Narrating Law and Environmental Body Politics (in Times of War) in "Indigenous America/America"

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Taking Lawrence Friedman's *History of American Law* (1985) as his example, Peter Fitzpatrick recently remarked that the near-silence of the majority of scholars of American law and politics on the topic of so-called Indian law and indigenous America is no mere forgetting of one of America's margins. Having traced the "ground of modern law" to the scene of legality at the interface of native and nonnative relations in the United States, Fitzpatrick suggested this silence is a symptom of "the occidental strategy of marginalizing the foundational" (Fitzpatrick 2001:175). Arguing further that such silence is a profound sign of "the potency of the insignificant" in U.S. imperial politics, Fitzpatrick went on to discuss the ways the scene of legality at this relational interface, which I refer to here as "indigenous America/America," inhabited the metaphysics and legal discourses of America's war in the Philippines (Fitzpatrick 2001:175). Others have shown the same with regard to Vietnam (Drinnon 1980). Now we are witness to the same forces at work in Iraq.

Fitzpatrick's comments and these gestures toward war begin to surround the text before us, *Worship and Wilderness: Culture, Religion, and Law in Public Lands Management*, with the sort of contextualization it demands. Indeed, wherever we use the term *indigenous peoples*, as Burton does here off and on, post–World War II international law discourses are immediately invoked and must be brought into some account. It is against this background, and three decades of dogged official U.S. resistance to recognizing Native Americans as "indigenous peoples," that Burton's extended introductory proposal that we use "First Natives" as our master term in the United States so as to make room for immigrant senses of nativity can be read as an indicator of this work's decontextualized politics of narration.

I will return to this theme of war, but it is important to note by way of introduction that Fitzpatrick's remarks also begin to indicate

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a framework by which we can discuss *Worship and Wilderness*, for there is surely no more profound geography from which to interrogate the "potency of the insignificant" in indigenous America/America than the interface of religion, law, and environmental body politics. It is, moreover, a form of precisely the right question that Burton puts to this geography—namely, the question of the obscured, more-than-raced "differences" that are at stake in the countless, daily mediations of public, so-called natural resources in which native claims are articulated in religiously inflected terms that reference myth-historic geographies and mundane-ceremonial regulatory regimes that persist across the United States against all historical odds.

From the moment of its enunciation here, however, this question suffers under the force of an overwhelming desire to intervene in "whiteness" by revealing that nonnatives too have religiously formed interests at stake in such encounters. While both the attempt to intervene in "whiteness" and to address nonnative religious imaginaries are tremendously important tasks in the project of unearthing suppressed histories indigenous America/America, I suggest the formulation of this problematic takes shape here under the force of national ideologies that leave the geography of more-than-raced "difference" Burton traverses standing in excess of his terms and frame of narration. In responding to *Worship and Wilderness*, I will gesture to these excesses, to a critical framework concerning law as a site of colonial-postcolonial encounter that they entail, and to a more-than-raced history of law and environmental body politics that Burton's rendering calls up but obscures.

In discussing these issues, I suggest an analogy for reading that this work invites by way of its terms, strategies, and geopolitical scene of narration—Lewis and Clark's imperial trek of "discovery" in pursuit of a fabled Northwest Passage to the "Orient." Not only does *Worship and Wilderness* emerge from deep within the history of colonial America and travel a route over the whole of the American West with the Pacific theater as the final destination of its gaze—it is rendered as a journey of "discovery." Gazing out across contemporary contests over public lands in the American West involving indigenous Americans, in his first pages Burton argues that while this appears as a landscape marked by disputes waged between "the cultural and spiritual interests of American Indian tribes on the one hand and the recreational, scientific, or resource-extractive interests of dominant society on the other . . . the real situation . . . [is] far more complex and multidimensional" (p. 3). Arguing this "real situation" requires one to take some distance from "conventional categories" and "either a standard legal or an anthropological approach," and intending to set off on a course of his own

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Burton announces, "What I have discovered over the course of this research is cultural *coevolution*" (p. 6; emphasis in original).

