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Citation Information

Kristen A. Carpenter, *Real Property and Peoplehood*, 27 STAN. ENVTL. L.J. 313 (2008), available at <https://scholar.law.colorado.edu/faculty-articles/280>.

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Real Property and Peoplehood

Kristen A. Carpenter*

This Article proposes a theory of “real property and peoplehood” in which lands essential to the identity and survival of collective groups are entitled to heightened legal protection. Although many Americans are sympathetic to American Indian tribes and their quest for cultural survival, we remain unwilling to confront the uncomfortable truth that the very thing Indian peoples need is their land, the same land that the United States took from them. This is especially true with regard to Indian “sacred sites.” These are features of the natural landscape holding religious and cultural significance for American Indian tribes. The Supreme Court has held that destruction of sacred sites located on the public lands does not impinge on individual religious belief and falls within the government’s powers as a landowner. This is true even if the sacred site is unique and essential to a particular religious practice. Although recent federal policy has evolved in favor of accommodating Indian sacred sites practices, land management agencies use their considerable discretion to permit competing uses of the public lands—such as natural resource development and tourism—that threaten the physical integrity of sacred sites. Such decisions devastate Indian people and undermine our shared expectation of free exercise rights for all Americans. Thus, federal law needs to prioritize Indian interests in sacred sites over competing uses of the public lands. Unfortunately, we do not yet have a legal theory justifying such a position.

My theory of real property and peoplehood furthers the work of scholars who have recognized the relationship between human beings and property, albeit in other contexts. Most influentially, Professor Margaret Jane Radin

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has long argued for special legal protection of property that expresses an individual's sense of self and therefore cannot be translated into a monetary value. But whereas Radin focuses on property that expresses individual personhood, I am interested in property that expresses collective "peoplehood." As a descriptive matter, this concept of peoplehood reflects that, even in the United States where the individual rights paradigm dominates, individuals affiliate themselves along sub-national political, religious, ethnic, and cultural lines and their exercise of fundamental liberties occurs in those contexts. As a normative concept, John Rawls has argued that as a matter of "reasonable pluralism," liberal states like the United States should recognize peoples and treat them fairly. To do otherwise is to fall short of our best democratic principles, such as the idea that all Americans are entitled to religious freedom. Working at the confluence of Radin and Rawls, the Article argues that Indian tribes are peoples whose legitimate interests in sacred sites deserve special legal protection as a testament to American liberty for both individuals and groups.

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I. INTRODUCTION

When this place is destroyed, the Cherokee people cease to exist as a people.¹

As Americans, our national identity is shaped by the guarantee of individual liberties. To be American is to have the right to speak, worship and vote freely. To be American is to be treated equally before the law, irrespective of race, creed, or national origin. To be American is to enjoy private property. These and other quintessentially American freedoms are legally protected as individual rights.² Aside from the Constitution's provisions on association and non-discrimination, we lack a robust set of legal protections for group rights.³ Indeed, a defining characteristic of American "peoplehood"⁴ seems to be the belief that our fundamental freedoms and democratic ideals can be meaningfully

1. BRIAN EDWARD BROWN, RELIGION, LAW, AND THE LAND: NATIVE AMERICANS AND THE JUDICIAL INTERPRETATION OF SACRED LAND 15 (1999) (quoting Cherokee traditionalists in sacred site lawsuit).

2. See John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 13, 22 (1992). Our American identity is also shaped, and tested, by instances where our country fails to afford such individual freedoms. See, e.g., Mark D. Rotenberg, *America's Ambiguous Exceptionalism*, 3 U. ST. THOMAS L.J. 188, 195 (2005); see also Michael Fisher, Book Note, *The President of Good and Evil: The Ethics of George W. Bush* by Peter Singer Dutton, 51 FED. LAW., Mar.-Apr. 2004, at 48, 49 (criticizing suspension of individual rights during the "war on terror").

3. See generally AVIAM SOIFER, LAW AND THE COMPANY WE KEEP (1995) (surveying existing basis for group rights in U.S. law and calling for additional legal protection of groups); cf. Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L. J. 1287 (1982) (describing the emergence of constitutionally-based jurisprudence protecting ethnic, national, and racial minorities).

4. Cf. David C. Williams, *The Militia Movement and the Second Amendment: Conjuring with the People*, 81 CORNELL L. REV. 879, 884 (1996) (describing one view in which "the principal component of American peoplehood" is "loyalty to the Constitution"). For definitions of the terms "peoples" and "peoplehood" see *infra* notes 212-215, 223-225 and accompanying text.

effectuated through the legal protection of individual rights.⁵

In practice, however, many Americans affiliate themselves in political, ethnic, religious, or cultural groups, and exercise their fundamental liberties in those contexts.⁶ Indeed, for some Americans, the group serves as even more than a context for the exercise of individual liberties. Rather, it is the group's survival that gives individual lives purpose and meaning.⁷ Without legal protection for the group and its special needs within the larger society, some Americans only aspire to enjoy the freedoms that others take for granted.⁸

Many American Indians are, for example, intimately connected to the land, perhaps to a greater degree than are many other Americans.⁹ This relationship with the land reflects the collective values of many tribal communities. At the most basic level, the land sustains subsistence hunting, fishing and gathering, on which some tribal people depend for their daily food.¹⁰ Though individual hunters go out on the land, they often do so on behalf of their family, clan, or the entire tribe—consistent with tribal rules and expectations.¹¹ The land also gives rise to the origin stories, societal

5. Cf. Leti Volpp, *The Culture of Citizenship*, 8 THEORETICAL INQUIRIES L. 571, 600 (2007) (critically examining the notion of "tolerance" for minority communities as an attribute of American peoplehood); James U. Blacksher, *Majority Black Districts, Kiryas Joel, and Other Challenges to American Nationalism*, 26 CUMB. L. REV. 407, 440-41 (2005) (arguing that reformers tend to address minority rights through an integrationist approach rather than extension of political recognition to ethnic or religious communities).

6. See, e.g., JOHN-MICHAEL RIVERA, *THE EMERGENCE OF MEXICAN AMERICA: RECOVERING STORIES OF MEXICAN PEOPLEHOOD IN U.S. CULTURE* (2006); NABEEL ABRAHAM AND ANDREW SHRYOCK, *ARAB DETROIT: FROM MARGIN TO MAINSTREAM* (2006); RICHARD K. MACMASTER, *LAND, PIETY, PEOPLEHOOD: THE ESTABLISHMENT OF MENNONITE COMMUNITIES IN AMERICA, 1683-1790* (1985); LEE SHAI WEISSBACH, *JEWISH LIFE IN SMALL TOWN AMERICA* (2005).

7. See, e.g., Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 203-04 (2000).

8. See, e.g., Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 831-35 (2007) (arguing that American Indians' culture, commerce, and governance depend on tribes' legally-protected status as "illiberal" entities within American society).

9. See generally KEITH H. BASSO, *WISDOM SITS IN PLACES: LANDSCAPE AND LANGUAGE AMONG THE WESTERN APACHE* (1996) (detailing varied roles of "place" in Western Apache life).

10. See, e.g., RICK BASS, *CARIBOU RISING: DEFENDING THE PORCUPINE HERD, GWICH-IN CULTURE, AND THE ARCTIC NATIONAL WILDLIFE REFUGE* (2004) (portraying Neet'sai Gwich'in dependence on caribou hunting).

11. See, e.g., N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY* 9-12 (1941) (analyzing the case of a Cheyenne man who declared, "I am hunting for myself," thereby breaking tribal rules against individual hunting."). For a contemporary example, see *Makah*

norms, governing patterns, and spiritual practices that bind individuals together.¹² For most tribes, it has been this way since they came to view themselves as distinct peoples, that is, as Kiowas or Cherokees, Navajos or Hopis.¹³

Following European conquest and American colonization, the relationship between tribes and the land has become only more important, if difficult to maintain. Tribes lost most of their traditional territories to the United States and its citizens.¹⁴ With those losses also went many tribal cultural and socio-economic practices.¹⁵ On the lands that tribes managed to keep, however, they continue to live as distinct peoples—governing, worshipping, supporting themselves, and relating to one another as tribal members.¹⁶

Many Americans today are sympathetic to American Indians and their quest for cultural survival.¹⁷ Yet, we lack a national consensus that subgroups of Americans may require something more than individual rights if they are to realize the national promise of freedom.¹⁸ And even if we try to develop such an understanding, we confront the uncomfortable truth that the very

Nation delays trial for unauthorized hunt, INDIANZ.COM, January 21, 2008, <http://www.indianz.com/News/2008/006722.asp> (discussing tribal proceedings against five individuals charged with illegal whale hunt).

12. See Padraic I. McCoy, *The Land Must Hold the People: Native Modes of Territoriality and Contemporary Tribal Justifications for Placing Land into Trust Through 25 C.F.R. Part 21*, 27 AM. INDIAN L. REV. 421, 424-45 (2002-2003).

13. See Swimmer & John Ax, *How the World Was Made*, in JAMES MOONEY, HISTORY, MYTHS AND SACRED FORMULAS OF THE CHEROKEE 239 (1992) (describing a traditional Cherokee creation story); N. SCOTT MOMADAY, *THE WAY TO RAINY MOUNTAIN* (1969) (describing Kiowa origins and relationship with their landscape).

14. See generally STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* (2005) (explaining how by 1887 Indians had lost 98 percent of the land they held before Europeans arrived); Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 13 & n.59 (1995) (describing the loss of another ninety million acres of Indian nation land from 1887 to 1934).

15. See Kristen A. Carpenter, *Contextualizing the Losses of Allotment Through Literature*, 82 N.D. L. REV. 605, 622-23 (2006) (detailing cultural and socio-economic practices lost as a result of the federal "allotment" of tribal lands).

16. See McCoy, *supra* note 12, at 423.

17. John Doble & Andrew L. Yarrow, *WALKING A MILE: A FIRST STEP TOWARD MUTUAL UNDERSTANDING: A QUALITATIVE STUDY EXPLORING HOW INDIANS AND NON-INDIANS THINK ABOUT EACH OTHER*, A REPORT FROM PUBLIC AGENDA 24 (2007), available at <http://www.publicagenda.org/research/pdfs/walkingamile.pdf> (non-Indian participants in national study generally indicated they "want to . . . preserve Indian culture").

18. See Soifer, *supra* note 3, at 1-6.

thing Indian peoples need is their land, the same land that the United States took from them. Perhaps unsurprisingly then, even the body of "Federal Indian Law," which substantially departs from the individual rights tradition to provide for "exceptional" treatment of tribes,¹⁹ often fails to protect the Indian land base.²⁰ It is particularly unsuccessful in protecting Indian sacred sites located outside of reservation lands.²¹

In this Article, I advance a framework for legal acknowledgment and protection of the essential relationship between Indian tribes and their lands. This framework is grounded in scholarship recognizing the relationship between human beings and property, albeit in other contexts. Most influentially, Professor Margaret Jane Radin has long argued for special treatment of property that expresses an individual's sense of self and therefore cannot be translated into a monetary value.²² Beginning with her paradigmatic description of one's attachment to an engagement ring, Radin has since applied her "property and personhood" framework to many contemporary issues such as alienability of the human body, takings, criminal justice, and the regulation of cyberspace.²³ In these contexts, Radin argues that where property is so bound up with an individual person that it becomes "non-fungible," it should be protected, at least partially, from

19. See generally Philip P. Frickey, (*Native*) American Exceptionalism in Federal Public Law, 119 HARV. L. REV. 431 (2006).

20. See, e.g., Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 40-51 (1991); ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 313-17 (1990).

21. See *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 453 (1988) (finding that the free exercise clause does not preclude the federal government from destroying a sacred site located on public lands). See generally Jeri Beth K. Ezra, *The Trust Doctrine: A Source of Protection for Native American Sacred Sites*, 38 CATH. U. L. REV. 705 (1989) (describing unrealized potential of federal Indian trust doctrine to protect Indian sacred sites).

22. See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

23. Radin has authored dozens of articles and several books exploring these themes. This article relies primarily on Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987); Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667 (1988) [hereinafter Radin, *The Liberal Conception*]; MARGARET JANE RADIN, REINTERPRETING PROPERTY (1993); MARGARET JANE RADIN, CONTESTED COMMODITIES (1996); Margaret Jane Radin, *Property Evolving in Cyberspace*, 15 J.L. & COM. 509 (1996); and Margaret Jane Radin, *Contested Commodities*, in RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE (Martha M. Ertman and Joan C. Williams, eds., 2005) [hereinafter Radin, *Rethinking*].

government interference and market pressures.²⁴ Even if other important values are at stake, the law should regulate such property to promote “human flourishing.”²⁵

This Article takes Radin’s work in a new direction, using it as a basis for conceptualizing and regulating American Indian relationships with sacred sites.²⁶ Sacred sites are mountains, lakes, valleys, and other natural features revered by tribal people for their religious and cultural significance.²⁷ Indian people recognize sacred sites as formative in tribal creation stories and visit them to conduct contemporary ceremonies. The relationship between American Indians and sacred sites is more poignant than one’s attachment to a diamond ring ever could be. To put it in Radin’s terms, the relationship may be more like an individual’s attachment to her second kidney. That is, Indians often assert that without their sacred sites, they cannot survive as tribes.²⁸ They do not necessarily mean that each individual tribal member will literally die, but rather that without the ability to worship, visit, and take care of a sacred site, it will become impossible to live as Kiowas or Cherokees, Navajos or Hopis.²⁹

The problem is that our legal system does not protect Indian relationships with sacred sites, particularly those located on federal public lands.³⁰ In the famous case of *Lyng v. Northwest Indian Cemetery Association*, the Supreme Court held that the First Amendment did not prevent the United States Forest Service from engaging in timber development that would destroy a sacred site located on public lands.³¹ Such destruction was allowable because

24. Radin, *Property and Personhood*, *supra* note 22, at 1015.

25. See Radin, *Market-Inalienability*, *supra* note 23, at 1851.

26. While this is the first Article to consider Radin’s theory in the context of American Indian real property, other scholars have applied Radin’s theory to indigenous intellectual and cultural property. See *infra* note 192 and accompanying text.

27. For additional background on American Indian sacred sites, see SACRED LANDS OF INDIAN AMERICA (Charles E. Little & Jake Page eds., 2001); ANDREW GULLIFORD, SACRED OBJECTS AND SACRED PLACES: PRESERVING TRIBAL TRADITIONS (2000).

28. See BROWN, RELIGION, *supra* note 1; see also *infra* note 40.

29. Cf. JONATHAN LEAR, RADICAL HOPE: ETHICS IN THE FACE OF CULTURAL DEVASTATION (2006) (examining how the Crow Nation responded to loss of lands, buffalo, and warrior culture).

30. See CHRISTINE A. KLEIN, FEDERICO CHEEVER, & BRET C. BIRDSONG, NATURAL RESOURCES LAW: A PLACE-BASED BOOK OF PROBLEMS AND CASES 103 (2005) (describing the public lands and the agencies that manage them).

31. *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 440-53 (1988).

the Free Exercise Clause only prevents the government from imposing religious beliefs on individuals and because the government has extensive ownership rights over the public lands.³²

While generally criticizing *Lyng*'s constricted view of the First Amendment, scholars contend that federal policy has evolved since that decision and is now sufficiently protective of Indian interests.³³ Moreover, they laud the administrative process and its ability to promote cooperation and compromise among multiple users of the public lands.³⁴ However, this viewpoint needs greater scrutiny. It is true that recent statutes, regulations, and orders articulate a policy of solicitude for Indian sacred sites.³⁵ But in practice, these provide only limited opportunities for Indian participation in the land management process and no substantive standards for protecting sacred sites.³⁶ As a result, federal land managers are free to permit land uses that desecrate sacred sites and may even destroy Indian religions.³⁷

Recent examples bear out the contention that federal practice still presents serious risks for Indian sacred sites.³⁸ In 2005, the United States Forest Service approved snowmaking using sewage effluent at a ski resort on San Francisco Peaks in Arizona,³⁹ a decision that the Navajo Nation equated to "genocide" because it would desecrate their most sacred mountain.⁴⁰ In 2007, the Ninth Circuit reversed the decision on grounds that the snowmaking

32. *Id.*

33. See Marcia Yablon, Note, *Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land*, 113 YALE L.J. 1623, 1628-29 (2004) ("In foreclosing judicial protection, the *Lyng* Court shut off one method of protecting sacred sites, but suggested another, more feasible method in its place-agency accommodation."); see generally Charlton H. Bonham, *Devils Tower, Rainbow Bridge, and the Uphill Battle Facing Native American Religion on Public Lands*, 20 LAW & INEQ. 157, 163-74 (2002).

34. See MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE?, at xi, 10, 144-72 (2003).

35. See *infra* Part II.

36. See *id.*

37. See *id.*

38. See generally Nelson D. Schwartz, *Far From the Reservation, but Still Sacred?* N.Y. TIMES, Sunday Business Section at 1, Aug. 12, 2007 (reporting on various off-reservation sacred sites disputes).

39. *Navajo Nation v. U.S. Forest Serv.*, 408 F. Supp. 2d 866, 871 (D. Ariz. 2006), *rev'd*, 479 F.3d 1024 (9th Cir. 2007).

40. Cyndy Cole, *Snowmaking Opponents Now Targeting City Council*, ARIZ. DAILY SUN, Jan. 13, 2006 ("It is another sad day . . . [when] in the 21st Century, genocide and religious persecution continue to be perpetrated on Navajo people [and] other Native Americans . . . who regard the Peaks as sacred.") (quoting Navajo Nation President Joe Shirley Jr.).

plan violated the Religious Freedom Restoration Act of 2000 (RFRA),⁴¹ but the court then granted the government's petition for rehearing en banc and has not yet issued a final decision.⁴² In 2008, a federal district court upheld the Bureau of Reclamation's decision to engage in a federal land transfer ultimately conferring title on a private company intending to build a fuel refinery on lands sacred to the Quechan tribe in Arizona.⁴³

These and other threats to sacred sites devastate Indian people.⁴⁴ But, ultimately they threaten all of us. Most Americans want to live in a country where everyone enjoys fundamental freedoms.⁴⁵ Indians cannot enjoy religious freedom without the ability to protect and visit their sacred sites.⁴⁶ Thus federal

41. *Navajo Nation*, 479 F.3d at 1029 (citing 42 U.S.C. §§ 2000bb, 2000bb-1 to 2000bb-4 (Westlaw 2008)).

42. *See Navajo Nation v. U.S. Forest Serv.*, 506 F.3d 717, 718 (Oct. 17, 2007) (granting rehearing en banc). This case raises the question of whether RFRA applies on the public lands, a question that the Supreme Court has not yet addressed. *See Note, Religious Land Use in the Federal Courts Under RLUIPA*, 120 HARV. L. REV. 2178, 2194-95 (2007).

43. *See Quechan Indian Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, No. CV 07-0677-PHX-JAT, 2008 WL 450268 at *12-16 (D. Ariz. February 15, 2008). As a factual matter, it is important to note, as the district court did, that "while [Arizona Clean Fuels, LLC] has purchased the Transfer Lands site from the District, ACF has since decided to relocate the oil refinery project to lands that are not involved in the Title Transfer."). *Id.* at *3. This case contrasts significantly with another in which a federal district court found federal agencies liable under the Federal Tort Claims Act for damage to Quechan sacred sites caused by electrical transmission line pole replacement and line maintenance project on the reservation. *See Quechan Tribe v. United States*, 2008 WL 495618, * 5, 37-43 (S.D. Cal. Jan. 10, 2008).

44. *See* Ed Taylor, *U.S. Senators Back Mining Project Through Bill*, E. VALLEY TRIB., July 24, 2007 (Indian objections to land swap proposal that would give private corporation about 3025 acres of federal land, including Apache sacred site, to develop an underground copper ore mine); ARCTIC NATIONAL WILDLIFE REFUGE (ANWR): REVIEW, CONTROVERSIES AND LEGISLATION (Barbara T. Lieland ed., 2006) (examining legislative proposals to allow oil drilling in Alaska National Wildlife Refuge, including sacred birthplace of caribou on which Neet'sai Gwich'in culture depends).

45. *Cf.* NOAH FELDMAN, *DIVIDED BY GOD: AMERICAN'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* (2005) (examining various viewpoints on religious freedom in the United States).

46. I assume in this Article that enhanced Indian property rights would *promote* fundamental freedoms, especially religious and cultural freedoms at sacred sites. I have previously considered counter-arguments to this idea. *See* Kristen A. Carpenter, *A Property Rights Approach to Sacrede Sites Cases: Asserting a Place for Indians as Non-Owners*, 52 UCLA L. REV. 1061, 1138-42 (2005). *Cf.* Jane Baron, *Property and "No Property"*, 42 HOUS. L. REV. 1425, 1425-32 (2006) (evaluating the question of whether property promotes freedom); Lydia Butler, *The Pathology Of Property Norms: Living Within Nature's Boundaries*, 73 S. CAL. L. REV. 927, 932 (2000) ("[M]any of the norms, principles, and policies of traditional

administrative practice needs to prioritize Indian interests in sacred sites over uses of the public lands that will harm such sites. Unfortunately, however, we do not have a legal theory justifying this position.⁴⁷ It is in this regard that I believe Radin's work is useful. Using her framework, we can conceive of sacred sites as non-fungible real property deserving special legal treatment and reform federal practice accordingly.

This Article expands upon Radin's approach in several ways. First, whereas Radin focuses on property that expresses individual personhood, I am interested in property that expresses collective "peoplehood". To elaborate on this concept of peoplehood, the Article draws on the work of political theorists who observe that individual rights paradigm, so prevalent in the United States, fails to capture the pervasiveness of subnational (and supranational) groupings. Thus the term "peoples" thus describes groups that organize along political, religious, ethnic, and cultural lines.⁴⁸ As a normative concept, the notion of peoplehood dictates that states should recognize peoples and treat them fairly in furtherance of democratic ideals.⁴⁹ With particular inspiration from John Rawls, the Article argues that Indian tribes are peoples⁵⁰ whose legitimate interests in property and religion at sacred sites deserve legal protection as a testament to American liberty for both individuals and groups.⁵¹

Second, whereas Radin calls for enhanced protection of property that individuals presently own (their diamond rings and

American property law inherently conflict with the goal of effective ecosystem management over the long term.").

47. See Erik B. Bluemel, *Accommodating Native American Cultural Activities on Federal Public Lands*, 41 IDAHO L. REV. 475, 548 (2005) (criticizing sacred sites scholarship that fails to "provide a mechanism by which to prioritize the two competing sets of human values raised by owners and non-owners or between recreational or developmental uses and cultural uses of public lands"); see also LLOYD BURTON, *WORSHIP AND WILDERNESS: CULTURE, RELIGION, AND LAW IN PUBLIC LANDS MANAGEMENT* 292 (2002) ("The problem in the free exercise/sacred sites cases is that instead of [American Indians] being accorded some form of elevated status, their rights have been assigned a status at or very near the bottom.").

