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“THUS IN THE BEGINNING ALL THE WORLD WAS AMERICA”:¹ THE EFFECTS OF ANTI-PROTEST LEGISLATION AND AN AMERICAN CONQUEST CULTURE IN NATIVE SACRED SITES CASES

*Elizabeth Hampton**

I. Introduction

The United States remains the global leader for energy and raw materials pipeline networks, maintaining over 2.6 million miles of liquid, gas transmission, and gas distribution pipelines.² Though economically lucrative, the industry is not without controversy. Since time immemorial, the energy sector has received harsh criticism for the environmental impact of these pipeline networks and their proximity to communities and homes in the United States. More recently, however, protests have erupted against pipeline construction causing the desecration of numerous tribal religious and sacred sites. Construction resulting in such defilement has caused national opposition to the energy industry’s actions and support for the affected Native American tribes.

In response to these protests, the United States and numerous state governments have introduced legislation criminalizing damage to, and even merely an attempt or intent to interfere with, pipeline construction and operation. Most recently, Texas Governor Greg Abbott signed the Critical Infrastructure Protection Act into law in June 2019.³ The Act charges a felony against an individual who damages property or interferes with the operations of critical infrastructure such as pipelines, dams, and petrochemical plants.⁴ Proponents of the Texas Act cite instances of arson and gun violence at pipeline facilities to show the alleged need for this law.⁵

1. JOHN LOCKE, TWO TREATISES OF GOVERNMENT bk. II, ch. 5, § 49 (1690), <http://press-pubs.uchicago.edu/founders/documents/v1ch16s3.html>.

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2. *General Pipeline FAQs*, DEP’T OF TRANSP.: PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., <https://www.phmsa.dot.gov/faqs/general-pipeline-faqs> (last visited Nov. 19, 2019).

3. *See* H.B. 3557, 86th Leg., Reg. Sess. (Tex. 2019).

4. *See id.* § 2.

5. Audiovisual: Testimony of Al Philippus, Public Hearing on H.B. 3557 Before the Judiciary & Civil Jurisprudence Comm., Tex. H.R. 86th Leg. Sess. (Mar. 25, 2019) (on file with author).

Additionally, a new U.S. Department of Transportation proposal seeks to broaden the type of energy projects protected, as well as the activities subject to criminal prosecution, under existing federal law.⁶ On the surface, such legislation seems to protect energy and raw materials infrastructure, but a closer look into the legislative history reveals the laws' blatant objective of preventing pipeline justice movements from challenging energy use and facility construction.

The growing body of pro-pipeline legislation acts as a fear tactic against groups with grievances similar to those of the Standing Rock Sioux Indian Reservation.⁷ The Standing Rock Reservation is home to the Standing Rock Sioux Tribe, which has actively opposed the Dakota Access Pipeline's construction from its proposal in 2014 until its halted development in September 2016.⁸ The Tribe opposed the project because of the government's disregard for the pipeline's proposed route; though the line would travel underground through public land one-half of a mile from the reservation's border, it would cross through the Tribe's water source and a variety of its sacred sites.⁹ While the Standing Rock Tribe does not have legal title to the land, the sites along the pipeline's path of construction contain sacramental burial grounds and other areas of religious and cultural significance.¹⁰ Surrounding the reservation, protests erupted as a result of the United States' disrespect for these sites,¹¹ which ultimately gave rise to North Dakota initiating litigation against the federal government for its failure to contain the protests and the participants' presence on federal, state, and private property.¹²

State legislation introduced after the Standing Rock protests targeted tribal communities and discouraged them from exercising their rights under the First Amendment and American property law. But the United States' acquiescence to actions that "legitimize[] the conquest and colonization of

6. Keith Goldberg, *DOT Plan Would Lower Criminal Boom on Pipeline Protests*, LAW360 (June 3, 2019, 4:21 PM), <https://www.law360.com/articles/1165206/dot-plan-would-lower-criminal-boom-on-pipeline-protests>.

7. Naveena Sadasivam, *Mess with a Texas Pipeline Now and You Could End Up a Felon*, GRIST MAG. (June 17, 2019), <https://grist.org/article/mess-with-a-texas-pipeline-now-and-you-could-end-up-a-felon> [hereinafter Sadasivam, *Texas Pipeline*].

8. *History*, STAND WITH STANDING ROCK, <https://standwithstandingrock.net/history/> (last visited Sept. 19, 2019) [hereinafter *Standing Rock History*].

9. *Id.*

10. *Id.*

11. *See id.*

12. Complaint at 1, *North Dakota v. United States*, No. 1:19-cv-00150-DLH-CRH (D.N.D. July 18, 2019).

Native lands” dates back to the Supreme Court’s decision in *Johnson v. M’Intosh*.¹³ Applying the discovery doctrine,¹⁴ the *Johnson* Court “redefined indigenous lands as an object to be conquered and exploited” rather than preserved and protected.¹⁵ *Johnson* created a judicial framework that overrides tribal property rights and discourages tribal opposition to the taking of tribal land. Though a site on federal land may have historical and cultural value to a tribe, numerous courts will not afford the site protection under the First Amendment’s speech, assembly, and exercise of religion provisions unless the land is sufficiently central to the tribe’s religion.¹⁶ Further, government activities that destroy parts of tribal religion, such as building roads through tribal ceremonial sites, are permissible so long as they do not coerce tribal members into acting contrary to their religious beliefs.¹⁷

Historically, Indian nations have been unsuccessful in defending against government action absent a showing of fee simple title to the land holding their sacred sites. Lack of precedent in favor of native peoples, as well as the American conquest culture created in *Johnson*, has led to an emerging body of state and federal anti-protest legislation. The broad language of anti-protest laws may seem to apply universally; in reality, the laws serve as a strong message to individuals to stay quiet amidst intrusion on sacred, culturally significant land. The Standing Rock crisis poses a unique and unprecedented opportunity to combat the *Johnson* framework.¹⁸ Without strong advocacy against this legislation, tribal acquiescence to government actions may become the new norm.

This Comment serves a dual purpose. First, this analysis is a message to tribal communities that they are entitled—and encouraged by many

13. Mary Kathryn Nagle, *Environmental Justice and Tribal Sovereignty: Lessons from Standing Rock*, 127 YALE L.J. FORUM 667, 669 (2018); see also *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

14. The Doctrine of Discovery follows that European or Christian nations that discover new lands gain governmental and property rights to the land in spite of existing native ownership, occupation, and use of the land. This Doctrine entitles unilateral transfer of native rights over the land to the European or Christian discoverer absent tribal consent. See *Johnson*, 21 U.S. (8 Wheat.) 543.

15. Nagle, *supra* note 13, at 669.

16. See *Sequoyah v. Tenn. Valley Auth.*, 620 F.2d 1159 (6th Cir. 1980); see also *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983); *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988).

17. See Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1081–82 (2005).

18. See Nagle, *supra* note 13, at 676–78.

Americans—to continue their fight against the wrongdoings of federal and state governments. This entitlement is supported by the First Amendment and theories of property law that afford non-owner rights to the use of federal land. Second, this Comment discusses current constitutional violations by state governments and warns scholars and lawmakers alike of the effects of an American culture of conquest and discrimination created by anti-protest legislation.

Part I broadly introduces the Standing Rock crisis and the plight imposed by emerging anti-protest legislation. Part II illustrates the Standing Rock Sioux Tribe movement and litigation resulting from the protests. Part III of this analysis focuses on legislation that successfully silences the voices of Americans and Native American communities opposing unjust pipeline construction. In Part IV, this text discusses the free speech, assembly, and exercise of religion provisions of the First Amendment in relation to pro-pipeline legislation and past tribal claims against the government. Part V introduces property law precedent in the sacred site context and discusses the differences between Western and native property ideals, concluding that a realistic view of American property law affords tribes non-owner rights to the use of their sacred lands. In Part VI, this analysis concludes by summarizing the rights of tribes opposed to the government actions preventing them from protesting and fighting for their sacred sites.

II. The Standing Rock Protests and Subsequent Litigation

Controversy within the Standing Rock Sioux Tribe began when the U.S. Army Corps of Engineers chose Energy Transfer Partners to begin construction on the Dakota Access Pipeline.¹⁹ The Army Corps considered two pipeline routes: the first, a northern route surrounding the city of Bismarck, North Dakota; and the second, a southern route nearing the border of the Sioux Territory and crossing through various sites of cultural significance to the Tribe.²⁰ Both proposed routes crossed under the Missouri River, but the route closer to the Sioux Reservation passed under Lake Oahe, the Standing Rock Tribe's primary source of drinking water.²¹ The Army Corps ultimately chose the second, southernmost route because of

19. *Treaties Still Matter: The Dakota Access Pipeline*, SMITHSONIAN NAT'L MUSEUM OF THE AM. INDIAN, <https://americanindian.si.edu/nk360/plains-treaties/dapl> (last visited Sept. 23, 2019).

20. *Standing Rock History*, *supra* note 8; *see also* *Treaties Still Matter: The Dakota Access Pipeline*, *supra* note 19.

21. *Treaties Still Matter: The Dakota Access Pipeline*, *supra* note 19.

concerns that the northern route through Bismarck could jeopardize the city's drinking water.²²

The chosen route shields Bismarck residents from danger and passes the risk of contaminated water to the Standing Rock Tribe. Pipeline officials assured the Tribe that extraordinary measures were being taken to safeguard against disaster.²³ But the pipeline's opponents note that even the safest pipelines could leak, and that a small spill would threaten, and could permanently damage, the water supply of nearly 10,000 tribal members.²⁴ The environmental assessments used to choose the route failed to consider that taking the pipeline under Lake Oahe would compromise the integrity of the Tribe's water.²⁵ In fact, the Army Corps' assessment seemed to ignore the Tribe's existence entirely, leaving native communities off of maps and environmental analyses.²⁶ This omission especially frustrated the Tribe given Congress' express delegation to Native American communities to autonomously regulate their water in the tribal provision of the Clean Water Act.²⁷

The Keystone 1 Pipeline in North Dakota provides an excellent and recent example of the environmental dangers associated with oil pipelines. In late October 2019, the Keystone 1 Pipeline spilled an estimated 9120 barrels, or 383,000 gallons, of oil.²⁸ Releasing enough liquid to fill more than half of an Olympic-size swimming pool, the spill affected surrounding wetlands and attracted the concern of the state's water quality officials.²⁹ Months later, emergency response teams are still working to recover the spilled oil and prevent migration to drinking water sources.³⁰ The Keystone 1 leak is precisely what the Army Corps prevented in Bismarck by deciding

22. *Standing Rock History*, *supra* note 8.

23. Justin Worland, *What to Know About the Dakota Access Pipeline Protests*, TIME (Oct. 28, 2016), <https://time.com/4548566/dakota-access-pipeline-standing-rock-sioux/>.

24. *Id.* ("The Pipeline and Hazardous Materials Safety Administration (PHMSA) has reported more than 3,300 incidents of leaks and ruptures at oil and gas pipelines since 2010.")

25. *Standing Rock History*, *supra* note 8.

26. *Id.*

27. *Revised Interpretation of the Clean Water Act Tribal Provision*, U.S. EPA, <https://www.epa.gov/wqs-tech/revised-interpretation-clean-water-act-tribal-provision> (last visited Oct. 26, 2019); Federal Water Pollution Control Act § 518, 33 U.S.C. § 1377 (2018).

28. Phil Helsel, *Leak in Keystone Pipeline Spills 9,000 Barrels of Oil in North Dakota*, NBC NEWS (Nov. 1, 2019, 12:10 AM), <https://nbcnews.com/news/us-news/leak-keystone-pipeline-spills-9-000-barrels-oil-north-dakota-n1074991>.

29. *Id.*

30. *Id.*

against the northern route for the Dakota Access Pipeline. Instead, the Army Corps passed this risk onto the Sioux Tribe, seemingly ignoring the health, safety, and water quality risks posed to individuals on the reservation. One barrel of crude oil yields forty-two gallons,³¹ but a spill of just one gallon of oil can contaminate one million gallons of drinking water.³² Even the slightest spill in Lake Oahe will compromise the Standing Rock Tribe's drinking water source—possibly permanently.

