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American Indian Sacred Religious Sites and Government Development: A Conventional Analysis in an Unconventional Setting

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NOTES

American Indian Sacred Religious Sites and Government Development: A Conventional Analysis in an Unconventional Setting

When the Lord saw that Moses had turned aside to look, he called to him out of the bush, "Moses, Moses." And Moses answered, "Yes, I am here." God said, "Come no nearer; take off your sandals; the place where you are standing is holy ground."

— *Exodus* 3:1-6

[I]n the long run if the expansion 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.

— *Wilson v. Block*¹

INTRODUCTION

For centuries, American Indians have regarded specific lands as essential to their livelihood, government, culture, and religion. Congress and the courts have at times recognized the important relationship between tribes and their lands.² Recognition has not always coincided with protection; during the nineteenth century and part of the twentieth century a series of governmental actions resulted in the tribes surrendering title and possession to many of their ancestral lands.³ Recently, however, American Indians have become increasingly active litigants in a variety of contexts.⁴ In one set of cases, Indians challenged government development projects on public lands, contending that because the projects interfered with Indian sacred sites, they violated the free exercise clause.⁵

1. 708 F.2d 735, 740 n.2 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983).

2. *See, e.g.*, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); American Indian Religious Freedom Act, as originally enacted, Pub. L. No. 95-341, 92 Stat. 469 (1978) (current version at 42 U.S.C. § 1996 (1982)); Indian Trade and Intercourse Act ch. 19, § 8, 1 Stat. 330 (1793).

3. *See, e.g.*, Indian General Allotment Act of 1887, ch. 119, § 1, 24 Stat. 388 (current version in scattered sections of 25 U.S.C.); Termination Act, ch. 303 §§ 1-12, 68 Stat. 250-52 (1954) (repealed 1973).

4. For example, American Indians have asserted ancient claims to their lands. *See, e.g.*, *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).

5. The first amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I. This Note

This Note focuses on the sacred lands cases⁶ and argues that courts have improperly transferred conventional free exercise analysis to an unfamiliar setting. As a result, these decisions fail to give adequate consideration to sincere Indian religious interests, and seem to conflict frequently with vital principles underlying the free exercise clause.

Part I outlines the development of the Supreme Court's current tripartite approach to free exercise issues. Part II examines the application of this approach to a series of earlier cases in which Indian free exercise claims did not involve sacred sites. Part III analyzes the sacred lands cases and concludes that they are inconsistent with both mainstream free exercise cases and the earlier Indian religious cases. After surveying possible legislative alternatives, Part IV offers recommendations for restructuring current free exercise analysis so that it leads to fairer evaluation of sacred site issues.

I. DEVELOPMENT OF FREE EXERCISE CLAUSE ANALYSIS

A. *Early Free Exercise Clause Analysis*

In its initial construction of the free exercise clause, the Supreme Court drew a distinction between religious beliefs, which were protected, and religious actions, which were unprotected and therefore subject to extensive government regulation.⁷ While "Congress was deprived of all legislative power over mere opinion . . . [it] was . . . free to reach actions which were in violation of social duties or subversive of good order."⁸

In the 1940s, the Court began to move beyond this belief-action distinction. In *Cantwell v. Connecticut*,⁹ a Jehovah's Witness was convicted for playing a record attacking organized religions on a busy street corner, without first obtaining official approval. In reversing the

is restricted to a discussion of the free exercise clause and does not address establishment clause issues raised in a few of the cases.

6. See *United States v. Means*, 627 F. Supp. 247 (D.S.D. 1985); *Northwest Indian Cemetery Protective Assn. v. Peterson*, 565 F. Supp. 586 (N.D. Cal. 1983), *modified*, 764 F.2d 581 (9th Cir. 1985), *cert. granted sub nom.* *Lyng v. Northwest Indian Cemetery Protective Assn.*, 107 S. Ct. 1971 (1987); *Inupiat Community of the Arctic Slope v. United States*, 548 F. Supp. 182 (D. Alaska 1982), *affd.*, 746 F.2d 570 (9th Cir. 1984), *cert. denied*, 106 S. Ct. 68 (1985); *Crow v. Gullet*, 541 F. Supp. 785 (D.S.D. 1982), *affd.*, 706 F.2d 856 (8th Cir.) (per curiam), *cert. denied*, 464 U.S. 977 (1983); *Hopi Indian Tribe v. Block*, 8 Indian L. Rep. 3073 (D.D.C. 1981), *affd. sub nom.* *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1056 (1984); *Sequoiah v. Tennessee Valley Auth.*, 480 F. Supp. 608 (E.D. Tenn. 1979), *affd.*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980); *Badoni v. Higginson*, 455 F. Supp. 641 (D. Utah 1977), *affd.*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

7. See *Reynolds v. United States*, 98 U.S. 145 (1878) (Supreme Court upheld conviction of a Mormon under polygamy statute, rejecting defendant's assertion that polygamy was a religious belief protected by the free exercise clause).

8. *Reynolds*, 98 U.S. at 164. See generally *Pepper, Reynolds, Yoder, and Beyond: Alternatives for the Free Exercise Clause*, 1981 UTAH L. REV. 309, 322; *Riga, Yoder and Free Exercise*, 6 J. L. & EDUC. 449, 456-57 (1977).

9. 310 U.S. 296 (1940).

conviction, the Court stressed that actions as well as beliefs would now be afforded some manner of free exercise protection, noting that:

[T]he 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. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.¹⁰

The impact of cases such as *Cantwell* on free exercise analysis was unclear, however, since those cases simultaneously involved other important first amendment issues.¹¹ This problem was alleviated in *Sherbert v. Verner*,¹² where the Court confronted only a free exercise claim.¹³

B. Modern Approach to the Free Exercise Clause

1. Sherbert v. Verner

In *Sherbert v. Verner*,¹⁴ the Court indicated that many forms of religiously based action would be entitled to free exercise protection, and correspondingly, that the government would face stricter limits on its ability to regulate such behavior. In *Sherbert*, a Seventh Day Adventist was discharged from her job because she would not work on Saturday, which was her Sabbath Day. Finding that appellant's religious reasons did not constitute "good cause" for her inability to work, the state denied her unemployment benefits.¹⁵

In holding that appellant's disqualification from benefits violated her right to free exercise of religion, the Supreme Court enunciated a two-step approach for analyzing free exercise claims. First, claimant had to demonstrate that the state regulation or practice imposed a sub-

10. 310 U.S. at 303-04 (footnote omitted). See also *Pepper*, *supra* note 8, at 329.

11. See *Pepper*, *supra* note 8, at 327 (arguing that "these cases are too intricately entwined with free speech, press and assembly considerations to assist significantly in a coherent, independent elaboration of the appropriate meaning of the free exercise clause"); Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350, 353 (1980).

12. 374 U.S. 398 (1963).

13. Two years before *Sherbert*, the Court addressed a distinct free exercise claim in *Braunfeld v. Brown*, 366 U.S. 599 (1961). In *Braunfeld*, orthodox Jewish merchants whose beliefs prevented them from conducting business on Saturday challenged the state's Sunday closing law. They argued that the law infringed on their free exercise rights, since in forcing them to close on both Saturday and Sunday it placed them at a financial disadvantage compared with their fellow merchants. The Court rejected the claim, stressing that the burden on religious practices was "indirect." 366 U.S. at 605-09. This indirect/direct analysis, however, seems to have been overruled by *Sherbert*. See text at note 19 *infra*.

14. 374 U.S. 398 (1963).

15. 374 U.S. at 401.

stantial burden on the exercise of her religion.¹⁶ Second, the burden was justified only if it was necessary to advance a "compelling state interest" that outweighed the impaired free exercise rights.¹⁷ Furthermore, the state had to show that there were no less restrictive means which might serve its interests without impairing claimant's free exercise rights.¹⁸

The Court found that appellant satisfied both steps of the analysis. The state argued that since the unemployment statute did not explicitly compel appellant to work on Saturday, it placed only an indirect burden on her religious practices. The Court held, however, that any distinction between "direct" or "indirect" burdens was irrelevant. Rather, a substantial burden on appellant's religion existed because the ruling forced "her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."¹⁹

Moreover, the Court was unwilling to assess the state interests offered to justify the statute, noting that the evidence was insufficient to show that persons would feign religious protest to Saturday work in order to collect compensation. State concerns with avoiding fraud and the disruption of scheduling were not the sort of "paramount interests" required to override appellant's religious interest.²⁰ The state also failed to demonstrate that there were no less restrictive means for attaining its goals.²¹

2. Wisconsin v. Yoder

*Wisconsin v. Yoder*²² is one of the most significant recent free exercise cases. In *Yoder*, members of the Old Order Amish religion were convicted under a state compulsory school attendance law when they refused to send their children to public school after the eighth grade or to enroll them in an alternative private school.²³ Following its analysis in *Sherbert*, the Court affirmed the state supreme court's reversal of the convictions on free exercise grounds.²⁴

Before reaching the two-step analysis developed in *Sherbert*, how-

16. 374 U.S. at 403. See also J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 1058-59 (2d ed. 1983).

17. 374 U.S. at 406.

18. 374 U.S. at 407.

19. 374 U.S. at 404. The Court analogized this conditioning of benefits on violating one's religious faith to the imposition of a fine on appellant for her Saturday worship. 374 U.S. at 404.

20. 374 U.S. at 407.

21. 374 U.S. at 407-08.

22. 406 U.S. 205 (1972).

23. 406 U.S. at 207-08.

24. 406 U.S. at 234.

ever, the Court established several threshold criteria which defendants had to satisfy in order to state a free exercise claim. First, defendants were required to demonstrate that they sincerely followed a recognizable "religion."²⁵ Since the parties previously stipulated to the sincerity of the Amish religious beliefs, this inquiry was not a problem.²⁶

The second threshold criterion mandated that the actions for which defendants sought protection be "rooted in religious belief."²⁷ The Court contrasted these activities with those such as Thoreau's, which were based on personal and philosophical choice, rather than on religious belief: "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations"²⁸ The Amish way of life, however, was religiously based, and not "merely a matter of personal preference"²⁹ Indeed, the Court stressed that the Amish daily life and religious practices were derived from written scripture, and had been followed for nearly three hundred years by an organized, coherent religious group.³⁰

Third, the Court inquired into the connection between defendants' practices and their religious beliefs. It found that the Amish regarded their entire way of life, including their mode of education via "learning by doing," as closely related to their beliefs.³¹ The Amish protest against formal education beyond the eighth grade was thus based on their "central religious concepts" calling for a life apart from worldly values and influences.³²

Having completed this series of threshold inquiries the Court then followed the two-step analysis advanced in *Sherbert*, noting that:

[I]n order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of

25. 406 U.S. at 235. The Court has at times struggled with what constitutes a "religion" for purposes of the free exercise clause. See, e.g., *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981) ("religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection").

26. 406 U.S. at 209. Similarly, this criterion is not controversial in the sacred site cases where the parties frequently agree that the Indian religious beliefs asserted are sincerely held. See notes 86-88 *infra* and accompanying text.

27. 406 U.S. at 215.

28. 406 U.S. at 215. The Court believed that this personal preference exception was necessary to prevent individuals from asserting their own moral standards as ways of circumventing the law. 406 U.S. at 215-16. Such concerns date back to *Reynolds v. United States*, 98 U.S. 145, 167 (1878) (an individual could not be allowed to become a "law unto himself").

29. 406 U.S. at 216.

30. 406 U.S. at 216-17, 235. Such an analysis would also seem to favor tribal claims derived from long-standing, organized religious practices.

31. The Court noted that the Amish lifestyle was "inseparable from and a part of the basic tenets of their religion" 406 U.S. at 219.

32. 406 U.S. at 210-11. In the sacred site cases, several courts transformed this "centrality" inquiry into the primary means for determining whether claimants' religious practices had been burdened by government development. See notes 88-125 *infra* and accompanying text.

a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.³³

Applying this analysis, the Court found that since the compulsory education statute exposed Amish children to worldly influences, attitudes, and goals that contravened their beliefs, and since it inhibited the adolescent's integration into the community, it imposed a severe burden on defendants' religious practices.³⁴

In addition, the asserted state interest in the compulsory education system did not override the burden on defendants' religious practices. While conceding that providing public schools ranked at the "very apex" of state functions,³⁵ the Court held that the two chief goals of the education system — preparing persons for political participation and promoting self-reliance — were just as readily satisfied by the Amish mode of education, so that granting defendants an exemption would not undermine these goals.³⁶

II. EARLIER CASES ADDRESSING INDIAN RELIGIOUS CLAIMS

Free exercise claims asserted by American Indians in other settings have arisen from such matters as the unlawful taking and transportation of moose,³⁷ a prisoner wearing his hair in a traditional Indian style,³⁸ and the Native American Church's use of peyote in religious ceremonies.³⁹ The courts in these earlier cases were among the first to

33. 406 U.S. at 214. Moreover, as in *Sherbert*, the state had to demonstrate that its interests could not be served by less restrictive means. 406 U.S. at 235-36.

34. 406 U.S. at 217-18. Describing this burden on defendants' practices, the Court added that the compulsory school attendance law posed the "very real threat of undermining the Amish community and religious practice as they exist today . . ." 406 U.S. at 218.

35. 406 U.S. at 213.

36. 406 U.S. at 221-23. Significantly, the Court evaluated the value of the Amish education system from the practitioners' viewpoint:

"It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith."

406 U.S. at 222. Part IV of this Note argues that a similar perspective is required for proper consideration of the sacred site claims. See notes 206-31 *infra* and accompanying text.

37. *Frank v. State*, 604 P.2d 1068 (Alaska 1979).

38. *Teterud v. Burns*, 522 F.2d 357 (8th Cir. 1975).

