

“THE SACREDNESS OF HAPPINESS”

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The Sacredness of Happiness

Why do they sing? What do they have to sing about? Somewhat apart from one another, separated by roughly equal distances, facing outward from the water, they clank and croak all through the night with tireless perseverance. To human ears their music has a bleak, dismal tragic quality, dirgelike rather than jubilant. It may nevertheless be the case that these small beings are singing not only to claim their stake in the pond, not only to attract a mate, but also out of spontaneous love and joy, a contrapuntal choral celebration out of the coolness and wetness after weeks of desert fire, for love of their own existence, however brief it may be, and for joy in the common life.

Has joy any survival value in the operations of evolution? I suspect that it does; I suspect that the morose and fearful are doomed to quick extinction. Where there is no joy there can be no courage; and without courage all other virtues are useless. Therefore the frogs, the toads, keep on singing even though we know, if they do not, that the sound of their uproar must surely be luring all the snakes and ringtail cats and kit foxes and coyotes and the great horned owls toward the scene of their happiness.¹

INTRODUCTION

The structure of our legal system outlaws the Native American values. We defy the essence of nature, and our national structure: the pursuit of happiness and equality. Inherent to the United States national defiance of sustainability and the limits of the natural, is cultural harm of Native Americans by leaving Native pursuits and beliefs outside the protection of the law. In fact with an eye and ear to the earth, the large discrepancies between Native American and non-Native American rights in natural resources in the US courts is dangerous. But if we merely recognize the law, the symptoms underscore the elements of a colonized nation.

¹ EDWARD ABBEY, DESERT SOLITAIRE: A SEASON IN THE WILDERNESS 125 (Simon and Schuster 1968).

I grew up in India and Malaysia and I find that visions come to me from my childhood reminding me the parameters of colonization are here in America. I have a sadly innovative suggestion: let's listen to the facts, the intentions, the truth that brought America here today. Let us do in legal terminology. Property or land was the basis to our rights.² History substantiates property rights for Native Americans through their relationship with the earth.³ Going beyond history and the view that the "substantive scale on which law should be studied, taught, and learned is the entirety of human experience,"⁴ it is important we listen to modern Native American recognition of all living creatures when we define natural resource uses in the western U.S..

Reduction of the basic rights to property of Native American individuals is genocide within the U.S..⁵ Native American values ignored, or unimportant to the courts, are rights beyond the protection of the law.⁶ Cultural harm is an element of genocide actions brought in the International Criminal Courts.⁷ The continual disregard of Native rights intends the death of a culture,⁸ may culminate in the death of a people, the result are international crimes. If our courts and Indian policies are not redesigned we allow the genocide Native America culture. International law does offer a remedy for inequities in natural resource management.⁹ In property disputes, the United Nations offers a solution for native title issues based on

² Cherokee v. Georgia 30 U.S. 1 (1831).

³ "Indian religion is localized. Every spring, creek and river, every valley, hill and mountain as well as the trees that grow upon the soil are made sacred by the inherited traditions of their religion." DONALD WORSTER, *A RIVER RUNNING WEST: THE LIFE OF JOHN WESLEY POWELL* 270 (OXFORD UNIVERSITY PRESS 2001) quoting JWP to Senator Henry Teller, Feb. 1880, file 3751, Powell papers, NAA.

⁴ Jim Chen, *The Pragmatic Ecologist: Environmental Protection as a Jurisdynamic Experience*, 87 MINN. L. REV. 847, 849 (2003).

⁵ Cobell v. Norton, 229 F.R.D. 5, 23 (July 2005).

⁶ Navaho v U.S. Forest Service, 408 F.Supp.2d 866 (2005).

⁷ G.A. Res. 96(I), U.N. Doc. A/64/Add.1, at 189 (1946).

⁸ Donald Worster, *A RIVER RUNNING WEST: THE LIFE OF JOHN WESLEY POWELL* 270 (OXFORD UNIVERSITY PRESS 2001) quoting JWP to Senator Henry Teller, Feb. 1880, file 3751, Powell papers, NAA.

⁹ UN Art 27 application in case and redress for cultural harm to Native Americans.

recognizing the indigenous rights bargained for in the initial agreements between conquerors and the colonized.¹⁰

The substantiality of the harm is so egregious that the harm expands past individual physical harms to a repetition that amounts to cultural harm which is regarded by international comity as genocide outside America's borders. Cultural harm to Native Americans manifests through the continual denial of Native American interests in court.¹¹ Basic to colonization is assimilation, and the use of one tribal members assimilations as grounds to deny the substance in native claims brought by different individual natives who continue ancient practices.¹² If we review the fact as dryly as the courts, there is little representation of the native view.¹³ The courts opinions fall cold on my ears. It is an after thought to consider cultural harm as a possible means towards redress. We cannot recognize ourselves outside the global arena, and frankly there is little to turn to for remedy of the abuse of native interests other than international comity regarding genocide.

This essay is an attempt to be courageous and alive enough to provide a view on how we came to this place in America, and acknowledge history and the alternative resources available as guidance for court decisions. In part I, this essay recognizes historically, the basic sacredness of the Native American relationship with the United States, the U.S. government's intentional removal of native Americans from their land in order to remove a

¹⁰ U.N Draft Declaration on the Rights of Indigenous Peoples Part VI Art. 27 (26 August 1994). ("Indigenous peoples have the right to the restitution of the lands, territories and resources which we have traditionally owned or otherwise occupied or used; and which has been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands territories and resources equal in quality, size and legal status.")

¹¹ *Lyng v. Northwest Indian Cemetery Protective Association* 485 U.S. 439 (1988).