Aside from the water contamination risks, the Standing Rock Sioux Tribe further opposes the Dakota Access Pipeline's construction because it impedes on sacred burial grounds and other sites of religious and cultural significance.³³ This issue introduces unique problems involving the property rights of the Tribe and its ability to oppose the project; though the pipeline will not cross the Tribe's boundary, it nears the border of the Tribe's reservation and crosses under its primary source of drinking water.³⁴ In accordance with federal law, the government is required to consult with tribes before engaging in any archeological or environmental excavations that may result in the loss of tribal artifacts.³⁵ Especially considering the potential for destruction of significant cultural artifacts and sites, Standing Rock tribal leaders argue they are entitled to oppose the construction because the government failed to engage in meaningful consultation with them throughout the permitting process.³⁶

The Sioux Tribe organized protests, runs, marches, and horseback rides to generate support for its opposition to the pipeline.³⁷ The movement attracted the attention and support of thousands of Americans across the country, including celebrities and notable military veteran groups.³⁸

31. *Frequently Asked Questions (FAQs): How Many Gallons of Gasoline and Diesel Fuel Are Made from One Barrel of Oil?*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/tools/faqs/faq.php?id=327&t=9> (last updated May 23, 2018).

32. *Can Aboveground Storage Tanks Contaminate My Drinking Water?*, MINN. RURAL WATER ASS'N, <https://www.mrwa.com/SWP/Brochures/WebAbovegroundStorageTanktri-foldBr.pdf> (last visited Jan. 3, 2020).

33. *Standing Rock History*, *supra* note 8.

34. Worland, *supra* note 23.

35. 54 U.S.C. §§ 302705, 306108 (2018); 42 U.S.C. § 4331(b)(4) (2018).

36. Worland, *supra* note 23.

37. *Treaties Still Matter: The Dakota Access Pipeline*, *supra* note 19.

38. Worland, *supra* note 23; *see also Hollywood A-Listers Join Protests Against Controversial Dakota Access Pipeline*, FOX NEWS (Oct. 31, 2016), <https://www.foxnews.com/entertainment/hollywood-a-listers-join-protests-against-controversial-dakota-access-pipeline> ("A growing number of celebrities are joining the fight against construction of the Dakota Access oil pipeline on tribal land – including actress Shailene Woodley, who faces trial after her arrest during the protests."); Leonardo DiCaprio (@LeoDiCaprio), TWITTER

National support for the cause is particularly moving to indigenous peoples who “have been beaten down for so many years that [they] have forgotten how strong [they] are.”³⁹ For Standing Rock Tribe members, non-members joining to defend against the pipeline was a highly spiritual and empowering moment.⁴⁰ Defending the cause was so empowering, in fact, that thousands of protesters committed to camping at the sites for months despite worsening winter conditions.⁴¹ The sprawling encampments grew so large that their combined population would have comprised the tenth largest city in North Dakota.⁴² But as the winter weather worsened, so worsened the conditions at the protest camps.

Unbeknownst to the protesters, the camps occupied federal, state, and private land, and their actions constituted unlawful trespass.⁴³ In its lawsuit against the United States, North Dakota alleges that campers erected “unsafe structures and unsanitary waste systems,” leaving behind “a spoiled environment and a vast quantity of noxious waste, garbage, and debris.”⁴⁴ The United States, as the facilitator of the project, assumed a duty to maintain all pipeline happenings, but North Dakota was forced to step in following “frequent outbreaks of illegal, dangerous, unsanitary, and life-threatening” activities at the encampments, such as blocking highways and threatening pipeline employees.⁴⁵ Local law enforcement officers deployed weapons such as tear gas, pepper spray, tasers, and rubber bullets to contain the protesters.⁴⁶ Despite the sub-twenty degree temperatures, officers

(May 9, 2016, 8:24 PM), <https://twitter.com/LeoDiCaprio/status/729844614237147136> (“Standing w/ the Great Sioux Nation to protect their water & lands. Take a stand: change.org/rezpectourwater #RezpectOurWater #KeepItInTheGround”); Daniel A. Medina, *Standing Rock Protest: Veterans Pledge to Protect Protesters*, NBC NEWS, <https://www.nbcnews.com/storyline/dakota-pipeline-protests/brutal-winter-conditions-deepen-pipeline-protesters-resolve-n690791> (last updated Dec. 2, 2016, 2:43 PM) (“Groups of U.S. military veterans are descending on the Standing Rock oil pipeline protest, vowing to act as ‘human shields’ against possible clashes between demonstrators and law enforcement.”).

39. Heather Stringer, *The Aftermath of Standing Rock*, MONITOR ON PSYCHOL., Feb. 2018, at 50, <https://www.apa.org/monitor/2018/02/cover-standing-rock>.

40. *Id.*

41. Medina, *supra* note 38 (“More than 2,000 people have arrived this week despite a blizzard that left more than a foot of snow on the ground.”).

42. Complaint, *supra* note 12, at 3.

43. *Id.*

44. *Id.* at 4.

45. *Id.* at 2.

46. Julia Carrie Wong, *Standing Rock Protest: Hundreds Clash with Police over Dakota Access Pipeline*, GUARDIAN (Nov. 21, 2016, 12:08 AM), <https://www.theguardian.com/us->

attacked protesters with water cannons for lighting fires to keep warm.⁴⁷ Attendees described the camps as militarized zones,⁴⁸ the National Guard set up checkpoints outside the camps and employed helicopters and high-intensity spotlights to keep watch over the areas at night.⁴⁹ This constant surveillance traumatized participants, with some reporting symptoms of paranoia following their experience at the camps.⁵⁰ More than 700 protesters were arrested for expressing their opposition to the pipeline.⁵¹ Over ninety-three percent of arrested individuals traveled from outside North Dakota to show their support for the Tribe.⁵²

During the protests, the Environmental Protection Agency, the Advisory Council on Historic Preservation, and the Department of the Interior submitted letters of concern to the Army Corps.⁵³ With no response from the Army Corps, the Tribe filed suit to reverse the pipeline's approval.⁵⁴ The Tribe's Complaint cited the Fort Laramie Treaty as support.⁵⁵ The Treaty affords the Sioux Nation "absolute and undisturbed use and occupation" of its land, stating that no unauthorized individual is permitted to "enter upon Indian reservations in discharge of duties enjoined by law . . . [nor] pass over, settle upon, or reside in the territory."⁵⁶ Supporting the status of Sioux Tribes as sovereign nations, the Treaty affords great power to these tribes to exclude non-Indians at their discretion.⁵⁷ The Supreme Court demonstrated its support for the Fort Laramie Treaty in *South Dakota v. Bourland*, a case in which the Cheyenne River Sioux Tribe sought to enforce its unqualified right of use and occupation against non-Indian fishing and hunting on its land.⁵⁸ The *Bourland* Court upheld the

news/2016/nov/21/standing-rock-protest-hundreds-clash-with-police-over-dakota-access-pipeline.

47. *Id.*

48. Stringer, *supra* note 39.

49. *Id.*

50. *Id.*

51. Complaint, *supra* note 12, at 4.

52. *Id.*

53. *Standing Rock History*, *supra* note 8.

54. See Complaint, *Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs*, No. 1:16-cv-01534 (D.D.C. July 27, 2016); See also *Standing Rock History*, *supra* note 8.

55. *Treaties Still Matter: The Dakota Access Pipeline*, *supra* note 19.

56. *Transcript of Treaty of Fort Laramie (1868)*, OUR DOCUMENTS INITIATIVE, <https://www.ourdocuments.gov/doc.php?flash=false&doc=42&page=transcript> (last visited Sept. 23, 2019).

57. See Treaty Between the United States of America and Different Tribes of Sioux Indians, art. 2, Apr. 29, 1868, 15 Stat. 635, 1868 WL 24284.

58. See 508 U.S. 679 (1993).

Treaty and insisted that any future reading of it be interpreted liberally in favor of Native American tribes.⁵⁹ The Standing Rock Tribe's use of this treaty to support its claims presents an interesting issue considering the Tribe does not have legal title to the land in dispute. But the *Bourland* Court's liberal interpretation of the Fort Laramie Treaty suggests a potential non-owner right of the Standing Rock Tribe to control and use the federal land housing its sacred sites.

The Tribe's Complaint additionally alleges that the Army Corps violated numerous federal statutes, including the Clean Water Act, the National Historic Preservation Act, and the National Environmental Policy Act.⁶⁰ Pipeline officials opposed this allegation, claiming full compliance "with all federal environmental laws."⁶¹ Energy Transfer Partners, the firm commissioned to construct the Dakota Access Pipeline, asserted that after "extensive searching and investigation in, on, and around the path of the proposed pipeline," it found "not a shred of evidence" suggesting that the construction "harmed or threatened a historic resource."⁶² Just one week after these statements, the Tribe's former Historic Preservation Officer, Tim Mentz, received a phone call from an individual "concerned about the potential destruction of culturally important sites."⁶³ This individual owned a significant portion of land within the pipeline's construction path, just one mile north of the Standing Rock Reservation.⁶⁴ Mentz surveyed the individual's land, describing his visit as follows:

We immediately observed a number of stone features in the pipeline route plainly visible from the edge of the corridor. I am very confident that this site, located within the center of the corridor, includes burials because the site contained rock cairns which are commonly used to mark burials. Two cairns were *plainly visible* and a possible third one existed above the cut area. I then noticed . . . multiple stone rings . . . *directly in the cleared pipeline corridor*.⁶⁵

59. *Id.* at 687.

60. *See* Complaint, *supra* note 54; *see also* *Standing Rock History*, *supra* note 8.

61. Nagle, *supra* note 13, at 680.

62. *Id.*

63. *Id.* at 679.

64. *Id.* at 678–79.

65. *Id.* at 679 (emphasis added).

Mentz later returned to the land with a team to conduct a full cultural survey.⁶⁶ Along the path of the construction, the team found eighty-two stone features and archeological sites and at least twenty-seven burial sites.⁶⁷ Mentz described the survey as “one of the most significant archeological finds in North Dakota in many years.”⁶⁸ Mentz quickly filed a supplemental declaration notifying the district court of his findings.⁶⁹

Pipeline officials moved quickly to cover up their lack of compliance with federal environmental laws.⁷⁰ Less than twenty-four hours after Mentz filed the declaration, the pipeline employees relocated their equipment to the land identified in the declaration—more than twenty miles away from the site they were currently working on—to commence construction.⁷¹ The workers began bulldozing “directly on top of the sacred sites and burial grounds identified” in the Mentz’s Declaration.⁷² A group of individuals approached the workers, asking them to stop desecrating the sites with their equipment.⁷³ Though the group’s request was peaceful, the pipeline employees unleashed attack dogs on the individuals, resulting in bloodshed.⁷⁴ The sudden relocation of the construction was suspicious, especially considering the distance traveled. These actions indicate a knowing and intentional destruction of sites which the United States is not authorized to impose upon.⁷⁵ To date, none of the pipeline’s officials or workers have been arrested for the permanent damage done to the Mentz Declaration’s sites.⁷⁶

Soon thereafter, the Tribe’s motion for a preliminary injunction was denied.⁷⁷ The Department of Justice, Department of the Army, and Department of the Interior quickly ordered a stop to pipeline construction in the Lake Oahe area, calling for “national reform to ‘ensure meaningful tribal input’ on infrastructure projects.”⁷⁸ Construction on the area

66. *Id.*

67. *Id.*

68. *Id.* at 680.

69. *Id.*

70. *See id.*

71. *Id.*

72. *Id.*

73. *See id.* at 680–81.

74. *See id.* at 681.

75. 54 U.S.C. §§ 302705, 306108 (2018); 42 U.S.C. § 4331(b)(4) (2018).

76. *See Nagle, supra* note 13, at 681.

77. *See* Memorandum Opinion, *Standing Rock Sioux Tribe v. United States Army Corps of Eng’rs*, 205 F. Supp. 3d 4 (D.D.C. Sept. 9, 2016).

78. *Standing Rock History, supra* note 8.

surrounding Lake Oahe remains halted while the Tribe awaits a ruling on its appeal.⁷⁹

The State of North Dakota filed suit against the U.S. Army Corps of Engineers in July 2019—nearly three years after construction was halted.⁸⁰ The State complains, to the tune of \$38 million, that the United States’ failure to maintain the Standing Rock protests and encampments forced local law enforcement to employ “a sustained, large-scale public safety response to protect public safety and health.”⁸¹ The safety response refers to the numerous weapons employed throughout the course of the protests, such as tear gas, rubber bullets, and water cannons.⁸² The State additionally seeks compensation under the Federal Tort Claims Act for providing “thousands of days of law enforcement and first responder time” to contain the protests.⁸³ The tortious conduct alleged includes both the Army Corps’ failure to govern “private access to and conduct on the federal lands” as well as the abandonment of its assumed legal duty to protect protesters and the general public from “unlawful and dangerous protest activity.”⁸⁴ Between providing first responders, cleaning camp sites, and repairing damaged infrastructure, the county spent close to \$40 million on the protests.⁸⁵ However, the State of North Dakota, rather than the county, is suing the Army Corps.⁸⁶ The county’s emergency fund only amounted to \$500,000, so the State had to pick up almost the entire tab to clean up the Army Corps’ mess.⁸⁷

79. *Id.*

80. Complaint, *supra* note 12, at 1.

81. *ND Files Suit to Recover Costs Related to DAPL Pipeline Protests*, WAYNE STENEHJEM: N.D. ATT’Y GEN. (July 18, 2019), <https://attorneygeneral.nd.gov/news/nd-files-suit-recover-costs-related-dapl-pipeline-protests>.

