THE TRUTH ABOUT PROPERTY

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FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES. By *Gregory Ablavsky*. New York: Oxford University Press. 2021. Pp. ix, 350. $39.95.

INTRODUCTION

"The truth about stories is that that's all we are."[1] This is one of the repeated refrains in Thomas King's *The Truth About Stories: A Native Narrative*. King is an American-born Canadian author and Indigenous scholar. His book, a collection of public lectures, is not the subject of this review, at least not directly. But King's book is relevant to the work that is our subject: Gregory Ablavsky's *Federal Ground: Governing Property and Violence in the First U.S. Territories*,[2] an incredible, expansive inquiry into the origins of federal property titles and, more broadly, federal jurisdiction and sovereignty in the first U.S. territories at the end of the eighteenth century.

Let's start with *The Truth About Stories*. King's point about stories being "all we are" is, I think, a reminder that our deepest narratives—the stories we hear within our families and in our own heads and also the stories that we tell ourselves collectively as a society—shape the world as we see and experience it.[3] He shares two examples to prove his point: a retelling of an Indigenous creation story and a version of Genesis.

First, King tells a First Nations creation story about a woman named Charm.[4] Charm falls to a watery earth from a "larger, more ancient world" in the sky;[5] finds her way onto an agreeable turtle's back;[6] and then works in harmony

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1. THOMAS KING, THE TRUTH ABOUT STORIES: A NATIVE NARRATIVE 2 (2003).

2. Gregory Ablavsky is a professor of law at Stanford Law School.

3. For further theoretical support, see *infra* note 15 and accompanying text.

4. KING, *supra* note 1, at 10–22. Some First Nations traditions refer to this as the story of Sky Woman. Lisa Dickson & Tracy Summerville, *'The Truth About Stories': Coming to Compassionate Pedagogy in a First-Year Program*, 6 J. PERSPS. APPLIED ACAD. PRAC., no. 3, 2018, at 24, 26.

5. KING, *supra* note 1, at 10.

6. *Id.* at 16 ("Oh, okay said Turtle. But if anyone else falls out of the sky, she's on her own.").

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with "chatty fish and friendly rabbits,"[7] a host of other sentient and supportive animals, and her own children to build a beautiful world here on earth, with mud.[8] "Boy, they said, this is as good as it gets. This is one beautiful world."[9]

Then, King tells his version of Genesis: God creates heaven and earth and, on the last day, humans. Adam and Eve are spawned in a perfect garden with no sickness, death, hunger, or hate.[10] The only rule is not to eat the apple. Eve eats the apple, and God casts them out "into a howling wilderness to fend for themselves, a wilderness in which sickness and death, hate and hunger are their constant companions."[11]

These are both powerful stories with many different interpretations and variations. I am not really an expert in either.[12] But here is the point: How might we understand the world differently if we believed one story versus the other? King argues Charm's story creates a world governed by cooperation that celebrates caretaking and balance, where a formless world of water and mud is collectively reimagined and transformed into a more beautiful, diverse, and harmonious place for humans and nonhumans alike.[13] In Genesis, King asserts, we have a universe built by a solitary act, governed by a powerful hierarchy, where a single breach of imposed law and order moves humans from perfection to chaos, a "world of harsh landscapes and dangerous shadows."[14]

These stories—and their consequences—are both much more complex and multifaceted than this simplified comparison can suggest. But perhaps we can accept for now that King is probably right: stories are powerful, and for that reason, "you have to watch out for the stories that you are told."[15] For me,

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7. *Id.* at 12.

8. *Id.* at 18–20.

9. *Id.* at 20. There are so many layers to this story. The animals, for example, try one after another to dive to the bottom of the water to bring up some mud for pregnant Charm. It's hard. A lot of them fail. And then Otter, inspired by Charm's promise that mud is magic, dives into the water and disappears for days. *Id.* at 17. Otter's body finally floats to the surface, with little paws clenching mud—not dead, but nearly. "Of course I found the mud, whispered Otter . . . . This magic better be worth it." *Id.* at 18.

10. *Id.* at 21.

11. *Id.* at 22.

12. If you get nervous about me, a non-Indigenous and only gently Christian (practically agnostic) white woman, retelling these sacred stories (or retelling King's retelling of these sacred stories), perhaps this reaction is further evidence of how powerful these narratives are.

13. KING, *supra* note 1, at 23–25.

14. *Id.* at 24. These two stories also present very different depictions of women. In one, Charm is a mother, curious, and central to creating the whole cooperative project. In the other, Eve is responsible for original sin and all human suffering. *See id.* at 22; *see also infra* note 74 and accompanying text.

15. KING, *supra* note 1, at 10. This idea that collective stories shape our world view also resonates with social construction theories that, in the law-and-society context, assert that "legal life and everyday social life are mutually conditioning and constraining and that elements of legal consciousness play an active part in popular consciousness and practices." Alan Hunt, *Law, Community, and Everyday Life: Yngvesson's Virtuous Citizens and Disruptive Subjects*, 21 LAW & SOC. INQUIRY 173, 178–79 (1996) (book review) (describing "constitutive theory"); *see also*

reading Gregory Ablavsky's *Federal Ground* was like this: a new creation story that changed how I understand the current legal world and how I imagine what is possible. Rather than a flat outline of historic effects, Ablavsky animates a whole bustling landscape across early America, in which a succession of small interactions shapes modern property systems and governance institutions. In so doing, Ablavsky makes me reconsider the American creation stories that I have been told.

The American expansion story that I first learned—and that I would argue still dominates the popular imagination—presumes westward settlement proceeding along a carefully unfolding grid, with new and enterprising owners spreading methodically across, and filling up, an otherwise empty landscape.[16] America, we learn, turned land into property for the good of all mankind and populated the West in an egalitarian, even progressive, way.[17] If you work hard in America, you can own property.[18] Opportunity is equal. Rights are neutral. The predominant ethic is productive improvement, and American property and governance are not only morally legitimate but practically inevitable.[19]

LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 162 (2003) (framing property in particular as a "socially constructed phenomena"). Nick Blomley has also reflected on how stories, myths, and other socially constructed ideas (like property) create lived realities because we collectively—and repeatedly—perform these narratives in the real world. Nicholas Blomley, *Performing Property: Making the World*, 26 CANADIAN J.L. & JURIS. 23, 35–36 (2013).

16. There is a lot encoded in this imagery, especially along race and gender lines. *E.g.*, Angela P. Harris, *[Re]integrating Spaces: The Color of Farming*, 2 SAVANNAH L. REV. 157 (2015) (decoding layers of white, male supremacy built into images like the famous *American Gothic*).

17. K-Sue Park has also written eloquently about the erasure implicit in American property stories like these. K-Sue Park, *This Land Is Not Our Land*, 87 U. CHI. L. REV. 1977, 2027 (2020) (book review) (describing "traces of erasure, its symptoms and patterns" as existing "everywhere" in American property thinking and explaining that "curing erasure means researching buried stories" while also critiquing "the conventions of one's canons and the ideals that may structure one's political imagination").

18. Homesteading laws and policies, for example, are often exalted as "one of the most progressive land distribution policies ever undertaken by any nation" because they were built on a promise that "held out hope to little people." Charles F. Wilkinson, *The Law of The American West: A Critical Bibliography of the Nonlegal Sources*, 85 MICH. L. REV. 953, 963–64 (1987). *But see* Douglas W. Allen, *Homesteading and Property Rights; or, "How the West Was Really Won,"* 34 J.L. & ECON. 1 (1991) (describing homesteading laws as efficient means to dispossess Indigenous peoples); Claire Priest, *The End of Entail: Information, Institutions, and Slavery in the American Revolutionary Period*, 33 LAW & HIST. REV. 277, 314 (2015) (emphasizing unintended land-consolidation effects after the American Revolution).