39. Some courts have permitted the use of peyote in Indian religious ceremonies. See *Native Am. Church of New York v. United States*, 468 F. Supp. 1247 (S.D.N.Y. 1979), *affd. mem.*, 633 F.2d 205 (2d Cir. 1980); *State v. Whittingham*, 19 Ariz. App. 27, 504 P.2d 950 (1973), *cert. denied*, 417 U.S. 946 (1974); *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964); *In re Grady*, 61 Cal. 2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964); *Whitehorn v. State*, 561 P.2d 539 (Okla. Crim. App. 1977); *but see State v. Soto*, 21 Or. App. 794, 537 P.2d 142 (1975) (prohibiting use of peyote), *cert. denied*, 424 U.S. 955 (1976). See generally Comment, *Brave New World Revisited: Fifteen Years of Chemical Sacraments*, 1980 WIS. L. REV. 879 [hereinafter Note, *Chemical Sacraments*].

apply the approach developed in *Sherbert* and *Yoder* to issues involving Indian religions, and their analysis provides a useful model for analyzing the sacred site cases.⁴⁰ This section focuses on these cases' treatment of key aspects of the free exercise analysis — the role of threshold criteria, the proper relationship between the centrality inquiry and the burden requirement, and the balancing of the respective interests of Indians and government.

A. Yoder's Threshold Criteria

The application of *Yoder's* threshold criteria⁴¹ to Indian free exercise cases has proven problematic. For example, courts have found that the requirement that the claimant prove the sincerity of his or her beliefs creates a difficult tension. While this inquiry serves to strain out frivolous claims in which parties seek "to wear the mantle of religious immunity merely as a cloak for illegal activities,"⁴² a court that probes too deeply into the parties' sincerity might violate the established principle that the judiciary should not attempt definitions of orthodoxy.⁴³

Courts have negotiated this tension artfully by restricting the evidence they consider regarding sincerity. In *People v. Woody*,⁴⁴ the leading case addressing the use of peyote in ceremonies of the Native American Church, the court held that the sincerity inquiry was limited to "whether the defendants' belief in Peyotism is honest and in good faith."⁴⁵ This narrowed scope ensured that: "the court makes a factual examination of the bona fides of the belief and does not intrude into the religious issue at all; it does not determine the nature of the belief but the nature of defendants' adherence to it."⁴⁶ This good faith standard was easily satisfied by the Indian defendants in *Woody*, and has proven similarly easy to meet for Indians in many other cases.⁴⁷

40. Several of the sacred site cases referred to these earlier cases, but seem to have misinterpreted their meaning. See notes 175-86 *infra* and accompanying text.

41. Perhaps the most rigorous statement of the threshold criteria occurred in *Frank*, where the court commented that "[t]he free exercise clause may be invoked only where there is a religion involved, only where the conduct in question is religiously based, and only where the claimant is sincere." 604 P.2d at 1071.

42. *Woody*, 61 Cal. 2d at 276, 394 P.2d at 821, 40 Cal. Rptr. at 77.

43. This principle can be traced to the United States Supreme Court decision in *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). See notes 177-79 *infra* and accompanying text.

44. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Repr. 69 (1964).

45. 61 Cal. 2d at 726, 394 P.2d at 820-21, 40 Cal. Rptr. at 76-77; see also *In re Grady*, 61 Cal. 2d 887, 888, 394 P.2d 728, 729, 39 Cal. Rptr. 912, 913 (1964).

46. *Woody*, 61 Cal. 2d at 726, 394 P.2d at 821, 40 Cal. Rptr. at 76-77; see also *State v. Whittingham*, 19 Ariz. App. 27, 31, 504 P.2d 950, 954 (1973), cert. denied, 417 U.S. 946 (1974); *Whitehorn v. State*, 561 P.2d 539, 546 (Okla. Crim. App. 1977).

47. See, e.g., *Teterud v. Burns*, 522 F.2d 357, 361 (8th Cir. 1975) (court based finding of sincerity largely on defendant's statement that if he cut his long hair he "would feel spiritually just dead"); *Frank v. State*, 604 P.2d 1068, 1073 (Alaska 1979) (because the trial court found the defendant to be sincere in his beliefs, "[t]he question of sincerity require[d] no extended discus-

B. *The Centrality Inquiry and the Burden Requirement*

A second issue addressed by courts in these earlier cases concerned the proper function of the centrality inquiry. The courts used the centrality inquiry as a gauge to measure the degree of connection existing between the Indians' practices and their religious beliefs,⁴⁸ and reasoned that those practices which were closely related to beliefs were most worthy of free exercise protection. This analysis was expressed by the shorthand formulation that if a practice was "central" to the Indians' beliefs, then impairments of that practice satisfied *Yoder's* burden requirement.⁴⁹ The courts recognized, however, that terms such as "central" were susceptible to shades of meaning,⁵⁰ which should not divert the court from its primary evaluation of the connection between the practice and the belief.

*Frank v. State*⁵¹ constitutes a noteworthy example of this method of analysis. The defendant in *Frank*, an Athabascan Indian, had taken a moose out of season for use in a religious funeral ceremony, and was charged with violating Alaskan game laws.⁵² The Supreme Court of Alaska held that Frank's conduct was protected by the free exercise clause.⁵³

Performing its burden analysis, the court noted that the religious practice at issue, a funeral potlatch, was the "most important institution in Athabascan life,"⁵⁴ and was always performed soon after death.

sion"); *Woody*, 61 Cal. 2d at 727, 394 P.2d at 821, 40 Cal. Rptr. at 77 ("we encounter no problem as to the bona fide nature of defendants' assertion of the free exercise clause"). But cf. *United States v. Kuch*, 288 F. Supp. 439, 445 (D.D.C. 1968), discussed in Note, *Chemical Sacraments*, *supra* note 39, at 891-96, where the court found that defendant "had totally failed in her burden to establish her alleged religious beliefs" in the Neo-American Church. See also Note, *Chemical Sacraments*, *supra* note 39, at 928-31, where the author points out that courts applying a good faith standard to their sincerity inquiry will have "considerable evidence" available to aid them. The sincerity inquiry was adequately handled similarly by courts in the sacred site cases. See notes 86-87 *infra* and accompanying text.

48. The centrality inquiry played an analogous role in *Yoder*. See notes 31-32 *supra* and accompanying text. In the sacred site cases, the courts carried this inquiry to another level. They focused on the relationship between the site and practice, rather than the relationship between the practice and beliefs. Such an analysis assumed that the land in question had only a derivative value for purposes of the free exercise clause — land was to be protected, if at all, so that the court might protect practices performed thereon. Cf. notes 88-140 *infra* and accompanying text, discussing cases where Indian plaintiffs suggested that the site itself might possess an intrinsic sacredness (that is, a direct connection to beliefs), which alone would warrant free exercise protection.

49. Courts in the sacred site cases, however, did not treat the centrality inquiry merely as a threshold issue in a free exercise claim, but instead transformed the inquiry into the controlling factor in determining whether claimants' practices were burdened. See notes 174-86 *infra* and accompanying text.

50. See, e.g., THE RANDOM HOUSE COLLEGE DICTIONARY 218 (rev. ed. 1975) which states nine different definitions of "central," one of which is "principal; chief; dominant."

51. 604 P.2d 1068 (Alaska 1979).

52. 604 P.2d at 1068-69.

53. 604 P.2d at 1070.

54. 604 P.2d at 1071.

The Athabascan religion dictated that only native foods could be used in the potlatch. Moose was at the "apex"⁵⁵ of these foods; indeed, "[m]oose is the centerpiece of the most important ritual in Athabascan life and is the equivalent of sacred symbols in other religions."⁵⁶ Given the importance of moose to a ceremony so closely connected to defendant's beliefs, the court concluded that the game laws' prohibition constituted a burden on a practice important to Athabascan beliefs, and it thus proceeded to the balancing part of its analysis.⁵⁷

The court carefully articulated the scope of its burden inquiry. The lower court had found that while moose was very desirable, it was not "specifically required"⁵⁸ for the potlatch ceremony; based on this finding, the lower court held that Frank had not been denied his free exercise privileges. The Supreme Court of Alaska explicitly rejected the notion that only practices which were indispensable to the religion might be afforded protection, noting 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."⁵⁹ Thus, the court's characterization of moose as the "centerpiece"⁶⁰ or "cornerstone" of the ritual constituted no more than a description of the significant connection between this practice and Athabascan beliefs, and the terms themselves were not dispositive of the case.⁶¹

As in *Frank*, the defendants in *People v. Woody*⁶² presented strong evidence regarding the importance of the religious practices in question. The court noted that the "cornerstone of the peyote religion" was a ceremony referred to as the "meeting."⁶³ At these ceremonies, "[t]he central event, of course, consists of the use of peyote in quanti-

55. 604 P.2d at 1072.

56. 604 P.2d at 1073.

57. 604 P.2d at 1073. See notes 70-73 *infra* and accompanying text for discussion of the manner in which the court performed the balancing analysis.

58. 604 P.2d at 1069.

59. 604 P.2d at 1072-73. Similarly, in *Teterud v. Burns*, 522 F.2d 357 (8th Cir. 1975), the court held that a prison regulation prohibiting the defendant, a Cree Indian, from wearing long braided hair violated the free exercise clause. In the course of its *Yoder* analysis, the court found that wearing long braided hair was a "tenet of the Indian religion." 522 F.2d at 359. As in *Frank*, the court specifically rejected the notion that defendant had to show that wearing long braided hair was "an absolute tenet of the Indian religion practiced by all Indians." 522 F.2d at 360. See also Note, *Chemical Sacraments*, *supra* note 39, at 927-28, (stressing that the *Teterud* decision did not require any proof of "centrality" of the practice to the Cree beliefs).

60. 604 P.2d at 1073.

61. 604 P.2d at 1071. This analysis parallels *Yoder*, where the Supreme Court used terms such as "central religious concepts" to illustrate the strong connection existing between claimants' religious practices and beliefs. See notes 31-34 *supra* and accompanying text.

62. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

63. 61 Cal. 2d at 720, 394 P.2d at 817, 40 Cal. Rptr. at 73.

ties sufficient to produce an hallucinatory state.”⁶⁴ Not only was the use of peyote highly important to such ceremonies, but the Native American Church viewed peyote as itself “an object of worship.”⁶⁵ The defendants’ practices were thus closely connected, if not actually intertwined, with their religious beliefs. The court concluded that since the regulation prohibited these practices, it placed a burden on them for free exercise purposes.⁶⁶

As in *Frank*, the *Woody* court did not mistake labels for sensitive analysis. In ascertaining whether the threshold criteria were met (and the balancing test thus triggered), it kept its main focus on the nature of the relationship between the practice and the belief. “The test of constitutionality calls for an examination of the degree of abridgment of religious freedom involved in each case.”⁶⁷ Terms such as “central” were merely means of illustrating such relationships and did not themselves constitute the test.⁶⁸

C. Balancing Indian Religious Interests and Government Interests

A third issue considered by courts in the earlier cases concerned the method of performing the balancing analysis mandated by *Sherbert* and *Yoder*. Unlike courts in the sacred site cases, these courts

64. 61 Cal. 2d at 721, 394 P.2d at 817, 40 Cal. Rptr. at 73. Indeed, the court stated that peyote was so important to defendants’ religion that “[t]o forbid the use of peyote is to remove the theological heart of Peyotism.” 61 Cal. 2d at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74.

65. 61 Cal. 2d at 721, 394 P.2d at 817, 40 Cal. Rptr. at 73. The notion that the Navajos’ use of peyote warranted protection in part because of its intrinsic sacredness provides an interesting parallel for the sacred site cases. It might be argued that intrinsic characteristics of the sites themselves may call for their protection, regardless of the quantity of practices carried on at those sites. See generally *Native Am. Church of New York v. United States*, 468 F. Supp. 1247, 1249-51 (S.D.N.Y. 1979), *affid. mem.*, 633 F.2d 205 (2d Cir. 1980).

66. 61 Cal. 2d at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74.

67. 61 Cal. 2d at 725, 394 P.2d at 820, 40 Cal. Rptr. at 76. That this is the proper reading of *Woody* is further evidenced by *In re Grady*, 61 Cal. 2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964), decided by the California Supreme Court on the same day as *Woody*. In *Grady*, petitioner, a non-Indian “peyote preacher” and “way shower,” pleaded guilty to possession of narcotics. He petitioned the court for a writ of habeas corpus, arguing that he had used peyote for religious purposes. The court held that *Woody* meant that “the state may not prohibit the use of peyote in connection with bona fide practice of a religious belief.” It then concluded that if defendant’s beliefs were held in good faith, he would be entitled to free exercise protection, and remanded on the sincerity question. 61 Cal. 2d at 888, 394 P.2d at 729, 39 Cal. Rptr. at 913. As one commentator has noted, “[n]owhere in the opinion did the court question whether peyote was ‘central’ to Grady’s practices. If peyote was used ‘in connection with’ the practice of a religious belief, then that, apparently, was enough.” Note, *Chemical Sacraments*, *supra* note 39, at 889-90. Cf. *State v. Whittingham*, 19 Ariz. App. 27, 31, 504 P.2d 950, 954 (1973), *cert. denied*, 417 U.S. 946 (1974) (in a prosecution under Arizona law for possession of peyote it is a defense if the parties show that peyote “was being used in connection with a bona fide practice of a religious belief; that it was an integral part of the religious exercise; and that it was not used in a manner dangerous to the public health, safety or morals.” The court cites *Grady* for this test, and does not require any further showing of “centrality.”).

68. Courts in the sacred lands context have, however, made a somewhat misleading use of these earlier cases’ burden analysis. See notes 174-86 *infra* and accompanying text.

frequently reached the balancing issue,⁶⁹ and they established a useful framework for evaluating government interests asserted in support of regulations.⁷⁰

First, the courts recognized that under *Sherbert* and *Yoder* only a "compelling state interest" could override an individual's free exercise rights.⁷¹ This high standard meant that many important state interests might nevertheless have to yield to Indian religious claims. For example, in *Frank*, the court noted that in Alaska there was a "very strong interest underlying hunting restrictions."⁷² Yet, the identification of a strong interest in game regulations, and particularly in maintaining the moose population, was not alone dispositive. The case instead turned on the question "whether that [state] interest, or any other, will suffer if an exemption is granted to accommodate the religious practice at issue."⁷³

Similarly, in *Woody*, the court commented that California had a very strong interest in enforcing its narcotic laws, and in ensuring that fraudulent claims of religious protection did not undermine those laws.⁷⁴ Yet these important state interests also had to yield to the Indian defendants' sincerely held religious claims.⁷⁵ This singling out of Indians for special protection creates a striking counterpoint to the

69. See, e.g., *Teterud v. Burns*, 522 F.2d 357, 361 (8th Cir. 1975); *Frank v. State*, 604 P.2d 1068, 1073 (Alaska 1979); *Woody*, 61 Cal. 2d at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74.

