This Land Was Not Made for You and Me
The Black Hills Dispute, and Struggles for Authority in Sacred Land Conflicts

by

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This thesis is dedicated to the Black Hills, and the communities who continue to revere the land as a sacred space
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“Let my inspiration flow
in token lines suggesting rhythm
that will not forsake me
till my tale is told and done.”
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Introduction

*One does not sell the earth upon which the people walk.*[^12]  – Crazy Horse

In 1980, the Supreme Court thought it had rectified a great injustice. The Court ruled that the United States had seized the Black Hills from the Oglala Sioux and other tribes constituting the Sioux Nation without just compensation. In doing so, it declared that the United States owed the Sioux over $105 million, the largest claim ever awarded through the courts to a Native American tribe. However, from the perspectives of the indigenous communities that would receive the award, it seemed like another chapter in a contentious history of bad dealings with the American state. When Congress held hearings about the dispute years earlier, Sioux activists such as Frank Fools Crow declared their opposition to any monetary means of restitution. For them, they could never give up the land for money. As Fools Crow and Frank Kills Enemy told Congress in 1976:

> “The Black Hills are sacred to the Lakota [a specific branch of the Sioux Nation][^13] people. Both the sacred pipe and the Black Hills go hand in hand in our religion. The Black Hills is our burial grounds. The bones of our grandfathers lie buried in those hills. How can you expect us to sell our church and our cemeteries for a few token whiteman dollars? We will never sell.”[^14]

Ultimately, Mario Gonzalez, the tribal attorney for the Oglala Sioux, and his community would affirm that the Black Hills were not for sale, suing to stop the government from paying the tribes. Instead, they sought to secure a land return of the Black Hills themselves, revitalizing a dispute that has lasted since the 1870’s. After

[^12]: Lazarus, *Black Hills/White Justice*, 81
[^13]: This will be explained in the following chapter.
[^14]: Anita Parlow, ed., *A Song from Sacred Mountain* (Lakota Nation: Oglala Lakota Legal Rights Fund, 1983), 104
almost four decades, the question of why the Sioux rejected the award still stands as an intriguing portal into both the conflict that has defined American-Sioux relations, and the inadequacy of American institutions to resolve disputes over lands deemed sacred.

Of course, this introductory exploration of the Black Hills land claim begs the question of what marks land as “sacred.” When certain communities designate a space as “sacred,” they endow the location with a unique significance, highlighting the place in their collective religious and cultural frameworks. However, sacred sites do not only reflect the religion of the community. In *American Sacred Spaces*, David Chidester and Edward T. Linenthal derive a tripartite approach that demonstrates how the designation of “sacredness” imputes a communal significance that extends beyond its cultural postulations and institutions. First, a “sacred space” represents a place where people practice certain rituals – actions with “extraordinary” purposes. Second, sacredness stems from the role of the space in the formation of a community’s perspectives on human identity and humanity’s relationship to the world around them. The idea of the sacred thus means that not all spaces are interchangeable or equally recognized, as some possess unique value in collective rituals and understandings of their shared realities. The third factor, however, demands further consideration: that sacred spaces reflect the power relations within a community, as groups claim authority to certain sites when they assign them significance in the construction of their societal institutions. For Chidester and

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16 Chidester and Linenthal, “Introduction,” 12
Linenthal, they emphasize that the power ingrained in “sacred” spaces attracts contestation, as different groups seek to assert their interpretation of the space over others through forms of ownership. As places earn significance from processes of ritualization, they assume the dynamics that lie beneath the foundation of the community.

Examining the history of the Black Hills land dispute and sacred land jurisprudence in the United States, this thesis will demonstrate how the contentious relationship between the American state and indigenous communities has disrupted Native American efforts to preserve their sacred sites and practice their religions. The fight over the Black Hills, like other sacred land conflicts, has arisen in the context of the United States’ settler-colonialism, the conceptual framework underlying the country’s pursuits of accruing resources and establishing national identity through the elimination of indigenous communities and their culture on colonized lands. However, institutional structures alone do not initiate this violence; through necropolitics, the processes of excluding communities from the accepted public, individual actors further the broader goals of the state. Within this multifaceted interplay between settler-colonialism and the necropolitical exercises of decision-makers within the system, sacred land disputes reflect nodes of power inequalities between the United States and its indigenous communities. Specifically, the conflicts stem from a denial of indigenous access and authority over their sites, a product of past necropolitical efforts to fulfill the settler-colonialist state’s interests. Translating the broader theoretical frameworks, in which the institutional structures and

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17 Chidester and Linenthal, “Introduction,” 15-16
individual actors operate within, into notions of access and authority helps elucidate how present controversies stem from past actions. More importantly, these terms facilitate a normative discussion of how to resolve these disputes in a manner that properly restores indigenous communities’ relationships with their sacred spaces.

Prior to the exploration of the Black Hills land dispute, the central case study of the thesis, this introductory chapter will first provide a basic overview of the themes, frameworks, and conceptual methodologies employed throughout. After explicating the project’s theoretical foundation, the chapter will conclude with a chapter-by-chapter preview of the project.

**Institutionalizing the Power to Erase: Settler-Colonialism and Necropolitics**

The term “sacred land” employs two central constructs: “religion” and “land.”

These two terms may seem self-evident or neutral in meaning; with regards to “religion,” scholars such as Mel Spiro have been able to derive general conceptions in order to provide a stable basis for research within the field of religious studies. However, any analysis of “religion” and “land” in the United States needs to highlight how these terms reflect networks of institutions, linked by the discursive relationships of authority between members of a certain community.

Beginning with an exploration of “religion,” Talal Asad’s analysis exemplifies the centrality of power relations, reified by social institutions, in the formation of a

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18 As a basic definition of religion, I will personally use Mel Spiro’s conception of religion as “institution consisting of culturally patterned interaction with culturally postulated superhuman beings.” Jonathan Z. Smith, “Religion, Religions, Religious,” in *Critical Terms for Religious Studies*, ed. Mark C. Taylor (Chicago: The University of Chicago Press, 1998), 281-282. In addition to clarifying a term that evades simple explanations, Spiro’s link between religion, culture, and social interactions also reinforces Chidester and Linenthal’s analysis of sacredness. Rituals themselves represent “culturally patterned interactions,” as people perform certain acts at specific locations to communicate with “culturally postulated superhuman beings.” Furthermore, the emphasis on interaction helps illuminate the importance of communal efforts to propose new understandings of the world around them, which in turn inspires the development of certain institutions to support further investigation. Of course, the nature of social interactions also stems from the power dynamics that inform the community, so Spiro’s definition correlates nicely with the tripartite analysis that Chidester and Linenthal develop, as well as Talal Asad’s argumentation (see fn. 19-20).
community’s religion. notes in his critique of Clifford Geertz’s own anthropological definition of religion, while “the configurations of power” have evolved from the time of Augustine to the contemporary era, “the patterns of religious mood and motivation, the possibilities for religious knowledge and truth, have all varied with them and been conditioned by them.”19 Since the social construction of religion arises from “the configuration of power,” theorists and scholars therefore cannot think of religion as a decontextualized institution separate from a society’s historical power structures. Instead, “the connection between religious theory and practice is fundamentally a matter of power–of disciplines creating religion, interpreting true meanings, forbidding certain utterances and practices and authorizing others.” Akin to Chidester and Linenthal’s definition of sacred spaces as contested, scholars cannot separate religion from the exercises of authority, exerted by one party over another, that are embedded into certain “concrete institutions.”20 Religion thus represents a product of a society’s creation and distribution of certain approved practices by a dominant group, an exercise of power that shapes its citizens’ behaviors and approach to understanding themselves and the world around them.

In the United States, the power structures and institutions underlying “religion” are inherently settler-colonialist, meaning that they seek to eliminate and replace native societies. Patrick Wolfe theorized the framework of settler-colonialism to explicate the forces that underlie the institutions of states founded on the seizure of indigenous lands. As he explains, the settler-colonialist state’s connected pursuits of

developing an economic and cultural basis for a society without indigenous claims to its territory requires constant endeavors to erase native communities on its lands. Unlike the simple dichotomies between American and indigenous communities, settler-colonialism explains the relationship between the motives of the state, its actions against indigenous communities, and the power dynamics that form as a result. While settler colonialism no longer represents a cutting-edge theory, it serves as a strong approach to the institutional structures involved in sacred land disputes, reflecting the notions of sacredness and religion developed by Chidester, Linenthal, and Asad.

Throughout his writings, Wolfe asserts that “settler colonialism” encourages the destruction of indigenous societies and their ties to the lands in order to clear physical and cultural space for the establishment of new societies. At the heart of colonization, the process of removing indigenous communities from their lands stems from a desire for “access to territory;” as Wolfe explains, “territoriality is settler colonialism’s specific, irreducible element.” However, colonization extends beyond material concerns. When the colonial forces settle on indigenous lands, they need to construct a society that “replaces” the one that they sought to erase. These produced states proceed to then fashion new cultural and national institutions while at the same time continue the elimination of native communities that could threaten their claims to legitimacy. This leads to Wolfe’s central argument: that the colonial “invasion is a structure not an event,” as the settler-colonialist state develops its economic and cultural entities on the basis of “the native repressed,” the suppression of indigenous

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peoples in order to bolster its own claims to nationhood. In countries like the United States, which were founded through colonial means, the pursuits of colonization thus influence its continual development. Otherwise, the indigenous communities that survived the preceding exercises of elimination could undermine the state’s grasp on its lands.

Furthermore, the power of cultural assimilation illuminates how settler-colonialism transforms religious institutions adopted by the invasive state into arenas for eliminating indigenous social systems. As Wolfe observes, the United States’ policies shifted in the late 1800’s after it had effectively moved the vast majority of tribes onto reservations or into American population centers. From these actions, the frontier that settler-colonialist actions operated on shifted from the physical frontier, which no longer existed, to the cultural frontier: Native American societies. As a result, the assimilationist policies detailed earlier in this introduction represent more than just conflicts over what “religions” receive accommodation. As an avenue of elimination, they represent the development of an American society based on Christian notions carried over from its European roots, in which the erasure of indigenous forms of culture cleared possible challenges to newly-formed American institutions. This worked in tandem with further land seizures, as the process of forcing Native Americans to adopt the lifestyle of individualized, Christianized

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22 Wolfe, “Settler colonialism and the elimination of the native,” 388-390. Wolfe’s intervention that settler-colonialism is a structure is a crucial aspect of his framework. In an interview with J. Kēhaulani Kauanui, he defines himself as a settler because of his existence within the Australian state as a white citizen. This did not arise from his “individual consciousness” or “free will,” instead, the history of settler colonialism that he inherited along with the rest of the white community in his country designated him as a “beneficiary and a legatee of the dispossession and the continuing elimination of Aboriginal people in Australia.” As latter sections of this introduction intimate, this lack of responsibility for one’s complicity in settler-colonialism changes when they assume the mantle of the sovereign and commit necropolitical exercises against indigenous communities. J. Kēhaulani Kauanui and Patrick Wolfe, “Settler Colonialism Then and Now,” in Politica & Societa, no. 2 (2012), 237

23 Wolfe, “Settler colonialism and the elimination of the native,” 399-401
households presented opportunities for the government to claim what was previously held collectively by tribes. While specific Christian interpretations may have encouraged the development of settler-colonialist thought, such as *ex nihilo* logic and notions of creating an earthly representation of God’s dominion, the maneuvers of the state to eliminate native cultures reflects a translation of these religious views into the structural formation of an unequal power dynamic between white, American society and indigenous communities. Analyzing settler-colonialism thus re-describes both religion and land in a manner that designates Native Americans as automatically excluded from ownership or any position of power. Without control over their territory or culture, the United States could justify its seizure of both.

The cultural aspects of the settler-colonialist framework strengthen when combined with notions of culturicide. Derived prior to Wolfe’s conception of settler-colonialism, culturicide arose as an advancement of ethnocide, a new analytical approach to policies that promote the destruction of communities through non-genocidal means. As James V. Fenelon stated in his exploration of culturicide through the history of American policies against the Lakota, culturicide “describes the practices, processes and forms that occur when one culture-society dominates another culture through targeting, attacking and eliminating cultural practices of dominated groups, as a means of attaining some material interest.” Extending beyond the parameters of ethnocide, which frames the destruction of culture through terms of

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24 As discussed in Chapter 2, the Dawes Act exemplified this maneuver. Wolfe, “Settler colonialism and the elimination of the native,” 400
25 A specific subset of the Oceti Sakowin, the Sioux. This will be discussed in Chapter 1 (see fn. 77-79).
ethnicity,$^{27}$ culturicide expands upon the conceptualization of communal erasure in a manner that acknowledges marginalized peoples that do not identify as an ethnicity.$^{28}$ Overall, the notion of culturicide operates nicely in the broader framework of settler-colonialism, as the “material interest” that guides culturicide is the territorial expansion and development of a new state.

However, settler-colonialism alone does not explicate the relationship between institutional structures of the state and the individualized actions of decision-makers on a local level. While the society as a whole may have a collective awareness of expanding its territory and developing its culture, short-term leaders do not necessarily think in terms of the state’s settler-colonialist endeavors. Instead, they may frame their arguments and actions through their unique motives and specific responses to events that directly affect them. Of course, the totality of settler-colonialism in colonial states intimates that these influences nevertheless stem from the project of erasure and replacement. At the same time, agency can inform structure concomitantly, as the accumulation of short-term decisions can affect the long-term ascendency of the settler-colonialist state. Consequently, a supplementary framework needs to demonstrate that agency exists in the settler-colonialist state as a counterpart to structure, illustrating how broader endeavors arise on the individual level and how actions on this plane can further or modify the society’s long-term initiatives.

Necropolitics represents the perfect theoretical counterpart of settler-colonialism, as its analytical focus on the actions of decision-makers on the frontier of

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$^{27}$ For more on ethnocide, see John P. LaVelle, “Rescuing Paha Sapa: Achieving Environmental Justice by Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation,” in *Great Plains National Resources Journal*, vol. 5, no. 40 (2001), 79-85

$^{28}$ Fenelon, *Culturicide, Resistance, and Survival of the Lakota*, 44-46
society frames agency in colonial states in a language of exclusion and death that mirrors the articulation of those states’ long-term approaches to erasure. Deriving necropolitics from Michel Foucault's notions of biopower, and Carl Schmitt's models of sovereignty and “the state of exception,” Achille Mbembe defines necropolitics as a system of “necropower,” authority that operates on the frontiers and colonies of the Western, modern state. For Mbembe, the edge of society is where “the controls and guarantees of judicial order can be suspended—the zone where the violence of the state of exception is deemed to operate in the service of ‘civilization.’” Consequently, “the sovereign right to kill is not subject to any rule” of justice. However, Mbembe notes that necropower does not necessarily pertain to just physical violence. Citing David Theo Goldberg, he asserts that “necropower can take multiple forms: the terror of actual death; or a more “benevolent” form—the result of which is the destruction of a culture in order to ‘save the people’ from themselves.” Necropolitics thus represents an administration of a simplified order of domination, whether through genocide or culturicide, that exists beyond the realm of legal and political safeguards that the rest of the society enjoys.

Mbembe’s analysis raises two crucial aspects of necropolitics: necropower depends on the exclusion of the colonized from the accepted public in order to exist, and the role of the sovereign entails that the state can localize the administration of necropower to decision-makers operating in the exceptional space. As he notes, necropolitics historically arose when the colonial states of Europe territorialized the world in a manner that distinguished colonies as zones outside the *jus publicum*

30 Mbembe, “Necropolitics,” 22-25
Europaeum, the public law that prioritized peace through the recognition of the citizenry’s rights. This encouraged a dichotomy between the “savages” of the colonies, living on the frontier, and the “civilized” world of Europe and other colonial states. This establishes a separate legal system for marginalized communities relegated to the “savage” frontier; distinguished from the jus publicum established for accepted members of the public, they instead live under necropolitical rule.

Meanwhile, necropolitics does not operate only as a structural system of power. Since necropolitics concern activities outside of jus publicum, the exercise of sovereignty stems from a smaller pool of leaders and institutions than those that rule over the general public. The “sovereign” can consequently manifest itself in the form of select decision-makers living in the colonies, authorized to determine life or death in order to perpetuate the state’s domination over the “savages.” Together, these intimations reflect the consequences that a community faces when the central government territorializes them as colonial subjects. They no longer receive the benefits of legal and political recognition as members of the public, and thus face the physically and culturally-violent wrath of the sovereign when they seek to exert their authority.

The theoretical lens of necropolitics thus complements settler-colonialism by articulating how the individuals and agencies that possess sovereign authority translate the settler-colonialist pursuits of the state into action against colonized communities. The logic of elimination guides the ultimate mission of the colony, yet it does not explain how this manifests in specific exercises of sovereignty.

31 Mbembe, “Necropolitics,” 23-24
32 Ibid., 24-25. Mbembe exemplifies the deconstruction of institutional sovereignty in colonial frontiers through his analysis of “war machines” and the anarchic disintegration of the state in territories outside of the jus publicum. See Ibid., 30-34
Meanwhile, under the notion of necropolitics, this conception of the connection between state structure to individual actions becomes more clear. Since the sovereign inculcates a state of exception in areas that operate outside of *jus publicum*, it establishes crisis as the norm on the frontier. While this source of crisis reflects its long-term nature, the instability nevertheless encourages the state to exercise necropower on an immediate, day-to-day basis. Furthermore, the concomitant decentralization of the state on its frontier intimates the need for individuals to assume the role of the sovereign over the colonized communities. This illustrates the relationship of settler-colonialist institutions to the state’s leaders and their activities. Since they possess the necropower of the state, they translate the state’s settler-colonialist pursuits into policy and into life-or-death decisions. Through necropolitics, settler-colonialism does not only guide the larger societal system of the colonial state; it influences officials and leaders, who possess their own biases and personalities, to project sovereignty onto the marginalized communities that the state has rejected from the accepted public.

Combined to form one large theoretical framework, settler-colonialism and necropolitics can illuminate the transformation of institutions, such as “land” and “religion,” into realms of colonial domination. The lands of modern-day South Dakota and the frontiers of the American state did not become focal points of anti-indigenous violence and culturicide merely because of conflicting conceptions of property and religious worldviews. Instead, the decades of tensions between the Sioux bands and the United States, which ultimately resulted in the seizure of the Black Hills, stems from the implementation of the state’s desires for territorial
expansion and elimination of the tribes that had staved off the United States’ military might and cultural institutions for years. At the same time, the place of the individual actors involved in the conflict become contextualized in the greater history of American colonialism and the establishment of a dominant Christian nation. As a result, the interaction between settler-colonialism and necropolitics elucidates the stakes of Asad’s emphasis on the importance of authority. When American power relations are predicated on the exclusion of Native Americans from the jus publicum, the state’s institutions by definition do not consider indigenous populations and their perspectives. In some cases, their existence depends on the continued pursuit of erasing those communities, as to otherwise incorporate Native Americans would threaten the legitimacy of American claims to power over its lands and its peoples.

The Consequential Christian Construction of Religion and Land in the United States

From these institutional structures, specific Christianized notions of “land” and “religion” become privileged by political and judicial decision-makers as they operate within the American state. As the country arose from the loose network of colonies established by European powers on indigenous lands, Christianized conceptions of each term informed the formation of the American institutions that replaced those of the indigenous communities living on its lands. As the logic of continued elimination promoted efforts for further erasure, it concomitantly encouraged the development of these Christian constructions in order to develop a civil society for the nascent American state. Since then, culturally-biased notions of “land” and “religion” have formed the basis of political decisions and judicial principles, such as the doctrine of discovery, that inculcated the unequal power
dynamics between the American state and Native Americans. While most scholarship on sacred land disputes has not relied upon the language of settler-colonialism, let alone necropower, to discuss the institutionalization of these terms, it has nevertheless focused on these constructions, so reviewing their development will also reflect the extent of previous work on these conflicts.

As Winnifred F. Sullivan argues in *The Impossibility of Religious Freedom*, understanding the Christian roots of the United States’ social and legal customs is an important task because these structural biases have real consequences on minority communities. In the case of the American right of religious freedom, the focus of her work, this legal right stems from “protestant” understandings of religion and the state that arose in uniquely Christian debates in Europe during the 15\textsuperscript{th}-17\textsuperscript{th} centuries. Consequentially, the theoretical underpinnings of this institution guide decision-makers who engage with it. When practitioners of “lived religions,” followed by localized communities, seek legal protections for rituals and behavior that do not align with the conception of religion that informed the institution of religious freedom, judges are inclined to rule that they do not receive this right because it does not match their understanding of religion.\textsuperscript{33} The actors within these institutions thus reinforce the codified biases. This relationship between theoretical constructions, institutions, and individuals derived from Sullivan’s analysis thus elucidates how supposedly neutral laws nevertheless continue to embody Christianized backgrounds, which in turn impact applications of those laws by decision-makers.

Consequentially, notions of “religion” and “land” promulgated throughout American society privilege Christian conceptions of these institutions, reinforcing the settler-colonialist erasure of indigenous perspectives whenever political or judicial leaders utilize these understandings to make decisions regarding indigenous law. As Richard King explains in *Orientalism and Religion*, the origins of “religion” as a concept reflects the Christian project to establish itself as the model institution. He begins with Lactantius’ theorization of *religio* and its derivation. Defying his Roman peers, the Christian scholar argued that *religio* did not stem from *traditio*, or ancestral notions of “tradition.”34 Instead, he asserts that *religio* denotes “the bond of piety” and communities united by a “worship of the true.” While Lactantius might not have altered “religion” by himself, his reformation of *religio* reflects a greater scholarly pursuit in early Christianity to establish itself as a historical and universal truth, reinforcing its superiority over other religions.35 This leads King to conclude that “religion” is “a Christian theological category,” a “culturally specific social construction with a particular genealogy of its own.”36 Consequentially, this etymological basis has influenced the adoption of Christianized conceptions, such as “belief,” to conceive of religious behavior.37 As “religion” has become universalized

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34 Author’s Note: while King employs his notion of “tradition” as ancestral (see fn. 35), this represents a crucial place to explicate my own use of the term “tradition.” This ambiguous term can connote problematic dichotomies between “past” customs and “contemporary,” “modern” activities. For the Native American communities discussed in this thesis, I will use “tradition” and “traditional” to signify two types of religious activity: precolonial practices that communities followed prior to American colonization, and behavior that reflects an attempt to revive precolonial and ancestral institutions. While I will signify “precolonial” and “revived” practices in certain places, I will cautiously use “tradition” and “traditional” as signifiers of non-Christian indigenous religious systems.
36 King, *Orientalism and Religion*, 40
37 The Christianized etymology of religion has shaped the conceptualization of behavior and customs associated with religion, such as the notion of “belief.” As David S. Lopez Jr. explains, “belief” reflects a commonly-used term in discussions concerning religion, yet “belief” has its own Christian etymology. Donald S. Lopez Jr., “Belief,” in *Critical Terms for Religious Studies*, ed. Mark C. Taylor (Chicago: The University of Chicago Press, 1998), 21. The proliferation of “belief” as a universalized term to frame religious behavior thus reflects the establishment of a distinctly Christian expression of religious truth as a norm accepted across Western societies.
and used to describe the practices of communities across the world, its cross-cultural proliferation does not eliminate its Christianized origins.

When the American legal and political systems addressed questions of indigenous religious freedom during its colonization of the North American continent, the inherent bias within the term’s construction informed the state’s cultural assaults against these communities and their practices. As discussed in Chapter 2, the American government passed policies at the turn of the twentieth century that encouraged assimilation by extinguishing the public practice of indigenous religions across the country.\(^{38}\) The courts facilitated these efforts, as demonstrated the Supreme Court’s own characterization of indigenous nations as “a simple, uninformed and inferior people,” influenced by “superstition” and governed “according to the crude customs inherited from their ancestors.”\(^{39}\) At the same time, the state explicitly endorsed the Christianization of indigenous communities without any regard for their own religions, employing missionaries to run education and administrative systems across reservations.\(^{40}\) This Christian bias did not only hurt indigenous communities; as discussed in Chapter, the Court also ruled in a series of cases that the Mormon community lacked First Amendment protection for their practices because their practices fell outside of the scope of what constituted religion for the Court and the American public.\(^{41}\) These exclusionary expectations of what counts as “religion” for the American state reflects a strict adherence to the Christian


\(^{39}\) Wunder, “Retained by the People,” 42-44

\(^{40}\) Ibid., 37-38

\(^{41}\) See Davis v. Beason, 133 U.S. 333 (1890) and Reynolds v. United States, 98 U.S. 145 (1879); see fn. 289 for the discussion of these cases.
etymology and connotations of the term. In turn, this affected the policies and legal decisions that the state issued in defense of its assimilationist policies against indigenous communities and other religious minorities.

The American judicial system has continued to demonstrate, through cases such as *Lyng v Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), that Christianized conceptions of religion inform an institutional exclusion of indigenous claims to sacred lands from the relief provided by rights to religious freedom under the First Amendment. In both cases, the courts appealed to notions of “spirituality” in order to distinguish indigenous practices from the Court’s conception of religions, which mandate constitutional protections. Proliferated throughout the 20th century by proponents of “American nature religion,” 42 “Native spirituality” arose as a legal term to distinguish Native American religious systems from mainstream institutions. By classifying Native practices as “spiritual,” government officials could regard Native American claims as personal desires rather than legitimate practices protected by the First Amendment. Writing for the Court in *Lyng*, a case in which the Court ruled that the construction of a road through sacred forests for the Yurok, Karok, and Tolowa peoples did not violate their right to free exercise under the First Amendment, Justice Sandra Day O’Connor codified this distinction in *Lyng*, describing the tribes’ claims as issues of “spiritual development” and “spiritual fulfillment.” 43 As Michael McNally notes, O’Connor could therefore use these categories to transform “the time-honored practices necessary to these three Native

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nations into the hypothetical claims of several individuals seeking pristine meditative experiences of nature religion.\textsuperscript{44} Using Asad’s language, O’Connor exercised her authority due to the American configuration of power to create a new system of knowledge that casted Native American systems out of the legally-accepted conception of religion. Since their practices do not match the Christianized norms that O’Connor and her colleagues accept as “religious,” her argumentation thus excludes them from the bounds of religion and thus constitutional protections for religious groups.

Meanwhile, the American understanding of “land” has also followed conceptual guidelines initially rooted in Christian thought, namely the presupposition of humanity’s superiority over natural environments and supposed right to transform land into private, commoditized property. Of course, Christianity does not represent a monolith; many Christian communities possess different interpretations of the relationship between God, humanity, and the environment.\textsuperscript{45} However, certain anthropocentric understandings and readings of Scripture have informed the formation of key institutional structures and cultural attitudes towards land in the United States. As Whitney Bauman explains in \textit{Theology, Creation, and Environmental Ethics: From Creatio Ex Nihilo to Terra Nullius}, specific Christianized views of land evolved through the larger project of basing colonialist and imperialist initiatives on theological foundations. In early Christianity, theologians and leaders crafted the notion of \textit{creatio ex nihilo}, the belief that God

\textsuperscript{44} McNally, “From Substantial Burden on Religion to Diminished Spiritual Fulfillment,” 57-59
created the world “out of nothing,” in order to justify the omnipotence of God as the ultimate deity, and the importance of abiding the Judeo-Christian doctrines that God established.\textsuperscript{46} When empires adopted Christianity as a state religion, rulers adopted the narrative of \textit{ex nihilo} to conceive of their state as an ordered body in a chaotic world. From this framework, a “logic of domination” emerges: since the Christian state stands in the center of an anarchic universe, it recognizes its mission of asserting power over other nations and lands in order to “unify” the world under Christianity.\textsuperscript{47} The theorization of \textit{creatio ex nihilo} thus provided a basis for states and empires to frame their power to model God’s relationship with the universe.

Expanding upon the logic of \textit{ex nihilo}, European states transformed the theological justification for their self-conceived superiority into rationales for territorial expansion, commodification, and colonization of land. When Christopher Columbus, his fellow explorers, the papacy, and the state governments that supported them conceived of the notion of “discovery,” the notion of \textit{ex nihilo} reinforced European beliefs that exploring the “New World” recreated these spaces in a Christian context, subject to God’s rule as administered through God’s chosen people.\textsuperscript{48} Although indigenous communities inhabited the lands that they came across, European leaders argued that the Christian dominion extended to include them as well. The belief arises from Genesis 17, when God granted Abraham and his people control of Canaan despite the presence of indigenous communities already living there. During the Age of Discovery, European monarchs utilized this passage

\textsuperscript{46} Whitney Bauman, \textit{Theology, Creation, and Environmental Ethics: From Creatio Ex Nihilo to Terra Nullius} (New York: Routledge, 2009), 19-32
\textsuperscript{47} Bauman, \textit{Theology, Creation, and Environmental Ethics}, 37-44
\textsuperscript{48} \textit{Ibid.}, 52-54
from Genesis to frame North America as their “Canaan,” and to assert that as God’s chosen people, they possessed a divine duty to colonize the land and incorporate those communities into God’s dominion. As they resorted to Scripture to legitimize “discovery,” they also sought to justify their exercises of violent force in order to subdue the tribes they met. They cited passages such as Deuteronomy 20:10-18, in which God explicitly commands God’s chosen people to conquer heathen lands, declaring that “thou shall save alive nothing that breatheth: but thou shalt utterly destroy them.” European Christian explorers and colonialists cited this proclamation to support their methods of seizing their “Canaan,” defending the atrocities inflicted upon indigenous peoples. From *ex nihilo* and subsequent logics derived from Scripture, European leaders derived a framework of colonization grounded in the belief that they could re-imagine newly-explored lands as extensions of Christendom.

In the context of continuing acts of self-declared “discoveries” throughout the 16<sup>th</sup> and 17<sup>th</sup> centuries, political theorists and leaders derived new conceptions of land in order to comprehend the territories newly incorporated into the Christian worldview. Responding to the discourse that arose from colonial projects, as well as the Scientific Revolution, John Locke tries to develop a rational basis for natural law, yet nevertheless posits that a God-like figure must exist in order to create nature *ex nihilo*.

This theological basis for his derivation of natural order informed his influential theory of property, in which humans re-create nature into property by embedding “labor” into objects, akin to the process that God used to endow humanity

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50 Newcomb, *Pagans in the Promised Land*, 47
51 Bauman, *Theology, Creation, and Environmental Ethics*, 71-77
with reason. This view of property also positions humanity above nature and the material in the same manner as God’s superiority over the universe. Since this view of property intimates that undeveloped land signifies land without ownership, it supports the foundation of *terra nullius*, the view that the lands “discovered” by Europeans were empty, unincorporated into the privileged world of Christian civilization. This notion thus encouraged the state and its members to venture off to the “periphery” of their societies, settle in those areas, and develop the land in order to assert ownership without any regard for the claims of indigenous communities to those lands. These frameworks, all produced by the adaptation of *ex nihilo* to European relationships with land, established anthropocentric institutions that empowered them to develop property and expand their states without consideration for those who did not share their Christian perspective.

The logics developed to legitimize exploratory and colonial projects would influence the development of the American colonies. Throughout the establishment of the Virginia and New England colonies, Protestant colonialists argued that they possessed superior status over the tribes they came across because they fulfilled God’s mandate for labor. Of course, indigenous communities possessed their own systems of agriculture and resource accumulation, yet since they did not match the conception of divinely-ordained work, the colonialists imposed their own standards on Native American tribes. This encouraged leaders like John Winthrop, the first governor of the Massachusetts Bay Colony, to evoke Lockean property and *terra*

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53 Bauman, *Theology, Creation, and Environmental Ethics*, 89-98
nullius to craft a legal argument for claiming title to indigenous lands. Observing the agricultural practices of the tribes who lived on the lands the colony sought to possess, he argued that because of the lack of enclosure or “manuerance,” the use of manure for fertilization, on their lands, the Native Americans lacked proper title to their lands. This consequently permitted the colonialsists to establish property on indigenous lands by implementing their own systems of labor.55 Winthrop’s rationale for seizing the territory of the tribes already residing across New England exemplifies the translation of labor-based property rights and terra nullius into governmental institutions. Since the lack of work apparatuses approved by Christian society signified that the lands were empty de jure, the colonialists could claim them as their own by working them in a manner that sufficed their conceptions of labor.

As Steven Newcomb demonstrates in his crucial work, Pagans in the Promised Land: Decoding the Doctrine of Christian Discovery, these principles also informed the doctrines that the early United States would use to justify its own colonization of the North American continent and disregard for indigenous claims to the land. A central pillar of American colonization stems from the Supreme Court’s decision in Johnson & Graham’s Lessee v. M’Intosh, 21 U.S. (8 Wheat.) 543 (1823), a case concerning a land dispute between two non-Native parties over land originally purchased from the Wabash and Kaskaskias of Midwestern North America. In the Opinion of the Court, Chief Justice John Marshall argues that the U.S. has inherited the right of “discovery” from the colonial powers of the 15th and 16th centuries, citing King Henry VII’s commission of John Cabot and his company “to discover countries

55 Axtell, The Invasion Within, 155
then unknown to Christian people, and to take possession of them in the name of the king of England.”56 This granted them divinely-ordained permission to claim title to these lands, “a right to take possession [of the land], not-withstanding the occupancy of the natives, who were heathens.”57 While this colonial “right” arose in England and other European countries, Marshall asserts that the U.S. inherited the “dominion” of the continent from the British after the Treaty of Paris in 1783, as well as from France and Spain after buying their colonial territories. From these agreements, the United States possessed the right of discovery as well.58 Adopting the extensions of *ex nihilo* logic formed by European colonial powers, the United States framed itself as an accepted body within the Christian world in order to permit itself to claim lands at the frontier of Christendom.

The implementation of these Christian logics into its governmental systems all facilitate the broader settler-colonialist infrastructure of the United States. Framed in Wolfe’s argumentation, the espousal of dominion by the European powers who designed the doctrine of discovery furthered this initiative, as the concept that the European discoverer of the land received underlying title to the land tilted every land transaction and treaty between indigenous communities and the United States in favor of the American government. Consequently, when the time came for the settler-colonialist state to end native communities’ “occupancy” of the lands on the frontier of the state’s dominion, the doctrine of discovery served as a catalyst for eliminating any claims those communities raise in opposition to the colonialist onslaught.59 At the

57 Ibid., at 21 U.S. 576-577; Ibid., 85-86
58 Ibid., at 21 U.S. 584-589, 595-596; Ibid., 95-97
59 Wolfe, “Settler colonialism and the elimination of the native,” 390-393
same time, the combination of the doctrine of discovery and Lockean conceptions of property in American institutions also serviced the cultural erasure of indigenous communities. Throughout colonial discourse, the American state has portrayed indigenous communities as uncivilized due to their lack of Christianity and European industry, despite their own economic and cultural systems. This led to two major consequences: first, it provided another justification for the elimination of native communities and subsequent construction of American society. More importantly, it integrated assimilationist policies into the framework of settler-colonialism, providing an avenue of erasure that did not involve violence.\(^6\) This form of elimination proves nefarious, in comparison to the continuance of genocide, the integration of marginalized tribes seems like a humanitarian, multicultural act of support. However, due to the United States’ roots as a settler-colonialist state, it only furthers its pursuits of securing its grasp to the lands once held by those tribes, and corresponding weakening of indigenous claims to their territory.

Of course, the conceptions of “religion” and “land” employed by the American state to further its settler-colonialist pursuits, and to consequently exclude indigenous practices from the \textit{jus publicum}, generally differ from the notions of religion and land derived by indigenous communities. On the one hand, providing broad statements ignores the intricate differences between hundreds of Native American tribes, all of which represent communities with localized systems of interpretation and socialization. However, as Vine Deloria Jr.’s analysis in \textit{God is Red} demonstrates, certain European constructions differ greatly from those developed by

\(^6\) Wolfe, “Settler colonialism and the elimination of the native,” 395-397
native peoples. For Deloria, he views indigenous America and the Christianized West as two societies primarily divided by their understanding of the relationships between culture, time, and space. While European and American religious, cultural, and legal systems depend on notions of linear history to inform their institutions, native communities rely on places rather than time as the foundations for their own.61 One could argue that, in addition to broadly generalizing a vast number of practices across indigenous North America, Deloria Jr. constructs a strict divide between the two worldviews, one that does not invite reconciliation. However, Deloria Jr.’s framework responds to the rejection of indigenous land practices by white settlers, as evidenced by Gov. Winthrop’s commentary and the Supreme Court’s landmark decision in Johnson v. M’Intosh.62 Furthermore, Deloria Jr.’s dichotomy recognizes that both physical and metaphysical stimuli inform the construction of land, religion, and other social institutions in each society, and that distinctions in basic orientations to the world lead to different, and sometimes conflictive, institutions.

Analyzing the differences between each communities’ views of religion and land has captured the attention of most scholarship on the broad issue of sacred land disputes. In Brian Edward Brown’s Religion, Law, and the Land, he employs a simple distinction between the state’s views of land as “property” from the sacred land claims raised by indigenous communities. A dynamic running through the cases concerning sacred land disputes in the late 1970’s and 1980’s, he argues that the courts’ continued decisions in favor of governmental projects, at the expense of

62 See fn. 54-58; Newcomb, Pagans in the Promised Land, 73-87
multiple indigenous communities and their religions, affirmed property as the
“dominant conception for the characterization and disposition of land” in the United States. Furthermore, this “allegiance to the concept of land as property” directly resulted in the “judicial failure to accord constitutional protection to tribal religious belief and practice with respect to land.” This represents the central pillar of his analytical framework, as he views every case he addresses through the binary between economic property and sacred lands. By focusing on this argument, Brown simplifies the institutional forces at play that have guided the development of these perspectives on land and the power dynamics between parties involved in these conflicts. Nevertheless, Brown’s strict reliance to this dichotomy encourages him to provide in-depth analysis on the claims raised by both sides in each case, providing a strong basis for further research that is grounded in more explorative frameworks.

Not all scholars have utilized this strict juxtaposition concerning issues of religion and land, as some have asserted that the use of state institutions to articulate indigenous perspectives can support legal and political efforts within the American state. In their article, “In Defense of Property,” Kristen A. Carpenter, Sonia K. Katyal, and Angela R. Riley argue that the concretization of “cultural property” as a legal concept, through suits and political actions initiated by indigenous advocates, can facilitate efforts to protect their cultural and religious institutions, including sacred lands. This would require revising conventional notions of property in the United States, as suggested by their advocacy for models of “stewardship” and

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64 Brown, Religion, Law, and the Land, 3-7
communal responsibility as opposed to individual ownership. If they reviewed Brown’s work, they would most likely assert that his dichotomy of property against indigenous religions ignores the utilization of “property” as a framework for securing justice within the United States’ legal and political systems. Their work thus demonstrates the insights that are excluded by scholars when they apply rigid analytical lens to the divide between the American state’s perspective on religion and land versus those of indigenous communities.

Regardless of whether they uphold a strict dichotomy between the state’s conception of these institutions and those of Native Americans, scholarship that focuses on this juxtaposition cannot provide a proper elucidation of the issues raised at the beginning of this introduction: why the Sioux refused compensation for the government’s taking of the Black Hills, and what this means for indigenous communities seeking to protect their sacred lands through the state’s institutions. Understanding that the American state’s adoption of Christianized views in the formation of its institutions illuminates the biases that influence the decisions of individual actors, yet it does not explain how the power inequalities between the United States and indigenous communities arose. Plus, it does not account for the influences and desires that encourage the state to impose its authority over Native American tribes, despite their status as semi-autonomous nations. Even if scholars could derive conclusions concerning power dynamics from comparing conceptions of religion and land, this framework remains difficult to translate into normative

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standards that could serve as the linguistic basis for legal and political action to resolve the Black Hills dispute and other sacred land conflicts.

A Brief Review of Scholarship on the Black Hills Land Dispute

A few sources provide the necessary base of information to begin an exploration of the question concerning the Sioux’s resistance to the Supreme Court’s decision. When scholars write on the Black Hills land claim, they usually rely on Edward Lazarus’ *Black Hills/White Justice*, an extensive history on the land seizure and the subsequent legal dispute. As discussed in Chapter 3, there are editorial concerns with this piece, yet it nevertheless presents ample research into the conflict, especially the legal proceedings from 1923 to 1980. While a lot of scholarship on the Black Hills has taken the form of journalistic articles or news reports, Jeffery Ostler’s *The Lakotas and the Black Hills* provides an accessible yet in-depth analysis of the dispute. Both of these secondary sources represent foundational texts in the development of this project, since they synthesize a variety of primary texts from both sides. Consequently, they provide the necessary evidence to derive insight from the institutions and decision-makers involved in the taking and the subsequent land claim.

However, a couple of sources illuminate the perspectives of those directly involved in the Sioux’s actions, providing a point of departure for analyzing the underlying local and societal forces that have guided their campaigns. In their book, *The Politics of Hallowed Ground*, Mario Gonzalez and Elizabeth Cook-Lynn both elucidate how the Black Hills land seizure exemplified the American state’s desire to militarily subdue the Sioux, take advantage of their resources, and erase their culture in order to bolster their own claim to the land. Using their contemporary efforts to
secure federal recognition of the 1890 massacre at Wounded Knee as the basis for their analysis, they elucidate how the tragedy, as well as current efforts to stand up for their ancestors, correlate with their efforts to reject the Black Hills land claim. Together, both incidents and their extensive histories tie together in the larger narrative of Sioux-American relations, one of American revisionism and Sioux resilience. This argument mirrors the collective assertions made by Sioux leaders interviewed by Anita Parlow for *A Song from Sacred Mountain*, a book published during the height of legal and political efforts to secure a land return for the Black Hills. Throughout their commentaries on the Black Hills land dispute and related issues, such as the fight for accommodations for their religious practices on Bear Butte, they all evoke this comprehensive approach to the past atrocities inflicted upon their community and the initiatives of their peers to address those wrongs through reform. Together, both sources provide an expansive worldview that exceeds the theoretical boundaries that secondary scholarship has acknowledged.

Engaging with these sources thus alludes to the need for a conceptual and argumentative framework that yields insight beyond that the dichotomies over religion and land, and highlights possible approaches to resolving the Black Hills land dispute and other conflicts over sacred lands. This is why the integration of previous analysis regarding religion and land into the frameworks of settler-colonialism and necropolitics is an important theoretical advancement. While these concepts illustrate the same problems addressed by the dichotomy between each society’s conception of religion and land, synthesizing them also accounts for the power dynamics formed by the settler-colonialist state and its necropolitical exercises of authority against
indigenous communities. By translating the historical roots of sacred land disputes into developments of power inequalities, this multifaceted approach elucidates how these institutional constructions are inseparable from efforts to marginalize Native American communities and their perspectives. Furthermore, as individuals have shaped the broader structures that they operate within, the extensive history of erasing Native American territory and culture arises from the sum of necropolitical exercises on behalf of the state. With this understanding of the institutions at play, as well as the relationship between them and contemporary American leaders, a productive discussion aimed towards resolving sacred land disputes can proceed.

Frameworks for Resolution: Re-Describing Access and Authority

The issue of resolving the Black Hills land dispute and other sacred land conflicts necessitates the translation of theoretical arguments into normative terms that can guide possible resolutions to these crises. While they help expand the insight that advocates can draw from their historical analysis, notions of settler-colonialism and necropolitics alone do not present language that indigenous leaders and their allies can use to encourage tribal and American decision-makers to honor their claims to sacred lands. Of course, a possible counter-argument against the pursuit of shifting the discussion is that the maneuver implies the need to work through American forums in order to achieve justice. This implies that any reform within state systems perpetuates the settler-colonialist foundation that the state rests on. On the contrary, this thesis will contest that advocates can initiate decolonization efforts through the American state through measures that establish greater sovereignty for indigenous communities over their sacred spaces. While they may not ameliorate the complete
occupation of Native American territory, specialized policies can reverse attempts to erase indigenous claims to sacred lands, and initiate larger efforts to promote decolonization.

At the same time, any form of resolution that Native Americans should pursue to resolve sacred land disputes will defy what the American *jus publicum* stipulates for reconciliation, let alone compensation. As Deloria Jr. notes in *God is Red*, indigenous campaigns for justice and other minority communities’ efforts, such as the Civil Rights movement of the 1950’s and 1960’s, differ because the American state cannot accommodate communities and cultures that it has sought to exclude and ultimately erase. For him, “the Civil Rights movement was a movement that found its ideology, strategy, and meaning in Christian religious doctrines,” as its Christian leaders translated Christian notions of morality and justice into “political tools of resistance.” The demand for civil rights drew upon Christian notions of “brotherhood” and harmony, persuading the general public that civil rights legislation could accommodate and even improve the *jus publicum*. Meanwhile, indigenous activists during that time and afterwards have drawn inspiration from their own religions and cultures, institutions excluded from civil society by past necropolitical exercises of the state.66 The “ideology, strategy, and meaning” of indigenous-led efforts to resolve sacred land disputes all reside outside the *jus publicum* and the social institutions that influenced its development. Equality without structural reform does not rectify the unequal power dynamics underlying the issue of protecting sacred lands. While civil rights legislation could operate in the boundaries of *jus publicum*,

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66 Deloria Jr., *God is Red*, 48-49
resolving sacred land disputes requires the deconstruction of the institutions predicated on excluding indigenous communities.

Consequently, this thesis proposes the re-description of two terms that can facilitate the process of resolving the Black Hills land claim and sacred land disputes across the country: access and authority. The inspiration for these two concepts stems from an attempt to expand upon Elizabeth Povinelli’s analysis of recognition in Australian indigenous law in *The Cunning of Recognition*. Much of her research focused on land return cases, in which native communities can receive title to lands that they demonstrate were incorporated into practices existing prior to colonization. This process of recognizing their claim means that communities have to link their contemporary activities to those of their ancestors, even though past national efforts to erase indigenous culture disrupted the generational transmission of tribal customs for decades. For state, this serves its newfound mission to construct itself as a multicultural haven. However, this encourages the state to look “not at but through contemporary Aboriginal faces” in order to resurrect knowledge and culture destroyed by colonization; as a legal priority, the state asks them to “tell us something we do not, cannot, know from here – what it was (you and we were) like before all all this. What our best side looks like.” However, if the state wanted to efficaciously rectify past atrocities, it could establish more simple processes of securing land returns. This consequently intimates the state’s hesitancy towards recognizing indigenous title; by acknowledging their sovereignty, it threatens the legitimacy of its own claims to the land.

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Povinelli’s work thus raises key questions about the importance of forming institutions of legal and political recognition that actually address the power inequalities established by past attempts to eliminate native communities and their culture. While the land claim process bolsters the state’s pursuit of promoting a multicultural imagination of itself, its legal and political mechanisms ignore the desires of indigenous communities for unqualified land returns and other legislative acts that ameliorate economic disparities without forcing them to evoke tradition for the musings of the state.⁶⁸ The dichotomy between each side’s position thus exemplifies the tensions underlying recognition in liberal, multicultural states. For Australia, recognition signifies permission to practice indigenous religions as a part of a multicultural exchange of customs. Meanwhile, native advocates want more than just this cultural form of recognition; they want the land back. This conflict over the extent of recognition thus exemplifies the tensions underlying reconciliatory efforts initiated by settler-colonialist states. By pursuing a multicultural re-imagination of the state instead of fundamentally transforming the power structures between the government and indigenous communities, state-authorized forms of recognition gloss over longstanding land disputes instead of actually remedying them.

While the pursuits of Povinelli’s exploration of recognition, as well as her central case studies, differ from the parameters of this project, her analysis of the ineffectual nature of policies aimed at promoting multiculturalism without addressing decolonization encourages a discourse on power dynamics centered around contemporary pursuits for justice. Unlike Australia, the United States does not offer a

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⁶⁸ Povinelli, *The Cunning of Recognition*, 1-17, 60-69, 153-185
land claims process that awards actual title. As the second and third chapters will explain, the U.S. has only issued monetary compensation for suits initiated by tribes. However, Povinelli’s discussion of recognition reflects the contemporary angle that this project wants to explore in the Black Hills land dispute and other sacred land conflicts. Like Australian claims cases, the discourse surrounding these issues in the U.S. reflect a broad attempt to bring indigenous communities into the public sphere and to extend *jus publicum* to them. However, each side possesses a different conception of the result of this process. While the American state believes that inclusion entails participation in a multicultural discourse among the citizenry, indigenous communities assert that inclusion must involve greater authority, as well as concentrated efforts to rectify state-condoned attempts to erase those religions.

