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PROTECTING THE SACRED SITES OF INDIGENOUS PEOPLE IN U.S. COURTS: RECONCILING NATIVE AMERICAN RELIGION AND THE RIGHT TO EXCLUDE

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The key to understanding current U. S. caselaw concerning the protection of Native American sacred sites is arguably found in the dissenting opinion of an eighteen-year old case involving not religious freedom, not sacred sites, and not cultural heritage – but the right of Indian tribes to impose severance taxes on non-tribal members who extract oil and gas from tribal lands. In *Merion v. Jicarilla Apache Tribe*,¹ Justice Stevens refused to join the majority's conclusion that the inherent sovereignty of the Jicarilla Apache Tribe included the power to impose such a tax. In his view, a tribe's authority to regulate the activities of non-tribal members "derives solely from the tribes' power to exclude nonmembers entirely from territory that has been reserved for the tribe."² Justice Stevens thus equated the tribe's power as sovereign with its right as property owner, focusing on what the Court has called "one of the most essential sticks in the bundle of rights that are commonly characterized as property" – "the right to exclude."³

Justice Stevens' contention that a tribe's inherent authority to regulate nonmembers derives solely from its right to exclude others from reservation lands, was expressly rejected by six of the nine members of the Court at the time.⁴ The majority chose, instead, to engage in the more complex and difficult balancing required to determine what inherent sovereignty means in the unique Indian law context. However, over the last twenty

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1. *Merion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

2. *Id.* at 173 (Stevens, J., dissenting).

3. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982), quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

4. *Id.* at 141 ("[w]e are not persuaded by the dissent's attempt to limit an Indian tribe's authority to tax non-Indians by asserting that its only source is the tribe's power to exclude such persons from tribal lands").

years, Justice Steven's position has, sub silentio, gained ascendancy until it now appears to be the current law in most respects. In its most recent decision addressing tribal sovereignty over nonmembers, a unanimous Court indicated that once a tribe loses its "landowners' right to occupy and exclude" nonmembers, it generally lacks any inherent authority to regulate the conduct of those nonmembers.⁵ The Court cited with approval the observation of seven members of the Court in a 1993 decision that a "[t]ribe's loss of the right of absolute and exclusive use and occupation ... implies the loss of regulatory jurisdiction over the use of the land by others."⁶ It now appears that, to a large extent, the Court believes "[r]egulatory authority goes hand in hand with the power to exclude."⁷

During the past two decades the Supreme Court has thus reduced a somewhat nuanced theory of jurisdiction and inherent sovereignty, requiring careful analysis and a sensitive balancing of interests, into a much more simplified test focusing largely on a single aspect of traditional property law – a landowner's right to exclude.

What has all this to do with sacred sites? A review of the case law involving the right of Native Americans to use and protect their sacred sites reveals that the same kind of simplification has occurred, with the courts focusing on the same aspect of property law – the right to exclude. For example, in its seminal decision, *Lyng v. Northwest Indian Cemetery Protective Ass'n*,⁸ the Supreme Court rejected a claim that the federal government violated the free exercise rights of members of three tribes by allowing timber harvesting in, and road construction through, a parcel of National Forest land traditionally used by tribal members for religious purposes. While acknowledging that the tribal members' "beliefs are sincere and that the Government's proposed actions will have severe adverse effects on the practice of their religion,"⁹ the Court concluded 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

5. *Strate v. A-1 Contractors*, 520 U.S. 438, 456 (1997). In *Strate*, the Court held that the Tribe did not have jurisdiction over the conduct of a nonmember involved in an auto accident on a state highway crossing the reservation on a right-of-way granted to the state. The Court indicated that the land was to be treated like non-Indian fee land, *id.*, and applied the general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions." *Id.* at 446. The Court subsequently interpreted the two exceptions very narrowly. *Id.* at 457-59.

6. *Id.* at 456 (quoting *S. Dakota v. Bourland*, 508 U.S. 679, 689 (1993)). In *Bourland*, the Court ruled that tribal lands taken by the federal government for a federal dam and reservoir project were also to be treated like fee lands owned by non-Indians.

7. *S. Dakota v. Bourland*, 508 U.S. 679, 691 n. 11 (1993).

8. *Lyng v. N.W. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

9. *Id.* at 447.

land.”¹⁰ The federal government, not the Tribes, had the property right to exclude others, and as owner, it had no duty to grant preferential rights to anyone. Indeed, the Court observed ruling for the tribal members would require an unacceptable shift in the respective property interests of the tribal members and the federal government. “[W]hen one notes that such beliefs could easily require de facto beneficial ownership of some rather spacious tracts of public property ... the diminution of the Government’s property rights ... would in this case be far from trivial.”¹¹ The Court refused to sanction what it characterized as the tribal members’ attempt to impose a “religious servitude” on the Government’s property.¹² It expressly declined to engage in the difficult, but important task of balancing the competing interests involved¹³ and instead opted to focus on property law concepts.

A similar theme has been sounded in lower federal court rulings under the Free Exercise Clause, both before and after *Lyng*. Prior to *Lyng*, for example, a federal district court in Tennessee rejected the free exercise claim of members of the traditional Cherokee religion who sought to enjoin completion of the Tellico Dam and the resultant flooding of various sacred sites. The court focused solely on the relative property rights of the parties and found determinative the government’s right as land owner to chose whom it would admit onto its land.¹⁴

The federal government uses the land *it owns* for a wide variety of purposes, many of which require *limiting or denying* public access to the property ... The free exercise clause is not a license in itself to enter property, government-owned or otherwise, to which religious practitioners have no other legal right of access. *Since plaintiffs have no other legal property rights in the land in question ... a free exercise claim is not stated here.*¹⁵

10. *Id.* at 453.

11. *Id.* The Court noted that the District Court’s ruling in favor of the Native Americans “permanently forbade commercial timber harvesting, or the construction of a two-lane road, anywhere within an area covering a full 27 sections (i.e. more than 17,000 acres) of public land.” *Id.*

12. *Id.* at 452.

13. *Lyng*, 485 U.S. at 457.

14. *Sequoyah v. Tennessee Valley Auth.*, 480 F. Supp. 608, 612 (E.D. Tenn. 1979), *aff’d* 620 F.2d 1159, 1165 (6th Cir. 1980).

15. *Id.* at 612 (emphasis added). While the Sixth Circuit subsequently indicated that “the plaintiffs’ lack of any property interest” in the land in question “should not be conclusive,” 620 F.2d at 1164. It nevertheless affirmed the lower court decision and the Supreme Court’s decision in *Lyng* appears to follow the district court’s reasoning more closely than it does the reasoning of the Sixth Circuit.