48. See, e.g., ROGERS M. SMITH, *STORIES OF PEOPLEHOOD: THE POLITICS AND MORALS OF POLITICAL MEMBERSHIP* 20 (2003); see also JOHN LIE, *MODERN PEOPLEHOOD* (2004).

49. JOHN RAWLS, *THE LAW OF PEOPLES* 25 (1999).

50. Cf. Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 776, 779, 781 & n.142 (1992) (arguing that "right to exist as a tribe" implicates issues of peoplehood).

51. See RAWLS, *supra* note 49, at 39, 124.

homes), I advocate for enhanced protection of property that Indian tribes no longer own (their sacred sites on public lands).⁵² This latter point builds on my own work arguing for the property rights of Indians as non-owners of sacred sites⁵³ and more broadly on the work of legal scholars who describe property as a system wherein human values should sometimes trump the rights of owners.⁵⁴ It further highlights the reparative aspect of recognizing Indian interests in sacred sites that the federal government originally acquired through the conquest of North America.⁵⁵

In Part II, the Article sets forth the current legal framework governing sacred sites claims, focusing on *Lyng* and two subsequent federal appellate cases marking important developments in the law.⁵⁶ Evaluating the strengths and weaknesses of each case, this Part makes the case for a new theory to animate federal sacred sites policy. In Part III, the Article sets forth a theory of "real property and peoplehood." It draws from both property and political theory to argue that Indian interests in sacred sites on the public lands deserve heightened legal protection because they are integral to Indian peoplehood. In Part IV the Article advocates practical ways to reform the administration of federal sacred sites policy consistent with the theory of real property and peoplehood. As a procedural matter, it suggests that peoples have a special role to play in federal land management and, substantively, that administrative officials should prioritize Indian needs at sacred sites claims over competing uses of the public lands, especially those that may be realized elsewhere or foregone for monetary compensation. Part V concludes by considering other applications of the real property and peoplehood theory that, like the sacred sites context, provide an opportunity for American Indian and American peoplehood interests to converge.

52. See, e.g., BURTON, *supra* note 47, at 34-35 (describing certain Indian rituals that "originated on lands . . . tribes once inhabited but no longer control").

53. Carpenter, *supra* note 46.

54. See generally JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY (2000).

55. See William Bradford, *Beyond Reparations: An American Indian Theory of Justice*, 66 OHIO ST. L.J. 1 (2005) (arguing that Indian property deprivations could serve as a basis for reparations).

56. See *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814 (10th Cir. 1999); *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024 (9th Cir. 2007).

II. THE LEGAL FRAMEWORK ON SACRED SITES

"Whatever rights the Indians may have to use of the [sacred] area, however, these rights do not divest the Government of its right to use what is, after all, its land."⁵⁷

A. *The First Amendment: Lyng (1988)*

The Supreme Court reviewed the First Amendment's applicability to sacred sites disputes in *Lyng v. Northwest Indian Cemetery Association*.⁵⁸ This case has been the subject of extensive scholarly commentary⁵⁹ and will be discussed briefly here.

In *Lyng* several Northern California Indian tribes challenged the federal government's decision to build a road through a site where tribal religious practitioners gathered medicine and prepared for ceremonial dances.⁶⁰ The sacred area in *Lyng*, known as the "High Country" or "Medicine Rocks," was within the tribes' traditional territory. In the mid-nineteenth century however, California tribes experienced land conquest at its worst. In one decade, white settlers massacred thousands of Indians and the federal government wiped out Indian land title to the entire state.⁶¹

By the 1970s, when the dispute underlying *Lyng* arose, the sacred lands at issue were located in the Six Rivers National Forest, owned by government and managed by the United States Forest Service.⁶² Before recommending the road and logging project, the

57. *Lyng*, 485 U.S. at 453.

58. *Id.*

59. See *infra* note 77.

60. *Lyng*, 485 U.S. at 443.

61. See RUSSELL THORNTON, AMERICAN INDIAN HOLOCAUST AND SURVIVAL: A POPULATION HISTORY SINCE 1492, 107-09 (1987) (describing the Gold Rush-era "genocide" of California Indians in which "primarily because of the killings, the California Indian population . . . decreased almost by two-thirds in little more than a single decade: from 100,000 in 1849 to 35,000 in 1860"); see also Amy C. Brann, Comment, Karuk Tribe of California v. United States: *The Courts Need a History Lesson*, 37 NEW ENG. L. REV. 743 (2003) (noting that although eighteen treaties were negotiated with California tribes, the Senate refused to ratify them and instead passed the California Land Claims Act of 1851, which effectively transferred all Indian aboriginal title to the public domain).

62. See KLEIN ET AL., *supra* note 30, at 103 (describing how 654 acres of public lands are primarily managed by four federal agencies: the United States Forest Service, located within the Department of Agriculture (192 million acres); and the National Park Service (79 million acres), Bureau of Land Management (180 million acres), and Fish and Wildlife Service (93 million acres), all within the Department of Interior).

Forest Service commissioned a study of Indian religious uses. The study found that the area was "significant as an integral and indispensable part of Indian religious conceptualization and practice."⁶³ Such religious activities were "dependent upon and facilitated by certain qualities of the physical environment, the most important of which are privacy, silence, and an undisturbed natural setting."⁶⁴ Because the road 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," the report recommended against pursuing the project.⁶⁵

Despite these findings, the Forest Service approved the project, and attempted to mitigate Indian and environmental concerns by choosing a road location "as far as possible" from archaeological sites and contemporary Indian activities.⁶⁶ A location that would have avoided Chimney Rock, a specific sacred area, was rejected because of soil stability problems and the need to acquire private land.⁶⁷ Finding these accommodation efforts unsatisfactory, the Indians sued under the First Amendment, several federal statutes, and common law doctrines.⁶⁸ The District Court enjoined the road and timber project on grounds that it would substantially infringe on the Indians' religion and that the government had failed to demonstrate a compelling interest under the Free Exercise Clause.⁶⁹ The 9th Circuit affirmed.⁷⁰

The Supreme Court reversed, holding that even if the road would "virtually destroy" the Indians' ability to practice their religion, the government's action would not violate the Free Exercise Clause because it would not "coerce individuals into

63. *Lyng*, 485 U.S. at 442.

64. *Id.*

65. *Id.*

66. *Id.* at 443.

67. *Id.*

68. *Nw. Indian Cemetery Protective Ass'n v. Peterson*, 565 F. Supp. 586, 590-91 (N.D. Cal. 1983).

69. *Id.* at 595-96.

70. *Nw. Indian Cemetery Protective Ass'n v. Peterson*, 764 F.2d 581 (9th Cir. 1985), *aff'd on reh'g*, 795 F.2d 688 (9th Cir. 1986). By the time the Ninth Circuit heard the case, Congress had enacted the California Wilderness Act of 1984, restricting commercial activities such as logging in much, but not all, of the contested area. See *Lyng*, 485 U.S. at 444-45.

acting contrary to their religious beliefs.”⁷¹ And secondly, Justice O’Connor held that “[w]hatever rights the Indians may have to use of the area, . . . these rights do not divest the Government of its right to use what is, after all, *its* land.”⁷² *Lyng* thus stands for the proposition that the First Amendment allows the government to destroy Indian sacred sites located on public lands, so long as this action does not coerce religious belief.⁷³

Lyng did recognize some basis for the government to accommodate Indian sacred site usage on a voluntary, discretionary basis. In particular, the Court referenced the American Indian Religious Freedom Act of 1978, which provides:

It shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the[ir] traditional religions . . ., including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.⁷⁴

Lyng held that although this statute created no enforceable rights, it nonetheless embodied a strong statement of federal policy. O’Connor wrote in dicta: “[N]othing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen.”⁷⁵ And, more specifically, “the Government’s rights to the use of its own land . . . need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents.”⁷⁶

Lyng could be perceived as an opinion that usefully sets out a bright-line rule. It makes clear that the government has no obligation to Indian religious practitioners on the public lands but may use its discretion to accommodate them. Yet the case has other limitations. It leaves Indian people without enforceable rights at sacred sites and effectively holds that the First Amendment does not apply to a major category of religious worship. *Lyng* thus represents a problematically ethnocentric view

71. *Lyng*, 485 U.S. at 450-51.

72. *Id.* at 453.

73. *Id.* at 447-53.

74. 42 U.S.C. § 1996 (Westlaw 2008).

75. *Lyng*, 485 U.S. at 453.

76. *Id.* at 454.

of the First Amendment, criticized by many scholars as inappropriately limiting religious freedom for minority religious practitioners⁷⁷—and expanding the federal government's power as an owner of the public lands.⁷⁸ I will not rehash these criticisms here.

Lyng's jurisprudential failings can, however, inspire contemporary advocates to deal with the larger problem of categorizing Indian sacred sites claims.⁷⁹ Tribal relationships with sacred sites depart in some ways from the notion of "religion,"⁸⁰ at least as courts have construed the term.⁸¹ Unlike some Western traditions, Indian spirituality is difficult to capture in an abstract or broad set of intellectual beliefs.⁸² Spiritual concepts are bound up with associated ritual practices (such as preparing and taking medicine, and participating in dances, sweat lodges, prayers), which can only take place at certain sacred mountains, lakes, buttes, and valleys. Moreover, Indian "religions" permeate every part of tribal life, such as subsistence hunting and agriculture, traditional oral storytelling, kinship responsibilities, interpersonal

77. See, e.g., Ira Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 944-46; Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1486 (1990); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 125-26 (1992); S. Alan Ray, Comment, *Lyng v. Northwest Indian Cemetery Protective Association: Government Property Rights and the Free Exercise Clause*, 16 HASTINGS CONST. L. Q. 483, 490-510 (1989); Peggy Healy, Case Note, *Lyng v. Northwest Indian Cemetery Protective Association: A Form-Over-Effect Standard for the Free Exercise Clause*, 20 LOY. U. CHI. L.J. 171 (1988); Kathryn C. Wyatt, Note, *The Supreme Court, Lyng, and The Lone Wolf Principle*, 65 CHI.-KENT L. REV. 623, 625 (1989); J. Brett Pritchard, Note, *Conduct and Belief in the Free Exercise Clause: Developments and Deviations in Lyng v. Northwest Indian Cemetery Protective Association*, 76 CORNELL L. REV. 268 (1990).

78. See generally Carpenter, *supra* note 46, at 1082-87, 1092-93.

79. See *Sequoyah v. Tenn. Valley Auth.*, 620 F.2d 1159, 1165 (6th Cir. 1980) ("[T]hough 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.").

80. For thoughtful commentary on definitional issues in religious scholarship, see generally HOW SHOULD WE TALK ABOUT RELIGION? PERSPECTIVES, CONTEXTS, PARTICULARITIES (James Boyd White ed., 2006).

81. See *Lyng*, 485 U.S. at 459-60 (Brennan, J., dissenting) ("[A]ny attempt to isolate the religious aspects of Indian life is in reality an exercise which forces Indian concepts into non-Indian categories.") (internal quotations and citations omitted).

82. See *id.* at 460-61 (Brennan, J., dissenting) ("Established or universal truths—the mainstay of Western religions—play no part in Indian faith. Ceremonies are communal efforts undertaken for specific purposes in accordance with instructions handed down from generation to generation. . . . Where dogma lies at the heart of Western religions, Native American faith is inextricably bound to the use of land.").

relations, and sense of place. Accordingly Indian ceremonial practices are not undertaken for one person's salvation, but for the well-being of tribal people and the entire world.⁸³

A broader conception of "religion" may not be unique to tribal peoples. Other religious traditions, including Judaism and Christianity, also have important ritualistic or practice-based aspects, as well as sacred places around the world.⁸⁴ There are devout practitioners of every faith whose religious beliefs guide their private conduct and still others who insist that religion should guide public policy as well.⁸⁵ Viewed in this light, *Lyng* may represent a view of religion that is too narrow not only for Indians but for other religious adherents as well.

For present purposes, however, the point is that American Indian relationships with sacred sites are quite broad—while the federal courts' approach to free exercise claims is narrow.⁸⁶ For these reasons, advocates need to find a way to secure legal protection for the multi-faceted nature of Indian relationships with sacred sites. Such legal protection should also reflect Indian understandings of their own cultural and religious practices, rather than ill-fitting categorizations from other traditions. The federal administrative process provides great potential to offer such meaningful protection of Indian sacred sites practices, though as I will argue in the next section, this potential remains unrealized.

83. See Thomas Buckley, *Renewal as Discourse and Discourse as Renewal in Native Northwestern California*, in NATIVE RELIGIONS AND CULTURES OF NORTH AMERICA: ANTHROPOLOGY OF THE SACRED 33, 33 (Lawrence E. Sullivan ed., 2000) (analyzing world-renewal "Jump Dance" which "is intended to cure the world's ills, and to stave off evil"); e.g., *Lyng*, 485 U.S. at 460 (Brennan, J., dissenting) ("Failure to conduct these ceremonies in the manner and place specified, adherents believe, will result in great harm to the earth and to the people whose welfare depends upon it.").

84. See Joseph William Singer, *Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism*, 63 S. CAL. L. REV. 1821, 1832 (1990).

85. Cf. FELDMAN, *supra* note 45, at 3, 150-234 (identifying the position that religious principles should instruct public policy as "values evangelism" and contrasting it with a "legal secularist" approach in which religious values should remain a private matter).

86. See *Sequoyah v. Tenn. Valley Auth.*, 620 F.2d 1159, 1164 (6th Cir. 1980) (rejecting Indian religious freedom claim on ground that claims were more cultural and historical than religious).

B. *Administrative Practice: Bear Lodge (1998)*

Following *Lyng*, federal policy changed to become more protective of Indian interests in sacred sites. This section will briefly review these policy developments and then discuss their application in the Tenth Circuit's *Bear Lodge* case and its progeny.

In 1992 Congress amended the National Historic Preservation Act (NHPA) to extend its protections to certain Indian sacred sites.⁸⁷ The NHPA now provides that "properties of traditional religious and cultural importance to an Indian tribe" (TCPs) may be determined eligible for inclusion on the National Register of Historic Places.⁸⁸ Federal agencies are directed to consult "with any tribe . . . that attaches religious and cultural significance" to such properties regarding federal "undertakings" that affect TCPs.⁸⁹

In 1996, President Clinton issued an Executive Order pertaining to Indian sacred sites. It requires federal agencies to "accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and avoid adversely affecting the physical integrity of such sacred sites."⁹⁰ Procedurally, the agencies must give notice to tribal governments when federal management may affect sacred sites and consult with tribal leaders regarding such plans.⁹¹

While the 1996 Executive Order expressed a substantive directive to "avoid adversely affecting . . . sacred sites," it was, by its own terms, explicitly unenforceable against the United States.⁹² Yet a number of agencies have developed internal guidelines in favor of sacred site protections.⁹³ The Park Service's *Management Policies* explains that the Park Service "will develop and implement its

87. See National Historic Preservation Act, 16 U.S.C. §§ 470-71 (Westlaw 2008); see also Dean B. Suagee, *Historical Storytelling and the Growth of Tribal Historic Preservation Programs*, 17 NAT. RESOURCES & ENV'T 86, 86-87 (2002) (describing 1992 amendments to the NHPA and implementing regulations); Peter J. Gardner, *The First Amendment's Unfulfilled Promise in Protecting Native American Sacred Sites: Is the National Historic Preservation Act a Better Alternative?*, 47 S.D. L. REV. 68, 79-82 (2002); Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultured Bridges, and Common Ground*, 21 VT. L. REV. 145, 160 (1996).

88. 16 U.S.C. § 470a-470f (Westlaw 2008).

89. *Id.*

90. Exec. Order No. 13007, 3 C.F.R. 196 (1996).

91. *Id.*

92. *Id.*

93. Here I focus on the Park Service and Forest Service as the agencies that address the majority of sacred sites disputes.

programs in a manner that reflects knowledge of and respect for the cultures of Native American tribes or groups with demonstrated ancestral ties to particular resources in parks.”⁹⁴ Procedurally, the policy provides that, through its Superintendents, the Park Service will consult with tribes regarding administration of parks including sacred sites.⁹⁵ Substantively, the Park Service is to undertake “decisions [that] reflect knowledge about and understanding of potentially affected Native American cultures and people, gained through research and consultations with the potentially affected groups.”⁹⁶

The Forest Service’s *National Resource Guide to American Indian and Alaska Native Relations* acknowledges federal obligations at sacred sites arising from the government-to-government relationship, contemporary assertions of tribal sovereignty, and the fact that the USFS and Indian nations are often contemporary “neighbors.”⁹⁷ It recognizes that even though “[Forest Service] lands are public . . . [and] most Indian title to these lands has been extinguished,” the Forest Service nevertheless “has to be concerned where there are—tribal rights reserved by treaty, spiritual and cultural values and practices.”⁹⁸ The Forest Service Guide instructs its employees to “walk the land with American Indians . . . to gain an understanding and appreciation of their culture, religion, beliefs, and practices.”⁹⁹ The substantive goal is to “identify and acknowledge [Indian] cultural needs . . . and consider these values as an important part of management of the national forest.”¹⁰⁰

These post-*Lyng* evolutions in administrative law were tested in *Bear Lodge Multiple Use Association v. Babbitt*, a 1998 case involving Devil’s Tower National Monument. The Tower, known to some Plains Indians as “Bear Lodge,” is a place of historical and

94. U.S. DEP’T OF THE INTERIOR, NATIONAL PARK SERVICE MANAGEMENT POLICIES 2001 89 (2000), available at <http://www.nps.gov/refdesk/mp/chapter8.pdf>.

95. *Id.*

96. *Id.*

97. U.S. FOREST SERV., FOREST SERVICE NATIONAL RESOURCE GUIDE TO AMERICAN INDIAN AND ALASKA NATIVE RELATIONS, xi (1997), available at <http://www.fs.fed.us/people/tribal/tribexec.pdf>.

98. *Id.* at 36.

99. *Id.* at 59.

100. *Id.*

contemporary cultural significance to at least six tribes.¹⁰¹ As part of the Black Hills, the Tower was originally reserved to the Great Sioux Nation with the Black Hills in the Treaty of Fort Laramie of 1868, which was soon thereafter violated by the United States.¹⁰² Devils Tower became a National Monument in 1906, and is now managed by the Park Service.¹⁰³ By the 1990's, conflicting use patterns of rock climbers, local citizens, tourists, environmental groups, and Indian religious practitioners were creating management challenges for the Park Service.¹⁰⁴

The Park Service was obligated to manage these conflicting uses at Devils Tower, not only by the NHPA,¹⁰⁵ but also by the National Park Service Organic Act and the Presidential Proclamation establishing Devil's Tower as a National Monument.¹⁰⁶ After a planning process, including public meetings, circulation of drafts, and a formal notice and comment period, the Devils Tower Superintendent announced a management plan banning commercial rock climbing during the month of June, when most religious ceremonies were conducted.¹⁰⁷ The Plan also called for educational programs on Indian religious and cultural uses and mitigation of climbing's effects on the environment through reduced use of pitons and closure of routes near raptor nests.¹⁰⁸

The Bear Lodge Multiple Use Association filed suit, challenging the plan primarily on Establishment Clause grounds, and the NPS changed the climbing ban to a voluntary closure.¹⁰⁹

101. *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 815 (10th Cir. 1999).

102. See Ray H. Mattison, *Nat'l Park Serv., Devil's Tower History: Our First Fifty Years* (1955), <http://www.nps.gov/deto/first50.htm> ("[T]he Treaty of 1868 guaranteed this region to the Indians. In 1874, in violation of this treaty, General George A. Custer led a reconnaissance expedition into the Black Hills.").

103. *Bear Lodge*, 175 F.3d at 819.

104. *Id.*

105. *Id.* at 817-18.

106. *Id.* at 819 & n.7 ("Under its governing statute, NPS must protect the values for which Devils Tower national monument was established. . . . One of the primary bases for the Tower's designation as a National Monument is the prominent role it has played in the cultures of several American Indian tribes of the North Plains. . . . President Roosevelt declared the Tower is 'a natural wonder and an object of historic and great scientific interest . . . [and] warning is hereby given to all unauthorized persons not to appropriate, injure, or destroy any feature of the natural tower.'").

107. See *Bear Lodge*, 175 F.3d at 819.

108. See *Bear Lodge Multiple Use Ass'n v. Babbitt*, 2 F. Supp. 2d 1448, 1450.

109. See *id.*

The federal district court upheld the plan, ruling that it did not violate the Establishment Clause because it advanced secular purposes, did not have the primary effect of advancing religion, and did not entangle the government with religion.¹¹⁰ On appeal, the Tenth Circuit affirmed, but not on the merits. It held that because the plan made the climbing restrictions “voluntary” and the plaintiff climbers had continued climbing, they suffered no injury and therefore lacked standing to sue.¹¹¹ The Supreme Court denied certiorari.¹¹²

Thus while *Bear Lodge* is a circuit court decision, it effectively set the standard for agency accommodation. Following *Bear Lodge*, agencies are likely to offer modest accommodations of Indian religious practices, with the expectation that they will withstand Establishment Clause challenges, particularly if they request “voluntary” compliance or refrain from causing “actual injury” to would-be challengers. Thus in *Natural Arch and Bridge* (2000), a court upheld the Park Service’s implementation of a management plan requesting “voluntary compliance” in which tourists are asked to walk around a sandstone bridge, rather than under it, out of respect for Navajo religious traditions.¹¹³

Scholars laud the administrative process as a beacon of tolerance and accommodation in sacred sites cases, and consider *Bear Lodge* a model of improved administrative practice.¹¹⁴ *Bear Lodge* certainly represents an important development over agency policy of the *Lyng* era. Federal land use officials worked closely with tribal people and developed a management plan reflecting some of their religious needs. The fact that the tribes did not challenge the management plan may indicate some satisfaction with it—even after the Park Service changed the climbing moratorium from mandatory to voluntary.

110. See *id.* at 1454 (applying *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (articulating Establishment Clause test)).

111. See *Bear Lodge*, 175 F.3d at 821 (applying *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (articulating the standing test)).

112. See *Bear Lodge Multiple Use Ass’n v. Babbitt*, 529 U.S. 1037 (2000).

113. See *Natural Arch & Bridge Soc’y v. Alston*, 98 Fed. Appx. 711, 716 (10th Cir. 2004) (upholding National Park Service plan asking tourists to refrain from walking under a sandstone bridge out of respect for Native American religious beliefs on grounds that plaintiffs had not suffered an actual injury and thus lacked standing to bring Establishment Clause challenge).