70. Much of their treatment of the religious interests involved was discussed previously. See notes 37-68 *supra* and accompanying text. Moreover, some courts perceived Indian religious interests as part of larger social issues regarding tolerance. In *Woody*, the court concluded:

We know that some will urge that it is more important to subserve the rigorous enforcement of the narcotics laws than to carve out of them an exception for a few believers in a strange faith. . . . [Yet] [t]he 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 who honestly practiced an old religion in using peyote one night at a meeting in a desert hogan near Needles, California.

61 Cal. 2d at 727-28, 394 P.2d at 821-22, 40 Cal. Rptr. at 77-78.

71. See, e.g., *Frank*, 604 P.2d at 1070; *State v. Whittingham*, 19 Ariz. App. 27, 29, 504 P.2d 950, 952 (1973), *cert. denied*, 417 U.S. 946 (1974); *Woody*, 61 Cal. 2d at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74; *Whitehorn v. State*, 561 P.2d 539, 554 (Okla. Crim. App. 1977). Indeed, one explanation for the failure of the Oregon Court of Appeals to follow the *Woody* exception for peyote use seems to be the court's misunderstanding of the "compelling interest" requirement. See *State v. Soto*, 21 Or. App. 794, 797-98, 537 P.2d 142, 143-44 (1975), *cert. denied*, 424 U.S. 955 (1976). See also Note, *Chemical Sacraments*, *supra* note 39, at 905 n.130.

72. 604 P.2d at 1073.

73. 604 P.2d at 1073 (footnote omitted).

74. 61 Cal. 2d at 723, 394 P.2d at 818-19, 40 Cal. Rptr. at 74-75.

75. Significantly, the use of peyote by the Native American Church is the only major exception to the drug laws that state courts and legislatures have recognized. New Mexico, Montana, and Iowa have recognized the exception by statute, while California, Arizona, and Oklahoma have recognized the exception by judicial decision. See *Whittingham*, 19 Ariz. App. at 29, 504 P.2d at 952 n.1; Note, *Chemical Sacraments*, *supra* note 39, at 900-01 nn.111-12. A similar exception to the Federal Controlled Substance Act has been provided by regulation, see 21 C.F.R. § 1307.31 (1986) ("[t]he listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church").

sacred site cases, where most of the courts denied Indian religious claims without even considering the merit of the state interests involved.⁷⁶

Second, in contrast to courts in the sacred site cases, the earlier courts followed closely *Yoder's* admonition that the availability of less restrictive alternatives be considered in the balancing analysis. In *Teterud v. Burns*,⁷⁷ the government argued that a series of interests in penal administration justified a regulation limiting prisoners' hair length. The court rejected that claim, noting that less restrictive alternatives existed. For example, the government's interests in sanitary food preparation and the careful and safe operation of machinery could be served by having prisoners with long hair wear hair nets; its interest in ready identification of prisoners could be served by rephotographing those with long hair; and its interest in preventing the hiding of contraband in long hair could adequately be served through normal searches of the prisoners.⁷⁸

Third, the courts mandated that the asserted state interests be articulated specifically — vague fears or concerns were insufficient to override defendants' free exercise claims. In *Frank v. State*, for example, the state argued that allowing Athabascans to take moose out of season would trigger "widespread civil disobedience"⁷⁹ culminating in a pattern of "poaching and creek robbing,"⁸⁰ which necessitated that no exception be granted defendants. The court rejected this argument completely, holding that "[i]nterests which justify limitations on religious practices must be far more definite than these."⁸¹ In short, courts in the earlier cases uniformly placed far greater emphasis on having the state articulate its interests concretely, with attention to less restrictive alternatives, than do their counterparts in the sacred site cases.⁸²

III. THE SACRED SITE CASES

A. *Free Exercise and Indian Sacred Sites*

This section of the Note considers judicial application of the *Yoder* analysis to cases in which American Indian plaintiffs have sought free exercise clause protection for part or all of a site associated with their

76. See notes 88-140 *infra* and accompanying text.

77. 522 F.2d 357 (8th Cir. 1975).

78. 522 F.2d at 361.

79. 604 P.2d 1068, 1074 (Alaska 1979).

80. 604 P.2d at 1074.

81. 604 P.2d at 1074. The court added that "[j]ustifications founded only on fear and apprehension are insufficient to overcome rights asserted under the First Amendment." 604 P.2d at 1074 (quoting *Teterud v. Burns*, 522 F.2d 357, 361-62 (8th Cir. 1975)); see also *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 508 (1969).

82. See notes 88-154 *infra* and accompanying text.

religious practices and beliefs.⁸³ The courts have generally denied plaintiffs relief. This Note argues that in doing so, they have applied the *Yoder* analysis to the context of Indian religions in an inappropriate manner. Specifically, the courts have overstated the role of the threshold centrality inquiry, thus often unfairly denying to Indian plaintiffs the protection afforded by the *Sherbert/Yoder* balancing test.⁸⁴ Moreover, the few courts that have reached the balancing portion of the analysis often have not accorded proper regard to the Indians' religious interests.⁸⁵

1. *Yoder's Threshold Criteria*

In all of the cases where they sought free exercise protection of sacred sites, American Indian plaintiffs readily demonstrated that they followed an actual religion in which they sincerely believed.⁸⁶ Similarly, plaintiffs were often able to show that practices performed at the sites were based upon their religious beliefs, as opposed to mere cultural or historical concerns.⁸⁷ However, in these cases the courts erroneously transformed *Yoder's* threshold inquiry regarding the importance or centrality of the claimant's practices to his religious beliefs into the determinative aspect of the burden analysis.

2. *Burdens on Sites and Practices*

a. Centrality. One of the most influential cases involving the relationship between American Indian sacred sites and the free exercise clause is *Sequoyah v. Tennessee Valley Authority*.⁸⁸ In *Sequoyah*, three individual Cherokee Indians and two bands of the Cherokee Nation brought a class action in which they sought to enjoin the completion

83. See note 6 *supra*.

84. See notes 90-128, 174-86 *infra* and accompanying text.

85. See notes 144-57, 187-95 *infra* and accompanying text.

86. See, e.g., *Northwest Indian Cemetery Protective Assn. v. Peterson*, 764 F.2d 581, 586 (9th Cir. 1985) ("[t]he government does not challenge the sincerity of the Indians' beliefs nor their religious character"), *cert. granted sub nom.* *Lyng v. Northwest Indian Cemetery Protective Assn.*, 107 S. Ct. 1971 (1987); *Wilson v. Block*, 708 F.2d 735, 740 (D.C. Cir.) (parties "stipulated that the plaintiffs' beliefs are religious and are sincerely held"), *cert. denied*, 464 U.S. 956 (1983); *Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159, 1163 (6th Cir.) ("[t]he Cherokees have a religion within the meaning of the Constitution and the sincerity of the adherence of individual plaintiffs to that religion is not questioned"), *cert. denied*, 449 U.S. 953 (1980); *Crow v. Gullet*, 541 F. Supp. 785, 790 (D.S.D. 1982) ("there is no dispute that plaintiffs' practices at Bear Butte are based upon a system of belief that is religious and is sincerely held"), *aff'd.*, 706 F.2d 856 (8th Cir.), *cert. denied*, 464 U.S. 977 (1983).

87. See *Wilson*, 708 F.2d at 740; *Northwest Indian Cemetery*, 565 F. Supp. 586, 594 (N.D. Cal. 1983), *modified*, 764 F.2d 581 (9th Cir. 1985), *cert. granted sub nom.* *Lyng v. Northwest Indian Cemetery Protective Assn.*, 107 S. Ct. 1971 (1987). In contrast, in *Sequoyah*, 620 F.2d at 1163, and *Inupiat Community of the Arctic Slope v. United States*, 548 F. Supp. 182, 188-89 (D. Alaska 1982), *aff'd.*, 746 F.2d 570 (9th Cir. 1984), *cert. denied*, 106 S. Ct. 68 (1985), both courts suggested that some of the Indian plaintiffs advanced cultural and not religious concerns.

88. 620 F.2d 1159 (6th Cir.), *aff'g.*, 480 F. Supp. 608 (E.D. Tenn. 1979), *cert. denied*, 449 U.S. 953 (1980).

and flooding of the Tellico Dam on the Little Tennessee River.⁸⁹ Plaintiffs argued that land along the Little Tennessee River that would be flooded by the Tellico Reservoir was sacred to their religion.⁹⁰ The land was the location of the ancient village of Chota, which had served as a capital, sanctuary, and as the religious "birthplace of the Cherokee."⁹¹

Not only did the land possess intrinsically sacred qualities, but it also constituted plaintiffs' "connection with the Great Spirit."⁹² In addition, the Cherokees felt that the beliefs and knowledge of their ancestors had been placed into the land where they were buried and that current medicine men obtained their powers by communing with these ancestors.⁹³ Thus, plaintiffs argued that the TVA's proposed flooding of the land violated their right to free exercise by destroying the sacred and holy character of the area, and denying them the access necessary for pilgrimages and collection of medicines.⁹⁴

The Court of Appeals for the Sixth Circuit affirmed the district court's denial of an injunction. In applying the *Yoder* analysis to the sacred site context, the Sixth Circuit majority treated the centrality inquiry as the exclusive means of gauging whether *Yoder's* burden requirement had been satisfied. Finding that plaintiffs' affidavits failed to establish the "centrality or indispensability of the Little Tennessee Valley to Cherokee religious observances,"⁹⁵ the majority ruled that

89. 620 F.2d at 1160. For discussion and description of the case, see generally Note, *Native Americans' Access to Religious Sites: Underprotected Under the Free Exercise Clause?*, 26 B.C. L. REV. 463, 475-81 (1985) [hereinafter Note, *Native Americans' Access to Religious Sites*]; Note, *Native American Free Exercise Rights to the Use of Public Lands*, 63 B.U. L. REV. 141, 143-45, 161-63 (1983) [hereinafter Note, *Native American Free Exercise Rights*]; Note, *Indian Worship v. Government Development: A New Breed of Religion Cases*, 1984 UTAH L. REV. 313, 323-24 [hereinafter Note, *Indian Worship v. Government Development*]; Note, *Indian Religious Freedom and Government Development of Public Lands*, 94 YALE L.J. 1447, 1461 n.65 (1985) [hereinafter Note, *Indian Religious Freedom*].

90. *Sequoyah*, 620 F.2d at 1160. Plaintiffs sought protection for the sacred character of the region itself, in addition to protecting practices they performed there. As one commentator noted, "[t]he Cherokee practice their religion, in part, by worshipping the valley itself; they believe that prayer to and at sacred sites facilitates direct communication with the supernatural world." Note, *Native American Free Exercise Rights*, *supra* note 89, at 161 (footnote omitted).

91. 620 F.2d at 1162. One affiant described Chota as "analogous to a Cherokee Jerusalem." Note, *Native American Free Exercise Rights*, *supra* note 89, at 161 n.112.

92. 620 F.2d at 1162. The Cherokee made pilgrimages to the site, during which they recounted the legends and events associated with the site so as to preserve and maintain the content of their religion. One anthropologist commented that "[v]isiting Chota is analogous to reading a Christian bible"; thus, attempting to understand the Cherokee religion in the absence of access to sacred sites "would be like attempting to understand or practice Judaism or Christianity without the Book of Genesis." Note, *Native American Free Exercise Rights*, *supra* note 89, at 162 n.115.

93. 620 F.2d at 1162. Indeed, the court at least partly recognized the special role of the site in Cherokee practices and beliefs, noting that "because of their beliefs respecting the transmission of knowledge and spiritual powers to succeeding generations, particular geographic locations figure more prominently in Indian religion and culture than in those of most other people." 620 F.2d at 1163.

94. 620 F.2d at 1160.

95. 620 F.2d at 1164. The term "central" is susceptible of different shades of meaning. By

the plaintiffs had “fallen short of demonstrating that worship at the particular geographic location in question is inseparable from the way of life (*Yoder*), the cornerstone of their religious observance (*Frank*), or plays the central role in their religious ceremonies and practices (*Woody*).”⁹⁶ Applying this standard, the majority concluded that since the land was not central to the Cherokee practices, the TVA’s flooding of the land did not amount to a constitutional burden on plaintiffs’ practices and beliefs.⁹⁷ Because it found no burden on plaintiffs’ practices, the majority did not reach the balancing part of the *Yoder* test.⁹⁸

The majority also questioned whether plaintiffs’ activities at the site were based on religious, as opposed to other, concerns. It suggested that plaintiffs sought to protect Chota primarily for historical and cultural reasons, which constituted a mere “personal preference”⁹⁹ lying outside the parameters of the free exercise clause.¹⁰⁰ Under *Yoder*, the court’s finding that the practices associated with the site were not “rooted in religious belief”¹⁰¹ would alone be sufficient to dispose of the case, and the court’s application of the centrality standard could thus be viewed as an alternative holding.¹⁰²

modifying “central” with the term “indispensable” the court thus made its standard stricter, indicating that only unique sites might even have a chance at some manner of free exercise protection. See note 50 *supra* and accompanying text.

96. 620 F.2d at 1164 (citations omitted).

97. 620 F.2d at 1165. Part II of this Note argues that *Frank v. State* and *People v. Woody* do not support such a strict centrality standard. See notes 51-68 *supra* and accompanying text. It seems that “[t]he centrality requirement singlehandedly defeated the Cherokee claims.” Note, *Indian Worship v. Government Development*, *supra* note 89, at 328. The dissent argued that since the court had not yet enunciated its centrality standard at the time the complaint and affidavits were filed, the case should have been remanded to allow plaintiffs to offer further evidence concerning the connection between the site and their religious practices and beliefs. 620 F.2d at 1165 (Merritt, J., dissenting). Cf. Note, *Native American Free Exercise Rights*, *supra* note 89, at 165 (contending that the anthropological evidence the *Sequoyah* plaintiffs had already introduced should have satisfied the court’s centrality standard).

98. 620 F.2d at 1165.