82. Wong, *supra* note 46.

83. *ND Files Suit to Recover Costs Related to DAPL Pipeline Protests*, *supra* note 81.

84. Complaint, *supra* note 12, at 2.

85. Jeff Brady, *2 Years After Standing Rock Protests, Tensions Remain but Oil Business Booms*, NPR (Nov. 29, 2018, 7:20 AM), <https://www.npr.org/2018/11/29/671701019/2-years-after-standing-rock-protests-north-dakota-oil-business-is-booming>.

86. See Complaint, *supra* note 12, at 1.

87. Brady, *supra* note 85.

III. Legislation Targeting Pipeline Protests

Large oil and gas companies are successfully encouraging anti-protest legislation at the state level.⁸⁸ In 2019, firms such as Koch Industries, Marathon Petroleum, and Energy Transfer Partners—the company behind the Dakota Access Pipeline—entered into a lobbying campaign to “effectively outlaw demonstrations near pipelines, chemical plants and other infrastructure.”⁸⁹ Onlookers describe these firms’ political push as an “orchestrated [and] unholy alliance of oil, gas, chemical, and electric utility companies to crush resistance to polluting industries.”⁹⁰ Instead of identifying a clear answer as to who should pay for protest damages, big oil is politicking to end anti-energy demonstrations altogether. Just this year, the state legislatures of Indiana, North Dakota, South Dakota, Tennessee, and Texas passed critical infrastructure trespassing laws at the encouragement of these corporations.⁹¹ To illustrate, Texas’ new law introduces harsh criminal penalties for damaging, interrupting, or intending to damage or interrupt the operations of a critical infrastructure facility,⁹² while South Dakota’s new law criminalizes mere riot “boosting”—a term not specifically defined by the state’s legislature.⁹³ The intentions of these five state legislatures are clear: by furthering the interests of massive oil and gas companies, the states are endorsing free speech suppression to benefit the energy industry in the purported name of pipeline safety.

Similarities among these five states point to the legislatures’ likely intentions. Indiana, North Dakota, South Dakota, Tennessee, and Texas are all currently experiencing, and have historically experienced, what is called a “Republican trifecta.”⁹⁴ A Republican trifecta occurs when the Republican party holds the governorship, the majority in the Senate, and the majority in the House.⁹⁵ Though facially apolitical, the energy protection legislation comes in the wake of heightened Republican support for the oil and gas industry. Only a few months after taking office, President Trump

88. See Jennifer A. Dlouhy, *Oil Companies Persuade States to Make Pipeline Protests a Felony*, BLOOMBERG (Aug. 19, 2019), <https://www.bloomberg.com/news/articles/2019-08-19/oil-companies-persuade-states-to-make-pipeline-protests-a-felony>.

89. *Id.*

90. *Id.*

91. *Id.*

92. See H.B. 3557, 86th Leg., Reg. Sess. (Tex. 2019).

93. See S.B. 189, 94th Leg. Assemb., Reg. Sess. (S.D. 2019).

94. See *State Government Trifectas*, BALLOTPEdia, https://ballotpedia.org/State_government_trifectas (last visited Oct. 31, 2019).

95. *Id.*

reversed the Obama administration's denial of a key permit for the Dakota Access Pipeline and approved construction moving forward.⁹⁶ Additionally, all five states have a vested economic interest in maintaining oil and gas operations in their respective jurisdictions. As of July 2017, the natural gas and oil industries in Indiana and Tennessee added nearly \$14.9 billion and \$10.6 billion, respectively, to the states' economies.⁹⁷ Even in times of an oil and gas downturn in Texas, experts still consider the energy industry to be the backbone of the state's economy.⁹⁸ Similarly, pipelines are considered a "critical energy lifeline in South Dakota," fueling natural gas to thousands of homes and businesses in the state.⁹⁹ Finally, the oil and gas industry in North Dakota generated tens of billions of dollars for the state's economy in addition to creating over 72,000 statewide jobs in 2015.¹⁰⁰ This was considered a down year for North Dakota.¹⁰¹

It is difficult to identify a government commitment to protect the interests of those opposed to pipelines considering the political and economic influences at stake. Energy companies portray lobbying as a "necessary counter to the increasingly aggressive tactics of activists" seen in the Standing Rock protests.¹⁰² These firms maintain that their advocacy is not aimed at chilling First Amendment rights; rather, energy corporations allege that their actions intend to protect public safety and preserve public and private property.¹⁰³ The First Amendment, these companies argue, does not entitle an individual "to destroy property or create public hazards" that threaten community safety.¹⁰⁴

96. Brady, *supra* note 85.

97. *Economic Impacts of the Natural Gas and Oil Industry*, AM. PETROLEUM INST., <https://www.api.org/news-policy-and-issues/american-jobs/economic-impacts-of-oil-and-natural-gas> (follow "Natural Gas and Oil: Fuel Indiana" hyperlink for information pertaining to the State of Indiana; follow "Natural Gas and Oil: Fuel Tennessee" hyperlink for information pertaining to the State of Tennessee) (last visited Oct. 31, 2019).

98. Kathryn Cargo, *Oil, Gas Industry Is Backbone of Texas Economy*, VICTORIA ADVOC. (June 25, 2017), https://www.victoriaadvocate.com/news/business/oil-gas-industry-is-backbone-of-texas-economy/article_58bd525c-c44e-5d64-a549-f4d4b74a350e.html.

99. *Pipelines in South Dakota*, S.D. OIL & GAS ASS'N, <http://www.sdoil.org/education/pipelines> (last visited Nov. 1, 2019).

100. *Economic Output in North Dakota from Oil & Gas Remains Strong Despite Down Year*, N.D. PETROLEUM COUNCIL, <https://www.ndoil.org/economic-output-in-north-dakota-from-oil-gas-remains-strong-despite-down-year/> (last visited Nov. 1, 2019).

101. *Id.*

102. Dlouhy, *supra* note 88.

103. *Id.*

104. *Id.*

The firms fail to acknowledge that individuals opposed to pro-pipeline legislation are not asking for destructive conduct to receive constitutional protection. Rather, protesters seek clarity in legislative language and intent; these states should take care to specifically define the conduct prohibited. For instance, South Dakota's riot boosting law does not even demand that an individual destroy property or create a public hazard to be charged with a felony.¹⁰⁵ The law's ambiguous "boosting" term criminalizes mere encouragement of political opposition, regardless of the individual's proximity to the protest.¹⁰⁶ Nor does the Texas law require more than mere intent to interrupt facility operations.¹⁰⁷ Pipeline opponents do not wish to destroy critical infrastructure facilities and put themselves in harm's way. Alternatively, they seek legislative language that does not afford states the authority to subjectively determine an individual's intent or degree of protest encouragement.

These laws provide no avenue for alternate modes of protest, leaving advocates frustrated and with very little room to voice their opinions. Critics further regard the laws as unconstitutional for targeting Native American groups with grievances similar to those of the Standing Rock Sioux Tribe.¹⁰⁸ While the language is seemingly unbiased and universally applicable, the conversations surrounding the laws suggest otherwise.¹⁰⁹ Between the muzzling of free speech and an American history of discrimination against Native Americans,¹¹⁰ one may be left wondering if

105. See S.B. 189, 94th Leg. Assemb., Reg. Sess. (S.D. 2019).

106. See *id.*

107. See H.B. 3557, 86th Leg., Reg. Sess. (Tex. 2019).

108. See *Dakota Rural Action v. Noem*, ACLU, <https://www.aclu.org/cases/dakota-rural-action-v-noem> (last updated Mar. 28, 2019) [hereinafter ACLU Article on *Dakota Rural Action v. Noem*].

109. See Sadasivam, *Texas Pipeline*, *supra* note 7.

110. Erin Blakemore, *California Slaughtered 16,000 Native Americans. The State Finally Apologized for the Genocide*, HIST. CHANNEL (June 19, 2019), <https://www.history.com/news/native-american-genocide-california-apology> ("Up to 16,000 Native Californians died in the genocide, which took place from the 1840s through the 1870s. Most of the deaths occurred during hundreds of massacres during which state and local militias encircled and murdered Native peoples. The genocide was facilitated by discriminatory California laws and the outright support of state officials and Federal authorities who condoned and supported the attacks."); see also *Racism and the Native American Experience*, U.S. CONF. OF CATH. BISHOPS, <http://www.usccb.org/issues-and-action/human-life-and-dignity/racism/upload/racism-and-native-american-experience.pdf> (last visited Nov. 12, 2019) ("Colonial and later U.S. policies toward Native American communities were often violent, paternalistic, and directed toward theft of Native American land. Native Americans were killed, imprisoned, sold into slavery, and raped. These policies decimated entire

the protesters are to blame for resorting to destructive behavior to make their point.

A. South Dakota Laws Under Scrutiny

Three South Dakota laws are under ACLU attack for targeting “full-throated advocacy and protest.”¹¹¹ The laws are targeted at Keystone XL Pipeline protesters who took issue with the government’s failure to consult with tribes before threatening their surrounding environment.¹¹² The ACLU asserts that the laws target and chill protected speech, “failing to adequately describe what speech or conduct could subject protesters and organizations to criminal and civil penalties.”¹¹³

The first two criminal laws under fire charge individuals with varying classes of felonies.¹¹⁴ Section 22-10-6 of the South Dakota Codified Laws charges any riot participant who “directs, advises, encourages, or solicits” others participating in a riot “to acts of force or violence” with a Class 2 felony.¹¹⁵ Section 22-10-6.1 charges an individual who directs or encourages riot participants to acts of force or violence with a Class 5 felony regardless of his participation in the riot.¹¹⁶ The State defines “riot” as “[a]ny use of force or violence or any threat to use force or violence, if accompanied by immediate power of execution, by three or more persons, acting together and without authority of law.”¹¹⁷ Without defining what it means to direct, advise, encourage, or solicit a riot, South Dakota grants itself the authority to arbitrarily determine what actions fall under this statute.¹¹⁸ The laws further criminalize participation in a riot that later results in violence regardless of an original intention to keep the protests

communities and brought about tragic death.”); *see also* Press Release, First Nations Development Institute & Echo Hawk Consulting, Groundbreaking Research Reveals Depth of Discrimination against Native Americans (July 6, 2018), <https://intercontinentalcry.org/groundbreaking-research-reveals-depth-of-discrimination-against-native-americans> (“The research found that people have limited personal experience with Native Americans but accept pervasive negative narratives that are erroneously set or reinforced by others, and that proximity shapes some perceptions Only 56% of survey respondents living in close proximity to Native communities believed the U.S. should do more to help Native Americans compared to 64% of respondents further removed.”).

111. ACLU Article on *Dakota Rural Action v. Noem*, *supra* note 108.

112. *Id.*

113. *Id.*

114. S.D. CODIFIED LAWS §§ 22-10-6, 6.1 (2005).

115. *Id.* § 22-10-6.

116. *Id.* § 22-10-6.1.

117. *Id.* § 22-10-1.

118. *See id.*

calm. Therefore, one may be charged with a felony under these laws for supporting a peaceful assembly that later turns violent, whether that individual was present for the violence or not. These statutes entitle the State to subjectively determine the intent of a participant or non-participant, as well the likelihood that a non-participant's speech will incite chaos or riot.

The third law, South Dakota's new Riot Boosting Act, covers actions similar to these two codified laws.¹¹⁹ The Act adds that any defendant found soliciting or compensating "any other person to commit an unlawful act or to be arrested" is subject to treble damages—fees comprised of three times the sum of the detriment caused by the actions.¹²⁰ Similar to the preexisting criminal laws, this Act holds that an individual does not have to be found participating in a protest or engaging in any unlawful activity to be convicted.¹²¹ The language of the Act is vague, as it fails to define what it means to engage in riot "boosting" in the first place. Does a restaurant owner encourage a riot by serving food to paying customers which happen to be participating in the protest? In the age of social media, does an individual boost a riot by distributing protest information via sharing, liking, or retweeting? Is an attorney liable for advising a past, present, or future protester regarding his or her participation in the assembly?

Even more damning is the Riot Boosting Act's creation of a riot boosting recovery fund.¹²² The fund is designed to "pay any claim for damages arising out of or in connection with a riot" with the damages paid by violators of the Act.¹²³ The State then profits, as the treble damages requirement demands payment of "three times a sum that would compensate for the detriment caused."¹²⁴ Given the first third of paid damages compensates for protest damages, this structure does not account for the remaining two-thirds of paid damages. The recovery fund provision incentivizes the State to sue any and all protesters and riot solicitors.¹²⁵ With arbitrary language and an opportunity for high payout to the state, a greater number of prosecutions is likely to result from an act as such.