¹² *Navaho v. U.S. Forest Service at 890* (Portions of the WMA reservation, considered sacred by tribal members, are dedicated to recreational uses. For example, the White Mountains, considered sacred to some members of the WMA, are home to the Sunrise Ski Resort that is owned and operated by the WMA.)

¹³ *Lyng v. Northwest Indian Cemetery Protective Association at 453*.

people and a way of being from this continent. Part II examines some aspects of modern Native America law and discusses how the modern law ignores rights as is exemplified when the U.S. Supreme Court ignores Native American property rights in *Lyng v. Northwest Indian Cemetery Protective Association*. The essay concludes with looks globally for ways the courts to recognize Native American rights and address the actual circumstances property and natural resource management.

I. THE SACREDNESS OF NATIVE AMERICAN VALUES IN WESTERN AMERICA

A. A historical view of opposing values

Though Native Americans have asked the U.S. to recognize their rights for centuries, recognition of Natives as people with equal rights has been denied from the beginning of America: “We desire you to consider, brothers, that our only demand is the peaceful possession of a small part of our once great country, look back and review the lands from whence we have been driven to this spot. We can retreat no further ...”¹⁴

The property values of the Native Americans remain diminished.¹⁵ The relationship between nature and man perceived by Indians and the U.S. government significantly influenced initial Indian and U.S. negotiations. The intention of the U.S. government through John Wesley Powell in his letter to Senator Teller in 1880:

All of our Indian troubles have arisen primarily and chiefly from two conditions inherent to savage society. The first is that the land belonging to an Indian clan or tribe is dear to it not only as a region for which it obtains subsistence but chiefly because it is the locus of its religion. The Indian religion is localized. ... When an Indian ... tribe gives up its land it not only surrenders its home as understood by civilized people but its gods are abandoned and all its religion connected therewith, and connected with the

¹⁴ Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack On Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 641 (2003) *citing* Helen Hunt Jackson, *A Century of Dishonor: A Sketch of the United States Government's Dealings with Some of the Indian Tribes* 42-43 (181), reprinted in *Great Speeches by Native Americans* 37 (Bob Baisdell ed., 2000) (*quoting* unknown author from among Delaware or twelve other tribes).

¹⁵ *Lyng v. Northwest Indian Cemetery Protective Association* 485 U.S. 439, 453 (1988).

worship of ancestors buried in the soil; that is everything most sacred to Indian society is yielded up. Such a removal of the Indians is the first step to be taken in their civilization.¹⁶

America's purposeful separation of Indian people from their beliefs was recorded many times by John Powell, who was an advisor of Indian affairs for both the Indians and the federal government.¹⁷ "Breaking the emotional bond between Indians and their land, . . . , could open the minds to a more advanced interpretation of nature. Indians needed to cease worshipping the earth and begin exploiting it."¹⁸ The actual purpose of the character of Native American title for white settlers was to keep them separated from what was sacred.

Sacred is defined as "[e]steemed especially dear or acceptable to deity; employed or frequented by divine or supernatural beings; as a sacred grove; the peacock; sacred to Juno."¹⁹ While legally the Latin word for sacred is "sacer"²⁰ is an adjective meaning "sacred, forfeited to a god. Roman law (Of an outlaw or a wrongdoer punished by being placed outside the law's protection."²¹ The second term for sacer is "outlawry"²² which means is "the act or process of depriving someone of the benefit and protection of the law."²³ And the third, "consecratio capitis,"²⁴ "consecrating the body"²⁵ which in Roman law is "the act of declaring a wrongdoer an outlaw who could be killed on sight; the punishing of criminal behavior by relegating an offender to the gods i.e., leaving the person outside divine and

¹⁶ Donald Worster, *A RIVER RUNNING WEST: THE LIFE OF JOHN WESLEY POWELL* 270 (OXFORD UNIVERSITY PRESS 2001) *quoting* JWP to Senator Henry Teller, Feb. 1880, file 3751, Powell papers, NAA.

¹⁷ *A RIVER RUNNING WEST* at 270.

¹⁸ Donald Worster, *A RIVER RUNNING WEST: THE LIFE OF JOHN WESLEY POWELL* 271 (OXFORD UNIVERSITY PRESS 2001) *commenting on* JWP to Senator Henry Teller, Feb. 1880, file 3751, Powell papers, NAA.

¹⁹ *Id.* at 2155

²⁰ Black's Law Dictionary, at 1362.

²¹ *Id.*

²² *Id.* at 1135.

²³ *Id.* at 1135.

²⁴ *Id.* at 323.

²⁵ *Id.* at 323.

human protection.”²⁶ By definition sacrilegious is the “theft of a sacred thing,”²⁷ but in application sacrilegious or sacrilegium is “the neglect or violation of imperial orders or enactments.”²⁸

History shows Native Americans have always understood this. Owhi a Yakama in negotiations over Indian land said, “the Creator ‘made our bodies from the earth. ... what shall I do? Shall I give the lands that are a part of my body and leave myself poor and destitute?’”²⁹ The real effects of this policy were immediately observable.

However, white-settlers’ solutions were not desirable. Clarence Dutton describing the Kanab-pipe Spring region in 1881, noted that “ten years ago the desert spaces outspreading to the southward were with abundant grasses, affording rich pasturage to horses and cattle. Today hardly a blade of grass is to be found within ten miles of the spring, unless upon the crags and mesas of Vermilion Cliffs behind it. The horses and cattle have disappeared, and the bones of the latter are bleached upon the plains in front of it.”³⁰

Recognition and respect of the deep difference in views on what is divine is required to begin negotiation on rights and land uses. “In Judeo-Christian origin story ... God ousted man from the garden and said that the earth would produce thorns and thistles and man was going to have to work by the sweat of his brow to survive and he would have to dominate the earth, to subdue it. But the Lakota origin story says that the earth is the mother who nourishes everything. It teaches respect for all living things, all related to one another. That’s an important difference.”³¹

²⁶ Id.