99. 620 F.2d at 1164. This term was initially used by the United States Supreme Court in *Yoder* to describe personal and philosophical beliefs such as those of Thoreau, which were not protected by the free exercise clause. *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972). See notes 27-28 *supra* and accompanying text.

100. 620 F.2d at 1164-65.

101. *Yoder*, 406 U.S. at 215. See notes 27-30 *supra* and accompanying text. See also Note, *Native American Free Exercise Rights*, *supra* note 89, at 144 n.23.

102. Several other factors seem to have driven the *Sequoyah* court’s denial of the Cherokee claims. Since 1966 the federal government had spent \$111,000,000 on the Tellico Dam project. *Sequoyah v. Tennessee Valley Auth.*, 480 F. Supp. 608, 610, *aff’d*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980). Moreover, in 1979 Congress had directed that the project be completed notwithstanding the provisions of “any other law.” 620 F.2d at 1161. Despite its centrality rhetoric, then, the court may well have engaged in an implicit form of balancing in which it determined that the “congressional command” that the project be completed established a compelling governmental interest. 620 F.2d at 1161.

In addition, the court emphasized plaintiffs’ delay in bringing their claims. Although plaintiffs knew about the project since 1965, this suit had not been filed until “the eve of its [the project’s] completion.” 480 F. Supp. at 610. See also 620 F.2d at 1162. Although the court did

Several courts have applied the centrality standard articulated in *Sequoyah*.¹⁰³ For example, in *Wilson v. Block*,¹⁰⁴ the Hopi Indian Tribe, the Navajo Medicinemen's Association, and individual Navajos challenged the federal government's decision permitting private interests to expand the government-owned Snow Bowl ski facilities located on the San Francisco Peaks.¹⁰⁵ Plaintiffs sought the phased removal of all artificial structures on the Peaks, or, at a minimum, an injunction barring further development of the area.¹⁰⁶

Plaintiffs presented free exercise claims similar to those advanced in *Sequoyah*. The Navajos argued that the Peaks possessed intrinsically sacred characteristics. They believed that specific Navajo gods resided on the Peaks.¹⁰⁷ Indeed, they considered the mountains themselves as composing the body of a living god, "with various peaks forming the head, shoulders, and knees of a body reclining and facing to the east, while the trees, plants, rocks, and earth form the skin."¹⁰⁸ In addition, the Navajos performed religious ceremonies and gathered ceremonial objects and herbs on the Peaks.¹⁰⁹

Similarly, the Hopis believed that the Peaks were sacred because emissaries of the Creator, termed "Kachinas," resided on them for six months each year. These emissaries provided rainfall and helped sus-

not base its holding on any doctrine of repose, such as laches, plaintiffs' delay may well have made it easier for the court to deny them relief. Part IV of this Note discusses the need for American Indian claimants to bring suits seeking to protect sacred sites as quickly as possible. See notes 230-31 *infra* and accompanying text.

103. See, e.g., *Wilson v. Block*, 708 F.2d 735, 743-45 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983); *Northwest Indian Cemetery Protective Assn. v. Peterson*, 565 F. Supp. 586 (N.D. Cal. 1983), *modified*, 764 F.2d 581, 585-86 (9th Cir. 1985), *cert. granted sub nom. Lyng v. Northwest Indian Cemetery Protective Assn.*, 107 S. Ct. 1971 (1987); *Inupiat Community of the Arctic Slope v. United States*, 548 F. Supp. 182 (D. Alaska 1982), *aff'd.*, 746 F.2d 570 (9th Cir. 1984), *cert. denied*, 106 S. Ct. 68 (1985). In *Inupiat*, Eskimo plaintiffs sought to quiet title to the area lying from three to sixty-five miles offshore in the Beaufort and Chukchi Seas of the Arctic Ocean. 548 F. Supp. at 184-85. Plaintiffs alleged, among other things, that federal government leasing in the region interfered with practice of their religion on the superjacent sea ice. The court rejected their free exercise claims, holding that since plaintiffs failed to show the significance of the region to their religion, they had not satisfied *Yoder's* burden requirement. 548 F. Supp. at 188-89. The court supported this decision by relying on the *Sequoyah* centrality standard. 548 F. Supp. at 189 n.4. See also Note, *Native Americans' Access to Religious Sites*, *supra* note 89, at 476-77 (suggesting that the court may also have regarded plaintiffs' claims as "too generalized" to be based on religious, as opposed to other, interests).

104. 708 F.2d 735 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983).

105. 708 F.2d at 738. For discussion and description of the case, see generally Note, *Native Americans' Access to Religious Sites*, *supra* note 89, at 485-91; Note, *Indian Religious Freedom*, *supra* note 89, at 1455, nn.33-34, 1460 n.59; Note, *Indian Worship v. Government Development*, *supra* note 89, at 322, nn.66 & 68, 330-31.

106. 708 F.2d at 740.

107. 708 F.2d at 738. For further discussion of Navajo beliefs and their relationship to sites, see notes 141-54 *infra* and accompanying text.

108. 708 F.2d at 738.

109. 708 F.2d at 738, 740.

tain the villages.¹¹⁰ The Hopis had built many shrines on the Peaks and, like the Navajos, they performed ceremonies and collected sacred objects and herbs there.¹¹¹ Plaintiffs argued that the proposed expansion of the 777 acre Snow Bowl ski area violated their free exercise rights by diminishing the intrinsic sacredness of the area, insulting their deities, and interfering with their ability to pray and conduct ceremonies on the Peaks.¹¹²

The Court of Appeals for the District of Columbia Circuit affirmed the district court's grant of summary judgment in favor of the government. Relying on the *Sequoyah* analysis, the court articulated the centrality standard in an even more extreme form than in the earlier case: "We thus hold that plaintiffs seeking to restrict government land use in the name of religious freedom must, at a minimum, demonstrate that the government's proposed land use would impair a religious practice that could not be performed at any other site."¹¹³ The court stressed that this version of the centrality standard was only a minimum, and that satisfying it did not necessarily demonstrate a burden on free exercise.¹¹⁴

Applying this standard, the court held that plaintiffs had failed to show that the small region of the Peaks encompassed by the Snow Bowl was central or indispensable to their religious practices. It noted that plaintiffs would still have free access to the remainder of the Peaks for collecting herbs and objects, and performing ceremonies.¹¹⁵ As in *Sequoyah*, the court concluded that since the Snow Bowl was not central to plaintiffs' practices, impairment of that site did not constitute a burden for free exercise purposes. Since it found no burden on

110. 708 F.2d at 738. Thus, as in *Sequoyah*, plaintiffs argued that the site itself had sacred qualities, apart from the activities conducted there.

111. 708 F.2d at 738.

112. 708 F.2d at 740.

113. 708 F.2d at 744 (footnote omitted).

114. 708 F.2d at 744 n.5. The court's indication that satisfying its strict centrality standard still might not warrant a finding of a burden on free exercise suggests that free exercise protection would be available to few, if any, sites held sacred by American Indians or other groups.

The notion that a site is not deserving of protection if the religious practices can be performed at other places is similar to the position that elements of "mainstream" religious practices are not entitled to protection if substitutes for them exist. The *Wilson* court's reasoning thus implies that the government could regulate or prohibit Christian practitioners' use of wine, wafer, and other sacraments in their ceremonies without burdening those practices, since substitute products could be used. Because no burden would be said to exist, the government would not even have to assert any interests to justify the regulation or prohibition.

115. 708 F.2d at 744. In narrowing its focus solely to the importance of the connection between the Snow Bowl area and plaintiffs' religious practices and beliefs, the court rejected plaintiffs' assertion that "the mountain as a whole, and not just parts thereof, is considered sacred." 708 F.2d at 744. This analysis seems to conflict with the court's earlier attempt to describe carefully the nature of plaintiffs' practices and beliefs. See notes 105-11 *supra* and accompanying text. Indeed, the court seemed to be indicating that although the Navajos regarded the entire region as the body of a living god, the government could cut off part of that body without in any way interfering with the Navajo religion.

plaintiffs' religious beliefs or practices the court did not reach the balancing part of the *Yoder* test and the question whether "ski area expansion is a compelling governmental interest."¹¹⁶

Moreover, the court rejected plaintiffs' challenges to its use of the centrality standard. Plaintiffs contended that the centrality standard was an overly restrictive way of measuring whether a burden existed on their religious practices and beliefs. They asserted that *Sherbert v. Verner*¹¹⁷ and *Thomas v. Review Board*,¹¹⁸ and not *Sequoyah*, established the proper standard for determining whether there was an indirect burden on religious practices and beliefs.¹¹⁹ Noting that the proposed expansion of the ski facilities "effectively prohibits the practice of their religions," plaintiffs contended that the burden thus created was "greater than that of the practitioners in *Sherbert* and *Thomas*, who . . . could have continued to practice their beliefs simply by choosing to forego government benefits."¹²⁰ The court, however, declined to extend *Sherbert* and *Thomas* beyond their specific factual situations, and dismissed the argument.¹²¹

Plaintiffs further contended that the centrality standard, as stated in *Sequoyah* and adopted by the court, violated the principle that courts are not to inquire into the orthodoxy of a claimant's religious beliefs or practices.¹²² The court countered that the *Sequoyah* standard did not mandate judicial consideration of religious doctrines but

116. 708 F.2d at 745. In another portion of the opinion the court also held that expansion of the ski facilities did not burden plaintiffs' freedom to hold certain beliefs. It rejected plaintiffs' argument that the desecration of the site would force them to modify their religious doctrine, thereby creating a burden on free exercise. 708 F.2d at 740-42.

117. 374 U.S. 398 (1963). See notes 14-21 *supra* and accompanying text.

118. 450 U.S. 707 (1981) (holding that the board had impermissibly burdened Thomas' free exercise rights by compelling him to choose between the exercise of his rights and an otherwise available public benefit).

119. *Wilson*, 708 F.2d at 743. In *Sherbert* and *Thomas* the Supreme Court held that the distinction between direct and indirect burdens on religious practices was irrelevant for purposes of free exercise analysis. See notes 18-19 *supra* and accompanying text.

120. 708 F.2d at 743.

121. 708 F.2d at 743. In refusing to extend *Sherbert* and *Thomas* beyond the situation where the government attempted to condition benefits on a claimant's decision to follow or forego a religious practice or belief, the court commented that "[t]hose cases did not purport to create a benchmark against which to test all indirect burden claims." 708 F.2d at 743. This reasoning is misleading since many mainstream free exercise cases as well as Indian religion cases treat *Sherbert* and *Thomas*, along with *Yoder*, as leading authorities. One commentator has suggested that courts like *Wilson* have hesitated to extend free exercise protection beyond the two traditional categories — where plaintiffs "claimed that compliance with a law requires them to violate a tenet of their religion, or claimants have alleged that they will be denied government benefits unless they modify their religious practice." Note, *Indian Worship v. Government Development*, *supra* at note 89, at 313 (footnote omitted). See also Note, *Indian Religious Freedom*, *supra* note 89, at 1460 n.59 (traditional categories of analysis are "inapplicable to Indian belief, since no benefit in the commonly understood sense of the terms flows from government's leaving sacred sites on public lands undisturbed").

122. 708 F.2d at 743. The principle against judicial determinations of orthodoxy is considered more fully at notes 177-79 *infra*.

rather focused “solely upon the importance of the geographic site in question to the practice of the plaintiffs’ religion.”¹²³ The court reasoned that if the site were central to the practice, it might warrant protection even if the practice itself was not central to plaintiffs’ beliefs.¹²⁴ It thus denied this challenge to the centrality standard.¹²⁵

b. *Coercive effects.* In *Crow v. Gullet*,¹²⁶ the court articulated an alternative means of determining whether a burden on claimants’ practices and beliefs existed. In *Crow*, traditional chiefs and spiritual leaders of the Tsistsistas Nation and the Lakota Nation challenged the state’s construction of roads, bridges, parking lots and similar access facilities at Bear Butte.¹²⁷ Plaintiffs sought an injunction halting the construction and ordering the removal of artificial structures near the site.¹²⁸

Plaintiffs introduced numerous affidavits and several witnesses to establish the site’s religious significance. The Lakota asserted that Bear Butte was intrinsically sacred, as it was the place where the tribe “originally met with the Great Spirit.”¹²⁹ In addition, the region was “the most significant site of Lakota religious ceremonies,”¹³⁰ and the deeply religious “Vision Quest”¹³¹ was performed there. Similarly, the Tsistsistas made pilgrimages to and performed religious ceremonies at

123. 708 F.2d at 743.

124. 708 F.2d at 743. This argument is also misleading. Regardless of the scrutiny made of claimants’ practices, an inquiry into the importance of a site to those practices may still lead to judicial evaluations of the claimants’ orthodoxies.

125. 708 F.2d at 743. The court also rejected claims based on the American Indian Religious Freedom Act, as originally enacted, Pub. L. No. 95-341, 92 Stat. 469 (1978) (current version at 42 U.S.C. § 1996 (1982)). 708 F.2d at 747. See notes 197-201 *infra* and accompanying text.

126. 541 F. Supp. 785 (D.S.D. 1982), *aff’d*, 706 F.2d 856 (8th Cir.) (per curiam), *cert. denied*, 464 U.S. 977 (1983). The reasoning and analysis of the case is contained in the district court opinion; the eighth circuit only entered a brief, *per curiam* opinion.

127. 541 F. Supp. at 787-88. Plaintiffs challenged the state’s restriction of their access to the Butte during the construction period. 541 F. Supp. at 788, 792. This allegation is considered more fully at note 142 *infra*. Plaintiffs also contended that tourists visiting the Butte violated the sanctity of their pilgrimages and ceremonies. They argued that the state impinged on their free exercise rights by permitting intrusions by the tourists. The court, however, rejected this claim based on an establishment clause analysis. 541 F. Supp. at 788, 791-92.

128. 541 F. Supp. at 788. Plaintiffs also sought declaratory relief and damages based on 42 U.S.C. § 1983. For discussion and description of the case, see generally Note, *Native Americans’ Access to Religious Sites*, *supra* note 89, at 483-85, 490-91; Note, *Indian Worship v. Government Development*, *supra* note 89, at 325-26.

129. 541 F. Supp. at 788. This assertion that the site was intrinsically sacred and holy in character was analogous to claims made in *Sequoyah* and *Wilson*. See notes 90-91 and 107-08 *supra* and accompanying text.

