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SUSTAINING GEOGRAPHIES OF HOPE: CULTURAL RESOURCES ON PUBLIC LANDS

SANDRA B. ZELLMER*

Then I was standing on the highest mountain of them all,
and round about beneath me was the whole hoop of the
world. . . . [T]he sacred hoop of my people was one of many
hoops that made one circle, wide as daylight and as star-
light, and in the center grew one mighty flowering tree to
shelter all the children of one mother and one father.

And I saw that it was holy.

—John G. Neihardt¹

I gave my heart to the mountains the minute I stood beside
this river with its spray in my face By such a river it is
impossible to believe that one will ever be tired or old . . . it
is purity absolute. Watch its racing current, its steady re-
newal of force:

it is transient and eternal.

—Wallace Stegner²

* Visiting Associate Professor, Tulane University Law School (2001), and Associate Professor, University of Toledo College of Law (1998–present). I thank Professors Phil Closius, Oliver Houck, Susan Martyn, Joseph Slater, and Dean Suagee, as well as Wayne Brewster, Courtney Coyle, James Dubois, Brian Ferrell, Roger Flynn, Dr. Thomas King, Deb Liggett, Albert Lin, and Tom VanNorman for their contributions and encouragement. I am also grateful to the University of Toledo College of Law for its summer research stipend and the American Law Institute for the opportunity to speak about cultural resources at its 2001 Environment Course. A revised version of my remarks is published at Sandra B. Zellmer, *The Protection of Cultural Resources on Public Lands: Federal Statutes and Regulations*, 31 E.L.R. 10689 (June 2001). The phrase “geography of hope” is from WALLACE STEGNER, *THE SOUND OF MOUNTAIN WATER* 11, 153 (Penguin ed., 1997) (1969).

1. JOHN G. NEIHARDT, *BLACK ELK SPEAKS: THE LIFE STORY OF A HOLY MAN OF THE OGLALA SIOUX* 36 (Pocket Books 1972) (1932).

2. WALLACE STEGNER, *THE SOUND OF MOUNTAIN WATER* 11, 42 (Penguin ed., 1997) (1969).

INTRODUCTION

The natural world has been a source of spiritual inspiration for the nation, as well as a stimulant for political aspirations and nationalism, throughout American history. Nature is a recurring motif in the rich cultural tapestry that comprises our national identity and heritage. Our federal public lands, widely known for their physical resources—timber, range, minerals, water, and wildlife—are as notable for their cultural significance as they are for their economic potential. Congress has long recognized that the remarkable natural features on our public lands are true American “antiquities,” integral to American culture.³

As critical as the public lands are to the nation, certain communities have especially deep associations with the land and its resources. For many American Indian tribes, physical features and objects on the public lands hold extraordinary political and spiritual significance. The land has represented an unparalleled bulwark against the otherwise inevitable effects of colonization—tribal eradication and assimilation. American Indian cultural interests in the public lands deserve special consideration, given their unique associations with the land and its resources, and the political and legal obligations arising from the historic treatment of tribes, their treaties, and their continuing sovereign status.

Cultural resources, which include historic structures and artifacts as well as natural landscapes, physical features, and objects with spiritual or other intangible human associations, are addressed by a panoply of federal laws.⁴ Congress has ex-

3. See, e.g., The Antiquities Act of 1906, 16 U.S.C. § 431 (1994). The first parcel to be withdrawn from the public domain and designated as a National Monument under the Antiquities Act, Devils Tower National Monument, was described as a “such an extraordinary example of the effect of erosion in the higher mountains as to be a natural wonder and an object of historic and great scientific interest . . .” See Proclamation No. 658, 34 Stat. 3236 (Sept. 24, 1906). The Tower has been a prominent landmark and meeting place for American Indians for centuries, and it is revered by northern plains tribes as a site of great importance in tribal culture and spirituality. See *Bear Lodge Multiple Use Ass’n v. Babbitt*, 175 F.3d 814, 816 (10th Cir. 1999), *cert. denied*, 529 U.S. 1037 (2000), discussed *infra* at Part III.A.

4. I have culled this description of “cultural resources” from anthropological works, as there is no single definition of the term in federal law. THOMAS F. KING ET AL., *ANTHROPOLOGY IN HISTORIC PRESERVATION: CARING FOR CULTURE’S CLUTTER* 8–9 (1977), was especially helpful; see also E.V. WALTER, *PLACEWAYS: A*

pressed broad secular objectives in preserving cultural resources on public lands, particularly those of interest to American Indian tribes. It has prioritized tribal cultural interests by requiring the repatriation of cultural items and human remains,⁵ and by directing federal agencies to consult with tribes regarding the effects of their undertakings on traditional cultural properties, and in some cases to mitigate adverse impacts on those properties.⁶

The land management laws applicable to national parks, forests, and other public lands provide additional authority to protect cultural resources by requiring sustainable use and the prevention of long-term degradation of the land and resources.⁷ These laws also require that cultural values be considered through decision-making processes for land use planning and other activities.⁸ Meanwhile, however, the public lands laws grant extensive discretion to the land management agency, discretion that has been used most frequently to favor economic and recreational activities over cultural practices.⁹

The First Amendment of the Constitution is often asserted as a barrier to accommodating tribal cultural interests. The religion clauses of the First Amendment—protecting free exercise while prohibiting governmental establishment of religion—have not afforded meaningful protection for cultural resources.¹⁰ While the Free Exercise Clause forbids the govern-

THEORY OF THE HUMAN ENVIRONMENT (1988) (concluding the holistic experience of place and space is essential to understanding human cultures). The term "culture" is itself a deeply complex term. For purposes of this Article, I use it with reference to a particular way of life by and through which a group of people brought together by common characteristics, such as ethnicity, religion, language, or history, express shared behaviors and values. See Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 73 B.U. L. REV. 559, 561–62 (1995). For insightful expositions on the concept of culture over time and across disciplines, and its relationship with law, see CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* (1983); Sally Engle Merry, *Law, Culture, and Cultural Appropriation*, 10 YALE J.L. & HUMAN 575 (1998); Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN 35 (2001).

