RETURNING THE LAND: NATIVE AMERICANS AND NATIONAL PARKS

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> The best things we experience, the best things we know are immaterial things. They're ideas or emotions . . . if you look at the earth, there are certain places that seem to have power, and we don't know what kind of power it is except you have a different feeling, you feel energized. . . . How do you approach that, take something that's larger in yourself and create a vehicle whereby you can be in communion with it? . . . I think the various tribes located these various places.
>
> — Vine Deloria, Jr.[1]

INTRODUCTION

On April 12, 2021, *The Atlantic* published an article entitled "Return the National Parks to the Tribes."[2] The article makes a case that the return of the National Parks to Native American Nations "ensure[s] unfettered access to tribal homelands" for Native people, is a form of "deeply meaningful . . . restitution," and "would be good not just for Natives, but for the parks as well" since "Indian communities have become adept at the art of governance."[3] Such governance has been in the face of "legal, political, and physical struggle," and a "[transfer of] the parks to the tribes would protect them from partisan back-and-forth in Washington."[4] David Treuer, the author of the article,[5] notes that "[t]he federal government should continue to

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1. Sacred Land Film Project, *Vine Deloria Jr. on Our Relationship to the Unseen*, YOUTUBE (May 7, 2015), https://youtu.be/l-nVoQ4cZBE (from a June 1997 recording with Native American intellectual Vine Deloria, Jr.).

2. David Treuer, *Return the National Parks to the Tribes*, ATLANTIC, May 2021, at 31.

3. *Id.* at 44.

4. *Id.*

5. *Id.* at 31.

offer some financial support for park maintenance, in order to keep fees low for visitors . . . ."[6] Still, this hint at the real difficulties of aforementioned restitution is a brush upon the legal, historical, and cultural intricacies of his proposal. These difficulties far exceed monetary concerns and are so complex that the author could not have possibly hoped to detail them in one *Atlantic* piece.[7] Some questions include:

> [H]ow did the relative power held by the NPS [National Park Service], local governments, Indian tribes, and conservationists change? When and why? Do morality and holding power affect environmental tactics, and how do politics and ethics influence governmental decisions, regulations, and obligations? In what areas are Indians and the general public in agreement over common interests? Where do they face inherent conflicts? What ideals and imperatives drive the NPS, tribes, and environmentalists? . . . What attitudes, myths, and stereotypes influence our values about land, government, and ethnic minorities? Who is an ethnic minority, and what makes a bureaucracy tick?[8]

To spelunk through that cave of problems, it is pertinent to understand what Native Nations share with National Parks. In 1832, George Catlin, the former lawyer turned adventurist and realist painter,[9] wished for conservation of the American West *and* the American Indian.[10] Yet, the landscape of North America, the wildlife, and Native Nations were all on the brink of destruction in the late nineteenth century.[11] From that historical

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6. *Id.* at 44.

7. *See* ROBERT H. KELLER & MICHAEL F. TUREK, AMERICAN INDIANS AND NATIONAL PARKS, at xiv-xv (1998) ("What obligations, if any, do others owe to people displaced by parks? Do aboriginal people have special rights to their former resources and homeland? [T]o self-determination? If so, how is this exercised and regulated? Are resource preservation and native economic development always incompatible? What is the role of human culture in natural ecosystems? Will preservation of nature enhance and protect local cultures? Who plans? Who decides? Who has political power? Does an assumption that native people live in harmony with nature fit reality? Do environmentalists have an overly romantic view of natives and ecology 'before the white man came'? What is the role of national parks in cultural preservation and historical interpretation?"); *see also* RESIDENT PEOPLES AND NATIONAL PARKS: SOCIAL DILEMMAS AND STRATEGIES IN INTERNATIONAL CONSERVATION, at xv-28 (Patrick C. West & Steven R. Brechin eds., 1991) (exploring the questions within Keller and Turek's novel in the international context).

8. KELLER & TUREK, *supra* note 7, at xv (explaining what to ask when examining park and Indian relationships).

9. *See* Biography of George Catlin, SMITHSONIAN AM. ART MUSEUM, https://americanart.si.edu/artist/george-catlin-782 (last visited Nov. 12, 2021).

10. KELLER & TUREK, *supra* note 7, at xi.

11. *Id.* at xii.

tipping point, connections with National Parks grew in abundance. Now, Native Nations control 56 million acres of American land, and the National Parks account for 85 million acres.[12] Parks, like reservations, were created mainly by presidential executive orders.[13] Indians and parks share federal supervision[14] under the same branch of government, leaving both at risk to potential conflicts of interest, as well as susceptibility to the whims of the Department of Interior's development plans.[15] Native Nations face problems today, including the shortest life expectancy, the highest rates of violence, suicide, unemployment, and much more.[16] Similarly, the National Parks are afflicted by mismanagement, excessive tourism, traffic concerns, and pollution.[17] Native Nations typically receive little monetary help from Congress, and the National Park Service[18] "receives an even smaller percentage of the federal budget."[19]

Until 1998, almost no literature linked these two facets of life and culture in America.[20] In what was the first of its kind, authors Robert Keller and Michael Turek collected many of these connections between Native Nations and Parks into *American Indians and National Parks*.[21] They discovered a large scope and variety of relationships between Native Nations and Parks[22]

12. *Id.*; *see also* Treuer, *supra* note 2, at 44.

13. KELLER & TUREK, *supra* note 7, at xii.

14. About the Department of Interior, U.S. GOV'T SERV. & INFO., https://www.usa.gov/federal-agencies/u-s-department-of-the-interior (last visited Nov. 12, 2021) ("The Department of the Interior manages public lands and minerals, national parks, and wildlife refuges and upholds Federal trust responsibilities to Indian tribes and Native Alaskans.").

15. KELLER & TUREK, *supra* note 7, at xii.

16. *Id.*

17. *Id.*

18. About the National Park Service, U.S. GOV'T SERV. & INFO., https://www.usa.gov/federal-agencies/national-park-service (last visited Nov. 12, 2021) ("The National Park Service cares for the more than 400 national parks in the United States. The National Park Service partners with local communities to assist in historic preservation and the creation and maintenance of recreational spaces.").

19. KELLER & TUREK, *supra* note 7, at xii.

20. *Id.*

21. *Id.* at xiii.

22. *Id.* ("Of the 367 Park Service units in 1992, at least 85 had some relationship with Indian tribes [. . .] We found parks totally inside Indian reservations and Indian reservations totally inside parks. There are parks sharing a common border with one tribe, parks surrounded by a half-dozen or more different tribes, and tribes encircled by the NPS. In places, a tribe may have title to park land. Elsewhere Indians may lease land to the NPS, or the service may lease land to Indians. Sometimes Indians manage park facilities; elsewhere the NPS trains rangers for tribal parks.").

because, for all of their parallels, Native Nations and Parks can often be at odds with one another.[23]

Catlin imagined a harmony "by some great protecting policy of government . . . a magnificent park, where the world could see for ages to come the native Indian in his classic attire, galloping his wild horse, with sinewy bow, and shield and lance, amid the fleeting herds of elk and buffalo."[24] Aside from the goal of viewing a colonized stereotype of Native Americans, it took 150 years for the government even to adopt a "park policy toward native people," all the while still overlooking tribal welfare and much less lacking a congenial Native adapted to life within a park.[25] Catlin was spot on with Indians being intimate with National Parks, despite disparate needs.[26] In 1916, Congress created the NPS, placing it within the Department of the Interior and making it a next-door neighbor of the Bureau of Indian Affairs.[27]

Federal Indian policy began many years prior, ostensibly with the transfer of the Indian Office from the War Department to the Department of Interior in 1849.[28] Along the way, there came a shift in the Federal approach with Natives—from promoting trade with them, to seeking their outright removal from the path of the expansive desires of colonizers.[29] With this new attitude came the idea of reservations, an official policy of "protecting" Indians and their welfare by relocating them to faraway lands.[30]

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23. *Id.* at xiii-xiv ("The list of Indian/Park Service conflicts and disputes is long: boundary lines, land claims, rights-of-way, hunting and wildlife management, grazing permits, water rights, employment preference, craft sales, cultural interpretation, sacred sites and the disposition of cultural artifacts, entrance fees, dams, the promotion of tourism, commercial regulation, 'squatting' in parks, relations with tribal parks, and resentment over past injustices.").

24. *Id.* at xi.

25. *Id.* at 17-18.

26. *Id*. at 18.

27. *Id. See Bureau of Indian Affairs (BIA)*, U.S. DEP'T INTERIOR INDIAN AFFS., https://www.bia.gov/bia (last visited Nov. 12, 2021) ("In 1849, the BIA was transferred to the newly created U.S. Department of the Interior. For years thereafter, the Bureau was known variously as the Indian office, the Indian bureau, the Indian department, and the Indian Service. The Interior Department formally adopted the name 'Bureau of Indian Affairs' for the agency on September 17, 1947.").

28. KELLER & TUREK, *supra* note 7, at 18.

29. *Id.*

30. *Id.*

Meanwhile, the National Parks were created with Yosemite and Yellowstone in 1864 and 1872, respectively.[31] After inheriting land surrendered by Natives in bloodshed,[32] President Lincoln created Yosemite and gave it to California to manage; it represented the worst outcome for Native/white relations and made it "difficult for any park to build a worse record."[33] In 1890, 40 years after the Mariposa Indian War that preceded Yosemite's founding in 1864, dozens of Natives who still wandered Yosemite's vast lands petitioned Congress for a million dollars in gold for victimization, tyranny, and oppression.[34] The petition was futile, and still, "[t]oday Indians at Yosemite demand that their story be told accurately and their culture be recognized."[35] Less bloody was the founding of Yellowstone, America's first national park;[36] except, not only were Natives unwelcome in the park,[37] the Nez Percé incident[38] in 1877 rewrote the record to exclude Native connection to Yellowstone altogether.[39] Such problems persisted in other park foundations as well.[40] Even today in Grand Canyon National Park (GCNP), Indian welfare is a neglected afterthought in the shadow of a sinister foundation. As Sarah Krakoff writes:

> The GCNP as a whole is ringed by industrial landscapes (uranium mines, coal-fired power plants, and coal strip mines) that make possible the West's

31. *Id.* at 20; Act of June 30, 1864, Pub. L. No. 159, 13 Stat. 325 ("Authorizing a Grant to the State of California of the Yo-Semite Valley, and of the Land embracing the Mariposa Big Tree Grove."); Act of Mar. 1, 1872, ch. 21-24, 17 Stat. 32 ("To set apart a certain Tract of Land lying near the Head-waters of the Yellowstone River as a public Park.").

32. KELLER & TUREK, *supra* note 7, at 20-21 (detailing the Mariposa Indian War).

33. *Id.* at 20 ("[At Yosemite, there was] prior occupation with extensive horticulture by Indians; brutal military conquest of the land; a park created with no regard for past or present native claims; an Indian petition for redress of grievances; the ignoring of the petition by Congress; repeated efforts by park rangers to evict remnant villages; Park Service neglect of ethnographic interpretation; and belated NPS recognition that Yosemite was, and is, important to aboriginal people.").

34. *Id.* at 21.

35. *Id.* at 22.

36. *Id.*

37. *Id.*

38. *Id.* at xi; *see also Nez Perce fight Battle of the Big Hole*, HISTORY, https://www.history.com/this-day-in-history/nez-perce-fight-battle-of-big-hole (last visited Feb. 4, 2022) ("Having refused government demands that they move to a reservation, a small band of Nez Perce tribesmen clash with the U.S. Army near the Big Hole River in Montana. The conflict between the U.S. government and the Nez Perce was one of the most tragic of the many Indian wars of the 19th century.").

39. KELLER & TUREK, *supra* note 7, at 25 (explaining that through taboo and misconception, the general public justified "a national park that excluded natives.").

40. *Id.* (explaining the foundation of Rainier National Park and the lack of truth regarding Indian heritage and culture there).

> metropolises of Phoenix, Tucson, Las Vegas, and Los Angeles. The Havasupai, Hualapai, Hopi, and eight other American Indian Tribes were violently displaced from their aboriginal lands in order to create "public" land that became the basis for the National Park, even as their resources were recruited to build up the West's cities and suburbs. Within the Park, racial and gender hierarchies play out in ways that belie the notion that wild places are ever truly separate from human frames, even when we establish them with the goal of being so.[41]

To further understand the National Park Service's mismanagement of Indian Nations, it should be noted that the NPS inherited distortions and ignorance about Native history,[42] perhaps without the necessary resources to set the record straight.[43] The whole point of creating the NPS was to clean up some of the mismanagement that resulted from the fast land-grabbing of the Antiquities Act of 1906.[44] Still, the NPS is looked fondly upon today, though it is one of the only federal agencies that strictly costs taxpayers money.[45] Perhaps the trust lies in the nature of the NPS and its mission,[46] whereas the BIA seems to experience the opposite sentiment.[47] Nonetheless, NPS admiration is not universal.[48] Park supervisors have faced criticism for

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41. Sarah Krakoff, *Not Yet America's Best Idea: Law, Inequality, and Grand Canyon National Park*, 91 U. COLO. L. REV. 559, 561–62 (2020).

42. Further discussion of this history follows in Part III; *but see* KELLER & TUREK, *supra* note 7, at 26 ("When Congress created the NPS in 1916 to operate the national parks, it bequeathed distortions and ignorance about native history at Rainier, Yosemite, Yellowstone, and many other of the thirty-six existing units.").

43. *Id.* ("From its beginning the NPS lacked the power and prestige of other land management agencies in Washington.").

44. *Id.* at 27 ("Congress created the NPS because early parks, along with national monuments, which the president could create at will under the American Antiquities Act of 1906, had grown into this 'hodgepodge of areas inconsistently managed and inadequately protected.' Stirred into the hodgepodge were former Indian lands at Yellowstone, Mesa Verde, and Glacier, as well as odd places like Sully's Hill and Platte. Condemned as 'the most worthless national park ever created' Sully's Hill had been carved out of the Devil's Lake reservation of the Wahpeton Sioux in 1904; the NPS cheerfully turned it over to Agriculture in 1931. The nine hundred acres at Platt National Park in Oklahoma had been purchased from the Chickasaw and Choctaws in 1902. Featuring hot springs polluted by sewage from the town of Sulphur, it became the most ridiculed park in the system, the butt of 'give it back to the Indians' jokes.").

45. *Id.* at 26 ("Considered a luxury, the Park Service lacked scientific or military prestige; its programs did not produce dollars or protect potential wealth-instead, they cost dollars and could limit wealth.").

46. *Id.* ("More than most federal agencies, it pursued an idealistic mission that led to exceptional public trust.").

47. *Id.* ("The BIA had no founder's myth, no lobby, no public popularity, few avid supporters in Congress, no tourist industry, and no upper-class professional elite.").

48. *Id.* at 28 ("The NPS may be the most admired and trusted of all federal agencies but when one talks to loggers, ranchers, or Indians, that feeling proves to be far from universal.").

"naïve" and "superficial" knowledge of Native Nations while attempting to fulfill their interests.[49] Questions endure about the effectiveness of the NPS, successes or failures aside.[50]

Considering all of this, Treuer's proposition in *The Atlantic*[51] appears more than relevant. However, upon analyzing the history of Tribal-Park relationships, alongside their likenesses and divisions, one may find that Treuer's proposition rests on shaky ground. The hazardous restraint on Native Nations today is not necessarily the DOI, BIA, or NPS themselves, but the disjointed matrimony between the federal government and Native Nations—the trust responsibility.[52] This relationship, born out of the colonial expansion, is a web of confusion and has historically done more harm than good.[53] Recently, Adam Crepelle[54] described the trust responsibility succinctly:

> Soon after the nation's inception, the United States implemented a series of laws governing Indian trade. The laws were supposedly designed to protect Indians from unscrupulous dealings with non-Indians because Indians were deemed incompetent. In 1823, the U.S. Supreme Court decided that the United States owned the Indians' land and the Indians merely occupied it. The Supreme Court later built upon this principle to classify tribes as

49. *Id.* ("Although the services first two directors, Mather and Albright, plus many of the superintendents, had a genuine interest in archaeology and native artifacts, their knowledge of living Indians was superficial and naïve . . . Despite their shaky knowledge, Tillotson and Albright had a genuine concern for Indians and could defend native interests as they understood them.").