119. See S.B. 189, 94th Leg. Assemb., Reg. Sess. (S.D. 2019).

120. *Id.* § 4.

121. *See id.*

122. *Id.* § 5.

123. *Id.*

124. *Id.* § 4.

125. See Complaint at 1, *Dakota Rural Action v. Noem*, No. 5:19-cv-5026 (D.S.D. 2019).

Per the ACLU's request, the district court granted a preliminary injunction halting the State's use of the three laws in question.¹²⁶ South Dakota was barred from applying these laws because they exposed future plaintiffs to immediate and irreparable harm.¹²⁷ The court's order noted that, while the state has an interest in criminalizing riot participation, the law's provisions extend past that interest and threaten protected speech and the right of association.¹²⁸ The court warned against the laws' overreaching and overbroad power; under the now-overturned framework, these laws kept an individual from sending a "supporting email or letter to the editor in support of a protest" and giving a "coffee or thumbs up or \$10 to protesters."¹²⁹ Judge Piersol put the laws into perspective for the State, rhetorically posing the following question: "if these riot boosting statutes were applied to the protests that took place in Birmingham, Alabama, what might be the result?"¹³⁰ Dr. Martin Luther King, Jr. and the Southern Christian Leadership Conference would absolutely be liable under these laws. One would be hard pressed to find an individual today who would come out in support of a conviction of Dr. King under a riot boosting law like the one overturned in South Dakota.

Targeting pipeline protesters is no different. Governor Noem of South Dakota has called to shut down "out-of-state people" coming into the state to hinder pipeline construction; such a call to action is reminiscent of the Birmingham protests, which were criticized for being the work of "outside agitators."¹³¹ First Amendment violations aside, these calls to action are wholly evocative of attempts to delegitimize and minimize Dr. King's civil rights movement as the work of outside actors. The Keystone XL opposition movement in South Dakota very closely resembles the Dr. King era: a minority group, tired of being ignored and taken advantage of, finally takes a stand only to be shut down by the laws and constitutions that

126. S.D. CODIFIED LAWS §§ 22-10-6, 6.1 (2005); S.B. 189, 94th Leg. Assemb., Reg. Sess. (S.D. 2019); Lisa Kaczke, *Judge Grants Injunction in 'Riot Booster' Lawsuit over Possible Keystone XL Protests*, ARGUS LEADER (Sept. 18, 2019, 3:14 PM), <https://www.argusleader.com/story/news/politics/2019/09/18/judge-grants-injunction-riot-booster-lawsuit/1442805001/>.

127. ACLU Article on *Dakota Rural Action v. Noem*, *supra* note 108.

128. Kaczke, *supra* note 126.

129. Vera Eidelman, *South Dakota Governor Caves on Attempted Efforts to Silence Pipeline Protesters*, ACLU (Oct. 24, 2019), https://www.aclu.org/news/free-speech/south-dakota-governor-caves-on-attempted-efforts-to-silence-pipeline-protesters/?fbclid=IwAR3k-H3uJApxXS2noKZAm1NuP3ybG1xMOqbt3pjhhq_ijmLbIF9HqtKQR8.

130. *Id.*

131. *Id.*

purport to protect it. These groups are equated to “domestic terrorists and saboteurs” for fighting against government actions that will substantially, and negatively, impact their everyday lives.¹³²

Though South Dakota has complied with the order halting the enforcement of these three laws,¹³³ nothing is stopping the State from crafting a similar law to successfully mute outsiders and keep them from fighting for what they feel is right. States are entitled to prohibit speech directed at inciting lawless action,¹³⁴ but these three South Dakota laws surpass this right by criminalizing “impassioned advocacy that lies at the core of our political discourse.”¹³⁵

B. Texas’ Critical Infrastructure Protection Act

Texans and the media have criticized Governor Greg Abbott for signing the Critical Infrastructure Protection Act into law.¹³⁶ Passed in June 2019, this Act criminalizes trespassing on and loitering near critical infrastructure facilities, such as oil and gas pipelines, as well as such facilities that are under construction.¹³⁷ The Act charges an offense to anyone who intentionally or knowingly damages a facility; additionally, it charges any individual who has the intent to damage, destroy, or interrupt a facility without evidence that any particularized damage has occurred.¹³⁸ The maximum penalty under this Act is a second-degree felony.¹³⁹ Second-degree felons in Texas face imprisonment of two to twenty years and fines

132. Andrew Malone & Vera Eidelman, *The South Dakota Legislature Has Invented a New Legal Term to Target Pipeline Protesters*, ACLU (Apr. 1, 2019, 3:45 PM), <https://www.aclu.org/blog/free-speech/rights-protesters/south-dakota-legislature-has-invented-new-legal-term-target>; see also Will Parrish & Sam Levin, ‘*Treating Protest as Terrorism*’: US Plans Crackdown on Keystone XL Activists, GUARDIAN (Sept. 20, 2018, 4:00 AM), <https://www.theguardian.com/environment/2018/sep/20/keystone-pipeline-protest-activism-crackdown-standing-rock> (“The government has characterized pipeline opponents . . . as ‘extremists’ and violent criminals and warned of potential ‘terrorism,’ according to recently released records.”).

133. Eidelman, *supra* note 129.

134. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

135. Malone & Eidelman, *supra* note 132.

136. See generally Sadasivam, *Texas Pipeline*, *supra* note 7; see also Naveena Sadasivam, *You Could Get Prison Time for Protesting a Pipeline in Texas—Even If It’s on Your Land*, MOTHER JONES (May 25, 2019), <https://www.motherjones.com/environment/2019/05/you-could-get-prison-time-for-protesting-a-pipeline-in-texas-even-if-its-on-your-land> [hereinafter Sadasivam, *Prison Time*].

137. H.B. 3557 § 424.001, 86th Leg., Reg. Sess. (Tex. 2019).

138. See *id.* §§ 424.051, 424.052.

139. *Id.* § 424.051(b).

not to exceed \$10,000.¹⁴⁰ Opponents consider this punishment extreme given Texas already has sufficient laws in place for criminalizing unlawful trespass and damage to land.¹⁴¹

The Texas House of Representatives' Judiciary & Civil Jurisprudence Committee heard testimony for and against the Act before deciding its fate.¹⁴² During a public hearing in March 2019, constituent Alyssa Tharp discussed two stories to illustrate her opposition to the bill.¹⁴³ The first example focused on the story of a great-grandmother in Texas who, back in 2012, peacefully protested against the state for acquiring her land to build a pipeline.¹⁴⁴ The individual was arrested and charged with trespassing on the land that she rightfully owned before the taking.¹⁴⁵ Even a harmless, elderly great-grandmother peacefully exercising her right to protest would be subject to criminal punishment and treated as an enemy to the State of Texas under the Critical Infrastructure Protection Act.¹⁴⁶

The second illustration offered by Ms. Tharp's testimony referenced a Louisiana critical infrastructure protection law similar to Texas' Act.¹⁴⁷ In contrast, Louisiana's law explicitly outlines that actions such as "lawful assembly and peaceful and orderly petition" near a pipeline are not subject to the criminal provisions.¹⁴⁸ Though this language seems to provide a feasible option for protesters to avoid criminal liability, Ms. Tharp suggests the legislation is more of a cautionary tale than admirable lawmaking.¹⁴⁹ After this law was passed, numerous individuals protested a pipeline from kayaks in open, public water.¹⁵⁰ Law enforcement fan boats approached the protesters, pushing their kayaks onto the easement.¹⁵¹ The protesters had permission from the landowners to be on the land as the State had not yet

140. TEX. PENAL CODE ANN. §§ 12.33(a)–(b) (West 2009).

141. Audiovisual: Testimony of Alyssa Tharp, Public Hearing on H.B. 3557 Before the Judiciary & Civil Jurisprudence Comm., Tex. H.R. 86th Leg. Sess. (Mar. 25, 2019) (on file with author).

142. *Actions on HB 3557*, TEX. LEGISLATURE ONLINE, <https://capitol.texas.gov/BillLookup/Actions.aspx?LegSess=86R&Bill=HB3557> (last visited Oct. 29, 2019).

143. Audiovisual: Testimony of Alyssa Tharp, *supra* note 141.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*; *see also* H.B. 727, 2018 Leg., Reg. Sess. (La. 2018).

148. H.B. 727 § 61(D)(1).

149. Audiovisual: Testimony of Alyssa Tharp, *supra* note 141.

150. *Id.*

151. *Id.*

acquired full easement entitlements.¹⁵² Regardless, the protesters were arrested and charged with felonies for disruptively protesting too close to the facility.¹⁵³ While the Louisiana law's vague language may not look to single out pipeline protesters on its face, the culture surrounding the energy industry allows laws like this to result in less-than-civil outcomes.

Government actions that protect critical infrastructures inherently discriminate against protesters by creating a culture of energy-facility supremacy. This discriminatory culture gives state governments a big brother complex by telling citizens who they should and should not associate with.¹⁵⁴ Further testimony against the Critical Infrastructure Protection Act identified other Texas laws dealing with vandalism and destruction of property.¹⁵⁵ In support of the Act, even a representative from the Texas Pipeline Association contended that this new law would not change preexisting state trespass laws during his testimony.¹⁵⁶ This fact leaves opponents wrestling with this question: why waste more government resources on a new law with redundant provisions that only serves to single out protesters and dissuade them from exercising their constitutional rights?¹⁵⁷

The law's proponents argue Texas merely followed the lead of other states trying to keep individuals from exceeding the scope of their First Amendment rights.¹⁵⁸ A number of individuals who testified before the Committee in support of the Act focused on the bill's health and safety benefits.¹⁵⁹ The critical infrastructure industry is primarily concerned with a group that refers to itself as "valve turners."¹⁶⁰ This group travels to pipeline facilities around the country and shuts off pipeline valves,¹⁶¹

152. *Id.*

153. *Id.*

154. Audiovisual: Testimony of Marisa Perales, Public Hearing on H.B. 3557 Before the Judiciary & Civil Jurisprudence Comm., Tex. H.R. 86th Leg. Sess. (Mar. 25, 2019) (on file with author).

155. Audiovisual: Testimony of Robin Schneider, Public Hearing on H.B. 3557 Before the Judiciary & Civil Jurisprudence Comm., Tex. H.R. 86th Leg. Sess. (Mar. 25, 2019) (on file with author).

156. Audiovisual: Testimony of James Mann, Public Hearing on H.B. 3557 Before the Judiciary & Civil Jurisprudence Comm., Tex. H.R. 86th Leg. Sess. (Mar. 25, 2019) (on file with author).

157. Audiovisual: Testimony of Robin Schneider, *supra* note 155.

158. Sadasivam, *Prison Time*, *supra* note 136.

159. See Audiovisual: Public Hearing on H.B. 3557 Before the Judiciary & Civil Jurisprudence Comm., Tex. H.R. 86th Leg. Sess. (Mar. 25, 2019) (on file with author).

160. Audiovisual: Testimony of James Mann, *supra* note 156.

161. *Id.*

presumably in an effort to demonstrate its opposition to the growing number of energy facilities in the United States. Energy experts contend that industry safety procedures require qualified and trained individuals to operate pipeline valves; these supporters argue the Texas Act is designed to prevent unqualified individuals from causing harm to both the facilities and themselves.¹⁶²

The Act's proponents fail to recognize that the inherent danger surrounding these facilities is part of the reason so many individuals are protesting the construction. No one disputes that energy facilities are dangerous to the untrained public; rather, rural residents do not want energy lines to take oil and gas through their towns, threatening their water supply and community safety. These residents likely view an argument for public safety in support of the Act as wholly irrelevant and, frankly, quite ironic given the inherent risks associated with pipelines.¹⁶³ The law's opponents want legislators and supporters to address the question of silencing unpopular speech. The best response to this concern, offered by multiple individuals who testified in favor of the legislation, is that the law is not *trying* to limit individual rights and liberties under the Constitution,¹⁶⁴ rather, the potential chilling of fundamental rights is an indirect, unavoidable consequence resulting from the government's legitimate interest in protecting critical infrastructures.¹⁶⁵ Notably, it was seldom argued that the bill did not chill free speech in practice.¹⁶⁶

Many Texans view this Act as a fear tactic employed to dissuade justice movements and prevent protests similar to Standing Rock's.¹⁶⁷ By criminalizing intent to damage facilities without considering whether actual, concrete damage was caused, the Critical Infrastructure Protection Act allows for extremely liberal prosecution of peaceful protesting. Even more frightening is the fact that the law considers intent to interrupt facility operations a felony offense. Why would an individual opposing a pipeline peacefully protest if not to disrupt facility operations? Very seldom do

162. *Id.*

163. *Can Aboveground Storage Tanks Contaminate My Drinking Water?*, *supra* note 32.