114. See BROWN, *supra* note 34, at xi, 144-72.

Bear Lodge thus affirms the idea that agencies can, if they want, use their discretion to accommodate sacred site usage, but agencies have no obligation to prioritize Indian claims or even to offer them a meaningful baseline of protection. When all is said and done, the Devil's Tower climbing management plan merely asks that climbers consider refraining from climbing one month of the year and offers tourists some educational programs about Indians. This "accommodation" of Indian religious practices ultimately requires those religious practices to yield to the interests of climbers and tourists.¹¹⁵ Rock climbers can, in fact, climb Devil's Tower during Indian religious ceremonies, even if those ceremonies will be disrupted. Rock climbing and tourism are legitimate uses of the public lands—but it is difficult to see how they should trump the religious practices of Indian tribes who have historic treaty claims to occupy such lands¹¹⁶ and claim that their wellbeing as a tribe depends on continued use of these lands.¹¹⁷

Following *Bear Lodge*, the Forest Service has adopted a practice of using its discretion to accommodate Indian sacred sites' needs in some cases. One notable decision was *Wyoming Sawmills* (2004) involving the Medicine Wheel National Monument in Wyoming.¹¹⁸ The Forest Service issued a management plan for the sacred Medicine Wheel providing that the Forest Service would consult with outside parties, including Indian organizations and historic preservation officers, regarding any project within 18,000-20,000 acres around the Medicine Wheel.¹¹⁹ As authority for the plan, the Forest Service cited NHPA, AIRFA, President Clinton's 1996

115. See GULLIFORD, *supra* note 27, at 166 ("Even when climbers are asked not to interfere with our people when we are praying, some of them keep on climbing [at *Mato Tipila*] The vision quest ceremony requires a year of preparation but the young people couldn't finish what they started because they weren't left alone; the climbers interfered.") (quoting Romanus Bear Stops, Cheyenne River Sioux traditional leader).

116. See, e.g., Alexandra New Holy, *The Heart of Everything That Is: Paha Sapa, Treaties, and Lakota Identity*, 23 OKLA. CITY U. L. REV. 317, 321-22 (1998) (describing ongoing claims to the Black Hills under the 1868 Treaty of Fort Laramie).

117. See, e.g., *Bear Lodge*, 175 F.3d at 817 (citing Lakota views that the "traditional religious uses" of Devil's Tower are "vital to the health of our nation and to our self-determination as a Tribe. Those who use the butte to pray become stronger. They gain sacred knowledge from the spirits that helps us to preserve our Lakota culture and way of life. They become leaders. Without their knowledge and leadership, we cannot continue to determine our destiny.").

118. See *Wyo. Sawmills Inc. v. U.S. Forest Serv.*, 383 F.3d 1241 (10th Cir. 2004).

119. See *id.* at 1245.

Executive Order and several archaeological protection statutes.¹²⁰

After adopting the management plan, the Forest Service decided not to hold several previously advertised timber sales within the Medicine Wheel management area.¹²¹ The Wyoming Sawmills Corporation sued, alleging violations of the Establishment Clause and National Forest Management Act.¹²² The Tenth Circuit held, however, that the company lacked standing to sue on its claim of lost opportunity to bid on future timber sales and that the Forest Service's actions were within its substantial discretion.¹²³

Bear Lodge and *Wyoming Sawmills* both reflect agencies' power to accommodate sacred sites practices if they wish (as O'Connor suggested in *Lyng*) and their adherence to subsequent developments in federal policy (such as NHPA's consultation process). Both announced management plans that avoided "actual injury" to non-Indian users of the public lands. Yet, the Forest Service plan actually prevented timber harvesting at the Medicine Wheel, whereas the Park Service plan did not prevent rock climbing at Devil's Tower. To determine the effectiveness of these plans, one would need to survey the Indian religious practitioners with respect to their ability to practice their religion. Yet, even a superficial review suggests that the Forest Service in *Wyoming Sawmills* seems to have used its discretion to effectuate a management plan with more teeth than did the Park Service in *Bear Lodge*.

Thus under *Bear Lodge* and its progeny, the decision about whether, and to what extent, an agency will accommodate Indian needs at sacred sites is left to agency discretion. Under the Ninth Circuit's recent *Navajo Nation* case, however, it appears that two recent federal statutes may begin to impose greater requirements on agencies to respect Indian religious freedom at sacred sites.

C. Statutory Reform: *Navajo Nation* (2007)

Navajo Nation v. Forest Service was the first major case to consider

120. *See id.*

121. *See id.*

122. *See id.* at 1243, 1245-56.

123. *See id.* at 1248-49, 1252.

the applicability of two new religious freedoms statutes to sacred sites cases.¹²⁴ The Religious Freedoms Restoration Act of 1993 (RFRA)¹²⁵ and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)¹²⁶ potentially, though not explicitly, offer protection for federal land use practices that burden Indian worship at sacred sites. This section will describe these statutes and then analyze the Ninth Circuit's treatment of them in *Navajo Nation*.

Passed in response to the Supreme Court's 1990 decision in *Employment Division v. Smith*, rejecting Indian Free Exercise clause claims in an Indian peyote case, RFRA aims to restore earlier First Amendment standards protecting religious freedom.¹²⁷ RFRA provides that the government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless it can show the burden on religion furthers a compelling governmental interest and is the least restrictive means of furthering that interest.¹²⁸ RFRA has been ruled unconstitutional as applied to state governments,¹²⁹ but it still applies to the federal government.¹³⁰

RLUIPA expands religious freedom protections for prisoners and property owners.¹³¹ It allows federal and state prisoners to seek religious accommodations pursuant to the same standard as set forth in RFRA.¹³² It also limits the government's ability to use land use regulation to interfere with religious institutions that have a property interest in their religious facility.¹³³ Beyond these two specific contexts, RLUIPA also amends RFRA to expand the definition of "exercise of religion" as described in greater detail

124. See *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1048 (9th Cir. 2007).

125. 42 U.S.C. §§ 2000bb, 2000bb-1 to 2000bb-4 (Westlaw 2008).

126. *Id.* §§ 2000cc, 2000cc-1 to 2000cc-5 (Westlaw 2008).

127. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 418 (2006) ("Congress enacted . . . RFRA . . . in response to *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990) . . . where, in upholding a generally applicable law that burdened the sacramental use of peyote, this court held that the First Amendment's Free Exercise Clause does not require judges to engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws.").

128. 42 U.S.C. §§ 2000bb-1(a)-(b) (Westlaw 2008).

129. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

130. See *Gonzales*, 546 U.S. at 424.

131. 42 U.S.C. §§ 2000cc to 2000cc-5 (Westlaw 2008).

132. *Id.* § 2000cc-1.

133. *Id.* § 2000cc.

below.¹³⁴

The Supreme Court has applied these statutes broadly. In *Cutter v. Wilkinson* prisoners practicing “non-mainstream religions” such as the Satanist, Wicca, Asatru, and Church of Jesus Christ-Christian religions claimed that prison officials violated RLUIPA by restricting religious literature, dress, group worship, chaplain services, and ceremonial items.¹³⁵ The prisons responded that RLUIPA violated the Establishment Clause by providing greater protections for religious freedom than the First Amendment.¹³⁶ In upholding RLUIPA, the Court recognized that the “political branches could shield religious exercise through legislative accommodation” consistent with the Establishment Clause.¹³⁷

In *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, the Court applied RFRA to prevent the federal government from enforcing a ban on a church’s use of a hoasca, a sacramental, hallucinogenic tea.¹³⁸ It held that the government failed to show a compelling interest under the Controlled Substances Act, especially given that it makes exceptions for other religious users of Schedule I substances.¹³⁹ Though the Court acknowledged the government’s interest in uniform administration of drug laws and promoting public safety and welfare,¹⁴⁰ it also emphasized that Congress expressly restored the compelling interest test to situations like that experienced by the UDV church.¹⁴¹ Under this standard, the government did not provide enough evidence to justify its burden on the sacramental use of hoasca.¹⁴²

Some commentators believe the unanimous decision in *O Centro* may signal a new willingness of the Supreme Court, under Chief Justice Roberts, to consider seriously Congress’ intent in restoring religious liberty in the post-Smith era.¹⁴³ At the very least,

134. *Id.* § 2000cc-3.

135. *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005).

136. *Id.*

137. *Id.* at 714.

138. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 418-19 (2006).

139. *Id.* at 433-34.

140. *Id.* at 436, 438.

141. *Id.* at 429-30.

142. *Id.* at 438.

143. David L. Hudson, Jr., *Tea and Sympathy: High Court Backs Religion Law: This Time, Ruling in Religious Drug-Use Case Favors Sacramental Rites*, A.B.A. J. E-REP., Feb. 24, 2006, at 1

tribal advocates can cite *O Centro* for the unremarkable point that RFRA mandates a compelling interest analysis when federal programs of general applicability burden religious freedoms, and argue that this principle should apply to Indian sacred sites. This theory has worked in one major lawsuit to date—*Navajo Nation v. Forest Service*.¹⁴⁴

The dispute adjudicated in *Navajo Nation* arose when the Forest Service approved the Arizona Snowbowl's proposal to use sewage effluent in snowmaking and expand facilities at the ski resort that it operates on the San Francisco Peaks.¹⁴⁵ For six southwestern tribes, including the Navajo and Hopi, the Peaks are one of the most sacred places to their religion, the site of tribal origin stories, contemporary prayers, rituals, and medicine gathering.¹⁴⁶ Located within the Coconino National Forest, the Peaks are protected as a "traditional cultural property" under federal law.¹⁴⁷ As a result of the consultation process mandated by the NHPA and NEPA, the Forest Service was well aware of the Peaks' religious significance and the tribes' belief that snowmaking using sewage effluent would desecrate the Peaks and harm religious practices.¹⁴⁸ Yet, the Forest Service approved the snowmaking plan, with accommodations to Indian tribes, including the avoidance of shrines in trail expansion and free rides on ski area chairlift for religious practitioners.¹⁴⁹ The tribes sued under RFRA and other statutes, and the district court affirmed on grounds that *Lyng* foreclosed relief for individuals claiming government regulation of the public lands burdened

(quoting Anthony Picarello, president of the Becket Fund for Religious Liberty, who called *Gonzales* a "thumping victory for religious accommodation laws [and] [i]t's especially good news for religious minorities").

144. *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024 (9th Cir. 2007).

145. *Id.* at 1029, 1030.

146. *Id.* at 1034-44.

147. *Id.* at 1029.

148. *Id.* at 1059.

149. *Navajo Nation*, 408 F. Supp. 2d at 880 & n.10 (noting that the Forest Service's mitigating measures included: "(1) access [for religious practitioners] before, during and after construction; (2) protection and regeneration of plants of traditional importance; (3) that the Forest Service must work to ensure that current ceremonial activities continue uninterrupted; (4) that the Forest Service must protect shrines; (5) that tribes must be provided water-quality information; and (6) where practicable, projects must take advantage of previously-disturbed areas. . . . [Additionally] the agency has guaranteed traditional cultural practitioners access . . . as well as free use of the ski lifts in the summer. The agency has also committed to working to protect any plants of traditional importance that may be subsequently identified in the project area.").

religious practice.¹⁵⁰

But the lawsuit did not arise under the First Amendment. The Ninth Circuit believed it was bound to apply RFRA's broad protections for religious exercise. Under RFRA, the court found that using sewage effluent in snowmaking would cause a "substantial burden" to Navajo and Hopi religions in two ways. First, it would make certain practices (namely, the Navajo blessingway and other healing ceremonies and Hopi kachina dances and prayers) impossible "because the ceremon[ies] require[] collecting natural resources that would be too contaminated—physically, spiritually, or both—for sacramental use."¹⁵¹ Second, the snowmaking would cause a broader burden in the form of the tribes' inability to maintain "an entire way of life" based on religious practices that "require belief in the mountain's purity or a spiritual connection to the mountain that would be undermined by the contamination."¹⁵² This second burden referred to the fact that the San Francisco Peaks pervade Navajo and Hopi traditional religious life,¹⁵³ from certain practices to entire systems of ritual observances that are thought to support corn crops.¹⁵⁴ Thus the tribal plaintiffs had demonstrated evidence of a "substantial burden."¹⁵⁵

To justify this burden, the government and Snowbowl asserted two compelling interests: (1) meeting the Forest Service's multiple-use mandate including managing public lands for recreational uses like skiing and (2) protecting skier safety on the public lands by upgrading the ski resort. The Ninth Circuit held that fulfilling the multiple use mandate was a "broadly formulated interest[]" justifying the general applicability of government mandates" of the sort the Supreme Court had rejected as a compelling interest in the *O Centro* case.¹⁵⁶ The Forest Service and Snowbowl tried to make the more particularized argument that snowmaking would allow a more "reliable and consistent operating season."¹⁵⁷ But the court rejected the idea that approving snowmaking "at an already

150. *Id.* at 904-06.

151. *Navajo Nation*, 479 F.3d at 1039.

152. *Id.*

153. *See id.* at 1041-43.

154. *See id.* at 1034.

155. *Id.* at 1043.

156. *Id.* at 1044.

157. *Id.*

functioning commercial ski area” demonstrated a governmental interest “of the highest order.”¹⁵⁸

The court finally tried to put things in perspective, imagining what would happen if the government required Christians to use sewage effluent in baptisms.¹⁵⁹ Given the equally sensitive nature of the issue here, the court stated: “[I]f [the tribes] do not have a valid RFRA claim in this case, we are unable to see how any Native American plaintiff can ever have a successful RFRA claim based on beliefs and practices tied to land they hold sacred.”¹⁶⁰

Navajo Nation shows potential for meaningful substantive protection of Indian religious freedom at sacred sites. It suggests that when agencies burden Indian religious practices through land use decisions, such actions will be subject to RFRA scrutiny and minor gestures of accommodation will not get the government off the hook. This is a welcome improvement over *Lyng* and an important corollary to *Bear Lodge*. It also makes some headway, albeit indirect, on the sometimes empty nature of NHPA’s consultation requirement. While agreeing that NHPA does not require the Forest Service to implement anything it learns during the consultation process, the court’s holding makes it clear that the Forest Service cannot disregard Indian religious needs to the point of imposing a substantial burden under RFRA.

Following the Ninth Circuit’s panel decision, the federal government requested, and was granted, rehearing by the en banc court.¹⁶¹ As the case proceeds, a significant question will be whether RFRA applies to federal public lands at all. Some commentators point to the legislative history suggesting that RFRA left the *Lyng* holding in place.¹⁶² However, the statutory language of

158. *Id.* The Ninth Circuit further found that the Forest Service had violated NEPA by failing to study the effects of human ingestion of sewage effluent. *Id.* at 1051. However, it agreed that the government had discharged its obligation to consult with the tribes through several years of written communications, meetings, and opportunities to comment, under NHPA. *Id.* at 1055-56.

159. *Id.* at 1048.

160. *Id.*

161. See *Navajo Nation v. U. S. Forest Serv.*, 506 F.3d 717, 718 (Oct. 17, 2007) (9th cir. granting rehearing en banc).

162. Anastasia P. Winslow, *Sacred Standards: Honoring The Establishment Clause In Protecting Native American Sacred Sites*, 38 ARIZ. L. REV. 1291, 1315 & nn.198-99 (1996) (“Congress was assured that RFRA would not create a cause of action on behalf of Native Americans seeking to protect sacred sites. The Senate report stated that RFRA would not overrule *Lyng* and that, under *Lyng*, ‘strict scrutiny does not apply to government actions

RFRA does not contain a public lands exception. And it is difficult to imagine a principled reason for such an exception, particularly when RFRA has been held to apply to federally-owned prisons where the governmental interest in management authority would seem to be exceedingly high.¹⁶³

D. *Synthesizing the Current Sacred Sites Framework*

Lyng generally forecloses Free Exercise clause relief to Indians in cases where government activity on federal lands threatens religious uses of sacred sites,¹⁶⁴ but it leaves the door open for agency accommodations of religious practices.¹⁶⁵ *Bear Lodge* tells agencies how to craft those accommodations. So long as they are “voluntary” in nature or refrain from causing “actual injury” to other citizens, sacred site accommodations seem to withstand Establishment Clause challenges. *Navajo Nation* begins to set forth substantive standards for agency accommodations. If agencies try to mitigate harm to sacred sites, but nonetheless “burden” Indian exercise of religion, they will be required to meet RFRA’s compelling interest/least restrictive means test.¹⁶⁶ Reconsidering this legal framework through a theory of property and peoplehood reveals several ways in which federal agencies (and Congress if necessary) should reform the current protection available for American Indian relationships with sacred sites.

involving only management of internal government affairs or the use of the government’s own property or resources.”); see also *Thiry v. Carlson*, 78 F.3d 1491 (10th Cir. 1996) (denying RFRA relief to a Native American couple challenging road construction through the gravesite of their infant on grounds that RFRA does not alter *Lyng* standard).

163. See, e.g., *O’Bryan v. Bureau of Prisons*, 349 F.3d 399 (7th Cir. 2003) (applying RFRA to religious freedom claim of federal prisoner at Federal Correctional Institution on grounds that RFRA may be applied to the internal operation of the national government); *Kikumura v. Hurley*, 242 F.3d 950 (10th Cir. 2001) (applying RFRA to religious freedom claim of federal prisoner at the United States Penitentiary, Administrative Maximum (Florence ADX), which houses prisoners deemed the most dangerous and in need of the tightest control).

164. See Charlton H. Bonham, *Devils Tower, Rainbow Bridge and the Uphill Battle Facing Native American Religion on Public Lands*, 20 LAW & INEQ. 157, 165 (2002) (“The decision in *Lyng* effectively marked the end of Native American attempts to employ the Free Exercise clause to protect Native American religious sites on public lands.”).

165. See Yablon, *supra* note 33, at 1629 (“In foreclosing judicial protection, the *Lyng* court shut off one method of protecting sacred sites, but suggested another, more feasible method in its place—agency accommodation.”).

166. See *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1043 (9th Cir. 2007).

III. A THEORY OF REAL PROPERTY AND PEOPLEHOOD

"Surely you're not suggesting the [Navajo] plaintiffs use another mountain."¹⁶⁷

In this section, I propose a theory of "property and peoplehood" that reflects the relationship that Indians have with sacred sites and offers a basis for enhanced legal protection of this relationship.

A. *Property and Personhood*

Professor Margaret Jane Radin changed the way we think about property when she introduced the idea that some property is deserving of a high level of legal protection because it expresses individual "personhood."¹⁶⁸ If previously we envisioned property as any thing—whether chattel, land, or intangible—whose value could be translated into monetary terms, Radin encouraged us to make a finer set of distinctions. She argued that most individuals possess certain objects that are "almost part of themselves."¹⁶⁹ Because of this inextricable relationship between the object and the self, the loss of such property "causes pain that cannot be relieved by the object's replacement."¹⁷⁰ In Radin's view, items such as wedding rings, portraits, and heirlooms are "personal" property distinguishable from "fungible" property that can be replaced or compensated with money.¹⁷¹

By identifying these aspects of personal property, Radin also rejected the ideas of "commensurability," "universal commodification," and "market inalienability" so prevalent in our legal system.¹⁷² That is, the value of some things cannot be translated into a monetary figure, and these things should not be traded, at least with complete freedom, on the open market. Nor should they be subjected to government interference, at least not without special protection. Instead the law should treat these forms

167. INDIANZ.COM, *U.S. Argues Against Protecting Sacred Peaks in Arizona*, Oct. 7, 2005, <http://www.indianz.com/News/2005/010671.asp> (quoting federal district court Judge Paul Rosenblatt).

168. See Radin, *supra* note 22, at 1013-14.

169. *Id.* at 959.

170. *Id.*

171. See *id.* at 959-61, 986-88.

172. See RADIN, *CONTESTED COMMODITIES*, *supra* note 23, at 8-15.

of property carefully. Putting these "property and personhood" theories into a legal framework, Radin proposes: (1) some property rights should be "recognized and preserved as personal;"¹⁷³ (2) personal property rights "should be protected to some extent against invasion by government and against cancellation by conflicting fungible property claims of other people;"¹⁷⁴ and (3) fungible property rights "should yield to some extent in the face of conflicting recognized personhood interests .

...¹⁷⁵

Radin has applied her theories to various contemporary issues such as the alienability of the human body (touching on topics such as prostitution, organ and tissue sale, surrogate motherhood, and stem cell research), takings law, and criminal justice. Her view is that that economic analysis may fail to capture the issues most pressing to individuals and society as a whole as we evaluate certain types of property transactions. If a person is considering selling her kidney out of a desperate need for money, her decision-making process is unlikely to be meaningfully informed by concepts of wealth maximization or freedom of contract. From a societal perspective, we should not focus exclusively on whether the individual is allowed to sell the kidney, but rather address the underlying desperation and its causes.¹⁷⁶

Radin proposes that we transcend market-based rhetoric and instead adopt a concept of "human flourishing."¹⁷⁷ That is, the appropriateness of property exchanges should be evaluated according to the extent to which they promote the well-being of people. Under this approach, it is wrong treat certain property, such as the human body, as either universally alienable or universally non-alienable. Instead of imposing or lifting a complete ban on property transactions degrading to personhood (prostitution, for example), society should address the underlying social problems (poverty, for example) and adopt regulations that will promote the wellbeing of people.

Radin's work on real property offers a particularly useful

173. Radin, *supra* note 22, at 1014.

174. *Id.* at 1014-15.

175. *Id.* at 1015.

176. See Radin, *Rethinking*, *supra* note 26, at 81.

177. Radin, *Market-Inalienability*, *supra* note 23, at 1851.

platform for rethinking Indian interests in the public lands.¹⁷⁸ In her analysis of the Supreme Court's takings jurisprudence, for example, she critiques the judges (and scholars) who "treat all property as fungible."¹⁷⁹ This bias undergirds much of takings law, including the presumption that all real property should be equally subject to the power of eminent domain with compensation. We know that there are differences, including non-economic differences, in the ways that people use their property and how they experience property loss. As Radin writes, "airplane overflight noise 'takes' much more from a (hearing) resident than from a (hearing) proprietor who already operates a noisy manufacturing business or from a (nonhearing) corporation."¹⁸⁰ Yet the law of takings makes no distinction between these parties, or their particular relationship with property, when it comes to determining just compensation for a taking.

While pervasive, this universal and equal commodification approach problematically ignores "our abiding tendency to treat some property as personal."¹⁸¹ Radin would reform takings law by injecting personhood analysis to create a "hierarchy of rights" wherein "property that is bound up with individuals in a normatively appropriate sense would enjoy greater constitutional solicitude than property conforming more closely to the market commodity paradigm."¹⁸² The current approach of awarding fair market value to takings plaintiffs remains appropriate primarily for real property that is fungible to its owner, or easily valued and compensated in monetary terms. By contrast, real property that is "important to the freedom, identity, and contextuality of people"¹⁸³ merits a different level, or even type, of protection against the government's power of eminent domain.¹⁸⁴

Radin admits that the Constitution does not explicitly provide for such solicitous treatment for real property that is personal.¹⁸⁵ But she notes that the Constitution similarly fails to mandate the universal commensurability (or market-alienability) approach that

178. See Radin, *The Liberal Conception*, *supra* note 23, at 1679.

179. *Id.* at 1684-5.

