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### Indian Religious Freedom and Governmental Development of Public Lands

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# Indian Religious Freedom and Governmental Development of Public Lands

In the early 1970's, the federal government abandoned its official policy of terminating tribes as a means of forcing American Indians<sup>1</sup> to assimilate into mainstream society.<sup>2</sup> Yet the elimination of the basis of Indian religious belief by government action continues apace. The recent resurgence of site-specific Indian religions,<sup>3</sup> coinciding with stepped-up federal development of public lands,<sup>4</sup> highlights the dilemma of native worshipers in a system that does not recognize site-specific belief. Indian tribes are challenging development plans affecting sacred areas in previously undisturbed federal and state lands, claiming that the free exercise clause protects their religious interest in governmental property.<sup>5</sup>

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1. The terms Indian, Native American, and native are used interchangeably throughout this Note.

2. In a letter to Congress dated July 8, 1970, President Nixon declared that the federal policy of formal termination of Indian tribes as a method of encouraging assimilation, H.R. Con. Res. 108, 83rd Cong., 2d Sess., in force since 1953, was "morally and legally unacceptable, because it produces bad practical results, and because the mere threat of termination tends to discourage greater self-sufficiency among Indian groups . . ." Instead of a policy of termination, President Nixon recommended that the federal government encourage self-determination among Indian tribes. 116 CONG. REC. 23,132 (1970). Congress responded by enacting several pieces of legislation designed to promote self-determination. See, e.g., Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450a-450n (1982); Act of December 15, 1970, Pub. L. No. 91-550, 84 Stat. 1437 (1970) (returning sacred Blue Lake area to Taos Pueblos). See generally D. GETCHES, D. ROSENFELT & C. WILKINSON, FEDERAL INDIAN LAW 86-112 (1979 & Supp. 1983) (tracing deleterious effects of termination, and change of federal policy since 1970); Israel, *The Reemergence of Tribal Nationalism and Its Impact on Reservation Resource Development*, 47 U. COLO. L. REV. 617 (1976) (tribal nationalism and congressional encouragement of self-determination together with protection of Indian rights by Supreme Court have brought about great change and progress since mid-1960's).

3. Professor Brown points out that Native American religions have survived colonization and cultural isolation, and are flourishing today:

American Indian religions represent preeminent examples of primal religious traditions that have been present in the Americas for some thirty to sixty thousand years. Fundamental elements common to the primal nature of those traditions not only survive into the present among Indian cultures of the Americas, but in many cases are currently being reexamined and reaffirmed by the people with increasing and remarkable vigor.

J. BROWN, THE SPIRITUAL LEGACY OF THE AMERICAN INDIAN 1 (1982).

4. See Jawetz, *The Public Trust Totem in Public Land Law: Ineffective—And Undesirable—Judicial Intervention*, 10 ECOLOGY L.Q. 455, 459-60 (1982) (commercial exploitation of wealth of natural resources on public lands steadily increased over last 30 years); Mantell, *Preservation and Use: Concessions in the National Parks*, 8 ECOLOGY L.Q. 1, 2 n.3 (1979) ("intense use of the parks which accelerated greatly after World War II continues to increase each year," based on Park Service statistics of recreational use from 1904-76).

5. Indian suits seeking to block development because of their religious beliefs or practices include: *Wilson v. Block*, 708 F.2d 735 (D.C. Cir.), cert. denied, 104 S. Ct. 371 (1983), cert. denied, 104 S. Ct. 739 (1984), cert. denied, 104 S. Ct. 739 (1984) (Hopi suit against proposed expansion of ski resort in Coconino Mountains); *New Mexico Navajo Ranchers Ass'n v. ICC*, 702 F.2d 227 (D.C. Cir. 1983) (Navajo suit against ICC's grant of authority to construct rail line); *Badoni v. Higginson*,

Indians have long worshiped at sacred sites situated on what are now public lands.<sup>6</sup> Adherents of traditional Indian religions claim that development of certain areas threatens their religions with extinction.<sup>7</sup> They fear that development will undermine the religious power of sacred sites, inhibit communication with spirits, prevent the collection of healing herbs, and even kill tribal deities.<sup>8</sup>

This Note argues that the approach taken by many courts to Indian challenges inappropriately rejects Native American free exercise claims. The requested relief is fundamentally different from traditional religious exemptions; and current free exercise analysis is constrained by concepts drawn from Judeo-Christian doctrine. The Note concludes that courts must adopt a less rigid approach that takes into consideration the unique site-specificity of Indian religions, in order to provide adequate constitutional protection for sacred sites.

## I. INDIAN THEOLOGY AND THE RELIGIOUS NATURE OF THE CLAIMS

Judicial analysis of the religious interests at stake in Native American challenges to site development has in large part misconstrued the nature of Indian beliefs and practices, and has thereby denied constitutional protection to legitimate Indian religious claims.<sup>9</sup> The Judeo-Christian concept of a supreme and immortal deity, belief in whom may be divorced in many respects from any specific situs or mode of worship, is not applicable to

638 F.2d 172 (10th Cir. 1980), (Navajo suit against water storage project and management of Rainbow Bridge National Monument), *cert. denied*, 452 U.S. 954 (1981); Sequoyah v. TVA, 620 F.2d 1159 (6th Cir.) (Cherokee challenge to Tellico Dam), *cert. denied*, 449 U.S. 953 (1980); Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586 (N.D. Cal. 1983) (Yurok, Karok and Tolowa challenge to proposed road construction and timber harvesting plans on federal land in California), *appeal pending*, No. 83-2225 (9th Cir. argued July 9, 1984); Crow v. Gullet, 541 F. Supp. 785 (D.S.D. 1982) (Lakota and Tsistsista challenge to state management of Bear Butte Park), *aff'd*, 706 F.2d 856 (8th Cir.), *cert. denied*, 104 S. Ct. 413 (1983).

6. Sites sacred to native religions but not in actual possession of the Indian worshipers are often located on public lands. As the legislative history of the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1982), states: "There are certain sites, a hill, a lake, or a forest glade which are sacred to Indian religions . . . . Most of these sites not in Indian possession are owned by the Federal Government and a few are on State lands." 123 CONG. REC. 39,300 (1977) (statement of Sen. Abourezle).

7. A religion may be destroyed when the cosmology upon which it is founded is undermined. See J. CAMPBELL, *THE MASKS OF GOD: CREATIVE MYTHOLOGY* 5-6 (1968):

For those in whom a local mythology still works, there is an experience both of accord with the social order, and of harmony with the universe . . . . [Where the mythology is no longer meaningful, however,] the individual can only harden to some figure of living death; and if any considerable number of these members of a civilization are in this predicament, a point of no return [for the religion] will have been passed.

8. See *Wilson v. Block*, 708 F.2d at 740 n.2 (testimony of tribal leader that development would destroy basis of Hopi belief); *Badoni v. Higginson*, 638 F.2d at 177 ("[T]he stated infringement is the drowning of the Navajo gods."); *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 565 F. Supp. at 592 (logging would impair collection of medicinal plants and erode religious significance of sacred area).

9. See *infra* text accompanying notes 56-83.

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many Indian religions. Native American religions view gods, people, and nature as an integral whole. In this view of the universe, spiritual and physical reality converge in certain natural phenomena or locations.<sup>10</sup> In many Indian religions, therefore, transcendent reality is not immune to destructive physical forces.<sup>11</sup> Indeed, an Indian deity may be particularly vulnerable to changes in the physical habitat to which it is intimately and inseparably connected.<sup>12</sup> In short, location is essential to many aspects of Indian ritual and belief. In Indian belief, the place where an event occurred, rather than the event itself, assumes special spiritual significance. As a result, Indian worship focuses not so much on revelatory events, but on spiritual renewal through ceremonious and individual relationships with holy places.<sup>13</sup> Thus actual spiritual residence in, or the necessity of communicating with the spirits through, certain locations makes the destruction of an Indian sacred site a cataclysmic event. Even the prospect of

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10. It is dangerous, of course, to generalize about an area as rich and complex as that of religion in native North America. See, e.g., A. HULTKRANTZ, *THE RELIGIONS OF THE AMERICAN INDIANS* 3 (M. Setterwall trans. 1979):

[T]he simple hunting religion of the Naskaipi Indians of Labrador contrasts sharply with the intricate horticultural religion of the Pueblo Indians of New Mexico and Arizona, and the simple structure of the Californian Indian religions bears little resemblance to the religion of sacred kingship represented by the Natchez on the lower Mississippi. Even among tribal religions of the same type the nature of conceptions and rites has varied. The more our research is concerned with taking stock of tribal Indian religions the richer and more complicated becomes our picture of their total outcome.

Yet it is universally true among Indian religions that transcendent reality and the natural world are not divided by any bright conceptual line. As noted by Professor Hultkrantz, "divinity manifests its being through nature." A. HULTKRANTZ, *BELIEF AND WORSHIP IN NATIVE NORTH AMERICA* 126 (C. Vescey ed. 1981) [hereinafter cited as A. HULTKRANTZ, *BELIEF AND WORSHIP*].

11. In Indian belief and ritual, the relationship between spiritual reality and physical reality is symbiotic, both aspects finding expression in an appropriate vision of the way things are. As one scholar has explained the Indian perception of reality:

[I]t's rather like looking through the viewfinder of a camera, the viewfinder which is based upon the principle of the split image. And it is a matter of trying to align the two planes of that particular view. This can be used as an example of how we look at the world around us. We see it with the physical eye. We see it as it appears to us, in one dimension of reality. But we also see it with the eye of the mind. It seems to me that the Indian has achieved a particularly effective alignment of those two planes of vision. He perceives the landscape in both ways. He realizes a whole image from the possibilities within his reach. The moral implications of this are very far-reaching. Here is where we get into the consideration of religion and religious ideas and ideals.

Momaday, *Native American Attitudes to the Environment*, in *SEEING WITH A NATIVE EYE: ESSAYS ON NATIVE AMERICAN RELIGION* 79, 81 (W. Capps ed. 1976). This alignment of spiritual and physical reality in nature makes the spiritual uniquely tied to the physical, and partially explains why native belief is site-specific, thus making development of a sacred site a threat to religious life as well as religious practice.

12. See Testimony of Assiniboine Chief John Snow, *quoted in* A. HULTKRANTZ, *BELIEF AND WORSHIP*, *supra* note 10, at 127: "If [a sacred] area is destroyed, marred, or polluted, my people say, the spirits will leave the area. If pollution continues not only animals, birds, and plant life will disappear, but the spirits will also leave. This is one of the greatest concerns of Indian people."