While the substance of this historical phenomenon remains somewhat elusive, its linchpin is clearly identified from the start of the journey on which Burton invites his reader as an "earthen spirituality" that is there to be discerned in native *and* immigrant American religions and that, however different its forms might be, bears the mark of an essential "contemplative" and "extra-rational" sensibility toward "wilderness" (pp. 9–10, 20–1). This is the stuff of discovery and coevolution in this account, which by its first page morphs into "a study of how culture, *spirituality*, and law have combined to affect the management of public lands within the United States and how they may also affect their future" (p. 3, emphasis added). This enormous agenda having been put on the line, it is with a conceptual armature made up largely of definitions of religion, culture, and spirituality that Burton sets out to address himself to suppressed continuities that link native and nonnative peoples in struggles against the homogenization of the national commons with a gesture that chronologically begins in Europe some 10,000 years ago; turns to colonial America and the formation of First Amendment, Native American, and conservation law; and then advances across the American West and on to what he describes as Pacific Rim variations (p. 218) with case studies of contemporary disputes.

More pressing in this formulation than the discussion of religion this vocabulary implies is the question as to why it is in these terms that Burton's desire takes shape in the first place. Why is it that quasi-religious, spiritual "similarities" are the sum of the more-than-raced politics of difference Burton conceptualizes at the interface of native and nonnative relations? Why is it that, to a standard treatment of the emergence of native claims to natural resources under the American Indian Religious Freedom Act (AIRFA) of 1978, his historical chapters add a story of the emergence of nineteenth-century U.S. conservation law under the influence of immigrant religions? And why is it that so much space is expended in framing chapters distinguishing Wiccan and New Age religionists who nowhere appear in Burton's case studies, while under the force of a presumptive "spirituality" entailed in modern environmental movements distinctions between conservationists, other environmentalists, and environmental justice movements go unremarked?

While Burton's account distances itself from the conventional, these are all indices of the degree to which this work is overdetermined by a desire fully formed within a dominant national imaginary. In a sense, *Worship and Wilderness* makes no bones about this insofar as the historical and other chapters that frame the

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contemporary case studies to which nearly half of this work is devoted are cast in terms of the First Amendment, the "trust doctrine" in U.S. Indian law, religious and cultural pluralism, and multiculturalism. It is, I suggest, such a formulation of the problematic at stake in the geography Burton takes up, and the attendant Americanist ideology of the separate spheres occupied by religion and law, that predict Burton's desire to locate nonnative religious-cultural claims alongside their native corollary and discover "coevolution" in these terms.

However—and this becomes this work's most important aspect—like the Corps of Discovery's fantasy of a Northwest Passage, when Burton sets off on a course across the American West in pursuit of contemporary cases in what he terms "the newly emerging issue area of spiritual uses of public lands and resources" (p. 96), the conceptual-historical imaginary that launched his journey offers no guide for discerning a geography that transforms under his reader's feet, and exceeds his framing vision and its view of "difference."

At certain moments Burton's case vignettes, no less than his historical account, provide important insights on their own terms. His treatment of religious difference in immigrant colonial America vis-à-vis the "commons," his discussion of the ways native participants in the recent Bear's Lodge/Devil's Tower controversy exceeded and thus transformed the adversarial logic of that dispute, and especially his contextualization of disputes over the ongoing slaughter of bison in Yellowstone National Park as simultaneously a struggle over biogenetic modification are all significant contributions to the literature on religion, law, and natural resources in U.S. Indian law.

Taken as a whole, however, this work's most significant contribution lies in the ways Burton's case studies in the present tense exceed and challenge his conceptual-historical framework by resisting the force of law. For while his framing remains committed to a discussion of disputes over public lands in which native claims are voiced as religious claims, his case studies collocate disputes that travel well beyond public lands and deeply into the realm of native religiously inflected claims that are voiced through a variety of evolving legal discourses. And it is in this way that Burton offers a significant view of disputed scenes that are generally dramatically dispersed under the categorical force of dominant legal discourse.