5. 25 U.S.C. § 3002 (1994).

6. 16 U.S.C. §§ 470f, 470h-2(f) (1994).

7. See generally 16 U.S.C. § 1 (1994); 16 U.S.C. §§ 1600, 1604 (1994); 43 U.S.C. §§ 1701, 1732 (1994).

8. See 43 U.S.C. §§ 1702(a), 1712(c)(3) (1994); see also 43 U.S.C. § 1701(a)(8) (1994) (declaring policy of managing lands to protect various environmental and social values).

9. See, e.g., *infra* note 320 (citing cases).

10. See *id.*

ment from penalizing individuals for their religious beliefs, facially neutral laws that incidentally burden or even destroy the religions associated with a particular site or resource have survived judicial scrutiny.¹¹ Nonetheless, there are many compelling reasons for land managers to facilitate the interests of American Indian tribes in sacred sites and cultural resources. Protecting cultural resources and allowing tribal access to them advance numerous secular objectives, including the political and legal obligations inherent in the federal trust responsibility toward tribes, as expressed in treaties and statutes.

Decisions that support American Indian cultural interests do not establish or endorse religion. Many governmental decisions that protect cultural resources or provide access to them have cultural, historical, or political, rather than religious, objectives and effects. These decisions satisfy traditional Establishment Clause analysis, even if they result in incidental benefits to religious interests. Moreover, decisions that provide preferences or exemptions for tribal spiritual needs by alleviating burdens to ceremonial practices or otherwise dispelling the lingering effects of religious suppression are an appropriate form of accommodation. Absent extraordinary measures, such as outright delegation of veto power over other lawful activities to tribal religious leaders, preserving cultural resources and providing access for affiliated tribes do not excessively entangle the government with religious affairs or otherwise establish religion.

The First Amendment is not the only constitutional consideration implicated by governmental management of tribal cultural resources. Accommodations may trigger equal protection concerns by providing preferences for Indian tribes over other groups with cultural, economic, or aesthetic interests in the public lands. Indian tribes, however, are not similarly situated to other groups, given the unique site-based, communal nature of their beliefs and practices and the history of governmental relations with tribes and suppression of Indian religions. Although racially sensitive affirmative action programs are losing ground in equal protection jurisprudence, accommodations for federally recognized tribes are political, not racial, and require only that the government have a ra-

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

tional basis for adopting them, a threshold easily met in most cases. Programs that alleviate government-imposed burdens on tribal cultural practices promote vital remedial objectives and result in non-discriminatory effects. Accommodations for non-federally recognized tribes affiliated with a particular site should also satisfy equal protection concerns in most cases, although the level of scrutiny will be higher absent a formal political relationship with the United States.

This Article integrates constitutional principles, statutory requirements, and federal policy governing the use and preservation of cultural resources to sketch out a decision-making framework for public land managers. Specific examples of cases where American Indian interests have been pitted against competing demands at Devils Tower National Monument, the Indian Pass area of the California Desert, and the Medicine Wheel are examined to illustrate optimal solutions—solutions allowing the greatest possible accommodation of cultural, even spiritual, interests, while protecting the resources from degradation. The conflicts at these sites, and the opportunities presented by these conflicts, show that federal agencies can adopt reasonable accommodations without violating either statutory or constitutional mandates.

Part I of the Article draws upon history, literature, and art to demonstrate the cultural and spiritual importance of public lands and resources to our national heritage and to closely affiliated individuals and groups. These same sources serve as a testament to the systematic displacement of American Indians from their aboriginal lands, the destruction of tribal burial grounds, and the overt suppression of cultural practices in a concerted effort to assimilate tribes into Anglo-American culture. Part II examines contemporary congressional provisions encouraging the accommodation of tribal cultural interests. The governing statutory requirements for specific categories of public lands, from the conservation objectives applicable to National Park System lands to the multiple use requirements for National Forests and Bureau of Land Management lands, are reviewed in Part III. Finally, Part IV assesses the constitutional implications of federal decisions regarding the management and prioritization of tribal cultural resources.

The resolution of constitutional and statutory conflicts is necessarily fact-specific, and there is no rigid prescription that will determine the outcome of every case. Historic and cultural

associations with the site or resource at issue are central to the inquiry, along with the nature of any short- and long-term physical effects on the resource and the overarching management mission for the relevant category of public lands. If cultural affiliation is shown by ethnological studies, written or oral histories, or federal treaties, neither the First Amendment nor equal protection considerations prevent reasonable accommodation, and the relevant statutory authorities can and should be utilized to the fullest extent to preserve and allow access to cultural resources.

I. THE CULTURAL AND SPIRITUAL VALUES OF PUBLIC LANDS

A. *American Heritage and Nationalism*

America's vast natural resources have been instrumental in shaping the nation's cultural identity. The natural world has been a prominent theme in much of our important literature and art, fostering religious, political, and social constructs throughout American history. Nature was viewed by the New England Puritans as "a hideous and desolate wilderness, full of wild beasts and wild man," to be subdued and converted to agrarian purposes.¹² The progress and triumph of civilization went hand in hand with the perceived Christian role of man, having fallen from grace, in recovering Eden from the wilderness.¹³ By the mid-1800s, however, the influences of Romantic poets and philosophers contributed to a burgeoning appreciation for wild places, rare in Europe but abundant in the New World.¹⁴ With the rise of a more affluent leisure class, the notion of "community through nature" became a pervasive influence in American political and social life.¹⁵ Nature, as por-

12. 1 AUBREY L. HAINES, *THE YELLOWSTONE STORY* 158 (rev. ed. 1996) (quoting William Bradford (1620)); see also *Genesis* 1:28 ("replenish the earth, and subdue it: and have dominion . . . over every living thing that moveth upon the earth").

