Review Essay

Protecting Sacred Sites

Land Is Kin: Sovereignty, Religious Freedom, and Indigenous Sacred Sites by Dana Lloyd (2023) University Press of Kansas, 224 pp, ISBN 9780700635894

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Abstract

When Indigenous nations' sacred and cultural sites are threatened, legal disputes often frame land in one of two ways: either land is sacred, or it is property. In *Land Is Kin*, Dana Lloyd argues that this positioning is inadequate. Not only does it facilitate the damage and destruction of sacred sites, but it fails to appreciate the familial responsibilities we all have to Country. In this review essay, I outline Lloyd's argument and suggest that emerging treaty processes in Australia offer one way to ground a deeper appreciation of land within Australian law and society.

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I Introduction

Aboriginal and Torres Strait Islander sacred and cultural sites are protected by legislation in Australia.[1] This does not prevent their damage or destruction. In only the last few years, carvings have been vandalised,[2] rock shelters exploded,[3] and work

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1 See, eg, *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).

2 Keira Proust, 'Bulgandry Aboriginal Art Site Vandalised for a Second Time in Brisbane Water National Park at Kariong', *ABC News* (online, 12 January 2024) <https://www.abc.net.au/news/2024-01-12/bulgandry-aboriginal-art-site-vandalised-again-nsw-central-coast/103301182>.

3 Calla Wahlquist, 'Rio Tinto Blasts 46,000-year-old Aboriginal Site to Expand Iron Ore Mine', *Guardian Australia* (online, 26 May 2020) <https://www.theguardian.com/australia-news/2020/may/26/rio-tinto-blasts-46000-year-old-aboriginal-site-to-expand-iron-ore-mine>.

undertaken on restricted sites without permission.[4] These are just some of the instances that attract media and other attention. Is this all that we can hope for? In *Land Is Kin: Sovereignty, Religious Freedom, and Indigenous Sacred Sites*,[5] Dana Lloyd examines the legal regime for the protection of Native American sacred sites in the United States. In outlining and tracing the unsatisfactory jurisprudence issued by the Supreme Court, Lloyd argues that protecting sacred sites requires stepping away from settler law and reconceptualising how we — members of non-Indigenous communities — understand land.

Settler colonial states like Australia and the United States were built on dispossession. Foundational narratives speak of taming the frontier and expanding colonial and national settlement. In this context, is it possible to reconceive our understanding of land, from economic and civilisational bounty — from hard-won property — to something else entirely? This essay argues that the emerging treaty processes in Australia could augur such a development in this country. This is because treaties serve both legal and relational goals. On the one hand, an Indigenous–state treaty would acknowledge that Aboriginal and Torres Strait Islander nations possess political and legal authority, carving space within Australian law for Indigenous communities to manage their responsibility and obligations to Country. At the same time, given treaties constitute promises between political communities to reconcile competing claims through dialogue and mutual agreement,[6] these concords provide an opportunity to develop relationships built on trust and respect. Through these sustained conversations, treaty-making could prompt a broader and deeper understanding among all Australians of land and our relationship to Country.

II A Discouraging Jurisprudence

In the late 1970s, the United States Forest Service developed plans to construct a six-mile road in the Six Rivers National Forest in northern California to facilitate timber harvesting. The road would traverse an area known as the High Country, a site of religious significance and core to the cultural identity of the Yurok, Karuk and Tolowa nations. Cognisant of the importance of the site, the Forest Service commissioned a report to assess the impact of the road. The report was clear: construction 'would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples'.[7] It recommended construction not proceed.

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4 Lorena Allam, 'Parks Australia Charged with Damaging Sacred Site in Kakadu National Park', *Guardian Australia* (online, 15 September 2020) <https://www.theguardian.com/australia-news/2020/sep/15/parks-australia-charged-with-allegedly-damaging-sacred-site-in-kakadu-national-park-northern-territory>.

5 Dana Lloyd, *Land Is Kin: Sovereignty, Religious Freedom and Indigenous Sacred Sites* (University Press of Kansas, 2024).