In order to frame this discussion in a manner that can translate to specific resolutions, this thesis will expand upon the notion of recognition with notions of access and authority. Access refers to the ability of communities to enter physical, social, cultural, and sacred spaces, as well as the realities attached to them. In addition to this condition, access will also include the ability to practice communal customs within these spaces. Meanwhile, authority signifies the ability to dictate the treatment and management of spaces. ⁶⁹ These terms do not necessarily exclude each other; in some instances, authority to a space entails access to it. However, they can signify different, sometimes competing pursuits; while the United States envisions that reconciliation only entails expanding physical access to federally-owned sacred lands, indigenous communities contest that the preservation of their religious institutions

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⁶⁹ While authority equals legal ownership in many cases, it does not have to necessarily entail legal ownership through forms of title and/or property claims.
necessitates indigenous authority over specific sites. This demonstrates that these terms and their relationship to each other shifts in accordance to who is conceptualizing them. For the United States, they represent different degrees of reform; for indigenous communities, they represent two sides of the same pursuit: greater self-determination over sacred lands.

Thinking about the current dynamics of these disputes through terms of access and authority helps reify the settler-colonialist and necropolitical foundations of these conflicts in a manner that can stimulate policy discussions. Discourse on settler-colonialism and necropolitics encourages analyses of power, yet the notion of “power” alludes concrete definition. Furthermore, they also shift the narrative to focus on the actions of the oppressive state. While this represents important work, the development of resolution should stem from analyzing the perspectives of indigenous communities regarding these lands and what they need to preserve their religious, social, and cultural institutions. This information ultimately provides decision-makers, whether they are indigenous leaders or allies within the American state, the necessary analysis to develop a platform that they can build campaigns around.

Chapter-by-Chapter Overview

These themes thus represent the foundation of the frameworks used to understand why the Sioux have refused monetary compensation for the Black Hills, why they seek the return of their land, and how this conflict can illuminate the dynamics underlying other sacred land disputes. While settler-colonialism and necropolitics will guide the initial discussions of the Black Hills dispute arose, the analysis will transition to considering questions of access and authority as the scope
shifts from the development of these conflicts to the desires of indigenous communities. Ultimately, this multifaceted approach will strive to achieve the following goals. It will re-describe the controversies discussed throughout the thesis in a manner that highlights indigenous perspectives. It will also seek to explicate the development of unequal power dynamics between the state and Native Americans, and how sacred land disputes reflect an embedding of these dynamics. Towards the latter half of the thesis, it will elucidate current efforts to resolve conflicts over the Black Hills and other sacred lands, and to confront the United States’ colonialist structures that continue to exist.

Chapter 1, “The Heart of Everything: Understanding The Black Hills as a Religious Institution,” begins with an explication of the Sioux’s perspective on the Black Hills. These views will be juxtaposed with an analysis of the United States’ settler-colonialist pursuit of territorial expansion and resource accumulation. The chapter will conclude with an exploration of how the seizure of the Black Hills reflected a necropolitical exercise to erase the Sioux, and the meanings they assigned to the land, in order to establish a frontier society based on mining and timber operations in the Black Hills. This will provide the necessary background for discussing the legal proceedings and extralegal actions that followed the seizure.

The next two chapters will focus on the Black Hills land claim. Unlike other scholarship, this thesis will structure the discussion by separately addressing the perspective of the white lawyers and American parties involved in the case, and those of the Sioux and their allies. The former viewpoint will represent the focal point for Chapter 2, “A Struggle for ‘Just’ Compensation: The Legal History of the Black Hills
Land Claim, 1923-1980,” while the analysis of the Sioux’s actions and rationale for ultimately rejecting monetary compensation will occur in Chapter 3, “The Black Hills Are Not for Sale: Understanding the Continued Litigation of the Black Hills Land Dispute.” Throughout these chapters, the theoretical approach will introduce the re-description of access and authority in order to explicate the Sioux’s legal and political arguments, how their claims to the Black Hills differ from those of the government, and the implications of their argumentation. Chapter 4, “Access and Authority: How the Black Hills Land Claim Can Inform Sacred Land Jurisprudence,” will build on this discussion by expanding the scope to consider sacred land disputes more broadly, especially those in which tribes have filed suits under the First Amendment.

After these arguments, the thesis will turn towards the present and future with Chapter 5, “Preserving the Sacred: Land Returns, Co-Management Plans, and Resolving Sacred Land Disputes,” in which the analysis developed in the four previous chapters will be used to draft legal and political resolutions to sacred land conflicts. While each dispute reflects its own dynamics and circumstances, necessitating specific legislation or legal strategies, the thesis will strive to present certain general observations and arguments that tribes can factor into their organizing and their plans for action. These include considerations about the possibility of co-management plans for federally-owned sacred lands, as well as the suitability of the legislative branch versus the judiciary in these cases. Following this chapter, the thesis will conclude by addressing recent developments concerning the protests at Standing Rock against the construction of the Dakota Access Pipeline, as well as the suits filed in response to the government’s actions regarding Bears Ears National
Monument. In this epilogue, “A New Hope: Standing Rock, Bears Ears, and the Creation of a Movement for Sacred Lands,” these contemporary cases will provide additional insight for the conclusions reached in the previous chapters, emphasizing the importance of extralegal action.

Overall, this thesis strives to revitalize discourse surrounding sacred land conflicts with an unconventional case study, the Black Hills land dispute, and a novel combination of theoretical approaches. Throughout these endeavors, it seeks to provide both in-depth analysis of the discussed conflicts, especially the Black Hills land claim, as well as general observations on the settler-colonialism embedded in the United States’ institutions and the necropolitical nature of past exercises of power against indigenous communities. Combined with efforts to develop access and authority as optimal frameworks for expressing the pursuits of indigenous communities as they seek to resolve these crises and preserve their religions, this project will serve to provide information that the Sioux and other tribes can draw upon in order to strengthen their advocacy and strategies. The thesis thus reflects academic and political missions; to articulate the issues underlying the Black Hills case and other sacred land disputes in new language and manners, and to utilize these findings in order to support indigenous activism for land returns and other resolutions that bolster their communal institutions and rectify past wrongs. These overarching goals will necessitate careful consideration of the claims made by native communities in these cases, so as the analysis commences with its exploration of the Black Hills land claim, understanding the Sioux’s perspectives on their sacred lands provides the optimal starting point.
Chapter 1

The Heart of Everything: Understanding the Black Hills as a Religious Institution

At first glance, choosing the Black Hills land dispute as the central case study for an exploration of sacred land jurisprudence and politics in the U.S. seems peculiar. As other chapters will explain, lawyers have primarily argued the case in pursuit of 5th Amendment protections rather those provided by the 1st Amendment. Furthermore, for an audience unfamiliar with sacred land disputes, the Black Hills do not seem like a religious institution. The American public associates the Black Hills with Mt. Rushmore, tourism, gold-mining, and its consumable scenery. However, they would not associate the notion of a religious institution to the land. As O’Connor’s language in Lyng suggests, they would see indigenous practices as individualistic, “spiritual” endeavors, not manifestations of intricate religious systems. After all, the dictionary defines “institution” as a “significant practice, relationship, or organization in a society or culture,” a “something or someone firmly associated with a place or thing she has become an institution in the theater,” or an “established organization or corporation (such as a bank or university) especially of a public character.”70 The social sciences have postulated a variety of other definitions, yet as Dick Ruiter noted in “A Basic Classification of Legal Institutions,” they generally reflect the same emphasis on institutions as “systems of rules governing

specific social action in the context of a comprehensive social order.”

However, what unites all of these conceptions of “institution” is the focus on human activity; people create institutions in order to support modes of individual and collective behavior. In the realm of religion, no one strains to conceive of churches, synagogues, mosques, and temples as institutions because they represent entities established by humans in order to promote specific social actions or orders.

As this chapter will demonstrate, the Black Hills represents a religious institution, the Paha Sapa. The Sioux have constructed the Paha Sapa as the foundation of their society, their religion, and their culture, transforming the mountainous region into a space in which humans, animals, and spirits interact, binding the Sioux as a people and connecting them to the world around them. Like a church or any entity commonly conceived as a religious institution, the Black Hills represent a physical establishment assigned specific meanings and values by a community in order to support a system of collective behavior. Understanding the Black Hills as a religious institution thus reveals a crucial pillar in the Sioux tribes’ fight for the return of the Black Hills in the 20th and 21st centuries: the Black Hills did not exist solely as land prior to American colonization. Instead, the Sioux had constructed and revered the Paha Sapa for centuries beforehand, as the land served as the religious and cultural foundation for their society. When the United States began to invade the area, and eye the Black Hills for economic gain, the state recognized the need to erase the indigenous realities and meanings attached to the land; to give the

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72 While the “Black Hills” will be the name used to describe the land from an American context, “Paha Sapa” will be used in context of Sioux claims and perspectives, as it reflects their construction of the land as a religious institution. This subtle distinction between the Black Hills and the Paha Sapa will reinforce my argument concerning the two competing paradigms concerning the land.
nihilistic appearance that nothing existed before their arrival. Through this lens, the history of the conflicts between the U.S. and the Sioux tribes in the 19th century exemplifies the use of necropower to exclude the Sioux from the American public, inflict violence in the name of serving the frontier, and erase the Sioux’s claims to their *Paha Sapa* in order to replace that institution with the mines and ranches that defined the American use and understanding of the land.

This juxtaposition of the Sioux’s development of their *Paha Sapa* and the colonization of the Black Hills thus requires a bifurcation of the chapter into two sections. Mirroring the framework employed by the courts during a standard balancing test, the argumentation will first consider the religious claims of the Sioux. This entails explications of the land itself, the Sioux, and how certain bands incorporated the Black Hills into the cultural framework of the larger Sioux nation. Following this analysis of the *Paha Sapa*’s formation as a religious institution, the chapter will transition to explicating the interests of the United States as illustrated by its seizure of the Black Hills. This history exemplifies both the centrality of the state’s settler-colonialist structures in the United States’ approach to the Black Hills, as well as its realization through the necropolitical actions of the government and its emissaries on the frontier. Overall, the chapter will strive to demonstrate that the roots

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73 The inspiration for this analytical method stems from the framework established by the Supreme Court in *Sherbert v. Verner*, 374 U.S. 398 (1963). In *Sherbert*, the Court ruled that the government has to provide a “compelling state interest” in order to enact any law that “significantly burdens” a religious practice or system of belief. This necessitates a balancing test in which the Court juxtaposes the religious claims of the parties involved against the state’s reasons for regulating their behavior. While the Court would problematize the standard of “compelling state interest” in *Employment Division v. Smith* 494 U.S. 872 (1990) by introducing the “secular regulation” rule, the basic framework of the balancing test remains. Donald P. Kommers, John E. Finn, and Gary J. Jacobsohn, eds., *American Constitutional Law* (Lanham, MD: Rowman & Littlefield Publishers, 2010), 846-847. As discussed in the next chapter, the Black Hills land claim evolved an issue concerning Fifth Amendment-based property rights and the government’s approach to Native American land. However, applying this judicial methodology to the facts of the Black Hills land claim, rather than follow the historical methodology of previous scholarship, helps to expand the conception of the case as an illegal land seizure by the U.S. military to include questions of religious freedom, which in turn will provide insight as to why the Sioux have rejected the settlement for the Black Hills.
of the dispute over the sacred Black Hills stem from the United States’ attempt to
destroy the religious and societal systems attached to the land in order to recreate the
space and incorporate it into the ascendant American dominion.

The *Hocoka* of a Nation: The *Paha Sapa*

Understanding the native perspective on the *Paha Sapa* necessitates an
examination of the Hills’ precolonial significance. In a physical sense, the Hills
themselves possess an overwhelming presence. Around 120 miles long and 40 to 50
miles wide, they extend from Wind Cave and Buffalo Gap (*Pte Tatiyopa*, “The
Doorway of the Buffalo”) in modern-day South Dakota to Devil’s Tower (*Mato
Tipila*, “Bear’s Lodge”) in what is now Wyoming. As one approaches the Hills, the
mountains tower above the Great Plains, the forests of ponderosa pines that cover the
rocky peaks emanating a dark hue that counters the lighter colors of the surrounding
grasslands. From the top of Black Elk Peak, the tallest mountain between the Rocky
Mountains of western North America to the Pyrenees in Europe, one can see over a
hundred miles in each direction, with the rocky terrain of the Black Hills in the
forefront juxtaposed against the smooth horizon of the Plains in the distance (see
Figures 6-8). Despite the rigid landscape defined by numerous towers of rock, the
Black Hills host a variety of wildlife, as the ample sources of water provide more
support than the relatively arid prairies that encompass the area. Compared to the
rest of the Great Plains, which would deemed by early American leaders and settlers
as “the Great American Desert,” the Black Hills stand out as an oasis.

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74 Mark Van Every, “Welcome from the Forest Supervisor,” USDA Forest Service, accessed November 4, 2017,
https://www.fs.usda.gov/detailfull/blackhills/home/?cid=fseprd521673&width=full
The abundance of flora and fauna explain why humans have inhabited the area for thousands of years, demonstrated by the abundance of artifacts dating back from as far as thirteen thousand years ago. These include Clovis points and weapons used by early inhabitants to take down mammoths and bison, as well as cave drawings reflecting scenes ranging from hunts to abstract displays to even images that reflect Lakota religious iconography. Examining the rock art in the region, archeologists have been fascinated by the latter category of paintings, as one cave even depicts a bird that looks exactly like Wakinyan, the “Thunder Bird” that creates the thunderstorms in the *Paha Sapa* according to Sioux religion, as well as many drawings that juxtapose female genitalia next to bison, evoking the traditional conception of creation and the roles of women and bison as “givers of life.”\(^77\)

The art, along with both the hunting artifacts, reflect the generations of people who have called the *Paha Sapa* home and have depended on it as a source of sustenance and fodder for cultural expression. The Black Hills have thus served as a hub for life for thousands of years, and have captivated the imagination of the human communities who have dwelled in its rocky forests and caverns.

For the Sioux, especially the Oglala Lakota, the Black Hills serve as the center of the universe and the foundation of their community. As some historians note, the Sioux have not always lived in the Black Hills. When French fur traders and travelers first encountered the Sioux in the late 1600’s, they met them near the Great Lakes and the tributaries of the Mississippi River in contemporary Minnesota. Critics of the Sioux’s pursuit for a return of the Black Hills have been quick to cite their eastern

\(^{77}\) Ostler, *The Lakotas and the Black Hills*, 3-6
presence in order to rebuke the centrality of the *Paha Sapa* in Sioux religion, yet the composition and history of the Sioux suggests otherwise. First, the term Sioux refers to the conglomeration of the seven bands of the *Oceti Sakowin Kin*, the “Seven Council Fires.” The four Santee Sioux groups, the Sisseton, Wahpeton, Wahpekute, and the Mdewakanton, resided in the east towards the Mississippi River, while the two Yankton groups, the Yankton and the Yanktonai, in between the Mississippi and Missouri Rivers, and the Teton, the westernmost group in the *Oceti Sakowin*, lived around the Missouri. This latter group would distinguish themselves by developing their own dialects, referring to themselves as their dialect, the Lakota, as opposed to the Dakota, which the Santee spoke, and Nakota, which the Yankton Sioux spoke.\(^{78}\)

As for the Lakota, seven tribes composed their band: the Oglalas, the Brulés, the Minneconjous, the Two Kettles, the Hunkpapas, the Sans Arcs, and the Sihasapas/Blackfeet.\(^{79}\) While some of these respective bands and tribes had specific areas that they ancestrally inhabited, they did not establish fixed borders nor did they delineate territory from each other or other Indian nations. In fact, individual Lakota had moved westward towards the Black Hills and beyond prior to the migration of the whole community.\(^ {80}\) The decentralized nature of the Sioux thus complicates the narrative concerning their exact arrival in the Black Hills.

Nevertheless, the Sioux ascended to power across the Great Plains and gravitated towards the Black Hills in the 1700’s and early 1800’s, as their pursuit of

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\(^{78}\) When I am discussing each major group separately from the entirety of the Sioux, I will use “Lakota” to discuss the Lakota/Teton people. Meanwhile, I will use “Santee” and “Yankton” when I discuss those groups respectively.


\(^{80}\) Ostler, *The Lakotas and the Black Hills*, 10. Ostler cites Frank Fools Crow, “a prominent twentieth-century Lakota religious leader,” who said that he learned as a child that the Lakota had “made journeys as far west as the Rocky Mountains long before our entire nation migrated to buffalo country.” See also Thomas E. Mails, *Fools Crow* (Lincoln, NE: University of Nebraska Press, 1979), 55.
bison herds out west shifted the center of their world towards the alluring *Paha Sapa*. Initially, militaristic and economic concerns drove the Sioux’s migration towards the West. Pressure from rival tribes in the East that had acquired guns before them, such as the Assiniboines, Crees, and Ojibwas (Chippewas), encouraged most of the Sioux bands to look beyond the ancestral confines of the Mississippi headwaters. More importantly though, the Sioux began to move towards the Great Plains because of the allure of both the European fur trade, which they could prosper from if they trapped beavers along rivers and streams that traders hadn’t settled upon yet, and the prospect of bison, a potential source of meat, clothing, and other resources. Led by the Lakota, the Sioux settled along new rivers, trade fur for guns and other goods from European traders, and displace other tribes in order to establish new villages. Over the course of decades, these initiatives transformed the structure of Sioux society, from their economic basis to their cultural foundation.

Aside from the Santee, the Sioux eventually pushed westward throughout the mid-1770’s. As they incorporated new lands into their territory, their diets and customs evolved to maximize the new resources of the West, leading many Sioux bands to transform their societal structure from living in semi-permanent villages to following bison herds as nomadic communities. Their transition did not occur without conflict; as the Lakota approached the Black Hills, they encountered the Crows, Kiowas, Plains and Paduoca Apaches, Arapahoes, Yamparika Comanches, and the Cheyennes, who also moved westward from the Great Lakes region. Trading with certain bands and warring with others, the Lakota settled around the *Paha Sapa* and

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began to establish the area as the center of their community. From Sitting Bull’s arrival in the Black Hills in 1775-1776, a landmark moment frequently cited by historians as the beginning of their reign over the region, to the 1830’s, the Sioux established themselves as the preeminent nation of the Black Hills and the surrounding Plains.\textsuperscript{82} By the time George Catlin, an American painter, travelled to Fort Pierre in 1832, he observed that the Sioux had expanded their territory to cover lands from the Mississippi River in modern-day Minnesota in the east to the base of the Rocky Mountains in the West, an observation further affirmed by the Sioux’s own accounts of their westward expansion.\textsuperscript{83} This territorial shift thus resulted in the development of a Sioux nation distant, both geographically and structurally, from the Sioux of the past.

Understanding how the evolution of the \textit{Paha Sapa} as the foundation of the Sioux nation, especially the Lakota, begins with an examination of how the bison became the basis of their society. Bison represent integral figures in the history of the Lakota people and their understanding of the world around them. In the story of the White Buffalo Calf Woman, two men, seeking to stave off famine, encounter an emissary of the Buffalo Nation during a hunt. A sister of the \textit{Wakan Tanka}, the “Great Mystery” and spirit that pervades the world, the woman gives one of the men a pipe and tells him to announce her arrival to his village. The next morning, she comes

\textsuperscript{82} Lazarus, \textit{Black Hills/White Justice}, 3-5; Ostler, \textit{The Lakotas and the Black Hills}, 7-13

\textsuperscript{83} Ostler, \textit{The Lakotas and the Black Hills}, 23. Although his observations reflect a condescending gaze towards the indigenous communities he visited, Catlin reflects one of the few catalogued perspectives of the region prior to American expansion. Historians can thus use notes on the land to buttress the Sioux’s precolonial accounts. In addition to supporting Fools Crow’s claim that the Sioux had established a presence as far west as the Rocky Mountains, Catlin also focused on the proliferation of bison in his writings and illustrations. This further reinforces traditional accounts, and even unintentionally supports their claims that U.S. expansion nearly wiped out the bison. George Catlin, \textit{Letters and Notes on the North American Indians}, ed. Michael M. Mooney (1841; repr., New York: C. N. Porter, 1975), 232-251. See also fn. 80 for Frank Fools Crow’s assertion that the Sioux had travelled to the Rocky Mountains for centuries, even prior to the westward migration of the nation.
to the village, declares that the *Wakan Tanka* “has smiled upon everyone present,” and explains that the pipe symbolizes a harmonious link between the “Buffalo Nation” and the people. After lighting the pipe and bestowing it with the chief, she shifts into the form of a white bison calf and departs. For the Lakota, the White Buffalo Calf Woman’s gift not only saved their people from famine; it established the Lakota as a “Buffalo nation” themselves, granting them the qualities of the bison. Furthermore, the Woman linked them to the animal that would serve as the basis of their transformed, westward-oriented society.

The rise of the bison in Lakota lore as they moved towards the west corresponded with the prominence of the *Paha Sapa* in their spiritual orientation as they integrated themselves into a new territorial realm. Several traditional myths, detailing the interactions between humans, bison, and other animals, all highlight the centrality of the *Paha Sapa* in the formation of humanity’s world, as well as the relationships connecting it to those of the spirits and animals. Beginning with their creation story exemplifies how the *Paha Sapa* represents the *hocoka*, the center, of the Lakota world. At the time of the world’s beginning, humans and bison arose from Wind Cave, an extensive cavern known for the breath-like movement of air that flows through its entrance. Emerging out of the cave’s small opening like “a string of tiny ants,” the humans and bison grew as they inhaled “the breath of life,” eventually reaching their modern-day size. After their arrival, the bison burst out of the *Paha*  

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Sapa through Pte Tatiyopa. Together, both humans and bison eventually spread out of the Paha Sapa and expanded across the Plains. Linking humanity to both the bison and the Paha Sapa, this account of human creation establishes the Black Hills as the hocoka from which human and animal beings on Earth migrated from as they developed.

Shortly after the formation of the world, the Paha Sapa also signified the site of the Race, the competition that preserved humanity and established the Lakota’s relationship with bison and other animals. According to Charlotte Black Elk’s interpretation of the myth, Maka, “the Earth,” had just cleared the world of the beings that defied her. The “four-legged” animals, angry at the “two-legged” humans that they perceived as the culprits of the “cleansing,” sought to wipe them out as retribution. In response, the “winged” animals aligned themselves with the humans, as the symbol of wisdom was Bear, a human. Thus, the animals and humans arranged a race around the perimeter of the Paha Sapa, stipulating the following conditions: if the four-leggeds won, they could eliminate the two-leggeds, while if the two-leggeds, they “would gain ‘continued life.’” The two-leggeds and winged animals won the race, which resulted in a series of consequences that shaped Lakota life. First, the competitors bloodied the route that they had run, forming a red circle around the Paha Sapa. In response to the race, Maka solidified the red soil as the Ki Inyanka Ocanku, the “Race Track” that now encompasses the Black Hills, as a marker of the event and humans’ symbiotic relationship with their animal counterparts. In Nicholas Black Elk’s account, the Wakinyan, the Thunder Beings, also rewarded the

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86 Ostler, The Lakotas and the Black Hills, 4-5, 196
87 Witkin–New Holy, “Black Elk and the Spiritual Significance of Paha Sapa (the Black Hills),” 195
two-leggeds after the race by gifting them the technology of archery and permitting them to hunt the four-leggeds. Combined together, both accounts highlight the monumental impact of the Race on the development of human society and their interactions with the world around them.

Tying together key conceptions in Lakota mythology, this event solidified the centrality of the *Paha Sapa* as the foundation of their worldview, a link that connects the human, animal, and spiritual realms. In the Lakota religion, the notion of *cangleska*, the circle, signifies the inclusion of beings within a specific space. For the Lakota, they envision themselves as bound by the *Cangleska Oyate*, the “Hoop of the Nation” that unites the community. When the two-legged humans raced their four-legged counterparts around the Black Hills, their victory and the subsequent creation of the *Ki Inyanka Ocanku* forever connected the humans to animals, demonstrated by the circular, red “Race Track” around the *Paha Sapa*. Furthermore, the formation of the *Ki Inyanka Ocanku* established a *cangleska* around the *Paha Sapa* itself, linking the *Cangleska Oyate* and the *cangleskas* of the animals to the land. Nicholas Black Elk emphasized this bond in his telling of the myth, stating that when the *Wakinyan* offered the first bow and arrow to Red Thunder, a starving hunter watching the race, they declared that “the place where they had the race was the heart of the earth.”

Through the establishment of the *Ki Inyanka Ocanku*, the *Paha Sapa* became “The Heart of Everything That Is,” the center of the *Oyate* and the world they inhabited. Serving as the symbolic link of the Lakota to the physical and spiritual realms around

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89 Ibid., 193-194
90 Ibid., 195-196
91 Ibid., 195-196
them, and the *hocoka* of their universe, the Race signified the *Paha Sapa* as the basis of their communal reality.

Serving as the link between the *cangleskas* of the humans, animals, and spirits, the *Paha Sapa* thus influence the seasons and the passing of time, which in turn dictated the hunting patterns and movement of precolonial Sioux communities across the Plains. In the late fall and winter, the *Paha Sapa* served as a refuge for the Lakota and a source for food, as the bison would return to the Black Hills through Buffalo Gap and other openings in order to avoid the harsh winds and weather of the Plains. In the woods of the *Paha Sapa*, bands would hunt for a variety of animals in addition to the bison, using their meat, hides, fur, and bones to feed their community and revamp their inventories of clothing, weapons, and other tools. As winter ended, the Lakota would begin to expand their hunting grounds. In addition to further retooling, the Lakota also sought to harvest seasonal plants and crops, including key herbs for medicinal purposes and religious ceremonies. The spring also represented the “return” of the *Wakinyan*, manifested through the thunderstorms and torrential downpour that would engulf the Black Hills. During this time, young adults and spiritual leaders would embark on vision quests across the *Paha Sapa*. After cleansing themselves through sweat lodge ceremonies, they would seek out secluded places high up on top of mountains, hills, and ridges to communicate with spirits and offer gifts to them. It is important to emphasize that these activities do not stem from individualistic pursuits; as Vine Deloria Jr. noted, these ceremonies instead reflect “moral duties” that impact the practitioners’ community and the world around

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them. Consequently, the Lakota people depended upon the *Paha Sapa* for both sustenance and religious realizations in order to prosper throughout the difficult seasons of winter and spring.

During the summer, a time in which bands moved across the Black Hills and out onto the Plains for greater hunting and gathering expeditions, the *Paha Sapa* served as the foundation for the Sun Dance, a communal ritual that represented a central practice in the religion of the Lakota and other Sioux tribes. Prior to the collision of Sioux and American societies, the Sun Dance occurred over the course of several weeks in the summer across the *Paha Sapa*, including regular gatherings at Sundance Mountain and *Mato Tipila*. After months of preparation, including “pledges” of “sacrifice” to *Wakan Tanka* and purification through sweat lodge ceremonies, Sioux bands would travel from across the Plains to set up a large, circular camp with a special enclosure designated for the Sun Dance. After fasting for the

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94 In his essay, “Lakota Belief and Ritual in the Nineteenth Century,” Raymond DeMallie problematically frames his conception of the vision quest as an individual activity. He argues that:

“Each individual man formulated a system of belief by and for himself. There was no standardized theology, no dogmatic body of belief. Basic and fundamental concepts were universally shared, but specific knowledge of the spirits was not shared beyond a small number of holy men. Through individualistic experience, every man had the opportunity to contribute to and resynthesize the general body of knowledge that constituted Lakota belief.” (DeMallie, “Lakota Belief and Ritual,” 34)

While DeMallie proceeds to discuss Lakota ritual as a communal activity (Ibid., 34), emphasizing that even the vision-seeking process itself is “at once individualistic and collectivistic” (Ibid., 42), he nevertheless frames the vision quest generally as a personal rite of passage (Ibid., 34-41). This raises a series of problems for both understanding Lakota religion as a communal institution and for granting Lakota practices the same considerations under the First Amendment as more conventional, collective rituals. In *Lyng*, Justice O’Connor’s opinion for the Court stripped tribal religions of their First Amendment practices by determining them to be individualistic pursuits of “spiritual fulfillment.” While DeMallie’s analysis, despite his intent, would affirm O’Connor’s dubious assessment of the tribes’ religious practices, Vine Deloria Jr.’s arguments demonstrate how the vision quests should be interpreted as communally-oriented. Despite the personal nature of each seeker’s vision, they nevertheless pursue the vision with their community in mind. As argued above, the “moral duty” compelling each vision-seeker reflects a collective awareness for promoting the world’s functionality and the prosperity of the *oyate*. Understanding the vision quest as a practitioner’s act of devotion on behalf of their community, instead of the formation of a personal “system of belief” that transitively expands tribal “knowledge,” shifts the characterization of Lakota religion away from the conception of individualized spirituality conceived by Justice O’Connor that strips Lakota practices of their protection and definition as religious. Deloria Jr., *God is Red*, 279-280; Vine Deloria Jr., Sam Scinta, and Kristen Foehner, *Spirit and Reason: The Vine Deloria Jr. Reader* (Golden, CO: Fulcrum Publishing, 2017), web, accessed October 11, 2017, ProQuest Ebook Central, created from Wesleyan on 2017-10-11, 13:41:16

days leading to the Dance, participants would wake up before dawn and enter the enclosure, a structure built around a central altar composed of a cottonwood tree, bison skulls and hides, figurines of humans and bison, sage, and rawhide rope. As the community sang and danced, the ritual would proceed with each participant making a sacrifice of their own flesh, as “helpers” would cut through the participants’ bodies in order to fasten the rawhide rope to them, connecting them to the central altar. While the participants fulfilled the “pledges” they made to Wakan Tanka, the Sun Dance also signified a collective renewal of the tribe’s prosperity and its connections to the world, its spirits, and its animals. Furthermore, the bands would stay in the encampment for weeks after the ceremony to trade goods and collectively gather more resources from their spot in the Paha Sapa. Exemplified by the physical tie of the dancers to symbols of the bison and the land, the Sun Dance thus strengthened the ties between the cangleska oyate, the hoop of the Sioux nation, to those of the spirits, animals, and the Paha Sapa that housed them.

As the summer gave way to the fall, Lakota bands relied on the Paha Sapa for the critical bison and eagle hunts, each integral for sustaining the community and supporting its religious activities. After the Sun Dance, bands set off from the Paha Sapa to scout bison herds across the region. These bison hunts, which provided food and raw materials for the band for the entire year, reinforced their relationship to the bison. Before each mission, religious leaders would guide the scouts through “bison calling ceremonies” in order to assist the search for bison. After discovering a herd, the scouts would return and smoke the band’s pipe by a specially-built altar before

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96 Lazarus, Black Hills/White Justice, 7; Ostler, The Lakotas and the Black Hills, 17-19
telling the band where the bison were. Thus, the process of finding the bison represented another manifestation of the relationship between humans and bison. Meanwhile, the Paha Sapa itself served as a hospitable environment for eagles, a key animal in Lakota lore. During the fall, Lakota hunters would trap eagles in order to collect feathers, plumes, and bones for religious purposes. Feathers also symbolized awards for “courageous acts in battle” as well as tokens of remembrance for fallen relatives, so men and women also wore feathers earned for their deeds and those that their relatives received. Serving as the base for both types of major hunts, the Paha Sapa facilitated the link between the Lakota and the animals that they depended on for the material and religious foundation of their community.

In order to navigate the transition of the seasons and shift societal activity accordingly, the Lakota and other Sioux bands depended upon cosmological readings of constellations in relation to the Paha Sapa. The myths of Fallen Star, a legendary figure known for performing incredible feats on behalf of the human world, reflect the connection between the night sky and the Paha Sapa. One tale asserts that after an eagle killed seven girls on top of Black Elk Peak, Fallen Star climbed up the mountain, defeated the eagle, and then lifted the girls into the stars to form the Pleiades. This story thus exemplifies Black Elk Peak as a physical connection between the sky and the earth, as well as the past and the present. In addition to mythology, indigenous cosmology also translated the geographical features of the Paha Sapa, and characteristics of the Sioux people, to the night sky. Ki Inyanka Ocanku, Mato Tipila, Black Elk Peak, and other locations have attachments to

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98 *Ibid.*, 20
specific constellations in order to guide the Sioux through the seasons. For example, if the sun rose in the Pleiades, the Lakota would move to Black Elk Peak and prepare for the springtime return of the *Wakinyan*. Meanwhile, the seven stars of the Big Dipper, “the Carrier” that guided souls to the Milky Way, the “Road of the Spirits,” symbolized the Seven Council Fires that constituted the Sioux as well as the crucial rituals of the Lakota bands. In their cosmological understanding of the world, the *Paha Sapa* thus represented a framework for the Lakota to connect with the spirits in the night sky and to navigate the world around them.

Together, these meanings and practices that the Sioux attached to the *Paha Sapa* all demonstrate the nature of the Black Hills as *wakan*, a key space in the nation’s religious framework. Translating this term into English yields a variety of crucial keywords: sacred, holy, powerful, mysterious, incomprehensible. All of these terms signify the broader notion that for the Sioux, the Black Hills possessed supernatural qualities that warrant special behaviors and considerations, as demonstrated through the vision quests, the Sundance, the cosmological mapping of the region, and other myths and practices. While the Sioux held that other locations, as well as the physical world at large, reflected *wakan* qualities, the *Paha Sapa* represented an “especially highly charged landscape.” It represented the space where the *Wakan Tanka*, the *Wakinyan*, and other spirits dwelled, the site of humanity’s creation alongside the bison, the place where the spirits established world orders between themselves, the humans, and the animals.

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100 As Ostler explains, “powerful” signifies “not the kind of power that dominates, but that animates.” Ibid., 26
101 Ibid., 25-26
*wakan* itself ties the myths and rituals of the Sioux together into a culturally-postulated framework that reflects the common definition of “religion,” as it contextualizes supernatural entities and beings within a social order.\(^{102}\) Understanding the *Paha Sapa* as a *wakan* space thus places the Black Hills in the religious framework of the Sioux.

In sum, the evolution of the *Paha Sapa* as the *wakan* foundation of the Sioux’s social and cultural activity, their history, and their communication with the animal and spirit worlds, exemplifies its status as a religious institution. Since the *Paha Sapa* itself functions as a system of social and cultural orders that organize the Sioux’s rituals and practices, reflecting common conceptions of institutions,\(^{103}\) the land thus meets the definition of a religious institution that supported the Sioux’s society ever since they moved westward.

This extensive analysis of the *Paha Sapa* and the role of the Black Hills in Sioux religion and culture serves to undermine the narratives that arose from the American colonization of the region. When the American state arrived in the region, intricate societal systems already existed on the land, as it served as the religious, economic, and social foundation for Sioux bands. Across all four seasons, the *Paha Sapa* guided their communal movement and behavior, encouraging the formation of a variety of rituals as well as different modes of hunting and gathering. However, the conception of the Black Hills as the *Paha Sapa* came under threat from colonization. The state had to conceive and promulgate the notion of the Hills as empty and devoid

\(^{102}\) This assumes that we are seeking to define Sioux practices as a “religion,” which for the sake of seeking legal and political recognition of their customs and their authority over those institutions, we will pursue. As for the definition employed throughout the thesis, review Mel Spiro’s definition of religion. Smith, “Religion, Religions, Religious,” 281-282

\(^{103}\) See fn. 70-71
of civilization in order to promote settlement on those lands. As the next section of the chapter explains the settler-colonialist pursuits of the state, it is important to remember that the *ex nihilo* narrative constructed lacks any historical basis. Something existed on those Hills, and it was a central religious institution for a society. While the state and its leaders may not have understood this conception of the land, they recognized that they had to destroy any native system attached to the land in order to incorporate it into the formation of its own society and culture.

**A New Paradise: American Colonization of the Black Hills**

When American explorers and military leaders arrived, they did not see the Black Hills as a realm of spirits and deities. Recognizing its material potential, these officials saw the vast region as a possible catalyst for economic growth, territory crucial for the development of an American dominion that stretched across the continent. However, the transformation of the Black Hills into American lands required the concomitant elimination of the society already dwelling in its rocky forests. As this section will demonstrate, the history of American colonization exemplifies both the settler-colonialist structure of the state, particularly the embedment of the logic of elimination in its pursuits of expansion, as well as the modes of necropolitical translation of these broad endeavors to individual action, as demonstrated by the leaders living on the Plains. As time passed and conflicts between the Americans and the Sioux intensified, the military formed the frontier as a state of exception, in which the sovereignty of indigenous nations preserved by *Johnson* and other decisions became a tool for excluding them from the *jus publicum* and for subjecting them to physical and cultural destruction.
Addressing early interactions and the initial treaties between the Sioux and white explorers illuminates the settler-colonialist foundation of the American approach to the Sioux. During the eighteenth and early nineteenth centuries, European fur traders travelled up the Mississippi and Missouri Rivers, trading with Sioux bands in the fall and even joining them for the winter, or longer periods of time, before returning to their home countries. When Merriweather Lewis and William Clark encountered the Sioux in 1804, the first interaction between the United States and the Sioux, they announced to them that the American president, Thomas Jefferson, had bought their homeland from its supposed owner, Napoleon, in their purchase of the Louisiana Territory. Their declarations immediately established the “doctrine of discovery,” and the subsequent project of asserting control over the territory held by indigenous communities, as the basis of Sioux-American relations.

Although this encounter did not immediately trigger the wave of settlements and conflict that enveloped the Sioux’s world, the Louisiana Purchase nevertheless initiated the incorporation of the Sioux into the process of necropolitical erasure that the United States sought in the formation of its idealized, sea-to-shining-seas

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104 Lazarus, Black Hills/White Justice, 8-9. In his discussion of European fur traders, Ostler focuses on how the decision of some European fur traders to stay with Sioux bands for decades and raise families led to the nascent development of European knowledge about the religious significance of the Black Hills. While most traders did not completely adopt the Sioux’s religious or cultural practices, some learned about basic aspects of their language and institutions. Furthermore, only a few possessed the literary skills to communicate their experiences. Ostler thus highlights Edwin Thompson Denig’s writings, produced during the 1850’s, as notable attempts to understand the Black Hills as a religious space for the Sioux. Denig observed that “much superstition is attached to the Black Hills by the Indians,” focusing on a myth about the “Great White Giant,” a large being “condemned to perpetual incarceration under the mountain as an example to all whites to leave the Indians in quiet possession of their hunting grounds.” Despite the questionable veracity of his account, let alone the language he uses, Denig’s work does correlate with traditional conceptions of the Waziya and Waziyata, two subterranean spirits that lived below the Black Hills. While he derisively uses the term “superstition,” his awareness of the supernatural qualities of the land nevertheless reflects the Sioux’s conception of wakan, and the Black Hill’s possession of a wakan nature. Although these figures did not alter American approaches to the Black Hills when gold miners and American military forces began to penetrate Sioux territory, they nevertheless help validate the religious nature of the Black Hills as an alternative view to the economic perspective adopted by their white peers. Ostler, The Lakotas and the Black Hills, 24-25

105 The interactions between the Sioux and the explorers did not go well; attempting to convince a band of Brulé Lakotas to allow for American trade along the upper Missouri River, Lewis and Clark offered gifts to the Lakotas. Seeking more, members of the band seized one of their canoes, which nearly led to violence between the two groups. In response to the incident, Lewis declared that the Sioux represented “the vilest miscreants of the savage race.” See Lazarus, Black Hills/White Justice, 9; Ostler, The Lakotas and the Black Hills, 11-12
dominion. At the same time, these interactions made it clear that the Louisiana Purchase did not extend the *jus publicum* of this dominion to the Sioux. Instead, the evocation of the doctrine of discovery immediately established the characterization of the Sioux as occupants of the country’s frontier, a dependent nation holding the lands that the American state desired.\(^{106}\)

Consequently, future treaties served as little assurance for preventing American encroachment into Sioux territory. Even though the Atkinson-Fallon mission in 1825 established agreements with the Sioux that promised the protection of their land and guarantees of sovereignty,\(^ {107}\) it took only fifteen years for settlers to jeopardize the agreements established that the United States ensured that the Sioux could control their territory in peace.\(^ {108}\) After these parties began settling across the Plains, primarily along the trail that led to the fabled riches of Oregon and California, the United States convened a new conference with the Sioux at Fort Laramie in 1851 to establish a new treaty to govern Sioux-American relations (see Figure 1). In the document, the Sioux agreed to allow the U.S. to construct roads and railroads across their lands and to not attack settlers in exchange for annual compensation and guaranteed sovereignty of the region surrounding the Black Hills. Even this latter condition conflicted with the Sioux’s precolonial conception of their land, as they

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\(^{106}\) I choose this language to reflect the words declared by Chief Justice John Marshall in *Cherokee Nation v. Georgia* 30 U.S. (5 Peters) 1 (1831), a case in which the Court decided that indigenous tribes represent “denominated domestic dependent nations.” Justifying this assertion, Marshall stated that: “They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases; meanwhile, they are in a state of pupilage. Their relations to the United States resemble that of a ward to his guardian. They look to our Government for protection, rely upon its kindness and its power, appeal to it for relief to their wants, and address the President as their Great Father.” (See 30 U.S. 1 (1831), at 30 U.S. 2)

While the Louisiana Purchase predated *Cherokee Nation* by almost three decades, Marshall’s 1831 decision, along with his other prominent decisions regarding indigenous sovereignty, served as codifications and legal justifications for practices pursued throughout the nascent history of the United States and the colonies that preceded it.

\(^ {107}\) Lazarus, *Black Hills/White Justice*, 10-14

objected to the notion that they had to adopt borders for their territory. Despite U.S. assurances about the benefits of the agreement for the Sioux when they negotiated the treaty at Fort Laramie, the United States Senate unilaterally decreased the annuities, without the Sioux’s consent, once the Treaty arrived in Congress. The Senate’s maneuvers, in addition to the conditions that permitted the construction of roads and railroads in Sioux territory, reaffirmed the American state’s position that the Sioux represented occupants of its frontier, lands that it would proceed to seize despite any treaty. The structure of invasion thus superseded the agreements, which came to only represent brief reprieves from violent exercises of the state’s necropower.

The 1868 Treaty challenged the ability of the U.S. to actualize its settler-colonialist pursuits, as the agreement arose from the Sioux’s victories over the American military. Despite the calls for peace codified in the 1851 Treaty, the desire for westward expansion encouraged the United States to pressure the Sioux into subordination. However, the Sioux won a series of battles and expeditions throughout the 1850’s and 1860’s, under the guidance of Red Cloud, Crazy Horse, and other Sioux leaders, that stymied the federal government’s efforts to seize their territory.

When the new peace commission asked Red Cloud for his thoughts on developing a new treaty, he declared that:

“If the Great Father kept white men out of my country, then peace would last forever. The Great Spirit has raised me in this land and has raised you in another land. What I have said I mean. I mean to keep this land.”

109 Lazarus, Black Hills/White Justice, 16-20; Ostler, The Lakotas and the Black Hills, 38-42
110 For more information on the years of conflict between 1851 and 1868, as well as the build-up to the Treaty of 1868, see Lazarus, Black Hills/White Justice, 21-45; Ostler, The Lakotas and the Black Hills, 42-59
111 Lazarus, Black Hills/White Justice, 47
Red Cloud, Crazy Horse, and other leaders reinforced their position by continuing to raid American trade routes throughout 1867. Recognizing the constraints on military resources caused by Reconstruction, as well as the voices of more humanitarian-oriented officials in the federal government, the United States sought to draft a new agreement.

Certified after months of negotiations at Fort Laramie, the 1868 Treaty established an uneasy peace. Article 2 created the Great Sioux Reservation, which set the entirety of modern-day Western South Dakota as permanent Sioux territory. Meanwhile, Article 16 defined fifty million acres of land along the Powder River and across the Big Horn Mountains, land in modern-day Wyoming and Montana, as “unceded Indian territory.” Even though Article 11 of the 1868 Treaty stipulated that the Sioux had to sacrifice to land claims outside of Articles 2 and 6, it granted the Sioux hunting rights across millions of acres in modern-day Nebraska, Wyoming, and Colorado (See Figure 2). Together, Articles 2 and 16 codified approximately seventy million acres as Sioux territory, and Article 11 created hunting grounds that the Sioux could use for “so long as the buffalo may range thereon in such numbers as to justify the chase.” Of course, the U.S. constructed several of the Treaty’s articles to impose their lifestyle upon the Sioux and assert their view of the Sioux as a dependent nation. Article 4 stipulated that the government would establish their new agencies along the Missouri River, forcing the Sioux to travel eastward for their annuities and rations. Meanwhile, Articles 3, 6, 8, 10, and 14 all encouraged the Sioux to adopt agricultural practices and privatize their lands.\(^{112}\) Plus, the United States had to translate these

\(^{112}\) The treaty even furthered cultural assimilation through education. Article 7 urged parents to force their children to enroll in school from the ages of six to sixteen. Ostler, *The Lakotas and the Black Hills*, 65
conditions to the Sioux, which led to devious maneuvers aimed at shifting the terms of the treaty to support the U.S. Nevertheless, Red Cloud and other leaders signed the treaty with an understanding that the established peace stemmed from Sioux victories, solidifying their sovereignty over their *Paha Sapa* and other lands.¹¹³ The 1868 Treaty thus represented an uncomfortable milestone, in which both sides, especially the U.S., recognized that they did not receive what they wanted.

It was in this tenuous climate, informed by broad dissatisfaction with the 1868 Treaty and decades of conflict preceding the agreement, that shaped the necropolitical exercises that secured American control over the Black Hills. Local entrepreneurs and military leaders wanted to drive the Sioux out of the Black Hills for years, as they argued that the Sioux only used the region as a “hiding place.” After the U.S. established the Black Hills and adjacent Powder River region as Sioux territory, local business leaders and the Dakota territorial legislature immediately began to pressure the federal government to allow “‘scientific’ expeditions” to survey the Black Hills.¹¹⁴ “Expeditions” represented a tool of invasion; by finding gold and other natural resources, local leaders could then assert that they could extract these resources and seize the Black Hills from the Sioux. The advocacy for these expeditions thus exemplifies the application of the logic of elimination to the Black Hills. If settlers could establish gold and timber industries in the region, the produced wealth could rejuvenate the local and national economies, strengthening the Dakota Territory and the country as a whole. The Black Hills thus symbolized a means to this economic and political end. On the other hand, the Sioux’s non-economic use of the

Hills, especially in comparison to the prospective pursuits of mining, represented an obstacle to clear. For those local leaders, they wanted the federal government to authorize them to extend American sovereignty over the land through their expeditions, even if it meant using violence against the Sioux.

Recognizing that these “expeditions” served as a step towards colonization, the federal government resisted until the early 1870’s, when concerns over a weak national economy overshadowed the few “humanitarian” voices in Washington. In 1874, the government embraced the view of the Black Hills as a possible opportunity for newfound wealth by sending Lieutenant Colonel George Custer and a crew of over 900 soldiers, dozens of Arikara and Santee scouts, four scientists, two engineers, two miners, a photographer, and three Gatling guns to venture into the Black Hills. When they encountered this massive expedition, two hundred Lakotas asserted that the U.S. government violated the 1868 Treaty, which stipulated that all non-native movement through the Black Hills had to receive Sioux approval. However, Custer highlighted a minor clause in Article 2 that allowed governmental officials to travel through. On their travels through the Black Hills, Custer exclaimed that “no portion of the United States…can boast of a richer or better pasturage, purer water…and of greater advantages generally to the farmer or stockman than are to be found in the Black Hills.”115 When the expedition discovered a miniscule amount of gold, Custer immediately sent notice to nearby white settlements, exclaiming that the Black Hills teemed with gold. Even though Custer’s own geologist criticized the Colonel’s boast after the expedition, hundreds of miners across the country immediately flooded the

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115 Lazarus, Black Hills/White Justice, 75
Custer’s description of the Black Hills, and the public reaction to his updates, exemplifies the actualization of the settler-colonialist narrative through necropolitical action and nihilistic re-descriptions of the land. Exploiting the Treaty to impose American order on the Sioux, this erasure of the Sioux’s claim to sole occupancy created the state of exception necessary for Custer and his soldiers, perfect reflections of Mbembe’s notion of “war machines,” to enter the space. Once they saw the land, their immediate evocation of industry illustrates the quick integration of the Hills into the project of the American frontier: transforming unknown lands into foundational territories for the new American empire and its expansive dominion. The Black Hills thus represented a paradise that the state could create for its public. Unfortunately, this did not include the Sioux and their understandings of the land.