164. Audiovisual: Testimony of Al Philippus, *supra* note 5; *see also* Audiovisual: Testimony of James Mann, *supra* note 156.

165. *See* Audiovisual: Public Hearing on H.B. 3557, *supra* note 159.

166. *See id.*

167. *Tougher Laws on Pipeline Protests Face Test in Louisiana*, NPR (Sept. 19, 2018, 5:08 AM), <https://www.npr.org/2018/09/19/648029225/tougher-laws-on-pipeline-protests-face-test-in-louisiana> ("After a high-profile campaign to oppose the Dakota Access Pipeline in 2016, a number of states moved to make it harder to protest oil and gas projects.").

protests occur in support of the continuation of an act; the definition of the word “protest” illustrates an act of objection and a “solemn declaration . . . usually of dissent.”¹⁶⁸ Therefore, while the Texas law purports to criminalize acts beyond the protest rights of the First Amendment, a closer look reveals that it serves to dissuade peaceful protest as well, leaving advocates with no alternative method of voicing pipeline-related concerns. It seems that since the Texas Legislature’s friends jumped off the proverbial cliff of chilling free speech, it, too, jumped.

C. *The Department of Transportation’s Proposed Legislation*

At the federal level, the Department of Transportation is proposing to reauthorize pipeline safety initiatives through the PIPES Act of 2019.¹⁶⁹ This bill, which stands for “Protecting our Infrastructure of Pipelines and Enhancing Safety,” amends the PIPES Act of 2016; “prioritizes safety, promotion, [and] innovation”; and “encourages reliable energy infrastructure.”¹⁷⁰ The DOT’s primary concerns typically focus on safety with hazardous materials,¹⁷¹ but its most recent proposal prioritizes deterring the public from interacting with energy facilities that could cause serious harm.¹⁷² The PIPES Act of 2016 covers knowing and willful damage and destruction to, or an attempt or conspiracy to damage or

168. *Protest*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/protest> (last visited Sept. 25, 2019).

169. Press Release, U.S. Dep’t of Transp., U.S. Transportation Secretary Elaine L. Chao Announces 2019 Pipeline Safety Legislative Proposal (June 3, 2019), <https://www.phmsa.dot.gov/news/pipeline-safety-reauthorization>.

170. *Id.*; see also PIPES Act of 2019, S. 2299, 116th Cong. (2019); see also *Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2019: Section-by-Section Analysis*, DEP’T OF TRANSP.: PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., <https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/news/71476/2019-pipeline-safety-reauthorization.pdf> (last visited May 20, 2020).

171. See *The State of Pipeline Safety and Security in America: Hearing Before the Subcomm. on Energy of the H. Comm. on Energy and Commerce, 116th Cong. (2019)*, <https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Testimony-Elliott.pdf> (statement of Howard “Skip” Elliot, Administrator, Pipeline and Hazardous Materials Safety Administration, Department of Transportation); see also Press Release, U.S. Dep’t of Transp., U.S. Secretary of Transportation Elaine L. Chao Announces More Than \$34.3 Million to Enhance Pipeline and Hazmat Safety (Sept. 20, 2019), <https://www.phmsa.dot.gov/news/transportation-secretary-chao-announces-343-million-in-pipeline-hazmat-safety-grants> (announcing DOT grants to entities including states, tribes, and emergency responders in support of state and local pipeline safety programs).

172. Goldberg, *supra* note 6.

destroy, interstate and intrastate pipelines.¹⁷³ The 2019 DOT proposal would amend the existing PIPES Act to criminalize “damaging, destroying, vandalizing, tampering with, impeding the operation of, disrupting . . . or inhibiting the operation of” pipelines.¹⁷⁴ Similar to Texas’ Critical Infrastructure Protection Act,¹⁷⁵ the DOT bill would protect facilities both in operation and under construction.¹⁷⁶ The PIPES Act of 2019 is currently the only critical infrastructure protection legislation brewing at the federal level.¹⁷⁷

Though DOT representatives assure the legislation is not meant to deter lawful protests under the First Amendment,¹⁷⁸ opponents of the proposal beg to differ. Representative Frank Pallone, Chairman of the U.S. House Committee on Energy and Commerce, argues the bill will be “used as a vehicle for stifling legitimate dissent and protest.”¹⁷⁹ Pallone expects the provision will not make it past the committee.¹⁸⁰ Other opponents to the proposal find the bill to be in direct conflict with the constitutional right to peacefully assemble.¹⁸¹ The DOT proposal is a blatant intimidation tactic against those who are passionate about keeping water, communities, and the climate clean. Just like Texas’ new law, the DOT bill attempts to draw eyes away from the chilling of free speech and toward the need to protect the energy agenda.

IV. Ebbs and Flows of First Amendment Restrictions

The First Amendment protects an individual’s right to express his or her ideas free from interference. The Amendment reads as follows: “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.”¹⁸² The First Amendment was adopted as a safeguard against any basic civil rights restrictions from

173. *Id.*

174. *Id.*

175. *See generally* H.B. 3557, 86th Leg., Reg. Sess. (Tex. 2019).

176. Goldberg, *supra* note 6.

177. *See US Protest Law Tracker*, INT’L CTR. FOR NOT-FOR-PROFIT LAW, <http://www.icnl.org/usprotestlawtracker/> (last updated June 6, 2020).

178. Goldberg, *supra* note 6.

179. *Id.*

180. *Id.*

181. *Id.*

182. U.S. CONST. amend. I.

governments and private individuals alike;¹⁸³ the Fourteenth Amendment's Due Process Clause extends these protections to apply against state governments as well.¹⁸⁴ Former Supreme Court Justice William Douglas described the restriction of First Amendment rights as "the most dangerous of all subversions . . . the one un-American act that could most easily defeat us."¹⁸⁵ But the First Amendment's protections are not absolute, as case law is continuously redefining the scope of permissible conduct under the Constitution.

Inherent in the First Amendment's free speech and peaceable assembly provisions is the right to protest.¹⁸⁶ The government is entitled to restrict speech and assembly only if the restriction is both narrowly tailored in furtherance of a compelling government interest and the least restrictive means of achieving that interest.¹⁸⁷ Additionally, speech can be regulated if it is directed at inciting imminent lawless action.¹⁸⁸ But First Amendment restrictions cannot be content-based or lack neutrality based on ideas or subject matter;¹⁸⁹ restrictions distinguishing between types of speech are overbroad and patently unconstitutional.¹⁹⁰ The anti-protest laws of South Dakota and Texas, as well as the DOT proposal, are unconstitutional because they restrict an individual's right to peaceably assemble in addition to the subject matter of speech. For example, Texas' new law is content-based because it bans assembly where the content of the speech surrounds critical infrastructure facilities.¹⁹¹ And South Dakota's failure to clearly define protest boosting places a blanket ban on all speech of a certain topic and leaves no alternative means of communicating information.¹⁹² This discussion introduces examples of both restricted and unrestricted conduct to illustrate the unconstitutionality of anti-protest legislation. In addition,

183. *First Amendment*, HIST. CHANNEL, <https://www.history.com/topics/united-states-constitution/first-amendment> (last updated Sept. 25, 2019).

184. U.S. CONST. amend. XIV § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law"); see *Gitlow v. New York*, 268 U.S. 652 (1925); see also *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

185. William O. Douglas, *The One Un-American Act*, NIEMAN REP., Jan. 1953, at 20, 20, https://niemanreports.org/wp-content/uploads/2014/03/Spring-1953_150.pdf.

186. *Free Speech and the Right to Protest*, ACLU OF TEX., <https://www.aclutx.org/en/know-your-rights/freedom-of-speech-right-to-protest> (last visited Jan. 4, 2020).

187. See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

188. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

189. See *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92 (1972).

190. See *id.*

191. See H.B. 3557, 86th Leg., Reg. Sess. (Tex. 2019).

192. See S.B. 189, 94th Leg. Assemb., Reg. Sess. (S.D. 2019).

this analysis demonstrates that the precedent presented is unworkable, outdated, and inapplicable to free speech and assembly claims today.

This section additionally discusses the First Amendment's Free Exercise of Religion Clause with a focus on tribal opposition to pipelines. Notwithstanding a finding of these state and federal laws as constitutional, prohibiting tribal worship is unconstitutionally coercive and restricts the religious free exercise of Native American communities. While the government is entitled to force compliance with criminal laws, it cannot impede the observance of a religion¹⁹³ nor coerce an individual into violating his religious beliefs.¹⁹⁴ For most tribal peoples, such obstruction and coercion occurs when communities are unable to worship and acknowledge the existence of sacred sites. Preventing these individuals from protesting against the destruction of their sacred sites goes hand-in-hand with preventing the free practice and exercise of their religion. This portion of the First Amendment discussion introduces examples of constitutional and unconstitutional restrictions on religious free exercise to demonstrate the massive imposition placed on tribes by anti-protest legislation. These principles are further illustrated by a brief history of free religious exercise disputes by tribes against the United States government.

A. Constitutional Restrictions on Free Speech and Assembly

Speech can be regulated if it is directed at inducing, and likely to produce, imminent lawless action. In *Brandenburg v. Ohio*, a state statute criminalized the act of advocating for “crime, sabotage, violence, or unlawful methods of terrorism” and the assembly of any group formed for the purpose of teaching such doctrines of criminal syndicalism.¹⁹⁵ Though the appellant—convicted for inviting another individual to a Ku Klux Klan rally—ultimately prevailed, the Supreme Court held that a state can forbid “advocacy of the use of force or of law violation” where such speech or assembly is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”¹⁹⁶

The government is entitled to enforce time, place, and manner regulations on speech and assemblies. The respondents in *Ward v. Rock Against Racism* disputed a New York City regulation requiring Central Park

193. See *Sherbert v. Verner*, 374 U.S. 398 (1963).

194. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

195. 395 U.S. 444, 445 (1969).

196. *Id.* at 447–48 (“As we said in *Noto v. United States* . . . ‘the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.’”).

performers to use the city's sound equipment and technicians.¹⁹⁷ In deciding for the city, the Supreme Court set forth a three-pronged test for determining the constitutionality of a time, place, and manner restriction; such restrictions must be (1) applied neutrally and without reference to the content of the speech, (2) narrowly tailored to a significant government purpose, and (3) open enough to allow for alternative communication of the ideas.¹⁹⁸ The respondents argued the regulation was content-based, as the city's concern for sound quality sought to impose "artistic control over performers at the bandshell by enforcing a bureaucratically determined, value-laden conception of good sound."¹⁹⁹ The Court declined this argument, finding the restriction to be merely esthetic.²⁰⁰

Finally, a state is entitled to criminalize the public uttering of fighting words. The appellant in *Chaplinsky v. New Hampshire* was arrested for calling the complainant a "God damned racketeer" and a "damned Fascist" as well as stating that the entire government was filled with "Fascists or agents of Fascists."²⁰¹ The statute in question states no person is allowed to address another in a manner that is "offensive, derisive or annoying," call that person by any offensive name, nor make noise in that person's presence with the intent of offending or preventing him from "pursuing his lawful business or occupation."²⁰² Because the statute was narrowly drawn and punished specific conduct, the restriction of speech was constitutional.²⁰³

American public opinion is constantly evolving, and modern ideas demand Supreme Court decisions that are workable, applicable, and reflective of the world today. Administering outdated reasoning to present-day problems effectively discredits the issues of all appellants. Anti-protest statutes allow states to silence tribal and American voices against blatant wrongs and, since these cases are still good law, courts will look to their unworkable holdings when considering both the Sioux Tribe's claims against the Army Corps and general claims against anti-protest legislation. Unless the outdated precedent created by these cases is overruled, anti-protest legislation will survive scrutiny and tribal interests will continue to be put on the backburner.

197. 491 U.S. 781, 784 (1989).

198. *See id.*

199. *Id.* at 792.

200. *See id.*

201. 315 U.S. 568, 569 (1942).

202. *Id.*

203. *Id.* at 573.

Under the framework in *Brandenburg*, the imminent lawless action case, one could argue that tribal and public opposition to a federal project, such as a pipeline, is classified as terrorism or sabotage. *Brandenburg* entitles states to enact statutes criminalizing “advocacy of the use of force or of law violation” and assembly “directed to inciting or producing imminent lawless action”²⁰⁴ near or regarding pipeline facilities. With laws such as Texas’ Critical Infrastructure Protection Act²⁰⁵ in place, intending to interfere with a pipeline’s operations is the precise lawless action the *Brandenburg* mentality criminalizes. This outcome leaves tribes hopeless to defend their sacred sites unless they can successfully convince their state and local governments not to succumb to the influence of big oil. Every opposition movement is different, but Texas’ ban on all pipeline interferences unconstitutionally imposes on the fundamental right to protest regardless of how peaceful the opposition is.