The vignettes of recent "sacred site" cases that launch his trek over the present tense open to accounts of a variety of interjurisdictional disputes over "moving" natural resources that cross the boundaries of, or have nothing whatsoever to do with, public lands; disputes that together implicate international, national, state, municipal, and tribal-indigenous jurisdictions as well as an array of legal discourse regimes through which environmental resources

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are currently being mediated in the United States—the National Environmental Policy Act (NEPA), treaty rights, and native and nonnative "co-management" among these. At Burton's furthest reach in the continental United States, when he turns to disputes unfolding on the boundaries of officially recognized native lands over the quality of resources such as water and air that utterly link native and nonnative communities, further genres of legal discourse (notably the Environmental Protection Agency's "treatment as state" designation for tribes) and the literal inseparability of environmental law and body politics in indigenous America/America are placed on the table. Finally, Burton's turns to vignettes labeled "Pacific Rim variations" offer sketches from Canada, Australia, New Zealand, and Hawaii that raise further genres of legal-political discourse and scenes in which religion and spirituality at times disappear from the conversation altogether.

Thus, the terms that intend to organize this monograph fall away, and much transpires before Burton's closing remarks on wilderness, religious and cultural pluralism, and U.S. national parks as national classrooms (p. 294). In its interstices if not its imaginary, *Worship and Wilderness* becomes a gesture toward the whole of law and environmental body politics in indigenous America/America in a global scene. The raw product and irreducible remainder of this gesture is a portrait of "difference" that is particularly complex and multidimensional in terms of an anatomy of diverse environmental law discourses that have emerged at the interface of indigenous and nonindigenous relations. This emergent architecture or geography of legal discourses stands as this work's strongest suit, alongside the portrait it offers of the sheer diversity of regimes of governance through which native peoples in the United States daily negotiate their claims to environmental resources. Brought together in this way, the anatomies of legal discourse and regimes of governance Burton traverses might well have provided an occasion for illuminating the largely suppressed role indigenous America has played in constituting America in a global scene.

Here, however, not only do these legal discourses remain largely dislocated from and in excess of this work's historical account. By remaining committed to a dispute-centered and comparative approach, the contextualization Burton brings to any single case does not become part of a project of contextualizing these scenes in relation to one another. In this way, not only is the fact elided here that native communities deal simultaneously and daily in encounters negotiated through the array of legal discourses Burton has called up. His case vignettes also fail to address the environmental issues at stake across the geography he narrates. In this regard, it is a profoundly decontextualized view that weaves a

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course across the American West and fails to name one of the multinational corporate actors or one of the nuclearized scenes that hover in the margins of every narrated dispute—where it would have become clear that, rather than "wilderness," the subject of environmental mediations across indigenous America/America is the biopolitics of a socially constructed thing called "nature" (Foucault 1980). Finally, while Burton's cases do show conservationists and other nonnatives armed with religiously and spiritually inflected discourses to be involved as both allies and adversaries of native peoples across the present tense, his theory of earthen spiritualities fails to delineate the differences between and among native and nonnative peoples, how it may be that indigenous America/America is "coevolving" in this scene, and what role legal discourses play in all of this.

The irony in this is that, like the Corps of Discovery, Burton's is a sojourn over terrain that has been well-traveled and widely mapped, and along the way his reader encounters leading scholars in law and anthropology who have long since moved beyond the "standard treatments" from which he seeks to distance himself. Indeed, Burton's account is as pregnant in terms of its appropriation of scholarship as it is in its appropriation of geo- and biopolitics. And yet, inasmuch as *Worship and Wilderness* invites commentary along these lines, there is the important risk Burton has taken in posing and improvising a response to questions concerning obscured, more-than-raced relations in indigenous America/America that remain largely suppressed in academic scholarship in the United States, notwithstanding a robust specialized literature on law and Native America. In view of these questions and the risk *Worship and Wilderness* takes, let me take several steps into the margins of this work in the hope of contributing in some small way to the question it has formulated.

It will come as no surprise to our audience that the critical scholarly framework hovering in this work's margin has long shared a concern to decenter dominant national-colonial terms as a point of reference for reading law as a force in modern social relations. There can be no more pertinent window onto this evolving scholarship than Sally Merry's "Anthropology, Law, and Transnational Processes" (1992). It is remarkable that Burton would draw on Merry without reference to this essay to advance his discussion of "legal pluralism," which, as I have said, casts his case studies in terms of religious and cultural pluralism (p. 113).

