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AN AMERICAN TRADITION: THE RELIGIOUS PERSECUTION OF NATIVE AMERICANS

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An American Tradition

The thunder stopped. Silence replaced the roar of guns. At its core, the cloud of carbon haze clung to the ground. On its edges, the smoke thinned, and the blanket of snow that stretched to the horizon reemerged. Gradually, the cover of smoke lifted, revealing the wrath of the gunfire. Lying near where the Army had ordered them to congregate, hundreds of bodies, wrapped in tattered clothing, rested in small pools of blood-soaked snow. The Ghost Dance at Wounded Knee had ended.

During the 1989-90 term, the United States Supreme Court

ruled in *Employment Division, Department of Human Resources v. Smith*[1] that the first amendment does not protect from criminal sanctions the sacramental ingestion of peyote during Native American Church ceremonies, even though the ritual is integral to the practice of the religion.[2] In the process of making this decision, the Court fabricated a novel free exercise approach. Compared to the Wounded Knee Massacre in 1890, the Court's ruling in *Smith* appears relatively innocuous: rather than unleashing military firepower to eradicate the Ghost Dance Religion as was done in 1890, 100 years later the Court provided a far more humane and reasoned process for persecuting Native Americans in the exercise of their religion. Yet, as Native Americans learned long ago, due process does not ensure justice because the ethnocentrism and discrimination that characterized America's historic treatment of Indians persist today.

Smith reflects this persistence, even though the critical response to *Smith* will undoubtedly fixate on its implications for free exercise doctrine. While casting an ominous shadow over the future of free exercise rights, *Smith*'s disregard for Native American religion should not be glossed over in the haste to dissect the free exercise consequences that *Smith* portends. Focusing on *Smith* as an example of America's religious persecution of Native Americans does not discount its future implications as a revision of free exercise doctrine. Indeed, viewing *Smith* as a denial of American Indians' free exercise rights reveals the type of future free exercise abridgment that this decision harbors.

Although our nation professes to cherish its first amendment-enshrined religious liberty, our society persistently denies this right to America's original inhabitants. Historically, the religious persecution of American Indians is undisputed. The massacre at Wounded Knee in 1890 provides the most sensational and tragic illustration of this persecution. Apparently, we have never learned from this tragedy, as the government continues to deny religious freedom to Native Americans today. Recently, this denial has also surfaced in the application of the first amendment to the sacred site cases, in which courts repeatedly deny the asserted free exercise rights of American Indians by permitting the development of their sacred lands.

The legal system's role in the present denial of the religious freedom of Native Americans has not gone unnoticed. Many com-

1. 110 S. Ct. 1595, *reh'g denied*, 110 S. Ct. 2605 (1990).
2. *Smith*, 110 S. Ct. at 1599.

mentators have argued that sacred site decisions abridge the free exercise rights of American Indians.[3] Even Congress has sympathized with the plight of Indians, passing the American Indian Religious Freedom Act in 1978.[4] However, the Supreme Court has interpreted this Act as having no legal consequence.[5] As a result, courts continue to deny the free exercise claims of American Indians despite the sentiments of Congress.

Ethnocentrism[6] is at the root of this denial, as it has been in the past. An empowering sense of cultural superiority encouraged Europeans to mount a war of cultural genocide against American Indians, nearly exterminating them in the process. Wounded Knee represents the nadir of the white man's inhumanity and religious intolerance. European immigrants, limited by their own religious experience, misunderstood the religious nature of the Ghost Dance and misinterpreted this messianic religion as a militaristic uprising.[7] Contemporary attitudes have changed little from the ethnocentrism that has historically influenced our treatment of American Indians. As a result, we continue in 1990, the 100th anniversary of Wounded Knee, to deny Native Americans the religious freedom that the Constitution guarantees.[8]

The courts do not understand the nature of Indian religious beliefs because most judges are confined intellectually by Judeo-Christian notions of what constitutes a religion. This bias is reflected in the judicially constructed legal doctrines for determining the constitutional validity of religious claims; because these doc-

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3. Within the domain of legal periodicals, several journals have published articles that review the denial of religious freedom to Native Americans. *See infra* notes 99, 127, 131, 133, 158.

4. 42 U.S.C. § 1996 (1988).

5. See, *e.g.*, Justice O'Connor's majority opinion in *Lyng v. Northwest Indian Protective Association*, 485 U.S. 439, 455 (1988).

> Nowhere in the law is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights.
>
> . . . Representative Udall [sponsor of the bill] emphasized that the bill would not "confer special religious rights on Indians," would "not change any existing State or Federal law," and in fact "has no teeth in it."

Id. (citations omitted). *But see*, Note, *The First Amendment and the American Indian Religious Freedom Act*, 71 IOWA L. REV. 869 (1986)(arguing that the Act should be instrumental in vindicating Native American sacred site claims).

6. Ethnocentrism has been defined as "viewing other peoples ways of life in terms of one's own cultural assumptions, customs, and values." R. KEESING, CULTURAL ANTHROPOLOGY 511 (1981).

7. This mistake was made despite the historic example of the Romans persecuting another messianic religion in Palenstine, circa 30 to 35 A.D.

8. The pertinent part of the first amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

trines are framed in Western concepts of religiosity, they are prejudicial to the non-Western religions of Native Americans. Similarly, courts are unwilling to recognize the free exercise rights of American Indians whenever this recognition would impose substantial costs on the government, suggesting that it is not the religious liberty of Native Americans that is instrumental in deciding Indians' free exercise claims, but rather the cost to the government of indulging this liberty.

In order to understand the religious basis of American Indians' free exercise claims, one must appreciate the religions of Native Americans. Part I of this article will explain the distinctive religious beliefs of American Indians. Part II will illustrate the historical denial of Indians' religious freedom by reliving the violent death of the Ghost Dance at Wounded Knee. In Part III, an analysis of recent case law will reveal the legal perpetuation of this denial. Part IV will propose a doctrinal system for resolving sacred site claims. Finally, Part V will outline recommendations for protecting Native Americans' religious rights.

I. A Native American Tradition: An Introduction To Indian Religions

Before examining the violent suppression of Indian religious activity at Wounded Knee and the judiciary's perpetuation of this denial of religious freedom today, it is necessary to understand Native American religion. Without such an understanding, it is difficult to comprehend the free exercise rights that contemporary Indians have recently asserted in the courts. Reliance on Western conventions, such as the English language and the Judeo-Christian conception of religion, to explain the spirituality of American Indians is inherently problematic. However, only when one experiences these linguistic and conceptual difficulties can one begin to glimpse into the world of the American Indian. This overview is intended to convey a sense of the difference between Native Americans' conceptions of religion and the typical Western understanding of religion. Consequently, this overview will not catalogue the diverse religious beliefs and practices of America's original human inhabitants. Nonetheless, one must be careful not to ignore the diversity of traditional American Indian religions. Ethnological illustrations will demonstrate that, despite this acknowledged diversity, the philosophy and core beliefs behind the various tribal religions traditionally were and today remain remarkably similar. Experiencing this foreign conception of religion is the first step in understanding how our society continues the religious persecution of

American Indians.

A. The Traditional "Oneness of Indian Life"

In their traditional languages, Native Americans have no word for religion.[9] This absence is very revealing. Unlike the Western world, which isolates religion as a discrete aspect of social and individual life, religion permeates the lives of American Indians.

> The area of worship cannot be delineated from social, political, cultur[al], and other areas of Indian life-style, including his general outlook upon economic and resource development. . . . [W]orship is . . . an integral part of the Indian way of life and culture which cannot be separated from the whole. This oneness of Indian life seems to be the basic difference between the Indian and non-Indians of a dominant society.[10]

This *Weltanschauung*[11] contrasts with the Western mentality that goes to great lengths to separate the sacred from the profane. Indeed, no institution better demonstrates this Western commitment than the law.[12]

The "oneness of Indian life" implicates more than Native Americans' cognitive structuring of social reality. For Indians, not only can cultural manifestations not be discretely categorized, but neither can the many life forms that populate the earth. From the perspective of American Indians, humans are merely one of many beings, and certainly are not the paramount being that Western culture glorifies. A Sioux medicine man prefaced his life story with an emphasis on the oneness of creation:

> It is the story of all life that is holy and is good to tell, and of us two-leggeds sharing in it with the four-leggeds and the wings of the air and all green things; for these are children of one mother and their father is one Spirit.[13]

This perception rejects the anthropocentric view that characterizes Western thought and religion.

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9. A. HULTKRANTZ, THE RELIGIONS OF THE AMERICAN INDIANS 9 (1967).

10. *American Indian Religious Freedom: Hearings on S.J. Res. 102, Before the Senate Select Committee on Indian Affairs*, 95th Cong., 2d Sess. 86-87 (1978)(statement of Barney Old Coyote, Crow Tribe, Montana).

11. Literally translated from German, *Weltanschauung* means "worldview." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2596 (1963).

12. The law reflects this effort in many ways, with perhaps its attempt to separate religion from the public sphere being the most striking example of this commitment. Thomas Jefferson asserted that the first amendment raised "a wall of separation between Church and State." M. PETERSON, THOMAS JEFFERSON AND THE NEW NATION: A BIOGRAPHY 712 (1970).

13. BLACK ELK & J. NEIHARDT, BLACK ELK SPEAKS 1 (1932).

Rather than viewing the earth and its creatures as objects to be harnessed and exploited, Indians consider them equal partners in the enterprise of life. "In [their] mind, nature is not something apart from [them]."[14] As one of earth's many life forms, Indians perceive an interdependency between life forms that escapes the Western mind. This feeling of interdependency influenced their traditional utilization of resources.

> When we killed a buffalo, we knew what we were doing. We apologized to his spirit, tried to make him understand why we did it, honoring with a prayer the bones of those who gave their flesh to keep us alive, praying for their return, praying for the life of our brothers, the buffalo nation, as well as for our own people.[15]

Another Sioux shared a similar relationship with the earth's many beings:

> Kinship with all creatures of the earth, sky and water was a real and active principle. For the animal and bird world there existed a brotherly feeling that kept the Lakota safe among them and so close did some of the Lakotas come to their feathered and furred friends that in true brotherhood they spoke a common tongue.[16]

B. A Tradition of Interdependency and Stewardship

A consequence of this perception of the interdependency of living things is the Indian notion of stewardship. Native Americans perceive themselves as caretakers of the earth, not as developers. This notion of stewardship permeates Native American religions throughout the continent. For instance, Hopi religious leaders consider their stewardship as vital to the preservation of life:

> Hopis are the caretakers of all the world, for all mankind. Hopi lands extend all over the continents from sea to sea. But the lands at the sacred center are the key to life. By caring for these lands in the Hopi way, in accordance with instructions from the Great Spirit, we keep the rest of the world in balance.[17]

Over a thousand miles to the north, an Assiniboin chief expressed a similar duty to protect the earth:

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14. Momaday, *Native American Attitudes to the Environment*, in SEEING WITH A NATIVE EYE 84 (1976).

15. J. LAME DEER & R. ERDOES, LAME DEER, SEEKER OF VISIONS 122 (1972).

16. Luther Standing Bear, *quoted in* T. MCLUHAN, TOUCH THE EARTH 6 (1971).

17. Statement of Hopi Religious Leaders, Appendix to Petition for a Writ of Certiorari at 27a-28a, Susenkewa v. Kleppe, 425 U.S. 903 (1976)(No. 75-844), *denying cert. to* Lomayaktewa v. Hathaway, 520 F.2d 1324 (9th Cir. 1975).

> We believe that the Creator made everything beautiful in his time. We believe that we must be good stewards of the Creator and not destroy nor mar His works of creation. We look upon stewardship not only in terms of money and the profit of a hundredfold, but in those of respect for the beauty of the land and of life in harmony with the succession of the seasons, so that the voices of all living things can be heard and continue to live and dwell among us. If an 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.[18]

Such notions of stewardship are not a twentieth century phenomenon. In 1855, a Cayuse Indian hesitated to sign a treaty relinquishing part of present-day Oregon and Washington to the government because he felt that innumerable living beings were not represented in the transaction.

> I wonder if the ground has anything to say? I wonder if the ground is listening to what is said? I wonder if the ground would come alive and what is on it? Though I hear what the ground says. The ground says, It is the Great Spirit that placed me here. The Great Spirit tells me to take care of the Indians, to feed them aright. The Great Spirit appointed the roots to feed the Indians on. The water says the same thing. The Great Spirit directs me, Feed the Indians well. The grass says the same thing, Feed the Indians well. The ground, water and grass say, The Great Spirit has given us our names. We have these names and hold these names. The ground says, The Great Spirit has placed me here to produce all that grows on me, trees and fruit. The same way the ground says, It was from me man was made. The Great Spirit, in placing men on the earth, desired them to take good care of the ground and to do each other no harm.[19]

Not only do these words express the Native American sense of stewardship, they also vividly illustrate the American Indian perception of the interdependency of living things.

As the quoted passages suggest, personification of the land is integral to the Native American perception of and relationship with the earth, and indeed, with all forms of life. "Other living things are not regarded as insensitive species. Rather they are 'peoples' in the same manner as the various tribes of men are peo-

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18. J. SNOW, THESE MOUNTAINS ARE OUR SACRED PLACES 145 (1977).
19. Young Chief, *quoted in* T. MCLUHAN, *supra* note 16, at 8.

ples."[20] Because all of life is animated, Indians learn from various life forms.

> Did you know that trees talk? Well they do. They talk to each other, and they'll talk to you if you listen. Trouble is, white people don't listen. They never learned to listen to the Indians so I don't suppose they'll listen to other voices in nature. But I have learned a lot from trees: sometimes about the weather, sometimes about animals, sometimes about the Great Spirit.[21]

The animated and life-sustaining traits of land make the relationship of a particular people with a particular land "the primary thesis of tribal religions."[22] In return, this relationship inspires Native Americans' self-identities as stewards and encourages ecological harmony and not exploitive development.

> The White people never cared for land or deer or bear. When we Indians kill meat, we eat it all up. When we dig roots we make little holes. When we built houses, we make little holes. When we burn grass for grasshoppers, we don't ruin things. We shake down acorns and pinenuts. We don't chop down the trees. We only use dead wood. But the White people plow up the ground, pull down the trees, kill everything. The tree says, "Don't. I am sore. Don't hurt me." But they chop it down and cut it up. The spirit of the land hates them. They blast out trees and stir it up to its depths. They saw up the trees. That hurts them. The Indians never hurt anything, but the White people destroy all.[23]

C. *American Indian Spirituality and Traditional Sacred Lands*

The land, its birds and animals, trees and grasses, streams and lakes, valleys and mountains, winds and breezes, and boulders and stones, are all relatives of the American Indians. These relationships have a history, as reflected in the myths of the Indians.[24] It is this history and the life-sustaining gifts of these beings that make particular land sacred to particular tribes.

> Every part of this soil is sacred in the estimation of my people. Every hillside, every valley, every plain and grove, has been hallowed by some sad or happy event in days long vanished . . . the very dust upon which you now stand responds more lovingly to their footsteps than to yours, because it is rich with the dust of

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20. V. DELORIA, GOD IS RED 103 (1973).
21. Walking Buffalo, *quoted in* T. MCLUHAN, *supra* note 16, at 23.
22. V. DELORIA, *supra* note 20, at 269-70.
23. Words of an old Wintu Indian, *quoted in* T. MCLUHAN, *supra* note 16, at 15.
24. Numerous books are dedicated to preserving the myths of Native Americans. For an illustrative example, see P. BULLCHILD, THE SUN CAME DOWN (1985).

> our ancestors and our bare feet are conscious of the sympathetic touch . . . .[25]

Chief Seattle's monumental words reveal the sanctity of tribal lands to Native Americans. Similar passion inspires sacred site litigation today. Implicit in Chief Seattle's testimony is the pervasive spirituality that defines the lives of Native Americans. This spirituality touches every aspect of Indian life. As an Osage explained,

> All life is *wakan*.[26] So also is everything which exhibits power, whether in action, as the winds and drifting clouds, or in passive endurance, as the boulder by the wayside. For even the commonest sticks and stones have a spiritual essence which must be reverenced as a manifestation of the all pervading mysterious power that fills the universe.[27]

Sacred site claims arise when the spiritual and interdependent relationship of Native Americans with all living things, including land, is threatened by development. This relationship is at the core of Indian religions; it defines the identities of Native Americans. Sacred site litigation aims to preserve and protect such religious passions. While Native Americans share a religious relationship with all of their historic lands, they have not brought suits to halt development of just any public lands. Instead, as the label "sacred site" suggests, the Indians have restricted their protests to development of lands that are sacred to the tribe. Presumably, the first amendment protects such religious beliefs from government interference.

D. Religion and the Preservation of Traditional Native American Culture

Preserving Native Americans' freedom of religion is of more than constitutional significance. It is a matter of cultural survival. As the American Indian Religious Freedom Act acknowledged, "[T]he religious practices of the American Indian . . . are an integral part of their culture, tradition and heritage, such practices forming the basis of Indian identity and value systems."[28] Histori-

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25. Chief Seattle, *quoted in* AMERICAN FRIENDS SERVICE COMMITTEE, UNCOMMON CONTROVERSY: FISHING RIGHTS OF THE MUCKLESHOOT, PUYALLUP, AND NISQUALLY INDIANS 31 (1970).