In *Ward*, the city’s subjective regulation on the basis of mere sound quality was upheld. This decision allows states to pass laws such as those of Texas and South Dakota that are theoretically neutral but, in practice, obviously prohibit a certain speech or assembly from occurring. Applying the three-pronged *Ward* test to the anti-protest laws demonstrates the unconstitutionality of the restrictions. As a reminder, *Ward* established that a time, place, and manner restriction must be (1) applied neutrally, without reference to the speech’s context, (2) narrowly tailored to a significant government purpose, and (3) open, allowing for alternative communication of the ideas proffered.²⁰⁶ First, arising anti-protest restrictions are not content-neutral as they could not possibly be aimed at deterring speech other than that opposing pipelines and energy projects. Even assuming that there is a significant government interest in restricting speech surrounding critical infrastructure facilities, these restrictions still are not narrowly drawn, nor do they punish specific conduct. South Dakota’s failure to define what it means to “boost” a riot²⁰⁷ supports the anti-protest laws’ failure to meet the second *Ward* prong. The laws’ ambiguous language also leads the legislation to fail the third prong of the *Ward* test: failing to define the means by which the law can be violated affords opponents no opportunity to communicate their ideas through alternate channels. Cryptic language intimidates protesters and discourages them from voicing their opinions entirely out of fear of prosecution.

204. *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969).

205. See H.B. 3557, 86th Leg., Reg. Sess. (Tex. 2019).

206. See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

207. See S.B. 189, 94th Leg. Assemb., Reg. Sess. (S.D. 2019).

Texas and South Dakota passed their respective anti-protest laws because of the influential opinions of large oil and gas companies. The *Chaplinsky* legacy affirms this restriction of free speech just because popular opinion deems it to be bothersome. *Chaplinsky* affords states the opportunity to quash the opinions of tribes in the name of derisive and annoying speech by passing legislation at the influence of energy corporations. The fact that *Chaplinsky* was heard in 1942 is particularly relevant to the holding's applicability today. Calling someone a "fascist" in the midst of the World Wars and Mussolini's reign over Italy is arguably more damning than doing so one hundred years after the Fascist Party was founded.²⁰⁸ This characteristic is not unique to *Chaplinsky*. In 1925, the Supreme Court upheld an individual's conviction for distributing a left-wing socialist manifesto in *Gitlow v. New York*. The statute in *Gitlow* criminalized advocating for the "overthrowing or overturning [of] organized government."²⁰⁹

Analyzing the breadth of a state's ability to restrict conduct commands us to consider the history surrounding these cases.²¹⁰ We must question whether the speech and assembly interests of Americans should be subjected to judicial decisions that happened in a time where words deemed offensive, derisive, or annoying are completely different under a modern lens. If you were called a "God damned racketeer" today, would you do more than furrow your brow in confusion and walk away? Anti-protest legislation seeks protection under these First Amendment cases that allow for subjective determinations of popular conduct and acceptable sound quality. Surely, we would not still apply the *Gitlow* statute, considering support for socialism to be an attempt to overthrow the government, today. If so, maybe someone should warn Senator Bernie Sanders, Representative Alexandria Ocasio-Cortez, and the reported 50,000 members of the Democratic Socialists of America.²¹¹

208. *This Day in History: Mussolini Founds the Fascist Party*, HIST. CHANNEL, <https://www.history.com/this-day-in-history/mussolini-founds-the-fascist-party> (last updated July 28, 2019).

209. 268 U.S. 652, 654 (1925).

210. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969); see also *Ward*, 491 U.S. 781; *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

211. Portland DSA, *Democratic Socialists of America Exceeds 50,000 Members*, MEDIUM (Sept. 2, 2018), <https://medium.com/@dsaportlandoregon/democratic-socialists-of-america-exceeds-50-000-members-4208107e857b>.

B. Bars to Restricting Free Speech and Assembly

Advocating for a moral need to resort to force is different from “preparing a group for violent action and steeling it to such action.”²¹² *Brandenburg v. Ohio*, the criminal syndicalism case, illustrates instances in which a state is powerless to encroach on First Amendment rights.²¹³ In this case, a state statute criminalizing the advocacy of sabotage and terrorism was struck down because it failed to draw a distinction between mere advocacy and imminent lawless action.²¹⁴ Much to the chagrin of many Americans, the *Brandenburg* Court was committed to protecting pure speech regardless of how unpopular it was. Congress enacted the Civil Rights Act of 1964 just five years before the *Brandenburg* decision, guaranteeing all Americans the equal enjoyment of public accommodations “without discrimination or segregation on the ground of race, color, religion, or national origin.”²¹⁵ *Brandenburg* demonstrates that racist, outrageous, and offensive speech can be afforded great protection under the First Amendment—even in the midst of a national civil rights movement.

Distinguishing between different types of speech and assembly is patently unconstitutional and violative of principles of equal protection. In *Police Department of Chicago v. Mosley*, the respondent challenged a city ordinance which provided a labor exemption to its ordinance banning picketing within a certain distance from a school.²¹⁶ The city’s exemption was struck down because the ordinance unconstitutionally affected picketing, a form of expressive conduct, “by classifications formulated in terms of the subject of the picketing.”²¹⁷ The Constitution grants the government “no power to restrict expression because of its message, its ideas, its subject matter, or its content.”²¹⁸ Therefore, permitting one type of protest over the other is overbroad and presumptively unconstitutional.²¹⁹

Speech on matters of public concern “is at the heart of the First Amendment’s protection” regardless of how despicable the public finds the conduct to be.²²⁰ In *Snyder v. Phelps*, the Court reaffirmed the *Brandenburg* principles and upheld the offensive speech of picketers protesting a military

212. *Brandenburg*, 395 U.S. at 448.

213. *See id.*

214. *See id.* at 449.

215. 42 U.S.C. § 2000a(a) (2018).

216. 408 U.S. 92, 93 (1972).

217. *Id.* at 95.

218. *Id.*

219. *See id.*

220. *Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011).

funeral service.²²¹ Individuals congregated outside the service to communicate their belief that “God hates the United States for its tolerance of homosexuality, particularly in America’s military.”²²² The picketers chanted statements such as “Thank God for 9/11,” “Thank God for Dead Soldiers,” and a variety of pejorative stereotypes aimed at homosexuals.²²³ Supporting the 9/11 attacks is terrorism and sabotage against the United States, but because the picketers’ signs concerned “broad issues of interest to society at large,” the speech was constitutional.²²⁴ The Bill of Rights reflects a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”²²⁵ Further, speech concerning public affairs is “the essence of self-government.”²²⁶

Each of these cases formulates a singular defense for those opposing anti-protest legislation: public speech, no matter how offensive or outrageous, is always afforded protection under the First Amendment. South Dakota’s blanket ban on all riot support is unconstitutional under the *Brandenburg* lens; criminalizing mere support of pipeline protests—whether direct, through participation, or indirect, by showing approval via social media—fails to distinguish between mere advocacy and an actual, likely incitement to lawless action. Texas’ new law is less suspicious, as its outlined violations are clearer than South Dakota’s. But it still fails under *Brandenburg* as its restrictions are content-based and leave no alternative channels for communication.

Texas’ law stands in direct contrast to the holding in *Police Department of Chicago v. Mosley*. Here, the problem with the law in Texas is that the outlined restrictions are *too* specific. Restrictions made by a classification or distinction based on the subject matter of speech are clearly violative of the Fourteenth Amendment’s Equal Protection Clause.²²⁷ Specifically banning anti-critical infrastructure speech and assembly gives Texas the authority to “restrict expression because of its message, its ideas, its subject matter, or its content”—a power not afforded to governments by the Constitution.²²⁸

221. *Id.* at 452.

222. *Id.* at 448.

223. *Id.*

224. *Id.* at 454.

225. *Id.* at 452.

226. *Id.*

227. *See* *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92 (1972).

228. *Id.* at 95.

Federal energy projects are some of the most pressing issues of public concern; therefore, speech surrounding critical infrastructure facilities should be awarded blanket protection under the First Amendment. Speech is of public concern if it relates to political or social community matters and is “a subject of general interest and of value and concern to the public.”²²⁹ Pipeline construction under a community’s water source and through areas of cultural and religious significance is a social community matter; the Standing Rock Sioux Tribe has standing to oppose the Dakota Access Pipeline on this element alone. The immense national support for the movement against the Dakota Access Pipeline further evidences the public value and interest surrounding the issue of construction. The Standing Rock case does not dispute whether a significant government interest exists; maintenance of public and private property, peaceful protesting, and successful energy projects are legitimate concerns worthy of preventive legislation. But the actions taken against anti-pipeline movements are wholly coercive, overly restrictive, and lacking in content-neutral application. Supporting the government and supporting the protesters are not mutually exclusive; Americans can contend that a legitimate government interest behind maintaining the protests exists while still identifying the responses to the Standing Rock movement as overly restrictive.

C. Where the Government Can and Cannot Restrict the Free Exercise of Religion

The government is not required to conduct its affairs in a manner which aids a citizen in carrying out his or her religious beliefs. In *Bowen v. Roy*, two individuals receiving state welfare benefits refused to comply with a requirement that beneficiaries provide the social security numbers of each member receiving the benefits.²³⁰ The individuals felt that obtaining a social security number for their daughter “would violate their Native American religious beliefs.”²³¹ The parents, members of the Abenaki Tribe, believe “control over one’s life is essential to spiritual purity and indispensable to ‘becoming a holy person’”;²³² obtaining a social security number—a number over which they had no control—would rob their daughter of her ability to keep her person and spirit unique and “prevent her from attaining

229. *Snyder*, 562 U.S. at 453.

230. 476 U.S. 693, 695 (1986).

231. *Id.*

232. *Id.* at 696.

greater spiritual power.”²³³ The social security requirement was found to be “wholly neutral in religious terms and uniformly applicable” notwithstanding the family’s religious free exercise claims.²³⁴

The Free Exercise of Religion Clause “does not relieve an individual of the obligation to comply with a law that incidentally forbids . . . the performance of an act that his religious belief requires” so long as the law is neutral to religion “and is otherwise constitutional as applied to those who engage in the specified act for nonreligious reasons.”²³⁵ The respondents in *Employment Division, Department of Human Resources of Oregon v. Smith* were fired for ingesting peyote, a hallucinogen banned by state law, for religious purposes as members of the Native American Church.²³⁶ The government was entitled to deny unemployment benefits to the respondents because they were discharged for the use of illicit drugs, even though the use of those drugs was sacramental.²³⁷ Allowing a religious exception to a law “would open the prospect of constitutionally required religious exemptions from civil obligations of almost every conceivable kind.”²³⁸

As for the bars to restricting religious free exercise, a law impeding the observance of a religion and discriminating between religions is significantly burdensome and invalid. In *Sherbert v. Verner*, the appellant was denied unemployment benefits after she was fired for refusing to work on Saturdays.²³⁹ The appellant was a practicing Seventh-day Adventist, and Saturdays are the faith’s Sabbath days.²⁴⁰ The appellant’s employer viewed her refusal to work on Saturdays as her failing to accept suitable work without good cause.²⁴¹ Finding for the appellant, the Court held the Free Exercise Clause prohibits a state from applying the eligibility requirements of an unemployment compensation statute where the provisions prevent an

233. *Id.*

234. *Id.* at 703.

235. *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

236. *See id.*

237. *See id.*

238. *Id.* at 888.

239. 374 U.S. 398, 399 (1963).

240. *Id.*; see also Jessica Taylor, *All Your Questions About Seventh-Day Adventism and Ben Carson Answered*, NPR (Oct. 27, 2015), <https://www.npr.org/sections/itsallpolitics/2015/10/27/452314794/all-your-questions-about-seventh-day-adventism-and-ben-carson-answered> (“Unlike most other Christian denominations, Seventh-day Adventists attend church on Saturdays, which they believe to be the Sabbath instead of Sunday, according to their interpretation of the Bible.”).

