletics/Sequoyah-Fight-Song> [<http://perma.cc/6FNW-95QJ>].

433. *See, e.g.*, Gregg Simmons, *Indian Mascot Resolution Causes Controversy, Fails*, CHEROKEE PHOENIX (Nov. 10, 2005, 2:06 PM), <http://www.cherokeephoenix.org/Article/index/1180> [<http://perma.cc/P5G9-7ZAW>] (describing opposition to a resolution to change the Sequoyah Schools' mascot from the Indians to the Eagles).

434. *See* Adrienne Keene, *Missing the Point on the Red Mesa Redsk\*ns*, NATIVE APPROPRIATIONS (Oct. 28, 2014), <http://nativeappropriations.com/2014/10/missing-the-point-on-the-red-mesa-redskins.html/> [<http://perma.cc/2MMB-YBXJ>] (arguing that Native people living on reservations might feel differently than Native people living elsewhere in part because the former don't face racism and stereotyping in the same way as the latter).

435. *Id.*

436. *See* Clarkson, *supra* note 408, at 399 (discussing the harm revealed by a *Sports Illustrated* poll of Native people regarding the word R-skin).

of the mascot? Is the mascot tribal or racial in nature? If it is tribal, does the designated tribe have input into the depiction of the mascot and the use of potentially sacred or religious iconography, such as feathers or drums?

Though these roughly sketched questions do not fully answer the dilemma of how to approach the use of Indian mascots in secondary schools, the literature emphasizes that the most salient question in the educational context is whether the mascot impedes the ability of Indian students to learn and fully thrive in an educational environment.<sup>437</sup> We add to that the importance of incorporating tribal voices and considering the rights of local tribes to participate in decisions affecting them.

#### D. *Drawing from Tribal Law*

Native people who are enmeshed in their cultures and tribal communities are significantly driven by considerations of tribal law<sup>438</sup> and tribal norms<sup>439</sup> regarding what is considered to be permissible behavior, particularly when it comes to cultural matters. Several of the examples above have already suggested a role for tribal law in resolving or informing cultural appropriation issues. Yet it is also true that tribal law's influence over non-Indians is limited because of strict jurisdictional rules. In general, tribes do not have regulatory jurisdiction over non-Indians outside of their reservations (and increasingly have limited jurisdiction, even within them).<sup>440</sup> As a result, even when there is a tribal law regarding appropriation that might provide limits and remedies in cases of appropriation, these cannot be applied extraterritorially.

The most famous case highlighting this divide is that of *In re Estate of Tasunke Witko*,<sup>441</sup> also known as the *Crazy Horse Malt Liquor* case. In this particularly famous example, descendants of the Lakota religious leader Crazy Horse challenged the use of the revered Sioux leader, Crazy Horse, to sell a high alcohol content malt liquor in stores bordering the Sioux reservation.<sup>442</sup> Relatives explained that Crazy Horse fiercely protected his likeness and also opposed alcohol consumption, a well-known scourge to Indians.<sup>443</sup> The descendants first sought and won protection in the legislative

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437. See Carpenter, Katyal & Riley, *supra* note 29, at 1109.

438. See generally MATTHEW L.M. FLETCHER, *AMERICAN INDIAN TRIBAL LAW* (2011) (examining modern tribal government activities and exploring how disputes are resolved within American Indian nations).

439. See generally JOHN BORROWS, *CANADA'S INDIGENOUS CONSTITUTION* 23–58 (2010) (distinguishing among various types of indigenous custom, law, and norms); JOHN BORROWS (KEGEDONCE), *DRAWING OUT LAW: A SPIRIT'S GUIDE* (2007) (engaging with indigenous customary law).

440. Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1189–90 (2010).

441. 23 Indian L. Rptr. 6104 (Rosebud Sioux Sup. Ct. 1996) (en banc).

442. *Id.* at 6105–06.

443. *Id.* at 6105.

process when Congress passed a law that prohibited the use of Crazy Horse's name and likeness to sell alcohol.<sup>444</sup> But Hornell prevailed in a First Amendment lawsuit, and the law was struck down as unconstitutional.<sup>445</sup>

Subsequently, the descendants sued in tribal court, alleging that, as a matter of privacy, publicity, and other rights under Lakota law, the Hornell Brewing Company should not be able to continue in the unauthorized use of the name and image of Crazy Horse and Sioux warriors fighting the U.S. Cavalry in the Lakota's sacred Black Hills to sell malt liquor.<sup>446</sup> Remedies were available under tribal law that would not be provided for in the state or federal courts. Among other things, Crazy Horse's relatives sought restorative justice for the transgression, including an apology, blankets, sweet grass, and other goods.<sup>447</sup> Moreover, there were causes of action for violations of publicity rights and reputation that were cognizable under Lakota law but not elsewhere. Despite the opinions of the tribal court and the Rosebud Sioux Supreme Court, Hornell continued to challenge the tribe on jurisdictional grounds.<sup>448</sup> Ultimately, the Eighth Circuit held that the tribal court did not have jurisdiction to hear the case because the company was located off the reservation.<sup>449</sup> This prevented the tribal law cause of action from being heard and also changed the parameters for restorative justice.<sup>450</sup> In this and in countless other matters, indigenous peoples have tried to assert protections over their songs, stories, prayers and symbols based on indigenous cosmologies or tribal law, but this has been exceedingly difficult.<sup>451</sup>

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444. Hornell Brewing Co. v. Brady, 819 F. Supp. 1227, 1230–31 (E.D.N.Y. 1993).