6 On the constitutional nature of Indigenous–state treaties in Australia, see Harry Hobbs, 'Anticipating and Weathering Storms to Modern Treaties in Australia' (2024) 35(4) *Public Law Review* (forthcoming).

7 Quoted in *Lyng v Northwest Indian Cemetery Protective Association*, 485 US 439, 442 (O'Connor J) (1988) ('*Lyng*').

The Forest Service rejected the report's recommendations and pressed forward. Several Native American groups, led by the Northwest Indian Cemetery Protective Association, and joined by environmentalists and the State of California, challenged the Forest Service's plans. At first instance they succeeded. In 1983, the US District Court for the Northern District of California issued a permanent injunction. Finding that the High Country 'constitutes the center of the spiritual world' of the Yurok, Karuk and Tolowa peoples,[8] the Court held that construction would 'seriously damage' the qualities that make the site sacred.[9] The Forest Service plan thus violated the free exercise clause of the First Amendment, which holds that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...'.[10] The decision was affirmed on appeal to the Ninth Circuit,[11] but the Forest Service pushed on to the Supreme Court.

In *Lyng v Northwest Indian Cemetery Protective Association*,[12] the Supreme Court handed down 'one of the worst Indian cases ever decided'.[13] Despite accepting evidence that the road would 'virtually destroy the … Indians' ability to practice their religion',[14] the Court allowed the appeal in a 5:3 decision. Writing for the majority, Justice Sandra Day O'Connor held that the free exercise clause only prohibits government action that either coerces an individual into violating their religious beliefs or penalises religious activity by denying a person an equal share of the rights, benefits and privileges enjoyed by other citizens. On this account, Justice O'Connor reasoned that a law excluding the Yurok, Karuk and Tolowa nations from the High Country may violate the clause.[15] The construction of the road would not, however, because it neither penalises the Indigenous nations for expressing their faith, nor coerces them to violate their faith.[16] In an incredulous dissent, Justice William Brennan remarked that the 'cruelly surreal result' means that 'government action that will virtually destroy a religion is nevertheless deemed not to "burden" that religion'.[17]

Ultimately, the road was not built. Responding to significant outcry, in 1990 Congress passed the *Smith River National Recreation Area Act*.[18] The Act designated the proposed road corridor a 'wilderness' under the *Wilderness Act of 1964*,[19] preventing construction. The designation was a victory for the Yurok, Karuk and Tolowa nations. As Dana Lloyd draws out in *Land Is Kin*, however, that victory is incomplete. *Lyng* remains the law of the land.

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8 *Northwest Indian Cemetery Protective Association v Peterson*, 565 F Supp 586, 594 (Weigel J) (1983).

9 Ibid 594–5.

10 *United States Constitution* amend I.

11 *Northwest Indian Cemetery Protective Association v Peterson*, 795 F 2d 688 (9th Cir, 1986) ('*Northwest 1986 Decision*').

12 *Lyng* (n 7).

13 Walter R Echo-Hawk, *In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided* (Fulcrum, 2012) 345.

14 *Lyng* (n 7) 451 (O'Connor J), citing *Northwest 1986 Decision* (n 11) 693 (Canby J).

15 *Lyng* (n 7) 453.

16 Ibid 449.

17 Ibid 472.

18 Pub L No 101-612, 104 Stat 3209.

19 16 USC § 1131.

The *Lyng* case has attracted substantial criticism since it was handed down over three decades ago.[20] Much of this scholarship critiques the Supreme Court's narrow understanding of the free exercise clause and its application to Indigenous peoples' sacred sites. There is much to critique. Although the Court was not able to accommodate the place-based nature of Indigenous religions, many have wondered whether it would have had the same difficulty preventing proposed action that would damage the Wailing Wall in Jerusalem,[21] or the desecration of the Arlington National Cemetery in Washington DC.[22] Despite an apparent constitutional bar on government action that prohibits the free exercise of religion, government agencies may damage and destroy Native American cultural and religious sites on public lands.