Standing to date as one of the most significant attempts to locate post–World War II scholarship on colonized peoples vis-à-vis a broader critical scholarship on law, Merry's essay is devoted to the argument that local scenes of the sort Burton takes up can only be adequately read as unfolding at the interface of "mutually

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constitutive" local-indigenous, national, international, and transnational legal orders within a global frame. Taking as her point of departure "legal relations of the colonial aftermath" (Merry 1992:363) in Africa, South Asia, and the Middle East that set anthropology on the path of wholesale revision, in this essay Merry ranged widely over two decades of English-language scholarship toward articulating a model of "mutually constitutive" legal discourses as the basis of a "revived theory of legal pluralism closely linked to the questions of culture and power" (Merry 1992:358). While, as Merry's title suggests, she was concerned to insist on framing any local scene with reference to the transnational forces at work in shaping its contours, her principal concern in relation to a literature that had largely focused on documenting the ways dominant ideologies and forces pervade legal discourses and "construct" native peoples and other modern publics was to trace work that had developed more fully historicized, dynamic accounts of law as a strategic site of encounter and a force in both domination and resistance. This is a view that has increasingly taken the dynamics of appropriation and assimilation at play wherever individuals, groups, and nations strategically mobilize local, national, and global discourses as a critical locus of the cultural, political, and ideological work accomplished in legal-political events (Comaroff 1996; Wilson 1997; Merry 1998). This is also a view that has widely argued that "difference" does not exist wholly formed with law as its theater of reflection or recognition but is, rather, being produced as it is negotiated in such multidimensional scenes. Moreover, as Merry and others have noted, such mediations often have quite unintended effects (Merry 1998; Comaroff 1996), and we can, I think, take the dramatic emergence of discourses of "indigeneity" as one such instance, which brings us to the question of war that must be accounted for when taking up the complex discourses of law and politics in indigenous America/America.

Whereas Burton does not mention international legal discourse and briefly speaks of U.S. policies of native "self-determination" as having emerged autochthonously, at the behest of the United States and entirely within national political time and space —however many referents it might have as the basis for recognizing legal and political claims today—"self-determination" indexes international law in a post–World War II scene of decolonization. By the 1960s, native peoples in the United States began articulating their claims in these terms and undertook to join with peoples located in other so-called postcolonial nations in attempting to appropriate international human rights discourses of self-determination and decolonization never intended for them, but which historically, legally, and morally descended to them in ways that have set before us the complex scenes of layered, relational sov-

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ereignties that today mark every continent (compare Churchill 1998, Young 2002, and Dombrowski 2002 for different perspectives on the mobilization of discourses of "indigeneity" in the United States). It was in this global milieu that the U.S. Congress, in 1975, attempted to appropriate international law by promulgating its first "Indian self-determination" policies while, at the same time, severing any reference to concomitant international law discourses on decolonization (Indian Self-Determination and Educational Assistance Act (1975)). Indeed, since 1977, when representatives of native communities and groups from the United States first formally appeared with those of other nations before the United Nations as "indigenous peoples," U.S. resistance to the recognition of indigenous Americans as such has been a quiet cornerstone in resisting any international law requisites perceived to constrain American sovereignty.

In turn, while the discourses of indigenous Americans in any contemporary scene are flooded with invocations of "human rights," "self-determination," and "sovereignty," these discourses inhabit a liminal space enlivened by international law discourses that exist well beyond anything a dominant U.S. imaginary permits. In this historical view, it is, then, in a contested space between local, national, and international postwar discourses of self-determination, and in relation to a form of decolonization altogether different than followed immediately in the aftermaths of World Wars I and II, that we can begin to approach the question of difference at stake in any particular legal, political, and cultural contests evolving in indigenous America/America. Pushing a bit further on the framework Merry mapped in 1992, we can say that much more has been set in motion in the wake of World War II than a shift in the balance of colonial and postcolonial regimes. At work as well is a blurring of the model of political time and space that would take these terms—*colonial* and *postcolonial*—as solid, discrete, and sufficient referents for narrating modernity, a blurring that has, of course, come home to roost with the U.S. occupation of Iraq. This blurring has pushed forward the question of the role of law as a simultaneously colonial-postcolonial force. And it is with a view to these simultaneities that we can discern the question of more-than-raced rhythms at work over time and space in indigenous America/America as elsewhere.