50. *Id.* at 27 ("Whether creating a new bureau could streamline and rationalize matters whether a National Park Service meant a national park system, became a debate that continues today. Whatever its successes or failures, the service marked a final step in the Far West's 'bureaucratic revolution' that had begun thirty years earlier.").

51. *See* Treuer, *supra* note 2, at 44.

52. *See* Adam Crepelle, *White Tape and Indian Wards: Removing the Federal Bureaucracy to Empower Tribal Economies and Self-Government*, 54 U. MICH. J.L. REFORM 563, 567 (2021) (explaining that the trust responsibility is based in some racism and illogical law).

53. *Id.* at 568–69 ("Federal Indian law and its nearly two-century-long interdiction of tribes is the greatest inhibitor of tribal self-determination and economic development."); *see* Rebecca Tsosie, *Land, Culture, and Community: Reflections on Native Sovereignty and Property in America*, 34 IND. L. REV. 1291, 1292 (2001) ("As trustee, the United States has certain powers of control and disposition that have not always been used for the best interests of Indian people.").

54. Biography of Adam Crepelle, A.B.A., https://www.americanbar.org/groups/domestic_violence/about-us/adam-crepelle/ (last visited Nov. 12, 2021).

> "domestic dependent nations" rather than full sovereigns and named the United States guardian of the Indian wards. Indians lost their freedom.[55]

Thus, approaching Indian Law issues requires an understanding that the "[l]egal history of the indigenous peoples of the United States influences every new problem in Indian Country that arises for resolution before a court of law, today."[56] Courts, to make accurate and just decisions that pave a meaningful way forward while acknowledging sins of the past,[57] must consider the history that Native Americans have with the land of their ancestors,[58] their current desire to return to their sacred land,[59] and the costs/benefits of reparations in the United States of America.[60] Without these considerations, courts may never steer far from their own definition of

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55. *See* Crepelle, *supra* note 52, at 565-66; *see* Indian Trade and Intercourse Act of 1790, ch. 33 § 4, 1 Stat. 137, 138 (codified as amended at 25 U.S.C. § 177); *see also* Warren Trading Post Co. v. Ariz. Tax Comm'n, 380 U.S. 685, 688 (1965) ("In the very first volume of the federal statutes is found an Act, passed in 1790 by the first Congress, 'to regulate trade and intercourse with the Indian tribes,' requiring that Indian traders obtain a license from a federal official, and specifying in detail the conditions on which such licenses would be granted."); Cent. Mach. Co. v. Ariz. Tax Comm'n, 448 U.S. 160, 163 (1980) ("In 1790, Congress passed a statute regulating the licensing of Indian traders. Act of July 22, 1790, ch. 33, 1 Stat. 137. Ever since that time, the Federal Government has comprehensively regulated trade with Indians to prevent 'fraud and imposition' upon them."); Ewert v. Bluejacket, 259 U.S. 129, 136 (1922) ("The purpose of the section clearly is to protect the inexperienced, dependent, and improvident Indians from the avarice and cunning of unscrupulous men in official position, and at the same time to prevent officials from being tempted, as they otherwise might be, to speculate on that inexperience, or upon the necessities and weaknesses of these 'wards of the nation.'"); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 584-85 (1823) ("It has never been doubted, that either the United States, or the several States, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it."); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

56. VICTORIA SUTTON, DECOLONIZING THE FOUNDATIONS IN AMERICAN INDIAN LAW 2 (2021).

57. Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 HARV. L. REV. 1294, 1296 (2021) ("Government officials in this nation have been desecrating and destroying Native American sacred sites since before the Republic was formed. At the hands of both public and private actors, graves have been despoiled, altars decimated, and sacred artifacts crassly catalogued for collection, display, or sale. Native American people have also faced hurdles, if not outright prohibitions, on accessing sites essential to their rites of worship.").

58. *See generally* PHILIP BURNHAM, INDIAN COUNTRY, GOD'S COUNTRY: NATIVE AMERICANS AND THE NATIONAL PARKS (2000).

59. *See* Treuer, *supra* note 2, at 43.

60. *See generally* William Bradford, *"With a Very Great Blame on Our Hearts": Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1 (2003); William Bradford, *Beyond Reparations: An American Indian Theory of Justice*, 66 OHIO STATE L.J. 1 (2005); Erik B. Bluemel, *Accommodating Native American Cultural Activities on Federal Public Lands*, 41 IDAHO L. REV. 475 (2005).

the federal government's relationship with Native Nations: "bureaucratic imperialism."[61]

The rest of this Note proceeds as follows. Part I's first sections will briefly survey the timeless arc of the Native American's relationship with their land. Part I's later sections will examine Native Nations' relationship with the Highest Court in the land, including foundation cases that gave rise to the trust responsibility. Part II will take specific note of a National Park in the ongoing saga a Native Nation has within it. Part II will also assess the reparations movement in the United States and the pros and cons of the Pandora's box[62] of acknowledging past sins in such a manner. Part III will return to David Treuer's argument, seeking to answer the questions posed by West, Brechin, Keller, and Turek, the authors who sought to keenly understand the implications of National Parks and indigenous peoples (much like the Natives themselves know their land), from today's prospective vantage point. Part III will then suggest an approach for the U.S. legal system and for Native Nations going forward that may bring peace and harmony to suffering, stricken people. This Note seeks to make the case that decolonization[63] and self-determination are the pathways to Indian/tribal justice that extend beyond troublesome claims for reparations.

Catlin's nostalgia for harmony between Native Nations and America's great National Parks was not in bad faith.[64] Tweaking the trust responsibility, among other strategies, forges a more positive relationship for Native Nations in America, one that can culminate in a National Parks co-management that allows tribes the "return" to their ancestral lands, too.

Professor Crepelle, just this year, wrote, "[o]nce the unconstitutional white tape is peeled from Indian country, tribes must be empowered to self-govern."[65] Professor Crepelle echoed President Reagan and President Nixon, whose goals for Native Americans were self-determination and self-

61. Harjo v. Kleppe, 420 F. Supp. 1110, 1130 (D.D.C. 1976) ("This attitude, which can only be characterized as bureaucratic imperialism, manifested itself in deliberate attempts to frustrate, debilitate, and generally prevent from functioning the tribal governments expressly preserved by § 28 of the Act."); *see also* Crepelle, *supra* note 52, at 566.

62. *Pandora's box*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/Pandora%27s%20box (last visited Nov. 12, 2021) ("[A] prolific source of troubles . . . . Anything that looks ordinary but may produce unpredictable harmful results can thus be called a Pandora's box.").

63. *See* SUTTON, *supra* note 56, at 1 ("Decolonizing here means to consider the unequal power distribution and the coded language used with objectives of racial and governmental domination or subjugation of tribes and their people.").

64. KELLER & TUREK, *supra* note 7, at 20.

65. *See* Crepelle, *supra* note 52, at 568.

government.[66] Professor Crepelle continued: "Tribal self-determination and Orwellian federal oversight are entirely at odds. . . . As long as federal Indian law remains underpinned by archaic assumptions about the United States' indigenous peoples and that might makes right, Indians will remain a conquered people living under an immiserating colonial regime."[67] This proposal is not without risk. As Professor Vickie Sutton points out, "why do we not just unravel all of these cases and invalidate their holdings . . . [t]hat might be technically possible, but it would undo commitments, policies, treaties and law that tribes, as well as anyone interacting with tribes, have come to rely on in investing time, resources and their future."[68]

This Note will untie some laws so that tribes may be self-empowered to find a new way in America, on its reservations, and in its National Parks. As will be understood, "[t]he greatest and most troubling conflicts are not between good and evil, but between good and good."[69]

I. HISTORICAL OVERVIEW OF LAND & NATIVE AMERICANS

A. *From Time Long Ago*

To summarize approximately 20,000 years or more[70] of Native American history is an insurmountable task that, even if somehow accomplished, would not give due respect to Native Nations today. That said, it is crucial to understand where Native relationships with the land began so long ago. This is partly for the unique reason that Native Nations are the only ethnic group in the United States that has its ethnic roots in the land itself.[71] The historical implications of these roots are evident, as Jake Page wrote, "without the first 16,500 years of at least partially known accomplishment and loss, the last five hundred years of loss and accomplishment cannot be seen with anything approaching wholeness."[72]

So, what exactly was the beginning of it all? For philosopher Vine Deloria Jr., "humanity arose [in North America] in the first place and spread

66. *Id.*; *see* Proclamation No. 5049, 48 Fed. Reg. 16227 (Jan. 24, 1983).

67. *See* Crepelle, *supra* note 52, at 568-69.

68. SUTTON, *supra* note 56, at 1.

69. KELLER & TUREK, *supra* note 7, at iii.

70. JAKE PAGE, IN THE HANDS OF THE GREAT SPIRIT: THE 20,000-YEAR HISTORY OF AMERICAN INDIANS 3 (2003).

71. *Id.* at 2.

72. *Id.* at 3.

around the world."[73] For the archaeologists of the twentieth century, the earliest proof of Native habitation on this continent was "a projectile point found in 1932, embedded among the ribs of a woolly mammoth near the town of Clovis, New Mexico."[74] Linguists, formerly limited to a 6,000-year trace of languages, have recently determined "that numerous groups of people migrated in waves to this hemisphere over many thousands of years, leaving plenty of time for people to have fetched up in southern Chile and near Pittsburgh."[75] Molecular geneticists that have studied mitochondrial DNA have noticed that humans widely separated by geography had a small ancestral group yet share very few connections with Asian DNA.[76] This evidence suggests the arrival moment for Native Americans to be "sometime between twenty-one thousand and forty-two thousand years ago."[77] Yet, perhaps more mysterious, several mitochondrial DNA haplogroups of Native Americans "are found *only* in Asians and not anywhere else. . . . [O]ther[s] . . . . are also found in *Indian* populations, but . . . one . . . occurs minimally in Europeans but more fully in people from the *Indian subcontinent*."[78] More recently, thanks to Kennewick Man[79] and other archaeological discoveries, "who exactly the first Americans were and when exactly they arrived remains a tantalizing mystery—in science if not among the Indian people themselves."[80]

To reduce Native relationships with their land to simple hunter-and-gatherer nomadism is a tragic oversight, at best.[81] The land was symbiotic

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73. *Id.* at 22.

74. *Id.* at 23.

75. *Id.* at 31.

76. *Id.*

77. *Id.* at 30.

78. *Id.* at 31 (emphasis added) (explaining that not only do Native Americans have DNA ties to modern-day countries like Russia, Japan, and China, but also to Pakistan, India, Nepal, Thailand, etc.).

79. *Id.* at 31-32; *see The Ancient One, Kennewick Man*, BURKE MUSEUM, https://www.burkemuseum.org/news/ancient-one-kennewick-man (last visited Jan. 22, 2022) ("Public interest, debate, and controversy began when independent archaeologist Dr. James Chatters, working on contract with the Benton County coroner, thought that [Kennewick Man, an ancient skeleton,] might not be Native American. He described [Kennewick Man] as 'Caucasoid' and sent a piece of bone to a laboratory to be dated. The results indicated an age older than 9,000 years, making The Ancient One among the oldest and most complete skeletons found in North America. . . . After DNA findings confirmed The Ancient One was Native American, the tribes who claim him as their ancestor could begin the process of reclaiming his remains under NAGPRA.").

80. PAGE, *supra* note 70, at 32.

81. *Id.* at 92 ("Perhaps the most lasting misperception of the American Indians is that, in their pristine, pre-Columbian state, they were mostly hunters and gatherers.").

with Native Americans for those purposes,[82] yes; though, "[i]n good times, when the grasses were rich locally and the herds were large and less nomadic, communal hunts were more effective and more common, and the people stayed together in more complex groups for longer periods of the year."[83] Beyond that, it is known that Native Americans were indeed agriculturalists.[84] Anton Treuer, David's brother, wrote, "[t]he land shaped Native American cultures. Most were farmers. In the Southwest, the Hopi farmed corn on arid slopes with an innovative system of rain capture irrigation."[85] Page adds that Native Americans "made significant changes in the nature of the American landscape, clearing plots of land, diverting streams, creating irrigation channels, building huge mounds, burning large areas to encourage new vegetative growth and the presence of such animals as deer."[86] Property rights were recognized in many agricultural and agrarian Native Nations, and nomadic tribes even "acknowledged land rights if an individual mixed her labor with the land."[87] This portrait of Native Americans as wielders of fire and engineers[88] can explain how their "different paths to sustenance and prosperity shaped political and cultural institutions."[89]

As these adapters became multilingual as the ages went by, and their social systems shifted in accordance with the "continuously changing nature of the places where they found themselves, they had invented new tools, new talents, new habits, new meanings, new gods, all to suit their circumstances."[90] So, it can be said, "[e]ach tribe has its own linguistic and cultural history, but the eight major geographic regions in which they lived were indelible parts of their formation."[91]

Therefore, it is critical to understand Native Nations' spiritual connection with their land.[92] Rebecca Tsosie deduced one interpretation of tribes' land

82. *Id.* at 42 ("Using natural features of the land like ridges and arroyos, the hunters drove bison stampeding toward the corral, which they could not see until it was too late.").

83. *Id.* at 43.

84. *Id.* at 92.

85. ANTON TREUER, ATLAS OF INDIAN NATIONS 10 (2014).

86. PAGE, *supra* note 70, at 92.

87. *See* Crepelle, *supra* note 52, at 598-99.

88. PAGE, *supra* note 70, at 92 ("Fire was used as well as a herding device. The Indians were, to the degree they were capable, engineers of the landscape.").

89. TREUER, *supra* note 85, at 10.

90. PAGE, *supra* note 70, at 92.

91. TREUER, *supra* note 85, at 10.

92. U.N. DEP'T OF ECON. & SOC. AFFAIRS, STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS, at ¶ 196, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4, U.N. Sales No. E.86.XIV.3

relationship as a "world in which the Native people, the land and its resources interact under a Divine plan created for a particular place on earth. The people exist under the same set of laws that governs all other living things, which results in order, balance, and abundance."[93] Long before "natural law" became a well-known basis for human rights,[94] Native Americans observed and obeyed it.[95] Native religion was molded from the land as "lifeways and religious practices were rooted to place and formed by the land."[96] In some sense, removing the connection between Native Americans and land is like removing the Bible from Christians.[97] Scholar Gary Meyers wrote, "Indians' conception of human beings as part of, or at one with the land, distinguishes their approach to aboriginal rights from that of the white cultures in the United States and Canada."[98] Thus, Native Nations' natural rights are logically tied to the land, and so is the cultural survival of Native Americans.[99]

Their cultural survival is not independent of recognition of cultural identity, which also comes from the land, as "Indian nations identify their origin as a people with a particular geographic site, often a mountain, river or valley, which represents an integral part of the tribe's religion and cultural world view."[100] Through land, the "cultural universe" of Native Nations is transparent,[101] as exemplified by one Native origin:

> The Senecas of the northeast woodlands tell how the daughter of the Great Chief fell through a hole during the time when the whole world was water, plummeting into empty space. Birds flew up, making a nest for her with their wings. Finally growing tired, they placed the girl on the back of

(1987) ("It is essential to know and understand the deeply spiritual special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture.").

93. Tsosie, *supra* note 53, at 1291.

94. *See generally* Note, *Natural Law for Today's Lawyer*, 9 STAN. L. REV. 455 (1957).

95. Sarah A. Garrott, *New Ways to Fulfill Old Promises: Native American Hunting and Fishing Rights as Intangible Cultural Property*, 92 OR. L. REV. 571, 582 (2013).

96. TREUER, *supra* note 85.

97. Gary D. Meyers, *Different Sides of the Same Coin: A Comparative View of Indian Hunting and Fishing Rights in the United States and Canada*, 10 UCLA J. ENV'T L. & POL'Y 67, 79-80 (1991) ("[O]ne principal difference between Native American and Western religious traditions is that native religions can be described as spatially oriented while Western religions are temporally oriented. Consequently, native cultures depend upon specific holy places for the practice of their religious traditions.").

98. *Id.* at 79.

