

## Book Review

### Property in All the Wrong Places?

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*Who Owns Native Culture?* By Michael F. Brown.\* *Cambridge: Harvard University Press*, 2003. Pp. 315. \$29.95.

*Public Lands and Political Meaning: Ranchers, the Government, and the Property Between Them.* By Karen R. Merrill.\*\* *Berkeley: University of California Press*, 2002. Pp. 274. \$50.00.

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## INTRODUCTION

“Good fences make good neighbors,” New England’s poet laureate Robert Frost famously observed.<sup>1</sup> But something must be going on in Williamstown, Massachusetts to make some New Englanders think differently. The two Williams College academics who wrote these fascinating recent books are clearly skeptical of Frost’s nostrum, at least insofar as he implied that clearly defined property rights might help to keep the peace among the quite different players in the two studies. Michael Brown is an anthropologist at Williams, and in his book *Who Owns Native Culture?* he is so skeptical of property rights that he appears to reject his own title, asserting that the central issue about indigenous cultural productions is not *ownership* but rather *dignity*.<sup>2</sup> More on that subject shortly. Meanwhile, over in the history department, Karen Merrill has written *Public Lands and Political Meaning*, in which she similarly decries what she sees as a baleful but growing tumor of property talk, which has spread its tentacles into the century-and-a-half-long relationship between ranchers and public land officials in the Western United States. Both authors seem to wonder, Why can’t everyone just talk it over, without all this posturing about who owns what? Wouldn’t that be better for people who at the end of the day have to find some way to live with one another?

For one like myself, who has spent a great deal of time tinkering with property concepts and more than occasionally pointing out their subtle and misunderstood virtues, these lugubrious views of ownership are a bit distressing, especially coming as they do in such exceptionally interesting and informative books. I console myself that at least the authors are *talking* about property, which I expect would not have happened in the social sciences and humanities a decade or two ago. Fortunately, by now at least the anthropologists have gotten interested in my favorite subject, even if, like these authors, they don’t like it very much,<sup>3</sup> and it appears that the historians may be joining them.

In this Review I will differ somewhat with both authors on the (to me) endlessly engaging subject of property. This is not to say that these books don’t have a point, or rather, quite a lot of points. Both deal with areas in which, as any sensible person would notice, there are huge difficulties for

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1. ROBERT FROST, *Mending Wall*, in THE POETRY OF ROBERT FROST 33, 33 (Edward Connery Lathem ed., 1979).

2. MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? 10 (2003).

3. See, e.g., PROPERTY IN QUESTION: VALUE TRANSFORMATION IN THE GLOBAL ECONOMY (Katherine Verdery & Caroline Humphrey eds., 2004) (featuring collections of largely anthropological and generally rather hostile essays on property); PROPERTY RELATIONS: RENEWING THE ANTHROPOLOGICAL TRADITION (C.M. Hann ed., 1998) (same).

what we think of as conventional conceptions of property—that is to say, “conventional” in a modern commercial society. In raising these challenges, both authors illustrate some of the cultural limits on our everyday conceptions of ownership. But in my opinion, neither author sufficiently credits the possibility that property might do more for them than they think—or might already be doing more. I think the reason for their disaffection is this: Each author encounters some persons or groups who claim property in something they can’t or shouldn’t have, or shouldn’t have exclusively, and then concludes that all this talk about property is a bad idea altogether. This seems to me to be throwing the baby out with the bathwater. It is true, as both authors point out, that currently conventional categories of property do not match well with the needs of the people they are describing. That problem in itself can give rise to overreaching. But there is no reason to think that we are stuck with today’s conventions. Property is a highly malleable institution, and people have adjusted its institutional contours many times in the past. Despite the many wonderful insights of these books, the authors do not seem to notice that these mutations are already underway, right in front of our noses. More important, newly evolving property rights may well take us closer to the mutual respect and genuinely negotiated outcomes these authors want to see. Even “property talk,” maligned though it may be in these books, has its uses: Property talk and rights talk can open up our imaginations to matters as subtle and as poetic as the relationships between good neighbors.

#### I. INDIGENOUS HERITAGE: THE SHORTCOMINGS OF BELONGINGS

Brown’s book might better have been called “Globalization Meets Native Culture.” He takes the reader on an anthropological tour of the strains that modern commerce places on indigenous peoples’ relationships to what might be called, for lack of a better phrase, cultural productions. Thus we meet the Hopi in the Southwest, distressed that the missionaries and anthropologists of a century ago took photos of their sacred dances and recorded their music;<sup>4</sup> photos and music like these now are available worldwide on the Internet.<sup>5</sup> We meet as well a group of Australian Aborigines who claim that the now-quite-successful artworks produced by one of their own members also belong to the community as a whole.<sup>6</sup> Then there are the members of the Zia Pueblo, who feel strongly that the State of New Mexico has ripped off one of their symbols for its state flag,<sup>7</sup> and the

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4. BROWN, *supra* note 2, at 11-15.

5. *Id.* at 35-36.

6. *Id.* at 45.

7. *Id.* at 70.

descendants of Crazy Horse, who seethe at the use of their ancestor's name to advertise an alcoholic beverage.<sup>8</sup> Mexican Indian communities claim that pharmaceutical companies must ask their permission before using local native plants; Native American groups in the West and the Great Plains want to get rid of the rock climbers who clamber up sacred cliffs, and, while they are at it, they would be pleased to oust as well the New Age cultists who poke around in sacred sites and copy native medicine wheels.<sup>9</sup> And for each of these examples, there are many more indigenous peoples with kindred grievances.

Brown is sympathetic to many of these claims, and he applauds a number of the legal developments that have given them more weight in official channels. But he thinks property is generally a rather problematic route, for two different kinds of reasons. The first reason is the more expansive, the Big Reason: Property claims are a form of rights talk, and rights talk is (supposedly) poisonous to good relationships and to the kind of fluidity and flexibility that people need in their mutual interactions. This Big Reason overlaps with Merrill's views about the relationships of ranchers and public lands officials, so I will take it up later with respect to both authors. Meanwhile, Brown also has a more limited Little Reason why property claims do not work well for indigenous groups: Modern commercial conceptions of property simply do not map well onto the kinds of things indigenous groups want to do.

In their most general form, property rights identify which persons' claims count against which resources, but in commercial societies, commentators often cite the right to exclude as property's defining characteristic.<sup>10</sup> Exclusivity can be exaggerated, because even the seemingly most exclusive property claims generally have some porosity. But as a kind of trope, exclusive rights yield some theoretical leverage.<sup>11</sup> According to standard utilitarian rationales, exclusive property rights advance investment and trade, and, by advancing those interests, property also enhances social wealth. These arguments are simple, and, as Richard Posner points out in his *Economic Analysis of Law* (citing Blackstone's eighteenth-century treatise), they have been known "for hundreds of

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8. *Id.* at 77-78.

9. *Id.* at 120, 162-63.

10. *See, e.g.*, Thomas W. Merrill, *Property and the Right To Exclude*, 77 NEB. L. REV. 730 (1998).

11. Theoretical "exclusivity" in property needs to be taken with a grain of salt, because any interest can be subdivided into a multitude of supposedly "exclusive" rights that require reassembly for any practical use. Indeed, in practice even fairly strongly exclusive property rights, like those in land in Anglo-American law, include social obligations (e.g., avoiding nuisances to the neighbors). *See* Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 612, 621-22, 631 (1998) (treating exclusivity as a trope to serve various functions).

years.”<sup>12</sup> The fundamental idea is that secure ownership encourages appropriate investment, because the owner takes the benefit of good decisions and also bears the burden of poor decisions about the owned thing. This concentrated pattern of rewards and punishments makes the owner attend carefully to the things she owns. Besides, when ownership is clear, people in general are less likely to try to grab things and get into fights over them. Instead, people are more likely to cut deals and trade, because clear property rights lower the cost of bargaining as they reduce the costs of identifying owners. Trade itself expands an owner’s thinking about the best ways to invest in and deploy her property, because she now can take into account not just her own personal use but that of all the potential buyers in the trading community.

So go the conventional arguments for “standard” property in a commercial world: While certainly acknowledging that property is available for personal use and enjoyment, much of the thinking about property looks outward, to a wider world of investment, trade, and commerce. This is true not only for tangible property but also for intellectual property (IP)—a subject, by the way, to which Brown’s book gives the general reader an excellent introduction. Particularly in the United States, IP is justified by the incentives that it gives for investment and trade, in the expectation that the resulting commerce will ultimately enhance the general production and dissemination of ideas.