Turning from the remapping of modernity inhering in Merry's discussion of an anthropology of law and politics that has moved well beyond standard approaches, it is in precisely these terms that Vine Deloria Jr. has framed the specific issues taken up by Burton. Deloria being among the handful of scholars Merry counted as having contributed to a discussion of the "mutually constitutive" relations between legal orders in the United States, it is again re-

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markable that Burton would draw on Deloria's work on religion while failing to address a single one of his works on law, politics, *and* religion. It is particularly remarkable that Burton would fail to draw for some compass on Deloria's essay on *Lyng v. Northwest Indian Cemetery Protective Association* (1988) when he discusses this native "sacred site" case, in which the U.S. Supreme Court gutted AIRFA.

It is noteworthy that it was in his essay on *Lyng* that Deloria clearly remarked that

> the popular prevailing belief that non-Indians can somehow absorb the philosophical worldview of American Indians and inculcate "reverence" for the land into their intellectual and emotional perspective is blatantly false. Inherent in the very definition of "wilderness" is contained the gulf between the understandings of the two cultures. Indians do not see the natural world as a wilderness. (Deloria 1992:281)

Much as this commentary is clearly relevant to a work entitled *Worship and Wilderness*, this critique is but a piece of Deloria's larger discussion of the evolving dynamics of assimilation and appropriation at stake in *Lyng*. It was on this basis that Deloria offered a reading against the grain in suggesting that this gutting of AIRFA by the Supreme Court *might* someday be remembered as a "positive landmark" by native peoples (Deloria 1992:286). As others have noted, the national agenda promulgated by AIRFA represented more than an important strategy vis-à-vis native claims to natural resources across myth-historic geographies. As a framework for reckoning with the issues before us—culture, religion, and law in the negotiation of environmental body politics—AIRFA also represented an assimilation of native claims to "difference." Framed under the First Amendment, the blurring and diminishment of such claims as themselves religiously inflected indigenous environmental law discourses is ever a tremendously possible effect. And it appears to have been in this view that Deloria read *Lyng* as a potentially "necessary step" in the decolonization of native claims as these had been constructed under dominant notions of "religion" and "culture," and part of a long overdue process already underway toward "moderniz[ing] . . . the diplomatic treaty process" (Deloria 1992:286).

If in moving decisively beyond the First Amendment/"trust doctrine" framework Deloria makes clear that what is "standard" is a view that fails to consider native religiously inflected environmental discourses in their regulatory and even case law dimensions (Borrows 1997), this would not be all he had to say about *Lyng*. While taking pains to distinguish native discourses from "some intangible and difficult to define spiritual aspect of nature" artic-

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ulated by many conservationists, this "Indian law" case, he concluded, posed "pivotal inquiries that must be resolved if American citizens are to maintain (or recover) their collective freedoms" (Deloria 1992:286). *Lyng*'s most telling contour, he argued, was the new threshold it marked in the outright legitimated appropriation of U.S. environmental law and the national commons by a corporate-government patronage alliance (Deloria 1992:287). Indeed, traveling the margins of *Worship and Wilderness*, we find the naming of this more-than-raced struggle over the colonization of environmental law in the United States was similarly the key point to which Williams devoted a study of events concurrent to *Lyng*, in an essay Burton draws on for other purposes (Williams 1994).

To come full circle, insofar as Burton traverses the geography of indigenous America/America on a journey of discovery without these established "keys" (in a cartographic sense) that hover in the margin of his account, it is not surprising that the pedagogical remarks with which he concludes *Worship and Wilderness* argue for increased public knowledge and intercultural appreciation of native and immigrant religion-spiritualities vis-à-vis nature. By contrast, I want to gesture to two scenes inhabiting this work's margin that suggest our pedagogical energies would be better spent reconstructing the native and nonnative "coevolution," mutual constitution, or co-production of environmental law discourses called up in Burton's account, and the flow of legal discourses and natural resources from this scene in a global political economy.