Judicial authorities continue to permit such activity on questionable bases. In *Navajo Nation v United States Forest Service*, for instance, the United States Court of Appeals for the Ninth Circuit applied *Lyng* and dismissed a challenge brought by several Indigenous nations. The Forest Service had approved a plan to pump 1.5 million gallons of sewage effluent per day to manufacture artificial snow on the San Francisco Peaks in Arizona to improve the economic viability of a private ski resort. The Court accepted that the Peaks are 'the most sacred mountain of southwestern Indian tribes',[23] and that the use of recycled wastewater would 'spiritually contaminate the entire mountain and devalue their religious exercises',[24] but because this neither coerced nor penalised the exercise of their religious beliefs, the plaintiffs lost.[25]

A legal claim must be prepared in a way that is comprehensible to a court. While some scholars have suggested that Indigenous nations seeking protection of their religious sites on public land should adopt arguments from property law,[26] it is understandable that many will choose to frame their dispute through the lens of religious freedom. As Lloyd argues, however, religious freedom 'and settler law more generally' cannot provide the answer that Indigenous communities seek.[27] This is because the law positions Native American sacred sites cases within a binary in which they are predetermined to lose. In a dispute between an Indigenous community's religious freedom and property rights, the courts choose to protect the

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20 Lloyd draws substantially on this literature. The general tenor of the reception of the decision is identifiable in the titles of case notes on the judgment. See, for a representative sample, Donald Falk, '*Lyng v Northwest Indian Cemetery Protective Association*: Bulldozing First Amendment Protection of Indian Sacred Lands' (1989) 16(2) *Ecology Law Journal* 515; Camala Collins, 'No More Religious Protection: The Impact of *Lyng v Northwest Indian Cemetery Protection Ass'n*' (1990) 38(1) *Journal of Urban and Contemporary Law* 369; W Pemble DeLashmet, 'The Indian Wars Continued' (1990) 10(1) *Mississippi College Law Review* 79.

21 Robert J Miller, 'Correcting Supreme Court "Errors": American Indian Response to *Lyng v Northwest Indian Cemetery Protection Association*' (1990) 20(4) *Environmental Law* 1037, 1037.

22 Stephanie Hall Barclay and Michalyn Steele, 'Rethinking Protections for Indigenous Sacred Sites' (2021) 134(4) *Harvard Law Review* 1294.

23 *Navajo Nation v United States Forest Service*, 535 F 3d 1058, 1080 (9th Cir, 2008) (Fletcher J) ('*Navajo Nation*').

24 Ibid 1063 (Bea J for the Court).

25 For a very recent case, see *Apache Stronghold v United States* (9th Cir, No 21-15295, 1 March 2024).

26 See, eg, Kristen A Carpenter, 'A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners' (2005) 52 *UCLA Law Review* 1061; Patrick E Reidy, 'Sacred Easements' (2024) 110(4) *Virginia Law Review* 833.

27 Lloyd (n 5) 1.

latter. The religion–property binary is set out explicitly in these judgments. In *Lyng*, Justice O'Connor noted that '[w]hatever rights the Indians may have to the use of the area … those rights do not divest the Government of its right to use what is, after all, its land'.[28] In *Navajo Nation*, the Court characterised the case as concerning 'whether … government-approved use of artificial snow on government-owned park land violates' the law.[29] Lloyd rejects this positioning. As she explains, understanding the cases — and Native American sacred sites — in this way 'sets two (ostensibly) mutually exclusive conceptions of land against each other: either land is sacred or it is property'.[30] For Lloyd — and for the Indigenous nations in question — land is so much more.