13. See BARBARA NOVAK, *NATURE AND CULTURE* 158, 164-65 (1995).

14. See HAINES, *supra* note 12, at 159 (discussing influence of Rousseau, Wordsworth, Coleridge and others).

15. See NOVAK, *supra* note 13, at 15; see also RODERICK NASH, *AMERICAN ENVIRONMENT: READINGS IN CONSERVATION HISTORY* 9 (1976). One of the country's most beloved anthems, *America The Beautiful*, written by Katharine Lee Bates in 1893 after a visit to Pike's Peak, extols the "purple mountain majesties" and "amber waves of grain" as evidence that God shed his grace on America, "crown[ing] thy good with brotherhood, from sea to shining sea." Lyrics and brief

trayed in art, conveyed a powerful image of America as the chosen land, giving rise to a sense of independence and opportunity, along with a duty to maximize the productivity of the abundant natural riches flowing from God's blessings.¹⁶

The beauty of the American landscape provided a surrogate for a "missing" national tradition. Lacking the great cathedrals, castles, and paintings of Europe, the forests, waterways, and mountains became America's most significant antiquity, crucial in establishing a sense of national identity.¹⁷ The depiction of dramatic natural features and landscapes by nineteenth century American artists and authors promoted the public's fascination with nature.¹⁸ During the 1830's, George Catlin's journals and paintings of Great Plains tribes were published in eastern newspapers, capturing the public's imagination and sparking intrigue with the "wild" west and its native inhabitants.¹⁹ Catlin urged that the West be preserved so "the world could see for ages to come, the native Indian in his classic attire, galloping his wild horse . . . amid the fleeting herds of

history are available at <http://www.library.utoronto.ca/utel/rp/poems/batesk1.html> (last visited Feb. 10, 2002).

16. See NOVAK, *supra* note 13, at 16, 53. A belief in the unity of God and nature is reflected in a variety of artistic devices. Painters used water to symbolize spiritual cleansing, *id.* at 40–41; sky and light as God's special means of communicating with man, *id.* at 41; and mountains as expressing the moment of creation, *id.* at 48–49. Remarkably, instead of resisting nature-worship, "most religious orthodoxies in America obligingly expanded to accommodate a kind of Christianized pantheism. . . . The implications of this . . . make the concept of nature before the Civil War indispensable to an understanding of American culture." *Id.* at 3–4.

17. See DAVID LOWENTHAL, *THE PAST IS A FOREIGN COUNTRY* 114–15 (1985); NOVAK, *supra* note 13, at 20, 49; see also William A. Shutkin, *The Concept of Environmental Justice and a Reconceptation of Democracy*, 14 VA. ENVTL. L.J. 579, 581 (1995) (stating that "[f]or [Thomas] Jefferson, the environment (albeit cultivated) was the essential ingredient for a healthy democracy").

18. See, e.g., HENRY DAVID THOREAU, *THE MAIN WOODS* 88 (Penguin ed., 1988) (1864); Henry David Thoreau, *Walking*, in ENVIRONMENTAL DISCOURSE AND PRACTICE: A READER 93, 95 (Lisa M. Benton & John Rennie Short eds., 2000) [hereinafter ENVIRONMENTAL DISCOURSE]; see also NOVAK, *supra* note 13, at 4 (describing influence of painters Thomas Cole, Alfred Bierstadt, and Thomas Moran).

19. George Catlin, *North American Indians: Being Letters and Notes on their Manners, Customs, and Conditions, 1832–1839*, at 288–295, in ENVIRONMENTAL DISCOURSE, *supra* note 18, at 35.

elks and buffaloes.”²⁰ By the turn of the century, preservation of natural “antiquities” was a recurring theme.²¹

The law eventually reflected the sense that America’s heritage and cultural identity were inextricably bound with our nation’s natural attributes. John Muir, our country’s most famous conservationist and founder of the Sierra Club, and Frederick Law Olmsted, Jr., another early visionary, subsequently championed Catlin’s idea for a national park preserve.²² They advocated for the preservation of open space to promote public health and spiritual well-being.²³ Their efforts finally spurred political action on Capitol Hill in 1864, when United States Senator John Conness from California supported legislation to protect the Giant Sequoias from encroachment.²⁴ Rather than extolling natural or spiritual virtues of the area in terms of preservation *per se*, Conness’s appeals to national pride—and the desire to disprove popular British sentiment that the giant trees were mere “Yankee hoax”—generated the necessary support for withdrawing the Yosemite area from settlement and timber harvest.²⁵

20. Joseph L. Sax, *The Trampas File*, 84 MICH. L. REV. 1389, 1389 n.2 (1986).

21. Peter Manus, *One Hundred Years of Green: A Legal Perspective on Three Twentieth Century Nature Philosophers*, 59 U. PITT. L. REV. 557, 588–601 (1998) (citing, *inter alia*, JOHN MUIR, *A THOUSAND MILE WALK TO THE GULF* (1916), *MY FIRST SUMMER IN THE SIERRA* (1911), and *THE MOUNTAINS OF CALIFORNIA* (1894)).