But what do the Hopi care about all this investment and trade when they face losing control over the images of sacred rituals? As Brown points out, what the Hopi want is confidentiality and even secrecy, not dissemination; that is why the standard categories of IP are so out of sync with their wishes. Their major concern is not money or fame. They simply don’t want other people to rummage promiscuously through the imagery that matters so deeply to them. Interestingly enough, one of their preoccupations is with maintaining the balance among the various subgroups that make up the clan itself. As Brown describes the situation, the Hopi are made up of a number of subgroups added over time, and it enhances the tribe’s sense of oneness that each subgroup has a special role to play in the tribe’s ceremonial experiences. By hiding the details of the various subgroups’ ritual contributions, the Hopi make certain every subgroup depends on every other. If secrets get out, there will be trouble—not so much because outsiders will learn the secrets, but rather because those secrets may leak back from outsiders to the wrong subgroups of

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12. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 32 (6th ed. 2003).

insiders, so that the subgroups may not think that they need to depend on one another so much.<sup>13</sup>

Perhaps not surprisingly, then, the Hopi and other indigenous groups are not well served by standard categories of intellectual property law, with their fixed eye to investment, commerce, and the commercial dissemination of knowledge. Trademark didn't help Native American groups in their effort to keep a certain Washington, D.C. football franchise from using the name "Redskins"; apparently the name wasn't insulting enough to be denied trademark status, and even if it had been, the football team could have used the name anyway—just without a trademark.<sup>14</sup> Copyright would not have helped the Snuneymuxw in Canada to keep their ancient, sacred petroglyph imagery for themselves; while long in duration, copyright is not forever, as tribal groups often want. Besides, copyright only attaches to things one makes up oneself, and it does not prevent others from coming up with their own versions of, say, a given narrative or image.<sup>15</sup> Had it been tried, patent could not have helped the Native Americans of the Great Plains keep the New Agers from making their own bogus prayer wheels and doing a lot of mumbo jumbo around them.<sup>16</sup> Yes, patent rights are exclusive, but they are reserved for "useful" objects, and the object itself has to be described in considerable detail precisely so that others can make it—not something that native groups are always willing to do.

In short, standard intellectual property is not very helpful when you do not want to sell your expressions or inventions but rather want to keep others' mitts off them, so that these objects and images are not coarsened and diluted by reproduction and profane uses among people who do not know or care about their significance. The Internet only makes things worse: What might originally have been a guarded disclosure to a trusted and interested outsider now can easily slip out into a digitized version, there to be perused by the world at large. No wonder native groups have little truck with the "information wants to be free" crowd of the so-called copyleft; for some native groups, open access is the problem, not the solution.<sup>17</sup> Instead, some are starting to turn to that most old-fashioned method of keeping intellectual property intact: secrecy. As Brown points

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13. BROWN, *supra* note 2, at 13-14. For other groups, see *id.* at 28, 30, 34. The one exception to Brown's generally excellent introduction to IP is trade secret law, which he dismisses in a footnote, *id.* at 296 n.13, but which might be adapted for use in situations of this sort.

14. *Pro-Football v. Harjo*, 284 F. Supp. 2d 96 (D.D.C. 2003).

15. The Snuneymuxw actually used a special protective law of Canada, which required them to place copies of the petroglyph designs in a public registry. BROWN, *supra* note 2, at 83-85; see also Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1 (1997) (pointing out related issues).

16. For the New Age uses of Indian sites, see BROWN, *supra* note 2, at 162-63.

17. *Id.* at 237.

out, this is a shame, because secrecy throws up walls around everyone else's knowledge of native culture.<sup>18</sup> But then, maybe that is the point.

There is a bit of a minor key that sounds through these laments, however: Brown lets the reader know that indigenous groups are not always quite as interested in keeping secrets as they are in making sure that they themselves get the revenue if the cat gets out of the bag. The Hopi are mad at the Navajo for making kachina dolls because the Navajo dolls, they say, are a ripoff of a Hopi art form—and besides that, they also crowd out the Hopi's own market for the dolls.<sup>19</sup> Meanwhile, indigenous groups in Latin America seem to be quite ready to give away the secrets of their cultivars and medicinal plants, if giving them up means that pharmaceutical companies will pay them for their local knowledge.<sup>20</sup> Similarly, the Zia in New Mexico may not like the sun symbol showing up all over the place, but they have worked out a trademark deal that allows them to license its use to interested parties, and presumably they could charge if they wished.<sup>21</sup>

An indigenous interest in commercial profit should not give rise to a lot of knowing winks and cynical smirks, though. The indigenous group may really not like its images being spread around, and the members may especially dislike it when others spread them around for money. For one thing, if images are marketed, they are likely to be distributed over a much wider ambit than they would be if they were simply given to some individual for personal use. For another, if the images are already up for sale, the proceeds might as well go to the originators. To borrow a term from economists, this might be considered a problem of the "second best," which dogs commodification of many intimate goods.<sup>22</sup> First best might be no sales at all, but as long as sales are inevitable, the second-best solution might be that the money goes to the creators and their progeny. And, by the way, this is an attitude held not just by indigenous groups. Some modern scientists feel the same way: They would prefer that investigative results be freely available to all, but if somebody is going to cash in on the information, they would just as soon have the cash in their own pockets.<sup>23</sup>

Notice that such commercial uses are not far out of line with conventional property conceptions, including intellectual property. While the current IP categories might not work exactly, it doesn't take much of a

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18. *Id.* at 29-32, 146.

19. *Id.* at 19.

20. *Id.* at 114.

21. *Id.* at 70-71.

22. Carol M. Rose, *Whither Commodification?*, in *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE* (Martha M. Ertman & Joan C. Williams eds., forthcoming 2005) (manuscript at 7-12, on file with author).

23. Robert P. Merges, *Property Rights Theory and the Commons: The Case of Scientific Research*, in *SCIENTIFIC INNOVATION, PHILOSOPHY, AND PUBLIC POLICY* 145, 158-59, 163 (Ellen Frankel Paul et al. eds., 1996).

tweak to permit native groups to capitalize on the commercial possibilities of their creations. The Zia have done so by trademarking their symbols; why can't others do the same? Yes, yes, there are little hitches; for example, in our current trademark law, a certifying organization is not supposed to be selling the certified goods,<sup>24</sup> for the very sensible reason that we want consumers to know that publications like *Good Housekeeping* can honestly claim they are disinterested when they put a seal of approval on some gadget. This could get in the way of indigenous peoples' certifications of their own goods, but it is basically a technical detail of IP law. Conventional IP scholars and activists are now hard at work coming up with arrangements through which commercial users of native cultural productions at least have some obligations to the indigenous creators.<sup>25</sup>

Brown does raise some important problems with these efforts, though, and they are problems of a sort familiar to property law scholars. The general scenario is this: Some group of people claims collective cultural ownership of an artifact or useful substance, or it claims that a particular location is central to a spiritual practice. Why is this problematic? There are at least three reasons, one about evidence of the practice, a second about the identity of the claiming group, and a third about the thing claimed. The evidentiary question is, roughly, What signals of ownership are these people using, and how can we know they really mean it? To illustrate the difficulty, Brown retells the story of an Australian Aboriginal group that opposed a bridge-building project, saying that the bridge would go to an island that was the site of women's rituals, whose nature was undisclosed.<sup>26</sup> In the last decade and a half, Australia has been extraordinarily attentive to Aboriginal land claims (after having systematically ignored them for a century or more) and is now very much attuned to cultural signals that suggest Aboriginal title.<sup>27</sup> But officials did not know what to make of the claims of "women's business," which were supported perhaps by beliefs

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24. 15 U.S.C. § 1064(5) (2000) (providing that a certification mark is cancelable at any time if the registrant produces or markets certified goods).

25. See, e.g., Thomas Cottier & Marion Panizzon, *Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protection*, 7 J. INT'L ECON. L. 371 (2004); Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1 (2004); Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793 (2001).