III Understanding What Is at Stake

Land Is Kin begins by asking 'what land means — and what it *could* mean — to the different parties involved in Indigenous sacred sites cases'.[31] As Lloyd notes, reading *Lyng* and later cases like *Navajo Nation* through the lens of religion or property misses the significance of sacred sites and how Indigenous nations understand their Country and the responsibilities that flow from their relationship to land. It is also for this reason that Lloyd argues that protecting the High Country as 'wilderness' is only a partial victory. While the designation precluded the construction of the road and the consequent destruction of the sanctity of the High Country, it failed to properly understand and account for Indigenous peoples' relationship to land.[32] Across five rewarding and engrossing chapters, Lloyd reads *Lyng* as revealing five dimensions to land: land as home, as property, as sacred, as wilderness and, finally, as kin. By uncovering these multilayered dimensions, Lloyd seeks to impress upon her reader an ethic of responsibility and to reconceive our relationships with the more than human world.

Each of these dimensions captures only a small part of the meaning of land. They may also be inconsistent or even in conflict at times.[33] The Yurok, Karuk and Tolowa nations have managed the High Country and relied on its tranquillity for meditative and ceremonial religious practices for thousands of years, but wilderness implies an untouched and pristine environment free from human activity. In positioning their legal claim as one concerning the exercise of their religion, Indigenous witnesses at trial described the High Country not merely as a sacred place but as their home. The three nations also characterise their relationship to the High Country and land in familial terms, but they have purchased large areas of their traditional Country. Can you own kin? Lloyd acknowledges these complications but

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28 *Lyng* (n 7) 453.
29 *Navajo Nation* (n 23) 1063 (Bea J for the Court).
30 Lloyd (n 5) 2.
31 Ibid 1 (emphasis in original).
32 Ibid 124.
33 For a similar argument examining the basis of Indigenous rights claims, see Benedict Kingsbury, 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law' (2001) 34(1) *New York University Journal of International Law and Politics* 189.

argues that the productive tension between these logics allows us to escape the religion–property binary.[34]

It also allows us to expand our field of vision beyond the judgment. The sharp words of the majority decision cannot account for the multilayered understandings of land, nor for how colonisation has affected the relationship Indigenous peoples have with their sacred sites. Neither can the more generous dissent of Justice William Brennan, which 'depoliticizes religion and essentializes indigeneity'.[35] Lloyd skilfully weaves testimony from the first instance trial, where witnesses compellingly spoke of the centrality of the High Country to their life and culture, with broader meditations on colonisation, anthropology and religion. Of these, colonisation features most heavily. Indeed, underlying the dispute in all Indigenous sacred sites cases is colonialism. Only by reading the decision against long histories of state-sanctioned murder and dispossession, of broken or unratified treaties,[36] and of concerted efforts to destroy Indigenous religious practices, can a deeper picture of the meaning of the High Country and of land emerge. As Lloyd persuasively argues, the process by which the High Country became 'public land' is not explored in *Lyng*, even though it should be critical to assessing whether and how the Yurok, Karuk and Tolowa First Amendment rights to exercise their religion can be protected.[37]

Combining a clear understanding of legal doctrine but embedded in humanities scholarship that emphasises law as storytelling, *Land Is Kin* does not only demonstrate the complexity of land but outlines a potential path forward. In the penultimate chapter, Lloyd examines a 2019 resolution by the Yurok Tribal Council that extended rights to the We-Roy or Klamath River. Part of an emerging global approach that recognises the rights of nature by granting legal personality to rivers, mountains, and other natural features and ecosystems, Lloyd identifies the resolution as an assertion of sovereignty, a claim of right to 'make decisions about Yurok everyday life based on traditional values'.[38] Like the water protectors challenging the Dakota Access Pipeline,[39] the Yurok Tribal Council's resolution reflects their inherent and continuing sovereignty. It is also an acknowledgment of ongoing kinship relations that have not been severed by colonialism.[40] To Lloyd, this aspect is more important. Indeed, Lloyd acknowledges that it may be hard to imagine private corporations accepting Yurok jurisdiction and appearing before the Tribal Court to answer for their alleged harms, but the resolution nonetheless articulates the responsibility we have to the more than human world.[41]

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34 Lloyd (n 5) 5.
35 Ibid 83.
36 Eighteen treaties between California Native American nations and the United States government were negotiated between 1851 and 1852. However, in the face of settler opposition, Congress failed to ratify the treaties: see '1851–1852: Eighteen Unratified Treaties between California Indians and the United States' (2016) *US Government Treaties and Reports* 5.
37 Lloyd (n 5) 21, 42.
38 Ibid 143.
39 See, eg, Nick Estes and Jaskiran Dhillon (eds), *Standing with Standing Rock: Voices from the #NODAPL Movement* (University of Minnesota Press, 2019).
40 Lloyd (n 5) 128.
41 Ibid 151.