99. *Id.*

100. Tsosie, *supra* note 53, at 1302.

101. *Id.*

> Turtle. Turtle soon got tired from this burden, and the birds knew that he would need something to rest upon. They persuaded Toad to dive into the water and bring back some mud, which he put on Turtle's back. Soon the earth—and Turtle—began to spread out in all directions. Before long, there was plenty of land and the girl, now known as Star Woman, had children.[102]

For the Seneca and other Native Nations, "land is not merely a possession and a means of production. The entire relationship between the spiritual life of indigenous peoples and their land has a great many deep-seated implications. Their land is not a commodity which can be acquired, but a material element to be enjoyed freely."[103] A Cherokee chief once wrote to Congress, attesting, "[i]mprovements can be and frequently are sold, but the land itself is not a chattel. Its occupancy and possession are indispensable to holding it. . . . In this way every one of our citizens is sure of a home."[104] Another Indian Law scholar, Frank Pommersheim,[105] wrote the land itself "determines the values of the human landscape."[106] With this context, the land is the metaphysical and epistemological story of Native Americans, the "source of spiritual origins and sustaining myth."[107] Tsosie wrote, "these stories provide a code of appropriate moral behavior to guide the people. Thus, the place name evokes not only a picture of the place but a story to 'make you live right.'"[108]

With history, natural law, religion, and cultural origin imbued, and beyond the fact that Native Americans still use this land today, "[the land] identif[ies] fundamental cultural symbols and patterns, provide[s] an image of social order, and, perhaps most importantly, [is] a tangible link between the world of human beings and the sacred, 'where spiritual power' can be accessed."[109] The land relationship is not nature worship as some critics may say. Nor is it a mere connection to sustenance; the land is critically

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102. PAGE, *supra* note 70 at 14.

103. U.N. DEP'T OF ECON. & SOC. AFFAIRS, STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS, at ¶ 197, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4, U.N. Sales No. E.86.XIV.3 (1987).

104. 11 CONG. REC. S875 (daily ed. Dec. 6, 1880) (statement of D.W. Busyhead et al.); *see also* Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1571 (2001).

105. *See* Michael Ewald, *Professor Frank Pommersheim Retires after 35 Years*, UNIV. OF S.D. L., https://www.usd.edu/academics/colleges-and-schools/knudson-school-of-law/south-dakotan-lawyer/professor-frank-pommersheim-retires-after-35-years (last visited Aug. 22, 2022).

106. Tsosie, *supra* note 53, at 1302.

107. *Id.*

108. *Id.* at 1302-03.

109. *Id.* at 1303.

significant, so much so, there is always "a dynamic and on-going relationship between Native peoples and the land."[110] History must always be considered when approaching Indian Law issues today.[111] The pre-Colombian age of land relationships for Native Nations is thus summarized:

> [Native Americans] had experimented with highly complex societies replete with caste systems, with wholly egalitarian ways, and with many social forms in between . . . they had discovered, perhaps by trial and mortal error, how to use the plants of their regions as medicines. They were immensely practical people . . . just as smart as people today—and no smarter. They simply had other things . . . to be smart about. And there was no way on earth that these people could have been prepared for what was to come.[112]

America is a hallowed Indian landscape.[113] From this metaphorical crow's nest, the magnitude of the National Parks comes into focus,[114] as these revered lands are a part of Native Nations.[115]

If the purpose of the NPS was conservation,[116] what of these sacred sites—were they conserved, unspoiled for Natives? No, that is not the case.[117] Professor Tsosie argues this calamitous circumstance is causally connected to "[t]he history of the United States [which] is, at a very basic level, a history of conflict over two things: property and sovereignty."[118] The philosophical justification behind the United States' land-grabbing, adopted by President James Monroe, was that Native Nations should not hold claim to more than what they needed for their support.[119] This

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110. *Id.* at 1302.

111. WILLIAM CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 1 (7th ed. 2020).

112. PAGE, *supra* note 70, at 93.

113. Tsosie, *supra* note 53, at 1303 ("The land that we now call 'America' in fact represents a 'sacred geography' of mountains, forests, rivers, canyons, and deserts.").

114. *Id*. at 1303 ("Unless rituals are performed at the proper locations, they have little or no efficacy.") (quoting Deward E. Walker, Jr., *Protection of American Indian Sacred Geography*, in HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM 110-11 (Christopher Vecsey ed., 1991)).

115. *Id.*

116. Andrew Schrack, *The Shifting Landscape of Ancestral Lands: Tribal Gathering of Traditional Plants in National Parks*, 9 ARIZ. J. ENV'T L. & POL'Y 1, 1 (2018).

117. *Id.* ("However, in the process of conservation, the new legal regime stripped away the historic uses of these ancestral lands from many Native American tribes.").

118. Tsosie, *supra* note 53, at 1293.

119. *Id.* at 1294 ("'No tribe or people,' [President Monroe] explained, 'have a right to withhold from the wants of others more than is necessary for their support and comfort.'"); s*ee* Joseph William Singer, *Legal Theory: Sovereignty and Property*, 86 NW. U. L. REV. 1, 1 n.3 (1991) (citing FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 149 (1984)).

philosophy is an obvious failure to recognize tribal sovereignty and the necessity of protecting sacred land. With all this history, from a time not so long ago, of land relationships and Native American culture sharp and unmistakable in mind, the next logical step is to explore how that relationship changed upon the development of American Law.

B. *Indian Law Overview*

To discuss Native peoples' interests in the National Parks, a discussion involving property and inequality, an understanding of the law on Native sovereignty is required.[120] Preeminent Indian Law scholar William Canby defined, through the pendulum swing of "popular and governmental attitudes towards Indians," a few simplified themes which have outlasted the shifting of the winds of Indian law.[121] They are as follows:

> *First*, the tribes are sovereign entities with inherent powers of self-government. *Second*, the sovereignty of the tribes is subject to exceptionally great powers of Congress to regulate and modify the status of the tribes. *Third*, the power to deal with and regulate the tribes is wholly federal; the states are excluded unless Congress authorizes them to exercise such power. *Fourth*, the federal government has a responsibility for the protection of the tribes and their properties, including protection from encroachments by the states and their citizens.[122]

Page argues that the root of the land-grabbing philosophies of President Monroe, and to a much greater and sinister extent, President Andrew Jackson, emanated from an unwritten rule that governed human history and was adopted by the Catholic Spanish monarchy by way of papal "delegation"[123]—the veracity of this claim is ripe for investigation in another article. Spanish theologian Fr. Francisco de Vitoria knew the Spanish could not claim ownership of Indigenous lands, however, and that "the Indians truly owned the land."[124] According to Page, what Fr. Vitoria proposed as an alternative to ownership by discovery was that "the Indians could *voluntarily*

120. Tsosie, *supra* note 53, at 1292.

121. CANBY, *supra* note 111, at 1.

122. *Id.* at 1-2.

123. PAGE, *supra* note 70, at 109-11 ("[J]ust war . . . could not be simply a matter of whim, . . . [U]nderlying all of the rationalizations and justifications for the Europeans' presence [in the New World, was that Christianity] alone had the truth. . . . This underlying attitude about Christianity infused and justified all other actions in the New World . . . well into the twentieth century.").

124. *Id.*

agree to cede land to the new arrivals—unless, of course, a just war took place."[125] War, of course, was rife during colonization, not just between Native Nations and colonizers, but between the colonies and England.[126] Sovereignty of Native Nations was crucial during this time, and the English Crown became protectors of indigenous peoples, recognizing sovereignty "with the Indian tribes formally."[127] As settlers encroached onto Native lands, "nearly all of the tribes allied themselves with the Crown."[128]

With independence and the Revolution, challenges between Native interests and the colonizers' interests furthered, so, "[i]f wars were to be avoided and stability achieved, Indian affairs had to be placed in the hands of the central government."[129] The Constitution of the United States of America in 1789 empowered Congress in just that way.[130] As government dominion over Native Nations expanded and non-Indian populations bloomed, the Highest Court of this new country would create a legal doctrine that would alter Native history forever.[131]

Take for example the Cherokee, who, like many other Native Nations, were on their path to civilization prior to horrendous policies.[132] The Cherokee prospered at the time, not only as farmers but as societal adapters, as they held a constitutional convention establishing an electorate, a legislature with representatives, and court hierarchies.[133] In addition, they owned livestock, managed farms, translated their language for the English and French, and established a newspaper.[134] The Cherokee "reinvented itself economically and politically in the hope of maintaining much of its deeper culture, its independence, and what remained of its original territories."[135] They held the American system of civilization in high regard but were not rewarded for their affectionate compliance.[136]

Simultaneously, Andrew Jackson was elected President and inherited the idea of "removing" tribes to outer lands to counter the "absurd" treaty system

125. *Id.*

126. CANBY, *supra* note 111, at 15.

127. *Id.* at 15-16.

128. *Id.* at 16.

129. *Id.*

130. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .").

131. CANBY, *supra* note 111, at 17-18.

132. PAGE, *supra* note 70, at 251.

133. *Id.* at 251-52.

134. *Id.* at 252.

135. *Id.*

136. *Id.* at 252-53.

awarding Native sovereignty.[137] While Natives were passionate about their "rights to their land," Jackson would "clear up the confusions" by any means necessary—"by persuasion, law, the overruling of treaties, or main force."[138] In Georgia, a 1789 law ostensibly authorized the hunting of Native Americans, and Jackson's 1830 removal bill that followed only heightened tensions in the Southeast.[139] Surprisingly, the battle manifested itself in the courts. The Marshall Trilogy, three cases with opinions by Chief Justice John Marshall, established Native American tribes as a sovereign government within the United States—a special distinction that complicates all sorts of federal interests.[140]

The first case of this trilogy, *Johnson v. M'Intosh*,[141] held that after the American Revolution, "title to all of the colonial land was transferred to the new United States government. In exchange for the Native Americans' loss of the property right of ownership, the discovering nations acquired an obligation to protect the Native American tribes while respecting their right of occupancy."[142] Despite treaties made over the previous centuries, the "ancient right of discovery" prevailed.[143]

Marshall set a dastardly precedent in *M'Intosh*, stating that "Native Americans were uncivilized, like savages, unable to be governed and too wild to be left alone."[144] Thus, "this negative characterization provided the necessary justification for taking title to Native American lands and imposing the 'protection' that the federal government promised."[145] An Indian nation's right of occupancy to land continues only in cases where the federal government has allowed it to do so.[146]

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137. *Id.* at 253.

138. *Id.*

139. *See id.* at 254-55.

140. This will be discussed further in Part I, Subpart C; *see* William R. Di Iorio, *Mending Fences: The Fractured Relationship Between Native American Tribes and the Federal Government and Its Negative Impact on Border Security*, 57 SYRACUSE L. REV. 407, 410 (2007); s*ee also* Jennifer Butts, Note, *Victims in Waiting: How the Homeland Security Act Falls Short of Fully Protecting Tribal Lands*, 28 AM. INDIAN L. REV. 373, 375-76 (2004).

141. *See generally* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

142. Di Iorio, *supra* note 140, at 410.

143. PAGE, *supra* note 70, at 255.

144. Di Iorio, *supra* note 140, at 411; *see also M'Intosh*, 21 U.S. (8 Wheat.) at 411.

145. Di Iorio, *supra* note 140, at 411; *M'Intosh*, 21 U.S. (8 Wheat.) at 411.

146. Meyers, *supra* note 97, at 78 ("[T]he doctrine of aboriginal title protects native occupancy and traditional uses of ancestral homelands, but only to the extent recognized by the governments of the United States and Canada. Extinguishment of these rights in the United States and until recently in Canada, has been a purely political decision, a prerogative of the sovereign.").

Marshall's attempts to answer the fundamental questions of the country—"Who owned the real estate of the new nation? Were Indian nations independent? Were treaty rights sanctified, or subject to change in new circumstances?"—all came to a head in 1831.[147] The second case of the trilogy, *Cherokee Nation v. Georgia*, involved dismissal of the Cherokee's claim that Georgia could not remove Cherokee Nations members by force.[148] Marshall decreed that the Cherokee Nation was not a foreign state, "describing Native American tribes as 'domestic dependent nations' and the federal government-Native American relationship as that of a 'ward to his guardian.'"[149] Specifically, Marshall wrote:

> [Native Americans] may more correctly perhaps be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will. . . . Their relations to the United States resemble that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father.[150]

This distinction of sovereignty was the same one echoed in the Constitution's Commerce Clause.[151] To some, this marked the day "Indians lost their freedom."[152]

William Di Iorio explained the topic of sovereignty succinctly when he wrote, "[w]hile the Cherokee Nation had the inherent right to occupy its land unless it voluntarily ceded its right, only the United States Government possessed authority to protect this land from intervention or invasion."[153] In fact, "Chief Justice Marshall refused to acknowledge any rights of the Cherokee Nation, stating that if there were any, and if they had been violated, the Supreme Court was not the correct place to redress those grievances."[154]

147. PAGE, *supra* note 70, at 255.
148. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 1 (1831).
149. Di Iorio, *supra* note 140, at 411.
150. *See Cherokee Nation*, 30 U.S. (5 Pet.) at 14.
151. *See* U.S. CONST. art. I, § 8, cl. 3; *see also* Di Iorio, *supra* note 140, at 411.
152. Crepelle, *supra* note 52, at 566.
153. Di Iorio, *supra* note 140, at 411.
154. *Id.* at 411-12.

The preeminent question became—were Indian issues state authority or federal authority?[155] The trilogy's third case, *Worcester v. Georgia*,[156] held that states do not have the right to impose laws on Indian nations, stating that "only the federal government possessed regulatory powers over the Native American territories."[157] Marshall "held unconstitutional a state law barring white persons from living on tribal lands without a license and without pledging an oath to the state."[158] The holding affirmed federal government and Indian tribe relations set in prior decisions by Marshall because the Court only heard the case based on the race of the plaintiff, Caucasian.[159] The racist implications were clear when "the plaintiff entered the Cherokee Nation by the will of the President [Jackson], under a federal law designed to promote 'those humane designs of civilizing . . . Indians.'"[160] Therefore, "only the federal government possessed regulatory powers over the Native American territories[;] the plaintiff had constitutionally protected access to the courts. . . . Only because the federal government grants *its* citizens access to the courts could Chief Justice Marshall expound on the 'rights' inherent to Native Americans."[161]

In the least sense, Marshall's trilogy held policies like Georgia's 1789 hunting Indian law unconstitutional.[162] Yet, more so, the trilogy instilled in the federal government an ultimate say on Indian law and an obligation to protect Native interests.[163] Marshall did not appease President Jackson, as infamous words live on, whether in legend or truth, "Chief Justice Marshall has made his law; then let him enforce it."[164] Andrew Jackson ignored the Court and began the genocidal march dubbed the Trail of Tears.[165]

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155. *See* PAGE, *supra* note 70, at 256.

156. *See generally* Worcester v. Georgia, 31 U.S. 515 (1832).

157. Di Iorio, *supra* note 140, at 412.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 412-13.

162. *See generally* PAGE, *supra* note 70, at 254-56.

163. Di Iorio, *supra* note 140, at 416. ("The federal government giveth, and the federal government may taketh away.").

164. PAGE, *supra* note 70, at 256.

165. *Id.* at 256-57 ("Astonishingly, an estimated twenty-five hundred Choctaws died of exposure, starvation, and marauding by whites during the trek of more than five hundred miles that three groups made between 1831 and 1834.").

C. *Trust Responsibility Enforcement and Application Towards Native Lands*

The trust responsibility has been a profoundly complicated web of law since the Marshall Trilogy, and it has often been "blurred, contradicted, or ignored."[166] The axioms are: Native Nations are separate governments, with autonomy over lands they still have and the natural resources of the grounds, but "the federal government serves as the 'trustee' for reservation lands and resources. Thus, although the Native people have beneficial use of these lands and resources, the title is held in trust for them by the United States government."[167] *Black's Law Dictionary* defines a trustee as "[s]omeone who stands in a fiduciary or confidential relation to another; esp., one who, having legal title to property, holds it in trust for the benefit of another and owes a fiduciary duty to that beneficiary."[168] Why does the Supreme Court still hold Native lands to be in trust today? The world is long past the age of discovery, and the assertion that Indians are too incompetent to deal with non-Indians is blatantly outdated and racist.[169] The answer is that trust responsibility has its advantages in some sense, as it requires that the federal government is obligated to benefit Native Nations by handling the land.[170] The Supreme Court affirmed this obligation some years after Chief Justice Marshall's reign ended:

> These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. [. . .] From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.[171]

Scholars have deconstructed the trust obligation into substantive, as applied to treaty reserved rights, and procedural duties, to actively participate

166. *Id.* at 256.