180. *Id.* at 1689.

181. *Id.* at 1685.

182. *Id.* at 1686-87.

183. *Id.* at 1686.

184. *Id.* at 1686-87.

185. See *id.* at 1688.

characterizes the Supreme Court's takings jurisprudence. Moreover, she argues that the Constitution's overriding concern for individual rights must include individual interests in property essential to the human condition. Thus courts should have latitude to consider personhood concerns in takings analysis. As I argue below, I believe courts should enjoy similar latitude in considering peoplehood concerns in sacred sites cases.¹⁸⁶

B. *From Personhood to Peoplehood*

1. *Group interests in property.*

While Radin's primary concern is about the relationship between property and the individual person, I am primarily focused on the relationship between property and certain groups, which I define below as "peoples." Radin herself offers a springboard for this analysis in a brief discussion of group claims to "personhood" interests in property. Radin's primary example is the Supreme Court case of *Village of Belle Terre v. Boraas*, in which six students living together contested a nuclear-family zoning rule on the theory that the regulation impinged their rights of association.¹⁸⁷ The families responded that their own freedom of association promoted their interests in the nuclear family.¹⁸⁸

Radin finds this case challenging because our legal system "lacks a convincing theory of group rights," and because personhood interests can be found on both sides. Neither claim is particularly strong, however, because the students had not lived in the community long enough to establish deep "roots" and the families had "ample opportunities in our culture to reinforce and express" their traditional family lifestyle.¹⁸⁹

Though *Village of Belle Terre* does not ultimately provide a satisfactory example of group claims to personhood, Radin leaves the door open for a "minority group or some group outside the mainstream of American culture, [whose] claims would seem stronger because more clearly necessary to their being able to

186. Cf. Dan Gildon, *Location, Location, Location: Forest Service Administration of the Recreation Residence Program*, 28 *ECOLOGY L.Q.* 993, 1014-17 (2002) (applying Radin's "personhood" theory to a certain category of "permit holders" on the public lands).

187. Radin, *supra* note 22, at 1012 (describing *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974)).

188. *Id.*

189. *Id.* at 1013.

constitute themselves as a group and hence as persons within that group."¹⁹⁰

Yet, even though she allows for the possibility of group rights to property, Radin's work ultimately focuses on the individual. She contends that the group is like the "home" and other external "contexts" that further self-individuation.¹⁹¹ These are places where we develop the characteristics and aspirations that define us as individual people.

I am, by contrast, primarily concerned with group's *collective* interests in property.¹⁹² The need for theoretical and practical work along these lines is demonstrated by the sacred sited jurisprudence described above. The First Amendment protects individual religious belief from governmental interference. But traditional American Indian religions are not typically about individual belief¹⁹³ (or, as Radin might put it, "personal individuation").¹⁹⁴ As Vine Deloria said, "[t]here is no salvation in tribal religions apart from the continuance of the tribe itself."¹⁹⁵ And the continuance of the tribe itself often requires ongoing access to sacred sites for spiritual activities.¹⁹⁶ Thus tribes need a legal theory that will

190. *Id.*

191. See RADIN, CONTESTED COMMODITIES, *supra* note 23, at 56.

192. For scholarship considering Radin's property and personhood theory in group claims to "cultural property," see Madhavi Sunder, *Property in Personhood*, in RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE 164 (Martha M. Ertman & Joan C. Williams eds., 2005) (applying property and personhood theory to claims of "subordinated groups" for intellectual property rights to songs, folklore, agricultural knowledge, and religious symbols); John Moustakas, Note, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179 (1989) (using Radin's work to develop a "[cultural] property for grouphood" theory in which loss of national artistic patrimony, linked to group identity, causes pain for dispossessed groups, as in the case of the Greek Parthenon Marbles held in the British Museum following the spoliation of Greece); Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 569-70 (1995) (defining cultural property as tangible objects and intangible expressions that capture a group's identity). But see Eric K. Posner, *The International Protection of Cultural Property: Some Skeptical Observations*, 8 CHI. J. INT'L L. 213, 214-15 (2007) (challenging the notion that cultural property is "distinctive or special and therefore different from ordinary property").

193. See Kristen A. Carpenter, *Considering Individual Freedoms Under Tribal Constitutional Law*, 14 KAN. J.L. & PUB. POL'Y 561, 571-73 (2005).

194. Cf. RADIN, CONTESTED COMMODITIES, *supra* note 23, at 56.

195. See VINE DELORIA JR., GOD IS RED: A NATIVE VIEW OF RELIGION 194 (1992).

196. See Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1034 (9th Cir. 2007). ("The Hopi believe that pleasing the *Katsinam* on the [San Francisco] Peaks is crucial to their livelihood. Appearing in the form of clouds, the *Katsinam* are responsible for bringing rain to the Hopi villages from the Peaks. The *Katsinam* must be treated with

express how their survival depends, in part, on protection for tribal relationships with sacred sites.

Of course the “glaring omission of groups from dominant legal theory” (as Avi Soifer has put it) is not just a problem for American Indians.¹⁹⁷ Even in the relatively narrow context of sacred sites cases, other groups clamor for a voice. Non-Indian religious communities, citizens of local towns, and recreation groups complain that they too are disenfranchised in the legal proceedings surrounding sacred sites.¹⁹⁸ Thus we need a better way to include groups in the sacred sites process—and as a first step, we probably need a better way of conceptualizing these groups in terms of their legal interests. And while the remainder of this Article will focus on such group interests in the sacred sites context, developing a coherent way to talk about collective interests in land may have broad implications in our pluralistic society.

2. *Conceptualizing peoples and peoplehood.*

Following the lead of political theorists, I propose using the terminology of peoples and peoplehood to identify group interests that have a role to play in contemporary law and policy. In common parlance, the term “people” connotes a collective association of individuals based on political affiliation, religion, culture, language, or other factors.¹⁹⁹ This broad definition suggests national groups like the American, Iraqi, or Israeli people. It also includes subnational groups like the Mormon, Orthodox Jewish, or Navajo people within the United States; the Sunni, Shiite, or Kurdish people in Iraq; and the Jewish or Arab people in Israel.

Beyond these common meanings of the terms, scholars advance several definitions of peoples and peoplehood. Rogers Smith defines “a political people” as a group that is “a potential adversary of other forms of human association, because its proponents . . . assert that its obligations legitimately trump many

respect, lest they refuse to bring the rains from the Peaks to nourish the corn crop.”).

197. See SOIFER, *supra* note 3, at 1.

198. See generally William Perry Pendley, *The Establishment Clause and the Closure of “Sacred” Public and Private Lands*, 83 DENV. U. L. REV. 1023 (2006) (discussing non-Indian opposition to sacred sites accommodations).

199. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 860 (10th ed. 1993).

of the demands made on its members in the name of other associations."²⁰⁰ Peoples may be constituted along national, religious, cultural, ethnic, racial, or other lines. Smith recognizes the following as examples of peoples: China, the United States, Belgium, the Navajos, Puerto Rico, Ecovillages, Quebec, Wales, Antioquia, Brooklyn, Hong Kong, Jehovah's Witnesses, the AFL-CIO, Greenpeace, and Oxfam.²⁰¹

Under Smith's model, some groups or associations are not peoples at all. The *political* nature of his model excludes, for example, "football clubs, singing groups, and Girl Scout troops."²⁰² Although members might feel "great loyalty" to such groups, "neither the leaders nor members of such associations are ever likely to assert seriously that the obligations of those memberships justify them in violating governmental laws."²⁰³

As the Article will argue below, Indian tribes meet Smith's strict definition of political peoples and in this way, they are distinct from other groups in the United States. Tribes, like the federal and state governments, are political "sovereigns."²⁰⁴ Federal decision-makers must recognize the special status of Indians under the Constitution, treaties, and trust relationship.²⁰⁵ Yet, as a matter of good administrative policy, I will ultimately call for the broad inclusion of all groups that have a legitimate stake in the land management process and also self-identify as peoples, even those that may lack political autonomy.²⁰⁶ Ethnic, cultural, and religious peoples may have important roles to play in the land management process, even if they are not ultimately empowered to bring claims

200. See SMITH, *supra* note 48, at 20.

201. *Id.* at 21.

202. *Id.* at 20.

203. *Id.* My article does not focus on the extent to which peoplehood causes groups to violate property laws, but other scholars have persuasively identified individual and collective examples of property law-breaking as dynamic means of transforming systematic entitlements and pursuing justice for "have-nots." See Eduardo Moises Penalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PENN. L. REV. 1095 (2007).

204. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L. J. 1, 1 (1997) ("Today, in the United States, we have three types of sovereign entities—the Federal government, the States, and the Indian tribes.").

205. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 10 (1831) ("The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. . . . marked by peculiar and cardinal distinctions which exist nowhere else.").

206. See *infra* Part IV (discussing the implementation of property and peoplehood theory in the administrative process).

as legal sovereigns.

C. American Indian Peoplehood

Much in the way that Radin's discussion of "personhood" invokes what is most essential to the individual human condition, "peoplehood" refers to the qualities that define a group and inspire individuals to participate in the collective. In common parlance, peoplehood is the state of being a people or the sense of belonging to a people.²⁰⁷ A more nuanced definition is offered by Professor John Lie who identifies peoplehood as "an inclusionary and involuntary group identity with a putatively shared history and distinct way of life."²⁰⁸ Peoplehood is a shared consciousness and commitment to a group characterized by "common descent—a shared genealogy or geography" as well as "contemporary commonality, such as language, religion, culture, or consciousness."²⁰⁹ It is a sense of peoplehood that prompts people to identify as American or Arab or Navajo and to comport their lives according to the values and behaviors of those peoples. This collective sense of identity, belonging, and participation will be explicated in the specific context of American Indian peoplehood.

Tribes have long viewed themselves in terms akin to "peoples" and "peoplehood." In the Cherokee language, for example, one of the terms used internally to reference Cherokees is "*aniyunwiya*," which translates literally as "people" and figuratively as "the principal people."²¹⁰ In external relations, tribes historically viewed themselves as entities capable of entering into diplomatic relationships with one another long before the arrival of Europeans.²¹¹ That is, tribes related to one another as distinct, political, and collective "peoples." For example, early treaties and agreements exist among the Oneidas, Onondagas, Mohawks, Senecas, and Cayugas, the affiliated tribes of the Iroquois Confederacy.²¹² Today, too, American Indians continue to affiliate along tribal lines—as members of the Cherokee Nation, Hopi

207. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 871 (1989).

208. See LIE, *supra* note 48, at 1.

209. *Id.*

210. See PRENTICE ROBINSON, EASY TO USE CHEROKEE DICTIONARY (1996).

211. See ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW & PEACE 1600-1800, 40-82 (1997).

212. See *id.*

Tribe, or Acoma Pueblo. Therefore their sense of "peoplehood" is usually expressed in those tribal-specific terms rather than in the more general sense of being "Indian."²¹³

Tribes' self-identification as peoples corresponds with their status under the body of Federal Indian Law. Treatment of Indians as separate political peoples dates back to European conquest and the treatment of Indians as "nations" with the capacity to enter treaties as a matter of international law.²¹⁴ After the Revolutionary War, the United States stepped into the shoes of its predecessors and continued to interact with Indian tribes as separate polities. Within the new constitutional scheme, Indian tribes were determined to be "domestic dependent nations" rather than foreign states or states of the union.²¹⁵ These nations within the nation retain political sovereignty over their land base and citizenry, subject only to the power of Congress to abrogate these reserved rights of self-governance.²¹⁶ As a matter of their dependency, tribes were held to have lost rights to enter into treaties with foreign nations and alienate their property to any entity or person other than the federal government.²¹⁷

Even though the Supreme Court continues to limit tribal sovereignty today, American Indian peoplehood still includes sovereignty over its members and territory, and a government-to-government relationship with the United States.²¹⁸ As the Supreme Court has held, Indian tribes are "'a separate people' possessing 'the power of regulating their internal and social relations.'"²¹⁹ This

213. See generally EVA MARIE GARROUTE, *REAL INDIANS: IDENTITY AND THE SURVIVAL OF NATIVE AMERICA* (2003). Cf. HAZEL W. HERTZBERG, *THE SEARCH FOR AN AMERICAN INDIAN IDENTITY: MODERN PAN-INDIAN MOVEMENTS* (1982) (discussing modern pan-Indian identity).

214. See Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 52-74 (1996) (discussing the historical treatment of Indian nations under international law).

215. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 10 (1831). See generally Hope M. Babcock, *A Civic-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-Envisioned, Reinvigorated, and Re-Empowered*, 2005 UTAH L. REV. 443 (discussing the contemporary meaning of Indian nations' historically-delineated legal status).

216. *United States v. Mazurie*, 419 U.S. 544, 557 (1975) ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . .").

217. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 573 (1823).

218. See generally Sarah Krakoff, *The Virtues and Vices of Sovereignty*, 38 CONN. L. REV. 797 (2006) (describing the contours of tribal sovereignty).

219. *Mazurie*, 419 U.S. 544, 557.

political status also has contemporary ramifications for the tribes' external relations. Like the groups Smith defines as "peoples," American Indians quite often find themselves at odds with other associations, most notably states and the federal government, as a result of their obligations to the Indian tribe. This singularity is illustrated by Congress's enactment of a voluminous body of law "singling [Indians] out for special treatment" in a way that would otherwise be unconstitutional under the strict scrutiny standard.²²⁰

Indian tribes also manifest non-political traits commonly attributed to peoples. Each tribe typically maintains its own religion, culture, and language, though they often share traditions with other tribes in a geographic or linguistic region. Though these are dynamic, continually changing elements of peoplehood, most tribes trace their current religion, culture, and language to pre-contact times. Reflecting the historical depth of Indian identity, as well as Indian people's connection to a land base, Anaya offers the following specialized definition of "indigenous peoples":²²¹

They are indigenous because their ancestral roots are embedded in the lands in which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity. Furthermore, they are peoples to the extent they comprise distinct communities with a continuity of existence and identity that links them to the communities, tribes, or nations of their ancestral past.²²²

American Indian Studies scholar Tom Holm postulates four attributes of peoplehood that have ensured the survival of Indian tribes during periods of conquest, colonization, and forced assimilation. These comprise: (1) maintaining language, (2) understanding place, (3) keeping particular religious ceremonies alive, and (4) perpetuating a sacred history. Though he does not explicitly include it in his matrix, Holm also writes extensively

220. *Morton v. Mancari*, 417 U.S. 535, 552 (1974) ("Literally every piece of legislation dealing with Indian tribes and reservations . . . single[s] out for special treatment a constituency of tribal Indians living on or near reservations. If these laws . . . were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased . . .").

221. See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 100-06 (2004).

222. *Id.* at 3.

about a fifth element essential to American Indian peoplehood: retaining rights as political sovereigns.²²³

In the final analysis, all of these attempts to define Indian peoplehood may be truly academic, because "indigenous peoples have insisted on the right to define themselves."²²⁴ Yet, it may be helpful for advocates to link tribal interests in property to "recognized indicia of [people]hood."²²⁵ Applying Holm's model suggests that sacred sites are deeply related to American Indian peoplehood.²²⁶ Though dozens of examples are available, I will discuss two that are particularly relevant to this Article—the Navajo and Hopi relationships with San Francisco Peaks, the sacred site at issue in the *Navajo Nation* case.

The relationship between tribal languages, religions, and peoplehood is an intimate one.²²⁷ Various prayers, songs, and healing ceremonies can only be performed in the indigenous tongue and the survival of tribal religions depends on passing the language down to future generations.²²⁸ As tribes revitalize their cultures and communities, language and religion are mutually reinforcing aspects of tribal worldviews and ritual practices. Sacred places are known to the tribal community by indigenous names that carry with them an entire set of meanings, instructions, and values.²²⁹ In the Navajo language, the San Francisco Peaks are

223. TOM HOLM, *THE GREAT CONFUSION IN INDIAN AFFAIRS: NATIVE AMERICANS & WHITES IN THE PROGRESSIVE ERA* xiv, xvii (2005).

224. See Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 663 & n.4.

225. See Radin, *supra* note 22, at 979 (identifying property theories that link "stronger property claims to recognized indicia of personhood").

226. See Rebecca Davis, *Opportunistic Hate Crimes Targeting Symbolic Property: When Free Speech Is Not Free*, 10 J. GENDER RACE & JUST. 93, 103 (2006) (arguing that religious symbols representative of group identity are associated with personhood to the degree that destruction of them "constitutes, at some level, a death of a part of the victim").

227. See, e.g., Mark A. Michaels, *Indigenous Ethics and Alien Laws: Native Traditions and the United States Legal System*, 66 FORDHAM L. REV. 1565, 1571 (1998) ("Because Native religions depend on the oral tradition for their transmission, the death of a language often means the death of a religion. Stories and ceremonies are at the core of most, if not all, Native religions, and these stories and ceremonies lose their context and meaning when translated.").

228. See WILMA MANKILLER, *EVERY DAY IS A GOOD DAY: REFLECTIONS BY CONTEMPORARY INDIGENOUS WOMEN* 37 (2004) ("You have to be able to speak Cherokee to be a Cherokee medicine person. How can you say the right words if you can't speak Cherokee?" (quoting Florence Soap)).

229. Cf. MERON BENVENISTI, *SACRED LANDSCAPE: THE BURIED HISTORY OF THE HOLY*

"*Doko'oo'sliid*", or "Shining on Top." Home of the Sacred Abalone Shell Woman, *Doko'oo'sliid* is a name that reflects the Peaks snow-covered appearance and their role in sustaining Navajo life.²³⁰

When it comes to understanding place, the San Francisco Peaks plays an important role in Navajo peoplehood. The Peaks are one of four mountains marking *Dinetah*, the sacred Navajo homeland which is itself is a sacred concept. From the time of their creation, the Navajo people have had a spiritual obligation to stay within their homeland, care for it, and revere their sacred mountains. Accordingly, the Peaks are greeted with daily prayer songs referencing the mountain as "mother" and "leader."²³¹ The Navajo writer Luci Tapahonso said that the four mountains—Blanca Peak, Mount Taylor, Hesperus Peak, the San Francisco Peaks—"were given to us to live by. . . . These mountains and the land keep us strong. From them, and because of them, we prosper. This is where our prayers began."²³²

The San Francisco Peaks are integral to keeping alive a number of religious ceremonies and an entire ceremonial way of life.²³³ Navajo families keep bundles with elements collected from the four sacred mountains and use these in prayers directed toward the Peaks.²³⁴ Some medicine men conduct pilgrimages, gathering plants from the Peaks and relying on their purity for medicinal purposes.²³⁵ They use these medicines in Blessingway and other healing ceremonies.²³⁶ These ceremonies link the spiritual and

LAND SINCE 1948 (2000) (chronicling the journey of the son of an Israeli cartographer who literally "remapped" Palestine, replacing Palestinian villages and site with Israeli names, as part of the process of transforming an Arab landscape into an Israeli state).

230. See S.J. Wilson, *Sacred Mountain Prayer Run a Prayer for the Sacred*, NEWS FROM INDIAN COUNTRY, June 25, 2007, http://indiancountrynews.net/index.php?option=com_content&task=view&id=695&Itemid (reporting on Navajo Sam Tso explaining that *Doko'oo'sliid* in Navajo philosophy means the breath of life, of good thoughts).

231. *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1035 (9th Cir. 2007). The use of these terms reflects the "personification" of Indian sacred sites. See also VINE DELORIA JR., *FOR THIS LAND: WRITINGS ON RELIGION IN AMERICA* 131 (1999) ("[T]he essence of the Indian attitude toward peoples, lands, and other life forms is one of kinship relations in which no element of life can go unattached from human society. Thus lands are given special status because they form a motherhood relationship with the peoples who live on them.").

232. LUCI TAPAHONSO, *BLUE HORSES RUSH IN: POEMS & STORIES* 42 (1997).

233. *Navajo Nation*, 479 F.3d at 1035-36.

234. *Id.*

235. *Id.*

236. *Id.* at 1036.

physical health of Navajo people directly to the Peaks.²³⁷

For Navajo people, the Peaks reflect sacred histories, both ancient and modern. The mountain connects Navajos with their very origins.²³⁸ In the Navajo creation story, the first woman, Changing Woman, lived on the Peaks and experienced her *kinaalda* coming-of-age ceremony there.²³⁹ She then gave birth to twins who are ancestors of the Navajo people, and young Navajo women continue to celebrate their own *kinaalda* ceremonies today.²⁴⁰ In modern historical times, the federal government forcefully relocated the Navajos from their homeland to a prison camp at Bosque Redondo.²⁴¹ The four year ordeal, stretching from 1864 to 1868, became known as the "Long Walk," a defining time in Navajo history. During the Long Walk, the Navajo suffered physical and emotional harms, longing to return to the traditional homeland cradled by the San Francisco Peaks and the other three sacred mountains.²⁴²

The Long Walk period reflects the importance of the Peaks to Navajo sovereignty. The Navajos' attachment to their sacred lands was one of the main factors inspiring their political resistance to the federal government's relocation practice.²⁴³ The Navajos prevailed (to some extent) and in 1868 negotiated a treaty restoring their rights to occupy, govern, and live as Navajos on a reservation within their traditional territory.²⁴⁴ As elder Frank Goldtooth explained, "We now live within our four great sacred mountains, where our . . . Holy People want us to live, but most of the mountains themselves were taken away from us by the white

237. *Id.* at 1035-36.

238. See PAUL ZOLBROD, DINE BAHANE: THE NAVAJO CREATION STORY 23 (1991) (arguing that references to San Francisco Peaks in Navajo creation story were "proof that it would be sacrilegious" to expand ski facilities).

239. *Navajo Nation*, 479 F.3d at 1035.

240. See *id.*

241. See generally RUTH ROESSEL, NAVAJO STORIES OF THE LONG WALK PERIOD (1973).

242. See *id.* at 40-41 (quoting Navajo elder Howard W. Gorman). To the extent that many sacred sites are identified in tribal origin stories and form a crucial part of the tribe's "homeland," an interesting project might be to conceptualize sacred sites as "homes" for tribal cultures. As a number of scholars have noted, our legal system offers solicitous treatment of homes, and people's related interests in security, privacy, and liberty. See, e.g., D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255 (2006).