²⁷ Id. at 1362.

²⁸ Id. at 1362 *quoting* Adolf Berger, *Encyclopedic Dictionary of Roman Law* 689 (1953).

²⁹ BLOOD STRUGGLE, at 37.

³⁰ Id. at 353-354.

³¹ JUDITH V. ROSTER & MICHAEL C. BLUMM, *NATIVE AMERICAN NATURAL RESOURCES LAW: CASES AND MATERIALS* 11 (Carolina Academia Press 2002) *citing* Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge* 21 VERMONT L. REV. 225, 268-287 (1996) *quoting* Gerald Clifford, an Oglala Lakota who has studied Catholic theology has traditional Lakota religion.

All indigenous peoples within North America are culturally linked through experiencing similar treatment by Europeans.³² Native Americans have common responses to contact and colonization which is to hold on to themselves, to their history, “to cling to traditional belief systems as a way to define themselves in opposition to the Euro-Americans who were attempting to assimilate native peoples to Western values.”³³

What brings joy to a culture keeps a culture alive, and is what is most valuable to it. Our modern society bases value on commerce, on quantifying nature. If nature is not altered by man it is outside the law, it is wild, it is without protection of the laws. This is the deepest distinction between the dominant culture and native indigenous values. America is built on the exploitation of nature, the destruction of the values and the rights of any people who value the natural.

Native Americans respect the natural in their experience of life.³⁴ A sacred site is to be revered, to require respect and protection, it is not considered outside their protection.³⁵ With respect to the sacred comes the connection to life, the power of life. To disrespect or harm the natural is to take from one's self to endanger all living beings.³⁶ The court's effect is in opposition to modern international human rights, in fact we are living in an age when the courts are decisions are an assumption that has occurred. The courts do not turn to Native Americans to define their values, they turn to Anthropologists outside the culture to decide

³² JUDITH V. ROSTER & MICHAEL C. BLUMM, *NATIVE AMERICAN NATURAL RESOURCES LAW: CASES AND MATERIALS* 11 (Carolina Academia Press 2002) *citing* Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge* 21 VERMONT L. REV. 225, 268-287 (1996).

³³ *Id.*

³⁴ Donald Worseter, *A RIVER RUNNING WEST: THE LIFE OF JOHN WESLEY POWELL* 271 (OXFORD UNIVERSITY PRESS 2001) *commenting on* JWP to Senator Henry Teller, Feb. 1880, file 3751, Powell papers, NAA.

³⁵ *Navaho v. U.S. Forest Service at 887* (The Plaintiff tribes believe that the Peaks is a living entity and that the presence of the Snowbowl desecrates the mountain).

³⁶ *Navaho v. U.S. Forest Service at 888* (Native practitioners also believe that certain deities, such as Kachina or Ga'an, dwell on the Peaks, and that snowmaking (irrespective of the source of water) will negatively impact the deities, potentially causing drought or other suffering).

whether a real harm is there.³⁷ This diminishes of the rights of the individuals. The reduction of a people and their rights to land enabled the federal government to acquire their title, and intentionally reduced everything Native Americans were. The practice included actions to remove them from the quiet of their own history and culture, their stories, their food source, it imposed a diminishment upon them founded on disrespect for their actual interests. However, this does not mean it occurred to the absolute extent. Yet, genocide can still be brought about today. Our courts efforts to use the actions of Native Americans who have assimilated and entered our society in a more economically successful level to disprove Native claims in courts is to deny individuals of their rights and define a culture as lost. The requirement to have become a modern American is a present effort to culturally harm Native Americans.

B. Oppression of Native American Property Rights Based on Precedent

The always referenced *Johnson v. McIntosh* formed the United States' precedent in property law. Marshall relies on historical events prior the revolutionary war to articulate the influence of the Discovery Doctrine on property rights.³⁸ A young America required a conqueror's court to manage the questions of title.³⁹ The decision ignored property settlements that had recognized fee title in Indians as early as 1630.⁴⁰ He relied on British

³⁷ *Navaho v. U.S. Forest Service* at 888 (Dr. Propper agreed that the tribes view the Peaks: (a) as a home of spiritual beings; (b) a place where significant mythological events occurred; (c) a place where spirits of the dead went to be changed into bringers of rain; (d) a personification of gods and goddesses; (e) an area where important societies originated; and (f) as a source of life. ... Dr. Propper testified that although practitioners sincerely felt that the Forest Service decision would impact their beliefs and exercise of religion, the impacts did not amount to a substantial burden).

³⁸ Blake A. Watson, *John Marshall and Indian Land Rights: A Historical Rejoinder to the Claim of "Universal recognition" of the Doctrine of Discovery*, 36 SETON HALL L.REV. 481, 481 (2006) quoting JOHN MARSHALL, *THE LIFE OF GEORGE WASHINGTON* xi (1804).

³⁹ *Johnson and Graham's Lessee v. McIntosh*, 588-589 (1823).