241. *See Sherbert*, 374 U.S. at 401.

individual from properly observing the key principles of her religion.²⁴² No compelling state interest supports the subjective good cause requirement when it substantially infringes on an individual's constitutional rights.²⁴³

Individual religious interests outweigh state interests when a state is attempting to coerce a violation of religious beliefs. In *Wisconsin v. Yoder*, Amish respondents successfully challenged the state's compulsory school attendance law requiring children to attend school until the age of sixteen.²⁴⁴ The respondents declined to send their children to school after the eighth grade, setting forth evidence of "the adequacy of [the Amish] alternative mode of continuing informal vocational education" to prepare children for life in the Amish community.²⁴⁵ The respondents further believed that high school attendance was sincerely "contrary to the Amish religion."²⁴⁶ Ultimately, the Court found the state could not compel the respondents' children to attend school because the Free Exercise Clause trumps a state's interest in universal education when it imposes on fundamental constitutional rights.²⁴⁷

Congress passed the Religious Freedom Restoration Act to prevent government actors from "substantially burdening" religious free exercise, even if the burden is the result of a generally applicable rule.²⁴⁸ The Act follows that the government is only entitled to burden an individual's exercise of religion if the restriction is (1) in place to further a compelling government interest, and (2) the "least restrictive means of furthering that compelling governmental interest."²⁴⁹

Knowingly destroying tribal sites of religious and cultural significance impedes upon the tribes' ability to exercise their religions freely. The Mentz Declaration illustrates such blatant and intentional destruction of sacred sites by the government.²⁵⁰ Not only does the *Sherbert* decision afford Sioux Tribe members the right to protest the Dakota Access Pipeline's

242. *See id.* at 410.

243. *See id.* at 409.

244. 406 U.S. 205, 234–35 (1972).

245. *Id.* at 235.

246. *Id.* at 209.

247. *See id.* at 214.

248. *See* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2012).

249. *Id.* § 2000bb-1 (3)(b).

250. *See* Nagle, *supra* note 13 (describing the Army Corps' knowing destruction of significant religious and cultural sites to the Standing Rock Sioux Tribe less than twenty-four hours after Tim Mentz filed a Supplemental Declaration notifying the Court of visible sacred burial grounds, archaeological sites, and stone features along the Dakota Access Pipeline's path of construction).

construction, but it invalidates any anti-protest legislation preventing such tribal advocacy. Preventing these tribes from observing the key principles of their religion unconstitutionally coerces them into violating their religious beliefs. Native individuals are forced to ignore the fact that the government is blatantly destroying key facets of their religious practices. But *Sherbert* gives tribal members a framework with which they can defend sacred sites as central to their religious observances; any restriction imposing upon the tribes' religious observances is significantly burdensome and invalid.

Avoiding the destruction of a religion does not constitute a government establishment of religion. In *Smith*, the peyote case, the Court was concerned with the slippery slope of providing a religious exemption.²⁵¹ *Yoder* remedies this concern. In *Yoder*, the government demonstrated respect for the unconventional beliefs of the Amish religion to exempt the respondents from following the compulsory school attendance law.²⁵² The *Yoder* Court recognized that requiring the Amish respondents to comply with the law unconstitutionally coerced the individuals into violating their religious beliefs while holding that any exemption was not an establishment of the Amish religion.²⁵³

The Army Corps fails to recognize that it can avoid the desecration of sacred sites without establishing or even supporting the Sioux Tribe's religion. By choosing to work around these sites of religious and cultural significance, the Army Corps has the opportunity to show its respect for the Standing Rock Tribe's religion and avoid conflict altogether. By forcing the Tribe to give up sacred and burial sites inherent to its religion, the government is endorsing a coercion of the Sioux Tribe to violate its religious beliefs.

D. A Tribal History of Unsuccessful Religious Free Exercise Claims

A sacred place is not a symbol of religion, nor is it a place to remember the people and events of the past; on its own, a sacred place is "the source of sacred power."²⁵⁴ Indigenous people have "an understanding of the relatedness, or affiliation, of the human and nonhuman worlds," giving rise

251. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 888 (1990) (arguing that providing for religious exemptions to laws "would open the prospect of constitutionally required religious exemptions from civil obligations of almost every conceivable kind").

252. See *Yoder*, 406 U.S. at 236.

253. See *id.*

254. Carpenter, *supra* note 17, at 1071.

to a central concept of respect for the “inherent value belonging to the natural world.”²⁵⁵ Notwithstanding their religious and spiritual significance, sacred sites contribute to a tribe’s political and economic survival by ceremonially “restoring the community’s balance with the natural world.”²⁵⁶ Analyzing the history of tribal Free Exercise claims demands recognition of the value of indigenous sacred sites. Historically, however, courts have failed to recognize the importance of these sites, often giving great deference to the federal government.

A tribe’s characterization of land as “sacred” demonstrates mere personal preference and not a “conviction[] shared by the entire organized group.”²⁵⁷ In *Sequoyah v. Tennessee Valley Authority*, various Cherokee Indian plaintiffs sought to prevent a government dam project which would result in “irreversible loss to the culture and history” of the tribes; specifically, the reservoir would flood and ruin generations of graves and sacred sites.²⁵⁸ During the trial, Cherokee elder Richard Crowe spoke of the affected land as one of the Tribe’s most sacred places; to Crowe’s family, the land was the birthplace of the Cherokee tradition and the group’s one true “connection with the Great Spirit.”²⁵⁹ Despite Crowe’s testimony, and the sacred religious sites’ impending submersion as a result of the reservoir, the Sixth Circuit approved the dam’s construction and found the land was not indispensable nor sufficiently central to the Tribe’s religious observances.²⁶⁰ Though culture, history, and tradition are vital to many individuals, the Sixth Circuit did not afford these interests protection under the First Amendment’s Free Exercise provision.²⁶¹

Sequoyah’s centrality and indispensability standard was reaffirmed in *Wilson v. Block* just three years later.²⁶² In *Wilson*, various Hopi and Navajo Tribe members sought to enjoin U.S. Forest Service operations aimed at developing downhill skiing facilities.²⁶³ The *Wilson* plaintiffs claimed that the *Sequoyah* decision did not properly interpret the Constitution, as “the First Amendment protects all practices” regardless of their centrality to the

255. *Id.* at 1068 (internal quotations omitted).

256. *See id.*

257. *Sequoyah v. Tenn. Valley Auth.*, 620 F.2d 1159, 1164 (6th Cir. 1980).

258. *Id.* at 1164–65 (internal quotations omitted).

259. Nagle, *supra* note 13, at 676–77.

260. *See Sequoyah*, 620 F.2d at 1164.

261. *See id.* at 1165.

262. 708 F.2d 735, 744 (D.C. Cir. 1983).

263. *See id.* at 739.

given religion.²⁶⁴ But the D.C. Circuit in *Wilson* held that the *Sequoyah* analysis “focuses inquiry solely upon the importance of the geographic site in question to the practice of the plaintiffs’ religion” and not on the alleged “theological importance of the disputed activity.”²⁶⁵ The American Indian Religious Freedom Act only “requires [that] federal agencies . . . avoid unnecessary interference with . . . traditional Indian religious practices.”²⁶⁶ Since the skiing developments did not deny the tribes access to the land, the government’s projects did not violate the First Amendment.²⁶⁷

Finally, as long as the government’s actions do not constitute an attempt to coerce individuals into violating their religious beliefs, those actions that have severe adverse effects on tribal religious practices are constitutionally permissible. In *Lyng v. Northwest Indian Cemetery Protective Ass’n*, three tribes sought to enjoin federal timber harvesting and road construction in an area historically utilized for religious purposes.²⁶⁸ The government contended, and the Supreme Court agreed, that the projects would have “devastating effects on traditional Indian religious practices.”²⁶⁹ But whatever that “exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct [of the] government” may be, “the location of the line cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development.”²⁷⁰ The United States “simply could not operate if it were required to satisfy every citizen’s religious needs and desires,” placing final affirmation on the government’s knowing destruction of tribal religious sites.²⁷¹ In his dissent, Justice Brennan described the *Lyng* decision as one that has “effectively bestowed on one party,” meaning the federal government, “the unilateral authority to resolve all future disputes in its favor, subject only to the Court’s toothless exhortation to be ‘sensitive’ to affected religions.”²⁷² In Brennan’s opinion, “Native Americans deserve—and the Constitution demands—more than this.”²⁷³

264. *See id.* at 743.

265. *Id.* (internal citations omitted).

266. *Id.* at 746.

267. *Id.* at 747.

268. 485 U.S. 439, 442 (1988).

269. *Id.* at 451.

270. *Id.*

271. *Id.* at 452.

272. *Id.* at 473.

273. *See id.*

The preceding cases illustrate that the Supreme Court is unlikely to protect a sacred site on the grounds of religious freedom. There are strong arguments that a site's classification as "sacred" deems it to be central or indispensable to the religion, and destroying any of these sites coerces a tribe into violating its beliefs by taking away its ability to practice in the area. But courts—particularly the *Lyng* Court—focus on the tribes' right to the land in determining whether they can even allege an injury against the government. Perhaps Standing Rock supporters are wrong to assert the First Amendment in the name of tribal justice;²⁷⁴ the *Lyng* Court held the dispute primarily concerned property law rather than religious freedom.²⁷⁵ Recall that the Dakota Access Pipeline will run through the Sioux Tribe's water source just a mile north of the reservation's border, but it will not actually cross the threshold to enter the Tribe's land. Does lack of land ownership mean the Standing Rock case is dead in the water?

V. Property Law and Cultural Conceptions of Ownership Rights

When the government owns tribal sacred sites, there exists an "obvious tension between Indian religious preferences and federal land ownership interests."²⁷⁶ The issue of land ownership is closely bound to religious free exercise when a tribe is trying to stake a claim to land. Absent federal validation of the land's centrality to a religion, tribes cannot establish the requisite land ownership—whether literal or constructive.²⁷⁷ Courts struggle with the fact that granting land ownership to a tribe entitles property rights to federally owned land. This struggle is rooted in the history of American jurisprudence, with the *Johnson v. M'Intosh* decision setting precedent for such questions today.

A. Johnson v. M'Intosh and the Doctrine of Discovery

In 1775, Thomas Johnson purchased land from members of the Piankeshaw Indian Tribe and left the land to his heirs upon his death.²⁷⁸ Absent knowledge of this conveyance, the federal government sold 11,560

274. See Marcia Yablon, Note, *Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land*, 113 YALE L.J. 1623, 1629 (2004).

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

276. Peter Zwick, Note, *A Redeemable Loss: Lyng, Lower Courts and American Indian Free Exercise on Public Lands*, 60 CASE W. RES. L. REV. 241, 244 (2009).

277. See generally *Sequoyah v. Tenn. Valley Auth.*, 620 F.2d 1159 (6th Cir. 1980).

278. See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 555–61 (1823).

acres of this land to William M'Intosh in 1818.²⁷⁹ Both Johnson's heirs and M'Intosh claimed a legal right to the land.²⁸⁰ The Court found for M'Intosh, as the Piankeshaw Indians had "no right of soil as sovereign, independent states" and, therefore, no right to sell the land to Johnson in the first place.²⁸¹ The Doctrine of Discovery governed the outcome in this case.²⁸² The Doctrine of Discovery theorizes that European or Christian nations that discover new lands automatically gain sovereign and property rights notwithstanding existing native ownership, occupation, and use of the land.²⁸³ The notion entitles transfer of native rights over the land—political, commercial, and property—to this European or Christian discoverer.²⁸⁴ The discoverer gains "sovereign governmental rights over the native peoples and their governments . . . without the knowledge or the consent of the Indian people."²⁸⁵ So, since European or Christian discovery of land gives title to the government of the subjects who made the discovery, M'Intosh's claim to the land was superior.²⁸⁶

Though the brunt of this decision fell on Johnson's heirs, the true injustice lies in the fact that tribal land ownership—established by hundreds of years of living and practicing on the land—was trumped by new American "discovery." The *Johnson* Court did not consider how long the Piankeshaw Indians lived on the land before this discovery; since the Tribe failed to commercially exploit the land before the land's discovery, the land ownership could be stripped and given to an entirely new owner.²⁸⁷

The Doctrine of Discovery "redefined indigenous land as an object to be conquered and exploited," not preserved or maintained for future generations.²⁸⁸ This principle conflicts with the basic tribal motivation for preserving land: maintaining "spiritual connections to . . . ancestors."²⁸⁹ A significant site's mere existence perpetuates such a connection, even absent an ability to access the site.²⁹⁰ The spiritual connection is lost when a site is

279. *See id.* at 560.

280. *See id.* at 563.

281. *Id.* at 567.

282. *See id.*

283. *See id.*

284. *See id.*

285. Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 5 (2005).

286. *See Johnson*, 21 U.S. (8 Wheat.) 543.

287. *See Nagle*, *supra* note 13.

288. *Id.* at 669.

289. *See id.* at 667.