243. ROESSEL, *supra* note 241, at 153 (quoting Navajo elder Frank Goldtooth).

244. Treaty Between the United States of America and the Navajo Tribe of Indians, U.S.-Navajo, June 1, 1868, 15 Stat. 667.

people.”²⁴⁵ Today, Navajos maintain a separate government, land base, religious and cultural traditions, and language—and some continue to live in sight of the Peaks.²⁴⁶ As one Navajo man explained, San Francisco Peaks “is where the Holy Ones emerged to this world. The soil guides our people, it affects how we treat them, it’s how we treat ourselves.”²⁴⁷ The tribe’s relationship with San Francisco Peaks or *Doko’oo’sliid*—maintained against many governmental attempts to sever it—is a formative element of Navajo peoplehood.²⁴⁸

For the Hopi people, the Peaks are known as *Nuvatukaovi* or “the place of snow on the very top” and they are the center of Hopi religious life.²⁴⁹ After emerging into this world, the Hopi clans journeyed to the Peaks and entered into a spiritual covenant with *Ma’saw*, a spiritual presence that directed them to care for the land.²⁵⁰ Today, too, “the Peaks are the place where the Hopi direct their prayers and thoughts, a point in the physical world that defines the Hopi universe and serves as home to the *Katsinam* [popularly known as “kachinas” in English], who bring water, snow, and life to the Hopi people.”²⁵¹ These are not abstract sentiments for the Hopi people, but are rather infused in Hopi life. Water and fir branches gathered from the Peaks are used in ceremonies to welcome visiting *Katsinam* when they migrate to the Hopi mesas in early spring.²⁵² The *Katsinam* stay through the corn planting season, bringing water to the crops, and then return to the Peaks in July.²⁵³ Hopi people show respect to the Peaks by maintaining numerous shrines there, conducting pilgrimages to the Peaks, praying toward the Peaks, and singing songs focused on them.²⁵⁴ These practices reflect the Hopi ceremonial and planting

245. See ROESSEL, *supra* note 241, at 153 (quoting Navajo elder Frank Goldtooth).

246. See, e.g., Wilson, *supra* note 230 (describing a Navajo activist who “lives within the ancestral boundaries of the Navajo, within sight of *Doko’oo’sliid*”).

247. See Sararesa Begay, *Navajos, Hopis Speak Against Snowbowl Plan*, NAVAJO TIMES, Dec. 12, 2002, available at http://www.nathpo.com/News/Sacred_Sites/News-Sacred_Sites42.htm (quoting Navajo Adair Klopfeistein).

248. BETWEEN SACRED MOUNTAINS: NAVAJO STORIES AND LESSONS FROM THE LAND 2 (Sam Bingham et al. eds., 1982) (situating Navajo life between the four sacred mountains).

249. Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1034 (9th Cir. 2007).

250. See *id.*

251. Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024 (9th Cir. 2007).

252. *Id.* at 1035.

253. *Id.* at 1034.

254. See *id.*

cycles, Hopi values and responsibilities, and Hopi reliance on rain and corn for survival.²⁵⁵

The Navajo and Hopi experiences with San Francisco Peaks suggest that tribal relationships with sacred sites are essential to Indians' ability to survive as "peoples."

D. *Peoplehood as a Normative Concept*

If we can accept that Indians are peoples and sacred sites are integral to Indian peoplehood, there remains the question of why protecting peoples and peoplehood is a good idea. In his important work, *The Law of Peoples*, John Rawls articulates several reasons for analyzing the interests of "peoples."²⁵⁶ These boil down to his view that contemporary liberal society is comprised of various political groups, each of which must recognize the others as legitimate—even if their values differ within acceptable limits of liberalism and decency—in order to effectuate just democratic ideals.²⁵⁷

Rawls' goal is to develop principles for the operation of a "just democratic society."²⁵⁸ This task, he argues, is best informed by a focus on "peoples" and analysis of the extent to which they meet democratic ideals and practices.²⁵⁹ In Rawls' vision of a "realistic utopia"²⁶⁰ there exist "liberal [democratic] peoples" who have "a reasonably just constitutional democratic government that serves their fundamental interests; citizens united by . . . common sympathies; and finally, a moral nature."²⁶¹ In addition to "liberal peoples," there may also be "decent peoples" whose ideals and practices do not meet the standard of liberal democracies but are nonetheless welcomed into the society of peoples because they are non-aggressive entities, ultimately pursuing peace through legitimate means and because they extend human rights to their members.²⁶²

Such liberal (or decent) peoples pursue several legitimate

255. See *id.* at 1034-35.

256. See RAWLS, *supra* note 49, at 12.

257. See *id.*

258. *Id.* at 26.

259. *Id.* at 27.

260. *Id.* at 16.

261. *Id.* at 23.

262. *Id.* at 65.

interests: “[t]hey seek to protect their territory, to ensure the security and safety of their citizens, and to preserve their free political institutions and the liberties and free culture of their civil society.”²⁶³ In Rawls’ realistic utopia, peoples accord one another “respect and recognition to other peoples as equals.”²⁶⁴ Though there may be inequalities between peoples, they practice a relationship of “reciprocity” involving cooperation, mutual acceptance, and adherence to the Law of Peoples.²⁶⁵

Federal law already recognizes that the legal protection of American Indian peoplehood is crucial to the operation of a just, democratic society. Historically, the United States signed treaties with Indian nations that recognized their existence, territorial sovereignty, and ongoing right to exist as political entities.²⁶⁶ A foundational principle of federal Indian law is that the United States has an obligation to protect Indian tribes against other governments and individuals.²⁶⁷ In its common law sense, this “trust responsibility” embodies the national obligation to exercise the highest duty of care for Indian tribes.²⁶⁸ The federal government also has numerous specific statutory duties to care for Indian health, education, child welfare, cultural patrimony, natural resources, economic development, language retention, lands, and religious freedom—many of the aspects comprising tribal peoplehood.²⁶⁹

The United States’ treatment of Indian nations is primarily important as a matter of Indian wellbeing and survival. Many tribes continue to suffer challenges of recovering from conquest and colonization, and thus rely on the nation’s long-standing promises to support their communities. Secondarily, the United States’

263. *Id.* at 29.

264. *Id.* at 35.

265. *Id.*

266. See generally INDIAN TREATIES 1778-1883 (Charles J. Kappler ed., 1996); VINE DELORIA JR., BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE (1974); VINE DELORIA JR. & DAVID E. WILKINS, TRIBES, TREATIES, AND CONSTITUTIONAL TRIBULATIONS (1999).

267. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831).

268. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) (maintaining that in establishing a treaty with the Indians the government has charged itself with the “moral obligations of the highest responsibility and trust,” and that its conduct should therefore be judged by “the most exacting fiduciary standards”).

269. See NELL NEWTON ET AL., COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, ch. 22 (2005).

treatment of Indian nations offers an important diagnostic test of the country's democratic ideals. As Felix Cohen, the founding father of Federal Indian Law,²⁷⁰ famously said:

The Indian plays much the same role in our American society that the Jews played in Germany. Like the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall of our democratic faith.²⁷¹

This statement echoes Rawls propositions about the role of peoples in just democratic societies. A society's treatment of other peoples, particularly disempowered peoples, reflects that society's commitment to the rule of law, freedom, and democracy itself. Thus, it is for the sake both of Indian tribes and American society itself that the law should operate to protect Indian peoples. Unfortunately, when federal policy threatens Indian interests in sacred sites, it also threatens the wellbeing and survival of Indian peoples, and fails to advance our best democratic ideals.

E. *Democratic Ideals at Sacred Sites*

Sacred sites disputes present an opportunity to advance the democratic ideals of our nation by recognizing and addressing the interests of peoples with interests in those sites. The seeds of justice, decency, and morality already exist in our federal land use law and policy, as I will describe in greater detail below. But our Supreme Court has stymied realization of these democratic ideals at sacred sites. The *Lyng* case perpetuates the outmoded idea that the federal government is the only party that ultimately matters in sacred sites analysis, because it wields both political sovereignty and property ownership over the public lands, and such power is not limited by the First Amendment's protections for religious belief.²⁷² This approach obviates consideration of the interests of

270. See Philip P. Frickey, *Transcending Transcendental Nonsense: Toward a New Realism in Federal Indian Law*, 38 CONN. L. REV. 649, 649-50 (2006) (discussing the centrality of Cohen's work to the field); see also DALIA TSUK MITCHELL, *ARCHITECT OF JUSTICE: FELIX S. COHEN AND THE FOUNDING OF AMERICAN LEGAL PLURALISM* (2007).

271. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW v (Rennard Strickland, et al. eds., 1982).

272. See *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 453 (1988).

"peoples," focusing exclusively on the power of the state vis à vis individuals.

Beyond the general observation that *Lyng* obviates the concerns of peoples, Rawls' framework has even more specific implications for sacred sites disputes. The Law of Peoples sets forth two norms with relevance to the sacred sites discussion – these include respect for other peoples' territorial boundaries and reasonable religious pluralism.²⁷³ On the first point, liberal or decent peoples "cannot make up for their irresponsibility in caring for their land and its natural resources by conquest in war or by migrating into other people's territory without their consent."²⁷⁴ Moreover, a fundamental principle of liberal democracy is "reasonable pluralism."²⁷⁵ That is, free democratic institutions, by their very nature, allow the development of conflicting doctrines, both religious and secular.²⁷⁶ By extending mutual respect and cooperation, peoples can tolerate one another's religions, even if they do not espouse the same worldview.²⁷⁷ This is the only way to ensure that all citizens enjoy freedom of conscience and worldview.²⁷⁸

Unfortunately, the current state of federal sacred sites policy perpetuates the United States' historical failings to respect Indian peoples' territory and religions. Justice O'Connor seemed to trumpet these failings when she wrote in *Lyng*: "Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land."²⁷⁹ In a previous article, I criticized this holding for its treatment of the government as an owner with near absolute rights over the public lands.²⁸⁰ But Rawls' work suggests still additional criticisms. These include O'Connor's veiled references to, and perpetuation of, the history of Indian land dispossession and religious oppression.

To put it in Rawls' terms, the federal government owns many

273. See RAWLS, *supra* note 49, at 39, 124.

274. *Id.* at 39.

275. *Id.* at 124.

276. See *id.*

277. See *id.*

278. See *id.* at 151.

279. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 453 (1988).

280. See Carpenter, *supra* note 46, at 1092-93.

sacred sites only because it violated the Law of Peoples: in many cases, it either engaged in literal conquest or migrated into Indian people's territory without their consent.²⁸¹ Tribes have lost title to sacred sites through outright conquest,²⁸² forced relocations,²⁸³ treaty violations,²⁸⁴ allotment of Indian lands,²⁸⁵ and other methods—and federal law has legitimized almost all of these events as transferring good title.²⁸⁶ Often the government created policies to take Indian lands with the explicit purpose of destroying the essential connection between tribal cultures and traditional land bases,²⁸⁷ and paving the way for white civilization.²⁸⁸ Even if some land sales by treaty could be described as fair, arms-length transactions, we are still left with the question of whether the government's ownership of sacred sites should include the legal right to destroy them when they remain so important to Indian peoples.²⁸⁹

281. Cf. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 589-91 (1823) (holding that although the Law of Nations recognized the property rights of conquered peoples, that law was "incapable of application" to American Indians).

282. See Wenona T. Singel & Matthew L.M. Fletcher, *Power, Authority, and Tribal Property*, 41 TULSA L. REV. 21, 28-33 (2005) (discussing instances of dispossession of Indian lands accomplished by government-sanctioned "brute physical force," and offering the example of a Michigan Odawa cemetery lost through "the mixture of apparent legal authority and physical power").

283. See, e.g., *Sequoyah v. Tenn. Valley Auth.*, 620 F.2d 1159, 1164 (6th Cir. 1980) (denying First Amendment claim regarding flooding of Cherokee sacred site, despite recognition that Cherokees' lack of any property interest in the site "should not be conclusive in view of the history of the Cherokee expulsion from Southern Appalachia followed by the Trail of Tears to Oklahoma and the unique nature of the plaintiffs' religion").

284. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 409, 416-17 (1980) (ruling the taking of treaty-guaranteed lands including the sacred Black Hills, in the absence of a showing of Congressional good faith, compensable under the Fifth Amendment).

285. See THE NATIVE AMERICANS OF THE SOUTHEAST (Turner Broadcasting System Films 1992) (discussing tribal "stomp grounds," where ceremonial dances are held, were lost during allotment period when tribal lands were divided up and title granted to Indian and non-Indian individuals).

286. See Singel & Fletcher, *supra* note 282, at 22, 35 (arguing that the dispossession of Indian lands was accomplished through "the exercise of legal authority in accordance with the letter of federal law").

287. See, e.g., President Theodore Roosevelt, Message of the President of the United States to the First Session of the Fifty-Seventh Congress, 103 Cong. Rec. 1257 (Dec. 3, 1901) ("The General Allotment Act is a mighty pulverizing engine to break up the tribal mass. It acts directly upon the family and the individual.").

288. See BURTON, *supra* note 47, at 93.

289. Cf. Joseph William Singer, *After the Flood: Equality and Humanity in Property*

The historical treatment of Indian religious freedoms is equally troubling. To put this history in Rawlsian terminology: the federal government's historic intolerance of Indian religions has long undermined the "fact of reasonable [religious] pluralism" which is a "basic feature of liberal democracy."²⁹⁰ In the Nineteenth and Twentieth centuries the United States government undertook specific and sustained practices designed to eradicate American Indian religious practices.²⁹¹ These included United States Army massacres of people engaged in religious dances, federal laws criminalizing Indian religious practices, federally funded programs assigning Christian missionaries to reservations, the removal of Indian children from their families to Christian boarding schools, and other programs tied closely to the federal project assimilating American Indians.²⁹² Congress officially repudiated the federal assimilation policy in 1934 but many of its ramifications for Indian religious freedoms have been difficult to remedy.

It is difficult to read *Lyng* without hearing echoes of these earlier policies. *Lyng* could be read to hold that, although there is no longer a government-wide policy of converting Indians to Christianity, the First Amendment only protects Indians who worship in what Justice Brennan calls a "Western" religious tradition based on an individual belief system.²⁹³ And though there is no longer a government-wide policy of destroying Indian religions, agencies can carry out this practice so long as it occurs

Regimes, 52 LOY. L. REV. 243, 295 (2006) ("The question is whether an owner can claim to be entitled to exercise that much power over other human beings. Even if one thinks the process by which someone acquired property was just because it followed from a series of voluntary transactions, a resulting imbalance in the distribution of property may create a form of social life that gives some people the power to rule over others.").

290. See RAWLS, *supra* note 49, at 124, 149.

291. See generally John Rhodes, *An American Tradition: The Religious Persecution of Native Americans*, 52 MONT. L. REV. 13 (1991).

292. See generally 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, 787-805 (1997) (recounting various acts by federal government and religious institutions, often acting together, that suppressed Indian religions).

293. See *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 460-66 (1988) (Brennan, J., dissenting) (distinguishing between protected Western religions based on an individual belief system and unprotected indigenous religious based on land use); see also BURTON, *supra* note 47, at 293 (arguing that in *Lyng* and *Smith*, "the anti-pluralist majority [of the Supreme Court] regularly accords indigenous beliefs a constitutional status far inferior to that of established Euro-American religions").

pursuant to their land management authority.²⁹⁴ These holdings are problematic beyond the facts of *Lyng*. As Rawls put it, even if various religious groups “might prefer that the others not exist, the plurality of sects is the greatest assurance each has of its own equal liberty.”²⁹⁵ By legitimizing the destruction of an Indian religion, the *Lyng* opinion thus threatens the liberty of other religions and undermines liberal democratic principles.²⁹⁶

In short, *Lyng* specifically violates the Law of Peoples by failing to respect Indian people’s territorial boundaries or religious liberties. While Rawls’ regime may be theoretical, it is supported by positive law. I have highlighted the tendency of our domestic American law to privilege individual rights. Yet our legal system recognizes the legal interests of certain collective entities with cognizable claims to religion and property. Churches representing congregations assert religion claims under the First Amendment. Corporations representing shareholders often assert property claims Fifth Amendment claims.²⁹⁷ The Supreme Court treats corporations as “persons” under the Fourteenth Amendment.²⁹⁸ Among other American groups, Indian tribes seem to be particularly unsuccessful in asserting religious²⁹⁹ and property³⁰⁰

294. See *Lyng*, 485 U.S. at 476.

295. See RAWLS, *supra* note 49, at 124. Onondaga leader Oren has said, “[Europeans] came over here for religious freedom but we know they came over here to occupy lands, to colonize lands. In their search for religious freedom, we lost ours.” THE NATIVE AMERICANS: THE NATIONS OF THE NORTHEAST (Turner Broadcasting Systems Films 1994).

296. Rawls calls for mutual “toleration” and “reconciliation” of religions but stops short of “ensur[ing] the spiritual well-being” of peoples. RAWLS, *supra* note 49, at 126-27. I would argue that toleration requires protection for Indian sacred sites, but the *Lyng* majority seemed to suggest that it only requires the government to refrain from coercing religious belief. It is not clear where Rawls would come out on this question. Professor Noah Feldman has considered other religious questions implicating the space between the First Amendment’s Free Exercise and Establishment Clauses. See e.g., FELDMAN, *supra* note 45 (calling for the accommodation of religious symbols in public spaces but restraint on government funding of religious organizations).

297. See, e.g., *Church of Lukumu Bablu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (discussing a church that brought cognizable Free Exercise claim against city regulations against ritual slaughter of animals); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (holding that an EPA regulation requiring disclosure of confidential company data would amount to a taking under the Fifth Amendment).

298. See *Santa Clara County v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1889) (holding that corporations are persons deserving protection under the Fourteenth Amendment).

299. See, e.g., L. Scott Smith, *From Promised Land to Tower of Babel: Religious Pluralism and the Future of the Liberal Experiment in America*, 45 BRANDEIS L.J. 527, 557-62 (2007) (discussing religious pluralism) and arguing the Supreme Court generally applies the liberal position of “neutrality” rather than support for any religious practice, but even

rights. This is true even though federal common law, statutory law, and treaties all require the government to protect Indian lands from the intrusions of states and individuals³⁰¹ and the American Indian Religious Freedom Act make its federal policy to “protect and preserve Indian religions.”³⁰² The law would appear to guarantee Indians protections beyond those set forth in the Constitution, but the practical reality is that they enjoy less property and religious freedom than do other American individuals and groups.³⁰³

In international law, there is still more specific support for applying the Rawlsian principles to indigenous peoples. On September 13, 2007, after twenty-five years of negotiation, the United Nations passed the Declaration on the Rights of Indigenous Peoples explicitly recognizing indigenous groups as “peoples” under international law and thus entitled to the Declaration’s protection of property, religion, and other interests against incursions by other peoples and states.³⁰⁴ Even before passage of the Declaration, numerous instruments and principles of international law have long provided potential protection for indigenous interests in off-reservation sacred sites cases.³⁰⁵ These include indigenous rights to property, religion, culture, association, and resources found, for example, in the American Convention on Human Rights and American Declaration on the Rights and Duties of Man.³⁰⁶ International human rights law may

within this tradition, Native Americans are “outsiders” for whom “neutrality may be little more than a mirage”).

300. See Joseph William Singer, *Lone Wolf, or How to Take Property by Calling It a “Mere Change in the Form of Investment,”* 38 TULSA L. REV. 37, 44 (2002) (arguing that Indian tribes are denied compensation under the Fifth Amendment on facts that would support recovery by individuals or corporations).

301. See NEWTON ET AL., *supra* note 269, at ch. 15 (on federal protections for tribal property).

302. See *supra* note 74 and accompanying text.

303. See Joseph William Singer, Reply, *Double Bind: Indian Nations v. The Supreme Court*, 119 HARV. L. REV. F. 1 (2005) (surveying cases in which the Supreme Court denied to Indians property and sovereignty rights routinely according to non-Indians), available at <http://www.harvardlawreview.org/forum/issues/119/dec05/singer.pdf>.

304. See Declaration on the Rights of Indigenous People, U.N. Doc. A/61/L.67 (Sept. 13, 2007).

305. See Carpenter, *supra* note 46, at 1131-38. See also Robert T. Coulter et al., Memorandum, International Human Rights Law Relating to Indigenous Sacred Sites (Oct. 16, 2006), <http://www.indianlaw.org/pdf/dpa/bb/Sacred%20sites%20mmo.pdf>.

306. See Carpenter, *supra* note 46, at 1132-33.

not be strictly enforceable in the United States, which was one of four countries voting against the Declaration on the Rights of Indigenous Peoples.³⁰⁷ Yet these instruments create expectations regarding states' treatment of indigenous peoples within their borders, including administrative agencies' protection of off-reservation tribal property.³⁰⁸

In short, the United States Supreme Court has found it constitutional to violate American Indian religious freedoms at sacred sites,³⁰⁹ but emerging ideals and principles of domestic and international law raise the question of whether it is *right* to do so.³¹⁰

IV. IMPLEMENTING REAL PROPERTY AND PEOPLEHOOD

*"A (reasonable) Law of Peoples must be acceptable to reasonable peoples who are . . . diverse; and it must be fair between them and effective in shaping the larger schemes of their cooperation."*³¹¹

307. Press Release, Sixty-First U.N. Gen. Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples (Sept. 13, 2007), *available at* <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>. Of particular relevance to this Article is the United States' long-standing opposition to use of the term "peoples" in the Draft Declaration on Indigenous Peoples' Rights. For the United States, the term problematically connotes an indigenous right of self-determination which the United States believes it has already recognized through its domestic legislative policy of "self-determination" and indigenous statehood and secession under international law (which the United States would oppose). *See generally* ANAYA, *supra* note 211, at 100-03. Despite the United States' resistance to the use of these terms, domestic lawmakers may still have the power to use international legal norms in their decision-making processes. For scholarship on this topic, see, for example, Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 75-80 (1996); Note, *International Law as an Interpretive Force in Federal Indian Law*, 116 HARV. L. REV. 1751, 1751-52, 1756 (2003); Kirsten M. Hetzel, *Reaching Regional Consensus: Examining United States Native American Property Rights in Light of Recent International Developments*, 10 TUL. J. INT'L & COMP. L. 307, 327-38 (2002).

308. S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 33 (2001) (reviewing four cases that analyze indigenous land and resources claims); Lorie M. Graham, *The Racial Discourse of Federal Indian Law*, 42 TULSA L. REV. 103, 120 (2006) (debating the applicability of international human rights norms in cases involving American Indian property rights).

309. *See* *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 477 (1988) (Brennan, J., dissenting) (maintaining that the *Lyng* majority "makes a mockery" of federal policy in favor of Indian religious freedom and "fails utterly to accord with the dictates of the First Amendment").

310. *See* Singer, *supra* note 20, at 55 ("Conquest is not something that happened in the distant past which cannot be corrected. Rather, the [Supreme] Court is attempting to conquer Indian nations *now* by its failure to protect tribal property rights and inherent sovereignty.").

311. RAWLS, *supra* note 49, at 11-12.

I have argued that certain interests in real property are expressive of, and integral to, American Indian peoplehood. The loss of Indian interests in sacred sites causes pain that cannot be relieved by replacement or monetary compensation; thus these interests are nonfungible and deserve heightened legal protection. The question is how such a property and peoplehood approach would work in *practice*. Procedurally, federal agencies should include "peoples" in the federal land management process. Substantively, federal land managers should try to accommodate competing uses, but where this proves impossible, they should prioritize sacred site access and protection over competing uses (rather than vice versa as in *Lyng* and many of the other cases).³¹²

To illustrate these contentions in greater detail, this Part suggests reforms to agency sacred sites practice consistent with a theory of property and peoplehood. This Part also considers legislative reform and potential critiques of my property and peoplehood approach.

