

Saving Sacred Sites: The 1989 Proposed Amendment to the American Indian Religious Freedom Act

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NOTE

SAVING SACRED SITES: THE 1989 PROPOSED AMENDMENT TO THE AMERICAN INDIAN RELIGIOUS FREEDOM ACT

Holding the pipe up with its stem to the heavens, she said: "With this sacred pipe you will walk upon the Earth; for the Earth is your Grandmother and Mother, and She is sacred. Every step that is taken upon Her should be as a prayer."

Black Elk, Oglala Sioux, 1953¹

For countless years, American Indians² have worshipped at natural sites,³ holding the sites sacred. Since the adoption of the first amendment, Congress and the courts have zealously protected the right to freely practice a religion of choice.⁴ However, the religious beliefs of many American Indians do not follow lines traditionally recognized by Judeo-Christian culture.⁵ As a result, policy makers

¹ BLACK ELK, *THE SACRED PIPE: BLACK ELK'S ACCOUNT OF THE SEVEN RITES OF THE OGLALA SIOUX* 5-6 (Joseph Epes Brown ed. 1953) (footnote omitted). For a discussion of the role of women in Indian culture, see PAULA GUNN ALLEN, *THE SACRED HOOP* (1986).

² Although the terms "Indian" and "Native American" can be used interchangeably, "Indian" will be used throughout this Note to refer to indigenous peoples of the United States. Many Indian tribes and people themselves prefer the term Indian. See STEPHEN CORNELL, *THE RETURN OF THE NATIVE* (1988).

³ Various kinds of natural sites are sacred to different Indian tribes. Ranging from the small and unnamed to the grand in scale, sacred natural sites typically include mountain peaks, hot springs, tipi rings, ancestral tribal lands, and valley overlooks. For Karuk Indians, Mount Shasta, at 14,162 feet in California, is a sacred place vital for the healing of the earth. *Hearing Before the Select Comm. on Indian Affairs, United States Senate: Oversight Hearing to Discuss Issues of Concern to Central and Northern California Tribes*, 101st Cong., 1st Sess. 35 (1989) [hereinafter *Hearing, California Tribes*] (statement of Charles Thom, Sr., hereditary medicine man and ceremonial leader of the Karuk tribe, Northern California).

Indian religions are not alone in holding certain sites sacred: "Our religions have their Jerusalems, Mount Calvarys, Vaticans, and Meccas. We hold sacred Bethlehem, Nazareth, the Mount of Olives, and the Wailing Wall." 124 CONG. REC. 21,444 (daily ed. July 18, 1978) (statement of Rep. Udall of Arizona).

⁴ U.S. CONST. amend. I. The first amendment provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

⁵ For further discussion of various Indian religious traditions, see AMERICAN INDIAN PROPHETS (Clifford E. Trafzer ed. 1986); BLACK ELK, *supra* note 1; W.Y. EVANS-WENTZ, *CUCHAMA AND SACRED MOUNTAINS* (1981); CATHERINE FEHER-ELSTON, *CHILDREN OF SACRED GROUND* (1988); PETER J. POWELL, *SWEET MEDICINE* (1969); *SEEING WITH A NATIVE EYE* (Walter Holden Capps ed. 1976); HYEMEYOHSTS STORM, *SEVEN ARROWS* (1972); and *TEACHINGS FROM THE AMERICAN EARTH* (Dennis Tedlock & Barbara Tedlock eds. 1975).

often discount or ignore Indian beliefs. Government agencies frequently make public land management decisions that affect Indian sacred sites located on federal land without considering Indian religion.⁶ This lack of cultural sensitivity continually threatens the practice of Indian religion. Historically, Indians found European settlers intolerant of their religions.⁷ Today, the threat to Indian religion arises not from crusading missionaries, but from federal policies based largely on ignorance.

In 1978, Congress responded to this threat by passing the American Indian Religious Freedom Act (AIRFA).⁸ The Act's avowed purpose was to protect Indian religion and Indian sacred land. In practice, AIRFA has failed to protect Indian sacred sites on public lands. In *Lyng v. Northwest Indian Cemetery Protective Association*,⁹ the United States Supreme Court denied an injunction request from Indians to stop road building and timber harvesting on traditionally sacred land in California. The Court's decision demonstrated AIRFA's inability to protect Indian sacred land sites.

Congress recently appeared willing to amend and strengthen AIRFA. On September 28, 1989, the Senate Select Committee on Indian Affairs held hearings on Senate Bill 1124, the "American Indian Religious Freedom Act Amendments of 1989."¹⁰ The proposed amendment directed federal agencies to manage federal lands in a way that "shall not . . . pose a substantial and realistic threat of undermining and frustrating such [Indian] religion or religious practice."¹¹ In addition, the amendment created a private

⁶ See *infra* text accompanying notes 41-46.

⁷ U.S. DEP'T OF INTERIOR, FEDERAL AGENCIES TASK FORCE: AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT 1-8 (Aug. 1979) [hereinafter TASK FORCE].

A missionary once undertook to instruct a group of Indians in the truths of his holy religion. He told them of the creation of the earth in six days, and of the fall of our first parents by eating an apple. The courteous savages listened attentively, and, after thanking him, one related in his turn a very ancient tradition concerning the origin of maize. But the missionary plainly showed his disgust and disbelief, indignantly saying: "What I delivered to you were sacred truths, but this that you tell me is mere fable and falsehood!"

VINE DELORIA, JR., *GOD IS RED* 99 (1973) (quoting Dr. Charles Eastman).

⁸ Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified at 42 U.S.C. § 1996 (1988)). In several early cases and acts, the government and the courts recognized the important connection between tribes and their land. 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); *Indian Trade and Intercourse Act*, ch. 19, § 8, 1 Stat. 329, 330 (1793).

⁹ 485 U.S. 439 (1988).

¹⁰ S. 1124, 101st Cong., 1st Sess. (1989); see *Hearings Before the United States Senate Select Comm. on Indian Affairs: S. 1124, American Indian Religious Freedom Act Amendments of 1989*, 101st Cong., 1st Sess. (1989) [hereinafter *Hearings S. 1124*].

¹¹ S. 1124, 101st Cong., 1st Sess. § 3(a)(2) (1989).

cause of action enforceable in United States district courts.¹²

This Note concentrates on several aspects of the proposed legislation. Part I surveys the general precepts of several different Indian religions. Part I also discusses AIRFA's enactment history, court cases interpreting AIRFA's scope, and the attempt to amend AIRFA in 1988. Part II details the 1989 proposed amendment and the need for such legislation. Part III concludes that the 1989 amendment, by providing a standard analogous to that in traditional free-exercise analysis of Indian site-specific religions, does not violate the establishment clause.¹³ Challenges to the 1989 amendment centered on a perceived establishment clause conflict. Perhaps because of concern over its constitutional dimensions, the 1989 amendment has not been re-introduced during the 1990 or 1991 congressional sessions.¹⁴ Any amendment attempt will inevitably confront the question of constitutional validity. A discussion of S. 1124's constitutional dimensions sheds light on AIRFA's entire amendment process. Clearly, this is an issue that will not go away in the near future. With certain language clarification, this Note urges Congress to re-introduce and enact the 1989 amendment.

¹² *Id.* § 3(c)(1).

¹³ *See supra* note 4.

¹⁴ As is the nature of legislation, two significant changes have occurred in AIRFA's amendment process since the hearings on amendment S. 1124. On November 21, 1989, Senator Inouye of Hawaii (chairperson of the Senate Select Committee on Indian Affairs) introduced another amendment bill. S. 1979, 101st Cong., 1st Sess., 135 CONG. REC. S16,799-800 (daily ed. Nov. 21, 1989). Responding both to AIRFA's ineffectiveness and the Supreme Court's holding in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), Senator Inouye announced that "there must be a rebalancing of governmental interests against Native American religious interests." 135 CONG. REC. S16,800. S. 1979 is an extensive amendment attempt, with sections covering definitions, policy, federal-Indian consultation, and excavations. Moreover, S. 1979 responds to AIRFA's shortcomings by mandating extensive cooperation and communication between federal agencies and Indian traditional or governmental leaders. S. 1979, 101st Cong., 1st Sess. § 5 (1989).

On January 14, 1991, Senator Inouye again introduced AIRFA legislation. S. 110, 102 Cong., 1st Sess., 137 CONG. REC. S763 (daily ed. Jan. 14, 1991). In virtually identical language to that used on behalf of S. 1979, Senator Inouye announced that S. 110 was "[a] bill to remove barriers to the free exercise of, and to ensure equal respect for, and treatment of, traditional religious practices by Indians, Alaska Natives, and native Hawaiians." *Id.* S. 110 addresses regulations and consultation between federal agencies and Indian tribes. It prohibits federal agency action that would disturb the integrity of a sacred site or the exercise of a religious ceremony unless the agency proves by clear and convincing evidence that the proposed action fulfills a compelling federal interest. Even if such an interest is shown, the agency must propose means with the least potential to disturb the site or ceremony. S. 110 also provides for *de novo* review by a United States district court of the factual record compiled by the federal agency as its decisional basis. Injunctions and attorneys' fees and costs may be awarded by the court.

Although these amendments represent refinements of S. 1124, their constitutional viability remains a central question. Since this Note argues that S. 1124 is constitutionally valid, any proposed amendments with clearer constitutional dimensions should also pass muster.

1

THE EVOLVING NEED FOR NEW LEGISLATION

A. The Historical Loss of the Continent

The growth of the United States from a band of colonies to a transcontinental nation drove Indians from their native lands. The Supreme Court refused to recognize the Indians' legal title to the land in *Johnson v. M'Intosh*.¹⁵ In *Johnson*, Justice Marshall pronounced the doctrine of discovery, declaring that conquest determined title to the land.¹⁶ The new Americans excelled at conquest. In 1778, the first treaty signed by the United States established the Lenape or Delaware Nation territory; thirty years later this nation had disappeared.¹⁷ The government granted the Black Hills of South Dakota to the Indians in 1868. To the Sioux, Cheyenne, and Arapaho Indians, the Black Hills, Paha Sapa, was the center of the world, a place of holy mountains. Four years after the signing of the treaty of the Black Hills, white miners considered the Black Hills sacred for another reason: gold. By 1876, Indian tribes were driven from this region promised to them forever.¹⁸

As two systems of values and cultures clashed, Indians lost all but isolated patches of the continent to the onslaught of white settlers.¹⁹ Between 1850 and 1900, Indians lost extensive lands as white settlers moved West.²⁰ During that period, many tribal members echoed the sentiments of a chief of the northern Blackfeet:

¹⁵ 21 U.S. (8 Wheat.) 543 (1823). Chief Justice John Marshall declared that the right of discovery by the Europeans extinguished any Indian title to the continent. "Conquest gives a title which the Courts of the conqueror cannot deny . . ." *Id.* at 588. Marshall continued to explain that to leave the Indians in possession of the continent would be to leave the continent a wilderness. *Id.* at 590.

¹⁶ *Id.* at 587.

¹⁷ PETER MATTHIESSEN, *INDIAN COUNTRY* 5 (1984). Between 1779 and 1871, the United States Congress ratified 371 treaties with different Indian nations. REX WEYLER, *BLOOD OF THE LAND* 65 (1982).

¹⁸ DEE BROWN, *BURY MY HEART AT WOUNDED KNEE* 264-96 (1970); see VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS* (1969).