19. *E.g.*, Melinda Harm Benson, *Shifting Public Land Paradigms: Lessons from the Valles Caldera National Preserve*, 34 VA. ENV'T L.J. 1, 8 (2016) (describing the predicate assumption of Manifest Destiny as "the moral legitimacy and inevitability of U.S. territorial acquisition and subsequent privatization of land"); *see also* Jedediah Purdy, Essay, *Property and Empire: The Law of Imperialism in* Johnson v. M'Intosh, 75 GEO. WASH. L. REV. 329, 335–37 (2007) (describing how some American imperialists assumed a singular pathway of human progress, with Americans farther along on this trajectory than other—especially Indigenous—societies).

Ablavsky, by contrast, tells a story of American expansion that is messy, uncertain, even haphazard. Rather than preordained, Ablavsky describes an America that is experimental, improvisational, unlikely. The Native nations that first owned and governed this land are powerful agents, as are the diverse cadre of other residents and speculators who made numerous overlapping and competing claims to ownership at the same time—drawing authority from multiple sovereigns and operating within pluralistic and dynamic understandings of what property even is.

From this tumultuous soup, Ablavsky explores how the federal government ultimately concentrated power to create a singular system of federal land title, preclusive federal control of Indian affairs, and ongoing federal jurisdiction across the West, especially over remaining public lands. He takes the reader deep into the details of early territorial land and governance struggles that "played out one parcel of land, one violent dispute at a time" (p. 15). And here is the kicker: he shows how the primary source of federal authority is, again and again, neither inevitability nor morality but, rather, the federal government's ability to position itself as the authoritative storyteller—to act as the central arbiter of which narratives would be heard, which land claims would be deemed legitimate, and which rights were legible and why.[20]

Although Ablavsky is not the only scholar to unearth these truer histories of American empire,[21] his work is uniquely meticulous and specific.[22] Much of the book is devoted more to rich historical description than to forward-looking analysis of what these narratives mean for modern property law or other subjects.[23] Yet, in my own mining of this more nuanced American cre-

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20. *See, e.g.*, p. 12 (describing one theory of state formation based on this adjudicatory function).

21. *See, e.g.*, ALLAN GREER, PROPERTY AND DISPOSSESSION: NATIVES, EMPIRES AND LAND IN EARLY MODERN NORTH AMERICA (2018); BLAKE A. WATSON, BUYING AMERICA FROM THE INDIANS (2012); STUART BANNER, HOW THE INDIANS LOST THEIR LAND (2005); Michael A. Blaakman, *The Marketplace of American Federalism: Land Speculation Across State Lines in the Early Republic*, 107 J. AM. HIST. 583 (2020); K-Sue Park, *Money, Mortgages, and the Conquest of America*, 41 LAW & SOC. INQUIRY 1006 (2016); Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385 (2006); Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1 (1977).

22. Ablavsky also asserts this work is novel because it focuses on an otherwise overlooked period of land administration (immediately after the Revolution but before clear public-land distribution practices had been systematized) and because he compares two early territories (the Northwest and the Southwest) that are more often considered in isolation or opposition. Pp. 13–15.

23. In some ways, the book reads like a collection of meticulous receipts for the many other articles Ablavsky has written (and, if we are lucky, will continue to write in the future). In his prior work, Ablavsky often connects this history more directly to modern legal issues, including public lands law, administrative law, federalism, and even constitutional interpretation. *See, e.g.*, Gregory Ablavsky, *Empire States: The Coming of Dual Federalism*, 128 YALE L.J. 1792 (2019); Gregory Ablavsky, *Administrative Constitutionalism and the Northwest Ordinance*, 167 U. PA. L. REV. 1631 (2019) [hereinafter Ablavsky, *Administrative Constitutionalism*]; Gregory

ation story, I think *Federal Ground* suggests important insights about the nature of property relations today—including important lessons about how property systems emerge and evolve, how property choices entrench inequities across geography and generations, and what might be lost in the continuing homogenization of how we even imagine and conceive of what property, land, and community relations can be.

In the remainder of this Review, I briefly summarize *Federal Ground*, attending mostly to Ablavsky's history of property system formation in the West. Then, I explore some of the potential consequences that could flow from Ablavsky's more nuanced property creation story. If stories matter as much as King tells us they do, Ablavsky's history could be alchemy, reorganizing and transforming how we understand the world.

I. PROPERTY CREATION STORIES

Federal Ground starts in 1791, as then-Secretary of State Thomas Jefferson compiles "a dense, four-thousand-word catalog tracing a welter of claims . . . in the so-called western country" (p. 1). At this moment in history, a lot depends on the new country's settlement of the West.[24] The new federal government needs to sell western lands to fund its war debts (p. 51) and is striving to project its power into the tenuous borderland spaces west of Appalachia where multiple sovereigns have already come and gone and significant Native power remains.[25] It also wants to solidify its authority vis-à-vis the states and other global powers (pp. 5–7). Much of the American identity at this time is also tied to civic-republican ideals that see neat, orderly, and widely dispersed citizen landownership across the West as instrumental to achieving an engaged, participatory civil society in America.[26]

Jefferson's report, however, depicts not the blank canvas on which these visions had been projected but rather an expanse that already "teemed with people asserting ownership—many Native peoples, . . . but also land companies, French villagers, Revolutionary War veterans, and roughly forty thousand Anglo-American migrants, many alleging title under prior state laws" (p. 1). *Federal Ground* takes us deep into the daily decisionmaking and on-the-ground negotiations that followed as officials sorted through this morass, setting precedent and building institutions along the way. In the following two

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Ablavsky, *The Rise of Federal Title*, 106 CALIF. L. REV. 631 (2018) [hereinafter Ablavsky, *Rise of Federal Title*].

24. Here I use "the West" to refer to all territory west of the thirteen original colonies.

25. Ablavsky frames these spaces as "[l]ong the graveyard of empires," with France, Spain, Britain, and the individual colonies all having come and gone. Across these landscapes, Native sovereignty was really the only enduring constant. P. 7.

26. Pp. 50–51. Indeed, at this time, land law had intentionally been remade in light of these distributional goals. P. 19 ("[S]tates stripped common-law property of its feudal vestiges and enthroned the unrestricted, freely alienable title known as fee simple absolute."); *see also* GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970, at 30–31 (1997); Priest, *supra* note 18, at 277; Priest, *supra* note 21, at 392.

Sections, I first broadly summarize *Federal Ground*'s contents, then turn to more focused analysis of the property-specific history. More detailed attention to the many other threads that emerge from the book—including how federal-state relations and American imperialism evolved more generally—is reserved for future work.[27]

A. *Broad Themes of* Federal Ground

Federal Ground takes us to the Northwest and Southwest Territories as the U.S. Constitution is newly enacted. The Northwest Territory, in what is now the Midwest, has recently been ceded to the federal government by Virginia, and much of it is still owned by the Delaware, Shawnee, Miami, Wabash, and other Native nations. The Southwest Territory, which is now Tennessee, includes lands ceded by North Carolina, and nearly all of it still belongs to the Cherokee and Chickasaw Nations (pp. 1, 6, 19). Ablavsky considers events in these territories beginning after Great Britain's surrender of its claim to the North American colonies and continuing through the first territorial transitions to statehood in 1796 (Tennessee) and 1802 (Ohio) (pp. 1, 15).