A. *Improving Administrative Practice*

1. *Procedure.*

I offer three suggestions for improving agency procedures relative to sacred sites management: (1) Include peoplehood interests in the initial "statement of purpose" or equivalent document for land management decisions; (2) tailor the NHPA "consultation process" to the peoples identified in the statement; and (3) secure the identified peoples as signatories to the "memorandum of understanding" required by the NHPA and any interim or final management plans. Agencies are not presently required by law to do any of these things, but they may result in improved practice.³¹³

312. See *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 476 (1988) (Brennan, J., dissenting) (calling *Lyng* a "ruling [that] sacrifices a religion at least as old as the Nation itself, along with the spiritual well-being of its approximately 5,000 adherents, so that the Forest Service can build a 6-mile segment of road that two lower courts found had only the most marginal and speculative utility, both to the Government itself and to the private lumber interests that might conceivably use it").

313. See generally CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* (1990) (citing expertise and accountability as justifications for agency discretion).

a. *Statement of purpose.*

When an agency articulates its “statement of purpose” in reviewing a land management proposal, it should explicitly include peoplehood interests. This is particularly appropriate where the sacred site is eligible for protection as a traditional cultural property (TCP) under the NHPA. A traditional cultural property is one “associat[ed] with cultural practices or beliefs of a living community that (a) are rooted in that community’s history, and (b) are important in maintaining the continuing cultural identity of the community.”³¹⁴ Thus a sacred site’s legal designation as a TCP implicates the relationship between it and a particular community. It makes sense to manage such properties with attention to the relevant community or people.

Unfortunately, the Forest Service’s statement of purpose in the *Navajo Nation* case is an example of ignoring peoplehood concerns altogether. Though San Francisco Peaks is also a protected TCP under the NHPA, the Forest Service focused on other goals. It set forth the following statement of purpose:

(1) to ensure a consistent and reliable operating season, thereby maintaining the economic viability of the Snowbowl and stabilizing employment levels and winter tourism within the local community; and (2) to improve safety, skiing conditions, and recreational opportunities, bringing terrain and infrastructure into balance with current use levels.³¹⁵

In short, the Forest Service seems to have framed its NEPA review process by asking: “How can we approve these upgrades to the ski resort?” This statement contains some implied recognition of other groups such as the local community, skiers, and recreationalists—and ultimately the decision to expand skiing and snowmaking seems to have reflected their needs. There is no mention of the various Indian peoples or their interests in the environmental wellbeing of San Francisco Peaks.

The statement of purpose seems to set the tone for the entire decision making process. After articulating its statement of

314. PATRICIA L. PARKER & THOMAS F. KING, U.S. DEPT. OF THE INTERIOR, GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES (rev. ed. 1998), available at <http://www.cr.nps.gov/nr/publications/bulletins/nrb38/>.

315. *Navajo Nation v. U.S. Forest Serv.*, 408 F. Supp. 2d 866, 873 (D. Ariz. 2006).

purpose, the Forest Service worked primarily with the Snowbowl to develop the various proposals for snowmaking and ski expansion. By the time it solicited input from the tribes and environmental organizations, the Forest Service was already putting forth the Snowbowl's proposal as its own and tribal input seemed somewhat superfluous, at least from the tribes' perspective. Yet the tribal peoples had concerns of the highest order. The Navajo plaintiffs testified to the project's ramifications for the 225,000 members of the Navajo tribe, for whom "the Peaks [are] the holiest shrine in the Navajo way of life."³¹⁶ The Hopi plaintiffs claimed "the Peaks are of central importance to the Hopi tradition, culture, and religion [and] there is a direct relationship between the Hopi way of life and the environment, including the Peaks."³¹⁷

Despite the Indian concerns, the reviewing courts found the narrow statement of purpose to be within the Forest Service's discretion. It was appropriate to focus on the ski area because the Forest Service had earlier classified the entire Snowbowl permit area as a "Developed Recreation Site."³¹⁸ Moreover, the decision was consistent with the "multiple use mandate" and its direction to provide public recreation opportunities.³¹⁹ Thus the Forest Service was clearly entitled, as a matter of administrative and public lands law, to articulate its purpose narrowly. But ultimately it was not well-served by this decision. By failing to take into account the needs of Indian peoples, the Forest Service's decision led to protracted litigation and was ultimately overturned as violating RFRA.

A better approach would be to articulate a statement of purpose explicitly referencing peoples affected by the relevant land management issue. The agency would then gather tribal officials and religious leaders from the outset, rather than consulting with them as an afterthought. The Forest Service took this approach in the facts leading up to the *Wyoming Sawmills* case. There the Forest Service had described that its management "purpose" was "to ensure that the Medicine Wheel and Medicine Mountain are managed in a manner that protects the integrity of the site as a sacred site and a nationally important traditional

316. *Id.* at 888.

317. *Id.* at 894.

318. *Id.* at 873.

319. *Id.* at 873.

cultural property.”³²⁰ The Medicine Wheel statement could also be more explicit about the people who value the site as a “traditional cultural property” but at least their needs were referenced implicitly and ultimately addressed very sensitively in a final management plan.

b. *Consultations.*

Agencies should next tailor the NHPA consultation process to the peoples identified in the statement of purpose. Indian participants sometimes find the federal processes to be culturally foreign, particularly when it comes to discussing the sensitive topic of religion.³²¹ They may not be permitted by their religious beliefs to submit written comments or voice public statements about their ceremonial practices.³²² Moreover, tribes may lack the financial or administrative resources to participate in formal consultation processes.

The failure to address these problems appears to have hampered the consultation process in the *Navajo Nation* case. The Forest Service had been consulting with tribes interested in San Francisco Peaks since at least the 1970s when the original expansion of the ski area occurred. Thus the Forest Service knew which tribes to consult with and had some idea how to reach them. Accordingly, over the course of two years, the Forest Service mailed several rounds of letters and made numerous phone calls inviting the tribes to participate and “specifically requesting tribal input on the resolution of the adverse effects.”³²³ For example, it sent a letter to the Hopi Tribe informing them “that the owner of the Snowbowl is working on a draft proposal, stat[ing] that the Forest Service believes the Hopi should be involved in the development of this proposal,” and “ask[ing] for input on ‘how the interests and concerns of the Hopi people might best be addressed’ before the Forest Service accepts the proposal.”³²⁴

One can well imagine that the Forest Service thought that

320. *Wyo. Sawmills Inc. v. U.S. Forest Serv.*, 383 F.3d 1241, 1245 (10th Cir. 2004).

321. See generally Sarah Palmer, Cherie Shanteau & Deborah Osborne, *Strategies for Addressing Native Traditional Cultural Properties*, 20 NAT. RESOURCES & ENV'T 45 (2005).

322. See Carpenter, *supra* note 193, at 563.

323. *Navajo Nation*, 408 F. Supp. 2d at 880.

324. *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1060 (9th Cir. 2007).

these attempts to communicate with the tribes were sufficient. Yet several tribes reported never having received the letters. Tribal religious practitioners described receiving in the mail heavy binders containing hundreds of pages of data which they could not meaningfully digest.³²⁵ This problem of cultural disconnect occurs in many sacred sites consultations. It needs to be addressed if the consultation process is to have any meaning at all. It is not enough just to identify the affected Indian peoples and then subject them to a boilerplate process of federal-style consultation. The consultation process itself must be reflective of tribal peoplehood; this means that the sacred sites consultation process must reflect each tribe's cultural and political norms of receiving information, digesting it, and making decisions.

The *Bear Lodge* case shows some progress in the consultation process. The Park Service initiated meaningful conversations with tribes and other stakeholders about the Proposed Climbing Management Plan. In addition to the publication of drafts, opportunity for notice and comment, and letter-writing campaign, Park Service officials visited tribal communities to hold meetings there. They asked for substantive input, and also learned about how to develop communication channels with various Plains tribes, intertribal organizations, and individual religious practitioners.³²⁶

Paying attention to peoplehood concerns in the consultation process may require intensive relationship-building between agency officials and tribal peoples. One risk is that non-Indians complain the administrative process unfairly fosters Indian participation to the detriment of non-Indian participation.³²⁷ The agencies must take care to provide consultations processes that also reflect the needs of non-Indian peoples. The solution is not a one-size fits all approach, but one that makes the process responsive to all affected peoples. The task will be expensive and time-consuming, but ultimately worth the costs if the result is more harmonious management of public lands.

325. See THE SNOWBOWL EFFECT: WHEN RECREATION AND CULTURE COLLIDE (Indigenous Action Media 2005) (giving the testimony of tribal leaders and religious practitioners).

326. See BURTON, *supra* note 47, at 131-35; see IN THE LIGHT OF REVERENCE (Bullfrog Films 2001) (interview with Devil's Tower Superintendent Deb Liggett).

327. See Pendley, *supra* note 198, at 1024-25, 1028.

c. *Management documents.*

A final procedural suggestion is for agencies to make all affected peoples parties to the Memorandum of Understanding (MOU) mandated by the NHPA and any other management documents, such as an interim or final management plan. Regulations promulgated under the NHPA require an agency to develop an MOU for any sacred site that will be adversely affected by a federal undertaking.³²⁸ The agency must secure various federal and state historic preservation offices as parties to the MOU but not the tribes. This omission is unfortunate. Like some of the other limitations of the NHPA, the MOU is a procedural mechanism that allows the agency to make only half-hearted attempts to include the tribes and their concerns.

The *Navajo Nation* case is again instructive. After consultations with the tribes, the Forest Service entered into a MOU that included a number of attempts to mitigate adverse effects of the project. These included:

- (1) [tribal] access before, during and after construction;
- (2) protection and regeneration of plants of traditional importance;
- (3) that the Forest Service must work to ensure that current ceremonial activities continue uninterrupted;
- (4) that the Forest Service must protect shrines;
- (5) that the tribes must be provided water-quality information; and
- (6) where practicable, projects must take advantage of previously-disturbed areas.³²⁹

Further, the Forest Service promised that traditional religious practitioners could use the ski lifts for free.³³⁰

None of these measures included in the MOU, no matter how laudable, could mitigate the Navajo's and Hopis' fundamental concerns. The Forest Service and Snowbowl were proposing to cover the sacred San Francisco Peaks with sewage effluent on a regular basis. This activity would desecrate their sacred mountain, make their ceremonies impossible, and disrupt entire lifeways and value systems. The Navajo and Hopi tribes did not sign on as parties to the MOU, though the Havasupai and Hualapai tribes did. The MOU was a precursor document to the Forest Service's

328. 36 C.F.R. § 800.6(c) (Westlaw 2008).

329. *Navajo Nation v. U.S. Forest Serv.*, 408 F. Supp. 2d 866, 880 (D. Ariz. 2006).

330. *Id.*

ultimate management decision. In February 2005, at the culmination of the consultation and review process, the Forest Supervisor issued a Final Environmental Impact Statement and Record of Decision.³³¹ The decision approved the Snowbowl's ski area expansion project, including approval of 205 acres of snowmaking coverage, using reclaimed water.³³² The accommodations for Indian religious practice were the same ones provided for in the MOU, so the Navajo and Hopi tribes sued.

Again *Wyoming Sawmills* suggests a better alternative. When the Forest Service first issued a Draft Environmental Impact Statement for management of the sacred site—calling for unlimited vehicle access except for certain times when the Medicine Wheel was being used for ceremonial purposes—it received significant criticism for failure to address Indian concerns.³³³ The criticism seems to have prompted the Forest Service to work more meaningfully with affected Indians. It initiated extensive consultation with affected Indians and used the information gleaned as the basis for a Memorandum of Agreement (MOA) providing for closure of the road to Medicine Wheel except for traditional religious practitioners' access.³³⁴ Notably, the Indians were parties to the MOA. They were also parties to each subsequent management plan for Medicine Wheel. This included an interim agreement preventing “undertakings” including “any new mining or timber harvesting” projects within 2.5 miles of Medicine Wheel and a Final Management Plan calling for consultation regarding any activity within 18,000 acres of the Medicine Wheel.³³⁵

2. *Substance.*

I suggest two reforms to substantive decision-making regarding the management of sacred sites on the public lands. Agencies should (1) recognize that Indians as peoples have a baseline of enforceable religious exercise rights and (2) prioritize Indians' non-fungible needs at sacred sites. As I argue below, these reforms

331. *See id.* at 870-71.

332. *Id.*

333. *See Wyo. Sawmills Inc. v. U.S. Forest Serv.*, 383 F.3d 1241, 1244 (10th Cir. 2004).

334. *Id.*

335. *Id.* at 1244-45.

will help agencies comply with RFRA's broad protections for religious exercise and serve to effectuate existing federal policy in favor of sacred sites accommodation.

a. *Recognizing peoplehood interests in religious exercise.*

Agencies have long operated under the assumption, based on *Lyng*'s interpretation of the First Amendment, that they need only refrain from activities that will coerce religious belief by *individuals*. But I believe that since the passage of RFRA, agencies must refrain from burdening the religious exercise of tribal *peoples* at sacred sites on the public lands. Focusing again on the *Navajo Nation* case, I contrast the approach of the Forest Service and federal district court (discounting peoplehood concerns) with the approach of the Ninth Circuit (recognizing peoplehood concerns). I suggest that the latter approach is not only consistent with RFRA but also forms the basis of good land management policy.

In the events leading up to *Navajo Nation*, the Forest Service's Final Environmental Impact Statement had admitted that the ski area expansion and snowmaking, "especially the use of reclaimed water[,] would contaminate the natural resources needed to perform the required ceremonies" that constitute "the cultural identity of many of these tribes."³³⁶ The Forest Service had also been aware that such impact would be "irretrievable" in terms of its harm on the mountain, its soil, plants, and animals.³³⁷ However, the Forest Service thought it was within its authority to disregard this information gleaned through the NEPA and NHPA consultation processes. Under the *Lyng* standard, the Forest Service would have been quite right. The federal government was thought to be largely immunized from charges that management of its own lands could burden religious practice.

The District Court affirmed the Forest Service, in large part, by focusing on the testimony that, in its view, failed to show government coercion of individual religious belief under *Lyng*. Both in the consultation process and at trial, witnesses presented volumes of testimony about spiritual significance of the mountain and the many ceremonial activities either taking place or related to

336. *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1039 (9th Cir. 2007).

337. *Id.*

the mountain. But the court found all of this testimony inadequate. Though Navajo witnesses testified to the Peaks' centrality to the Navajo way of life, these particular witnesses had not actually visited the Peaks themselves.³³⁸ A Navajo medicine man conceded that *he* had not been "denied access to any part of the Peaks."³³⁹ Some plaintiffs, according to the court, did not *personally* leave offerings on the mountain, did not collect water there, or did not gather plants and medicines there. A Hopi witness explained that his religion prevented him from disclosing specific shrines or describing religious practices.³⁴⁰

The District Court sounded like *Lyng* all over again when it held that the Forest Service's action "does not coerce individuals into acting contrary to their religious beliefs nor does it penalize anyone for practicing his or her religion."³⁴¹ This standard confined RFRA to the narrow First Amendment standard approach articulated in *Lyng*. It also shifted the evidentiary analysis in the government's favor. Focusing on the religious beliefs of individuals, the court could harp on all of the evidentiary weaknesses of individual witnesses—and ignore the overwhelming effects of the snowmaking plan on Indian tribes and their ways of life.

The Ninth Circuit took a different look at the same evidence when it reviewed the RFRA claim. It first identified which tribal activities constituted "religious exercise" and then assessed whether the Forest Service's action would "substantially burden" these activities.³⁴² In assessing the evidence on these factors, the court focused on religious beliefs and practices of the tribes *as tribes*, rather than limiting its inquiry to individual religious practices.

For example, the court discussed the historic journey of Hopi clans to the Peaks to enter into a "spiritual covenant . . . to take care of the land"; the Peaks as the home of the Hopi ancestors or *Katsinam*; and the role of the *Katsinam* in Hopi ceremonial and

338. See *Navajo Nation v. U.S. Forest Serv.*, 408 F. Supp. 2d 866, 889 (D. Ariz. 2006).

339. *Id.*

340. *Id.* at 890-91.

341. *Id.* The district court also found that the government had met the "compelling interest" and "least restrictive means" tests. *Id.* at 906-07.

342. *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1033-34 (9th Cir. 2007).

agricultural life.³⁴³ When the court described Hopi pilgrimages to the Peaks, it was not to highlight the religious exercise of any particular pilgrim. Rather the description emphasized that religious leaders are selected from forty congregations (or kivas) to visit shrines, gather water and fir boughs for *Katsinam* ceremonies, in which the entire community participated. The same approach prevailed in the assessment of the Navajos' "exercise of religion." The court observed that "the whole of the Peaks is the holiest of shrines in the Navajo way of life."³⁴⁴ This was not so because any particular religious or political leader visited the Peaks, but because the Peaks had a role in fundamental religious experiences such as the Navajo creation story, Navajo medicine bundles, Navajo healing ceremonies, the Navajo sense of place and "every Navajo religious ceremony."³⁴⁵

The court observed religious "burdens" in two general categories, namely, the (1) inability to conduct certain ceremonies "because the ceremony requires collecting natural resources that would be too contaminated—physically, spiritually, or both—for sacramental use" and (2) inability to maintain "daily and annual religious practices comprising an entire way of life" because such practices "require belief in the mountain's purity or a spiritual connection to the mountain that would be undermined by the contamination."³⁴⁶

As to the first category of harm, Navajo religious practitioner Larry Foster testified that using sewage effluent on the Peaks "would be like injecting me and my mother, my grandmother, the Peaks, with impurities, foreign matter that's not natural."³⁴⁷ This sentiment reflected, in part, a Navajo understanding that water, once tainted, cannot be "reclaimed" or made pure again. Because he would not be able to go on religious pilgrimages if the Peaks were so desecrated,³⁴⁸ he would also not be able to rejuvenate

343. *Id.* at 1034-35.

344. *Id.* at 1035.

345. *Id.* at 1035-36.

346. *Id.* at 1039.

347. *Id.* at 1040.

348. *Id.* (Navajo practitioner Larry Foster testified: "[I]f someone were to get a prick or whatever from a contaminated needle, it doesn't matter what the percentage is, your whole body would become contaminated. And that's what would happen to the mountain." Medicine man Norris Nez said: "All of it is holy and sacred. It is like our body. Every part of it is holy and sacred.").

medicine bundles which are necessary for Navajo healing ceremonies. Medicine Man Norris Nez testified: "Like the western doctor has his black bag with needles and other medicine, this bundle has in there the things to apply medicine to a patient."³⁴⁹ Because these medicines were gathered from San Francisco Peaks, the contamination of the mountain would eventually affect "all [Navajo medicine] bundles," ultimately making it impossible to perform the Blessingway ceremony.³⁵⁰

Religious practitioner Foster also connected the burdens of the proposed snowmaking quite expressly to their impact on the Navajo people:

Your Honor, our way of life, our culture we live in—we live in the blessingway, in harmony. We try to walk in harmony, be in harmony with all of nature. And we go to all of the sacred mountains for protection. We go on a pilgrimage similar to Muslims going to Mecca. And we do this with so much love, commitment and respect. And if one mountain—and more in particularly with the San Francisco Peaks—which is our bundle mountain, or sacred, bundle mountain, were to be poisoned or given foreign materials that were not pure, it would create an imbalance—there would not be a place among the sacred mountains. We would not be able to go there to obtain herbs or medicines to do our ceremonies, because that mountain would then become impure. It would not be pure anymore. And it would be a devastation for our people.³⁵¹

With respect to the second type of burden, entire religious "way of life," the court was particularly persuaded by the Hopis' testimony. Hopi religious practitioner Leigh Kuwanwisiwma testified that when the Hopi clan entered into the spiritual covenant with the deities and *Katsinam* that reside in the Peaks, the mountains "were in their purest form."³⁵²

The purity of the spirits, as best we can acknowledge the spiritual domain, . . . were content in receiving the Hopi clans. So when you begin to intrude on that in a manner that is really disrespectful to the Peaks and to the spiritual home of the

349. *Id.* at 1035.

350. *Id.*

351. *Id.* at 1040.

352. *Id.* at 1041.

Katsina, it affects the Hopi people. It affects the Hopi people, because as clans left and embarked on their migrations and later coming to the Hopi villages, we experienced still a mountain and peaks that were in their purest form as a place of worship to go to, to visit, to place our offerings, the tranquility, the sanctity that we left a long time ago was still there.³⁵³

Though such experiences were historical, they have contemporary repercussions. If the Hopis allowed the mountain to be desecrated today, they would be violating their spiritual covenant to take care of it. The *Katsinam* dance ceremonies would become “simply . . . a performance” rather than “a religious effort.”³⁵⁴ The contamination caused by sewage effluent would “undermine the Hopi faith in their daily ceremonies and undermine the Hopi faith in their Kachina ceremonies as well as their faith in the blessings of life that they depend on the Kachina to bring.”³⁵⁵

Based on this evidence Ninth Circuit held that the Navajo and Hopi tribes had presented evidence of a burden on religion.³⁵⁶ The court next turned to RFRA’s requirement that the plaintiff show that the burden on religious exercise is “substantial” versus a mere “inconvenience.”³⁵⁷ The governmental activity must “prevent the plaintiff from engaging in religious conduct or having a religious experience.”³⁵⁸ Here again the court was willing to look at the plaintiffs as tribal peoples and assess whether they experienced a substantial burden on a collective level. The Navajo witnesses had demonstrated that use of sewage effluent would prevent the “rejuvenation” of medicine bundles which were needed for Blessingway and healing ceremonies.³⁵⁹ The Hopi witnesses had demonstrated that “contamination by the effluent would fundamentally undermine their entire system of belief and the associated practices of song, worship, and prayer that depend on the Peaks, which is the source of rain and their livelihoods and the home of the *Katsinam* spirits.”³⁶⁰ This testimony, in the Ninth

353. *Id.*

354. *Id.*

355. *Id.* at 1042.

356. *Id.* at 1039-42.

357. *Id.* at 1042.

358. *Id.* (internal quotations and citations omitted).

359. *Id.* at 1043.

360. *Id.*

Circuit's view, demonstrated a substantial burden on their religion.³⁶¹

b. *Prioritizing non-fungible peoplehood needs in sacred sites.*

Thus agencies should be aware that Indians, as peoples, may be able show a substantial burden to religious exercise under RFRA. If they meet this standard, the government must then show that its activity is the least restrictive means of furthering a compelling interest. Because *Lyng* had effectively immunized agencies from judicial review on the merits of this test, the *Navajo Nation* case again serves as an important model under current law.