130. 541 F. Supp. at 788.

131. 541 F. Supp. at 788. The Vision Quest was “one of the seven sacred ceremonies of the Lakota people.” During the ceremony, the practitioner fasted, climbed to a solitary point on the Butte, sang aloud, and prayed to the Great Spirit. 541 F. Supp. at 788. See also Note, *Indian Religious Freedom*, *supra* note 89, at 1456 n.41 (during the Vision Quest the worshipper received “an all-important vision from a personal guardian spirit. This vision will guide the recipient throughout his or her life, and is often an essential part of the transition from youth to adulthood”).

the site.¹³² Plaintiffs contended that the construction violated their free exercise rights by desecrating the sacred area at the foot of the Butte, and diminishing the "power of the Butte as a ceremonial ground."¹³³

The district court denied the claims, holding that plaintiffs had failed to establish that the construction placed an improper burden on their free exercise rights.¹³⁴ In performing its burden analysis, however, the court did not use a centrality standard. Rather, it held that to demonstrate a burden on their practices plaintiffs had to "show the coercive effect of the [restriction] as it operates against the practice of their religion."¹³⁵ In prior cases this coercive effect standard had been satisfied in two types of situations: where, as in *Yoder*, the government regulation forced practitioners to violate the tenets of their religion, and where, as in *Sherbert* and *Thomas*, the government conditioned receipt of public benefits on claimants' foregoing their religious practices.¹³⁶ The court noted that the Indian plaintiffs might meet the coercive effect standard by showing that their situation was analogous to those in *Yoder* or *Sherbert*; alternatively, plaintiffs could satisfy the standard by demonstrating that "their conduct in the course of exercising their beliefs has been unduly restricted."¹³⁷

132. 541 F. Supp. at 788.

133. 541 F. Supp. at 788, 791.

134. 541 F. Supp. at 791. The court likewise denied the remainder of plaintiffs' claims on various grounds, granting summary judgment in favor of the defendants. 541 F. Supp. at 794.

135. 541 F. Supp. at 790 (quoting *School Dist. of Abington v. Schempp*, 374 U.S. 203, 223 (1963)).

136. 541 F. Supp. at 790. *See also* *Thomas v. Review Bd.*, 450 U.S. 707, 716-18 (1981) ("[W]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists."); *Wisconsin v. Yoder*, 406 U.S. 205, 218-19 (1972) (holding compulsory state education impermissibly burdened the Amish method of preparing for the Amish lifestyle which is integral to their religious beliefs and practices); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("[i]t is too late in the day to doubt that liberties of religion . . . may be infringed by the denial of or placing of conditions upon a benefit or privilege"); *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947) (holding that the state could not exclude members of a religious faith, "because of their faith or lack of it, from receiving the benefits of public welfare legislation") (emphasis in original). One commentator has noted that these situations demark the "two contexts in which religion cases traditionally have arisen." Note, *Indian Worship v. Government Development*, *supra* note 89, at 325.

137. 541 F. Supp. at 790-91. Although the limited evidence presented in *Crow* may have constricted the court's application of the coercive effect standard, it should be noted that this standard is potentially more flexible than is the centrality approach used by courts in *Sequoyah* and *Wilson*. Indeed, the coercive effect standard might well be applied so that it focused on whether plaintiffs' performance of their ceremonies at a given site had been interfered with in some obvious manner. This contrasts with the centrality standard, which confronts plaintiffs with the difficult task of showing that the site was unique to their religious practices. *See* notes 173-86 *infra* and accompanying text. *Cf.* Note, *Native Americans' Access to Religious Sites*, *supra* note 89, at 490-91 (arguing that "in looking for a burden before applying the balancing test, the [*Crow*] court gave a broad reading to 'burden'" and concluding that "[g]iven the facts of the case, the finding of the *Crow* court was reasonable"). *But cf.* Note, *Indian Worship v. Government Development*, *supra* note 89, at 330-31 (arguing that in applying the coercive effect stan-

The court held, however, that the construction did not have a coercive effect on plaintiffs' religious practices. It stressed that plaintiffs had not sufficiently elaborated how particular Lakota and Tsistsistas ceremonies carried out on the Butte were impaired by building of roads and bridges at the foot of the Butte.¹³⁸ Indeed, there was some indication that many Indians themselves did not think that the construction burdened their practices — the state park manager testified that "numerous Indian religious campers requested that the State provide safer and better access to the ceremonial grounds."¹³⁹ Courts other than *Crow* have also employed a coercive effects analysis. However, the standard has not yet gained unequivocal acceptance.¹⁴⁰

3. *Balancing Indian Religious Interests Against Government Development Interests*

*Badoni v. Higginson*¹⁴¹ was one of the few cases in which a court ruling on sacred site issues reached the balancing part of the *Yoder* analysis.¹⁴² In *Badoni*, individual Navajos, several Navajo medicine

dard, courts such as the one in *Crow* focused too greatly on the intent as opposed to the result of the government regulations).

138. 541 F. Supp. at 791. By focusing on the impairment of specific ceremonies, the court implicitly rejected any argument that the Butte as a whole was sacred and that an infringement of any portion of the site constituted a burden on free exercise.

139. 541 F. Supp. at 791. Moreover, the court seemed to be strongly influenced by the state's earlier attempts to accommodate the Indians' religious practices. For example, religious campers had been granted a special area apart from that used by the general public. Religious campers could acquire permits to stay on the Butte longer than other campers, and they did not have to follow any established platforms or trails at the site. 541 F. Supp. at 794.

140. See, e.g., *Badoni v. Higginson*, 455 F. Supp. 641 (D. Utah 1977), *aff'd.*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981). As in *Crow*, the appellate court in *Badoni* articulated a coercive effect standard based on language in *School Dist. of Abington v. Schempp*, 374 U.S. 203 (1963). Since the Tenth Circuit reached the balancing part of its analysis without deciding whether government action had infringed on plaintiffs' free exercise rights, it did not have occasion to apply further its coercive effect standard. 638 F.2d at 177 n.4. See also notes 141-55 *infra* and accompanying text.

Similarly, the lower court in *Wilson* relied in part on a coercive effect analysis in finding that there was no burden on plaintiffs' religious practices. The appellate court's affirmance, however, was based on a centrality analysis and did not address the alternative standard. See *Hopi Indian Tribe v. Block*, 8 Indian L. Rep. (Am. Indian Law. Training Program) 3073 (D.D.C. 1981), *aff'd. sub nom. Wilson v. Block*, 708 F.2d 735 (D.C. Cir.), *cert. denied*, 464 U.S. 1056 (1983). See also Note, *Indian Worship v. Government Development*, *supra* note 89, at 326.

141. 455 F. Supp. 641 (D. Utah 1977), *aff'd.*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

142. See also *Northwest Indian Cemetery Protective Assn. v. Peterson*, 565 F. Supp. 586 (N.D. Cal. 1983), *modified*, 764 F.2d 581 (9th Cir. 1985), *cert. granted sub nom. Lyng v. Northwest Indian Cemetery Protective Assn.*, 107 S. Ct. 1971 (1987), discussed at notes 155-72 *infra* and accompanying text; *Crow v. Gullet*, 541 F. Supp. 785 (D.S.D. 1982), *aff'd.*, 706 F.2d 856 (8th Cir.) (per curiam), *cert. denied*, 464 U.S. 977 (1983). One of plaintiffs' claims in *Crow* was that the state had burdened their religious practices by closing the Butte area for overnight camping during the period of construction of the access road and parking lot. In rejecting this claim the district court relied on a type of balancing analysis. It held that the state had a "compelling interest" in finishing the projects, based on administrative and environmental concerns. In addition, the court noted that closing the site temporarily during construction was a "least restrictive

men, and three chapters of the Navajo Nation sought an injunction in connection with the federal government's operation of the Glen Canyon Dam and Reservoir, and its management of the Rainbow Bridge National Monument.¹⁴³

The Rainbow Bridge, a large sandstone arch, was located within the 160 acre Rainbow Bridge National Monument.¹⁴⁴ Plaintiffs regarded the Rainbow Bridge, a nearby prayer spot, spring, and cave as sacred areas, holding "positions of central importance" in their religion.¹⁴⁵ They considered these geological formations as the "incarnate forms of Navajo gods," who provided them with rainfall and protection.¹⁴⁶ Moreover, before the area was flooded, plaintiffs performed religious ceremonies near the Bridge, and used water from the spring for conducting other ceremonies.¹⁴⁷

The federal government had created a reservoir behind the Glen Canyon Dam and had subsequently filled it to a high level. The reservoir had, in turn, flooded the sacred canyon located near the Rainbow Bridge.¹⁴⁸ Plaintiffs alleged that in flooding this canyon and in creat-

means" of completing the project quickly and with minimal danger to public safety and the environment. 541 F. Supp. at 792.

Yet, prior to considering the strength of the state's interest, the court had already suggested that the overnight closing of the site did not place any burden on plaintiffs' religious practices because no person had ever been denied access for religious purposes. 541 F. Supp. at 792. The court's subsequent balancing thus did not seem to follow the comparative pattern envisioned by *Yoder*. See also *Badoni*, discussed at note 140 *supra*.

143. *Badoni*, 638 F.2d at 175-76. In addition to their free exercise claim, plaintiffs sought relief under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4331-35 (1982), alleging that the government had continued operating the dam and reservoir without providing the required environmental impact statement. For further discussion and description of the case see generally, Note, *Native Americans' Access to Religious Sites*, *supra* note 89, at 481-83; Note, *Native American Free Exercise Rights*, *supra* note 89, at 145-46, 159-60; Note, *Indian Worship v. Government Development*, *supra* note 89, at 331-32; Note, *Indian Religious Freedom*, *supra* note 89, at 1455-56.

144. 638 F.2d at 175. Although it was surrounded by the Navajo reservation, the monument was public land administered by the National Park Service.

145. 638 F.2d at 177.

146. 638 F.2d at 177. The Navajo's belief that living gods inhabited such natural objects may have stemmed from "the fact that several of the canyon's rock formations resemble human beings with Native American facial characteristics." Note, *Native American Free Exercise Rights*, *supra* note 89, at 160 n.105. In addition, the Navajo believed that the Rainbow Bridge itself was inhabited by two gods, one male, one female, who had transformed themselves into stone after aiding two Navajo children in moving from the land of the gods across the canyon to the land of humans. Navajos called the mountain near the Rainbow Bridge "Head of Earth," and regarded it as the earth god's crown. Similarly, gods known as Water People lived in rivers, springs, rainbows and serpents, and collaborated to provide the Navajos with rainfall. *Id.* at 160 n.105-09, which also discusses K. LUCKERT, *NAVAJO MOUNTAIN AND RAINBOW BRIDGE RELIGION* (1977).

147. 638 F.2d at 177. In one such ceremony, the Navajos requested rain by "taking water from a sacred spring located in the canyon floor and ceremoniously depositing it in another spring located on the top of Head of Earth . . ." Note, *Native American Free Exercise Rights*, *supra* note 89, at 160 n.108.

148. 638 F.2d at 175-77. The court noted that "[b]ecause of the operation of the Dam and Lake Powell [the reservoir], the springs and prayer spot are under water." 638 F.2d at 177.

ing a tourist attraction, the government had drowned some of their gods, destroyed the sacred character of the site, and denied them access to the prayer spots necessary to their ceremonies, thereby violating the free exercise clause.¹⁴⁹

The Court of Appeals for the Tenth Circuit affirmed the district court's grant of summary judgment in favor of the government. Without addressing the question whether the government's actions infringed on plaintiffs' free exercise of religion, the court nevertheless held that "the government's interest in maintaining the capacity of Lake Powell at a level that intrudes into the Monument outweighs plaintiffs' religious interest."¹⁵⁰ The court noted that the dam and reservoir were key elements in a water storage and power generation project that covered several states. In order to alleviate the alleged infringements on plaintiffs' practices, the reservoir's surface level would have to be dropped so far that its storage capacity would be cut in half.¹⁵¹

Such a reduction would greatly lessen the water available to several states for irrigation, development of natural resources, and municipal and industrial uses.¹⁵² Moreover, the court concluded that since the reservoir had to be maintained at the current level and no other action besides reducing the level could eliminate the alleged infringements on plaintiffs' religious practices, there was no less restrictive manner in which the government could attain its interests.¹⁵³ The

149. 638 F.2d at 176-77. One of the drowned gods was Talking Rock, a collection of eight Rock People who lived on the floor of the Canyon. These Rock People heard every word spoken in their vicinity and in turn informed the Navajos when ceremonies ought to be performed. Note, *Native American Free Exercise Rights*, *supra* note 89, at 145 n.30 and 160 n.106.

Plaintiffs also contended that the government had violated their free exercise rights by permitting tourists to visit the Rainbow Bridge, because tourists had desecrated the sacred character of the area, and interfered with plaintiffs' performance of their ceremonies. 638 F.2d at 176-77. The court held, however, that the establishment clause precluded the government from excluding tourists from the site. It argued that "[w]ere it otherwise, the Monument would become a government-managed religious shrine." 638 F.2d at 179. This establishment clause issue is also discussed in Note, *Indian Worship v. Government Development*, *supra* note 89, at 331-32.

150. 638 F.2d at 177 & n.4. The court explicitly rested its decision on the balancing analysis, rejecting the lower court's finding that plaintiffs' lack of a property interest in the Monument barred relief. It stressed that the "government must manage its property in a manner that does not offend the Constitution." 638 F.2d at 176. See also *Sequoyah v. Tennessee Valley Auth.*, 480 F. Supp. 608 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159, 1164 (6th Cir.) (plaintiffs' lack of property interest in the site is not determinative of the free exercise analysis), *cert. denied*, 452 U.S. 953 (1980).

151. 638 F.2d at 177. For background concerning the Glen Dam and Reservoir project, see *Friends of the Earth v. Armstrong*, 485 F.2d 1 (10th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974).

152. 638 F.2d at 177. See also Note, *Native Americans' Access to Religious Sites*, *supra* note 89, at 483 ("The *Badoni* court protected government interests it perceived as compelling because of the impact of the project on large numbers of Americans").