13. V. DELORIA, *GOD IS RED* 80-81 (1973); see also FEDERAL AGENCIES TASK FORCE, *AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT* 10 (1979) ("The tribal religions do not incorporate a set of established truths but serve to perpetuate a set of rituals and ceremonies which must . . . be performed at the place and in the manner . . . designated.").

the desecration of the Christian sites in Jerusalem by an enemy of Christianity, which was enough to send countless Christians on religious crusades,<sup>14</sup> did not threaten actual spiritual destruction.<sup>15</sup>

Yet religions that posit a separation between spiritual and physical reality may infuse certain locations with such religious meaning and history that their preservation is of great importance to adherents. For Judaism and Christianity, those sites are located in the Middle East, and, to most Americans, seem distant and somehow magical or more genuinely "religious" than an Indian location in a national park or forest. In Israel, such places and access to them are protected<sup>16</sup> by the

14. From the late eleventh century through the thirteenth century, European *Peregrini Christi* flocked to the Middle East to free the Holy Land, and especially Jerusalem, from Saracen control. R. PAYNE, *THE DREAM AND THE TOMB: A HISTORY OF THE CRUSADES* 17 (1984) ("[P]easants allowed themselves to be uprooted, [and princes] plundered their treasuries in order to make the pilgrimage; [survivors were few, yet they] returned . . . proud and happy that they had been to the holy places."). The role of the earthly city of Jerusalem as the spiritual center of Christian worship for the Crusaders made freeing the holy city a religious mission of the highest importance. Pilgrims "believed that they were marching directly to the city of eternal bliss." H. MAYER, *THE CRUSADES* 12 (J. Gillingham trans. 1972). Indeed, Christians had believed in the sanctity of places associated with the life of Jesus and early Christians long before the Crusades brought the notion of a sacred place to the center of international politics. As one scholar noted, "The places associated with the life of Christ, or with the lives of the apostles, saints, and martyrs, were reputed to be of special sanctity." P. NEWHALL, *THE CRUSADES* 22 (1927).

Representative Udall noted the parallel between Indian sites and sacred sites in the Middle East for Christians and Jews:

For many tribes, the land is filled with physical sites of religious and sacred significance to them. Can we not understand that? Our religions have their Jerusalems, Mt. Calvarys, Vaticans and Meccas. We hold sacred Bethlehem, Nazareth, the Mount of Olives, and the Wailing Wall. Bloody wars have been fought because of these religious sites.

124 CONG. REC. 21,444 (1978).

15. In fact, Judeo-Christian religions may be hesitant to attach special spiritual importance to physical structures or sites. In the United States, most houses of worship do not acquire religious significance in the eyes of communicants, since the spiritual is usually considered distinct from particular locations or structures. The required historic preservation of a physical structure for historic, cultural or aesthetic reasons not directly tied to religious significance may therefore impose great hardship on the religious institution involved. Courts that have considered the issue of a religious institution's free exercise right to be exempt from burdensome property use regulations and restrictions have rejected the argument that the First Amendment provides relief from historic preservation ordinances. *See, e.g., Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449, 415 N.E.2d 922, 434 N.Y.S.2d 932 (1980) (free exercise clause does not protect religious organization from neutral historic preservation regulations). Yet a religious belief that does not attach spiritual importance to the particular site of houses of worship may conceivably be so burdened by high maintenance costs as to impede substantially the fulfillment of religious obligations. *Cf. Note, Land Use Regulation and the Free Exercise Clause*, 84 COLUM. L. REV. 1562 (1984) (proposing exemption from regulation for religious institutions that demonstrate preservation impermissibly burdens central religious practice or belief); *Note, First Amendment Challenges to Landmark Preservation Statutes*, 11 FORDHAM URB. L.J. 115 (1982) (free exercise clause requires state to compensate religious institutions for costs imposed by historic preservation). St. Bartholomew's Episcopal Church, for example, claims that the financial drain of maintaining its church on East 50th Street in New York City prevents it from contributing to the welfare of the city's poor and homeless. *N.Y. Times*, June 13, 1984, at B1, col. 1; *N.Y. Times*, Jan. 31, 1984, at B1, col. 1.

16. Israel recognizes that religious individuals and institutions have long-held expectations that certain locations will remain accessible and protected from governmental development, I. ENGLARD, *RELIGIOUS LAW IN THE ISRAEL LEGAL SYSTEM* 60 n.11 (1975), whether or not formal title remains in the hands of the religious authority in question. Indeed, the United States has stressed in its deal-

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### Holy Places Law.<sup>17</sup>

The American legal system, however, has generally failed to recognize that physical locations within its own jurisdiction may be of vital significance to site-specific religions. It does not acknowledge that a sense of spiritual immediacy and of awe for places that have witnessed momentous spiritual events, similar to that felt by many Jews and Christians only in the "Holy Land," is felt by Native Americans for sites that may seem unremarkable or of mere natural beauty to non-Indian observers. In fact, Indian religions invest natural phenomena and locations with even greater spiritual importance than given by Judeo-Christian religions to sites in the Mideast. International law is gradually formulating principles to protect such sites, and nations such as Israel have strong policies of respecting sacred sites;<sup>18</sup> yet the gap in American protection of site-specific religious freedoms continues, despite congressional efforts to address the problem.<sup>19</sup>

The problems of access to and protection of sacred sites on what are now public lands is not unique to the United States. Colonization by European powers resulted in the abrogation of aboriginal rights to land, and in cultural and religious oppression and isolation worldwide.<sup>20</sup> The

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ings with Israel that the protection of the spiritual "special interest of three great religions in the holy places of Jerusalem" is important. 57 DEPT. STATE BULL. 33 (1967), *quoted in* Jones, *The Status of Jerusalem: Some National and International Aspects*, 33 LAW & CONTEMP. PROBS. 169, 172 (1968).

17. Protection of Holy Places Law, 5727-1967, 21 L.S.I. 76 (1967). See also The Palestine (Holy Places) Order in Council, 1924, 3 LAWS OF PALESTINE 2625 (Drayton ed. 1934), a British Mandatory Statute adopted into Israeli law, Law and Admin. Ordinance, 5708-1948, § 11, 1 L.S.I. 7 (1948), which was the subject of a suit involving the right of Jews to worship on the Temple Mount after Israel assumed control of all of Jerusalem following the Six-Day War in 1967. The statute restricts judicial jurisdiction to adjudicate challenges to ordinances promulgated by the executive under the law, and the Israeli Supreme Court unanimously dismissed the case, on the dual grounds of lack of jurisdiction and the nonjusticiability of the subject matter. See generally Y. ZEMACH, *POLITICAL QUESTIONS IN THE COURTS* 112-19 (1976) (reviewing history and holding of Temple Mount case).

18. The legal rights of aboriginal populations have recently been the subject of human rights movements and international conventions, spearheaded by the International Labor Organizations Convention 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, Official Bulletin, Vol. 40, 22 (1957). Two international organizations of aboriginal peoples have been granted "non-governmental organization" status by the United Nations Economic and Social Council. They are the World Council of Indigenous Peoples, based in Canada, and the Indian Law Resource Center of Washington. Sanders, *The Rights of the Aboriginal Peoples of Canada*, 61 CAN. B. REV. 314, 323-24 (1983).

With regard to religious freedoms, Art. III (2)(e) of the United Nations Convention on the Elimination of all Forms of Religious Intolerance specifically recognizes the legal right to "make pilgrimages and other journeys in connection with a religion or belief." *Reprinted in* HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS, United Nations Publication, Doc. No. ST/HR/1/Rev. 1 (1978). One international scholar has recommended that the United Nations Economic and Social Council establish an Aboriginal Commission. G. BENNETT, *ABORIGINAL RIGHTS IN INTERNATIONAL LAW* 61 (1978). The Aboriginal Commission would institute such proposed reforms as the "legal recognition . . . of the right to visit and preserve sacred shrines and burial grounds, whether or not they are found on lands to which aboriginal title has been granted." *Id.* at 62.

19. See *infra* text accompanying notes 48-55.

20. Belief in the sanctity of a particular place, and in actual spiritual residence in the place, is not confined to primitive or aboriginal peoples; nor is the destruction or desecration of the habitat of a

United States, Canada,<sup>21</sup> and Australia,<sup>22</sup> where the descendants of European settlers far outnumber remaining native populations, all face the perplexing question of the legal rights of native minorities.<sup>23</sup>

The legal relationship between conqueror and conquered in colonial societies has often been compared to a trust or fiduciary relationship running from government to native populations.<sup>24</sup> The development of legally

deity confined to modern colonial powers. The sanctuary of Apollo at Delphi was for many centuries a focal point of Greek worship and Greece's premier oracle. From all over the Mediterranean world, pilgrims came to Delphi to receive from the oracle the god's commandments for the conduct of their lives, and to bring rich offerings in gratitude and piety. P. HOYLE, *DELPHI* 66 (1967). After the Roman conquest of Greece, Delphi was despoiled by the conquerors. *Id.* at 120. Like the destruction or desecration of sacred sites in Native American religions, the depredation of Delphi undermined the religious power of the site. When Roman emperor Julian, called the Apostate, attempted to revive the ancient religion in the fourth century C.E., the oracle is said to have replied to his appeal:

Tell the King, the fairwrought hall has fallen to the ground,  
no longer has Phoebus a hut, nor a prophetic laurel,  
nor a spring that speaks. The water of speech even is quenched.

B. PETRAKOS, *DELPHI* 9 (1977).

21. Section 25 of the Canadian Charter of Rights and Freedoms, enacted by the Canada Act, 1982, ch. 11 (U.K.), *reprinted in* 61 *CAN. B. REV.* 4-11 (1983), provides that existing aboriginal rights and freedoms shall not be impaired by any of the other egalitarian sections of the Charter. There is some disagreement in Canada, however, as to the content of existing rights and freedoms. Other provisions on aboriginal self-government and consent to amendments were omitted from the Charter, despite vigorous lobbying by Indian and Eskimo leaders. *See generally* Sanders, *supra* note 18 (reviewing history of Canadian debate about rights of Indians and of aboriginal provisions of the Charter). Section 37, not technically part of the Charter, acknowledges that questions of aboriginal rights have not yet been adequately answered and provides for another constitutional conference. One commentator has expressed doubts that such a conference will answer the problem of Indian rights in Canada. Green, *Aboriginal Peoples, International Law and the Canadian Charter of Rights and Freedoms*, 61 *CAN. B. REV.* 339, 352 (1983) (recommending enactment of an Aboriginal Charter of Rights and Freedoms devoted entirely to recognition of tribal land rights, traditional customs and habits, as most effective means of securing reforms desired by Canadian aboriginals). To date, Canadian deliberations have produced inconclusive results. Held in April, 1985, the constitutional conference on aboriginal rights was adjourned for two months after provinces objected to Prime Minister Mulroney's proposed amendment to recognize the principle of aboriginal self-government. MacQueen, *Failing to Right Old Wrongs*, *MACLEANS*, Apr. 15, 1985, at 12.