Ablavsky divides his coverage into three parts: "Property," which details federal efforts to reconcile diverse, preexisting claims to land ownership into a single system of federalized property title (pp. 19–105); "Violence," which explores the way federal management of borderland violence—frequently through distributions from the federal purse, as often to fund political and racial violence as to prevent it—contributed to the legitimization of federal authority (pp. 109–97); and "Statehood," which examines, somewhat more briefly, the negotiated federalism that was ultimately achieved—via conditional admission processes—as early territories became states subject to ongoing federal land distribution and other authorities (pp. 201–30). This final Statehood part refutes persistent far-right claims that continued federal land ownership and management in western states, where the federal government still owns up to 47 percent of the land,[28] is unconstitutional.[29] Ablavsky makes abundantly clear why and how the federal government today has this authority.

In careful detail, Ablavsky explains how early federal laws originally "cast this vast expanse as blank canvas on which to plot the future" (p. 1) and sought to "project the new nation's tenuous power into the places where it was most uncertain and contested" (p. 4). For example, the Land Ordinance of 1785 imagined numerous government-run land auctions of abundant 640-acre square parcels of unclaimed land proceeding in orderly pace across the West (p. 51),

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27. *See also supra* note 23 and accompanying text.

28. Quoctrung Bui & Margot Sanger-Katz, *Why the Government Owns So Much Land in the West*, N.Y. TIMES: UPSHOT (Jan. 5, 2016), https://www.nytimes.com/2016/01/06/upshot/why-the-government-owns-so-much-land-in-the-west.html [perma.cc/Z9B7-5T84].

29. *See infra* note 59 and accompanying text; *see also* Ann M. Eisenberg, *Do Sagebrush Rebels Have a Colorable Claim? The Space Between Parochialism and Exclusion in Federal Lands Management*, 38 PUB. LAND & RES. L. REV. 57, 58 (2017) (connecting to wider history).

and the Northwest Ordinance of 1787 articulated nearly absolute federal sovereignty in these territories, without significant enfranchisement even for territorial residents who were already American citizens. [30] In practice, however, these public land auctions resulted in only meager sales, in part because so many lands were already inhabited or otherwise still claimed by their original Native owners.[31] And despite broad legal declarations from the East Coast about the federal government's imperial authority in the territories,[32] the territories' residents and other stakeholders did not go along so quietly with this agenda. In practice, federal officials "thought themselves besieged and powerless before the demands of the borderlands' residents" (p. 10).

One core theme of *Federal Ground* is that the law on the books rarely directed the actual outcomes in the myriad on-the-ground conflicts of the borderlands. Instead, it was this very contradiction—abstract law versus grounded reality—that "lay at the core of territorial governance."[33] In practice, legal rules were frequently contested and negotiated as federal and territorial officials improvised to reconcile the many overlapping and ambiguous preexisting land claims and to control frontier violence.[34]

In both domains—Property and Violence—the federal government had two primary, related resources at its disposal: (1) the ability to situate itself as central arbiter and decisionmaker over who would receive federally recognized legal *rights*, in the form of vindication and legitimization *from* some central government authority in the face of vast uncertainty, and (2) money. Federal actors used both to support their own authority: the ability to convert some claims into rights with some semblance of overarching legitimacy from a single, unifying authority (p. 13) and the discretionary, and generous, distribution of federal largesse (p. 171).

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30. Ablavsky describes territories as "states-in-waiting" that had to pass through three preordained stages of governance: first, an early territorial stage managed almost entirely by federally appointed officials; second, an in-between stage with an elected territorial legislature and a nonvoting delegate to Congress; and, finally, admission to the union as a state upon reaching "sixty thousand free inhabitants." P. 5. At all stages, the federal government asserted control over land distribution, including "the right to own and sell the territories' unclaimed land." P. 5.

31. For example, in the first two years under the Land Ordinance of 1785, only a "meager" 150,000 acres were sold. P. 51. The federal government also spent more money giving land away to meet preexisting claimants' demands than it earned from land sales. P. 79; *see also* p. 78 (describing land sales as "disappointingly small").

32. *See* Ablavsky, *Administrative Constitutionalism*, *supra* note 23, at 1637 ("The early territories reveal . . . the limits of popular sovereignty in the United States—not only because . . . the nation explicitly excluded women, African-Americans, and Native peoples from governance, but also because territorial governance failed to include the people, however narrowly defined, in making the laws that governed them.").

33. P. 7; *see also* p. 105 ("None of this work ended because Congress passed a single statute."). Law in the early United States was "less an adjunct of state power than a 'zone of contestation.' " P. 12.

34. Ablavsky pays particular attention to how efforts to control violence turned into contests over federal finance. P. 167.

By depicting the numerous halting starts and stops, successes and failures, and even contradictory choices of early America, Ablavsky methodically illustrates a gradual process by which innumerable small decisions eventually accumulated into something like precedent and which later matured into the more robust systems of property and governance that persist today. Ablavsky ultimately reminds us that this was not simple top-down law imposition but rather a complex give-and-take in which people of the borderlands strategically asserted their own agency and used this overarching uncertainty to their advantage. Ultimately, one of Ablavsky's key contributions is to reject strict either/or explanations of American expansion—either the expansive legal assertions of federal law or the self-help of transitory and uncertain borderland residents. Instead, Ablavsky sees these two accounts as "not only complementary but mutually explanatory."[35]

B. *Property from the Ground Up*

Nowhere is this back-and-forth clearer than in efforts to establish a singular system of federal title in the face of so many competing property claims on the ground. Again, despite federal land laws imagining a clean grid of new advancing landownership, the experience on the ground was "a property morass" (p. 19), in which "[c]onfusion was the hallmark" (p. 49) and all interested parties "jockeyed alongside the federal government for jurisdiction and ownership" (p. 230). By reconciling complex and messy preexisting land claims, the federal government not only established itself as the final arbiter of legitimacy in the territories but also used that power to directly shape the actual contours of the new country, including who owned what and under what terms.[36]

One of the most interesting aspects of Ablavsky's account is the window into the myriad systems of land tenure on the ground before (and at the time of) American expansion. These preexisting claims came from multiple sources. First and foremost, Native title, which derived from inherent Indigenous sovereignty, still existed across huge expanses of these territories.[37] Ablavsky concurs with the generally accepted view that, whatever broad claims European powers may have made to conquest, these assertions quickly retreated when faced with the on-the-ground reality of continuing Native power (p. 24). The federal government returned quickly to a title-transfer regime that required Native consent, often through elaborate treaty negotiations.[38]

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35. P. 15. In general, Ablavsky—like many historians—seems to revel in this messiness. Part of the point, it seems, is that the real world cannot be boiled down into simple legal pronouncements or overly generalized summations. *See* Gregory Ablavsky, *Two Federalist Constitutions of Empire*, 89 FORDHAM L. REV. 1677, 1678 (2021) ("Like all tidy dichotomies, this approach artificially imposes a sharp divide on a muddled past.").

36. *See also supra* note 20 and accompanying text.

37. *See* pp. 21–22.

38. *See* pp. 183–84 (detailing "weeks- or months-long conventions in the woods" that became so elaborate and expensive that "a single treaty session usually cost many times more than the federal annuities that resulted").