¹⁹ For a historical overview of the most tumultuous period in American Indian modern history, see PHILIP WEEKS, *FAREWELL, MY NATION: THE AMERICAN INDIAN AND THE UNITED STATES, 1820-1890* (1990). For a historical account of the Cherokee Indian Nation, see JOHN EHLE, *TRIAL OF TEARS: THE RISE AND FALL OF THE CHEROKEE NATION* (1988).

²⁰ Beginning in the 1850s, the reservation system came into existence. This system confined Indians to land completely surrounded and controlled by private landholders, the States, the territories, or the federal government. Also, the transcontinental railroad, completed in 1869, linked the continent and brought settlers to previously remote areas. Soon after the completion of the railroad, the great buffalo herds, essential to the traditional existence of the Plains Indians, disappeared. DAVID H. GETCHES & CHARLES F. WILKINSON, *FEDERAL INDIAN LAW* 102-03 (1986). For an in-depth discussion of several treaty histories, see *FORKED TONGUES AND BROKEN TREATIES* (Donald E. Worcester ed. 1975).

"Our land is more valuable than your money. It will last forever. . . . we will give you anything we have that you can take with you; but the land, never."²¹ Despite this uncompromising stance, Indians were unable to keep their land.²²

As the land was seized, federal Indian law developed in a reactionary manner in response to the changing desires of the dominant white culture.²³ The unique relationship between Congress and Indian tribes sprang mainly from a common desire for the land.²⁴ Two different philosophies motivated each side. The Indians viewed the land in terms of stewardship; the white culture wanted ownership.²⁵ As Chief Red Cloud of the Lakota said, "They made many promises to us, but they only kept one: they promised to take our land, and they took it."²⁶

Although Congress traditionally held fiduciary and plenary

²¹ T.C. McLuhan, *TOUCH THE EARTH* 53 (1971).

²² American Indians have recently begun asserting claims to their lands. See, e.g., *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (Indian tribe claim for damages representing fair rental value of land owned and occupied by New York counties allowed under federal common law), *reh'g denied*, 471 U.S. 1062 (1985). Extensive land claims by the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians were settled out of court with the passage of the Maine Indian Claims Settlement Act of 1980. 25 U.S.C. §§ 1721-1735 (1988). This Act extinguished all aboriginal title and remaining Indian claims, enabled the purchase of 305,000 acres for the tribes, and created a \$27 million trust fund with quarterly payments to the Passamaquoddies and Penobscots. Congress also enacted the Indian Land Consolidation Act of 1982, 25 U.S.C. §§ 2201-2211 (1988). This Act allows tribes to adopt land consolidation plans to eliminate fractional property interests and to combine tribal land holdings.

²³ As trustee for American Indian tribes, Congress has almost unlimited power over Indian affairs. For this reason, Indian law and history are hopelessly intertwined. American Indian law has swung through various extremes during its relatively short history. From 1776 to 1871, the United States tended to treat Indians as separate nations—drawing straight line boundaries delineating Indian and non-Indian country. In the mid-1850s, the reservation system came into existence as settlers moved westward and began to increasingly encounter the Indians. The United States government still considered the Indians semisovereign nations during this expansion period, as evidenced by the government's desire to make treaties with the various tribes.

In 1871 two important changes occurred. First, all treaties with the Indians ended. Second, Congress passed the General Allotment Act (Dawes Act), apportioning land to individual Indians and non-Indians alike. Until 1928, the avowed policy of the federal government was total assimilation of the Indians into the white culture. The government passed the Indian Reorganization Act in 1928, signaling a brief period of self-determination for Indian tribes. This period ended in 1948 with the implementation of the termination program. With this program, the federal policy performed an about-face in seeking complete integration of Indians into American society, thereby extinguishing tribal status. Around 1961, the government again revised its attitude toward Indians and commenced a policy of Indian self-determination. This particular policy has lasted until the present. Unfortunately, there are signs of increasing public resentment of the "special status" of Indians. Time will only tell if we are headed for another assimilationist period. See D. GETCHES & C. WILKINSON, *supra* note 20, at 33-159.

²⁴ R. WEYLER, *supra* note 17, at 14-15.

²⁵ *Id.* at 15.

²⁶ *Id.* at 65.

power over the gamut of Indian affairs,²⁷ modern cases signal that the Bill of Rights applies to Indians in almost the same way as it does to other citizens.²⁸ In only two areas, trust land holdings²⁹ and political treatment of tribes,³⁰ does Congress's fiduciary or plenary power alter the application of the Bill of Rights to Indians. Because neither of these areas concerns sacred sites,³¹ this Note follows an unmodified first amendment analysis.

B. Foundations of Indian Religious Practices

The federal government now owns roughly three-quarters of a billion acres of public land.³² Because Indians once held all this land, much of it contains sites sacred to Indian religious beliefs. Many Indians believe that their sacred sites were stolen from them. One Lakota chief protested, "we never gave up the Black Hills or the buffalo country, never! That is our church; we never sold our church."³³

Indian tribes generally believe that these sacred sites must be left untouched and undisturbed.³⁴ The Navajo Indians, for example, believe that spiritual beings inhabit certain natural places.³⁵ These sites become relatives and family with whom the Navajo must

²⁷ *United States v. Kagama*, 118 U.S. 375 (1886) (Indian tribes fall under the control of the federal, not state, government. "These Indian tribes are the wards of the nation." *Id.* at 383.).

²⁸ See *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, *reh'g denied*, 471 U.S. 1062 (1985); *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

²⁹ See *Sioux Nation*, 448 U.S. at 416-17 (because Indian land is held in trust by the federal government, Congress may manage the land in ways that would violate the just compensation clause if applied to private land holdings).

³⁰ See *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974) (singling out Indian tribes does not violate the equal protection clause because "Indian" is a political, not racial, category).

³¹ The sacred sites covered by AIRFA are not on land held in trust for the Indians. In addition, *Morton*, in labeling Indian status as a political category, did not address Indian religion or possible religious discrimination.

³² NEWSPAPER ENTERPRISE ASSOCIATION, *WORLD ALMANAC AND BOOK OF FACTS* 421 (1988). This 1985 statistic of 740,885,157.6 acres includes land controlled by the Bureau of Land Management, United States Forest Service, Bureau of Reclamation, United States Fish and Wildlife Service, United States Park Service, Tennessee Valley Authority, Army Corps of Engineers, Army, Navy, Department of Energy, and Bureau of Indian Affairs.

³³ R. WEYLER, *supra* note 17, at 28 (quoting Lakota Chief Matthew King).

³⁴ Generalizations about Indian beliefs must yield to the fact that each tribe has its own cultural and religious identity. In short, Indian tribes and religions cannot be lumped into one category. See *infra* notes 35-40, 47-55 and accompanying text.

³⁵ Many Navajos believe that the San Francisco Peaks in the Coconino National Forest in Arizona are intrinsically sacred. They believe that specific gods live on the Peaks and perform specific religious ceremonies there. *Wilson v. Block*, 708 F.2d 735, 738 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983), *cert. denied*, 464 U.S. 1056 (1984). The Hopi Indians similarly believe that the Peaks are sacred. According to the Hopi, emissaries of the Creators, the Kachinas, live on the Peaks for six months every year. *Id.*

stay. "We cannot make prayers at any spring or rock, only the ones where we know the spiritual beings. These places are sacred to us. We cannot practice our religion anywhere else."³⁶

Indians value these sites in at least two ways.³⁷ First, Indians need access to the sites for religious ceremonies. Such rituals include gathering medicine, healing the sick, speaking with the gods, or performing religious obligations.³⁸ For example, the Paiute-Shoshone people of California believe that a hot spring is the site of their creation; as such, it is a healing place. Religious ceremonies for elders and the sick use the water, the vapor, and the mud of the hot spring.³⁹ Similarly, the Chumash Indians help the deceased in their journey to the spiritual world by burying a medicine bundle on the top of Santa Lucia Peak in California.⁴⁰

Even though AIRFA directs federal agencies to preserve access for worship at sacred sites, the government has largely ignored this policy directive in these two instances. The Paiute-Shoshone hot spring is located in Channel Lake Naval Weapons Center. The Navy and the Department of Energy use the site for geothermal development. The Navy denies the Indians access to the hot spring for sacred ceremonies, but regularly allows academic archaeologists on the site.⁴¹ The Chumash Indians have not fared much better. Citing fire hazards, the United States Forest Service has blocked their access to Santa Lucia and told them to use another peak.⁴²

Federal courts have also allowed interference with and destruction of these sites. In two cases, government dams flooded sacred

³⁶ *Improvement of the American Indian Religious Freedom Act: Hearing on S. 2250 Before the United States Senate Select Comm. on Indian Affairs*, 100th Cong., 2d Sess. 231 (1988) [hereinafter *Hearings S. 2250*] (affidavit of Kee Shay, Navajo Trihe of Arizona).

³⁷ Note, *American Indian Sacred Religious Sites and Government Development: A Conventional Analysis in an Unconventional Setting*, 85 MICH. L. REV. 771, 778 n.48, 791 n.138 (1987) (authored by Mark S. Cohen) (contrasting claims about site access and intrinsic sacredness of the site).

³⁸ See AKE HULTKRANTZ, *THE RELIGIONS OF THE AMERICAN INDIANS* 103-15 (1979); LAURA THOMPSON & ALICE JOSEPH, *THE HOPI WAY* 36-38 (1944).

³⁹ *American Indian Religious Freedom: Hearings on S.J. Res. 102 Before the United States Senate Select Comm. on Indian Affairs*, 95th Cong., 2d Sess. 193-94 (1978) [hereinafter *AIRFA Hearings*] (statement of Stephen Rios, Executive Secretary, Native American Heritage Commission).

⁴⁰ *Id.* at 194.

⁴¹ *Id.*

⁴² *Id.* Interestingly, the Secretary of the Interior in 1980 unhesitatingly endorsed the continuation of an annual Christian Easter pageant at Wichita Mountains National Wildlife Refuge in Oklahoma. Citing the fact that "Holy City," a group of backdrop structures for the pageant, had been there for 45 years, the Secretary asserted, "No one is going to disturb the observance or the sacred symbols on that refuge as long as I am Secretary of the Interior." *Indian Religious Freedom Issues: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 53-57 (1982) [hereinafter *Judiciary Hearing*] (memo from Cecil D. Andrus, Secretary of Interior).

sites and rendered them completely unreachable.⁴³ In other instances, the federal government built a road through a sacred site⁴⁴ and allowed a ski resort to be constructed on a place of worship.⁴⁵ Such destruction of sacred sites harms more than the religion of the Indian tribes; it undermines their existence as a people:

[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.⁴⁶

Indians also value the sites in a second and more central way. To many Indians, the sites themselves, apart from the ceremonies performed there, have deep religious significance and spiritual importance.⁴⁷ One scholar has noted: "[O]nce a site is chosen by the gods as a place of sacred value, that sacredness continues to reside there for eternity. . . . Sacred places transcend human history and are places of inexhaustible power and spiritual energy. They are not merely sites of convenience."⁴⁸

According to many Indian religions, the physical world continually threatens to return to its original state of chaos:

[I]f we abandon our land, who will return the balance and harmony to the earth when it is necessary. If we are not there, everything will fall more and more out of balance and our religious prophecies teach us that very bad things will happen and the world may end.⁴⁹

Consistent with this philosophy, Yakima Indians believe that they are the keepers of the continent;⁵⁰ Hopi Indians believe that they must guard the land through prayers and religious traditions.⁵¹

⁴³ *Sequoyah v. Tennessee Valley Auth.*, 480 F. Supp. 608 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980); *Badoni v. Higginson*, 455 F. Supp. 641 (Utah 1977), *aff'd*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

⁴⁴ *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

⁴⁵ *Wilson v. Block*, 708 F.2d 735 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983), *cert. denied*, 464 U.S. 1056 (1984).