22. See Alfred Runte, *Preservation Heritage: The Origins of the Park Idea in the United States*, in PERCEPTIONS OF THE LANDSCAPE AND ITS PRESERVATION 56–64 (1983). See generally HAINES, *supra* note 12, at 156–63; RICHARD WEST SELLARS, *PRESERVING NATURE IN THE NATIONAL PARKS: A HISTORY* 7 (1997).

23. Olmsted and Muir both believed that access to natural areas would “stimulate healthy contemplation . . . and regenerate spirits dulled by the constant labor of the ordinary citizen’s life.” Holly Doremus, *Nature, Knowledge and Profit: The Yellowstone Bioprospecting Controversy and the Core Purposes of America’s National Parks*, 26 ECO. L.Q. 401, 441–42 (1999). Muir also relied on the Bible to urge the credo of preservation. Manus, *supra* note 21, at 591 (citing MUIR, *A THOUSAND MILE WALK TO THE GULF*, *supra* note 21, at 126) (describing Muir’s response to an adversary: “Christ says, ‘Consider the lilies,’ . . . Now, whose advice am I to take, yours or Christ’s?”).

24. Runte, *supra* note 22, at 56. By this time, a few city parks and scenic cemeteries had been set aside as public preserves, including New York’s Central Park in 1851, with Olmsted as its first superintendent. See HAINES, *supra* note 12, at 161–62.

25. HAINES, *supra* note 12, at 163. The administration of the area was initially left to the State. Yosemite became a National Park in 1890. Act of Sept. 25, 1890, 16 U.S.C. § 41 (1984).

Muir and others were adept at using nationalism and the perceived need to compensate for the lack of cultural antiquities in America to advocate a system of national parks.²⁶ Shortly after Yosemite was withdrawn from settlement, sketches and reports of the fantastic canyons and geysers near the Yellowstone River prompted Congress to designate Yellowstone as the world's first National Park, providing "a public park or pleasuring ground for the benefit and enjoyment of the people."²⁷ To mollify opponents' economic concerns, the initial legislation provided no funds for Park management, but poaching and the destruction of natural features and artifacts posed chronic problems.²⁸ Congress ultimately enacted the Park Service Organic Act of 1916 to coordinate the management of existing preserves and to officially recognize a dual mission of conservation and public enjoyment in the National Park System.²⁹ Nationalism played a persuasive role in the adoption of

26. JOHN MUIR, OUR NATIONAL PARKS 1 (1901) ("Thousands of tired, nerve-shaken, over-civilized people are beginning to find out that . . . parks and reservations are useful not only as fountains of timber and irrigating rivers, but as fountains of life."); *see also* NAT'L PARK SERV., RETHINKING THE NATIONAL PARKS FOR THE 21ST CENTURY (2001), *available at* <http://www.nps.gov/policy/report.htm> ("Inspiring us, uplifting our spirits, [National Parks] serve as powerful reminders of our national origins and destiny. . . . Parks should become sanctuaries for expressing and reclaiming ancient feelings of place."). This theme was echoed by Stephen Mather, the first director of the Park Service, "who envisioned parks as places where people could renew their spirits and become better citizens through clean living in the outdoors." Doremus, *supra* note 23, at 441.

27. Act of Mar. 1, 1872, 16 U.S.C. § 21 (1994). Reports from Dr. Ferdinand Hayden's 1871 expedition and the drawings of artist Thomas Moran were instrumental in capturing the public's interest and generating congressional support. *See* HAINES, *supra* note 12, at 140–55, 164–72. The Northern Pacific Railroad was influential in moving the legislation along, in hopes of expanding and drawing passengers to the area. *Id.* at 153–54, 163–66.

28. HAINES, *supra* note 12, at 171–72 (noting that Hayden promised Congress that no moneys would be requested for several years); *id.* at 242 (reporting that the first appropriation for Yellowstone National Park was authorized in 1878, in the amount of \$10,000). The primary opposition came from California Senator Cornelius Cole, chairman of the appropriations committee, who stated "grave doubts" about precluding settlers from the Yellowstone area. *Id.* at 169–70.

29. 16 U.S.C. §§ 1–4 (1994) (popularly known as the "National Park Service Organic Act"). Frederick Law Olmsted, Jr., was instrumental in the passage of the Organic Act and played a key role in crafting the language of section 1. *See* Robin W. Winks, *The National Park Service Act of 1916: "A Contradictory Mandate"?*, 74 DENV. U. L. REV. 575, 596–97 (1997). For further discussion of National Park System management, *see infra* Part III.A.

the Act: "great parks are, in the highest degree . . . a sheer expression of democracy."³⁰

Even before the Organic Act was adopted, Congress had declared its intent to preserve archeologically important public lands and artifacts from destruction. The Antiquities Act of 1906 authorizes the President "to declare . . . historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest . . . to be national monuments."³¹ The executive branch has exercised this power aggressively ever since the Act's inception, citing archeological, scientific, and cultural objectives in preserving millions of acres of land from mining, logging, and grazing.³²

Preservation was not the only by-product of America's interest in the west. Nineteenth century laws also encouraged rapid settlement and exploitation of western natural resources.

30. Winks, *supra* note 29, at 596 (citing CONGRESSIONAL HEARINGS OF 1916, H.R. 8668, at 53). Forest preserves were also being set aside, beginning in the late 1800s, for the utilitarian purposes of preserving timber and watersheds. See CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN 122-24 (1992); Federico Cheever, *The United States Forest Service and National Park Service: Paradoxical Mandates, Powerful Founders, and the Rise and Fall of Agency Discretion*, 74 DENV. U. L. REV. 625, 648 (1997).