26. BROWN, *supra* note 2, at 172-81.

27. *Id.* at 46-50. As Brown notes, the critical turning point was the Australian High Court's decision in *Mabo v. Queensland II* (1992) 175 C.L.R. 1 (Austl.), which overturned Australia's longstanding denial of all Aboriginal land claims and set the stage for intensive inquiries into the bases for such claims. Not all have resulted in outcomes favorable to native title, however. For legal developments since *Mabo*, see Carlos Scott Lopez, *Reformulating Native Title in Mabo's Wake: Aboriginal Sovereignty and Reconciliation in Post-Centenary Australia*, 11 TULSA J. COMP. & INT'L L. 21 (2003) (arguing for greater sensitivity to Aboriginal land sensibilities).



but by little evidence of actual practice and which, as it turned out, were denounced as a fraud by other women in the same group.<sup>28</sup>

There is a solution to this problem, of course, one even offered by some anthropologists: Cultural knowledge is unevenly distributed within the group, and those not in the know should shut up and defer to the insiders who do know—those are the people whose permission should be asked.<sup>29</sup> Brown clearly has little use for this answer, but it provides a segue into the second problem in claiming culture: defining the group that owns the relevant cultural property. In claiming a particular cultivar, story, song, or symbol, an indigenous group is setting itself up as the owner whose permission must be asked before others learn about it or repeat it. But insofar as that claim suggests exclusive ownership, it can be quite problematic, because a number of groups may tell similar stories or use similar plants; they may well have traded these stories and plants among themselves, tinkering and improving all along the way. And if exclusive claims are problematic, overlapping ones can be even worse, because there are so many of them coming from so many directions. Well-meaning pharmaceutical researchers have found themselves stymied by all these demands; when one such project in Mexico attempted to compensate local indigenous communities for their role in maintaining medicinal plants with pharmacological potential, the project participants found themselves facing a cacophony of claimants and complainants.<sup>30</sup> Perhaps to avoid such complications from local claimants, some field researchers have simply bypassed the whole lot of them and instead bought the plants at local markets, naturally asking the market sellers about potential uses.<sup>31</sup>

This problem of multiple claimants, all tending to value their own contributions particularly highly, is a familiar one to legal scholars. It presents an issue of transaction costs or, more specifically in resource-related contexts, of the “anticommons.” In the anticommons, there are so many and such diffuse holders of purportedly exclusive claims to a given resource that they can never be brought to agreement, with the result that the resource can never be used at all.<sup>32</sup> Brown is familiar with the anticommons concept, but he discusses it in connection with conventional

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28. BROWN, *supra* note 2, at 179-80.

29. *Id.* at 183-84.

30. *Id.* at 119-24; *see* CORI HAYDEN, WHEN NATURE GOES PUBLIC: THE MAKING AND UNMAKING OF BIOPROSPECTING IN MEXICO 100-08 (2003).

31. BROWN, *supra* note 2, at 124; HAYDEN, *supra* note 30, at 141, 145-50; *see id.* at 126-57 (describing ethnobotanical research in Mexican markets more generally).

32. Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 624 (1998); *see also* Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698 (1998) (applying the anticommons idea to scientific research).

intellectual property, where other scholars have already flagged the issue.<sup>33</sup> He may not have noticed how relevant the anticommons concept is to the very native claims that he is describing—the multiple claimants on cultivars or artworks or cultural productions, whose crosscutting demands might make the relevant information or creative works unusable by anyone.

What really interests Brown, though, is the third problem: Just what is the thing that a group claims to own? In particular, can a whole culture be owned? Interestingly enough, claims to exclusive ownership of a culture map onto a fundamental debate within anthropology: On one side (not Brown's) is the view that culture is a self-contained object, something that can be claimed exclusively by its creator-owners—and indeed should be so claimed, because culture is a delicate thing, easily infected and corrupted by outside influences. The other side takes quite the opposite view: Culture is not at all self-contained, but rather robust, fluid, or, as Brown puts it, “hybrid,” merrily mixing all kinds of disparate elements.

Brown is squarely in the hybridity camp, and he thinks the purity camp is dangerously mistaken. He especially dislikes seeing its influence in modern protective laws—laws that would establish a kind of ownership in whole cultures. Brown calls this initiative “Total Heritage Protection.”<sup>34</sup> Underlying it is the anthropological assumption that while a culture may consist of many interacting parts, it is still a single Thing, and a rather fragile one at that. The idea is that each indigenous group has created an entire set of practices of its own and that these form a seamless whole that only insiders understand; the consequence is that only those insiders should set the rules for access by outsiders.<sup>35</sup> Brown thinks that when anthropologists operate on views like this (and influence lawyers to do the same), they may become overly solicitous of their own little groups, with the result that they lose their grip on evidentiary standards and succumb to credulity about spurious indigenous cultural claims—as perhaps happened with the women's business in Australia, among others.<sup>36</sup> He might have added that these rather solemn views invite mockery, as in the mountain climbers' claims that they too have a religion, one that impels them to climb in the very areas that have long been Native American sacred sites.<sup>37</sup>

It is not clear to this writer, however, how many anthropologists actually hang on to such hermetically tribalistic views of culture; these notions seem rather antique, not to say quaint, now that anthropologists are

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33. See Heller & Eisenberg, *supra* note 32.

34. BROWN, *supra* note 2, at 209.

35. *Id.* at 209-12.

36. *Id.* at 190-92.

37. *Id.* at 163 (noting some climbers' claims that climbing is their religion, protected by the First Amendment).

chasing around investigating Internet banking practices and post-Soviet decollectivization of industry.<sup>38</sup> Perhaps instead it is just us lawyers, with our usual lag time, who threaten to perpetuate such pieties. But be that as it may, Brown argues that the group-property-like claims of Total Heritage Protection are completely out of place in a real world in which Hopi kids form reggae bands and become the hit of the rez.<sup>39</sup>

Ultimately, according to Brown, the object should be “respect” for indigenous culture rather than ownership—respect that comes out of claims based on actual practice rather than asserted belief, and that entails messy negotiations that begin without fixed starting positions and end with renegotiable compromises. His central examples of the right way to proceed, interestingly enough, come from the kind of property that Merrill’s book takes up: public lands. Thus in northeast Wyoming, the Park Service worked out an arrangement whereby at important ceremonial times, rock climbers generally have agreed (with the exception of some recalcitrants) to stay off a cliff sacred to the region’s Native Americans; at the Bighorn Medicine Wheel in the same state, the Forest Service exhorts the generally cooperative tourists to keep a respectful distance when Native American ceremonies take place.<sup>40</sup>

Consistent with this insistence on fluidity and messiness, Brown offers a somewhat messy concluding chapter devoted to potential aids in negotiating respect for native culture. He does not eschew all legal roads; for example, he likes the way the Native American Graves Protection and Repatriation Act (NAGPRA) has pushed mainstream archivists and museum professionals into discussions and negotiations with Native American groups. What is most striking about this chapter, though, is the waffling about his distaste for rights in general and for property rights in particular. To be sure, his antiproperty position is not uniform throughout the book; in one earlier chapter, for example, he points out that indigenous peoples themselves frequently have had some conception of ownership of knowledge and cultural artifacts.<sup>41</sup> He goes so far as to find some room for Western IP regimes: Some versions of IP, he thinks, could be more helpful to indigenous groups than the idea that native knowledge and creativity belong to the “common heritage of mankind,” a move that throws their achievements open to all as a giant commons. In this respect he is reserved

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38. See, e.g., Bill Maurer, *Cyberspatial Properties: Taxing Questions About Proprietary Regimes*, in *PROPERTY IN QUESTION*, *supra* note 3, at 297; Katherine Verdery, *Property and Power in Transylvania’s Decollectivization*, in *PROPERTY RELATIONS*, *supra* note 3, at 160.

39. BROWN, *supra* note 2, at 221.

40. *Id.* at 144-73.

41. *Id.* at 88-89; see also Mark C. Suchman, *Invention and Ritual: Notes on the Interrelation of Magic and Intellectual Property in Preliterate Societies*, 89 *COLUM. L. REV.* 1264, 1264-67 (1989) (arguing that magic serves as intellectual property in preliterate societies).

about the appropriateness for native cultures of the ideas of some modern anti-IP scholars, who would like to cut back substantially on intellectual property.<sup>42</sup> Though he detests Total Heritage Protection and expresses great doubts about the rigid exclusivity of patent law, he likes the idea of a weaker form of licensing of native knowledge on a group basis,<sup>43</sup> and he suggests that perhaps some tweaks of the looser copyright and trademark laws could further accommodate native concerns about protecting their individual or collective creative works.<sup>44</sup>

But in spite of these practical concessions and accommodations, at the end of the day he invokes the legal scholar Mary Ann Glendon to deride what he and she both see as the cascade of “rights talk,”<sup>45</sup> a phrase that itself signals a derogatory attitude toward solving problems through the allocation of entitlements. With this, of course, we arrive at Brown’s Big Reason why property rights are a problem. It isn’t just the little things, the ways that specific commercial property categories fail to match indigenous needs. Instead, in the final analysis, Brown seems to think that all this blabbing about rights, and especially about property rights, lends itself to a mindset too fixed and rigid to deal with the realities of native cultural claims.

This is clearly a book full of wonderful insights, but Brown’s swipes at rights in general and property rights in particular do raise some issues not well resolved in the book. In particular, his scorn seems to run at cross-purposes with several of the positions he wishes to advance.