167. Tsosie, *supra* note 53, at 1292.

168. *Trustee*, BLACK'S LAW DICTIONARY (11th ed. 2019).

169. *See* Crepelle, *supra* note 52, at 565-66.

170. Curt Sholar, *Glacier National Park and the Blackfoot Nation's Reserved Rights: Does A Valid Tribal Co-Management Authority Exist?*, 29 AM. INDIAN L. REV. 151, 169 (2005).

171. United States v. Kagama, 118 U.S. 375, 383-84 (1886).

in protecting those rights.[172] Marshall's opinion on nationhood in *Cherokee Nation* created a "mixed blessing" because it generated the trust responsibility and left open limits to tribal sovereignty to be decided by later courts.[173] As Native Nation outcomes evolved from removal to relocation to reservations roughly in the years 1850 to 1887, reservations were primarily made via treaty with the Executive branch until Congress limited the constitutional treaty-making power concerning Native Americans in 1871.[174] To this shocking overstep, Professor Vickie Sutton wrote, "[n]o one has ever challenged the constitutionality . . . and whether it is constitution[al] remains a question."[175] Thus, the compelling effect of previous treaties was in doubt, and courts were free to interpret the trust responsibility's substantive and procedural duties towards treaty reserved lands.[176] With the legal root of Native land unprotected, the "essence of sovereignty" for Native Nations was concerningly brittle.[177]

Frequently, the trust responsibility is abusive and restrictive.[178] Its first dangerous applications began when Indian agents were assigned to the reservations "to supervise the Indian's adaptation to non-Indian ways."[179] Then, in *United States v. Kagama*, the Court upheld Congress' power to enact criminal laws that apply in Indian country.[180] Scholars have since elaborated on the origin of Congress' newfound power,[181] that it "did not emanate from the Commerce Clause but rather exists in the federal government . . . because it has never been denied. . . ."[182]

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172. *See* Sholar, *supra* note 170.

173. CANBY, *supra* note 111, at 20.

174. *Id.* at 22; *see* 25 U.S.C.A. § 71 (Westlaw through Pub. L. 100-647).

175. SUTTON, *supra* note 56, at 64.

176. *Id.* at 64-65.

177. Crepelle, *supra* note 52, at 569.

178. *Id.* at 568-69 ("Federal Indian law and its nearly two-century-long interdiction of tribes is the greatest inhibitor of tribal self-determination and economic development.").

179. CANBY, *supra* note 111, at 23.

180. Berkey, *infra* note 181.

181. Grant Christensen, *Predicting Supreme Court Behavior in Indian Law Cases*, 26 MICH. J. RACE & L. 65, 114 (2020); *see also* Curtis G. Berkey, *Rethinking the Role of the Federal Trust Responsibility in Protecting Indian Land and Resources*, 83 DENV. UNIV. L. REV. 1069, 1069 (2006) ("In *United States v. Kagama*, the Supreme Court upheld the constitutionality of an act of Congress extending the criminal jurisdiction of the United States over crimes committed by Indians against Indians within Indian country. The power of Congress to govern Indian tribes in this fashion could not be located in any textual provision of the Constitution. Rather, the Court based such power on the 'wardship' status of Indian tribes . . . .").

182. Christensen, *supra* note 181, at n.6.; *see generally* Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 11 (1999) (explaining how the "plenary power" is rooted in America's political scheme).

Later, in *United States v. Clapox*, by the United States' authority to supervise tribes and by the Native's dependence on the United States, it was well within the power of the federal government to civilize an Indian accused of adultery by sentencing her to prison even when no such moral crime existed at common law.[183] The Court opined, "the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian."[184] The millennia-old cultural practice of Native Nations resolving internal disputes amongst their people on their lands had been replaced under the auspices of trust responsibility.[185]

The next abysmal application of trust doctrine was the General Allotment Act of 1887, what some call the Dawes Act.[186] Dubbed "the most disastrous piece of Indian legislation in United States history," reservation land was divided up to individuals by acres, where it would remain in trust for 25 years, after which the individual Native would hold the land in fee and become a United States citizen.[187] Any excess lands were to be repurposed for non-Indian settlement.[188] The effect would be the erasure of reservations, destruction of Indian culture, and "transfer of Indian lands to whites."[189] Canby details further that much of the 138 million acres of land held in trust in 1887 was lost either by sale as tribal surplus, by sale to disingenuous deceivers, or from default on tax payments on useless, dry land unsuitable for farming.[190] Native Nations were left with only 48 million acres, nearly half of it arid desert, by 1938.[191] The remaining land was "checkerboard," that is, mixed between non-Indian and Indian ownership, which made the stated purpose of the Allotment Act—to turn Natives into small farmers—impossible, and the effect was that Natives were left in further despair.[192]

The ensuing years of the twentieth century brought some needed change to trust responsibility use, beginning with the Indian Reorganization Act

183. United States v. Clapox, 35 F. 575, 577 (D. Or. 1888).

184. *Id.*; *see also* Major Crimes Act, 18 U.S.C. § 1153 (1885) (responding to *Ex parte* Crow Dog, 109 U.S. 556 (1883) and requiring major crimes by a Native American on reservation land to be a federal offense to be tried in federal court).

185. CANBY, *supra* note 111, at 24.

186. Dawes Act of 1887, ch. 119, 24 Stat. 338, *repealed by* Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984.

187. CANBY, *supra* note 111, at 24-25.

188. *Id.*

189. Crepelle, *supra* note 52, at 585.

190. CANBY, *supra* note 111, at 26.

191. *Id.*; *see also* Crepelle, *supra* note 52, at 585-86.

192. *See* Crepelle, *supra* note 52, at 585-86.

(IRA) of 1934, also known as the Wheeler-Howard Act.[193] This "positive legislation" was an admission that the previous policy was devastating.[194] The IRA restored the excess lands to Native Nations that were lost as tribal surplus under Dawes, and the IRA encouraged self-government by allowing tribal constitutions and allowing Tribes their own counsel—subject to Secretary of the Interior approval.[195] A positive step, but the "superabundance of federal regulations remain . . . ."[196]

Today, Natives are subject to 2,200 more regulations than any other citizen because of the trust responsibility relationship as all trader transactions, mortgage executions, or oil drills—to name a few examples—require federal approval.[197] The direct consequence is poverty, seen most on reservations, as a lack of jobs due to federal regulations renders economic prosperity a dream.[198] Poverty, an "eight of the ten poorest counties in the United States" type, fastened with a lack of clean water, basic sanitation, electricity, or broadband internet, leaves Native Nations with very little to hope for.[199] When opportunity comes, as it did with oil drilling for the Mandan, Hidatsa, and Arikara Nation (the MHA Nation also known as the Three Affiliated Tribes) on the Fort Berthold Reservation in North Dakota, it is counterbalanced by immense, violent crime.[200] Journalist Sari Horwitz wrote that on Fort Berthold Reservation, "crime has tripled in the past two years and that 90 percent is drug-related. 'The drug problem that the oil boom has brought is destroying our reservation.'"[201] To be forthright,

193. CANBY, *supra* note 111, at 27.

194. Crepelle, *supra* note 52, at 587-88.

195. CANBY, *supra* note 111, at 28.

196. Crepelle, *supra* note 52, at 588.

197. *Id.* at 595 ("The application of Indian trader laws is also odd considering their purpose. The laws are designed to protect 'Indian wards' from devilish dealings with non-Indians. The laws, however, only apply to transactions between non-Indians and Indians while on a reservation. If the laws are designed to protect Indians from corrupt business practices by non-Indians, shouldn't the laws apply to commerce involving Indians off the reservation? Presumably, Indians are easier prey for non-Indians outside of Indian country than within it. This means that whatever justification existed for protecting Indians from non-Indians on a reservation is even stronger when Indians leave the reservation; thus, requiring a license to trade with Indians on a reservation but not requiring a license to trade with Indians off the reservation makes no sense. Indian trader regulations need to be erased from the books. The laws do nothing but hurt Indians, and Indians have expressed desire to be liberated from the Indian trader system.").

198. *Id.* at 563.

199. *Id.* at 570-71.

200. Sari Horwitz, *Dark Side of the Boom*, WASH. POST (Sept. 28, 2014), https://www.washingtonpost.com/sf/national/2014/09/28/dark-side-of-the-boom/.

201. *Id.*

"[m]ore money and more people equals more crime."[202] Tribal criminal jurisdiction is all but gone, another unintended consequence of further legislation, so determining who exactly prosecutes these crimes has been ruminated on by many scholars.[203] One police officer of the MHA Nation told Horwitz, "[t]here are volumes of treatises on Indian law that are written about this stuff. . . . It's very complicated. And we're asking guys with guns and badges in uniforms at 3:30 in the morning with people yelling at each other to make these decisions—to understand the law and be able to apply it."[204]

The obvious question is: what is the meaning behind all these regulations? Well, the policies undergirding restrictions seem to be well-intentioned, whether it be in the interests of archaeological preservation or environmental activism.[205] The introduction to this Note quoted Keller and Turek's wisdom that Indian law conflicts can arise in benevolence.[206] Yet, all these well-intentioned policies create an "adventure in federal bureaucracy."[207] This "white tape" is exactly why scholars, like Professor Crepelle, remark there are no laws like this anywhere else and that "bureaucratic imperialism" must go so that Native Nations may fully develop.[208]

Perhaps a less obvious question: what does this say about the great, diverse United States if this is allowed to continue? It is well-studied that these legal policies were designed to destroy Indian culture and resulted in the transfer of Indian land to non-Indians.[209] Again, look no further than the Dawes Act legislative history.[210] Look at the root of the poisonous tree itself, "[r]acism has played a significant role in United States-Indian relations, and nowhere is this more obvious than the 'trust relationship.'"[211]

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202. *Id.*

203. CANBY, *supra* note 111, at 292 (explaining how Public Law 280 granted criminal jurisdiction to the States).

204. Horwitz, *supra* note 200.

205. Crepelle, *supra* note 52, at 575 ("To obtain the BIA's approval for a business lease on trust land, a company must provide a litany of documents including archeological and environmental 'reports, surveys, and site assessments' that apply to federal and tribal land as well as 'a restoration and reclamation plan.'").

206. KELLER & TUREK, *supra* note 7, at iii.

207. Crepelle, *supra* note 52, at 575.

208. *Id.* at 566.

209. *Id.* at 583 ("The Olympic-level bureaucratic obstacle course created by trust land and Indian trader laws is rooted in racism and serves no purpose other than to strangle the red man in white tape.").

210. *Id.* at 585.

211. *Id.* at 584.

So, ask yourself: what about the very constitutionality of that reasoning? Why can the federal government of the United States discriminate against Native Nations without a compelling rationale? In *Brown v. Board of Education*, the Supreme Court elucidated the natural law principle that segregation based on race denies equal protection under the law.[212] What exactly then is the legitimate government purpose of segregating Native Nations from the full potentialities, capabilities, and rights of any other United States citizen?[213]

That is why abolishment of the trust responsibility was brought up years ago.[214] Make no mistake, "[t]he federal government is terrible at managing Indian land . . . because the United States has no incentive to behave."[215] The federal government has no accountability because "the Supreme Court has gone to tremendous lengths to shield the federal government from liability . . . ."[216] One extreme example is that the Court "ruled that tribes cannot even access documents to determine whether the United States has mismanaged a tribe's resources."[217] This type of conflict of interest prompted Justice Sotomayor to write that "had this type of mismanagement taken place in any other trust arrangements . . . there would be war."[218]

D. *Forging Forward in Indian Law History to Formulate the Future*

If the dark abyss of trust responsibility holdings is plunged to its deepest depth, a light emerges at the bottom—the avenue to create new law with resounding implications for Native Nation sovereignty and self-determination—the National Parks themselves. Naturally, this task will be far from simplistic as it requires a complete encapsulation of constitutional theory, current political dogma, and a balancing test between, on the one

212. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 495 (1954).

213. Crepelle, *supra* note 52, at 591 ("The current trust land regulations are irrational and promote no legitimate government purpose. The current federal restrictions on Indian trust land are unconstitutional.").

214. St. Cloud v. United States, 702 F. Supp. 1456, 1462–63 (D.S.D. 1988) ("[I]t is the policy of Congress, as rapidly as possible, to make the Indians within the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship. . . ." (quoting H.R. Con. Res. 108, 83rd Cong., 1st Sess., 67 Stat. B132 (1953), a portion of overturned legislation dubbed "Termination")); *see also* CANBY, *supra* note 111, at 29.

215. Crepelle, *supra* note 52, at 590.

216. *Id.*

217. *Id.*

218. United States v. Jicarilla Apache Nation, 564 U.S. 162, 208 (2011) (Sotomayor, J., dissenting); Crepelle, *supra* note 52, at 590.

hand, sycophantic, obsequious reparations, and fundamental, natural law, and ameliorative justice on the other.[219] Professor Singer explains the importance of the trust responsibility as a means of keeping Native Nations together.[220] This trust responsibility, a restraint on alienation, is what most, if not at all, Natives desire because it keeps the Nations together.[221] This Note does not suggest anything to the contrary, so the trick is to discover how to empower Native Nations to enforce that imperfect trust obligation to the United States when the restraint on alienation does not serve the interests of the specific Nation or themselves collectively.[222]

The United States has unfailingly displayed its desire for the trust responsibility to continue, whether for a morally sound reason or not.[223] Nearly 100 years after its language in *Kagama*, the Supreme Court again reaffirmed the trust responsibility relationship between Native Nations and the United States government—this time explicitly noting its usefulness regarding Tribes' property—"a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians."[224]

Mitchell II also professed that the United States should be liable for damages when in breach of the trust responsibility.[225] True as it may have been for Chief Justice Marshall that "'domestic dependent nation' [meant] little more than that Native American tribes exist in some form of limbo," and Native Nations' rights [are] "severely limited, if existent at all," it is a failure to recognize the unique opportunity the trust responsibility provides regarding the National Parks.[226] While authors like Di Iorio summarize tribes' legal relationship with the federal government as affording tribes rights only at the whim of the Federal Government,[227] another view is that

219. Crepelle, *supra* note 52, at 578 ("Overturning legislation in the field of Indian affairs has been nearly impossible because Congress is said to have plenary power over Indian affairs.").

220. Joseph William Singer, *Indian Title: Unraveling the Racial Context of Property Rights, or How to Stop Engaging in Conquest*, 10 ALB. GOV'T L. REV. 1, 34 (2017); *see also* Crepelle, *supra* note 52, at n.27.

221. Singer, *supra* note 220, at 35.

222. *Id.* at 34.

223. *Id.* ("The U.S. title to Indian lands has been used by the U.S. as an excuse to interfere with tribal self-determination and as a reason to exercise paternalistic power over Indian nations.").

224. United States v. Mitchell, 463 U.S. 206, 225 (1983) (known as "Mitchell II").

225. *Id.* at 226 ("Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust.").

226. Di Iorio, *supra* note 140, at 412.

227. *Id.*

Chief Justice Marshall's infamous policy "protects Indian nations in owning and governing their lands."[228] From the *Mitchell II* Court's holding, the trust responsibility grants damage recovery against the United States, too.[229]

The palpability for trust obligation reform has been determined as the years have passed. The policy of "termination" in 1953 sought to free Native Nations from "domination by the Bureau of Indian Affairs," yet its termination by statute of several tribes was a disastrous use of the trust obligation and ushered in the era of tribal self-determination in the late 1960's and 1970's era of President Nixon.[230] It is easy to look at the negatives of the trust responsibility as Rebecca Tsosie did many years ago: "[a]s trustee, the United States has certain powers of control and disposition that have not always been used for the best interests of Indian people."[231] Except, particularly in the years since Nixon's and Reagan's self-determination policies, the United States has indeed been held accountable, even if just in a narrow view of the government as "trustee."[232] In 2003's *Navajo I*, the Supreme Court acknowledged trust responsibility holdings and statutes have a bearing on each other,[233] but later reaffirmed the need for a statute to expressly state a trust obligation in order for a tribe to recover damages from the government.[234] *White Mountain Apache Tribe* was judged on the same day as *Navajo I* and has stood the test of time because of the precise language in the statute of question that specified a trust responsibility.[235]

While *Mitchell II* took a broad view of the trust responsibility, the Court has never granted relief for breach of that general duty, and the Court in *Navajo II* provided its two-step test for recovery under the trust responsibility: "a statute must contain rights-creating or duty-imposing conventional trust-like prescriptions and, second, the trust duty must be money-mandating."[236] Applying this test in recent cases like *Cobell* and

228. Singer, *supra* note 220, at 36 ("The only rights asserted by the United States were a right to regulate the transfer of tribal lands and a right of first refusal. According to Marshall, any limitation on the property rights owned by Indian nations without their consent is not only unjust but constitutes a form of conquest.").