⁴⁰ Blake A. Watson, *John Marshall and Indian Land Rights: A Historical Rejoinder to the Claim of "Universal recognition" of the Doctrine of Discovery*, 36 SETON HALL L.REV. 481, 482 (2006).

occupation through war,⁴¹ and the requisite infringement on Indians rights through colonization and dominance by Christianity that reduced native rights for his opinion.⁴²

But even in *Johnson v. McIntosh*, colonialism seemed a dubious tool to create a nation.⁴³ The justifications Justice Marshall offers (1) the European pretension that colonial “power should displace indigenous peoples unilaterally based on the both the duty and the privilege of Christianizing and civilizing the heathens,” and (2) the “natural law notion that (European) people finding themselves with insufficient land”⁴⁴ have the “privilege of displacing (non-European) others”⁴⁵ since they are not using their lands to the highest and best uses, based on a European perspective.⁴⁶ Marshall recognized that to diminish the rights of people who occupied their own land left an unreasonable discrepancy in logic.⁴⁷ He reasoned the Conqueror’s title,⁴⁸ based in the law of discovery.⁴⁹ The rights of the Indian

⁴¹Johnson and Graham's Lessee v. McIntosh, 21 U.S. (8 Wheat.) 543, 590 (1823). (“But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence. What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighbourhood, and exposing themselves and their families to the perpetual hazard of being massacred.”)

⁴² Id.

⁴³ Id.

⁴⁴ Philip P. Frickey, *Native American Exceptionalism in Federal Public Law*, 119 HARV. LAW REV. 431, 433 (1993).

⁴⁵ Id.

⁴⁶ Id. at footnote 121. See, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 542-43 (1832) (implying dubiety of European colonial pretensions, which Chief Justice Marshall termed “difficult to comprehend”). *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 573, 588-90 (1823) (distancing the Court from any normative defense of justifications based on “the character and religion of [the] inhabitants” and labeling the European colonial claims as “pompous”).

⁴⁷*Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 562 (1823). (In regulating the rights of civilized nations, when there is independence, the principles of the ruling government has under, the “particular circumstances,” been different from those of civilized nations and nevertheless decides the law.)

⁴⁸ Id. at “Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted. ...It is not for the Courts of this country to question the validity of this title, or sustain one which is incompatible with it.

tribes were outside Constitutional protections and separate from citizens, which is in absolute opposition to America's extraordinary plan,⁵⁰ and is the premise controlling U.S. property law that makes it impossible for Native American to establish stakes in land and land uses; specifically when these rights are in relationship with the U.S. government in the western United States.

U.S. Federal title is founded on human and moral inequities required by law. Marshall recognized an evolved society and described the requisite grounds for title in law derived from the divine or the sacred.⁵¹ However, the Church establishes a sophisticated system of political oppression within a colonized land, such that colonization and evangelization work together from the premise of the "Colonizer's God"⁵² structured as if humans are either inferior or superior.⁵³ This is the pattern of colonialism: the removal of people from their codes, the banishment of their beliefs from the code of law to aspire to happiness.⁵⁴

C. Impossibility: Aspiring for a Constitutional Democracy Without Consent

⁴⁹ Id at 572-73. (The Discovery Doctrine to the United States required Marshall to opine the Indians to be a people that were lesser. When the European nations who largely make up the dominant society today, first discovered America, it was to them an "immense continent."⁴⁹ A continent the Europeans were "eager to appropriate to themselves."⁴⁹ In their haste to acquire, they formed opinions to meet their goal, and found that "the character and religion of its inhabitants afforded an apology for considering them [Indians] as a people over whom the superior genius of Europe might claim an ascendancy."

⁵⁰ Philip P. Frickey, *Native American Exceptionalism in Federal Public Law*, 119 HARV. LAW REV. 431, 433 (1993).

⁵¹ *Johnson v. McIntosh* at 562.

⁵² François Maspéro *Les damnés de la terre*, Macgibbon & Kee (Great Britain 1961) citing FRANZ FANON, THE WRETCHED EARTH.

⁵³ Id.

⁵⁴ *Cherokee v. Georgia* 30 U.S. 1 (1831). (Cherokees were the occupants and owners of the territory in which they resided, before the first approach of the white men of Europe to the western continent; 'deriving their title from the Great Spirit, who is the common father of the human family, and to whom the whole earth belongs.' The tribes composing the Cherokee nation, they and their ancestors were the sole and exclusive masters of the territory, governed by their own laws, usages, and customs; yet, in trade for the rivers and meadows and forests they took as their own, "the potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence.")

“The government of the United States has been emphatically termed a government of laws, and not of men.”⁵⁵ Democracy in America⁵⁶ is only understood by reviewing “its singular origins and evolution.”⁵⁷ What makes America exceptional is the creation of a constitutional system based on personal liberty, popular sovereignty, and the rule of law.⁵⁸ Happiness is defined as “the pleasurable experience that springs from possession of good, the gratification of desires, or relief from pain or evil; enjoyment; . . .”⁵⁹ Native American claims in court to protect sacred sites are left without protection or remedy.⁶⁰ The law defines through legal definitions necessitating the legal definitions applicable to sacred and happiness. Legally, the “right to pursue happiness”⁶¹ is “[t]he constitutional right to pursue any lawful business or activity - in any manner not inconsistent with the equal rights of others - that might yield the highest enjoyment, increase one's prosperity, or allow the development of one's faculties.”⁶² This essence is what the U.S. is founded on.⁶³

But there remains a “dark side of this nation-building,”⁶⁴ however: “The expulsion of the Indians often takes place at the present day in a regular and, as it were, a legal manner,” involving “great evils . . . [that] appear to me to be irremediable.”⁶⁵ The U.S. will “certainly

⁵⁵ Marbury v. Madison, at 163

⁵⁶ Philip P. Frickey, 433. (1 Alexis de Tocqueville, *Democracy in America* (Phillips Bradley ed., Francis Bowen rev., Vintage Books 1990) (Henry Reeve trans., 1835) (1835).

⁵⁷ Id. See, e.g., Seymour Martin Lipset, *American Exceptionalism: A Double-Edged Sword* 13 (1996); Byron E. Shafer, *American Exceptionalism*, 2 *Ann. Rev. Pol. Sci.* 445, 446-48 (1999) (noting that de Tocqueville was an early proponent of “the notion that the United States was born in, and continues to embody, qualitative differences from other nations”).