445. *Id.* at 1228.

446. *Witko*, 23 Indian L. Rptr. at 6106. Professor Frank Pommersheim was the author of the Rosebud Sioux Supreme Court decision. Frank Pommersheim, *Tribal Court Jurisprudence: A Snapshot from the Field*, 21 VT. L. REV. 7, 28–30 (1996) (“The breadth of the theory of this case reflects a unique confidence in the competence of the Rosebud Sioux Tribal Court to adequately hear claims rooted in dominant society jurisprudence, Lakota tradition and custom, and federal law.”); see also Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse*, 27 CONN. L. REV. 1003, 1005–06 (1995) (telling the story behind the famous law suit); Joseph William Singer, *Publicity Rights and the Conflict of Laws: Tribal Court Jurisdiction in the Crazy Horse Case*, 41 S.D. L. REV. 1, 3 (1996) (using the *Crazy Horse* case to argue “that state courts should refrain from asserting jurisdiction over claims which arise under tribal law if there is an available tribal court ready and able to hear the case and litigation in that court will not be unfair to the defendant”).

447. *Witko*, 23 Indian L. Rptr. at 6106.

448. Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087, 1091 (8th Cir. 1998).

449. *Id.* at 1093.

450. See Elizabeth Stawicki, *Crazy Horse Dispute Settled*, MINN. PUB. RADIO (Apr. 26, 2001), [http://news.minnesota.publicradio.org/features/200104/26\\_stawickie\\_crazyhorse/?refid=0](http://news.minnesota.publicradio.org/features/200104/26_stawickie_crazyhorse/?refid=0) [<http://perma.cc/368Y-UZ94>].

451. See, e.g., Arewa, *supra* note 21, at 550–52 (discussing the challenges of applying copyright law in music, especially across differing cultural norms about borrowing, sampling, privacy, and authorship).

Despite these challenges, tribal law has an important role to play in defining the limits of intangible property protection, both inside and outside of Indian country. Tribal notions of ownership can define which individuals, families, and clans, for example, can utilize certain designs in tipi adornment.<sup>452</sup> Tribal law similarly will speak to questions of ceremonial obligations and duties, and who is and is not allowed to conduct or participate in ceremonies. Tribal conceptions of justice can drive decisions about the ability of individual tribal members to commodify and sell specific goods, or designate how goods can and should be reproduced so as not to violate tribal norms.

Even where tribal law is not formally applicable, the norms of harm, duty, responsibility, and justice underlying the law can inform the actions of both tribal members and those who they come in contact with on issues of cultural appropriation. Returning to the Hopi *Katsinam*, for example, although American and international law failed to produce results for the Hopi, the story did not end there. One of the wealthy art dealers that had purchased the *Katsinam* for private use, Monroe Warshaw, stated publicly that he would probably never return the *Katsinam* he purchased to the Hopi.<sup>453</sup> Warshaw was subsequently vilified in the press. In an unexpected move, he took a trip out West, making several visits to Hopi. Although he had stated at one point that “[t]he culture that created a work might not necessarily be the best one to preserve it,”<sup>454</sup> Warshaw ultimately had a change of heart after being invited to attend a sacred Hopi ceremony. Leigh Kuwanwisiwma, director of the Hopi Cultural Preservation Office simply explained that: “He became convinced, and that’s what happened.”<sup>455</sup> After Warshaw’s trip to Hopi, he returned two objects—which he purchased for around \$40,000—at no cost to the tribe.<sup>456</sup> Kuwanwisiwma said that he and the Hopi people “appreciated” Warshaw’s actions.<sup>457</sup> And though he would not be specific about what would happen to the *Katsinam*, he said they “will be kept safe.” He stated further: “The sacred objects will be returned to one of the Hopi villages, to the Kachina priests who have stewardship over these types of items.”<sup>458</sup>

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452. See Candace S. Greene & Thomas D. Drescher, *The Tipi with Battle Pictures: The Kiowa Tradition of Intangible Property Rights*, 84 TRADEMARK REP. 418, 431–32 (1994).