26. *Wakan*, a word from the Siouan language, is difficult to translate into English. In a dictionary of the Dakota language, *wakan* in its noun form is defined as "a spirit, something consecrated" and in its adjective form as "spiritual, sacred, consecrated, wonderful, incomprehensible, mysterious." *See* 2 HANDBOOK OF AMERICAN INDIANS 897 (F. Hodge ed. 1968).

27. Frances LaFlesche, *quoted in* R. UNDERHILL, RED MAN'S RELIGION 21 (1965).

28. American Indian Religious Freedom Act, Pub. L. No. 95-341, 1978 U.S. CODE

cally, the government has acted on this knowledge by suppressing the religious freedom of American Indians; the government has assaulted Indian religious beliefs with the goal of gutting Native American cultures and thereby hastening assimilation into mainstream society.

Despite its persistence, the government has not yet destroyed the spirituality of Native Americans. However, the assault continues today as the development of land sacred to Indians continues. The current assault on Native American religions is less deliberate than in the past: today, we insult Native American religions, not with the instrumental purpose of destroying their culture, but with the result of denying them religious freedom because the government and the courts (as well as the population that supports these institutions) are unable to understand or unwilling to acknowledge the Indians' religious relationship with their sacred lands.

Native Americans certainly recognize the government's land development proposals as a continuation of historic injustice, and fear that if their religions are destroyed, their cultures will dissipate:

> "[I]n the long run if the expansion [of the ski resort on national forest land] is permitted, we will not be able successfully to teach our people that this is a sacred place. If the ski resort remains or is expanded, 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. If our people no longer possess this long-held belief and way of life, . . . [this will have] a direct and negative impact upon our religious practices . . . . The destruction of these practices will also destroy our present way of life and culture."[29]

By denying sacred site claims, courts are ignoring, or at best marginalizing, this destructive aspect of the development of public land. Courts frequently inflict damage without even recognizing the Indian claims as presenting constitutionally valid challenges. Somehow, Native American religious emphasis on a pervasive spirituality defies the judiciary's notion of religion.

The distinctive nature of Native American religions, or more precisely the Indians' *Weltanschauungen*, could be explored and unfolded in far greater detail.[30] For the purposes of this paper, the

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CONG. & ADMIN. NEWS (92 Stat.) 469 (codified at 42 U.S.C. § 1996 (1988)).

29. Wilson v. Block, 708 F.2d 735, 740 n.2 (D.C. Cir. 1983)(quoting "Narrative Direct Testimony" of Abbott Sekaquaptewa, then-chairman of the Hopi tribe), *cert. denied*, 464 U.S. 1056 (1984).

30. *See, e.g.*, V. DELORIA, *supra* note 20; A. HULTKRANTZ, *supra* note 9; BELIEF AND

following passage adequately suggests the differing reality experienced by Native Americans.

> [Knowledge] has taught us that the world is differently defined in different places. It is not only that people have different customs; it is not only that people believe in different gods and expect different post-mortem fates. It is, rather, that the worlds of different peoples have different shapes. The very metaphysical presuppositions differ: space does not conform to Euclidean geometry, time does not form a continuous unidirectional flow, causation does not conform to Aristotelian logic, man is not differentiated from non-man or life from death, as in our world.[31]

II. A Misunderstood Tradition: The Ghost Dance And The Wounded Knee Massacre

A. Lakota Cultural Traditions

Rising to prominence circa 1700 and flourishing for a century and a half, the Sioux lived the horseback-riding, gun-toting, buffalo-chasing, war bonnet-wearing, peace pipe-smoking life that Hollywood made famous. This 150-year period was the golden age of Plains Indian culture, and the Sioux epitomized this archetypal life.

Ironically, the cultural contacts that stimulated this blossoming were the same forces that led to the demise of classic Plains Indian culture. Without the infusion of guns from the French traders of the Great Lakes region, and more importantly, horses from the Spanish conquistadors of the Southwest, this classic culture would not have developed. Indeed, prior to the European invasion of the New World, the Sioux were a woodlands and prairie people, living amidst lakes and forests near the headwaters of the Mississippi. As the French began to exploit the resources of the Great Lakes area, however, they introduced firearms to the Sioux's bitter enemies, the Ojibwa,[32] who used the new weapons to drive the Sioux westward onto the Great Plains. The Sioux who drifted farthest onto the Plains called themselves Lakota, meaning "friends" or "allies."

By the nineteenth century, the Lakota homeland encompassed an area larger than the states of New York and Pennsylvania com-

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Worship in Native North America (1981); Seeing With A Native Eye (1976).

31. Goldschmidt, *Foreword* to C. Castaneda, The Teachings of Don Juan: A Yaqui Way of Knowledge at vii (1968).

32. Derived from Ojibwa nomenclature, the word "Sioux" means "snake" or "enemy." E. Schusky, The Forgotten Sioux 12 (1975).

bined, ranging from the South Dakota segment of the Missouri River to the Big Horn Mountains of Wyoming, and from the North Platte River of Nebraska to the Cannon Ball River of North Dakota. However, just as Lakota culture grew to dominate this geographic area, the pressure of European expansion from the East began to mount. As a result, the golden age of Lakota culture was remarkably short-lived. By 1868 the Lakota agreed to confine themselves to a reservation. The Great Sioux Reservation, as it was known, encompassed all of the present state of South Dakota west of the Missouri River.

In 1874 gold was discovered in the Black Hills of western South Dakota, prompting the government to offer to purchase the Hills from the Lakota. The Lakota refused and, in retaliation, the government announced that it would strictly police the boundaries of the Great Sioux Reservation to keep the Lakota on reservation land. The Treaty of 1868 had granted the Lakota the right to occupy unceded territory to the west of the South Dakota reservation, in what is today eastern Montana and Wyoming. Now, however, the government pledged to deploy military force to keep the Indians out of this unceded territory. When the army ventured into the unceded territory to pressure the Indians to return to their reservation, the Lakota (and several other tribes) objected to the government's interpretation of the Treaty of 1868, and the Battle of Little Big Horn ensued.[33] Shocked by the savagery of the Indians at Little Big Horn, an outraged Congress demanded that the Lakota either vacate the Black Hills and the unceded territory or cease receiving government rations. Victorious on the battlefield but impotent in the Capitol, the Lakota sold their land.[34]

Coinciding with this reduction in freedom was the near extermination of the Lakota's staff of life, the buffalo.[35] The combination of these two events created an increasingly disintegrated and frustrated reservation life for the Lakota during the 1880s. This frustration culminated in the division of the already reduced Great Sioux Reservation into six smaller reservations: a sacrifice of nine million acres of land to appease the flood of white immigrants.

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33. R. UTLEY, THE LAST DAYS OF THE SIOUX NATION 18 (1963). This brief synopsis of the Sioux has been compiled from several sources. For a general overview of this period in Indian history, see E. SCHUSKY, *supra* note 32, R. SMITH, MOON OF POPPING TREES (1975), D. BROWN, BURY MY HEART AT WOUNDED KNEE (1970), J. MCGREGOR, THE WOUNDED KNEE MASSACRE (FROM THE VIEWPOINT OF THE SIOUX) (1940).

34. R. UTLEY, *supra* note 33, at 44.

35. While exact figures are impossible, estimates place the North American bison population at 40,000,000 in 1800. By 1895, there may have been as few as 800 bison left. *See* 3 E. SETON, LIVES OF GAME ANIMALS, Part 2 at 670 (1953).

Never defeated militarily, by 1890 the Lakota's way of life was a memory confined to the past as they were transformed from a free nation of proud individuals to dependant wards of the United States government. This transformation

> had plunged the Sioux to depths of despair unprecedented in their history. Virtually every meaningful custom had been attacked or proscribed, every institution damaged or destroyed. That they could not avoid adopting some of the alien customs and institutions thrust upon them only intensified their grief over the loss of the old. A pervasive feeling of bitterness, helplessness, and futility gripped the Sioux.[36]

B. Vanishing Traditions and the Ghost Dance Religion

During this age of despair, word began to drift across the Plains that a messiah had come to resurrect Indian culture.[37] Receptive to such a message, the Lakota sent several delegates to investigate this messiah. The delegates traveled by horse, train, and wagon[38] to Walker Lake on the Paiute Reservation in western Nevada, where a Paiute Indian named Wovoka claimed that he had experienced a vision during a solar eclipse. Wovoka explained that, "when the sun died, I went up to heaven and saw God and all the people who had died a long time ago. God told me to come back and tell my people they must be good and love one another, and not fight, or steal, or lie. He gave me this dance to give to my people."[39] God instructed Wovoka that if the Indians adhered to his instructions, by the summer of the following year (1891) an Indian millennium would occur in which the adherents to the new religion would be joined by their ancestors to live in a bountiful world void of Europeans. Wovoka distilled the gospel of this new religion to the simple doctrine, "You must not fight. Do no harm to anyone. Do right always,"[40] and instructed that its ceremonial celebration

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36. R. UTLEY, *supra* note 33, at 39.

37. Among anthropologists, the Ghost Dance Religion is considered a "revitalization movement," which is "a deliberate, organized, conscious effort by members of a society to construct a more satisfying culture." Wallace, *Revitalization Movements*, 58 AM. ANTHROPOLOGIST 265 (1956). Typically, these movements are a response to the cultural destruction wrought by colonialism, having occurred in Asia and Indonesia, Polynesia, Melanesia, Central and South America, and Africa, as well as in North America. R. THORNTON, WE SHALL LIVE AGAIN: THE 1870 AND 1890 GHOST DANCE MOVEMENTS AS DEMOGRAPHIC REVITALIZATION 16 (1986).

38. Ironically, without European conventions, such as trains, telegraphs, written language, and mail, the Ghost Dance Religion would not have spread so far so fast.

39. J. MOONEY, THE GHOST-DANCE RELIGION AND THE SIOUX OUTBREAK OF 1890, at 2 (1896).

40. *Id.* at 18.

should take the form of a dance, which came to be known as the Ghost Dance.[41]

After visiting the self-proclaimed messiah and witnessing several demonstrations of his power, the Lakota delegates returned to the reservations to make their reports. "On the report of these delegates the dance was at once inaugurated and spread so rapidly that in a few months the new religion had been accepted by the majority of the tribe."[42]

The Ghost Dance was a sacred and solemn event "that required much preparation and much attention to form."[43] For twenty-four hours prior to the ceremony, the tribal leaders fasted. After this preparation, the dancers formed a giant circle, gathering around a dance tree decorated with eagle feathers, bright cloth, and on occasion, an American flag. The dancers wore feathers in their hair, and it was the Lakota who wore the famous Ghost shirt, believed to be bullet proof. All willing members of the tribe participated, which was unusual for most Lakota dances. After a ceremonial invocation, the actual dance began; the dancers shuffled slowly in a circle and sang songs reflecting the hope that the millennium promised. The dance continued for hours as the participants intermittently fell exhausted to the ground and experienced visions, during which they would visit ancestors and catch glimpses of the world to come.[44]

When related to non-participants, these visions must have spurred the spread of the new religion among the Lakota. Soon after the introduction of the Ghost Dance, many of the Indians abandoned their reservation cabins and farms and pitched lodges in newly formed dance camps. As these camps grew, so did the frequency of the dances, which eventually became a daily event. This religious fervor, evidenced in the expanding dance camps and daily dances, alarmed Indian agents and other white observers. The reactions of these individuals led to the tragedy at Wounded Knee.

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41. Mooney claimed that the Ghost Dance was variously named among the different tribes. Most tribes of the Plains, including the Lakota, called it the "spirit" or "ghost" dance, and this has become its popular name. *Id.* at 35.

42. *Id.* at 29.

43. R. SMITH, *supra* note 33, at 83. Accurate accounts of the Ghost Dance do not exist, but available evidence provides some idea of the ritual.

44. *See* D. BROWN, *supra* note 33, at 432-34. *See also* J. MOONEY, *supra* note 39, *passim*.

C. *A Traditional Approach: The Government's Reaction to the Religious Movement*

The series of events leading to the massacre reflected the increasing disarray on the reservations and the perplexity on the part of the government regarding how to react to the religious movement. The general white reaction was predominantly one of terror in response to a perceived militaristic uprising. Accordingly, the government took affirmative steps to check the religious fervor of the Lakota. To their credit, the Indian agents in charge of the reservations first attempted to deal with (*i.e.*, stop) the Ghost Dance movement themselves. Despite their efforts, however, the dancing continued, and the religion spread.

Of particular significance was its spread to the Standing Rock Reservation, home of Sitting Bull. To whites, Sitting Bull was an enigmatic figure. To some whites then, as well as now, Sitting Bull represented the noble, but inevitably doomed, attempt by the American Indian to retain his freedom. To others, Sitting Bull constituted a threat. According to the agent in charge of Sitting Bull's reservation:

> Sitting Bull is high priest and leading apostle of this latest Indian absurdity; in a word he is the chief mischief-maker at this agency, and if he were not here this craze, so general among the Sioux, would never have gotten a foothold at this agency. Sitting Bull is a man of low cunning, devoid of a single manly principle in his nature or an honorable trait of character, but on the contrary is capable of instigating and inciting others (those who believe in his powers) to do any amount of mischief. . . .
>
> . . . .
>
> Sitting Bull is a polygamist, libertine, habitual liar, active obstructionist, and a great obstacle in the civilization of these people.[45]

Once Sitting Bull's name was associated with the new religion, violent confrontation loomed on the horizon. Indeed, less than a month after Sitting Bull and his people first learned the Ghost Dance, which by that time had been practiced by other Lakota for several months, the press began fanning the flames of confrontation. After the Standing Rock Reservation agent sent the above quoted letter to Washington, the *Chicago Daily Tribune* printed the letter virtually verbatim, headlining it,

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45. Letter from James McLaughlin to T.J. Morgan, Comm'r of Indian Affairs (Oct. 17, 1890), *quoted in* R. SMITH, *supra* note 33, at 107.

TO WIPE OUT THE WHITES

What the Indians Expect Of The Coming Messiah

FEARS OF AN OUTBREAK

Old Sitting Bull Stirring Up the Excited Redskins[46]

As the white reaction grew more confrontational, the dancing craze continued. "By mid-November Ghost Dancing was so prevalent on the Sioux reservations that almost all other activities came to a halt. No pupils appeared at the schoolhouses, the trading stores were empty, no work was done on the little farms."[47]

At this point, the Army was asked to solve the growing problem. Coinciding with the Army's command were a flurry of newspaper headlines proclaiming that,

IN A STATE OF TERROR

Great Excitement at the Pine Ridge Agency

Indians Dancing with Guns;[48]

* * *

The Messiah Expected To Arrive At The Pine Ridge Agency To-Day, When The Savages Will Fight;[49]

* * *

WITH RIFLE ON BACK

The Red Skins Are Dancing The Dreaded Ghost Dance.[50]

Interestingly, the local newspapers saw a different story evolving. After visiting the Pine Ridge Reservation, a reporter for a Nebraska newspaper commented that, "It is hard after visiting Pine Ridge Agency, to write with patience of the liars, big and little, who have filled the continent with scare headlines and inflam-

46. Chicago Daily Tribune, Oct. 28, 1890, *quoted in* R. SMITH, *supra* note 33, at 111.
47. D. BROWN, *supra* note 33, at 435-36.
48. Chicago Daily Tribune, Nov. 20, 1890, *quoted in* R. SMITH, *supra* note 33, at 132.
49. New York Times, Nov. 20, 1890, *quoted in* R. SMITH, *supra* note 33, at 132.
50. Omaha Daily Bee, Nov. 20, 1890, *quoted in* R. SMITH, *supra* note 33, at 132.

matory reports in the past two weeks."[51] Similarly, the *Pierre Free Press* challenged, "If ever a stupendous fake was better faked . . . than this latest Sioux Indian hostility racket, please tell us about it!" and observed, "[I]t is when one approaches the alleged scenes of hostility that he begins to comprehend the dimensions of the grand farce."[52] Outraged by rampant sensationalism, the editor of the Sturgis, South Dakota newspaper chastised the Eastern yellow journalists:

> Isn't it about time some of these wild and wooly newspaper liars . . . be spanked and sent out of harm's way? . . . There never was any danger of an Indian outbreak, and none exists now, unless these silly sensational reports have scared people into acts that might properly be construed by an Indian into a desire to fight.
>
> . . . .
>
> . . . This ghost dance has been worked up into a very wonderful and exciting matter by pinheaded "war correspondents" and other irresponsible parties until they have succeeded in massing nearly half the United States army to be spectators to an Indian pow wow.[53]

The Indians were equally dismayed that a religious ceremony created such trepidation and were outraged when troops marched into their land. Little Wound, a leader of a dance camp, pondered,

> What have we done? We have done nothing. Our dance is a religious one, and we are going to dance until spring. If we find then that the new Christ does not appear we will stop dancing, but in the meantime, troops or no troops, we are going to start our dance at [Medicine Root] creek this morning.[54]

Despite such sentiments, with the Eastern press clamoring for action, the Army decided to march into Pine Ridge. Even with the presence of the soldiers, the Lakota continued dancing in their camps; although a group of over 1000 Indians did trek to a desolate and remote area of the Badlands known as the Stronghold where they intended to dance throughout the winter. Because the religious movement continued, the Army, determining further action was necessary, decided to arrest Sitting Bull. On December 15, 1890, Indian police surrounded Sitting Bull's cabin. In the process

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51. Chadron (Neb.) Advocate, late Nov., 1890, *quoted in* R. SMITH, *supra* note 33, at 138.