31. 16 U.S.C. § 431 (1994 & Supp. IV 1998). Reports of the destruction of southwestern pueblos by pothunters had reached Congress by the 1890s, generating proposals for the withdrawal of specific sites, including Pueblo Bonito in the Chaco Canyon area; see KING, *supra* note 4, at 17-18. Several bills were initiated in Congress in 1900, ranging from the fairly narrow House version, forbidding the unauthorized disturbance of antiquities, to a more sweeping version proposed by Interior, advocating withdrawals for broad protective purposes. *Id.* at 18-19. The final bill was a compromise between the two extremes. *Id.*

32. See 146 CONG. REC. S7030-32 (daily ed. July 17, 2000) (statement of Sen. Nickles) (listing monuments by president and total acreage); Richard M. Johannsen, *Public Land Withdrawal Policy and the Antiquities Act*, 56 WASH. L. REV. 439, 453-56 (1981) (discussing President Carter's withdrawal of fifty-six million acres for seventeen monuments in Alaska). In *United States v. Cameron*, 252 U.S. 450, 455-56 (1920), the Supreme Court upheld one of the earliest withdrawals, citing presidential findings that the Grand Canyon was appropriate for designation as "an object of unusual scientific interest" and "one of the great natural wonders." More recently, the Clinton administration promoted a strategy of protecting landscapes and "anthropological ecosystem[s]" by designating millions of acres of land as national monuments. James R. Rasband, *The Rise of Urban Archipelagoes in the American West: A New Reservation Policy?*, 31 ENV'L L. 1, 85 (2001) (citing Bruce Babbitt, *From Grand Staircase to Grand Canyon Parashant: Is There a Monumental Future for the BLM?*, Remarks at Univ. of Denver (Feb. 17, 2000)). Examples include Grand Staircase-Escalante, Proclamation No. 6920, 61 Fed. Reg. 50,223 (Sept. 18, 1996) (1.7 million acres), and Grand Canyon-Parashant, Proclamation No. 7265, 65 Fed. Reg. 2825 (Jan. 11, 2000) (one million acres).

The Homestead Act of 1862 encouraged agrarian activity by giving settlers title to the land if they occupied and cultivated it for a prescribed period of time.³³ The General Mining Law of 1872 provides that the discovery of a valuable mineral deposit entitles a miner to develop a claim and to take title to the land.³⁴ Shortly after the turn of the century, Congress enacted the Reclamation Act of 1902 to assist farmers who settled the arid West by providing for the construction of dams, reservoirs, and irrigation systems to supply water for the production of crops.³⁵ Federal policies also allowed customary use of the public range to continue, largely unabated and unregulated.³⁶

During this "Great Barbecue"³⁷ of the public lands and resources, the government encouraged the expansion of trade in western agricultural and mineral products by allocating lands for railroads to support national transportation systems.³⁸ The government commissioned landscape artists to assist in the railroad surveys, and their portrayals of the expansive western lands helped convince entrepreneurs to "go west young man,"³⁹

33. 43 U.S.C. §§ 161–64 (1994) (allowing for entry and patent for 160 acres of land) (*partially repealed* by the Federal Land Policy and Management Act of 1976, Title VII, § 702, 90 Stat. 2744, 2787); *see also* The Desert Lands Act of 1877, 43 U.S.C. §§ 321–39 (1994) (expanding opportunities for settlement in the arid areas of the west by providing for entry on 640 acres with patent to the land to be issued upon proof that the land had been irrigated).

34. 30 U.S.C. § 22 (1994). The General Mining Law of 1872 codified the Lode Mining Act of July 26, 1866, 30 U.S.C. §§ 43, 46, 51, 53 (1982), and the Placer Mining Act of July 9, 1870, 30 U.S.C. §§ 35–36, 38, 47, 52 (1982).

35. *See* 43 U.S.C. §§ 371–431 (1994), *amended by* 43 U.S.C. §§ 390aa–390zz-1 (1994).

36. *See* WILKINSON, *supra* note 30, at 82–94 (discussing the development of the range); *see also* *Light v. United States*, 220 U.S. 523 (1911) (upholding Forest Service's authority to regulate the "use and occupancy" of the range by requiring permits, and rejecting argument that ranchers had developed a vested right to continue their "implied license" to graze on public lands without regulation).

37. *See* STEWART L. UDALL, *THE QUIET CRISIS* 96 (1963) (quoting historian Vernon Parrington).

38. *See* STEPHEN E. AMBROSE, *NOTHING LIKE IT IN THE WORLD: THE MEN WHO BUILT THE TRANSCONTINENTAL RAILROAD 1863–1869* (2000) (describing westward expansion by rail, encouraged by government land grants and low-interest loans).

39. *See* NOVAK, *supra* note 13, at 140–44 (noting that various artists had assisted with the railroad surveys, and that their work was widely disseminated); Thomas Patin, *Exhibitions and Empire: National Parks and the Performance of Manifest Destiny*, 22 J. OF AM. CULTURE 41 (1999), *available at* 1999 WL 32980506 (describing the Northern Pacific Railroad's use of Thomas Moran's painting, *The Grand Canyon of the Yellowstone*, in promotional brochures).

as urged by journalist Horace Greeley.⁴⁰ The seemingly innocent nationalism invoked by the works of Thomas Moran and others of this era promoted "imperial iconography" as a moral and religious imperative.⁴¹ Many landscape paintings, along with common design features of the National Parks, convey a palpable expansionist message by projecting a "magisterial gaze" across verdant valleys stretching out below the viewer.⁴²