Similarly, the federal district court in *Badoni v. Higginson*,¹⁶ focused on property rights in rejecting the efforts of members of the Navajo Tribe to prevent the flooding of Rainbow Bridge National Monument, which the tribal members claimed would result in the "destruction and desecration of many Navajo gods and sacred areas."¹⁷ The first basis of the court's ruling was that the "plaintiffs do not allege nor do they have any property interest" in the land at issue.¹⁸ "Because plaintiffs ha[d] no interest in the land," the court agreed with defendants' assertion that the plaintiffs claim "does not come within a country mile of any cognizable legal theory upon which relief can be granted," concluding that "the lack of a property interest is determinative."¹⁹ As Professor Allison Dussias has thoroughly described, other pre- and post-*Lyng* cases similarly rely on property law concepts to a very considerable extent.²⁰

Instead of engaging in the critical and difficult balancing task that a full free exercise analysis might require, federal courts dealing with Native American sacred sites issues in the past twenty years, have paralleled federal courts dealing with tribal jurisdiction issues by collapsing the analysis into a single-factor test which focuses largely on who has the critical property right to exclude. The fact that the tribes have lost the right to exclude others from these sacred areas under traditional common-law property analysis is determinative. As is the case with a tribe's regulatory jurisdiction over nonmembers, a tribe's ability to obtain legal protection for indigenous sacred sites appears to go "hand in hand with the power to exclude."²¹ If the sacred site is on tribal lands the tribe can protect it and use it as it wishes. If the site is on lands owned by others, including public lands long used by the tribe, the tribe has no legally protectable interest.

16. *Badoni v. Higginson*, 455 F. Supp. 641 (D. Utah 1977), *aff'd* 638 F.2d 172, 181 (10th Cir. 1980).

17. *Id.* at 643.

18. *Id.* at 644.

19. *Id.* Like the Sixth Circuit in *Sequoyah*, the Tenth Circuit in *Badoni* rejected the trial court's conclusion that the "plaintiffs' lack of property right was determinative." *Badoni*, 638 F.2d at 176. However, also like the Sixth Circuit, the Tenth Circuit concluded that the lack of property interest was "a factor" and affirmed the lower court decision. *Id.* Moreover, as was the case in *Sequoyah*, the Supreme Court's subsequent decision in *Lyng* seems more in keeping with the district court's line of reasoning than that of the court of appeals.

20. Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 823-833 (1997) (discussing, in addition to *Badoni* and *Sequoyah*, *Crow v. Gullet*, 541 F.Supp. 785 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983) (per curiam); *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983); *United States v. Means*, 858 F.2d 404 (8th Cir. 1988); *Manybeads v. United States*, 730 F. Supp. 1515 (D. Ariz. 1989); *Attakai v. United States*, 746 F. Supp. 1395 (D. Ariz. 1990); *Havasupai Tribe v. United States*, 752 F. Supp. 1471 (D. Ariz. 1990), *aff'd sub nom.* *Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991)(per curiam)).

21. See *supra* note 7.

Why has this happened, one might ask? Several answers are possible. Perhaps the most obvious is that this ascendancy of property law concepts in Native American sacred site cases is the result of prejudice, conscious or unconscious, against Native Americans or at least Native American values.²² After all, "[t]he principle point of dispute between white and Indian historically has been land."²³ Given the intimate connection between many Native American cultures and their lands,²⁴ one would be hard pressed to design a more effective scheme for decimating these cultures than one which used common-law concepts of property – with their emphasis on individual ownership and the concomitant right to exclude – as the legal paradigm within which disputes between the cultures would be resolved.

That the sacred site caselaw's preoccupation with property rights is fueled by anti-Native American sentiment is supported by the fact that the same focus on property rights has manifested itself in the Supreme Court's recent tribal civil jurisdiction cases.²⁵ It appears that the last twenty years have witnessed the "propertyization" of federal Indian caselaw in general.²⁶ When one adds to this fact the reality that in the last three centuries, Native Americans have been dispossessed of so much of the land they once "owned."²⁷ This leaves them at a considerable comparative disadvantage

22. See, e.g., Dussias, *supra* note 21, at 851 ("in light of the government's past efforts to suppress Native American religious practices, the Court's willingness to accept the denial of Native American religious rights as an acceptable sacrifice to democracy suggests continuing hostility toward Native American religious traditions").

23. WILCOMB E. WASHBURN, *RED MAN'S LAND / WHITE MAN'S LAW* 143 (2d ed. 1995).

24. As Justice Brennan noted in his dissent in *Lyng*, "Native American faith is inextricably bound to the use of land. The site-specific nature of Indian religious practice derives from the Native American perception that land itself is a sacred, living being." *Lyng v. N.W. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 460-61 (1988) (Brennan, J., dissenting).

25. See text accompanying notes 5-7, *supra*.

26. *Id.*

27. For example, as a result of the allotment policy, under which tribal lands were divided into individual allotments for tribal members, with excess lands being made available to non-Indians, "total Indian landholdings [fell] from 138 million acres in 1887 to 52 million acres in 1934." CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 20 (1987). Even prior to the passage of the General Allotment Act in 1887, tribes had been deprived of much of their land by the removal policy of the early 1800's, see Felix Cohen, *HANDBOOK OF FEDERAL INDIAN LAW* 78-92 (1982), and by confinement to reservations much smaller than their traditional land base, see ROBERT N. CLINTON, NELL JESSUP NEWTON & MONROE E. PRICE, *AMERICAN INDIAN LAW: CASES AND MATERIALS* 146-47 (3d ed. 1991). The impact of these efforts was especially acute for sacred sites because "[r]eservations often were set aside and tribal lands confiscated without regard for the location of sacred sites, leaving many sites on federal or state lands, and a few in private non-Indian hands." Russel Lawrence Barsh, *The Illusion of Religious Freedom for Indigenous Americans*, 65 OR. L. REV. 363, 396 (1986). See also Anastasia P. Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 ARIZ. L. REV. 1291, 1309 (1996) (noting that during the 1800's "Native Americans lost possession of many sacred sites when forced onto reservations").

in a scheme in which ownership is the key factor. Thus, one can make a powerful argument that the root cause of the current state of the law is anti-Native American sentiment, or at least antipathy toward Native American values and culture. If that is the true source of the problem, until such sentiments are eliminated, it will matter little what kinds of arguments Native Americans make in sacred site cases — they will lose.

Yet, this position seems too simplistic and too pessimistic for a couple of reasons. First, emphasis on property rights, particularly the right to exclude others, has increased even in the non-Indian law context in the past twenty years. Prior to 1980, the Supreme Court had on only one occasion held that government regulation constituted an unconstitutional taking of private property without just compensation.²⁸ In the last twenty years, by contrast, the Court has found government regulations unconstitutional under the takings clause three times,²⁹ and has indicated its belief that takings may well have occurred in other cases where a final ruling could not be made because of the procedural posture of the case.³⁰ In each of the three direct rulings the Court invalidated government actions that interfered with the landowner's right to exclude,³¹ a right which the Court characterized as

28. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

29. See *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

30. In *First Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987), the Court assumed, because of the procedural posture of the case, that the property owner had been deprived of all economically viable use of the land for a period of time and then held that the landowner was constitutionally entitled to compensation for that temporary taking if, on remand, the assumption was proven correct. In *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court held that government restrictions which deprive a landowner of all economically viable use of the land are per se unconstitutional takings unless the restrictions are consistent with pre-existing (though perhaps not express) principles of state property or nuisance law. *Id.* at 1029-1030. It then remanded the case for consideration whether the exception applied, after expressing doubt that it did. *Id.* at 1031.