52. Pierre (S.D.) Free Press, late Nov., 1890, *quoted in* R. SMITH, *supra* note 33, at 138.

53. Sturgis (S.D.) Weekly Record, Nov. 28, 1890, *quoted in* R. SMITH, *supra* note 33, at 139.

54. R. SMITH, *supra* note 33, at 131.

of his arrest, Sitting Bull was killed.[55]

The Indian reaction to the assassination was remarkably restrained, perhaps because of the calming and sustaining influence of the Ghost Dance Religion.[56] Fear of the Ghost Dance led to Sitting Bull's death; yet the same religion calmed the Indians when their leader was murdered. After Sitting Bull's death; hundreds fled the Standing Rock Reservation to join other Ghost Dance camps, including one under the leadership of Big Foot. Joining Big Foot would prove to be a fatal mistake.

As soon as they learned of Sitting Bull's assassination, Big Foot's band opted to move their camp to Pine Ridge where they would be under the protection of Red Cloud, a long-time leader of the Lakota whose relationship with the whites was far more cordial than many of the tribe's other leaders. Unbeknownst to Big Foot, however, the Army considered him a renegade cut from the same cloth as Sitting Bull. To Nelson Miles, the Army general in charge of the campaign, Big Foot was "very cunning and [his Indians] very bad."[57] Miles ordered Big Foot and his followers arrested. By this time, Big Foot's people were a haggard and motley band of roughly 120 men and 230 women and children, ration-starved and with no means of subsistence. Big Foot himself, stricken with pneumonia, was confined to a wagon bed.

On December 28, 1890, this formidable military threat, upon sighting Army troops, raised a white flag from Big Foot's wagon and peacefully agreed to camp under the Army's auspices at Wounded Knee Creek. According to Lakota survivors, the Indians were told that the next day troops would escort them to Pine Ridge, where they could join Red Cloud. Following orders, the Indians camped along the creek, where they were joined by additional Army troops later in the evening. These troops brought with them orders to transport Big Foot's band to a military prison in Omaha; they also brought two Hotchkiss guns, which joined the two Hotchkisses already placed on the hill overlooking the Indian encampment.

Early the next morning, the Lakota men were ordered to come to the center of the camp, which had already been surrounded by mounted soldiers. Upon orders, the warriors surrendered their guns. Dissatisfied with the number of guns produced, the soldiers began searching the packs and lodges of the Lakota, gathering any instruments that had lethal potential and heaping them in a pile.

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55. D. Brown, *supra* note 33, at 438.
56. *Id.* at 439.
57. R. Smith, *supra* note 33, at 4.

Still not satisfied, the soldiers began to go "among the Indians, [throw] back their blankets [to] look at their belts to see if they had any knives or other things that could be used to fight with."[58] The Lakota did not protest any of these intrusions, although a medicine man named Yellow Bird began shuffling his feet in a dance and proclaimed,

> Do not be afraid! Let your hearts be strong to meet what is before you! There are lots of soldiers and they have lots of bullets, but the prairie is large and the bullets will not go toward you, but over the large prairies.[59]

Meanwhile, the searches of the Indians revealed that some of the Lakota were indeed concealing weapons. One, Black Coyote, refused to surrender his rifle, arguing that he had paid a great sum for the rifle and that it belonged to him. What happened next is unclear. According to a Lakota eyewitness,

> If they had left him alone he was going to put his gun down where he should. They grabbed him and spinned him in the east direction. He was still unconcerned even then. He hadn't his gun pointed at anyone. His intention was to put that gun down. Right after they spun him around there was the report of a gun, [which] was quite loud.[60]

Many of the survivors spoke of this loud noise and the resulting carbon haze as the Army responded instantaneously to the report of Black Coyote's rifle.[61] Some of the survivors contested what has become the official shot-fired-in-a-scuffle story.[62]

Regardless of who fired the first shot, the subsequent Army assault was merciless. The Hotchkiss guns raked the Lakota camp, blindly mowing down Indians, regardless of age or sex, and shredding the Indian lodges. Big Foot and the warriors ordered to the center of the camp were the first victims, yet the soldiers were relentless in their barrage. Most of the warriors were slaughtered near where the fight began, but women and children "were found scattered along for two miles from the scene of the encounter, showing that they had been killed while trying to escape."[63] Esti-

58. Statement of Charley Blue Arm, a Lakota survivor, *quoted in* J. McGregor, *supra* note 33, at 27-28.

59. R. Smith, *supra* note 33, at 187.

60. Statement of Dewey Beard, *quoted in* J. McGregor, *supra* note 33, at 95.

61. *See* J. McGregor, *supra* note 33, at 98-125.

62. Commenting on this version of the story, Joseph Black Hair contended, "It is very wrong," and Charley Blue Arm suggested that an Army officer ordered the soldiers to fire. *See id.* at 67, 124, 128.

63. J. Mooney, *supra* note 39, at 27.

mates vary, but certainly more than half of the Lakota were killed. Three days after the massacre, the Army hired a party to return to Wounded Knee Creek and collect and bury the bodies of the Indians in a mass grave. By this time, the dead lay frozen in grotesque shapes under the cover of freshly fallen snow.

D. A Traditional Consequence: Wounded Knee as an Illustration of Religious Persecution

This is the story of Wounded Knee. I purposely use the word *story* to make a point. Reconstructing factual history is inherently problematic, particularly when events occur on wind-swept prairies far removed from the instruments of Western civilization. Memories that recreate the event are emotionally charged and susceptible to formulating the sequence of events to satisfy these emotions. We will never know who fired the shot that triggered the bloodbath at Wounded Knee. This fact is lost in history. The injustice suffered by Indians is not.

Wounded Knee dramatically illustrates the government's persistent suppression of Lakota religious beliefs. In 1883, the Commissioner of Indian Affairs "distributed a set of rules designed to stamp out 'demoralizing and barbarous' customs. The directive defined a number of 'Indian Offenses.' It was an offense to hold feasts and dances, including the Sun Dance."[64] This government's effort at suppression was systematic: "[w]ith the proscription of the Sun Dance, the social and religious framework of the Sioux began to give way."[65] When the Lakota turned to the Ghost Dance for religious salvation, the government not only proscribed it, but also resorted to unleashing military power to prevent the Indians from practicing their religion. The government misunderstood the motivations of the Lakota. Rather than recognizing its religious basis, most white observers perceived the Ghost Dance as a militaristic uprising. Because this misunderstanding motivated the government actions, the suppression of the Ghost Dance cannot be explained simply as a shrewd and instrumental maneuver by the government to destroy Lakota culture. Instead, the invasion of the Lakota lands and subsequent massacre are more completely understood as a reflection of the government's ethnocentric inability to correctly perceive the Ghost Dance as a religious movement.[66]

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64. R. UTLEY, *supra* note 33, at 31.

65. *Id.* at 33.

66. As will be explained *infra*, ethnocentrism (and not any shrewd or devious designs) prevents today's courts from appreciating the religious inspirations behind sacred site claims.

That the Ghost Dance was religious, and not militaristic, in orientation is undisputable. The religion's central tenets—You must not fight. Do no harm to anyone. Do right always.—preached non-violence and pacifism. The Lakota embraced this gospel. As one of the dancers pleaded when the Army invaded their land, "What have we done? We have done nothing. Our dance is a religious one . . . ."[67] In fact, the religious and inward-looking orientation of the Ghost Dance did not escape all white observers. When asked to assess the movement, a former Indian agent counseled,

> I should let the dance continue. The coming of the troops has frightened the Indians. If the Seventh-Day Adventists prepare their ascension robes for the second coming of the Savior, the United States Army is not put in motion to prevent them. Why should not the Indians have the same privilege?[68]

This individual, and others like him, understood that the Ghost Dance was a religious ceremony and not a militaristic uprising. Inspired by a sensationalist press and other societal influences, however, the Army failed to appreciate the difference despite the obvious Christian overtones of the messianic religion. In retrospect, the mistake was obvious but explicable, given the ethnocentrism that taints our perceptions of Native American religious practices.

That the Wounded Knee tragedy is arguably explainable does not justify it. If the Indian agents, the press, the Army and government officials had recognized the religious impulses and non-violent intentions of the Lakota, hundreds of lives could have been spared and a historical legacy of shame and bitterness could have been avoided.

Despite the costs of our forebearers' inability to understand the Ghost Dance movement, our ignorance of Native American religions continues today. This misunderstanding is manifest in judicial decisions that deny Indian religious claims. The courts explain that this denial results because the Indians are not presenting constitutionally cognizable religious claims. In other words, the Indian claims are either not truly religious or do not constitute the kind of religion that our society chooses to indulge. Thus, the courts deny Indian religious freedom because judges either simply do not comprehend Indian religious beliefs or else subconsciously feel that the sacrifice necessary to protect these beliefs is prohibitive. If judges were less constricted by their Western heritage, American Indian religions might be protected in compliance with the first amend-

67. R. SMITH, *supra* note 33, at 131.
68. Report of the U.S. Comm'r of Indian Affairs 333 (1891).

ment's dictate that the government "shall make no law . . . prohibiting the free exercise [of religion.]"[69]

III. A GRAND TRADITION?: NATIVE AMERICAN RELIGIOUS FREEDOM UNDER THE FIRST AMENDMENT

The continuing inability of our society to comprehend and appreciate the religions of Native Americans is reflected in first amendment case law, both in the results of the cases, which frequently deny Indian religious rights, and in the flavor of the opinions, which rarely transcend Judeo-Christian notions of religion to grasp the spirituality of American Indian religions. Of all the courts, the United States Supreme Court is unsurpassed in manifesting this disability.[70] Indeed, despite the dramatic increase in cases in which Indians assert their freedom of religion, the Supreme Court has made a conscious and concerted effort to avoid addressing the grievances of the Indians. To avoid reaching these issues, the Court has either denied certiorari[71] or entertained discussion of an aberrational Indian religious claim but has not issued an opinion on one of the more litigated issues of sacred sites or peyote use.[72]

Although Indians have regularly asserted free exercise rights in the federal and state courts, *Lyng v. Northwest Indian Cemetery Protective Association*,[73] decided during the 1988 term, was

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69. U.S. CONST. amend. I.

70. The High Court again confirmed this disability in *Smith*.

71. *See, e.g.*, Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983) (Hopi and Navajo suit claiming that a proposed ski resort would destroy a sacred site), *cert. denied*, 464 U.S. 956 (1984); Fools Crow v. Gullet, 706 F.2d 856 (8th Cir. 1982) (Sioux suit attempting to limit public access to the proposed Bear Butte State Park), *cert. denied*, 464 U.S. 977 (1983); Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980) (Navajo suit claiming that Glen Canyon project would destroy a religious site), *cert. denied*, 452 U.S. 954 (1981); Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159 (6th Cir.) (Cherokee suit claiming that Tellico Dam project would destroy a religious site), *cert. denied*, 449 U.S. 953 (1980); Oliver v. Udall, 306 F.2d 819 (D.C. Cir. 1962) (action by Navajo Indians to declare Code of Indian Tribal Offenses banning peyote null and void failed to show the existence of a case and controversy as only an abstract question was presented), *cert. denied*, 372 U.S. 908 (1963); State v. Whittingham, 19 Ariz. App. 27, 504 P.2d 950 (1973) (protection of peyote use by Native American Church members), *cert. denied*, 417 U.S. 946 (1974); State v. Soto, 21 Or. App. 794, 537 P. 2d 142 (1975) (religious users of peyote are not exempt from criminal prosecutions), *cert. denied*, 424 U.S. 955 (1976).

72. *See* Bowen v. Roy, 476 U.S. 693 (1986) (upheld the constitutionality of requiring Indian children to obtain Social Security registrations despite their religious objections but did not have occasion to rule on sacred sites or peyote use); Native Am. Church of Navajoland, Inc. v. Arizona Corp. Comm'n, 405 U.S. 901 (1972) (in the context of issuing an order on procedural grounds, the Court discussed peyote use and the Native American Church but did not reach any conclusions regarding the constitutionality of peyote use).

73. 485 U.S. 439 (1988).

the first case in which the High Court delineated Indians' free exercise rights with regard to either the peyote use or sacred site issues. Before examining that opinion, this article will outline the reigning (pre-*Smith*) free exercise jurisprudence and the lower courts' and the Supreme Court's application of this free exercise doctrine to both peyote use and sacred site cases. These cases illustrate that the attitudes and misconceptions that led to Wounded Knee are still operative in denying religious freedom to Indians today. Moreover, comparing the peyote decisions with the sacred site decisions will reveal that the "costs" of protecting Native Americans' free exercise rights become an operative dynamic in the judicial resolution of these cases.

A. An Overview of Traditional Free Exercise Jurisprudence

The purpose of this review[74] is to outline the handful of first amendment decisions that figure most prominently in the sacred site and peyote use cases. The Supreme Court first seriously interpreted the free exercise clause in *Reynolds v. United States*.[75] The defendant Reynolds claimed that polygamy was an exercise of his religion and, thus, protected from congressional regulation by the first amendment. The Court rejected this claim on the grounds that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[76] Consequently, Reynolds was free to believe whatever he wanted, but if acting on his beliefs resulted in behavior that was inimical to "social duties" and "good order," then his behavior could be regulated. The Court found polygamy to be an "odious" custom and, thus, subject to legislative control.[77]

The distinction between freedom to believe and freedom to act dominated free exercise jurisprudence for many years. Cases like *Cantwell v. Connecticut*[78] maintained this distinction, explaining that the first amendment "embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. [Thus,] [c]onduct remains subject

74. This overview is not intended to be exhaustive. For such a review, see, *e.g.*, Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409 (1986).

75. 98 U.S. 145 (1878)(criminal prosecution of a Mormon for violating anti-polygamy laws).

76. *Id.* at 164.

77. *Id.* at 164-65.

78. 310 U.S. 296 (1940)(conviction of Jehovah's Witnesses for soliciting funds without a license struck down because they were distributing religious materials).

to regulation for the protection of society."[79]

In *Sherbert v. Verner*,[80] however, the Court held for the first time that the free exercise clause protects religiously motivated conduct. In this decision, Justice Brennan developed a two-part test to evaluate the extent of first amendment protection for religiously motivated conduct. The first step is to determine whether the government action imposes any burden on the free exercise of the claimant's religion.[81] If such a burden is found, then the court must consider whether some compelling state interest justifies the infringement on claimant's free exercise right. With regard to this calculus, the Court emphasized that "in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.' "[82] Even if paramount interests are found, the Court placed the burden on the state "to demonstrate that no alternative forms of regulation" would serve such interests "without infringing first amendment rights."[83]

The Court employed the *Sherbert* balancing test in *Wisconsin v. Yoder*,[84] a case in which the Amish claimed that high school attendance was contrary to their religion and the Amish way of life. Under the first step of the *Sherbert* test—determining whether the state action burdened the free exercise of the Amish religious beliefs—the Court found such a burden, concluding in the process that the Amish religious faith and their mode of life are inseparable and interdependent.[85] This finding triggered the second part of the *Sherbert* analysis—evaluating the compelling state interests that justify this burden. Emphasizing the Amish communities' historic success at self-education, the Court did not find the state's interest in one or two more years of schooling adequately compelling, and held that the Amish could not be fined for violating the mandatory school-attendance law. The *Sherbert* test, as illustrated by its application in *Yoder*, is the jurisprudential paradigm for adjudicating both peyote use and sacred site cases.[86]

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79. *Id.* at 303-04.

80. 374 U.S. 398 (1963) (a Seventh Day Adventist who refused to work on Saturday for religious reasons could not be denied state unemployment benefits).

81. *Id.* at 403.

82. *Id.* at 406 (citing Thomas v. Collins, 323 U.S. 516, 530, *reh'g denied*, 323 U.S. 819 (1945)).

83. *Id.* at 407 (citations omitted).

84. 406 U.S. 205 (1972)(Amish parents convicted by lower court of violating the State's compulsory school-attendance law by refusing to send their children to school after they had graduated from the eighth grade).

85. *Id.* at 215-16.