22. *See, e.g.*, *Millirrpum v. Nabalco Pty. Ltd.*, [1971] 17 *F.L.R.* 141 (Austl. Sup. Jud. Ct.) (holding that relationship of aboriginals to ancestral lands does not constitute a legal property interest); Tatz, *Aborigines and human rights*, in *TEACHING HUMAN RIGHTS, AN AUSTRALIAN SYMPOSIUM* 149 (Erh-Soon Tay ed. 1981) (historical analysis of Australian attitudes and prejudices against Aborigines); *THE LAW REFORM COMMISSION, Aboriginal Customary Law—Recognition?*, *DISCUSSION PAPER* No. 17, Nov., 1980 (recommending limited recognition of customary aboriginal law where not repugnant to general principles of Australian law).

23. G. BENNETT, *supra* note 18, at 3 (“[T]he manner in which ethnically distinct, aboriginal communities come to terms with the rapid encroachments of a politically and technologically advanced civilisation must rank, on any level, as a problem of the first importance.”).

24. This trusteeship theory was first advanced in the sixteenth century by the Spanish theologian and publicist Francisco de Vitoria, who argued that colonial authorities, possessing a “more mature intelligence” than their aboriginal subjects, should be required to act “for the welfare and in the interests of the Indians and not merely for the Spaniards.” *Vitoria De Indis et de Iure Belli Reflectiones*, quoted in G. BENNETT, *supra* note 18, at 7; *see also* Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 *GEO. L.J.* 1 (1942) (analyzing positive contribution of Vitoria to protection of Indian rights in Americas); Williams, *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 *S. CAL. L. REV.* 1, 63-99 (1983) (Vitoria's dualistic approach to Indians as having natural rights but as subject to colonial rule as a result of violation of international law of nations has had strong and harmful influence on subsequent

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enforceable trust duties has been problematic in the United States,<sup>25</sup> however, and all but nonexistent in other countries.<sup>26</sup> It is hardly surprising that this doctrine, which imposes only “moral” duties on the government as guardian, has remained advantageous to the guardians rather than to their wards.<sup>27</sup> With regard to the preservation of sacred sites, the solution for American Indians lies in the free exercise clause of the United States Constitution, which protects the exercise of religious beliefs against all but the most compelling state interests. Yet to date courts have not accorded Indian free exercise claims proper scrutiny.

## II. THE CURRENT STATUS OF SITE-SPECIFIC FREE EXERCISE CLAIMS BY NATIVE AMERICANS

Indian suits challenging development of public lands in the United States<sup>28</sup> are based on the First Amendment guarantee of the free exercise

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civil and common law colonial authorities).

The trusteeship analogy was adopted by Great Britain and other colonial powers, and was the cornerstone of Chief Justice Marshall’s opinion in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 7 (1831) (“[Indian tribes] are in a state of pupillage. Their relation to the federal government resembles that of a ward to his guardian.”).

25. Since the relationship between Indian tribes and national government is often said only to “resemble” that of ward and guardian, it has been held not to require any legally enforceable duties except where such duties have been explicitly assumed by government. *See, e.g.*, *United States v. Mitchell (Mitchell I)*, 445 U.S. 535, 542 (1980) (no fiduciary duty exists between government and Indians absent explicit language delineating trust responsibilities); *Chippewa Indians of Minn. v. United States (No. 2)*, 307 U.S. 1, 5 (1939) (guardianship duties of United States not abandoned in favor of formal trust duties without clear congressional intent to do so); *see also* Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975) (courts should enforce fiduciary obligation of government toward Native Americans through traditional common law equitable remedies); Clinebell & Thomson, *Sovereignty and Self-Determination: The Rights of Native Americans Under International Law*, 27 BUFFALO L. REV. 669 (1978) (arguing that Indian tribes should be recognized as independent nations with full rights to self-determination under international law); Hughes, *Can the Trustee be Sued for Its Breach? The Sad Saga of United States v. Mitchell*, 26 S.D.L. REV. 447 (1981) (recent Supreme Court cases on federal trust responsibility to Indians yielded unjust results); Note, *Rethinking the Trust Doctrine in Federal Indian Law*, 98 HARV. L. REV. 422 (1984) (proposing that analysis of trust responsibility focus on tribal autonomy rather than “pupillage” status of Indians or technical control of tribal assets by federal government).

26. *See* *Tito v. Waddell (No. 2)*, [1977] 2 W.L.R. 496 (trust owed Ocean Islanders is “trust in higher sense” distinguishable from formal and enforceable trust duties); *Kinloch v. Secretary of State for India in Council*, [1882] 7 App. Cas. 619 (P.C.) (trust between British government and native populations of India is moral obligation, a “trust in the higher sense,” and only trusts in the lower sense are enforceable through legal action).

27. Note, *The American Indian Religious Freedom Act*, 25 ARIZ. L. REV. 429, 439 (1983) (analogy of relationship between federal government and Indians to trust relationship is fundamentally flawed because government may “unilaterally abrogate trust agreements” and may as sovereign refuse to be sued). *But see* *United States v. Mitchell*, 103 S. Ct. 2961 (1983) (*Mitchell II*) (regulation giving government responsibility for managing harvest of timber on Indian land created enforceable fiduciary relationship that may subject government to money damages). *Mitchell II* may signal a shift in the trust doctrine toward enforceability, although the decision is limited to cases in which the United States has assumed a statutory duty and has further consented to suit for enforcement of the statute. *Cf.* Note, *Money Damages for Breach of the Federal-Indian Trust Relationship After Mitchell II*, 59 WASH. L. REV. 675 (1983).

28. *See supra* cases cited note 5.



of religion,<sup>29</sup> and on the federal policy of accommodation of Indian religious beliefs and practices embodied in the American Indian Religious Freedom Act of 1978 (AIRFA).<sup>30</sup> Native Americans have increasingly sought to vindicate these rights in court.<sup>31</sup>

### A. *Indian Free Exercise Challenges to Development*

Faced with Indian challenges to development projects, some courts have denied that development of public lands gives rise to any free exercise claim, emphasizing that the plaintiffs have no "property" interest at stake.<sup>32</sup> Other courts, however, have recognized that lack of a specific

29. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. 1.

30. 42 U.S.C. § 1996 (1982). In addition, plaintiffs have unsuccessfully argued that courts should enforce the fiduciary duties owed by the government to the Indians. The doctrine that explains the relationship between the federal government and Indians as one that resembles a trust duty running from government to the Indians, obligating government to act in the Indians' best interest, was first articulated in American jurisprudence by Chief Justice Marshall in the early nineteenth century. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 19 (1831), described *supra* note 24. See also Chambers, *supra* note 25, at 1215-34 (analysis of history and scope of judicially-developed doctrine of duty of federal government to protect interests of Indians); Note, *The American Indian Religious Freedom Act*, *supra* note 27 at 438-49 (tracing development of trust doctrine from Chief Justice Marshall's Indian law opinions to present day). See also *supra* text accompanying notes 24-27.

Sites sacred to Indian religions often are also of environmental or cultural significance. P. MATTHIESSEN, *INDIAN COUNTRY* 13 (1984). Federal statutes enacted to preserve irreplaceable natural and cultural resources, see, e.g., Historic Sites, Buildings and Antiquities Act, 16 U.S.C. §§ 461-467 (1982); National Historic Preservation Act of 1966, 16 U.S.C. §§ 470 to 470w-6 (1982); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (1982); and have been appended to free exercise claims brought by Indian plaintiffs, but without success.

Indians have also invoked the protection of the international law of human rights, such as Article 18 of the Universal Declaration of Human Rights, U.N. Doc. A./811 (1948), reprinted in I. BROWNLIE, *BASIC DOCUMENTS IN INTERNATIONAL LAW* 250 (1983), and Article 18 of the International Covenant on Civil and Political Rights, Res. 2200 (XXI) of Dec. 16, 1966, in force Mar. 23, 1976, reprinted in I. BROWNLIE, *supra*, at 270, to no avail.

31. See *supra* note 5. Indians have also increasingly sought to assert their rights in court to lands under treaties, see, e.g., *County of Oneida v. Oneida Indian Nation*, 105 S. Ct. 1245 (1985) (suit challenging validity of 1795 transfer of Oneida land to State of New York as violation of Non-Inter-course Act); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (suit for declaratory judgment to settle boundaries of Rosebud Sioux reservation established by treaty in 1889 and amended by three subsequent acts of Congress), and to hunting and fishing rights, see, e.g., *Puyallup Tribe v. Department of Game*, 433 U.S. 165 (1977) (seeking exemption from conservation regulations limiting Puyallup tribal fishing rights); *Inupiat Community of Arctic Slope v. United States*, 548 F. Supp. 182 (D. Alaska 1982) (suit to quiet title to Inupiat fishing grounds). These cases reflect the great importance Indians give to land in the political and social as well as religious spheres. Cf. Note, *supra* note 25, at 429 ("[T]he methods employed by the government for valuing real property in other contexts may be wholly inappropriate in its dealings with the tribes, in light of the paramount political and spiritual significance that Indians attach to land.").

32. For example, in *Sequoyah v. TVA*, 480 F. Supp. 608, 612 (E.D. Tenn. 1979), *aff'd on other grounds*, 620 F.2d 1159 (6th Cir. 1980), the district court granted the defendant's motion to dismiss, holding that "[s]ince plaintiffs [have no] legal property interest in the land in question, . . . a free exercise claim is not stated here." See also *Hopi Indian Tribe v. Block*, 8 I.L.R. 3073 (D.D.C. 1981) (Indian tribe without property interest in Coconino Mountain Range may not block construction of ski resort on religious grounds), *aff'd sub nom. Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983); *Crow v. Gullet*, 541 F. Supp. 785 (D.S.D. 1982) (state not required to administer state park in manner consistent with beliefs of Indian worshippers), *aff'd*, 706 F.2d 856 (8th Cir. 1983).