31. *Loretto* invalidated a statute that required landlords to permit cable companies to install cable on their property in exchange for payment of a fee established by a state commission. See *Loretto*, 458 U.S. at 423-24. Critical to the Court's analysis was its conclusion that under the statute the landowner "has no power to exclude the occupier from possession and use of the space." *Id.* at 435. *Nollan* invalidated the California Coastal Commission's requirement that the landowners grant access to the public to pass over the beach portion of their property as a condition to issuing a building permit. See *Nollan*, 483 U.S. at 828. The Court reasoned that "[h]ad California simply required the Nollans to make an easement across their beachfront available to the public ... we have no doubt there would have been a taking" because "the right to exclude [others is] one of the most essential sticks in the bundle of [property] rights." *Id.* at 831 (internal quotation omitted). In *Dolan*, the Court struck down a city's requirement that a landowner dedicate portions of her property for improvement of the storm drainage system and a bicycle/pedestrian pathway as a condition to granting her a permit to redevelop her property. See *Dolan*, 512 U.S. at 379. In distinguishing this from an ordinance which would have simply prohibited the property owner from developing the land, the Court noted "the difference to [the landowner], of course, is the loss of her ability to exclude others...[which] is 'one of the most

"one of the most essential sticks"³² and "most treasured strands"³³ in a landowner's bundle of property rights. Thus, it may not be so much a decline in the weight given Native American interests, as a marked increase in the weight given property interests – especially the right to exclude – that explains the Court's recent emphasis on property rights in sacred site cases.³⁴

Second, it is not just Native Americans who have seen their sacred sites desecrated without legal recourse. The U. S. government has on other occasions, both in the past and in the present, used property law concepts as a club against religion, even when the religion is not Native American. For example, in its effort to prevent members of The Church of Jesus-Christ of Latter-day Saints (the L.D.S. Church or Mormons) from practicing polygamy, as then required by their religious beliefs,³⁵ the federal government enacted a series of statutes in the late 1800's. The last dis-incorporated the L.D.S. Church and transferred its property to the government.³⁶ Pursuant to that statute, the government sought and obtained appointment of a receiver to take over the property of the L.D.S. Church, including the Temple

essential sticks' in the bundle of [property] rights." *Id.* at 393.

32. *Nollan*, 483 U.S. at 831; *Dolan*, 512 U.S. at 384.

33. *Loretto*, 458 U.S. at 435.

34. Indeed, the dissenting justices in *Loretto* criticized the majority's emphasis on certain elements of a property right, including the right to exclude others, in terms that apply equally well to the Court's simplification of the tribal jurisdiction and free exercise claims of Native Americans:

The Court erects a strained and untenable distinction between 'temporary physical invasions,' whose constitutionality concededly 'is subject to a balancing process,' and 'permanent physical occupations,' which are 'taking[s] without regard to other factors that a court might ordinarily examine.'... In my view, the Court's approach reduces the constitutional issue to a formalistic quibble...

Loretto, 458 U.S. at 442 (Blackmun, J., dissenting).

35. L.D.S. doctrine teaches that plural marriage was initiated as a result of a revelation from God to the prophet Joseph Smith. See Preface to *THE DOCTRINE AND COVENANTS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS*, § 132, 266 (1981)(hereinafter *DOCTRINE AND COVENANTS*); *Plural Marriage*, 3 *ENCYCLOPEDIA OF MORMONISM*, 1091-92 (1992). The L.D.S. Church formally ended the practice of polygamy in 1890 when it accepted as "authoritative and binding" a declaration from its then President, Wilford Woodruff, that:

[I]nasmuch as laws have been enacted by Congress forbidding plural marriages, which laws have been pronounced constitutional by the court of last resort, I hereby declare my intention to submit to those laws and to use any influence with members of the Church over which I preside to do likewise.

See *Official Declaration*, *DOCTRINE AND COVENANTS*, *supra*, at pp. 291-92. See also LEONARD J. ARRINGTON, *GREAT BASIN KINGDOM: AN ECONOMIC HISTORY OF THE LATTER-DAY SAINTS 1830-1900*, 376-79 (1958).

36. Act of Mar. 3, 1887, ch. 397, '§§ 13, 17, 24, 1887 (repealed 1978).

Block in Salt Lake City³⁷ on which the Salt Lake Temple was being constructed.³⁸ That land had been dedicated in a formal religious ceremony more than thirty years previously³⁹ as the site of the most sacred of buildings in L.D.S. theology – the only sites where, according to L.D.S. beliefs, ordinances essential to exaltation can take place.⁴⁰ While the Utah Supreme Court ultimately eliminated this particular property from the receivership, the U.S. Supreme Court upheld the power of Congress to dispossess the Church of its property, stating simply “we have no doubt of the power of Congress to do as it did.”⁴¹

In more modern times, the Colorado Supreme Court upheld a city’s condemnation of religious property claimed to have special significance⁴² for the Pillar of Fire Church, an evangelical religious group.⁴³ The court concluded that the church had not proven that the site was significant enough to its religion to stand in the way of an urban renewal project, [] and noting, tellingly, that “[e]ven if the Pillar of Fire had proven that the church building was *Sui generis* [sic], the scales tip convincingly in favor of the interest of the Denver Urban Renewal Authority in this case.”⁴⁴

37. ARRINGTON, *supra* note 35, at 368. L.D.S. church authorities voluntarily surrendered some of the property, including the Temple Block, to the receiver “with the reservation that an appeal would be made” and an agreement that the Temple Block would be leased back to the church for \$1 a month. *Id.* Work on the temple, which had been progressing for more than thirty years, stopped at the time. *See id.*

38. *See id.* Anticipating the passage of the Edmunds-Tucker Act, church officials in 1886 conveyed the existing temples in St. George, Logan, and Manti, Utah, to “temple associations” organized for the purpose of placing legal ownership of these three sacred buildings in the hands of local ecclesiastical leaders. *Id.* at 362.

39. JAMES E. TALMADGE, *THE HOUSE OF THE LORD* 115 (1971). The Salt Lake Temple site was dedicated and ground was broken for its foundation on February 14, 1853. The site was chosen only four days after the first Mormon pioneers arrived in the Salt Lake valley. *Id.* at 113. The building was not completed until forty years later. *Id.* at 127.

40. *Id.* at 75-91 (describing the ordinances performed in L.D.S. temples). L.D.S. theology teaches that in order for a person to be exalted in the highest degree of the celestial kingdom (the highest degree of heaven), a person must be married in the temple. *DOCTRINE AND COVENANTS*, *supra* note 35, § 131:1-4, at 266. James Talmadge, who was a member of the L.D.S. Church’s governing body of the Twelve Apostles, summarized the role of temples in L.D.S. doctrine very succinctly: “*Temples are a necessity.*” TALMADGE, *supra* note 39, at 74.