⁴⁶ *Wilson*, 708 F.2d at 740 n.2.

⁴⁷ David C. Williams & Susan H. Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L. REV. 769, 820-23 (1991).

⁴⁸ *Judiciary Hearing*, *supra* note 42, at 105 (manuscript by David Carrasco, Sacred Space and Religious Vision in World Religions: A Context to Understand the Religious Claims of the Kootenai Indians).

⁴⁹ *Hearings S. 2250*, *supra* note 36, at 271 (affidavit of Violet Ashkie, Navajo Tribe of Arizona).

⁵⁰ *AIRFA Hearings*, *supra* note 39, at 31-37 (statement of Johnson J. Meninick, Yakima Tribe of Washington).

⁵¹ P. MATTHIESSEN, *supra* note 17, at 79.

For Indians, the place where the natural and the supernatural mix creates a reference point for our world and keeps it from chaos.⁵² Such a belief explains the significance of the sacred sites; an undisturbed sacred site bridges the “real” world and the world of the supernatural.⁵³ Sacred sites hold balance and harmony for the world.⁵⁴ Sacred sites also often link Indians and their creation beliefs.⁵⁵ Bear Butte, near Sturgis, South Dakota, is the creation place for both the Oglala Sioux and the Northern Cheyenne Indians. It is also a state park. The development and modification of these sites has destroyed these Indians’ religions, turned their order into chaos, erased their reference points for the world, and changed forever the Indian people.

C. A Legislative Response: The American Indian Religious Freedom Act of 1978

AIRFA succinctly expresses an important policy objective of Congress, and its language echoes a theme from the Bill of Rights. In its entirety, the first and controlling section of AIRFA reads:

Henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.⁵⁶

The second and last section of the Act requires the Executive to

The Hopi have been placed on this side of the Earth to take care of the land through their ceremonial duties, just as other races of people have been placed elsewhere around the Earth to take care of her in their own ways. Together we hold the world in balance, revolving properly. If the Hopi Nation vanishes, the motion of the Earth will become eccentric, the water will swallow the land, and the people will perish.

R. WEYLER, *supra* note 17, at 274 (interview of Dan Katshongva, Sun Clan).

⁵² WILLIAM E. COFFER, *SPIRITS OF THE SACRED MOUNTAINS* 51-52 (1978); MIRCEA ELIADE, *THE SACRED AND THE PROFANE* 29-54 (1959).

⁵³ See P. MATTHIESSEN, *supra* note 17, at 116-21; Alfonso Ortiz, *The Tewa World View*, in *TEACHINGS FROM THE AMERICAN EARTH* 179-89 (Dennis Tedlock & Barbara Tedlock eds. 1975).

⁵⁴ A. HULTRANTZ, *supra* note 38, at 60-64; JOHN UPTON TERRELL, *THE NAVAJOS* 3 (1970); L. THOMPSON & A. JOSEPH, *supra* note 38, at 52.

⁵⁵ You know, everything had to begin, and this is how it was: the Kiowas came one by one into the world through a hollow log. They were many more than now, but not all of them got out. There was a woman whose body was swollen up with child, and she got stuck in the log. After that, no one could get through, and that is why the Kiowas are a small tribe in number. They looked all around and saw the world. It made them glad to see so many things. They called themselves KWUDA, “coming out.”

Kiowa folk tale, *reprinted in* N. SCOTT MOMADAY, *THE NAMES* I (1976).

⁵⁶ Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified at 42 U.S.C. § 1996 (1988)).

prepare a task force report on federal agency practices and policies regarding Indian religions.⁵⁷

The limited scope of the legislation aroused little debate;⁵⁸ its enactment was largely unopposed.⁵⁹ In later interpretations, AIRFA would be noted mostly for what it did not contain. It did not create any right to civil action to enforce its provisions; it merely stated policy objectives. AIRFA did not instruct agencies to consider the possible impact to Indian religions in their decisionmaking; it only emphasized that the government should comply with the first amendment's directive that Congress shall make no laws abridging the free exercise of religion.⁶⁰

AIRFA's legislative history provides a picture of the types of religious violations contemplated by Congress. Congress acknowledged the need for ensured access to certain physical locations.⁶¹ Additionally, Congress sought to permit the use of substances with religious significance and to prevent interference in ongoing ceremonies by government officials.⁶² Congress concluded that "America does not need to violate the religions of her native peoples. There is room for and great value in cultural and religious

⁵⁷ *Id.* § 2, 92 Stat. 469.

⁵⁸ A supporter of the Act asserted that it "is not conveying any right to anybody." 124 CONG. REC. 21,445 (daily ed. July 18, 1978) (remarks of Rep. Roncalio, Democrat of Wyoming).

⁵⁹ *AIRFA Hearings*, *supra* note 39. S.J. Res. 102 passed in the Senate on April 3, 1978 and an amended version, incorporating text from H.R.J. Res. 738, passed on July 27, 1978. 124 CONG. REC. 8365-66, 23,078-79 (1978). AIRFA passed in the House on July 18, 1978. *Id.* at 21,451. President Carter signed AIRFA in August, 1978. 14 WEEKLY COMP. PRES. DOC. 1417-18 (Aug. 12, 1978).

⁶⁰ H.R. REP. NO. 1308, 95th Cong., 2d Sess. 1, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 1262, 1262.

⁶¹ The legislative history shows Congress's increased sensitivity to Indian access to sacred sites. "To deny access to them is analogous to preventing a non-Indian from entering his church or temple." *Id.* at 2, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 1262, 1263.

⁶² Peyote, a mild hallucinogen, is used in religious ceremonies of the Native American Church. Its religious use is protected under federal law. 21 C.F.R. § 1307.31 (1989) ("The 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, and members of the Native American Church so using peyote are exempt from registration."); *see also* *Olsen v. Drug Enforcement Admin. (DEA)*, 878 F.2d 1458, 1463-64 (D.C. Cir. 1989) (explaining DEA's rationale for the exception). Some officials, unaware of peyote's protected status, have confiscated the plant. *See generally* SILVESTER J. BRITO, *THE WAY OF A PEYOTE ROADMAN* (1989); TONY HILLERMAN, *PEOPLE OF DARKNESS* (1980); OMER C. STEWART, *PEYOTE RELIGION* (1908); J.S. Slotkin, *The Peyote Way*, in *TEACHINGS FROM THE AMERICAN EARTH*, *supra* note 53, at 96-104.

Narcotics officers have seized bags of pine needles or sweet grass, mistaking these plants for drugs. Officials have also confiscated feathers of common birds, assuming they come from an endangered species. Eagle feathers can be passed down for generations within a family without violating the protected status of the bird. *See* H.R. REP. NO. 1308, 95th Cong., 2d Sess. 3, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 1262, 1264.

diversity. We would be poorer if these American Indian religions disappeared from the face of the Earth."⁶³ AIRFA appeared to be a step toward increased government understanding of Indian religions.⁶⁴

1. AIRFA's Extent and Coverage

Despite its apparent broad sweep, AIRFA created no private cause of action or any other enforcement mechanism. The Act aimed only to fill a gap in governmental policy that allowed agencies to infringe on the practice of native traditional religions.⁶⁵ In fact, the Act provided no new protection for Indian religion. It merely emphasized the importance of considering religion when formulating government policy. Although AIRFA stressed protection and preservation, it had no enforcement provisions. As a supporter of the Act, Congressman Udall seemed to marginalize the legislation by stating, "[the resolution] simply says to our managers of public lands that they [Indians] ought to be encouraged to use these places. It has no teeth in it. It is the sense of the Congress."⁶⁶

Section two of AIRFA directed the Executive to evaluate its policies and procedures in consultation with native traditional religious leaders.⁶⁷ Accordingly, the Carter administration established a task force comprised of representatives of federal agencies. The task force's report identified 522 instances where federal agencies violated Indian religious practices in 1978 and 1979.⁶⁸ On the Hawaiian islands of Kahoolawe, Koa, and Oahu, for example, the United States Navy used sites sacred to Native Hawaiians as bombing ranges.⁶⁹ Members of the Mescalero Apache tribe also were denied access to their sacred mountain sites: Guadalupe Peak, Organ Mountain, Three Sisters, and Oscura Peak in New Mexico. In Montana, oil wells were drilled in the middle of traditional tipi rings. At present none of the task force's recommendations has been adopted.⁷⁰

⁶³ H.R. REP. NO. 1308, 95th Cong., 2d Sess. 3, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 1262, 1264.

⁶⁴ See generally Ellen M.W. Sewell, *The American Indian Religious Freedom Act*, 25 ARIZ. L. REV. 429 (1983).

⁶⁵ H.R. REP. NO. 1308, 95th Cong., 2d Sess. 2, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 1262, 1264.

⁶⁶ 124 CONG. REC. 21, 444-45 (1978).

⁶⁷ 42 U.S.C. § 1996 (1988).

⁶⁸ TASK FORCE, *supra* note 7.

⁶⁹ The United States Navy used the 27,000-acre island of Kahoolawe for target bombing practice from 1953 until November 5, 1990. However, the recent halt may be short-lived. Navy officials are pushing for an executive order from President Bush to resume use of the island. *Military Still Wants Access to Hawaiian Island*, N.Y. TIMES, Dec. 20, 1990, at B20, col. 1.

⁷⁰ D. GETCHES & C. WILKINSON, *supra* note 20, at 569. The task force recom-

2. Federal Court Interpretations of AIRFA

Several federal court interpretations of AIRFA illustrate its toothlessness.⁷¹ The court in *Crow v. Gullet*⁷² held that AIRFA "does not create a cause of action in federal courts for violation of rights of religious freedom."⁷³ In *Wilson v. Block*,⁷⁴ the court made it clear that AIRFA merely required an agency to solicit and consider the opinions of Indian leaders, but it did not require these opinions to have a binding effect on federal administrators.⁷⁵ Finally, in *Northwest Indian Cemetery Protective Association v. Peterson*,⁷⁶ while the court found a violation of Indians' first amendment free exercise clause rights, it ruled that there had been sufficient compliance with AIRFA because studies had been conducted and hearings had been held.⁷⁷

The Supreme Court first considered AIRFA in 1986 when it heard *Bowen v. Roy*.⁷⁸ Although the case did not involve a sacred site, it did address the issue of agency infringement on freedom to worship, an area also covered by AIRFA.⁷⁹ Roy, a member of the Abenaki Indian tribe, refused to obtain a Social Security number for his daughter, Little Bird of Snow. Roy contended that the representation of his daughter by a unique number violated the family's religious beliefs.⁸⁰ Because Roy's youngest daughter did not have a

mended new legislation in six areas: creation of federal land-use designation for areas containing sites or shrines; removal of statutory provisions which restrict Indian access to religious sites; permission for withholding information from the public about sacred sites; restriction of exports of objects sacred to Indians; exemption for Indians to import sacred objects duty free; and prohibition of the unauthorized removal of religious objects from Indian or Eskimo land. *Id.*; see 137 CONG. REC. S763 (daily ed. Jan. 14, 1991) (statement of Senator Inouye).