The federal government had two goals with respect to these lingering Native titles: to establish the federal government as the sole possible purchaser of these Native lands[39] and to then purchase, and thereby "clear," these Native titles in order to make more land available for federal sales or other distributions to new individual settlers.[40] Ablavsky details how, in order to achieve these goals, the federal government also had to engage directly with Native law and Indigenous property systems, mediating questions about which Native nations even had claim to which lands for transfer (p. 82), what consent even meant,[41] and when consent had been fairly achieved (p. 25).

In addition, when North Carolina and Virginia originally ceded the Northwest and Southwest Territories to the federal government, both stipulated that their prior land grants under state (colonial) law "would retain the 'same force and effect' as they had enjoyed under state sovereignty."[42] Prior to this, both states had already designed and implemented land policies hoping "to make western land widely and cheaply available to individual white men" (p. 51). In practice, however, these preexisting distributions systems created complex and nearly impossible-to-decipher claim requirements that speculators quickly exploited, devolving into a "chaotic land rush" in both territories (p. 33). This left territorial officials to mediate claims within easily manipulated systems, including rules of "indiscriminate location" (p. 32) and other "floating potential source[s] of ownership," such as supernumerary warrants (p. 37) and certain ill-defined preemption rights (p. 40).

Finally, a whole assortment of other claims—some based on federal authority, others just raw claims of possession outside of any legal right or license—pockmarked the rest of the territories. For example, certain communities of French residents (*habitants*) in Illinois Country had developed localized property systems that "associated ownership less with the market than with community, and so their property law reflected long-standing customary practices and acknowledged overlapping claims" (p. 80). Federal officials also administered prior promises of "federal bounty land" to Revolutionary War veterans (p. 99) and experimented with direct sales to wealthy investors and land companies, which themselves created new layers of land distribution complexities that ultimately just exacerbated this overall "tangle of title" (p. 53).

Through it all, the federal government positioned itself as arbiter of these claims, and in careful detail, Ablavsky unpacks and unravels their intricacies.

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39. Pp. 22–25; *see also* Eric Kades, *The Dark Side of Efficiency:* Johnson v M'Intosh *and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065 (2000) (discussing federal government's economic advantages as monopsonist in Native land sales).

40. P. 19; *see infra* note 71 and accompanying text.

41. Pp. 25–31. Federal officials' transactional mindset seemed largely unable to compute Native ideas of consent based on a continuing relationship with an "ongoing commitment to justice and fair dealing." P. 29.

42. P. 32 (quoting NORTH CAROLINA: CESSATION OF WESTERN LAND CLAIMS (Dec. 22, 1789), *reprinted in* 4 THE TERRITORIAL PAPERS OF THE UNITED STATES 3, 5 (Clarence Edwin Carter ed., 1936)).

Any reader interested in property-law dynamism and diversity will be intrigued. But a few key takeaways are worth highlighting. First, Ablavsky is clear about the limits of territorial officials' ability to read, much less translate, these diverse Indigenous and other local property systems.[43] The entire project of territorial governance, in Ablavsky's telling, "was built on . . . many layers of misapprehension" (p. 11). Indeed, Ablavsky acknowledges that his own historic account is limited in some ways by the fact that his data set (high law and policy as well as daily documents from the lives of territorial officials and residents) is also filtered through these same historical actors' perspectives, which "often poorly grasped Anglo-American citizens, let alone French *habitants* or the Native peoples they homogenized into Indians" (p. 10).

Second, despite these challenges of translation and legibility, Ablavsky describes the entire land-distribution project as evincing the federal government's steadfast pursuit of "federal colonialism's key work—defining, then confining and extinguishing, prior rights to ownership and sovereignty inherited from a long and complicated past" (p. 238). The goal was uniformity: standardization, formalization, and singular authority. Indigenous land-tenure traditions, the bespoke arrangements within French *habitant* communities, and numerous other diverse land relations were affirmatively universalized into a singular federal title system, by design.

Third, there were choices made throughout this process. Ablavsky is often willing to describe these choices from the posture of a more neutral observer, but the power of federal and territorial officials flowed from the fact that they "controlled the alchemy by which territorial residents' *claims* became *rights* under federal law" (p. 13). This meant officials also actively decided when land claims were denied. These choices resulted in vastly unequal distributions—often at the expense of the very egalitarian goals the policies purported to further.[44]

Finally, Ablavsky's key takeaway is that, through whatever magic or alchemy, these individual disputes and choices slowly trickled up and solidified into processes and systems that persist today. "[F]ederal land law, however shifting and tentative, was defined in opposition to the existing chaos" (p. 49), and that anti-chaos work solidified into universalizing systems that define much of what we have today. The federal government succeeded by positioning itself as the arbiter of a whole host of borderland conflicts: practical government in action that formed slowly into precedent, law, and ultimately a more unitary federal title system.

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43. Pp. 10–14. Even as the federal government positioned itself as neutral arbiter, it sifted through divergent claims with a particular property code in mind: Does this look like property as I understand property relations to be?

44. *See supra* note 26 (describing civic-republican goals of widespread, dispersed, and easily accessible landownership, in rejection of European feudal systems of landed aristocracy).

II. PROPERTY AND OTHER ALCHEMY

So, here we find ourselves. Ablavsky's meticulous retelling of these early negotiations and the ultimate emergence of a unified federal land title is messier, more complicated, and—frankly—significantly more fraught than the primary narrative of American expansion would lead us to believe. Unlike a neat, neutral, and original property system unfurling in an open, blank expanse, Ablavsky shows property emerging as the result of a complex power struggle with, at times, unsettling outcomes.

If Thomas King is right that stories suggest and shape the world we inhabit, what does Ablavsky's new picture give us? Although not an exhaustive list by any means, in what follows I attempt to highlight four specific aspects of Ablavsky's property story that might emerge from this alternative telling: (1) the inherently collective (and complex) nature of property systems; (2) the reality of property's role in determining, in lasting ways, who wins and who loses in America, often along racial lines; (3) the losses associated with the ultimate universalization—and commodification—of American property institutions; and finally (4) how sticky these systems can be. Even if federal land governance systems emerged in ad hoc and unpredictable ways, Ablavsky's story hints at their dramatic staying power once embedded, physically and legally, across actual landscapes (pp. 15, 105). This underlines how important it must be, then, to engage more creatively with these stories, to imagine new chapters and, perhaps, question their endings.

A. *Property Is a Collective Project*

First, property is a collective project. Ablavsky's history centers government recognition as the essential prerequisite for valid (and valuable) property rights.[45] Again and again, claimants asserting their property rights to land sought not freedom *from* government but, rather, articulated an "appeal *to* government, a craving for official validation to help ward off challenges to ownership and autonomy" (p. 13). Without government recognition, territorial residents' claims were virtually worthless.

Even the most antigovernment voices in Ablavsky's story did not actually assert that they wanted no government; rather, they wanted a government that would serve their purposes and recognize their claims (pp. 44–45). For example, when certain self-sovereignty (or natural law) advocates in the French Broad region were frustrated at federal refusals to recognize their land claims, they went so far as to try to create their own state—the State of Franklin—with its own constitution, legislature, executive, and court, almost entirely "to legalize the intruders' titles" and to enable them to execute valid (in their view) treaties with the Cherokees (p. 44). The effort ultimately fizzled, but the story highlights the essential role of the state—*any* state—in property relations (p. 45).

45. Ablavsky expands on this idea in an article that preceded *Federal Ground*. *See* Ablavsky, *Rise of Federal Title*, *supra* note 23.