153. 638 F.2d at 177. The court's analysis illustrates problems with performing a less restrictive means inquiry after the challenged project has been substantially completed. See notes 193-95 *infra* and accompanying text.

court's evaluation of the government interest thus seemed to follow the pattern established in *Yoder*.¹⁵⁴

B. *Recent Developments: Northwest Indian Cemetery Protective Association v. Peterson*

*Northwest Indian Cemetery Protective Association v. Peterson*¹⁵⁵ was the first case in which American Indian plaintiffs succeeded in obtaining free exercise protection for a sacred site. In *Northwest*, members of the Yurok, Karok, and Tolowa tribes, several associations, and the state of California challenged the United States Forest Service's decision to build a section of the "G-O" road through the Blue Creek Unit of Six Rivers National Forest, and to adopt a plan permitting timber harvesting in that Unit.¹⁵⁶

Plaintiffs contended that the entire northeastern corner of the Blue Creek Unit constituted a sacred region known as "high country."¹⁵⁷ Since the early nineteenth century, members of the Yurok, Karok, and Tolowa tribes had performed religious ceremonies in the high country, and they continued to do so.¹⁵⁸ For example, tribal members used "prayer seats" located on the highest mountain peaks of the region to "seek religious guidance or personal 'power' through 'engaging in emotional [and] spiritual exchange with the creator.'"¹⁵⁹ Crucial participants in ceremonies such as the White Deerskin and Jump Dances journeyed to the region prior to the ceremony in order to fabricate medicines and to purify themselves. Medicine women visited the high country to obtain "healing power" and to gather important medicines.¹⁶⁰ Plaintiffs emphasized that the efficacy of such ceremonies depended strongly on the maintenance of "the solitude, quietness,

154. 635 F.2d at 175-77. See notes 33-36 *supra* and accompanying text. In short, the court held that the government had a "compelling interest" in water storage and power generation, such interest had been specifically articulated, and no less restrictive alternatives existed. Yet, the court's holding that the government's interest was compelling even though it had not explicitly decided whether plaintiffs' practices had been burdened, suggests that it was not applying the *Yoder* balancing analysis in a truly comparative manner. See notes 190-92 *infra* and accompanying text.

155. 565 F. Supp. 586 (N.D. Cal. 1983), *modified*, 764 F.2d 581 (9th Cir. 1985), *cert. granted sub nom.* Lyng v. Northwest Indian Cemetery Protective Assn., 107 S. Ct. 1971 (1987).

156. 565 F. Supp. at 589-91. Plaintiffs also based their action on a variety of other statutes, including the American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996. See notes 197-201 *infra* and accompanying text.

157. 565 F. Supp. at 591.

158. 565 F. Supp. at 591. Available evidence indicated that approximately 110-140 tribal members used the high country for religious purposes. The number of users was difficult to estimate because some of the ceremonies could only be carried out secretly. 565 F. Supp. at 591 n.3. See also Echo-Hawk, *Natural Resource Development on Public Lands: Strategies for Protection of First Amendment Rights*, INDIAN LAW SUPPORT CENTER REP. Oct. 1983, at 1, 9 (discussing need for maintaining privacy and confidentiality of testimony made by religious leaders and practitioners).

159. 565 F. Supp. at 591.

160. 565 F. Supp. at 591-92. Unlike Western philosophies and religions, which generally

and pristine environment found in the high country.”¹⁶¹

Plaintiffs asserted that construction of the section of road and the allowance of timber harvesting would violate their free exercise rights in several ways. First, the road would “dissect the high country,” diminishing the region’s inherent sacredness.¹⁶² In addition to noise arising from the construction and use of the road, its visibility from the peaks would destroy the “pristine visual conditions” necessary for performance of plaintiffs’ religious ceremonies. Similarly, intensive harvesting of timber would result in serious “adverse visual, aural, and environmental impacts . . . on the high country’s salient religious characteristics.”¹⁶³

The district court upheld plaintiffs’ free exercise claims, enjoining road construction and timbering in the high country.¹⁶⁴ Although the court reached a different result, its method of applying the *Yoder* analysis did not vary greatly from the approach used by courts in earlier cases.

In determining whether the proposed government actions placed a burden on plaintiffs’ religious practices, the court relied on *Sequoyah*’s centrality standard. It noted that the high country comprised the “center of the spiritual world” of the Yurok, Karok, and Tolowa tribes, and that “[n]o other geographic areas or sites hold equivalent religious significance for these tribes.”¹⁶⁵ Indeed, maintenance of the region’s pristine qualities was “central and indispensable” to the performance of plaintiffs’ religious ceremonies.¹⁶⁶ Since use of the high country was central to plaintiffs’ religious practices, and the proposed road and timbering interfered with such usage, the government had improperly burdened plaintiffs’ free exercise of religion.¹⁶⁷ The court distinguished the results in earlier cases such as *Sequoyah* by holding that the current plaintiffs had made a stronger factual showing of centrality than had their counterparts in those cases.¹⁶⁸

perceive power in relational terms, the Indian practitioners seemed to regard power as a tangible substance which could be obtained and subsequently channeled toward healing.

161. 565 F. Supp. at 591.

162. 565 F. Supp. at 592.

163. 565 F. Supp. at 592 & n.6.

164. 565 F. Supp. at 596-97, 606.

165. 565 F. Supp. at 594. Thus, the court seemed to recognize the intrinsic sacredness of the region.

166. 565 F. Supp. at 594.

167. 565 F. Supp. at 594-95. Critical to the court’s finding of a burden on plaintiffs’ religious practices was its acknowledgment that “[t]he religious integrity of the high country rests on the pristine qualities of the entire area rather than on just a few individual sites.” 565 F. Supp. at 592 n.6. Moreover, even the Forest Service conceded that “[i]ntrusions on the sanctity of the Blue Creek high country are . . . potentially destructive of the very core of Northwest [Indian] religious beliefs and practices.” 565 F. Supp. at 595. Cf. *Wilson v. Block*, 708 F.2d at 744-45 (where the court rejected the assertion that the region as a whole was sacred); see also note 121 *supra*.

168. 565 F. Supp. at 595.

Turning to the balancing part of its analysis, the court found that the government had failed to demonstrate the compelling interests necessary to justify such an infringement on plaintiffs' free exercise of religion. The extra section of the road would not materially improve access to timber resources existing in the Blue Creek Unit, and thus would not lead to any increase in the number of jobs in the local timber industry.¹⁶⁹ Because the Forest Service was currently able to provide all required services to the high country, the road was not necessary to "improve the efficient administration" of the region.¹⁷⁰

Similarly, the court noted that the timber contained in the high country constituted a small portion of all the timber located in the entire Six Rivers National Forest. The harvesting of such timber would not greatly alter supplies; nor would the local timber industry suffer if it was denied access to timber in the region. Furthermore, the court held that even if the government could show a substantial need for harvesting more timber in the Blue Creek Unit, it could use "means less restrictive of plaintiffs' First Amendment rights" to satisfy those goals.¹⁷¹

The Court of Appeals for the Ninth Circuit affirmed the district court opinion. In a narrowly written decision, the Ninth Circuit approved the district court's reliance on the *Sequoyah* centrality standard. Quoting extensively from the district court opinion, the Ninth Circuit held that the district court's findings that there was a burden on plaintiffs' religious practices and that the government's interest did not outweigh this religious interest were not clearly erroneous.¹⁷²

C. Problems with the Sacred Site Cases

This section of the Note considers several common problems that arise from courts' extension of the *Yoder* analysis to the sacred site context.¹⁷³ Part IV then proposes a way of adapting *Yoder* so that these problems are avoided.

1. Burdens on Sites and Practices

As the preceding sections demonstrate, significant analytical problems are engendered by the use of the centrality standard to determine burdens, as was mandated by *Sequoyah*. As an initial matter, the courts unduly exaggerated portions of *Yoder* and the earlier Indian religion cases. For example, while *Yoder* provided that the impor-

169. 565 F. Supp. at 595-96.

170. 565 F. Supp. at 596.

171. 565 F. Supp. at 596-97.

172. 764 F.2d 581, 586-87 (9th Cir. 1985). The Supreme Court has recently granted certiorari in this case, 107 S. Ct. 1971 (1987).

173. Since this section of the Note focuses only on problem areas, it omits discussion of *Yoder*'s threshold criteria besides the centrality inquiry. See notes 86-90 *supra*.

tance of claimants' practices to their religious beliefs was just one threshold issue involved in stating a free exercise claim,¹⁷⁴ courts in cases such as *Sequoyah* transformed it into the sole mechanism for determining whether plaintiffs' practices had been burdened, thereby distorting the remainder of the *Yoder* analysis.¹⁷⁵ Similarly, these courts justified the centrality inquiry as deriving from language in earlier cases such as *Frank* and *Woody*. Yet those cases used the centrality language as simply one way to describe these results, and not as the controlling standard for evaluating claimed infringements on religious practices.¹⁷⁶

Moreover, the overextension of the centrality standard raises some larger policy questions regarding the propriety of judicial inquiries in this area. To begin with, the courts' reliance on the centrality standard often conflicts with the well established principle prohibiting extensive judicial investigations of orthodoxy.¹⁷⁷ In *Sequoyah*, for example, the court's finding that the Little Tennessee Valley was not central or indispensable to Cherokee religious practices amounted to a judicial conclusion regarding the relative merit of a given site and ceremonies performed thereon to the Cherokee religion.¹⁷⁸ In rejecting plaintiffs' contention that the mountain as a whole and not just the Snow Bowl region was sacred, the *Wilson* court may well have inquired too far into the merits of Navajo beliefs themselves (as opposed to merely examining the sincerity with which those beliefs were held).¹⁷⁹

174. See notes 24-32 *supra* and accompanying text.

175. See Note, *Indian Worship v. Government Development*, *supra* note 89, at 329 n.119 (arguing that the sacred site courts' reliance on centrality as the primary means for ascertaining whether a burden exists on plaintiffs' practices is especially inappropriate since "[n]one of the major non-Indian religion cases have mentioned centrality"); Note, *Indian Religious Freedom*, *supra* note 89, at 1463 (pointing out the "methodological gap between standard free exercise analysis and Indian site-specific religious belief").

176. See notes 48-68 *supra* and accompanying text. See also Note, *Indian Worship v. Government Development*, *supra* note 89, at 324 (describing how the centrality approach, first used as an attempt to explain the unfamiliar, "hardened into an ironclad requirement").

177. This principle was stated by the Supreme Court in *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion"); see also *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981) ("religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection"); *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) ("[I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment.").

178. See notes 88-106 *supra* and accompanying text. Cf. Note, *Indian Religious Freedom*, *supra* note 89, at 1461 (warning that the centrality inquiry in the site cases has impermissibly "evolved into an examination of the 'doctrinal pedigree' of a religious belief").

179. See notes 103-25 *supra* and accompanying text. Moreover, even if courts attempted to use centrality to evaluate the bona fides of claimants' religious practices and beliefs, it is not clear that they would be institutionally capable of doing so. See Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350, 360 n.60 (1980) [hereinafter Note, *Religious Exemptions*] (commenting that identifying the "essence of [a] particular religion [is] difficult even for theologians; religions have survived loss of even apparently

A second problem with the centrality inquiry is that it prompts judges who are usually educated in Judeo-Christian religions to depend on "familiar criteria" in evaluating qualitatively different Indian religions.¹⁸⁰ Courts in *Woody* and *Frank* properly used such familiar criteria in explaining and understanding the Indian religions involved in those cases.¹⁸¹ By contrast, the sacred site cases suggest that unless the relationship of site, practice, and belief accord with the Judeo-Christian model, Indian plaintiffs will probably be denied free exercise protection. For example, the *Inupiat* court's difficulty in perceiving a religious practice that occurred upon superjacent sea ice as legitimate no doubt contributed to its denial of plaintiffs' claims.¹⁸² Evaluating Indian religions solely in terms of their Judeo-Christian counterparts is not only unworkable, but again seems to violate the principle against judicial determinations of orthodoxy.¹⁸³

Moreover, the use of familiar criteria as a means of evaluating sacred site claims raises a unique problem in sacred site cases. In considering various sacred site claims, courts focused on the availability of alternative areas in which plaintiffs could perform their ceremonies.¹⁸⁴ Since access to specific sites is far less important in Judeo-Christian religions than in Indian religions, courts may well view plaintiffs as being required merely to move from one outdoor "church" to another.

fundamental features") (citing M. KONVITZ, *RELIGIOUS LIBERTY AND CONSCIENCE* 77-79 (1968)).

180. See Note, *Religious Exemptions*, *supra* note 179, at 360 n.60 ("[a]mong the dangers inherent in [reliance on] the 'centrality' inquiry is the natural tendency to use familiar criteria taken from general experience"); Note, *Native American Free Exercise Rights*, *supra* note 89, at 157 n.91 ("[C]ourts often compare unconventional beliefs to theistic beliefs in determining their religious character.").

181. See notes 48-68 *supra* and accompanying text. One commentator points out that in *Woody* the court "referred to centrality to explain how that unfamiliar practice fit into an unfamiliar religion, and why prohibiting the use of peyote would violate the Indians' free exercise rights" and yet this "attempt to explain the unfamiliar . . . hardened into an ironclad requirement in later Indian cases." Note, *Indian Worship v. Government Development*, *supra* note 89, at 324.

182. See note 103 *supra* and accompanying text. This problem is further illustrated by an exchange in the district court opinion in *Badoni v. Higginson*, 455 F. Supp. 641 (D. Utah 1977), *aff'd*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981). Questioning the relationship between the Rainbow Bridge Monument and plaintiffs' religious practices, the district court noted that a small number of individuals had carried out infrequent religious ceremonies in the area. Plaintiffs countered that Navajo ceremonies "are not periodic ceremonies . . . [but] are performed when needed, and requested by an individual or family." 455 F. Supp. at 646. Despite this contention, the district court held that the small number of ceremonies performed in the region in part justified the denial of plaintiffs' claims. Its reliance on familiar patterns of church attendance made the court insensitive to plaintiffs' arguments.

183. See Note, *Indian Religious Freedom*, *supra* note 89, at 1461 (the centrality inquiry promotes a narrowing of "the scope of free exercise protection to familiar and well-documented religious tenets, despite the Supreme Court's statement that the First Amendment knows no orthodoxy") (footnote omitted).