⁷¹ Only one district court case has given AIRFA any weight. In *United States v. Means*, 627 F. Supp. 247, 266-69 (D.S.D. 1985), the court held that a Forest Service refusal to issue a permit for the Black Hills was arbitrary and capricious because the lack of meaningful consultation with Indian religious leaders conflicted with AIRFA.

⁷² 541 F. Supp. 785 (D.S.D. 1982).

⁷³ *Id.* at 793.

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

⁷⁵ *Id.* at 746-47.

⁷⁶ 565 F. Supp. 586 (N.D. Cal. 1983), *aff'd*, 795 F.2d 688 (9th Cir. 1986), *rev'd sub nom.* *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

⁷⁷ *Id.* at 597-98.

⁷⁸ 476 U.S. 693 (1986).

⁷⁹ 42 U.S.C. § 1996 (1988).

⁸⁰ *Bowen*, 476 U.S. at 696.

[Q.] Mr. Roy, could you explain why obtaining a Social Security Number for Little Bird of Snow would be contrary to your religious beliefs as a native Abenaki?

[A.] Yes. Because we felt that this number would be used to rob her of her ability to have greater power in that this number is a unique number. It serves unique purposes. It's applied to her and only her; and being applied to her, that's what offends us, and we try to keep her person unique, and we try to keep her spirit unique, and we're

Social Security number, the government terminated a portion of the family's federal public assistance.

Roy contended that under either AIRFA or the free exercise clause, his family was entitled to an exemption from the Social Security number requirement. The Court held that the free exercise clause did not require the government to conduct its internal affairs in ways that comported with the religious beliefs of citizens.⁸¹ The Court also noted that AIRFA "accurately identified the mission of the Free Exercise Clause itself."⁸² Under either analysis, the Court noted that the federal government did not impair Roy's freedom to believe, express, and exercise his religion.⁸³

The Supreme Court applied the *Bowen* approach to sacred sites in the 1988 case, *Lyng v. Northwest Indian Cemetery Protective Association*.⁸⁴ Citing *Bowen* extensively, the *Lyng* Court held that neither the free exercise clause nor AIRFA could protect sacred Indian sites from federal development.

In *Lyng*, the United States Forest Service wanted to build a six-mile paved road through the Chimney Rock section of the Six Rivers National Forest in California.⁸⁵ Yurok, Karok, and Tolowa Indians traditionally used this forest area for religious purposes.⁸⁶ The Forest Service commissioned a study of the American Indian cultural and religious sites in the area. The study found that the entire Chimney Rock section was an indispensable part of Indian religious life: "[S]uccessful use of the [area for Indian religious purposes] is dependent upon and facilitated by certain qualities of the physical environment, the most important of which are privacy, silence, and an undisturbed natural setting. . . . [The road] would cause serious and irreparable damage to the sacred areas."⁸⁷ Based on these findings, the study recommended that the road not be completed. Despite AIRFA's stated policy to protect and preserve access to sacred sites, the Forest Service ignored this recommendation.

The Supreme Court concluded that neither the free exercise

scared that if we were to use this number, she would lose control of that and she would have no ability to protect herself from any evil that that number might be used against her.

Id. at 697 n.3.

⁸¹ *Id.* at 700. "As a result," said the Court, "Roy may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size and color of the Government's filing cabinets." *Id.*

⁸² *Id.*

⁸³ *Id.* at 700-01.

⁸⁴ 485 U.S. 439 (1988).

⁸⁵ *Id.* at 442.

⁸⁶ *Id.*

⁸⁷ *Id.*

clause of the first amendment nor AIRFA prohibited the government from constructing the road or harvesting timber on this sacred land.⁸⁸ Writing for the majority, Justice O'Connor found this case indistinguishable from *Bowen v. Roy*: "The building of a road or the harvesting of timber on publicly owned land cannot meaningfully be distinguished from the use of a Social Security number."⁸⁹ Because internal agency procedures guided the decision to build the road and harvest timber, the Court refused to hold that this particular government action unconstitutionally violated Indian religious freedom.⁹⁰

The *Lyng* decision destroyed any effectiveness that AIRFA may have had. Justice O'Connor's opinion proclaimed that "[n]owhere in the law is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights."⁹¹ The Court's decision meant that AIRFA only required agencies to pay lip service to Indian views, and confirmed that AIRFA never gave Indians an enforceable veto over any government development or disturbance of sacred lands.⁹²

⁸⁸ *Id.* at 441-42. Justice O'Connor wrote the majority opinion, and Justices White, Stevens, Scalia, and Chief Justice Rehnquist joined her opinion. Justices Brennan, Marshall, and Blackmun dissented. Justice Kennedy took no part in the consideration or decision of the case.

⁸⁹ *Id.* at 449.

⁹⁰ *Id.* at 450. The Indians argued that indirect coercion or penalties on the free exercise of religion should be subjected to first amendment inquiry. While the Court agreed with this argument, it doggedly maintained that the incidental effects of internal government programs did not mandate a compelling justification from the government. Nothing in the government actions, according to the Court, prohibited Indian religion. *Id.* at 450-51.

Many commentators have criticized this decision. See Donald Falk, *Lyng v. Northwest Indian Cemetery Protective Association: Bulldozing First Amendment Protection of Indian Sacred Lands*, 16 *ECOLOGY L.Q.* 515, 559 (1989) ("The result . . . is clear: Indian religions can be extinguished at the government's pleasure."); Note, *Conduct and Belief in the Free Exercise Clause: Developments and Deviations in Lyng v. Northwest Indian Cemetery Protective Association*, 76 *CORNELL L. REV.* 268, 289 (1990) (authored by J. Brett Pritchard) ("The Court's refusal to extend constitutional protection to the religious practices of the American Indians signaled a substantial retreat from . . . earlier free exercise claims."); Note, *Lyng v. Northwest Indian Cemetery Protective Association: A Form-Over-Effect Standard for the Free Exercise Clause*, 20 *LOY. U. CHI. L.J.* 171, 196 (1988) (authored by Peggy Healy) (Noting the contradiction between the Court's sympathetic dicta and its refusal to recognize a first amendment violation, this author asserted: "A guaranty of freedom to exercise one's religion . . . is meaningless if the conditions under which that freedom may be exercised can be shattered. Allowing the free exercise of religion while destroying the individual's ability to exercise that freedom is akin to granting the freedom to vote but banning elections.")

⁹¹ *Lyng*, 485 U.S. at 455.

⁹² The Supreme Court again took notice of AIRFA's lack of real and actionable meaning in *Employment Division, Department of Human Resources v. Smith*, 110 S. Ct. 1595 (1990). There, the Court refused to find a violation of the free exercise clause where members of the Native American Church lost their jobs due to peyote use and were denied state unemployment benefits. For further discussion of the facts and hold-

D. 1988 Amendment Attempt

Just prior to the *Lyng* decision, Senators Cranston, Inouye, and DeConcini attempted to amend AIRFA in order to give the Act some real meaning and effectiveness.⁹³ Although Congress did not ultimately amend AIRFA, the proposed 1988 amendment and its hearings provide a good background for the proposed 1989 amendment. The proposed 1988 amendment, S. 2250, set forth two important changes.⁹⁴ First, it set a threshold requirement for court challenges to federal land management. The language of the amendment called for a "historically indispensable" standard for Indian religious challenges to federal land management. Congress never spelled out the exact definition of this standard. At the least, tribes or tribal members would have been required to show that the land in question was indispensable to their religion and had been indispensable in their historic past. Several Indian advocates attacked the proposed historical and indispensable standard as too demanding.⁹⁵ The Senate Select Committee on Indian Affairs heard testimony suggesting the replacement of the "historically indispensable" standard with language emphasizing the whole and complete integrity of Indian religious practices.⁹⁶

ing of *Smith*, see *infra* note 140. Dissenting in *Smith*, Justice Blackmun viewed the Court's holding as reconfirming that "[t]he American Indian Religious Freedom Act, in itself, [does] not create rights enforceable against government action restricting religious freedom . . ." *Smith*, 110 S. Ct. at 1622 (Blackmun, J., dissenting). For further discussion of the original enactment of AIRFA, see Robin K. Rannow, *Religion: The First Amendment and the American Indian Religious Freedom Act of 1978*, 10 AM. INDIAN L. REV. 151 (1982); Ellen H.W. Sewell, *The American Indian Religious Freedom Act*, 25 ARIZ. L. REV. 429 (1983); Howard Stamber, *Manifest Destiny and American Indian Religious Freedom: Sequoyah, Badoni, and the Drowned Gods*, 10 AM. INDIAN L. REV. 59 (1982); Dean B. Suagee, *American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers*, 10 AM. INDIAN L. REV. 1 (1982); Note, *The First Amendment and the American Indian Religious Freedom Act: An Approach to Protecting Native American Religion*, 71 IOWA L. REV. 869 (1986) (authored by Diane Brazen Gould); Note, *The American Indian Religious Freedom Act—An Answer to the Indian's Prayers?*, 29 S.D.L. REV. 131 (1983) (authored by Rex P. Craven).

⁹³ The proposed amendment to AIRFA, S. 2250, 100th Cong., 2d Sess. (1988), was introduced on March 31, 1988; *Lyng* was decided on April 19, 1988.

⁹⁴ S. 2250 would have added the following provisions to AIRFA:

Sec. 3(a) Except in cases involving compelling governmental interests of the highest order, Federal lands that have been historically indispensable to a traditional American Indian religion shall not be managed in a manner that would seriously impair or interfere with the exercise or practice of such traditional American Indian religion.

(b) United States district courts shall have the authority to issue such orders as may be necessary to enforce the provisions of this section.

S. 2250, 100th Cong., 2d Sess. § 3 (1988).

⁹⁵ *Hearings S. 2250*, *supra* note 36, at 70-73 (testimony of Steven C. Moore, Staff Attorney, Native American Rights Fund).

⁹⁶ *Id.* at 75 (testimony of Dr. Deward E. Walker, Jr., Professor of Anthropology, University of Colorado at Boulder). Dr. Walker believes that this standard would encompass and protect a broader range of Indian religious practices.

Second, the proposed amendment also established the availability of an individual cause of action in the United States district courts. As is, AIRFA merely encourages agencies to use their discretion in order to protect and preserve traditional Indian religions. This change would have forced the Supreme Court in *Lyng* to address AIRFA, its goals, and its purposes.

Unfortunately, Congress did not act on the proposed amendment. At hearings held by the Senate Select Committee on Indian Affairs, several witnesses voiced various objections to the amendment. The Department of the Interior opposed the amendment, contending that it was "vague and unworkable"⁹⁷ and would "curtail the ability of the various land management agencies to carry out the congressional mandates under which they operate."⁹⁸ The government claimed it could not even estimate the amount of federal land covered by this bill.⁹⁹

Other witnesses, representing various timber, mining, and coal associations, argued that proposed amendment S. 2250 would unfairly give Indians power over other interests because it effectively gave them a veto over use of federal land.¹⁰⁰ A representative of one of the lobbying groups also claimed that S. 2250 violated the establishment clause of the first amendment by favoring Indian religions.¹⁰¹

Other witnesses, many of whom represented various Indian tribes and tribal organizations, spoke in support of S. 2250. Suzan Harjo, executive director of the National Congress of American Indians, stressed the overriding importance of religion in Indian life: "Indian religion is not a program. Indian spirituality is a world view and, when the last people who believe and practice traditional Indian spiritual ways would be gone, there would be no more Indian nations. It is the fabric, the network, the glue that holds the Indian nations together."¹⁰² Another witness disputed the Department of the Interior's claim that conflicts between Indian religion and other uses of public land would be more than a rare occurrence.¹⁰³

⁹⁷ *Id.* at 44 (written testimony of Roland G. Robinson, deputy director, Bureau of Land Management).