Uncovering the multidimensional nature of land does not mean that 'rights' are unimportant. Lloyd's emphasis on the significance of the Tribal Council's resolution confirms her argument that broader notions of kinship and sovereignty should guide the resolution of these disputes. In this, Lloyd concurs with scholars of law and religion that see the fundamental problem in Indigenous sacred sites cases as their funnelling through the First Amendment.[42] The challenge for Indigenous nations is that within settler courts this dialogue inevitably assigns Indigenous peoples 'a status at or near the very bottom'.[43] Lloyd's response is to recentre jurisdiction to the Yurok themselves, away from the settler courts. The resolution is one example of how Indigenous nations across North America are living sovereignty by assuming jurisdiction and making decisions to manage their kinship responsibilities to and for the land.

IV Treaty-Making

Land Is Kin is focused entirely on the *Lyng* case and the way the High Country — and land more generally — is more than property. The problem Lloyd identifies, however, is one common to settler colonial states and an Australian reader would identify many parallels. Although the *Australian Constitution* protects few rights, it does expressly protect freedom of religion in similar, albeit narrower, terms to the First Amendment of the *United States Constitution*. Section 116 precludes the Commonwealth Parliament from making laws for establishing any religion, imposing any religious observance, or prohibiting the free exercise of any religion. The High Court of Australia has adopted a strict interpretation of the provision, including the free exercise clause.[44] In *Kruger v Commonwealth*, for example, the Court held that a 1918 Ordinance that forcibly removed Indigenous children from their families did not violate the guarantee in s 116.[45] This was because the Ordinance was not enacted for the purpose of prohibiting religious practices even though it had that effect.

The protection of Aboriginal and Torres Strait Islander sacred sites in Australia is also inconsistent. Often such protection is subsumed beneath other considerations such as economic use. Infamously, in the 1990s following a political and legal storm, the Commonwealth Parliament passed legislation to facilitate the construction of a bridge to Hindmarsh Island despite concern it would damage or destroy sites sacred to Ngarrindjeri women.[46] In the course of a High Court challenge to the legislation, the Commonwealth asserted that it possessed the power to enact Nazi-style laws against Indigenous peoples.[47] Even beneficial laws have significant

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42 See generally Michael D McNally, *Defend the Sacred: Native American Religious Freedom beyond the First Amendment* (Princeton University Press, 2020).

43 Lloyd Burton, *Worship and Wilderness: Culture, Religion, and Law in Public Lands Management* (University of Wisconsin Press, 2002) 292.

44 Luke Beck, *Religious Freedom and the Australian Constitution: Origins and Future* (Routledge, 2018).

45 *Kruger v Commonwealth* (1997) 190 CLR 1.

46 *Hindmarsh Island Bridge Act 1997* (Cth).

47 Transcript of Proceedings, *Kartinyeri v Commonwealth* (High Court of Australia, A29/1997, Brennan CJ, Gaudron, McHugh, Gummow, Kirby, Hayne, Callinan JJ, 5 February 1998). See also Megan Davis, 'Recognition of Aboriginal and Torres Strait Islander Rights' (2006) 5 *Journal of Indigenous Policy* 35, 46.

gaps. In Western Australia, the *Aboriginal Heritage Act 1972* allows land users including mining companies to lodge an application for permission to damage or destroy a registered Aboriginal heritage site.[48] The destruction of the 46,000-year-old sacred rock shelters at Juukan Gorge in May 2020 occurred in accordance with the State's heritage regime. An attempt to revamp and update that legal framework failed,[49] leaving sacred and cultural sites across Western Australia vulnerable.