229. *Mitchell*, 463 U.S. at 226.

230. CANBY, *supra* note 111, at 29-36.

231. Tsosie, *supra* note 53, at 1292.

232. *Id.*; *see also* CANBY, *supra* note 111, at 47.

233. United States v. Navajo Nation, 537 U.S. 488, 504-06 (2003).

234. United States v. Navajo Nation, 556 U.S. 287, 301-02 (2009).

235. United States v. White Mountain Apache Tribe, 537 U.S. 465, 469 (2003).

236. CANBY, *supra* note 111, at 48.

Fletcher, the United States has paid handsomely for past wrong doing.[237] Thus, it makes logical sense why the federal government wants the test, as "courts may be concerned that enforcement of trust duties which are not directly tied to statutory or treaty provisions is a slippery slope leading to a rule that tribal litigants will always prevail."[238] Curtis Berkey, a partner in a firm specializing in Indian law, wrote, "if the 'best interest' standard is a subjective test depending on the tribes' own articulation of their interests, courts may be concerned about endorsing a standard that has few limits."[239]

With all the wrongdoing, encumbrances, and irrational, racist logic from the federal government, it is more than fair to ask if there is a better system.[240] If principles of justice are not the foundation for Indian law decisions, then perhaps an observance of the natural law is long overdue. Americans deserve to know why President Reagan's remarks have never been met, and self-determination has never been actualized in a meaningful way.[241] Justice Black, in 1960, wrote, "[g]reat nations, like great men, should keep their word."[242] Justice Gorsuch echoed the same in 2019 when he wrote:

> Really, this case just tells an old and familiar story. The State of Washington includes millions of acres that the Yakamas ceded to the United States under significant pressure. In return, the government supplied a handful of modest promises. The State is now dissatisfied with the consequences of one of those promises. It is a new day, and now it wants more. . . . [T]he Court holds the parties to the terms of their deal. It is the least we can do.[243]

Perhaps the answers lie finally in viewpoints unifying, as all federal branches seek the vitality of Native Nations culturally and governmentally.[244] Without debate between assimilationists, preservationists, abolitionists, racists and the rest, Canby speculates no further major changes in Indian law

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237. *Id.* at 51.

238. Berkey, *supra* note 181, at 1078.

239. *Id.*

240. *See* Crepelle, *supra* note 52, at n.27.

241. *Id.* at 568.

242. Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting); *see also* Crepelle, *supra* note 52, at n.38.

243. Washington State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1021 (2019) (Gorsuch, J., concurring); *see also* Crepelle, *supra* note 52, at 569.

244. CANBY, *supra* note 111, at 36-37.

could occur.[245] Vickie Sutton penned optimism for *McGirt v. Oklahoma*, when the Court itself thought it said nothing new by holding that Congress cannot disestablish reservations by the results of the dastardly Dawes Act.[246] Other courts have since stated *McGirt* "did not break any new ground or impose a new obligation on the State,"[247] and the case has left many wondering what the consequences are if half of Oklahoma is reservation, Native land.[248]

What is certain from this web of Indian law is that (1) *Navajo II* provides a test for recovery of monetary damages,[249] (2) the trust responsibility protects Native Nation interests,[250] (3) the constitutionality of many Indian Law precepts deserves its racist reputation,[251] and (4) the treaty-reserved rights of Tribes are to be protected, even if the Executive perhaps no longer has the power to enter new treaties.[252] From this legal framework, there are many ways to know how the historical, spiritual, cultural, and ethereally transcendent land of the National Parks has an eternal connection in the souls of Native Americans. Like how the direct consequence of the Trail of Tears—when the East was free of Natives and the BIA moved from the War Department to the Department of the Interior[253]—forever linked Native Nations to National Parks, perchance the National Parks may rightfully be coupled to Native Nations in perpetuity.

II. INDIAN LAW & NATIONAL PARK LANDS

This Note began by describing the history of the National Parks, the NPS, and Native American relationships therein. To begin a view of Indian law's impression upon the National Park relationship, look no further than Yellowstone. Commonly considered America's "first" National Park,

245. *Id.* at 37.

246. *See* SUTTON, *supra* note 56, at 63; *see also* McGirt v. Oklahoma, 140 S. Ct. 2452, 2464 (2020); *cf.* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022).

247. Sanders v. Pettigrew, No. CIV 20-350-RAW-KEW, 2021 WL 3291792, at *5 (E.D. Okla. Aug. 2, 2021); *see* Donahue v. Harding, No. CIV-21-183-PRW, 2021 WL 4714662, at *5 (W.D. Okla. Sept. 15, 2021).

248. *See generally* Adam Liptak, *Supreme Court May Revisit Ruling on Native American Rights in Oklahoma*, N.Y. TIMES (May 26, 2021), https://www.nytimes.com/2021/05/26/us/supreme-court-oklahoma-native-american.html.

249. *See* CANBY, *supra* note 111, at 48.

250. *See generally* Worcester v. Georgia, 31 U.S. 515 (1832).

251. *See generally* Crepelle, *supra* note 52.

252. *See* SUTTON, *supra* note 56, at 64-66.

253. CANBY, *supra* note 111, at 21-22.

Yellowstone had a less bloody history than Yosemite, but its history was mixed, nonetheless.[254] "God's country," the stunning geysers of Yellowstone, and the other National Parks were intended at first to only rival artificial European marvels like the Louvre and were useless for making a dollar.[255] In Yellowstone's case, a prevailing thought at the time was that its "uninhabited" nature, due to its "forbidding" and "grim character," meant Native Americans never lived there, and the land was suitable for taking.[256]

The presumption that Yellowstone was uninhabited was wrong in the following three respects, a commonality for many of the National Parks.[257] Truth be told, "the Yellowstone area had been visited by human beings for at least eight thousand years before the park's creation."[258] Yet, the first explorers of Yellowstone thought the Crow they encountered were nothing but plains Indians seeking refuge.[259] Then, the "timid and harmless" Sheepeater Shoshone occupied Yellowstone land since at least about 1800, and when Yellowstone was created in 1872, the Sheepeater were forcibly removed, due to a never-ratified treaty, by 1879.[260] Lastly, many other Native Nations crossed the Yellowstone Plateau for hunting or other use, including the Blackfeet and the aforementioned Nez Perce.[261]

For the Nez Perce, their use of Yellowstone's geysers was to cook food, and that is presumably why they fled to the area when hunted by the U.S. Army for refusing to settle on a reservation.[262] In the following days, the Nez Perce would capture and kill several park tourists, and the history of Native Americans in the park would be subdued for decades afterward.[263] Meanwhile, the bison—hunted into extinction on the plains—would be, ironically, the effort of much preservationist talk at Yellowstone.[264] The man and his hunt in the marvelous National Park, Catlin's dream, would be

254. BURNHAM, *supra* note 58, at 21; *see* Schrack, *supra* note 116, at 4 ("The dispute over Indian treaty rights and national parks also played out between Yellowstone National Park.").

255. BURNHAM, *supra* note 58, at 19-20.

256. *Id.* at 20 (discussing a congressman's sentiment, one who, in fact, sponsored the bill creating Yellowstone).

257. *See generally id*.

258. *Id.* at 23.

259. *See* MARK DAVID SPENCE, DISPOSSESSING THE WILDERNESS: INDIAN REMOVAL AND THE MAKING OF THE NATIONAL PARKS 42 (1999).

260. BURNHAM, *supra* note 58, at 22.

261. *Id.*

262. *Id.* at 22-23.

263. *Id.* at 23-24 ("In 1880, Superintendent Norris negotiated a banishment of Indians from most of Yellowstone proper.").

264. *Id.* at 24-25.

separated for good.[265] Washington saw to that—in *Race Horse*, the Supreme Court of the United States held that Native Americans who once hunted Yellowstone were not guaranteed hunting rights by treaty forever.[266] Instead, it was the white man's destiny that these lands of Wyoming be settled; thus upon Wyoming's statehood, the hunting rights of Native Americans were nonexistent.[267] Traditions lasting millennia—where different groups of Natives considered Yellowstone useful, whether for reverent healing, prayer, mining of obsidian, controlled forest burns, or "vision quests"—was over.[268]

In 2019, *Race Horse* was repudiated to accord with *Navajo II*, and it held that treaty rights could be impliedly extinguished at statehood.[269] Yet, *Race Horse*'s underlying issue—whether all Native Americans can use their ancestral lands (National Park land) in the best ways they see fit—remains in question. Now, this Note turns its focus to a prominent example, among a plethora, of the ongoing struggle between the National Parks and Native Nations: that is to hunt, fish, gather, and freely practice their religion amongst other rights either treaty-reserved or guaranteed by natural law itself.

A. *Everglades National Park, the Seminole, and the Miccosukee*

Far across the country from Yellowstone, the land that would become known as Everglades National Park experienced similar strife and anguish. European disease wiped out most aboriginal Natives by 1700, leaving most of the Everglades and the State of Florida to its diverse wildlife.[270] The Creek of the Southeast made their way into Florida in the eighteenth century, and by the time of their crushing defeat in the Creek War of 1813-14, Native

265. *Id.* at 25.

266. Ward v. Race Horse, 163 U.S. 504, 509 (1896) ("To suppose that the words of the treaty intended to give to the Indian the right to enter into already established states, and seek out every portion of unoccupied government land, and there exercise the right of hunting, in violation of the municipal law, would be to presume that the treaty was so drawn as to frustrate the very object it had in view. It would also render necessary the assumption that congress, while preparing the way, by the treaty, for new settlements and new states, yet created a provision, not only detrimental to their future well-being, but also irreconcilably in conflict with the powers of the states already existing.").

267. Schrack, *supra* note 116, at 5 (quoting Race Horse) ("The Court noted, '[T]he march of advancing civilization foreshadowed the fact that the wilderness . . . was destined to be occupied and settled by the white man.' The right to hunt on unoccupied land existed only 'so long as the necessities of civilization did not require otherwise.'").

268. SPENCE, *supra* note 259, at 44.

269. Herrera v. Wyoming, 139 S. Ct. 1686, 1696, 1700 (2019).

270. KELLER & TUREK, *supra* note 7, at 216-17.

Americans fled southward down the Florida peninsula.[271] By 1830, they were known as the Seminole.[272] Adapting to Everglades land, they set aside the towns, horses, and gardens of their Creek heritage, and instead mastered canoes and lived in camps.[273] These refugees "were looked upon with great suspicion (and land hunger) by the settlers of Georgia."[274] Tensions stirred, prejudiced perhaps by the Seminole's welcoming acceptance of runaway slaves.[275] No matter the cause, President Andrew Jackson's "removal" policy came for the Seminole too, and so began the Seminole Wars.[276]

After the first war,[277] President Jackson's agents tried for "peace" with an 1823 treaty, a fitting legal exemplification of the removal *faux pas*:

> ARTICLE 5. For the purpose of facilitating the removal of the said tribes to the, district of country allotted them, and, as a compensation for the losses sustained, or the inconveniences to which they may be exposed by said removal, the United States will furnish them with rations of corn, meat, and salt, for twelve months, commencing on the first day of February next; and they further agree to compensate those individuals who have been compelled to abandon improvements on lands, not embraced within the limits allotted, to the amount of four thousand five hundred dollars, to be distributed among the sufferers, in a ratio to each, proportional to the value of the improvements abandoned. The United States further agree to furnish a sum, not exceeding two thousand dollars, to be expended by their agent, to facilitate the transportation of the different tribes to the point of concentration designated.[278]

Incomprehensibly, this treaty sought to bribe Native Americans from their homeland—a home where they held aboriginal title, acknowledged officially more than a century later by the Indian Claims Commission (ICC).[279] As to be expected, Seminole were not eager to move, and President

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271. *Id.* at 217.

272. *Id.*

273. *Id.* at 219.

274. PAGE, *supra* note 70, at 258.

275. *See id.*

276. *Id.*; *see also* KELLER & TUREK, *supra* note 7, at 219.

277. *Id.* ("[I]n 1818, Andrew Jackson led a small army of American soldiers . . . in an outburst called the First Seminole War that persuaded the Spanish to sell Florida to the United States.").

278. Treaty with the Florida Tribes of Indians art. 5, Sept. 18, 1823, 7 Stat. 224.

279. Allison M. Dussias, *The Seminole Tribe of Florida and the Everglades Ecosystem: Refuge and Resource*, 9 FIU L. REV. 227, 230 (2014) ("By this point, as the Indian Claims Commission found in 1964, Seminoles had established aboriginal title—ownership based on long-term and exclusive use and occupancy—to almost all of Florida.").

Jackson was forced to march United States troops into Florida once again in 1835.[280] Known as the Second Seminole War, "the fiercest of all the wars ever waged by the U.S. Government against native peoples,"[281] this seven-year war of "lethal skirmishing" would result in the capturing of four thousand Seminoles to be "shipped off to the Indian Territory."[282] Not all Seminoles were captured, and by 1842 the fighting stopped, leaving about 500 Native Americans left in South Florida.[283] The land of the Everglades directly helped as "[h]unting down Seminole families in the inhospitable conditions of the Everglades posed many problems for military operations."[284] Page wrote, "[t]his was, in fact, the only permanently successful resistance that any American Indians ever accomplished against the United States."[285]

Upon the government's ignorance of the remaining Seminole, those few remained in hiding and isolation until they began trading with a few friendly whites who established trading posts further inland.[286] The Europeans never had much luck settling Florida until the railroad cut down the coast in the 1880s,[287] and with newfound settlement came the next threat to Native ways of life: draining, damming, and dredging the Everglades.[288] Before draining the canals, the Everglades was still the "huge sawgrass swamp" that proved too difficult for the United States Army to fight over decades prior.[289] The upheaval of the swamp brought a shrinking of Seminole hunting grounds, and the fresh bustling metropolis of Miami made the trading ways of Natives second-fiddle.[290] To do something little for the Seminole, a reservation was set aside by the State of Florida in 1917, in the deep south of Monroe County, covering almost no dry land.[291] Nationwide, conservations would try to step in and create a park to save the wildlife in an ecosystem threatened by the recent surge in population, but the Seminole reservation presented a problem.[292] At the same time of "threats to Seminole lands and concomitant

280. *See* PAGE, *supra* note 70, at 259.
281. Dussias, *supra* note 279, at 230-31.
282. PAGE, *supra* note 70, at 259-60.
283. *Id.* at 260; *see also* KELLER & TUREK, *supra* note 7, at 219.
284. Dussias, *supra* note 279, at 232.
285. PAGE, *supra* note 70, at 260.
286. KELLER & TUREK, *supra* note 7, at 219.
287. *Id.* at 217.
288. *Id.* at 219.
289. Dussias, *supra* note 279, at 231-32.
290. KELLER & TUREK, *supra* note 7, at 220.
291. *Id.*
292. *Id.* at 220-21.

threats to the Everglades ecosystem, threats to the survival of the Florida Seminoles as a people with a continuing government-to-government relationship with the United States also arose."[293]