184. See, e.g., *Wilson v. Block*, 708 F.2d 735, (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983), where the court noted that although development would impair practices carried on in the Snow Bowl area, plaintiffs would still have free access to the rest of the Peaks for collecting herbs and objects, and performing ceremonies. See notes 103-26 *supra* and accompanying text.

Yet, this familiar analogy is misleading. One commentator on Indian religions has noted that:

[O]nce a site is chosen by the gods as a place of sacred value, that sacredness continues to reside there for eternity and cannot be annulled (by mere transportation by humans to another location). Sacred places transcend human history and are places of inexhaustible power and spiritual energy. *They are not merely sites of convenience.*¹⁸⁵

Consideration of alternative sites is thus often meaningless unless it is conducted from the perspective of the Indian religion itself.¹⁸⁶

2. *Balancing Indian Religious Interests Against Government Development Interests*

In *Sherbert* and *Yoder*, the Supreme Court set out guidelines for assessing governmental interests offered to justify disputed regulations. The Court provided that only "compelling state interests" which were concretely articulated could override claimants' free exercise rights. Moreover, the government also had to demonstrate that no less restrictive means for achieving its interests existed.¹⁸⁷ This method of analysis was accurately and fully applied by the court in *Northwest*.¹⁸⁸ While the other courts that reached the balancing stage of the analysis mostly followed *Yoder's* guidelines,¹⁸⁹ their analysis has often been problematic.

First, courts have failed to keep separate their consideration of Indian and government interests. For example, in *Badoni* the court found that the government's interest in maintaining the reservoir at a high level was compelling even though it had not first decided whether plaintiffs' religious practices had been burdened. This suggests that the court believed that the governmental interest was sufficient to override any possible religious interest that plaintiffs might advance.¹⁹⁰ This invocation of a "predetermined overriding governmental interest"¹⁹¹ ignores the comparative quality of the balancing approach.

185. D. Carrasco, Sacred Space and Religious Vision in World Religions: A Context to Understand the Religious Claims of the Kootenai Indians, 11 (unpublished manuscript, attained from Native American Rights Fund) (emphasis added).

186. Part IV of this Note argues that courts should evaluate the strength of Indian claimants' religious interests from the viewpoint of the religion involved.

187. See notes 16-18 & 36 *supra* and accompanying text.

188. *Northwest Indian Cemetery Protective Assn. v. Peterson*, 565 F. Supp. 586, 594-97 (N.D. Cal. 1983), *modified*, 764 F.2d 581 (9th Cir. 1985), *cert. granted sub nom. Lyng v. Northwest Indian Cemetery Protective Assn.*, 107 S. Ct. 1971 (1987); see notes 169-72 *supra* and accompanying text.

189. Two other cases where courts reached the balancing stage of the *Yoder* analysis were *Crow v. Gullet*, 541 F. Supp. 785 (D.S.D. 1982), *aff'd.*, 706 F.2d 856 (8th Cir.), *cert. denied*, 464 U.S. 977 (1983), and *Badoni v. Higginson*, 455 F. Supp. 641 (D. Utah 1977), *aff'd.*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

190. See notes 141-54 *supra* and accompanying text.

191. Note, *Indian Religious Freedom*, *supra* note 89, at 1456 n.37.

Under *Yoder*, governmental interests are not measured according to an absolute standard; rather, the court's assessment of the governmental interest is colored by its simultaneous consideration of the burdened religious practices. By refusing to ascertain whether a burden existed on plaintiffs' practices, and if so, the extent of burden present, the *Badoni* court improperly applied the balancing analysis.¹⁹²

Second, courts attempting to determine whether less restrictive means exist are often hampered by the timing of sacred site litigation. If the action is not brought until the government project has been mostly completed, the inquiry is unlikely to uncover truly viable alternative means.¹⁹³ This timing problem in part explains the different results reached in *Badoni* and *Northwest*. In *Badoni*, the less restrictive means analysis was performed after the dam and reservoir had been completed, and the demands of the multi-state water storage system made clear that the reservoir would have to be maintained at its existing high level. Since an established project was almost by definition less costly and more efficient than any possible alternative, the court's consideration of less restrictive means was not fruitful.¹⁹⁴ By contrast, in *Northwest* the less restrictive means analysis was performed before the road was built or timbering had commenced, when truly workable alternatives existed.¹⁹⁵

192. See Note, *Native American Free Exercise Rights*, *supra* note 89, at 174 (the *Badoni* court "merely assumed that the Glen Canyon project as implemented justified an abridgement of religious rights. . . . However, without analyzing the nature and content of Navajo interests, this court could not have compared the importance of these interests with the costs of adopting alternative means."). The balancing analysis performed by the court in *Crow* was also marred by the court's failure to engage in the balancing required by *Yoder*. See note 142 *supra*.

193. One commentator points out that "analyzing alternatives after the government expends substantial resources exaggerates, for first amendment purposes, the government's interest in building a project on sacred lands. The government will automatically satisfy its burden of proof whenever the controversy involves a substantially completed project." Note, *Native American Free Exercise Rights*, *supra* note 89, at 176. Part IV of the Note tempers this argument somewhat; it suggests that government accommodation of Indian religious interests may be possible at every stage of the development except for final completion of the project. See note 230 *infra* and accompanying text.

194. *Badoni v. Higginson*, 455 F. Supp. 641 (D. Utah 1977), *aff'd.*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981); see notes 141-62 *supra* and accompanying text; see also Note, *Indian Worship v. Government Development*, *supra* note 89, at 333 (in *Badoni*, "[W]here accommodation would have meant both a complete win for the Indians and a complete loss for the government, the courts were reluctant to apply the tests in a way that would mandate accommodation.").

195. *Northwest Indian Cemetery Protective Assn. v. Peterson*, 565 F. Supp. 586 (N.D. Cal. 1983), *modified*, 764 F.2d 581 (9th Cir. 1985), *cert. granted sub nom. Lyng v. Northwest Indian Cemetery Protective Assn.*, 107 S. Ct. 1971 (1987); see notes 155-72 *supra* and accompanying text. Similarly, although it did not formally reach the balancing analysis, the court in *Sequoyah* seemed to be influenced by the large amount of government resources that had already been devoted to the Tellico Dam project. *Sequoyah v. Tennessee Valley Auth.*, 480 F. Supp. 608, 610 (E.D. Tenn. 1979), *aff'd.*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980); see note 102 *supra*.

IV. RECOMMENDATIONS

A. *Legislative Developments*

Legislatures and administrative agencies may be as well equipped as courts to resolve conflicts between Indian religious interests and government developmental interests, particularly when an issue is raised prior to government construction of the project.¹⁹⁶ Several recent statutes seek to provide Indian sacred sites with some measure of protection from government development.

For example, the American Indian Religious Freedom Act¹⁹⁷ provides that as of 1978 "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 [their] traditional religions . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rights."¹⁹⁸ To achieve this goal, the Act requires administrative agencies to reexamine their procedures and policies, and alter them where it is necessary to eliminate government interference with Indian religious practices.¹⁹⁹

Despite its protective language, however, the Act has not been a controlling factor in the sacred site cases. Courts treat the Act simply as a congressional recognition of Indians' free exercise rights that does not provide plaintiffs with any independent protections. Thus, "where a traditional free exercise analysis has been applied and either a lack of infringement or an overriding governmental interest found, courts have not felt obligated to enforce more than consultation with Indian religious leaders by federal agencies."²⁰⁰ In addition to restructuring the *Yoder* analysis, clashes between Indian religious interests and gov-

196. The need for some type of legislative solution for sacred site issues may well become more pressing in the immediate future. Section 2 of the American Indian Religious Freedom Act required the executive to prepare a report within a year from the statute's enactment that would, among other things, identify sacred site problems in various regions. The report listed over two hundred such problem areas. See AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT appendix C (1979).

197. Originally enacted as Pub. L. No. 95-341, 92 Stat. 469 (1978) (current version at 42 U.S.C. § 1996 (1982)).

198. 42 U.S.C. § 1996. The legislative history demonstrates Congress' increased sensitivity to Indians' needs for undisturbed access to sacred sites in order to worship and collect objects and medicines. "To deny access to them is analogous to preventing a non-Indian from entering his church or temple." H.R. REP. NO. 1308, 95th Cong., 2d Sess. 2 (1978), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 1262, 1263. For further discussion of the Act, see generally Note, *Native American Free Exercise Rights*, *supra* note 89, at 152-54; Note, *Indian Worship v. Government Development*, *supra* note 89, at 320-21; Note, *Indian Religious Freedom*, *supra* note 89, at 1457-59.

199. 42 U.S.C. § 1996. See also Note, *Native American Free Exercise Rights*, *supra* note 89, at 151-52 & nn.71-72.

200. Note, *Indian Religious Freedom*, *supra* note 89, at 1458 (footnote omitted). For example, courts have held that the Act did not confer a private right of action on Indian plaintiffs. *Id.* See also Note, *Native American Free Exercise Rights*, *supra* note 89, at 153 ("[t]he Act does not confer a right of action on Native Americans"); Note, *Indian Worship v. Government Develop-*

ernment development interests might be alleviated by a strengthening of the Act.²⁰¹

B. *Adapting the Yoder Analysis to Sacred Site Context*

1. *Threshold Criteria Other than Centrality*

The *Yoder* analysis requires claimants to demonstrate that they sincerely follow an actual religion and that the practices for which they seek protection are based on religious, as opposed to cultural or historical, concerns.²⁰² These threshold criteria should be retained in the sacred lands context. They did not create undue disputes in the cases,²⁰³ and indeed they contributed positively to free exercise analysis. For example, the threshold criteria strain out frivolous actions where parties attempt to use first amendment claims as a guise to block development they actually oppose for nonreligious reasons.²⁰⁴ Furthermore, by clearly satisfying these criteria, Indian plaintiffs may well add a measure of legitimacy to their claims.²⁰⁵

2. *Burdens on Sites and Practices*

a. Limiting the centrality inquiry. Preceding sections demonstrated that courts have often misapplied *Yoder's* centrality standard in the sacred site cases. The seeming unfairness which has resulted from such misapplication can only be avoided in the future if the centrality inquiry is restored to the limited threshold function initially

ment, *supra* note 89, at 328 (discussing court's finding that "the Act was not meant to grant rights in excess of first amendment guarantees").

201. In a recent case one court appears to have given greater weight to AIRFA. In *United States v. Means*, 627 F. Supp. 247, 266-69 (D.S.D. 1985), the district court found that a Forest Service official's failure to consult meaningfully with Indian religious leaders regarding a special use permit for the Black Hills conflicted with AIRFA; the court concluded that denial of the permit was arbitrary and capricious. Similarly, the AIRFA Report recounts several instances where the Act prompted Indian tribes and a governmental agency to reach a compromise agreement concerning access to sacred sites. AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT 55-58 (1979). See also CAL. PUB. RES. CODE §§ 5097.9-.99 (Deering 1984 & 1986 Supp.) (establishing a moratorium on the disturbance of Indian burial grounds and creating a task force to identify archeological and historical sites in consultation with tribal representatives); Echo-Hawk, *supra* note 158, at 7 (after noting that "[i]n instances where practitioners have sacred areas located on public lands which are not in imminent danger, tribes should consider lobbying for protective legislation," the author lists a variety of existing federal statutes that could be interpreted so as to provide for protection of sacred sites); Note, *Indian Religious Freedom*, *supra* note 89, at 1457 n.49.

202. See notes 25-30 *supra* and accompanying text.

203. For example, the parties often stipulated that plaintiffs meet these threshold criteria. See note 86 *supra*.

204. An analogous problem occurred in the cases involving peyote use by members of the Native American Church, where non-Indians sought to take advantage of the Church's exemption under the drug laws. See notes 40-47 *supra* and accompanying text.

205. Cf. Echo-Hawk, *supra* note 158, at 8 (noting that it is crucial for Indian advocates to convince judges of the nature and gravity of their sacred site claims).

outlined in *Yoder*.²⁰⁶ Instead of controlling the analysis, the centrality inquiry would operate simply as one way for the court to examine the asserted connection between a particular site and plaintiffs' religious practices.

The recent case of *United States v. Means*²⁰⁷ is a good example of this more limited approach. In *Means*, a group of Indians established a religious campsite on public lands located in the Black Hills National Forest. The Forest Service denied the group a special use permit and sought a court order directing them to leave the site.²⁰⁸ While the district court engaged in a centrality inquiry, it stressed that centrality was just part of, and not determinative of, its analysis.²⁰⁹

If the problems arising from the courts' earlier use of the standard are to be avoided entirely, the courts must inquire into centrality from the viewpoint of the Indian religion involved. As one commentator noted, "[i]f the focus is to be one of centrality, it becomes essential that courts inquire into the significance of governmental actions in the context of the affected religion."²¹⁰ This approach is particularly needed here, insofar as Indian religious practices and beliefs are so unfamiliar to judges and lawyers raised in the Judeo-Christian tradition.

206. *Yoder* provided that centrality was one of several threshold criteria, and was not to determine a court's analysis. See notes 22-32 *supra* and accompanying text. Another way to avoid the problems caused by misapplication of the centrality standard is, of course, to eliminate the standard entirely.

207. 627 F. Supp. 247 (D.S.D. 1985).

208. 627 F. Supp. at 249.

209. The court outlined a series of questions necessary to address properly the free exercise claim. These questions included:

1. Is the idea that the Black Hills are sacred a sincerely held religious belief?
- 2(a). If yes to No. 1, is the Black Hills central or indispensable to the performance of particular religious practices?
- (b). If yes to No. 1, is the YTC [camp]site central or indispensable to the performance of particular religious practices?
- 3(a). If yes to No. 2(a) and YTC [campsite] is *not central* do the Lakota have access to other areas and is their conduct in those areas sufficiently free from regulation so that their religious practices are not burdened?
- (b) If YTC [campsite] is central, do the Lakota have access to the site and is their conduct in performing their religious practices sufficiently free from government regulation so as not to be burdened?

627 F. Supp. at 261 (emphasis added). Question 3(a) demonstrates that the *Means* court did not view the centrality inquiry as dispositive, and indeed accepted that even noncentral sites might warrant free exercise protection. The court ultimately held that the Forest Service's regulations and policies violated the free exercise clause, and that its denial of the special permit was arbitrary and capricious. 627 F. Supp. at 269.