Constitutional doctrine can sometimes complicate this area. In 2019, Parks Australia constructed a walkway near Gunlom Falls in Kakadu National Park. Parks Australia did so without seeking permission from the Aboriginal Areas Protection Authority and, after inadvertently damaging a site sacred to Jawoyn men, was charged with an offence under the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT). The Director of National Parks pleaded not guilty, submitting that, as a government instrumentality, Parks Australia enjoyed the full privileges and immunities of the Crown, including immunity from criminal liability. The argument succeeded in the Supreme Court of the Northern Territory,[50] but was overturned by the High Court in May 2024.[51]

In each of these cases we might say that the relevant sacred or cultural site was not treated with sufficient respect. But this is really to say that the relevant Indigenous nation was not treated with respect. Their responsibility to Country, their obligations to kin, were not considered or were actively ignored. Other concerns, be they majoritarian, financial or simple lack of care, took priority. Australian law facilitated this lack of respect — and almost allowed the attempt to avoid liability in the case of Gunlom Falls. There must be a better way. If we take seriously Lloyd's call to understand our relationship with land, these sorts of cases would begin from a different starting point. They would commence with the recognition of the legal and political authority of Aboriginal and Torres Strait Islander communities and nations. Respecting this status would require legislative amendment. Gaps within legal regimes that enable the destruction of sacred and cultural sites would be filled. It would also require cultural changes that deepen our understanding of Country and help to make inadvertent destruction less likely. As generations of Aboriginal and Torres Strait Islander peoples have argued,[52] treaty-making offers a useful vehicle to promote such change.

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48 *Aboriginal Heritage Act 1972* (WA) s 18.

49 Sarah Collard and Josh Butler, 'WA Premier Roger Cook Axes Aboriginal Cultural Heritage Laws after Outcry by Landholders', *Guardian Australia* (online, 8 August 2023) <https://www.theguardian.com/australia-news/2023/aug/08/wa-repeals-axes-aboriginal-cultural-heritage-laws-premier-roger-cook>.

50 *Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks* [2022] NTSCFC 1.

51 *Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks* (2024) 259 LGERA 26.

52 See, eg, National Aboriginal Conference, 'The Makarrata: Some Ways Forward' (Position Paper, World Council of Indigenous Peoples, May 1981); Treaty 88 Campaign, 'Aboriginal Sovereignty: Never Ceded' (1988) 23(91) *Australian Historical Studies* 1, 1–2; Michael Mansell, 'Treaty Proposal: Aboriginal Sovereignty' (1989) 1(37) *Aboriginal Law Bulletin* 4; Hannah McGlade (ed), *Treaty: Let's Get It Right!* (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2003); Council for Aboriginal Reconciliation, *Reconciliation: Australia's Challenge* (Final Report, December 2000) 106; *Uluru Statement from the Heart* (Statement, First Nations National Constitutional Convention, 26 May 2017).

In recent years, several governments across Australia have committed to pursuing treaty negotiations with Aboriginal and Torres Strait Islander nations.[53] However, the historical absence of treaty relationships on this continent means many Australians have little familiarity with the character and meaning of these agreements. In Canada, where modern treaty negotiations have been ongoing since the 1970s, it is recognised that treaties are complex instruments that serve both legal and relational goals. These complementary and mutually reinforcing dimensions could help support the development of a new understanding of land and Country on this continent.