⁵⁸ Id. at 434. (On the last, he wrote that “[w]ithin these limits the power vested in the American courts of justice of pronouncing a statute to be unconstitutional forms one of the most powerful barriers that have ever been devised against the tyranny of political assemblies.” 1 de Tocqueville, *supra* note 3, at 103.)

⁵⁹ Funk & Wagnalls at 1113

⁶⁰ Lyng

⁶¹ Black's Law Dictionary VIIIth Edition at 733

⁶² Id.

⁶³ Marbury v. Madison, 1 Cranch 137, 5 U.S. 137, 176 (1803). (“That the people have an original right to establish, for their future government, such principles as, . . . , shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected.”)

⁶⁴ Id. at 433.

⁶⁵ Id. at 340, 342.

cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”⁶⁶ Basically, it is impossible to form a constitutional democracy based on consent of the governed and protection of liberty and property by unilaterally displacing preexisting indigenous institutions and acquiring the indigenous land estate,⁶⁷ their interests are neither protected nor are they are they consenting to the values of the government.⁶⁸

II. THE MODERN MAP IN INDIAN LAW

A. Modern Law Ignoring Rights

Civil liberty is the right of every individual to the protection of the law. Whenever an injury, the “first duty of government is to afford that protection.”⁶⁹ Injuries to property rights cannot be committed by the government without the law intervening.⁷⁰ Yet, the U.S. Supreme Court has altered the landscape of Indian law substantially in recent years, by removing some of the protections in place to help evolve the nation into one of equals.⁷¹

Basic premises have long been established in Indian law through Congress.⁷² The Indian tribes have a trust relationship with the federal government, wherein the Indians and Indian tribes are wards to the federal government.⁷³ The law says, in its role as trustee of such lands, the government must act for the Indians' benefit.⁷⁴ This fiduciary relationship is referred to as "one of the primary cornerstones of Indian law."⁷⁵ Thus, treaties, statutes,

⁶⁶ *Marbury v. Madison*, at 163

⁶⁷ *Johnson v. McIntosh*, at 589-590. (When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot neglect them without injury to his fame, and hazard to his power.

⁶⁸ Philip Frickey, at footnote 121.

⁶⁹ *Marbury v. Madison* 1 Cranch 137, 5 U.S. 137, 163 (1803).

⁷⁰ *Marbury v. Madison*, at 165. (By the act passed in 1796, authorizing the sale of the lands above the mouth of Kentucky river (vol.3d. p. 299).

⁷¹ *U.S. v. Lara*, 541 U.S. 193, 124 S.Ct. 1628, (2004).

⁷² U.S.C.A. Const. Art. 1, § 8, cl. 3.

⁷³ *County of Yakima v. Confederated Bands of the Yakima Indian Reservation*, 502 U.S. 251, 269 (1992).

⁷⁴ *See United States v. Mitchell*, 463 U.S. 206, (1983).

⁷⁵ FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 221 (1982).

executive orders, and agreements are construed liberally in the Indians' favor, as directed by the canons of construction:⁷⁶ courts are directed to construe Indian treaties according to the way in which the Indians themselves would have understood them.⁷⁷ Yet courts have been limiting the scope of rights be they usufructuary rights in agreements or trust relationship rights.⁷⁸ The documents are not construed as they would be understood but the express language is referenced, only actions of the federal government provide a trust relationship with fiduciary responsibility barring express language in the document or statute rather than the intentions of Congress.⁷⁹ When it comes to property rights the federal government does not honor the Native Americans. Even the Office of the Interior, in charge of Indian affairs does little to meet its fiduciary responsibilities when directed to do so by the courts.⁸⁰

In recent years, the Court has injected itself into Indian affairs in place of Congress despite no historical foundation to do so.⁸¹ The fundamental problem is constitutional

⁷⁶ *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269, (1992).

⁷⁷ *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999); *Greeley*, 712 P.2d at 763.

⁷⁸ See *United States v. Mitchell*, 445 U.S. at 542 (The General Allotment Act creates a trust relationship between the United States and Indian allottees but concluded that the trust relationship was limited.)

⁷⁹ *U.S. v. Mitchell*, 463 U.S. 206, 225. (“[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.”⁷⁹)

⁸⁰ *Cobell v. Norton*, 229 F.R.D. 5, 23 (July 2005). (“[T]he Court has wanted to simply wash its hands of Interior and its iniquities once and for all, ... and finally relieve the Indians of the heavy yoke of government stewardship. The Court may eventually do all these things – but not yet. Giving up on rehabilitating Interior would signal more than a downfall of a single administrative agency. It would constitute an announcement that negligence and incompetence in government are beyond judicial remedy, that bureaucratic recalcitrance has outpaced and rendered obsolete our vaunted system of checks and balances, and that people are simply at the mercy of governmental whim with no chance for salvation. The Court clings to a slim and quickly receding hope that future progress may vitiate the need for such grim declaration. This hope is sustained in part by the fact that the Indians who brought this case found it in themselves to stand up, draw the line in the sand, and tell the government: Enough is enough—this far and no further. Perhaps they regret having done so now, nine years later, beset on all sides by the costs of protracted litigation and the possibility that their efforts may ultimately be futile; but still they continue.)

⁸¹ Philip P. Frickey, *Native American Exceptionalism in Federal Public Law*, 119 HARV. LAW REV. 431, 433 (1993). (1 Alexis de Tocqueville, *Democracy in America* (Phillips Bradley ed., Francis Bowen rev., Vintage Books 1990) (Henry Reeve trans., 1835) (1835).

problems created by colonialism and remedies provided by Congress are ignored.⁸² Thus, the solutions made by the Court are ruthless and inconsistent with not “even ... modest respect for tribal prerogatives that traditional federal Indian law sometimes reflected in appreciation of our colonial past.”⁸³ In fact, we live in a colonial present.