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property interest is not dispositive of the First Amendment claim,<sup>33</sup> but have held that the challenged governmental action does not constitute a burden on religious beliefs or practices, reasoning that actual access to sacred sites has not usually been denied, even if the site itself has been substantially altered by development.<sup>34</sup> Finally, in *Badoni v. Higginson*,<sup>35</sup> the Court of Appeals for the Tenth Circuit held that even if increased development and use impose a burden on Indian free exercise rights, the government interest outweighed the religious claim. The dispute in this case centered on the federal government's creation of a lake as part of a water storage project. The artificial lake covered Navajo gods and prayer spots, as well as the base of Rainbow Bridge, a national monument sacred to the Navajos as the physical incarnation of a god.<sup>36</sup> The court, finding a

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The existence of a property right in a sacred site is not a prerequisite of a free exercise claim, however. As the legislative history of AIRFA states: "The issue is not ownership . . . of the lands involved. Rather, it is a straightforward question of access in order to worship and perform the necessary rites." SEN. REP. NO. 709, H.R. REP. NO. 1308, 95th Cong., 2d Sess. 1, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 1263. The "property interest" basis for denying free exercise claims raises the question, of course, of where the government "got" the property in the first place. As Representative Udall noted, "it is stating the obvious to say that this country was the Indians [sic] long before it was ours." 124 CONG. REC. 21,444 (1978). If the taking was unjust to begin with, it seems especially egregious to use the lack of a legal interest in land to deny a free exercise claim for protection of preexisting sacred sites. See Bennett, *Aboriginal Title in the Common Law: A Stony Path Through Feudal Doctrine*, 27 BUFFALO L. REV. 617, 623 (1978) ("[C]ourts ought not to go behind the native system in search of common law notions of property which communal native possession neither knows nor requires.").

33. See, e.g., *Wilson v. Block*, 708 F.2d 735, 744 n.5 (D.C. Cir. 1983) (government property rights not exempt from free exercise limitations, although plaintiffs failed to meet initial burden of demonstrating infringement); *Badoni v. Higginson*, 638 F.2d 172, 176 (10th Cir. 1980) (lack of property interest not conclusive, but a factor to consider when weighing governmental interest against free exercise claim).

The relationship of First Amendment rights to government property is complex. Certainly the fact that a legal property interest does not exist is not the relevant gauge for determining whether or not a First Amendment claim is valid. See *infra* text accompanying notes 87-91 (public forum doctrine protects First Amendment rights on government lands).

34. For example, in *Wilson*, 708 F.2d 735 (D.C. Cir. 1983) the court of appeals denied a Hopi claim that development of a ski resort on mountains sacred to the tribe would constitute an infringement of protected religious freedoms, despite such testimony as that of the Chairman of the Hopi Tribe, Abbott Sekaquaptewa, who testified at trial that:

If [development] is permitted, we will not be able successfully to teach our people that this is a sacred place . . . . Our people will not accept the view that this is the sacred Home of the Kachinas. The basis of our existence as a society will become a mere fairy tale to our people. 708 F.2d at 740 n.2. The court found that destruction of "a religion's most sacred shrine" did not state a prima facie free exercise claim. *Id.* at 741. The court distinguished *Pillar of Fire v. Denver Urban Renewal Auth.*, 181 Colo. 411, 509 P.2d 1250, 1254 (1973) (religious faith and tradition may provide First Amendment protection for certain structures that have "unique religious significance" against demolition in city urban renewal project), on the ground that "a governmental taking of privately owned religious property . . . involves different considerations than does a claimed First Amendment right to restrict government's use of its own land." 708 F.2d at 742 n.3.

35. 638 F.2d 172 (10th Cir. 1980).

36. In the court's words, "the stated infringement is the drowning of Navajo gods, the increased tourist presence [and accompanying noise, litter, and defacement of the bridge itself] attributable to the level at which the lake is kept, and the denial of access to the prayer spot now under water." *Id.* at 177. Talking Rock, one of the drowned gods, inhabited a collection of rocks at the mouth of a creek on the floor of Glen Canyon. K. LUCKERT, *NAVAJO MOUNTAIN AND RAINBOW BRIDGE RELIGION*

compelling governmental interest in water storage, refused to reach the question whether the government's action infringed native religion.<sup>37</sup>

The *Badoni* court further held that granting the requested free exercise relief would necessarily violate the establishment clause, by creating a "government-managed religious shrine."<sup>38</sup> The opinion implies that because protection constitutes a limitation on the alienability of public lands in the interest of religious freedom, it inevitably implicates impermissible establishment of religion.<sup>39</sup>

Only one court has determined both that proposed development posed a substantial threat to site-specific Native American religions, and that the governmental infringement could not be justified in light of the free exercise clause. In *Northwest Indian Cemetery Protective Association v. Peterson*,<sup>40</sup> a federal district court granted a permanent injunction against a timber-harvesting plan. Recognizing that logging would burden the religious practices of the Yurok, Karok, and Tolowa<sup>41</sup> tribes by disturbing the peace and isolation of their sacred area, the court held that the coun-

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53-54 (1977); see also Stambor, *Manifest Destiny and American Indian Religious Freedom: Sequoyah, Badoni and the Drowned Gods*, 10 AM. INDIAN L. REV. 59 (1982); Note, *Native American Free Exercise Rights to the Use of Public Lands*, 63 B.U.L. REV. 141, 159-63 (1983) (describing Navajo and Cherokee religious beliefs and practices at issue in *Sequoyah* and *Badoni*).

37. Because of a predetermined overriding governmental interest in the maintenance of the water level of Lake Powell, the court held that it need not reach the question whether the government's action burdened the Navajo religion. 638 F.2d at 177 n.4.

38. *Id.* at 179. The court of appeals did not address the question of the constitutionality of the federal government's preservation and management of other religious shrines. The Gloria Dei (Old Swedes) Church and St. Joseph's Roman Catholic Church in Philadelphia, the Shrine of the Ages Chapel in Grand Canyon National Park, the Yellowstone National Park Chapel and Yosemite National Park Chapel are each owned and operated by the National Park Service. Further, several congressional enactments have provided for Indian ownership or permanent access to and preservation of sacred sites. See, e.g., Pub. L. No. 91-550, 84 Stat. 1437 (1970) (returning sacred Blue Lake area to Taos Pueblo); 16 U.S.C. § 228i(c) (1982) (guaranteeing Havasupai access to sacred sites in Grand Canyon National park). See generally *Petition for Writ of Certiorari, Badoni v. Higginson*, No. 80-1688, at 34n.17, 35 n.18 (filed Mar. 19, 1981) (listing nationally managed churches and federal statutes and regulations guaranteeing access and/or preservation).

39. 638 F.2d at 178-79. The court also denied more limited relief, such as requiring tourists to behave respectfully when visiting Rainbow Bridge, or allowing the Indian worshipers exclusive access on infrequent occasions for the conduct of religious ceremonies. First Amendment use of public lands, the court held, does not give plaintiffs a constitutional right to have their beliefs respected: "We must accommodate our idiosyncracies, religious as well as secular, to the compromises necessary in communal life." (quoting *Otten v. Baltimore & O.R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)).

40. 565 F. Supp. 586 (N.D. Cal. 1983), *appeal pending*, No. 83-2225 (9th Cir. argued July 9, 1984).

41. The Vision Quest performed by the California tribes in *Northwest Indian Cemetery* is a ceremony common to many North American Indian religions. The ritual may last for several days of fasting and solitude, during which time the lone seeker receives an all-important vision from a personal guardian spirit. This vision will guide the recipient throughout his or her life, and is often an essential part of the transition from youth to adulthood. H. DRIVER, *INDIANS OF NORTH AMERICA* 420 (2d ed. 1969); see also *Crow v. Gullet*, 541 F. Supp. 785, 788 (D.S.D. 1982) (Vision Quest one of seven sacred ceremonies of Lakota nation).

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tervailing governmental interest in revenue and increased recreational access did not outweigh free exercise values.<sup>42</sup>

According to the district court, the proposed development plan failed to meet both the compelling state interest<sup>43</sup> and least restrictive means<sup>44</sup> requirements of traditional free exercise analysis. In response to the defendants' invocation of the establishment clause, the court, citing Supreme Court free exercise decisions,<sup>45</sup> affirmed that when the free exercise clause mandates accommodation, the establishment clause may not be raised as a bar to the constitutional freedom.<sup>46</sup> The case is currently on appeal to the Court of Appeals for the Ninth Circuit.<sup>47</sup>

### B. *Congressional Effort to Avert Infringement of Indian Free Exercise*

Responding to site-specific concerns, Congress enacted the American Indian Religious Freedom Act of 1978<sup>48</sup> to "insure that the policies and procedures of various Federal agencies, as they may impact upon the exercise of traditional Indian religious practices, are brought into compliance with the constitutional injunction that Congress shall make no laws abridging the free exercise of religion."<sup>49</sup> However the Act has not fostered the increased protection of Native American religions hoped for by

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42. The court stated that:

Communication with the "great creator" is possible in the high country because of the pristine environment and opportunity for solitude found there . . . . [H]arvesting of timber in the high country . . . would seriously damage the salient visual, aural, and environmental qualities of the high country . . . . Harvesting of timber . . . would not serve any compelling public interest. . . . [E]ven if defendants could demonstrate a compelling need for additional timber harvesting . . . , means less restrictive than the . . . [proposed] Plan exist that would satisfy that need.

565 F. Supp. at 594-96.

43. See *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (state interest must be "of the highest order" to override free exercise claim).

44. See *Sherbert v. Verner*, 374 U.S. 398, 408-09 (1963) (burden on free exercise must be by least restrictive means possible).

45. The court, citing *Yoder*, 406 U.S. 205 (1972), and *Sherbert*, 374 U.S. 398 (1963), pointed out that religious exemptions from government regulations would violate the establishment clause if all accommodations of religion were prohibited. 565 F. Supp. at 597.

46. "Actions compelled by the Free Exercise Clause," the court held, "do not violate the Establishment Clause." 565 F. Supp. at 597.

47. See *supra* note 40.

48. 42 U.S.C. § 1996 (1982).

49. SEN. REP. NO. 709, H.R. REP. NO. 1308, 95th Cong., 2d Sess. 1 (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 1262. On the state level, California enacted comprehensive legislation protecting sacred sites in 1976. Native American Historical, Cultural, and Sacred Sites Act, CAL. [PUB. RES.] CODE §§ 5097.9-99 (Deering 1984). Sections 5097.91 and 5097.95 provide for a Native American Heritage Commission, and require state and local agencies to cooperate with the commission in identifying and protecting Indian heritage in California. The commission is empowered to seek injunctive relief in state courts "to prevent severe and irreparable damage to, or assure appropriate access for Native Americans, to a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property . . ." *Id.* § 5097.94(g). Like the AIRFA, however, Indians do not have a cause of action under the California act to prevent harm to sacred sites.

those involved in its enactment.<sup>50</sup> The AIRFA has largely been interpreted as Representative Udall predicated it would be: "simply [to say] to our managers of public lands that [Native Americans] ought to be encouraged to use these [sacred] places. It has no teeth in it."<sup>51</sup> Indeed, one court has explicitly held that "the Act does not create a cause of action in federal courts for violation of rights of religious freedom."<sup>52</sup>

Courts have construed the Act as embodying a desire on the part of the federal government merely to articulate the existing constitutional rights of Native Americans.<sup>53</sup> Therefore, where a traditional free exercise analysis has been applied and either a lack of infringement or an overriding governmental interest found, courts have not felt obligated to enforce more than consultation with Indian religious leaders by federal agencies.<sup>54</sup> The Act has not been read to require any more deference to Native American religious interests than what is required by the standard first amendment free exercise test.