86. If *Smith* fulfills its revolutionary potential, however, the *Sherbert* test will become

B. *Peyote and the Emerging Traditions of the Native American Church*

Native Americans first raised free exercise claims in the context of the ceremonial use of peyote in the Native American Church. Peyote (*Lophophora williamsii*) is a spineless cactus that grows in the Rio Grande Valley of the United States and southward into northern Mexico. The Spanish conquerors noted the pre-Columbian ritual use of peyote by the Aztecs; however, peyotism did not spread into the Great Plains and beyond until the late nineteenth and early twentieth centuries.[87] In 1918, the Native American Church was first incorporated in Oklahoma and included ritual peyote use as an integral aspect of its ceremonial worship. The Native American Church is now a recognized religious body throughout the United States, and "[t]he Peyote Religion or Peyote Way, as it is called by members, is the most widespread contemporary religion among the Indians . . . ."[88]

The Native American Church service is an all-night ceremony, usually lasting from sunset to sunrise, and is typically held in a Plains-style tipi. The ritual itself is comprised of four elements: prayer, singing, eating the sacramental peyote, and contemplation. The Church's adherents consider peyote a teacher and an integral part of their religion. In their minds, peyote provides a heightened sense of self-understanding and awareness. Because it inspires revealing visions, peyote creates a link between humans and the supernatural.[89] Native American Church members consider peyote an integral part of their religion.

Although peyote use within the Native American Church does not fit the model of American Indian religions outlined in Part I, the judicial resolution of ritual peyote use is relevant to the courts' handling of sacred site claims. Most courts (with the Supreme Court's decision in *Smith* being the major exception) are willing to indulge peyote use under the first amendment but are unwilling to recognize the free exercise rights of Native Americans to preserve sacred land from development. This disparity may be explained by the relative costs that recognizing each free exercise right entails:

(largely) obsolete.

87. W. La Barre, The Peyote Cult 109 (1938).

88. Slotkin, *The Peyote Way*, in Teachings From the American Earth 96 (1975). The Native American Church is not to be confused with the Peyote Way Church of God, Inc., a non-Indian peyote-based religious group, whose equal protection challenge to exempted use of peyote by members of the Native American Church recently failed. Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991).

89. Slotkin, *supra* note 88, at 101-02.

protecting peyote use within the Native American Church under the free exercise clause is relatively cost-free to society at large; whereas perpetually preserving land from development deprives society of exploiting one of its prime resources—real estate. Because these differing consequences influence the judicial resolution of peyote use and sacred site claims, it is necessary to canvass the peyote cases before examining the sacred site claims that are inspired by the American Indian religious beliefs previously outlined.

C. The Peyote Issue and the First Amendment Tradition

The first court to entertain an Indian claim for free exercise protection was the Montana Supreme Court in 1926.[90] Thirty-six years after Wounded Knee, the Plains Indians were graciously elevated from the prairie to the courtroom as a forum for dispute resolution. A different forum did not, however, produce a totally different result. In *State v. Big Sheep*, the Crow Indian defendant claimed that his possession of peyote was protected on first amendment grounds and, thus, could not be criminalized. The court considered this assertion with incredulity, commenting that the free exercise defense "is not insisted upon with much seriousness in this court."[91] The court reasoned that the criminalization of peyote possession was consistent with maintaining the "peace, good order and morals of society."[92] The court disclosed its jurisprudential Christian bias by citing the Bible's preclusion of peyote use[93] and by failing to recognize the uniquely religious nature of the Indian peyote experience.[94] In retrospect, although Big Sheep received more due process than the Lakota at Wounded Knee, the Indians were still dancing to a drum beat so beyond Western experience that the court refused even to acknowledge as bona fide the religious claim.

1. Woody—The Breakthrough Case

By the 1960s, at least one court began to grasp the distinctive nature of Native American religious beliefs. In *People v. Woody*,[95]

90. State v. Big Sheep, 75 Mont. 219, 243 P. 1067 (1926).

91. *Id.* at 238, 243 P. at 1072.

92. *Id.* at 240, 243 P. at 1073.

93. "We do not find peyote or any like herb mentioned by Isaiah, or by Saint Paul in his epistle to the Romans, nor does it seem from the language employed that Saint John the Divine had any such in mind." *Id.* at 239, 243 P. at 1073.

94. "[I]f carried to the length defendant insists upon, the use of opium, cocaine and even 'moonshine' might be justified under the guise of religious observance." *Id.*

95. 61 Cal. 2d. 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

police entered a Navajo hogan in the California desert and arrested the defendants for possession of peyote. The Navajo claimed that because their possession of peyote was incident to their religious worship in the Native American Church, criminalizing their possession of peyote was tantamount to denying the free exercise of their religion. The state did not deny that at the time of their arrest the Navajos were performing a religious ceremony, but argued that their possession of peyote was nonetheless a crime. Utilizing the *Sherbert* test,[96] the California Supreme Court balanced the compelling state interest in criminalizing peyote use against the infringement imposed on American Indian religious beliefs. In marked contrast to the Montana court's summary treatment of the relevance of peyote to Indian religious beliefs, Justice Tobriner detailed the effects of peyote,[97] the history of the Native American Church, and the ceremony in which peyote is ingested. Justice Tobriner identified peyote as the Native American Church's sacramental equivalent to bread and wine.[98] After canvassing these details,[99] the court held that the state did not offer sufficiently compelling interests to justify the infringement on Indian religion that a peyote ban would impose; the court was not persuaded by the state's chronicle of negative consequences (*i.e.*, drug addiction, harmful side effects, and fraudulent assertion of religious immunity to mask illicit drug use).[100] In concluding that "the use of peyote incorporates the essence of [Native American] religious expression" and thus warrants first amendment protection, the court emphasized that by protecting an ancient Indian tradition, freedom of religious expression was maintaining the "depth and

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96. *See supra* notes 79-82 and accompanying text.

97. Justice Tobriner's characterization of these effects links it to an era ostensibly far removed from the drug-paranoid society of today.

> In most subjects [peyote] causes extraordinary vision marked by bright and kaleidoscopic colors, geometric patterns, or scenes involving humans or animals. . . . Beyond its hallucinatory effect, peyote renders for most users a heightened sense of comprehension; it fosters a feeling of friendliness toward other persons.

Woody, 61 Cal. 2d at 720, 394 P.2d at 816-17, 40 Cal. Rptr. at 72-73.

98. *Id.* at 720-21, 394 P.2d at 817, 40 Cal. Rptr. at 73.

99. For a criticism of the court's canvassing approach, see Note, *Constitutional Law: Dubious Intrusions — Peyote, Drug Laws and Religious Freedom*, 8 AM. INDIAN L. REV. 79 (1980). The note counseled that "whether intended or not, the description of peyotism, with its references to a long history, many members, and Christian parallels, reads like a litany of what the court considers to be religious characteristics." *Id.* at 88. The student note also foresaw the reliance on *Woody* to develop the centrality doctrine, "*Woody* should not, however, be regarded as authority that only central, essential religious practices can hope to avoid state regulation." *Id.* at 89. *See infra* note 135 and accompanying text.

100. *Woody*, 61 Cal. 2d at 722-24, 394 P.2d at 817-19, 40 Cal. Rptr. at 73-75.

beauty" of our diverse society.[101] Certainly, this court understood the religious beliefs of Native American Church members and the prescripts of the free exercise clause far better than the Montana court fifty years earlier.

After *Woody*, state courts considering the issue tended to recognize the first amendment right of Native Americans to use peyote in their religious practices.[102] However, an Oregon court denied the right of Native American Church members to use peyote. In *State v. Soto*,[103] the Oregon Court of Appeals upheld the defendant's conviction for peyote possession, even though the defendant possessed peyote for use in Native American Church worship.[104]

Unlike the religious use cases, the companion cases of *Smith v. Employment Division, Department of Human Resources*[105] and *Black v. Employment Division, Department of Human Resources*[106] explored whether the state could deny unemployment compensation benefits to drug rehabilitation counselors who were discharged after using peyote in a Native American Church service.[107] Limiting the holding in *Soto*[108] to criminal sanctions, the Oregon Supreme Court reasoned that under *Sherbert*, the state's interest in denying the unemployment claims was purely financial and that this was not sufficiently compelling to justify burdening the Native Americans' free exercise rights.[109]

The state appealed these decisions to the United States Supreme Court, where the cases were joined.[110] Writing for the majority, Justice Stevens was uncomfortable with the Oregon court's

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101. *Id.* at 727-28, 394 P.2d at 821, 40 Cal. Rptr. at 77.

102. State v. Whittingham, 19 Ariz. App. 27, 504 P.2d 950 (1973), *cert. denied*, 417 U.S. 946 (1974); Whitehorn v. State, 561 P.2d 539 (Okla. Crim. App. 1977). *Whittingham* and *Whitehorn* involved the criminal charges of peyote possession against Native American Church members. *But see* State v. Soto, 21 Or. App. 794, 537 P.2d 142 (1975), *cert. denied*, 424 U.S. 955 (1976).

103. 21 Or. App. 794, 537 P.2d 142 (1975).

104. The court reasoned that under the *Sherbert* test, the state's interest in preserving the health and safety of the people justified condemning Native American religious practices. *Id.* at 798, 537 P.2d at 143-44. In his vigorous dissent, Judge Fort maintained that under the majority's calibration of the *Sherbert* test, once the legislature exercises its police power to determine that possession of a substance is "inimical to the public weal, such decision precludes any consideration of the religious freedom" guaranteed by the first amendment. *Id.* at 805, 537 P.2d at 147 (Fort, J., dissenting).

105. 301 Or. 209, 721 P.2d 445 (1986).

106. 301 Or. 221, 721 P.2d 451 (1986).

107. *Smith* and *Black* have made long and torturous journeys through the Oregon state courts and the United States Supreme Court.

108. *See supra* notes 103-04 and accompanying text.

109. *Smith*, 301 Or. at 219-20, 721 P.2d at 450.

110. Employment Div., Dep't of Human Resources v. Smith, 485 U.S. 660 (1988).

position that although peyote possession was held to be illegal in *Soto*, this conclusion did not affect the court's analysis in protecting unemployment compensation in *Smith*. Justice Stevens perceived an incongruity between these holdings, writing that "if Oregon does prohibit the religious use of peyote, and if that prohibition is consistent with the Federal Constitution, . . . the state is free to withhold unemployment compensation from respondents for engaging in work-related misconduct, despite its religious motivation."[111] Justice Stevens then suggested that regardless of the Oregon court's decision on remand, it may ultimately be necessary for the Supreme Court to decide "whether the ingestion of peyote for sincerely held religious reasons is a form of conduct that is protected by the Federal Constitution from the reach of a State's criminal laws."[112] The High Court did just that last term. After the Oregon Supreme Court concluded that the first amendment protected peyote use and possession by Native American Church members,[113] the Supreme Court granted certiorari to review the Oregon decision.[114]

2. *Smith—A Revived Tradition*

Reversing the trend originated by *Woody*, by a six-to-three vote[115] the Court refused to recognize the free exercise rights of Native Americans to use peyote as part of the Native American Church's religious worship.[116] While Justice O'Connor retained the *Sherbert* balancing test in her concurring opinion,[117] Justice

111. *Id.* at 672.

112. *Id.* The religious use of peyote in Indian country ordinarily would exempt Native American Church members from criminal prosecution under state law. The extent to which the state assumed criminal jurisdiction on Indian reservations under Public Law 280 would determine the exact effect of this decision upon Indian peyote use. Because Oregon is among the states originally mandated by Public Law 280 to assume criminal jurisdiction over all Indian country within the state (except the Warm Springs Reservation), religious users of peyote within Oregon are forced to seek protection under either the federal or state constitutions. 18 U.S.C. § 1162(a) (1988).

113. Smith v. Employment Div., Dep't of Human Resources, 307 Or. 68, 763 P.2d 146 (1988).

114. Employment Div., Dep't of Human Resources v. Smith, 489 U.S. 1077 (1989).

115. Justice Scalia's opinion of the court was joined by Chief Justice Rehnquist and Justices White, Stevens, and Kennedy. Justice O'Connor wrote a concurring opinion, while Justices Brennan, Marshall, and Blackmun joined parts of her concurrence, but dissented from its result.

116. Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, *reh'g denied*, 110 S. Ct. 2605 (1990).

117. In her opinion, Justice O'Connor reasoned that the state interests in preventing the use of harmful drugs and in waging the War on Drugs justified the Oregon ban on peyote use in Native American Church ceremonies. *Smith*, 110 S. Ct. at 1614 (O'Connor, J., concurring). While Justice O'Connor should be praised for her criticism of Justice Scalia's

Scalia's majority opinion adopted a version of the *Washington v. Davis*[118] test used for identifying unconstitutional race discrimination.[119] According to Justice Scalia, unless an act is specifically directed at a religious practice, it is not unconstitutional. Consequently, a law that only incidentally burdens a religion passes constitutional muster. If this approach becomes the standard by which free exercise rights are adjudicated, the Court has departed significantly from *Sherbert* analysis.

The practical impact of this decision on Native American Church members' use of peyote may be minimal. Currently, even though peyote is listed as a Schedule I controlled substance,[120] federal law exempts members of the Native American Church from criminal prosecution for using peyote during "bona fide religious ceremonies."[121]

Although most states list peyote as a Schedule I controlled substance,[122] few have enacted legislation specifically proscribing

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reworking of free exercise doctrine, *id.* at 1607, her *Sherbert* analysis is reminiscent of the Court's treatment of Japanese-Americans in *Korematsu v. United States*, 323 U.S. 214 (1944), because, in each instance, a war justified the infringement of the victim's liberty. Moreover, as Justice Blackmun's dissent pointed out, the harmful effects of peyote have not been substantiated, so the compelling nature of this state interest is suspect. *Smith*, 110 S. Ct. at 1618 (Blackmun, J., dissenting).

118. 426 U.S. 229 (1976)(an intelligence test given by the District of Columbia for prospective police officers did not violate equal protection based upon disproportionate impact on blacks).

119. *Smith*, 110 S. Ct. 1604 n.3. Justice Scalia's use of a footnote to plant the seed for significant doctrinal departures is not unprecedented. *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 n.3 (1987)(Justice Scalia arguing that the standard for review of land regulation is greater than rational basis).

120. 21 U.S.C. § 812 (c)(c)(12) (1988).

121. Special Exempt Persons: Native American Church, 21 C.F.R. § 1307.31 (1990) (promulgated under the authority of 21 U.S.C. §§ 821, 822(d), 871(b)).

122. ALA. CODE § 20-2-23(3)(l) (1990); ALASKA STAT. § 11.71.150(16) (1989) (Alaska lists peyote as Schedule IIA, a classification including mescaline and other drugs generally categorized as Schedule I); ARIZ. REV. STAT. ANN. § 36-2512(3)(q) (1990); ARK. STAT. ANN. § 5-64-203 (1987) (establishes criteria for Schedule I, but authorizes specific categorization by administrative regulation); CAL. HEALTH & SAFETY CODE § 11054(d)(15) (West 1991); COLO. REV. STAT. § 12-22-309(2)(a)(XIV) (1990); CONN. GEN. STAT. § 21a-243(b) (1989) (adopts federal regulations and authorizes categorization by administrative regulation); DEL. CODE ANN. tit. 16, § 4714(d)(11) (1983); D.C. CODE ANN. § 33-514(3)(o) (1988); FLA. STAT. ANN. § 893.03(1)(c)(27) (West 1991); GA. CODE ANN. § 16-13-25(3)(k) (1988); HAW. REV. STAT. § 329-14(d)(16) (Supp. 1984); IDAHO CODE § 37-2705(d)(17) (Supp. 1990); ILL. ANN. STAT. ch. 56½, para. 1204(d)(12) (Smith-Hurd 1990); IND. CODE ANN. § 35-48-2-4(d)(17) (Burns 1990); IOWA CODE ANN. § 204.204(4)(p) (West 1987); KAN. STAT. ANN. § 65-4105(d)(17) (Supp. 1990); KY. REV. STAT. ANN. § 218A.050(3) (Baldwin 1982); LA. REV. STAT. ANN. § 40.964(c)(11) (West 1991); ME. REV. STAT. ANN. tit. 17-A, § 1102(2)(C)(3) (1983) (peyote is classified as "X" in Maine's "WXYZ" scheduling scheme); MD. ANN. CODE art. 27, § 279(a)(3)(c)(9) (1988); MASS. ANN. LAWS ch. 94C, § 3 (Law. Co-op. 1990) (incorporates federal definition from 1970 Drug Control Act); MICH. STAT. ANN. § 14.15(7212)(1)(c) (Callaghan 1988); MINN. STAT. ANN. § 152.02 subd. 2(4) (West 1989); MISS. CODE ANN. § 41-29-113(c)(14) (Supp. 1990); MO. ANN.

peyote use.[123] Eleven states have adopted statutes similar to the federal exemption for sacramental peyote use.[124] Another eleven states incorporate the federal exemption into their state codes by reference.[125]

STAT. § 195.017(2)(4)(q) (Vernon 1991); MONT. CODE ANN. § 50-32-222(3)(l) (1989); NEB. REV. STAT. § 28-405(c)(12) (1989); NEV. REV. STAT. § 453.166 (1987) (authorizes board of pharmacy to schedule and defines Schedule I substance as one that has "high potential for abuse" and "no accepted medical use"); N.H. REV. STAT. ANN. § 318-B:1-b (1990) (authorizes board of pharmacy to schedule and defines Schedule I substance as one that has "high potential for abuse" and "no accepted medical use"); N.J. STAT. ANN. § 24:21-5(e)(12) (West 1990); N.M. STAT. ANN. § 30-31-6(C)(12) (Supp. 1990) ("peyote, except as otherwise provided in the Controlled Substances Act"); N.Y. PUBLIC HEALTH LAW § 3306(d)(16) (McKinney 1991); N.C. GEN. STAT. § 90-89(c)(11) (1990); N.D. CENT. CODE § 19-03.1-05(5)(r) (Supp. 1989); OHIO REV. CODE ANN. § 3719.41(c)(17) (Anderson 1988); OKLA. STAT. ANN. tit. 63, § 2-204 (West 1984) (statute does not list peyote as Schedule I substance, but decision notes reference federal exemption and *Whitehorn v. State*, 561 P.2d 539 (Okla. Crim. App. 1977)); OR. REV. STAT. § 475.035 (1987 & Supp. 1990); PA. STAT. ANN. tit. 35, § 780-104(1)(iii)(11) (Purdon 1977); R.I. GEN. LAWS § 21-28-2.08(d)(12) (1989); S.C. CODE ANN. § 44-53-190(d)(12) (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 34-20B-14(17) (1986) (sacramental use in Native American Church excepted (Supp. 1990)); TENN. CODE ANN. § 39-17-406(d)(15) (Supp. 1990); TEX. HEALTH & SAFETY CODE ANN. § 481.032(a)(3) (Vernon 1991); UTAH CODE ANN. § 58-37-4(2)(a)(iii)(Q) (Supp. 1990); VT. STAT. ANN. tit. 18, § 4201(10) (1982) (lists peyote as hallucinogenic subject to regulation by board of health); VA. CODE ANN. § 54.1-3446(3) (1988); WASH. REV. CODE ANN. § 69.50.204(d)(16) (Supp. 1991); W. VA. CODE § 60A-2-204(d)(15) (1989); WIS. STAT. ANN. § 161.14(4)(m) (West 1989); WYO. STAT. § 35-7-1014(d)(xvi) (1988).