453. Larry Hendricks, *Art Dealer Returns Hopi Sacred Artifacts*, ARIZ. DAILY SUN (Oct. 6, 2013, 5:15 AM), [http://azdailysun.com/news/local/art-dealer-returns-hopi-sacred-artifacts/article\\_503390c2-2e5c-11e3-a799-001a4bcf887a.html](http://azdailysun.com/news/local/art-dealer-returns-hopi-sacred-artifacts/article_503390c2-2e5c-11e3-a799-001a4bcf887a.html) [<http://perma.cc/5SUE-BDPZ>].

454. *Id.*

455. *Id.*

456. *Id.*

457. *Id.*

458. *Id.*



Warshaw was ultimately touched by Hopi law—the system of duties and responsibilities that make Hopi who they are. Experiencing this enabled Warshaw to understand the depth of connection the Hopi have to the *Katsinam* and the vital importance they play in the community. Today, the preservation and use of the *Katsinam* are again subject to Hopi law, which will dictate their future care and destiny.

#### IV. Conclusion

If we take seriously what Indian people are saying, it appears that, in many instances, Indian appropriation diminishes the well-being of individual Indian people and, correspondingly, the health, welfare and self-determination of tribes as collectives. The very phenomenon of Indian appropriation, in our view, is deeply grounded in historical circumstances that are inextricably attached to law. Native peoples continue to assert that some instances of appropriation—in cases of land, material culture, and intangible cultural property—cause harm to tribal communities. This harm can take many forms and does not impact all American Indians in the same way. Some are concerned about harm to the tribe and universe, focusing on the role that rituals and ceremonies play in keeping the tribe and all the earth in balance. Others describe how acts of appropriation and misrepresentation foster humiliation and discrimination, particularly in the educational context.<sup>459</sup>

We have argued that the contemporary phenomenon of cultural appropriation is deeply grounded in a much longer and continuing phenomenon of Indian appropriation—or process by which the U.S. legal system has long facilitated the taking of Indian lands, culture, and identity by non-Indians for their own purposes. We have also identified responses to the problem of Indian appropriation, both legal and nonlegal, by Indian peoples who seek to remedy or mitigate some of these wrongs.

There are many blurry lines among questions of what is or should be actionable in the cultural appropriation context. But in some instances—applicability of trademark law to the R-skins case, for example—existing laws, or even modest extensions of those laws, can offer some redress for Indian appropriation and begin to heal some of the dramatic, historical wrongs of the past. These moments may also inspire the United States to fully embrace its obligation to fulfill its trust responsibility toward Indian peoples.<sup>460</sup> Remedies in these cases, and others like them, advance Indian sovereignty, autonomy, governance, and self-determination. Thus, they provide the best opportunity possible for the cultural survival of Indian people.

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459. See sources cited *supra* note 35.

460. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

At the same time, some historical wrongs have become so deeply embedded that the law and society itself are tainted with that history.<sup>461</sup> The First Amendment does not adequately protect Indian religions and the Fifth Amendment does not protect Indian aboriginal lands. Intellectual property doctrines, like copyright and patent, fail to meet the real needs of tribes when it comes to redressing the mimicry of Indian ceremonies or commodification of Indian medicines. In these instances where legal doctrine presents a poor fit, we are inspired by the thoughtfulness, passion, and activism of Indians, tribes, and allies who continue to push the bounds of international, domestic, and tribal law while also exploring other mechanisms—social media, art, comedy, film, and technology—to highlight ongoing wrongs and push for change.

Native studies scholar Bruce Duthu has said, “When lands have been lost and cultures have been decimated, one of the last things left to be appropriated from Native cultures is their very dignity.”<sup>462</sup> American Indian land, culture, and identity have all been acquired by non-Indians for their own purposes, whether the settlement of the country or development of a broader American identity, often at the cost of the well-being of Indians. Today, many American Indians have decided that it is time for the legacy of Indian appropriation to end. Through their advocacy, legal and nonlegal, indigenous peoples are resisting the longstanding concept that all things Indian are free to be defined or taken by non-Indians. They are claiming the pieces of land, culture, and identity—fractured, diminished, and changed—and reassembling and reconfiguring them to support indigenous self-determination today. American Indians are now reclaiming *Red*, with all of its challenges and possibilities, for the next generation.

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461. In the U.S. Capitol building, from whence Congress exercises its plenary power over Indians, hangs a painting entitled, *Columbus and the Indian Maiden*, created in 1875 by the Italian painter Constantio Brumidi. The image is one personalizing his ostensible discovery of the “New World” through the body of an Indian woman, as he lifts her veil and looks out upon the landscape. Even today, the painting hangs over the door of the Indian Affairs Committee Room.

462. Paul Hiebert, *A Native American Expert on No Doubt’s Controversial Video and Cultural Appropriation*, FLAVORWIRE (Nov. 12, 2012, 12:00 PM), <http://flavorwire.com/344807/what-a-native-american-expert-thinks-about-that-controversial-no-doubt-music-video> [<http://perma.cc/7WSN-29VT>].