Subsequent maneuvers by the American government officials and newspapers across the West to justify their seizure of the Black Hills hardened both the settler-colonialist imagination of the country’s new promised land and calls for eliminating the Sioux and their claims to the land. In his interviews with newspapers, Custer called for the “extinguishment of Indian title at the earliest moment.” These publications echoed his words; the Chicago Inter-Ocean asserted that “we owe the Indians justice and fair play…but we owe it to civilization that such a garden of mineral wealth be brought into occupation and use.” The Bismarck Tribune declared that “[the Sioux’s] prayers, their entreaties, can not change the law of nature…the American people need the country the Indians now occupy.”

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116 Lazarus, Black Hills/White Justice, 71-76; Ostler, The Lakotas and the Black Hills, 80-87
117 See fn. 32
118 Ibid., 76
119 Ibid., 76
Concomitant to these blunt statements in support of removing the Sioux from their lands, for the sake of American “civilization,” were the efforts to criticize the Sioux’s use of the land in order to portray the Black Hills as empty. Custer told reporters that the Black Hills are “not occupied by Indians” and are “seldom visited by them,” while his botanist argued that the Sioux only saw them as “occasional hunting grounds.” In 1876, Lieutenant Colonel Richard Dodge advanced the notion that the Sioux did not possess the Black Hills in his book *The Black Hills*, stating that the “Black Hills have never been a permanent home for any Indians,” as any activity in the Hills represented “mere sojourns of the most temporary character.” All of these testimonies employed the Lockean conception of property through labor in order to justify invasion. By extracting wealth from the land, the United States could claim ownership, at least in a recognizable form, over the Hills. Meanwhile, since they saw the Sioux’s use of the land as non-economic and transitory, they did not acknowledge any previous settlement on the land. For the state, its leader, and its public, the absence of a market-based, Christian society existing in the space necessitated, let alone permitted, American settlement of the region.

The resistance of the Sioux to the seizure of the Black Hills, from the battles of 1876 to the Wounded Knee Massacre in 1890, demonstrates that the U.S. could only actualize its imagination of the Black Hills through necropower. Government agents knew that the Sioux were “violently opposed…to the presence of the white man on their sacred ground.” By 1875, the government had initiated negotiations to

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120 Ostler, *The Lakotas and the Black Hills*, 88-90
121 See fn. 51-53 in the introduction
122 Ostler, *The Lakotas and the Black Hills*, 90
encourage the Sioux to sell the Black Hills. However, the Sioux rejected their offers and began rallying bands to fight against any American exercise of force. As Little Big Man and his party of men, representing bands that refused to sign the 1868 Treaty, sang on their way to garner support from other Sioux bands:

The Black Hills is my land and I love it
And whoever interferes
Will hear this gun. ¹²³

The U.S. government responded to the Sioux’s steadfast refusal by declaring that it would eliminate the rations program for the Sioux unless they sold the Black Hills. They also ordered the Sioux to leave their treaty lands in the Black Hills and the Powder River region to head eastward. Several Sioux bands, particularly the non-treaty communities, ignored this command, so the U.S. sent its military into the frontier. Even though the Sioux won a few notable battles in early 1876, including the infamous Battle of the Little Bighorn, their initial success only encouraged further American involvement in the war effort. When the country learned of Custer’s death, newspapers portrayed him as a Christian martyr, stoking anti-Sioux fervor among the public. ¹²⁴ This translated to policy, as the government formed the Manypenny Commission, which utilized intimidation, threats, and negotiations to cajole a minority of Sioux leaders, despite the minimum standard of signatures mandated by the 1868 Treaty for new agreements, into signing a new agreement that ceded the

¹²³ Lazarus, Black Hills/White Justice, 81; Ostler, The Lakotas and the Black Hills, 93
¹²⁴ Newspapers also racialized the religiously-tinged portrayal of the Sioux as demonic forces that killed a hero. In their response to the Battle of Little Bighorn, the Richmond Whig declared that “the North alone shall not mourn this gallant solder...He belongs to all the Saxon race; and when he carried his bold dragoons into the thickest of the last ambuscade, where his sun of life forever set, we behold in him the true spirit of that living cavalry which cannot die, but shall live forever to illustrate the pride, the glory, and the grandeur of our imperishable race.” For these papers, and their audiences, Custer and his everlasting “spirit” thus represent the ideal for America: white and Christian. Lazarus, Black Hills/White Justice, 83-89; Ostler, The Lakotas and the Black Hills, 93-98.
Black Hills to the United States. If the Sioux refused to sign, they would lose the
rations that they needed, as the bison they relied upon nearly faced extinction.
Meanwhile, the U.S. military waged its onslaught against the more resistant bands,
debilitating the Sioux until they agreed to move out of the Black Hills and their
western lands. The degree of coercion and violence used to deprive the Sioux of
their lands highlights the necropower employed in order to eliminate the Sioux’s
presence on the land. Placing the Sioux in the state of exception through acts of war,
the United States had to resort to exercises of lethal force in order to incorporate the
Black Hills into its territory.

While the Sioux moved from their physical lands, their cultural resistance to
elimination, which triggered the Wounded Knee Massacre, demonstrates how the loss
of the lands reflected the government’s necropolitical attempt to destroy the oyate.

As Mario Gonzalez, the current attorney for the Oglala Sioux Tribe, has argued,
scholars often treat Wounded Knee separately from the wars of the 1860’s and
1870’s. In The Politics of Hallowed Ground, Gonzalez counters this notion:

The Ghost Dance religion and resulting Wounded Knee Massacre in 1890 were caused by
(among other things) the theft of the Black Hills in 1877 and of nine million additional acres in

125 Lazarus, Black Hills/White Justice, 89-95; Ostler, The Lakotas and the Black Hills, 98-103
126 For the sake of my argumentation, my discussion of Wounded Knee will not provide an extensive history of the event itself,
nor the Ghost Dance movement that preceded the Massacre. I highly recommend reviewing the following selections: Mario
Gonzalez and Elizabeth Cook-Lynn, The Politics of Hallowed Ground: Wounded Knee and the Struggle for Indian Sovereignty
(Chicago: University of Illinois, 1999), 13-21, 106-107, 254-255, 292-295; Lazarus, Black Hills/White Justice, 106-118; Ostler,
The Lakotas and the Black Hills, 117-124.
127 While Jeffrey Ostler’s book, as a whole, serves as an invaluable text for explicating the history of the Lakota Sioux and their
relationship with the Black Hills, it commits the historical maneuver that Gonzalez criticizes. As he declared at the end of Part 1,
“Crazy Horse’s surrender and Sitting Bull’s flight to Canada” in 1877, after the seizure of the Black Hills, “marked the end of an
era.” This frames his argument that the Sioux’s fight for the Black Hills had shifted from physically resisting American rule to
working within the confines of American society for justice. Ostler, The Lakotas and the Black Hills, 103. While he does
proceed to criticize other scholars for not recognizing that the Ghost Dance movement reflected an acute “political” message of
defying American authority, he nevertheless separates Wounded Knee from the trials of the 1860’s and 1870’s. Ibid., 123-124.
Responding to Ostler, Gonzalez would assert that the Sioux Ghost Dancers’ political message sought to assert an indigenous
rebuke of specifically the Black Hills seizure. While the Ghost Dance movement occurred across the country, the Sioux’s
adoption of the practice reflected the continuation of their resistance to policies and maltreatments that stemmed from the federal
government’s violation of the 1868 Treaty (see fn. 126).
1889, not other reasons given by apologists in history. Lakota people were looking for salvation in a messiah [Wovoka, a Paiute visionary] that would rid them of the non-Indian intruders and the terrible conditions they were living under in the late 1880’s; the famine, sickness, and death. They wanted their stolen lands and way of life restored.128

Gonzalez’s view of the Wounded Knee Massacre reflects how the U.S. relied upon physical and “social death”129 in order to suppress the Sioux’s relationship to the Black Hills. Even though the Sioux no longer lived in the Hills, the Ghost Dance offered an avenue to preserve the link between the cangleska oyate and the cangleskas of the spirits, animals, and the Paha Sapa. By killing hundreds of practitioners, the U.S. used murder as a tool to eliminate a religious practice, and more broadly a culture, that opposed their authority over the Sioux and their land. This multifaceted application of terror to subordinate the Sioux thus exemplifies the intersection of Mbembe’s dual notion of social death and physical subordination, all exercised through the mechanics of necropower. Unfortunately, the structure of settler-colonialism only encouraged the individual actors in the U.S. military, the war machines, to carry out this violence. In the eyes of the U.S., it could not coexist with the Sioux and their precolonial society. It rebuked their notions that they had rights to own and develop all of the lands in their dominion. Sioux religion and culture thus represented a threat to foundational tenets of the nascent nation, its government, and the ideologies that unified its disparate populations. Of course, the Sioux held the same feelings regarding American social systems, explaining their militant resistance to settlements across their lands. However, the extent of government-ordered violence

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129 Mbembe, “Necropolitics,” 21
against the Sioux demonstrates how the state’s construction of the Black Hills led it to conclude that they had to erase the Sioux and the *Paha Sapa*.

Juxtaposing the Sioux’s conceptualization of the Black Hills as a religious institution to the American colonization of the Black Hills demonstrates that the violence on the American frontier ultimately disrupts the settler-colonialist narrative of the American dominion rising from uncivilized lands. The Sioux saw the mountainous region as the *Paha Sapa*, a place where they could communicate with spirits and thrive as a semi-nomadic people. Their use of the land operated within a broad religious framework that linked them to the spirit and animal worlds and rooted their nation in the forests of the *Paha Sapa*. This rebukes the *ex nihilo* conception that the American state promulgated in order to justify its own settlements across the land. The Dakota Territory thus did not originate from a “Great American Desert.” It arose from an invasion of Sioux territory and concomitant destruction of the society they developed on the Black Hills, as well as precolonial institutions attached to those lands. As the violent era from the contestation of the 1851 Treaty to the Wounded Knee Massacre demonstrates, the American state and its local emissaries chose to withhold *jus publicum* from the Sioux as they marched onto the Black Hills. Operating within the state of exception, Custer and other military leaders could inflict the power of the state upon the Sioux through means of physical and cultural violence. Both the structural and localized histories of the conflict surrounding the Black Hills land seizure illustrates the processes of elimination that United States pursued in order to legitimize its claim to the lands.
Chapter 2


After the seizure of the Black Hills, the Sioux could no longer defend their way of life through force and external resistance. Engulfed by the United States, they had to resort to fighting for their land in the legal system of the colonial state. However, as this chapter will demonstrate, the subsequent 103 years would reflect the new forms of erasure that arose as the United States gradually extended *jus publicum* to the Sioux. The Black Hills land claim, filed in 1923 and decided by the U.S. Supreme Court in 1980, exemplifies problematic dynamics underlying the shift in governing principles. Filed in a political climate informed by decades of violent assimilation, the Sioux’s white counsel sought “just compensation,” framing the government’s actions as an exercise of eminent domain under the 5th Amendment that requires monetary payments to damaged parties.

Understanding the Sioux’s ultimate rejection of the award thus entails and exploration of how the initial argumentation of the Black Hills land claim operated in the mode of elimination reified through the incorporation of indigenous communities in American *jus publicum*. Although sympathy would encourage policies that deconstructed the state of exception that dictated indigenous policies in the late 19th and early 20th centuries, even the well-intentioned actors did not promote reforms that recognized the Sioux’s perspective on their sacred land. Reflective of the flaws that underlie Native American law in the United States, the claim from 1923 to 1980
signified an unsatisfactory pursuit, one in which the efforts to secure “just compensation” failed to address the institutions built on the seizure of the Black Hills and inadequately recognized the religious, cultural, and societal systems that the Sioux sought to restore.

1877-1923: Necropower on the Reservations

In the decades prior to 1923, the year in which the Sioux filed the Black Hills’ land claim, Congress passed a series of laws that would shift the modes of necropower from outright violence to land seizures and assimilationist programs. The Supreme Court’s decision in *United States v. Kagama*, 118 U.S. 375 (1886) epitomizes this transformation. In *Kagama*, the Court considered a case about the murder of a Klamath man by two fellow tribal members on the Klamath reservation in California. Due to the passage of the Major Crimes Act of 1885, the federal government could prosecute murders and other “major” felonies that occurred on Native American reservations. The plaintiffs, Kagama and Mahawama, contended that this Act violated the Constitution because it violated “Congress’ lawmaking powers;” they argued that Congress could not extend federal jurisdiction to cover indigenous activity. On behalf of the Court, Justice Samuel Miller declared that Congress could assume plenary power over tribes because they represented “wards of the nation.” Citing Chief Justice John Marshall’s opinions in *Johnson v. M’Intosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), Miller asserts that indigenous communities have always been subject to American rule because of their ultimate subservience to the American state’s territorial
sovereignty over their lands.\textsuperscript{\textit{130}} However, Marshall described tribes as “domestic dependent nations,” and mainly coined the notion of “wards” as an analogy to explain the unique nature of indigenous tribes as semi-autonomous communities.\textsuperscript{\textit{131}} While this recognition of sovereignty ultimately enabled the nascent United States to support its necropolitical acts of war against tribes, it could not serve as justification for continuing the erasure of indigenous communities when they reside within the boundaries of the American state. The American state thus had to envision the reservations as the new frontiers, the states of exception that it could operate within.

Fulfilling this structural need, Justice Miller uses historical “experience” and circular logic to modify Marshall’s language in order to craft a basis for Congress’ new right to exercise plenary power over Native Americans without granting them citizenship. First, he subtly changes Marshall’s description of tribes, classifying them as “local dependent communities.”\textsuperscript{\textit{132}} This phrasing strips tribes of any sovereignty and autonomy granted by the concept of nationhood. He then asserts that “after an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure – to govern them [the tribes] by acts of Congress.”\textsuperscript{\textit{133}} In an exercise of circular logic, he later explicates in the concluding paragraph of the Court’s opinion by declaring that the “experience” of the last century demonstrates that:

“The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government, because it never has existed

\textsuperscript{\textit{130}} 118 U.S. 375 (1886), at 118 U.S. 381-382.
\textsuperscript{\textit{131}} 30 U.S. 1 (1831), at 30 U.S. 2
\textsuperscript{\textit{132}} 118 U.S. 375 (1886), at 118 U.S. 382
\textsuperscript{\textit{133}} Ibid., at 118 U.S. 382
anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.\textsuperscript{134}

Of course, this right for the government’s plenary powers thus exists only because of previous executions of that power, as their “weak and diminished” status largely stemmed from the American state’s military campaigns.\textsuperscript{135} The logic employed thus demonstrates the structural shift in necropower that the American state implemented in order to adjust its erasure of indigenous communities when they resided within the borders of the country. By framing the pursuits of “safety” and “protection” through unilateral action, the Court enabled Congress to usurp the power of tribal governments and their traditional systems without extending \textit{jus publicum} to Native Americans. \textit{Kagama} therefore established Congress, and the emissaries representing its institutions and implementing its policies, as the sovereign ruling over the reservations, the new physical states of exception.

In addition to \textit{Kagama}, concomitant Congressional efforts to accelerate the takeover of indigenous lands through legislative means reflected the new necropolitical forms of erasure. In 1887, Congress passed the Dawes Severalty Act, which sought to impose property allotment across Native American reservations. Based on the pursuit of “agricultural and grazing purposes,”\textsuperscript{136} the Dawes Act

\textsuperscript{134} 118 U.S. 375 (1886), at 118 U. S. 384-385

\textsuperscript{135} This argument, the basis of the Court’s rationale for granting Congress the constitutional right to extend federal jurisdiction over tribes, neglects how past actions of the federal government had rendered previously-sovereign nations “weak and diminished.” The necessary conditions for the U.S.’ constitutional right exists only because the U.S. had exercised plenary powers over tribes when they were sovereign nations, violently transforming them into “domestic dependent nations” and eventually “local dependent communities.” For more information on \textit{Kagama}, see Robert T. Anderson, Bethany Berger, Sarah Krakoff, and Philip P. Frickey, \textit{American Indian Law: Cases and Commentary}, 3rd edition, (St. Paul, MN: West Academic Publishing, 2015), 98-101

stipulated that Native American individuals and families could apply for “patents” from the U.S. government, receiving a maximum of 160 acres that they would own. The government would hold each patent for twenty-five years, during which the state expected the property owners to develop their land and adopt agricultural or grazing practices, and then give full control of the land to them. Meanwhile, the government also stated that it would buy any “surplus” allotments left unclaimed by Native American households, at “bargain rates,” and sell them to “homesteaders.”

The Dawes Act effectively presented Native American communities with the following dire choices: either abandon precolonial conceptions of land ownership and allow the federal government to divide their territory into allotments, or lose even more land to the federal government. Regardless of their decision, they lost authority over their own territories, even those granted through treaties. Forcing Native Americans families to form households, adopt American systems of agriculture, and settle on individualized plots of land, the Dawes Act thus legally supplanted indigenous ownership by imposing the American ideal of the homestead across their frontier.

The passage of the Dawes Act provided a legal basis for the American state to claim more Sioux territory and dissolve precolonial customs in the name of property development. Throughout the early 1880’s, the U.S. government sought to seize millions of acres across the Great Sioux Reservation in order to placate the pressure of increasing white settlements across the Dakota Territory. After the Edmunds Commission, which hardly followed the guidelines of the past treaties and agreements

with the Sioux, drafted legislation to expropriate millions of acres of Sioux territory, Congress rejected the bill because it blatantly ignored the requirement that all new agreements had to receive approval from three-fourths of the Sioux.\textsuperscript{138} However, Congress did not reject the pursuit of the Commission; instead, it wanted to claim Sioux land in a legally and political palatable manner. The Dawes Act provided the necessary template. Since the Sioux could not claim their entire reservation through 160-acre patents, millions of acres across the reservation could qualify as “surplus” land. The U.S. government could then buy these lands and then resell them to white homesteaders, who would develop the agricultural economy and society that the government desired. The Act thus enabled Congress to seize, once again, millions of acres of Sioux lands. Following the passage of the Dawes Act, federal commissions cajoled the Sioux into signing the Sioux Agreement of 1889, which permitted the government to buy nine million acres of Sioux land at rates below the land’s market value and enforced the Dawes Act across Sioux reservations.\textsuperscript{139} The specialized application of the Act through the Sioux Agreement furthered the state’s efforts to simultaneously secure indigenous territories and eliminate claims to authority attached to their lands (see Figure 3), even if the necropolitical exercises shifted from military intervention to economic development.

When tribes sought to counter government efforts to dictate the allotment of their lands, the Supreme Court only strengthened the legal basis for the American

\textsuperscript{138} In Appendix D of their book, The Politics of Hallowed Ground, Mario Gonzalez and Elizabeth Cook-Lynn reprinted a 1980 report written by Robert T. Coulter, Curtis G. Berkey, and J. David Lehman on behalf of Mario Gonzalez and the Indian Law Resource Center. The document extensively covers the land seizure efforts by the federal government throughout the 1880’s. For their description of the Edmunds Commission legislation and its failure, see Gonzalez and Cook-Lynn, The Politics of Hallowed Ground, 260-267. For additional information, see Lazarus, Black Hills/White Justice, 106-108

\textsuperscript{139} Gonzalez and Cook-Lynn, The Politics of Hallowed Ground, 267-283; Lazarus, Black Hills/White Justice, 109-112; Ostler, The Lakotas and the Black Hills, 115-117
government’s pursuits through its landmark decision in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). In the case, the Court responded to the claims of the Kiowa, Comanche and Apache, who all asserted that the U.S. Secretary of the Interior could not administer a 1900 Congressional mandate because the law stemmed from an illegitimate agreement between the tribes and the government. The tribes argued that the government did not receive signatures from three-fourths of all adult males from the indigenous communities, as stipulated by the Medicine Lodge Treaty signed by all parties in 1868. In its decision, the Court ruled that the government could “abrogate” treaties, regardless of tribal consent, because it possessed “plenary” authority over tribes. Instead of representing “domestic dependent nations,” as stipulated by Chief Justice John Marshall in *Cherokee Nation*, the Court in *Lone Wolf* adopts the language of the Court’s opinion in *Kagama*. Quoting from that decision, the Court states that “the power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection.”

Adapting this “power” to treaty rights, the Court ruled that:

The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians, it was never doubted that the power to abrogate existed.

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140 30 U.S. 1 (1831), at 30 U.S. 2
141 187 U.S. 553 (1903), at 187 U.S. 567; Lazarus, *Black Hills/White Justice*, 170-171. By using this language in the Opinion of the Court, Justice Edward White evokes the language used in the Court’s opinion in *Kagama*, specifically the Court’s assertion that:

“The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.” (118 U. S. 375 (1903), at 118 U.S. 384-385)

in Congress, and that, in a contingency, such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians.\footnote{187 U.S. 553 (1903), at 187 U.S. 566; Anderson et al., eds., \textit{American Indian Law: Cases and Commentary}, 118}

\textit{Lone Wolf} thus solidified the conception of federal sovereignty over tribes and their lands, as the claim that “it was never doubted that the power to abrogate existed in Congress” eliminates any past or present recognition of tribes as “domestic nations” or bodies with some sense of autonomy, fully transforming them into “local domestic communities.”\footnote{Ibid., at 187 U.S. 566; \textit{Ibid.}, 118} Furthermore, \textit{Lone Wolf}’s undermining of treaties enabled the government to impose its allotment system on any tribe, even those with longstanding treaty rights and who refused to recognize the Dawes Act.\footnote{Anderson et al., eds., \textit{American Indian Law: Cases and Commentary}, 111-117} More importantly, \textit{Lone Wolf} expanded the scope of \textit{Kagama} by using the incorporation of indigenous communities into American territories as a rationale for undermining treaty obligations. This did not equate to extending \textit{jus publicum}; \textit{Lone Wolf} reserved the right of Congress to act unilaterally when needed, preserving tribes’ place in the state of exception. The decision thus solidified the state’s power over indigenous communities without recognizing them as citizens with constitutional rights.

While these legal and political actions legitimized further seizures of tribal territories, the government also pursued a multi-faceted effort to destroy the religions and cultural institutions of the Sioux and other indigenous communities. During Ulysses S. Grant’s administration, the government implemented the “Quaker policy,” hiring missionaries and Christian advocates as federal agents to work on reservations. Reflecting Grant’s clear interest in imposing Christianity at the expense of Native American religion, this policy resulted in the establishment of Christian mission
schools, through which the government forced Native American children into violent acculturation.\textsuperscript{145} Government officials and education leaders also established boarding schools off reservations in order to, as Richard Henry Pratt notoriously declared, “kill the Indian and save the man.”\textsuperscript{146} Concomitant to the emphasis on assimilation through education, the U.S. government also established codes of “Indian Offenses,” which listed a variety of religious practices and other cultural customs that Native Americans could no longer follow.\textsuperscript{147} The U.S. also established the Courts of Indian Offenses, which tasked police forces on reservations with the responsibility of persecuting those who continued conducting banned ceremonies and rituals.\textsuperscript{148} These reforms particularly targeted the Sioux, as the Codes explicitly outlawed the sun dance and other Sioux customs. The combination of aggressive education and legal suppression forced the Sioux, like many other tribes, to go undercover with their beliefs.\textsuperscript{149} Due to these programs, the Sioux and other tribes could not fight to preserve their religious institutions and freedoms.

Despite apparent violations of the First Amendment’s Establishment Clause, no governmental body would enforce any separation of church and state in indigenous policy. The Supreme Court had ordained the Christianization of Native American policy through its own evocation of Christianity in \textit{Missouri v. Roberts}, 152 U.S. 114 (1894), a case concerning the construction of railroads on reservation land, when the Court broadly declared that “the United States will be governed by

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\textsuperscript{145} Wunder, “\textit{Retained by The People},” 37-38; Lazarus, \textit{Black Hills/White Justice}, 102-103 \\
\textsuperscript{146} Lazarus, \textit{Black Hills/White Justice}, 101-102; Ostler, \textit{The Lakotas and the Black Hills}, 114-115 \\
\textsuperscript{148} Wunder, “\textit{Retained by The People},” 35-36 \\
\textsuperscript{149} Lazarus, \textit{Black Hills/White Justice}, 100-101; Ostler, \textit{The Lakotas and the Black Hills}, 113-115
\end{flushleft}
such considerations of justice as will control a Christian people in their treatment of an ignorant and dependent race.”

In *Quick Bear v. Leupp*, 210 U.S. 50 (1908), the Court applied this stance to religious assimilation when it ruled that the Rosebud Sioux had violated the First Amendment when they challenged the establishment of sectarian schools on the Rosebud Sioux Reservation. Along with the central claim that the tribal and treaty funds did not count as public funds, as the money belonged to the Sioux to administer and use for educational services, Chief Justice Melville Fuller argued on behalf of the Court that “it seems inconceivable that Congress shall have intended to prohibit them from receiving religious education at their own cost if they desire it; such an intent would be one to prohibit the free exercise of religion amongst the Indians, and such would be the effect of the construction for which the complainants contend.”

Through the legal mechanisms set in *Missouri* and *Quick Bear*, the Court affirmed the attempted erasure of indigenous religions and concomitant replacement of those institutions with Christian customs, all in support of the American dominion’s development. The explicit endorsement of Christian missionary work may shock a 21st century audience, accustomed to a strict understanding of the First Amendment, yet these decisions further highlight how the formation of the United States *ex nihilo* as a white, Christian nation required the destruction of all native societies and social systems attached to the land. In contrast, Christianity co-existed with the settler-colonialist logics that legitimized the state’s establishment. From these structural needs, the American state justified its pursuit of

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150 152 U.S. 114 (1894), at 152 U.S. 117; Wunder, “Retained by The People,” 38
151 210 U.S. 50 (1908), at 210 U.S. 81-82; Wunder, “Retained by The People,” 38
religious and cultural assimilation through its own legal and political mechanisms in order to subordinate indigenous communities and eliminate their ways of life.

Together, the imposition of allotment and concurrent efforts to curb indigenous religions and cultures reflected a campaign to “kill the Indian,” through the elimination of native perspectives, claims, and social systems in order to “save” the state.


Consequently, when the Sioux hired Ralph Case and his colleagues to pursue the Black Hills land claim, he chose to focus on monetary compensation through the lens of property rights. It took eleven years for Case to finally present his argumentation, as he had filed the case in 1923, three years after Congress passed a jurisdictional act in 1920 that allowed the Sioux to file claims for the Black Hills. Nevertheless, when Case and his team submitted twenty-four petitions to the Court of Claims in 1934, they presented a new division of the treaty lands (see Figure 4). They divided the treaty lands into three categories: The Black Hills, classified as “absolute fee title” (Class A), the lands guaranteed by the 1851 Treaty for “undisturbed use and occupation” (Class B), and the hunting lands granted by the 1868 Treaty (Class C). With cents per acre assigned to each class, Case determined that the value of the lands equaled $189 million, and that with interest, the U.S. owed the Sioux $750 million as “just compensation” in order to ameliorate the government’s violation of the Fifth

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152 Lazarus, Black Hills/White Justice, 138, 146-147, 154-156; Ostler, The Lakotas and the Black Hills, 134. For an audience unaware of sovereign immunity, the notion that the Sioux’s counsel would have to lobby Congress to pass legislation authorizing a suit against the government may seem bizarre. This principle stems from a custom that governments across the world have adopted: that no party, such as foreign entities, can sue a government. This policy applies to local parties in the United States, including Native American tribes. Anderson et al., eds., American Indian Law: Cases and Commentary, 208
Amendment. While the valuations and land categorizations would shift as counsel changed over the course of the next forty-six years, Case’s petitions represented the integration of the Black Hills into the legal system. The Sioux supported these endeavors, as decades of squalor amplified calls for monetary compensation, yet the legal construction of the Black Hills represents an alien interpretation of the land. To appease the purviews of the American legal system, the Sioux’s white counsel had to derive an economic valuation of the Sioux’s former lands. While the differentiation of classes implied considerations of the centrality of each class in their precolonial society, the counsel’s categorization system nevertheless intimates that the Sioux had to accept foreign conceptions of their sacred land in order to have a chance of receiving monetary restitution.

As the legal arguments over the Black Hills commenced in the 1930’s, the case law concerning indigenous claims began to shift in a favorable direction. If the Court were to decide the claim prior to the 1930’s, it would have relied entirely upon Lone Wolf. However, in 1935, the Supreme Court ruled in United States v. Creek Nation, 295 U.S. 103 (1935) that the Creek tribes were entitled to “just compensation” under the 5th Amendment after a government agent mistakenly surveyed the reservation during a government appropriation of land, illegally seizing 5,000 acres of Creek land. While the Court did not amend its conception of

The phrase “just compensation” stems from the Fifth Amendment itself: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation” [italics added by author]. Kornm, Finn, and Jacobsohn, eds., American Constitutional Law, 1999
guardianship from past decisions, Justice Willis Van Devanter declared on behalf of the Court that:

“This power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship, and to pertinent constitutional restrictions. It did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them, for that ‘would not be an exercise of guardianship, but an act of confiscation.’”

While the circumstances of *Creek Nation* could have limited the scope of the Court’s decision, it nevertheless established nascent right to “just compensation” for Native American tribes under the Fifth Amendment.

If *Creek Nation* signaled the Court’s desire to constrain the powers granted by *Lone Wolf*, its subsequent decision in *Shoshone Tribe of Indians v. United States*, 299 U.S. 476 (1937) would firmly establish a new jurisprudence regarding indigenous claims to “just compensation” for land seizures by the federal government. Even though the United States had agreed to grant the Shoshone their own reservation in Wyoming, as stipulated by the 1868 Medicine Treaty, the federal government violated the terms by placing the Arapahoe, rivals of the Shoshone, on the same land in 1878. The Shoshone sued the federal government after the Arapahoe had settled on their lands, arguing that they were entitled to “just compensation” because the government’s act of splitting the reservation between the two tribes constituted a federal land seizure. In their decision, the Supreme Court agreed with the Shoshone.

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Writing on behalf of the Court, Justice Benjamin Cardozo asserted the designation of the Shoshone’s reservation lands for Arapahoe necessitated “just compensation” in return. Unlike *Creek Nation*, Cardozo addressed *Lone Wolf* in his opinion, agreeing with the previously-established notion that the “power to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty.” However, Cardozo qualifies his statement, quoting the passage from *Creek Nation* stated above.  

Expanding the scope of the case, Cardozo condemns past exercises of unfettered power over native communities, asserting that “spoliation is not management.” Consequently, the Shoshone would win $4.4 million, plus interest, as compensation. While proponents of *Lone Wolf* could discard *Creek Nation* as a ruling on an erroneous government survey, *Shoshone* establishes new precedent for limiting federal powers to take indigenous lands without giving “just compensation” in return.

As the jurisprudence in *Shoshone* solidified in subsequent terms during the late 1930’s, the judicial admission that indigenous communities need to receive just compensation.

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156 In his opinion, Cardozo states that “the power [of Congress] does not extend so far as to enable the government ‘to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation; . . . for that would not be an exercise of guardianship, but an act of confiscation.’” 299 U.S. 476 (1937), at 299 U.S. 497; Lazarus, *Black Hills/White Justice*, 171-172
157 ibid., at 299 U.S. 498; Lazarus, *Black Hills/White Justice*, 171-172; Wunder, “Retained by The People.” 90
158 In *Chippewa Indians of Minnesota vs. United States*, 301 U.S. 358 (1937), the Court ruled that the government violated the trust it established with Chippewa when it appropriated 663,421 acres of the Red Lake Reservation to other landholders. In the Opinion of the Court, Justice Van Devanter wrote that “our decisions, while recognizing that the government has power to control and manage the property and affairs of its Indian wards in good faith for their welfare, show that this power is subject to constitutional limitations, and does not enable the government to give the lands of one tribe or band.” 301 U.S. 358 (1937), at 301 U.S. 375. A year later, in *United States v. Klamath and Moadoc Tribes*, 304 U.S. 119 (1938), a suit raised by the two tribes after the United States expropriated thousands of acres of land in 1906 without compensation, the Court ruled that the United States had to provide “just compensation.” Reviewing this exercise of eminent domain under the 5th Amendment, the Court expanded upon the judgment from *Chippewa Indians*, declaring that the federal government’s powers under *Lone Wolf* do not “enable the United States without paying just compensation therefore to appropriate lands of an Indian tribe to its own use or to hand them over to others.” While the United States asserted that it made an error in surveying the land, similar to one that lead to the *Creek Nation* suit, the Court declared that its “expropriation” of the land constituted eminent domain and thus necessitated “just compensation” in return. 304 U.S. 119 (1938), at 304 U.S. 123-125. Together, these two cases cemented Cardozo’s assertions in *Shoshone* and provided more precedents for attorneys to use in any challenges of federal powers over indigenous tribes.
compensation reflects a nascent effort to extend the protections of *jus publicum*. The *Shoshone* line of cases created an avenue for advocates to secure certain, albeit limited, constitutional rights against governmental abuse, a notion ignored by the Court a few decades earlier. It is worth noting that the Court heard and decided *Lone Wolf* twenty-three years before the Merriam Report, the groundbreaking survey of desolation across Native American reservations that would encourage the Indian New Deal and reforms in the 1930’s. While *Shoshone* and associated cases focused on incidents that occurred before the 1930’s, their emphasis on the restrictions placed on federal powers regarding Native American communities reflects the change in political climate, highlighted by the Merriam Report, that began to extend some legal protections to Native Americans.  

159 Plus, President Franklin D. Roosevelt’s efforts to establish a liberal Supreme Court only encouraged a greater consideration of indigenous claims.  

160 These two factors provided momentum for the Court to consider Native American communities as protected by a basic form of *jus publicum*. However, the *Shoshone* line of cases did not overturn any part of *Lone Wolf*, nor did they rebuke the prejudiced logic that the Court used to change the relationship between indigenous communities and the federal government. They only asserted that the government had to meet the basic requirement of “just compensation” for its land seizures. The *Shoshone* line of cases thus did not rebuke the Court’s previous necropolitical exercises, nor upheave the institutions that continued to encourage the seizure of indigenous territories. In sum, they provided a competing jurisprudence for

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advocates to cite in order to secure monetary compensation, yet did little to correct
*Lone Wolf* and other structural hurdles facing Native Americans.

The failure of Case and the Sioux’s white counsel to secure a favorable ruling in the Court of Claims demonstrates the limited impact of these decisions on the challenges indigenous communities faced in the settler-colonialist state’s courts. The new precedents led Case to frame his initial brief entirely around *Shoshone* and *Creek Nation*, inexplicably leaving out any rebuttal of *Lone Wolf* and the arguments that the government would derive from *Lone Wolf* in their defense. Un fortunately, the Court of Claims decision on the Black Hills land claim rejected the arguments made by Case. Finally decided in 1942, the Court of Claims ruled that it lacked the jurisdictional authority to determine the case. On behalf of the Court of Claims, Judge Benjamin Littleton presented a myriad of different arguments. His main assertion focused on jurisdiction, as he stated that Congress, despite its special jurisdictional act for the Sioux, did not grant the Court the ability to rule upon matters of just compensation in the dispute. Littleton then proceeded to argue that the jurisdictional issue necessitated the Court to view the claim through the lens of *Lone Wolf*, justifying its refusal to restrict Congress’ authority. Meanwhile, the Court rebuked Case’s historical claims, finding that the government acted honestly during its dealings with the Sioux. After failing to secure a new trial, Case appealed for a *writ of certiorari* from the Supreme Court, asserting that the Court of Claims made

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162 Political context also reveals another underlying argument in Littleton’s opinion; in his opening statements, he highlighted the unprecedented size of the Sioux’s claim, a monetary sum that no court would want to mandate the federal government to pay during the height of World War II. This may have influenced Littleton to side with the government when formulating his jurisdictional argument. Lazarus, *Black Hills/White Justice*, 175-177; Ostler, *The Lakotas and the Black Hills*, 144-145
163 An order from a higher court to review the decision made by a lower court and issue its own opinion. “Writ of certiorari,” Legal Information Institute, Cornell Law School, accessed March 17, 2018, [https://www.law.cornell.edu/wex/writ_of_certiorari](https://www.law.cornell.edu/wex/writ_of_certiorari)
numerous mistakes regarding the historical facts of the case and the claim itself, yet the Supreme Court declined to hear the case.\textsuperscript{164} The judiciary’s resistance to check congressional exercises of power during its seizure of the Black Hills once again exemplified its refusal to check the colonialist project of the federal government. Despite \textit{Shoshone}, the judiciary refused to extend the Fifth Amendment considerations that any other community in United States enjoys, as members of the \textit{jus publicum}, to the Sioux.

Fortunately, a moment of political sympathy for indigenous concerns after World War II provide another legal avenue for the Sioux to seek justice. In 1947, federal lawmakers finally established the Indian Claims Commission (ICC), a body with judicial and legislative capabilities tasked with settling indigenous community’s grievances. The ICC sprung from the efforts of white lawmakers and attorneys driven to apply post-war sentiments on justice to the United States’ dishonest dealings with its indigenous communities, as it sought to ameliorate past wrongs through a broad waiver of sovereign immunity and the administration of monetary compensation to tribes with claims that the ICC deemed deserving of restitution.\textsuperscript{165} As the next chapter will discuss, the ICC failed to reflect these values, and at times served as a key instrument in the country’s necropolitical pursuits, such as termination.\textsuperscript{166} More broadly, the ICC exemplified the conflict between increasing sentiments among American leaders to address unjust relationships with indigenous communities and a

\textsuperscript{165} For more information on the complicated history of the ICC, see Gonzalez and Cook-Lynn, \textit{The Politics of Hallowed Ground}, 377-378; Lazarus, \textit{Black Hills/White Justice}, 183-186; Ostler, \textit{The Lakotas and the Black Hills}, 150-151; Wunder, \”Retained by The People,\” 97-98
\textsuperscript{166} Fenelon, \textit{Culturicide, Resistance, and Survival of the Lakota}, 231-232; Wunder, \”Retained by The People,\” 97-98
refusal to alter the institutions that perpetuate those unequal power dynamics, let alone extend *jus publicum* to Native Americans. No other American community had to pursue just compensation through a separate judicial apparatus like the ICC, yet at the same time, it seemed like a more favorable forum than the courts. Since it stemmed from a legislative act influenced by a desire to correct the past, the ICC seemed predisposed to sympathize with the complaints raised by tribes.

In response to the new judicial body, Case revived the Black Hills claim for ICC review, yet this proved to be another blow to the Sioux’s white counsel and their case. Filing the claim with the ICC in August 1950, Case shifted his arguments away from Fifth Amendment jurisprudence, appealing to the ideological sentiments of reconciling historical wrongs that informed the ICC’s creation. When pressed to develop an argument that provided a theory of compensation, Case crafted an interpretation of the ward/trustee relationship established in *Cherokee Nation*, arguing that the Sioux should receive royalties on all mineral wealth extracted after 1877 as a trustee to the land. While this enabled Case to avoid governmental offsets, expenditures on the Sioux after 1877, and any calculations of the land’s value in 1877, he lacked any precedent to cement a relationship based on Chief Justice Marshall’s analogy.\(^{167}\) Other non-lawyerly moments included the public revelation during a hearing that Case had met with ICC commissioners to ask them to disregard Class B and C, approximately 65 million acres of land, in an attempt to negotiate a more feasible settlement. Ultimately, after Case failed for years to establish sufficient

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\(^{167}\) Plus, the ICC mandated that it could only determine claims with the value of the land at the moment of seizure. However, Case thought that, in addition to the years of extra legal work he would have to complete, the government would diminish compensation through offsets. See fn. 168.
argumentation, the ICC decided on April 5th, 1954, to reject the Black Hills claim.\textsuperscript{168} When Case sought another appeal to the Supreme Court, the Sioux convinced Case to resign, afraid that he would mishandle this last opportunity to achieve compensation.\textsuperscript{169} In front of a judicial body established specifically for addressing indigenous land claims, the Sioux failed to receive any form of restitution for the seizure of the Black Hills.

While scholars have characterized this episode as a tragedy concerning Ralph Case’s ineptitude, focusing on his role ignores the insurmountable structural hurdles the Sioux faced, as the state’s unwillingness to extend \textit{jus publicum} to the Sioux rendered the case nearly unwinnable. In his book \textit{Black Hills/White Justice}, Edward Lazarus, the son of one of the lawyers who replaced Case, cites the ICC’s decision and Case’s argumentation as proof that his moralistic approach to the claim prevented him from arguing the case in a legally sufficient manner. While one could interpret his case work, consistently based on altruistic arguments that the United States needed to correct past wrongs, as honorable appeals to moral conceptions of justice, he misunderstood the role that he needed to serve for the Sioux. As Lazarus argues, the tribe needed someone who could advance their views of the Black Hills and the land seizure in a legal system designed to exclude them, and Case failed to do so.\textsuperscript{170} However, this argument assumes that the courts would have authorized monetary

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\item[170] Lazarus, \textit{Black Hills/White Justice}, 195-196, 213-216, 228-230. For Lazarus, this inept approach to the case stemmed from Case’s hubristic conception of himself as the hero for the Sioux. In 1923, James McGregor, the Pine Ridge Reservation bureau superintendent, heralded the lawyer as the Sioux’s “Moses,” the person who would bring them out of exile and poverty. According to Lazarus, Case embraced this conception of himself as the Sioux’s savior, evincing the misguided passion that he possessed. This vision thus led him to make risky decisions on behalf of the Sioux, endangering their case. \textit{Ibid.}, 147.
\end{footnotes}
restitution under any rationale that the Sioux’s counsel presented at the time. Case initiated the claim prior to Merriam Report and the liberal decisions of the Roosevelt administration, facing the full brunt of *Lone Wolf*. While he did not convince the courts to expand upon *Shoshone* and made multiple mistakes that jeopardized the claim, he could not have altered the Sioux’s place outside of the *jus publicum*.

The Court’s contemporaneous decision in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), which rejected the Tee-Hit-Ton tribe’s claim to compensation for the federal government’s seizure of timber from their homelands under the Fifth Amendment, demonstrates this continued resistance towards extending *jus publicum* to indigenous communities. As an indigenous community in Alaska, they argued that while they never signed a treaty with the United States, they had lived and worked the lands for generations, even before the Russians arrived. In addition to this attempt to exempt themselves from the precedent established by *Johnson v. M’Intosh*, they argued that several legislative acts established a legal basis for their ownership of the land. However, in a 6-3 decision, the Court rejected both of these arguments, asserting that the tribe needed an explicit agreement with Congress to possess legal rights regarding non-treaty lands. On behalf of the Court, Justice Stanley Forman Reed directly applied the doctrine of discovery from *Johnson* to the Tee-Hit-Ton, asserting that their dependence on hunting and fishing, as well as the treatment of their lands by the Russians, did not distinguish them from the tribes of the contiguous United States.\(^\text{171}\) Towards the conclusion of the Opinion, Reed declares that “the line of cases adjudicating Indian rights on American soil leads to

the conclusion that Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation. Eliminating any Fifth Amendment claims to originally-held lands for indigenous communities, *Tee-Hit-Ton* rendered any tribal attempt to seek compensation for property losses dependent on Congressional recognition.

While ICC and the Court of Claims would counter the severity of the Court’s decision in *Tee-Hit-Ton*, even decisions such as *Otoe and Missouria Tribe of Indians v. United States*, 131 F.Supp. 265, 131 Ct. Cl. 593 (1955) exemplified the legal system’s continued exclusion of indigenous communities from the rights and protections that every other community in the United State enjoys. Responding to the impact of *Tee-Hit-Ton* on the understanding of Native American lands in the Indian Claims Commissions bylaws, the Court of Claims repeatedly noted that tribes could seek compensation for the loss of originally-held lands, based on “aboriginal title,” through the ICC. For the Court of Claims, however, “aboriginal title” required “exclusive possession, occupancy, and use from time immemorial.” While this provided some respite in light of *Tee-Hit-Ton*, it established a difficult series of standards for tribes to prove. As discussed in the previous chapter, tribal communities did not exist in fixed zones like bounded nation-states; their territories shifted as people moved, and multiple tribes could occupy a single area of land. The Sioux exemplified this fluidity, as their bands expanded westward at a time that some

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174 Wunder, "Retained by The People," 117
have argued does not qualify as “time immemorial.” Overall, the standards established by the Court of Claims for cases involving the ICC defied conventional conceptions of the relationship between tribes and their lands. Furthermore, no one from any other American community has to demonstrate this connection to their property in order to just compensation when the government exercises eminent domain. These decisions once again reinforce the divide between *jus publicum* and colonialist dictates that apply only to Native American tribes.

When the Sioux’s tribal representatives and treaty organizations hired Arthur Lazarus Jr., Richard Schifter, Marvin J. Sonosky, and William Howard Payne to lead their new counsel in this tumultuous environment, they revised the approaches implemented by Case and solidified the legal basis of the Sioux’s claim. In order to revive the case once again, they had to appeal to the Court of Claims and the ICC to permit new hearings and clear prior decisions due to the “grossly incompetent” representation that Case provided for the Sioux. In addition to Case’s bizarre decision to drop the Class B and C claims, they eviscerated Case’s failure to present a valid valuation theory, his exclusion of key evidence “to show liability,” and “untenable” arguments about the Sioux’s relationship to the U.S. government. While the U.S. protested the motion, the ICC vacated its past decision and allowed the new counsel to pursue the claim. With a revitalized case, the new counsel revised the Sioux’s approach to the land claim.

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175 Ostler, *The Lakotas and the Black Hills*, xvii-xviii, 182-185
176 This legal definition of “aboriginal title” exemplifies the argument that Vine Deloria Jr. makes in *God is Red* regarding the differences between Western emphases on time and history versus indigenous communities’ use of space and place as the framework of social institutions. Deloria Jr., *God is Red*, 61-75
However, the Sioux’s new white counsel nevertheless continued to operate in the same realm of Fifth Amendment jurisprudence. Rather than attempting to receive compensation for mineral wealth removed from the Black Hills since 1877, as Case tried to pursue, they instead sought to maximize the monetary valuation of the Sioux’s entire territory at the time of the land seizure. Abandoning Case’s A-B-C system, they instead split the case into two claims: Dockets 74 and 74B. Unlike Case, who defined Class B and Class C lands based on how the Sioux used the lands, the new counsel returned to the language of 1868 treaty and realized that they could combine the lands into a single claim, Docket 74, for lost ownership rights and land use rights (See Figure 5). This accounted for all of the lands that the federal government expropriated in the 1868 Treaty after the 1851 Treaty recognized the Sioux’s original title to them, drastically increasing the value of that claim. In Docket 74B, the counsel focused entirely on the seizure of the Black Hills, arguing that the United States did not provide just compensation for the rights it negated in the 1877 Act. In 1960, the ICC allowed the bifurcation of the Sioux claim, establishing two legal tracks for the Sioux’s land claim.178 This division of the cases, which provided legal frameworks for the counsel to comprehensively evaluate the lands at the moment of each category’s respective seizure, is important because it presented the counsel’s claims in a palatable manner for the ICC and the courts. By framing the lands in two separate cases, based on language from each Congressional act regarding the Black Hills in the 1860’s and 1970’s, the counsel could help the judiciary digest

the size of these claims and recognize the need to administer *jus publicum* to the Sioux.