41. *Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1, 64 (1890). As a result of the decision, the government seized property valued, in 1890 dollars, at more than \$1 million. ARRINGTON, *supra* note 35, at 371.

42. The site was “revered for its historical and symbolic meaning in the birth” of the Church because it was constructed shortly after the founding of the Church to house meetings originally held in tents. *Pillar of Fire v. Denver Urban Renewal Auth.*, 509 P.2d 1250, 1252 (1973) (hereinafter *Pillar of Fire I*)

43. The Colorado Supreme Court described the church as “an evangelistic offshoot of Methodism.” *Pillar of Fire I*, 509 P.2d at 1251. The church was originally known as the Pentecostal Union. *Id.* at 1251.

44. *Denver Urban Renewal Auth. v. Pillar of Fire*, 552 P.2d 23, 25 (Colo. 1976) (hereinafter *Pillar of Fire II*).

Still more recently, the Seventh Circuit held that a private organization could not maintain a statute of Christ on land located in the middle of a public park, even though ownership of the land (and hence the right to exclude) had been conveyed to the private organization. It concluded that "the continued perception of government endorsement" and the granting of "preferential access" to the private organization constituted a violation of the Establishment Clause.⁴⁵

In these three instances, non-Native American religions were unable to protect sites sacred to them and use them as they wished, even when they owned the land and possessed the critical right to exclude. Since no Native Americans were involved in these cases, they suggest that at least some of the bias at work in Native American sacred site cases may be an anti-religion bias. Perhaps reliance on the property law scheme, rather than on some more nuanced balancing analysis, is the result of uneasiness with, or even hostility toward, religious values in modern society.⁴⁶

The reluctance to rule in favor of the religious use of property may also stem from the belief, accurate or not, that it is required by the Establishment Clause. Concern that a ruling in favor of the tribes would result in a violation of the Establishment Clause is often expressly manifested in the sacred sites cases.⁴⁷ Courts may also be hesitant to make the kinds of difficult distinctions that would be required if they were to engage in the sensitive task of determining the sincerity and centrality of the religious beliefs of others and then balancing those beliefs against other competing interests.⁴⁸

45. *Freedom From Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 497 (7th Cir. 2000).

46. Several scholars have noted an anti-religious theme in modern religion clause jurisprudence. See, e.g., Thomas C. Berg, *Slouching Towards Secularism: A Comment on Kiryas Joel School District v. Grumet*, 44 EMORY L. J. 433, 484 (1995) (noting that the rationale of recent Establishment Clause cases "demands hostility to religion, and a blatant preference for the secular"); Karen T. White, *The Court-Created Conflict of the First Amendment: Marginalizing Religion and Undermining the Law*, 6 J. L. & PUB. POL'Y 181, 210 (1994) ("[r]ather than fostering neutrality, the Court's rulings have produced hostility to religious beliefs and devalued the positive effects of religion on society"). See generally Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671 (1992) (advancing the proposition that American politics are hostile to religion in public life).

47. See, e.g., *Badoni v. Higginson*, 638 F.2d 172, 179 (10th Cir. 1980); *Crow v. Gullet*, 541 F. Supp. 785, 791, 794 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983); *Inupiat Cmty. of the Arctic Slope v. United States*, 548 F. Supp. 182, 188 (D.Alaska 1982), *aff'd*, 746 F.2d 570 (9th Cir. 1984); *Wilson v. Block*, 8 Indian L. Rep. 3073, 3075 (1981).

48. The Court expressed such concerns in *Lyng*.

This Court cannot determine the truth of the underlying beliefs that led to the religious objections here or in [another free exercise case] and accordingly cannot weigh the adverse effects on the appellees [in that case] and compare them with the adverse

Regardless of the reason, or the appropriateness, of the hesitation to protect sacred sites on overtly religious-based grounds, such as the Free Exercise Clause, the phenomenon is real enough that some consideration should be given to seeking protection not on free exercise or other grounds dependant on the value of religion to society, but on grounds more directly compatible with common law property principles which appear to be in ascendancy in federal courts in both the Indian and non-Indian law context.

There is some evidence that, at least in some contexts, this will work. In one of the relatively few instances in which Native Americans have been successful in using litigation to protect their religious practices in a land use context, *United States ex rel. Zuni Tribe of New Mexico v. Platt*,⁴⁹ a federal district court severed the Zuni Tribe's free exercise claim from its prescriptive easement claim and ruled in the Tribe's favor on the latter. The Court held that by Arizona state law the Zuni Indians had a prescriptive easement to cross over a private landowners' property during a two-day period every four years as part of a religious pilgrimage to a sacred site in northeast Arizona.⁵⁰ With religion out of the equation⁵¹ the court even stretched the law somewhat to rule in the Native Americans' favor,⁵² something courts have been more than hesitant to do when ruling on free exercise grounds in cases involving land use.⁵³

effects on the Indian respondents. Without the ability to make such comparisons, we cannot say that the one form of incidental interference with an individual's spiritual activities should be subjected to a different constitutional analysis than the other.

Lyng v. N.W. Indian Cemetery Protective Ass'n, 485 U.S. 439, 449-450 (1988) (citations omitted).

Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location ... cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.

Id. at 451.

49. *United States ex rel. Zuni Tribe of New Mexico v. Platt*, 730 F. Supp. 318 (D. Ariz. 1990).

50. *See id.* at 323-24.

51. The court made clear that it did "not base its ruling on any religious or 1st Amendment rights to the land in question." *Id.* at 324 (citing *Lyng v. N.W. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988)).

52. *Id.* at 322. The court found that the Tribe was in "continuous possession" even though it merely passed over the land on two days every four years. The ruling was not extraordinary in light of prior precedent involving a claim established by two-to-three week possession every year, *id.* (citing *Kay v. Briggs*, 475 P.2d 1 (1970)), but it was still an extension of the law, even if a logical one. With respect to the Free Exercise Clause, courts have not made any extensions, logical or otherwise.

53. A federal government lawyer who appeared on behalf of the Tribe in the case has noted that one of the lessons learned from his experience is that "a successful claim for a prescriptive

Such a shift will not always be easy because the sacred sites claims of Native Americans do not always fit neatly into the categories recognized by traditional U.S. property law. However, there are signs that innovative thinking concerning the intersection of longstanding Native American land use practices and traditional common law property concepts can lead to surprisingly favorable results for Native Americans. In the last decade, indigenous people in both Hawaii and Australia have gained the right to use lands for which they did not have fee title, relying on their customary use of the lands for traditional purposes, and demonstrating that common law principles may, in some situations, be flexible enough to accommodate Native American beliefs and practices.