This emphasis on governmental endorsement as a prerequisite to legitimate property rights will make sense to progressive property theorists who also stress the need for public justification of even the most private rights.[46] Yet, I chose the language "collective project" carefully here because it's also clear from Ablavsky's account that a formal legal pronouncement, on paper alone, is not sufficient to create any difference on the ground. *Federal Ground* is replete with examples of legal proclamations that, in practice, had little effect. The Trade and Intercourse Act of 1790, for example, sought to control property relations with Native nations by declaring via federal statute an exclusive federal right to purchase Native lands—but on the ground, private attempts to purchase Native land continued for decades.[47]

Ultimately, it was not until 1823, in *Johnson v. M'Intosh*, that the Supreme Court directly held that Indigenous landowners had a more limited property right than fee simple—Native title—that could be purchased only by the federal government.[48] But, even then, to justify this result, Chief Justice Marshall relied less on the laws like the Trade and Intercourse Act and more on "the actual state of things" on the ground.[49] This case, which is so fundamental to how property scholars imagine the origins of all property titles in this country, warrants only a footnote in *Federal Ground*. Ablavsky seems to imply, again, that it is this grounded experience that matters most.

So it turns out property on paper is just that: paper. It has to be enacted and performed on the ground to take effect.[50] In some extreme instances, this meant federal soldiers actively enforcing state property choices "at gunpoint" and "burning the homes and crops" of settlers who refused to leave cabins where they were deemed to not belong (p. 46). But importantly, this also meant

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46. *E.g.*, Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 749 (2009) ("For the community, acting through the state's laws, is what transforms pre-legal claims into legally recognized property rights in the first place. That which is socially cognizable as property is only that form of access to resources that is consistent with human flourishing and community itself."); Joseph William Singer, Essay, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1046–47 (2009) (arguing that property scholarship should focus "on understanding the role that property and property law play in a free and democratic society"); *see also* Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12–13 (1927) (framing property as delegation of state sovereignty to private owner who enjoys rights against the world enforced by the state).

47. *See* p. 23. The Trade and Intercourse Act also ultimately sought to end borderland violence by separating Indian country jurisdiction from state and territorial authorities, with similarly mixed effect. *E.g.*, p. 111.

48. 21 U.S. (8 Wheat.) 543 (1823).

49. *M'Intosh*, 21 U.S. at 591. Marshall went on:

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.

Id.

50. *See supra* note 15 and accompanying text.

that federal rules often bent to and accommodated grounded resistance, modifying the law to reflect facts and experiences that did not readily budge. *Federal Ground* is also full of examples of federal law being shaped by a series of reactive governance choices.[51] It was "the people of the borderlands themselves, as much as distant officials, who built the federal state," including the property relations that were ultimately recognized—or rejected—by that state (p. 15).

The fact that, in Ablavsky's creation story, property emerges through coaction of both the state and the people also informs ongoing debates in property literature about *how* private property systems first emerge and then evolve. This debate tends to focus on a binary between informal individual or social choices and more formal political, public choices.[52] Harold Demsetz's canonical account tells an infamous story about the emergence of private fur-trading territories among the Indigenous peoples of the Labrador Peninsula to explain, in economic terms, *why* property rights emerge,[53] but, as Demsetz himself acknowledges, this account lacks any explanation of the mechanism for *how* this transition occurs.[54] In Demsetz's story, private property rights seem to emerge almost by magic, and so scholars since have debated the public versus private mechanisms of that evolution.[55] Ablavsky reminds us that the answer is both. Property requires a give and take between people and the state, and both have power in its formation and evolution.

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51. *E.g.*, p. 209 (describing one of many examples where white settler land claims that lacked legal authority where nonetheless recognized and compensated based on "moral claim to the land"); p. 3 (describing cobbling together of ad hoc precedents over time); p. 230 (focus on experience of federal authority as "improvisational").

52. *See* Jamie Baxter, *Storytelling, Social Movements, and the 'Evolution' of Indigenous Land Tenure*, 8 AUSTRALIAN INDIGENOUS L. REV., no. 1, 2014/2015, at 65, 65 ("[M]ost [property law] scholars . . . would readily admit that we still know remarkably little about the dynamics that actually shape institutional persistence and change, especially in transitions between property regimes."). For more on this theme, see Carol M. Rose, Essay, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601 (1998); Stuart Banner, *Transitions Between Property Regimes*, 31 J. LEGAL STUD. S359 (2002); Terry L. Anderson & P.J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J.L. & ECON. 163, 172 (1975); Saul Levmore, *Two Stories About the Evolution of Property Rights*, 31 J. LEGAL STUD. S421 (2002); Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315 (1993) (emphasizing social-norm theories outside of law); and Katrina Miriam Wyman, *From Fur to Fish: Reconsidering the Evolution of Private Property*, 80 N.Y.U. L. REV. 117, 121 (2005) (emphasizing issues of political choice).

53. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. (PAPERS & PROC.) 347, 350–52 (1967) (developing economic theory that private rights emerge when externalities associated with resource use exceed the social costs of creating, policing, and enforcing formal property systems).

54. Harold Demsetz, *Frischmann's View of "Toward a Theory of Property Rights,"* 4 REV. L. & ECON. 127, 129 (2008) (acknowledging strategic decision not to address *how* property adjustments occur).

55. *See supra* note 52 and accompanying text.

B. *Property Picks Winners and Losers, with Lasting Effects*

Because Ablavsky's history describes the frontier as such a vibrant, diverse, and populated landscape—just teeming with complex, preexisting land-tenure arrangements—we can register much more clearly the many lifeways and land- and community-based relationships that were displaced, dispossessed, and in some cases lost by American expansion. Although the ultimate ending of Indigenous dispossession is not in itself surprising, Ablavsky's account is striking in its intimacy and humanity. The Delaware, Shawnee, Miami, Cherokee, Chickasaw, and other Native nations navigate complex internal and external sovereign relations, with both success and failure. Native individuals are also described in full, contradictory, breathing relief: Piomingo, the Chickasaw leader dismayed at American passivity in the face of other tribes' aggressions (pp. 82, 139); Nenetooyah, the Cherokee representative who refused to yield "one inch of land" (p. 218); and Betty, the Cherokee widow who dined with President Washington and lobbied Congress for relief for wounds caused to her and her husband—on the same day the perpetrators of this violence were reimbursed expenses for their illegal expedition (p. 169).

Although sometimes Ablavsky describes individual decisionmakers dispassionately, as if they were just passively swept up in a messy and hard-to-read process, the aggregate effect of their collective decisions is a clear picking of winners and losers in ways that are familiar today. Indigenous peoples are repeatedly treated as expendable and unworthy. Native nations repeatedly received insufficient compensation for Native title,[56] and there was intense pressure for land cessions as well as a string of broken promises and a pattern of the United States only acting to U.S. advantage (p. 31). This disparity is also apparent when comparing the bespoke, local property arrangements that existed within both French *habitant* communities and Native nations. In both cases, the federal government struggled to understand alien property concepts and to standardize these rights in a way that made them legible, and transferrable, in the wider land markets.[57] But repeatedly, Native title was exchanged for pittances while the French were given generous consideration. As Ablavsky frames it most clearly: "Federal officials interpreted Native title to extinguish it; they sought to understand the French villagers' title to confirm it" (p. 98).

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56. In one instance, the federal government spent three times as much to survey ceded Native lands in Ohio Country as it annually paid the Native nations for the land itself. P. 78. Ablavsky also recounts other examples of Indian lands being taken for "pitiful considerations." P. 183. Interestingly, Ablavsky also shows that although other territorial residents tended to perceive—and complain about—spending on Indian affairs, in reality, these same "[t]erritorial citizens easily outcompeted their Native neighbors in this shared endeavor to extract federal aid." Pp. 187. "[T]erritorial citizens better merited the title of federal dependents than their Native neighbors." P. 187.