While the Seminole refused to move to the reservation from their camps further to the northwest, factional disputes amongst them, utterly oblivious to the Bureau of Indian Affairs, arose, which culminated in acknowledgment of two "distinct political entities": the Seminole Tribe of Florida in 1957, and the Miccosukee Tribe of Indians of Florida in 1962.[294] With two groups to negotiate with, the conservationists' goals became more complex, prompting one crusader, Ernest F. Coe, to propose that Native Americans have jobs within the park as canoe guides.[295] Eventually, the reservation in Monroe County was canceled—the legislation held that since the Indians never lived continuously on the reservation, it could be canceled—and Everglades was set to be the first national park reserved for biological reasons.[296] Professor Allison Dussias wrote, "[w]hen the Everglades' natural conditions prevailed, slow moving freshwater flowed through the system from north to south, prompting early Everglades protection proponent Marjorie Stoneman Douglas to refer to the Everglades as a 'River of Grass'—a possible reference to the Seminole word pahay-okee ('grassy water')."[297]

Once talks were in the works, Coe called for the voiding of the hunting and fishing rights of the Native Americans living in and around the park, but others wanted Native voices involved in the tourism of the new park.[298] For twenty years, between 1920 and 1940, tourist villages existed, and most Natives looked back favorably on them in the latter half of the twentieth century; then, the BIA thought the tourism contributed to alcoholism, sexual disease, and prostitution.[299] The Secretary of the Interior of the time, Harold Ickes, worried about the National Park's effect on the Native people and thought they should have another reservation established where they held camps northwest of the park.[300] Ickes realized the Everglades "provided a refuge to the Seminole Indians, to whom it once belonged exclusively,"[301] and he made a grand statement on Native rights before the park's

293. Dussias, *supra* note 279, at 235.
294. *Id.*; *see also* KELLER & TUREK, *supra* note 7, at 221.
295. KELLER & TUREK, *supra* note 7, at 221.
296. *Id.* at 221-22; *see also* Dussias, *supra* note 279, at 249.
297. Dussias, *supra* note 279, at 249.
298. KELLER & TUREK, *supra* note 7, at 223.
299. *Id.*
300. *Id.*
301. *Id.* at 225.

authorization in 1934: "For a considerable time to come, the Seminoles ought to have the right of subsistence hunting and fishing within the proposed park, and they should always have the labor preference."[302] Ickes's public statements continued in 1935, saying the establishment of a new reservation would "make up for the sufferings . . . at our hands" of the Native Americans in Florida.[303] Keller and Turek wrote, "Harold Ickes, the 'righteous pilgrim,' had made creation of Everglades National Park a moral issue."[304] As Ickes promised employment for Natives and protection, John Collier, the Indian commissioner, said Florida Indians had an emotional bond with nature unknown to whites.[305]

Upon authorization of Everglades in 1934, the legislation held rights for Seminole and Miccosukee, "which are not in conflict with the purposes for which the Everglades National Park is created."[306] Later legislation also states Native Nations have the right "to 'continue their usual and customary use and occupancy' of lands and waters in the BCNP, 'including hunting, fishing, and trapping on a subsistence basis and traditional tribal ceremonials.'"[307] While the Seminole certainly had a stake in the Everglades,[308] Coe trumpeted for the removal of all Indian camps and villages, and others in the BIA knew they would never approve hunting, trapping, cattle or hog raising, or agriculture in the park.[309] Still, some others knew complete avoidance of Native Americans would be unwise and may not be successful, so requirements for "Indian activity" were put in place that were eventually agreed upon.[310] Though time passed and groups still pled for removal—Native presence at President Truman's dedication ceremony of Everglades National Park on December 6, 1947, was nonexistent—Native Americans would be involved in the Everglades management.[311]

Today, an ideological view persists—the Native identity of the people is so linked to Florida's Everglades that if the land died, so, too, would the people.[312] This disposition informed the Seminole in their successful pursuit

302. *Id.* at 223, 225.
303. *Id.* at 225.
304. *Id.*
305. *Id.*
306. Dussias, *supra* note 279, at 235.
307. *Id.* at 236.
308. *Id.*
309. KELLER & TUREK, *supra* note 7, at 226.
310. *Id.* at 228.
311. *Id.* at 229.
312. Dussias, *supra* note 279, at 241.

of new reservation lands by 1950.[313] In addition, the "more traditional"[314] Miccosukee sought the land crucial to their survival, and "with expert legal help and their own persistence," the Miccosukee succeeded in 1962.[315] To do its part, Florida eventually codified subsistence rights of these Native Nations in a nearby preserve:

> It is lawful for members of the Miccosukee Tribe and members of the Seminole Tribe to take wild game and fish at any time within the boundaries of their respective reservations and in the exercise of hunting, fishing, and trapping rights within the Big Cypress Preserve under Pub. L. No. 93-440 and under s. 380.055(8), provided that game may be taken only for food for the Indians themselves.[316]

The NPS, however, uses Florida's statute as a workaround for refusing to recognize the same rights within the Everglades National Park.[317] The Seminole have encountered additional frustrations with federal law—famously, *State v. Billie*,[318] where the killing of the Florida panther for sacred ceremonial use, violated the Endangered Species Act.[319] Meanwhile, the Miccosukee feel equally unwelcome in Everglades,[320] and "the Tribe brought breach of trust claims against the Department of the Interior and Army Corps of Engineers for their failure to alleviate hurricane-related flooding on three parcels of tribal land."[321] The court held in line with *Mitchell II*, stating, "despite the general trust obligation[s] of the United States to Native Americans, the government assumes no specific duties to Indian tribes beyond those found in applicable statutes, regulations, treaties or other

313. KELLER & TUREK, *supra* note 7, at 229.

314. *Id.* at 216.

315. *Id.* at 230 ("After the federal government granted official recognition in 1962, the band acquired a fifty-year lease from the NPS for a strip five and half miles long and 600 feet deep along Highway 41. The new Forty-Mile Bend Reservation provided space for Miccosukee offices, a school, housing and the Green Corn Dance ceremonies. Most of all, it answered a plea that elderly shaman Sam Jones had made to Ingraham Billie, George Osceola, and Buffalo Tiger a decade earlier: 'This land I stand on is my body. I want you to help me keep it.'").

316. FLA. STAT. ANN. § 285.09 (West 2022).

317. KELLER & TUREK, *supra* note 7, at 230.

318. State v. Billie, 497 So. 2d 889, 895 (Fla. Dist. Ct. App. 1986).

319. 16 U.S.C.A. § 1531 (Westlaw through Pub. L. No. 117-214).

320. KELLER & TUREK, *supra* note 7, at 231.

321. Berkey, *supra* note 181, at 1075; *see also* Miccosukee Tribe of Indians of Fla. v. United States, 980 F. Supp. 448, 464 (S.D. Fla. 1997).

agreements."[322] Keller and Turek interviewed a former NPS superintendent at Everglades who said:

> Our staff see the Miccosukees with a huge bingo parlor, see them working with Shell Oil to slant drill under the Everglades to enhance their financial base. They act on economic imperatives. On the other hand, they talk about traditional ways and sacred land. It creates a lot of resentment, and it's painful for the park manager because you recognize the validity of their claims and history and human needs, yet you have a responsibility to protect the park. It's sometimes very difficult. It's sometimes impossible.[323]

Despite the frustration, the Seminole still prove their "concern for Everglades ecosystem protection and restoration, for cultural preservation and other reasons," by "its administration of the Clean Water Act water quality standards" and participation "in a number of water protection programs and initiatives."[324] The courts may not see a specific duty to keep reservation lands from flooding,[325] but Natives in South Florida "partner[] with state, federal, and other tribal agencies in a number of other initiatives and intergovernmental task forces" for the restoration and protection of the Everglades.[326] Professor Dussias remarked, "[t]he Tribe's efforts . . . mark a new chapter in the story of the Tribe's relationship with the water resources of this unique area . . . what might be termed the Fourth Seminole War—[acceptance of] the Tribe's vision of what needs to be done for the ecosystem that has supported the Tribe for many generations—is still being fought."[327]

Much like other timeless disputes between governments and cultures, the bones of contention in the National Park and Native American story brings with it some good and some bad. The case study of the Seminole/Miccosukee proves that it is, in fact, possible to fight for land claims and be rewarded, even if the land is the muddied swamps of South Florida.[328] Without a tribal liaison, without much in the way of co-management in the last sixty some odd years, and with minimal tribal consultation, Everglades National Park is "not exempt from the anomalies of

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322. *Miccosukee*, 980 F. Supp. at 461; *see also* United States v. Mitchell, 463 U.S. 206, 224-26 (1983); Berkey, *supra* note 181 at 1075.

323. KELLER & TUREK, *supra* note 7, at 231.

324. Dussias, *supra* note 279, at 241.

325. Berkey, *supra* note 181, at 1075.

326. Dussias, *supra* note 279, at 251.

327. *Id.* at 253-54.

328. KELLER & TUREK, *supra* note 7, at 231.

history," but is indeed a source of inspiration in the ever-present discordant, bad blood between Native Americans and the Europeans that colonized the Americas.[329] As the next section will address, the National Parks make indigenous justice—a maneuver from historical hostility towards authentic affinity and amicability—attainable today with reasonableness and credibility that other approaches turn a blind eye to.

B. *National Parks in an Age of Reparations*

A natural element of improving any system is acknowledging its flaws and where they came from. For many in the United States today, reparations are *en vogue* as a counterbalance to historical harm.[330] The Land Back movement, a spear-header of this line of thinking for Indigenous peoples, defines reparations as "one part of the process of restoring justice for the land theft, genocide, and enslavement committed in the spirit of capitalism, because the generational privilege is still real and the harm to our communities and peoples persists."[331] In step with social pushes for diversity, inclusivity, and equity,[332] the Land Back movement argues the ways to meet its demands is for colonizers to pay rent, contribute to land trusts, and "support efforts to return national public lands to Indigenous stewardship."[333]

The movement does not obfuscate its desires, as it states it wishes to be "truly consulted about who can enter our land, and what is done to it—and that when we say no, the response is to respect our decision and stay

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329. *Id.*

330. *See* Vivian Ho, '*If Not Us, Then Who?': Inside the Landmark Push for Reparations for Black Californians*, GUARDIAN (Jan. 9, 2022, 6:00 AM), https://www.theguardian.com/us-news/2022/jan/09/california-reparations-slavery-african-americans; Taryn Luna, *California Created the Nation's First State Reparations Task Force. Now Comes the Hard Part*, L.A. TIMES (Dec. 9, 2021, 5:00 AM), https://www.latimes.com/california/story/2021-12-09/california-reparations-panel-grapples-with-the-task-at-hand.

331. Nikki Pieratos & Krystal Two Bulls, *Land Back: A Necessary Act of Reparations*, NONPROFIT Q., Summer 2021, at 24, 24.

332. *See, e.g.*, Monisha Kapila et al., *Why Diversity, Equity, and Inclusion Matter*, INDEP. SECTOR (Oct. 6, 2016), https://independentsector.org/resource/why-diversity-equity-and-inclusion-matter/; Lisa Fairfax, *Empowering Diversity Ambition: Brummer and Strine's* Duty and Diversity *Makes the Legal and Business Case for Doing More, Doing Good, and Doing Well*, 75 VAND. L. REV. EN BANC 131 (2022); *cf.* Jordan Peterson, *Jordan Peterson: When the Left Goes Too Far — The Dangerous Doctrine of Equity*, NAT'L POST (May 10, 2019), https://nationalpost.com/opinion/jordan-peterson-when-the-left-goes-too-far-the-dangerous-doctrine-of-equity (explaining the concerns with social pushes towards diversity, inclusivity, and equity).

333. Pieratos & Two Bulls, *supra* note 331, at 28-29.

away."[334] It notes that "rent" payments have begun towards the Duwamish Nation and that Congress's vote "to return 12,000 acres of Chippewa National Forest to the Leech Lake Band of Ojibwe" are positive first steps.[335] However, those so-called rent payments are not statutorily obligated; they are mere donations from those who feel compelled to do so.[336] Moreover, the 12,000 acres return stems from overt, egregiously evil decisions by the federal government, ones no law can inveigle in modern times.[337]

Neither approach is appropriately applicable for the National Parks, the public lands every American—made equal—is entitled to appreciate in their glory.[338] Noting that Native Nations have occasionally "received monetary compensation for the forcible dispossession of their lands," Rebecca Tsosie explained, "[Native peoples] continue to suffer in ways not amenable to financial redress."[339] What, then, exactly is to be done about historical injustices?

There needs to be a new framework that respects unique claims to land and resources[340] and does not subordinate "Native peoples' interests to the greater public good."[341] For every negative example of interference, there exists a positive counterbalance in this exploration of Native Americans' legal relationship with their federal government. Just take for example, "[in] the National Park Service's management plan for the Devil's Tower National Monument, Native peoples' religious interests are accommodated as a 'cultural use' of the lands and qualified by the rights of other parties, such as recreational rock climbers, to enjoy the resource."[342] President Nixon took direct action on his promises, "restor[ing] 48,000 acres of land, including

334. *Id.*at 28.

335. *Id.* at 29.

336. *See* REAL RENT DUWAMISH, https://www.realrentduwamish.org/ (last visited Feb. 18, 2022).

337. Briana Bierschbach, *'Land Is Culture': Measure Could Restore Nearly 12,000 Acres of Leech Lake Land*, STAR TRIB. (Dec. 7, 2020, 4:53 AM), https://www.startribune.com/measure-will-restore-nearly-12-000-acres-of-leech-lake-land/573311681/ ("[I]n 1948, the Bureau of Indian Affairs misinterpreted an order to mean that the Department of the Interior had the authority to make 'secretarial transfers,' or sell tribal allotments without their consent. That went on until 1959, when attorneys in the department said the sales were illegal and must be stopped. By then, 17,000 additional acres had been illegally taken from the tribe.").

338. Tsosie, *supra* note 53, at 1303 ("[T]he concept of 'public lands' which are perceived to belong to all Americans collectively and which are managed for the 'greater public good' by the national government.").

339. *Id.* at 1301-02.

340. *Id.* at 1301.

341. *Id.* at 1304.

342. *Id.* at 1305.

Blue Lake, to the Taos Pueblo."[343] On top of that, "[i]n 1975, as part of the Grand Canyon National Park Enlargement Act, 185,000 acres were returned to the Havasupai Tribe for 'traditional purposes, including . . . the gathering of, or hunting for, wild or native foods, materials for paints and medicines.'"[344]

Native Nations have also had their rights within National Parks restored from violated treaties,[345] as in the Apostle Islands National Lakeshore, NPS managed home of the Chippewas.[346] Andrew Schrack comments, "[s]everal lands within the NPS's purview allow tribal traditional [rights] . . . in recognition that the tribe had occupied their 'ancestral homeland' since 'time immemorial,' Congress gave the Timbisha Shoshone Tribe rights to continue traditional practices in special use areas of Death Valley National Park."[347] The hope must be that the Everglades National Park will follow suit for the Seminole and Miccosukee. In 2006, in a first of its kind NPS statement acknowledging so, "the NPS officially recognized the parks as ancestral lands," thereby noting that within "its duty to protect park resources," the NPS would seek to protect cultural and religious practices within the National Parks.[348]

This "thorny question of National Parks and historic injustice"[349] requires patience and communication. There is no better example than the Lakota Sioux's fight to repatriate its Black Hills, as they have refused—for decades—what is now over a billion dollars in monetary compensation from the government acknowledging its illegal appropriation of the Black Hills.[350] Rebecca Tsosie illuminates the dangers of Indigenous reparations in their strictest sense by examining theories of property rights: "a pervasive

343. *Id.*; *see also* Act of Dec. 15, 1970, Pub. L. No. 91-550, 84 Stat. 1437 (1970).

344. Schrack, *supra* note 116, at 6; *see also* Grand Canyon National Park Enlargement Act, 16 U.S.C. § 228i(b)(1) (2012).

345. Schrack, *supra* note 116, at 7 ("Congress has, on occasion, returned rights to tribes years after the establishment of the national park lands. . . . Beginning in the 1990s, several individual parks entered into agreements with tribes to allow traditional gathering and other accommodations. These agreements usually premised their authority on the American Indian Religious Freedom Act[.]").

346. *Id.* at 5.

347. *Id.* at 5, 7; *See* Timbisha Shoshone Homeland Act, Pub. L. No. 106-423, § 2(1), 114 Stat. 1875 (2000).