In a series of decisions beginning in 1982,⁵⁴ and culminating in its 1995 decision in *Public Access Shoreline Hawaii v. Hawai'i County Planning Comm'n*,⁵⁵ the Hawaii Supreme Court has recognized and expanded the right of Native Hawaiians to access, for customary and traditional uses, less than fully developed lands⁵⁶ owned by others. The court noted in its seminal decision that the right "remains intact, notwithstanding arguable abandonment of a particular site."⁵⁷ In these cases, the court has concluded that the traditional common law right to exclude is not absolute in some instances and that customary uses of the lands, including use for religious practices,⁵⁸ are not necessarily inconsistent with the exercise of that right

easement narrowly drawn to conform to the actual Indian religious needs may be possible without regard for First Amendment problems ..." and that while almost, "... if not all of the evidence would be of religious orientation, the specific activity, that is the actual physical use of the land ... would not be presented to the court as a legally cognizable religious right but as mere indicia of the fulfillment of the requirements for a prescriptive easement." Hank Meshorer, *The Sacred Trail to the Zuni Heaven: A Study in the Law of Prescriptive Easements*, in READINGS IN AMERICAN INDIAN LAW: RECALLING THE RHYTHM OF SURVIVAL, 318, 323 (Jo Carillo ed., 1998).

54. *Kalipi v. Hawaiian Trust Co.*, 656 P.2d 745 (Haw. 1982); *Pele Defense Fund v. Paty*, 837 P.2d 1247 (Haw. 1992); *Public Access Shoreline Hawai'i, Inc. v. Hawai'i County Planning Comm'n*, 903 P.2d 1246 (Haw. 1995); *State v. Hanapi*, 970 P.2d 485 (Haw. 1998).

55. *Public Access Shoreline Hawaii, Inc. v. Hawai'i County Planning Comm'n*, 903 P.2d 1246 (Haw. 1995).

56. See *Hanapi*, 970 P.2d at 494-95 (in *Hanapi*, the Hawaii Supreme Court clarified that "if property is deemed 'fully developed' i.e. lands zoned and used for residential purposes with existing dwellings, improvements, and infrastructure, it is always 'inconsistent' to permit the practice of traditional and customary native Hawaiian rights on such property").

57. *Public Access Shoreline*, 903 P.2d at 1271.

58. While claims are often couched as claims to use the land for traditional and customary gathering rights, *Pele* involved "the assertion of customarily and traditionally exercised subsistence, cultural, and religious practices." *Id.* at 1260 (emphasis added). Similarly, the Court relied in part on article XII, section 7 of the Hawaiiin Constitution, which, provides that the State will "protect all rights, customarily and traditionally exercised for subsistence, cultural, and religious purposes." *Id.* at 1258 (emphasis added).

by others.⁵⁹

Similarly, the Australian High Court has in the last ten years overruled prior precedent and recognized the concept of aboriginal title, thereby granting Australia's indigenous peoples a previously unrecognized legal right to use lands for which they possessed no formal written title. In *Mabo v. Queensland*⁶⁰ the Court concluded that the "indigenous inhabitants in occupation of a territory when sovereignty is acquired by the Crown are capable of enjoying proprietary interest in lands." Those rights "which they had theretofore enjoyed under the customs of their community are seen to be a burden on the radical title which the Crown acquires."⁶¹ More recently, in *Wik Peoples v. State of Queensland*⁶² the Court held that pastoral leases, a unique Australian property interest covering up to 40% of the land in the country,⁶³ do not necessarily include the right to exclude all others and therefore do not automatically extinguish the native title the Court had recognized four years earlier in *Mabo*.⁶⁴

Thus both the Hawaii Supreme Court and the Australian High Court have reexamined existing property law concepts, including the right to exclude others, and have found them more flexible with respect to traditional indigenous uses than most had previously thought possible. Native Ameri-

59. The Court indicated that "[o]ur examination of the relevant legal developments in Hawaiian history leads us to the conclusion that the western concept of exclusivity is not universally applicable in Hawai'i," *id.* at 1268, but consistent with "the non-confrontational aspects of traditional Hawaiian culture." The Hawaiian Constitution grants the State the authority to reconcile traditional Hawaiian rights and western property rights by declining protection to traditional uses that are "unreasonable" i.e. practicing on fully developed lands. *Id.* Without indicating whether it agreed with the ruling, the Hawaii Supreme Court cited *Lyng*, 485 U.S. 439, and noted that the U.S. Supreme Court had held "unreasonable" an attempt "by religious practitioners to exclude all other uses, including timber harvesting, from sacred areas of the public lands." *Id.* at 1268 n. 38.

60. *Mabo v. Queensland* (1992) 175 C.L.R. 1. There is no single majority opinion for the Court. Justice Brennan authored a judgment, with which two other justices (Mason and McHugh) concurred in the reasoning. *Mabo*, 175 C.L.R. at 182 (per Mason, CJ and McHugh, J). Justices Dean and Gaudron authored a joint opinion, and Justice Toohey authored an opinion agreeing with much of what they said. Six of the seven justices were "in agreement that the common law of this country recognizes a form of native title," but split 3-3 on the issue of whether extinguishment of native title "gives rise to a claim for compensatory damages." *Id.* On that issue, Justice Dawson, who was the sole dissenter on the issue of whether a common law native title existed, joined three others in refusing to agree that extinguishment of aboriginal title required payment of compensation. *Id.*

61. 107 A.L.R. at 37 (Brennan, J). Justice Toohey likewise indicated that "[i]f occupation by an indigenous people is an established fact at the time of annexation, why should more be required?"

62. "Wik" Peoples v. State of Queensland (1996)141 A.L.R. 129.

63. Garth Nettheim, *Wik: On Invasions, Legal Fictions, Myths and Rational Responses*, 20 U.N.S.W.L.J. 495, 496 (1997).

64. The Court did indicate, however, that the lessees of pastoral leases can continue to engage in any activity authorized by the lease and that, in the event of any conflict between the aboriginal title and pastoral lease rights, the lease rights will prevail. *Wik*, 141 A.L.R. at 190.

cans seeking to gain legal protection for their use of sacred sites may be able to achieve similar gains by couching their claims in property law terms.

For example, tribes which entered into treaties with the U.S. could re-examine those treaties to determine whether they contain express reservations of ceremonial and subsistence rights or other rights which might be interpreted broadly to protect sacred sites outside their reservations.⁶⁵ If the tribes determine that the rights are not expressly stated, then they could claim that such rights still exist because they were not expressly extinguished by the treaty.⁶⁶ Similarly, a tribe which had not entered into a treaty might consider whether it could claim an unextinguished aboriginal right to access and use a sacred site.⁶⁷

It should be emphasized that such claims would have to be infused with innovative arguments about the nature of property rights. Efforts to use arguments based on traditional views of treaty and aboriginal rights to protect Native American religious practices have not fared much better in the past than have efforts based on the Free Exercise Clause.⁶⁸ Moreover, property law concepts in Hawaii and Australia are different enough from those in the continental United States that the extent to which these rulings would be adopted by other U.S. courts is far from clear.⁶⁹ Nonetheless, both the Hawaii Supreme Court and the Australian High Court relied to a considerable extent on long-standing common law principles of property

65. *Cf. United States v. Washington*, 157 F.3d 630, 643-44 (9th Cir. 1998) (broadly interpreting the term "fish" in a treaty because of the Tribes' pre-treaty right to take fish without species limitation).