In briefs and trials concerning both Dockets, the counsel revived the Sioux’s argumentation for compensation under the 5th amendment, discretely jettisoning the remnants of Case’s pleas to ICC bylaws in favor of an argument that could lead to a greater settlement for the Sioux. As mentioned before, Case departed from advocating for compensation under the 5th Amendment to appeal to the trustee relationship proposed in *Cherokee Nation*. This entailed appealing to the statute of the ICC Act that called for the United States to rectify “unconscionable considerations,” payments to tribes that did not meet the market value of the lands claimed. However, the new counsel recognized that the Sioux did not receive any “consideration,” as the government seized the lands outright. Consequently, the counsel sought to appeal to the ICC Act’s statutes regarding unilateral land seizures and the 5th Amendment. By choosing this line of argumentation, the Sioux could win compensation that included interest as well as the value of the land when it was expropriated. Since Case had conceded government offsets in his argumentation of the case, this provided another source of money for the Sioux if the new counsel could not undo the damages of this past mistake. However, the counsel did not want to rapidly shift argumentation, since they feared that the commissioners would react poorly if they began to call for the value of the original land plus interest. These concerns led the counsel to slowly integrate their new assertions into their advocacy. Despite the novel methods of argumentation, the goal of restitution thus never changed; like previous attorneys

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representing the Sioux, they were asking for money. Instead of challenging the
institutions that reinforce the unequal power dynamic between the United States and
the Sioux, they sought to pragmatically pursue an award that they could recognize as
just compensation.

As the counsel battled government lawyers through the 1960’s, the courts
would shift 5th Amendment jurisprudence concerning indigenous land claims yet
again with *The Three Affiliated Tribes of the Fort Berthold Reservation v. United
States*, 390 F.2d 686 (Ct. Cl. 1968). Ruling on a controversy surrounding a federal
expropriation of reservation lands in 1910 at the Fort Berthold reservation, the Court
of Claims devised a new test to reconcile the Congressional powers granted by *Lone
Wolf* and the restrictions applied by *Shoshone* and related cases. Dubiously pulling
language from *Chippewa Nation*,181 the Court of Claims declared that:

“In short, it is concluded that it is the good faith effort on the part of Congress to give the Indians
the full value of their land that identifies the exercise by Congress of its plenary authority to
manage the property of its Indian wards for their benefit. Without that effort, Congress would
be exercising its power of eminent domain by giving or selling Indian land to others, by dealing
with it as its own, or by any other act constituting a taking.”182

From this statement, a test emerged: if the government did not act with “good faith”
when “managing” Native American lands, it has to give “just compensation” because
its actions instead qualify as an exercise of eminent domain under the 5th
Amendment.183 This supposed compromise between *Lone Wolf* and *Shoshone* tipped
the scales in the government’s favor, as they could justify inadequate compensation

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181 See fn. 158
182 390 F.2d 686 (Ct. Cl. 1968), at 390 F.2d 693
for land seizures by meeting a subjective standard of decent morality. As a reminder, no other community in the United States has to contest the government’s intentions in order to receive “just compensation” in an eminent domain case. In an attempt to establish a new standard, the Court of Claims produced another instrument, a mechanism that distinguished indigenous law from the \textit{jus publicum}. The courts could therefore disregard the complaints of indigenous peoples according to the government’s judgments of its own actions, preventing potential decisions that could upend the settler-colonialist structures imposed on Native American communities across the country.

Despite the prominence of the \textit{Fort Berthold} test in its rationale, the ICC eventually ruled in favor of the Sioux when it finally issued its decision on the Black Hills land claim, Docket 74B, on February 15, 1974. Applying the “good faith” standard to the government’s actions during the 1870’s, the ICC found that the U.S. failed to make any “effort to give the Sioux the full value of their land.” Consequently, the U.S. owed the Sioux “just compensation” for the land seizure. Despite this victory, key issues remained for the Sioux’s counsel to solve. The ICC accepted their methodology to evaluate the Black Hills, which established a claim of over $100 million. However, the ICC then factored in government offsets, the expenditures and programs that the government created for the Sioux “in fulfillment of the new obligations under the act.” Even if the Sioux’s claim survived subsequent appeals, based on the government’s argument that the case violated \textit{res judicata} due

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\item Lazerus, \textit{Black Hills/White Justice}, 321-323
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to the Court of Claim’s own decision in 1942,\(^{186}\) the ultimate amount compensation would suffer due to the vast number of offsets the government could claim.\(^ {187}\) The counsel therefore had to craft unique strategies to counter both potential threats to the Sioux’s compensation.

In response to these two dilemmas, the Sioux’s counsel resorted to legislative action, ushering key pieces of legislation through Congress that diminished the impact of possible governmental offsets on any compensation package and waived *res judicata* for the case. Throughout 1974, they worked with U.S. Senator John Abourezk of South Dakota to draft legislation to eliminate “food, rations, or provisions” as potential offsets. While Sen. Abourezk led its swift passage through the U.S. Senate as an amendment to the annual re-authorization of the ICC, the counsel had to cajole the U.S. House to pass a bill with the amendment. Nevertheless, Congress eventually passed the act in the fall of 1974, and President Gerald Ford signed it with the express intent to “heal…wounds from the past.”\(^ {188}\) While this political victory cleared a major hurdle for the Sioux to receive proper compensation, the problem of *res judicata* would eclipse the issue of offsets. After the government appealed the ICC’s decision to the Court of Claims, the Court ruled on June 25, 1975 that the Sioux could not pursue the case because the Court’s 1942 decision still stood, rendering even the counsel’s 5\(^{th}\) Amendment arguments *res judicata*. This limited the potential compensation to $17.5 million on “the ground of dishonorable dealings,” a small fraction of what they could have received. After the Supreme Court declined to

\(^{186}\) *Res judicata* is the legal principle that the judiciary cannot hear a case again after making a decision on it. “Res judicata,” Legal Information Institute, Cornell Law School, accessed March 29, 2018, https://www.law.cornell.edu/wex/res_judicata


issue a *writ of certiorari*, the claim faced demise once again. In response, the counsel returned to a friendlier body: Congress. After two years of lobbying, Sen. Abourezk and other amicable leaders secured the passage of a waiver that would eliminate *res judicata* considerations and allow the Court of Claims to hear the Sioux’s 5th Amendment argumentation. Since the counsel managed to clear its two major challenges through two savvy legislative maneuvers, the case could finally consider the basis of its merits, due in part to a political system willing to extend *jus publicum* to the Sioux.

With the passage of the *res judicata* waiver, the counsel and the government’s lawyers returned to the Court of Claims in 1978 to discuss the merits of the Sioux’s claims to just compensation. After decades of alternative legal arguments and hurdles, the two sides squared off over the applicability of the 5th Amendment. In a climactic collision of differing jurisprudences regarding the 5th Amendment, the government’s attorneys asserted that *Lone Wolf* permitted Congress to exercise its powers without compensation. Addressing the *Fort Berthold* test, the good faith standard, the government’s lawyers excluded *Shoshone* and related cases because they supposedly applied to situations where the government explicitly acted arbitrarily. In response, the Sioux’s counsel argued that the *Fort Berthold* test should not apply because the government unilaterally seized the lands without consent. Therefore, the case should automatically qualify as a taking subject to the 5th Amendment. Furthermore, they

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190 The passage of the waiver itself reflected a tumultuous political climate, as prominent members of the Sioux tribes began to call for land returns instead of compensation. These specific testimonies will be addressed in the next chapter. For more on this legislative feat, see Gonzalez and Cook-Lynn, *The Politics of Hallowed Ground*, 353; Lazarus, *Black Hills/White Justice*, 347-365; Ostler, *The Lakotas and the Black Hills*, 163
declared that *Lone Wolf* has no bearing on the question at hand, as it did not state whether Congress could act and not pay compensation. Should the Court of Claims utilize the *Fort Berthold* test, the counsel asserted that “the conclusion is inescapable that Congress in the 1877 Act was not making any effort, in good faith or otherwise, to pay [the Sioux] the then full present market value of the land.”191 After hearing oral arguments on November 27, 1978, the Court of Claims would release its ruling on June 13, 1979, a 5-2 decision in favor of the Sioux. In their opinion, the Court dismissed *Lone Wolf* and applied the *Fort Berthold* test in the manner that the Sioux counsel articulated, finding that the U.S. did not act in good faith. Consequently, the United States owed the full compensation award of approximately $105 million to the Sioux.192 Pending a possible Supreme Court intervention, the Sioux could finally receive the constitutional right to “just compensation” that every other American community enjoyed.

When the government appealed the decision, the Supreme Court sided with the Sioux’s counsel and granted the tribe the largest compensation award ever for an indigenous land claim, a clear extension of *jus publicum* to the Sioux. In front of the nine justices, the government and the Sioux’s counsel further developed the arguments presented to the Court of Claims, debating the morality of the U.S.’ seizure of the Black Hills and the authority of *Lone Wolf* over the case.193 On June 30, 1980,194

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193 For more on the writ of certiorari and the argumentation of the case before the Supreme Court, see Lazarus, *Black Hills/White Justice*, 378-380, 383-392; Ostler, *The Lakotas and the Black Hills*, 164. In *The Politics of Hallowed Ground*, Gonzalez and Cook-Lynn criticize the “racist” argumentation of Arthur Lazarus and the Sioux’s counsel in front of the Supreme Court. In their discussion, they included a scathing analysis written by Steven Tullberg and Robert Coulter in *Rethinking Indian Law* that highlighted Lazarus’ decision to assume that the United States could legally violate treaties. This critique will be discussed in depth later in this chapter and in the next one. Gonzalez and Cook-Lynn, *The Politics of Hallowed Ground*, 374-376.

194 Meanwhile, in his book, Edward Lazarus provides a fascinating exposé of the politics behind the Supreme Court’s ultimate decision, highlighted by Justice William Rehnquist’s attempt to subvert both sides’ argumentation by raising the issue of the
the Court released its 8-1 decision in favor of the Sioux. Writing on behalf of the Court, Justice Harry Blackmun began his opinion by extensively detailing the history of the dispute, from the seizure to Congress’ waiver of res judicata. In anticipation of Justice William Rehnquist’s dissent, Blackmun went beyond the core issues of the case to dismiss possible objections based on a “separation of powers” argument, asserting that “Congress may recognize its obligation to pay a moral debt not only by direct appropriation, but also by waiving an otherwise valid defense to a legal claim against the United States.” 194 By preempting Rehnquist’s objection to the process that the counsel followed to bring the case to the Supreme Court, Blackmun could hone in on the 5th Amendment claims without alternative issues clouding his analysis.

When Blackmun reached the heart of each side’s argument, he declared that Lone Wolf did not apply, stating that the views expressed in Lone Wolf regarding congressional powers “has long since been discredited in takings cases,” and its general application to all instances “was expressly laid to rest in Delaware Tribal Business Comm. v. Weeks, 430 U. S. 73, 430 U. S. 84 (1977).” 195 Although Blackmun


Blackmun’s assertion greatly stems from the Court’s recent opinion in Delaware Tribal Business Comm. v. Weeks, 430 U. S. 73 (1977). In that case, the Kansas Delawares challenged the distribution of funds by Congress after recognizing its breach of the 1854 Treaty with the Delawares. As one of three Delaware groups, the Kansas Delawares did not compensation because earlier actions had led the federal government to no longer recognize them as a tribe. In their case against the government and the two other Delaware groups, the Kansas Delawares evoked the Due Process Clause of the Fifth Amendment. After a lower court ruled in favor of the Kansas Delawares, the Supreme Court ultimately reversed the decision. In a case in which the two Delaware tribes included in the Congressional act evoked Lone Wolf to support their own cause, the Court dismissed their argument in favor of the other appellants’ stances. Writing on behalf of the Court, Justice William J. Brennan declared that: “The statement in Lone Wolf, supra at 187 U. S. 565, that the power of Congress ‘has always been deemed a political one, not subject to be controlled by the judicial department of the government,’ however pertinent to the question then before the Court of congressional power to abrogate treaties, see generally Antoine v. Washington, 420 U. S. 194, [at] 420 U. S. 201-204 (1975), has not deterred this Court, particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment.” (430 U.S. 73 (1977), at 430 U.S. 84)
did not overturn *Lone Wolf*, he dismissed it as having “limited relevance to this case.” Qualifying federal powers to “control and manage” tribal affairs, he cited *Creek Nation*’s proclamation that this power “[is] subject to limitations inhering in . . . a guardianship, and to pertinent constitutional restrictions.”\(^{196}\) Blackmun then turned to the *Fort Berthold* test to adjudicate the question of whether the governments’ actions in 1877 fell under the purview of the 5\(^{th}\) Amendment. Affirming the Court of Claims’ findings, Blackmun ruled that the rations and other governmental programs established by the government did not reflect a “good faith effort” to compensate the Sioux for their land losses because “it is reasonable to conclude that Congress' undertaking of an obligation to provide rations for the Sioux was a *quid pro quo* for depriving them of their chosen way of life, and was not intended to compensate them for the taking of the Black Hills.”\(^{197}\) By dismissing *Lone Wolf* and disavowing the dealings of the American state as dishonest, Blackmun’s argument reflects a significant admission: that the placement of the Sioux in the state of exception was wrong.

The admission that the government’s conduct did not qualify as “good faith” reflects the broader maneuver in Blackmun’s opinion, the extension of *jus publicum* to the Sioux and a concentrated effort to deconstruct the state of exception. In decisions such as *Kagama*, *Missouri v. Roberts*, *Lone Wolf*, and *Quick Bear*, the

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Court authorized the necropolitical exercise of destroying the Sioux’s social and cultural institutions because they saw indigenous communities as distinct from the populace protected by the Constitution. While the *Shoshone* line of cases intimated the need to recognize seizures of indigenous lands as takings subject to the Fifth Amendment, Blackmun’s opinion finally considers the Sioux as parties to the Constitution and the American community. Furthermore, the Court’s denunciation of the government’s past actions seems like an emotional rejection of its deceitful policies. If so, then Blackmun’s historical argument reflects a surface-level rejection of the United States’ past exercises of necropower against the Sioux. By adopting his characterization of the United States’ dealings, the Court affirmed this desire to rectify the conflictive relationship between the state and the Sioux by recognizing its own fallibility.  

From this perspective, the Court’s ruling represents a major victory. After bolstering the Court of Claims’ arguments regarding the failure of the government to pass the *Fort Berthold* test, Blackmun declared that:

“In sum, we conclude that the legal analysis and factual findings of the Court of Claims fully support its conclusion that the terms of the 1877 Act did not effect "a mere change in the form of investment of Indian tribal property." *Lone Wolf v. Hitchcock*, 187 U.S. at 187 U. S. 568.

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198 Of course, not everyone embraced Blackmun’s efforts to fully recognize the extent of past injustices. In a concurring opinion, Justice Byron White declared that he was only joining Parts III and V, the discussion of *res judicata* and the concluding affirmation of the Court of Claims’ opinion. See 448 U.S. 371 (1980), at 448 U.S. 424. According to Edward Lazarus, White’s seemingly-innocuous concurring opinion stemmed from a displeasure regarding Blackmun’s historical analysis and his tone. Believing that the case was “much closer” than Blackmun’s writing intimated, he informed his colleagues that he could not join the entirety of the majority opinion because he disliked “the atmosphere of [Blackmun’s] draft that often casts the conduct of the government in such an unfavorable light.” Lazarus, *Black Hills/White Justice*, 399. While White signed off on the majority’s conclusion, his hesitancy to critically evaluate the government’s deceitful actions reflects a moral equivalency stemming from anti-Native American understandings to American history that devalue indigenous perspectives on their homelands, their religions, and the events that stripped them of their way of life.

Meanwhile, Justice William Rehnquist, who would eventually become the Chief Justice of the Supreme Court, exacerbated this moral equivalency in the only dissent in the case. Since his opinion warrants its own discussion and critique, his arguments are addressed in Appendix A. See “Appendix A – Justice Rehnquist’s Dissent in *United States v. Sioux Nation*.”
Rather, the 1877 Act effected a taking of tribal property, property which had been set aside for the exclusive occupation of the Sioux by the Fort Laramie Treaty of 1868. That taking implied an obligation on the part of the Government to make just compensation to the Sioux Nation, and that obligation, including an award of interest, must now, at last, be paid.”

As a result, the Supreme Court ordered the U.S. government to establish a fund of $17.5 million plus interest for the Sioux. At the time of the ruling, the award exceeded $105 million, the largest sum of money ever won in an indigenous land claim. For the Sioux’s white counsel, they believed that they achieved a monumental victory. While the opinion may not have been exemplary, they secured just compensation in a forum that had rejected their cause for decades.

However, subtle details in the decision reflects the hollow nature of the Sioux’s victory, and the limitations of the Court’s extension of *jus publicum* to the Sioux. Blackmun’s opinion codified the *Fort Berthold* test, which, as discussed earlier, established a different standard for Native American tribes to pursue 5th Amendment claims than any other community in the United States. He also did not overturn *Lone Wolf*, the “Indian’s Dred Scott decision,” when he had the opportunity to vanquish the case. This means that future courts could resurrect it to devalue tribal sovereignty, treaties between the U.S. government and indigenous communities, and restrictions against Congressional powers regarding issues outside of 5th Amendment jurisprudence. While the case distinguished *Lone Wolf* from “just compensation” cases in a manner that privileged the jurisprudence of *Shoshone* and *Creek Nation*, the applicability of *Sioux Nation* to constraining congressional

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Ostler, *The Lakotas and the Black Hills*, 165

powers to abrogate treaties seems dubious. Furthermore, the Court subletly limited the impact of *Sioux Nation* on non-treaty land claims. As Blackmun notes in the 29th footnote:

“Of course, it has long been held that the taking by the United States of "unrecognized" or "aboriginal" Indian title is not compensable under the Fifth Amendment. *Tee-Hit-Ton Indians v. United States*, 348 U. S. 272, 348 U. S. 285 (1955). The principles we set forth today are applicable only to instances in which "Congress, by treaty or other agreement, has declared that, thereafter, Indians were to hold the lands permanently." *Id.* at 348 U. S. 277. In such instances, "compensation must be paid for subsequent taking." *Id.* at 348 U. S. 277-278. *n*204

*Sioux Nation*, therefore, did not only exempt *Tee-Hit-Ton* from the scope of its legal implications; it affirmed the decision’s authority over non-treaty lands. The Court’s decision thus did little to halt the de-legitimization of indigenous title to lands not proscribed to them in unabrogated treaties and agreements. It only solidified the rights of Native American tribes to receive “just compensation,” in the form of monetary means, after exercises of eminent domain. As discussed earlier, *Tee-Hit-Ton* represented the evolution of the “doctrine of discovery” established in *Johnson v. M’Intosh*. Blackmun’s endorsement of *Tee-Hit-Ton* consequently reinforces the perpetuation of the colonialist logic that underlies the necropolitical development of the United States at the expense of its indigenous communities.

While the Sioux’s white counsel believed that these pitfalls represented secondary consequences from an otherwise favorable opinion, the preservation of *Lone Wolf* and *Tee-Hit-Ton* demonstrates how the Court’s decision did little to

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203 For more possible questions for discussions concerning *Sioux Nation*, see Anderson et al., eds., *American Indian Law: Cases and Commentary*, 228
204 448 U.S. 371 (198), at fn. 29
205 See fn. 171-172
deconstruct the institutions that perpetuate the erasure of their traditional claims to the land. The Supreme Court may have affirmed the Court of Claim’s moral proclamation that “a more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history," yet its rationale does not rectify other “dishonorable dealings,” nor the decisions and laws that extend the consequences of those necropolitical exercises. In the eyes of a legal and political system built upon American conceptions of property, exchange, and “just compensation,” the decision seemed satisfactory, yet for the Sioux, the extension of jus publicum did not to resolve the issues at hand. No amount of money could restore the Paha Sapa, and all of the religious, social, and cultural systems attached to the land that they lost. While the Court’s evolution from its discriminatory attitudes towards Native Americans in Kagama and Lone Wolf represents a small victory, the existing rules of jus publicum, as determined by Sioux Nation, can only provide monetary compensation, not the institutions that the Sioux revered.

The events of July 1980 would reflect the Sioux’s subsequent dissatisfaction with a decision that did not upheave American jus publicum and the forms of reparation that it permitted. While Lazarus and his colleagues celebrated, the Sioux felt, in the words of Elizabeth Cook-Lynn, “hopeless.” For the Sioux, they saw that accepting the compensation fund would extinguish future attempts to retrieve the lands themselves. As Cook-Lynn argued, the Court’s decision reflected an “effort to legitimize its theft and plunder of the Black Hills in 1877 by offering the Sioux tribes

$17.1 million [plus interest] to forget about the crime.”²⁰⁷ On July 18th, 1980, they boldly asserted themselves into the legal foray. Representing the Oglala Sioux Tribe, Mr. Mario Gonzalez filed a suit calling for the return of 7.3 million acres from the Black Hills as well as $11 billion in damages. This followed the passage of two resolutions between the 10th and the 16th by the Oglala Sioux Tribal Council, which authorized Gonzalez to “take whatever legal action necessary” to preserve their interests in the case. The Oglala Sioux would proceed to deny the U.S. government from paying their share of the compensation fund, and through the Black Hills Sioux Nation Council, all of the other Sioux tribes joined the Oglalas in resisting any governmental payout.²⁰⁸ This repudiation of the Supreme Court did not occur overnight. On the contrary, the legal maneuvers of Mario Gonzalez stemmed from a decades-long effort across the Sioux tribes to vocalize their own perspective on the forms of justice that would rectify the seizure of their sacred lands and the damage done to their Paha Sapa. The Sioux never wanted to fight for “just” compensation, and they continue to seek more than “just” money. They want the restoration of the Paha Sapa.

²⁰⁷ Gonzalez and Cook-Lynn, The Politics of Hallowed Ground, 4
Chapter 3

The Black Hills Are Not for Sale: Understanding the Continued Litigation of the Black Hills Land Dispute

Exploring indigenous perspectives on the Black Hills land claim, their evolution throughout the 20th century, and how they encouraged Mario Gonzalez’s argumentation of the case all demonstrate the gap between *jus publicum* as currently constructed and the forms of justice demanded by the Sioux. Previous scholarship on the Black Hills and conflict between the Sioux and the U.S. has not adequately addressed the Sioux’s perspective of their own land claim, let alone the argumentation they have led in the years of dispute after *United States vs. Sioux Nation*. Instead, past works have limited their presentation of indigenous voices to those who lived during the land seizure, placing the emphasis on the events between the Fort Laramie Treaty of 1851 and the Wounded Knee Massacre in 1890 while disproportionately excluding the Sioux’s plight in the early 20th century, their commentary on the case and its relationship with current problems in the community, and the work of contemporary leaders. In response, this chapter will employ historical and legal analysis to evaluate the development of the Sioux’s campaign for a land return and explore the merits of the arguments presented by Mario Gonzalez,

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209 This reflects what Vine Deloria Jr. called in *God is Red* an “escapist attitude,” as “for generations it has been traditional that all historical literature on Indians be a recital of tribal histories from the pre-Discovery culture through the first encounter with the whites to about the year 1890.” Instead of addressing the realities faced by tribes today, pieces on Indian history glorify myths of past Indian leaders, who symbolize for white audiences “not living people but the historic fate of a nation overwhelmed by the inevitability of history,” Deloria Jr., *God is Red*, 24-25. Deloria Jr.’s assertion thus signifies a call for writers, especially non-indigenous writers, to stop mythologizing the distant past and instead focus on the efforts of America’s indigenous communities.
their attorney. In the early decades of the claim, anti-Native American policies hindered indigenous efforts to advocate for their communities through American political and legal institutions. The Sioux’s view that the Black Hills are sacred, and thus non-exchangeable, laid dormant, as the Sioux did not have the legal and political rights to assert their own perspective into the claims case. However, by the 1970’s, shifts in the American political climate enabled the Sioux to buck both their white counsel and the Supreme Court, rejecting the award in order to fight for the land itself. Leading this movement is Gonzalez, who has diverged from the strategies used by his predecessors to offer revolutionary re-examinations of the Sioux’s property and religious claims to the land. Overall, the saga surrounding the Sioux’s approach to the land claim exemplifies the inability of the American justice system to grant the Sioux control over their religious spaces. Through a land return rather than compensation, the courts could deconstruct the unequal power dynamics between the state and the Sioux, as well as support the Sioux tribes’ efforts to reintegrate the Paha Sapa into their contemporary religious and social customs.

Revisiting the Claim: The Rise of Sioux Voices in the Black Hills Dispute

The legal efforts of Gonzalez, the Sioux tribes, and various Sioux organizations stem from their collective belief that the fight for monetary compensation never truly reflected the desires and pursuits of the Sioux themselves. Some scholars frame the development of the monetary rejection solely in context of AIM, the American Indian Movement, and its peak years in the 1970’s. This furthers the misguided notion that the Sioux’s call for land reclamation only represents a
recent phenomenon, one that past members would not have supported. From Case’s counsel in the early 1920’s to Lazarus, Sonosky, and their team of lawyers, the Sioux never had a tribal member represent them in court. At the beginning of the claim, when they had to rely entirely upon Case’s representation, members reconciled spiritually-inspired beliefs that the land would return to their control while also pursuing monetary compensation. In speeches to Congressman Eben W. Martin of South Dakota in 1903, Red Cloud and other Sioux leaders emphasized that the 1876 “agreement” represented an illegal act, as the United States failed to achieve approval from three-fourths of Sioux men. While some of these notable voices opined that they did not demand the removal of white settlements from the Black Hills, their initial conceptions of the claim reflected both notions that the Black Hills ultimately represented Sioux land, as codified in the legitimate 1868 Treaty, and that the United States also did not uphold its promise to adequately compensate the Sioux. While these leaders would ultimately initiate efforts to pursue monetary compensation, this

210 Although Jeffery Ostler’s The Lakotas and the Black Hills generally defends the Sioux and provides a strong, considerate analysis of their claims to the Black Hills, he makes the assertion that “had Ralph Case won a similar judgment in the 1940’s or ‘50s, most Lakotas would have accepted it as providing a measure of justice and a welcome economic benefit. By 1980, however, much had changed in Lakota country.” Ostler, The Lakotas and the Black Hills, 165. While he intimates that ideological changes occurred, which is accurate, this comment also suggests that the economic condition of the Sioux had improved enough by the 1970’s to encourage a rejection of the “welcome economic benefit” that the compensation fund could have brought. However, this ignores the economic hardships the Sioux faced at the time of Gonzalez’s legal maneuvers. In 1979, five of the twenty-five poorest counties in the United States were those that encompassed Sioux reservations in South Dakota. Of these five counties, each had poverty rates above 41%. In 1989, poverty rates worsened for these counties and others across Sioux country. For Oglala Lakota County (formerly known as Shannon County), which encompasses most of the Pine Ridge Reservation, its poverty rate increased by almost 19%, exceeding 63%. “The 100 Poorest Counties in the United States: 1979 and 1989,” United States Census Bureau, web, accessed December 22, 2017, https://www.census.gov/data/tables/time-series/dec/cph-series/cph-l/cph-l-184.html. The Sioux thus upheld their position in spite of the systemic poverty that continued to hinder their community’s prosperity. By contextualizing the Sioux’s recent legal efforts with only the movements of the late 1960’s and ‘70s, these texts limit the scope of the historical narrative around the Sioux’s assertions to the 1970’s, neglecting the voices of those from the late 1800’s and early 1900’s who also advocated for the return of the land. Meanwhile, Edward Lazarus notes these past voices in the formation of the Sioux’s repudiation of monetary compensation (Lazarus, The Lakotas and the Black Hills, 350-351), yet he derisively refers to the centrality of land restoration in Sioux culture as the “mantle of traditionalism.” See Ibid., 405. This reflects Lazarus’ misguided editorializing of the Sioux’s actions and the land claim itself, which unfortunately sours an otherwise useful and informative source that has factored in greatly in the research behind this work. Later parts of this chapter will scrutinize his criticism of Gonzalez and the Sioux, analyze the responses of Elizabeth Cook-Lynn and others who have challenged Lazarus, and demonstrate how his arguments reflect the misunderstandings that hinder a legal and political resolution of the claim on terms that the Sioux themselves can accept.

does not intimate that they abandoned any recognition of their claim to their *Paha Sapa*.\(^{212}\) Any review of Nicholas Black Elk’s advocacy in the early 20\(^{\text{th}}\) century, as Appendix B explicates, exemplifies how the conception of the Black Hills as sacred lands held firm for the Sioux.\(^{213}\) Instead, they sought to present a multi-faceted solution to correct the unlawful and immoral actions of the federal government in the 1870’s and restore the terms of the 1868 Treaty.

However, the Sioux could not have orchestrated a movement built around the *Paha Sapa*, one that could challenge the U.S. government, at this time because assimilationist policies and discriminatory institutions prevented the Sioux from advocating for their religious customs, let alone practice them for their own sake. As mentioned in the previous chapter, the Courts of Indian Offenses explicitly banned the practice of indigenous religions in 1883, while subsequent federal policies would reinforce the attempted destruction of tribal customs and cultures across the country.\(^{214}\) Since the Sioux began the pursuit of the land claim during this toxic time for indigenous interests, they lacked any platform from which they could encourage accommodation, let alone recognition, of their religious and cultural institutions in the American legal and political systems. Eventually, the passage of the Indian Reorganization Act (IRA) in 1934 would allow tribes to establish their own court systems and codes, enabling the Sioux and other indigenous communities to overturn bans on indigenous religions established by the Courts of Indian Offenses.

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\(^{212}\) Lazarus and Ostler seem to juxtapose the Sioux leaders’ calls for compensation in opposition to land return, as they both cite Edgar Fire Thunder’s assertion that “we do not mean that we will take back the Black Hills and drive the white people away.” Lazarus, *Black Hills/White Justice*, 122; Ostler, *The Lakotas and the Black Hills*, 130. However, this neglects the audience that these leaders were addressing; since they had to appeal to Congressman Martin, representing the state established by settlers who colonized the Sioux’s own lands, and his colleagues in Washington, discussions of monetary compensation could open broader negotiations more effectively than a call for land restoration.

\(^{213}\) See “Appendix B – Black Elk”

\(^{214}\) See fn. 145-149
Furthermore, the Act allowed tribes to establish Western-style forms of democratic
governments, permitting a degree of sovereignty qualified to fit American
conceptions of governance. Although the IRA would raise new debates regarding
indigenous politics on reservations across the country, it ended some of the forms of
cultural oppression waged since the late nineteenth century.

During this thaw in federal policies and attitudes towards indigenous
communities, the Sioux began to form treaty organizations that would organize
representatives from all constituent tribes in order to boost their own voices in the
land claim. In 1937, the tribes established the Black Hills Sioux Nation Council
(BHSNC), a coalition of Sioux leaders from every tribe that sought to connect the
Sioux’s counsel to the people they were representing. Since then, other treaty
organizations arose as different tribal leaders sought to create forums for discussions
concerning the land claims among members of their community. The development
of the BHSNC and its peer groups reflects the indigenous response to changing
political climates on and off the reservations, one in which leaders recognized that
they could lay the foundation for future advocacy on their own behalf. Since the IRA
and other reforms controversially endowed IRA-approved tribal governments with
authority over their communities, the Sioux needed to integrate these bodies into
the longstanding land claim in a manner that could boost their standing as a party in

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215 Gonzalez and Cook-Lynn, *The Politics of Hallowed Ground*, 379. The IRA has represented a controversial reform for tribal
governance and sovereignty. For further discussion of the IRA, see Anderson et al., eds., *American Indian Law: Cases and
Hills/White Justice*, 161-166; Ostler, *The Lakotas and the Black Hills*, 143, 171; Wunder, “Retained by The People,” 60-78
217 Nevertheless, the BHSNC has stood out as the one of the leading non-government organizations in the land claim process. As
Elizabeth Cook-Lynn explains in *The Politics of Hallowed Ground*, the BHSNC evolved to represent one of the “major treaty
organizations formally sanctioned by the tribes,” since all eight tribes that are party to the land dispute send representatives to the
218 See fn. 215
the dispute. As a result, the BHSNC and other treaty organizations forged links in between the Sioux tribes, and more importantly, between the foundational fight for the Black Hills and the forums provided by the IRA governments and other contemporary institutions.

Despite the IRA and other reforms in the 1930’s and 1940’s, the swift shift back towards assimilationist policies through the enactment of termination in the 1950’s would continue the suppression of the Sioux’s religious and cultural interests in the American legal and political systems. Bolstered by anti-Communist pursuits and broader efforts to develop a homogenous American populace after World War II, Congress passed sweeping legislation in 1953 that initiated the process of stripping Native American communities of federal support. By seeking to “terminate” the trust relationships between tribes and the U.S., the government hoped that indigenous communities would ultimately disintegrate the reservations and blend into the greater American population. Until 1968, the U.S. government would enforce its new directive through destructive policies that stripped tribes of federal recognition and the resources that came with the designation. This accompanied concomitant efforts to weaken tribal sovereignty, including new laws across several states that weakened tribal legal jurisdiction on reservations and the expansion of state power over them.

While the government assailed the political and legal powers of tribes, it also established economic programs that transplanted tens of thousands of Native Americans to cities far from their homelands.219 Together, these endeavors sought to

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pursue the settler-colonialist logic inherent in the notion of “termination:” the elimination of tribes as distinct, self-governing entities. By delegitimizing the role of tribes through political and economic reforms for indigenous communities, the state could couch erasure in the language of integration.

While they did not include explicit prohibitions of religious and cultural institutions, unlike past initiatives, these efforts ultimately reflected an attempt to pursue assimilation through economic and political pressure. As Vine Deloria Jr. noted in *Custer Died for Your Sins*, the policies of de-recognition and relocation exemplified the “cultural confrontation” that the United States sought to execute, a necropolitical endeavor to assail the semi-autonomous standing of indigenous communities and their members in order to erase societies distinct from the American mainstream.220 Viewing termination through cultural lens also demonstrates how the broader initiative warped already-existing programs to serve its own agenda. Even though the ICC was established prior to termination as an aspirational institution that sought to rectify past injustices, it transformed into a mechanism of the government’s directive. The state could not convince tribes to agree to termination if they could rally around outstanding claims to land, so they saw the ICC as a tool to transform the violation of treaties into monetary matters, clear the obstacle that treaties presented against assimilation, and proceed to eliminate any further governmental obligation to tribes.221 Unlike past periods of assimilationist policy, termination did not outlaw or outwardly subdue claims to land, autonomy, and culture. Instead, it encouraged the government to transform a reconciliatory body into a forum that could efficiently

220 Deloria Jr., *Custer Died for Your Sins*, 76-77
relegate indigenous demands, such as restoring possession and access to sacred lands, outside the sphere of *jus publicum*. By administering awards and settling claims, proponents of termination could utilize the ICC to render any unique rights that indigenous communities could claim mute. Termination thus represented an existential threat to tribes, their sovereignty, their institutions, and their distinction as unique nations.

In response to termination, indigenous activists formed new organizations to lead a national movement against these efforts to disintegrate their tribal societies. Founded in 1944, the National Congress of American Indian (NCAI) grew throughout the 1950’s and 60’s in response to termination, convincing the Eisenhower administration in 1958 to roll back the extent of termination. In 1961, as the NCAI organized a conference in Chicago to draft a “Declaration of Indian Purpose,” younger, college-educated Native Americans broke off to form the National Indian Youth Council (NIYC), an “extralegal” activist group that sought stricter resistance against American institutions than the NCAI. As the 1960’s progressed, a broader societal push for social change, combined with the rise of educated, young, urban communities of Native Americans across the country, would lead to the development of an indigenous rights movement that sought to upheave American governance. After activists founded the American Indian Movement (AIM) in 1968, a “coalition of Indians willing to fight for Indians.” A year later, AIM and other groups seized Alcatraz Island in the San Francisco Bay and remained on the rock until June 1971,

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raising public awareness about the plight of indigenous communities across the
country. Throughout the early 1970’s, AIM would lead a series of protests and
occupations, including the Trail of Broken Treaties march and subsequent seizure of
the Bureau of Indian Affairs headquarters in 1972, that ignited demands for justice
and reform.\textsuperscript{224} By the middle of the decade, Native American activists had defied
erasure by asserting the interests of their communities into American public
discourse.

With support from these organizations, Sioux activism flourished. In response
to efforts by South Dakota to assume jurisdiction over Sioux reservations, indigenous
activists and leaders led a successful campaign to pass a statewide referendum in
1964 that vetoed the state’s own legislation.\textsuperscript{225} In the mid-1960’s, the Sioux also
resurrected the sun dance, a defiance of legal codes from the nineteenth century that
continued to oppress the tribe’s religious and cultural institutions.\textsuperscript{226} The Sioux also
staged their own occupation of Alcatraz, five years before AIM, in order to voice
their interpretation of the Treaty of 1868.\textsuperscript{227} These events served as precursors to the
strong relationship between the Sioux and AIM. The ascendance of indigenous
activism, particularly the work of AIM, resonated across the Sioux reservations,
leading to the promulgation of the Sioux’s claims to the Black Hills as a national
rallying cry for indigenous rights. In the late summer of 1970, a group of Oglala
Sioux activists visited Mt. Rushmore to practice religious rituals in the \textit{Paha Sapa}

\textsuperscript{224} The involvement of the Sioux in AIM will be discussed in the subsequent paragraph. For broad overviews of AIM, see
Ostler, \textit{The Lakotas and the Black Hills}, 167-173; Wunder, “\textit{Retained by The People,}” 157-159
\textsuperscript{225} Lazarus, \textit{Black Hills/White Justice}, 253-257; Ostler, \textit{The Lakotas and the Black Hills}, 156
\textsuperscript{226} Fenelon, \textit{Culturicide, Resistance, and Survival of the Lakota}, 237-238
\textsuperscript{227} Lazarus, \textit{Black Hills/White Justice}, 290
and inform tourists of their claim to the land. Hearing of the protests, AIM members travelled to South Dakota and transformed the act into an occupation, climbing to the top of the mountain. During the protests, Lehman Brightman, a Lakota doctoral student at University of California at Berkeley, became one of the first members of the tribe to declare on a national news platform that the U.S. should return the Black Hills to the Sioux. A few years later, in 1973, AIM staged a pivotal occupation that captured the attention of American public: Wounded Knee II. Throughout a multi-month standoff with police forces at Wounded Knee, protestors declared the establishment of the Independent Oglala Nation and demanded American adherence to the 1868 Treaty along with a federal investigation of conditions across the Sioux reservations. As Russell Means, a Sioux leader of AIM, declared at Wounded Knee, “here we are at war, we’re still Indians, and we’re Ghost Dancing again.”

Bolstered by activism across the country, the Sioux capitalized on the charged political climate to assert their interpretation of tribal sovereignty and the 1868 Treaty.

In response to the efforts of activists, legislative reforms in the late 1960’s and 1970’s signaled the end of termination, as the government established political and legal recourses for indigenous communities to benefit from the protections of the Constitution and fight for their rights without sacrificing their autonomy. In 1968, Congress passed the Indian Bill of Rights, which extended constitutional protections to Native Americans on reservations and subjected tribal governments to most of the

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228 Ostler, The Lakotas and the Black Hills, 168-169. A year later, AIM would stage another protest at Mt. Rushmore, which did not last as long. Lazarus, Black Hills/White Justice, 293-294; Ostler, The Lakotas and the Black Hills, 169
230 Ostler, The Lakotas and the Black Hills, 173
standards established by the U.S. Constitution. The legislation initially received a mixed response from indigenous communities, as some critics argued that it further infringed the autonomy of indigenous communities as distinct nations. While the Congressional committees tasked with drafting the legislation attempted to respect traditional principles of governance across Native American tribes, many still saw it as an imposition of a governing document foreign to these communities.

Nevertheless, the Bill finally guaranteed Native Americans their constitutional rights on and off reservations, establishing a political basis for Native Americans to claim constitutional rights without sacrificing tribal identities. Meanwhile, the Nixon administration declared in 1968 that it would seek to promote “self-determination,” replacing the remnants of termination with new directives aimed at supporting the development of semi-autonomous and self-sustaining indigenous communities on and off reservations. These initiatives set the stage for further advancements within the American legal and political systems throughout the 1970’s. In 1978, Congress

231 A key example is the absence of the Establishment Clause from the legislation’s reiteration of the Bill of Rights. In response to the testimonies given by the Pueblo tribes of New Mexico, who rely upon theocratic systems of governance to support their religious and cultural institutions, the drafters of the Bill decided to exempt tribal governments from adhering to the U.S. Constitution’s prohibition of state-sponsored religions. Wunder, “Retained by The People,” 138

232 Other objections included concerns over the ability of tribal governments to establish their own governing principles. During hearings on the Bill, Domingo Montoya, the chair of the All Indian Pueblo Council, requested that the Bill exempted all Pueblo peoples of New Mexico because he believed that the imposition of the U.S. Constitution would endanger their entire system of governance in addition to their religion. This reflects the broader concern across indigenous communities that the Bill imposed the values of foreign governmental principles on communities that had enacted different political institutions for generations. AIM adopted this position on the Bill of Rights, arguing that Native Americans should instead pursue political systems that restore the power they possessed prior to colonization. However, many Native American organizations, including the NCAI, ultimately supported the legislation. For them, the Bill represented a major step forward in the fight to end termination. Furthermore, the Bill of Rights also presented indigenous advocates a platform to advance subsequent policies, including stricter protections of indigenous religious practices. The acceptance of political assimilation could therefore support broader efforts to bolster Native Americans’ rights to combat cultural assimilation through American courts and future acts of Congress. Lazarus, Black Hills/White Justice, 297-298; Wunder, “Retained by The People,” 140-141

The debate surrounding the Indian Bill of Rights also evokes Vine Deloria Jr.’s concerns over the pursuit of “civil rights” instead of fundamentally revising the relationship between indigenous communities and the United States. This was discussed in the introduction (see fn. 66).


234 Certain policies from this era will be discussed in subsequent chapters and passages of the thesis. For broad discussions of the Nixon administration and subsequent policy directives, see Lazarus, Black Hills/White Justice, 297; Wunder, “Retained by The People,” 247-277. For Nixon’s declaration of “self-determination without termination,” see Anderson et al., eds., American
passed the American Indian Religious Freedom Act (AIRFA), which mandated that any federal agency had to ensure that its projects did not violate lands, institutions, and customs with religious value for Native American tribes. At its time of inception, it represented an opportunity to grant indigenous communities another legal basis to challenge governmental actions that threatened their religious practices. The change in political climate thus informed a series of necessary reforms to bolster indigenous communities, their rights, and protections for their religious and cultural institutions.

Changes in the political climate did not rectify all of the issues that AIM and indigenous activists sought to address, yet the combination of strong activist groups and new platforms for indigenous communities in the American political and legal systems provided a basis for the Sioux to voice their call for a return of the Black Hills. After the ICC declared its decision to award compensation in 1974, the BHSNC declared that the tribes should reject the decision because the land is “not for sale.” Instead, they advocated for a delay of any judicial proceedings until Congress passed legislation to return the Black Hills to the Sioux. In their testimonies to Congress on behalf of the Sioux elders, Matthew King, Frank Fools Crow, and Frank Kills Enemy declared their opposition to the legislation. Emphasizing the prominence of the 1868 Treaty as the governing standard over U.S.-Sioux relations, they asserted that the Black Hills “legally and morally belong to the Sioux Nation, the Oglala

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Indian Law: Cases and Commentary, 149-151. For discussion of the development of “self-determination” into a policy directive, see Anderson et al., eds., American Indian Law: Cases and Commentary, 152-154.


236 Lazarus, Black Hills/White Justice, 325-326; Ostler, The Lakotas and the Black Hills, 173-174
Nation.” The religious qualities of the *Paha Sapa* factored prominently in their reasoning; as Frank Fools Crow noted, the “Black Hills is our church, the place where we worship.” This intimates that since American ownership of the land infringed their ability to uphold their religious institutions, Congress should restore Sioux control of their *Paha Sapa*.\(^{237}\) Even though Congress would ignore their opposition and ultimately pass the *res judicata* waiver, their testimonies along with the BHSNC’s earlier statement demonstrate the shift among Sioux leaders towards assertive opposition to compensation. While their positions did not change from those of past generations, they could declare their views more effectively in a political, legal, and extralegal climate that began to accommodate their perspectives.

It is important to note, however, that the creation of a political climate across the Sioux reservations that permitted a rejection of monetary compensation does not suggest that AIM, other activist organizations, and their actions guided Gonzalez’s legal maneuvers. As Elizabeth Cook-Lynn writes in her joint book with Gonzalez, AIM and other groups did not directly inform the Sioux’s legal strategies. In fact, Gonzalez has held that scholarship regarding the Black Hills land claim, such as Peter Matthiessen’s *In the Spirit of Crazy Horse*, has over-valued the role of AIM and its actions on behalf of the Sioux in the development of their legal case. According to Cook-Lynn, Gonzalez asserts that the tribal governments, not AIM, led the efforts to transform extralegal sentiments into legal and political action. To support this argument, Cook-Lynn cites the courses of action proposed by the tribal government and AIM after the Supreme Court’s ruling in 1980. While the tribal government

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worked to pass a resolution authorizing Gonzalez to file *Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. The United States of America et. Al.*, 650 F.2d 140 (8th Cir. 1981), cert. denied, 455 U.S. 907 (1982) (Civil Case No. 80-5062), AIM instead declared that the tribes should publish lists of those who accepted compensation payments in order to mark the “sellouts.” The latter course of action never occurred, as the tribes pursued legal resistance instead. In response, Cook-Lynn declares that “the American Indian Movement had absolutely no influence on the Oglala Sioux Tribe’s decision to file Civil Case No. 80-5062,” the official rejection of monetary compensation.238 However, while AIM and its peers did not guide Mario Gonzalez and the Oglala Sioux’s decision to file the suit for land return, they represent actors within a broader movement that shifted the political and legal climate of the United States to give the Sioux the necessary momentum and platforms for rebuking monetary compensation.

**Revolutionizing the Public: The Argumentation of Mario Gonzalez**

Within this movement for the Black Hills, Gonzalez translated the Sioux’s claims to their *Paha Sapa* into a legal strategy that sought to directly engage Fifth Amendment jurisprudence and treaty-making while slowly integrating the religious significance of the land into the case. On the surface, Gonzalez’s argumentation did not shift the debate dramatically from the 5th Amendment, the bedrock of the arguments established by the Sioux’s previous counsel in their pursuits. In their pursuit of quiet title, which would allow the Sioux to establish ownership of the Black

Hills as their real property, Gonzalez had to target a different section of the 5th Amendment, one that would authorize the Sioux’s greater, and bolder, assertion that the 1877 Act was unconstitutional, and that the 1868 Treaty actually governs U.S.-Sioux relations. Instead of focusing on only the just compensation clause, Gonzalez turned his attention to the final phrases as a whole: “No person… be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” While prior counsel examined the payment of just compensation, Gonzalez approached the Black Hills land seizure through the lens of the whole excerpt, particularly the language of “public use.” Operating within a line of conventional jurisprudence, he argued that the Fifth Amendment requires that any government exercise of eminent domain to claim property needs to reflect a development that engages the general populace. The 1877 Act, and the transactions that accompanied the land seizure, did not meet this mandate. As Gonzalez has publicly stated, “Congress cannot take Indian land and give it out to private homesteaders, mining interests, and other individuals...that is not a taking for public uses.” Under Gonzalez’s argumentation, the 1877 Act consequently violated the Constitution, voiding the exercise of eminent domain it authorized.