First, there is his view that respect comes through *negotiation*. In any negotiation, rights clearly form the background; indeed, even Brown mentions that negotiations take place “in the shadow of the law”<sup>46</sup>—that is to say, in the shadow of rights. Although Brown cites the more conservative Glendon for his anti-rights-talk position, he might just as well have cited some members of the more leftist Critical Legal Studies group, who also eschew all this chatter about rights.<sup>47</sup> But feminists and critical race theorists have undertaken something of a rescue of rights and rights talk,

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42. BROWN, *supra* note 2, at 236-38.

43. *Id.* at 240.

44. *Id.* at 237.

45. *Id.* at 231 (citing MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991)).

46. *Id.* at 246; *see also* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968-69 (1979) (arguing that participants’ substantive and procedural rights influence outcomes of bargaining).

47. *See, e.g.*, Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1382-94 (1984) (critiquing rights talk).

which they regard as an important source of social progress.<sup>48</sup> In one variant on this theme, feminist and family law scholars critique the so-called divorce revolution of the last generation, through which both parents were to be regarded as having equal interests in the custody of children. This well-meaning development was in fact a reduction of the wife's entitlements in the dissolution of a garden-variety marriage, because the more old-fashioned approach generally had given her the house and the kids. At the post-"revolution" negotiating table, this loss of rights means that she may well have to bargain away the house in order to get the kids.<sup>49</sup>

The point is that the outcome of negotiations—and even the fact that anyone will negotiate with you at all—depend a great deal on the entitlements that you have when you show up at the table. One might well suspect, for example, that the museum professionals and the Park Service agents now spend more time negotiating with Native American groups because new legislation has given those groups some rights, even if the rights are no more than an entitlement to a hearing. Brown wants to engage the museum curators' professionalism in the quest for respect for native culture, but a century ago, professionalism did little to prevent the autopsy and dismemberment of a deceased Native American who had lived in the custody of anthropologists and who had expressly rejected this procedure for his remains.<sup>50</sup> Indigenous groups' claims have a very substantial moral weight, as Brown quite rightly points out,<sup>51</sup> but legislation confirms and adds to that weight, just as it helps to alter the standards of professionalism. And in fact, Brown appears to approve of such legislation and the rights it confers. He just prefers rights of the fuzzier type. One might respond, though, that fuzzy rights are rights too, even if they are fuzzy.

Putting that objection to one side for the moment, a second problematic issue concerns the relationship between fuzzy rights and Brown's stated goal of *flexibility*. He seems to prefer fuzzy rights because he thinks that they will lead to lots of talk and give-and-take—this in contrast to more firmly defined rights (and especially property rights), which he thinks freeze things in place and reduce the fluidity that negotiations bring. This is a view that he shares with Merrill (of whom more shortly), but just with respect to Brown's subjects, it is a view that calls for some qualification. Sharply defined rights only freeze things if their use rights are not transferable—that is to say, if they are inalienable. But once rights can be

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48. *Introduction* to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, at xiii, xxii-xxvii (Kimberlé Crenshaw et al. eds., 1995) (reviewing differences arising between feminist and critical race writers and the Critical Legal Studies movement).

49. See MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 149-50, 163-64 (1991).

50. Clifford Geertz, *Morality Tale*, N.Y. REV. BOOKS, Oct. 7, 2004, at 4 (book review).

51. BROWN, *supra* note 2, at 245.

transferred, markets are likely to enter the picture, and whatever attributes might be assigned to markets, frozenness is not one of them. To this reader, it is somewhat disappointing that Brown is not more interested in market transactions, because markets undoubtedly help to shape culture and, indeed, to shift cultural elements around in a veritable hydra of hybridity. Brian Spooner has observed how Turkmen carpet weavers have redesigned their wares to meet their European customers' ideas of authenticity,<sup>52</sup> and it would not be altogether surprising if similar motivations were bringing about reworkings of kachina dolls or Australian Aboriginal "dreaming" paintings. Some might gripe that such a development undermines the very idea of authenticity, but so what? For one who sees culture as hybrid, market influences ought to be an interesting channel through which cultural elements flow into one another.

Markets thrive on well-defined rights, where everyone knows who owns what; it is rather the fuzzier rights that tend to impede transactions and slow things down while the various stakeholders scope one another out and jockey for position. True, fuzzy rights might make people talk more, but all that talk means that fuzzy rights are, if anything, rather viscous. In fact, one might come away from Brown's book thinking that flexibility is not really what he wants after all and that his real desideratum is viscosity. This would accord with Brown's self-description as one who occupies a middle ground; perhaps viscous entitlements preserve a middle ground of a somewhat slow-moving cultural hybridity, somewhere between the sclerosis of the anticommons (or inalienable Total Heritage Protection) on the one side and the dizzyingly rapid speed of global markets on the other. If the former really do stifle all access and use, the latter threaten to dissolve native culture altogether.

Avoiding this kind of dissolution may be the reason why Brown wants to avoid conventionally understood property rights, which are so easily traded, and why he instead looks to fuzzy rights to reach the goal of *respect*—his desideratum for interactions between indigenous and mainstream societies. But that raises a third issue: Fuzzy rights have at best an ambiguous relationship to respect for anyone. Here I ask the reader to undertake a thought experiment and to ask, Which of the following statements from *A* to *B* implies greater respect on the part of *A* for *B*?

(1) *A*: I can only take this stuff with your consent. (*B* has a property right.)

(2) *A*: I can only take this stuff after we talk it over, and then only if necessary. (*B* has a consultation right—strong form.)

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52. Brian Spooner, *Weavers and Dealers: The Authenticity of an Oriental Carpet*, in *THE SOCIAL LIFE OF THINGS: COMMODITIES IN CULTURAL PERSPECTIVE* 195, 214-35 (Arjun Appadurai ed., 1986).

(3) *A*: I can only take this stuff after we talk it over. (*B* has a consultation right—weak form.)

(4) *A*: I can only take this stuff after I let you know I am doing so. (*B* has a notice right.)

(5) *A*: I can take this stuff whether you like it or not. (*B* has no right.)

So, under which scenario would you say that *A* has most respect for *B*? The point of this didactic little exercise is that strong property rights do imply respect, and that other versions of rights—like the fuzzy rights (2) through (4)—imply less respect, though certainly more than (5), where poor *B* has no rights at all. This is not to say that strong property rights in a conventional sense are appropriate to every subject. Take water, for example: Because water is so much more difficult to fence than land is, water rights regimes tend to incorporate many more accommodations to the whole community of water rights holders.<sup>53</sup> Similarly, copyright is full of exceptions<sup>54</sup>—and perhaps it should have even more—in light of the fact that the creation and dissemination of expressive works may come from sharing as well as from the incentives that property brings.

It may well be that many indigenous cultural claims are also impossible to fit into the form of strongly exclusive property rights—Brown is certainly convincing when he argues that whole cultures cannot be treated as objects of exclusive rights. Quite aside from the issues that his book raises, one might note a point made above, that strongly exclusive property rights actually are too easily traded in the market, and markets themselves can erode a whole range of cultural practices so swiftly that little survives. There have been plenty of times when well-defined rights in the hands of indigenous peoples have gotten traded rapidly away to others who have a better sense of their market value.<sup>55</sup> This is a reason that, in the past, some indigenous rights have been made inalienable or only limitedly alienable. Perhaps fuzzy rights are the best that can be done when more sharply defined (and tradeable) rights might have such a dissolving effect on a local community. If so, fuzzy rights may represent a kind of compromise position about respect, a halfway house between cultural preservation and the genuine respect that accompanies attentiveness to property rights.

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53. See, e.g., Barton H. Thompson, Jr., *Institutional Perspectives on Water Policy and Markets*, 81 CAL. L. REV. 671 (1993) (describing the importance of institutions in water allocation).

54. Most notably, the Copyright Act explicitly permits a variety of “fair uses” of copyrighted material, though unauthorized by the copyright holder. 17 U.S.C. § 107 (2000); see, e.g., *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994) (permitting parodic reproduction of a song).

55. See, e.g., Stuart Banner, *Two Properties, One Land: Law and Space in Nineteenth-Century New Zealand*, 24 LAW & SOC. INQUIRY 807, 844-45 (1999) (describing the rapid purchase of Maori land by settlers once Maori lands were opened to individual sale, followed by the collapse of tribal authority).

Finally, to repeat, fuzzy rights are rights too, even if they are fuzzy. The point is this: Despite its appearance of formalism, property law has never had much trouble generating new kinds of rights to suit the occasion, including new fuzzy rights.<sup>56</sup> Property rights are a lot more changeable than Brown lets on. The very fact that we have fuzzy rights in other property domains—copyright, for example, with its many exceptions, or even landed property, with its constraints of nuisance—suggests that property rights are malleable and that they can be refashioned to meet new demands. The modern residential lease is worlds away from the agricultural lease of the sixteenth century or from the modern commercial lease in a shopping center, but property makes room for all of them. Just within the United States, water rights differ substantially between the humid East and the dry West. In a world that has now concocted new properties in “moral rights” for artists’ creative works<sup>57</sup> and tradeable allowances for coal-burning utilities’ sulfur emissions,<sup>58</sup> it is hard to imagine that we cannot craft property rights suitable to protect native culture without stultifying it. Such properties could include modest group claims and consultative rights. Indeed, some of the legislation that Brown describes seems to be feeling its way toward these newer kinds of entitlements—fuzzy, to be sure, but certainly not foreign to property.