66. *Cf. Settler v. Lameer*, 507 F.2d 231, 326-37 (9th Cir. 1974) (holding that the Yakima Nation retained jurisdiction to regulate off-reservation fishing by tribal members because the treaty did not expressly relinquish such rights).

67. *Cf. Havasupai Tribe v. United States*, 752 F. Supp. 1471, 1477-79 (D. Ariz. 1990), *aff'd* 943 F.2d 32 (9th Cir. 1991) (*per curiam*) (recognizing aboriginal title to sacred lands, but finding such title extinguished by subsequent federal reservation of the lands for forest purposes and compensation for the taking of the land). For an explanation of how Native American litigants might respond to such arguments about extinguishment of aboriginal title, see text accompanying notes 71-73, *infra*.

68. *See, e.g., Havasupai Tribe v. United States*, 943 F.2d 32 (9th Cir. 1991) (rejecting a claim that mining on national forest service lands considered sacred by the Tribe violated the Tribe's aboriginal property rights); *United States v. Billie*, 667 F.Supp. 1485, 1497 (S.D. Fla. 1987) (rejecting a claim that a treaty protected taking panthers for religious purposes).

69. According to most standard accounts the type of aboriginal title recognized in *Mabo* has been extinguished in most areas in the United States. Thus, the ruling which recognizes that aboriginal title may be extinguished by the government may be of little use to many tribes in the continental U.S. But see text at notes 71-73, *infra*. The Hawaii Supreme Court concluded that the customary and traditional rights of Native Hawaiians fit into its property system in part because of the unique way that property law had developed in Hawaii with differences reflected in both statutory and constitutional provisions. *See Public Access Shoreline*, 903 P.2d at 1258-70.

law.⁷⁰ Both have attempted to reconcile, in a new way, the tension between the land owner's right to exclude and the right of indigenous peoples to use the same land in order to perpetuate their culture. If nothing else, these cases indicate that with innovative thinking previously unpersuasive claims may now have more force.

Thus, while courts have repeatedly held that reservation of lands for national forests or parks extinguishes aboriginal title,⁷¹ a claimant could argue that such rulings were based on the erroneous view that aboriginal title exists only in the form of an exclusive possessory right. Therefore, courts have overlooked the possibility that while that broad right may have been extinguished, a lesser right, somewhat like a limited easement, may still exist. Courts have found congressional compensation of a [] tribe's claim for destruction of aboriginal title convincing evidence that all aboriginal title has been extinguished.⁷² However, a tribe may argue that because the Indian Claims Commission generally awarded compensation only for the economic uses to which the land could be put and not the actual uses Native Americans made of it,⁷³ tribes may still have some claim to access the land for non-economic uses. These would include religious uses. Such claims might have particular appeal to courts enamored with property rights if they emphasize longstanding prior use, a key fact which exists in many sacred sites cases⁷⁴ and is accorded considerable weight under tradi-

70. For example, the Hawaii Supreme Court concluded that the rights it recognized were "akin to" those established by "the English doctrine of custom whereby practices and privileges unique to particular districts continued to apply to the residents of those districts even though in contravention of the common law" *Id.* at 1261. The Australian High Court relied on several common law principles including the "general rule . . . that ownership could not be acquired by occupying land that was already occupied by another." *Mabo*, 175 C.L.R. at 31 (Brennan, J.).

71. *See, e.g.*, *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1391-92 (Ct. Cl. 1975); *Tlingit & Haida Indians of Alaska v. United States*, 177 F.Supp. 452, 467-68 (Ct. Cl. 1959); *Havasupai Tribe v. United States*, 752 F. Supp. 1471, 1478-79 (D. Ariz. 1990), *aff'd* 943 F.2d 32 (9th Cir. 1991) (*per curiam*).

72. *See, e.g.*, *United States v. Gemmill*, 535 F.2d 1145, 1148-49 (9th Cir.1976); *Havasupai Tribe*, 752 F. Supp. at 1478-79.

73. *See, e.g.*, *Tlingit & Haida Indians of Alaska v. United States*, 389 F.2d 778, 788 (Ct. Cl. 1968) (denying claim to compensation for loss of fishing rights); *Id.* at 793 (Nichols, J., dissenting) (noting that in compensating Tribes for un-mined gold but denying them compensation for their fishing rights "the Indians are being denied payment for the most valuable de facto asset of which they were deprived and instead are being compensated for de jure assets they never could have reasonably supposed belonged to them"). *See also* Barsh, *supra* note 27, at 410 (noting that compensation awarded only for "economic or 'land-resource use'"); MICHAEL LIEDER & JAKE PAGE, *WILD JUSTICE: THE PEOPLE OF GERONIMO VS. THE UNITED STATES* 142 (1997) (noting that fair market value approach used by the Commission "measured only the economic value of land," even though "[t]he real value of land to a tribe included its role in maintaining group identity and continuity, its religious significance, its aesthetic qualities, and a host of other attributes").

74. In many sacred site cases, Native Americans used the site before the land was set aside

tional property law rules.⁷⁵

Efforts to reshape sacred sites claims from religious-rights based free-exercise claims to customary-rights based property claims create at least two risks for Native Americans. First, such efforts may dilute the force of any Free Exercise claims that may exist.⁷⁶ Second, making such arguments may lessen the significance of the religious practice to adherents who may not feel the same pull from a ceremony that is merely customary or traditional rather than religious or spiritual. Given the current state of sacred sites case law, these risks, while real, seem acceptable.

As to the former, one wonders how much is lost even if Free Exercise claims are completely compromised by such an effort. The track record for such claims is not stellar to say the least. Moreover, giving up the Free Exercise claims would eliminate the potential Establishment Clause concerns which may be an impediment to the success of any religious-based argument, as several courts have noted in passing.⁷⁷

As to the latter, the risk of diluting the spiritual significance of a practice by characterizing it as traditional or customary, rather than religious, may be less for Native Americans than for others. This is largely because Native Americans are often already forced to re-characterize their claims in artificial ways in order to make them the type of religious claims that U.S. courts will understand.⁷⁸ As others have pointed out, for many Native American religions there is no division between the religious and the non-religious.⁷⁹ Thus, when Native Americans assert Free Exercise or relig-

for any specific use by non-Indians. See, e.g., *Badoni*, 638 F.2d at 177 (land used by Navajo for at least 100 years); *Inupiat Community*, 548 F. Supp. at 185 (land used by Inupian "from time before human memory"); *Lyng*, 485 U.S. at 451 (land used for religious purposes "for a very long time").

75. RICHARD R. POWELL, 4 POWELL ON REAL PROPERTY, § 34.10 (Patrick J. Rohan ed. 1998).

76. The Sixth Circuit rejected the efforts of members of the Cherokee Tribe to prevent the flooding of certain sites on free exercise grounds because it found that the

[t]he overwhelming concern of the [challengers] appears to be related to the historical beginnings of the Cherokees and their cultural development. It is damage to tribal and family folklore and traditions, more than particular religious observances which appear to be at stake. ... Though cultural history and tradition are vitally important to any group of people, these are not interests protected by the Free Exercise Clause of the First Amendment.

Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159, 1164-65 (6th Cir. 1980).

77. See, e.g., *Badoni*, 638 F.2d at 179; *Crow v. Gullet*, 541 F. Supp. 785, 791, 794 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983); *Inupiat Community*, 548 F. Supp. at 189; *Wilson v. Block*, 8 Indian L. Rep. 3073, 3075 (1981).

78. See Dussias, *supra* note 21, at 806-11, 815-19.

79. As Professor Robert Michaelsen has observed:

ious-based claims in U.S. courts they are already often required to force their own concepts into what for them are illogical compartments.⁸⁰ The label one puts on these artificial categories would seem to matter less than that they have to be used at all in order to assert a legal claim. For Native Americans the damage may be the same whether the practice is portrayed as traditional and customary on the one hand or religious and sacred on the other. Hence, while there clearly is some risk of dilution whenever Native American groups resort to U.S. judicial forums for protection of sacred sites, there may be no net loss if the claim is characterized as a traditional and customary property right rather than a religious right. The potential benefits from such a shift may therefore justify the increased risk in both respects.

However, even if recharacterizing sacred sites claims as non-religious, traditional or customary property claims yields the gains achieved in Hawaii and Australia, and avoids the potential Establishment

[t]he typical western approach is to split reality into separate categories which can be objectified and labeled "church," "religion," "culture," "art," "economics," "politics," etc. But the use of this common approach in dealing with traditional Indian realities rends the seamless garment of Indian life. "The area of worship cannot be delineated from social, political, cultural, and other areas of Indian lifestyle, including his general outlook upon economic and resource development," said a representative of the Crow Indian Tribe to a Senate Committee.

Robert S. Michaelsen, *American Indian Religious Freedom Litigation: Promise and Perils*, 3 J. LAW AND RELIGION 47, 62-63 (19B) (quoting AMERICAN INDIAN RELIGIOUS FREEDOM, Hearings on S.J. Res. 102 Before the Select Comm. On Indian Affairs, U.S. Sen., 95th Cong., 2d Sess. at 86 (1978)).

80. See Dussias, *supra* note 21, at 815-19. "[A]ny division into 'religious' or 'sacred' is in reality an exercise which forces Indian concepts into non-Indian categories." DOROTHEA THEODORATUS, REPORT FOR U.S. DEPT. OF AGRICULTURE, FOREST SERVICE ON CULTURAL RESOURCES OF THE CHIMNEY ROCK SECTION, GASQUET-ORLEANS ROAD, SIX RIVERS NATIONAL FOREST, reprinted in READINGS IN AMERICAN INDIAN LAW, *supra* note 53, at 302 and quoted in Michaellesen, *supra* note 79, at 63. See also Anastasia P. Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 ARIZ. L. REV. 1291, 1295 (1996) ("For Native Americans, the spiritual life is not separate from the secular life"); *Lyng*, 485 U.S. at 459-60 (Brennan, J., dissenting) ("for most Native Americans, 'the area of worship cannot be delineated from social, political, cultural, and other areas of Indian lifestyle'").

Referring to the Hopi culture, one scholar observed:

The culture is completely religious and therefore completely consistent. If you wrote an essay on Hopi farming, it would be an essay on Hopi religion; on Hopi hunting, it would be an essay on Hopi religion; an essay on Hopi family life would be an essay on Hopi religion; on Hopi games the same - everything they do and think is about their religion.

Hugh Nibley, *Promised Lands*, Address Before the Bill of Rights Symposium (October 9, 1992), in CLARK MEMORANDUM, 1993, at 5-6.

Clause problems, that may not be enough to protect what is truly at stake in many Native American sacred sites cases. In Hawaii,⁸¹ Australia, and even in the Zuni Pueblo case what each court was willing to grant was a right of shared access to the lands at issue. In many cases, shared access is not enough. What is required for full use of the sacred sites is, in many instances, exclusive access for at least some of the time.⁸² Indeed, in almost all Native American sacred sites cases over the last two decades, the Native American claimants have sought the right to exclude others from using the property in ways which desecrate its sacred nature.⁸³

What the Native Americans claim and need in such situations is the right to exclude others from property which the Native Americans do not own in the legal sense. If full legal protection is to be provided this shift must occur because there is, in many instances, a connection between the protection of sacred sites and the right to exclude others because of the connection between sacredness and secretness.⁸⁴ This is especially true for

81. As the Ninth Circuit indicated in rejecting the claim of a native Hawaiian family to exclusive use of a fish trap within a national historic park, *Public Access Shoreline Hawaii*, "did not involve any claim for exclusive use and possession." *Pai 'Ohana v. United States*, 76 F.3d 280, 282 (9th Cir. 1996). The court concluded that ancient Hawaiian custom "did not include the right to remain upon and exclude others from the land." For the claimed purposes, the court held that the contention that "native Hawaiian rights are exclusive and possessory is, [], unsupported in the law." *Id.*

82. As Russel Barsh has noted, "Indians' concerns include not only access to, but the environmental integrity of the site and its wildlife, and privacy when they use it." Barsh, *supra* note 27, at 396. Thus, for many Native American religions,

[t]he ability to exclude intruders ... is fundamental, as is the right to come and go freely without dependent on the permission of others. Exclusivity is as important to Indians on a mountaintop as to Christians in a church or Jews in a synagogue. All value the right to bar the gates against disruption or desecration.

Id. at 409.

83. See, e.g., *Lyng*, 485 U.S. at 442 (Native American use of site required "privacy, silence, and an undisturbed setting"); *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 816 (10th Cir. 1999) (Native American religious use of site requires "solemnity and solitude"); *Badoni v. Higginson*, 455 F. Supp. 641 (D. Utah 1977), *aff'd*, 638 F.2d 172, 176-77 (10th Cir. 1980) (Plaintiffs claim that allowing tourists to visit the area caused noise, litter, and defacement, desecrating the sacred nature of the area and denying their right to conduct religious ceremonies); *Crow v. Gullet*, 541 F. Supp. 785, 788-89 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983) (Plaintiffs allege that the conduct of tourists and the construction of access roads and parking lots desecrated the area and destroyed "the sanctity and power of the religious ceremonies"); *Inupiat Community of the Arctic Slope v. United States*, 548 F. Supp. 182, 188-89 (D. Alaska 1982), *aff'd*, 746 F.2d 570 (9th Cir. 1984) (Inupiat claim that all exploratory activities negatively affect their hunting and gathering life-style).