Yet, if nothing else, the Act is a formal congressional acknowledgment that government action on public lands does infringe Native American beliefs and practices to some extent, and that Indian religions must be accorded meaningful protection in ways not generally necessary for protection of Euro-American religious interests.<sup>55</sup> If the mandate of the free exercise clause, and thus derivatively of the AIRFA, is to be enforced appropriately, courts must take account of differences between Indian and Judeo-Christian religions. Alteration or destruction of Indian sacred sites

50. For example, Senator Abourezk indicated in a hearing held before its passage that the AIRFA would give Indians a statutory cause of action for infringement of religion in addition to the constitutional cause of action based on the free exercise clause. *American Indian Religious Freedom: Hearings on S.J. Res. 102 Before the Senate Select Comm. on Indian Affairs*, 95th Cong., 2d Sess. 135 (1978). Kathryn Harris, formerly Counsel for the Senate Select Committee on Indian Affairs, optimistically predicted that "the Religious Freedom Act is sufficient to stop the development of [a] ski slope" on the San Francisco Peaks in Arizona. Harris, *The American Indian Religious Freedom Act and Its Promise*, 5 AM. INDIAN J. 7, 9 (1979). However, in *Wilson v. Block*, 708 F.2d 735, 746 (D.C. Cir. 1983), the court endorsed the development of this very ski resort, holding that the Act did nothing more than "insure for traditional native religions the same rights of free exercise enjoyed by more powerful religions," and applying traditional free exercise analysis.

51. 124 CONG. REC. 21,445 (1978); see also Note, *The American Indian Religious Freedom Act—An Answer to the Indians' Prayers?*, 29 S.D.L. REV. 131, 143 (1983) (AIRFA is ineffective legislative "white elephant" left over from human rights policies of Carter administration).

52. *Crow v. Gullet*, 541 F. Supp. 785, 793 (D.S.D. 1982).

53. See, e.g., *Wilson v. Block*, 708 F.2d at 746 ("purpose of AIRFA" is limited to ensuring that federal government's policies and procedures "are brought into compliance" with free exercise clause).

54. See *New Mexico Navajo Ranchers Ass'n v. ICC*, 702 F.2d 227 (D.C. Cir. 1983) (federal agency required to enforce railroad's consultation with religious leaders before approving new construction).

55. The legislative history of the AIRFA reveals that there was a need for such statutory protection of Native American religious freedoms, because "[l]ack of knowledge, unawareness, insensitivity and neglect are the keynotes of the Federal Government's interaction with traditional Indian religions and cultures." H.R. REP. NO. 1308, 95th Cong., 2d Sess. (1978), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 1265.

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to serve government's recreational or developmental interests may produce infringements of a sort not known in government interaction with Euro-American religions and may well involve more than an emotional burden on worshipers. Courts must weigh the religious interest in the context of the site-specificity of Native American religions. A balancing test that analyzes such claims in their religious context is proposed in Part IV of this Note.

### III. CURRENT FREE EXERCISE METHODOLOGY AND AMERICAN CULTURAL BIAS

The substance of American free exercise rights has been impermissibly circumscribed to familiar or mainstream beliefs both because of flaws in free exercise methodology, and because of the fundamental ideologies that inform the national perception of religion and of the role of development as a sign of progress. These two factors have combined to produce a body of free exercise doctrine that does not recognize non-traditional Indian claims to protect sacred sites.

#### A. *Free Exercise Methodology*

Traditional free exercise doctrine has developed through claims of individuals or groups for religious exemptions from governmental activity or regulation. Those suits, which include efforts to obtain exemption from the military draft<sup>56</sup> or compulsory education<sup>57</sup> laws, differ fundamentally from Indian actions that seek to bar development of government-owned lands. In the former, the government's actions themselves are not challenged. Rather the action as applied to particular religious individuals is the heart of the dispute.<sup>58</sup> Indian suits to block development, on the other hand, challenge a generally valid governmental activity as it affects certain religious sites, rather than certain religious individuals or segments of the population. Not only are the faiths that underlie Indian suits radically different than Western monotheistic religions, but, not unexpectedly, the requested relief is different, too.

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56. See, e.g., *Welsh v. United States*, 398 U.S. 333, 344 (1970) (all draftees who hold deep, conscientious objection to all wars founded on moral, ethical or religious belief entitled to exemption from military service); *United States v. Seeger*, 380 U.S. 163, 176 (1965) (draftee who holds "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for exemption" entitled to exemption from military service).

57. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (free exercise clause mandates exemption from compulsory education laws for children of Old Order Amish beyond eighth grade).

58. For example, in *Sherbert v. Verner*, 374 U.S. 398 (1963), the validity of government provisions regulating unemployment benefits was not challenged. South Carolina's Unemployment Compensation Act was held unconstitutional only as applied to a Seventh Day Adventist whose refusal to work on Saturday stemmed from "a basic tenet of the Seventh-day Adventist creed, based upon that religion's interpretation of the Holy Bible." *Id.* at 399 n.1.

These essential differences between standard free exercise exemption claims and Indian claims are central to many courts' reasoning when denying Indian claims.<sup>59</sup> The structural distinctions between traditional free exercise claims and Indian suits should serve not so much to invalidate Indian claims, however, as to highlight the doctrinal flaws in current free exercise doctrine.

Free exercise analysis classically focuses on traditional indicia of Judeo-Christian religions, such as a scriptural foundation for religious convictions, emphasizing the religious quality of "acts of conscience."<sup>60</sup> An analysis that centers on individual conscience to ascertain the existence of interference with religious liberty is at once underinclusive and overinclusive.<sup>61</sup> Conscience, while it does motivate much religious behavior, is not the purview solely of the religious.<sup>62</sup> Faith in an alternative reality that symbolically embodies the explanation for the way the world is or the way the world should be, is a universal element of religion.<sup>63</sup>

59. In *Wilson v. Block*, 708 F.2d at 741, the court stated that Supreme Court free exercise cases "hold only that the government may not, by conditioning benefits, penalize adherence to religious belief. Many government actions may offend religious believers, and may cast doubt upon the veracity of religious beliefs, but unless such actions penalize faith, they do not burden religion." Destruction of a tribal belief structure, the court held, does not violate the free exercise clause unless a governmental benefit is denied or conditioned in such a way that it discriminates against religion. Such an analysis, however, is inapplicable to Indian belief, since no benefit in the commonly understood sense of the term flows from government's leaving sacred sites on public lands undisturbed. Other cases have also emphasized that the different nature of Indian free exercise claims does not fit neatly into traditional analysis, and have held that this departure from the standard claim for exemption precludes granting the requested relief. See *Badoni v. Higginson*, 638 F.2d at 178 ("Free exercise claims generally challenge government dictates which compel citizens to violate tenets of their religion . . . or government action which conditions a benefit or right on renunciation of a religious practice.") (citations omitted); *Crow v. Gullet*, 541 F. Supp. at 791 ("free exercise clause places a duty upon a state to keep from prohibiting religious acts, not to provide the means or environment for carrying them out").

60. See, e.g., *Thomas v. Review Bd.*, 450 U.S. 707 (1981) (employee who quit when transferred to munitions factory by employer entitled to unemployment benefits since work in arms manufacture would violate his conscience); *Johnson v. Robison*, 415 U.S. 361 (1974) (denial of veteran's benefits did not force conscientious objector who had performed alternative service to make untenable choice between violating conscience or serving in armed forces).

61. Because free exercise doctrine emphasizes acts of conscience, it leaves acts of faith and objects of faith unprotected. On the other hand, while conscience does overlap to a large degree with religion, the protection could technically extend beyond the bounds of religious behavior, since it is certainly true that not all conscientious behavior is religiously motivated. This explains the difficulty the Supreme Court has experienced when faced with conscientious objection to war that is certainly sincere and the product of individual examination of conscience, but not the result of religious belief. Compare, for example, *United States v. Seeger*, 380 U.S. at 173-74 (conscientious objection to war must be religious as opposed to political, sociological or economic beliefs, or mere personal code of ethics) with *Welsh v. United States*, 398 U.S. at 344 (conscientious objection may be based on "deeply held moral, clinical or religious beliefs").

62. See, e.g., M. KONVITZ, *RELIGIOUS LIBERTY AND CONSCIENCE* 97-99 (1968) (religious people do not have monopoly on conscience); Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 *YALE L.J.* 350, 357 (1980) (conscience not proper barometer of religious motivation).

63. Clifford Geertz has proposed an anthropological definition of religion as:

(1) a system of symbols which acts to (2) establish powerful, pervasive, and long lasting moods and motivations in men by (3) formulating conceptions of a general order of existence and (4)

The constitutional system of religious liberty should protect the entirety of religious faith rather than merely individual conscience.<sup>64</sup>

In addition to stressing acts of conscience, courts have held that to trigger free exercise protection a belief must be shown to be “central” or “indispensable” to the religion.<sup>65</sup> In conjunction with the emphasis on individual conscience, this inquiry has evolved into an examination of the “doctrinal pedigree”<sup>66</sup> of a religious belief. This approach narrows the scope of free exercise protection to familiar and well-documented religious tenets, despite the Supreme Court’s statement that the First Amendment knows no orthodoxy.<sup>67</sup> If the focus is to be one of centrality, it becomes essential that courts inquire into the significance of governmental actions in the context of the affected religion. In the case of Indian claims to protect sacred areas, the focus must shift to the role of the site in native worship.

The imprecision of the “act of conscience” emphasis, and the malleability of the centrality requirement in traditional free exercise analysis, have produced inconsistent and even contradictory decisions.<sup>68</sup> Such inconsistency is the natural product of a test whose vagueness leads courts to attach central importance to practices that are familiar or easily analogized to familiar practices.<sup>69</sup> Free exercise doctrine that has grown out of indi-

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clothing these conceptions with such an aura of factuality that (5) the moods and motivations seem uniquely realistic.