Treaties create enforceable legal obligations. They constitute binding promises by both parties. What sort of promises do they contain? While each agreement will differ according to the aspirations of the parties, a treaty recognises the inherent sovereignty of Indigenous nations and establishes or empowers institutions that can exercise self-government powers within the state.[54] In Australia, this will likely include the power to make laws over cultural heritage. For example, the Parliament of Victoria may devolve legislative authority to the First Peoples' Assembly of Victoria, enabling the Indigenous body to issue legislative instruments concerning the protection of sacred and cultural sites across the state. These instruments will be given the force of law. Other parties, be they public authorities or mining companies, will be required to engage with the Assembly to understand their legal obligations when carrying out work that may impact a protected site. In this way, a treaty carves out space for self-governance, empowering Indigenous peoples to protect their heritage in the form and structure that makes sense to them. It also forces other actors to acknowledge the political and legal capacity and authority of Indigenous nations.

This is important because political and legal authority within Aboriginal and Torres Strait Islander communities and nations is tied to Country. Indeed, the complex religious, legal, political and cultural systems that structure and breathe life into these societies is intimately connected to place. Often poorly translated as the 'Dreaming', these knowledge systems — the *Nura* of the Dharug, the *Daramoolen* of the Ngunnawal and Ngarigo — '[encompass] all life as well as the connections that link life together'.[55] The Dreaming explains that all life, animate and inanimate, from humans and kangaroos to rocks and Country itself, is alive and 'exists in *relationship* to everything else'.[56] Law does not occur in isolation from this vision, but 'weave[s] us all together',[57] sustaining 'the web of relationships established by

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53 See Harry Hobbs, 'Taking Stock of Indigenous-State Treaty-Making: Opportunities and Challenges' (2024) 47(2) *UNSW Law Journal* 548. Though note that the failed Voice referendum has complicated these processes.

54 Harry Hobbs and George Williams, 'The Noongar Settlement: Australia's First Treaty' (2018) 40(1) *Sydney Law Review* 1, 7–14.

55 Blaze Kwaymullina and Ambelin Kwaymullina, 'Indigenous Holistic Logic: Aspects, Consequences and Applications' (2014) 17(2) *Journal of Australian Indigenous Issues* 34, 35.

56 Ambelin Kwaymullina and Blaze Kwaymullina, 'Learning to Read the Signs: Law in an Indigenous Reality' (2010) 34(2) *Journal of Australian Studies* 195, 196 (emphasis in original).

57 CF Black, *The Land Is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (Routledge, 2011) 5.

the Ancestors'.[58] In connecting the human and non-human world, the Dreamings envision a holistic, interconnected cosmos built on principles of balance, respect, symmetry and autonomy.[59] Empowering Indigenous nations with legal decision-making power over their Country should see this relationship strengthened and recognised in state law.

Legal certainty is important, but it is the relational nature of treaties and treaty processes that offer the greater likelihood of grounding a reconceptualisation of land. Treaties obtain their legal force through enactment of legislation in Parliament. Without constitutional protection, a future parliament could revoke or rescind any element of a treaty. For this reason, the moral and political strength of the instrument is connected to the strength of the relationship produced through the process of negotiation. In conversations and dialogue, non-Indigenous Australians may begin to understand the relationship Aboriginal and Torres Strait Islander peoples have with Country; we may even begin to understand that, by our presence on this continent, we share those obligations and responsibilities.

Is this realistic? If we put to one side the very real political challenges to reaching meaningful settlements, another difficulty emerges. Treaties are fundamental instruments that constitute promises by diverse political communities to reconcile competing claims though dialogue and mutual agreement. However, colonisation and state formation have 'domesticated' these processes.[60] As such, Indigenous–state treaties will operate within the Australian legal order. Many Indigenous scholars have wondered whether a 'domestic' treaty can liberate Aboriginal and Torres Strait Islander peoples from colonial relations.[61] Can such an agreement catalyse the epistemic change required for non-Indigenous Australians to reconceptualise our understanding of and relationship to land and governance? I hope so.