84. As one scholar has noted, "[t]he sacred and the secret have been linked from earliest times." Sissela Bok, *SECRETS* 6 (1982). Bok explains that both concepts "are defined as being set apart and seen as needing protection. And the sense of violation that intrusion into certain secrets arouses is also evoked by intrusions into the sacred." *Id.*

many Native Americans, whose "religious beliefs and practices ... depend so intimately on privacy and the maintenance of land in a natural condition."⁸⁵

Thus, the effort to protect Native American sacred sites in U.S. courts by the use of non-First Amendment law principles will be fully successful only when the right to exclude is expanded beyond its property law form in a way that it can be invoked by a non-land owner. Once again, the foundation of such a right may be found in non-religious-based common law principles. But this time it is tort law, not property law, that provides the basic ingredients.

Modern common law tort principles have developed in this century to protect a person's interest in solitude or seclusion, imposing liability on "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns ... if the intrusion would be highly offensive to a reasonable person."⁸⁶ Tort law is designed to prevent unreasonable invasions on any "private seclusion that the plaintiff has thrown about his person or affairs."⁸⁷ Although courts are reluctant to impose liability when the plaintiff is in a public place when the invasive acts occur,⁸⁸ they have done so in appropriate circumstances noting that there are situations in which a person can reasonably expect to be left alone even in public places.⁸⁹

If used creatively, these tort law principles could provide some degree of protection in some circumstances to exclusive Native American use of sacred sites even on public lands. A key question in determining how much protection might be available is whether interference with Native American use of sacred sites on public lands would be "highly offensive to a reasonable person."⁹⁰ There may be some skepticism as to how well Na-

85. Barsh, *supra* note 27, at 409.

86. RESTATEMENT (SECOND) OF TORTS § 652B (1999).

87. *Id.* at § 652B comment c.

88. *See id.* ("No liability for observing or photographing plaintiff while he is walking on a public highway, since he is not then in seclusion, and his appearance is public and open to the public eye").

89. *See, e.g. Galella v. Onassis*, 487 F.2d 986, 994-95 (defendant liable for interference with seclusion even though some of the acts took place in public places and on public streets). *See also Evans v. Detlefsen*, 857 F.2d 330, 338 (6th Cir. 1988) (noting that tort could occur in a public restaurant because "the privacy which is invaded has to do with the type of interest involved and not the place where the invasion occurs"). The comments to the Restatement Second observe that "[e]ven in a public place ... there may be some matters about the plaintiff, such as his underwear or lack of it, that are not exhibited to public gaze; and there may still be invasion of privacy when there is intrusion upon these matters." RESTATEMENT (SECOND) TORTS, § 652B, comment c. *See also id.*, illustration 7 (noting that taking a photograph of a young women whose skirt is blown over her head in a public place of amusement constitutes an invasion of privacy).

90. RESTATEMENT (SECOND) OF TORTS § 652(B) (1999).

tive American interests might be protected by a reasonable person standard given the oft-times large cultural gap between Native American views and those of mainstream American society in whose image the reasonable person standard is usually cast. But some optimism in this regard can be found in several Tribes' recent efforts to protect their use of Bear Lodge,⁹¹ a geologic formation in northern Wyoming considered sacred by those Tribes.⁹²

After a series of meetings involving representatives of the Tribes, local governments, environmental groups, and rock climbers who regularly climbed the formation, all parties agreed that "out of respect for American Indian religious values" there should be some limits on rock climbing. This restriction was during one month of the year when the site was most used for sacred ceremonies.⁹³ This agreement indicates acceptance of the reasonableness of the Native American's request that they have exclusive use of the site on at least some occasions. Moreover, when the National Park Service subsequently implemented a voluntary closure policy pursuant to the agreement,⁹⁴ 85% of those who would have normally used the site for climbing during the month voluntarily chose not to do so.⁹⁵ This experience provides some evidence that a reasonable person might well find intrusion on Native American use of sacred sites highly offensive.

Again, while it is unlikely that a court would grant relief to Native Americans under a straight-forward application of the current version of the intrusion on seclusion tort, innovative use of the doctrine might at least change a judge's conception of the claim enough to generate success for Native Americans in sacred site cases. This is true especially if coupled with a successful property right claim to at least shared access to the site.

91. The site is more commonly referred to as Devils Tower, the name used when the site was designated as a national monument in 1906. Lloyd Burton & David Ruppert, *Bear's Lodge or Devil's Tower: Inter-Cultural Relations, Legal Pluralism, and the Management of Sacred Sites on Public Lands*, 8 CORNELL J.L. & PUB. POL'Y 201, 203-04 (1999).

92. Several tribes, including some which no longer reside in the area, have oral traditions concerning the creation and significance of Bear Lodge. *Id.* at 206-07. The Northern Cheyenne and the Lakota are the two tribes which today have the "strongest affiliation with the Tower." *Id.*

93. *Id.* at 216.

94. A group of climbers' claim that the voluntary ban violated the Establishment Clause was dismissed for lack of standing by the Tenth Circuit. *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 822 (10th Cir. 1999), *cert. denied*, ___ U.S. ___, 120 S.Ct. 1530 (2000). The district court had rejected the claim on the merits. *Bear Lodge Multiple Use Ass'n v. Babbitt*, 2 F. Supp. 1448, 1453-56 (D. Wyo. 1998).

95. Burton & Ruppert, *supra*, note 91, at 213 n. 65. A 1992 survey of climbers indicated that 67% would still continue to climb the tower even if "they knew that Native Americans considered it a sacred site and objected to climbing." *Bear Lodge*, 175 F.3d at 818-19. Whether the later more favorable results indicate a shift in attitude, a different sampling group, or some other factor is not clear.

Ultimately, however, long-lasting judicial protection for Native American sites will be available only when there are more marked changes in the attitudes of judges and the rest of American society. Current legal doctrines such as property and privacy concepts may be flexible enough to accommodate such changes, but they are not, in current form, sufficiently developed to guarantee success. The kinds of arguments set forth in this article will provide protection for Native American sacred sites only if judges and other policy makers are educated about the unique Native American perspective about such sites and become convinced that there is value in protecting Native American use of those sites. Therefore, while Native Americans should use property, tort, and other flexible areas of the law as vehicles for advancing their efforts to obtain legal protection for sacred sites, efforts should continue to be made to convince all Americans of the societal benefits generated by allowing religious adherents, including Native Americans, to practice their beliefs without undue outside interference.⁹⁶ Only then will there be true reconciliation between Native American religion and the right to exclude.

96. Some recognized the societal benefit of allowing Native Americans freedom to engage in traditional religious practices in the late 19th century, even as these practices were being outlawed on many reservations. See, e.g., Dussias, *supra* note 21, at 791 & n. 136 (quoting reports of Indian agents that the "moral tendency" of a religious dance of the Pottawatomie tribe was "very good" and that "under its teaching drunkenness and gambling have been reduced 75 percent") (quoting 1884 COMM'R OF INDIAN AFFAIRS ANN. REP. 102 (report of H.C. Linn, Pottawatomie and Great Nemaha Agency, Sept. 10, 1884); 1885 COMM'R OF INDIAN AFFAIRS ANN. REP. 111 (report of I.W. Patrick, Pottawatomie and Great Nemaha Agency, Aug. 20, 1885)).