No wonder, then, that when push comes to shove, Brown waffles on property. For the most part, he signs on to too conventional a view about what property is and what it can become, but he quite obviously notices property’s usefulness all the same. The modern statutes that give new rights to indigenous groups<sup>59</sup> are well on the way to reshaping and reconstructing entitlements in ways that may suit the modern relationships between indigenous peoples and surrounding societies—relationships that entail the very desiderata that Brown wants: flexibility, negotiation, and respect. The fundamental task is to get a firmer grip on the kinds of rights that are useful toward these ends and not to suppose that we can throw out the idea of rights—and property—altogether. What we need to do, as Robert Frost

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56. For the uses of formalism in property law, see Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000) (arguing that property law operates through a limited number of standardized legal forms). Nevertheless, the relevant standardized forms clearly change over time; no real estate lawyer today knows much about the dizzying array of “incorporeal hereditaments” that Blackstone described (e.g., advowsons, dignities, and corodies), whereas Blackstone knew nothing of condominium restrictions and time-shares. For Blackstone’s proliferation of property forms, see Rose, *supra* note 11, at 609-10.

57. See, e.g., Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1 (1997) (describing stronger European and weaker American versions of “moral rights” of authors to control treatment of creative works even after sale).

58. 42 U.S.C. § 7651b (2000).

59. See, e.g., Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001-3013 (2000).



would have said, is to consider what kind of fences we want, and what should get fenced in and what fenced out—and perhaps where some passageways should go.

## II. WHOSE HOME ON THE RANGE?

The connection between property and respect reappears in sharp focus in the opening scenario of Merrill's terrific new book, in which she recounts the story of the movie *Shane*, a classic depiction of the conflict between homesteaders and ranchers in the late-nineteenth- and early-twentieth-century West.<sup>60</sup> The ranchers occupied a world full of macho swagger and bravado, and at least in those early extravagant days, perhaps it was their very self-assuredness that let them disdain any talk of property. On the contrary, right from the start, the people talking about property were the ones who were also demanding *respect*: first, respect for the homesteaders' claims, like those of *Shane*'s Joe Starrett, but then later respect for environmentalists' claims and even, in the end, respect for claims made by the ranchers themselves, as they increasingly came to see themselves as beleaguered victims whose contributions went unnoticed without the solidity of property.

Like Brown's book, much of Merrill's beautifully written *Public Lands and Political Meaning* is devoted to a set of resources for which, she says, conventional property concepts have never seemed to work out very well. To be sure, the rhetoric of property rights did seem perfectly attuned to one segment of the range and the activities carried out there. That was homesteading. Property was the very heart of homesteading. At the outset, the homesteaders would get land in return for what we now would call "sweat equity" (a phrase often used these days in conjunction with the so-called "urban homesteading" of abandoned buildings<sup>61</sup>). As in the usual property story, the prospect of secure rights would encourage homesteaders to invest labor in the land, and their success would presumably invite others to come and do likewise. Moreover, homesteaders' farms seemed to fit perfectly with the activities associated with property: As farmers, homesteaders would communicate the extent of their claims by putting up fences, plowing the back forty, gardening in the vegetable plots, erecting farmhouses and outbuildings, and in general taking a panoply of measures that, in the classic language of original acquisition at common law, would

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60. KAREN R. MERRILL, *PUBLIC LANDS AND POLITICAL MEANING: RANCHERS, THE GOVERNMENT, AND THE PROPERTY BETWEEN THEM* 1 (2002).

61. See, e.g., Thomas A. Loftus, *Reforming Welfare: Are Effective Property Rights a Key?*, 7 MD. J. CONTEMP. LEGAL ISSUES 387, 411-13 (1996) (describing sweat equity and urban homesteading programs and suggesting reforms).

demonstrate to the world their intention to dominate the relevant location. Indeed, the world over, agriculture was the one kind of activity that clearly denoted recognizable property to settlers in the common law tradition; farming was the reason why British settlers thought the New Zealand Maori owned their land, whereas the lack of farming was the reason why they paid no attention to the claims of Australia's Aborigines.<sup>62</sup> Finally, in a matter particularly important to American traditions, homestead farms were small, generally limited by law to 160 acres; they were supposed to be manageable by a single hardy yeoman farmer and his equally hardy wife and family, in the ideal type of small-r republican independence.

Unfortunately for the West, smallness did not work well when property rhetoric was translated into real-life holdings. The standard 160 acres could not sustain agricultural activities in the Plains or, as they used to be called, the Great American Desert.<sup>63</sup> Eastern farming methods were inappropriate in large part because water was so limited in the West. This brute fact led to some very significant changes in American land law. One was reflected in the Desert Lands Act of 1877,<sup>64</sup> which permitted states to sever water rights from land rights, so that farmers could build irrigation channels with some security about the future water supply; this alteration paved the way for legal recognition of the appropriative water rights system that now distinguishes the Western states from those in the East.<sup>65</sup> Another legal change was to expand the size of the homestead, to sizes varying between 320 and 640 acres, but even this was not enough.<sup>66</sup> John Wesley Powell, the great explorer of the Colorado River and later head of the Geological Survey, proposed in 1879 to multiply the homestead size to 2560 acres on arid and semiarid lands to accommodate grazing homesteads where farming was not feasible.<sup>67</sup> But tracts of this size meant giving up on the yeoman farmer ideal, and Congress resisted.<sup>68</sup>

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62. Banner, *supra* note 55, at 809, 821-23; *see also* Stuart Banner, *Why Terra Nullius? Anthropology and Property Law in Early Australia*, 23 *LAW & HIST. REV.* 95, 99-101, 104 (2005) (describing how English settlers thought Australia was uninhabited because of the lack of improvements to land).

63. For the origin of this phrase in an 1821 map by Stephen H. Long, *see* Stanley K. Schultz & William P. Tishler, *Which Old West and Whose?*, [http://us.history.wisc.edu/hist102/weblect/lec03/03\\_02.htm](http://us.history.wisc.edu/hist102/weblect/lec03/03_02.htm) (last visited Feb. 28, 2005). The map, contained in 1 EDWIN JAMES, *ACCOUNT OF AN EXPEDITION FROM PITTSBURGH TO THE ROCKY MOUNTAINS, PERFORMED IN THE YEARS 1819, 1820*, at vii (1823), can be viewed at <http://www.loc.gov/exhibits/lewisandclark/images/ree0109p1.jpg>.

64. 43 U.S.C. §§ 321-323, 325, 327-329 (2000).

65. A. DAN TARLOCK ET AL., *WATER RESOURCE MANAGEMENT: A CASEBOOK IN LAW AND PUBLIC POLICY* 882 (5th ed. 2002).

66. MERRILL, *supra* note 60, at 43, 155; *see also* GEORGE CAMERON COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 80-81 (5th ed. 2002) (describing stockraising land legislation).

67. MERRILL, *supra* note 60, at 29, 106.

68. *Id.* at 29.

One reason the congressmen resisted was that they had already seen the grazing interests, and they did not like what they saw. Cattlemen began to loose their herds in earnest onto the Great Plains in the years after the Civil War, much aided by the opening of the railways in the 1870s and by the slaughter of the great competing herds, the bison, in the 1880s.<sup>69</sup>

These cattlemen were antihomesteaders, both literally and symbolically. Because of the thinness of the grasses in the West, the cattle interests used vast expanses of land rather than the modest stakes contemplated for homestead-farmers. As Merrill very tellingly recounts, early rancher society was relentlessly male, with no room for women and families.<sup>70</sup> Instead of the democratic self-governance of republican yeomen, the grazing business was thoroughly hierarchical, running from the cattle barons at the top down to the hired-hand cowpokes at the bottom.<sup>71</sup> The early cattlemen were entirely uninterested in settled locations, permanent structures, or nicely plowed fields and trim fences; they wanted to use the nation's vast grasslands on a transient basis, and they had no investment in land in mind.<sup>72</sup>

It was quite consistent that, unlike the homesteaders, the cattlemen for many years did *not* want to own the lands they planned to exploit. Moreover, they did not want anyone else to have property in the grasslands either, certainly not the pesky homesteaders who might challenge their privileges. At most they wanted (and got) property in the very scarce water source locations in the high plains, because controlling those locations meant that they could effectively control huge land areas without owning them.<sup>73</sup> But ownership? Certainly not: Ownership would entail taxes, which they did not wish to pay any more than they wished to purchase the land in the first place.<sup>74</sup> In short, the cattlemen understood that property involves investment and responsibility, and they had no intention of bothering with either.