In the United States, where historic practices of treaty-making grounded legal recognition of Native American sovereignty and self-government, similar challenges persist. Nevertheless, the sort of dialogue and discussion characteristic of modern treaty-making continues to occur, albeit with mixed results. The US Forest Service has broad discretion in determining whether and how to adopt policies that may impact sacred sites, but federal law requires the Service to conduct meaningful consultation with relevant Indigenous nations when the proposed impact may impose a substantial burden on sacred or religious sites. Todd Allin Morman's recent empirical study of these consultations reveals a nuanced picture where Indigenous nations have sometimes been able to protect the integrity of their sacred sites through

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58 Ambelin Kwaymullina, 'Seeing the Light: Aboriginal Law, Learning and Sustainable Living in Country' (2005) 6(11) *Indigenous Law Bulletin* 12, 13.

59 Deborah Bird Rose, 'Consciousness and Responsibility in an Australian Aboriginal Religion' in WH Edwards (ed), *Traditional Aboriginal Society: A Reader* (Macmillan, 2nd ed, 1998) 239, 243.

60 Miguel Alfonso Martinez, Special Rapporteur, *Studies on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations*, UN Doc E/CN.4/Sub.2/1999/20 (22 June 1999) [192]; Harry Hobbs and Stephen Young, 'Modern Treaty Making and the Limits of the Law' (2021) 71(2) *University of Toronto Law Journal* 234.

61 Irene Watson, 'Aboriginal Recognition: Treaties and Colonial Constitutions, "We Have Been Here Forever …"' (2018) 30(1) *Bond Law Review* 7. See also Maurice Agale, 'Necrology: List of Recently Dead People' (2002) 5(21) *Indigenous Law Bulletin* 12; Bhiamie Williamson, 'Treaty: All Ship, No Cargo', *Arena* (online, 3 June 2021) <https://arena.org.au/treaty-all-ship-no-cargo>.

negotiation and consultation. The 'greatest strength of the consultation process', Morman explains, is its ability 'to open communications and bridge cultural gaps, bringing greater understanding of Indian rights and concerns to non-Indian communities'.[62] As Morman recounts, consultations ensured the Washoe Nation were able to secure a permanent climbing ban on Cave Rock in Nevada.

Dialogue and discussion can work both ways. After several rounds of consultation, the Lakota, Cheyenne and Kiowa nations decided to seek a voluntary (rather than permanent) ban on climbing their sacred Bear's Lodge. The nations came to understand that a voluntary ban provided an opportunity for non-Indigenous peoples to demonstrate their care and respect by refraining from climbing. It appears this is working; in 2023, the National Park Service reported an 85% reduction in the number of climbers.[63] A similar voluntary ban on climbing Uluṟu eventually transformed to a permanent ban once the number of visitors climbing fell below 20%.[64]

Consultations do not always produce good outcomes for Indigenous nations. And, as we have seen, the legal framework within which negotiations take place does not provide much support for the protection of sacred sites on public lands. The same is certainly true in Australia.[65] Nevertheless, as Marcia Yablon has argued, these processes do encourage flexible compromises that courts are often unable to offer.[66]

V Conclusion

Indigenous sacred and cultural sites do not receive adequate protection in the United States and Australia. Dana Lloyd's *Land Is Kin* argues that this will remain the case so long as disputes frame land as either property or sacred. Lloyd urges us to centre the protection of sacred sites on an understanding that land is kin. By focusing attention on the land itself, Lloyd calls for a rearticulation of sovereignty away from notions of jurisdiction and control. On her account, sovereignty is not 'the right to decide the fate of a territory' but 'a partnership with the land itself'.[67] Treaty-making processes in Australia offer one model to develop a similar understanding on this continent. A treaty could empower and respect the political and legal authority of Aboriginal and Torres Strait Islander nations. Even more significantly, by providing a language for citizens within and across political communities to talk with, engage and understand each other, these processes could ground a deeper appreciation of land among all Australians. Only by recognising that land is kin can we hope to protect sacred sites.

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62 Todd Allin Morman, *Many Nations under Many Gods: Public Land Management and American Indian Sacred Sites* (University of Oklahoma Press, 2024) 200.

63 National Park Service (US), 'Voluntary Climbing Closure in June' (News Release, 31 May 2023) <https://www.nps.gov/deto/learn/news/voluntary-climbing-closure-in-june.htm>.

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