240 To restate the Fifth Amendment with a new emphasis: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” (italics added by author). Kommers, Finn, and Jacobsohn, eds., American Constitutional Law, 1099
241 For general information on the “public use” condition of the clause, see “Takings,” Legal Information Institute, Cornell Law School, accessed January 11, 2018, https://www.law.cornell.edu/wex/takings
242 Lazarus, Black Hills/White Justice, 407
This maneuver to expand the Fifth Amendment considerations of the land claim reflects the key departure of Gonzalez’s argumentation from his predecessors. While they accepted the power of the United States to abrogate treaties and seize indigenous lands without question, Gonzalez’s emphasis on “public use” exemplifies his efforts to challenge the implicit usurpation of indigenous authority in its legal foundations for territorial expansion, as well as the concomitant exclusion of the Sioux from the public. Quoting Steven Tullberg and Robert Coulter’s critique of Arthur Lazarus and the Sioux’s previous counsel in *Rethinking Indian Law*, Gonzalez and Cook-Lynn note in their book that Lazarus ceded that the United States possessed “bare legal title” to the Black Hills, despite the 1868 Treaty’s recognition of the land as “aboriginal title.” By forgoing a challenge to the United States’ title to the land in order to pursue just compensation, they did not consider the notion that the United States violated its own constitution in order to seize the Black Hills. As Tullberg and Robert Coulter state, the counsel thus “inexplicably” decided not to raise the specter that “the purpose of the taking was to give that Indian land and its gold to non-Indians,” one that “would obviously not meet the “public use” test of the Fifth Amendment.”

The evocation of “public use” thus represents the Sioux’s point of departure from past argumentation, one directed at questioning the legitimacy of the United States’ own claims to the land.

In his book on the Black Hills land claim, Edward Lazarus has tried to distinguish Gonzalez’s legal theory as unsubstantiated. According to him, his father

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“considered Gonzalez’s legal theory completely untenable.” In support of this claim, Lazarus himself asserts that “no federal court ever had prevented, much less rescinded, a governmental taking on the ground that it was not for a public use.”

He then shifts to discuss his second critique: that any court would deem that it lacks the jurisdiction to consider the Sioux’s suit. This stems from his father’s central concerns when Gonzalez ascended to lead the Oglala Sioux’s legal efforts in the late 1970’s. According to the Indian Claims Commission Act, the ICC serves as the sole governmental body that can settle indigenous land claims. Consequently, any court would have to dismiss the case based on jurisdictional grounds. Although later courts affirmed Lazarus’ father, the notion that the Sioux should abandon their pursuits and accept compensation because of a hurdle that no other group of citizens in the United States face seems like an incredulous request to make of a community displaced from their homelands. Nevertheless, Lazarus’ evocation of his father supports his own portrayal of Gonzalez as naïve and overreaching, a reincarnation of Ralph Case. To him, Gonzalez represented an obstacle to his desired goal, derailing the acceptance of the monetary award with supposedly impractical argumentation.

However, this criticism neglects the merits of Gonzalez’s evocation of public takings, as it problematizes the erasure of the Sioux from the concerned public and intimates that the Sioux, as members of the public involved in the Black Hills disputes in the mid-1800’s, thus possessed the power to alter the jus publicum and bar the seizure. First, the concomitant development of jurisprudence concerning takings

244 Lazarus, Black Hills/White Justice, 372
245 Ibid., 372
246 Ibid., 406-407
and the Court’s exploration of “public use” demonstrates that the courts have struggled with the issue of conceptualizing the “public” in takings cases.\textsuperscript{247} Even when considered separately from those decisions, Gonzalez’s argument excels as a viable rebuke of the United States’ necropolitical erasure of the Sioux in the 19\textsuperscript{th} century. For the government to even authorize a taking, it needs to demonstrate to the judiciary that their action reflects an intention to boost the community. While the judiciary has established a high degree of deference to the rationale of the legislature,\textsuperscript{248} Gonzalez could still demonstrate to a sympathetic bench of judges or justices that the 1877 Act did not seek to benefit the broader public, especially when factoring in the desires of the Sioux into the American community. While they were not citizens at the time, and did not see themselves as citizens either, the trustee relationship nevertheless incorporated Native Americans into the United States in a manner that would qualify them as members of the public. Of course, Edward Lazarus would argue that viewing Gonzalez’s arguments in this context represents an ahistorical effort to make his legal views seem conventional when they predated the major cases surrounding the issue of public use, which operated in a legal sphere separate from the conditions imposed on indigenous legal issues. However, this criticism does not consider that to examine Gonzalez solely in the terms of the case’s previous argumentation obfuscates the maneuvers he sought to pursue. Arguing that the “public” included the Sioux in 1877 does not only void the 1877 Act; it rejects the

\textsuperscript{247} Explicating the complicated line of jurisprudence concerning what constitutes a “public taking” under the Fifth Amendment requires its own appendix. Culminating in the case of \textit{Kelo v. City of New London}, 545 U.S. 469 (2005), the courts have struggled to determine the authority of the U.S. government to exercise eminent domain, even if federal and state legislatures endorse the action. While the details of the cases discussed do not necessarily address the concerns that Gonzalez raises, the existence of contemporaneous suits that question the meaning of “public takings” supports his efforts to challenge the U.S. government’s claim that the seizure of the Black Hills reflected a legal taking under the Fifth Amendment. See “Appendix C – Public Takings Jurisprudence” for a full explication of this debate.

\textsuperscript{248} See fn. 247 and “Appendix C – Public Takings Jurisprudence”


*jus publicum* developed from the seizure and reinforced by it, one that limited the Sioux’s recourses to monetary compensation. From this alternative perspective, the *jus publicum* should hold that no valid land transfer had ever occurred.

Gonzalez’s oral argument evoked this interpretation of “public use” and the takings clause, and expanded his framework in order to challenge other legal institutions that have barred a land return. In front of the U.S. Court of Appeals for the 8th Circuit, he asserted that since the 1877 Act, in addition to the failure of the U.S. to grant the Sioux due process or just compensation in the signing of the Act and its enactment,249 violated the public use clause, it therefore “was done in clear violation of the Fifth Amendment.” This led him to declare that “the 1877 act is unconstitutional,” and that “we [his clients] still own the confiscated area because the 1877 act is void *ab initio* [from the beginning].”250 Together, these claims constitute his larger assertion that the U.S. Constitution binds the government to consider the Sioux as members of the American public and consequently act with regard to their consent, which it failed to do with the drafting of the 1877 Act and the Black Hills land seizure as a whole. Even though Gonzalez did not mention the case by name in his oral argument, this in turn directly challenges the plenary powers granted by *Lone Wolf*, a legal hurdle that even Arthur Lazarus and the Sioux’s prior counsel did not pursue. While the white attorneys sought to distinguish *Lone Wolf* from the issue of just compensation for confiscated treaty lands, they did not attempt to convince the Court to overturn the case or even set new limits on congressional powers.251

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249 See fn. 125
250 Gonzalez and Cook-Lynn, *The Politics of Hallowed Ground*, 42
251 In fact, they did not even seek to challenge Congress’ plenary powers over Native American tribes. As Steven Tullberg and Robert Coulter argued in *Rethinking Indian Law*, Lazarus conceded the major ruling in *Lone Wolf* in order to settle for the issue of just compensation in his oral argument. A key excerpt of Lazarus’ interactions with the Supreme Court is reproduced below:
Gonzalez thus established a basis to revolutionize the central pillars of indigenous law in a manner that incorporated land returns as a form of reparation in the American *jus publicum*.

Another key innovation that Gonzalez’s expansion of Fifth Amendment claims, through the lens of “public use,” creates is that it establishes a legal platform for the Sioux to raise their perspective on the *Paha Sapa* and the “purpose” of the land without relying upon First Amendment jurisprudence. In his oral argument, Gonzalez noted that the courts could view this issue through a different constitutional lens. After stating his Fifth Amendment concerns, he suggested that:

> Also, the confiscated area was taken in violation of the First Amendment. This land is sacred to the Oglala Sioux Tribe. The United States took the only place in this world where we could practice our religion by taking away our church, if you will, by taking away the cemeteries where our grandfathers lie buried today.252

Finally, after decades of argumentation, the religious significance of the *Paha Sapa* received proper consideration in the legal system. Although the argumentation concerning the land claim still revolved around the Fifth Amendment, Gonzalez’s brief evocation of the Black Hills as sacred land in defense of a land return

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"Question by the Court: Under a treaty a reservation is set up for an Indian Tribe and at sometime later, the Government, the Congress just says, ‘Well, we think that reservation is too big. We are going to cut it in half and open the rest up.’ Now, is that a breach of the treaty or is it a taking, or both?" Attorney for the Sioux Nation: It is a breach of the treaty and the United States has the power to breach the treaty. Question by the Court: That is *Lone Wolf*. Attorney for the Sioux Nation: That is *Lone Wolf*. Question by the Court: Right. Attorney for the Sioux Nation: *Lone Wolf* tells us that Congress…if Congress determines that the reservation should be cut in half, Congress can come in and do it; it can do it without the consent of the Indians and it can do it in violation of a treaty. It is also a taking and when Congress does it, it has to pay for it." (Gonzalez and Cook-Lynn, *The Politics of Hallowed Ground*, 375 (endnote 9); Tullberg and Coulter, “The Failure of Indian Rights Advocacy”, 53-54) If Gonzalez received that question, he would argue that the hypothetical act by Congress would breach the treaty in a manner that violates the 5th Amendment, since it would defy the interests and consent of the indigenous community in order to favor private interests. This would lead to a broader argument against *Lone Wolf* and the Court’s empowerment of Congress to unilaterally break treaties with tribes, leading to a discussion of the trust relationship between indigenous tribes and the United States.

demonstrates how his reliance on “public use” created an opportunity for him to highlight the role of the Black Hills as the Paha Sapa for the Sioux. Since the Paha Sapa has always represented the foundation of their religion, the Sioux would never agree to let the United States confiscate their land for economic use, particularly by white miners and homestead owners. Consequently, the purported purpose of the 1877 Act conflicted with the needs and desires of the public who lived around the region and relied upon the Paha Sapa for their religious and cultural practices. This strategy thus enabled the Sioux to assert their perspective on the Paha Sapa in the American legal system alongside their efforts to void the 1877 Act through the Fifth Amendment.

Unconsidered Merits: The Success of Gonzalez’s Efforts in the Courts

Unfortunately, the courts would never settle the merits of Gonzalez’s public use evocation or the religiosity of the Black Hills, let alone engage in a re-examination of the United States’ authority to unilaterally seize indigenous lands, its sovereign immunity, or the doctrine of discovery. Instead, the judges in the Court of Appeals focused on issues of jurisdiction, as the U.S. attorneys countered the Sioux by declaring that the District Court could not void the 1877 Act. Aware of this issue, Gonzalez prepared an argument, largely based on Marbury v. Madison, 5 U.S. 137 (1803), that urged the Court to address the 1877 Act as an exercise of judicial review. Quoting Chief Justice John Marshall, Gonzalez sought to appeal to the judges’ concern for upholding the Constitution in order to discourage them from deciding the case on jurisdictional grounds, and not the First and Fifth Amendment claims that the
Sioux rose.\textsuperscript{253} Gonzalez also noted in his argumentation that the tribe that he specifically represented, the Oglala Sioux, did not back the counsel who argued the claims case in the Supreme Court and therefore did not qualify as a party to that ruling. This reflected an attempt to avoid another loss based on \textit{res judicata}.\textsuperscript{254} Despite Gonzalez’s emphatic argumentation, the Court of Appeals would ultimately dismiss the case, following the District Court’s lead in ruling that the Court lacked sufficient jurisdiction to consider the Sioux’s claims. Writing on behalf of the 8th Circuit Court, Judge Myron H. Bright argued that Congress passed the ICC Act as the only legal institution able to offer “any form of relief” to Native American tribes. The ICC thus represents the “exclusive remedy” for takings of indigenous lands, barring the Court of Appeals from ruling on the Sioux’s case.\textsuperscript{255} When Gonzalez appealed to the Supreme Court, the justices refused to issue a \textit{writ of certiorari}, passing on the opportunity to hear the Sioux argue for land returns.\textsuperscript{256} By 1982, the courts barred the Sioux from pursuing the legal recourse that any non-indigenous community could pursue in response to an unconstitutional taking.

In the courtrooms, Gonzalez and the Sioux proceeded to file smaller cases in order to assert greater considerations of Sioux interests concerning land use in the Black Hills and ultimately pursue incremental land return. One particular case, \textit{Frank Fools Crow et al v. Tony Gullet et al}, 541 F. Supp. 785 (1982), will be discussed in

\textsuperscript{253} Gonzalez and Cook-Lynn, \textit{The Politics of Hallowed Ground}, 43-46
\textsuperscript{254} Ibid., 43-44
the next chapter since the District Court’s ultimate decision pertains to the issue of applying lessons from the Black Hills dispute to the issue of sacred land jurisprudence. Other notable cases include *Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. Homestake Mining Co., et al.*, 722 F.2d 1407 (8th Cir. 1984), in which Gonzalez and the Oglala Sioux argued that they could seek quiet title to lands used by the Homestake Mining Company in the Black Hills. Asserting that Homestake Mining had violated the 1868 Treaty for over a century with their mining operations, the Sioux targeted them in an acute effort to secure the company’s share of the Black Hills. Their argument was two-fold; in addition to re-introducing the arguments made previously about the 1877 Act in the 1981 case, Gonzalez argued that the previous rulings did not bar action against Homestake Mining. However, the 8th Circuit Court would affirm the District Court’s decision to rule against the Sioux, declaring that the claims equal those made in *Oglala Sioux* (1981) and therefore violate the principle of *res judicata*. The stain of the earlier courts’ decisions to decide the Sioux’s cases without considering the actual merits of their claims impacted their efforts to rectify past wrongs, even though they narrowed the scope to consider only a mining company’s small acreage of land.

Later cases argued by Gonzalez, even those concerning land claims outside of the Black Hills land seizure, would reflect similar argumentation. In *Oglala Sioux Tribe of the Pine Ridge Reservation v. United States Army Corps of Engineers*, 507 F.3d 327 (2009), Gonzalez and the tribe sought to nullify the 1889 Act that divided
the Great Sioux Reservation and assume greater control over federal property within
the boundaries of the former Reservation, especially those along the Missouri River.
Considering an appeal filed after the district court dismissed the case, a divided D.C.
Circuit Court ruled against the Oglala Sioux, arguing that the Indian Claims
Commission Act stripped the Court of its jurisdiction over these land claims as
well.\textsuperscript{258} Writing a dissent, Judge David S. Tatel asserted that the majority did not
closely examine the individual claims that the Oglala Sioux presented. He argued that
some of these claims actually pertained to issues of “aboriginal” title, as the 1889 Act
did not govern some of the lands contested by Gonzalez.\textsuperscript{259} Twenty-eight years after
\textit{Oglala Sioux} (1981), the courts have continued to claim that they lack jurisdiction in
order to dismiss Gonzalez’s cases, whether they pertain to the Black Hills or not.

\textbf{From the Judiciary to Congress}

As their legal suits struggled to overcome jurisdictional concerns, Gonzalez
and his colleagues initiated political lobbying and governmental efforts to draft
legislation and inspire Congressmen to sponsor their proposed bills. While the Sioux
sought to resolve the case legally, either through the U.S. courts or through the United
Nations and the World Court, they still had a viable course of action in Gonzalez’s
“three-pronged approach:” convincing Congress to pass a “resolution of the claim”
itself.\textsuperscript{260} After the courts dismissed their case in 1982, Gonzalez and other Sioux
activists transitioned from operating within the legal realm to pushing for political
reforms. Forming the Black Hills Steering Committee, they sought to draft a bill that

\textsuperscript{258}507 F.3d 327 (2009), at 507 F.3d 331-333
\textsuperscript{259}Ibid., at 507 F.3d 335-336
\textsuperscript{260}For concise statement of “Gonzalez’s three-pronged approach,” see Gonzalez and Cook-Lynn, \textit{The Politics of Hallowed
Ground}, 162
would secure the return of the Black Hills, as well as monetary reparations and
greater Sioux control over the use of other federal properties in the region.\textsuperscript{261} In some
manners, this reflects the pattern of action that propelled the Sioux’s previous
counsel, since they achieved judicial success only after Congress passed ration offset
and \textit{res judicata} waivers. However, Gonzalez and the Black Hills Steering Committee
sought to utilize Congressional sympathy to pass a substantial resolution in lieu of
judicial action, a measure exceeding the extent of past legislation.

Their initial bill, eventually known as the Bradley Bill after its sponsor, would
effectively establish the Sioux as co-equal managers of the Black Hills with the
federal government in a manner that would support the tribe’s religious and cultural
institutions. If passed, Congress would authorize the transfer of all federal lands to the
Sioux except for Mount Rushmore and any federal properties designated for public
use, such as post offices and hospitals. The legislation would also approve the
establishment of the Sioux National Park and the Black Hills Sioux National Forest,
which would fall under the auspices of the Sioux, the National Park Service, and
other federal agencies. Asides from strict regulations over the use of religious sites,
the land would remain open to public use, yet the Sioux would have authority over
fishing, hunting, and water rights in the area. The bill would also impose new
restrictions on mineral leases, as well as greater control over grazing permits and
timber leases. Although privately-held properties would remain with their current
owners, the Sioux would also have “the right of first refusal” to buy privately-held
lands. In addition to these regulations concerning land use, the bill sought to bolster

\textsuperscript{261} Lazarus, \textit{Black Hills/White Justice}, 414; Ostler, \textit{The Lakotas and the Black Hills}, 180
the Sioux’s tribal economies. They would receive the funds generated by the permits and leases that they approved in the Black Hills, as well as the original compensation established by the Supreme Court. However, the legislation would classify this latter sum of money as “damages for lost use of land” instead of compensation, since they would otherwise intimate that they lost the title to the land in the 1877 Act. The bill thus outlined the restoration of the Paha Sapa in a contemporary context, in which the land would provide the religious and cultural foundation of Sioux society and provide sustenance through new revenue sources.

Similar to the cooperation between Senator Abourezk and his predecessors, the Black Hills Steering Committee found their political leader in Senator Bill Bradley of New Jersey, whose advocacy on behalf of the Sioux would transform the land dispute into a nationwide issue. As a professional basketball player, Bradley had travelled to the Pine Ridge reservation after Phil Jackson, his teammate on the New York Knicks, invited him to run a summer basketball camp with him. During this time, Bradley met Michael Her Many Horses, Jackson’s friend and a future leader within the Black Hills Steering Committee, and learned about the history surrounding the Black Hills land dispute. Years later, the Steering Committee found that Senator Bradley still felt passionate about supporting their cause. He would introduce the Sioux Nation Black Hills Act, S. 1453, in July 1985, asking his colleagues to help write “a new chapter in the history of the deeds dealing with the Sioux people,” one that “could describe a nation of honor, a nation of understanding, and a nation that affirms its great principles with great deeds.” Although Congressman James Howard

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262 Chapter 5 will examine the details of the bill more closely when it considers models for resolving sacred land disputes. Lazarus, Black Hills/White Justice, 418; Ostler, The Lakotas and the Black Hills, 180
of New Jersey would introduce a companion bill, H.R. 3651, later in the year, the Bradley Bill struggled to gain support in the 99th Congress. After receiving a hearing, almost a year after its introduction, S. 1453 failed to even receive a subcommittee vote. In 1987, Bradley and Howard would introduce their bills again, S. 705 and H.R. 1506 respectively, with greater backing. Bradley could count Senator Daniel Inouye of Hawaii and Senator Claiborne Pell of Rhode Island as co-sponsors, and Howard added fourteen colleagues as sponsors to his bill. Despite the increase in support, both bills would die without hearings.263 After passing a series of acts to support the pursuit of monetary compensation, Congress refused to extend its sympathy to the Sioux’s own demands for land return, leaving Bradley’s envisioned chapter unwritten.

The legislation’s fate stemmed from the strict opposition presented by the South Dakota congressional delegation, who mobilized to derail any efforts to give federal lands back to the Sioux. When Bradley introduced his bill, Republican Senator Larry Pressler criticized him for meddling in South Dakotan affairs, suggesting that the New Jersey resident should focus on indigenous issues from his own state. Although Senator Tom Daschle caucused with Bradley and his eventual co-sponsors as a Democrat, he would join Pressler’s opposition to any land return. While they did not approve of the land seizures from the 1870’s, they believed that reconciliation under jus publicum did not require land returns. Consequently, they led a series of attacks against the bill, derailing any attempt to give back the Black Hills. In response to Bradley, Pressler drafted his own legislation that would call for

referendums across the Sioux reservations on whether each tribe should accept its portion of the award granted by the Supreme Court. Meanwhile, Daschle aggressively mobilized against the legislation, convincing Sen. Inouye to suspend any hearings on S. 705 without his approval. He even established a committee, the Open Hills Association, to rally non-Sioux residents across the region to oppose the bill. As a result, Congress adopted the position that it could press forward without the support of South Dakota’s delegation, crushing the possibility of passing the bill.²⁶⁴ Despite the wrongs of the past, those who inherited the land from the seizure of the Black Hills and subsequent erasure of indigenous societies from the region refused to support the communities who suffered as a result of those unjust actions.

However, the Sioux’s internal conflict over leadership in the movement for a land return also hindered their efforts. At some moments, the debates between different treaty organizations led to positive advancements. In 1987, the BHSNC and the Grey Eagle Society, an organization of “Lakota elderlies,”²⁶⁵ announced their opposition to the Bradley Bill. One of the substantive critiques that they presented pertained to the limitations incorporated in the legislation, as the Sioux would not receive the entirety of the federal lands in the Black Hills nor compensation beyond the award set by the Supreme Court.²⁶⁶ These observations eventually led Gonzalez to draft a new bill that would have expanded the acreage of land returned to the Sioux, exponentially increase the compensation that they would receive, and provide new legal exemptions that would bolster tribal sovereignty over their lands and those who

²⁶⁵ Gonzalez and Cook-Lynn, *The Politics of Hallowed Ground*, 3
lived on them, regardless of tribal affiliation. Congressman Matthew Martinez of California sponsored the bill, H.R. 5680, in 1990, yet it would receive no committee hearings or votes. While expanding upon the terms of the Bradley bill, which itself faced low chances of success in Congress, may seem unproductive, Gonzalez has argued that the Martinez bill represented a necessary revision because its formulas for compensation cement the federal government’s responsibility to support the Sioux, even if it tried to disintegrate its trust relationships with all indigenous communities. Debates surrounding the Bradley bill thus produced an updated version that would further bolster the Sioux’s economic wellbeing, their autonomy, and their control over the management of the Black Hills.

On the other hand, this advancement itself arose from political turmoil that damaged the Sioux’s campaign for the Black Hills at a time when it needed unified support to push monumental legislation through a hesitant Congress. When the BHSNC and Grey Eagle Society denounced the Bradley bill, Oliver Red Cloud, a member of both organizations, called for the resignation of Gerald Clifford, the coordinator of the Black Hills Steering Committee who helped facilitate the drafting of the Bradley bill. This reflected a feud between the two leaders, one that arose in the early 1980’s over the direction of the Sioux’s legislative efforts. Tensions across these organizations would only increase with the sudden arrival of Phil Stevens, a Californian businessman who contentiously claimed that he descended from Standing Bear, a former chief of the Oglala Lakota. He argued that the Sioux should designate

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him as the leader of their legislative efforts for two reasons: the political connections he developed from the government contracts that he secured for his engineering firm, and his compensation formula that would expand the monetary gains that the Sioux could receive. Relying upon rent theory to argue that the United States had illegally occupied the Black Hills for over a century, he asserted that when combined with mineral royalties, the United States should in fact owe the Sioux $3.1 billion in damages. During a time in which momentum around the Bradley Bill was waning, Stevens’ interjection seemed like a necessary boost to the movement.

Promising to add this amount to the Bradley bill, he quickly won support across the Sioux reservations. Gonzalez and the Grey Eagle Society even agreed to cooperate with him, incorporating his compensation theory into their drafting of the Martinez Bill. However, Clifford and his allies viewed Stevens as a wrecking ball, arguing that he had shifted the focus of the legislation from securing sacred land, and consequently preserving their religion, to maximizing economic gains. At first, Stevens enjoyed increasing approval, yet when elders prepared to declare him a chief, the Sioux lashed back, ridiculing his supposed ties to Standing Bear and his intentions regarding the Black Hills. By 1989, he fell out of favor with the Sioux, exemplified by the “Stevens is not my chief” bumper stickers that became common across their reservations. While Stevens eventually faded from the land return campaign, his actions nevertheless revealed the political tensions that hindered tribal unity around the issue. Gonzalez himself possesses a complicated view of Stevens; he stated in The

Politics of Hallowed Ground that Stevens helped rejuvenate their focus on compensation, reflecting his “good intentions.” However, many of his colleagues disagree, as they portray him as a selfish businessman who exploited the Sioux’s political climate to portray himself as a tribal leader, a maneuver that has instead damaged their own political institutions. The Stevens episode thus demonstrates how the internal conflicts between different leaders and organizations have impeded the Sioux’s efforts to secure the return of the Black Hills. Without unity, the Sioux could not overcome the hurdles presented by institutions designed against their interests, and the politicians who utilized them to counter their pursuits for their land.

In recent years, Sioux in-fighting has slowed the progress towards securing a land return as the compensation award continues to grow. During his first campaign, President Barack Obama issued a press release that declared his support for “government-to-government negotiations” with the Sioux to resolve the issue as long as they present a unified proposal. In response, the Great Plains Tribal Chairman’s Association formed the He Sapa Reparations Alliance, an organization dedicated to informing Sioux communities of the land dispute and to drafting a plan that they could present to the President. From 2009 to 2011, the Alliance and other Sioux organizations frequently met to craft legislation that the Obama administration could endorse. However, President Obama’s two terms in office passed without any resolution of the dispute. Consequently, as of late 2011, the compensation award exceeds $1.3 billion due to interest, growing annually in value as the fund sits in the

272 Gonzalez and Cook-Lynn, The Politics of Hallowed Ground, 36-37. In fact, Gonzalez later recounts in The Politics of Hallowed Ground that Michael Her Many Horses, one of his close colleagues who helped initiate the legislative efforts, “chastised” him in a private correspondence over his cooperation with Stevens in the Martinez bill. See Ibid., 72
U.S. Treasury. Despite increasing $1.2 billion in value, the Sioux nevertheless remain committed to convincing the U.S. government to return the Black Hills and resolve the dispute.

Reflecting Upon the Sioux’s Rejection of Compensation

While some commentators have criticized the work of Mario Gonzalez and his colleagues, defenses presented by indigenous scholars and their allies demonstrate that the Sioux’s efforts to reject the Supreme Court’s decision reflect a necessary repudiation of the legal constructs that alienate indigenous communities from their sacred lands. Defending his father’s work, Edward Lazarus asserts that “both sides” have failed the calls of Chief Red Cloud for the advancement of Sioux prosperity. While he chastises the U.S. for granting the Sioux “a sum too little and too late even to begin the process of healing wounds that they had allowed to fester for a century,” he criticizes the Sioux for abandoning “any meaningful attempt to control their own destiny in favor of rhetorical claims to sovereignty and independence.” His harsh views of Gonzalez’s legal advocacy, especially his suit against Homestake Mining, reflect this latter view, as he argued that “what Gonzalez demanded as his clients’ “legal rights” was something no nation ever had required of itself.” In response to Lazarus, Elizabeth Cook-Lynn has repeatedly blasted Lazarus for promoting his father as the white savior of the Sioux. As Cook-Lynn notes, Lazarus portrays the


274 Lazarus, Black Hills/White Justice, 427-428

275 Ibid., 412-413
Sioux as a dying people, a nation fluctuating between being “blind,” “mute,” and “entirely dependent on the white experts” to “guide them successfully through the labyrinth of law,” or “agitators” who derailed the Black Hills claim with “untenable” legal theories. In *The Politics of Hallowed Ground*, she notes how Vine Deloria Jr. also criticized the legal work of Lazarus’s father and his colleagues, intimating that their cooperation with the U.S. government in the case reflects their hesitancy towards securing the true interests of the Sioux people, the actual return of the land. For Cook-Lynn and Deloria Jr., the Sioux needed lawyers like Gonzalez who would challenge the legal and political institutions in a manner that respected the Sioux’s autonomy and furthered their ultimate pursuit for a return of their *Paha Sapa*.

Furthermore, Lazarus’ own argument relies on the faulty acceptance of the right of conquest, a myth in indigenous law. Ridiculing Gonzalez, Lazarus argues that the “legal rights” that he demanded have never existed for any “conquered” peoples. For Native Americans, their “rights” in the United States exist “to their admittedly limited extent, only because for all the deceit, greed, and brutality that accompanied the government’s subjugation of the Indians, American legal culture, almost uniquely, at least recognized some legal limits on its conduct towards aboriginal peoples.”

Lazarus may celebrate these efforts to establish basic political and legal institutions for indigenous communities, despite their inadequacy in comparison to those enjoyed

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276 In her book review on Lazarus’ *Black Hills/White Justice*, she takes particular umbrage with his closing assertion that “in the meantime, of Red Cloud’s seven generations, four have already died. The fifth is dying now” (Lazarus, *Black Hills/White Justice*, 428). Lambasting his theatrical conclusion, she notes that:

“Anyone who reads history knows that the Sioux have been declared dead and dying by many writers and scholars more prestigious than Edward Lazarus. Such death knells for the indigenes are the very philosophical bases of much American thought, vain hopes and forecasts which permeate the work of many, many legal scholars and intellectuals of all disciplines.” (Elizabeth Cook-Lynn, “Review: Black Hill/White Justice: The Sioux Nation Versus the United States 1775 to the Present,” in *Wicazo Sa Review*, vol. 8, no. 1 (Spring, 1992), 102)


278 Ibid., 101; Ibid., 371-372

279 Gonzalez and Cook-Lynn, *The Politics of Hallowed Ground*, 5-6

280 Lazarus, *Black Hills/White Justice*, 413
by white Americans, yet he ignores how conquest has not served as a legal justification for state action in American law. The right of conquest conventionally entails the extinguishment of the defeated nation’s title after the complete subjugation of its people by a victorious force and the disintegration of its country. Since the United States drafted treaties with indigenous tribes and established reservations for them, the federal government did not technically conquer the Sioux and other Native American communities. Whether it was Chief Justice Marshall’s assertion in Johnson v. M’Intosh that “law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, was incapable of application” to Native Americans, or Chief Justice Roger B. Taney’s admission in Martin v. Lessee of Waddell, 41 U.S. (16 Pet.) 367 (1842) that “the English possessions in America were not claimed by right of conquest but by right of discovery,” the American government has stressed that it did not conquer indigenous peoples. Lazarus’ reliance on the right of conquest to criticize Gonzalez and the Sioux thus neglects the complexity of the relationship between Native Americans and the U.S. government. Like all other indigenous communities, the Sioux do not represent a conquered people. Instead, they possess a legal and political position both within the confines of American citizenship and outside of the U.S. as semi-autonomous nations. Consequently, Gonzalez’s pursuit of a land return represents a campaign to claim the

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282 21 U.S. 543 (1823), at 21 U.S. 590-591
283 41 U.S. 367 (1842), at 41 U.S. 409. Of course, the right of discovery and the right of conquest are related, as discovery justifies the colonial invasion of indigenous territory and seizure of native communities’ lands, even though it derives legitimation from theological tenets rather than physical dominance.
284 While the Supreme Court complicated this position by evoking conquest to justify its decision in Tee-Hit-Ton, this only demonstrates the estrangement of this case from conventional jurisprudence. See fn. 281
institutions and freedoms that the American government promised them in their
treaties and their incorporation into its civil society.285

Viewing the merits of Gonzalez and the Sioux’s claims in the Black Hills land
dispute therefore introduces a legal perspective that can shed new light on the
treatment of sacred lands, and the indigenous religions that endow those spaces with
significance, by the American legal and political systems. As discussed earlier,
Gonzalez’s evocation of “public use” to void the 1877 Act established a platform in
court for them to challenge past necropolitical attempts to erase their claims to their
lands, and to assert their authority over those spaces. In other words, Gonzalez’s
argument declares that the law of the land should consider the concerns of all
communities who have lived there, even those who inhabited the space prior to the
establishment of any settler-colonialist state. This maneuver delegitimizes the
government’s seizure of the Black Hills by extending jus publicum back in time to
when it was indigenously-held land. In effect, Gonzalez confronted the U.S.
government with an ultimatum: reaffirm settler-colonialism and necropolitics as the
public interest of the United States, or admit that the 1877 decision was a violation of
the public interest and agree that the state should pursue a land return and other
reconciliatory efforts.

285 Author’s note: At this point, I would like to address my own use of Lazarus’ Black Hills/White Justice. As Cook-Lynn
admitted in her review of his book, “all of this vicious assessment of the Sioux, both as individuals and as a nation of people, by
Lazarus in an attempt to repair his father’s career as legal counsel to the tribes has obscured some of the very interesting and
useful research that has gone into the manuscript.” See Cook-Lynn, “Review,” 102. I agree with Cook-Lynn, going as far as to
rely heavily on the research he conducted to support my historical claims. This follows the lead of other scholars, even those
from indigenous backgrounds, who have used his book to support their historical analyses. However, I believe that his move to
editorialize the recent developments in the dispute detracts from the value of his work as a resource. That is why I have
attempted to supplement every evocation of Lazarus with Ostler’s The Lakotas and the Black Hills, Gonzalez and Cook-Lynn’s
The Politics of Hallowed Ground, and/or other sources that provide the same legal and historical evidence. I hope that I have
used Lazarus enough to present a spectrum of legal views without relying on his work too heavily to not properly criticize it.
Access and Authority: How Gonzalez and the Black Hills Dispute Can Inform Sacred Land Jurisprudence

Applying Gonzalez’s arguments to sacred land jurisprudence at large requires connecting First and Fifth Amendment concerns in these cases. Whether it was the strategies pursued by Lazarus and his colleagues or those enacted by Gonzalez, the former nevertheless revolved around interpretations of the Fifth Amendment and its stipulations on eminent domain, government takings, and just compensation. Meanwhile, as this chapter will later illustrate, tribes that file suits to protect sacred lands usually evoke the First Amendment, as well as complementary legislation that has bolstered indigenous rights to religious freedom. However, the Black Hills dispute and its complementary case, *Frank Fools Crow v. Tony Gullet*, demonstrate that both lines of cases concern the authority of indigenous communities over the management of spaces they deem as sacred. While the previous chapters have focused 5th Amendment jurisprudence regarding Native American land claims, Gonzalez and the Sioux’s rebuke offer an alternative perspective on efforts to protect sacred lands through the First Amendment as well. Raising the relationship between access and authority, this re-examination of sacred land disputes in the context of religious freedom reflects the divide between the multicultural mandates established

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286 For reference, here is the First Amendment in its entirety: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Kommers, Finn, and Jacobsohn, eds., *American Constitutional Law*, 1998
by the Constitution and the actual pursuits of indigenous communities, as well as the Court’s inability to understand the complicated relationship between seeking access to sacred sites and reclaiming control over the treatment of those spaces.

Re-describing Access and Authority

Access and authority both require recognition; in order to possess a right or power as a community within a state, the government ultimately has to acknowledge and permit that behavior through the *jus publicum*. Elizabeth Povinelli’s analysis of Australian land claims and the issue of recognition thus serves as a useful point of departure for developing new interpretations of access and authority. Critiquing liberal multiculturalism’s manifestation in Australian indigenous law, Povinelli focuses on the government’s deliberate focus on traditional culture as the standard for granting indigenous communities title to land. As discussed in the introduction, the Australian government has oriented its land claim process around cultural knowledge and performance. Tribes can receive land returns if they can perform their identity; that is, if they can practice their customs in a manner that contributes to Australia’s multicultural discourse. Of course, this requires engaging with institutions destroyed by Australian colonization. As quoted in the introduction, the state consequently “looks not at but through contemporary Aboriginal faces” in order to resurrect knowledge and culture destroyed by colonization; as a legal priority, the state asks them to “tell us something we do not, cannot, know *from here* – what it was (you and we were) like before all all this. What our best side looks like.”287 Australia thus recognizes native communities’ claims to land in exchange for an impossible request:

287 See fn. 67-68
to practice customs destroyed by the state’s very own necropolitical acts of

culturicide and its past efforts to assimilate its native populations into white society.

While this analysis is inseparable from Australian politics, Povinelli’s

exploration of recognition inspires a re-description of access and authority. Since the

Australian land claim process requires groups to perform an indigenous identity, they

therefore have to reverse the effects of assimilation. The state thus seeks to erase the

settler-colonialist erasure that it instigated. Consequently, the state can obfuscate its

claims to authority by burying its past necropolitical acts under the façade of

recognizing groups’ ability to freely exercise their religion. In other words,

recognizing tribes’ access to their religious institutions. If the state did not distinguish

access from authority, recognizing tribal authority to these lands would in turn

question the Australian state’s own claims to the lands they colonized, as well as the

institutions it constructed on basis of eliminating its native peoples. Of course, the

indigenous communities in Australia do not frame their claims in this bifurcated

framework; they want sovereignty over their traditional lands restored. Relegating the

desires of indigenous peoples for greater authority over their land outside the sphere

of its jus publicum, the state limits the discourse in order to avoid granting too much

power to a single community, especially one that it previously sought to eliminate.

Tensions between each side’s claims to authority thus inform and construct these land

disputes.

While the United States does not possess a land return process like Australia,

the U.S. Constitution’s First Amendment reflects a similar endeavor to craft a

multicultural civil society without upsetting its political institutions through the
separation of access and authority. When considering issues of communities’ access
to their religious realities and practices, the structure of the First Amendment and the
intentions of the Constitution’s architects demonstrates how they engrained their
concern for religious plurality into the stipulations of the document. Viewed
alongside the First Amendment’s stipulations of free speech and the right to free
assembly, the religious clauses reinforce a broader liberal pursuit of protecting forms
of expression for all communities, regardless of the size of their membership. James
Madison confirmed this endeavor in his “Memorial and Remonstrance against
Religious Assessments,” arguing that if “religion be exempt from the authority of the
Society at large, still less can it be subject to that of the Legislative Body” because
“the latter are but the creatures and vicegerents of the former.” His concerns about the
role of government in determining the legality of “religion,” which entails both belief
and conduct, reflect the fear that any preference of a set of beliefs and conduct over
another encourages the establishment of a state religion.288 While the Supreme Court
has not always adopted this general principle,289 it codified this intent in Torasco v.

288 “James Madison, Memorial and Remonstrance against Religious Assessments,” The Founder’s Constitution, University of
289 Cases in the late nineteenth century concerning the religious freedom of Mormon groups reflected the Court’s resistance to
extending the benefits of plurality to these communities. In Davis v. Beason, 133 U.S. 333 (1890) and Reynolds v. United States,
98 U.S. 145 (1879), the Court ruled that the U.S. government could control the Mormons’ religious activities, including a ban on
polygamy. Writing on behalf of the Court in Davis, Justice Stephen Johnson Field argued that the First Amendment “was
intended was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his
relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his
sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation
for the support of any religious tenets, or the modes of worship of any sect.” However, he declared that “it was never intended or
supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the
peace, good order, and morals of society.” See 133 U.S. 333 (1890), at 133 U.S. 342; Kommers, Finn, and Jacobsohn, eds.,
American Constitutional Law, 913-914. This rationale exemplifies the Court’s adherence to a strict notion of religion as a
personal, internal conception based on belief and “worship” without proper consideration of the roles of culture, custom,
practice, and community in forming religions. While the Court would largely depart from this line of jurisprudence in future
cases, besides its landmark decision in Employment Division v. Smith, 494 U.S. 872 (1990), they nevertheless remain
relevant whenever the Court seeks to justify government actions through the “secular regulation” rule. According to this
standard, the government can impose laws that impact religious practices and behaviors as long as it does not intentionally
burden religious communities. Kommers, Finn, and Jacobsohn, eds., American Constitutional Law, 846-847. In cases such as
Davis and Reynolds, which reflected a particular harshness towards Mormons, the “secular regulation” rule can bar religious
activities if secular sensibilities, as the nebulous concept of “public interest,” do not accept them.

These decisions, which both expanded the Court’s conceptions of “religion” and institutions protected by the First Amendment, demonstrate a deliberate effort to extend protections to religious minorities who would otherwise have to sacrifice key tenets or behaviors in order to satisfy majoritarian demands.\(^{290}\) Madison’s concern for protecting religious communities thus became the bedrock of the First Amendment and the modern jurisprudence that the Court has developed.

However, the basic bifurcation of the “Free Exercise Clause” and the “Establishment Clause,” and the occasional tension between the two mandates, reflects the divide between access and authority imbedded in the language of the First Amendment. The courts have developed a variety of interpretational strategies to handle each clause,\(^{291}\) yet these do not prevent a broader conflict between avoiding “an establishment of religion” and “prohibiting the free exercise thereof.”\(^{292}\) As Winnifred F. Sullivan explores in *The Impossibility of Religious Freedom*, some communities need special accommodations from public laws and policies in order to freely practice their religions. While lines of recent Establishment Clause jurisprudence have recognized that the courts can allow certain degrees of accommodation,\(^{293}\) Sullivan’s analysis of *Warner v. City of Boca Raton*, 64 F. Supp. 2d 1272 (S.D. Florida 1999), a case concerning religious decorations of grave

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\(^{291}\) For a broad overview of the religion clauses and interpretations concerning them, see Kommers, Finn, and Jacobsohn, eds., *American Constitutional Law*, 833-851

\(^{292}\) See fn. 286 for language of the First Amendment.

\(^{293}\) Understanding the accommodationist line of jurisprudence that developed in the 20th century illuminates the key principles that justices have crafted in order to avoid halting religious activity due to the Establishment Clause. This discussion has been placed in the appendix, as it problematizes key arguments used against indigenous communities in cases concerning sacred lands. Please refer to “Appendix D – The Development of Accomodationist Understandings of the Establishment Clause” as a necessary supplement to this chapter.
markers in a public cemetery, demonstrates that judicial officials feel reluctant to support the rights of religious minorities if they feel that it disrupts the political institutions that they believe everyone should follow.\textsuperscript{294} This all illustrates a basic realization of the struggle to ensure First Amendment rights for all communities in a contemporary multicultural society, yet reviewing the notion through the framework of access and authority helps frame the issue in discursive terms of power. The state wants to grant its citizens \textit{access} to religious freedom through the Free Exercise Clause, yet it also reserves its right through the Establishment Clause to bar specific customs that threaten its secular, political institutions. Meanwhile, the claims that religious minorities, such as indigenous communities with non-Christian religions, raise in defense of their free exercise require some authority to bypass certain legal and political institutions that the government proscribes to the general public. As \textit{Fools Crow}, the extension of the Black Hills land dispute into sacred land jurisprudence, demonstrates, this conflict heightens when the religious communities involved claim authority stripped from them by necropolitical exercises of the settler-colonialist state.

\textit{Fools Crow: The Intersection of the Black Hills land claim and Sacred Land Jurisprudence}

The intersection of the Black Hills land claim and sacred land jurisprudence physically lies at \textit{Mato Paha} (Bear Butte),\textsuperscript{295} a sacred mountain located just north of the \textit{Paha Sapa} that has fallen under contention between the Sioux and South Dakota’s

\textsuperscript{294} Sullivan, \textit{The Impossibility of Religious Freedom}, 25, 150, 235; Kommers, Finn, and Jacobsohn, eds., \textit{American Constitutional Law}, 850-851

\textsuperscript{295} Ostler, \textit{The Lakotas and the Black Hills}, 5
Department of Game, Fish and Parks. Located a few miles away from the
northeastern edge of the Paha Sapa, on the outskirts of what is now the town of
Sturgis, Mato Paha towers above the plains, standing in isolation. From the peak of
the Mato Paha, one can look back upon the Paha Sapa and the surrounding region
(see Figures 9-11). The Sioux, especially the Lakota, have viewed the Mato Paha as a
sacred space. According to testimonies provided by Arvol Looking Horse, the
nineteenth generation Keeper of the Sacred Calf Pipe of the Lakota, as well as other
uncontested documents presented by the plaintiffs in Crow, the Sioux may have know
about Mato Paha since 901 A.D.\(^296\) Incorporated into their larger network of religious
spaces, the Sioux have travelled to the Mato Paha to perform rituals upon the
mountain-top for generations. The place symbolizes a crucial space for vision-seekers
and religious leaders to speak with the Wakan Tanka and other spirits in solidarity.
Meanwhile, it also serves as a venue for collective prayer and ceremonies as well. In
addition to the Sioux, the Tsistsistas people, commonly known as the Cheyenne, also
herald the Mato Paha as a sacred place, viewing the mountain as the spot where the
spirit realm first communicated with their community.\(^297\) For both the Sioux and the
Tsistsistas, the Mato Paha represents a foundational institution, as it supports both
individual and communal practices while linking them to their broader religious
framework.

Unfortunately, the United States’ seizure of the Black Hills region separated
the Sioux from the mountain that they hold sacred. In the 1851 and 1868 Treaties, the

\(^296\) Brian Edward Brown, Religion, Law, and the Land: Native Americans and the Judicial Interpretations of Sacred Land
(Westport, CT: Greenwood Press, 1999), 93, 184 (endnote 1)
\(^297\) Brown, Religion, Law, and the Land, 94-96
territories designated for permanent occupation by the Sioux included the *Mato Paha.* Despite these codified promises, from the conflicts of the 1870’s through Congress’ establishment of the Sioux reservations in 1889, the United States stripped the *Mato Paha* from the Sioux. Due to Congressional legislation in 1889, the government allowed the mountain to enter private, white ownership while it divided the Great Sioux Reservation. Seventy-three years later, South Dakota would purchase the lands from its private owner in order to establish the Bear Butte State Park, authorized by the state legislature and set for management under the Department of Game, Fish, and Parks. As Brian Edward Brown notes in *Religion, Law, and the Land,* the South Dakota government recognized the sacred nature of the mountain. However, they did not seek to establish the park for the sake of protecting the Sioux’s religious interests. Instead, they sought to capitalize on the significance of the place in order to attract tourists to the State Park. Advertising Bear Butte as a sacred spot to white audiences, the state sought to help the “general public…discover the importance of the Butte to the original development of the Black Hills, as well as the geological and Indian religious values of the Butte.” While the State no longer wished to annihilate indigenous religions, it sought to instead transform them into an educational commodity that it could sell to potential tourists, members of the “general public.” Unfortunately, the state did not seem to include the Sioux in its vision of the “general public” that the park would serve.

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298 Brown, *Religion, Law, and the Land,* 96. See also Figures 1-2
299 Ibid., 96
300 Ibid., 97
With this broader pursuit in mind, the State proceeded to develop the Park in a manner that intruded upon the Sioux’s religious values. Five years after the State bought Bear Butte, it constructed a visitor’s center for the Park’s guests at the base of the mountain with an access road from Sturgis, along with accompanying parking lots and maintenance shops. The Park also developed a network of trails for hikers to summit Bear Butte, including wooden platforms built near sites where indigenous communities would practice their prayers and ceremonies. These facilities encouraged the number of visitors to grow to more than 10,000 per year by the early 1980’s, leading to large crowds and human activity that would degrade the mountain’s environment and interrupt religious practitioners’ experiences. In 1982, the Park, led by Tony Gullet, met with indigenous leaders to inform them of their plans to re-build the park’s access road and shop, as well as a parking lot and alternative road for “ceremonial worshippers” to use. However, this work entailed a prohibition on the use of traditional campsites at the base of the mountain during construction, forcing practitioners to camp with tourists and forgo rituals that they could not perform in the campground. Furthermore, once the Park completed construction, it would impose a permit system to limit the number of practitioners camping on the mountain. The new restrictions on indigenous rituals, in addition to the growing pressure of tourism on the Butte’s environment, threatened to permanently harm the space that the Sioux and Tsistsistas revered as sacred, as well as the religious institutions based on an untainted Mato Paha.

301 Brown, Religion, Law, and the Land, 97-98
302 Ibid., 98-100
In response to these announcements, the Sioux and the Tsistsistas sued Gullet and the State for violating their First Amendment rights to freely practice their religion without government interference. Led by Frank Fools Crow, Arvol Looking Horse, other Lakota religious leaders, and their counterparts from the Tsistsistas, the plaintiffs argued that Gullet, on behalf of South Dakota, had violated the Free Exercise Clause of the Constitution, since the imposed restrictions would disrupt the “ceremonies and forms of worship which they have conducted on Bear Butte for thousands of years, and which are essential to, and intimately related to their daily lives.” They also claimed that these policies violated AIRFA, as well as articles from the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which provided three extra legal platforms for the plaintiffs to support their claims to religious freedom. Meanwhile, they asserted that the construction project itself would threaten Bear Butte’s environment in a manner that would “interfere with the power and spiritual unit of the site,” encouraging traffic and other forces of disruption that would prevent “plaintiffs from conducting ceremonies and from seeking visions and dreams in the proper manner and without interruption.” The Sioux and Tsistsistas did not want to bar other communities from visiting Bear Butte; their arguments instead reflect a desire for the State to consider their reverence for the Mato Paha and manage the space in a manner that does not desecrate the mountain. The plaintiffs thus sought to assure that the State properly incorporated their interest in the mountain into their plans for managing the land.