Reduced to its most basic terms, *Navajo Nation* pitted the Arizona Snowbowl's corporate profits against the Indian tribes' religious freedoms. The various partners in the Arizona Snowbowl Resort were distant investors—and the Arizona Peaks were, for them, just another asset.³⁶² By contrast, the Peaks were a spiritual living being, a sacred place of the highest spiritual and cultural value for the tribes. The snowmaking proposal would have devastatingly personal impacts on religious practitioners and the tribes as a whole. It did not seem right to the tribes that modest economic gain, or even recreation interests, should justify such desecration to a sacred site and entire ways of life.

To put it in Radin's framework, the tribes decried the idea that fungible corporate uses of the Peaks would trump their non-fungible peoplehood interests. Moreover, no legal decisionmaker was even required to confront explicitly the fact that the snowmaking plan would protect corporate profit at the expense of tribal religious freedom. Ignoring these issues would make sense under *Lyng*, where it seemed that no case could be made for the religious use. But *Navajo Nation* shows that where government action substantially burdens religious exercise, RFRA requires decision-makers assess the relative merits of competing uses under the compelling interest test. Fungibility should be an element of this assessment.

As Ninth Circuit observed, the compelling interest test is "the most demanding" constitutional standard and allows "only those

361. *Id.*

362. See THE SNOWBOWL EFFECT, *supra* note 325 (featuring documentary interviews with tribal leaders and religious practitioners).

interests of the “highest order and those not otherwise served [to] overbalance legitimate claims to the free exercise of religion.”³⁶³ The government’s compelling interest argument centered on the idea that without the new snowmaking, the economic success of the Snowbowl was at risk.³⁶⁴ But the Ninth Circuit did not find this argument compelling at all. The Snowbowl had always operated in relatively dry conditions—as a result of its location in the desert—and still managed to continue skiing operations. The Snowbowl’s new owners had been aware of these limitations when they purchased the ski area, but hoped that with the new snowmaking and expansion “the resort would be substantially more profitable and the income stream more consistent.”³⁶⁵

The Forest Service also cited its obligation to provide recreational opportunities on the public lands as a compelling interest. But the court pointed out that even if the ski resort changed hands or the Snowbowl stopped offering downhill skiing, the public could still enjoy a whole range of recreational activities including motorcross, mountain biking, horseback riding, hiking, camping, cross-country skiing, snowshoeing, and snowplay.³⁶⁶

The court did not believe that the economic and religious uses were mutually exclusive in this case. The Snowbowl would likely continue operating even without the snowmaking. The court wrote in dicta, however, that even if the “very survival” of the Snowbowl as a ski resort were on the line, this could not trump the survival of Indian religious lifeways under RFRA.³⁶⁷ Thus the government’s interest in promoting economically profitable uses of the public lands would have to yield to the religious interests of the tribes.

Framing *Navajo Nation* in terms of a theory of property and peoplehood, I would argue that the Ninth Circuit created a hierarchy of fungible concerns, and then appropriately privileged the tribes’ non-fungible peoplehood interests over the fungible economic claims of the Forest Service and Snowbowl.³⁶⁸ It required other fungible property rights to yield to conflicting tribal interests

363. *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1043 (9th Cir. 2007).

364. *Id.* at 1044.

365. *Id.*

366. *Id.* at 1045.

367. *Id.* at 1044.

368. See Radin, *The Liberal Conception*, *supra* note 23, at 1686-87.

in religion.³⁶⁹ This approach contrasts significantly with previous decisions. In *Lyng*, the Supreme Court allowed the government's fungible interests in timber and road development to destroy the Indians' non-fungible relationship with a sacred site.³⁷⁰ In *Bear Lodge*, the court accorded some protection for non-fungible Indian religious practices, but ultimately required them to yield to the relatively fungible commercial and recreational rock climbing interests.

As the *Navajo Nation* case also suggests, the accommodation of multiple uses can still occur under a property and peoplehood approach, so long as non-fungible needs are prioritized. In *Navajo Nation*, skiing and snowmaking are allowed, but only to the extent that they refrain from burdening Indian religion. In some instances, however, competing uses will be truly incompatible—as in cases where a development activity would desecrate a sacred site. Then, the fungible use should yield altogether to the non-fungible one. The very fact that some land uses are fungible suggests that this is the appropriate ordering of claims. The claimant with the fungible use can be compensated or otherwise made whole through a land exchange of equal value. An earlier dispute on the San Francisco Peaks represented just such a case. In the 1990s, the White Vulcan Pumice mine was operating on ninety acres of the Peaks.³⁷¹ When it became apparent that the mine was violating numerous environmental standards, as well as tribal religious needs, the government negotiated with the owner to close the mine, restore the site, and relinquish its mining claims, in exchange for a one million dollar settlement figure to be paid by the federal government to the company.³⁷² While the White Vulcan

369. Radin, *supra* note 22, at 1015.

370. Cf. Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 33-54 (1989). In this article, McConnell and Posner revisit *Lyng* by weighing the benefits to the lumber companies (who have an interest in logging) and other citizens (who can use the logging road for other purposes) against the harm to the Indians (destruction of their religion). They conclude that "the injury to the Indians religious interest appears unusually severe . . . while the secular interests seem relatively slight." *Id.* at 48.

371. Shannon Kelly, *San Francisco Peaks*, in CANYONS, CULTURES, AND ENVIRONMENTAL CHANGE: AN INTRODUCTION TO THE LAND-USE HISTORY OF THE COLORADO PLATEAU (John D. Grahme & Tomas D. Sisk eds., 2002), available at http://cpluhna.nau.edu/Places/san_francisco_peaks2.htm (describing White Vulcan Mine).

372. *Id.*

case is an interesting model, a literal “buy-out” of claimants with fungible interests may only be necessary if they have vested property interests under the Fifth Amendment or to promote settlement.³⁷³ In other cases when Indians have raised sacred sites objections, resource developers have agreed to relocate their projects.³⁷⁴

The *Navajo Nation* case finally shows how some land claims will be “relatively” fungible. Recreation, tourism, and local community interests probably fall in this category. The City of Flagstaff cited its interests in promoting environmentally feasible water use through its sewage effluent program and increasing tax revenues and employment opportunities for citizens.³⁷⁵ The Forest Service claimed that it was protecting the safety of public land users and providing recreational opportunities. For citizens, skiing at the Arizona Snowbowl may be a special experience: located within ten miles of Flagstaff, it may provide an opportunity for people to ski close to home or for families to enjoy the outdoors together.

It would be hard to translate these experiences into monetary values. Thus, they are not completely fungible. At the same time, they are *more* fungible than Indian interests in sacred sites. If the Snowbowl were to close, Flagstaff’s skiers could drive twenty miles further to the Williams Ski Area. The Forest Service could enhance

373. See Carpenter, *supra* note 46, at 1099 n.241 (discussing cases that evaluate whether private parties have Fifth Amendment takings claims for property interests on the public lands).

374. In several cases, companies have decided on their own to forego extractive activities after learning of their sacred quality to tribes. See, e.g., Hillary Rosner, *Saving a Sacred Lake: Zuni Activist Pablo Padilla*, HIGH COUNTRY NEWS, Feb. 2, 2004, available at http://www.hcn.org/servlets/hcn.Article?article_id=14527 (reporting decision of mining company to abandon project near sacred Zuni Salt Lake); Press Release, Interior Dep’t, Nat’l Trust for Historic Preservation, & Anschutz Exploration Corp., Agreement to Protect Historical and Cultural Features of Weatherman Draw, available at http://www.sacredland.org/PDFs/Weatherman_Draw_Press.pdf (reporting decision of Anschutz Corporation to refrain from drilling at Weatherman Draw, Montana, a tribal sacred site and transfer oil and gas leases to the National Trust for Historic Preservation). In some of these cases, the companies may have decided that the costs of battling tribal opposition outweigh the costs of relocating the natural resource development project.

375. See U.S. Forest Serv., Coconino Nat’l Forest, Frequently Asked Questions, <http://www.fs.fed.us/r3/coconino/publications/snowbowl/faq.shtml> (last visited Mar. 2, 2008) (“Flagstaff has a diverse economic base that is not completely dependent upon the AZ Snowbowl; however this proposal will have a positive net effect on Flagstaff’s winter economy. These economic benefits will be reflected in increased revenues from property, sales, and BBB taxes, and in higher local employment.”).

recreation opportunities on its dozens of other properties in the state. The City of Flagstaff may have other opportunities for increasing employment or environmentally-sensitive water use. But Navajo religious practitioners have no way of replacing their religious practices if the San Francisco Peaks are desecrated with sewage effluent.³⁷⁶

The relativity of claims applies on the Indian side of sacred site disputes too. As the Ninth Circuit recognized, most of the Navajo and Hopi practices could only occur on the San Francisco Peaks.³⁷⁷ The Navajo Changing Woman story took place on the Peaks and medicine men must recharge their healing bundles on that mountain. The Hopi received their spiritual covenant to take care of the land at the Peaks and the Hopi *Katsinam* cannot decamp to a different mountain today. Navajo and Hopi shrines are located on the mountain. Thus it was clear to the court that various Navajo and Hopi practices would be substantially burdened (indeed obliterated) by the snowmaking proposal.³⁷⁸ The Havasupai and Hualapai uses of the Peaks presented a closer question of substantial burden, which the court declined to reach.³⁷⁹ The Peaks figured in Havasupai and Hualapai origin stories and informed these tribes' use of waters and pine needles in ceremonial practices. Some practitioners testified that they used water that they believed to have come from the Peaks in sweat lodges; yet it was not entirely clear that the water and pine needles *had* to come from San Francisco Peaks for religious efficacy.³⁸⁰

Of course, the parties did not brief these facts in terms of the question of non-fungibility. If asked to address this question, the Havasupai and Hualapai might cite a religious reason why water and plants must be gathered on the Peaks for spiritual efficacy. Yet it is also possible that some tribal religious land uses are completely non-fungible, while others are relatively fungible. These are difficult questions that intrude into the sphere of religion to an extent that makes lawyers uncomfortable. In *Lyng*,

376. Cf. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 468 (1988). (Brennan, J., dissenting) (pointing out that Indian parties "do not even have the option, however unattractive it might be, of migrating to more hospitable locales; the site-specific nature of their belief system renders it nontransportable").

377. *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1042-43 (9th Cir. 2007).

378. *Id.* at 1042.

379. *Id.* at 1043.

380. *Id.* at 1042.

Justice O'Connor rejected a line of jurisprudence evaluating the relative "centrality" of religious practices, on grounds that the courts should not be engaged in theological judgments.³⁸¹ Unfortunately, however, O'Connor's solution was to announce a bright-line rule that puts all Indian religions at risk of complete destruction.

Instead of unilaterally denying all legal protection to Indian religious practices on the public lands, decision makers should work with tribes to understand what kinds of practices are really at stake. Agency officials are better suited to this task than federal judges. We expect federal agencies to acquire and apply expertise on the most complicated questions of science, finance, intelligence, and security; it is reasonable to expect them to acquire expertise about American Indian religions.³⁸² When it comes to prioritizing among claims, agencies should use their expertise and the tribal consultation process to determine which claims are non-fungible. If an agency must then make difficult decisions among uses, it should create a "hierarchy" of fungibility and make its decisions accordingly.³⁸³ The agency should offer the greatest protection for the uses most tied up with peoplehood and least realizable elsewhere.

B. *Legislative Reforms*

As the above discussion suggests, federal law and policy empowers land managers to protect Indian interests in sacred sites—if these land managers want to do so. If, however, officials continue to disregard Indian peoplehood interests at sacred sites, it will be appropriate to think about legislative reform. These reforms should build on existing law. The NHPA already sets forth

381. See *Lyng*, 485 U.S. at 457-58 (rejecting the "centrality" test on grounds that it would improperly entangle courts in theological debates, thereby "cast[ing] the Judiciary in a role that we were never intended to play").

382. See generally EDLEY, *supra* note 313 (citing expertise and accountability as justifications for agency discretion); David A. King, *Procedural Fairness, Personal Benefits, Agency Expertise, and Planning Participants' Support for the Forest Service*, 39 NAT. RESOURCES J. 443 (1999). Admittedly, the Forest Service and Park Service are expected to be expert in land use management, not American Indian religions, but given the number of sacred sites on federal public lands, it is reasonable to expect them to be expert at least in the religious practices that occur at the sacred sites within their jurisdiction.

383. See Radin, *The Liberal Conception*, *supra* note 23, at 1686-87.

a baseline for administrative procedure on sacred sites management and AIRFA articulates a federal policy of recognizing Indian religious freedoms at sacred sites. Both statutes could use some “teeth” however.³⁸⁴ Thus, Congress could amend NHPA to make mandatory the procedural reforms suggested above (recognizing Indians as peoples in various stages of the land management decision process). Federal agencies could do the same by amending their regulations to include these procedural changes. Additionally, Congress could consider amending the statutes creating specific national forests and parks to reference sacred sites located therein and explicate the agency’s duty to prioritize Indian relationships with sacred sites over competing uses of those forests and parks.³⁸⁵

With respect to improving substantive protections for sacred sites, Congress could amend the American Indian Religious Freedom Act to incorporate the RFRA standard. Such an amendment would essentially codify *Navajo Nation*, making it clear that RFRA applies to sacred sites on federal public lands and is enforceable by both tribes and individuals in federal court. A model of enforceable, substantive protection for Indian cultural property is the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA).³⁸⁶ NAGPRA provides for the repatriation of Indian human remains and cultural items found on federal or tribal lands (or within museums receiving full or partial federal funds) and imposes civil and criminal penalties for trafficking in such items.³⁸⁷ While some of its provisions are procedural in nature, and include limited tribal rights of consult on excavations,³⁸⁸ NAGPRA also contains substantive requirements of repatriation and grants federal court jurisdiction over actions to enforce the Act.³⁸⁹ NAGPRA’s protections extend to tribes, and

384. See *Lyng*, 485 U.S. at 455 (AIRFA “has no teeth in it”).

385. Cf. Bluemel, *supra* note 47, at 533 & n.350 (citing Proclamation No. 68, 43 Stat. 1977 (1924) (designating Wupatki National Monument specifically to protect Hopi ruins)).

386. See 25 U.S.C. §§ 3002(a)-3005(a) (Westlaw 2008).

387. See 18 U.S.C. § 1170 (Westlaw 2008).

388. See generally Angela R. Riley, *Indian Remains, Human Rights: Reconsidering Entitlement Under the Native American Graves Protection and Repatriation Act*, 24 COLUM. HUM. RTS. L. REV. 49, 62-66 (2002) (describing tribal rights of consultation under NAGPRA).

389. See 25 U.S.C. § 3013 (Westlaw 2008). For criticism of NAGPRA, see, for example, S. Alan Ray, *Native American Identity and the Challenge of Kennewick Man*, 79 TEMP. L. REV. 89 (2006); Allison M. Dussias, *Kennewick Man, Kinship and the “Dying Race”: The*

serve to effectuate Indians' property and peoplehood interests in cultural patrimony, human remains, and burial grounds.

The ultimate effectuation of Indian property and peoplehood claims at sacred sites would be the repatriation of these lands to tribes. Congress has only restored tribal ownership to sacred sites in rare instances, with Taos Pueblo's recovery of Blue Lake serving as a model.³⁹⁰

C. Considering Critiques

1. Sovereignty versus peoplehood?

Critics might argue that the language of peoplehood is neither necessary nor desirable³⁹¹ because Indians' collective status is defined by federal law.³⁹² Indeed, tribes are "sovereigns" who enjoy an exclusive political relationship with the United States.³⁹³

Ninth Circuit's Assimilationist Assault on the Native American Graves Protection and Repatriation Act, 84 NEB. L. REV. 55 (2005).

390. See, e.g., Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN L. & POL'Y REV. 191, 205 (2001) (describing the legislative restoration of Blue Lake to Taos Pueblo and Kaho'olawe to the Native Hawaiian people).

391. Similar, though not identical, themes were debated in a scholarly exchange between David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759 (1991) (arguing for treatment of Indians as "peoples," under the Fourteenth Amendment and international human rights law, as a solution to perceived problem. Congressional Indian legislation is race-based and should be subjected to strict scrutiny) and Carole E. Goldberg-Ambrose, *Not "Strictly" Racial: A Response To "Indians As Peoples"*, 39 UCLA L. REV. 169 (1991) (criticizing Williams' article as failing to appreciate the danger of characterizing Indian legislation as race-based, the unlikelihood of the Supreme Court recognizing tribes as peoples, and suggesting that a better solution is to rely on Congressional commerce clause power to legislate in Indian affairs). While my project is somewhat different than Professor Williams', some of Professor Goldberg's concerns might be raised in response to my peoplehood argument and I have tried to address them here. I broadly define "peoples" with reference to self-definition, tribal, domestic, and international law, and support their inclusion in legal processes, but acknowledge that not all peoples are similarly situated. Thus, religious, ethnic, or political peoples may have unique identities and entitlements, but these are not the same ones that Indian tribes can claim. My definition of Indian tribes as "peoples" does not depart from their status as political sovereigns under treaties, the Constitution, and other foundational instruments or statutes of federal Indian law. Rather, it is meant to emphasize the "personal" or human dimensions of sacred sites cases for Indian tribes as collective entities and should also invite broader analysis of other group rights to property in U.S. law.

392. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (tribes are "domestic dependent nations").

393. See Rebecca Tsosie, *The Conflict Between the "Public Trust" and "Indian Trust" Doctrines: Federal Public Land Policy and Native Nations*, 39 TULSA L. REV. 271, 272, 301-10

Deviating from tribes' unique status by appeal to the broadly applicable model of peoplehood might demote tribes to mere stakeholders clamoring alongside other peoples to have their claims heard in the federal land management process.³⁹⁴ Though the fact of tribal sovereignty and related legal arguments have not yet worked to protect Indian interests at sacred sites, I agree that the special status of Indian nations should play a prominent role in decisions about sacred site management. The inclusion of other "peoples," however can be justified both prudentially and jurisprudentially.

From a prudential perspective, a more inclusive approach may ultimately serve Indian interests at sacred sites. The present situation is that tribal viewpoints on sacred sites inspire challenges from all quarters. Perhaps anticipating such challenges, federal public land managers now extend only the smallest accommodations of sacred site usage to tribes in the hopes that these accommodations survive legal challenges. Perhaps if non-Indians were included as peoples in the land management process, they might have their own concerns addressed, "buy in" to management plans, and be less likely to contest them in court.³⁹⁵

My recommendation would be to invite the participation of a very broad group of peoples in the federal land management process. As described in the definitional discussion above, some scholars require a group to be a political entity in order to qualify as a people, whereas others recognize peoples who organize along cultural, religious, or ethnic lines.³⁹⁶ In the sacred sites decision-making process, I believe it makes sense to include all groups that self-identify as peoples and have a legitimate claim to the property in question. An inclusive approach would not only instill a feeling of enfranchisement among groups but also appropriately raise a broad spectrum of land management issues that officials should address as a matter of comprehensive decision-making.

The broad inclusion of peoples should not, however, cause federal decision-makers to lose sight of the fact that the various

(2003) (exploring how Indian claims to sacred sites can be based in the tribal sovereignty framework).

394. See *id.* at 292, 300.

395. See BURTON, *supra* note 47, at 114 (describing the participation of Indian and non-Indian "subcultural groups" in the consultation process at Devil's Tower).

396. See SMITH, *supra* note 48, at 19-21.

peoples may be situated differently, with distinct entitlements to places on the public lands.³⁹⁷ What I mean is that from a jurisprudential perspective, Indian nations do have a unique status as political sovereigns maintaining a nation-to-nation relationship with the United States.³⁹⁸ This status justifies special treatment of Indian nations, insulating federal Indian legislation from the strict scrutiny review that might otherwise undermine various important Indian programs.³⁹⁹ This special status also confers distinctive rights in the sacred sites arena. As Professor Burton has argued, the very first thing an agency should do in a sacred site dispute is to recognize tribes' political status by explicating the special treaty rights, statutory or regulatory law, trust duties, historical relationship, and circumstances under which the tribes originally lost access to their sacred site. These elements will often give tribes a stronger set of legal and moral claims to accommodation than other groups can claim.

While political, cultural, religious, or ethnic peoples do not have the same status of American Indians, they may have their own histories and characteristics that merit special attention when it comes to public lands management. A new initiative of the National Park Service, for example, recognizes African American interests in national parks with an historical association to slavery, the civil rights movement, or other group experiences,⁴⁰⁰ and the Bureau of Land Management negotiated a special lease with the Church of Latter Day Saints to give the church significant management control over a site where Mormon ancestors died while fleeing religious persecution in the east.⁴⁰¹

Thus, African Americans and Mormons have been treated by federal land managers as collectives deserving special acknowledgement on account of group history and experiences.

397. *See id.* at 20 (some peoples will "advance 'strong' claims to allegiance over a 'wide' range of issues down to those more politically trivial groups that advance only 'weak' claims to allegiance over a 'narrow' range of issues").

398. *See* *Morton v. Mancari*, 417 U.S. 535, 552 (1974).

399. *See id.*

400. *See* Nat'l Park Serv., Celebrating African American History and Culture, <http://www.nps.gov/history/aahistory/bhm-intro.htm> (last visited Mar. 2, 2008) (listing parks, historic sites, and memorials with special significance to African Americans and describing a new movement of interpretation and scholarship associated with these sites).

401. *See generally* Kevin Holdsworth, *Why Martin's Cove Matters*, 83 DENV. U. L. REV. 1003 (2006).

By affording broad recognition to peoplehood issues, while still respecting the unique status of Indian nations, agencies can aspire to manage the public lands as true "intercultural commons."⁴⁰²

2. *Peoplehood as a divisive approach?*

Some readers might argue that recognizing the interests of sub-national peoples will make sacred sites law and policy problematically divisive. Admittedly, in the years following conquest, Americans have themselves developed a strong attachment to the public lands. As a collective people, Americans express strong attachments to concepts of wilderness,⁴⁰³ national pride,⁴⁰⁴ and conquest⁴⁰⁵ embodied in the national parks. Others argue that the public lands should be used as national resources to advance economic prosperity, defense, or a conservation agenda.⁴⁰⁶ Many citizens believe that their American citizenship confers an unfettered right of individual (or corporate) access to the national parks, forests, and monuments for recreation and other purposes. Thus, the public lands already foster competing claims—and recognizing the concerns of peoples may make public land

402. See BURTON, *supra* note 47, at 283.

403. See RODERICK FRAZIER NASH, WILDERNESS AND THE AMERICAN MIND 350-51 (4th ed. 2001); MAX OELSCHLAEGER, THE IDEA OF WILDERNESS 3 (1991).