57. *E.g.*, pp. 79–81.

We know property makes power relations manifest, but what is striking here is that even when systems were intended to achieve more egalitarian objectives, the same hierarchies are reproduced again and again.[58] Ablavsky is careful to point out evidence of persistent Native power in the territories, but he is also clear-eyed about how, even though the fantasy of exclusive federal sovereignty was legally wrong, it was "the belief and demand that statehood extinguished competing sovereignties [that] helped call that reality into being"—including through the genocidal practice of Indian removal that followed the events of this book (p. 235). Ablavsky illuminates how the "dream of erasing Native ownership" and the "vision of seizing Native property" formed such a powerful internal narrative for the new country that this implicit "logic of elimination" shaped all sorts of future choices (pp. 81–82). Federal officials, and territorial residents, were equally and powerfully convinced "they already knew how the story would end"—and they made that ending a reality (p. 235), to their own benefit.

We see these same narratives of white American superiority and Indigenous inferiority and elimination play out today, often through similar low-level, discretionary choices of federal officials that position white, male property claims as legible and worthy of respect, even when legally *in*valid, while treating Indigenous rights in similar contexts as dispensable, despite longstanding and compelling claims to the contrary. Take for example the January 2016 violent takeover and armed occupation of the Malhuer National Wildlife Refuge in Oregon led by Ammon Bundy and other mostly white, mostly male militia members.[59] These violent intruders objected to federal public land management categorically and also pressed their own rights as longtime ranchers to graze their livestock on public lands without federal regulation. Both claims were absolutely and clearly legally wrong. Federal land management is legal, as detailed in the very history Ablavsky tells here,[60] and it is also absolutely clear the ranchers had, at most, only a temporary and revocable federal license for grazing on federal lands, not an absolute property right.[61]

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58. *See supra* note 26 and accompanying text; *see also* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

59. *See* Nora Simon, *Oregon Standoff: A Timeline of How the Confrontation Unfolded*, OREGONLIVE (Jan. 9, 2019, 8:40 PM), https://www.oregonlive.com/pacific-northwest-news/2016/01/oregon_standoff_a_timeline_of.html [perma.cc/92RX-6DBA]; Liam Stack, *Wildlife Refuge Occupied in Protest of Oregon Ranchers' Prison Terms*, N.Y. TIMES (Jan. 2, 2016), https://www.nytimes.com/2016/01/03/us/oregon-ranchers-will-return-to-prison-angering-far-right-activists.html [perma.cc/4Q9X-Q2M3]; Kirk Siegler, *Oregon Occupation Unites Native American Tribes to Save Their Land*, NPR (Oct. 27, 2016, 7:00 PM), https://www.npr.org/2016/10/27/499575873/oregon-occupation-unites-native-american [perma.cc/LL2V-6AWS].

60. *See supra* note 29; *see also* John D. Leshy, *Are U.S. Public Lands Unconstitutional?*, 69 HASTINGS L.J. 499 (2018).

61. *See* Bruce R. Huber, *The Durability of Private Claims to Public Property*, 102 GEO. L.J. 991 (2014).

That same year, we witnessed another protest emerge around federal land-use decisionmaking. Thousands of water protectors, including representatives of hundreds of Indigenous groups around the globe, built protest camps along the banks of Lake Oahe, a man-made reservoir at the confluence of the Missouri and Cannonball Rivers, half a mile outside the federally recognized Standing Rock Sioux Tribe reservation in what is now North Dakota. Protesters objected to the planned construction of the Dakota Access Pipeline, a crude-oil pipeline that would snake over a thousand miles from North Dakota to Illinois.[62] The Sioux have claimed this territory since time immemorial, and it is home to many of their sacred sites.[63] The proposed pipeline also crossed land that was unconstitutionally taken from the tribe in a complex history of federal misdealing—the culmination of which now sits in the form of over one billion dollars in the U.S. treasury as "just compensation" ordered by the Supreme Court for the Sioux's losses, a remedy that the Sioux refuse to accept.[64] Yet during the pipeline protests, both the developer and the governor of North Dakota repeatedly argued that the protestors' say in the project should be diminished because the tribe no longer formally owned—from a federal perspective—the land under which the pipeline would run.[65]

62. Jessica A. Shoemaker, Invited Essay, *Pipelines, Protest, and Property*, 27 GREAT PLAINS RSCH. 69, 74 (2017).

63. *See* NICK ESTES, OUR HISTORY IS THE FUTURE: STANDING ROCK VERSUS THE DAKOTA ACCESS PIPELINE, AND THE LONG TRADITION OF INDIGENOUS RESISTANCE 8 (2019).

64. *See generally id.* (detailing both the ten-month Standing Rock protests and the long history of Indigenous resistance to colonial forces); Robert T. Anderson, *Indigenous Rights to Water and Environmental Protection*, 53 HARV. C.R.-C.L. L. REV. 337, 367–70 (2018) (describing land-status history).

65. *See, e.g.*, *The Facts*, DAKOTA ACCESS PIPELINE FACTS, https://daplpipeline-facts.com/The-Facts.html [perma.cc/WN2A-RD57] ("The pipeline does not encroach or cross any land owned by the Standing Rock Sioux Tribe." (emphasis omitted)); Jack Dalrymple, Opinion, *Dakota Access Pipeline: Mob Rule Triumphed over Law and Common Sense*, STAR TRIB. (Dec. 15, 2016, 6:08 PM), https://www.startribune.com/dakota-access-pipeline-mob-rule-triumphed-over-law-and-common-sense/406939436 [perma.cc/44FL-HRCN] ("[T]he pipeline's permitted route never crosses tribal land.").

In the end, the Bundys were acquitted of all federal charges for their armed occupation of the refuge, and the Indigenous water protectors were removed with military tanks.[66] Oil flows through the disputed—and now expanded—pipeline,[67] and Ammon Bundy is running for Idaho governor.[68] The same patterns from *Federal Ground* repeat again.

C. *Abstract Land Commodification Has Costs*

A straight-line or square-by-square property grid did not naturally impose itself onto the landscape, but this kind of forced line-drawing occurred all across the West. As Ablavsky recounts, the imposed rectangular grid "willfully defied geography and difference, transplanting near-identical institutions across the continent" (p. 235). Uniform property rights have market advantages, making property more easily translated and transacted.[69] But, reproducing freely alienable (almost fungible) land titles as abstract rights—parchment, more than possession—even in the first territories also facilitated the early commodification of land as an abstract investment vehicle.[70] Ablavsky's history quietly reminds us to reflect on some of the costs of this development—physically, culturally, and, ultimately, in the ways property rights came to be skewed in favor of existing "haves," excluding even the intended "have-not" beneficiaries, in competitive market dynamics.