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The plaintiffs and their counsel further buttressed their claims by applying the frequently-cited *Sherbert* test to their case, arguing that South Dakota lacked a state interest compelling enough to justify the damage inflicted upon their sacred spaces. This standard stems from *Sherbert v. Verner*, 374 U.S. 398 (1963), a case on whether the South Carolina Employment Security Commission could deny Adell Sherbert’s application for unemployment benefits even though her commitment to the practices of the Seventh-Day Adventist Church prevented her from accepting employment. In a 7-2 decision, the Court ruled in her favor, arguing that the Commission’s ruling “forces her to choose between following the precepts of her religion and forfeiting benefits…[or] abandoning one of the precepts of her religion in order to accept work.” This consequentially qualified as an unconstitutional “burden” analogous to a direct “fine” on her worship.\(^{304}\) However, the Court, through the argumentation of Justice William J. Brennan Jr., expanded the scope of *Sherbert* to devise a test to determine whether a governmental action unconstitutionally burdens a religious person or group. When a plaintiff raises a complaint against a regulation based on religious grounds, “(o)nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation” by the federal or state government, and that no alternative solutions exist for them to fulfill their interest.\(^{305}\) The *Sherbert* test thus entails two central missions for the Court in free exercise cases: to decide whether the complaint raised reflects a religious claim, and whether the government’s actions pass strict scrutiny. In the construction of its balancing procedure, the Court’s decision to establish a strict standard for the government to meet created a legal refuge for

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\(^{304}\) 374 U.S. 398 (1963), at 374 U.S. 404; Kommers, Finn, and Jacobsohn, eds., *American Constitutional Law*, 921

religious minorities to seek when political actions threaten their practices and another safeguard for religious plurality in the United States.

The Court further legitimized *Sherbert* when it used the test to decide *Wisconsin v. Yoder*, 406 U.S. 205 (1972), a case that empowered religious communities to preserve their customs even when they countered the state-mandated conventions. Faced with the task of determining whether the Amish community in Wisconsin could break the state’s law that required children to attend schools until the age of sixteen, the Court sided with the Amish, recognizing their claims that the law threatened their approach to educating their youth. In a 6-1 decision, the Court ruled in favor of the Amish, defending their right to bypass Wisconsin’s mandate. Chief Justice Warren Earl Burger’s opinion on behalf of the Court exemplifies how the Court can apply the *Sherbert* test to other cases, especially those concerning communal practices. Throughout his opinion, he demonstrates the imbalance each side’s contentions. On one end, he illustrates both the centrality of the Amish’s beliefs concerning youth education in their religion, as well as the sincerity of the group and its convictions.  

“In sum, the unchallenged testimony of acknowledged experts in education and religious history, almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger, if not destroy, the free exercise of respondents' religious beliefs.”

On the other end, he proceeds to evaluate Wisconsin’s assertions that its education requirement reflects a compelling state interest. While accepting the state’s argument

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for the need for education, Burger argues that “the evidence adduced by the Amish in this case is persuasively to the effect that an additional one or two years of formal high school for Amish children in place of their long established program would do little” to promote the state’s goals nor those of the Amish community. In Burger’s view, the Amish education system has effectively helped children develop the skills necessary to function in society, rendering the state’s interest in keeping Amish children in its education system until the age of sixteen mute. Meanwhile, no alternatives existed for the government or the Amish, since both promoted entrenched systems of education. Consequently, the government’s actions did not balance out its burden on the Amish, leading the Court to rule in favor of the religious community. As shown through this explication of Burger’s opinion, Yoder signifies the epitome of the Sherbert test, both through its orchestration of the standard and the promotion of religious plurality that it encouraged.

For Gonzalez, his colleagues, and the plaintiffs in Crow, the Sherbert test seemed like a favorable, let alone applicable, standard for them to evoke in their argument against Gullet’s actions and secure access to their religious institutions. As Gonzalez noted in A Song from Sacred Mountain, the state never challenged the Sioux and Tsistsistas’ religious claims to Bear Butte, demonstrating the validity of the religious issues raised by the plaintiffs. Therefore, the counsel expected any court to accept the plaintiffs’ unchallenged sentiments as sincere religious beliefs. Furthermore, as Brown notes in his analysis, considering the government’s pursuit for

308 406 U.S. 205 (1972), at 406 U.S. 212-213; Kommers, Finn, and Jacobsohn, eds., American Constitutional Law, 925
309 Ibid., at 406 U.S. 222; Ibid., 925
310 Parlow, ed., A Song from Sacred Mountain, 15
increased tourism qualified as compelling seemed ridiculous for any proponent of the Sioux and the Tsistsistas. Analyzed through the lens of the government’s arguments in *Sherbert* and *Yoder*, South Dakota’s interests paled in comparison to South Carolina’s fears of unemployment benefit fraud, or Wisconsin’s concerns over youth education. Juxtaposed next to these rationales, tourism seems like a flippant excuse to burden the centuries-old practices of the Sioux and the Tsistsistas on the mountain. Meanwhile, as Brown notes in his analysis this notion, the state failed “to show that no alternatives for public hiking, camping, and enjoyment of nature existed among the 90,000 acres of other state parks, forests that South Dakota already afforded.”

While Brown’s commentary neglects that these many of these other state parks, such as Custer State Park, cover lands in the Black Hills and other lands that the Gonzalez and the Sioux would define as sacred spaces, as well as areas they own under the 1868 Treaty, it nevertheless demonstrates the inadequacy of the government’s argument to pass the *Sherbert* test established by the Supreme Court for cases concerning rights to free exercise.

However, when they brought their case to the United States District Court for the District of South Dakota, Western Division, Chief Justice Andrew W. Bogue ruled against the Sioux and the Tsistsistas, ignoring many of the plaintiff’s claims concerning the preservation of their sacred spaces in order to promote a narrow reading of what the Free Exercise Clause requires. Beginning his opinion with his observation that “it is clear to this Court that plaintiffs have no property interest in Bear Butte or in the State Park,” he proceeds to assert that, despite the claims raised

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by the plaintiffs, they have been able to perform their rituals alongside the Park’s
development in a manner that supposedly suffices a satisfactory standard for free
exercise. As Brown notes in his own analysis of the decision, Bogue’s focus on their
physical ability to practice their religion also reflected a concomitant disregard of
their complaints concerning the desecration of the space. Combined with his early
evocation of the plaintiff’s lack of any interest as a landowner, Bogue “reduced” Bear
Butte to “property,” a “mere locale,” and “confined” the Native Americans’ religions
to “Indian behavior.”312 Through these judicial maneuvers, Bogue and the District
Court divorced the Mato Paha from its associated religions, alienating the
perspectives of the plaintiffs and their communities on the integral relationship
between land and indigenous religion. By not recognizing the basis of the institutions
that the Sioux and Tsistsistas sought to protect under the First Amendment, the Court
thus stripped the plaintiffs of any legal refuge that the Constitution could provide.

With Bear Butte and religion characterized as property and behavior
respectively, Bogue furthered his argument by claiming that the government’s
management plan reflected a series of compelling interests that the Sioux and
Tsistsistas, due to their lack of property claims to Bear Butte, lacked the legal ground
to challenge. Reviewing the complaints filed against the State’s tourist-oriented plans,
Bogue cited the Park’s existing prohibitions on hiking off of trails and outside of
designated times during the day. For Bogue, these signify satisfactory efforts to
accommodate the plaintiffs’ behavior.313 Furthermore, the Park’s plan to increase
tourism did not violate the Free Exercise Clause, since he asserted that the

312 Brown, Religion, Law, and the Land, 103-104
313 Ibid., 104-105
construction projects and new restrictions on indigenous practices reflected “compelling state interest[s]” that could proceed without regard for the plaintiffs. Otherwise, limiting the State’s ability to pursue greater tourism would add to the “special treatment and special privileges to American Indian religious practices at the Butte,” suggesting that any further accommodation of the Sioux and the Tsistsistas would transgress the Establishment Clause. Through this evocation of the Establishment Clause, Bogue further constricted the legal grounds that the plaintiffs could utilize to protect their religious institutions. By elevating the State’s pursuit of tourism beyond the confines of the First Amendment while handicapping the Sioux and Tsistsistas, Bogue and his opinion authorized the State to operate the Park without any consideration of indigenous communities and their potential claims to dictate how Gullet managed and developed Bear Butte.

Despite the plaintiffs’ evocation of the Sherbert test, the federal courts managed to bypass Sherbert in order to arrive at their decision against the Sioux and the Tsistsistas. However, rather than distinguishing Sherbert from Crow, Judge Bogue chose to instead manipulate the Sherbert test so that it could validate South Dakota’s pursuit of tourism. As mentioned previously, Bogue’s characterization of religion as primarily behavior, and land as property, diminished the role of Bear Butte in their practices. Consequentially, Bogue could weaken the plaintiffs’ claims without considering their sincerity. Meanwhile, he proceeded to herald the government’s efforts to boost tourism as compelling without proper justification of its gravity, nor any consideration of potential alternatives. In his decision, Bogue stated

314 Brown, Religion, Law, and the Land, 105-108
315 Ibid., 103-104
that the construction projects would improve access to the site for tourists.\textsuperscript{316}

Difficulties for visitors does not seem like the “gravest abuse” that the Court highlighted in \textit{Sherbert}, yet Bogue gave it more weight than the interferences that the Park imposed on the plaintiffs. Plus, Bogue never considered the alternatives that South Dakota could have pursued to expand tourism revenues for the state.\textsuperscript{317} Instead, the authority of the state to develop Bear Butte without demonstrating any effort to consider other state parks to enhance escaped the purview of the courts’ decisions.

When the Sioux and Tsistsistas appealed to the Eighth Circuit Court of Appeals, they used Bogue’s decision as a framework to guide the restatements and advancements of their original complaints. Responding to his opinion, they argued that any rectification of their complaints would not violate the Establishment Clause because their desire for the government to let them practice their religion without interference would entail a degree of accommodation that most other religious groups enjoy.\textsuperscript{318} They also asserted that the District Court misunderstood the permit system that the State imposed on the plaintiffs, arguing that it enabled Gullet to impose burdens upon the plaintiffs that no other religious group in South Dakota would ever experience. In order to support this argument, they cited \textit{Shuttlesworth v. City of Birmingham}, 394 U.S. 147 (1969), a case in which the Supreme Court ruled against the empowerment of individual officials to determine who received permits to perform acts of free speech, and \textit{Larson v. Valente}, 456 U.S. 228 (1982), which declared that a financial scheme enacted by Minnesota law that hindered some

\footnotesize{\textsuperscript{316} Ibid., 107
\textsuperscript{317} See fn. 311
\textsuperscript{318} Brown, \textit{Religion, Law, and the Land}, 109-110}
religious groups more than others violated the Establishment Clause. Furthermore, the plaintiffs asserted that the District Court did not properly consider the nature of their religions, as its equation of practice with physical behavior neglected the heart of their complaint: that the Park’s actions, in addition to interrupting the free exercise of their religion on the site, impacted the land in a manner that burdened their practices as well. By ignoring this crucial aspect of their claims to the land, the District Court could disregard any need to balance the state’s interests in developing Bear Butte State Park with the concerns of the Sioux and the Tsistsistas. Combined together, the plaintiffs’ appeals reflect an overarching call for the federal courts to recognize their rights to follow their religion and the connection between the practices entailed by their religion and the land they sought to protect.

Unfortunately, the 8th Circuit Court provided little support for their claims. Issuing a minimalist *per curiam* opinion, the Court affirmed the decision of the lower court and its argumentation without providing any further explication of their approval of Gullet and the Park’s actions. In his analysis of *Crow*, Brown highlights that by refusing to offer a substantial meditation on the issues raised by the plaintiffs in their original complaint and their appeal, including “the fundamental question of what standard should be followed in determining when governmental activity constitutes a burden on the free exercise of Native American religions when the sacred reality that evokes their responses in prayer and ceremonial activity is land held by the government or to which it lays claim.”

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319 Ibid., 110-111
321 *Per curiam* signifies a court decision in which the court did not specify a judge as the author of the opinion. “Per curiam,” Legal Information Institute, Cornell Law School, accessed March 21, 2018, https://www.law.cornell.edu/wex/per_curiam
by asserting that since the plaintiffs did not present any claims to property ownership over Bear Butte, they lacked the grounds to challenge the government’s development of the mountain. However, this ignores the specific issue that the Sioux and the Tsistsistas raised: the construction of parking lots and more amenities in the Park disrupted their access to the sacred reality, the Mato Paha itself, that grounds their respective religions, as well as the practices inspired by that reality. For the indigenous plaintiffs, land management and free exercise are inseparable, requiring the application of First Amendment jurisprudence to determine the constitutionality of the government’s actions.

Bogue’s opinion, as well as the Circuit Court’s affirmation of his argumentation, exemplifies how courts can halt indigenous communities’ efforts to preserve their religious exercises and the spaces for those practices on the basis that their complaints reflect calls for greater authority, a supposed violation of the Establishment Clause. As stated earlier, Bogue believed that the State Park had already satisfactorily accommodated the plaintiffs’ practices, and that any abandonment of the projects or further support of their religious activity would break the separation between religious communities and the state that the Constitution mandates. Through the state’s lens of access versus authority, this reflects a concern that the plaintiffs could gain unacceptable degrees of control over the management of the Park, a violation of the state’s desire to preserve its conception of Bear Butte as its property. Meanwhile, Bogue’s argument infuriated Gonzalez, who states in A Song from Sacred Mountain that Bogue’s “outrageous” evocation of the

323 Brown, Religion, Law, and the Land, 105-108
Establishment Clause neglects the fact that “the assistance they are giving has never been requested nor desired.” Instead, Gonzalez asserts that “all we’re asking for is equal protection, the same protections that conventional religions get—Indian religion out to get…all we are asking is to be treated equally.” While Bogue understood the plaintiffs as seeking special authority over the Park, Gonzalez argues that their pursuits pertained only to achieving access to their religious venues in the manner that other religious groups in South Dakota experience.

However, Gonzalez’s critique of Bogue obfuscates the unique claims that the plaintiffs are raising. By demanding park management that respects the sacred value of the mountain and their access to their Mato Paha, the Sioux and the Tsistsistas are requesting a degree of authority over the space. This complicates Gonzalez’s analogy to Christian communities in his rebuke of Bogue. As he states in A Song from Sacred Mountain, “surely Christians would be outraged if the State of South Dakota started promoting tourism within a church and allowing people to come in and view people praying.” For Gonzalez, the cases seem analogous: “if they started to require people to register at the door and stay only an hour, people would be simply outraged at that type of activity.” While this hypothetical infringement mirrors the tourist practices encouraged at Bear Butte, the differences reflect the unique claims to authority that Gonzalez and the plaintiffs raised in Fools Crow. Churches are predominantly on private property, owned by the Christian organization; in this situation, the Church would seek relief from a government violating their right to dictate their own space. Meanwhile, the Mato Paha is public land seized from the Sioux after a treaty

324 Parlow, ed., A Song from Sacred Mountain, 15
325 Ibid., 15
abrogation. The suit thus implicitly seeks a degree of power over the space taken
from them during past conflict, a rebuke of the country’s settler-colonialist structures.
Unlike other religious communities, granting the Sioux control over their sacred
spaces inherently detracts from the power that the United States has derived from its
attempt to erase indigenous societies and expand its territory.

Understanding the special claims that Gonzalez and his plaintiffs sought in
_Fools Crow_ thus demonstrates how the case reflects an intriguing intersection of the
Black Hills land claim, general jurisprudence on sacred land disputes, and tensions
concerning who possesses authority over the management of sacred spaces.
Historically and culturally, _Fools Crow_ is inseparable from the Black Hills conflict.
First, the _Mato Paha_ represents a key place within the larger sacred space that is the
_Paha Sapa_. As Anita Parlow wrote in her editor’s introduction of _A Song from Sacred
Mountain_, “the elders say that Sacred Mountain [Bear Butte] cannot be discussed
without talking about all of the Black Hills, He Sapa [also known as _Paha Sapa_].
Sacred Mountain is a power place among power places, although all of the Black
Hills are sacred.”\(^{326}\) The testimonies that she collected affirm this observation. This
intimates the inseparability of the spaces. Arvol Looking Horse, the nineteenth
generation Keeper of the Sacred Buffalo Calf Pipe and one of the plaintiffs on _Crow_,
stated that “the Sioux believe that they originate from the Black Hills, and Bear Butte
they view that as a most important spot because that’s where they get their
instructions, when they fast and have Vision.”\(^{327}\) Other elders, such as Oglala Lakota
medicine man Pete Catches, assert that during the creation of humanity and the world,

\(^{326}\) Parlow, ed., _A Song from Sacred Mountain_, xiv

\(^{327}\) Ibid., 41
the earliest humans and spirits convened at Bear Butte, choosing the mountain “as the altar, the heart of the center of the Black Hills.” As Charlotte Black Elk, a granddaughter of Nicholas Black Elk, notes in *A Song from Sacred Mountain*, “our full name for Bear Butte is *Sinte Ocunku Paha Wakan*, the sacred mountain at the edge of trail…the edge of the Black Hills.” These testimonies exemplify the religious and cultural inseparability of the *Mato Paha* from the greater *Paha Sapa*.

Furthermore, Mario Gonzalez’s leadership as counsel for the plaintiffs in *Crow* reveals the case’s adoption of his broader legal framework for resolving the Black Hills dispute. As he recounts in *A Song from Sacred Mountain*, he joined his colleague Russel Barsh in filing the initial suit against Gullet and the Park after a meeting with concerned members of the Southern Cheyenne Nation. In his reflection on the dispute, he intimates that the conflict over the development of Bear Butte State Park did not reflect an isolated incident. Instead,

“The whole Black Hills area is a sacred area and has been since time immemorial. It is a place where people went to pray like at Bear Butte. There are many religious shrines like Bear Butte. There are many other shrines that can be identified by older people to this day. It was a place where people were buried and because it is religious, the government had to comply with the First Amendment in taking it. The 1877 Act is unconstitutional because it prevents the free exercise of religion.”

In Gonzalez’s view, *Crow* symbolizes the First Amendment plank of the larger legal campaign to invalidate the 1877 Act and instigate a land return of the Black Hills. If they had won *Crow*, Gonzalez could have then asserted that Bear

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328 Ibid., 2
329 Parlow, ed., *A Song from Sacred Mountain*, 7
330 Ibid., 15
331 Ibid., 16-17
Butte, as land linked religiously to the *Paha Sapa* and legally through the 1868 Treaty, extends those First Amendment considerations to the entire Black Hills. This provided another legal platform for Gonzalez to argue that the 1877 Act violates the Constitution, since its displacement of the Sioux prevents them from accessing religious sites in the *Paha Sapa*. Since the religious freedom argument serves a broader endeavor to void the land seizure, it therefore reinforces the Sioux’s authority over the lands designated as indigenous territory under the 1868 Treaty, which they claim were never willingly ceded.

As the dichotomy between Bogue’s opinion and Gonzalez’s position in *Fools Crow*, as well as the connection between the fight for preserving the *Mato Paha* and the Black Hills land dispute, demonstrate, the case demonstrates that sacred land disputes arise when the state cannot structurally recognize the authority that indigenous communities have over certain sacred sites without delegitimizing its own claims to those spaces. Bogue may have employed unique maneuvers to deny relief for the plaintiffs, and individual decisions influence the gradual development of jurisprudence, yet the fundamental discursive tensions underlying cases like *Fools Crow* extend beyond individual decision-makers. Instead, these disputes reflect a combination of the engrained resistance in settler-colonialist institutions to deconstructing their self-formulated sources of power, and the bifurcation of access and authority inherent in multicultural mandates. This represents a unique dilemma for indigenous plaintiffs seeking protections under the First Amendment. They seek to frame their suit in the context of those brought by religious communities who have won their cases, such as the Amish in *Yoder*, yet their necessary confrontation of the
quandaries embedded in the state’s approach to indigenous peoples and religions distinguishes their complaints in a manner that discourages favorable rulings. As the next section of this chapter will elucidate, the outcome of sacred land cases under the First Amendment have thus generally resulted in the exclusion of protections for sacred lands and practices attached to those sites from the American *jus publicum*.

**Applying Fools Crow to General Jurisprudence on Sacred Land Disputes**

The history of sacred land jurisprudence under the First Amendment demonstrates how this discursive dynamic impedes the extension of legal protections to indigenous communities and their sacred spaces. Prior to *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), judicial rulings concerning sacred land disputes arose from various rulings in lower courts concerning local cases across the country. While the details of each conflict distinguish the disputes from each other, Appendix E demonstrates that common arguments arose across the decisions, as judges resorted to dismissing tribal complaints through the Establishment Clause. This clearly reflects a general concern that recognizing their rights under the Free Exercise Clause would grant indigenous communities too much authority over their sacred lands and potentially the United States’ own claims to power over those spaces.\(^{332}\) The development of these arguments against constitutionally protecting sacred lands coalesced in the Supreme Court’s disastrous decision in *Lyng*. As discussed earlier, *Lyng* has exemplified the Christian construction of religion in the United States and its legal system.\(^{333}\) For the purposes

\(^{332}\) See “Appendix E – Sacred Land Jurisprudence Before *Lyng*”\(^{333}\) See introduction for analysis on *Lyng* and the development of “religion” as a legal category that excludes indigenous practices from First Amendment considerations (fn. 42-44).
of this chapter’s argument, a narrow analysis of Lyng through the lens of access and authority will suffice to further demonstrate that the federal courts have rendered themselves unable to comprehend the First Amendment arguments that indigenous plaintiffs raise in defense of their religious practices and their sacred lands.

The Supreme Court’s decision to withhold constitutional protections from the religious institutions that the Yurok, Karuk, and Tolowa have attached to the Chimney Rock area in the Six Rivers National Forest exemplifies how the Supreme Court saw that meeting the tribes’ standard of religious access to the sites would violate the degree of authority that they would grant to any religious community over federally-owned property. In the District Court for the Northern District of California’s initial decision on the case, in which the District Court sided with the tribes, Judge Stanley A. Weigel rebuked the government’s argument that preventing development on the grounds of protecting the tribes’ interests would violate the Establishment Clause, since any basic protection of religious practices under the Free Exercise Clause required a degree of accommodation, as intimated by Sherbert and Yoder. Despite concerns over the application of the Lemon test to the case, the U.S. Court of Appeals for the Ninth Circuit affirmed Weigel’s declaration that safeguards for the tribe’s religious institutions on the property did not constitute an unconstitutional sponsorship of religion. These lower court decisions reflect an understanding of the tribal claims at hand. They do not wish for the government to endorse their religions. Instead, they assert that the First Amendment mandates that

334 Brown, Religion, Law, and the Land, 135-136
335 For a definition of the Lemon test, see Appendix D, p. 238-239.
336 Brown, Religion, Law, and the Land, 142-143. For Brown’s analysis on the applicability of the Lemon test to the case, see Ibid., 143-146.
the government cannot destroy their religious institutions and their access to the realities that they hold sacred, even if it means constraining governmental action.

Unfortunately, Justice Sandra Day O’Connor cemented the judiciary’s disregard for the tribes’ nuanced approach to access and authority, instead arguing in the majority opinion that the tribes’ requests constituted unconstitutional demands to regulate governmental institutions, policies, and property. Her evocation of the Court’s opinion in *Bowen v. Roy*, 476 U.S. 693 (1986), in which it declared that “the Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens,”337 reflects an implicit evocation of the Establishment Clause. If the Free Exercise Clause could permit citizens to dictate governmental “affairs,” this would lead to an unacceptably close relationship between religion and the state. From this argument, O’Connor proceeds to assert that even if the lower courts’ concerns that government-led development of the land would destroy the tribes’ religious spaces and their correlating practices, she argues that:

“They however much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen’s religious needs and desires. A broad range of government activities — from social welfare programs to foreign aid to conservation projects — will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the

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tenets of their religion. The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion."

This crucial mechanism in her opinion, which allows her to dismiss the tribes’ religious claims without actually engaging the Sherbert test and past jurisprudence concerning religious exercise, exemplifies her concern that showing any sign of support for a group outside of cases of coercion would intimate a violation of the separation between religions and the state. She attempts to mask this by raising the possibility that a group of citizens may find the construction of a road through the tribes’ sacred sites and timber harvesting on the land “essential” to their “spiritual well-being.” This equivocation ignores the nature of religious claims raised under the Free Exercise Clause. No religious group files suit when they wish to dictate government policy or “veto” certain actions. Instead, they seek judicial intervention to force the government to choose alternative pursuits when the will of the majority, embodied by the government, threatens their constitutionally-protected religious practices. This exemplifies Madison’s concerns over the potential tyranny that could arise when the government could act without any regard to the religious institutions of its citizens, particularly those in minority communities. Citizens may not have the right to “satisfy” all of their “religious needs or desires,” yet the government does not enjoy this right to unrestrained satisfaction either.

As a whole, O’Connor’s argument reflects the Court’s view that any degree of protecting the tribes’ access to the sacred realities associated with federally-owned lands grants them a degree of authority that threatens the integrity of the state. This

338 485 U.S. 439 (1988), at 485 U.S. 452; Anderson et al., eds., American Indian Law, 777
exemplifies the state’s construction of access and authority as occasionally oppositional and its settler-colonialist foundations. The tribes in Lyng, like the plaintiffs in precedent cases, argued that they did not seek any power to “dictate” the management of the lands. Instead, they claimed that they merely sought to perform their rituals and ceremonies without any interference or degradation of their religious institutions, like the Amish in Yoder and other religious minorities. However, in Yoder, the state could allow the Amish to alter Wisconsin’s application of its education policies because it didn’t jeopardize any bedrock institutions of the government; public education could proceed as legally proscribed for the rest of the citizenry. Meanwhile, the Court’s ruling against the relief sought by the Northern Californian tribes that revered Chimney Rock, out of concern that it could intimate an establishment of religion, signals that access to religious practices and the realities attached to them in this case problematized the state’s conception of itself as the only manager of those lands. As detailed throughout earlier chapters, the state seized control of its lands through colonization and established primacy over them through the elimination of indigenous communities and the competition they presented. To bar the construction of the road near Chimney Rock would therefore undo the erasure; it would recognize the tribes as authorities over the land they deem sacred. The Court in Lyng consequently rejected their claims in order to avoid unsettling the foundation of the United States’ imagination of itself as the sole sovereign.

Looking for a way forward from this disastrous opinion and the judiciary’s resistance to granting Native Americans protections for their sacred lands and
realities should begin with Justice Brennan’s dissent. In the opening lines of his opinion, Brennan diagnoses the issues discussed above in the majority opinion:

“‘[T]he Free Exercise Clause,’ the Court explains today, ‘is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.’ Ante, at 451 … Pledging fidelity to this unremarkable constitutional principle, the Court nevertheless concludes that even where the Government uses federal land in a manner that threatens the very existence of a Native American religion, the Government is simply not "doing" anything to the practitioners of that faith. Instead, the Court believes that Native Americans who request that the Government refrain from destroying their religion effectively seek to exact from the Government de facto beneficial ownership of federal property.”

Since the Court framed the tribal complaints as calls for “de facto beneficial ownership,” this enables them to bypass the Sherbert test and any other consideration of conventional First Amendment jurisprudence. As Brennan observes, “the Court does not for a moment suggest that the interests served by the G-O road are in any way compelling, or that they outweigh the destructive effect construction of the road will have on respondents' religious practices. Instead, the Court embraces the Government's contention that its prerogative as landowner should always take precedence over a claim that a particular use of federal property infringes religious practices.” Brennan’s dissent thus recognizes that the Court’s refusal to grant the tribes the same constitutional considerations as the parties involved in Sherbert and Yoder reflects a unique fear that the Court possessed: that granting accommodations to the tribes could grant them a degree of authority over the management of the land, and in turn threaten the rationales underlying its own claims to the land.

340 Ibid., at 485 U.S. 465, Ibid., 781
Even if Brennan swayed the Court in his favor, leading the body to rule in favor of the tribes through his argumentation, his argument would not entirely solve the troubles that indigenous communities have in defending their religious institutions. Suppose that the Court, led by Brennan, ruled that after applying the *Sherbert* test to the case at hand, the government’s interest in building a road through the sensitive area did not outweigh the destruction of the tribes’ religious institutions and burden their practices. Under this standard, tribes would have to demonstrate to the Court that the specific sites in the case possess a central role in their religions compared to other lands, which would then shift the court’s focus to the interests raised by the government. However, Brennan’s own mechanisms regarding the determination of centrality, and the application of the *Sherbert* test to sacred land cases, does not solve the cultural dichotomies that he identifies between the government’s conception of land and those of Native American tribes. As he writes in his dissent, “at their most absolute, the competing claims that both the Government and Native Americans assert in federal land are fundamentally incompatible, and unless they are tempered by compromise, mutual accommodation will remain impossible.”

Tribes that revere sacred lands would still lack any authority over the spaces that affect their religious institutions, because the state would refuse to recognize the “other” party to managing those lands. Regardless of the good that could arise from possible interventions made by a Supreme Court that has hypothetically adopted Brennan’s standard, indigenous religions would remain

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341 This hypothetical argument stems from intimations based on Section II, Parts A and C of Brennan’s dissent. 485 U.S. 439 (1988), at 485 U.S. 465-469, 473-476
342 Ibid., at 485 U.S. 474
subject to the rule of the federal government, depending on the good will of the courts or friendly interests in the executive and legislative branches.

This reveals the dilemma that liberal multicultural systems of governance create for both tribes and governments. By establishing distinct legal conceptions of access and authority, it forces each party to adopt language that does not reflect the reality of indigenous religions: that access to sacred realities requires authority over the land and ongoing recognition of that power. Of course, critics would argue that this intimates that any accommodation beyond access to unfettered lands qualifies as a violation of the Establishment Clause. Furthermore, they would assert that it raises questions concerning the sovereignty of the United States to develop the lands that it claims to legally own. In response, they would cite Justice O’Connor’s argument in Lyng that “no disrespect for these practices is implied when one notes that such beliefs could easily require de facto beneficial ownership of some rather spacious tracts of public property.” Even those these “beliefs” may receive First Amendment protections in other cases, “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.” This exemplifies the settler-colonialist project. Why is the forest “its land?” The United States seized it. To undermine the claim as “its land” questions the authority of the government itself. The state’s continual affirmation of its property interests thus reflects its resistance towards resolving sacred land disputes in any manner that challenges the settler-colonialist foundation of its claims to sovereignty.

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Beginning the Pursuit of Possible Resolutions

Advocates should consequently look beyond the confines of First Amendment jurisprudence and confront the issue of American property interests over contested federal lands. In addition to distinguishing federally-owned sacred lands from spaces on lands held by private parties, this will require a bifurcation of federal lands into those that the United States received through means acknowledged by indigenous communities, such as treaties and other agreements, and those seized through illegal measures.\textsuperscript{344} Advocates may struggle to obtain greater authority over lands that tribes ceded to the United States in manners recognized by all parties, yet they could pursue bolder claims regarding this latter category. Of course, this raises a variety of issues. First, the United States would respond to any challenge to its authority over certain indigenous lands with the evocation of its right to discovery and its sovereignty over the United States, as cemented by cases ranging from \textit{Johnson v. M’Intosh} to \textit{Tee-Hit-Ton}. It would also try to evoke \textit{Lone Wolf} in order to defend the United States’ rights to abrogate treaties and manage indigenous lands without following treaty procedures. The government could then argue that any accommodations could bypass acceptable forms of compensation, which fall only under the jurisdiction of the ICC.

Even if Congress and other state legislatures acted to recognize greater indigenous sovereignty over certain lands, the government could sue on the basis that the Indian Civil Rights Act of 1968 extended the First Amendment to tribal governments, preventing every tribe except for the Pueblo from establishing a government-

\textsuperscript{344} Another bifurcation to be made is the distinction between public versus private property. On private property, the government does not have this degree of authority over the citizen who owns the space. Unfortunately, in \textit{Lyng} and the other sacred land disputes discussed throughout this thesis, these properties have already been taken by the government through colonization. Therefore, the preservation of sacred spaces on publicly owned lands has to compete against state interests and those of the broader American populace.
sanctioned tribal religion. All of these counterarguments reflect potential legal hurdles that the United States could raise to hinder efforts to pursue greater control over sacred spaces. However, they should not discourage advocates from utilizing approaches that extend beyond filing suits for First Amendment protections.

With the effort of expanding the possible recourses available to obtain greater authority over sacred lands, advocates should look to the solutions presented by Mario Gonzalez and the Sioux in response to the Black Hills land claim. Regardless of the lack of First Amendment argumentation surrounding the case, the fight over the Black Hills originates from the initial conflict between American conceptions of property and the Sioux’s reverence of the land as the Paha Sapa. While the circumstances surrounding the seizure of the land are unique, the United States has also abrogated other treaty obligations to obtain indigenous territory deemed sacred by native communities. If tribes can cite evidence of deceit like the Sioux have in their legal cases against the 1877 Act, they could pursue efforts to obtain legal authority over the land, and thus greater access to the sacred realities that stem from those spaces. However, the Black Hills land claim has risen to prominence due to Sioux activism, as leaders orchestrated intertribal campaigns to assert their issues into the popular discourse surrounding indigenous politics. If other communities could garner similar degrees of attention to their specific sacred land disputes, and empower leaders who can translate public support into efficacious political lobbying and complementary legal efforts, then they could develop the momentum necessary to shift the discussion surrounding sacred lands away from the sole confines of the Free
Exercise Clause to a re-examination of the legal construction of land in the United States through the lens of indigenous perspectives on sacred spaces.

Furthermore, these extralegal efforts reflect an arguably more important, lesson: that advocates should shift their focus away from filing extensive legal suits to campaigning in the halls of Congress and state governments for legislative measures that protect their religious spaces and institutions. Throughout the trials and tribulations of the Black Hills land claim, the Sioux’s efforts to seek justice for the United States’ land seizure progressed primarily through acts of Congress. Even when the argumentation only surrounded just compensation, legislative acts repeatedly revived and accelerated the Sioux’s case. When the courts rejected Gonzalez’s efforts to argue the case through public use jurisprudence rather than just compensation, he and his colleagues resorted to lobbying efforts in Congress to pass legislation that would secure a land return of the Black Hills. They even travelled abroad to advocate for their cause with the hope of increasing foreign pressure on the U.S. government to settle the dispute on the Sioux’s terms. While these more ambitious campaigns in the 1980’s failed to resolve the issue, they nevertheless advanced the national conversation surrounding the Black Hills beyond the extent to which their legal efforts promoted their interests. If other tribes could mount campaigns to further their own efforts to obtain greater authority over their sacred lands, in which they cultivate local and national interests in their cause that could sway amicable members of Congress, then they could bypass the judicial system and resolve disputes through legislative channels.
Chapter 5

Preserving the Sacred: Land Returns, Co-Management Plans, and Resolving Sacred Land Disputes

While this project has sought to explicate the Black Hills land dispute and to offer a reexamination of sacred land jurisprudence, its intentions extend beyond the diagnostic exercise of identifying settler-colonialist precedents, codified necropolitical exercises, and power structures that encourage an unequal relationship between the United States and its indigenous communities. Seeking to provide a series of suggestions for advocates and allies to support indigenous campaigns for greater access and authority over their sacred lands, this final chapter will explore potential resolutions and policies to these disputes that promote the interests of Native American tribes.

In order to piece together a strategy for advocates to pursue when they fight for land returns, this endeavor will be split into smaller discussions that elucidate the necessary components for developing successful campaigns. The first section will focus on the arguments for legislative reforms instead of legal suits, comparing the ability of the forums to address the dynamics of authority embedded in sacred land disputes. From this discussion, the chapter will proceed to explore a crucial example of a positive outcome for tribal communities: the restoration of Taos Pueblo sovereignty over Blue Lake. In addition to analyzing the reasons why the Taos Pueblo secured this historic legislative act, the conversation will also focus on how the event could serve as a template to other land returns. The chapter will then discuss how the
Bradley and Martinez bills from the Black Hills land dispute evoke alternative policies that could expand upon the framework provided by the Taos Pueblo’s fight, as well as the broader legal and political implications of these solutions.

**Bypassing the Courts: Why Advocates Should Prioritize Legislative Acts over Legal Pursuits**

Any comparison of the legislative and judicial branches in a discussion concerning sacred land dispute resolutions should acknowledge that both have served the settler-colonialist pursuits of the United States, and have consequently encouraged their respective actors to commit necropolitical exercises in support of those endeavors. Throughout the Black Hills land seizure, Congress encouraged the defiance of the 1868 Treaty and the takeover of Sioux lands. It established commissions, in which individual actors mixed personal biases and allegiances to broader directives to shift agreements with the Sioux in order to empower the United States over indigenous communities. Meanwhile, the Supreme Court has authorized the United States’ colonization of the North American continent through formulated doctrines, as exemplified by the doctrine of discovery and its continued evocation throughout American case law. Whether it was a justice joining the majority in decisions such as *Lone Wolf* and *Tee-Hit-Ton*, the judge in the lower court ruling against indigenous tribes in nascent sacred land cases, or the commissioner in the ICC who decided to deny a tribe’s land claim, they all acted in manners influenced by the United States’ ambitions to cement its own claims to owning its lands and subjugating its indigenous communities. Of course, these figures in both branches made specific decisions concerning the life and death of certain communities and
their cultures, yet their empowerment and rationales stem from an institutional motive to support their country’s settlement of the North American continent.

This prompts the question of whether any of the branches can shift to consider indigenous communities as members of the American public, even if it means defying the colonialist initiatives that the country has pursued for generations. As Kristen A. Carpenter explicates in her analysis of the laws drafted in response to *Lyng* and *Employment Division v. Smith*, 494 U.S. 872 (1990) legislative and administrative venues can incorporate several key factors into actions concerning indigenous tribes and their religions. Since Congress can assign responsibilities to federal agencies, they can craft laws that mandate that certain agencies develop an intensive knowledge concerning indigenous religions, more so than any judge reviewing a single case. Plus, reform through legislative and administrative means can respect the semiautonomous, collective nature of tribes and tribal governments. While cases such as *Lyng*, *Smith*, *Sherbert*, and *Yoder* concerned individuals and their specific injuries, Congress and agencies can work with tribes in a manner that respects how indigenous communities conceive of themselves and their religions as collective entities. As previously noted in the discussion of Deloria Jr. in the introduction, indigenous communities possess different conceptions of religion and societal institutions than American society at large. Working with tribes through legislative forums can therefore promote the accommodation of disparities in cultural views. Furthermore, these processes also encourage the recognition the semi-autonomous nature of tribal

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346 See fn. 61
governments by giving them greater authority to preserve and practice their religious institutions.

However, the analysis thickens when this argument is extended to consider a bolder proposition: that the legislature and federal agencies represent more suitable institutions to ameliorate sacred land disputes than the courts. While this immediately raises a basic debate in the realm of constitutional law, the balance of power between government branches, the courts have struggled to provide institutional support for Native American tribes in a manner that legislatures and agencies have since *Smith*. To avoid an extensive divergence, this analysis will concern a specific case study rooted in the consequences of the United States’ relationship with its indigenous communities: the aftermath of *Smith*, the passage of the Religious Freedom Restoration Act (RFRA) in 1993, and the courts’ various responses to RFRA. This saga demonstrates how the differences in each body’s response to the plight of Native American communities affected by *Smith* reflect broader institutional predispositions that enable the legislative branch to ameliorate the government’s relationship with indigenous communities more effectively than the judiciary.

*Employment Division v. Smith*, a case concerning the use of peyote by members of the Native American Church, ignited a national debate about religious freedom when the Court ruled that criminal statutes could bar the plaintiffs’ religious practice, even though it was central custom in their rituals. Writing on behalf of the Court’s majority, Justice Antonin Scalia formulated a new standard for cases concerning the Free Exercise Clause, undermining the compelling-state-interest test

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347 Many scholars have written on these issues. For a comprehensive introduction to this debate, see Kommers, Finn, and Jacobsohn, eds., *American Constitutional Law*, 61-80, 105-127.
codified in *Sherbert* and *Yoder*: the government can enforce any “neutral, generally applicable law,” even if it hinders important religious exercises for a community and its members, because to allow religious exemptions for all laws “would be courting anarchy.” This leads to Scalia’s major argument: the First Amendment does not “require” federal and state governments to make these exemptions. Instead, ensuring religious freedom remains an issue for “the political process” of the legislature to address. As he concludes his opinion, he argues that while “it may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in,” that “unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.” In his effort to justify exempting the Native American Church’s religious use of peyote from the constitutional guarantees in American *jus publicum*, he crafts an abdication of the Court’s self-proclaimed power of judicial review, the ability to determine whether governmental actions violate the Constitution, in cases concerning religious freedom.

After the Supreme Court decided in *Smith* that federal and state governments can prohibit the religious use of peyote, Congress sought to restore the strict scrutiny that the government once faced when its actions impacted religious behavior. The backlash against *Smith* stemmed from various religious communities across the country, who feared that the government could target them under the guise of *Smith*.

349 494 U.S. 872 (1990), at 494 U.S. 890; McConnell, “Institutions and Interpretation,” 159
In response to this decision, groups across the political spectrum mobilized as a coalition to reinforce their free exercise rights. Their lobbying led typically-antagonistic politicians, such as Senator Edward Kennedy and Senator Orrin Hatch, to reach across the aisle and draft bipartisan legislation.350 The end result was RFRA, a Congressional act passed in 1993, that deliberately sought “to restore the compelling interest test as set forth in Sherbert v. Verner and Wisconsin v. Yoder and to guarantee its application in all cases where free exercise of religion is substantially burdened.” By focusing on overriding the neutrality standard established by the Court in Smith rather than its specific result, RFRA focused on establishing general rules for the courts to follow across all Free Exercise Clause cases. At the same time, it reflected deliberate efforts to avoid unsettling the balance of power between the legislature and the judiciary, preserving the primacy of judicial review in religious freedom cases.351 RFRA thus represented the will of the American public, as voiced by Congress, to guide the courts’ understanding of the Free Exercise clause and the inalienability of religious freedom rights, including those of Native American communities.

Despite Congress’ efforts to respond to the concerns of religious communities after Smith through RFRA, the Supreme Court would respond by curtailing the applicability of RFRA to actions on the local and state levels. In City of Boerne v. Flores, 521 U.S. 507 (1997), the Court considered a suit initially raised by the

Catholic Archbishop of San Antonio when he sought to override local historical preservation ordinances under RFRA in order to secure a permit for expanding a church. After the District Court and Court of Appeals reached opposing conclusions, the Supreme Court considered the following question: Did Congress violate its powers under Section 5 of the Fourteenth Amendment to extend the authority of federal legislation to the states in order to rectify systemic injustices? In a 6-3 decision, the Court ruled that RFRA only applied to the federal government, as the legislation did not constitute a “remedial” enforcement of the Fourteenth Amendment. As previously mentioned, Congressional leaders drafted RFRA in a manner that would permit broad applicability. However, RFRA’s general nature violated the Court’s interpretation of Section 5 of the Fourteenth Amendment and developed jurisprudence, as its effect on governmental actions across the country disproportionately exceeded the Court’s perception of the frequency of religious discrimination across the country. This leads to the Court’s broader argument in Boerne: that Congress encroached on the judiciary’s power of judicial review through RFRA, as the Courts alone have the power to determine the legal application of the First Amendment. Through this ruling, the debate surrounding RFRA transformed from a discussion of religious accommodation to one about the Court’s authority over interpreting the Constitution.

352 As noted in the Court’s opinion, the concerned clauses of the Fourteenth Amendment are:

"Section 1. ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws...[and] Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." 521 U.S. 507 (1997), at 521 U.S. 516-517

353 Ibid., at 521 U.S. 519

354 The Court extensively outlined its understanding of the Fourteenth Amendment in sections preceding its analysis of RFRA. Ibid., at 521 U.S. 516-529

355 Ibid., at 521 U.S. 529-534

356 Ibid., at 521 U.S. 534-536
While Congress and the judiciary have struggled over the balance of governmental powers since the establishment of the United States, the *Boerne* decision obfuscates the reasons why Congress initially passed RFRA: to rectify the marginalization of minority religions and the communities that practice them. In her dissent, Justice O’Connor wrote that she disagreed with the majority based on her belief that *Boerne* codified the standards established in *Smith*. In fact, this served as the only source of her dissent; if the Court had ruled differently in *Smith*, then she would have sided with their argument concerning Congress’ powers under the Fourteenth Amendment. Nevertheless, she could not divorce RFRA from *Smith*. Despite any problems raised by the Fourteenth Amendment, O’Connor asserted that deeming RFRA as unconstitutional implicitly assumes that “*Smith* correctly interprets the Free Exercise Clause.” *Boerne* should have consequently featured a return to the issues raised in *Smith* and the case’s aftermath, a return to determining the Court’s understanding of the Free Exercise Clause. From O’Connor’s dissent rises a provoking intimation: that Congress, despite the limitation of its powers under Section 5 of the Fourteenth Amendment, should be able to promote an interpretation of the Free Exercise Clause and receive proper consideration from the Court without the unexplained evocation of previous rulings to reject their views. While Congress may not act beyond the limits of the body’s remedial authority, it nevertheless has the power to develop its own approach to religious freedom that the general public, through their elected officials, support.

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357 521 U.S. 507 (1997), at 521 U.S. 544-545; McConnell, “Institutions and Interpretation,” 167
358 Ibid., at 521 U.S. 546-548, 564-565; McConnell, “Institutions and Interpretation,” 167-168
359 McConnell, “Institutions and Interpretations,” 167
This realization demonstrates that the issue should have revolved around the reasons why Congress sought to correct *Smith*, a decision that the general public believed was wrong, and whether the Court is suited to determine this standard in the first place. By shifting the terms of the debate to separation of powers and judicial review, the Court implicitly asserted that *Smith* was right and did not necessitate a second review. In comparison to the outcry against *Smith*, this position seems absurd.

As Michael W. McConnell notes in his critique of *Boerne*, “when a unanimous House of Representatives and a nearly unanimous Senate have come to the solemn conclusion that a 5-4 decision [sic] of the Supreme Court was incorrect, it is hubristic for the Court to assume that it must be in the right.”

Justice Scalia’s own concurring opinion ironically reflects the conflict over religious freedom that the separation of powers argumentation clouded. While he agreed with the majority’s argumentation over Section 5, he sought to counter O’Connor’s critique of *Smith*, defending the majority opinion that he wrote seven years beforehand. Reviewing *Smith*, he declared that “the issue presented by *Smith* is, quite simply, whether the people, through their elected representatives, or rather this Court, shall control the outcome of those concrete cases” concerning burdens on religious freedom. For Scalia, “it shall be the people.”

Of course, Scalia’s proclamation holds little weight as a concurring statement in a case in which the Court hindered the public’s effort to assert its own standard of religious freedom. Instead, it exemplifies how the Court, seeking to secure its authority as a check against Congress, prioritized its own institutional concerns over those of religious communities across the country.