Was there any justification for this brazen behavior, this exploitation that upped the ante even on the ruthless captains of industry, who at least owned and presumably paid taxes on their dark satanic mills? Well, yes, there was a justification of sorts. The plains were not worth a damn for anything else. Or at least so said the cattlemen. They thought that they took

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69. *Id.* at 18-19; see also ANDREW C. ISENBURG, *THE DESTRUCTION OF THE BISON: AN ENVIRONMENTAL HISTORY, 1750-1920* (2000).

70. MERRILL, *supra* note 60, at 42-43.

71. *Id.* at 20-22.

72. *Id.* at 18-22, 42.

73. *Id.* at 17, 183.

74. See *id.* at 131 (“[M]any ranchers noted that only by *not* owning too much land could they make money in the business, given how heavy the burden of owning the large acreage required for ranching was.”).

great risks in running their herds on these otherwise arid and worthless lands; if the high plains had any economic value at all, they said, it was because the cattlemen had created it.<sup>75</sup> It followed that, because there were no viable alternatives, valuation was impossible. Besides, it was the cattlemen themselves who had brought something of value out of a desert—why should they have to pay, either in purchase price upfront or taxes downstream? Anyway, the government had always practically given away the public lands, for example, to homesteaders and miners.

Merrill, to her credit, presents these views with admirable balance and even some sympathy. They might have been more persuasive had the ranchers not exerted so much energy to shut out alternative users of the rangeland, notably the homesteaders at the outset and, in more recent times, environmentalists.<sup>76</sup> In any event, the ranchers' behavior, amply justified to themselves by their own rationalizations, led to an uneasy situation in which they effectively controlled the public rangeland without formally owning it, and in which the federal government simply could not challenge them—despite a set of practices totally at odds with the mythology of the much-idealized homesteader. But time marches on, and Merrill describes at length the way the grazing interests began to organize themselves after the great cattle baron era of the later nineteenth century. Some of the ranchers began to settle in and raise a bit of forage for themselves, and to talk as if they too, as agriculturalists of a sort, might become some kind of larger-scale homesteaders; others, however, wanted nothing to do with any fool ideas of propertizing the range.<sup>77</sup> Besides, another plan for the range soon emerged: First the Forest Service (at the turn of the twentieth century) and then the grazing bureaucracy (under the Taylor Grazing Act of 1934<sup>78</sup>) withdrew the rangelands from settlement, thus seemingly guaranteeing ranchers free or very cheap access and keeping out pretty much everybody else. If one thinks of property as the right to exclude, the ranchers really did seem to want all the benefits of property; they just got the federal

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75. *Id.* at 85.

76. For some inventive earlier exclusionary practices, see *Camfield v. United States*, 167 U.S. 518 (1897) (upholding a U.S. statute curtailing grazing interests' practice of fencing private rangelands in such a way as to exclude others from access to public lands). For some modern environmentalist efforts to acquire grazing leases, see Erik Ryberg, Comment, *Comedy of Errors or Confederacy of Dunces? The Idaho Constitution, State Politics, and the Idaho Watersheds Project Litigation*, 40 IDAHO L. REV. 187 (2003) (describing the efforts of one outspoken environmentalist to bid on state-held grazing leases on state-held school trust lands); and Randy Lee Loftis, *The Latest Range Wars: Ranchers, Loggers Fight Environmentalists Who Seek To Lease Federal Land*, DALLAS MORNING NEWS, Apr. 22, 1996, at 1A (documenting similar disputes).

77. MERRILL, *supra* note 60, at 39-40, 45-46, 49-51.

78. 43 U.S.C. §§ 315 to 315o-1 (2000).

government to do the dirty work of excluding for them and, of course, not charge them much.

The trouble was, as the heart of Merrill's book wonderfully demonstrates, this grand plan did not work out as the ranchers had hoped. Not so long after the major national forest lands were reserved in the early 1900s, the Forest Service started getting bossy, telling the ranchers to do this and not to do that.<sup>79</sup> By the early 1920s, to the great alarm of the stockmen, some congressmen began to ruminate about making ranchers pay something like market-rate grazing fees on federal forest lands.<sup>80</sup> Merrill notes that the thinness of the market made such ideas more problematic than they might seem; in fact, nearby ranchers were the ones most anxious to lease particular pasturage tracts.<sup>81</sup> But in some measure their vulnerability was a product of their own earlier political success: The ranchers had only become so dependent on nearby federal lands because the Forest Service's leasing policy from the outset had favored adjacent ranch owners.<sup>82</sup>

These disputes over fees gave a glimpse of the property language that would grow ever more pointed in the ranchers' relationships with the federal government. The ranchers did not think that the United States should act as other landowners did, at least not vis-à-vis themselves, who in their own minds had borne the whole burden of making the range valuable—hence their pained reaction when, as they complained, the Forest Service started to act as if it were a “landlord.”<sup>83</sup> Merrill follows the stockmen's organizations' thinking as some members began to mull over different kinds of property arrangements. Some opined that they might get a better deal if the public lands were turned over to the states,<sup>84</sup> and a few of the ranchers' spokesmen again floated the idea that stockmen might best become owners themselves after all,<sup>85</sup> though the idea did not get a great deal of traction in the 1920s. As it turned out, neither did the states' rights campaign, perhaps because state ownership might have meant either a

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79. See MERRILL, *supra* note 60, at 68-69, 78-80 (describing struggles between the Forest Service and ranchers over policies dealing with rancher-built improvements, herd size, and priority use).

80. *Id.* at 81-82.

81. *Id.* at 86; *cf. id.* at 100 (analogizing grazing rates to utility rates). One might note, however, that the thinness of the market might have been less of a problem if grazing lands were available for other uses as well, as homesteaders wished and as environmentalists later suggested. For the latter, see Ryberg, *supra* note 76; and Loftis, *supra* note 76.

82. MERRILL, *supra* note 60, at 60-61.

83. *Id.* at 123; *see also id.* at 84, 88.

84. *See, e.g., id.* at 81, 104, 115-16 (discussing the rise of states' rights sentiments among ranchers).

85. *Id.* at 93-94.

different set of bossy bureaucrats or the unpleasant prospect of having to buy their grazing lands, just from a new set of state owners.<sup>86</sup>

But all these conflicts about the national forest lands were soon to be eclipsed by a backup plan: If the very large leftovers of the still-unsettled and still-unreserved public lands could be withdrawn from homesteading and then more or less opened up to the ranchers' use, perhaps the ranchers could come back to that best of all possible worlds—exclusive access and not much responsibility. The Taylor Grazing Act of 1934 did indeed close the remainder of the range to homesteading, but alas, this new development would soon echo the experience with the Forest Service.

At first, the stockmen got just about everything they wanted through the local grazing district boards, which called the shots on grazing leases;<sup>87</sup> indeed, the ranchers' relationship with the understaffed and outgunned Federal Grazing Service became the model for the "capture" theory of administrative agencies, according to which regulators get coopted by the very persons subject to regulation.<sup>88</sup> But these glory days were not to last, or at least not completely. Even the hapless Bureau of Land Management (BLM), the successor agency to the original grazing bureau, began to act a bit like the Forest Service before it, though with a lot less muscle. There were more orders from bureaucrats, more grazing fee controversies, and more states' rights ideas in response.<sup>89</sup>

The ensuing rancor has very much turned up the volume on property rights language, leading to the core of Merrill's argument, which is that the property metaphor hasn't worked out there on the rangelands. By the 1940s, some of the ranchers had begun to insist that in some way they already owned the grazing leases that they had so long enjoyed on a privileged basis.<sup>90</sup> Merrill thinks that this turn to property talk was at least in part structured by the Taylor Grazing Act itself and subsequent grazing legislation, which followed the earlier Forest Service policy in favoring nearby property owners in the assignment of grazing leases.<sup>91</sup> But in response to the ranchers' property assertions in grazing leases, some federal officials—among them Harold Ickes, the New Deal head of the Interior Department—started to use the language of property rights in a discourse

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86. *See id.* at 127-28 (“[S]tates’ rightists never acknowledged that cession in and of itself did not resolve the government’s presence in western lands, for it simply replaced federal ownership with state ownership.”).

87. *Id.* at 153.

88. *See id.* at 136; *see also* PHILLIP O. FOSS, *POLITICS AND GRASS: THE ADMINISTRATION OF GRAZING ON THE PUBLIC DOMAIN* (1960) (describing stockmen’s takeover of the grazing districts).