One of the most memorable scenes in *Federal Ground* describes a well-intentioned set of federal actors who sought to physically mark the boundary negotiated in the 1791 Cherokee Treaty of Holston—over hills, through trees, right up to the water (pp. 212–15). Their goal was to mark this boundary (called Hawkins's Line) so that they could force the 2,500 to 3,000 white intruders on the Cherokee side of the line to relocate (p. 215). That the federal government might enforce its treaty commitments—the supreme law of the

66. Dave Archambault II, Opinion, *Justice Looks Different in Indian Country*, N.Y. TIMES: ROOM FOR DEBATE (Nov. 2, 2016, 3:20 AM), https://www.nytimes.com/roomfordebate/2016/11/02/taking-on-militants-after-acquittals-in-an-armed-standoff/justice-looks-different-in-indian-country [perma.cc/NLD4-W3HY]. The UN special rapporteur on the rights to freedom of peaceful assembly and association, Maina Kiai, also decried the state's use of "unjustified force" against pipeline opponents. Press Release, Off. of the High Comm'r for Hum. Rts., United Nations, Native Americans Facing Excessive Force in North Dakota Pipeline Protests (Nov. 15, 2016), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20868&LangID=E [perma.cc/QS9Z-KZ9S].

67. *More Oil Shipped as Dakota Access Pipeline Expansion Starts*, AP NEWS (Aug. 6, 2021), https://apnews.com/article/business-environment-and-nature-dakota-access-pipeline-f07ffb809cc57d760d8db24c7919731c [perma.cc/H4RA-E2WK].

68. Paulina Villegas, *Far-Right Activist Ammon Bundy Is Running for Idaho Governor, Tapping an Anti-establishment Trend*, WASH. POST (June 23, 2021, 12:47 AM), https://www.washingtonpost.com/politics/2021/06/23/bundy0622 [perma.cc/JL2U-2KJ8].

69. *See* Abraham Bell & Gideon Parchomovsky, *Property Lost in Translation*, 80 U. CHI. L. REV. 515, 553 (2013) (articulating unique transaction costs associated with communicating pluralistic, localized property systems to external parties).

70. *See* Priest, *supra* note 18, at 281–83; ALEXANDER, *supra* note 26.

land—and honor the Cherokee land rights over claims of law-breaking citizens enraged and panicked white residents, including Andrew Jackson (pp. 204, 213). Ultimately, the federal government reversed course and "abandon[ed] Cherokee land rights," setting the stage for their forced removal.[71]

But it is the physical challenge and grittiness of tracing this line that I focus on here. Three federal commissioners, two surveyors, several "packhorse men," and a military escort joined three Cherokee guides to slowly trace this space (pp. 214–15). It took two months to traverse fifty-nine miles of "twisting waterways and endless mountains," with surveyors carving "C.I." on trees on the Cherokee side and "U.S." on the Tennessee side (p. 215). Army rations failed, and "Cherokee hunters fed the entire party with freshly caught bear and fish" (p. 215). The summer heat made the mountains too difficult to pass, and the group had to wait until the cool of the fall for the party to reach the end—at the Cumberland River, "carving a portrait of Cherokee commissioner Silliqoughe onto the final tree" (p. 215). The environmental and ecological damage caused by the abstraction and commodification of legal property rights in straight, almost arbitrary lines—conceptually divorced from any material, physical limits of the land and environment itself—followed.[72]

As the physical landscape was reshaped to meet these new legal boundaries, social dimensions changed, too. So much local knowledge is embedded in localized land-tenure systems and is lost when diversified land relations are erased.[73] Ablavsky can only really hint at this loss, primarily by noting how many property concepts in place at the time of western expansion seemed just irreconcilable (and even incomprehensible) to federal officials: concepts like Native "hunting grounds"; a whole "welter of overlapping national, village, clan, and individual-based entitlements, some exclusive and some communal" (p. 85); and lands shared communally among multiple Native nations (p. 86). The French *habitants* also had novel land relations, including titles jointly held by couples and flexible internal community codes that were disdained for their

71. P. 218. This result is entirely consistent with the prior themes of property rights being shaped by collective action as much as the rule of law (with the law bending to recognize even residents' illegal claims) *and* the familiar patterns of power in these spaces being recognized and distributed in racialized ways. The Cherokee ultimately ceded the disputed land for $5,000 in goods and a $1,000 annuity in the Treaty of Tellico. Pp. 219–21. The widow Betty reappears as the Indian Removal Act ("federally financed deportation") rips her from her homeland. P. 197. The Cherokee and other tribes are forced west, and Tennesseans get the power and land they want. Pp. 220–24. "[T]he prosperity that Betty and other Natives had carefully amassed over generations [was] bestow[ed] upon their 'independent' white neighbors." P. 197.

72. *See, e.g.*, Levi Van Sant, *"The Long-Time Requirements of the Nation": The US Cooperative Soil Survey and the Political Ecologies of Improvement*, 53 ANTIPODE 686 (2021); NICOLE GRAHAM, LAWSCAPE: PROPERTY, ENVIRONMENT, LAW (2011).

73. *See generally* KEITH H. BASSO, WISDOM SITS IN PLACES: LANDSCAPE AND LANGUAGE AMONG THE WESTERN APACHE (1996) (exploring myriad ways cultural knowledge can be tied to relations around specific physical spaces).

"extreme irregularity" (p. 93). There were also gendered dynamics at play, with territorial officials particularly bad at reading claims by women.[74]

In addition, despite all the legal pronouncements and policy purporting to seek egalitarian distributions of land in an open, fair, and balanced way,[75] the on-the-ground experience continually tilted toward people with existing power and wealth (including individual speculators and more organized land companies) (p. 103). Early laws that were intended to "make landownership cheap, decentralized, and democratic" in practice quickly "swept smallholders . . . into the maw of the hungry land market," which elite speculators quickly used to their advantage (p. 39). And, in federal distribution schemes, the end result was also accumulation by powerful white males, who learned to use the federal government as their ally (p. 237). Even in the context of federal bounty land rights for Revolutionary War veterans, a system that was supposed to fulfill specific promises made to veterans, 70 percent of these bounty lands ended up in the hands of a little over one hundred men, mostly nonveterans (p. 103). We see these same trends play out today, with 98 percent of agricultural land already owned by people who are white and increasingly moving into the hands, not of resident farmers and stewards but of industrial and concentrated agricultural landowners, including the Bill Gates and Ted Turners of the world.[76]

The rawness of the original line-drawing to the Cumberland River, the lost diversity of the original local land-tenure and knowledge systems, and the co-opting of even egalitarian land distribution policies into vehicles for enormous wealth concentration by the few, all warrant serious pause. As we face the environmental impacts of climate change, record economic inequality, and increasing social and political alienation today, the gap between frontier vision and lived reality widens. The environmental, cultural, and economic consequences of the abstract commodification of land may be even greater than we knew.

D. *Federal Power, Like Property, Is Sticky*

Finally, Ablavsky's history points to the persistence of both property rights and federal power. Throughout *Federal Ground*, Ablavsky seems almost surprised that "[p]ast property regimes . . . were sticky and hard to displace" (p. 20). It took more than a century for the full property morass the federal

74. *See, e.g.*, pp. 10–11 (noting how federal officials "envisioned power as a masculine preserve, blinding them to women's authority"); p. 86 (exploring federal officials' struggle "to grasp the relationship between ownership and gender in the matrilineal Native nations they encountered"); pp. 188–89 (unpacking gendered and paternalistic language around territorial and federal relationships, including rejection of "feminized metaphor of family in favor of the masculine language of contract and citizenship").

75. *See, e.g.*, *supra* note 26 and accompanying text.

76. Jessica A. Shoemaker, *Fee Simple Failures: Rural Landscapes and Race*, 119 MICH. L. REV. 1695, 1699 (2021); *see also* Eric Kades, *Of Piketty and Perpetuities: Dynastic Wealth in the Twenty-First Century (and Beyond)*, 60 B.C. L. REV. 145 (2019).

government inherited to be sorted out, and this stickiness is also seen in the many dubious on-the-ground claims that matured into lawful rights.