Conquest over nature and its native human inhabitants appeared as a recurring theme in much of the literature of the nineteenth century as well. Even while portraying the beauty and serenity of the natural world, writers promoted its exploitation by deifying loggers and trappers.⁴³ Meanwhile, popular dime novels glorified the cowboys and military agents who fended off "barbaric savages" to clear the way west for "civilized" settlers.⁴⁴

40. See COY F. CROSS, *GO WEST YOUNG MAN!: HORACE GREELEY'S VISION FOR AMERICA* (1995). Whether Greeley himself wrote the exact phrase, "Go West Young Man," is in dispute, but there is no question that Greeley was a proponent of western settlement, and that his widely circulated articles were influential in westward expansion. See <http://www.honors.unr.edu/~fenimore/greeley.html> (last visited Mar. 11, 2002); see also Hanaba Munn Noack, *At the Millenium: Looking Back as We Move Forward*, *Times Record News*, at http://www.trnonline.com/millenium/forward/articles/setting_sun.htm (last visited Mar. 11, 2002) ("Do not lounge in the cities! There is room and health in the country, away from the crowds of idlers and imbeciles. Go west, before you are fitted for no life but that of the factory.") (quoting Greeley, N.Y. TRIBUNE (1841)).

41. Novak, *supra* note 13, at 7.

42. See Patin, *supra* note 39 at *5 (citing ALBERT BOIME, *THE MAGISTERIAL GAZE: MANIFEST DESTINY AND AMERICAN LANDSCAPE PAINTING c. 1830-1865*, 20-21, 138 (1991)). For examples of paintings that utilize this technique, see Jasper F. Cropsey, *Starrucca Viaduct* (1865), in NOVAK, *supra* note 13, at 170; Thomas Cole, *River in the Catskills*, in NOVAK, *supra* note 13, at 163; Albert Bierstadt, *Yosemite Valley, Glacier Point Trail*, in NOVAK, *supra* note 13, at 155; Thomas Moran, *The Chasm of the Colorado*, in NOVAK, *supra* note 13, at 148.

43. See James Fenimore Cooper, *The Pioneers*, in *THE LEATHERSTOCKING SAGA* 662-63 (Modern Library ed., 1966) (depicting professional logger's work as Herculean and deliberate).

44. See Raymond Cross, *Tribes as Rich Nations*, 79 OR. L. REV. 893, 906 (2000) (describing popular "dime novels" that portrayed "the treacherous, unscrupulous red-devil who raped white women for pleasure and burned wagon trains for entertainment"). Earlier works of fiction depicted Indians in a more romantic but equally distorted manner. Stories like Cooper's *The Last of the Mohicans*, which portrayed the Mohican Uncas as "graceful and unrestrained in the attitudes and movement of nature," perpetuated the notion of a "noble savage," yet one who, as a "precious relic," was doomed to extinction. FERGUS M. BORDEWICH, *KILLING THE WHITE MAN'S INDIAN* 48 (1996) (citing JAMES FENIMORE COOPER, *THE LAST OF THE MOHICANS* (1826)).

While westward expansion allowed multitudes of Americans to escape the confines of eastern urban centers and to access and enjoy the natural features of the vast public lands, it had grave consequences for American Indian peoples. It was widely believed that, like the beasts of the wilderness, Indians must be tamed or eradicated to make way for the march of civilization.⁴⁵ Early in the nation's history, George Washington proclaimed that "the gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire; both being beasts of prey tho' they differ in shape."⁴⁶ The nation's manifest destiny, calling as it did for the consumption of land and resources on an unprecedented scale, was on a collision course not only with wolves and other wildlife, but also with its First Nations. The most expedient solution, from the government's standpoint, was preserving a few remote fragments of land for tribes, while setting aside other areas for wildlife species and public pleasuring grounds.

B. The Importance of "Place" to Individuals and Communities

A sense of connectivity with a physical place has been vital to the well-being of individuals and communities throughout human history. Ancient societies experienced the landscape in a holistic way through the senses, the imagination, and the intellect, dramatizing features of their surrounding environment through mythology and art to develop and express collective knowledge of important people and events linked to specific locales. This sense of place has provided people with an understanding and appreciation of themselves, their past, and their relationship with the natural elements of their community.⁴⁷

45. Horace Greeley's justification for westward expansion and Indian removal was that "[t]hese [Indian] people must die out—there is no help for them. God has given the earth to those who will subdue and cultivate it and it is vain to struggle against his righteous decree." BORDEWICH, *supra* note 44, at 49.

46. George Anastaplo, *Law, Education, and Legal Education: Explorations*, 37 BRANDEIS L.J. 585, 713 (1998–1999) (citing RALPH LERNER, *THE THINKING REVOLUTIONARY: PRINCIPLE AND PRACTICE IN THE NEW REPUBLIC* 158 (1987)). Washington's remarks, issued in 1783, expressed his belief in the inevitable consequences of settlement. Subsequently, President Andrew Jackson conveyed an explicit edict for the removal of Indian tribes to lands west of the Mississippi River in his 1830 message to Congress. *Id.* at 720.