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360 McConnell, “Institutions and Interpretation,” 187
361 521 U.S. 507 (1997), at 521 U.S. 544
This saga, from the outrage over Smith to RFRA to Boerne, further affirms that the relative willingness of Congress to change its institutions and those of federal agencies in order to accommodate the American public’s claims to religious freedom, in comparison to the Court, makes the legislative branch a more supportive venue for Native Americans to fight for their sacred lands than the judiciary. The theme running through all of Carpenter’s observations listed before the case study of RFRA was adaptability. Congress can change its procedures and those of federal agencies to encourage officials to possess greater knowledge of indigenous religions, to work alongside tribes in order to preserve their practices, and to respect the collective nature of tribes, their cultures, and their religions. This adaptability thus enables Congress to recognize the past history of oppressive policies crafted by the United States government to target Native American religions, and to enact new legislation that shifts the country’s pursuits from the settler-colonialist endeavors that it had pursued for centuries. On the other hand, Boerne demonstrates the rigid nature of the Court, in which it prioritized the preservation of its own standards of religious freedom over those of the public in order to secure its own authority. This may stem from the dilemma surrounding the Court’s own institutional deficit. Unlike the other branches, which can cite Constitutional provisions for their authority, the Court’s stature stems from the continued development of judicial review. This volatile basis of authority encourages the Court to assert itself as the interpreter of the Constitution, even if its actions conflict with other branches of the government. Its institutional deficit thus hinders the Court’s ability to accommodate other views of the freedoms

that the Constitution provides, especially those that counter the precedents that it has established. As *Boerne* shows, one of the outcomes that arises from this insecurity is that the Court has to prioritize its own internal concerns over those of the communities involved in the cases that it oversees.

Ultimately, the relative ability of the legislative and judicial branches to alter their institutions in order to support the religious freedom of marginalized peoples shows that tribes and other Native American communities should pursue reform in the halls of Congress and the federal agencies that follow legislative stipulations. If the courts cannot transform their institutions to recognize other voices on the issue of First Amendment protections, then they cannot enact the necessary paradigm shift away from the United States’ settler-colonialist pursuits and to instead recognize the authority that indigenous communities should possess over the treatment of their sacred lands. This is not say that Congress has dropped these pursuits. Instead, the mechanisms available to indigenous advocates and their allies to secure long-lasting reform, distinguish the legislative and administrative channels in the government from the judiciary. Gonzalez and his colleagues recognized this as they shifted their efforts to secure a return of the Black Hills from the courts to Congress. In light of their struggles and successes, as well as the analysis developed in this section, other communities seeking authority over their sacred lands should recognize these institutional dynamics and orient their advocacy to seek justice in the most efficacious manner possible. As the next section of this chapter will discuss, the legislative strategy paid off for the Taos Pueblo when they secured a return of their sacred Blue Lake, after years of intensive extralegal organizing, from Congress in 1970.
What Success Looks Like: Blue Lake’s Return to the Taos Pueblo

A high altitude sanctuary, tucked away in the mountains of modern-day Northern New Mexico, Blue Lake has represented a central space for the Taos Pueblo, their religion, and their culture. In their mythology, the Lake represents the place from which life originated. Since the Taos have based their society on a predominantly agricultural lifestyle for generations, the Blue Lake watershed also supports their water supply, as its waters flow through the tributaries of the Taos Valley. The Lake also signifies a central place in Taos Pueblo religion for the performance of key rituals. These include a collective “pilgrimage” to the Lake every late summer, during which the Taos hold communal ceremonies, performing rituals for young Taos boys who seek initiation into the religion. However, after the arrival of the Spanish in 1598, who colonized the region and held onto power until it ceded the lands to the United States in the Treaty of Guadeloupe Hidalgo in 1843, the Taos Pueblo adapted to external pressures in order to preserve the Blue Lake’s integrity and role in their religion. In response to Spanish and American exercises of cultural oppression, the Taos continued their rituals in secrecy, barring non-native people from their practices. While colonialist policies regarding indigenous lands decreased the size of the Taos’ agricultural lands, Blue Lake’s isolation in the forested peaks protected it from these early seizures of indigenous territory. These factors enabled the Taos to practice their precolonial customs past 1900, despite the assimilationist assault on indigenous cultures that the United States was waging.

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across the country. As their sovereignty over their precolonial homelands diminished, Blue Lake and the religious institutions based on the land survived. The religious institutions fell under siege when the United States’ push to control the wilderness in the Sangre de Cristo Range instigated a multi-decade dispute with the Taos Pueblo over Blue Lake. In 1906, under the leadership of President Theodore Roosevelt, the United States established the Carson National Forest in response to the fledgling conservationist movement. This decision resulted in the extension of the Forest Service, and its “multiple-use” policies, over the land. In response, the Taos Pueblo launched an extensive legal and political campaign against the Forest Service. During the first few decades of the conflict, the Forest Service denied the Taos Pueblo their desire for exclusive access. Although they agreed to a permit program that promised accommodations for their late summer ceremonies, the Taos Pueblo asserted that the Forest Service repeatedly failed to uphold its end of the deal, which in turn criticized the Native Americans for neglecting conditions of the program as well. However, the Taos’ fortunes began to shift with the passage of the ICC Act in 1946. While the ICC would only award financial compensation for the taking, it could further legitimize their extralegal efforts to secure exclusive access to Blue Lake. Concomitant to this reform was the development of support from sympathetic non-Indians, symbolized by Frank Waters’ The Man Who Killed the Deer, who helped the Taos Pueblo publicize their complaints concerning the Forest Service’s management of their sacred lands. Together, these changes represented

opportunities to challenge the asymmetrical relationship developed with the government, rebuke the permit program, and to ultimately secure control over Blue Lake and activity in the space.

As the political climate in the 1960’s fueled indigenous activism across the country, the Taos Pueblo bypassed the judiciary and took their pursuit of a land return to the halls of Congress. After the ICC ruled in 1965 that the Taos held “aboriginal title” to the land due to their uninterrupted use of the lands before 1906, the Taos rejected the monetary award. Instead, they used the Commission’s opinion to bolster the tribe’s lobbying efforts, winning local support from Taos County as well as Senator Robert Kennedy and other prominent leaders. This nationwide recognition of the Taos’ claims to the land led to the U.S. House’s passage of H.R. 471 on September 9th, 1969. Despite this momentum, the Taos would face greater hurdles in the U.S. Senate. When H.R. 471 arrived in the Senate Subcommittee of Indian Affairs, Senator Clinton P. Anderson of New Mexico announced his opposition to the bill. As he and his fellow colleagues argued, the ICC already ameliorated the taking by providing compensation for the Taos. Although the Taos raised religious claims to the land, the permit program established decades beforehand already recognized their access to the Lake. Furthermore, granting them exclusive access to Blue Lake would encourage other tribes to pursue land returns, legitimizing “aboriginal use” as a claim to title and thus jeopardizing the United States’ ownership of all of the lands that Native Americans used and revered prior to colonization. Rather than evincing a

particular malice towards the Taos, these arguments reflected institutional concerns about the integrity of the United States’ claims to indigenous lands. An established precedent in favor of a land return would effectively admit the settler-colonialist logic underlying American sovereignty. In addition to stripping the ICC of its authority over indigenous claims, it would encourage tribes to challenge the government’s own claims to owning land.

In response to Anderson and the Senators who joined his side of the debate, the Taos and their allies utilized the public forums of the Senate to counter arguments while continuing their effort to build public support. Relying on the testimonies of Juan de Jesus Romero, the current Cacique of the Taos Pueblo, Taos tribal leaders, and experts from indigenous and non-indigenous backgrounds, the Taos argued that nonexclusive access to Blue Lake represented a pivotal necessity for the survival of their religion. Since the Forest Service’s “multiple use” policy permitted activity that disrupted the pristine nature of the Lake, both the space and the Taos’ interactions with it would suffer, disrupting all of their rituals and practices. While some chose to evoke comparisons with churches and shrines while others sought to legitimize the Blue Lake as an institution outside of Christian paradigms, they collectively demonstrated that without Blue Lake, the religion would collapse. Furthermore, the Taos Pueblo’s religion, as a whole, represents the foundation of their culture, government, and community structure.

In front of the Subcommittee and in other venues, the Taos and allied experts presented the drastic consequences:

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370 The Cacique serves as the central religious leader of the Taos Pueblo. Gordon-McCutchan, “The Battle for Blue Lake,” 791
371 As noted in Chapter 3 (see fn. 231-232), the Pueblo tribes across New Mexico also mobilized in the late 1960’s to ensure that the Indian Bill of Rights did not include an extension of the Establishment Clause to indigenous communities under the jurisdiction of tribal governments. Wunder, “Retained by the People,” 138
without exclusive access to Blue Lake, the place and the sacred reality would deteriorate in a manner that irreparably harms the religion, which in turn threatens the Taos’ culture and their society at large.\(^{372}\) Since Blue Lake possessed this multifaceted value, monetary compensation could not address the loss of control over the land and its management. At the same time, the Taos’ reminded Congress that the specialized role of the Lake in their society entailed that any land return would not result in economic exploitation, nor would it provide precedent for the return of non-sacred lands. By concentrating on the unique centrality of Blue Lake in the tribe’s religious and societal framework, the Taos provided a cohesive and practical response to Anderson’s concerns.

The public embraced the Taos’ perspective on Blue Lake, epitomized by President Richard Nixon’s announcement of support for the land return, ultimately swaying the Senate to pass the legislation. By 1970, tribes across the United States and their non-indigenous allies rallied behind the Taos Pueblo, inundating Senators with letters and speaking to the media. This encouraged the American public, who were already galvanized by the political climate of the 1960’s, to back the Taos and H.R. 471.\(^{373}\) Meanwhile, Nixon emphasized a transformation of the federal government’s approach to indigenous communities throughout his 1968 presidential campaign and his first few years in office, advocating for the replacement of termination with “self-determination,” a political paradigm built around the notion that Native American tribes should operate as semiautonomous governments and communities. Returning certain spaces to tribes could accelerate an institutional shift

\(^{373}\) Bodine, “Blue Lake,” 28; Gordon-McCutchan, “The Battle for Blue Lake,” 791-793
to self-determination, and since tribes and other indigenous communities had elevated Blue Lake to the forefront of public discourse on indigenous issues, lobbying for H.R. 471 represented an opportunity to win indigenous support for the government’s new initiative. While Nixon’s particular advocacy for self-determination warrants attention, it also reflected a broader shift in American attitudes regarding its indigenous communities, one that could recognize the importance and merit of granting tribes authority over access and management of their sacred lands.

Nixon’s approval signified a key milestone in the eventual passage of H.R. 471. In response to the possibility that the White House could back the Taos Pueblo, Anderson and his colleagues vowed to vote against the funding of new anti-ballistic missiles, another legislative priority, if the President supported the tribe. Despite these threats, Nixon declared his support for the land return on July 8th, 1970. The tension between Nixon and his fellow Republicans ultimately led to a climactic series of Senate debates on December 2-3rd, 1970. Discussing the bill in front of a large audience, Anderson’s stranglehold on the Senate fell when Senator Barry Goldwater of Arizona gave a speech in favor of the land return, declaring that the United States should grant indigenous communities control over lands that they revere as sacred as long as they present an honest claim to land with key religious value to them. With one of the leading arbitrators of indigenous policy in the Senate siding with the Taos Pueblo, the Senate passed H.R. 471 by a 70-12 margin with eighteen Senators abstaining. As members of the White House, Congress, and the Taos Pueblo

leadership “were all weeping,” Nixon signed the bill into law in a ceremony on December 15th, 1970, giving a short speech on the importance of the land return and handing the pen he used to Romero, a symbol of just reconciliation. Overcoming the conventional arguments of the U.S. government, as presented by Anderson and his colleagues, the Taos demonstrated that an efficacious political strategy built on lobbying leaders to push the issue of sacred land returns to the forefront of national debates on indigenous politics could sway the U.S. government to grant tribes control of their sacred sites. While this did not produce systemic change, it established precedent for other tribes to pursue land returns through extralegal forums.

Understanding the nuances of H.R. 471 itself illustrates the possible relationship that tribes can construct with the United States, in which the federal government respects the religious needs and pursuits of these semiautonomous

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376 While the Taos fought for Blue Lake, the Yakima Nation launched their own subversion of the ICC for Mt. Adams, known as Pakto by the Yakima for the spirit embodied by the peak. See “Legend of Mt. Adams,” The Treaty Trail: U.S.–Indian Treaty Councils in the Northwest, Washington State Historical Society, updated 2018, accessed February 10, 2018, http://www.washingtonhistory.org/files/library/legendOfMtAdams.pdf. According to the 1855 Treaty that the tribe signed with the United States, the boundaries of the Yakima’s reservation were supposed to include the mountain. However, surveying errors led later administrations to believe that the U.S. owned Mt. Adams, resulting in its inclusion in the Mount Rainier Forest Reserve by President Grover Cleveland and its eventual incorporation in the Gifford Pinchot National Forest. Consequently, the Yakima sought a land return, arguing that Mt. Adams in fact belongs to them. While the ICC would rule in their favor in 1966, it could only offer financial compensation for the taking. In response, the Yakima pursued alternative strategies. Their efforts ultimately inspired the NCAI to contact Nixon in 1971 and urge him to return the 21,000-acre zone of contested land to the Yakima. A few months later, on May 20th, 1972, the President responded by issuing Executive Order 11670, which corrected the boundaries of the Yakima’s reservation and granted them authority over their treasured Pakto. Reflecting upon Nixon’s decision to repatriate the mountain, Robert B. Jim, Chairman of the Yakima Tribal Council, declared that “on May 20, 1972, President Richard M. Nixon gave proof to my people that there is justice in America, and he restored faith in a government that has long been mistrusted.” See Donald L. Fixico, Indian Resilience and Rebuilding: Indigenous Nations in the Modern American West (Tucson, AZ: The University of Arizona Press, 2013), 205-207; Robert B. Jim, “Statement of the Chairman of the Yakima Tribal Council,” in The Yakima People, ed. Richard D. Daughterty, web, Plateau Peoples’ Web Portal, accessed February 10, 2018, https://plateauportal.libraries.wsu.edu/system/files/atoms/file/3WSUMASC0016.pdf; Richard M. Nixon, “Executive Order 11670—Providing for the Return of Certain Lands to the Yakima Indian Reservation,” The American Presidency Project, ed. by Gerhard Peters and John T. Woolley, accessed February 10, 2018, http://www.presidency.ucsb.edu/ws/? pid=60504. A year after the Taos Pueblo’s victory, the Yakima utilized a similar extralegal approach to encourage another act of self-determination, through its key proponent, to indigenous authority over their sacred lands.

On the other hand, an important distinction to draw between the Taos Pueblo and the Yakima is that the former secured a land return through the legislature while the Yakima depended on an executive order. While President Nixon was inclined to support indigenous communities, pursuing appeals to the President does not securely establish long-lasting reform. As the epilogue will discuss regarding the recent reductions made to Bears Ears National Monument, a reactionary President can revoke the decisions of a predecessor, including prior executive orders like the one that returned Mt. Adams to the Yakima. While both the Taos Pueblo and the Yakima serve as models for their extralegal activism, tribes should seek legislative resolutions similar to H.R. 471 rather than an executive order.
communities. As Jill E. Martin notes in her analysis of H.R. 471, the bill stipulates that the Taos Pueblo could only use Blue Lake for “traditional purposes only.” These include “religious ceremonials, hunting and fishing, a source of water, forage for their domestic livestock, and wood, timber, and other natural resources for their personal use;” otherwise, “the lands shall remain forever wild.”\(^{377}\) Of course, this raises similar concerns that Povinelli notes in her analysis of Australian land claim cases. If tribes could not practice their religions for several decades due to assimilationist policies, often exercised through necropolitical means, how can they satisfy the U.S. government’s expectations for legitimate “traditional” religions, let alone practice them to a degree that warrants governmental protection? This could hinder tribes if they pursued legal restitutions, in which judges or justices have to derive a ruling, one made on the narrowest grounds possible, from existing jurisprudences built on anti-indigenous decisions. However, the standards of scrutiny decrease when the arbitrators are elected officials, who respond to public opinion more readily than their judicial counterparts. Since members of Congress base their decisions and rationales on the will of the communities they represent, including their communities’ conceptions of religion and tradition, the institutional standard of what constitutes “traditional purposes” and “religious” activities in Congress thus possesses a more fungible nature than the one used by the courts.

The challenge moving forward from the Taos Pueblo’s success is the project of expanding the legislation to construct a template for other sacred land disputes,

including the ongoing debate over the Black Hills. At the time, many Senators sought
to classify the Taos Pueblo’s case as “unique” in order to prevent an onslaught of land
claim legislation in Congress. However, they did not seek to prevent the introduction
of other cases; instead, they called for the development of a “comprehensive policy”
regarding sacred lands so that they could uniformly handle disputes from across the
country.\textsuperscript{378} Unfortunately, Congress has failed to initiate the broader discussion
necessary to craft a “comprehensive policy” on sacred land conflicts. As this thesis
chapter will attempt to use the Taos Pueblo’s successful reclamation of Blue Lake as
a start to envision a potential “policy” approach for Congress, it is important to revisit
two major opportunities that Congress had to advance its framework concerning
sacred lands: the Bradley and Martinez Bills. While these legislative acts would have
only applied to the Black Hills land dispute, they would have served as political
precedents for other tribes to use in their own extralegal efforts to secure land returns.
Comparing H.R. 471 to these proposals could thus illustrate a potential path of
development for resolving conflicts over sacred lands.

Expanding the Realm of Possibility: Could the Bradley and Martinez Bills Serve as
Templates for Bolder Action?

At first glance, the Black Hills land claim seems too large and controversial to
warrant a juxtaposition of the Sioux’s efforts with those of the Taos Pueblo tribe.
Although the Sioux’s legislative proposals do not call for the return of all federal
lands, each propose the return of over 1.2 million acres of land.\textsuperscript{379} This dwarfs the

\textsuperscript{378} Martin, “Returning the Black Hills,” 35
\textsuperscript{379} Lazarus, \textit{Black Hills/White Justice}, 418-419; Ostler, \textit{The Lakotas and the Black Hills}, 180
48,000 acres of indigenous land that Congress restored in H.R. 471.\textsuperscript{380} Local white communities and the United States at large also transformed the Black Hills into a symbol of American expansion and patriotism, as evinced by Mt. Rushmore, while Blue Lake and Mt. Adams became locations incorporated into federally-protected wilderness and forest areas. Senator Anderson organized a serious campaign against the return of Blue Lake, yet the efforts of South Dakota’s delegation to shut down any discussion of land returns in the Black Hills, as exemplified by Senator Daschle’s creation of the Open Hills Association, reflect the magnitude of resistance to any form of reconciliation beyond federally-paid monetary compensation that the Sioux faced. These differences may consequently discourage a comparison between the two cases.

However, these variations between H.R. 471 and the Black Hills legislation evince how sacred land resolutions could expand from the small template of the Blue Lake return to one as large as the potential reclamation of the Black Hills. In H.R. 471, Congress ordered that “the lands held in trust pursuant to this section shall be a part of the Pueblo de Taos Reservation,” incorporating Blue Lake into reservation land. Meanwhile, as discussed previously, the Bradley Bill (S. 1453), would broadly return the Black Hills in their entirety to the Sioux, yet it would establish the “Sioux National Park” and the “Black Hills Sioux Forest.”\textsuperscript{381} Examining the language of S. 1453 elucidates the unique stipulations of these institutions. For the Park and the Forest, the Sioux would work with the National Park Service and the U.S. Forest

\textsuperscript{380} Bodine, “Blue Lake,” 27
\textsuperscript{381} During this chapter, I will primarily discuss the Bradley Bill because the Martinez Bill adopted the basic framework of the Sioux National Park and the Black Hills Sioux Forest. My analysis applying to these proposals in S. 1453 applies to those sections of the Martinez Bill as well. See fn. 261-263, 266-268 for introductory comments on the content of those bills.
Service respectively over a five-year “transition period” to co-manage the lands and eventually establish a “Management Agreement” as dictated by the Sioux.\(^{382}\) As the proposed establishment of religious sites designated exclusively for Sioux access, all under the broad name of *Tatanka Tacante* (“The Heart of the Buffalo”), demonstrates,\(^{383}\) the Sioux tribal governments and authorities would eventually claim a degree of primary authority over the land in order to enact their own management programs and institute their religious priorities without violating the Establishment Clause. Nevertheless, the creation of a Park and a Forest, in addition to transitional periods of coordination with the U.S. government, reflects proper consideration of the land return’s magnitude. Unlike the Taos Pueblo, who incorporated Blue Lake into their reservation without a complex plan for overseeing the land, the Sioux’s legislation recognizes the need to work with the U.S. as it organizes the necessary apparatuses to exercise their authority over the land.

If the Bradley Bill became a potential model for tribes to propose sizeable reclamations of sacred lands, its emphasis on early coordination between the Sioux, the National Park Service, and the U.S. Forest Service would have to address the contentious relationship between indigenous tribes and these government agencies. The Sioux’s own interactions with the Park and Forest Services exemplifies how the government has utilized these organizations to further its settler-colonialist pursuits, causing conflict with indigenous communities. During World War II, the United States seized a considerable portion of the Pine Ridge Reservation’s northwestern

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\(^{382}\) U.S. Congress, Senate, Select Committee on Indian Affairs, *Sioux Nation Black Hills Act: Hearing on S. 1453*, 99\(^{th}\) Cong., 2\(^{nd}\) sess., 1986, 17-20

\(^{383}\) U.S. Congress, Senate, Select Committee on Indian Affairs, *Sioux Nation Black Hills Act*, 18
territory to construct an artillery range. In addition to the communities who resided in the area, the Oglala Sioux recognized several sacred spaces, including Sheep Mountain, across the lands that the U.S. condemned. Despite these evictions, the government never returned them after the war. Instead, Congress authorized the incorporation of those lands into the Badlands National Monument, the predecessor of Badlands National Park, in 1968. In this legislation, Congress determined that it would first provide measures for Oglala Sioux owners to pursue compensation for their lost properties. Eight years later, the National Park Service enacted the other key portion of the bill, finalizing the incorporation of the lands into the Badlands National Park in exchange for an agreement with the Oglala Sioux Tribe to co-manage the segment of the Park that once belonged to them. 384 In three decades, the land transformed from Sioux territory held in trust to a co-managed federal park, shrinking the Pine Ridge Reservation in exchange for new sources of income and system of authority over tribal land.

While the inclusion of these lands in the Badlands National Park still remains a controversy, the co-management plan illuminates a potential step towards empowering tribes to assume authority over sacred lands. With the eventual goal of granting primary authority over the lands to the Oglala Sioux, the National Park Service and the Oglala Sioux Tribe agreed to split the entrance fees to the Badlands National Park, as well as coordinate efforts to develop new programs and resources.

for the unit in Pine Ridge. From this deal, which signifies the only co-management plan for any U.S. National Park, the Tribe receives $500,000 to $1 million per year.\textsuperscript{385} Some Sioux leaders have supported the pact, as Mario Gonzalez utilized the agreement to bolster his Congressional testimony in support of a co-managed National Monument on the site of Wounded Knee. This positive approach to the plan reflects a broader pursuit to utilize the agreement as a template to create a “tribal national park,” in which the Sioux would control over operations and the land itself.\textsuperscript{386} Meanwhile, other Sioux activists have staged multiple protests concerning the Badlands, demanding an unconditional land return of the unit to the Oglala Sioux.\textsuperscript{387} Furthermore, the progress towards transforming the co-managed unit into a functional park that the Oglala Sioux could manage on their own has slowed. While paved roads and extensive trail networks allow visitors to extensively explore the northern section of the Badlands, the southern lands lack the same structural support.\textsuperscript{388} Despite these difficulties, the co-management plan has nevertheless extended indigenous authority over federally-owned lands, and sacred spaces across them, in a manner that no other tribe has secured.

While these agreements should represent transitory pacts, the sustained treatment of Medicine Wheel demonstrates how co-management plans can withstand legal challenges and alter sites in a way that accommodates indigenous religious institutions and practices. Located in modern-day Bighorn National Forest in

\textsuperscript{386} Gonzalez and Cook-Lynn, \textit{The Politics of Hallowed Ground}, 127
\textsuperscript{387} \textit{Ibid.}, 131; Ostler, \textit{The Lakotas and the Black Hills}, 168, 190
Northern Wyoming, a massive physical “altar” of rocks and other materials has captivated the Northern Cheyenne, Eastern Shoshone, and other tribes since time immemorial. However, despite its religious significance to various communities, officials overseeing the National Historic Landmark and Bighorn National Forest proposed the construction of an access road and parking lot next to the site in order to allow tourists to visit the site year-round. Upset over the potential desecration of their sacred space and the religions attached to the Medicine Wheel, the tribes mobilized against the plan, demanding authority over the management of the Landmark. Over the course of eight years, tribes, indigenous coalitions, and historical organizations worked together to craft the Medicine Wheel Historic Preservation Plan (HPP). This agreement, finalized in 1996, ordered the Forest Service to prohibit grazing, camping, and timber harvesting around the Landmark. It also barred the construction of an access road and parking lot; now, visitors have to hike to the site, and can only access the Wheel during times of the year in which they would not interfere with religious ceremonies. Furthermore, it stipulated that all Forest Service employees coordinate their work with the desires of local tribes, and undergo extensive training with tribal representatives in order to ensure that the Forest Service’s staff recognizes the religious importance of the Medicine Wheel. Once under threat, Medicine Wheel received the necessary protections to remain a sacred space due to the effective extralegal organizing of concerned Native American tribes and their leaders.

390 Gulliford, Sacred Objects and Sacred Places, 140-144
After the Forest Service rejected a timber transaction on lands near the Medicine Wheel, Wyoming Sawmills filed a suit on the grounds that the agency’s HPP violates the Establishment Clause. When the District Court of Wyoming heard the case, they ruled that Wyoming Sawmills lacked the necessary “standing” to challenge the HPP on First Amendment terms because the HPP did not directly cause the injuries that Wyoming Sawmills alleged. Furthermore, the District Court recognized that the Forest Service and the tribes formed the HPP under the broader directive set by the National Historic Preservation Act (NHPA), which was revised in 1992 to permit the inclusion and subsequent protection of sacred sites under the National Register of Historic Places, and other archeological policies passed by Congress. When Wyoming Sawmills appealed to the 10th Circuit Court of Appeals, the judges affirmed the lower court’s decision and its argumentation, asserting once again that the Forest Service had acted properly when it established the HPP and when it rejected its transaction with Wyoming Sawmills. Since the Forest Service’s agreement, as well as the Congressional edicts that it followed, reflect the inclusion of these Native American tribes into the governing public and its will, the courts’ swift affirmation of the HPP should quiet any arguments that these programs grant too much authority to Native American tribes.

The Medicine Wheel Historic Preservation Plan (HPP), in addition to the agreement between the Oglala Sioux and Badlands National Park, thus represents a crucial example of how co-management plans, either implemented through Congress

392 Anderson et al., eds., American Indian Law: Cases and Commentary, 802-803
393 179 F. Supp. 2d 1279 (D. Wyo. 2001), at 179 F. Supp. 2d 1306
394 Wyoming Sawmills, Inc. v. United States Forest Service, 383 F.3d 1241 (10th Cir. 2004)
or through direct negotiations with agencies, can protect sacred lands and the religious realities attached to them. As stated earlier, the preservation of these spaces requires a shift in existing power structures and relations; while access supports some physical practices, the survival of religions that depend on the integrity of associated sites intimates the need for Native American tribes to dictate the treatment of their religious institutions. These plans reflect an awareness of this dynamic, enabling tribes to ensure that their federally-owned sacred lands remain in pristine condition.

The Medicine Wheel HPP serves as the strongest case study, as its parties avoided some of the conflicts and challenges that the Badlands and the Oglala Sioux faced. Of course, the U.S. Forest Service did not seize the Medicine Wheel from the tribes and then proceed to construct an artillery range on the site. Nevertheless, both elucidate potential templates for establishing institutions that can grant control to indigenous communities, and in the case of the Badlands, gradually shift primary authority over the sacred lands to the tribes.

These efforts thus illuminate the intriguing logic underlying the Gonzalez and other Sioux advocates’ legislative efforts to secure a return of the Black Hills. By striving to create temporary co-management programs that would eventually empower themselves to guide the preservation and development of the Black Hills, their legislation demonstrates how tribes could secure the proper degree of control over their sacred lands through extralegal agreements. While the Sioux’s prospective institutions would differ from plans established through direct negotiations with federal agencies, such as the Medicine Wheel HPP, they nevertheless stem from legislative impetus. As stated earlier, the amended NHPA and other Congressional
acts enabled the Forest Service to develop a progressive resolution of the controversies surrounding the Medicine Wheel. Of course, all of these programs, both potential and actualized, resulted when indigenous communities, activists, and their allies encouraged public officials to support their communities and the preservation of their religions. The successful campaigns of the Taos Pueblo and the tribes of modern-day Wyoming have progressed their respective pursuits through the legislature and other non-judicial efforts. This raises the question: should sacred land advocates prioritize extralegal action, especially the utilization of legislative platforms, rather than court cases and law suits? As the next section will explain, indigenous communities have a stronger chance of securing justice and authority over their sacred spaces in the halls of Congress, state legislatures, extralegal agencies, and even the executive branch than the courts.

Broader Implications Regarding Sacred Land Disputes in the United States

Throughout this project, analyzing the issue of sacred land disputes through the lens of the Black Hills land claim has illuminated the temporal dimensions and social dynamics that advocates have to navigate as they push for reform. While successes, such as the return of Blue Lake to the Taos Pueblo, serve as useful templates for specific sites, the Black Hills represents the ultimate opportunity for the Sioux and other indigenous communities to reclaim authority over an entire network of sacred spaces and realities that constitute the foundation of their religion. For Gonzalez, his colleagues, and his allies in Congress, this endeavor materialized in the form of proposed co-management plans, which would eventually encourage the transfer of control over federally-owned land in the Black Hills to the Sioux. Of course, the
prospects of a co-management plan depend on the context from which it arises, as the comparison of the Badlands and the Medicine Wheel elucidates. Nevertheless, the success of land returns and co-management plans passed through legislative means suggests that indigenous advocates and their allies should orient their efforts to focus on pursuits through Congress, federal agencies, and their state-level counterparts rather than the judicial branch. In addition to the broad merits of extralegal action, the judiciary’s institutional deficit hinders its ability to accommodate indigenous claims to religious freedom and authority over sacred lands. Formulated throughout the chapter, this proposal for a legislative approach targeting land return and co-management plans transforms the lessons that can be drawn from past efforts in the Black Hills land dispute and other conflicts into tangible, broadly-applicable guidelines for potential reforms.

This completes the development of an informative, multi-faceted approach that combines different thematic frameworks to understand how sacred land disputes exist in the greater context of American state’s history and relationship with indigenous communities, how power dynamics of access and authority influence the positions of both sides, and how indigenous advocates can achieve justice within the confines of the American state. Each conflict over indigenous sacred spaces reflects the settler-colonialist pursuits that have driven the United States’ actions since its founding, evoking both the doctrines initially formulated to boost those efforts and the fortification of those ideas through later decisions and actions. As settler-colonialism pervades the government’s relations with Native American communities, the necropolitical actions of individuals operating within their respective institutions
applies this larger theoretical framework to actual policy initiatives. The choices of whether to destroy a tribe through bodily violence, to seize their land, to facilitate the deconstruction of their cultural institutions, all translate the goals of the settler-colonialist state into decisions of single or collective actors. While this balanced narrative of institutional pressures and individual behavior within broader structures helps explicate the development of sacred land disputes, they do not provide concrete, diagnostic terms for decision-makers to analyze the circumstances affecting communities today and to pass restorative reforms. This is where “access” and “authority” serve as useful themes; by understanding how tribes lack the access and authority they need to practice their religions and protect their sacred realities due to the unequal power relations that the settler-colonialist state has constructed, it helps inform how these controversies have arisen. With an awareness of what communities need, advocates and leader can work together to craft proposals that convince the general public, and its political representatives, to support their cause.

In addition to addressing these thematic concerns, discussions around land returns, co-management plans, or any other form of resolution for sacred land disputes also encourage re-considerations of what “land” and “religion” should signify in the American jus publicum. As indigenous communities and their leaders demand greater authority over sacred spaces on public lands, the American state and its own officials will have to recognize other forms of relationships between communities and their land that do not follow the Western paradigm of individualized property ownership and management. This does not necessarily entail that scholars and advocates should abandon the term “property” in this discourse. As Kristen A.
Carpenter, Sonia K. Katyal, and Angela R. Riley extensively argue in their article, “In Defense of Property,” the concept of “indigenous cultural property” expands the concept beyond its conventional orientation around individual title and control over specific entities. For them, the pursuit of expanding legal notions of property to consider stewardship in addition to ownership, as well as entire communities rather than individuals as either owners or stewards of property, could empower indigenous advocates to file stronger claims that secure authority over desired cultural properties, such as sacred lands and other religious institutions. The resolutions proposed in the Bradley and Martinez Bill, as well as the successful land returns and co-management plans discussed above, reflect this empowerment of alternative approaches to property. If the American legal and political systems transformed to consider alternative forms of claiming responsibility and control over valued entities, ones that recognized key tenets of indigenous relationships with land, it would upend a key institution in the development of the imbalanced power dynamics between the United States and its indigenous communities.

Meanwhile, the successful protection of indigenous sacred spaces will depend on the acceptance of these communities’ institutions as “religion” by the American populace and their elected officials. This returns to the introductory discussion of religion; as Lyng demonstrates, judges and other leaders in the American government continue to regard Native American practices as “spiritual,” classified outside of the behavioral and cultural category of “religion” that receives First Amendment protection.

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When he analyzed Lyng, contemporary cases, and sacred land jurisprudence at large, this observation led to Michael D. McNally to conclude that contemporary “judicial considerations of sacred land claims under RFRA ought to remember that while many contemporary Americans profess, with apparent pride, that they are ‘spiritual, not religious,’ most such sacred land claims, at least those made by Native nations, are better understood as ‘religious, not spiritual.’” More importantly, any consideration of sacred land claims, whether a court is reviewing a conflict through the lens of RFRA, or if Congress is debating specific land return legislation, should recognize that most communities view their matters as “religious, not spiritual.” Achieving this governmental awareness will require a movement to convince, in addition to current judges and politicians, the American public, since they ultimately determine who occupies those decision-making positions. Indigenous communities can only achieve effective resolutions through the American state if its institutions and its actors recognize their claims as religious matters, and thus eligible for the government accommodations that conventional religious groups across the country receive without conflict.

At the same time, the American state and its public also have to recognize that the religious claims raised by indigenous communities differ from those of other religious minorities because they represent the customs and cultural institutions that the United States sought to erase through colonization in order to form its own civil society. A lot of the religious freedom cases examined throughout this thesis, such as

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397 McNally, “From Substantial Burden on Religion to Diminished Spiritual Fulfillment,” 63-64
Sherbert and Yoder, involve individuals or communities asking for exemptions from laws or public programs. These ultimately concern the affirmation of a negative liberty, a right against government infringement or imposition of its power, that those parties possessed due to the First Amendment. Sacred land disputes concern this issue as well, yet they extend beyond the framework of exemptions. Asking for authority over sacred spaces on public lands, through land returns, co-management plans, or even suits against proposed government plans, reflects an effort to rebuke the attempts of the U.S. to destroy indigenous communities, their sovereignty, and their religions as it founded its own culture on the North American continent. Since they attach their religious and social systems to lands that the state seized, territory that once belonged only to them, advocacy for sacred lands thus entails a confrontation of the country’s settler-colonialist past and its ramifications.

If these changes can occur, it will accelerate the transformation of the United States’ relationship with indigenous communities and enable the necessary reparations to occur. In promoting extralegal measures to achieve these objectives, and thus expanding the range of possible opportunities for securing authority over sacred lands, this chapter has also attempted to expand the field of advocates and allies who could pursue this work. If these conflicts remained only matters of legal proceedings, it would limit potential actors to those with the privilege of either possessing a legal background themselves or having legal representation. However, anyone can promote legislative and other legal efforts in some capacity; working families and others can perform simple acts of calling representatives to protect sacred sites in order to further existing efforts, while full-fledged activists and
advocates can mobilize their communities and work with decision-makers to organize successful campaigns. By providing a variety of potential resolutions, this chapter has sought to present an accessible call to action that inform current work and energize others to join the fight for sacred lands. With a broad, multifaceted coalition fighting for reform across the American government’s various institutions, indigenous communities and their allies can secure the necessary authority and accommodations to preserve their sacred lands and the religious institutions based upon those spaces.
Epilogue: Standing Rock, Bears Ears, and the Creation of a Movement for Sacred Lands

Any work written in 2017 and 2018 that advocates for the expansion of extralegal action in order to preserve indigenous religions and protect sacred lands would suffer without any consideration of the recent conflicts over Lake Oahe on the Standing Rock Reservation in North Dakota and over Bears Ears National Monument in southern Utah. Both of these ongoing disputes reflect collaboration between environmentalist organizations and indigenous activists, illuminating a possible template for cooperative efforts that shift the *jus publicum* to consider collectivist views of land and deconstruct settler-colonialist institutions. Together, environmentalists and indigenous advocates can succeed by challenging notions of who composes the “public,” and thus what the “public interest” is regarding land disputes across the country. Of course, the tumultuous history of their relationship demonstrates that environmentalist campaigns have to address the settler colonialism that exists within their movement, and own complicity in past necropolitical actions against Native Americans, prior to forming multilateral movements. Nevertheless, the united fronts against DAPL and the Trump administration represent positive steps forward. By rallying behind the Standing Rock Sioux, the Bears Ears Inter-Tribal Coalition, and their conceptions of their water and land, environmentalist organizations and the broader American public can support the empowerment of indigenous communities while fighting for policies that preserve land.
A New Hope: The Coalition to Defend Standing Rock

The development of a movement around the protection of Lake Oahe and Standing Rock’s burial grounds stem from a cooperation of indigenous advocates and allied environmentalists based on centralizing indigenous perspectives in the fight to save those lands. As Appendix F explains, environmentalists have a variety of perspectives about the potential sacredness of land, yet all of them tend to see nature and the environment as distinct from human society. The bifurcation of the Earth from humanity leads to a drive to preserve land as unoccupied, a restoration of a supposed primordial nature that ignores the existence of human communities who possess indigenous claims to those spaces. As a result, environmentalists can perpetuate settler-colonialist logics of removal and erasure, creating conflicts with native inhabitants of the lands they seek to preserve.398 Even if direct confrontations do not arise, seemingly benevolent campaigns can reflect these logics. As Linda Tuhiwai Smith notes in her writings, the colonization of indigenous space extended beyond physical conquest; it stimulated the domination of Western concepts, and forms of expressing those ideas.399 In response, any movement seeking indigenous support has to address how its construction of space, and the language used to express its interpretation of this space, reinforces the suppression of native understandings and deconstruct its participation in the asymmetrical power relation.

Revisiting the protests of Standing Rock with these conceptions in mind reveals that the construction of the pipeline has represented an opportunity for

398 See “Appendix F – Settler-Colonialist Environmentalism: From Muir to Earth First!”
environmentalists and indigenous activists to coalesce around the concerns of the Standing Rock Sioux. As David Archambault II, former Chairman of the Standing Rock Sioux, stated in his essay for The New York Times, the unification of the Oceti Sakowin, the entirety of Sioux Nation, reflects the historical magnitude of the protests. For Archambault II, the campaign represented another pivotal moment of opposition against the U.S. government and its transgression of tribal sovereignty, harking back to the fights against treaty violations in the 19th century and dam construction on the Missouri River in 1958. This immediate solidarity among the Sioux reflects how the burial grounds and the Missouri River in contention, sacred to the Standing Rock Sioux, represent significant sites in the broader religion and culture of the Oceti Sakowin. However, the movement’s expansion also stemmed from the efforts of nationally-affiliated indigenous groups and environmental groups. In their letter to President Obama, signed by dozens of local and international environmental organizations, the Indigenous Environmental Network (IEN) synthesized the link between the Sioux’s concerns for sacred lands and broader concerns over environmental degradation. Evoking the potential for oil spills, they asserted that the Pipeline could contaminate the drinking water of the Sioux and further damage Sioux lands. Although the campaign expanded with the incorporation of environmental activism, it actors nevertheless preserved the centrality of the Sioux’s claims.

The successful coalition of indigenous activists and environmentalist organizations stemmed from the group’s unified claim to collective authority over the contested sites, an assertion that their conception of property represents the “public interest” and should thus inform the *jus publicum*. In her essay on the disputation of private property by the Standing Rock protests and other campaigns against pipeline construction, Jessica A. Shoemaker observes that private property rights arise from the power of the owner to exclude others from the economic use of their own entities. This emphasis on the owner and their economic pursuits, of course, neglects the impact of individual property use on their community and their surroundings. The pipeline protests over DAPL have consequently illustrated the conflict between a legal system oriented around the economic and individual use of property, and those who assert that community concerns should impact the use of private properties for a pipeline. Furthermore, when the law recognizes the communal effects of an owner’s actions, it unsatisfactorily answers the question of who should determine the public interest. While pipeline developers would argue that the government’s exercise of eminent domain to secure land for DAPL reflects an exercise of the public through its state, the protestors argue that the government does not speak for all parties affected.

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403 Shoemaker notes that property itself presents legal contradictions, since owners have to rely on state authority and public institutions to ensure their rights to exclude those parties from using their property, yet the pipeline debates reflect an even larger legal paradox. For environmentalists and tribal advocacy groups, who champion a collective view of property, they have to utilize terms of exclusion in order to prevent the state from permitting the pipeline. In order to promote a community-oriented perspective on property, they have to use the language of individualized private property. While Shoemaker takes a quick note of this occurrence, the contradictions that the legal counsel for the Standing Rock Sioux have to navigate complicates their ability to authentically express the views of their clients. Jessica A. Shoemaker, “Invited Essay: Pipeline, Protest, and Property,” in *Great Plains Research*, vol. 27, no. 2 (Fall 2017), 70, 75. On the other hand, expanding legal considerations for collective forms of property does not require an overhaul of the American legal system. As noted in the discussion of the scholarship written by Kristen Carpenter, Sonia K. Katyal, and Angela R. Riley in Chapter 5, legitimizing notions of indigenous cultural property and stewardship can improve the protections that collective property receives from the judiciary without fundamentally transforming its central institutions. See fn. 395. Nevertheless, the resistance that the Standing Rock Sioux and their allies have faced demonstrates that even these reforms will require a groundswell of public support in order to shift the *jus publicum* towards accepting systems of collective property.
by the pipeline.\footnote{Shoemaker, “Invited Essay: Pipeline, Protest, and Property,” 75-76} For those against the construction of DAPL and other pipelines, conventional approaches to property prove inadequate to account for their perspectives on land use, mandating a change in American legal and political system in order to reflect their views of the land.

Framing the dispute over DAPL through the lens of the \textit{jus publicum}, and the need to recognize the public interest in the management of properties involved in the project, aligns the conceptions of sacredness espoused by both environmentalists and indigenous activists. As Shoemaker emphasizes in her essay, pipeline disputes demonstrate that many property-owners hold non-economic views of their land; otherwise, they would ultimately sell their property to pipeline developers.\footnote{Ibid., 75} The economic approach to land reflects a materialistic relationship to land and the environment in which the owner treats their property as an intermediary to future monetary gains. The protest against DAPL, bolstered by property-owners’ assertions that their land possesses value beyond potential profit, reflects an ecocentric worldview that frames humanity in relation to a broader, sacred conception of nature, that environmentalists have championed for decades.\footnote{Thomas R. Dunlap, “Environmentalism, A Secular Faith,” in \textit{Environmental Values}, vol. 15, no. 3, Perspectives on Environmental Values: The Princeton Workshop (Cambridgeshire, UK: White Horse Press, Aug. 2006), 324-327; Bron Taylor, “Resacralizing Earth: Pagan Environmentalism and the Restoration of Turtle Island,” in \textit{American Sacred Space}, ed. David Chidester and Edward T. Linenthal (Bloomington, IN: Indiana University Press, 1995), 105-118} At the same time, the rejection of DAPL also reflects the Sioux’s assertions that the land in question, even though they do not necessarily own Lake Oahe, possesses a sacred quality that connects the tribe to their history and ancestors through religious and cultural institutions. Since the land holds value as a site of ritual and community formation,
the Sioux cannot consent to the pipeline, even if it could lead to future economic gains.\textsuperscript{407} Their collective rebuke of a profit-driven view of property thus promotes stronger connections between their respective notions of sacredness.

With a broad alternative view of property shared by both parties, they have worked together to form syncretic arguments that bolster non-materialistic views of land, forcing the legal and political system to consider their perspectives as part of the public interest. Exemplified by the doctrine of “discovery” established in\textit{Johnson v. M’Intosh}, the American legal system has conventionally codified prejudiced attitudes towards indigenous land use and civility in order to permit the violent acquisition of their territories.\textsuperscript{408} Meanwhile, indigenous claims to constitutional protections for sacred lands and corresponding religious institutions have struggled to excel in the courts, as key decisions by the Supreme Court have rebuked efforts to strengthen indigenous rights.\textsuperscript{409} In light of this history, the Sioux’s defense of Lake Oahe has utilized environmentalist concerns when explaining their religious perspective of the land. The widely circulated phrase \textit{mni wiconi}, “water of life,” became a “rallying cry” embraced by the environmental side of the movement, yet as the Sioux’s counsel notes, \textit{mni wiconi} stems from the Sioux’s religious beliefs regarding water, and bodies such as Lake Oahe, as sacred.\textsuperscript{410} In response, environmentalists have relied upon indigenous claims to religious freedom to support their own strategies within the multilateral campaign. With the anti-environmentalist agenda of the Trump administration, environmental movements can pursue another avenue of justice by

\textsuperscript{407} Shoemaker, “Invited Essay: Pipeline, Protest, and Property,” 77
\textsuperscript{408} Ibid., 76; see also fn. 56-58, 62
\textsuperscript{409} Petre, “Environmental Protection and Religious Freedom,” 164-165
\textsuperscript{410} Ibid., 171-175
working with indigenous activists and their efforts to protect sacred lands.411

Although the Trump administration has threatened the victories of the movement, the collaboration between indigenous activists and environmentalists presents a template for legitimizing their approach to property in the *jus publicum*.

In order for the continued fights against DAPL to succeed, non-native environmentalists nevertheless have to recognize the remnants of settler colonialism in their own movement and work to centralize the experiences of indigenous communities in efforts to protect lands across the United States. Following the lead of Sioux activists and other native leaders, many environmental organizations followed the language of the Standing Rock Sioux and the IEN in their own statements. Greenpeace, one of the signatories of the IEN’s letter to President Obama, released their own statement that affirmed the integration of Sioux conceptions of sacredness into their environmentalist platform, championing the “sacred power of water” in their call to protect the Missouri River.412 This evokes the Sioux conception of *mni wiconi*, affirming the previous observation of the phrase’s resonance among environmental groups.413 More importantly, the reference to water as sacred reflects an attempt to center environmental advocacy around the perspective and language of the Sioux. Deconstructing the imposition of Western conceptions of space over Lake Oahe, environmental and indigenous groups have instead promoted the Standing Rock Sioux’s religiously ecocentric views of the contested space. This has encouraged multilateral resistance towards the continuation of colonialist power

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411 Petre, “Environmental Protection and Religious Freedom,” 177
413 Petre, “Environmental Protection and Religious Freedom,” 171-175
relations over Lake Oahe and the Sioux’s homelands. Therefore, activists should view this successful aspect of the protests as a model for developing cooperative movements that, in addition to achieving shared ecocentric goals, further the deconstruction of settler-colonial language and institutions that hinder indigenous communities.

More Than Just Voice: Bears Ears and the Need for Greater Indigenous Authority in Land Management

However, the struggle to protect Bears Ears National Monument in Southern Utah demonstrates that developing the appropriate processes and coalition does not dissolve these institutions alone. Instead, these campaigns need to pursue the empowerment of indigenous leaders on par with American officials and to centralize their authority in addition to their voices in the realm of American environmental policy. For the Hopi Tribe, Navajo Nation, Pueblo of Zuni, Ute Indian Tribe, and Ute Mountain Ute Tribe, the canyons and desert lands surrounding Bears Ears, a pair of buttes in southern Utah, has been a sacred space for them to gather resources and conduct religious ceremonies since time immemorial. Members of the tribes continue to use the land for these traditional purposes, yet the specter of development harms their ability to maintain their customs. In response, activists formed Utah Diné Bikéyah (UDB) in 2010, an organization that proceeded to pursue collaboration with county-level leaders and Utah’s federal delegation on land management plans for the region. After these officials marginalized the UDB and its proposals from public comment forums, and prioritized the voices of other stake-holders, the tribes formed the Bears Ears Inter-Tribal Coalition. Backed by resolutions passed by each member
tribe, the Coalition submitted a proposal to establish Bears Ears National Monument in 2015 to President Barack Obama. Over a year later, weeks before the end of his presidency, Obama designated 1.35 million acres of the region for the National Monument, affirming the Coalition’s proposal. In the establishment of Bears Ears National Monument, President Obama also authorized the Bears Ears Commission, a group composed of representatives from each Coalition tribe to work with federal agencies as they managed the lands together. A victory for the tribes, the U.S. government granted the tribes authority over the preservation of their sacred lands.