348. Schrack, *supra* note 116, at 12.

349. KELLER & TUREK, *supra* note 7, at 225.

350. Tsosie, *supra* note 53, at 1305 ("The Lakota are convinced that if they accept monetary damages for their claim to these sacred lands, they will forfeit their identity as Lakota people."); *see also* Kimbra Cutlip, *In 1868, Two Nations Made a Treaty, the U.S. Broke It and Plains Indian Tribes are Still Seeking Justice*, SMITHSONIAN MAG. (Nov. 7, 2018), https://www.smithsonianmag.com/smithsonian-institution/1868-two-nations-made-treaty-us-broke-it-and-plains-indian-tribes-are-still-seeking-justice-180970741/.

question is whether and how far the government may venture in regulating property rights to achieve some optimal social goal."[351] She elaborates that "[d]istributive justice implies that all citizens are entitled to a certain minimum or threshold allocation of resources, but it is unclear whether such justice can be gained by interfering with the existing property rights of others."[352] Many questions abound from this line of thinking, she suggests: "[I]n cases of historical injustice, should we provide reparations to the victims or their descendants? Are 'reparations' consistent with 'compensatory justice,' in the sense they alleviate any further inquiry into ongoing distributions of resources within society?"[353]

The Land Back movement contradicts itself, noting, "[t]here is not a one-size-fits-all strategy for reparations for Native Nations or Indigenous peoples."[354] When someone can see the dilemma's complexion clearer from Professor Tsosie and others, the Land Back movement nails the element of National Parks in all this contentiousness,[355] but misses the mark on the proportionate measure of the role. The approach was meant to start a conversation, but the conversation rages on in modern America in the shape of riots, insurrections, and "widespread distrust of institutions."[356] Judson Berger wisely warns that the "extreme proposal" of returning the National Parks to Native Americans would only result in more civil war and bloodshed.[357] He wrote:

> Should entire generations — who, incidentally, are generations removed from the violent ends of America's westworld — vacate the suburbs and cities to restore the other 98 percent? Why, no. That would set off a civil war. Alternatively, would returning 85 million acres of national parkland . . . suffice to address these wrongs? Mathematically speaking, it would address 3.5 percent of these wrongs. It's both too much, and not enough.[358]

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351. Tsosie, *supra* note 53, at 1310.

352. *Id.*

353. *Id.* at 1311.

354. Pieratos & Two Bulls, *supra* note 331, at 28.

355. *Id.* ("Reparations can take the form of national park lands being returned to Native Nation governments . . . .").

356. Judson Berger, *Maybe Handing Over America's National Parks Is a Bad Idea*, NAT'L REV. (April 24, 2021, 6:30 AM), https://www.nationalreview.com/2021/04/maybe-handing-over-americas-national-parks-is-a-bad-idea/.

357. *Id.*

358. *Id.*

Reparations cannot seek to unequivocally settle an old score over championing new forefronts—they should be, like their definition, a repair.[359] This Note's next section provides logical legal options for incorporating National Parks into the genuine issue of people being dispossessed of their rights in culture, religion, hunting, or any of the rest.

III. RETURNING THE NATIONAL PARKS TO NATIVE AMERICANS

Upon consideration of his film series, *The National Parks: America's Best Idea*, Ken Burns and PBS knew the narrative was "the story of an idea as uniquely American as the Declaration of Independence and just as radical: that the most special places in the nation should be preserved, not for royalty or the rich, but for everyone."[360] Andrew Schrack agreed, "[t]he national park system has come to symbolize some of the great ideals and cultural values of America."[361] While many lawyers, researchers, and other scholars have undoubtedly given much thought to returning National Parks to Native Americans, perhaps none have considered it from the epistemological position outlined above in this Note. Many of the problems from Sections I and II can thus be summarized:

> The NPS was created to preserve the natural wonders of the country. However, many of these natural wonders also hold great cultural and religious significance to Native American peoples as part of their ancestral lands. The historical relationships between Native American tribes and the NPS has been characterized as "ongoing antagonism." Tribes and other communities were often removed from their ancestral homelands in order to preserve that land as a national park. "Uninhabited wilderness had to be created before it could be preserved," and the national park system has benefited from the erosion of Indian country.[362]

This Note now turns to the application of the Native story in the legal form, as it furnishes a bare-bones integration of various legal proposals into a unified legislative package. Through this, the National Parks can be for everyone and no longer exclude Native needs. With this legislative idea,

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359. *Reparation*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/reparation (last visited Feb. 12, 2022) ("a repairing or keeping in repair").

360. *About the Film*, PBS, https://www.pbs.org/kenburns/the-national-parks/about (last visited Feb. 25, 2022).

361. Schrack, *supra* note 116, at 2.

362. *Id.* at 2-3.

National Parks can continue to be an exemplary precedent of the ideals and cultural values Americans could uniquely prioritize.

A. *Forge a New Way—The Atlantic's Article after Reparation's Faults*

Recall that an issue in The Atlantic's piece, "Return the National Parks to the Tribes," is not only its proposed solution to any financial hiccups—that the Federal Government should just continue to fund the operation—but its gloss over of the historical, cultural, and legal difficulties of reclassifying a massive amount of land that is regarded as public.[363]

Recently, seeds of cooperation were sowed with the arrangement by the Cherokee to harvest within Great Smoky Mountains National Park.[364] Of course, while the Cherokee have found some much-needed understanding of their rights and other Native Nations "have been able to successfully assert their rights through treaties, Congressional acts, Presidential proclamations, and formal and informal agreements, the majority of Native American tribes have been unsuccessful to legally continue their traditional practices."[365]

Considering the reparation movement, what should be done about those Native Nations that cannot continue their practices on the land? Rebecca Tsosie explained that ancestral property rights give a legal basis to treaty and modern-day Native rights, and she proclaimed the necessity for the decolonization of rights philosophies.[366] There is a near-impossibility of every Native Nation articulating every possible right it should have asserted at treaty-making time many decades ago or longer,[367] and it seems foolish to

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363. *See* Treuer, *supra* note 2, at 44.

364. Rex Hodge, *Historic Agreement Allows Cherokee Tribe Members to Gather Traditional Plant in Smokies*, ABC 13 NEWS (Mar. 25, 2019), https://wlos.com/news/local/historic-agreement-allows-cherokee-tribe-members-to-gather-traditional-plant-in-smokies.

365. Schrack, *supra* note 116, at 23.

366. Tsosie, *supra* note 53, at 1311 ("The dispossession of Native peoples from their lands was an act of colonialism designed to forcibly dismantle the Native peoples' existing governmental systems and supplant them with those of the conquering nation. Looking back, we may be critical of certain actions taken by the politicians of that time, particularly the more grotesque acts of genocide and warfare. However, we rarely question the right of contemporary citizens to reside on the lands that were forcibly taken from Native people. In fact, citizen outcry is at its strongest when the courts recognize 'ancient' property rights stemming from treaties or federal statutes such as the Nonintercourse Acts, which were illegally breached. Few non-Indians really think it would be just to give portions of New York state back to the tribes, even though the tribes may possess a legal right to such land.").

367. Meyers, *supra* note 97, at 83-84 ("In summary, the native concept of aboriginal rights is holistic; it is different both in kind and in content than the view held by the dominant white culture in Canada and the United States. The Indian perspective rests on an appeal to natural law. As David Ahenakew, National Chief of the Assembly of First Nations, contends, '[t]he Creator gave each people the

require further a continued relationship wherein Native Nations must seek approval all the time. One UCLA Law journal described the current logic of rights toward Natives as unjust because "all rights flow from [the] first principle of natural law—rights to occupancy and use of the land, rights to self-determination, and rights to control others' use of that land . . . requiring natives to identify and quantify specific rights is an impossible task, [and thus] unjust."[368] Since treaty rights, in the first place, acknowledged the need to share resources with Native Nations, "there is . . . an emerging sense that Native rights may impose a servitude on the federal and state/provincial governments to protect the 'property right' in the resource."[369] The counterargument to that sentiment is that the trust obligation can infringe—and often has—on treaty rights, and thereby Native rights, many times over, as previously detailed in Section II.[370]

Therefore, new legislation must be enacted that fulfills—with a co-management regime—the failed Chippewa-Apostle Islands National Lakeshore attempts of 1970.[371] This time around, the NPS is, and should continue to be, more tolerant of Native rights, evidenced by the gathering agreement in Great Smoky Mountains National Park and the more recent Interior Department co-management agreement for Bears Ears National Monument.[372] Co-management, therefore, should operate as a right to power-sharing between Indigenous groups and federal agencies in conflict resolution.[373] Significant participation with the NPS as co-managers is a persuasive argument "when viewed in light of the fundamental Indian law principle that treaties are not 'a grant of rights to the Indians, but a grant of rights from them-a reservation of those [rights] not granted.'"[374]

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right to govern its own affairs, as well as land on which to live and with which to sustain their lives. These Creator-given rights cannot be taken away.'").

368. *Id.* at 84.

369. *Id.* at 115.

370. *See* Sholar, *supra* note 170, at 157 ("However, the trust obligation has become a convoluted doctrine, and has been used by the United States not only to protect the rights of tribes, but also to infringe upon their inherent rights and sovereignty."); *see also* Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 2 (1991) ("More often, however, the United States simply abrogated the treaties. The federal government has a long and appalling history of breaking treaties with Indian nations whenever it was convenient for the United States to do so.").

371. *See* KELLER & TUREK, *supra* note 7, at 3.

372. *BLM, Forest Service and Five Tribes of the Bears Ears Commission Commit to Historic Co-management of Bears Ears National Monument*, U.S. DEP'T. INTERIOR (June 20, 2022), https://www.doi.gov/pressreleases/blm-forest-service-and-five-tribes-bears-ears-commission-commit-historic-co-management.

373. Meyers, *supra* note 97, at 119.

374. Sholar, *supra* note 170, at 151.

Native Americans are not entirely better off today because of personal property rights despite what automobiles or limited-internet access they may have.[375] As Americans, there must be an adoption of a different lens to view the Native American relationship with National Parks, one that requires a cultural approach.[376] Native voices like David Treuer are right in this regard.[377] Co-management is the legal solution to the cultural problem because, in light of all the divisiveness of our country and regardless of the possible property right justification, co-management is something Americans all agree on.

B. *New Legislation to Repair the Trust Responsibility and Restore Native Land*

The Apostle Islands once belonged to the Ojibwe people.[378] Over the years of colonization, the Ojibwe lost most of their land in this tiny archipelago, but a few reservations remained, including one of the Chippewa.[379] In 1970, the Senator, Gaylord Nelson, haphazardly became a key figure in the preservation of these islands to the Natives because of his vehement fight for ecological preservation.[380] To preserve these islands best, the federal government was to become involved and create another National Park.[381] To accompany this idea, there was a misguided thought that tourism could save the Native population on the islands from poverty.[382] To do so, Senator Nelson had a plan to create a booming recreational haven including awarding the Chippewa "preference in employment and guide services" within the park.[383] The land would retain its beauty, the local economy would boom (to the tune of an estimated seven million dollars annually), and the Native Americans would play an active role in driving themselves out of poverty in their rightful home.[384]

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375. Tsosie, *supra* note 53, at 1311-12.
376. *Id.* at 1312.
377. *See generally* Treuer, *supra* note 2.
378. KELLER & TUREK, *supra* note 7, at 3.
379. *Id.* at 5.
380. *Id.*
381. *Id.*
382. *Id.* at 7.
383. *Id.*
384. *Id.* at 7-8.

Like all ideas, there was pushback and that hope waned into failure.[385] Make no mistake, this could have been avoided. The legislation incorporating early seeds of co-management lost the support and trust of the Native population when it was drafted because several Native people were arrested for gathering on the soon-to-be park land, and the federal government failed to inform Chippewa people of lakeshore negotiations.[386] Hunting, fishing and trapping, and gathering rights on Department of the Interior lands were to be a part of a deal in exchange for shoreline in the National Park.[387] Justifiably predisposed to distrust, the Chippewa vowed never to give up another "foot of land."[388] When legislation went through and the National Lakeshore was created, the Chippewa did not cede their reservation land to the NPS, and hunting, fishing, trapping, and gathering were permitted.[389]

Once the park opened, it relied on the Native visitor center instead of one owned and managed by the NPS.[390] The Chippewa visitor center could not sustain itself without funds and personnel from the NPS and closed.[391] Today, those that travel to these islands learn little of the Native history and conflict, and the Chippewa view the lack of communication and outreach on behalf of the NPS as "indifference."[392] With the missteps of state officers arresting Natives—a total failure to properly communicate by the federal government—Senator Nelson's proposed, original plan resulted in lost trust, but rights were preserved.[393] The initial proposal included "government help in acquiring and developing land outside the lakeshore, [and] the Chippewa would have had access to . . . docks . . . freedom to cross NPS lands in order to hunt and fish . . . [retained] right to fish, trap, and hunt on ceded lands . . . preference in timber cutting, Park Service employment, and visitor concessions."[394] The Apostle Islands story elucidates what co-management can be possible when understanding and patience are at their peak.

As it happens, the United States is not the only country that wrestles with this question of what to do about Natives and their role within national

385. *Id.* at 8.
386. *Id.*
387. *Id.*
388. *Id.* at 9.
389. *Id.* at 14.
390. *Id.*
391. *Id.*
392. *Id.* at 15.
393. *Id.*
394. *Id.* at 247.

parks.[395] Unfortunately, most of the problem-solving in granting Native Peoples their proper due has been on a trial-error basis worldwide.[396] An unfortunate consequence is Indigenous deprivation and detriment, typically through the displacement of Natives once national parks were set-aside.[397] Native exclusion can sometimes be attributed to violations of environmental laws within the parks. However, authorities have been wrong about the origin of depletion of endangered species' sources of food in India and elsewhere.[398] Countries like Korea, Japan, and Australia do not exclude Native people from national parks because due to "high human density, and intensive land use" elsewhere, Native displacement would be contrary to other interests.[399] Surprisingly, Australia even allows Aboriginal peoples to resettle in the parks, an approach that could be taken in the United States.[400]

Transplanting natives, excluding them from traditional lands, was successful in Malolotja National Park in Swaziland because assimilation techniques were applied carefully.[401] The Malolotja model relocated Natives into areas of similar cultural and agricultural aspects as their native land.[402] On the other hand, in the United States, many Indian reservations are located upon desolate, arid lands utterly devoid of the characteristics of their ancestral homelands. Regardless of the passage of time, the successful model of displacement shown elsewhere in the globe requires Native Americans have the right to use productive lands—the United States National Parks. Natives must desire this offer, too.[403]

The Native way of life does not require that Native Americans own, in title, National Park land,[404] but the ability to hunt, fish, trap, and continue the religious practices that allowed them to flourish in their original settlements is a must. All over the world, national park authorities allow Native Peoples access to nationally protected land, and there is a notable difference in relationships between park officials and locals when resource uses are denied, and few replacement resources are available.[405] In the careful plan to

395. *See generally* WEST & BRECHIN, *supra* note 7, at 363-67.
396. *Id.*
397. *Id.*
398. *Id.* at 367.
399. *Id.* at 366-67.
400. *Id.*
401. *Id.* at 368-69.
402. *Id.*
403. *Id.* at 372.
404. Tsosie, *supra* note 53, at 1306.
405. WEST & BRECHIN, *supra* note 7, at 374-75, 377.

allow co-management of the parks, there must be an emphasis and understanding of Native needs and their current practices to account for the best fit when co-managing, staffing, and accessing National Parks.[406]

The pinnacle of Native involvement is not merely hiring local people in parks, but it is co-management—the Native participation in the planning process for determining management policies in the parks.[407] West and Brechin warned of co-management's pitfalls from their experience with active participation programs.[408] When ties with local groups soured, often it was an issue of perception versus reality:

> [L]ooking more carefully we see that this assessment [of solid community support] was based on the perception that the park administrators have done a good job of communicating the purposes of the reserve *to* the people. This confuses public relations with true participation; mistake communication *to*, for communication *with*.[409]

The solution suggested by West and Brechin is that "[t]rue participation must involve a give and take and a sharing of decision-making power."[410] It can be achieved by "alternative dispute resolution approaches, and institutions of checks and balances within power sharing joint management."[411] The authors advise that this approach is rarely implemented and remains in the ether.[412] With West and Brechin's work as a guide, implementation of co-management in the National Park is possible through "improved techniques of local participation," especially in tribes that border the National Parks.[413]

Another hint of a solution that will forever repair Native American relationships is far across the globe. The Te Awa Tupua Act, implemented in New Zealand, outlines that certain land should be treated as "a public body, a public authority, or a corporation."[414] This Act, acutely detailed for all possible misgivings, gives the Whanganui River legal personhood and

406. *Id.* at 381.
407. *Id.* at 394-95.
408. *Id.*
409. *Id.*
410. *Id.*
411. *Id.* at 399.
412. *Id.* at 396.
413. *Id.* at 399.
414. Malcolm McDermond, *Standing for Standing Rock?: Vindicating Native American Religious and Land Rights by Adapting New Zealand's Te Awa Tupua Act to American Soil*, 123 DICK. L. REV. 785, 807 (2019).

therefore affords it legal protections.[415] National Parks in the U.S. have a similar status as they are afforded legal protections in the name of conservation; "[h]owever, Congress has done little to protect Native Americans' religious connection to their ancestral and sacred lands."[416] Since the National Parks are already protected in legal ways, if Native Nations were allowed to have Te Awa Tupua-type legislation, their spiritual connection with the lands would be statutorily protected, responsibly. Adopting some form of the Te Awa Tupua model would allow Native Nations use of the protected land of National Parks, co-management would exist, and an emphasis on protecting spiritual connections with the land would be at the forefront.