123. CAL. HEALTH & SAFETY CODE § 11363 (West 1991) ("Every person who plants, cultivates, harvests, dries, or processes . . . peyote, . . . shall be punished by imprisonment in the county jail . . . or the state prison.").

124. Four states have statutes more liberal than the federal regulation. ARIZ. REV. STAT. ANN. § 13-3402(B) (1989) (provides defense if peyote used in "bona fide practice of a religious belief"); COLO. REV. STAT. § 12-22-317(3) (1990) (exempts peyote use in "religious ceremonies of any bona fide religious organization"); NEV. REV. STAT. § 453.541 (1987) (criminal sanctions inapplicable to peyote when used in "religious rites of any bona fide religious organization"); N.M. STAT. ANN. § 30-31-6(D) (Supp. 1989) ("enumeration of peyote as a controlled substance does not apply to the use of peyote in bona fide religious ceremonies by a bona fide religious organization").

Seven other states exempt ceremonial peyote use only for members of the Native American Church. IOWA CODE ANN. § 204.204(8) (West 1987); KAN. STAT. ANN. § 65-4116(c)(8) (Supp. 1990); MINN. STAT. ANN. § 152.02, subd. 2(4) (West 1989) (refers to "American Indian Church"); S.D. CODIFIED LAWS ANN. § 34-20B-14(17) (Supp. 1990); TEX. REV. CIV. STAT. ANN. art. 4476-15, § 4.11 (Vernon 1976 & Supp. 1991); WIS. STAT. ANN. § 161.115 (West 1988); WYO. STAT. § 35-7-1044 (1988).

125. ALASKA STAT. § 11.71.195 (1989) ("A substance the manufacture, distribution, dispensing, or possession of which is explicitly exempt from criminal penalty under federal law is exempt from the application of [state law.]"); MONT. CODE ANN. § 50-32-203 (1989) ("If any drug is . . . rescheduled . . . under federal law and notice thereof is given to the board [of pharmacy], the board shall similarly control the drug . . . unless altered thereafter by the board or by statute."); N.J. STAT. ANN. § 24.21-3(c) (West Supp. 1990) ("If any substance is . . . rescheduled . . . and notice thereof is given to the commissioner [of health], the commissioner shall similarly control the substance . . . unless the substance is specifically otherwise dealt with by an act of the Legislature."); N.C. GEN. STAT. § 90-88(d) (1990) (the Commission "shall similarly control" rescheduled drugs "unless the Commission objects"); N.D. CENT. CODE § 19-03.1-02(4) (Supp. 1989) (substantially similar wording); R.I GEN. LAWS §

Perhaps the protection that state and federal statutes currently afford ritual peyote use made *Smith* the ideal case for Justice Scalia's introduction of a new free exercise doctrine: because peyote use within the Native American Church is largely protected, the *Smith* doctrine has little practical impact on most Native Americans. This circumstance helps conceal the stifling effect that the new doctrine portends for the adherents of other minority religions whose practices might offend the Judeo-Christian mainstream. The fact that *Smith* involved drug use also made this an attractive case for Justice Scalia's reworking of free exercise doctrine. Most troubling, however, is the thought that because Indians were the immediate victims of the new doctrine, this was a perfect opportunity to revise the law. To illustrate this point, one need only consider whether the Supreme Court would have pronounced its new free exercise standard if a zealous district attorney had prosecuted a Catholic priest for ministering communal wine to a minor in violation of liquor laws.

D. Traditional Sacred Lands and the First Amendment

1. The Disparity Between Peyote Use and Sacred Site Decisions

The judiciary's inability to comprehend the religious beliefs of Native Americans also permeates sacred site decisions. In these cases, the Indian plaintiffs are asserting that public land proposed for development is sacred to them. Thus, if the land is developed and the area stripped of its sanctity, Indians can no longer enjoy their free exercise rights. Compared to the peyote cases, the stakes are much greater for the government when Indians assert sacred site claims. Rather than indulging occasional peyote use among a discrete minority, the government is threatened with religious rights that, if protected, would ensure the perpetual restriction of public land development. The severity of this sacrifice may explain why Indians repeatedly lose sacred site litigation. In fact, the United States Supreme Court recently overturned the only decision that protected Indian religious freedom at the expense of land development.[126] Apparently, an operative dynamic influencing the judicial determination of American Indian religious freedom is the

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21-28-2.01(c) (1989) (substantially similar wording); TENN. CODE ANN. § 39-17-403(d) (Supp. 1990) (substantially similar wording); UTAH CODE ANN. § 58-37-3(3) (1990) ("Whenever any substance is . . . rescheduled . . . , that subsequent . . . rescheduling . . . shall govern."); VA. CODE ANN. § 54.1-3443(D) (1988) (wording substantially similar to codes cited above except Utah's); WASH. REV. CODE ANN. § 69.50.201(d) (West 1991) (substantially similar wording); W. VA. CODE § 60A-2-201(d) (1989) (substantially similar wording).

126. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

cost to the government of recognizing the religious right.[127] Perhaps this one-dimensional cost analysis *is* the correct application of the *Sherbert* test that was the relevant standard when the federal judiciary considered Indians' sacred site claims during the 1980s. In those cases, courts did a one-dimensional cost benefit analysis, focusing solely on the cost and ignoring the benefit.[128] However, a balancing test that allows one factor of the equation—the cost to the government of tolerating religious diversity—to dictate the outcome is hardly balanced.[129]

By arguing that the costs of vindicating Native American sacred site claims influence the judicial resolution of these issues, this article does not abandon its primary thesis that ethnocentrism prevents much of the judiciary from appreciating (and thus protecting) American Indian religious practice. The judiciary's cognitive inability to transcend Western notions of religion dominates sacred site jurisprudence and dictates the outcome of the sacred site cases. This dominance results because the anti-development

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127. Others have perceived this dynamic. *See, e.g.*, Sewell, *The American Indian Religious Freedom Act*, 25 ARIZ. L. REV. 429 (1983).

> Indian belief in the sacred character of physical places is precisely the problem for the first amendment analysis of Indian sacred sites. . . . [I]n a modern industrial culture, where property is considered the basic resource to be exploited for the creation of value, the sacralization of a physical place is necessarily threatening.

Id. at 465.

128. This calculation betrays the opinion of the Court in *Thomas v. Collins*, 323 U.S. 516, (labor organizing meetings are lawful exercises of first amendment right of assembly), *reh'g denied*, 323 U.S. 819 (1945) in which the Court stated with regard to religious liberties that "it is the character of the right, not of the limitation, which determines what standard governs the choice." *Id.* at 530.

129. The willingness of courts to permit Indians to practice their religion when the government inconvenience is minimal is evidenced by a series of cases in which courts protected Native Americans' right to wear their hair in long braids in penal institutions or to occasionally hunt out of season. *See, e.g.*, Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975) (regulation of state penitentiary prohibiting American Indian inmate from wearing long braided hair impermissibly infringed on the inmate's first amendment right to the free exercise of his religion); Gallahan v. Hollyfield, 516 F. Supp. 1004 (E.D. Va. 1981) (Because the inmate's religious beliefs were sincere and the state had no overriding objective in cutting the prisoner's hair, he has a first amendment right to exercise his religion by wearing his hair long.), *aff'd*, 670 F.2d 1345 (4th Cir. 1982); Frank v. State, 604 P.2d 1068 (Alaska 1979) (Because use of moose meat at a funeral service was a practice deeply rooted in defendant's religion, his right to the free exercise of his religion shielded him from prosecution for hunting out of season.). *But see, e.g.*, Hatch v. Georke, 502 F.2d 1189 (10th Cir. 1974) (school can regulate hair length of students, including Indians, but must provide due process in form of an informal hearing before expulsion for violating the regulation); New Rider v. Board of Educ., 480 F.2d 693 (10th Cir.) (permissible for school districts to inhibit American Indians religious freedom by regulating hair length), *cert. denied*, 414 U.S. 1097 (1973); State v. Berry, 76 Or. App. 1, 707 P.2d 638 (1985) (During prosecution for violating fishing laws, trial court did not commit plain error by refusing to include evidence regarding religious ceremonies of Indian defendant.).

consequence of protecting Indian religions is contrary to traditional Western emphasis upon development as a beneficial use of land. Individuals who are alarmed by the anti-development consequences of protecting sacred sites tend to be bound by the Western *Weltanschauung* that views land as an inanimate resource whose ultimate value rests in its exploitation and development, and not in its religious significance. By virtue of their stature in society, judges implicitly embody and radiate the (Western) values of our society and, hence, are particularly susceptible to the ethnocentric limitations of the Western ordering of the world. Given a choice between perceiving land from a development perspective or from a religious perspective, judges tend toward the anthropocentric and development perspectives that our society and its institutions inculcate in them on a daily basis. Consequently, judges often are unable to appreciate the American Indian *Weltanschauung* that inspires sacred site claims.

Sacred site litigation is new to the judiciary's docket.[130] Moreover, sacred site claims are distinct from traditional Indian religious freedom litigation (*i.e.*, peyote cases). The peyote cases involve state regulation of individual activity, which consequently infringes on the individual's free exercise of religion. Sacred site cases, on the other hand, concern the interference with a group's free exercise of religion, precipitated by land development. As a result of the difference in the cost of protecting Indian religious freedom—one individual's peyote use versus preservation of land from development—sacred site jurisprudence has grown distinct from the analytical framework employed in the peyote decisions.[131]

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130. The first fully resolved sacred site case was *Sequoyah v. Tennessee Valley Authority*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

131. The author of a Yale Law Journal note has argued that sacred site claims are not only structurally different from peyote claims but also from most standard free exercise claims.

> Those suits, which include efforts to obtain exemption from the military draft or compulsory education 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. 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.

Note, *Indian Religious Freedom and Governmental Development of Public Lands*, 94 YALE L.J. 1447, 1459 (1985). As a result of these structural differences,

> free exercise doctrine that has grown out of individual 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, or to the aspects of nontraditional beliefs that are similar to Euro-American practices. The reluctance of courts to provide protection against infringement

2. Sequoyah, Ethnocentrism, and Misconstruction

Sequoyah v. Tennessee Valley Authority[132] illustrates the disparity in jurisprudence between peyote decisions and sacred site decisions. In *Sequoyah*, the court concluded that a religious claim based on a sacred site does not present a cognizable first amendment right. Although the court did not expressly state that the timing of the Cherokee's request influenced its decision, the court mentioned that the injunction request was filed less than a month before impoundment was scheduled to begin.[133] After noting this chronology, the court reviewed the geography and history of the land that the Cherokee claimed was a sacred site and that would be destroyed by the dam.[134]

The Cherokee supplied ample evidence confirming the sacredness of the land in question. The lead plaintiff, Ammoneta Sequoyah, testified that,

> If the water covers Choata and the other sacred places of the Cherokee along the River, I will lose my knowledge of medicine. If the lands are flooded, the medicine that comes from Choata will be ended because the strength and spiritual power of the Cherokee will be destroyed. . . . If this land is flooded and these sacred places are destroyed, the knowledge and beliefs of my people who are in the ground will be destroyed.[135]

Emmaline Driver added, "If they are flooded, our spiritual strength from our forefathers will be taken away from us, along

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of Indian religions may thus stem from a general failure of free exercise methodology.

Id. at 1461-62.

132. 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980). In *Sequoyah*, Cherokee plaintiffs requested an injunction to prevent the completion of the Tellico Dam and subsequent flooding of the Little Tennessee River. The plaintiffs were three Cherokee Indians acting as individuals and two Cherokee tribal organizations. The lead plaintiff was Ammoneta Sequoyah, a practicing Cherokee medicine man. The Cherokee were denied injunctive relief. *Id.* at 1160.

133. *Id.* at 1162. Some commentators believe that the timing of the complaint doomed its success. *See, e.g.*, Pepper, *The Conundrum of the Free Exercise Clause—Some Reflections on Recent Cases*, 9 N. KY. L. REV. 265, 278-79, 289 (1982); Suagee, *American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers*, 10 AM. INDIAN L. REV. 1, 54 (1982); Note, *Native American Free Exercise Rights to the Use of Public Lands*, 63 B.U.L. REV. 141, 175-76 (1983). These comments confirm the cost-as-outcome-determinative hypothesis discussed at *supra* notes 127-28 and accompanying text.

134. *Sequoyah*, 620 F.2d at 1162-63. For a detailed discussion of Cherokee religious beliefs and of the importance of land in this religion, see, *e.g.*, D. YWAHOO, VOICES OF OUR ANCESTORS (1987) and C. HUDSON, ELEMENTS OF SOUTHEASTERN INDIAN RELIGION (1984).

135. *See* Plaintiffs' Memorandum at Exhibit D, Sequoyah v. Tennessee Valley Auth., 480 F. Supp. 608 (E.D. Tenn. 1979)(No. CIV 3-79-418)(affidavit of Ammoneta Sequoyah).

with the origin of our organized religion."[136] And another of the plaintiffs, Richard Crowe, explained,

> This land is sacred to me and my people, and it is hard for me to talk about how I feel about this land. I have been going to the lands at Tellico for many years, for at least more than thirty years. Before I went myself, I used to hear my people, my parents, speak of the land. My people referred to it in the Cherokee language. They said *di ga ta le no hr.* This means, "This is where WE began."[137]

An anthropologist attempted to place these sentiments in a Judeo-Christian context:

> In short, to attempt to understand or maintain Cherokee religion without access to known and significant sites in the "old country" would be like attempting to understand and practice Judaism or Christianity without the Book of Genesis. These sites represent the ultimate foundation of Cherokee belief and practice, now, and for the future.[138]

During its discussion of the land in question, the court recognized the relative prominence of nature and land in Cherokee religion, specifically in terms of preserving the burial grounds of honored ancestors and maintaining spiritual strength through kinship with nature.[139]

After establishing this factual context, the court considered whether the Cherokee had demonstrated a "constitutionally cognizable infringement of a first amendment right" under *Sherbert* analysis.[140] Citing *Yoder*,[141] *Woody*,[142] and *Frank v. State*,[143] the

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136. *Id.* (affidavit of Emmaline Driver (Oct. 10, 1979)).

137. *Id.* (affidavit of Richard Crowe (Oct. 7, 1979)).

138. *Id.* (affidavit of Prof. Albert L. Warhaftig (Oct. 8, 1979)).

139. *Sequoyah*, 620 F.2d at 1162-63.

140. *Id.* at 1163. According to the decision in *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972), the first step of the *Sherbert* test is evaluating the quality of the alleged religious claim.

141. "[T]he religious faith and the mode of life of the Amish are 'inseparable and interdependent,' and . . . 'the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living.'" *Sequoyah*, 620 F.2d at 1164 (quoting Wisconsin v. Yoder, 406 U.S. at 215-16).

142. "[P]rohibition of the use of peyote results in a virtual inhibition of the practice of defendants' religion. To forbid the use of peyote is to remove the theological heart of Peyotism." *Id.* at 1164 (citing People v. Woody, 61 Cal. 2d 716, 722, 394 P.2d 813, 817-18, 40 Cal. Rptr. 69, 73-74 (1964)).