Concerning the latter, such a historical pedagogy would surely take us back to 1923, when the religiously authorized elders council of the Navajo peoples refused to sign a lease for oil and gas exploration with Standard Oil, and the United States installed its first handpicked, officially recognized "tribal" governing council and set of governing regulations, under whose auspices the desired leases were immediately signed (Robbins 1992:94). This scene is more than a potent origin story that historically locates the legal discourses whereby the United States inhabits Iraq today and its uses of constitutional discourses rooted in a secular/religious divide in "evolving" modern democracies, and more than a referent for current struggles across indigenous America to reintegrate native environmental law discourses with those tribal law regimes. This is a pivotal scene of government-corporate alliance that would take on profoundly toxic proportions when indigenous America/America became a literal ground for the formation of the military-industrial complex during World War II and in its Cold War wake; when native myth-historic geographies in the American West became a locus for the production and testing of nuclear weapons (Churchill & LaDuke 1992), and for multinational corporations that turned to indigenous lands in so-called postcolonial scenes in

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the United States and Canada in light of the "shaky investment climates" brought on by postwar decolonization in the "Third World" (Gedicks 1993). In the present tense, while the general public's fears are riveted by concerns over "others'" access to "weapons of mass destruction," the same native myth-historic geographies in the contested American West are more than the site of origin of much of the depleted uranium that is now settling over Iraqis and coalition forces delivered not least by Tomahawk missiles and military helicopters bestowed with the names "Apache," "Comanche," and "Blackhawk." These lands are the site of the proposed U.S. national nuclear waste storage site at Yucca Mountain and, not far away, the location of the proving grounds where the current regime proposes to violate international law to test new "smart" nuclear bombs.

This brief genealogy being suggestive of an array of more-than raced, national, and global *interests* at stake in the flow of legal discourses and natural resources to and from Native America that remain obscured in the framing of Burton's account, let me conclude by gesturing to the mutual constitution, or co-production, of only one of the genres invoked in the anatomy of native-nonnative legal discourses he has called forth. Let me turn briefly to the genre of the Environmental Impact Statement—to indicate a long history of more-than-raced *relations* and struggle over democracy in indigenous America/America. The scene I want to recall emerged in 1958 when, in search of "peacetime" uses for its nuclear legacy, the U.S. Atomic Energy Commission put forth a proposal under the name Project Chariot about which it was quite serious: to drop nuclear bombs "equivalent to 40 percent of all the firepower expended in World War II" 30 miles from the Port Hope Inupiaq village in Alaska with the vision of creating a harbor, a Panama Canal of sorts, and a coal mining zone (O'Neil 1998:180). The State of Alaska, the Episcopal Church, and the University of Alaska rallied around this proposal, while church clerics, university faculty, and members of the Port Hope Inupiaq resisted.

Leading this resistance with their religiously inflected environmental law discourses, claims to a "homeland," and war veterans who participated in the cleanup of Nagasaki among their ranks, Port Hope residents were joined by university faculty who believed that at the very least a study should be undertaken of the potential impacts this might have on the environment and the native community. Working with Port Hope residents to document their ceremonial-mundane, myth-historic (and anything but "contemplative and extra-rational") uses of to-be-affected resources, university faculty prepared a study that was not only a watershed in bringing about the abandonment of this project and anything of the sort elsewhere. Through their different labors, a study was also

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produced that "can be considered the first de facto environmental impact statement . . . [it] certainly provided the model for the early official one required after the passage of the National Environmental Policy Act of 1969" (O'Neil 1998:190).

It is, as Burton argues, a "complex, multidimensional" geography one encounters at the interface of law, environmental body politics, and religion in indigenous America/America, a scene utterly saturated with the "potency of the insignificant" (Fitzpatrick 2001:175). These scenes from the margin suggest that Burton could not be more on point in concluding there is a tremendous pedagogical project to be undertaken at this interface. Yet they also indicate the degree to which the framing of this geography exclusively in terms of religious and cultural pluralism, the trust doctrine, and multiculturalism is a tremendous giving in to the dominant national discourses his narratives exceed. If these American discourses are anything but irrelevant, as his cases and the works hovering in their margin suggest, they form but one discursive layer necessary to critically mapping the mutually constituted geography he has called up. As to this map's configuration, these scenes from the margin bring home law's simultaneities as a colonial-postcolonial site of encounter as the key to framing the more-than-raced histories of difference and democracy in indigenous America/America and beyond.

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