C. GEERTZ, *THE INTERPRETATION OF CULTURES* 90 (1973).

64. Professor Perry Dane has argued that the focus on conscience improperly emphasizes “preventing injuries to conscience rather than enforcing claims of right . . . .” Note, *supra* note 62, at 357. Indeed, a generalized “right of conscience” would imply that individuals should have substantially fewer obligations to obey laws, even when such laws are propounded within the current bounds of governmental authority. *Id.* at 357 n.48, 362–63. See generally *Wisconsin v. Yoder*, 406 U.S. at 215–16 (“ordered liberty” requires that individuals not be allowed to formulate personal standards of conduct in areas of concern to society as a whole). The protection of religious exercise, therefore, is not so much a license to be free from all violations of individual conscience as a prohibition against government intrusion into the province of faith.

65. See, e.g., *Sequoyah v. TVA*, 620 F.2d 1159, 1164 (6th Cir. 1980) (plaintiffs must show that religious practice is inseparable from their way of life, or central to ceremonies in order to state first amendment claim); *Frank v. Alaska*, 604 P.2d 1068, 1071–73 (Alaska 1979) (eating of moose meat is cornerstone of Eskimo funeral feast and thus is protected religious observance); *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (peyote protected from drug enforcement laws because it is “theological heart” of Native American Church).

66. Note, *supra* note 62, at 359 n.56.

67. See *infra* note 85.

68. Compare, e.g., *New Rider v. Board of Educ.* 480 F.2d 693 (10th Cir.), *cert. denied*, 414 U.S. 1097 (1973) (upholding expulsion of Pawnee high school students for violation of hair-length regulations against objection that long braided hair is traditional symbol of religious identity), and *Missouri Church of Scientology v. State Tax Comm’n*, 560 S.W.2d 837 (Mo. 1977) (religion limited to worship of Supreme Being) with *Terterud v. Burns*, 522 F.2d 357 (8th Cir. 1975) (Indian prison inmate’s challenge to hair-length regulations upheld on ground that braided hair is tenet of Indian religion), and *Founding Church of Scientology v. United States*, 409 F.2d 1146 (D.C. Cir. 1969) (religious organization lacking belief in deity in conventional sense protected by First Amendment).

69. When courts adjudicating Native American claims for free exercise protection of sacred sites have addressed the fact that the requested relief and the underlying faith are different than those



vidual claims for exemption from governmental activity is not equipped to deal with Indian suits. It tends to limit the range of the free exercise clause to societally mainstream or nonthreatening beliefs,<sup>70</sup> or to the aspects of nontraditional beliefs that are similar to Euro-American practices.<sup>71</sup> The reluctance of courts to provide protection against infringement of Indian religions may thus stem from a general failure of free exercise methodology.

Native American religious concerns do present doctrinally troublesome free exercise issues. The protection of sacred sites actually restricts the alienability of government land. Yet the adjudication of First Amendment rights must take into account the context in which the claim arises,<sup>72</sup> even when the structure of the claim departs from the mainstream. Traditional free exercise analysis, flawed conceptually in focusing on acts of conscience rather than on faith, also fails in practice to evaluate governmental actions in light of the religious practice affected.

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usually involved in free exercise claims, they have generally treated the uniqueness of the claim as vitiating against the Indians' claim. Instead of devising a test that properly reflects the religious interest at stake in such suits, courts have implied that the very uniqueness of Indian religions provides a basis for denying the claims. *See, e.g.*, cases cited *supra* note 59.

70. *Compare* *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (religious organization that discriminates on basis of race not "charitable" within meaning of tax laws, despite claim that discrimination is religiously mandated) *with* *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (high-school education not required for followers of religion who will become farmers and live simple agrarian life of early Christianity and pioneer America). *See generally* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: The Religious Liberty Guarantee* (pt. 1), 80 HARV. L. REV. 1381, 1385 (1967) (Supreme Court has failed to safeguard constitutional principle of religious liberty as fundamental national value, preferring morals of prevailing majority over religious interests of radical dissenters).

71. This tendency to protect the familiar may explain the contrary results in *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964), where the California Supreme Court held that the California legislature could not constitutionally prohibit members of the Native American Church from using peyote as a sacramental symbol similar to that of the bread and wine used in the Christian Eucharist, and cases such as *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983), in which the court of appeals held that development of a sacred site that did not entail denial of access could not pose a free exercise problem. Although the peyote cases go both ways, *compare, e.g., Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) *with* *State v. Soto*, 21 Or. App. 794, 537 P.2d 142 (1975) (use of peyote by Native American Church not protected by free exercise clause from enforcement of state narcotics laws), the theory that First Amendment doctrine to date has protected familiar or morally desirable practices may also explain the decisions in the late-nineteenth century holding that polygamy was not a protected religious practice. *See, e.g.,* *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890); *Davis v. Beason*, 133 U.S. 333 (1890); *Reynolds v. United States*, 98 U.S. 145 (1878). The sacramental use of an intoxicating substance, common to both Christianity and peyoteism, was recognized as a bona fide religious practice in *Woody*, while site-specific worship and polygamy, which have no analogy in mainstream religious practice, were left unprotected in *Wilson* and the Mormon cases.

72. *See, e.g., Lynch v. Donnelly*, 104 S. Ct. 1355 (1984) (proper focus for judicial analysis is religious context of belief or practice).

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### B. *Civil Religion and the Pioneer Ideal*

In addition to the methodological gap between standard free exercise analysis and Indian site-specific religious belief, claims to protect native sacred areas seem to run counter to many of the ideologies that inform our understanding of America's goals as a nation, and of the meaning of religion in the United States.<sup>73</sup> The "civil religion" of the United States, the religious dimension of civil government, which is neither Christian nor Jewish, clearly embodies many of the principal features of the Judeo-Christian worldview.<sup>74</sup> This national belief has developed into a complex system of scripture and ritual,<sup>75</sup> including in its liturgies the Declaration of Independence, the Constitution, and the Pledge of Allegiance, and peopled with legendary heroes such as George Washington and Abraham Lincoln<sup>76</sup>—the dark and mysterious Supreme Court serving as oracle.<sup>77</sup>

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73. See *infra* notes 74–78. Millennial concepts of America as the subject of sacred history, a prominent current in American religion to this day, have primarily focused on "Christianizing" the New World to set an example for the Old. In a sermon delivered aboard the *Arabella* to fellow Puritans on their way to New England in 1630, John Winthrop declared that "wee shall finde that the God of Israell is among us . . . for wee must Consider that wee shall be as a City upon a Hill . . ." Winthrop, *A Modell of Christian Charity*, reprinted in R. MATHIESEN, *THE ROLE OF RELIGION IN AMERICAN LIFE: AN INTERPRETIVE HISTORICAL ANTHOLOGY* 9, 18 (1982); see also S. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* xiv (1972) (Americans have "propensity to view the state itself in a religious light"). From this perspective, Indian religious belief—some would claim the very existence of Native American belief—is an impediment to the perfection of the nation in the eyes of God. Suagee, *American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers*, 10 *AM. INDIAN L. REV.* 1, 8–9 (1982) (historically, federal government relied on missionaries to "civilize" Indians, on theory that Indian religion is "primitive" and thus contrary to national, religious, and social ideals). The vision of America as somehow special in the eyes of a metaphysical Christian God does not leave room for a system of belief based on aboriginal notions of religious truth as embodied in the physical world.

74. See Bellah, *Civil Religion in America*, in *AMERICAN CIVIL RELIGION* 21–44 (R. Richey & D. Jones eds. 1974) (articulating theory of civil religion as powerful force of national unification and identity). This collection of beliefs, symbols and rituals with respect to sacred things institutionalized in a collectivity shares much in common with Judeo-Christian principles, and forms the "vehicle of a national religious self-understanding." *Id.* at 29. This ideological structure operates on the legal plane as well as in the political sphere. See Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 *HARV. L. REV.* 4, 9 (1983) (legal tradition is narrative embodiment of normative societal ideals and includes not only a corpus juris, but also a mythological complex and language for interpretation of behavior according to systematic norms).

75. The belief entails a conception of America as the Chosen Land, the Israel of old, with a God actively interested in American history and success, both material and spiritual. See Bellah, *supra* note 74, at 29.

76. Abraham Lincoln as a martyr symbol, and his Gettysburg address as the "New Testament" of redemption after the Civil War, have become especially strong touchstones of the civil religion, according to Bellah. *Id.* at 31–32. Recent heroes who have taken on the aura of civil religion include John and Robert Kennedy, and Martin Luther King.

77. See Lerner, *Constitution and Court as Symbols*, 46 *YALE L.J.* 1290, 1291 (1937) (black-robed Supreme Court Justices and Court itself, as interpreter of Constitution, have become symbols of divine right); Bellah & Levinson, *A.A.L.S. Law and Civil Religion Panel: Law as Our Civil Religion*, 31 *MERCER L. REV.* 477 (1980) (Supreme Court dispenses binding interpretations of Constitution analogous to papal encyclicals); Levinson, "The Constitution" in *American Civil Religion*, 1979 *SUP. CT. REV.* 123 (analyzing constitutional exegesis of individual Supreme Court Justices according to methodology of varying Christian traditions).

This mythic aspect of government reinforces the chasm between Native American religions and their protection by the court system.<sup>78</sup>

The emphasis of Indian belief on the confluence of spirit and nature is fundamentally at odds with a basic premise of American civil religion. The pioneer and development ideals of the westward movement in the nineteenth century glorified taming the wilds in the interests of progress and prosperity. These ideals still inform the national civil religion<sup>79</sup> and stand in opposition to Indian concepts of cyclical rather than linear history.<sup>80</sup> The Native American emphasis on the confluence and interaction of space and time places a value on physical reality unknown in the mainstream of modern American public or private belief.<sup>81</sup>

To the extent, therefore, that the judiciary is influenced by American civil religion and traditional monotheistic understandings of spiritual separation from the physical world, claims by Indians that development of public lands violates their religious beliefs would seem at once obstructionist and counterproductive.<sup>82</sup> In this land of great freedom and republican virtues, this ideology argues, we must not allow regressive attitudes—even religious ones—to get in the way of the greater good. Some exceptions are allowable, because they are relatively cost-free, but Indian free exercise claims would require government to alter its understanding of its property rights in public lands. Only in America, where they have such freedom and wealth, the courts seem to be implying, would native groups raise such “outlandish” claims.<sup>83</sup> To consider the problem care-

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78. See *Indians and Religious Freedom*, unpublished anonymous paper, delivered at the National Indian Youth Council, Albuquerque, N.M., April 7, 1984, at 7 (on file with author) (civil religion of United States largely developed to justify suppression and extermination of Indians and of their way of life).