⁹⁸ *Id.* at 45.

⁹⁹ *Id.* at 44.

¹⁰⁰ *Id.* at 114-20 (written testimony of Scott M. Matheson, attorney, Parsons, Bahle & Latimer, Salt Lake City, Utah, on behalf of American Mining Congress, Timber Associations of California, Alaska Miners Association, Colorado Mining Association, Montana Coal Council, Nevada Mining Association, Northwest Mining Association, Utah Mining Association, and Wyoming Mining Association).

¹⁰¹ *Id.* at 119-20.

¹⁰² *Id.* at 23.

¹⁰³ *Id.* at 29-30 (statement of Marilyn B. Miles, attorney, California Indian Legal Services).

Non-Indian religious groups also backed the amendment. The Bureau of Catholic Indian Missions expressed its support for religious freedom. "American Indians need the right to perform their act of worship to express their inner feelings to God. If they are denied that right, all religions are in danger of being denied that right."¹⁰⁴ The American Jewish Congress also endorsed the amendment, stating that it "chart[ed] a proper course between allowing government unfettered discretion over public lands . . . and the creation of an unyielding religious servitude."¹⁰⁵ Rather than envying the specific mention of Indian religions in the proposed amendment, these religious organizations applauded the amendment as an affirmation of religious liberty.

Even though Congress did not act on S. 2250, the impetus to amend AIRFA remained.¹⁰⁶ In January 1989, Senator Inouye announced plans for another amendment attempt.¹⁰⁷

II

THE 1989 PROPOSED AMENDMENT: ANSWERING THE SUPREME COURT'S CHALLENGE

On March 21, 1989, Representative Morris K. Udall expressed disapproval of the Supreme Court's decision in *Lyng* and introduced new legislation in the House of Representatives to amend AIRFA.¹⁰⁸ Criticizing the Supreme Court for its narrow holding in *Lyng*, Representative Udall proposed changes to AIRFA to give American Indians "a fighting chance."¹⁰⁹

Senator McCain introduced S. 1124¹¹⁰ to the United States

¹⁰⁴ *Id.* at 13 (statement of Monsignor Paul A. Lenz, Executive Director, Bureau of Catholic Missions).

¹⁰⁵ *Id.* at 142 (statement of the American Jewish Congress).

¹⁰⁶ It is clear therefore that mere policy statements regarding the Government's appreciation and respect of Indian traditional religious rights is not enough. . . . An important first step would be the reintroduction of a bill requiring Federal agencies to manage Federal lands so as not to impair or interfere with the exercise or practice of traditional Indian religion.

Hearing, California Tribes, supra note 3, at 34 (statement of Marilyn B. Miles, attorney, California Indian Legal Services).

¹⁰⁷ 135 CONG. REC. S798-99 (daily ed. Jan. 25, 1989) (statement of Senator Inouye).

¹⁰⁸ 135 CONG. REC. E898 (daily ed. Mar. 21, 1989) (statement of Rep. Udall). The House version of the amendment is H.R. 1546, 101st Cong., 1st Sess. (1989). Since the proposed Senate amendment, S. 1124, 101st Cong., 1st Sess. (1989), incorporates and expands upon the provisions of H.R. 1546, the Senate amendment will be the focus of this Note. All analysis applies equally to both bills.

¹⁰⁹ 135 CONG. REC. E898 (daily ed. Mar. 21, 1989) (statement of Rep. Udall).

¹¹⁰ S. 1124, 101st Cong., 1st Sess. (1989). S. 1124 reads as follows:

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled,

Senate on June 6, 1989.¹¹¹ Both bills reflected congressional dissat-

SECTION 1. This Act may be cited as the "American Indian Religious Freedom Act Amendments of 1989".

SEC. 2. The Congress finds that—

(1) unlike any other established religion, many traditional Native American religions are site-specific in that the Native American religions hold certain lands or natural formations to be sacred;

(2) such sacred sites are an integral and vital part of the Native American religions and the religious practices associated with such religions;

(3) many of these sacred sites are found on lands which were formerly part of the aboriginal territory of the Indians but which now are held by the Federal Government; and

(4) lack of sensitivity or understanding of traditional Native American religions on the part of Federal agencies vested with the management of Federal lands has resulted in the lack of a coherent policy for the management of sacred sites found on Federal lands and has also resulted in the infringement of religious freedom for Native Americans.

SEC. 3. Public Law 95-341 (42 U.S.C. 1996), popularly known as the American Indian Religious Freedom Act, is amended by adding at the end thereof the following new section:

SEC. 3. (a) Except as otherwise provided in this section, Federal lands that—

"(1) have historically been considered sacred and indispensable by a traditional Native American religion, and

"(2) are necessary to the conduct of a Native American religious practice, shall not be managed in a manner that will pose a substantial and realistic threat of undermining and frustrating such religion or religious practice.

"(b)(1) Subsection (a) shall not apply to management decisions which are necessary to—

"(A) carry out the legal responsibilities of the Federal Government,

"(B) protect a compelling governmental interest, or

"(C) protect a vested property right.

"(2) In making management decisions described in paragraph (1), the Federal agency shall attempt to accommodate the various competing interests and shall, to the greatest extent feasible, select the course of action that is the least intrusive on traditional Native American religions or religious practices.

"(3) Nothing in this section shall be interpreted as requiring any Federal agency to totally deny public access to Federal lands.

"(c)(1) The United States district courts shall have jurisdiction over any civil action brought by any person to enforce the provisions of this section and may issue such orders as may be necessary to enforce the provisions of this section.

"(2) Any person challenging a decision of a Federal agency in a civil action brought under this subsection shall have the burden of proving that the decision of the Federal agency will pose a substantial and realistic threat of undermining and frustrating a traditional Native American religion or religious practice. If such threat is established, the Federal agency shall have the burden of demonstrating that the Federal agency's decision is based on one or more of the criteria in subsection (b)(1). If the Federal agency's decision is found to have been based on one or more of the criteria in subsection (b)(1), then the Federal agency shall have the burden of proving that it selected the course of action that is the least intrusive on the Native American religion or religious practice."

¹¹¹ 135 CONG. REC. S6220-21 (daily ed. June 6, 1989) (statement of Senator McCain).

isfaction with the Supreme Court's narrow holding in *Lyng*.¹¹² With obvious reference to the *Lyng* decision, the amendment's backers intended the amendment to change the result of future litigation. Indeed, Congress may have found support for this idea in the *Lyng* decision itself. The *Lyng* Court had stated that competing demands on government, even those concerning religion, should be left for the legislature to reconcile.¹¹³ This dicta suggested that the Court might uphold a legislative attempt to protect Indian religion even if such a law was challenged under the establishment clause.¹¹⁴

* * *

The 1989 amendment repeats the two major provisions of the earlier amendment attempt. First, Indians must show that historically they have held the federal lands sacred and indispensable,¹¹⁵ and that these sites are necessary to conduct Indian religious practices.¹¹⁶ Second, S. 1124 creates an individual cause of action and authorizes district courts to issue enforcement orders.¹¹⁷ Therefore, S. 1124 makes the rights of Indian religious practitioners enforceable under AIRFA.

Section two of S. 1124 provides the underlying purpose of the amendment. It points out the unique, site-specific nature of traditional Indian religions and underscores the intent of Congress to create a coherent policy to protect Indian sacred sites located on federal land.¹¹⁸ The bill also emphasizes that these sacred sites, although now on federal land, originally were part of the aboriginal territory of the Indians.¹¹⁹ Once lands come under the "historically . . . sacred and indispensable" standard, the amendment directs that these lands "shall not be managed in a manner that will pose a substantial and realistic threat of undermining and frustrating such religion or religious practice."¹²⁰

The plaintiffs in a civil action brought under this amendment

¹¹² The holding of the Court ignores the peculiarity of traditional native American religions. These religions are different from other religions in the sense that many of them are site specific and many of these sites are found in nature. The Court's recent decision in effect allows the Government to totally destroy these sacred sites without constitutional restriction under the guise that such destruction does not force the Indians to behave contrary to their religious beliefs.

¹¹³ 135 CONG. REC. E898 (Mar. 21, 1989) (statement of Rep. Udall).

¹¹⁴ *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988).

¹¹⁵ See Falk, *supra* note 90. For a detailed discussion of this idea, see *infra* text accompanying notes 211-13.

¹¹⁶ S. 1124, 101st Cong., 1st Sess. § 3(a)(1) (1989).

¹¹⁷ *Id.* § 3(a)(2).

¹¹⁸ *Id.* § 3(c)1(1).

¹¹⁹ *Id.* § 2(1), (2).

¹²⁰ *Id.* § 2(3).

¹²¹ *Id.* § 3(a).

have the burden of proving that an agency decision will pose this substantial and realistic threat.¹²¹ Once such a threat is proven, the burden of proof shifts to the federal agency to show that its decision is based on one of three possible criteria specified in the bill:¹²² necessary to protect a compelling governmental interest;¹²³ necessary to carry out the legal responsibilities of the federal government;¹²⁴ or necessary to protect a vested property right.¹²⁵

Definitions of the latter two criteria are unclear. Witnesses who testified at the initial hearings for S. 1124 voiced this concern. Notably, a witness on behalf of the Tanana Chiefs Conference of Alaska said, "it is unclear whether [the phrase] 'legal responsibilities' includes discretionary acts by a federal land manager who has a legal responsibility to exercise that discretion."¹²⁶ A representative of the Salish and Kootenai Tribes of the Flathead Nation attacked the legal responsibility language as providing "no standard whatsoever."¹²⁷

The "vested property right" language is also confusing. Specifically, it is unclear whether this language refers exclusively to third party interests such as private leases of federal land. A broader interpretation might include agency property rights for exercising discretion in land management.¹²⁸ Because these interpretations vary considerably, some have advocated refined definitions.¹²⁹

Indeed, interpretational difficulties needlessly obscure an otherwise coherent legislative response. On one hand, section 3(b)(1)(A) may create a loophole so large that any agency decision fits under the category "legal responsibilities of the government." The same section, however, could be read merely to reiterate the compelling state interest exception. Similarly, the vested property right language of section 3(b)(1)(C) lends itself to interpretations

¹²¹ *Id.* § 3(c)(2).

¹²² *Id.*

¹²³ *Id.* § 3(b)(1)(B).

¹²⁴ *Id.* § 3(b)(1)(A).

¹²⁵ *Id.* § 3(b)(1)(C).

¹²⁶ *Hearings S. 1124, supra* note 10 (statement of Will Mayo, Special Assistant to the President, Tanana Chiefs Conference of Alaska); *see also id.* (statement of Reuben A. Snake, Jr., council member, Winnebago Tribe of Nebraska) ("The criteria listed under Sec. (3)(b)(1)(A), 'carry out the legal responsibilities of the Federal Government,' is a loophole which will allow federal agencies to subvert the intent and purpose of the American Indian Religious Freedom [sic] Act and should be stricken.").

¹²⁷ "This particular language couldn't possibly be any broader in scope. It provides no standard whatsoever, whereby the federal action could be measured." *Id.* (testimony of the Confederated Salish and Kootenai Tribes of the Flathead Nation).