143. 604 P.2d 1068 (Alaska 1979). The *Sequoyah* court cited *Frank* for the proposition that an Indian may violate a state prohibition against killing moose, because the "[m]oose is the centerpiece of the most important ritual in Athabascan life and is the equivalent of sacred symbols in other religions." *Sequoyah*, 620 F.2d at 1164.

court reasoned that for the Cherokee to have a cognizable claim, the alleged sacred site must be central or indispensable to Cherokee religious observances.[144]

This centrality doctrine has come under heavy criticism, both for being ethnocentric[145] and a misconstruction of the cases from which it draws its inspiration.[146] Indians do not divide the world into the religious and the profane. Rather, they live a spiritually informed existence. Within such an existence, separating the religious from the non-religious is impossible; similarly, separating the centrally religious from the merely tangentially religious is foreign to the structure of Indian thought. Hence, nothing is pervasively religious because all is religious. And although Native Americans do maintain some sort of hierarchial rankings within their religions (with some land being sacred), they would never dismiss or discount something for being merely tangentially religious. Applying the centrality doctrine to Indian religious beliefs is blatantly ethnocentric, and precludes a true understanding of Native American religions. Indeed, the very idea of a religious relationship between a people and the land is foreign to Western thought, leading "courts to attach central [religious] importance to practices that are familiar or easily analogized to familiar practices"[147] and to require religions to conform to Judeo-Christian notions of mass organization and obediency to external authority.[148]

Not only is the centrality test plagued by ethnocentric limitations, it is also based on a misconstruction of earlier case law. This misconstruction and ethnocentrism, which together fueled the centrality doctrine, are best illustrated by examining *Wisconsin v. Yoder*. The claim raised in *Yoder*—the right of Amish children not to submit to a compulsory school attendance law—is certainly no more centrally religious than the claims of the Cherokee.[149] In *Yoder*, the Court qualified the Amish claim as a religious right by demonstrating that for the Amish, religion and lifestyle are "inseparable and interdependent."[150] Do not Native Americans share a similar *Weltanschauung*?

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144. *Sequoyah*, 620 F.2d at 1164.

145. *See, e.g.*, Petoskey, *Indians and the First Amendment*, in AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 221 (V. Deloria ed. 1985); Pepper, *supra* note 133, at 283-85; Suagee, *supra* note 133, at 3-4; Note, *supra* note 131, at 1460-62.

146. *See, e.g.*, Stambor, *Manifest Destiny and American Indian Religious Freedom: Sequoyah, Badoni, and The Drowned Gods*, 10 AM. INDIAN L. REV. 59, 68-70 (1982); Pepper, *supra* note 133, at 282-83.

147. Note, *supra* note 131, at 1461.

148. Pepper, *supra* note 133, at 283.

149. Stambor, *supra* note 146, at 69.

150. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

In order to forge a distinction between the beliefs of the Amish and the beliefs of the Cherokee, the *Sequoyah* court seized upon two differences between their cultures. Not surprisingly, each distinction is rooted in Western prejudice.[151] First, the court concluded "that worship at the particular geographic location in question is [not] inseparable from the [Cherokee] way of life," as was the "faith and mode of life of the Amish."[152] In essence, then, the court delegitimizes the Cherokee claims by distancing the Cherokee identities from the land in question. Given that this distance, if extant at all, is the result of an historical assault on Indian culture, the court is adding insult to injury and rejoicing in a cynical version of winner's history.[153] Second, the court discounts the affidavits submitted by the Cherokee plaintiffs[154] because they "appear to demonstrate 'personal preference' rather than convictions 'shared by an organized group.' "[155] Here, the court's Judeo-Christian assumptions of what constitutes a valid religion prevent the court from understanding the religious nature of the Cherokee claims. If Western ideas of what should constitute a religion did not restrict the court, the judges might have realized that to be valid, a religion does not have to be characterized by organized mass worship. Rather, the court would have seen that religion can be simultaneously shared by a group while individualized in experience.

Misconstruction of precedent was not limited to the *Sequoyah* court's interpretation of *Yoder*. *Woody* and *Frank* were also misconstrued to develop the centrality doctrine. The *Sequoyah* court's reliance on *Woody* to derive the centrality test betrayed the

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151. Commenting on this phenomenon of "approved" versus "non-approved" minorities, one anthropologist explained,

> The experience of the Amish is one example of the way a subculture is tolerated by the larger culture within which it functions. As different as they are, the Amish actually practice many values that our nation respects in the abstract; thrift, hard work, independence, a close family life. The degree of tolerance accorded to them may also be due in part to the fact that the Amish are white Europeans, of the same race as the dominant culture. American Indian subcultures have been treated differently by whites. There was a racial difference; the whites came as conquerors, and Indian values were not as easily understood or sympathized with by the larger culture. The nation was less willing to tolerate the differences of the Indians, with results that are both a matter of history, as well as very much a current concern.

W. HAVILAND, CULTURAL ANTHROPOLOGY 31-32 (3d ed. 1981).

152. *Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159, 1164 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

153. For similar analyses, see Pepper, *supra* note 133, at 287-88, and Stambor, *supra* note 146, at 69.

154. *See supra* notes 135-38 and accompanying text.

155. *Sequoyah*, 620 F.2d at 1164 (citing *Yoder*, 406 U.S. at 216).

Woody court's effort to understand the religious beliefs of Native Americans. When this yearning to understand and protect Indians' free exercise rights is recognized as the operative force in *Woody*, it becomes clear that *Woody* does not contain a centrality requirement.

Similarly, *Frank*, while emphasizing that moose meat is the centerpiece of a sacred Athabascan ritual, did not require centrality to gain first amendment protection. Indeed, *Frank* expressly declared that

> absolute necessity is a standard stricter than that which the law imposes. It is sufficient that the practice be deeply rooted in religious belief to bring it within the ambit of the free exercise clause and place on the state its burden of justification. The determination of religious orthodoxy is not the business of a secular court.[156]

In light of such language, deriving the centrality doctrine from *Frank* is spurious at best. Needless to say, the court did not find the requisite centrality in *Sequoyah*, positing that even though the Cherokee will suffer irreversible loss of cultural history and tradition, the religious essence protected by the first amendment is not present.[157] This apologetic attempt to distinguish between Indian religion and Indian culture exposed the court's misunderstanding of Indian religious beliefs,[158] just as the assertion of Indians' freedom of religion in the courts has revealed the ethnocentric bondage of judges and first amendment jurisprudence.

In reaction to the newly created centrality doctrine, a dissent suggested that in fairness to the Cherokee, the Indians should have the opportunity to demonstrate the centrality of the now flooded land to their religion, rather than the majority's approach of developing a new doctrine and then deciding that the Indians did not satisfy the tests of this doctrine.[159] Perhaps, this dissent radiates a glimmer of insight into the religious beliefs of Indians. This glimmer shines brighter when it is viewed in contrast to the cultural blindness of the majority that forced the judges to perceive the essence of the Cherokee beliefs as merely tangential concerns[160]

156. *Frank v. State*, 604 P.2d 1068, 1072-73 (Alaska 1979) (citations omitted).

157. *Sequoyah*, 620 F.2d at 1165.

158. One commentator insightfully noted that "[s]uch a division [between culture and religion] contradicts the plaintiffs' testimony about how they understand their own religion." Pemberton, *I Saw That It Was Holy: The Black Hills and the Concept of Sacred Land*, 3 L. & INEQUALITY 287, 317 (1985).

159. *Sequoyah*, 620 F.2d at 1165 (Merritt, J., dissenting).

160. Others have understood that the Cherokee satisfied the centrality test, in spite of its ethnocentric underpinnings. *See* Pemberton, *supra* note 158, at 317; Stambor, *supra* note

and to impose the Western distinction between culture and religion on a group that historically has not recognized such a distinction.

3. *The Application of the Centrality Test to Subsequent Cases*

Sequoyah was the first of several decisions in the early 1980s abridging the free exercise rights of Indians. In *Badoni v. Higginson*,[161] Navajo religious leaders claimed that the government's impounding of water to form Lake Powell in Utah, and the subsequent use of the lake to ferry tourists to view the Rainbow Bridge National Monument, violated the Navajo's free exercise of religion because the lake covered land sacred to the Navajo and the flood of tourists desecrated the sacred nature of the sight and interfered with the Navajo ceremonies conducted at the monument.

To the Navajo, the Glen Canyon area is home to many gods. According to Navajo beliefs, these gods inhabit rock formations and the walls in the canyon, and it is the gods who are responsible for influencing many central aspects of Navajo life, including rainfall, health, and luck in dealing with the government. To entice the gods, the Navajo frequently left ceremonial offerings at various locations in the canyon, including the foot of Rainbow Bridge.[162]

The court accepted the validity—the centrality of the site to Navajo religion—of the Indians' claim.[163] Under the *Sherbert* calculus, however, the court decided that maintaining Lake Powell at an intrusive level was a compelling state interest, given the importance of this level in servicing the water needs of several Western states.[164] As for restricting tourism, the court concluded that such regulation would clearly violate the establishment clause, reasoning that the Navajo were unreasonably requesting the government to ensure privacy during the exercise of their first amendment rights.[165] Lying behind each of these conclusions was the

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146, at 68-72; Note, *supra* note 133, at 165-67.

161. 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

162. *See* K. LUCKERT, NAVAJO MOUNTAIN AND RAINBOW BRIDGE RELIGION (1977). See also G. REICHARD, NAVAJO RELIGION: A STUDY OF SYMBOLISM (1950) and S. GILL, SACRED WORDS: A STUDY OF NAVAJO RELIGION AND PRAYER (1981) for general discussions of Navajo religious beliefs.

163. "Rainbow Bridge and a nearby spring, prayer spot and cave have held positions of central importance in the religion of some Navajo people living in the area for at least 100 years." *Badoni*, 638 F.2d at 177.

164. *Id.* at 178.

165. The invocation of the establishment clause in *Badoni* appears to be yet another doctrinal disguise to mask the ethnocentric cost analysis that lies behind sacred site decisions. Other commentators have suggested such a dynamic, attacking *Badoni* for simplistically holding that facilitating the Navajo free exercise rights would violate the establishment

unstated premise that, unlike mainstream religions, Indians are requesting first amendment protection of a religious site that happens to be on public land, and this location justifies the infringement upon the Navajo's religious freedom. At least with regard to its *Sherbert* calculus, the court can be commended for not trying to hide its one-dimensional-focus-on-costs (*i.e.*, reduction of the water supply that the Indians' request would necessitate) free exercise jurisprudence.

Perhaps, the court brought this reasoning to the fore because it needed to explain candidly why it was denying the free exercise of what the court itself recognized as a constitutionally protected religion. By displaying such candor, the *Badoni* court appears less hypocritical than courts that deny sacred site claims on the grounds that Indians' free exercise rights are not being abridged. Yet, the *Badoni* court should not be applauded. Despite recognizing that the Navajo were expressing a constitutionally cognizable religion, the court failed to explore the implications behind the unstated premise that, since the Navajo were requesting first amendment protection of a religious site that was on public land, this public location justified the infringement of the Indians' first amendment rights. More pointedly, the court did not explore the history that created this circumstance. Thus, even when courts do evidence candor, neither justice nor the free exercise rights of American Indians necessarily follow.

Fools Crow v. Gullet[166] also involved the conversion of a sacred site into a tourist attraction. The case arose when traditional chiefs and spiritual leaders of the Lakota and Cheyenne Indians sued South Dakota for transforming Bear Butte, "the most significant site of Lakota religious ceremonies,"[167] into a state park with its attendant features of roads, bridges, parking lots and tourists.

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clause.

> Under current doctrine this holding is almost bizarre: government may favor religion (1) with property tax exemptions; (2) by mandating that children be confined in school, and then, on a solely religious basis, releasing some students for religious study; and (3) allowing some children on a solely religious basis to avoid mandatory schooling to which all others must submit. Certainly these are more substantial accommodations, or "establishments," than the relief requested by the Navajo in relation to Rainbow Bridge.

Pepper, *supra* note 133, at 292 (citations omitted). See also Stambor, *supra* note 146, at 78-80, for an additional showing that *Badoni* involved a misapplication of the establishment clause.

166. 541 F. Supp. 785 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir.), *cert. denied*, 464 U.S. 977 (1983).

167. *Id.* at 788. See, *e.g.*, BLACK ELK, THE SACRED PIPE (Joseph Epes Brown ed. 1971) for a general discussion of Lakota religious beliefs.

To the Cheyenne,

> [Bear Butte] is the holiest place in all the world for here *Ma'heo'o*, the All-Father Creator Himself, gave *Ma'aho'tse*, the Sacred Arrows, to Sweet Medicine the Prophet. From that day on, the Cheyenne have been *Ma'heo'o*'s own chosen, called-out people, the People. An endless stream of sacred power flows from the Creator's Lodge within the Holy Mountain, blessing His People, giving them abundant power for new life.[168]

Both the Lakota and Cheyenne continue to conduct one of their most important religious ceremonies on the butte; here they endure the vision quest, a rite of isolation and deprivation, during which an individual stays alone on the butte for several days and fasts until he has a vision. The vision quest is a recurring religious ceremony in the life of the Lakota and Cheyenne. Initially, the vision quest is a rite of passage. The individual's spirit guardian appears and shares its power with the vision seeker. An Indian's name may reflect his spirit guardian, which usually takes an animal form. Later vision quests provide revelations to deal with trying times. While vision quests are pursued for various reasons throughout an Indian's life, "the most important reason for 'lamenting' is that it helps us to realize our oneness with all things."[169]

Fools Crow was triggered by further construction to facilitate tourism in Bear Butte State Park. The Indians objected to the interference that the construction process would create as well as the results, particularly a proposed observation deck on the butte itself, increased pavement around the butte, and increased tourism resulting from these developments. Regarding the proposed construction, the court held that enjoining the plans would violate the establishment clause.[170] As for the tourists, the court agreed with the *Badoni* court that excluding tourism from Bear Butte would amount to a "government-managed religious shrine" and thus would also violate the establishment clause.[171] Further, the court felt that although the state-sponsored presence of tourism interfered with the Lakota religious ceremonies, it did not prevent the free exercise of religion, since the ceremonies could still be con-

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168. P. POWELL, PEOPLE OF THE SACRED MOUNTAINS 2 (1981) (providing a general discussion of Cheyenne religion).

169. BLACK ELK, *supra* note 167, at 46.

170. "[W]e conclude that the free exercise clause places a duty upon a state to keep from prohibiting religious [activities], not to provide the means or environment for carrying them out." *Fools Crow*, 541 F. Supp. at 791 (citation omitted).

171. *Id.* at 792 (quoting Badoni v. Higginson, 638 F.2d 172, 179 (10th Cir. 1980)).

ducted despite the presence of outsiders.[172] Finally, in response to the Lakota claims that the construction plans would temporarily interfere with their religious ceremonies, the court concluded that the state had compelling interests—administrative and environmental—to justify this temporary abridgment.

In its conclusion, despite expressly recognizing the unparalleled significance of Bear Butte to Lakota and Cheyenne religious practices, the court reached the peculiar holding "that plaintiffs failed to establish any infringement of a constitutionally cognizable first amendment right," and that any temporary infringement on the Indian religious ceremonies was outweighed by compelling state interests in preserving this "historical landmark."[173] So, in the same paragraph, the court stated that the Lakota and Cheyenne had not shown any protected first amendment right (necessary to trigger the *Sherbert* test), but then employed the *Sherbert* balancing test rhetoric, which presupposes a cognizable constitutional right, to justify the infringement on the Lakota and Cheyenne religions. The court then justified the inconvenience that it inflicted on the Indians by reciting the necessity of preserving Bear Butte as a historic landmark, a landmark that has gained its significance from its prominence in and continuing importance to the Lakota and Cheyenne religions.

Wilson v. Block[174] reiterated the *Fools Crow* reasoning that while the proposed development of a ski area would interfere with Indian religious practices, it would not prevent the practice and therefore did not constitute an impermissible burden on religion. For the Navajo and Hopi bringing this case, the San Francisco Peaks in Arizona were the dominant geographical formation in their lives. The Navajo consider the Peaks to be one of four sacred mountains forming the boundaries of their homeland. In addition, they regard the Peaks as a living deity and personify its attributes. Medicine men retreat to the Peaks to gather herbs for ceremonial use both on the Peaks and in healing rituals in their villages.

To the Hopi, the Peaks are the home of *Kachinas*, or spirit beings, who are the Creator's means of communicating with humans. During the fall and winter, the *Kachinas* live in the

172. *Id.* In response to this holding, Chief Spotted Eagle of the Lakota commented, "Imagine if we flip things around, and we had Indian people dominating the Christian churches. There would be signs on the church aisles saying 'Don't photograph the Christians.' We Indians would stroll in there with our popcorn and watch you practice your religion." Northern Sun News, Nov. 1984, at 6, col. 4, *quoted in* Pemberton, *supra* note 158, at 326 n.166.

173. *Fools Crow*, 541 F. Supp. at 794.

174. 708 F.2d 735 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1056 (1984).