With the examples of Te Awa Tupua and the Apostle Islands Chippewa as legislative backing, their legal fortification includes knowledge of how the Supreme Court has handled Indian Law issues. Native Nations are more likely to win when they are the appellant,[417] and perhaps that is a testament to the Supreme Court uniquely understanding Native interests and the complexities of Indian Law, along with the massive responsibility of ruling against Natives, their purported wards.[418] If the issues are framed as jurisdictional struggles, an excessive overreach of the state, there is a higher chance of success at the Supreme Court.[419] While gaming pursuits have certainly brought riches to some Nations, they have hurt Native chances of judicial victory, an indication that "there is some element of bias in the Court since 1987 that did not exist in the same way before 1987. The rise of Indian gaming is commonly used as that inflection point."[420]

Gaming success has also resulted in a renewed push for termination of the trust responsibility,[421] as the above-quoted passage—from *Part II, Subpart A* of this Note—cited an NPS agent's frustration with Native Nations that own gambling casinos near the Everglades.[422] Renowned professor of gaming law, Ronald Rychlak, noted that for the Mississippi Band of Choctaw Indians "under the Indian Gaming Regulatory Act [they]

415. *Id.* at 788.

416. *Id.* at 810.

417. Christensen, *supra* note 181, at 108.

418. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 14 (1831).

419. Christensen, *supra* note 181, at 109.

420. *Id.* at 110.

421. Berkey, *supra* note 181, at 1078-79 ("This skepticism ignores the reality that the great majority of tribes still suffer from inordinately high rates of poverty.").

422. *See* KELLER & TUREK, *supra* note 7, at 231.

will not have to pay state taxes or comply with state regulations."[423] A trouble with the Supreme Court's implied bias is that it does not consider how the casinos have afforded college scholarships or better-paying jobs to Natives.[424]

As always, with some bad, there is also some good, as "[t]he appointment of Justice Gorsuch to replace Justice Scalia has altered the balance in Indian law cases, with the tribal interest prevailing . . . [in] recent Indian law cases."[425] Recently, Professor Grant Christensen emphasized the importance of this information to lawyers, "[they] should use this information to frame their arguments to the court . . . [d]oing so suggests marginally improving the chances of securing a pro-Indian outcome."[426] As an aside, one element of this research that should persist is how the Court grants certiorari in Indian disputes.[427] It is vital to any legal argument in Indian law to note potential implicit bias of the Court on Indian gambling and to portray Native Nations as at odds with the State.[428] Perhaps if the Chippewa or other Nations faced further state overreach, like their arrests leading up to the Apostle Islands National Park enactments, their attorneys would find this information useful.

Equipped with the approach of a legislature and the Court, a lawyer can also rely on the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP)[429] for further support of Native Nation self-determination, decolonization, and co-management with National Parks. New statutes should observe UNDRIP, which declares self-determination universally protected.[430] The United States itself falls short of this goal because "[d]espite endorsing [UNDRIP] . . . [America is] 'out of step with contemporary legal developments in indigenous rights.' . . . The United

423. Ronald J. Rychlak, *The Introduction of Casino Gambling: Public Policy and the Law*, 64 MISS. L.J. 291, 322 (1995).

424. *Id.* at 322-23.

425. Christensen, *supra* note 181, at 111.

426. *Id.* at 112.

427. *Id.* ("Other scholarship suggests that additional amicus briefs may help cases gain attention at the certiorari stage of litigation.").

428. *Id.* at 111-12.

429. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, (Sept. 13, 2007).

430. Rebecca Tsosie, *Reconceptualizing Tribal Rights: Can Self-Determination Be Actualized Within the U.S. Constitutional Structure?*, 15 LEWIS & CLARK L. REV. 923, 929 (2011).

States can and must do better at respecting Indian rights."[431] In another sharp piece, Rebecca Tsosie wrote that the provisions of UNDRIP, with elaborate descriptions of the rights they protect, "may cause the United States to consider them to be mere 'suggestions' for a better relationship, rather than a set of norms that ought to be vindicated by domestic law."[432] However, it is of the utmost importance for lawyer arguments to use UNDRIP as moral authority side-by-side with the natural law. Not only is it a moral guideline, but its adoption "has the capacity to 'reform the dark side of federal Indian law,' which continues to dispossess native peoples of their full rights to self-determination."[433] Given that potentiality, the UNDRIP "calls for acknowledgment of the spiritual relationship that binds indigenous peoples to their land, their ancestors, and to their future generations. This . . . unbroken cord of light, transcendent and enduring, . . . ties together the constituent forces that enable the survival of native peoples throughout these lands."[434]

This Note's solution—a combination of international doctrine, Court statistics, and national and international rights legislations—equals a uniquely American legislative solution that should result in a harmonious co-management of National Parks. Before concluding, one final element is suggested by this Note that needs to be addressed.

C. *New Legislation to Repair the Trust Responsibility*

To get anywhere with National Parks and Native Americans, there must be trust reform that comprehensively results in self-determination being a possibility. With the debate that trust obligations help or hurt Native Nations, outlined in Section II of this Note, the remaining question is how to get past those debates and effectuate change:

> In the current hostile legal climate, arguments that the trust responsibility requires federal agencies to act in the best interests of tribes, independent of their statutory duties, are likely to be greeted with skepticism. The difficult

431. Crepelle, *supra* note 52, at 597 (internally quoting United Nations in Comm. on the Elimination of Racial Discrimination, Fifty-Ninth Session Summary of the 1475th Meeting, at ¶ 33, CERD/C/SR/1475 (Aug. 22, 2001)).

432. Tsosie, *supra* note 430, at 948.

433. *Id.* at 949.

434. *Id.*

> task of developing practical and workable solutions requires coordinated efforts by Indian tribes, lawyers, and scholars.[435]

There needs to be careful articulation of any trust reform.[436] The trust responsibility has the potential to strengthen the federal commitment, and fiduciary duties can become fundamental legal protections; the trust responsibility has already been proven effective at mandating tribal consultation.[437] Since the Court has thus far failed to expand the trust doctrine in land claims, "the development of a cohesive theory of the trust doctrine as a source of substantive law will be challenging."[438] Recall the plenary power of Congress from *Lone Wolf* and *Kagama*, referenced in Section II, as the primary roadblock.[439] So, for the trust obligation to be changed, the "legislation must have a logical relationship to the furthering of a legitimate governmental purpose."[440] Nevertheless, if keeping in mind "the fundamental principle that federal law should honor and protect the unique relationships of Indian tribes to their land and natural environment," then it is possible to effectuate future legal change with the trust responsibility[441]—it just requires a little legislative tweak to it.

Professor Crepelle suggests that "[m]aking tribal law the preeminent authority in Indian country furthers the U.S. policy of tribal self-

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435. Berkey, *supra* note 181, at 1079.

436. *Id.* at 1080.

437. *Id.*

438. *Id.* at 1080-81.

439. Crepelle, *supra* note 52, at 578-80 ("Overturning legislation in the field of Indian affairs has been nearly impossible because Congress is said to have plenary power over Indian affairs. Plenary power over Indian affairs is not supported by the text of the Constitution; rather, the plenary power doctrine is predicated on the belief in Indian racial and cultural inferiority. Federal laws pertaining to Indian economic activity are permitted by the plain text of the Constitution's Commerce Clause, however. This would seem to make all laws relating to Indian commerce constitutional. Not so. The Fifth Amendment contains a Due Process Clause. Due process prohibits the government from passing arbitrary laws, and the Fifth Amendment has been interpreted as mandating equal protection of the law.").

440. *Id.* at 580; *see also* 25 U.S.C.A. § 5301(a) (codifying tribal self-determination) ("The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that--(1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and (2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.").

441. Berkey, *supra* note 181, at 1081.

determination and will ignite long dormant tribal economies."[442] The proposition of tribal law as paramount assists Native Nations in autonomy and thus would differentiate them as separate peoples.[443] "Furthering tribal self-determination satisfies" the requirements of the plenary power doctrine, according to Professor Crepelle, and "[b]ureaucracy for bureaucracy's sake does not."[444] In fact, the bureaucracies of the federal trust responsibility are constantly inefficient or inept,[445] and promoting tribal law in a hierarchical system would be immeasurably helpful with the differing philosophical structures that all the different Nations have.[446] Many times, language is a serious barrier for other lawmakers or judges seeking to apply tribal law interests within the trust doctrine, and generalities gleaned are not necessarily objectively reasonable for all Native Nations.[447] Therefore, "[w]hen the Indian trader laws are stricken from the U.S. Code and the federal government begins to respect tribal land rights, true tribal self-determination can begin."[448] Through its own border control, economic regulations, and land tenure systems, tribal economic development will be furthered.[449] With its economy under its control, Native Nations will be able to foster the growth of their reservation land more fully, a land so vitally important to their political and cultural identity.[450] The intercultural system of tribal law responds to the "unique features of Native peoples' existence within the territorial boundaries of the United States."[451] After all, "[t]here is no logical reason why opening a hamburger stand on a reservation should require the federal government's blessing."[452]

Through reform of the trust responsibility into a tribal law focus—which better adheres to the needs of Native Nations—co-management conceptualizations for National Parks are clearer, at the very least. Then again, tribal self-determination can apply directly: "the doctrines of tribal

442. Crepelle, *supra* note 52, at 569.

443. Tsosie, *supra* note 53, at 1306.

444. Crepelle, *supra* note 52, at 583.

445. *Id.* at 589-90 ("Studies consistently show that non-Indian fee land is significantly more productive than adjacent trust land, and as additional proof of the failure of trust land, the United States has 'lost' billions of dollars from Indian trust land accounts. In the true spirit of inept federal bureaucracy, the cost of administering trust land is often far more than the value of the land itself.").

446. Tsosie, *supra* note 53, at 1307.

447. *Id.*

448. Crepelle, *supra* note 52, at 597.

449. *Id.* at 597-98.

450. Tsosie, *supra* note 53, at 1306.

451. *Id.*

452. Crepelle, *supra* note 52, at 608.

sovereignty include the right to participate as co-managers in protecting off-reservation reserved rights."[453] The vision of this Note may seem utopic, but it is backed by time-tested rationale "among groups and governments with very different history, religions, values, perspectives, goals, and even laws. Fitting reality into this idealism is now delegated to park managers and passed to future administrations."[454]

The most obvious way to fit reality into idealism is to return to West and Brechin's book, *Resident Peoples and National Parks*, [455] referenced previously in this Note, for the global blueprint of implementing significant legal reform of the role national parks play in Native lives, while always keeping in mind the urgency of sensitivity to Native concerns.[456]

IV. CONCLUSION

For Native Nations to prosper, there is quite a bit of work to do. It is very, *very* difficult to solve a problem. One of this magnitude and implication deserves utmost care to even attempt, but it *is* possible. Do Americans choose to adopt the ethos of the *United Nations Declaration on the Rights of Indigenous Peoples* and fulfill the metaphysical and epistemological narrative structure of Native Nations?[457] Do we codify the personhood of land or spirit? Natives know the answer since they were placed on the land for a purpose, so "[r]ather than accepting the current status of domestic law, indigenous peoples must invoke the legacy of their ancestors, channeling the life force that persists, endures, and ultimately flourishes in service of indigenous self-determination."[458]

Responses to questions about Native futures are varied, but there is no dispute that Native essence is inexpungible and encapsulated in the American spirit.[459] Lawyers can advocate for Native Nations this way:

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453. Sholar, *supra* note 170, at 168.

454. Schrack, *supra* note 116, at 17.

455. WEST & BRECHIN, *supra* note 7.

456. Meyers, *supra* note 97, at 121 ("Finally, it is in our interest, native and non-native alike, to resolve these issues with sensitivity to the perspective of North American Indian peoples. 'In ways that we may not fully recognize or appreciate, . . . [Native North Americans] represent our society's only deep historical links to the land, consolidated over millennia. If their land is now our land as well, their relationship with that land is particularly worthy of understanding and respect.'").

457. Tsosie, *supra* note 430, at 948.

458. *Id.* at 950.

459. PAGE, *supra* note 70, at 121 ("The question of what to take on from the white man—and what to try to avoid—would become a burning question for virtually every group of Indians and is one that is still

"[r]eference must be made again and again to the central importance of land and sovereignty to the identity of Indians as a people, to the long and ignominious history of mistreatment, and to the rights of political association the Court has protected under the first amendment."[460] Native Americans, to the same extent, need to be divorced in certain respects from an oppressive federal government and allowed self-determination in conjunction with the opportunity to co-manage National Parks.

Native Nations are the most disadvantaged people of America by any measure,[461] with a government "guardian" that does not provide enough sustenance—mentally, spiritually, or physically. With co-management legislation of National Parks, Native Nations have the choice to increase their prosperity and richness in the world. What may happen is—through the affluence of being reconnected to Native land—many young Natives will go to cities and/or universities once they become of age, and the bright, new generation will return the skills and knowledge to their homelands. In turn, the younger generation will bestow a sense of great spirit back to the people. Simultaneously, there will be less and less need for horizontal expansion into land territories by the government, and more lands will become protected from environmental turbulence, freeing those same lands to be returned for Native use and occupation. This Note does not suggest title to public lands of the United States be a reparations package to Native Nations. Instead, the Note argues for occupancy, free use for religious ceremony, hunting, fishing, and gathering. Co-management can be effective without agricultural or urbanization developments.

This Note was an attempt to look at the pain and suffering of Native Nations, an existential pain that makes people question the meaning of life. Perhaps the only functional way to not interpret pain and suffering as life's meaning is to take responsibility and seek to rectify such pain for others. The trend is to weaponize guilt. While American soil is soaked with blood, people must not despair—or that despair will be exploitable. Instead, let us stand together as on Nation. Professor Singer explained that one way "to move beyond our past sins of conquest and racial oppression" is to recognize the special Native claim.[462] Pope John Paul II once echoed the great Native philosopher Vine Deloria, Jr., when he wrote, "God gave the earth to the

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asked to this day. And wherever (and as long as) choice was possible, the responses would be as varied as the people.").

460. Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 287–88 (1984).

461. *See* KELLER & TUREK, *supra* note 7, at xii.

462. Singer, *supra* note 220, at 47-48.

whole human race for the sustenance of all its members, *without excluding or favouring anyone*. This is the foundation of the universal destination of the earth's goods."[463] He understood the importance of land to its people, explaining, "the earth does not yield its fruits without a particular human response to God's gift, that is to say, without work. It is through work that man, using his intelligence and exercising his freedom, succeeds in dominating the earth and making it a fitting home."[464] The Pope wisely concluded, "this is the origin of individual property . . . [man] must cooperate with others so that together all can dominate the earth. In history, these two factors—work and the land—are to be found at the beginning of every human society."[465] If Americans unite, faithful indigenous justice will be uncovered, and our human society will prosper further.

463. Pope John Paul II, *Centesimus Annus* [*Encyclical Letter on the Hundredth Anniversary of Rerum Novarum*] ¶ 31 (1991) (emphasis added).

464. *Id.*

465. *Id.*