290. *See id.*

destroyed—either literally, through action, or constructively, through a loss of title to the land.²⁹¹

The *Johnson* Court ignored this motivation, characterizing Native Americans as non-Christian “heathens.”²⁹² The added consideration of an individual’s Christianity “further explains the refusal of federal courts today to protect or preserve lands that contain the sacred sites or burials of individuals who do not practice Christianity.”²⁹³ The *Johnson* decision is primarily to blame for this judicial culture; *Johnson* created a legal framework that entitles absolute conquest powers and blanket immunity to the government at the expense of Native Americans.

American legal institutions “cannot escape from Western notions of property even when the Court believes those notions produce unjust results.”²⁹⁴ Chief Justice Marshall found the Doctrine of Discovery’s application in *Johnson* to be “unavoidable” considering the structure and attitude of the Western legal tradition.²⁹⁵ “Created to implement Anglo-American laws,” the American court system made it difficult for Marshall to find for the Piankeshaw Indians.²⁹⁶ Experts suggest we should sleep soundly knowing that Marshall likely disagreed with the decision²⁹⁷ and surely would not have wished the effect of *Johnson* on tribes today.

Dissenting opinions often shape future authority. The Standing Rock case presents a unique opportunity to oppose the *Johnson* framework, as the holding remains binding precedent. The *Plessy v. Ferguson*²⁹⁸ dissent “transformed into the foundational authority for the majority opinion in *Brown v. Board of Education*.”²⁹⁹ Similarly, the *Bowers v. Hardwick*³⁰⁰

291. *Id.*

292. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 577 (1823).

293. Nagle, *supra* note 13, at 671.

294. Yablon, *supra* note 274, at 1634–35.

295. *Johnson*, 21 U.S. at 591; *see also* Yablon, *supra* note 274, at 1635 (“‘Conquest,’ [Marshall] wrote, ‘gives a title which the Courts of the conqueror *cannot deny*, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.’” (emphasis added)).

296. Yablon, *supra* note 274, at 1636.

297. *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 12 n.5 (5th ed. 2002) (“The sarcasm and irony seen here and elsewhere in Marshall’s opinion suggest his embarrassment with what he had to write, and there is independent evidence that he was sympathetic to the plight of Native Americans.”).

298. 163 U.S. 537 (1896) (holding racial segregation on railway cars to be constitutional).

299. Nagle, *supra* note 13, at 671; *see also* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (finding separate but equal facilities to be inherently unequal where racial segregation is present).

dissent influenced the Court to strike down sodomy laws altogether in *Lawrence v. Texas*³⁰¹ almost twenty years later.³⁰² Every instance of dissent—art, litigation, free speech in public forums—effectively changes laws that a given majority has enacted.³⁰³ A ruling for Standing Rock will force the government to acknowledge a tribal right to land used for religious purposes. Such a holding might be the dissent needed to overturn *Johnson* for good. In addition, overruling *Johnson* could possibly overturn the tribal religious freedom cases discussed previously. If this were to happen, it would not matter to courts whether a religious practice was sufficiently central or indispensable to the religion; the mere existence of a religious practice on a given piece of land would bar the government from touching the property in any way that would interfere with the practice. “If George Washington founded the country, John Marshall defined it”;³⁰⁴ can Standing Rock redefine American property rights?

B. The Western Conception of Property and the Lyng Ownership Bar

Lyng held that government actions imposing severe adverse effects on a tribe’s religious practices are constitutional as long as the actions do not attempt to coerce the tribe members into violating their religious beliefs.³⁰⁵ Notwithstanding the “devastating effects [of government actions] on traditional Indian religious practices,” the government “simply could not operate if it were required to satisfy every citizen’s religious needs and desires.”³⁰⁶ Experts predicted that *Lyng* “would effectively eliminate the possibility of using the First Amendment to challenge agency decisions regarding the management of sacred sites,” resulting in “a serious blow to the protection of Indian sacred sites.”³⁰⁷

Lyng supporters propose an idea known as “the tragedy of the anticommons” as a counterargument to the negative effects of the

300. See *Bowers v. Hardwick*, 478 U.S. 186 (1986) (affirming that there is no fundamental right conferred upon homosexuals to engage in consensual sodomy).

301. See *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that an anti-sodomy conviction violates the vital interests in liberty and privacy protected by the Fourteenth Amendment).

302. Nagle, *supra* note 13, at 671.

303. *Id.* at 672.

304. George Dargo, *Jean Edward Smith, John Marshall: Definer of a Nation*, 42 AM. J. LEGAL HIST. 429 (1998) (book review).

305. See *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 429 (1988).

306. *Id.* at 451–52.

307. Yablon, *supra* note 274, at 1632–33.

decision.³⁰⁸ The concept of the tragedy of the anticommons stands in contrast to the well-known logic of the tragedy of the commons, whereby the “overexploitation of resources and over-production of pollution” occurs “as each individual pursues her self-interest.”³⁰⁹ Conversely, the tragedy of the anticommons illustrates that, with “too many owners holding rights of exclusion, the resource is prone to underuse.”³¹⁰ In *Lyng*, the tribes were able to use the disputed land, but could not exclude others from accessing the areas considered sacred.³¹¹ Supporters argue the *Lyng* holding was correct because the tribal desire to block all development in the future would lead to a rarely optimal, perpetual non-use of the property.³¹² This result—the tragedy of the anticommons—is remedied by eliminating “overlapping property rights that create the power to veto potential uses of the land.”³¹³ The Court exercised this veto power in denying the *Lyng* tribes exclusive access to the land.

American courts fail to understand the differences between American and Native American conceptions of property and religion, giving rise to outcomes such as the restrictive *Lyng* exclusionary power. The Anglo-American conception of property rests on an ownership model of property³¹⁴ whereby “property rights identify a private owner who has title to a set of valued resources with a presumption of *full power* over those resources.”³¹⁵ These property powers include the right to transfer, use, exclude from, destroy, consume, and possess property. In contrast, Indians view property “as utterly incapable of reduction to ownership as property

308. *Id.* at 1631.

309. Amy Sinden, *The Tragedy of the Commons and the Myth of a Private Property Solution*, 78 U. COLO. L. REV. 533, 534 (2007).

310. Yablon, *supra* note 274, at 1631 (quoting Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 624 (1998)).

311. *Id.*

312. *Id.*

313. *Id.* at 1631–32.

314. Kristen A. Carpenter, *In the Absence of Title: Responding to Federal Ownership in Sacred Sites Cases*, 37 NEW ENG. L. REV. 619, 626 (2003) (quoting JOSEPH WILLIAM SINGER, ENTITLEMENT 2 (2000)).

315. Yablon, *supra* note 274, at 1633 (emphasis added) (quoting JOSEPH W. SINGER, PROPERTY AND SOCIAL RELATIONS: FROM TITLE TO ENTITLEMENT, IN PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP 3, 4 (Charles Geisler & Gail Daneker eds., 2000)).

by human beings.”³¹⁶ The tribes in sacred sites cases only seek partial rights to the land—not full ownership; rather than take the land from the government, tribes merely wish to access the land and prevent its destruction. Federal courts apply Anglo-centric blanket bans on land use and ownership in sacred sites cases without considering native peoples’ desires and the manner in which they view property ownership.

Tribes such as the *Lyng* plaintiffs are simply asking the federal government to “manage its property in a way that would protect the ‘privacy and solitude’ necessary for Indian religious practices.”³¹⁷ This request introduces the second distinction American courts fail to make: the differences between Native and Judeo-Christian religions.³¹⁸ Failure to consider this distinction further bars tribes from making free exercise claims in defense of their sacred sites.³¹⁹ This obstacle is known as the *Lyng* ownership bar.³²⁰ Judeo-Christian religions, such as Judaism and Christianity, recognize specific places as having deep religious significance, but those Judeo-Christian individuals are assumed to be able to practice their religions anywhere.³²¹ Native religions are often “inextricably tied to particular places in the natural world and cannot be relocated” in contrast to Judeo-Christian religions.³²² Tribal religious practitioners have strong relationships to land deemed “essential to [both the] religion and [the tribe’s] culture.”³²³ Yet tribes are barred from establishing any type of ownership or property right because they lack fee simple title to the land in dispute.³²⁴

American jurisprudence incorrectly assumes that Western law and society operate through the ownership model of property. Sacred sites cases focus on the distinguished rights of owners (the federal government) and non-owners (native peoples). In reality, owners are bound by moral and legal obligations which restrict their rights and afford rights to non-owners.³²⁵ Landlords retain the right to take back property upon the

316. *Id.* (quoting William Bradford, “*With a Very Great Blame on Our Hearts*”: *Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1, 27 (2002-2003)).

317. Carpenter, *supra* note 314, at 626.

318. *See id.* at 623.

319. *See id.* at 625.

320. *See id.*

321. *Id.* at 623.

322. *Id.* at 624.

323. *Id.* at 625.

324. *Id.*

325. *Id.* at 627.

conclusion of a lease while tenants are entitled to an implied right of habitability, the ability to receive visitors, and security from eviction during the lease.³²⁶ Similarly, business owners can exclude patrons but are limited by federal discrimination laws.³²⁷ And copyright owners exercise exclusive rights for limited amounts of time, allowing for non-owners of property to participate in the free exchange of copyright ideas.³²⁸ On a basic level, property law has afforded non-owners land rights since time immemorial; easements, covenants, and adverse possession all entitle non-owners a stake in a piece of land. This more realistic conception of the American property model considers “the conflicting interests of everyone with legitimate claims to rights in the property in question.”³²⁹ Property rules structure social relationships “by setting expectations, imposing obligations, and affecting power distribution,”³³⁰ demonstrating that owners’ property rights are neither exclusive nor absolute. Analyzing a property right “depends on the way in which it shapes relationships . . . and expresses human values.”³³¹ Sacred sites cases should protect principles of equity and intent in the same way other areas of property law—such as wills and trusts—do. Since ownership is only one component of a property rights analysis, the same should be true in Indian sacred sites cases.³³²

Lyng is a cautionary tale to the Standing Rock movement; absent strong advocacy in favor of the property rights of non-owners, there is no end to the government’s exclusionary veto power. Just as tenants, consumers, and copyright owner-hopefuls retain non-owner rights to property, native tribes are entitled to limited ownership of sacred sites on federal land. *Johnson* and *Lyng* may give the government the right to desecrate tribal religions, but it is not by any means required to exercise this right.³³³ A favorable outcome in Standing Rock will keep the government from doing so.

VI. Conclusion

The wrongs at Standing Rock present a unique opportunity to oppose a discriminatory culture of conquest in America. For decades, tribes have faced innumerable civil rights injustices dating back to the original

326. *Id.* at 626–27.

327. *Id.* at 626.

328. *Id.* at 627 n.45.

329. *Id.* at 627 (quoting JOSEPH WILLIAM SINGER, ENTITLEMENT 2 (2000)).

330. *Id.*

331. *Id.*

332. *See id.*

333. *Id.* at 632.

American discovery of native lands and sacred sites. Now, anti-protest legislation stands in the way of advocating for tribal rights.

The first step toward establishing tribal non-ownership rights to sacred sites is to advocate for the reform of anti-protest legislation. Anti-protest laws are unconstitutional because they prevent individuals from exercising their rights to free speech, assembly, and religious exercise. These laws facially discriminate against certain types of speech and assembly, vaguely banning all advocacy of a given idea. The First Amendment precedent guiding these laws is outdated, unworkable, and mostly applicable to an era where allegations of fascism and socialism were insults rather than fact. The Standing Rock protesters are not terrorists, nor saboteurs, for opposing pipeline construction; these protesters are advocates for the health and safety of the Standing Rock community, water supply, and irreplaceable cultural sites.

The *Johnson v. M'Intosh* decision supports the American conquest mentality that encourages tribal disrespect in the Standing Rock case. *Johnson* entitles the government to entirely ignore the Sioux Tribe's existence in furtherance of the energy industries' interests. Alongside *Lyng*, *Johnson* kills a non-owner property claim before it even starts, favoring American and Judeo-Christian entitlements over all others. This precedent has not yet been successfully challenged. Standing Rock can serve as this vehicle.

Standing Rock Sioux Tribe members are non-owners of their sacred sites in the path of pipeline construction. Similar to tenants, copyright participants, and adverse possessors, tribal members are afforded non-owner rights to the use of property that is not theirs to own. The property rights of fee simple owners are not absolute, especially within the Native American conception of property law. The Standing Rock crisis gives tribes the chance to challenge the discriminatory *Johnson* framework to prevent similar wrongs in the future. Fortunately, national support surrounding the crisis at Standing Rock suggests that most Americans are encouraging tribes to do so.

While, sometimes, the government is entitled to trump tribal interests, it is never required to do so. Philosopher John Locke summarized early notions of property and possessions with the following statement: "Thus in the beginning all the World was *America*."³³⁴ Perhaps Locke was right. But the world does not have to stay that way.

334. LOCKE, *supra* note 1.