¹²⁸ *Id.* (statement of Will Mayo, Special Assistant to the President, Tanana Chiefs Conference of Alaska).

¹²⁹ *Id.* (testimony of the Confederated Salish and Kootenai Tribes of the Flathead Nation).

with differing results. This Note urges Congress to enact the 1989 amendment with clear definitions of these criteria. Before enactment, definitional uncertainties should be resolved in order for courts and federal agencies to apply the law consistently.

Even if an agency could justify its management decisions under any of the three criteria, section 3(b)(2) requires that the agency select the least intrusive method of acting when dealing with Indian religion or religious practice.¹³⁰ This provision mandates agency consideration of alternatives when making federal land management decisions.¹³¹

The 1989 amendment also soothes the concensus of those opponents to the 1988 amendment who feared that Indian groups could block non-Indian public access to federal lands.¹³² The 1989 bill explicitly states that the amendment shall not be interpreted to require any agency to deny public access to federal lands.¹³³

III

THE FIRST AMENDMENT RELIGION CLAUSES AND THE 1989 AIRFA AMENDMENT LEGISLATION

If Congress amends AIRFA with a bill similar to S. 1124, parties opposed to any limitations on federal land management could challenge the enactment on constitutional grounds. Mining and timber interests will undoubtedly argue that the establishment clause of the first amendment¹³⁴ prohibits such legislation. Ranching and archaeological interests opposed the 1988 proposed AIRFA amendment and may do so again.¹³⁵ Such challenges would be overcome, however, because the 1989 amendment does not violate the Constitution.

Both the free exercise clause and the establishment clause limit government interaction with religion. These interactions can be

¹³⁰ S. 1124, 101st Cong., 1st Sess. § 3(b)(2) (1989) ("In making management decisions . . . the Federal agency shall attempt to accommodate the various competing interests and shall, to the greatest extent feasible, select the course of action that is the least intrusive on traditional Native American religions or religious practices.")

¹³¹ This portion of S. 1124 mimics other laws which require agencies to consider alternative plans. Cf. National Environmental Policy Act, 42 U.S.C. § 4322 (1988); Administrative Procedure Act, 5 U.S.C. § 706 (1988).

¹³² *Hearings S. 2250, supra* note 36, at 114 (statement of Scott M. Matheson, Parsons, Behle & Latimer). Justice Brennan recognized this concern in his dissent from the *Lyng* decision. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988).

¹³³ S. 1124, 101st Cong., 1st Sess. § 3(b)(3) (1989).

¹³⁴ See *supra* note 4.

¹³⁵ *Hearings S. 2250, supra* note 36, at 152 (statement by the Public Lands Council, National Cattlemen's Association and National Wool Growers Association); *id.* at 367 (comments by the Society for American Archaeology).

viewed in one of three ways. First, the free exercise clause may require government accommodation of religious practices. Since the Supreme Court in *Lyng* ruled that federal land management decisions do not burden free exercise rights,¹³⁶ the amendment does not fall into this category and is therefore not required by the free exercise clause.

Second, the establishment clause could prohibit government action that accommodates religion or prefers one religion over another. In *Larson v. Valente*,¹³⁷ the Supreme Court outlined the standard with which to interpret statutes that construct "explicit and deliberate distinctions between different religious organizations."¹³⁸ This Note contends that the amendment does not belong in this category either.

Third, some government actions involving religion are neither prohibited nor required by the first amendment religion clauses. *Lemon v. Kurtzman*¹³⁹ dealt with statutes that accommodated religion in general, without singling out particular religions. This Note argues that the amendment should be placed and analyzed in this category.

A. Traditional Free Exercise Analysis and *Lyng*'s Narrow Standard

When the Supreme Court decided *Lyng*, traditional free exercise clause doctrine was fairly well established.¹⁴⁰ Specifically, tradi-

¹³⁶ See *supra* notes 88-90 and accompanying text.

¹³⁷ 456 U.S. 228, *reh'g denied*, 457 U.S. 1111 (1982).

¹³⁸ *Id.* at 246-47 n.23.

¹³⁹ 403 U.S. 602, *reh'g denied*, 404 U.S. 876 (1971).

¹⁴⁰ Free exercise analysis took a dramatic turn in *Employment Division, Department of Human Resources v. Smith*, 110 S. Ct. 1595, *reh'g denied*, 110 S. Ct. 2605 (1990). The majority opinion, written by Justice Scalia, held that the right of free exercise of religion did not exempt individuals from compliance with generally applicable neutral laws—even if the laws proscribed or required conduct contrary to or forbidden by the individual's religious practice. *Id.* at 1599-1601. Respondents were Oregon members of the Native American Church—an Indian religious organization which uses peyote, a mild hallucinogen, for sacramental purposes. The State of Oregon defines the possession of peyote as a Class B felony. OR. REV. STAT. § 475.992(4)(a) (1987); OR. ADMIN. R. 855-50-021(3)(s) (1988). Because of their peyote use, respondents not only lost their jobs, but they were also denied state unemployment benefits for "misconduct." *Smith*, 110 S. Ct. at 1598. The Court found no violation of the free exercise clause. Indeed, Justice Scalia went even further and virtually struck down the balancing test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963).

The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law

tional free exercise clause cases delineate a two-step analysis. Is the government placing a burden on the free exercise of a religious belief?¹⁴¹ If so, can the burden be justified by a compelling state interest?¹⁴²

Lyng narrowed this analysis. Relying on *Bowen*, the Court ruled that internal government decisions do not technically violate the free exercise clause, even though, as in this case, completion of the logging road could “virtually destroy the . . . Indians’ ability to practice their religion.”¹⁴³ According to the Court, if the executive branch could characterize its actions as internal functions, the government’s actions fell beyond the scope of judicial review.¹⁴⁴

This excessive formalism has shifted the Court’s focus from the type of government restriction to the effect of the government action.¹⁴⁵ After *Lyng* and the recent Supreme Court holding in *Employment Division, Department of Human Resources v. Smith*,¹⁴⁶ the amendments are not required by the free exercise clause.

When Congress originally passed AIRFA, its intent was simply

unto himself”—contradicts both constitutional tradition and common sense.

Smith, 110 S. Ct. at 1603 (citations omitted). In response to this turn of events, Representative Solarz and 34 other members of Congress introduced a resolution “to protect the free exercise of religion.” 136 CONG. REC. H5695 (daily ed. July 26, 1990) (introduction of H.R. 5377).

¹⁴¹ *Sherbert v. Verner*, 374 U.S. 398 (1963). The Supreme Court held that South Carolina could not constitutionally deny unemployment benefits to Sherbert, a Seventh-day Adventist. Sherbert refused employment which required her to work on Saturday because her religious faith forbade it. The *Sherbert* Court clearly stated that freedom of religion might be infringed by “the denial of or placing of conditions upon a benefit or privilege.” *Id.* at 404. In holding that Sherbert should receive unemployment benefits, the Supreme Court did not establish or foster the Seventh-day Adventist religion. The Court’s ruling thus fulfills the required governmental neutrality with regard to different religions. Moreover, the recognition of Sherbert’s rights did not discriminate against any other person’s religious freedom. *Id.* at 409-10; see also *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Yoder*, the Supreme Court held that the first amendment prevented a state from forcing Amish children to attend high school until the age of 16. The Amish demonstrated a sincere religious belief that such continued education would endanger not only their religion, but also their way of life.

¹⁴² *Bowen v. Roy*, 476 U.S. 693 (1986).

¹⁴³ *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 451 (1988).

¹⁴⁴ *Bowen*, 476 U.S. at 700. The Court’s classification of public land decisions as “internal” is problematic. Public land comprises one-third of the land in the United States. PUBLIC LAND LAW REVIEW COMM’N, ONE THIRD OF THE NATION’S LAND 37 (1970). Seemingly absurd results will be achieved if management of this much land is considered internal. “Thus, trees become internal. Even mountains become internal.” Falk, *supra* note 90, at 551. The federal government is not only a trustee for the Indian tribes; it also holds land in trust for all people. *Light v. United States*, 220 U.S. 523, 537 (1911); *Camfield v. United States*, 167 U.S. 518, 524 (1897). Governmental action ceases to be purely internal when it alters the physical environment of its citizens. *Shutlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969).

¹⁴⁵ See Falk, *supra* note 90, at 545.

¹⁴⁶ 110 S. Ct. 1595 (1990); see *supra* notes 92 & 140 for further case discussion.

to underscore the protections of the free exercise clause. Presuming that the free exercise clause constituted a reliable source of protection for Indian religion,¹⁴⁷ Representative Udall of Arizona stated that AIRFA "has no teeth in it."¹⁴⁸ Ironically, the Supreme Court in *Lyng* quoted Representative Udall in support of its position that AIRFA merely suggested policy objectives.¹⁴⁹

In addition to *Lyng*, Indians have brought many other free exercise claims challenging government use of public lands that contain sacred sites.¹⁵⁰ In these cases, courts have considered the extent to which the first amendment protects Indian religion and religious practices from government interference in its management of public lands.¹⁵¹ None of these cases, however, has advanced or protected Indian religious freedom.

The 1989 proposed amendment to AIRFA is a step toward protecting Indian sacred sites under an analysis similar to free exercise clause analysis prior to *Smith*. Given that the *Lyng* decision allows the government to defile and destroy sacred sites without constitutional restraint, Indians have been effectively forced to change their religious behavior. By following the pattern outlined in traditional free exercise clause cases, the 1989 amendment would help Indians save their sacred sites.

B. The Establishment Clause: Constitutionally Prohibited Religious Accommodation

The proposed 1989 amendment should survive establishment clause challenges. Such challenges can be expected from mining, timber, ranching, and archaeological groups.¹⁵² Indeed, these spe-

¹⁴⁷ "Of course, in 1978, the year the act was passed, I could not have foreseen the 1988 Supreme Court decision in the *Lyng* case and its adoption of an extremely narrow view of protection given to religious freedoms in the Constitution." 135 CONG. REC. E898 (daily ed. Mar. 21, 1989) (statement of Rep. Udall).

¹⁴⁸ 124 CONG. REC. 21,445 (daily ed. July 18, 1978).

¹⁴⁹ *Lyng*, 485 U.S. at 455.

¹⁵⁰ See *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *Wilson v. Block*, 708 F.2d 735 (D.C. Cir.), cert. denied, 464 U.S. 956 (1983), cert. denied, 464 U.S. 1056 (1984); *Inupiat Community v. United States*, 548 F. Supp. 182 (D. Alaska 1982), aff'd 746 F.2d 570 (9th Cir. 1984) (per curiam), cert. denied, 474 U.S. 820 (1985), reh'g denied, 485 U.S. 972 (1988); *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); *Sequoyah v. Tennessee Valley Auth.*, 480 F. Supp. 608 (E.D. Tenn. 1979), aff'd, 620 F.2d 1159 (6th Cir.), cert. denied, 449 U.S. 953 (1980); *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).

¹⁵¹ See Note, *Native Americans' Access to Religious Sites: Underprotected Under the Free Exercise Clause?*, 26 B.C.L. REV. 463 (1985) (authored by Erica Rosenberg) (analyzing free exercise cases).