47. See WALTER, *supra* note 4, at 193–94. To demonstrate the importance of place in human communities, Walter draws on an eclectic range of philosophy and

The force of personal associations with a particular plot of land or geographic region is evident in essays by Wallace Stegner, Mark Spragg, and other contemporary writers.⁴⁸ Stegner movingly portrays the importance of wilderness—a “geography of hope”—in shaping human character in *The Sound of Mountain Water* and other works.⁴⁹ Mark Spragg illustrates the point in *Where Rivers Change Direction*, with a poignant description of his experiences growing up on a Wyoming ranch:

It is easiest for me to remember the land. [When] I close my eyes . . . I see tar-black butterflies at work in the meadows along the Shoshone River I smell . . . the weedy scent of the bloodred Indian paintbrush, the overpowering tang of the banks of low-growing sage. I can step my memory onto the backs of the big boulders and hear my boots scuff against the black and rust and corn-yellow lichens that covered them As a boy I knew only that I was free on the land.⁵⁰

Although human inhabitants of both urban and rural environments develop a sense of belonging through a familiarity with their physical setting, those who make a living on the land

literature, including Plato and the Old Testament, ethnological studies of aboriginal Australians, and the works of environmentalist David Brower and modern playwright Peter Shaffer. See, e.g., *id.* at 121–23, 146–50 (citing PLATO, THE TIMAEUS AND THE CRITIAS, and PHAEDRUS); *id.* at 209 (“Life is only comprehensible through a thousand local Gods . . . living Geniuses of Place and Person . . . Spirits of certain trees, certain curves of brick wall . . .”) (citing PETER SHAFFER, EQUUS 71 (1975)).

48. See, e.g., STEGNER, *supra* note 2, ANGLE OF REPOSE (1971), WHERE THE BLUEBIRD SINGS TO THE LEMONADE SPRINGS (1992); MARK SPRAGG, WHEN RIVERS CHANGE DIRECTION (1999); see also GRETTEL EHRLICH, THE SOLACE OF OPEN SPACES (1985); NORMAN MACLEAN, A RIVER RUNS THROUGH IT (1976); TERRY TEMPEST WILLIAMS, REFUGE: AN UNNATURAL HISTORY OF FAMILY AND PLACE (1992); cf. Charles Wilkinson, *Land Use, Science and Spirituality: The Search for a True and Lasting Relationship with the Land*, 21 PUB. LAND. & RES. L. REV. 1, 2 (2000) (describing western landscapes as “entwined with daily life” of westerners).

49. See STEGNER, *supra* note 2, at 11, 153.

50. SPRAGG, *supra* note 48, at 1–2. As an adult, Spragg comes to realize: Everything that means home to me is a by-product of the North Fork of the Shoshone. . . . If the North Fork were somehow withdrawn, excised, . . . that small part of me that exists without fear would wither. I cling to the sound of water to be brave in the world. I go to the sound of water to remember that God is not mute.

Id. at 239–40.

experience unique associations by developing an intimate knowledge of the natural elements and adjusting daily habits and long-term plans according to season and weather.⁵¹ Farming, ranching, and fishing are among the lifestyles that most obviously lend themselves to place-based associations. The physical and emotional health and the very identity of farmers and their families are indelibly shaped by the influences of the land—its natural bounty along with its occasional harshness.⁵² Ranchers and fishermen surely cherish similar associational ties.⁵³

Certain groups have especially strong communal ties to the land. Some Hispanic communities can trace their presence in the American Southwest back centuries.⁵⁴ Mexican citizens owned millions of acres of land, sometimes held in common ownership by multiple families or villages, when the Treaty of Guadalupe Hidalgo was signed in 1848.⁵⁵ Although the inter-

51. For insights into the role of urban settings in shaping human communities, see WALTER, *supra* note 4, at 10–15, 108–11, 150–51 (assessing ancient and modern cities as places of shared experiences and identity); Lois Gibbs, *Toxic Struggles*, in ENVIRONMENTAL DISCOURSE, *supra* note 18, at 222–23; see also SANDRA CISNEROS, *THE HOUSE ON MANGO STREET* (1991) (fictional account of young woman's development growing up in a Latino neighborhood in Chicago); RICHARD WRIGHT, *NATIVE SON* xxxi (1940) (depicting the main character as "an American product, a native son of this land").

52. My family has raised livestock and crops on the same half-section of land in western Iowa, initially a homestead under the 1862 Act, for four generations. Counting my great-grandfather's original farm, Zellmers have been connected with the land in this area for over a hundred years, and I am certain that I would not be the same person had I grown up anywhere else. For further reflections on farmers' relationships with the land, see Wendell Berry, *The Boundary*, in ERIC FREYFOGLE, *THE NEW AGRARIANISM* 239 (2001); John Cougar Mellencamp, *Rain on the Scarecrow*, in *SCARECROW* (Warner 1985).

53. See generally LINDA GREENLAW, *THE HUNGRY OCEAN: A SWORDBOAT CAPTAIN'S JOURNEY* (1999) (depicting Gloucester, Massachusetts fishermen); ERNEST HEMINGWAY, *THE OLD MAN AND THE SEA* (1952) (portraying a Cuban fisherman's life).

54. Christine A. Klein, *Treaties of Conquest: Property Rights, Indian Treaties, and the Treaty of Guadalupe Hidalgo*, 26 N.M. L. REV. 201, 238 (1996) (describing struggles of a Hispanic community in Colorado for recognition of its rights to an area used in common for nearly 150 years); Sax, *supra* note 20 (describing proposal to purchase and preserve the village of Las Trampas, settled in 1751, as a National Historic Site; the village and its church were ultimately designated as National Historic Landmarks); see also JOHN NICHOLS, *THE MILAGRO BEAN FIELD WAR* (1994) (depicting Joe Mondragon, who diverted water allocated to a development company into his parents' long-fallow bean field, and the struggle of Hispanic villagers attempting to reclaim lost water rights).