The Supreme Court is the institution least able to generate a satisfactory, dialogic integration of our colonial roots with our constitutional framework and thus needs to stand aside.”⁸⁴ The highest law in the land is based on denying the rights of those whose values are not in kind with the government even though this may not be the intention of the citizenry, the law promotes a specific prospective. The realities of the intentional reduction of rights to Native Americans inherent in our legal system, requires we look further. Fortunately, the Supreme Court recognizes its own shortcomings, Justice Clarence Thomas says; “the time has come to reexamine the premises and logic of our tribal sovereignty cases. . . . [U]ntil we begin to analyze these questions honestly and rigorously, the confusion . . . will continue to haunt our cases.”⁸⁵

The field of Indian law is being pieced together in ad hoc decisions to attempt cohesion, when perhaps the solution is to recognize the "courage of our confusions"⁸⁶ rather than settle for the “alternative, some smaller certainty that imposes artificial coherence at the expense of the exceptional.”⁸⁷ It was an exceptional effort that America made in the American Revolution,⁸⁸ we as a country stood up against a monarchy and an oppressive

⁸² Id.

⁸³ Id.

⁸⁴ Id.

⁸⁵ Id. citing *United States v. Lara*, 124 S. Ct. 1628, 1641, 1648 (2004) (Thomas, J., concurring in the judgment). These two sentences bookend Justice Thomas's opinion.

⁸⁶ Philip P. Frickey, *Native American Exceptionalism in Federal Public Law*, 119 HARV. LAW REV. 431, 433 (1993).

⁸⁷ *Lyng v. Northwest Indian Cemetery Protective Association* 485 U.S. 439, 453 (1988).

⁸⁸ Philip P. Frickey at 433.

government so that we could achieve something better.⁸⁹ We removed ourselves from the role of colony to form an independent nation.⁹⁰ It is through Property law: land and natural resource uses that Native Americans today require our government take a look at its duties and expect the requisite integrity to allow its citizens their stake, to no longer diminish rights so the initial purpose may be arrived: a happy and strong society.⁹¹

A. Lyng v. Northwest Indian Cemetery Protective Association: The Courts Ignore Usufructuary Rights and Reduce Constitutional Rights

In *Lyng v. Northwest Indian Cemetery Protective Association*, the Supreme Court continued to minimize the interests of the Native Americans and frankly stated that solution did not lie within the law. The court did not dispute that the Indians' beliefs were sincere.⁹² The specified location, the Chimney Rock area, the *high country*, was found to be "intimately and inextricably bound up"⁹³ with the Indians practices.⁹⁴ Even on an individual level the rights of individual citizens' use of the area for personal spiritual development was seen as valuable. The activities were found to be "believed to be critically important in advancing the welfare of the tribe, and indeed, of mankind itself."⁹⁵ The Supreme Court decided that even if they accepted the Ninth Circuit's predication that the G-O road would "virtually destroy the Indians' ability to practice their religion,"⁹⁶ that the Constitution simply does not provide a principle that could justify upholding the Indians' legal claims.⁹⁷

⁸⁹ Id.

⁹⁰ Id.

⁹¹ *Marbury v. Madison* at 176.

⁹² *Lyng v. Northwest Indian Cemetery Protective Association* 485 U.S. 439, 453 (1988).

⁹³ Id.

⁹⁴ Id.

⁹⁵ Id.

⁹⁶ Id.

⁹⁷ Id.

What was not recognized was the property right that had been traded for, the right to travel in a protected natural habitat since time immemorial. The recognition of the sacredness of land to these people was their inherent title, the use that they had reserved and protected long ago. The Indians did not set aside these to the state, but retained access to them through agreements with the U.S. federal government.⁹⁸ There are no express documents expressing the parameters of the use rights because the reservations were made by executive order, but government reports show Native Americans continued traditional use,⁹⁹ and this is understood to equate as a property right claim.¹⁰⁰ The extinguishment of use rights without compensation or compelling reasons, is to deny them their legal rights and their rights as citizens.

A look to the past illuminates that when Indians agreed to live on Indian reservations it was at the behest of the federal government.¹⁰¹ The primary purpose to Indian reservations was to develop agriculturally self supportive communities.¹⁰² As part of these agreements, Indian Tribes reserved rights to undeveloped land that was not state controlled, yet outside Indian reservations,¹⁰³ the historical use of those areas is maintained into the present.¹⁰⁴

⁹⁸ Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting A Place For Indians As Nonowners*, 52 UCLA L. Rev. 1061, 1103-1104 (2005) (The federal promise that a tribe would have a continued right to use its traditional lands was often a key factor inducing tribes to convey title to the United States.)

⁹⁹ Id. at 1104. As Michael Blumm has argued in the context of Northwestern tribes, the right to fish was so important that tribes relinquished most of their traditional territories in exchange for small homelands and the right to fish. Citing Michael C. Blumm & Brett M. Swift, To tribal peoples, these off-reservation activities were inextricably linked to certain lands. For example, while Northwestern tribes "agreed to share access to the fish resource, they wanted to retain their property rights to their traditional fishing places regardless of land ownership." The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach, 69 U. Colo. L. Rev. 407, 429, 432-33 (1998).

¹⁰⁰ *Lyng v. Northwest Indian Cemetery Protective Association*, at 453.