89. MERRILL, *supra* note 60, at 185-90, 194-200.

90. *Id.* at 195-201.

91. *Id.* at 141, 156.

that continues to this day: The public lands belong to the public.<sup>92</sup> Environmental spokespersons, beginning with Bernard DeVoto in the 1940s, picked up this language and ran with it,<sup>93</sup> and environmentalists are still running with it today. Why, they ask, should the ranchers have special privileges on public lands that belong to all of us? Why do they get cheap leases not available to anyone else? Why should their nasty cows be able to trample around in riparian areas, poisoning everybody's water and spreading diseases to the wildlife that is supposed to be owned by the state? And speaking of wildlife, why should ranchers be able to get the federal government to poison prairie dogs and wolves and to arrange for helpless bison to be slaughtered?<sup>94</sup> Hey, this land is your land, this land is my land—it's not *their* land.

But Merrill, like Brown in an entirely different context, thinks that all this yakking about property mostly messes things up for both sides. The ranchers have had no real legal justification for their assertion that they own lands that were clearly under lease from the federal government. And in her view, the federal agencies are just that—bureaucrats, not owners.<sup>95</sup> As for public officials' and environmentalists' use of property language—the public lands “belong” to all of us<sup>96</sup>—well, says Merrill, public ownership is a “murky technicality”<sup>97</sup> that environmentalists deployed to “blow[] open notions of property at their seams”;<sup>98</sup> ownership presumably is about confined spaces or entities, assigned to limited numbers of people for the very purpose of concentrating the payoffs and costs of decisionmaking on the decisionmakers themselves. The public at large, she argues, is not that kind of an owner.<sup>99</sup> More importantly, in her view, the ecological concerns of the modern environmental movement can get stifled in the “box” of property.<sup>100</sup>

In the end, Merrill's central objection is that this talk of property in the public lands just “calcifi[es]” positions and makes it impossible to come to

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92. See *id.* at 201, 203 (describing federal agencies' assertions that the land belonged to the federal government); *cf. id.* at 180 (describing Ickes's property arguments against the grazing advisory boards in the 1930s).

93. See *id.* at 192-93 (presenting DeVoto's arguments).

94. See Federico Cheever, *From Population Segregation to Species Zoning: The Evolution of Reintroduction Law Under Section 10(j) of the Endangered Species Act*, 1 WYO. L. REV. 287, 342 & n.244 (2001) (describing the slaughter of wolves and prairie dogs in the early twentieth century); Robert B. Keiter & Peter H. Froelicher, *Bison, Brucellosis, and Law in the Greater Yellowstone Ecosystem*, 28 LAND & WATER L. REV. 1, 2-6, 14-15, 45-47 (1993) (discussing modern bison destruction policies).

95. MERRILL, *supra* note 60, at 63, 154-55, 167.

96. *Id.* at 207 (internal quotation marks omitted).

97. *Id.* at 154.

98. *Id.* at 207; see also *id.* at 192-93.

99. *Id.* at 65.

100. *Id.* at 208.

new forms of accommodation.<sup>101</sup> So here it is again, as in Brown's Big Reason for dislike of property for indigenous culture: In their respective areas of concern, both authors say that property talk is out of place, leading to rigidity and stasis just where we should be aiming for innovation and accommodation.

With Merrill as with Brown, I would take a more sympathetic view of at least some of these references to property. First of all, it is not property that created those animosities, but rather the *lack* of clearly defined property or, in the case of the federal lands, clearly enforced property. It is a part of a "natural history" of property that rights need not be very sharply defined when resources are plentiful. But when good things get scarce, ambiguities about rights encourage anxieties, overreaching, and shoving matches; indeed, people try to avoid such shoving matches by defining rights more carefully.<sup>102</sup> It has been the persistent ambiguity of the arrangements on the public lands that has encouraged the ranchers to keep pushing and to keep hoping that by forming pressure groups, concocting spurious claims to privileged positions, and generally pounding the table, they might get something nailed down that they never formally owned. No wonder the environmentalists finally got mad. In this area as in so many others, the absence of clearly defined property has induced people to fight over who gets what, instead of recognizing ownership rights and bargaining for exchanges.

The trouble with property talk on the range isn't just what Merrill says it is. The really serious trouble is talking as if something is your property when it isn't, that is to say, overreaching, just as overreaching is the trouble with some of the property claims that Brown describes. But the fact that people overreach should not mean that we ditch property. Quite the contrary: It has been the absence of better-defined and better-defended property—especially public property—that has encouraged this overreaching. And, by the way, jettisoning property talk in favor of relationship talk isn't likely to help much. Relationship talk or accommodation talk has problems of its own; as Lisa Bernstein has so brilliantly argued with respect to contracts, relationship talk is all well and good when things are going well, but when push comes to shove, misplaced relationship talk can lead to opportunism, more overreaching, and of course

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101. *Id.* at 209.

102. For a locus classicus of this evolutionary argument, see Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. (PAPERS & PROC.) 347 (1967).



more fury, as some people try to claim as “rights” things that were just extended to them as a matter of courtesy or convenience.<sup>103</sup>

A second point is that property relationships could have been better defined with respect to the rangeland. As Merrill makes clear, it was an unfortunate artifact of the nineteenth century’s antiquated political conception of property that made Congress insist on small plots and reject the possibility of large ranches—ranches of a size that might have better matched the needs of grazing.<sup>104</sup> John Wesley Powell suggested selling large entitlements in 1879, and he was echoed by the economist A.F. Vass in 1941.<sup>105</sup> These interesting suggestions fell on deaf ears, victims of the homesteading ideal in the early years, as well as the ranchers’ obdurate insistence that they themselves should have a privileged position and should not have to pay (or pay much) for anything.<sup>106</sup> When the homesteading and other settlement laws sliced and diced the public lands into plots that were too small to support a living, they undermined more rational uses of land and undoubtedly discouraged further permanent settlement.<sup>107</sup> And on those huge swaths of public lands that went abegging for settlers and that did not get withdrawn for national forests or parks, an underfunded and quiescent federal grasslands management more or less gave away the store, effectively inviting a grabfest by nearby ranchers and leaving us (though Merrill herself is too polite to say so) with the current decimated moonscape of public grazing lands. Even Merrill acknowledges that without more clearly drawn property lines, federal agencies could not even begin to exercise regulatory authority over this mess.<sup>108</sup> So is property to blame for the current problems? How could it be? On the grasslands, property was scarcely even tried, either from the private or the public side.

Speaking of public ownership, a third point could be taken as a bit of quibble, but it is an important one. Merrill implies that public ownership is really just a fiction, a technicality because the government acts primarily as a *sovereign* and not as an *owner*—that is to say, more as a regulator rather

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103. Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1796-802 (1996) (arguing for sticking to the letter of contractual entitlements in disputes).

104. MERRILL, *supra* note 60, at 29.

105. *Id.* at 29, 106, 194-95.

106. *Id.* at 194-99.

107. A similar fate overtook some oil lands, where the relatively small-scale surface-land ownership patterns created multiple claimants to underground reservoirs, very much impeding rational patterns of exploration and development. See Gary D. Libecap, *The Political Allocation of Mineral Rights: A Re-Evaluation of Teapot Dome*, 44 J. ECON. HIST. 381, 383-84 (1984). For an economic analysis of other maladies specific to homesteading, particularly the inducements to premature land improvement, see Terry L. Anderson & Peter J. Hill, *The Race for Property Rights*, 33 J.L. & ECON. 177 (1990).

108. MERRILL, *supra* note 60, at 166-67; see also *id.* at 33, 65-66 (discussing the Forest Service specifically).

than a normal owner.<sup>109</sup> But the collapse of ownership with property overstates the case, even though others have similarly overstated it.<sup>110</sup> It is certainly true that the United States's ownership role on the public lands is broader than that of an ordinary owner, particularly vis-à-vis state property regulation, a matter of very considerable annoyance to the states.<sup>111</sup> Nevertheless, there is a longstanding and significant difference between all governments' actions as regulators and their actions as owners. Though the "governmental"/"proprietary" distinction is not hard and fast, the proprietary capacity is actually quite important—for example, for allowing public authorities to commit credibly to their contractual obligations or to run public enterprises. This is because public authorities, in their capacities as *regulators*, must remain ever flexible; they cannot bind their own future decisions or those of their successors. Thus, if they were only "sovereigns" or regulators, no sensible people would contract with governments at all.<sup>112</sup> Without a proprietary capacity, the United States would be hard put to do something as relatively businesslike as managing oil leases on the public lands.