Peaks. During other months, these supernatural beings descend into Hopi villages for a series of ceremonies. The *Kachinas* are responsible for bringing rain, sun, health, happiness, and other good things to the life of the Hopi. The Hopi also revere the Peaks' many natural shrines and gather herbs in the Peaks for use in religious ceremonies.[175]

The religious significance of the Peaks area to the Navajo and Hopi was undisputed.[176] Nonetheless, the court held that the proposed ski development did not violate the Indians' freedom of religious belief or their free exercise rights.[177] According to the court, in order to violate their freedom of religious belief, the government would have to penalize the Indians' adherence to a religious faith.[178] To address the free exercise claim, the court adopted a modified version of the *Sequoyah*[179] centrality test, requiring that in order to justify first amendment protection, the Indians must demonstrate that the site was "indispensable to some religious practice, whether or not central to their religion."[180] Under this trumped-up centrality test, the court decided that while the San Francisco Peaks were indispensable to Hopi and Navajo religious practices, the indispensability of the specific site in question had not been demonstrated. Because the remaining Peaks area is available for the practice of Hopi and Navajo religion, the Court reasoned that the Indians' religious practices, like their religious beliefs, have not been burdened.[181] Consequently, the Court concluded that the compelling state interest factor of the *Sherbert* test need not be considered. Considering that the *Sequoyah* and *Fools Crow* courts reached similar conclusions, it appears that a frequent consequence of the centrality test is an avoidance of *Sherbert* analysis.

4. *Ethnocentrism, Cost Analysis, and Sacred Site Decisions*

The *Wilson* court, like the courts in *Sequoyah*, *Badoni* and *Fools Crow*, failed to appreciate the spiritual and ecologically-based nature of Native American religions.[182] This failure stems

175. *Id.* at 738.

176. See generally M. SEVILLANO, THE HOPI WAY (1986) for a discussion of the religious beliefs of the Hopi. For similar discussions regarding the Navajo, see authorities cited in *supra* note 162.

177. *Wilson*, 708 F.2d at 741.

178. *Id.*

179. *See supra* note 144 and accompanying text.

180. *Wilson*, 708 F.2d at 743.

181. *Id.* at 741.

182. A similar criticism can be levied at the court in *Inupiat Community v. United*

from our society's cultural inability to understand the nature of a non-Western culture's religious beliefs. Yet, as suggested earlier, perhaps this failure stems from a more pragmatic and utilitarian dynamic. Our society, vis-a-vis the courts, will indulge Native American religions when the costs to the government are minimal. Consequently, peyote use by one individual or by a discrete (both in terms of numbers and social isolation) minority is a minor sacrifice that can be indulged under the banner of freedom of religion. Yet when the costs of preserving religious freedom are greater, such as is the case with injunctions that permanently ban land development, neither courts nor legislatures will protect Native Americans' free exercise rights.[183] Maybe this cryptic cost-benefit analysis is not denied by first amendment jurisprudence: that is, perhaps the *Sherbert* balancing test is doctrinal proof that cost-benefit analysis does inform first amendment jurisprudence and that Native Americans' religious liberty must succumb to the government's property interests.

However, in *Sequoyah*, *Fools Crow* and *Wilson* (every sacred site case but one), the appellate courts have not found the requisite burden on religion to trigger the balancing test developed in *Sherbert*,[184] so the cost-benefit analysis that *Sherbert* entails is frequently not a part of sacred site jurisprudence. Nonetheless, a cost-benefit analysis is operative in sacred site jurisprudence. When courts fail to appreciate Native American religions, the judiciary has adopted the ethnocentric standards by which American society generally evaluates the credibility of Native American religions. Implicit within this biased evaluation is a cost-benefit analysis regarding the social value of the Indian religions. While this

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States, 548 F. Supp. 182 (D. Alaska 1982), *aff'd*, 746 F.2d 570 (9th Cir. 1984), *cert. denied*, 474 U.S. 820 (1985), *reh'g denied*, 485 U.S. 972 (1988). "In essence, the Inupiats' claim that their religious beliefs are inextricably inter-twined with their hunting and gathering lifestyle"; thus, the court determined that a claim to such a large area of land on such non-specific grounds cannot be constitutionally vindicated. *Id.* at 188-89.

183. Noticing this trend, a Yale Law Journal note argued that America is gripped by a civil religion that worships progress and material prosperity. The note suggested that:

> claims by Indians that development of public lands violates their religious beliefs would seem at once obstructionist and counterproductive. 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.

Note, *supra* note 131, at 1464.

184. This finding was particularly mystifying in *Sequoyah* where no religious burden was found even though the Cherokee were forever banned from worshipping on their now flooded sacred land.

cost-benefit analysis does not always determine the outcome of sacred site cases, it enables judges to ignore the fundamental premise of harmony with the land underlying all Native American religious practice. It is the implicit presence of this cost-benefit analysis regarding what can functionally be considered a religion in Western society that explains why judges recognize Indians' first amendment right to use peyote but will refuse to extend first amendment protection to sacred sites.

The refusal of judges to recognize sacred site claims as presenting constitutionally valid religious questions is not purely a consequence of the costs of protecting sacred sites. The interplay between the judiciary's refusal and the anti-development implications of Native American religions is more subtle. In essence, the judiciary is being asked to comprehend religions that defy Western notions of both religion and, maybe more importantly, land usage. These religions are so fundamentally foreign to Western values that many judges are simply unable to appreciate them. This inability stems from limitations upon Western thought, which make it impossible for some individuals to appreciate the existence of non-Western views of land. Because some Westerners are so rooted to the notion of land as real estate, they can never shed their Western *Weltanschauung*. And it is because of this inability that, within the judiciary's refusal to protect Native American religions, there exists an implicit cost-benefit analysis regarding the functional viability of protecting sacred sites from development.

5. *A Glimmer of Understanding*

Northwest Indian Cemetery Protective Association v. Peterson[185] may be to sacred site litigation what *Woody* is to peyote use—a seminal case in which a court was able to overcome cultural biases and recognize the religious rights of American Indians. The case arose when Yurok, Karok and Tolowa Indians raised a sacred site objection[186] to the National Forest Service's plans to construct a paved road through an area of the Six Rivers National Forest in California. Using the centrality test, the Ninth Circuit Court of Appeals determined that the Forest Service's proposals would interfere with the Indians' free exercise rights.[187] After reaching this

185. 795 F.2d 688 (9th Cir. 1986), *rev'd sub nom.* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

186. For a discussion of the religious importance of this area to these Indians, see *infra* notes 200-01 and accompanying text. See, *e.g.*, A. KROEBER, YUROK MYTHS (1976), for a general discussion of the religious beliefs and practices of these culturally similar tribes.

187. *Peterson*, 795 F.2d at 692. In reaching this decision, the court expressly rejected

conclusion, the court weighed the burden on the Indians' religion against the compelling state interests justifying this interference, holding that the government fell far short of proving persuasive interests.[188] Thus, for the first time, an appellate court granted first amendment protection to a sacred site religious claim.[189]

6. *The Supreme Court Considers Sacred Site Claims*

a. *Justice O'Connor's Majority Opinion*

In a five-to-three split, the United States Supreme Court, in *Lyng v. Northwest Indian Cemetery Protective Association*,[190] overturned the Ninth Circuit's precedent-breaking decision. Rather than focusing on preserving the sites of the Indians' religious worship from government interference, Justice O'Connor's majority opinion emphasized that neither the proposed road nor lumbering would force the plaintiffs to violate their religious beliefs or penalize them for their chosen religious activities.[191] Of course, Justice O'Connor ignored the fact that if the sacred lands were desecrated, the Indians would no longer have a coherent religion in which to believe.[192] Apparently, destroying a religion does not constitute coercion or penalty. Justice O'Connor stipulated that such coercion or penalization was the requisite infringement on free exercise rights necessary to trigger the *Sherbert* test. To justify such a high threshold, Justice O'Connor explained that protecting the Indians' religious rights would severely cripple the government's ability to use "*its* land" as it saw fit.[193] Once again, emphasis upon the maximum costs that our Western society will indulge to protect free exercise precluded consideration of Indian religious rights—an interesting phenomenon considering that the property that the government wants to protect was once exclusively the Indians' domain. It seems that every time a court finds that a sacred site claim has not presented a cognizable first amendment free exercise right, the "crippling" costs of recognizing this

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the notion, which was decisive in *Wilson*, that the free exercise clause can be violated only if the governmental activity penalizes an individual for his religious beliefs or practices.

188. *Id.* at 695.

189. Actually, the court was affirming the decision below. *See* Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586 (1983).

190. 485 U.S. 439 (1988). Joining Justice O'Connor's majority opinion were Chief Justice Rehnquist and Justices White, Stevens, and Scalia. Justices Brennan, Marshall, and Blackmun dissented. Justice Kennedy did not participate in the decision.

191. *Id.* at 451-53.

192. For a discussion of the destructive effect of developing sacred land, see *supra* note 23 and accompanying text.

193. *Lyng*, 485 U.S. at 453 (emphasis in original).

right lurk behind this determination. In other words, rights will trump utility, but only when the result is utilitarian.

To support its holding, the majority equated the American Indians' sacred site claim to the claim raised in *Bowen v. Roy*,[194] from which the Court adopted the coercion or penalty standard. The cynical might suggest that this analogy explains why the Court habitually denied certiorari to Native American first amendment religious claims. Perhaps, the High Court was waiting for a rather singular and obscure religious assertion, such as the one that accepting a numerical representation would rob a two-year-old Indian of her spirituality, in which to develop the doctrine for resolving Indian free exercise issues. Once developed, this doctrine could then be applied to more conventional and appreciable religious claims, such as the sacred land claim at issue in *Lyng*.

Even if this was not the Court's strategy, the majority's admitted inability to distinguish the claim in *Roy* from the claim in *Lyng* clearly exposed the prejudice that taints the Court's analysis. If the Court had appreciated the Yurok, Karok, and Tolowa claims in *Lyng*, the Court would have recognized the religious relationship that Native Americans share with their sacred lands. Certainly, these relationships, which are central to the identities of many Native Americans, are distinguishable from one Indian's singular and obscure claim that a social security number robs his daughter of her spirit. As an afterthought possibly designed to dissuade criticism, and to defend the Court's inability to distinguish the claims in *Lyng* from those in *Roy*, Justice O'Connor stipulated: "Nothing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen."[195] Given the historical insensitivity of our society to Indians' religious rights and *Lyng*'s reflection and perpetuation of this insensitivity, Justice O'Connor's apology amounts to an attempt by the Court to hide its continuing failure to appreciate Indians' religious rights behind the veil of judicial restraint.

b. Justice Brennan's Dissenting Opinion

In his dissenting opinion, Justice Brennan recognized the Court's perpetuation of this history. Doctrinally, Justice Brennan disagreed with the majority's requirement that in order to violate the free exercise clause, the government must either coerce indi-

194. 476 U.S. 693 (1986)(accepting a social security number would not interfere with the Indian plaintiffs' two-year-old daughter's religious beliefs). *See supra* note 72 and accompanying text.

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

viduals into violating their religious beliefs or penalize them for their chosen religious activity.[196] Justice Brennan maintained that this interpretation of the first amendment was flawed because it "essentially leaves Native Americans with absolutely no constitutional protection against perhaps the gravest threat to their religious practices."[197] Adopting a less stringent criterion, Justice Brennan suggested that a "substantial threat" test should frame the doctrinal analysis.[198] Under his formulation of the test, in order to successfully bring a sacred site claim Indians would have to demonstrate that the proposed use of the public land "poses a substantial and realistic threat of frustrating their religious practices."[199] Justice Brennan felt that the Indian claimants met this standard, but before he reached this conclusion he carefully reflected on the nature of the Yurok, Karok and Tolowa claims specifically, and on American Indian religions generally.

Justice Brennan respected the finding of the Forest Service's commissioned study that, "for Native Americans[,] religion is not a discrete sphere of activity separate from all others, and any attempt to isolate the religious aspects of Indian life 'is in reality an exercise which forces Indian concepts into non-Indian categories.' "[200] Justice Brennan continued his review of American Indians' religions, noting that a "pervasive feature of this lifestyle is the individual's relationship with the [land]; this relationship, which can accurately though somewhat incompletely be characterized as one of stewardship, forms the core of what might be called, for want of a better nomenclature, the Indian religious experience."[201] Because of their non-Western-based conception of land, Justice Brennan realized that Indian religions cannot be understood within Judeo-Christian frameworks: "Where dogma lies at the heart of western religions, Native American faith is inextricably bound to the use of land. The site-specific nature of Indian religious practice derives from the Native American perception that land is itself a sacred, living being."[202]

For the Yurok, Karok and Tolowa, this was why the land at issue in *Lyng* was important to their culture. For these people, the high country was the most sacred of land: when humans appeared

196. *Id.* at 459 (Brennan, J., dissenting).
197. *Id.*
198. *Id.* at 475.
199. *Id.*
200. *Id.* at 459 (citing D. THEODORATUS, CULTURAL RESOURCES OF THE CHIMNEY ROCK SECTION, GASQUET-ORLEANS ROAD, SIX RIVERS NATIONAL FOREST (1979)).
201. *Id.* at 460.
202. *Id.* at 460-61.

on Earth, the spirits who formerly dwelled in the lowlands had moved to and continue to live in this high country. Because of the spirits' presence, the high country is believed to contain many medicinal powers, both in the form of herbs as well as in the form of geological formations.

Nonetheless, under the majority's doctrinal formulation, it was insignificant as a constitutional matter that the proposed road and lumbering would interfere with the high country's sanctity for the Indians, and perhaps destroy their religion in the process. Without the requisite coercion or penalization, the majority considered the intrusion on the Indians' religious life constitutionally negligible. Justice Brennan attacked the majority's distinction between the non-constitutional harm suffered by the Indians and the Constitution's protection against coercion or penalty as a distinction "without constitutional significance."[203] Justice Brennan was similarly annoyed by the majority's reliance on *Bowen v. Roy*, finding the majority's inability to distinguish the claimants' sacred site claim from that raised in *Roy* "altogether remarkable."[204] Finally, Justice Brennan recognized the one-dimensional cost-benefit analysis that dictates sacred site decisions.[205] Justice Brennan understood that this one-dimensional analysis is the judiciary's contribution to the on-going saga of systematically denying Indians' rights.

> [T]he Court's refusal to recognize the constitutional dimension of respondents' injuries stems from its concern that acceptance of respondents' claim could potentially strip the Government of its ability to manage and use vast tracts of federal property. . . . These concededly legitimate concerns lie at the very heart of this case, which represents yet another stress point in the longstanding conflict between two disparate cultures . . . .[206]

Justice Brennan chastised the majority for refusing to confront this cultural conflict and pointed out that, by defining the Indians' injury as non-constitutional, the majority had ensured that the government would always win any future conflicts between land development and Indian sacred site claims.

> Rather than address this conflict in any meaningful fashion, however, the Court disclaims all responsibility for balancing these competing and potentially irreconcilable interests, choosing instead to turn this difficult task over to the Federal Legislature.

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203. *Id.* at 468.

204. *Id.* at 470. For similar sentiments, see comments in this article at *supra* notes 72, 93-94 and accompanying text.

205. *See supra* note 184 and accompanying text.

206. *Lyng*, 485 U.S. at 473.

> Such an abdication is more than merely indefensible as an institutional matter: by defining respondents' injury as "non-constitutional," the Court has effectively bestowed on one party to this conflict the unilateral authority to resolve all future disputes in its favor, subject only to the Court's toothless exhortation to be "sensitive" to affected religions.[207]

In contrast to such abdication, Justice Brennan felt the Court had a responsibility to balance the government's need to manage and use its vast property holdings against the Indians' free exercise rights. As a result of feeling this judicial obligation, Justice Brennan proposed his modified version of the centrality doctrine.

c. *The Lessons of Justice Brennan's Dissent*

While Justice Brennan's substantial threat test might some day be an informative part of constitutional law, this doctrinal contribution is not the most important aspect of his dissenting opinion. Of greater value are two non-doctrinal aspects of his dissent that try to bore through and expose the ethnocentrism currently plaguing sacred site jurisprudence.

Unlike many other judges, Justice Brennan actually seemed to understand that Native American religions cannot be comprehended within Judeo-Christian concepts. As a result, he conveyed a sense of the *Weltanschauung* of American Indians by detailing the particular importance of the now-developed land to the Yurok, Karok and Tolowa Indians specifically, and to Native Americans generally. After making this anthropological leap of faith, Justice Brennan confronted the difficulty of protecting such non-Western religions in a legal and jurisprudential system that operates on Western assumptions.