¹⁰¹ Despite what may be set forth in official documents, the fact is that Indians were forced onto reservations so that white settlement of the West could occur unimpeded. See Walter Rusinek, *A Preview of Coming Attractions? Wyoming v. United States and the Reserved Rights Doctrine*, 17 *ECOLOGY L.Q.* 355, 406 (1990).

¹⁰² *Arizona v. California*, 373 U.S. 546 (1963).

¹⁰³ *United States v. Adair*, 723 F.2d 1394 (1983).

Although the federal government acquired vested title to the lands, the Indian use did not alter and the Indian tribes retained rights to the resources and territories that allowed them to maintain the connection they had always had with their lands.¹⁰⁵ The structure of the Indian reservations was not one conducive to the preservation of sacred sites. But access to sacred sites, and hunting and fishing areas was, and is what was traded for by tribes forced onto small blocks of reserved land.¹⁰⁶

Lyng is an example of sacred in the legal sense, the removal of Indian tribal use rights without compensation. With logging comes the building of roads, altering the land and the possible uses available to the land.¹⁰⁷ There are huge changes to the public landscape making it inconsistent with the Indian uses since time immemorial.¹⁰⁸ In *Lyng*, the court ignored the costs, the property title bargained for, and found no constitutional protection. Such a holding is risky to our society and ignores material aspects of the cause of action brought by the Native Tribes.

Indians retain the property rights through consistent practice and use today,¹⁰⁹ consented to by the Federal government, and not in opposition to federal title.¹¹⁰ However,

¹⁰⁴ Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting A Place For Indians As Nonowners*, 52 UCLA L. Rev. 1061, 1103-1104 (2005). ([Even] in cases where tribes have explicitly reserved off-reservation use rights, courts are still called on to determine the ongoing existence and scope of these rights, citing *United States v. Washington*, 384 F. Supp. 312, 343 (W.D. Wash. 1974).

¹⁰⁵ *Id.* at 1103-1104, citing Jana L. Walker & Susan M. Williams, *Indian Reserved Water Rights*, Nat. Resources & Env't, Spring 1991, at 6, 6 ("With respect to off-reservation areas, a treaty effects a total cession unless the treaty explicitly reserves rights in the ceded area, such as hunting and fishing. Conversely, for on-reservation areas, tribes reserve all original rights except those expressly ceded by the treaty.").

¹⁰⁶ Kristen A. Carpenter, at 1103-1104 (2005) (The federal promise that a tribe would have a continued right to use its traditional lands was often a key factor inducing tribes to convey title to the United States.)

¹⁰⁷ *Lyng v. Northwest Indian Cemetery Protective Association* 485 U.S. 439, 453 (States Forest Service prepared a final environmental impact statement prior to constructing a paved road through federal land including a management plan for timber harvesting in the Chimney Rock Area).

¹⁰⁸ *Id.* at

¹⁰⁹ *Lyng v. Northwest Indian Cemetery Protective Association* 485 U.S. 439, 453 (1988). (In 1982, the United. The Forest Service rejected the study's recommendation that the road not be built through the Chimney Rock area due to the "irreparably damage to the sacred areas," and rejected alternative options for road routing outside the National Forest. The Service selected a route through the Chimney Rock area.)

the Supreme Court denied any deference to the style of that use of Native Americans or commitment to agreements made over a century ago.¹¹¹ Even though historically, the United States acquired title through war or by purchasing the land from Indians,¹¹² these agreements were made with Indians to divide the use and establish peace in western America, which at the time, was the federal policy over war.¹¹³ The federal policy in the west was to treaty and bargain for title rather than to purchase the land.¹¹⁴ The agreements establish a reserved right in Indian tribes for uses.¹¹⁵ The Indian Tribes certainly believed that they were reserving rights to protect and travel to the sacred Chimney Rock area.¹¹⁶

The Federal government retained the right to extinguish title of Indian tribes, but the character of that extinguishment is an act of war or purchase.¹¹⁷ Today to choose to extinguish title without compensation is an act of war against a peaceful citizenry. It is an assumption that a people and their values basically do risk nor need to be recognized legally in any applicable sense.

Native American plaintiffs infuse their view of property and use the term *sacred* in the non legal sense. Chimney Rock is where groups of Indians go to visit and practice religious rituals that required an undisturbed natural setting including privacy and silence.¹¹⁸ O'Connor's opinion in this case holds on the issue of property, finding federal title trumps

¹¹⁰ Johnson v. McIntosh, at 592. (The absolute title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which the discoverers have the exclusive right of acquiring.)

¹¹¹ Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439, 453 (1987). ("Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Governments of it right to use what is after all, *its* land." (O'Connor)).

¹¹² CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 38 (W. W. Norton Co. 2005).

¹¹³ Johnson and Graham's Lessee v. McIntosh, 21 U.S. (8 Wheat.) 543, 576-578 (1823).

¹¹⁴ CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 38 (W. W. Norton Co. 2005).

¹¹⁵ *Id.* at 38.

¹¹⁶ United States v. Adair, 723 F.2d 1394 (1983).

¹¹⁷ Blood Struggle at p. 38.

¹¹⁸ Lyng v. Northwest Indian Cemetery Protective Association

denying the protections under the Free Exercise clause, and First Amendment to Native Americans even in the face of egregious injury.¹¹⁹ As property, Native Americans have protected this place as a sacred preserve, where they only traveled to for religious reasons.¹²⁰ Unfortunately this is essential outside the laws that created this nation and unless the Native Americans can show some human alteration of the habitat, the wilderness it outside the protections of the law.