79. The ideal of progress as embodied in the westward movement, and the legends surrounding the pioneer settlement and development of the West, are still potent forces in the national American psyche. For European settlers, the notion of wilderness was one filled with both terror and challenge. The prospect of profit from exploration and settlement drew pioneers ever further westward, but as one scholar has noted, pioneers viewed the land as “satanic rather than sacred.” F. TURNER, *BEYOND GEOGRAPHY: THE WESTERN SPIRIT AGAINST THE WILDERNESS* 279 (1983); see also P. MATTHIJSSEN, *supra* note 30, at 7 (“To judge from the ruthless treatment of ‘the wilderness’ and the wasteful and destructive exploitation of the continent, the view of primordial nature as a wilderness to be tamed and dominated has persisted in North America to this day.”).

80. See V. DELORIA, *supra* note 13, at 75–109 (1973) (European or “Newtonian” concept of linear history is foreign to Indians, whose understanding of space and time is cyclical, and more closely resembles that postulated recently by physicists, recognizing that apparently objective truths such as space and time are relative, and that an experimenter actually affects outcome of seemingly objective experiments).

81. See *FEDERAL AGENCIES’ TASK FORCE, AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT* 12 (1979) (unique among American religions, free exercise for Indians “is the right to adjust to and maintain relationships with the natural world”).

82. See *supra* note 73.

83. An examination of the religious interests at stake in Indian claims, together with an understanding of the role of sacred sites in aboriginal populations worldwide, illustrates that the Indian claims are not out of the ordinary, however. For example, Christians could begin to comprehend the devastation to religion caused by the destruction of a sacred site if they imagine a proposal to construct

fully, however, is to realize that protection of sacred Indian sites is essential to Native American constitutional rights.

#### IV. TOWARD FREE EXERCISE PROTECTION OF SACRED SITES

The free exercise clause and establishment clause together stand for the proposition that religious variety unhampered by government interference is of great value to our society.<sup>84</sup> Governmental orthodoxy in either a positive<sup>85</sup> or a negative<sup>86</sup> sense is prohibited. When an Indian religion or deity may be destroyed as a result of governmental action and thus be the victim of a negative orthodoxy, the free exercise clause should protect the religious interest at stake. Courts holding that the requested relief falls outside the ambit of the constitutional protection of religious freedom have not adequately examined analogous areas of the law to determine whether to impose a limitation on property rights in public lands to protect the constitutional rights of Native Americans. This Note proposes two analo-

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a ski resort on the Mount of Olives. Most Christians would find such a development abhorrent and insulting to the momentous events the area has witnessed, if not actually destructive of spiritual reality.

After the Six-Day War, for example, the United States Representative to the United Nations declared that "the safeguarding of the Holy Places, and freedom of access to them for all, should be internationally guaranteed." U.N. Doc. A/P.V. 1546, at 3-5 (1967) *quoted in* Jones, *supra* note 16, at 173. *See supra* text accompanying notes 16-17. *Compare* Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983) (construction of ski resort on sacred mountains does not infringe free exercise, since access to sites has not been denied).

84. *See* Wisconsin v. Yoder, 406 U.S. at 226 ("idiosyncratic separateness" of Old Order Amish exemplifies diversity protected by free exercise clause); *see also* Lynch v. Donnelly, 104 S. Ct. 1355, 1371 (1984) (Brennan, J., dissenting) ("[O]ur remarkable and precious religious diversity as a nation" is protected by establishment clause.).

85. The establishment clause prohibits government from directly mandating what is the correct belief, and from indirectly establishing an orthodoxy by supporting one religion at the expense of another. *See* Larson v. Valente, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) ("The government must be neutral when it comes to competition between sects."); *Everson v. Board of Educ.*, 330 U.S. 1, 8-11 (1947) (indignation of colonists at compulsory worship and/or taxation in support of ministers motivated establishment clause). Justice Jackson in *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) wrote the classic defense of the constitutional freedom to dissent from the views of mainstream society: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . . If there are any circumstances which permit an exception, they do not now occur to us."

86. Just as government may not dictate what orthodoxy is, neither may it establish what orthodoxy is not, by refusing to protect unusual or unfamiliar belief. In this sense, the free exercise and establishment clauses form a coherent whole, prohibiting government from determining which religious beliefs merit constitutional protection. As the Court noted in *Larson v. Valente*, the "constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause." 456 U.S. at 245. *Accord* Thomas v. Review Bd., 450 U.S. 707, 715-16 (1981) (belief need not be logical or consistent to merit First Amendment protection); *Fowler v. Rhode Island*, 345 U.S. 67, 69-70 (1953) (fact that belief is unusual or held by few does not remove constitutional protection). *Cf.* M. HOWE, *THE GARDEN AND THE WILDERNESS* 1-33 (1965) (establishment clause serves to protect free exercise, and was motivated as much by desire of evangelical sects to avoid governmental corruption of religion as by skeptical Jeffersonian separationists).

gies for courts to use when adjudicating native claims. Both the public forum concept in First Amendment jurisprudence and the policy of the Endangered Species Act are useful parallels to the relief sought in Indian suits to protect sacred sites.

A. *Constitutional Limits on Governmental Property Rights in Public Lands: The Doctrine of the Public Forum and the Endangered Species Act*

Limitations on government's rights in public lands imposed by the guarantees of the First Amendment have long been recognized in the concept of the public forum.<sup>87</sup> Indeed, the Supreme Court has often used the public forum concept—a protection of traditional speech and assembly activities on publicly owned streets and parks—in analyzing cases with both speech and free exercise elements in general First Amendment terms.<sup>88</sup> The constitutional protection of First Amendment activity that has taken place on public land “from time immemorial”<sup>89</sup> naturally includes within its ambit not only speech and assembly, but also provides a useful guide for analysis of traditional Indian religions and worship,<sup>90</sup> which have been

87. See, e.g., *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (government may not regulate use of its land so as to discriminate against long-held First Amendment rights); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (religious expression may not be banned from public streets merely because it is “offensive”); *Hague v. CIO*, 307 U.S. 496 (1939) (government title to land is not as absolute as ownership of private property and is relative to First Amendment use of property).

88. In *Kunz v. New York*, 340 U.S. 290, 293 (1951), for example, Chief Justice Vinson stated: In considering the right of a municipality to control the use of public streets for the expression of religious views, we start with [the premise that] “Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”

(quoting *Hague v. CIO*, 307 U.S. at 515). Clearly, then, First Amendment use of a public place “from time out of mind” may limit the right of government to exclude would-be exercisers of this right.

89. See *supra* notes 87 and 88.

90. The public forum doctrine could serve as a useful limitation on protection of sacred sites in addition to the injury-in-fact and sincerity requirements. See *infra* text accompanying notes 98–99. As Chief Justice Burger noted in *Wisconsin v. Yoder*, 406 U.S. at 226–27, where a religious way of life that existed long before state activity or regulation is threatened by the government, the free exercise clause protects the religious interest against all but the most compelling of state needs. A similar argument could be made for the protection of sacred sites that existed before the issue of title to the land was ever considered. The free exercise clause provides constitutional relief from development, the argument runs, where native worship predates European settlement or extinguishment of aboriginal title. Even where Indian religious practices at sacred sites began after installation on reservations, the government should be estopped from denying the application of the free exercise clause where the tribal presence is the result of unwilling migration or treaty compliance. This “traditional worship” application of the public forum doctrine would exclude new religions from the ambit of site-specific constitutional protection. For example, under this theory, a person who claimed that the Lincoln Memorial was an incarnate God would not be entitled to preserve the Memorial from alteration or destruction. The public forum analogy protects only those beliefs and practices that have existed “from time out of mind.”

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observed at sacred sites for thousands of years.<sup>91</sup>

Congress has further statutorily restricted federal land-use development to protect unique cultural, architectural or archaeological resources,<sup>92</sup> and has provided protection of unique life forms in the Endangered Species Act of 1973 (ESA).<sup>93</sup> The convictions that motivated enactment of the ESA were that inadvertent destruction of life forms is ultimately more costly than protective measures,<sup>94</sup> and that all species are important in themselves in ways we do not currently and may never understand.<sup>95</sup> The Act provides a valuable intellectual context for judicial analysis of first amendment claims to protect site-specific, unique deities.

Courts, which traditionally look to written foundations for religious belief and the values at stake in free exercise claims, or to familiar types of religious practice, have been slow to recognize the nature of Native American religious issues, in part because of the absence of written traditions and legal analysis of such claims. Application of the public forum doctrine and the analogy to the ESA gives content both to the free exercise claim and to the substantial governmental interest in upholding the religious rights at issue. Like the speech and assembly rights currently protected by the public forum doctrine, traditional Indian worship at sacred sites has taken place “from time out of mind.” As in the case of endangered species,

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91. See *supra* note 3.

92. See *supra* note 30.

93. 16 U.S.C. §§ 1531–1543 (1982). This Act requires the Secretary of the Interior to ensure the continued existence of an endangered or threatened species when dealing with development of its habitat. *Id.* § 1533(d).

94. Chief Justice Burger, writing for the majority in the famous “snail darter” case, *TVA v. Hill*, 437 U.S. 153, 178 (1978), quoted from the Act’s legislative history:

From the most narrow point of view, it is in the best interests of mankind to minimize the losses of genetic variations . . . . They are keys to puzzles we cannot solve, and may provide answers to questions we have not yet learned to ask . . . . Sheer self-interest impels us to be cautious.

95. The ESA represents a commitment to the belief that the nation as a whole will profit by preserving the variety of nature whenever possible, even at substantial cost and inconvenience to government. Above all, caution is to be observed when taking irreversible steps toward destruction of a unique form of life.

The value of a life form is thus not measured economically or politically under the ESA. Rather, all forms of life are considered equal, and their status as endangered is left up to scientists as those most qualified to evaluate the danger. Section 1533(b) of the Act requires the Secretary of the Interior to determine whether a species is endangered or threatened “on the basis of the best scientific and commercial data available,” as well as in consultation with local residents and officials. See Rosenberg, *Federal Protection of Unique Environmental Interests: Endangered and Threatened Species*, 58 N.C.L. REV. 491, 526 (1981): “The federal policy has been based upon specific determinations that a particular species is endangered, not political decisions that the specific plant or animal is worthy of federal protection. In this way federal law regards all species as being equal in their value to society.” Similarly, the Israeli Holy Places Law consigns the definition and description of a sacred site to the adherents of the religion involved. See *supra* notes 16–17.

The constitutional prohibition against government-sanctioned orthodoxy embodied in the First Amendment also mandates equal treatment of religious interests, whether or not espoused by many or powerful believers. The First Amendment’s safeguard of diversity, the Supreme Court has held, forbids qualitative analysis of religious belief. See *supra* notes 84 & 86.

the continued existence and religious power of Indian deities and sacred sites is inextricably tied to the purity of their habitats. The protection of diversity provided by the public forum doctrine and the ESA should extend to unique native religions.