Despite President Obama’s declaration and the subsequent establishment of the Bears Ears National Monument, the Trump administration chose to shrink the Monument. When President Obama issued his order, Utah’s federal delegation, all Republicans, announced their opposition to the land designation, arguing that it constituted a federal land seizure of property that should fall under the authority of local parties. As a candidate, Donald Trump asserted his desires to reduce national monuments, or even abolish them, so when he ascended to power, he ordered the Department of the Interior, led by Secretary Ryan Zinke, to review national monuments established after January 1st, 1996 in order to determine which monuments the administration should target. National environmentalist groups joined indigenous advocates, in the Coalition and beyond, to denounce these efforts,

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asserting that they would combat those efforts. Grouped with reductions to the nearby Grand Staircase-Escalante National Monument, the Trump administration nevertheless announced on December 4th, 2017 that it would reduce the size of Bears Ears National Monument by 85 percent. Oil, gas, mining, and ranch development fueled the Administration’s actions; documents from the Department of the Interior note that the reductions reflect the maps and suggestions that Senator Orrin Hatch’s (R-UT) office sent to the Department regarding oil and gas sources in the area.

Personal interests and biases may have influenced the Administration, yet these economic interests exemplify the influence of settler-colonialist institutions embedded in the American state; the constant pursuit of growth through resource consumption depends on continued land use and labor, even if it destroys whatever claims indigenous communities have to those spaces.

Following the peak activism surrounding Standing Rock, the legal fight to protect Bears Ears reflects the multilateral coordination between indigenous advocates and non-native allies in the environmentalist movement that can develop far-reaching campaigns, garner public support, and sway decision-makers. Since the Trump administration shrunk both Bears Ears and Grand Staircase-Escalante, two legal fronts emerged. Working with the five member tribes of the Coalition, the Native American Rights Fund (NARF) sued the Trump administration for violating

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the limitations of executive authority, arguing that the Antiquities Act of 1906 only
gave the President the power to establish National Monuments, not to reduce or
modify them. Meanwhile, Earthjustice and other conservation groups filed a law
suit against the Trump administration against its reduction of Grand Staircase-
Escalante, arguing that this effort also constituted a breach of executive authority.
Earthjustice and some of these organizations also filed another suit against the
attempt to shrink Bears Ears, stating in its press release that it was “following in the
footsteps of the Native American Tribes who have already sued the President.”
Meanwhile, thousands of activists and concerned Utahans have held rallies before and
after the proclamation. Big outdoor retailers, such as Patagonia, have even joined the
fight, raising money in support of lawsuits and engaging with the legal process
themselves. These developments reflect the formation of a loose alliance between
indigenous advocates and concerned environmental groups, as they are working
against the Trump administration’s decision through specialized pursuits. As long as
environmentalists “follow in the footsteps” of the tribes who possess traditional
claims to the land in jeopardy, these parties can build the movement necessary to
support the legal suits and pursue extralegal action that can prevent the exploitation of

Bears Ears and surrounding lands for mining, oil drilling, and other destructive activities.

On the other hand, indigenous leaders and their allies also need to consider policies and plans to prevent future presidents with the same disregard for environmental protections and native communities. The plaintiffs in the cases filed against the Trump administration could still win, as they are all in nascent stages, yet these precedents alone cannot prevent another catastrophic reduction. Hence, this necessitates a review of President Obama’s proclamation itself and possible alternatives. The executive order to protect Bears Ears, and the overall effort to create a National Monument co-managed with the tribes, did not work because the next administration could easily reverse it, which it proceeded to do. This demonstrates that since the executive branch is too volatile to provide consistent support for protecting sacred lands, future agreements should shift greater authority over those spaces to the other parties involved in these matters: the tribes. This could take the form of a land return to the tribes or the development of a co-management plan that would confer title to the tribes involved with the agreement. While President Nixon’s order to return Mt. Adams to the Yakima people in Washington state demonstrates that the President can authorize land returns to a small degree, larger pacts should fall under the auspices of Congress. This returns to the points raised in earlier discussions of the Bradley and Martinez Bills, as well as the legislative pursuits of Gonzalez and his colleagues to resolve the Black Hills land dispute: that Congress and state legislatures are the best forum for indigenous advocates and their allies to

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423 See fn. 376
secure agreements that grant greater authority to indigenous communities over sacred spaces seized from them through colonization.

Conclusion

Analyzing the campaigns to protect Standing Rock and Bears Ears through the lens of the Black Hills land dispute further affirms the central arguments made throughout this thesis. From the early explications of the Sioux’s conception of the *Paha Sapa*, the land seizure, and the history of the Black Hills land claim, it is crucial to remember that the American state did not establish its communities in the Black Hills on empty grounds. While political reforms encouraged the American government to gradually include the Sioux in its systems of *jus publicum* rather than the violent state of exception, the American state nevertheless continued to institutionalize its erasure of the indigenous societies and religious systems built around the sacred *Paha Sapa*. Within the broader settler-colonialist framework of the American state, the land claim process thus reflected an attempt to administer justice without threatening the legitimacy of its own claims to the land. At first, the means of securing its grasp on its territory shifted from the necropolitical exercises of military leaders on the frontier to those of the administrative officials and Christian missionaries on the Sioux reservations. As sensibilities shifted in the 1920’s and 1930’s, explicit necropower gave way to the formation of competing legal doctrines, as the Supreme Court sought to mitigate the destructive aftermath of past decisions without upheaving the core tenets of American sovereignty and control over indigenous lands. Interacting with these structures and the individuals empowered by them, the white lawyers of the Sioux thus pursued justice through institutions that
would never truly recognize what their clients lost: the heart of everything. Nevertheless, the Sioux never forgot about the *Paha Sapa*, nor their desire for the return of their sacred land.

The thesis then proceeded to demonstrate how, through the translation of Sioux understandings of the Black Hills land claim and momentum from contemporaneous extralegal campaigns into an effective legal strategy, the Sioux asserted that inclusion in American *jus publicum* should mandate a return of their lands. While the questions that dominated the decades-long legal battle over the land claim primarily concerned issues of “just compensation,” the Sioux turned to other provisions of the 5th Amendment and the Constitution to question Congress’ powers to abrogate treaties. The 1877 Act not only failed the *Fort Berthold* test; it violated the Constitution through its clear disregard of treaties. While legal scholars have engaged with the Sioux over these 5th Amendment concerns, less have pursued the other dominant lines of argumentation for rejecting the compensation money. When Sioux leaders assert that “the Black Hills are not for sale,” it reflects considerations beyond those privileged by *jus publicum* in its current manifestation. It revives the *Paha Sapa*, a religious institution that defies the conventions of exchange, and reverses the settler-colonialist mode of elimination that the United States pursued. Breaking the confines of typical constitutional interpretations, the Sioux’s continued fight for their land exemplifies how mere inclusion in the American legal and political systems without addressing the power inequalities developed through American colonization fails to empower indigenous communities. As the Sioux’s resistance illustrates, efforts to deconstruct the necropolitical institutions established
by the American government are the exercises of justice that can help the Sioux and other indigenous communities preserve their own religious and social systems.

These analyses suggest that the lack of protection for sacred lands under the American judicial system necessitates such explorations of new, bold approaches. As Chapter 4 observes, sacred land disputes in which the tribes evoke their religious practices fall under the auspices of First Amendment argumentation. Gonzalez and the Sioux can directly attest, due to their unsuccessful challenge of South Dakota’s management of Bear Butte in *Frank Fools Crow v. Tony Gullet*, that the courts’ approach to the sacredness of certain spaces has been fraught with misconceptions of indigenous practices, concerns over acceptable degrees of state-sanctioned accommodation, and the balance of citizens’ interests with those of the state.

Understanding these legal conflicts necessitates the re-description of two key terms: access and authority. Inspired by the work of Elizabeth Povinelli, these notions can help explicate dichotomies between indigenous claims to sacred lands and the state’s understanding of religious freedom. For tribal communities, access and authority are inseparable; in order for practitioners to physically and mentally engage the sacred realities attached to certain sites, they need authority over the management of the space. Meanwhile, the bifurcation of the Free Exercise and Establishment Clauses demonstrates that the American state considers these as separate, and occasionally conflictive rights. As a result, courts have not protected certain practices if they believed that it would signal preferential treatment for a religious group.

Re-examining the perspectives of tribes, federal and state governments, and the courts in these cases, through the lens of Gonzalez’s own argumentation, shows
that sacred land jurisprudence has failed to grapple with the differences between each party’s interpretation of access and authority in relation to sacred lands. In a multicultural society, state institutions such as the First Amendment frame discussions of religious freedom around the notion of access, whether it’s the ability to hold and express certain beliefs or the ability to perform religious practices. However, the Black Hills dispute, and the related case of *Fools Crow*, exemplifies the greater pursuit of indigenous communities in litigating sacred land disputes: they wish to possess a degree of ownership, and thus authority, over the use and treatment of the lands that they have incorporated into the religious and cultural foundation of their societies since time immemorial. Reconciling this quandary represents a crucial obstacle that the American legal and political systems must pursue in order to resolve outstanding fights over sacred spaces, such as the Black Hills, and to establish a standard of justice that Native Americans find satisfactory.

The concluding chapters thus sought to explore the development of a multifaceted movement that prioritizes political action with supplementary legal efforts to overturn prohibitive case law could increase protections for sacred lands and indigenous religions that counters the supremacy of American conceptions of property in these spaces. The discussion began with an examination of why indigenous advocates should shift their efforts from the courts to federal and state legislatures. As the interactions between Congress and the Supreme Court throughout the late 1980’s and 1990’s demonstrates, the judiciary’s institutional deficits prevent it from addressing the impact of the country’s settler-colonialist foundations and dynamics of authority outside the Constitution without upsetting the basis of its own
power. Compounded with the history of the Black Hills land claim, in which the major advancements stemmed from Congressional acts, such as the establishment of the ICC and the res judicata waiver, these arguments illustrate the ability of the legislative branch to resolve sacred land disputes more effectively than the judiciary. This conclusion was then supported by a successful case study, the return of Blue Lake to the Taos Pueblo people in 1970. This event, which served as inspiration for other tribes in their own efforts, including Sioux activists and leaders, exemplifies how tribes could orchestrate political campaigns to secure the restoration of their sovereignty over sacred lands. The possibility of expanding the scope of land return legislation, focusing on the Bradley and Martinez bills as potential templates to establish indigenously controlled lands with the aide of the National Park Service and other federal agencies to bolster the tribes’ authority over those spaces.

As the movements for the Black Hills, Blue Lake, Standing Rock, and Bears Ears address the settler-colonialist institutions that endanger indigenous customs and the environment, leaders have to advocate for replacing these harmful state apparatuses with laws, policies, and agencies that endow tribes with the authority to check the state’s transgressions in addition to determining the management of traditionally sacred lands. These include both tribal officials and those elected to the White House and Congress, who especially need to recognize the power inequalities between the United States and its indigenous communities and understand that resolving sacred land disputes will require policies and decisions that exceed the notions of securing exemptions for a religious minority. If members of federal and state governments do not wish to solve these issues, then indigenous advocates and
their allies need to run in local and federal elections for those leadership positions. With representatives in Congress and state legislatures across the country who support the resolution of sacred land disputes in manners that accommodate indigenous interests, then land returns and co-management plans could occur across the country. Any effort to address the settler-colonialist institutions and unequal power dynamics embedded in the foundation of the American state thus requires a concentrated effort to elect officials who will consider the need to grant indigenous communities greater authority over the lands that serve as central institutions in their religious systems and their societies.
Appendices

Appendix A – Justice Rehnquist’s Dissent in United States v. Sioux Nation

As stated in fn. 193 and 198, Justice William Rehnquist filed the only dissenting opinion in United States v. Sioux Nation. His central claims exemplify the legal and historical arguments utilized by critics of Sioux activism and other indigenous communities’ pursuits for justice.

On the surface, Rehnquist’s position concerns the consequences that upholding Congress’ waiver of res judicata, yet his argumentation gradually reveals his discontent with recognizing the United States’ fallibility in its seizure of the Black Hills. He argued that the case should have fallen on res judicata grounds, declaring that Congress’ waiver violated the separation of powers between the legislature and the judiciary. However, when he addressed the actual issues raised by the Sioux’s counsel and the government, he departed from legal analysis to criticize the Court’s interpretation of American history. Rather than rebuke the application of the Fort Berthold test, or advocate for Lone Wolf as the controlling case, he declared that:

“I think the Court today rejects that conclusion largely on the basis of a view of the settlement of the American West which is not universally shared. There were undoubtedly greed, cupidity, and other less-than-admirable tactics employed by the Government during the Black Hills episode in the settlement of the West, but the Indians did not lack their share of villainy either. It seems to me quite unfair to judge by the light of "revisionist" historians or the mores of another era actions that were taken under pressure of time more than a century ago.”

Furthering his argument that the Court should not have rejected the historical interpretation that the Court of Claims promoted in 1942, he concludes his dissent with a bizarre paragraph in which he advocates for the Court to not serve as an arbitor of history. On the other hand, he could not prevent himself from simultaneously issuing his own judgment of American history:

“...That there was tragedy, deception, barbarity, and virtually every other vice known to man in the three-hundred-year history of the expansion of the original thirteen Colonies into a Nation which now embraces more than three million square miles and fifty states cannot be denied. But in a court opinion, as a historical and not a legal matter, both settler and Indian are entitled to the benefit of the Biblical adjuration: ‘Judge not, that ye be not judged.’”

At first, Rehnquist’s final assertions seem ridiculous. As Edward Lazarus notes, an editorial published in the *Patterson News*, a New Jersey newspaper, chastised Rehnquist’s biblical quote, asking “whatever else is the Supreme Court for?”

However, the justice’s evocation of the Bible, particularly in a case concerning conflicts in which the U.S. sought to destroy the Sioux’s religion and proselytize state-accepted forms of Christianity, reflects a blindness to the necropolitical horrors of assimilation that defined the seizure of the Black Hills. Furthermore, this equivocating approach to history, in the highest-ranking body of the judiciary, exemplifies the permanent hurdle that Native American tribes and their counsels have to overcome in almost every case. Arguing in the court of their oppressors, they have to counter conceptions of history that purposely neglect inequalities and imbalances in power structures. Of course, this also impacts any legislative effort as well. Written to chronicle the Sioux’s attempt to establish a national monument at the site of the

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427 Lazarus, *Black Hills/White Justice*, 401
Wounded Knee Massacre, to secure reparations for relatives of those who died, and to receive an official apology from the U.S. government, Mario Gonzalez and Elizabeth Cook-Lynn’s *The Politics of Hallowed Ground* illustrates how anti-indigenous understandings of American history impede efforts to achieve critical reforms. When Gonzalez and other community leaders pursued federal legislation at the time of Wounded Knee’s 100th anniversary, prominent South Dakota politicians resisted any effort to confront the faults of the United States. Whether it was Gov. George Mickelson’s classification of Wounded Knee as a “battle” in a 1990 speech to the Senate Select Committee on Indian Affairs,428 or Sen. Tom Daschle’s deletion of the “apology” from Senate Concurrent Resolution 153 in favor of the terms “deep regret,”429 the efforts of the American government to resist indigenous understandings of past conflict reflects a broader “failure of the United States to recognize its own criminality.”430 At this thesis has attempted to demonstrate, the continued rejection of the Black Hills compensation funds and other fights over sacred lands all reflect an effort to force the U.S. to finally confront its “criminality” and rectify the institutions that damage the livelihood of indigenous communities and their culture.

**Appendix B – Black Elk**

Nicholas Black Elk and his advocacy serve two key functions in the analysis of this thesis. His testimonies on behalf of the Black Hills’ sacredness further elucidate the religious qualities of the land, and his prominence as a religious leader

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428 Gonzalez and Cook-Lynn, *The Politics of Hallowed Ground*, 67-72
429 *Ibid.*, 66, 76
430 *Ibid.*, 77
during the early 20th century demonstrates that the Sioux continued to revere *Paha Sapa*, despite the assimilationist policies that threatened their precolonial practices.\textsuperscript{431}

As a child, Black Elk had visions in which spirits led him to the top of Black Elk Peak, the tallest mountain in the *Paha Sapa*, and instructed him that the land represented the “center of the earth.” Two years later, another vision would lead him back to Black Elk Peak, during which spirits told him that he had a duty to “save” their *Paha Sapa*. While Black Elk had these visions in the early 1870’s, John G. Neihardt’s *Black Elk Speaks* would proliferate these messages across the American public.\textsuperscript{432} In his interviews with Neihardt, he emphasized the religious importance of the Black Hills. Reiterating the myth of the race between humans and animals around the *Paha Sapa*, Black Elk told Neihardt that when the *Wakinyan* spoke with Red Thunder after the race, they told him that:

“…at the place where they had the race was the heart of the earth. He said, ‘Someday your tribe will be in this land.’ It was the promised land. ‘This land is a being. Remember in the future you are to look for this land.’ I think at the present time we found it and it is the Black Hills.”\textsuperscript{433}

Black Elk’s publicized actions, in addition to his accounts in *Black Elk Speaks*, reflects the continued prominence of the Black Hills as the *Paha Sapa*. One of these actions included his demonstration of the resilience of the Sioux’s reverence for the

\textsuperscript{431} There are numerous publications that explore Black Elk’s life, his visions, and the publication of *Black Elk Speaks*. For my analysis, I will rely upon selected readings from *The Black Elk Reader*, especially Alexandra Witkin-New Holy’s “Black Elk and the Spiritual Significance of *Paha Sapa* (the Black Hills)”, R. Todd Wise’s “Speaking Through Others: *Black Elk Speaks* as Testimonial Literature,” Amanda Porterfield’s “Black Elk’s Significance in American Culture,” as well as Raymond J. DeMallie’s *The Sixth Grandfather: Black Elk’s Teachings Given to John G. Neihardt*. Introduced earlier in Chapter 1, Witkin-New Holy’s piece integrates Black Elk’s testimonies in the broader context of traditional Sioux institutions concerning the *Paha Sapa*. Meanwhile, *The Sixth Grandfather* presents a scholarly interpretation of Black Elk’s visions and Neihardt’s famous recording of them. Instead of relying upon Neihardt’s own analysis and extrapolations that he included in *Black Elk Speaks*, DeMallie made sure that *The Sixth Grandfather* reflects Black Elk’s own words and approaches to his testimonies (for DeMallie’s critique of Neihardt, see Raymond J. DeMallie, ed., *The Sixth Grandfather: Black Elk’s Teachings Given to John G. Neihardt*, (Lincoln, NE: University of Nebraska Press, 1984), 77-80). I will also refer to passages from Lazarus and Ostler who also contextualize Black Elk’s visions and work in context of the Black Hills land claim and post-1876 history of the Sioux.


land with his famous prayer on top of Mount Rushmore in 1936, an act that signaled their refusal to cede their ties to the Paha Sapa.\textsuperscript{434} It is important to note that his conception of the Sioux’s eventual return to the Paha Sapa evokes a “promised land” motif that reflects the Catholic influences on his religious perspective.\textsuperscript{435} Although his catechism introduced terminology foreign to the precolonial religious systems of his people, this syncretism should not cloud the significance of Black Elk as a symbol of the Sioux religion’s survival.\textsuperscript{436} While the Black Hills claim would falter along lines of just compensation during the 1930’s and 1940’s, his religious messages and testimonies demonstrated that the Paha Sapa remained central to the foundation of the Sioux oyate, their religion, and their culture.

Appendix C – Public Takings Jurisprudence

While the details of public takings jurisprudence diverge from the focus of the thesis, they nevertheless illustrate the lively debate in the judiciary, contemporaneous to Gonzalez’s legal efforts, over what constitutes the “public interest” in situations in

\textsuperscript{434} Ostler, The Lakotas and the Black Hills, 147-148
\textsuperscript{435} In his essay on Black Elk and his exercise of the testimonio, R. Todd Wise meditates on his unique syncretism of indigenous religion and Catholicism. Scholars have debated the degree of Black Elk’s adherence to Catholicism, setting up a strict binary between Christianity and Sioux religion. Rather than investigate the truth of Black Elk’s religious beliefs, or treat his religious identity as an “either-or” matter, Wise views the visionary through the lens of testimonio literature, comparing him to the anti-colonialist writings of Rigoberta Menchú and other indigenous authors who utilized Christianity to advocate for their communities’ cultures. By adopting the lexicon of Christianity, he could present the views of his oyate in a manner that the broader American public could understand and appreciate. This, in turn, could develop the political momentum necessary to persuade the federal government to end its oppressive policies. By approaching Black Elk as an “activist” seeking to upend Christian hegemony through its own motifs and institutions, the relationship between his Christianized language and the presentation of the Sioux’s religious views becomes more apparent. R. Todd Wise, “Speaking Through Others: Black Elk Speaks as Testimonial Literature,” in The Black Elk Reader, ed. Clyde Holler (Syracuse, NY: Syracuse University Press, 2000), 19-38.
\textsuperscript{436} Activists in the mid-twentieth century would incorporate this “symbol” into their movement. In her essay on Black Elk, Amanda Porterfield emphasizes the importance of Black Elk for American Indian Movement (AIM) activists. As discussed later on in this chapter, AIM thrived across the Sioux reservations, as the group bolstered the extralegal campaigns that tribal activists were leading. As the Sioux embraced AIM, the organization would adopt their cultural institutions in return. Due to his advocacy for Sioux religion and culture, Black Elk became a figure heralded by AIM. While his visions focused primarily on his community, his resistance to assimilation and promotion of indigenous religions enhanced the political positions of AIM, adding another front to their campaigns. Furthermore, he guided the learning of Frank Fools Crow, one of the early religious leaders of AIM, so his message could spread through the pursuits of Fools Crow in addition to the promulgation of Black Elk Speaks and other publications of his testimonies. Recognized and respected by AIM and the broader countercultural movement of the 1960’s and 1970’s, traditional Sioux religion therefore received newfound support to develop after decades of assimilationist onslaught through the work of Black Elk. Amanda Porterfield, “Black Elk’s Significance in American Culture,” in The Black Elk Reader, ed. Clyde Holler (Syracuse, NY: Syracuse University Press, 2000), 42-43.
which the government exercises eminent domain. Recognizing that leaders in the courts have not agreed on a uniform conception of “public takings,” or the authority of federal and state legislatures to determine who constitutes the public, Gonzalez tapped into these issues in order to cast greater doubt on the legality of the government’s seizure of the Black Hills. The following explication of public takings jurisprudence thus demonstrates the strength of Gonzalez’s argumentation in utilizing broader discussions concerning eminent domain to justify his approach to “public interest” and the government’s power to seize lands on behalf of the American public, whoever that may be.

Questions concerning the public takings clause in the Fifth Amendment arose in the late 1970’s and early 1980’s as cases began to revolve around the role of the public interest in determining whether the government had to compensate private individuals for their lost property. As Justice William J. Brennan Jr. wrote on behalf of the Court in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), a case concerning the historical designation of Grand Central Terminal as a “landmark,” the Supreme Court recognized that it had previously “been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.”\(^{437}\) While the Court finally established a modern conception of governmental taking in *Penn Central*, it would later struggle to determine the “public use” required to authorize takings in the

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\(^{437}\) 438 U.S. 104 (1978), at 438 U.S. 124
first place. In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), the Court ruled that the Hawaii Housing Authority’s land condemnation scheme authorized by Hawaii’s Land Reform Act of 1967 adhered to the Public Use clause because the state’s method of breaking up its land oligopolies was “rationally related to a conceivable public use.” This effectively established the standard that states’ actions have to reflect reasonable attempts to promote a collective pursuit or benefit.

However, the Court would soon constrict the parameters of acceptable legislative pursuits. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the body decided that a public access easement issued by the California Coastal Commission to the home owners of a house located between two public beaches signified a taking that required just compensation in return. Writing on behalf of the Court, Justice Antonin Scalia raised the specter that the Commission needed to meet a standard beyond rationality, arguing that “the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was.” The Court advanced this retreat from the rationality standard in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), declaring that the South Carolina “must do more than proffer the legislature's declaration” in order to demonstrate to the Court that it did not need to pay the petitioner just compensation.

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439 467 U.S. 229 (1984), at 467 U.S. 241
440 Kommers, Finn, and Jacobsohn, eds., *American Constitutional Law*, 568-569
442 505 U.S. 1003 (1992), at 505 U.S. 1031; Kommers, Finn, and Jacobsohn, eds., *American Constitutional Law*, 569
effort to curtail federal and state legislatures’ powers of eminent domain by questioning the connection between legislative actions and the purported public use. While the Court had not engaged with the difficulty of defining the latter term yet, it nevertheless established the grounds to approach that quandary by scrutinizing the claims to public use that states had declared.

These debates coalesced in *Kelo v. City of New London*, 545 U.S. 469 (2005), a case in which a divided Court finally addressed the terminology of “public use” in order to determine whether the government could exercise eminent domain in order to promote collective economic projects. The City of New London sought to condemn over a hundred private homes in order to construct a privately-owned shopping and residential center along the city’s waterfront, a project that the city asserted would produce economic stimulus for the whole community. In this case, the challengers asserted that the act itself was unconstitutional because the city’s efforts, involving the forced transfer of private property from one group of owners to another, did not qualify as a “public use.” In a 5-4 decision, the Court ruled in favor of the City, arguing that the city’s pursuit of economic development signified a public use that could authorize the condemnation of the New London homes in favor of a new waterfront complex. Beginning the Opinion of the Court, Justice John Paul Stevens broadly states that:

> “Two polar propositions are perfectly clear. On the one hand, it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future ‘use by the public’ is the
purpose of the taking…Neither of these propositions, however, determines the disposition of this case. 443

Instead, Stevens focuses on “whether the City’s development serves a ‘public use.’” This requires a definition of “public use,” which Stevens broadly presents as an evolving concept that shifts according to the populace’s needs:

“Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances. Our earliest cases in particular embodied a strong theme of federalism, emphasizing the "great respect" that we owe to state legislatures and state courts in discerning local public needs. See Hairston v. Danville & Western R. Co., 208 U. S. 598, 606-607 (1908) (noting that these needs were likely to vary depending on a State's "resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people"). For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.” 445

Turning his attention to New London’s actions, Stevens argued that the City “is entitled to our deference,” as they sought “to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts.” 446 Since the City legislatively developed a plan that they believed would improve the city, the condemnation of the waterfront homes satisfied the conception of “public use” that the majority of the Court’s justices held. Furthermore, Stevens’ exercise of “deference” to the legislature reflects the

443 545 U.S. 469 (2005), at 545 U.S. 477; Kommers, Finn, and Jacobsohn, eds., American Constitutional Law, 570, 604
444 Ibid., at 545 U.S. 480; Ibid., 570, 605
445 Ibid., at 545 U.S. 482-483; Ibid., 570, 605
446 Ibid., at 545 U.S. 483-484; Ibid., 570, 605
majority’s hesitancy to infringe on the legislature’s role of determining the needs and desires of the public.

Other justices diverged from Stevens at this juncture. Although he signed onto Stevens’ majority opinion, Justice Anthony Kennedy wrote a concurring opinion to emphasize that “a court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.” In her dissent, Justice Sandra Day O’Connor argued that the determination of “public use” is not solely a legislative process, as “the police power [of the legislature] and ‘public use’ cannot always be equated.” Otherwise, “citizens with disproportionate influence and power in the political process, including large corporations and development firms,” could use their might to deprive poorer, less powerful communities of their property in favor of their own projects. The debate in Kelo thus demonstrates the quandaries of judicial supremacy, the Courts’ relationship with federal and state legislatures, and the power of determining “public use” that Gonzalez would have to navigate in order to assert his argument that the Court could rule the 1877 Act as unconstitutional based on the takings clause.

Evoking the “public takings clause” thus does not represent a far-fetched effort to shift the debate in the Black Hills land dispute. Instead, Gonzalez’s efforts to

447 545 U.S. 469 (2005), at 545 U.S. 491; Kommers, Finn, and Jacobsohn, eds., American Constitutional Law, 570, 606
448 Ibid., at 545 U.S. 502-505; Ibid., 570, 606
raise the issue of “public takings” reflects an attempt, grounded in legal discourse, to problematize the notion of the public at the time of the taking. Forcing the courts to determine whether the *jus publicum* and the “public interest” that governed the transfer of the Black Hills to private landowners included the Sioux, he utilizes the subtle language in the Fifth Amendment in order to present a clear rationale for voiding the 1877 Act. While the latter cases of *Lucas* and *Kelo* were decided after the peak of Gonzalez’s legal argumentation of the case, the multi-decade line of argumentation surrounding “public use” nevertheless demonstrates that the pursuit of contesting the 1877 Act on these grounds represents a viable way to condemn the legislation as unconstitutional.

Appendix D – The Development of Accommodationist Understandings of the Establishment Clause

Any discussion of the Establishment Clause should recognize that the courts in the 20th century have acknowledged that the judiciary can permit certain degrees of governmental “accommodation” of religious activity. While these cases do not concern indigenous communities or their religious systems, the development of this line of argumentation undermines Justice O’Connor’s assertions in *Lyng* that the Court cannot allow any sign of federal support for a group to practice their religions.

The development of “accommodationist” interpretations of the Establishment Clause arose in the mid-twentieth century with cases such as *Zorach vs. Clauson*, 343 U.S. 306 (1952). In *Zorach*, the Court had to determine whether New York City could permit public school students to leave grounds during school hours to receive instruction at religious centers. The case mirrored *McCollum v. Board of Education*,
333 U.S. 203 (1948), in which the Court determined that a similar program violated the Establishment Clause, as the promotion of religious education with publicly-funded resources violated the “wall of separation” established in *Everson v. Board of Education*, 330 U.S. 1 (1947). However, *Zorach* differed from *McCollum* in two important ways. First, the program in question mandated off-campus instruction and thus did not concern the use of public resources for religious education. Second, *Zorach* arose in a different political climate than *McCollum*. In the 1950’s, animosity towards the atheistic Soviet Union led the United States to distinguish itself from its rival by emphasizing its religiosity through its civil institutions. This surge in religious patriotism swayed Justice William Douglas, the author of the majority opinion, to defend the Court’s 6-3 decision to uphold New York’s program by declaring that “we,” the American people, “are a religious people whose institutions presuppose a Supreme Being.” Therefore, “when the state encourages religious instruction or cooperates with religious authorities…it follows the best of our traditions” because it “then respects the religious nature of our people and accommodates the public service to their spiritual needs.” This sudden advent of accommodation as a contrast to a strict “wall of separation” arose as a fearful reaction towards the notion of a non-religious civil society.

The debate concerning accommodation would dominate later rulings of the Court and obfuscate the application of the Establishment Clause during the late 20th century.

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452 343 U.S. 306 (1952), at 343 U.S. 313-314; McConnell, *Religion and the Constitution*, 796
century. The contrasting decisions in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *County of Allegheny vs. American Civil Liberties Union*, 492 U.S. 573 (1989) highlight the Court’s confusing views on accommodation. In *Lemon*, a case concerning a Rhode Island program that allocated public funds to benefit teachers at religious schools, the Court struck the measure down. Writing the opinion of the Court, Chief Justice Warren Burger formulated a three-part “test” as a new standard for Establishment Clause cases: “First, the statute must have a secular legislative purpose; second its principal or primary effect must be one that neither advances nor inhibits religion…; finally, the statute must not foster an excessive government entanglement with religion.”\(^{453}\) By emphasizing “secular” policy-making instead of active government “entanglement,” the *Lemon* test achieves an appropriate degree of separation without completely dividing religion and civil society. However, critics argue that its ambiguous nature causes more problems of interpretation. They assert that a “Catch-22” arises from the test: in order to determine the effects of a policy, a government has to become entangled in religion.\(^{454}\) While some justices have viewed the *Lemon* test as a clarification of the Establishment Clause, others have argued that it only exacerbates a conflict between religion and government.

In opposition to the *Lemon* test, “endorsement” arose as an alternative standard through Justice Sandra O’Connor’s concurring opinion on *Lynch*. In the 1984 case, the Court ruled that a nativity scene centrally located in the city center of Pawtucket, Rhode Island, did not violate the Establishment Clause, as it adhered to

\(^{453}\) 403 U.S. 602 (1971), at 403 U.S. 612-613; Long, The Church-State Debate, 33-34
\(^{454}\) McConnell, Religion and the Constitution, 471-472
the secular customs of the holiday season.\textsuperscript{455} In her concurring opinion, O’Connor sought to derive the same conclusion through a new test for “endorsement.” Looking to condense the “prongs” of the \textit{Lemon} test, she asserts that violations arise from either “excessive entanglement” or from a “government endorsement or disapproval of religion.”\textsuperscript{456} Despite its initial purpose as a simplification of the \textit{Lemon} test, it quickly became a competing test.\textsuperscript{457} Five years later, in \textit{Allegheny}, the Court rendered Pittsburgh’s display of a nativity scene on municipal property during the holiday season unconstitutional while allowing an accompanying menorah to remain in the public space. In a splintered series of opinions, the Justices all used the endorsement standard to determine whether each decoration endorsed a specific religion. While the nativity scene clearly promoted Catholicism, the Court saw the menorah as a symbol for the holiday season in general.\textsuperscript{458} As shown by the inconsistency within the \textit{Allegheny} ruling, the test of endorsement suffers from its own ambiguity. Both decorations were clearly religious, yet one was deemed a symbol of heritage and celebration while the other was correctly ruled as an endorsement. Furthermore, despite the differences in \textit{Lynch} and \textit{Allegheny}, the Court should have developed a consistent approach to holiday scenes on municipal property. Instead, in its attempt to accommodate religiosity, the Court created confusing precedents for how governments should regard religious iconography.

Despite the rise of competing standards, these decisions nevertheless codify accommodation as an acceptable approach to religious activity. Even though the

\textsuperscript{456} Ibid., at 465 U.S. 687-688; \textit{Ibid.}, 709-710
\textsuperscript{458} McConnell, \textit{Religion and the Constitution}, 715-716
Establishment Clause mandates separation between religion and the state, the judiciary has determined that federal, state, and local governments can facilitate religious communities’ practices. This recognition of accommodation in Establishment Clause jurisprudence therefore raises a specter of protection for indigenous communities as they seek to secure protections for their sacred lands. If the government provides support for other religious groups to practice their religions and to preserve their institutions, tribes have even more reason to pursue relief under the First Amendment.

Appendix E – Sacred Land Jurisprudence Before *Lyng*

As discussed in Chapter 4, *Lyng* encapsulated the central tenets of sacred land jurisprudence under the First Amendment. However, the viewpoints expressed by the Supreme Court in *Lyng* follow the conclusions drawn by lower courts in cases dating back to the late 1970’s and early 1980’s. While *Lyng* synthesized the arguments made by judges in these cases, reviewing their rationales further exemplifies the dynamics of authority underlying the rejection of tribal claims across the United States.

In *Sequoyah v. Tennessee Valley Authority*, 480 F. Supp. 608 (E.D. Tenn. 1979), 620 F.2d 1159 (1980), the federal courts authorized the Tennessee Valley Authority’s construction of the Tellico Dam despite the destruction of sites along the Little Tennessee River that the Eastern Band of Cherokee Indians and the United Ketooah Band of Cherokees revere as sacred. Although these spaces included Chota, “the Rome and Jerusalem of the Cherokees,”459 the judges that heard the cases ruled in their respective opinions that the Cherokees could not override the state’s interests

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with their religious claims. As Judge Robert L. Taylor Jr. wrote on behalf of the U.S. District Court for the Eastern District of Tennessee, “the free exercise clause is not a license in itself to enter property, government-owned or otherwise, to which religious practitioners have no other legal right of access. Since plaintiffs claim no other legal property interest in the land in question…a free exercise claim is not stated here.” Although Taylor did not explicitly evoke the Establishment Clause, his assertion that the Cherokees’ lack of a claim to owning the property reflects his view that the Cherokees sought an unacceptable degree of authority over the management of land. The Cherokees did not raise the specter of ownership because they believed that the Free Exercise Clause concerned the ability to engage with their religious institutions, yet the relief they requested would have impeded on the state’s project. The court thus erased their sacred space, and threatened the survival of the plaintiff’s religion, in order to preserve the power of the state to construct its dam.

In a similar case concerning the destruction of sacred sites due to the construction of a federally-approved dam and consequential flooding, the federal courts ruled in Badoni v. Higginson, 455 F. Supp. 641 (D. Utah 1977), 638 F. 2d 172 (1980) that the inundation of land surrounding the base of Rainbow Bridge, a sacred place for the Navajo people, did not violate the First Amendment. In their initial suit to the District Court of Utah, the Navajos only asked the judges to mandate that the government has to “operate” its facilities in a manner that ensured access to indigenous sacred sites, and limited further damage from tourism and other activities in the area. However, Judge Aldon J. Anderson ruled on behalf of the District Court

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460 Brown, Religion, Law, and the Land, 30, 9-38
that because the Navajo did not raise any tribal claims to ownership over the land, they could not challenge the activities based on First Amendment grounds. Furthermore, Anderson assailed the Navajo’s religious claims as unsubstantial, asserting that they did not reflect the gravity necessary to invoke the Sherbert test.\footnote{Brown, Religion, Law, and the Land, 39-50} When the Navajo appealed, the Tenth Circuit Court sided with the District Court. Although they rebuked Anderson for his failure to properly consider the religious claims that the Navajo presented, they contradicted their own critique by basing their justification of the government’s plans solely on the compelling nature of its interests. Within this failure to properly follow the Sherbert test, the Circuit Court introduced the argument that any accommodations of the Navajo beyond current standards would violate the Establishment Clause because it would create a “government-managed shrine” for a religious community.\footnote{Ibid., 50-60} Advancing the nascent jurisprudence introduced in the concomitant case of Sequoyah, the courts in Badoni struggled to understand the claims that the Navajo presented. Instead, they interpreted the Navajos’ complaints through the lens of authority, leading to the ultimate citation of the Establishment Clause in order to dismiss their pursuit of protections under the Free Exercise Clause.

A few years later, the federal courts once again denied First Amendment protections to sacred lands. In Wilson v. Block, 708 F. 2d 735 (1983), the D.C. Circuit Court decided to dismiss an appeal filed by the Hopi and the Navajo concerning a District Court opinion that allowed the expansion of a ski area located on the San Francisco Peaks in the Coconino National Forest, a sacred place for these tribes. When the tribes filed their initial suit, the District Court of D.C. ruled that the
government’s facilitation of the ski area’s development did not impede access to the Peaks, despite the plaintiffs’ claims that the alterations would destroy the sacred nature of the space and thus impact their practices. Furthermore, the District Court determined that, contrary to their actual complaints, the plaintiffs were demanding the restriction of all public access in order to preserve their religious activities. This led them to conclude that any accommodation of the Hopi and the Navajo would violate the Establishment Clause. In their appeal to the D.C. Circuit Court, the plaintiffs countered this conclusion by arguing that the District Court’s understanding of the Establishment Clause intimates that any effort to protect religious communities under the Free Exercise Clause would cause an unconstitutional establishment of state-sponsored religion, an interpretation that violates prior standards set by the Supreme Court in cases such as Sherbert and Yoder. Nevertheless, the Circuit Court ruled against the tribes, asserting that the land only served as the venue for their practices, not as a religious institution in itself, and thus only fell under the authority of its land owners, the U.S. government. Barring any consideration of the plaintiffs’ conceptions of the land and its sacred reality under the Free Exercise Clause, the issue became one of authority even though they never sought ownership over the land.

Appendix F – Settler-Colonialist Environmentalism: From Muir to Earth First!

A history of the relationship between American environmentalism and indigenous communities should serve as a useful addendum to the discussion in the epilogue concerning settler-colonialist institutions in American environmentalism.

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463 Brown, Religion, Law, and the Land, 61-76
464 Ibid., 83-87
465 Ibid., 87-91
In the United States, the origins of environmentalism reflected a Christianized view of land. As noted by Vine Deloria Jr. and Lynn White in their respective works on Christian perspectives regarding land, as well as the introduction of this thesis, colonialist interpretations of the Old Testament have posited an anthropocentric approach, one that places the value of land in its potential utility for human development. While this represents one of many understandings of the Bible and its guidance on land use, colonialist leaders utilized this hermeneutic to develop systems of property across early American settlements, codifying the distinction of the person as separate from the natural world. This interpretation of nature in turn gave rise to the “wilderness,” a European notion that untouched landscapes possess a fantastical quality outside of human society. While “wilderness” possessed connotations of danger during its conception in medieval Europe, later texts and writings, such as John Locke’s *Second Treatise on Government*, led early Americans to understand wilderness as spaces to utilize for societal development.466 For John Muir and early conservationists, wilderness could serve spiritual development for American citizens; in private correspondences to his friends, he asserted that the wilderness symbolized the idyllic world extolled in the Bible, a sacred place that people could seek in order to pursue spiritual fulfillment.467 While wilderness areas should be empty of residents, they can serve as the venue for the spiritual pursuits of those who venture off for sojourns away from mainstream society. Muir and his contemporaries thus crafted an anthropocentric understanding of sacred space. For them, wilderness

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466 Porter, *Native American Environmentalism*, 5-10
467 Ibid., 7-8
represented a place for ritualistic endeavors that would enrich society, a means to a spiritually-inspired end.

While early conservationists developed their understandings of wilderness from a position influenced by certain biblical interpretations, American society ignored indigenous approaches as settlements and conflict drove Native Americans off of their lands. Although a variety of attitudes towards land exist across the hundreds of tribes in the modern-day United States, many indigenous communities reject the notion of “wilderness” and the dichotomy of humanity and nature that is presupposes. Instead, they promote a variety of perspectives that generally treat land as a central factor in a tribe’s identity.468 As Vine Deloria Jr. notes in his analysis, this approach to land and the environmental employs the broader notion that society should be organized around space. Compared to Christian-influenced communities, which frame their social systems around time and temporal history, this focus on spatial orientation thus places greater importance on places in collective institutions, such as religion.469 However, as discussed in the introduction, European colonialists found that this perspective conflicted with their own understandings of land and property, deeming that it could not coexist with the institutions they sought to construct.470 One could argue that, in addition to broadly generalizing a vast number of practices across indigenous North America, Deloria Jr. constructs a strict divide between the two worldviews, one that does not invite reconciliation. Unlike the glorified conception of “wilderness,” the American state consequently deemed

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468 Porter, Native American Environmentalism, 30-35
469 Deloria Jr., God is Red, 32
470 See fn. 61-62
indigenous claims to land to exist outside of the accepted paradigm of their society, and thus a target for erasure.

Consequently, the first conservationist campaigns exemplified the necropolitical enforcement of the state’s settler-colonialist pursuits, removing indigenous communities from their lands and stripping those spaces of their native contexts. For Muir and his peers, the establishment of national parks reflected an American rejection of European approaches, as they sought to make areas of wilderness accessible to all social classes, not just the wealthy. However, the desire to construct these spaces as separate from the American perception of humanity, and unused according to American conceptions of land development, involved the separation of indigenous people from their homelands. The establishment of Yosemite exemplifies the paradox of early American conservationism. When Frederick Law Olmsted travelled to Yosemite Valley in 1864, he sought to design a park that captured the essence of a place untouched by humanity. This neglected the thousands of years of human interaction with the area, as the Miwok and other groups had physically shaped the region for generations. For these tribes, they depended on the Valley for its resources, and even developed religious and cultural institutions that incorporated the land into collective rituals. Nevertheless, early conservationists encouraged the U.S. government to expel the native communities that lived in Yosemite Valley in order to cultivate a beautiful wilderness that satisfied American audiences’ desires for awe and wonder. The transformation of Yosemite from a home for indigenous peoples into a curated experience for American society.

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471 Porter, Native American Environmentalism, 10-12
472 Porter, Native American Environmentalism, 13-17
exemplified the conflict between early American views of land use and “wilderness” versus indigenous approaches. For these conservationists, the “wilderness” they sought to preserve excluded the people that traditionally lived on the land.

After the nineteenth century, the early conservation movement encouraged the formation of “pagan environmentalism,” which would transform the worldviews at the foundation of environmental advocacy. Despite his Christian upbringing and the anthropocentrism that informed his notion of “wilderness,” Muir’s writings concomitantly encouraged the development of what Bron Taylor calls “pagan environmentalism,” as he thought that all features of the natural world around him possessed supernatural qualities. He believed that the flora and undomesticated fauna of the wilderness could communicate to humans, and he saw the natural environment as a place for meditation and spiritual self-introspection. While his Christian values appealed to his direct audience, his pantheistic and animistic views established a basis for pagan environmentalists to encourage American society to protect wilderness areas and to venture into the natural world as he did. After the proliferation of Edward Abbey’s writings and Gary Snyder’s *Turtle Island*, which promoted the notion of the wilderness as a supernatural entity warranting protection, organizations such as Earth First! formulated “ecocentric” approaches to environmental advocacy that recognized humanity as only another facet of the broader environment. Through various “rituals,” Earth First! and other pagan environmentalists drew upon pantheistic and animistic understandings of the Earth in order to honor the planet and its natural features as deified entities, respect nature’s authority over humanity, and

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473 Taylor, “Resacralizing Earth,” 100-104
474 Ibid., 105-115
combat any development that encouraged humanity to exceed its small role in the universal order. As these religious forms of inspiration and reverence for land shifted, they furthered the environmentalist understanding of humanity’s relationship to nature and the world around them.

Although many would argue that environmentalism does not mandate belief in deities or spirits that exist throughout nature, its ecocentrism continues the valuation of the natural world as a network that operates beyond humanity. As Thomas R. Dunlap emphasizes in “Environmentalism, A Secular Faith,” the adoption of scientific language to explicate environmental degradation has bolstered the movement in a scientistic society that grants science authority in discussions of public policy. However, environmentalism’s religious roots still influence the fervor and passion of contemporary activists. This has been exemplified by the embrace of ecocentrism after the 1970’s and 1980’s, a time during which advocates re-evaluated their campaigns’ core values in light of recent political failures. Recognizing their duty in preserving natural cycles beyond the realm of humanity, environmentalists began to frame their movement as a call for action outside of politics, one that required transforming society’s relationship with nature and the behavioral norms it espouses. While the reverence for “wilderness” shifted towards exalting untouched natural systems, rather than their benefit for humanity, the presupposition of nature’s authority over human life nevertheless promulgates the awe that John Muir, one of the first leaders of the American conservationist movement, reflected through his own

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475 Taylor, “Resacralizing Earth,” 115-118
476 Dunlap, “Environmentalism, A Secular Faith,” 322
477 Ibid., 324-326
calls for spiritual endeavors in nature. Many environmentalists may not share the pantheistic and animistic beliefs of their peers in Earth First! and other groups, yet the ecocentric world view that they all share nevertheless advances the imagination of nature as sacred, and thus worthy of protection.

Nevertheless, the promulgation of pagan beliefs, formation of scientific understanding of ecocentrism, and overall transformation of environmentalism do not ameliorate the settler-colonialist erasure that conditioned these developments. American environmentalists cannot pursue the preservation of wilderness because the country’s lands have never existed as wilderness, areas void of human activity. Indigenous communities have lived here for thousands of years and have shaped the environment in the spaces that they inhabited prior to American colonization. Although modern-day forms of conservation and reform do not include explicit removal of tribes from their territory, like the formation of Yosemite, they nevertheless build upon the logic of elimination that has excluded indigenous communities from the considerations of environmentalists in the United States.

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478 Dunlap, “Environmentalism, A Secular Faith,” 327
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