But one might think that the governmental/proprietary distinction is merely nitpicking over legal conventions. The much more important question is whether it really means anything for the public at large to be the owner of property. Merrill is skeptical; behind so-called public ownership she sees just a bunch of bureaucracies.<sup>113</sup> She relents only very slightly when she observes that in the turf-conscious bickering between the major federal land agencies in the 1930s, each agency thought that it would best serve the public's interest.<sup>114</sup>

To be sure, conceptions of the public's interest can be quite varied, especially on a subject so complex as the public lands. But varied as they may be, we still expect those conceptions to be a matter of democratic debate. Bureaucrats are supposed to listen to that debate and not just to the importuning of their friends and favorites. That was the complaint of the "capture" theorists. Merrill, consistently, is skeptical about the capture

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109. *See id.* at 64-66, 154-55, 202.

110. *Id.* at 65 (citing the work of Morris Cohen).

111. *See, e.g.,* *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (affirming U.S. authority over wild horses and burros on public lands despite contrary state estray law); *cf. Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987) (denying per se federal preemption of a state coastal commission's land use regulations on mining in national forest lands).

112. *See, e.g.,* John B. Nesbitt, *Local Government, 2002-2003 Survey of New York Law*, 54 SYRACUSE L. REV. 1275, 1281 (2004) (describing as "important" a new case making the governmental/proprietary distinction in a contractual context).

113. MERRILL, *supra* note 60, at 154, 167. Merrill's skepticism on this issue echoes the public choice theorists, who generally analyze bureaucratic actions as self-seeking; for one (whom she cites, *id.* at 75-76), see GARY D. LIBECAP, *LOCKING UP THE RANGE: FEDERAL LAND CONTROLS AND GRAZING* 9 (1981).

114. MERRILL, *supra* note 60, at 167.

arguments too.<sup>115</sup> But really thoroughgoing skeptics would say that because there is no public interest separate from private interests, and because bureaucrats always act in their own interest, the logical conclusion should be to sell off the public lands altogether—that is, turn them into private property.<sup>116</sup>

Merrill does not seem to take her skepticism of public ownership that far, but if she did, she would find still another quite ancient legal idea of public ownership in the way; in fact it is a rather radical one, though it applied only to some specialized properties. This more radical idea is that certain kinds of property belong inherently to the unorganized public—all of us, not just government officials; we are the beneficial owners, and governmental actors at most hold it in trust for us. The Romans had this conception of what is now called “public trust” property, and it has resurfaced regularly in European and American property law.<sup>117</sup> The general thought behind this body of law is that certain resources, whether physical spaces (like waterways or roads) or metaphoric ones (as some say of the Internet), are best used when kept open for the public at large. Whether the United States’s public lands are resources of that kind is certainly a matter of debate, but the concept of the general public as beneficial owner is by no means untenable as a matter of property theory or practice. It has been around a long time.

Moreover, the idea has some practical significance. By emphasizing the idea of the public as beneficial owner, the early environmentalists expanded people’s imagination about alternative uses of the grasslands, alternative uses that might indeed compete favorably with grazing—hiking, birding, and camping, for example, as well as wilderness restoration and conservation and, yes, ecosystem management, which Merrill regards as uncontainable within the confines of property. But like Brown, Merrill underestimates the capacity of property to morph into new forms as new issues arise. Despite the ranchers’ earlier protestations to the contrary, nowadays some of them realize that there are other valuable uses of the range—such as wildlife protection—that do not involve grazing domestic animals.<sup>118</sup>

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115. *Id.* at 154.

116. For a modest proposal to this effect, see TERRY L. ANDERSON & DONALD R. LEAL, *FREE MARKET ENVIRONMENTALISM* 179 (rev. ed. 2001) (arguing that privatization of public lands would be ideal, though currently impracticable).

117. Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 713 (1986); see also Carol M. Rose, *Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age*, *LAW & CONTEMP. PROBS.*, Winter/Spring 2003, at 89 (reviewing various categories of Roman public property).

118. See, e.g., Kirk Johnson, *For Wildlife with Wanderlust, Their Own Highway*, *N.Y. TIMES*, Dec. 2, 2004, at A26 (describing how ranchers have cooperated with environmental groups to develop an international wildlife-migration corridor along the “Crown of the Continent”).

The dawning idea that the range belongs to all of us opened people's eyes to many of those alternative possibilities. It was the environmentalists' insistence that the public really does own the public lands—that is, a kind of rights consciousness—that introduced new players into this field and gave some leverage to these players in constructing new ways to manage the public lands. Once again, you can negotiate until you are blue in the face, but the outcome will depend mightily on the assets that you initially carry into the room. Public ownership is a big asset, and, while some stockraising interests still may not like it, everyone knows that they are not the only ones who can claim entitlements any more. That fact has dramatically changed the negotiations about the uses of the public lands.

People who think about the public lands have groped their way toward understanding new forms of property, moving from land auctions to preemption to homesteading in the earlier nineteenth century, and then to specialized reserved lands and on to specialized leases; these devices have been conceptualized under theories running from republican yeomanry to “multiple-use, sustained-yield” to dominant use, among others. There are even fuzzy rights in this domain, as in the rights that concerned citizens now have to contest federal actions under the National Environmental Policy Act (NEPA) of 1969.<sup>119</sup> These fuzzy rights serve people with quite diffuse interests; indeed, the vast deployment of the environmental impact review under NEPA suggests that native peoples aren't the only ones who want to make the flow of decisionmaking a bit more viscous and to bring some more people to the table before those alarmingly rapid market forces gobble up everything. Whether or not one considers such consultative rights “property” in themselves, they are linked to a very considerable extent to a new theory of public property, or perhaps I should say a revived old theory, in the concept of the public trust.<sup>120</sup> This is a theory of the public lands that is still emergent, still controversial, perhaps even crazy, but one that clearly illustrates that property does not necessarily begin and end with the conventional fee simple. Public property, and the public as beneficial owner of that property, are venerable and meaningful concepts in our law.

Fourth and finally, the slippage of the various parties into property language may have been inevitable, for a variety of reasons. One is the general pattern in which property rights often take shape as resources come under pressure. Under those circumstances, property is a way of managing

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119. 42 U.S.C. §§ 4321-4370f (2000). For citizens' standing to sue, see *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); and *Sierra Club v. Morton*, 405 U.S. 727 (1972).

120. For the article that launched the modern public trust theory and very much linked it to NEPA, see Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). For a brief survey of its subsequent development, see Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351 (1998).

conflict, and the emergence of property language may simply have been a normal development with greater and more heterogeneous demands for the public lands and their resources. A more interesting reason is that any discussion of entitlements is apt to slide into property language, as in the famous example of James Madison's assertion of "a property" in his reputation, his religion, and a variety of other matters.<sup>121</sup> Property is a particularly visible and graspable form of entitlement, and a reference to property concretizes all kinds of claims of entitlement. It should not be a major wonder that both ranchers and environmentalists try to bolster their claims through the rhetoric of property. They are not the first to do so, and they will not be the last.

When we come right down to it, we do not have a lot of ways other than property to talk about people's relationships to resources and to one another with respect to resources. The authors of these two truly excellent books may not approve of the "proportization" of talk about native culture and the public domain, but perhaps this rhetorical proportization has some metaphoric implications that have yet to be explored. Certainly rights talk in other spheres has this metaphoric dimension, as when we talk about the rights of children or animals or trees, none of whom can stand up in court and speak for themselves. In these contexts we use rights talk to signify something important—something worthy of dignity and, yes, respect.<sup>122</sup>

Property doesn't just mean "it's all mine, so butt out"—and this is a point that might be addressed both to Merrill's and to Brown's baleful view of property and property talk as rigid and unyielding. Property is one of the most sociable institutions that human beings have created, depending as it does on mutual forbearance and on the recognition of and respect for the claims of others. Trusteeship and guardianship are part of property as well, and those terms generate a species of property talk much used by environmentalists. Environmentalists, like some native peoples, may be using this kind of property language to convey a quite subtle message about our relationship with resources, with one another, and with the future. It is a message that signals a sensibility of kinship with the natural world, as well as a careful attention to the legacy that is left to generations to come.<sup>123</sup> That's a metaphoric meaning of property too—an even wider metaphor of respect than the one that Robert Frost told us about so long ago, in the story of the mutual respect that property brings to good neighbors.

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121. James Madison, *Property*, NAT'L GAZETTE, Mar. 27, 1792, reprinted in 14 THE PAPERS OF JAMES MADISON 266, 266 (Robert A. Rutland et al. eds., 1983).

122. See RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 6, 234-35 (1999) (arguing that the language of rights is used as a signal of the importance and need for protection of the subject).

123. See Carol M. Rose, *Given-ness and Gift: Property and the Quest for Environmental Ethics*, 24 ENVTL. L. 1, 18-19, 25-26 (1994).