404. See Nat'l Park Serv., Carving History—Mount Rushmore National Memorial, http://www.nps.gov/moru/park_history/carving_hist/carving_history.htm (Aug. 2, 2002) ("Carved into the southeast face of a mountain in South Dakota are the faces of four presidents, a memorial to American history. The faces of George Washington, Thomas Jefferson, Theodore Roosevelt and Abraham Lincoln look down from their stony heights and remind everyone that even the impossible is possible."); cf. HUSTON SMITH, IN CONVERSATION WITH NATIVE AMERICANS ON RELIGIOUS FREEDOM: A SEAT AT THE TABLE 67 (2006) ("I love Mt. Rushmore, because every time I look at that monstrosity I know that I will never back down on being Lakota. Every one of those gentlemen up there represents institutionalized genocide against the American Indian people. . . . So long as that thing, Mount Rushmore, sits in our sacred lands, I have a responsibility to live my culture." (quoting Charlotte Black Elk)).

405. See MARK DAVID SPENCE, DISPOSSESSING THE WILDERNESS 55-70 (1999) (discussing the use of military force and other tactics to remove Indians from Yellowstone National Park, making room for white uses, values, and occupation); Derek De Bakker, *The Court of Last Resort: American Indians in the Inter-American Human Rights System*, 11 CARDOZO J. INT'L & COMP. L. 939, 970 & n.242 (2004) (describing the carving of Mount Rushmore as a "final act of humiliation" against the Sioux to make clear that the United States has no intention of returning the Black Hills).

406. Cf. Robert B. Keiter, *Public Lands and Law Reform: Putting Theory, Policy, and Practice in Perspective*, 2005 UTAH L. REV. 1127, 1128-29 (considering various evolutions in policy regarding the purposes of public lands).

management an increasingly divisive proposition.

These concerns resonate more generally in peoplehood scholarship. At the descriptive level, Professor John Lie argues that peoplehood grows out of now anachronistic and somewhat irrelevant designations of race, ethnicity, and nation, all of which fail to “offer[] a solid basis for modern peoplehood.”⁴⁰⁷ In reality, an individual’s identification with a (singular) people obscures overlapping identities and the mobility of populations. A Christian may be German or Arab. A Jewish person might be Israeli or Ethiopian, white or black, Hebrew-speaking or not. A Navajo may be an American, an Arizonan, a Mormon—or all three. As these examples suggest, “modern peoplehood creates a fiction of homogeneity, of holistic essences. . . . Particular individuality is bypassed in the name of an abstract collectivity.”⁴⁰⁸ The only explanation for the persistence of peoples today is, in Lie’s view, the modern preoccupation with “identity transmission” over “status distinction.”⁴⁰⁹

Lie further argues that peoplehood distinctions perpetuate normatively undesirable developments. The ugly underside of fostering identity along racial, ethnic, and religious lines is conflict between groups.⁴¹⁰ Incidents of genocide in the modern era reflect these tensions between national and sub-national identities at their most extreme.⁴¹¹ Peoplehood has been specifically problematic in the property arena as well. Around the world, governments have used the notion of peoplehood as a philosophical or political basis for appropriating property occupied by other (arguably) less powerful groups⁴¹² and individuals.⁴¹³ In the United States, federal

407. LIE, *supra* note 48, at 15.

408. *See id.* at 272.

409. *Id.* at 15.

410. *See id.* at 224.

411. *See id.* at 191-231.

412. *See, e.g.,* George E. Bisharat, *Land, Law and Legitimacy in Israel and the Occupied Territories*, 43 AM. U. L. REV. 467, 474, 475-490 (1994) (discussing “the centrality of land acquisition to the Zionist enterprise”); EDWARD SAID, *THE QUESTION OF PALESTINE* 97 (1992) (describing various methods by which the Zionist movement acquired lands for the establishment of Israel). For a viewpoint more sympathetic to the Israeli cause, see generally ALAN DERSHOWITZ, *THE CASE FOR ISRAEL* (2004).

413. Consider the Supreme Court’s much-discussed decision in *Kelo v. City of New London*, 545 U.S. 468, 484 (2005) (upholding, under the “public use” doctrine, city’s condemnation of residences for urban redevelopment project). The decision has been criticized for its failure to respect the property rights of both individuals, see Wendell E.

officials and citizens have historically tried to justify the dispossession of Indian lands by reference to the needs of the American people.⁴¹⁴ Showing that no people is immune from abusing its powers, however, Indian tribes have in recent years used tribal sovereignty to banish individuals from the tribal land base, with some of these cases resting on questionable rationales.⁴¹⁵

Whatever the intellectual failings of “peoplehood,” however, even critics acknowledge that individuals do, in practice, long for collective experiences and affiliate themselves as peoples, sub-national and otherwise.⁴¹⁶ This point of legal realism is well-taken in the federal public lands context. Numerous national subgroups have specialized interests in the public lands.⁴¹⁷ Mormon religious practitioners visit and preserve places associated with their migration to Utah, including those now owned by the federal government.⁴¹⁸ Rural communities may have a shared desire or need to maintain livelihoods based on grazing, mining, or drilling the public lands.⁴¹⁹ Hispanic descendants of Spanish land grantees similarly claim that land access for subsistence purposes is necessary for their cultural, social, and economic survival.⁴²⁰

Pritchett, *Beyond Kelo: Thinking About Urban Development in the 21st Century*, 22 GA. ST. U. L. REV. 895, 908 (2006) (“[T]he public is concerned that the government may take the homes of fellow citizens.”); and minority groups, see *Kelo*, 545 U.S. at 522 (Thomas, J., dissenting) (“Urban renewal projects have long been associated with the displacement of blacks Regrettably, the predictable consequence of the Court’s decision will be to exacerbate these effects.”).

414. See Russell L. Barsh, *Behind Land Claims: Rationalizing Dispossession in Anglo-American Law*, 1 LAW & ANTHROPOLOGY 15, 20-26, 28-41 (1986).

415. See Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1072-74, 1103-07 (2007).

416. See LIE, *supra* note 48, at 237, 269-72.

417. See Charles Wilkinson, *Listening to All the Voices, Old and New: The Evolution of Land Ownership in the Modern West*, 83 DENV. U. L. REV. 945, 952-58 (2006) (discussing Mormon, Hispanic, and Indian cultural interests in western lands).

418. See Holdsworth, *supra* note 401, at 1003.

419. Cf. Debra L. Donahue, *Western Grazing: The Capture of Grass, Ground, and Government*, 35 ENVTL. L. 721, 721 (2005) (critiquing federal policy promoting grazing on public lands as founded on “beliefs . . . that public-land ranching is a culture worth preserving”).

420. See *Lobato v. Taylor*, 70 P.3d 1152 (Colo. 2003) (a case where “successors to original settlers of a Mexican land grant sued a landowner who had fenced adjoining mountain property, seeking rights of access for grazing, hunting, fishing, timbering, firewood, and recreation”); See also Angela Garcia, *Land of Disenchantment: A Native New Mexican Digs for the Roots of a Tragic Epidemic*, HIGH COUNTRY NEWS, 3-13, 19, April 3, 2006, available at http://www.hen.org/servlets/hent.Article?article_id=16202# (tracing the heroin epidemic “that is destroying the Hispano community of the Espanola Valley” in

Christian churches have a long history of using the public lands for religious services, camps and retreats.⁴²¹ Practitioners of New Age religions, such as the Rainbow Family, hold annual gatherings in the national forests.⁴²² And recent research has begun to reveal special “historical, religious, and spiritual ties” between African Americans and the national forests.⁴²³

Federal land management policy is not well-served by denying the fact that sub-national groups have claims to the public lands. In 1916, Congress declared that the varied lands comprising the national parks are “united . . . into one national park system as cumulative expressions of a single national heritage . . . and managed for the benefit and inspiration of all the people of the United States.”⁴²⁴ One could read this statute as referencing only national and individual interests in the national parks. Yet, even if it wasn’t clear in 1916, it is quite clear today that the term “all people” implicates a number of “peoples” whose interests in the parks are collective. As Professor Burton has argued, the *Lyng* standard “do[es] . . . a disservice to the evolution of constructive legally pluralistic public policy” in the sacred sites arena.⁴²⁵

The property and peoplehood approach can help the land management agencies confront the pluralistic realities facing them. But it is important to mitigate potential conflict between

part to “land loss [which] is so much more than real estate: it is the loss of life and traditions”).

421. A recent Freedom of Information Act (FOIA) request initiated by the Native American Rights Fund, for example, reveals that dating back to the 1950s the Forest Service has granted over 350 special use permits to religious groups, primarily Christian churches and camps. See Letter from the U.S. Forest Serv. to Steven Moore, Native Am. Rights Fund (2003) (on file with author).

422. See U.S. Forest Serv. & Bureau of Land Mgmt., *Special Uses, Noncommercial Group Uses Regulations Frequently Asked Questions*, nos. 22-24 (2002), <http://www.fs.fed.us/recreation/permits/documents/ncgu-q-a-2002.doc>. The Forest Service allows the Rainbow Family, “a loosely knit association of persons who organize gatherings in the national forests for their stated purpose to celebrate life, worship, express ideas and values, and associate with others who share their beliefs” to use the national forests and BLM lands for gatherings attracting “as many as 20,000 people from across the nation.” *Id.* at no.22.

423. Earl C. Leatherberry, *An Overview of African Americans’ Historical, Religious, and Spiritual Ties to Forests*, in PROCEEDINGS OF THE SOCIETY OF AMERICAN FORESTERS 1999 NATIONAL CONVENTION 452 (2000), available at <http://ncrs.fs.fed.us/pubs/viewpub.asp?key=2570>.

424. 16 U.S.C. §§ 1a-1 (Westlaw 2008).

425. See BURTON, *supra* note 47, at 292.

peoples. Several factors may help in this regard.⁴²⁶ First, individual rights are still well-protected in public lands law. The Establishment Clause works to ensure that accommodations of sacred sites practice stop short of imposing American Indian religious belief on other citizens.⁴²⁷ Moreover, the Equal Protection and Due Process Clauses protect individual access and property rights on the public lands.⁴²⁸

Moreover, effectuating a theory of property and peoplehood at sacred sites has the potential to nurture "common ground" among various users of the public lands.⁴²⁹ As suggested above, United States citizens share a common interest in religious freedom and may be able to coalesce around that aspect of sacred sites practice. Secondly, Americans may be ready to address the historic oppression of Indian religious and dispossession of Indian land.⁴³⁰ As a common resource, the 654 million acres of public lands are well-suited for dispersing the costs (social, economic and otherwise) of Indian needs.⁴³¹ Finally, the Rawlsian notion of "reciprocity" suggests that, as decent peoples, Indian tribes should extend the same tolerance for non-Indian religion and property.⁴³² Thus, a reformed sacred sites practice might foster a widespread attitude of respect and cooperation among individuals and peoples on the public lands.⁴³³

426. See, e.g., John Dendahl, *Indian Sovereignty Has Outlived Its Usefulness*, HAW. REP., Jan. 26, 2006, available at <http://www.hawaiiireporter.com/story.aspx?b052fb7c-bf08-4526-8155-70cadd12d151> (arguing Indian sacred sites claims threaten to divide American citizens and lead to "national weakness" and "Balkanization").

427. See, e.g., *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1045 (9th Cir. 2007) (evaluating whether refusal to allow snowmaking plan on San Francisco Peaks would constitute Establishment Clause violation). See also Carpenter, *supra* note 46, at 1147 (arguing that accommodating Indian interests at sacred sites on federal public lands is unlikely to violate the Establishment Clause because it almost always pursues a secular purpose, does not have the primary effect of advancing religion, and does not entangle the government in religion).

428. See James L. Huffman, *The Inevitability of Private Rights in Public Lands*, 65 U. COLO. L. REV. 241, 270 & n.154 (1994).

429. See RONALD D. BRUNNER ET AL., *FINDING COMMON GROUND: GOVERNANCE AND NATURAL RESOURCES IN THE AMERICAN WEST* 15 (2002) (setting out the notion of "common interest" in natural resource governance).

430. Thomas E. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1876 (2007) (arguing that Americans generally favor Indian land reparations).

431. See Carpenter, *supra* note 46, at 1128-30 (considering a law and economics justification for sacred sites accommodations).

432. See RAWLS, *supra* note 49, at 28-29.

433. See KLEIN ET AL., *supra* note 30, at 292-93 (describing "collaborative

3. *Non-fungibility as an administrative standard?*

Finally, some critics may challenge the idea that Indian beliefs about the non-fungibility of sacred sites should be used as a normative management standard for the public lands. Indeed, this standard is not found in any of the organic statutes creating the agencies or, indeed, in any federal land management statute. The idea of non-fungibility may be compatible with the Park Service's "conservation" mandate, which calls for the protection of "scenery and the natural and historic objects and the wild life . . . by such means as will leave them unimpaired for the enjoyment of future generations."⁴³⁴ But non-fungibility is less obviously compatible with the Forest Service's "multiple-use" mandate, under which the forests are to be managed "for outdoor recreation, range, timber, watershed, and wildlife and fish purposes."⁴³⁵ This directive seems to treat the forests as generally fungible resources.⁴³⁶

There are several possible responses to this critique. The first is that, as cases like *Bear Lodge*, *Wyoming Sawmills*, *Natural Arch*, and *Navajo Nation* make clear, the land use agencies are bound not only by their organic statutes but also by the NHPA.⁴³⁷ Paying close

management of federal natural resources"). In some respects my argument may fall prey to a similar critique that scholars have mounted against Radin's work, namely its focus on consensus over conflict. See, e.g., Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin's Property and Personhood Theory*, 45 STAN. L. REV. 346, 361-62 (1993). Because I am writing in a context—the public lands—that requires some degree of compromise between conflicting groups, I feel bound to work toward consensus and believe such an approach offers Indians the best chance of meaningful sacred sites accommodations. In the final analysis, however, I argue that if conflict is unavoidable, Indian claims should be prioritized over competing claims that do not implicate non-fungible peoplehood concerns.

434. National Park Organic Act, 16 U.S.C. § 1 (Westlaw 2008).

435. Multiple Use Sustained Yield Act of 1960, 16 U.S.C. § 528 (Westlaw 2008). See also Federico Cheever, *The United States Forest Service and National Park Service: Paradoxical Mandates, Powerful Founders, and the Rise and Fall of Agency Discretion*, 74 DENV. U. L. REV. 625, 628 (1997) ("The Park Service and the Forest Service are different. The Forest Service authorizes logging, oil and gas development, mining and hunting in the national forests. The Park Service (with a few exceptions) permits none of these uses in National Parks.").

436. See IN THE LIGHT OF REVERENCE, *supra* note 326 ("Recreation is one of the top five income generators in every western state. It's very, very important. But what we also see is the potential that mining activity, oil and gas activity, or timber harvesting, or ranching or water development, or these other activities that are very important economically, could also be stopped as a result of, 'Well, somebody thinks it's sacred, and that's enough for us.'" (interview of William Perry Pendley)).

437. See also *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 807-08 (9th

attention to which public lands are, or aren't, fungible to American Indians is one way that agencies can use their considerable discretion to reconcile what may be conflicting statutory mandates.⁴³⁸ The fungibility analysis may help agencies prioritize among competing claims to the public lands where organic statutes fail to provide substantive guidance.⁴³⁹ Finally, Congress seems increasingly receptive to non-fungible concerns in the modern era, and has amended the Forest Service mandates to recognize a duty to implement "a natural resource conservation posture that will meet the requirements of our people in perpetuity."⁴⁴⁰

Critics may also argue that a societal bias in favor of wealth-maximization is not the only force that makes it difficult for agencies to protect sacred sites. Indeed, agencies must mediate political pressures of every conceivable nature.⁴⁴¹ Yet, my "non-fungibility" approach seems narrowly tailored to counter market arguments.⁴⁴²

Cir. 1999) (enjoining proposed land exchange due in part to agency's failure to mitigate effects as specified in NHPA regulations); *see generally* Melissa A. MacGill, *Old Stuff Is Good Stuff: Federal Agency Responsibilities Under Section 106 of the National Historic Preservation Act*, 7 ADMIN. L.J. AM. U. 697 (1994).

438. *See generally* Martin Nie, *Statutory Detail and Administrative Discretion in Public Lands Governance: Arguments and Alternatives*, 19 J. ENVTL. L. & LITIG. 223 (2004).

439. Michael C. Blumm, *Public Choice Theory and the Public Lands: Why "Multiple Use" Failed*, 18 HARV. ENVTL. L. REV. 405, 407 (1994) (arguing the multiple-use statutes amount to a "standardless delegation of authority to managers of public lands"); *see* 63C AM. JUR. 2D *Public Lands* § 86 (2008) ("While 'multiple use' is defined, there is no indication as to the weight to be assigned to each value, and the proper mix of uses within an area is left to the discretion of the Forest Service.").

440. Forest Service Organic Act of 1897, as amended, 16 U.S.C. § 1600(6) (Westlaw 2008).

441. These include the historical tension between federal power and local control over the public lands, competition among commodity-users of the public lands and the problem of "agency capture" by various interest groups. *See, e.g.*, Sandra K. Davis, *Fighting over Public Lands: Interest Groups, States, and the Federal Government*, in *WESTERN PUBLIC LANDS AND ENVIRONMENTAL POLITICS* (Charles Davis ed., 1997).

442. This Article does not address the extent to which non-fungibility succeeds as a response to economic arguments on the public lands. Just briefly, I note that proponents of a labor theory might argue that those who use the public lands for economic purposes such as mining and ranching have a higher set of entitlements than American Indians who seek to use them for "unproductive" purposes. This line of analysis echoes concerns that the public lands represent a "tragedy of the commons" scenario in which the absence of private property rights disincentivizes their productive use. *See generally* Amy Sinden, *The Tragedy of the Commons and the Myth of A Private Property Solution*, 78 U. COLO. L. REV. 533 (2007). Of course the aim of my real property and peoplehood argument is to further the idea that non-economic uses of the public lands are far from "tragic," that religious and

My hope, however, is that considering the non-fungible quality of certain places on the public lands to certain peoples will resound with broader theories of federal land management. Consider, for example, the “place-based” ethic of federal land management.⁴⁴³ Rather than presenting a dichotomous choice between commodity or conservation-driven uses of the public lands generally, a place-based approach evaluates appropriate uses of specific lands based on their natural features or other qualities.⁴⁴⁴ With their deep, intergenerational knowledge of the landscape,⁴⁴⁵ American Indians can help land managers appreciate the particular histories and environmental qualities of specific places.⁴⁴⁶ In the *Natural Arch* case, for example, decades of tourism had eroded the sandstone arch at Rainbow Bridge National Monument, a sacred site to Navajos.⁴⁴⁷ The Park Service eventually adopted a management plan asking all visitors to adopt the Navajo practice of not touching or walking under the arch.⁴⁴⁸ The Park Service believed this practice would be a useful tool in achieving the conservation goals required by federal statute.

Non-Indians also have important perspectives on “place” that should guide land use management decisions. Certain sites may be non-fungible because they serve as habitats for endangered species, monuments to national history, or settings for specialized

cultural uses are valuable in their own way, and that these uses should prevail at sacred sites. Cf. RUTHERFORD H. PLATT, *LAND USE AND SOCIETY* 5-6 (1996) (calling for attention to cultural and other non-economic values that people attach to land).

443. See CHARLES F. WILKINSON, *THE EAGLE BIRD: MAPPING A NEW WEST* 137-38 (1992) (“We need to develop an ethic of place. An ethic of place respects equally the people of a region and the land, animals, vegetation, water, and air.”). Another approach that may or may not be consistent with my peoplehood model—and that deserves consideration in a subsequent work—is an ecology approach to federal land management. See, e.g., Jamieson E. Colburn, *Habitat and Humanity, Public Lands Law in the Age of Ecology*, 29 ARIZ. ST. L. J. 145 (2007). Thanks to Martin Nie for raising the “ecology” question.

444. See KLEIN ET AL., *supra* note 30, at 2-3; ERIC FREYFOGLE, *THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD* 35 (2003).

445. See WILKINSON, *supra* note 417, at 960 (“The Indian world view holds the most sophisticated connection between our species and the natural world of any body of thought I know.”).

446. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 176 (1991) (“We have much to learn from [N]ative Americans who have long known that there is a way in which the land owns us, even as we pretend to own the land, and that we ignore that fact at our own peril.”).

447. See *Natural Arch & Bridge Soc’y v. Alston*, 98 F. App’x. 711, 715 (10th Cir. 2004).

448. See *id.*

recreational endeavors.⁴⁴⁹ Public lands may deserve special treatment because past uses have damaged the physical environment or because a community's way of life depends on it. Other lands may be ideal locations for extractive industries. Explicit consideration of what makes a certain natural resource non-fungible to various peoples is one component of a place-based approach to public lands management. Such analysis can supply meaningful content to abstract statutory land management concepts like "conservation" and "multiple-use," and inspire more thoughtful allocation of resources and uses on the public lands.

V. CONCLUSION

The opening paragraphs of this Article suggested that American peoplehood is defined, in large part, by the individual freedoms guaranteed to its citizens. Within the larger society, American Indians have struggled to maintain their own peoplehood, dependent as it is on their collective spiritual relationship with traditional lands, for which the law has inadequate protection. Historically, these tensions have seemed intractable. Today, however, the resolution of Indian sacred sites claims presents an opportunity for the peoplehood interests of Americans and Indian tribes to converge over shared interests in religious freedom and cultural pluralism.⁴⁵⁰

Beyond sacred sites, my theory of real property and peoplehood requires that tribal interests in land be treated seriously—at least as seriously as the property of individual citizens, states, and the national government.⁴⁵¹ Indeed, Indian claims should often be given special deference in light of the inextricable relationship between tribal peoples and their lands. Outside of Federal Indian Law, other groups might be able to make their own claims for special protection of real property.⁴⁵² By legitimizing

449. Cf. KLEIN ET AL., *supra* note 30, at 2-3 (describing the goal of place-based legal frameworks to "integrate ecological, economic, and social factors to provide long-term sustained protection of the environment").

450. See FELDMAN, *supra* note 45, at 3.

451. In a forthcoming article, I will critique Supreme Court jurisprudence that denies tribal jurisdiction, takings, and sovereignty claims over reservation lands and call for legal reform facilitating comprehensive recovery of the tribal land base. See *Property and Recovery* (2008) (unpublished manuscript, on file with the author).

452. Such group claims are often made with respect to cultural property, see *supra* note 195. Hopefully this Article will stimulate thinking on the ability of groups to bring

such claims, we might foster a better understanding of all citizens' relationship with the American landscape and begin to heal some of the inequities instigated at our nation's founding. Perhaps in these ways, the United States can make progress toward realizing both the individual and collective freedoms that define our American peoplehood.

claims to real property. *See supra* note 413 (on special ramifications of Supreme Court's *Kelo* decision for African Americans affected by urban redevelopment); Mary L. Clark, *Treading on Hallowed Ground: Implications for Property Law and Critical Theory of Land Associated with Human Death and Burial*, 94 KY. L.J. 487, 487-89 (2005) (considering Radin's property and personhood theory as a basis for criticizing unequal treatment of "white" and "non-white" burial sites).