¹⁵² Cf. *Hearings S. 2250*, supra note 36, at 367-68 (comments of the Society for American Archaeology). Indian groups have long accused archaeologists of being little more than grave robbers. See *id.* at 98-99 (testimony of the Confederated Salish and Kootenai

cial interests argued that the previous 1988 amendment attempt violated the establishment clause, and their reaction to S. 1124 has been no different.¹⁵³

1. *Congress May Not Favor Particular Religious Organizations*

The establishment clause prohibition against governmental religious advocacy demonstrates the interplay between the two religion clauses of the first amendment. Just as the free exercise clause prohibits official discouragement of religion, “[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”¹⁵⁴ It is also one of the oldest commands; this reasoning led to the abolition of most denominational preference statutes at the state level by the 1780s.¹⁵⁵

James Madison believed that free and equal competition among religions secured freedom of religion.¹⁵⁶ This concept requires that legislators treat their own religions in the same way as “small, new, or unpopular denominations.”¹⁵⁷ In *Larson v. Valente*, the Court clearly held that government may not give preferential treatment to particular religions.¹⁵⁸ Statutes that favor certain religions are valid only if narrowly drawn to serve a compelling state interest.¹⁵⁹ The *Larson* standard applies where a statute shows denominational preference on its face. The Court distinguished *Larson* from other establishment clause doctrines,¹⁶⁰ stating that “the *Lemon v. Kurtzman* ‘tests’ are intended to apply to laws affording a uniform benefit to *all* religions, and not to provisions . . . that discriminate *among* religions.”¹⁶¹

Tribes of the Flathead Nation). See generally Margaret B. Bowman, *The Reburial of Native American Skeletal Remains: Approaches to the Resolution of a Conflict*, 13 HARV. ENVTL. L. REV. 147 (1989); Walter R. Echo-Hawk, *Museum Right vs. Indian Rights: Guidelines for Assessing Competing Legal Interests in Native Cultural Resources*, 14 N.Y.U. REV. L. & SOC. CHANGE 437 (1986); Kristine Olson Rogers, *Visigoths Revisited: The Prosecution of Archaeological Resource Thieves, Traffickers, and Vandals*, 2 J. ENVTL. L. & LITIGATION 47 (1987).

A newly enacted law, the Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048 (1990), specifically protects Indian burial sites, prohibits trafficking in Native American human remains and cultural items, and gives ownership of such items found on federal or tribal lands to appropriate Indian groups. See Grace Lichtenstein, *Taking Back the Past*, OUTSIDE MAG., Apr. 1991, at 108.

¹⁵³ See *Hearings S. 1124*, *supra* note 10 (statement of Scott M. Matheson, attorney, Parsons, Behle & Latimer, on behalf of American Mining Congress *et al.*).

¹⁵⁴ *Larson v. Valente*, 456 U.S. 228, 244, *reh'g denied*, 457 U.S. 1111 (1982).

¹⁵⁵ LEO PFEFFER, *CHURCH, STATE, AND FREEDOM* 104-19 (rev. ed. 1967).

¹⁵⁶ THE FEDERALIST NO. 51, at 324 (James Madison) (Clinton Rossiter ed. 1961).

¹⁵⁷ *Larson*, 456 U.S. at 245.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 241-47.

¹⁶⁰ See *infra* text accompanying notes 185-98.

¹⁶¹ *Larson*, 456 U.S. at 252 (emphasis in original; footnote omitted).

Larson concerned a Minnesota statute that in effect distinguished between "well-established churches" and "churches which are new and lacking in a constituency."¹⁶² The statute imposed certain registration and reporting requirements only upon religious organizations that solicited more than fifty percent of their funds from nonmembers. The Court found that the statute was not facially neutral,¹⁶³ not closely tailored to meet a compelling state interest,¹⁶⁴ and, therefore, unconstitutional under the establishment clause.¹⁶⁵

The Court explicitly distinguished *Larson* from *Gillette v. United States*.¹⁶⁶ *Gillette* upheld section 6(j) of the Military Selective Service Act,¹⁶⁷ which granted conscientious objector status to anyone who opposed "participation in war in any form" based on religious belief. Section 6(j) distinguished between those persons religiously opposed to all wars and those religiously opposed only to a particular war.¹⁶⁸ The *Larson* Court explained that the statute in *Gillette* "focused on individual conscientious belief, not on sectarian affiliation."¹⁶⁹ Regardless of his or her denomination, an individual could qualify under section 6(j) if he or she held the requisite belief. Accordingly, the Selective Service exemption "simply did not discriminate on the basis of religious affiliation."¹⁷⁰ The statute struck down in *Larson*, in contrast, concentrated "precisely and solely upon religious organizations."¹⁷¹

2. The 1989 AIRFA Amendment Withstands a Larson Analysis

The language of S. 1124 singles out and protects Indian religions which hold federal land sites sacred.¹⁷² As a result, the amendment appears to violate *Larson's* prohibition against treating certain sects preferentially. Moreover, although the 1989 amendment specifies "Native American religions," not all Indian religions

¹⁶² *Id.* at 246 n.23.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 251.

¹⁶⁵ *Id.* at 255.

¹⁶⁶ 401 U.S. 437, *reh'g denied*, 402 U.S. 934 (1971).

¹⁶⁷ 50 U.S.C.A. App. § 456(j) (1988).

¹⁶⁸ *Id.*

¹⁶⁹ *Larson*, 456 U.S. at 247 n.23 (citing *Gillette*, 401 U.S. at 454).

¹⁷⁰ *Id.* (citing *Gillette*, 401 U.S. at 450).

¹⁷¹ *Id.*

¹⁷² See *Hearings S. 1124*, *supra* note 10 (written testimony of Prof. David C. Williams, Cornell Law School). This is not the first statute to single out religious activity on federal land for special consideration. In 1889, a criminal statute was enacted protecting worship in Indian Territory from disturbance. Act of Mar. 1, 1888, ch. 333, § 22, 25 Stat. 783, 787. Congress was undoubtedly considering Christian religions when it passed this law.

hold specific sites sacred.¹⁷³ In focusing its protection, the amendment creates a category of religions which hold certain sites on federal land historically sacred and indispensable. This category is not forbidden by *Larson* because “[i]t includes some but not all Native American religions, and it would include all site-specific non-Indian religions, but there are none.”¹⁷⁴

While the “Native American religions” language of the amendment suggests an impermissible distinction among religions, the practical effect of the language does not. The Court has established that certain apparently discriminatory categories are permissible where distinctions are not actually based on constitutionally impermissible criteria. In *Geduldig v. Aiello*,¹⁷⁵ the Court upheld a state statute that excluded pregnancy from a work-loss compensation scheme. The Court determined that the statute separated workers into pregnant and nonpregnant categories, not female and male ones. Even though one group in this classification system was exclusively female, its opposing group included both men and women. The classification, the Court concluded, was therefore not based upon gender “as such.”¹⁷⁶

Similarly, the proposed AIRFA amendment distinguishes between site-specific and nonsite-specific religions. While one category includes only Indian religions, the other category contains both Indian and non-Indian religions. In *Geduldig*, there was no possibility of including men in the pregnant group, so the statute did not mention them. Likewise, Congress has pointedly found that there are no non-Indian religions that value sacred sites on federal land.¹⁷⁷ Therefore, the amendment does not include them.

Characterized in this way, the 1989 AIRFA amendment compels a *Gillette*-type analysis. The statute challenged in *Larson* made explicit distinctions between religious organizations. The 1989 amendment does not specify religious organizations; rather, it identifies groups of ideas and ceremonies concerning the sacredness of land. An individual need not belong to a particular religious organization to have historically sacred and indispensable land protected. This mirrors *Gillette*'s distinction between individual conscientious

¹⁷³ The Native American Church is an example of an Indian religion which does not have sacred sites. *Hearings S. 1124, supra* note 10.

¹⁷⁴ *Id.*

¹⁷⁵ 417 U.S. 484 (1974) (superseded by statute as stated in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678-79 (1983)).

¹⁷⁶ *Id.* at 496 n.20.

¹⁷⁷ S. 1124, 101st Cong., 1st Sess. § 2(I), 135 CONG. REC. S6220 (1989). For a more detailed discussion concerning the absence of any other religious group which values sacred sites on federal land, see *Hearings S. 1124, supra* note 10 (written testimony of Prof. David C. Williams, Cornell Law School).

belief and sectarian affiliation.¹⁷⁸

To qualify for its protection, the amendment requires only that an individual believe in the precepts of traditional Indian religion. The amendment even provides for enforcement actions by individuals, not religious organizations.¹⁷⁹ Additionally, the amendment does not treat site-specific religions preferentially. Preference requires that the legislature treat one group better than another in common areas.¹⁸⁰ In *Corporation of the Presiding Bishop v. Amos*,¹⁸¹ the Court upheld Title VII of the Civil Rights Act of 1964, which distinguishes between religions with employees and those without. According to the Court, this distinction involves no preference.¹⁸² For religions without employees, then, employment discrimination is never an issue.

Likewise, the 1989 amendment protects sacred sites, but no preference is involved in this protection.¹⁸³ There is no basis for comparison between site-specific and nonsite-specific religions; Congress will not waste energy protecting the sites of nonsite-specific religions. As one witness wrote in testimony on S. 1124: "Rather than granting a preference, the statute merely treats differently those that are differently situated."¹⁸⁴

C. Neither Prohibited nor Required by the First Amendment

1. *The Lemon Test for Religiously Neutral Statutes*

*Lemon v. Kurtzman*¹⁸⁵ articulated the starting point for establishment clause challenges to statutes that do not create facial denominational distinctions. *Lemon* established a three-prong test to determine whether a statute unconstitutionally promotes religion in general.¹⁸⁶ First, the statute must have a secular purpose; second,

¹⁷⁸ *Gillette*, 401 U.S. at 454.

¹⁷⁹ S. 1124, 101st Cong., 1st Sess. § 3(c)(1), 135 CONG. REC. S6221 (1989).

¹⁸⁰ See *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

¹⁸¹ *Id.*

¹⁸² Title VII of the Civil Rights Act of 1964, § 702, 78 Stat. 255 (codified as amended at 42 U.S.C. § 2000e-1 (1988)) gives a "uniform benefit to all religions." *Amos*, 483 U.S. at 339 (quoting *Larson v. Valente*, 456 U.S. 228, 252, *reh'g denied*, 457 U.S. 1111 (1982)) (emphasis in original).

¹⁸³ In fact, at least 121 permanent Christian churches are located on National Park Service land. *Judiciary Hearing, supra* note 42, at 114-22 (Churches in National Park System Areas).

¹⁸⁴ *Hearings S. 1124, supra* note 10 (written testimony of Prof. David C. Williams, Cornell Law School).

¹⁸⁵ 403 U.S. 602 (1971). In 1947, the Supreme Court held that "[i]n the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'" *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947) (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)). Today, this line drawing is not so simple.