Justice Brennan also attempted to conform the law to social reality. The majority, on the other hand, lowered the veil of judicial restraint in order to ignore the presence of persecuted non-Western beliefs in our Western society. In doing so, the majority allowed the law to perpetuate Western society's dominance in this seemingly endless clash of cultures. The majority acknowledged its contribution in perpetuating the suppression of Indian beliefs by Justice O'Connor's throw-away line that, "Nothing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen."[208]

Demanding judicial candor instead of the judicial abdication

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207. *Id.*
208. *Id.* at 453.

preferred by the majority, Justice Brennan understood that two "concededly legitimate concerns lie at the very heart of this case"[209]—the government's property right in its land and the Indians' free exercise rights. He also understood that "the competing claims that both the Government and Native Americans assert in federal land are fundamentally incompatible."[210] Rather than ignoring these realizations or refusing even to recognize the Native Americans' constitutional interests in sacred sites, as courts have repeatedly done and as the Supreme Court chose to do in *Lyng*, Justice Brennan demanded that courts develop doctrine that flows from these realizations. Unfortunately, as of yet, the courts, and now it appears the law as settled by the Supreme Court, have not even reached these realizations. This moment of recognition must occur before courts confront the more difficult task of reconciling these two fundamentally incompatible interests.

IV. A New Tradition: A Doctrinal Proposal For Sacred Site Analysis

If the courts finally transcend their limited and Western-rooted notions of religion, judges will begin to appreciate that developing "nature" destroys Native American religions. If this leap of faith occurs, the judiciary will have to reconcile the fundamentally incompatible claims that Native Americans and the government assert over some public lands. Reconciling these conflicting rights will require both free exercise and establishment clause analysis.

Bound by the predominant cultural ideology, judges will still have to employ Western legal doctrines to protect American Indian religious rights in light of a heightened awareness of the cultural diversity within our society. And while there is an uneasy fit between Native American religions and Western legal doctrines, the law is still capable of protecting these non-Western religions. In doing so, not only will the law protect religions that it currently inhibits, but it will also recognize the social reality of religious diversity in America. As the *Woody* court explained, protecting this diversity is a benefit in itself.

> [T]he right to free religious expression embodies a precious heritage of our history. In a mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes ever more im-

209. *Id.* at 473.
210. *Id.* at 474.

portant. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty. We preserve a greater value than an ancient tradition when we protect the rights of the Indians . . . .[211]

A. *Free Exercise Analysis*

While some commentators have suggested alternative doctrines for resolving sacred site claims,[212] the substantial threat test proposed by Justice Brennan can do justice to both Indian and government claims. However, before this can occur, judges must recognize that Native American religions are based on a spiritual relationship that is particularly strong with certain undeveloped lands. Although the centrality test is ethnocentric in that it imposes Western notions of religiosity on a non-Western religion, perhaps the substantial threat test (admittedly a modification of the centrality test) should be adopted for sacred site analysis.[213] Any doctrine that is devised and then applied to Native Americans will be influenced by Western thought, but that does not mean that it has to be discriminatory in impact. To achieve nondiscrimination, judges must rise above their Judeo-Christian notions of what constitutes a religion and then apply a doctrine such as the substantial threat test.

Some might argue that adopting Justice Brennan's approach is tantamount to granting a Native American veto over any proposed development of public land. This conjecture is without basis. In order to meet the substantial threat test, Indian plaintiffs must demonstrate that the proposed development "poses a substantial and realistic threat of frustrating their religious practices."[214] Such

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211. People v. Woody, 61 Cal. 2d 716, 727-28, 394 P.2d 813, 821-22, 40 Cal. Rptr. 69, 77-78 (1964).

212. *See, e.g.*, Note, *supra* note 131, at 1466 n.90 (suggesting that Native American religions should be protected under a public forum analysis); Note, *supra* note 5, at 885 (suggesting that a free exercise claim that comes under the rubric of the American Indian Religious Freedom Act presumptively meets the burden of the first prong of the Sherbert test); Comment, *The Trust Doctrine: A Source of Protection for Native American Sacred Sites*, 38 CATH. U.L. REV. 705 (1989) (arguing that the trust relationship between the federal government and American Indians requires the government to protect sacred sites). But see *Sequoyah v. Tennessee Valley Authority*, 480 F. Supp. 608 (E.D. Tenn. 1979) and *Badoni v. Higginson*, 455 F. Supp. 641 (D. Utah 1977), in which these district courts held that the asserted free exercise claims could not supercede the government's property interest in federal lands. But see, also, the appellate court opinions that flatly rejected such an absolutist approach. Badoni v. Higginson, 638 F.2d 172, 176 (10th Cir. 1980); Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159, 1164 (6th Cir. 1980).

213. *See supra* note 198 and accompanying text.

214. *Lyng*, 485 U.S. at 475.

a demonstration would require a marshalling of evidence, both historical and contemporary, that the land in question is of particular significance to the plaintiffs. This burden would effectively prevent abuse of the first amendment. Moreover, because the government could still trump the Indians' free exercise rights by establishing a compelling government interest to justify the proposed development, the Native American right to limit government action is itself limited. This limitation on Native American free exercise rights, a limitation that is imposed on all Americans, ensures that the government property interests can be vindicated when necessary.

Criticism has been levied at the centrality approach. In *Smith*, Justice Scalia criticized this approach as unprincipled: "What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith?"[215] Justice Scalia's steadfast refusal to recognize the appropriateness of using any form of centrality test to evaluate sacred site claims parallels his refusal to recognize Native Americans' religious beliefs. Justice Scalia objects to a centrality test because he is afraid of stepping onto a slippery slope: carried to their logical extreme, American Indians' religious beliefs would raise objections to almost all development of public land. The untenability of vindicating such religious beliefs requires adopting either one of two approaches: rejecting all such claims, which is the current practice, or differentiating lands that are crucial to Indian religions from those that are not. Without such a differentiation, and assuming that development of public lands will continue, sacred site claims will never be protected. Hence, if the free exercise rights of Native Americans are to be protected, a centrality test is a necessary doctrine in sacred site jurisprudence.

B. Establishment Clause Analysis

In both *Badoni* and *Fools Crow*, the courts refused to protect Native Americans' free exercise rights because the judges reasoned that such accommodation would violate the establishment clause.[216] These conclusions highlight the tension between "the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."[217] The tension between the free exercise clause

215. Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1604 (1990).

216. *See supra* notes 165 and 171 and accompanying text.

217. Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970) (tax exemption of churches is

and the establishment clause has received much attention and frequent attempts are made to reconcile these doctrines.[218]

Despite this tension, accommodating the free exercise rights of Indian plaintiffs by not developing sacred lands is not an unconstitutional establishment of religion. The Supreme Court has held that exemptions from school attendance requirements[219] and from taxation[220] do not violate the establishment clause. In *Sherbert*, the Court required the state to make unemployment benefits available to a Seventh-Day Adventist who for religious reasons could not work on Saturday and hence was unemployed.[221] Similarly, in *Thomas v. Review Board*,[222] the state was required to supply unemployment benefits to a Jehovah's Witness who quit his job in a weapons plant based on his religious convictions. In other instances, as well, the Court has accommodated religions in order to vindicate free exercise rights.

Professor Laurence Tribe has concluded "that the free exercise principle should be dominant when it conflicts with the anti-establishment principle. Such dominance is the natural result of tolerating religion as broadly as possible rather than thwarting at all costs even the faintest appearance of establishment."[223] Individual justices have recognized the inevitability of accommodating religions in the pursuit of free exercise protection.[224] Such a preference for free exercise accommodation is particularly appropriate in the context of sacred site claims: without free exercise protection, the basis of the Native American religions—their immemorial relationships with particular lands—will be destroyed. Moreover, "government efforts to remedy a burden it has placed [or threatens to

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not equivalent to government sponsorship).

218. *See, e.g.*, McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1; Comment, *A Non-Conflict Approach to the First Amendment Religion Clauses*, 131 U. PA. L. REV. 1175 (1983).

219. 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 . . . .").

220. Walz v. Tax Comm'n, 397 U.S. 664 (1970).

221. Sherbert v. Verner, 374 U.S. 398 (1963).

222. 450 U.S. 707 (1981). See McConnell, *supra* note 218, for other instances of religious accommodation.

223. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1201 (1988).

224. *See, e.g.*, School Dist. v. Schempp, 374 U.S. 203, 247 (1963)(Brennan, J., concurring) ("[T]he logical interrelationship between the Establishment and Free Exercise Clauses may produce situations where an injunction against an apparent establishment must be withheld in order to avoid infringement of rights of free exercise."). Similarly, Justice O'Connor noted in *Wallace v. Jaffree*, 472 U.S. 38, 83 (1985), "[i]t is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion . . . ."

place] on the free exercise of a 'minority' religion cannot realistically be viewed as having the purpose or primary effect of attempting to establish religion."[225]

V. RECOMMENDATIONS

The Supreme Court's rejection of the Indians' claims in *Lyng* has robbed Indians and their sacred sites of the first amendment free exercise protection that they deserve. Justice Scalia's reworking of free exercise jurisprudence in *Smith* indicates that Native Americans should abandon efforts at convincing federal courts to preserve their sacred sites from destructive development; no matter what the legal arguments proffered, it is unlikely that Indian plaintiffs will be able to demonstrate that the government's motivating purpose in desecrating a sacred site was to deny Indians their religious rights. Ironically, in the process of announcing this new standard, Justice Scalia suggested one of the two avenues that Native Americans can take to protect their religious rights.

According to Justice Scalia, minority religions should rely on the political process to safeguard their religious practice.[226] From one perspective, Justice Scalia's suggestion adds insult to injury, given the dominant culture's historic treatment of American Indians. On the other hand, because it is clear that the Supreme Court does not view the first amendment as protecting the sacred sites of Native Americans, Indians are now forced to engage in democratic politics.

As has been demonstrated in some states that have protected peyote use within the Native American Church, lobbying efforts can be successful. Yet, as the substantively neuter American Indian Religious Freedom Act of 1978 illustrates, even legislative action does not ensure actual freedoms. In 1989, Congress introduced several bills[227] to amend the American Indian Religious Freedom Act of 1978. These proposed amendments were intended to ensure that the government only desecrate sacred sites in instances of

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225. Comment, *supra* note 218, at 1179.

226. Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1606 (1990).

In referring to the *Smith* and *Lyng* decisions, a tribal attorney emphasized the need for focusing on legislative action: "The Supreme Court has trampled on the Tribes' first amendment religious freedom rights, thus forcing us to shift the forum not only to Congress but also to state legislatures." Pat Smith, Attorney for Confederated Salish and Kootenai Tribes, Remarks at the Natural Resource Management in Indian Country Workshop, 13th Annual Public Land Law Conference, Missoula, Mont. (Apr. 25, 1991).

227. S. 1124, 101st Cong., 1st Sess. (1989); S. 1979, 101st Cong., 1st Sess. (1989); H.R. 1546, 101st Cong., 1st Sess. (1989).

manifest necessity. These bills never made it to the floor of Congress. Currently, efforts are underway to reintroduce similar legislation.

In the meantime, rather than relying exclusively on the federal government and federal judiciary to protect their religious rights, Native Americans should pursue protection elsewhere. Despite the application of such doctrines as aboriginal rights,[228] tribal sovereignty,[229] fiduciary relationship between guardian and ward,[230] and now first amendment free exercise,[231] for decades Indians have continued to lose ground in their struggle not only to keep their land, but even to maintain their cultural identities. Throughout the periods in history when acknowledged federal policy was assimilation of the Indians into mainstream American life and continuing into the period when federal policy has supported tribal self-determination,[232] the Supreme Court has been a protector of tribal autonomy and Native American culture.[233] *Smith*, construed in conjunction with other recent opinions,[234] signals the current

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228. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (Chief Justice Marshall distinguishing between title to land acquired by conquest and force and aboriginal right of occupancy). The Court reiterated Chief Justice Marshall's reasoning 60 years later in *United States v. Kagama*, 118 U.S. 375 (1886).

229. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (seminal case establishing Indians' right to self-government within their designated land).

230. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (Chief Justice Marshall identified Indian tribes as "domestic dependant nations . . . . Their relation to the United States resembles that of a ward to his guardian."). *See also Kagama*, 118 U.S. at 382.

231. *See* Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, *reh'g denied*, 110 S. Ct. 2605 (1990). Invoking the U.S. Constitution is a fairly recent development in asserting Indian rights. The Indian Religious Freedom Act of 1978 spurred litigation invoking free exercise rights because the Act declared it was *national policy* to protect Indian free exercise rights. *See* 42 U.S.C. § 1996 (1988) ("it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian . . . including but not limited to access to sites, use and possession of sacred objects . . . .").

232. The General Allotment Act of 1887, also known as the Dawes Act, resulted in the opening of many reservations to settlement by non-Indians. Allotment officially ended with passage of the Indian Reorganization Act of 1934 (codified at 25 U.S.C. § 461 (1988)).

233. Crow Tribe of Indians v. Montana, 819 F.2d 895 (9th Cir. 1987), *aff'd mem.*, 484 U.S. 997 (1988). White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Fisher v. District Court, 424 U.S. 382, *reh'g denied*, 425 U.S. 926 (1976); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Kennerly v. District Court, 400 U.S. 423 (1971); Williams v. Lee, 358 U.S. 217 (1959); United States v. Kagama, 118 U.S. 375 (1886); *Ex parte* Crow Dog, 109 U.S. 556 (1883).

234. In 1978, the Supreme Court denied an Indian tribe criminal jurisdiction over non-Indians on the reservation. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). In 1990, the Court diminished the tribal jurisdiction further by denying criminal jurisdiction over "non-member" Indians on the reservation. Duro v. Reina, 110 S. Ct. 2053 (1990). However, by amending the Indian Civil Rights Act of 1968, the House of Representatives has delayed the effect of the *Duro* decision until September 30, 1991 in order to give Congress further opportunity to consider this issue. Department of Defense Appropriations Act of

High Court's abandonment of its traditional role in protecting a discrete minority from the oppression of the majority culture.

Historically, state governments have been in conflict with Indians, who have had to depend upon the federal government (and most particularly, the Supreme Court) for protection from state encroachment upon their lands and their rights. This conflict exists today. However, as the peyote-use statutes demonstrate,[235] there is evidence that the atmosphere in statehouses may be changing and that educational efforts at the state and local levels of government may produce results beneficial to Native Americans. Raising the American public's awareness of the Indians' unique culture, as well as their constitutional rights, is a necessary precursor to overcoming their traditional prejudicial treatment by legislators and judges. When a sacred site is located on state land, both state courts[236] and legislatures can act to protect the religious practices of Native Americans. Moreover, by acting to preserve the religious rights of American Indians, the states can assist both their own citizens and federal judges and legislators in understanding the *Weltanschauung* that shapes Native American religions.

VI. Conclusion

The clash of cultures between American Indians and the dominant majority has been a part of America since its "discovery" by Europeans. Historically, the United States has not dealt with this clash very admirably. Rather than trying to understand the impulses behind Indian behavior, our society has maintained attitudes and policies that amount to a war of cultural genocide against the American Indian. No aspect of this cultural attack has been more damaging than the persistent denial of religious freedom for Native Americans. Wounded Knee, for all of its tragedy, was merely one isolated example dramatically exposing our society's relentless assault on Native American religions. Most of us are ashamed and embarrassed by what happened in 1890.

1991, Pub. L. No. 101-511, § 8077(b), 104 Stat. 1856, 1892-93 (1991) (*Duro v. Reina* amendment).

235. *See supra* notes 124-25 and accompanying text.

236. As Justice Brennan has convinced the legal world, the federal Constitution merely establishes the minimum individual rights that states must respect; the states, on the other hand, are free to expand and proliferate rights. *See, e.g.*, Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977). *See also* Note, *Crow Tribe v. Montana: New Limits on State Intrusion into Reservation Rights, New Lessons for State and Tribal Cooperation*, 50 Mont. L. Rev. 133 (1989) (authored by James R. Bellis) (suggesting states and tribes should join forces to ward off federal domination of both state and tribal natural resources).

Despite this consensus, the current law does not recognize that the prejudice that led to Wounded Knee persists today. Arguably, its presence today is even more insidious than it was in 1890. Mowing down Lakota men, women and children after they had peacefully agreed to travel with the Army is an obvious form of cultural persecution. Legal doctrines that appear to be neutral and that celebrate the virtues of freedom of religion, yet which manage to deny this freedom to American Indians are a more subtle and, hence, more dangerous form of persecution. That Wounded Knee was a regrettable event is undeniable. However, when prejudice is cloaked in legal doctrine, sanctioned by prestigious institutions, and manifest in cases of only marginal interest to mass society, the continuing denial of Indian religious freedom can be easily overlooked. We can no longer rely on the sensational clash between the white man and the red man on the open grasses and rolling hills of the Great Plains to illustrate the denial of Indian religious rights. Rather, an understanding and appreciation of Native American religions within the legal system will have to serve this function today. The legal system has yet to demonstrate its ability to achieve such comprehension.

Achieving this comprehension is the first, and crucial, step in preserving the free exercise rights of Native Americans. Once courts recognize that the Indians are presenting constitutionally cognizable injuries, the judiciary must resolve the conflicting religious and property interests that Native Americans and the government, respectively, assert in some public lands. However, before this can occur, judges must transcend the ethnocentrism that Western culture inculcates in them. Until then, the judiciary and the law, as currently settled by the Supreme Court in *Lyng* and *Smith*, will continue to perpetuate the historical denial of American Indians' religious freedom.