Further, the ESA and AIRFA serve as reminders to courts that government itself has a substantial interest in maintaining the existence of both ecological and religious variety on its own lands.<sup>96</sup> Where courts have misunderstood the nature and meaning of Indian claims in the past, the values expressed in the endangered species legislation and the caution it imposes upon governmental actors may validly serve as examples of protection against the danger posed by governmental destruction or diminution of the power of sacred sites and gods.

Central to the meaning of the free exercise clause is the protection of values and activities, the worth of which may always remain unknown. Avoidance of the incalculable harm to religion that is the inevitable result of government-decreed orthodoxy was certainly one factor involved in the enactment of both the establishment and free exercise clauses.<sup>97</sup> The freedom to believe and worship embodied in the First Amendment is rendered meaningless if government destroys the object of belief.

### B. *The Future of Indian Religious Freedom*

The proper focus for adjudication of Indian free exercise claims to protect sacred sites is the religious context of the threatened harm. Since native belief is intricately tied to physical sites, the focus of constitutional

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96. The legislative history of the American Indian Religious Freedom Act demonstrates a federal commitment to fostering the free exercise of Indian religion. As Senator Abourezk said when urging passage of the Act: "America does not need to violate the religions of her native peoples. There is room for and great value in cultural and religious diversity. We would all be poorer if these American Indian religions disappeared from the face of the Earth." 123 CONG. REC. 39,300-01 (Dec. 15, 1977); see also J. BROWN, *supra* note 3, at 29 (spiritual legacy of Indian religions of priceless value to United States).

The legislative history of the ESA reveals that the motivation for its enactment parallels the congressional concerns expressed by passage of the AIRFA. The federal government is concerned that the varieties of both genetic and religious life that enrich our nation may be irrevocably destroyed by inadvertent or hasty action. "Consideration of [the] need to protect endangered species goes beyond the aesthetic. In hearings before the Subcommittee on the Environment it was shown that many of these animals perform vital biological services to maintain a 'balance of nature' within their environments. Also revealed was the need for biological diversity for scientific purposes." S. REP. NO. 307, 93rd Cong., 2d Sess. (1973), *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 2989-90. Other commentators have noted the similarity of language and purpose between the AIRFA and legislation enacted to protect natural resources. Note, *AIRFA*, *supra* note 27, at 431 n.16 (AIRFA preamble expresses ideas common to environmental and ecological movements).

97. See M. HOWE, *supra* note 86, at 9 ("[I]f the First Amendment codified a figure of speech it embraced the believing affirmations of Roger Williams and his heirs no less firmly than it did the questioning doubts of Thomas Jefferson and the Enlightenment."). Cf. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) (purpose of religion clauses is "to prevent, as far as possible, the intrusion of either [religion or government] into the precincts of the other").

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analysis should shift from the examination of written tradition and acts of conscience to an analysis of the site-specific context in which such claims are brought.

This inquiry would not fundamentally alter the balancing process of constitutional adjudication, but would shift the analysis of the religious interest away from doctrinally narrow traditional free exercise principles toward an approach designed to give appropriate consideration to unique or unusual religious beliefs. This process would assess the degree of harm threatened to a traditional Indian religion by proposed development of a sacred site in the context of the tribal religion itself. When an adherent of the religion met the threshold requirement of establishing an infringement of the vitality or existence of a tribal deity or practice, the burden would shift to the government to show the development was justified by a compelling state need,<sup>98</sup> and that it was planned in the least restrictive form possible.<sup>99</sup> The constitutional balancing of interests would weigh the potential benefits to government gained from the logging or mining or construction of a recreational resort against the degree of harm threatened to Indian site-specific deities and practices as a result of the development.

Once the inquiry into the nature of the religious interests at stake in Native American suits has been adjusted to reflect the close bond of the spiritual to the physical in Indian theology, classic jurisdictional notions of standing<sup>100</sup> and sincerity<sup>101</sup> would limit claims to those in which the plaintiff has a genuine religious interest at stake.

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98. A law or project that infringes First Amendment freedoms must be justified by a compelling state interest. *See supra* note 43, *see also* *Widmar v. Vincent*, 454 U.S. 263 (1980) (regulation prohibiting religious groups from using college facilities did not rest on compelling state need); *Schneider v. Town of Irvington*, 308 U.S. 147 (1939) (town's policy of requiring police permit for door-to-door solicitation infringed of First Amendment rights of Jehovah's Witnesses; town interest in preventing fraud and trespass was not compelling).

99. A governmental action must also be narrowly drawn to further the compelling state need. *See supra* note 44, *see also* *Murdock v. Pennsylvania*, 319 U.S. 105, 116–17 (1943) (state regulation of public activity must be carefully worded to avoid impermissible overbreadth that would violate First Amendment rights); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (state must use less drastic means of curbing fraud than requiring state certification of religious cause for door-to-door solicitations).

The Supreme Court has held that “freedom of religion [is] in a preferred position.” *Murdock*, 319 U.S. at 115. “[O]nly those [state] interests of the highest order” can overcome an infringement of religion. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). The greater the intrusion into religious freedom, therefore, the more compelling must be the interest posited by government as overriding the religious interest. *Sherbert v. Verner*, 374 U.S. 398, 407 (1963) (administrative cost-reduction and efficiency do not justify abridging, even indirectly, religious freedom of Seventh Day Adventist by denying her unemployment benefits for refusing to work on her Sabbath).

100. *Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464 (1982) (plaintiffs in article III courts must show “injury in fact” to have standing to sue). Under this standard, an Indian plaintiff would have to show that he or she would in fact be injured by the destruction or impairment of a sacred site. In this sense, the religion would suffer injury through its members, who would have standing to raise the constitutional issue.

101. The test for sincerity should focus on the existence of belief, rather than on intensity of belief. The legal system is designed to elicit truth, and triers of fact are assumed to be competent to determine whether a litigant or witness is sincere. As the California Supreme Court noted in *People v.*



While restriction of government's development rights in land to protect religion is conceptually distinct from the typical free exercise accommodation, it is permissible under the establishment clause.<sup>102</sup> Protection of holy sites is clearly an avoidance of entanglement through accommodation of religious interests.<sup>103</sup> As the court noted in *Northwest Indian Cemetery*, "[g]overnment actions having the goal and effect of . . . accommodation [of religion] and which do not result in excessive government entanglement with religion are consistent with the Establishment Clause."<sup>104</sup> If the Constitution mandates governmental restraint to avoid inhibiting the freedom of religion, the resulting accommodation does not violate the establishment prohibition. Exemptions from taxation,<sup>105</sup> school attendance requirements,<sup>106</sup> and drug enforcement laws<sup>107</sup> are other examples of governmental accommodations of religion that avoid both infringement and entanglement. Thus, while the nature of the requested relief is fundamentally different from standard claims for purposes of the free exercise clause, the provision of that relief by government is doctrinally similar to other forms of accommodation for purposes of the establishment clause.

Indeed, a conclusion that constitutional protection of site-specific Indian deities violates the establishment clause would result in actual governmental destruction of religion through development. To hold that the establishment clause precludes challenges to termination of religious life forms

Woody, 61 Cal. 2d 716, 726, 394 P.2d 813, 821, 40 Cal. Rptr. 69, 77 (1964): "We do not doubt the capacity of judge and jury to distinguish between those who would feign faith in an esoteric religion and those who would honestly follow it."

102. The establishment clause has often been invoked as a defense to free exercise claims, a reflection of the expansion of the definition of religion and the growth of governmental activity in all walks of life. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-1, at 812 (1978) (religion clauses, originally complementary, have come into conflict through growth of government and expansion of our understanding of nature of religion). While the two clauses are in tension in some respects, the Supreme Court has made it clear that anti-establishment principles may not serve as the means of denying valid free exercise rights. See, e.g., *McDaniel v. Paty*, 435 U.S. 618 (1978) (religious freedoms may not be undermined by doctrines of non-establishment); *Wisconsin v. Yoder*, 406 U.S. 205, 234 n.22 (1972) ("The purpose and effect of exemptions [for Amish school children] are not to support, favor, advance, or assist the Amish, but to allow their centuries-old religious society . . . to survive free from the heavy impediment compliance with the Wisconsin compulsory-education law would impose."); *School District of Abington Township v. Schempp*, 374 U.S. 203, 296-99 (1963) (Brennan, J., concurring) (practices secured by free exercise clause may not be prohibited on establishment clause grounds).

103. Government involvement in terminating the existence of native deities and their worship by believers, runs afoul of the nonentanglement principle of the establishment clause. Government may even confer a benefit on religion in order to avoid entanglement. See, e.g., *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (tax exemptions for religious organization do not violate establishment clause where taxation would promote greater governmental involvement with religion); *Sherbert v. Verner*, 374 U.S. 398 (1963) (free exercise clause mandates some governmental accommodation of religious belief and practice in order to avoid entanglement). Thus avoidance of harm to religion, an attenuated benefit at best, clearly does not violate principles of non-establishment.

104. *Northwest Cemetery Protective Ass'n v. Peterson*, 565 F. Supp. 586, 597 (N.D. Cal. 1983).

105. *Walz v. Tax Comm'n*, 397 U.S. 398 (1970).

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

107. *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

by government would pervert a constitutional safeguard enacted to prevent governmental imposition of orthodoxy into an “awful engine of destruction.”<sup>108</sup>

### CONCLUSION

Traditional free exercise doctrine has tended to produce inconsistent results, because of its focus on “acts of conscience” rather than on faith, and because of its centrality requirement. To give meaning to the protection of religion mandated by the First Amendment, the judicial system must analyze free exercise claims in their religious context.

The conceptual flaws of traditional free exercise analysis are especially destructive when applied to Native American claims to protect sacred sites on public lands. Despite the constitutional commitment to religious diversity, courts have failed to protect Indian religions. Because native free exercise claims are unique in their emphasis on specific sites as the loci of spirits and spirituality, courts must approach the analysis of governmental development of sacred sites with a test that takes these considerations into account. Use of analogies to statutory and judicial limitations on the alienability of public land, such as the public forum doctrine and the ESA, would provide a contextual framework that properly reflects the religious concerns of Native Americans.

—Sarah B. Gordon

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108. L. TRIBE, *supra* note 102, § 14-6, at 831. The Supreme Court has held that the establishment clause may not be used as a justification for espousing a policy of “callous indifference” to the interests of religious individuals and organizations. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (upholding released-time program for public school students to attend religious instruction classes at parochial schools).