¹⁸⁶ *Lemon*, 403 U.S. at 612. Actions from Rhode Island and Pennsylvania were

its primary effect must neither advance nor inhibit religion; and third, the statute must not cause excessive entanglement between government and religion.¹⁸⁷ A statute that fails any one of these tests violates the establishment clause.¹⁸⁸

*Corporation of the Presiding Bishop v. Amos*¹⁸⁹ refined the *Lemon* test. Although *Lemon* required that a law serve a secular purpose, *Amos* held that the law's purpose need not be unrelated to religion.¹⁹⁰ A permissible secular purpose under *Amos* could simply be "to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."¹⁹¹

Regarding the second prong of the *Lemon* test, the *Amos* Court held that the establishment clause allows "benevolent neutrality"¹⁹² on the part of the government, so long as such neutrality furthers the free exercise of religion. Note that the establishment clause forbids only the government itself from promoting or inhibiting religion through its own actions. "A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose."¹⁹³

*Texas Monthly v. Bullock*¹⁹⁴ recently affirmed this analysis. A plurality of the Supreme Court noted that although statutes that relate "exclusively to religious organizations" are generally invalid under the first two *Lemon* prongs, several exceptions to this rule exist.¹⁹⁵ A statute that may "reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion"¹⁹⁶ may be constitutional. The Court explicitly placed the *Amos* statute in this category.¹⁹⁷ It reaffirmed *Amos*'s holding that the secular purpose and effect prongs are not violated by a statute that removes governmental interference from a religious practice.¹⁹⁸

joined in this case, challenging the constitutionality of state aid to nonpublic schools. The Supreme Court held both statutes unconstitutional under the religion clauses of the first amendment because both involved excessive intermingling of church and state.

¹⁸⁷ *Id.* at 612-13.

¹⁸⁸ *Id.*

¹⁸⁹ 483 U.S. 327 (1987).

¹⁹⁰ *Id.* at 337.

¹⁹¹ *Id.* at 335.

¹⁹² *Id.* at 334.

¹⁹³ *Id.* at 337 (emphasis in original).

¹⁹⁴ 489 U.S. 1 (1989). In *Texas Monthly*, a plurality of the Court struck down a statute that exempted religious periodicals from state sales tax. The plurality held that the statute violated the establishment clause, and that the exemption was not required by the free exercise clause.

¹⁹⁵ *Id.* at 15.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 15 n.8.

¹⁹⁸ *Id.*

2. *The AIRFA Amendment Passes All Three Prongs of the Lemon Test*

a. *The 1989 Amendment Serves a Secular Purpose*

Under the first prong of the *Lemon* test, the AIRFA amendment must serve a secular purpose. S. 1124 removes government-imposed obstacles to Indian religious practice. The Court has identified this as a valid secular purpose,¹⁹⁹ and has emphasized Congress's discretionary ability to accommodate free exercise values not mandated by the first amendment.²⁰⁰ Similarly, in *County of Allegheny v. American Civil Liberties Union*, the Court noted that "[g]overnment efforts to accommodate religion are permissible when they remove burdens on the free exercise of religion."²⁰¹ Past government management of public land constitutes a burden that has impeded and frustrated the exercise of Indian religions.²⁰²

Simply leaving the land undeveloped also serves a secular purpose. In a period of growing environmental concern, government no longer has a mandate to develop all public land. Other statutes have created a public policy in favor of leaving some public lands untouched.²⁰³ A general management scheme that leaves public land pristine has no connection with the establishment clause.²⁰⁴ In short, wilderness management does not establish a religion.

b. *The Amendment's Primary Effect Neither Advances nor Inhibits Religion*

The AIRFA amendment does not advance Indian religions. Rather, it simply allows the practice of established religion to continue. The amendment avoids any appearance of promoting Indian religions by balancing the protection of sacred sites against other interests. Public land left undeveloped creates no change in legal

¹⁹⁹ *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987); see text accompanying note 191.

²⁰⁰ *Gillette v. United States*, 401 U.S. 437, 454, *reh'g denied*, 402 U.S. 934 (1971).

²⁰¹ *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086, 3105 n.51 (1989); see *Amos*, 483 U.S. at 348.

²⁰² See *supra* text accompanying notes 41-46, 68-70, 85-88.

²⁰³ See, e.g., *Archaeological Resources Protection Act of 1979*, 16 U.S.C. § 470cc(c) (1988); *National Historic Preservation Act*, 16 U.S.C. §§ 470(f), 470h-2f (1988); *Wilderness Act of 1964*, 16 U.S.C. § 1131(a) (1988); *National Forest Management Act of 1976*, 16 U.S.C. § 1612 (1988); *National Environmental Policy Act*, 42 U.S.C. § 4332(C) (1988) (requiring agencies to facilitate public participation, consider alternatives, or minimize harms to federal lands, forests, historic sites, and the environment generally); *Federal Land Policy and Management Act of 1976*, 43 U.S.C. §§ 1712(f), 1739(e) (1988).

²⁰⁴ Cf. *Widmar v. Vincent*, 454 U.S. 263 (1981) (school access to both religious and nonreligious groups did not violate the establishment clause); Falk, *supra* note 90, at 560.

status at all.²⁰⁵ In addition, the amendment does not allow Indian tribes to dictate federal land management policy; it leaves the ultimate decisionmaking policy in the hands of the relevant agencies. Any other policy would indeed be unconstitutional.²⁰⁶

A wilderness management policy that leaves land undisturbed would preserve the status quo of the environment. Such a policy would only establish a religion if the *status quo ante* established a religion.²⁰⁷ It is impossible to suggest that the history of wilderness management in the United States has been prefaced on religious grounds. The very lack of sensitivity toward Indian religions belies that idea. Given that the status quo is nonreligious, respecting the status quo is also nonreligious.

There is legitimate concern that recognition of Indian religious rights could paralyze the government's ability to manage and use large amounts of federal property. Justice Brennan, in his dissent in *Lyng*, acknowledged this concern.²⁰⁸ Lobbying groups have expressed fears that Indians could exclude all human activity, save their own, from these areas. These concerns, while valid, stem from a clash between two different cultures—that of the dominant western culture, viewing land in terms of ownership and use, and that of native American Indian tribes, wherein concepts of private property are often completely alien. Unable to empathize with or perhaps even understand the Indian view of religion, the *Lyng* Court sidestepped the issue of “otherness.”²⁰⁹ The Court refused to address this intricate conflict, leaving the task to Congress.²¹⁰

c. *The Amendment Does Not Excessively Entangle Government and Religion*

Lemon's third prong requires that a statute not foster “excessive

²⁰⁵ “Where a public forum has been created, an ‘equal access’ policy, extending to both religious groups and non-religious groups, is not incompatible with the Supreme Court’s Establishment Clause cases.” American Civil Liberties Union v. Wilkinson, 895 F.2d 1098, 1102 (6th Cir. 1990) (quoting *Widmar v. Vincent*, 454 U.S. 263, 271 (1981)).

²⁰⁶ See *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 123 (1982) (invalidating a Massachusetts statute that gave churches the power to veto applications for liquor licenses within a 500-foot radius of a church; by vesting discretionary governmental powers in religious bodies, the statute violated the establishment clause).

²⁰⁷ Falk, *supra* note 90, at 560-61.

²⁰⁸ *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 473 (1988) (Brennan, J., dissenting); see *supra* note 132 and accompanying text.

²⁰⁹ Justice Thurgood Marshall wrote: “It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live.” *United States v. Kras*, 409 U.S. 434, 460 (1973) (dissenting opinion). For a discussion of the power of empathy in the Court’s decisions, see Lynn N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987).

²¹⁰ *Lyng*, 485 U.S. at 473-74 (Brennan, J., dissenting).

governmental entanglement with religion."²¹¹ The government, however, is already institutionally involved with Indian religion. Of crucial importance is whether the amendment adds to any entanglement that already exists under AIRFA.

Under the present version of AIRFA, federal agency administrators are required to consult with Indians and Indian religious leaders. This consultation may prompt a federal administrator to accord protection for Indian sacred sites. In *Lyng*, the Court never suggested that this consultation constituted excessive entanglement. To be sure, *Lyng* directly considered AIRFA and upheld it, even though it singles out Indian religions for special treatment.

In fact, the *Lyng* Court twice intimated that future congressional action should accommodate Indian religions in federal land management decisions. The Court stated:

The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent that it is feasible, is for the legislatures and other institutions.²¹²

Later in the opinion, the Court reiterated:

Nothing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen. The Government's rights to the use of its own land, for example, need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents.²¹³

The 1989 amendment would not change this consultation process.

Indian religion wraps itself around every aspect of Indian life; religion is crucial for continuing tribal identity.²¹⁴ The federal government is intimately, and inevitably, involved with Indian and tribal life. For official recognition, tribes must show an ongoing identity as a separate, culturally unified group.²¹⁵ A specific federal agency, the Bureau of Indian Affairs, deals with the unique position of these semisovereign, semidependent nations within the United States. Amending AIRFA will not entangle the government with Indian religion any more than it is already. Rather, the amendment acknowledges the separateness of the government and Indian religions.²¹⁶

²¹¹ *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

²¹² *Lyng*, 485 U.S. at 452.

²¹³ *Id.* at 453-54.

²¹⁴ KENNETH LINCOLN & AL LOGAN SLAGLE, *THE GOOD RED ROAD* xix-xxiii (1987).

²¹⁵ 25 C.F.R. § 83.7 (1990).

²¹⁶ Another criticism of S. 1124 reflects Justice O'Connor's concerns in *Lyng* that the Court would become entangled in deciding which practices were central to an Indian

IV

CONCLUSION: SAVING SACRED SITES

Congress should re-introduce and enact the proposed 1989 AIRFA amendment. The spirit of AIRFA reflects genuine sensitivity toward a religious culture vastly different from others in the United States. Without amendment, AIRFA goes no further than flowery, ineffectual sentiment. The amendment's language, however, must be narrowed to clarify the "legal responsibility" and "vested property rights" standards. Left undefined, this ambiguous language could create a loophole that diminishes the amendment's value. Assuming that Congress refines this language, the 1989 amendment will finally give Indians the ability to fight the destruction of their sacred sites.²¹⁷ It does so by requiring federal agencies to balance Indian religious interests against federal interests in making land management decisions, and by creating a private cause of action for judicial review of agency decisions. The amendment furthers the free exercise of religion and does not violate the establishment clause.

Before Congress considered the 1988 AIRFA amendment, Alice Benally, of the Nakai Dine', Clauscheei clan of the Navajo Nation, expressed her determination to save her sacred lands. In her words, "[t]he government is violating our religious ways, where our offering places used to be. They are trying to take our religion away from us. Everything we do comes with a song and a prayer. . . . We will resist to the very end and defend our sacred land, preserve our religion."²¹⁸ The AIRFA amendment cannot rectify past injustices. It can, however, acknowledge the value of Indian religion and culture. At the very least, it offers Indians a chance to preserve their sacred sites. Perhaps, at its outer limits, the amendment also rekindles the American ideal of religious tolerance and understanding.

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religion. *Lyng*, 485 U.S. at 457-58. This need not be the case. Giving plaintiffs the burden of showing that a government decision would destroy a land site central to their religion creates a presumption in favor of government action. Once the plaintiffs have fulfilled their burden of proof, however, the government must defend its position. This presumption of government legality eliminates the need for judicial evaluation of religion. For a more detailed discussion concerning the problems of constitutionally defining religion, see Note, *Defining "Religion" in the First Amendment: A Functional Approach*, 74 CORNELL L. REV. 532 (1989) (authored by Ben Clements).

²¹⁷ S. 110, 102d Cong., 1st Sess. (1991) is a step in the right direction. Hopefully, this current amendment will fare better than the rest. There is reason for optimism. Even though the other amendments did not proceed to a full chamber vote, the repeated attempts in the last four years demonstrate a commitment by congressional and tribal leaders to mold AIRFA into a useful, meaningful law. The resilience of the issue bodes well for eventual change.

²¹⁸ *Hearings S. 2250, supra* note 36, at 253-54 (1988 Affidavit of Alice Benally).