In terms of federal authority more generally, the systems of land title, federal Indian affairs, and other aspects of persistent federal authority remain surprisingly secure today. In part, Ablavsky traces this to the redeployment of these original experimental precedents into new, farther-removed territories as the frontier line progressed westward (p. 230). Now, these systems are persistent in new, expanding ways—with outsized federal land retention and management as we move farther west (p. 230), the fact that later territories now experience the path to statehood as virtually closed,[77] and in the continued modern federal presence (and intense control) within federal Indian reservations.[78]

For the Native nations of Ablavsky's narrative, the next chapter was largely removal to the West and, ultimately, containment within reduced reservations of new or prior territories. The history that unfolded to get to these modern reservation spaces is complicated and not the subject of Ablavsky's immediate work, but today Native nations continue to display incredible resilience and exercise their rights to self-governance, including within these retained spaces. As just one example, tribal governments' creative and proactive responses to the early devastation of the COVID-19 pandemic are now seen as having been particularly effective. Several tribes implemented testing programs before many states, created protective caretaking systems for vulnerable tribal elders, enforced border checkpoints, and, more recently, implemented highly successful vaccination campaigns.[79] The Poarch Band of Creek Indians began manufacturing their own personal protective equipment, and when children needed new Internet access for remote education access, "the Lower Brule Sioux Tribe built its own wireless network."[80]

Yet in terms of land specifically, all the diversity of original, carefully adapted land-tenure systems has largely been eliminated, and most tribal gov-

77. *See generally* DANIEL IMMERWAHR, HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES (2019) (describing how western frontier territories were slated for statehood in a way that other U.S. territories were not); Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 MICH. L. REV. 1639 (2021) (describing how certain U.S. territories are treated differently under the Constitution because there is no expectation of eventual statehood).

78. Jessica A. Shoemaker, *An Introduction to American Indian Land Tenure: Mapping the Legal Landscape*, 5 J.L. PROP. & SOC'Y 1, 46–51 (2020).

79. Katherine Florey, *The Tribal COVID-19 Response*, REGUL. REV. (Mar. 17, 2021), https://www.theregreview.org/2021/03/17/florey-tribal-covid-19-response [perma.cc/4EZD-XM8D].

80. *Id.* The Supreme Court has also handed down rare tribal victories recently, reinforcing the Creek Nation's treaty rights that impact jurisdiction across much of Oklahoma by acknowledging in a now-famous first line of the opinion: "On the far end of the Trail of Tears was a promise." McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020); *see* Robert J. Miller, *The Most Significant Indian Law Decision in a Century*, REGUL. REV. (Mar. 18, 2021), https://www.theregreview.org/2021/03/18/miller-significant-indian-law-decision-century [perma.cc/8ZLJ-UW4H].

ernments *still* find themselves in a federalized reservation system that is notoriously restrictive, bureaucratic, and expensive.[81] Both tribal and individual trust properties within reservations are subject to near-complete federal restraints on alienation, and nearly every land-use decision on trust property—whether by a tribal government owner or individual tribal citizen—is subject to extensive federal oversight and preapproval.[82] Despite good intentions by many federal actors and creativity among many tribal leaders, the path out of this sticky federalized property regime has largely proven elusive.[83]

There is much more to say here, but Ablavsky tries to sound what might be a somewhat hopeful note: even as frontier governance coalesced from "haphazard" responses to "contradictory demands," Ablavsky notes that "the work of colonialism, to extinguish preexisting claims, never fully succeeded . . . the United States remains a borderland where boundaries and authority are still up for grabs" (pp. 239–40). But if the lesson of Ablavsky's work is that property creation requires flexible give-and-take between people and the state, how will such a rigid structure adapt—especially when *Federal Ground* simultaneously reveals the stickiness of more formal systems and structures once they are physically and legally embedded across landscapes? In prior work, I have argued that solving reservation land-tenure challenges requires creating more flexible space for small, local experiments and innovations that may, over time, cascade up to more formal legal change—much like the flexible, open-ended legal spaces of the original borderlands where the formative local decisions in *Federal Ground* were made, but this time with tribes at the center.[84] *Federal Ground* reminds us that there is value in protecting more diverse land relations, just as it reminds us of the danger that—even with the best of intentions—it can be difficult to reverse course and rebuild new systems that are more equitable, inclusive, and just.

CONCLUSION

"The truth about stories is that that's all we are."[85] In *Federal Ground*, Gregory Ablavsky tells the creation story of American property and governance in meticulous detail. He also, in more subtle ways, I think, explores how deeply our collective stories can influence outcomes. Racial violence on the frontier, for example, was stoked by outsiders "fixated on . . . racial divides"; this, in turn, helped "create the very tensions that fit their preconceptions," building durable racial hostility and spaces of political violence (pp. 120–22). Likewise, where Ablavsky sees Native power in securing federal spending to meet Native

81. *See* Jessica A. Shoemaker, *Complexity's Shadow: American Indian Property, Sovereignty, and the Future*, 115 MICH. L. REV. 487 (2017).

82. *E.g.*, Jessica A. Shoemaker, *No Sticks in My Bundle: Rethinking the Indian Land Tenure Problem*, 63 U. KAN. L. REV. 383 (2015); Shoemaker, *supra* note 78.

83. *See generally* Jessica A. Shoemaker, *Transforming Property: Reclaiming Indigenous Land Tenures*, 107 CALIF. L. REV. 1531 (2019).

84. Shoemaker, *supra* note 81; Shoemaker *supra* note 83.

85. KING, *supra* note 1, at 2.

demands (p. 180), he decries the Supreme Court for writing "Native dependence into federal law" when it morphed this spending in Native communities into a demonstration of "Native weakness rather than strength," thereby erasing the history of Native empowerment and federal obsequiousness.[86]

When we really zoom out from *Federal Ground* and try to posit *how* the federal government ultimately succeeded here, the role that emerges again and again is its self-positioning as arbiter of conflicting claims. It was the federal government that decided what was worthy of incorporation into the new national narrative and what was not—which land claims were valid, when Native nations had fairly consented to treaty transactions, even how and when victims of violence deserved redress. In all these positions, it was the federal government—as mediator, decider, gatekeeper, and *storyteller*—that deemed what was true, valid, what could be believed. Through this alchemy, and often in response to the powerful voices of people on the ground, the new federal authority created itself as a government and built the West as we now know it.

We live at a time when voices in federal and state governments are now actively seeking to entrench, even more deeply, a singular American narrative with only one story that can be told: Don't discuss race. Teach the children patriotism. Tell them we are the best country in the world.[87] It must be true, then, as Thomas King says, that stories are powerful, and that "you have to watch out for the stories that you are told."[88] Gregory Ablavsky tells a different story, and it is one, of many, that we should hear.

86. Pp. 196–97; *see also* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 25, 31 (1831) (describing the Cherokee and other Native peoples as "domestic dependent nations").

87. *See, e.g.*, Exec. Order No. 13,958, 3 C.F.R. 471 (2020); Emma Pettit, *Nebraska Regents to Vote Friday on Whether to Join Condemnations of Critical Race Theory*, CHRON. OF HIGHER EDUC. (Aug. 12, 2021), https://www.chronicle.com/article/nebraska-regents-to-vote-friday-on-whether-to-join-condemnations-of-critical-race-theory [perma.cc/UMX6-NK4Y].

88. KING, *supra* note 1, at 10.