The real result is that Congress stepped in and the Chimney rock area is included in the Blue Creek Unit in the Smith National Recreation Area.¹²¹ Congress and the 9th Circuit Courts recognized the value to Indians, but the Supreme Court divested the tribes of their property right without acknowledging a source for protection. This is another form of intentional cultural harm. The *Lyng* decision effect is the denial of access and use is denied to other sacred areas traditionally used by the native population since time immemorial as places to practice religious rituals by American Natives.¹²² This is a reduction of their constitutional rights beyond the single case to several sacred sites on public land.

CONCLUSION: WHERE TO TURN FOR SOLUTION

History and International recognition of cultural harm are avenues available. A review of the past shows the need to redress long standing injuries that have not been remedied. If we leave dominant culture to handle indigenous rights the earth loses and we

¹¹⁹ *Lyng v. Northwest Indian Cemetery Protective Association*, at 453 (Overruling violations of Indians' rights under the Free Exercise Clause of the First Amendment as well as and would violate certain federal statutes.).

¹²⁰ *Id.*

¹²¹ *16 U.S.C. § 460bbb (2000). Based on the Const. Art. 4 § 3 cl. 2*

¹²² Kristin Carpenter, *A Property Rights Approach to Sacred Sites Case: Asserting A Place for Indians As Nonowners*. 52 *UCLA L. Rev.* 1061, , footnote (). For post-*Lyng* cases, see, for example, *United States v. Means*, 858 F.2d 404, 405 (8th Cir. 1988), holding that the Forest Service did not violate the First Amendment when it denied a group of Sioux Indians a special use permit that would have allowed them to occupy national forest land that they believed was sacred. See also 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.").

lose. In property, “[d]eforestation is directly linked to the disappearance or extinction of indigenous cultures and livelihoods. As one author writes, "It is no accident . . . that indigenous peoples are disappearing at an even faster rate than the tropical forests upon which they depend. Their own survival is intricately linked with that of their forests." ¹²³ “Native people will be required to employ a wide variety of measures to control the harms of cultural appropriation. However, at a very minimum, the legal system must be willing to recognize Native peoples' claims to cultural rights and acknowledge that the harms suffered by Native people deserve a solution.”¹²⁴

People are outlaws if they live outside the protections of the law, their views and actions based on their own culture are acts of crime. This is our world today. Native Americans have no recognized traditional method of pursuing happiness legally. Their values are sacred in the legal sense, sacre, ["sacred, forfeited to a god. Roman law (Of an outlaw or a wrongdoer punished by being placed outside the law's protection,")¹²⁵ and even to roam in a traditional manner in the forest can be an act of crime. The essence of their life is taken from them. Our national pursuits are thus based on this inequality before the law. The very foundation of federal title is on colonialism and the minimizing of Native American values to establish dominance and government control over the habitat in a particular fashion.

. The harm to the Native American culture is still happening in our present. Today, this is takings is from U.S. citizens and is based in human rights violations. The U.N Draft

¹²³ Marla Kerr, *Ecotourism: Alleviating the Negative Effects of Deforestation on Indigenous effects of Deforestation on Indigenous Peoples in Latin America*, 14 *Colo. J. Int'l Envtl. L. & Pol'y* 335 (2003) quoting Leslie E. Sponsel et al., *Anthropological Perspectives on the Causes, Consequences, and Solutions of Deforestation*, in *Tropical Deforestation: The Human Dimension* 3, 18 (Leslie E. Sponsel et al. eds., 1996).

¹²⁴ Rebecca Tsosie, *Introduction: Symposium on Cultural Sovereignty* 34 *Ariz. St. L.J.* 1, 14 (2002).

¹²⁵ *Id.*

Declaration on the Rights of Indigenous Peoples Part VI Art. 27 (26 August 1994) offers resolution if it may apply to these circumstances. Article 27 states:

Indigenous peoples have the right to the restitution of the lands, territories and resources which we have traditionally owned or otherwise occupied or used; and which has been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands territories and resources equal in quality, size and legal status.¹²⁶

The Supreme Court has the discretion to apply the international law based on our nation's evolving understandings of dignity and decency, or by analogizing the facts. Native Americans are categorically included in Article 27 based on their relationship with the earth and the manner of American conquest.

This essay is about the sacredness of happiness. I would like to say that it is about happiness and the sacred, but in reviewing the history of Native American rights, we are not supporting the possibility of happiness in America, the dominate culture has removed the large portion of our citizens from the protection of the law, and this is not a new story.

“He who has intimate knowledge of Indian character and life sometimes forgets their baser traits, and sees only their virtues, their truth, their fidelity to the trust, their simple and innocent sports, and wonders that a morally degenerate but powerful civilization, should destroy that primitive life.”¹²⁷ John Lewis Powell.

Native Americans living within the American borders have tried to be heard since Europe arrived here. In spite of relocation and destruction of life style of all the Indian tribes we live in a relatively peaceful country. The injury is apparent, what is a court that has no method to protect its citizens, but one that must look further to resolution. We have come to

¹²⁶ U.N Draft Declaration on the Rights of Indigenous Peoples Part VI Art. 27 (26 August 1994).

¹²⁷ Donald Worseter, *A RIVER RUNNING WEST: THE LIFE OF JOHN WESLEY POWELL* 284 (OXFORD UNIVERSITY PRESS 2001) *quoting* JWP, “An Overland Trip to the Canyon, 677.

this place in history where there is no land to move to, no where to hide the facts that we are a country of citizens with equal rights. Looking to the circumstances and to history, it is clear that there are views on land use that have to be heard. Indigenous rights to land have to be recognized and remedied. The Supreme Court as the enforcer of the laws, and the balancer of equities, is able to find more courageous and innovative remedies in the face of injury. Control over nature is so basic to the dominant cultures belief system, and as we see every day impossible. Now, I listen for the frogs to sing. I wonder if they know what we do not have the courage to allow ourselves to know, not definitions but the natural sacredness of happiness.