210. Note, *Indian Religious Freedom*, *supra* note 89, at 1461. The author adds that in the sacred site cases courts' "focus must shift to the role of the site in native worship." *Id.* See also AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT 57-58 (1979) (commending an agreement worked out between a group of Indians and the Bureau of Land Management for approaching the sacred site issue from the tribe's perspective); Echo-Hawk, *supra* note 158, at 8 (from the Indian advocate's perspective "[i]t is critical to educate and sensitize the presiding judge or trier of fact about the unique nature of Indian religion in terms he can understand"); Note, *Indian Worship v. Government Development*, *supra* note 89, at 335 (arguing that courts must develop familiarity with Indian religious practices and beliefs regarding sacred lands so that they can address them "on their own terms").

b. *Focusing on actual burdens.* With the centrality inquiry carefully limited, courts could then properly follow *Sherbert* and *Yoder*, and conduct the burden analysis by focusing on actual interferences with claimants' religious practices. For example, in *Sherbert* the Supreme Court held that by forcing the appellant to choose between following the tenets of her religion and foregoing benefits, or abandoning one of the precepts of her religion to obtain benefits, the state imposed a burden on her free exercise rights.²¹¹ Thus, to satisfy the burden requirement, appellant simply had to demonstrate that the state regulation, as a practical matter, interfered significantly with the exercise of her religion. She did not have to show that the state action would totally prevent her from practicing her religion.

Similarly, in *Yoder* the Court held that since the compulsory education law exposed Amish children to worldly influences, attitudes, and goals that conflicted with their beliefs and impaired the adolescent child's integration into the Amish community, it amounted to a burden on defendants' religious practices.²¹² The Court again stressed the practical interference with defendants' free exercise of their religion.²¹³

The emphasis on actual burdens on claimants' religious practices could be readily transferred to the sacred site context. The analysis of the district court in *United States v. Means*²¹⁴ illustrates this method. After completing a limited centrality inquiry,²¹⁵ the *Means* court addressed whether the Forest Service restrictions on use of and access to the Black Hills burdened the Lakota Indians' free exercise rights. It noted that:

The Supreme Court has not set forth a precise test for determining whether or not a burden exists. To answer this question, a court or agency must take a sensible and realistic look at the facts and circumstances of the case and then decide whether there exists a real negative impact upon the exercise of religion that is significant enough to be labeled a burden.²¹⁶

Applying this formulation, the court held that because the Forest Service regulations restricted "when, where, and how the ceremonies are conducted"²¹⁷ in the Black Hills, they imposed "a significant negative

211. 374 U.S. at 404. The Court added that the regulations interfered with "cardinal principles" of appellant's religion. 374 U.S. at 406. See note 19 *supra* and accompanying text.

212. See notes 33-34 *supra* and accompanying text.

213. Having found a burden on defendants' religious practices, the Court proceeded to describe the character of that burden, noting that the compulsory education law posed the "very real threat of undermining the Amish community and religious practice as they exist today." *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972). See note 34 *supra* and accompanying text.

214. 627 F. Supp. 247 (D.S.D. 1985).

215. See notes 207-09 *supra* and accompanying text.

216. 627 F. Supp. at 258.

217. 627 F. Supp. at 263. Specifically, the regulations restricted the location of claimants' religious campsite, and limited the manner in which their ceremonies were conducted. The Forest Service also imposed a fee for use of the region. 627 F. Supp. at 253-54, 263.

impact" on the Lakota religious practices, which satisfied the burden requirement.²¹⁸

Indian plaintiffs in sacred site cases would probably be more successful in meeting the practical burden standard than they have been under the previous approach.²¹⁹ Yet, because the standard ultimately depends on a factual, case-by-case inquiry, it would not result in an undue expansion of the number of sacred site cases occupying the courts.²²⁰

3. *Balancing Indian Religious Interests Against Government Development Interests*

Since Indian religious practitioners and government officials possess vastly and qualitatively different interests regarding sacred lands, it is unhelpful for courts to consider the balancing analysis as a mere "weighing" of rival concerns upon some equivalent "scale."²²¹ Rather, the court is in essence rendering a value judgment that resolves conflicts over land use in a particular situation. The balancing analysis should primarily serve to guide the court in understanding and comparing the various interests so that it can best make such judgments.²²²

a. Indian religious interests. In the sacred site cases, plaintiffs have asserted a variety of interferences with their free exercise rights: they

218. 627 F. Supp. at 263. The *Means* court's practical approach to the burden analysis is analogous to the "coercive effects" standard advanced by the court in *Crow v. Gullet*, 541 F. Supp. 785 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir.) (per curiam), *cert. denied*, 464 U.S. 977 (1983). Cf. notes 126-40 *supra* and accompanying text. See also Note, *Indian Worship v. Government Development*, *supra* note 89, at 335 (arguing that in making burden determinations courts should accept at "face value [Indian] assertions as to the importance of and infringement on that practice").

219. For example, the flooding of sacred lands and concomitant denial of access for performance of ceremonies presented in *Sequoyah* and *Badoni* would probably satisfy this practical burden standard. See Note, *Indian Worship v. Government Development*, *supra* note 89, at 323 (questioning how courts failed to find a burden "despite the fact that in two of the cases [*Sequoyah* and *Badoni*] plaintiffs became completely unable to reach sacred sites"); Note, *Native American Free Exercise Rights*, *supra* note 89, at 169 ("[r]eligious abridgment occurs whenever government action frustrates protected religious practice.").

220. Cf. *Echo-Hawk*, *supra* note 158, at 8 (recognizing that "[t]hrough the exact legal standards are not well defined, it is clear that the First Amendment test as developed in this context is a factual test"). Because of the potential number of sacred site cases, see note 196 *supra*, it is appropriate for courts, Indian advocates, and government officials to be sensitive to the floodgates problem. The factual grounding of the burden analysis as formulated in *Means*, for example, avoids most floodgate problems. See also Note, *Indian Worship v. Government Development*, *supra* note 89, at 333-34.

221. The "scale" metaphor is particularly troubling because it implies that to prevail on an uncertain free exercise claim all Indian plaintiffs need do is "add" another fact to their side by showing another religious use for the site. This obscures the fact that the court is ultimately making a value judgment.

222. This view of the balancing process accords with the parameters established by the Supreme Court in *Yoder* and *Sherbert*. See notes 14-36 *supra* and accompanying text. For example, in comparing the divergent interests the court will still require that the government have a "compelling interest" in the development project.

have argued that government activities destroyed the intrinsically holy character of the site, inhibited practitioners from performing both infrequent and common ceremonies on sacred lands, prevented worshippers from collecting sacred herbs, objects, and medicines, and diminished the general religious and cultural value of the region.²²³ The first amendment mandates that a court consider the severity of such alleged infringements from the perspective of the affected Indian religion.²²⁴ While a judge may personally believe, for example, that the inability to obtain sacred eagle feathers does not particularly frustrate Indian religious practices, he should defer to the plaintiffs if they offer sincere and good faith assertions to the contrary.²²⁵ This process allows the Indians themselves to participate in valuing a given site for purposes of the balancing analysis.²²⁶

b. Government development interests. After analyzing the extent of infringement on plaintiffs' religious practices, the court should address the government interests asserted to justify the development project. Courts should follow the method outlined in *Sherbert* and *Yoder*, which the court in *Northwest* recently extended to the sacred site context.²²⁷ Pursuant to this method, the government must demonstrate a "compelling interest" in the project. The government cannot simply assert general interests in irrigation or economic development — the need for a particular project at a particular site must be carefully demonstrated.²²⁸

223. This section assumes that Indian plaintiffs have already demonstrated an actual interference with their religious practices and the court is evaluating the degree of infringement which exists. See notes 88-172 *supra* and accompanying text.

224. See Part I *supra*.

225. See *United States v. Means*, 627 F. Supp. 247, 254 (D.S.D. 1985) (stressing the importance of taking into account "subjective criteria" of the Indian religion); Note, *Indian Religious Freedom*, *supra* note 89, at 1469 (the balancing analysis should "assess the degree of harm threatened to a traditional Indian religion by proposed development of a sacred site in the context of the tribal religion itself"); Note, *Indian Worship v. Government Development*, *supra* note 89, at 335 (courts should assess Indian religious practices "in their own terms").

226. Viewed from the perspective of the Indian religion, the infringements may be of such severity that few, if any, accommodations to development are possible. For example, plaintiffs might assert that an entire region and not just part of it was highly important to their religious practices and could not be disturbed. Compare *Wilson v. Block*, 708 F.2d 735 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983), and notes 103-26 *supra*, with *Northwest Indian Cemetery Protective Assn. v. Peterson*, 565 F. Supp. 586 (N.D. Cal. 1983), *modified*, 764 F.2d 581 (9th Cir. 1985), *cert. granted sub nom. Lyng v. Northwest Indian Cemetery Protective Assn.*, 107 S. Ct. 1971 (1987), and notes 155-72 *supra*.

In the majority of the cases, however, the religion may well permit some form of compromise with governmental development. See the discussion of *Northwest* at notes 155-72 *supra* (addressing the possibility of fashioning "protective zones"); see also *Means*, 627 F. Supp. at 259, 264 (religious practitioners willing to accept an alternative which granted them exclusive religious use of only 800 acres within the Black Hills and precluded them from building any permanent structures in the region).

227. 565 F. Supp. 586, 595-97; see notes 174-76, 188 *supra* and accompanying text.

228. See notes 187-89 *supra* and accompanying text. Courts could develop categories of interests that have the potential for qualifying as "compelling." They could thus find that while the construction of dams, water projects, or roads may in certain circumstances amount to com-

Furthermore, Indian plaintiffs should file sacred site claims as rapidly as possible. Early filing will enable the court to focus on the possible existence of less restrictive means for achieving the government's goals without having its analysis skewed by preexisting commitment of substantial government resources to the project.²²⁹ If government agencies learn that courts will employ a strict less restrictive means standard, they may be more likely to consider viable alternatives when they are initially planning the project.²³⁰

Finally, having determined the extent of infringement on plaintiffs' religious practices from the perspective of the Indian religion, and having analyzed the asserted compelling government interests in light of less restrictive alternatives, the court should carefully compare the rival interests. There may be situations where either party's interest, when viewed on its own terms, is so strong that the court must find entirely in favor of the Indians or entirely in favor of the government. The court should focus, however, on achieving measured accommodations of the competing interests, and this focus should inform the court's shaping of appropriate relief.²³¹

elling interests, the expansion of a ski lodge, however it is justified, cannot constitute such an interest. Compare *Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980), *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981), and *Northwest Indian Cemetery Protective Assn. v. Peterson*, 764 F.2d 581 (9th Cir. 1985), *cert. granted sub nom. Lyng v. Northwest Indian Cemetery Protective Assn.*, 107 S. Ct. 1971 (1987), with *Wilson v. Block*, 708 F.2d 735 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983), and notes 88-172 *supra* and accompanying text. They could support such a position by focusing on the *Yoder* Court's strong emphasis on the special character of the state's interest in education. See note 36 *supra* and accompanying text.

229. See notes 193-95 *supra* and accompanying text. For example, in *Northwest*, because the suit was filed before the projects were commenced, the court could consider protecting the high country by altering the road's direction and limiting the regions where timbering could be carried out. See notes 155-72 *supra* and accompanying text. Cf. *United States v. Means*, 627 F. Supp. 247, 264 (D.S.D. 1985) (considering less restrictive means before worshippers had constructed any permanent structures at the 800 acre religious campsite and before the Forest Service had targeted the area for other projects, the court concluded that the Forest Service could attain its varied objectives on the remaining 1.5 million acres of the Black Hills).

However, one Indian advocate has noted that the interest of worshippers in maintaining the secrecy of their religious practices may preclude early filing of claims. See *Echo-Hawk*, *supra* note 158, at 9 (recommending measures that might be used to preserve the confidentiality of Indian practices). Cf. *Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980), discussed at notes 88-103 *supra* (early filing inhibited since plaintiffs were not aware of the exact location of Chota until after TVA completed an archaeological project).

230. A strict less restrictive means inquiry may thus prompt the intensive consultation between tribal leaders and government agencies envisioned in the American Indian Religious Freedom Act. See notes 197-201 *supra* and accompanying text. Even partial construction of the project, however, should not preclude some type of less restrictive means analysis. See, e.g., Note, *Native American Free Exercise Rights*, *supra* note 89, at 173-74. The author notes that although at one point substantial funds had been appropriated for the Tellico Dam at issue in *Sequoyah*, "legislative history indicate[d] that a decision to forego construction probably would not have appreciably harmed the government's interest in developing power supplies." *Id.* at 173.

231. For example, the *Means* court, considering the appropriate relief for the first amendment violation, noted that it was "not in a position to nor does it want to draw the blueprints for

CONCLUSION

The sacred site cases provide a vivid example of courts attempting to apply conventional free exercise analysis to a new and unfamiliar setting. So far such attempts have been incomplete and at times unduly harmful to Indian religious concerns. The courts' use of centrality exceeds the inquiry required by *Yoder* and the earlier Indian religion cases, conflicts with the principle against judicial determinations of orthodoxy, and encourages improper reliance on familiar criteria as standards for measuring sacred site claims. Moreover, courts' efforts at balancing Indian religious interests and government development interests do not take into account the different natures of the two sets of interests, and are frequently conducted too late in the development process for evaluation of less restrictive alternatives to be meaningful.

Several modifications to conventional free exercise analysis will remedy these problems. Most significantly, once the centrality inquiry is restored to its original limited role, courts will properly be able to focus on actual interferences with religious practices, as they are perceived from the perspective of the Indian religion. They will then be able to compare carefully such interferences with asserted compelling governmental interests, while paying particular attention to existing less restrictive alternatives. In short, these modifications will be relatively easy for courts to implement, and will ensure fairer and more consistent consideration of American Indians' important religious concerns.

— *Mark S. Cohen*

a Lakota religious camp." 627 F. Supp. 247, 271 (D.S.D. 1985). Instead, the court required the parties to work out an acceptable compromise regarding Lakota religious practices in the Black Hills, and specified that no appeals could be taken until such relief had been arranged. 627 F. Supp. at 271-72.