55. Guadalupe T. Luna, *"Agricultural Underdogs" and International Agreements: The Legal Context of Agricultural Workers Within the Rural Economy*, 26

ests of Mexicans living in the area were to be protected under the Treaty, linguistic barriers and restrictive standards for defining property rights resulted in the loss of title for many farmers, along with the loss of communal grazing rights and water rights.⁵⁶

The affiliation with the land experienced by these Hispanic communities and by individual farmers, ranchers, and fishermen are, without doubt, quite powerful. They are qualitatively different, however, on cultural, spiritual, and political levels than those experienced by many American Indian people. Although small town diners, shops, schools, and churches serve as gathering places and community centers for rural people, most Americans choose a life on the land to promote individualism and independence, not communal living.⁵⁷ Their connection with the land sometimes takes on religious overtones,⁵⁸ but the religious practices of Anglo-Americans and the Hispanic communities in the Southwest generally take place in built

N.M. L. REV. 9, 11, 18 (1996). The Treaty of Guadalupe Hidalgo, Feb. 2, 1848, 9 Stat. 922, ended the Mexican-American War, allowing the United States to purchase the territories which became Arizona, California, Colorado, New Mexico, Nevada, Texas, Utah, and Wyoming. Christopher David Ruiz Cameron, *'Friends' or 'Enemies?' The Status of Mexican-Americans in The United States on the Sesquicentennial of the Treaty of Guadalupe Hidalgo*, 5 SW. J.L. & TRADE AM. 5, 5-6 (1998).

56. Luna, *supra* note 55, at 20-21. See *United States v. Sandoval*, 167 U.S. 278 (1897) (holding that under Spanish and Mexican law, the sovereign retained fee title to all communal lands granted to the villages); Richard Griswold del Castillo, *Manifest Destiny: The Mexican-American War and the Treaty of Guadalupe Hidalgo*, 5 SW. J.L. & TRADE AM. 31, 43 (1998) (noting that treaty rights of Mexican descendents "proved to be fragile" and they became a disenfranchised and poverty-stricken minority).

57. See Frederick Jackson Turner, *The Significance of the Frontier in American History* (1894), in ENVIRONMENTAL DISCOURSE, *supra* note 18, at 76 (noting that the American frontier produces individualism, not community); *id.* at 16 ("the frontier is productive of individualism . . . The tendency is anti-social."); WALLACE STEGNER, *THE BIG ROCK CANDY MOUNTAIN* 83 (Penguin Books 1991) (1943) (describing protagonist's life-long travels across the west to find a "Big Rock Candy Mountain where life was effortless and rich and unrestricted and full of adventure and action, where something could be had for nothing"). Cf. Joseph L. Sax, *Do Communities have Rights? The National Parks as a Laboratory of New Ideas*, 45 U. PITT. L. REV. 499, 501 (1984) (noting that "our identity as Americans carries more weight than does our identity as citizens of any state or region").

58. See Myrl L. Duncan, *High Noon on the Ogallala Aquifer: Agriculture Does Not Live by Farmland Preservation Alone*, 27 WASHBURN L.J. 16, 32 n.71 (1987) (quoting the Hawaiian State Motto: "the life of the land is perpetuated in righteousness").

structures.⁵⁹ In contrast, the land itself serves as the lifeblood of spiritual integrity, as well as community identity and political sovereignty, for land-based Indian tribes and many of their members.⁶⁰

The legal distinctions are equally pronounced. As a result of government policies favoring homesteading, mining, and grazing, Anglo-American settlers benefited from manifest destiny and the giveaway of lands taken from Indian tribes, many of whom were forcibly removed from their homelands.⁶¹ The agricultural industry continues to enjoy an array of federal subsidies that contribute to its stability and growth.⁶² Federal aid supports mining, grazing, and logging on public lands as well.⁶³

Of course, dislocation from the land is not unique to Indian tribes. Farmers have suffered economic displacement throughout American history, with extremely painful consequences.⁶⁴

59. See Sax, *supra* note 20, at 1392, 1411–12 (describing San Jose de Gracia Church, the preeminent architectural feature and community center in Las Trampas).

60. See *infra* Part I.C.

61. See *supra* notes 34–35 and accompanying text (discussing Mining, Homestead and Reclamation Acts).

62. See Michael R. Taylor, *The Emerging Merger of Agriculture and Environmental Policy: Building a New Vision for the Future of American Agriculture*, 20 VA. ENVTL. L.J. 169, 174 (2001) (noting that, on average, \$13.5 billion has been spent annually on economic aid to farmers over the past decade).

63. See Rasband, *supra* note 32, at 54–55. Miners pay no royalties for the hard-rock minerals they extract from public lands, and they can obtain title to the land itself by paying a maximum fee of five dollars an acre. See 30 U.S.C. § 29 (1994). Grazing fees on public lands hold steady at less than two dollars per animal unit month, well below the cost of grazing on private range lands. See generally Dale A. Oesterle, *Public Land: How Much is Enough?*, 23 ECO. L.Q. 521, 526–27 (1996). The cost of logging on public lands does not reflect the cost of building roads or administrative expenses arising from the sale and removal of timber. Michael Axline, *Forest Health and the Politics of Expediency*, 26 ENVTL. L. 613, 619 (1996).

64. Farmers have experienced such hardships from the earliest pioneering days. See O.E. ROLVAAG, *GIANTS IN THE EARTH* (1927) (depicting hardships of “sod-busters” on the Dakota prairie); FRED A. SHANNON, *THE FARMER’S LAST FRONTIER: AGRICULTURE 1860–1897* (1945) (describing economic conditions of farming during late 1800s). These hardships continued through the Great Depression. See BRUCE I. BUSTARD, *PICTURING THE CENTURY 80–83* (1999) (displaying Dorothea Lange’s photographs of impoverished farm workers); JOHN STEINBECK, *THE GRAPES OF WRATH* (1939) (depicting plight of Oklahoma farm family displaced by the Dust Bowl); Jim Chen, *Of Agriculture’s First Disobedience and Its Fruit*, 48 VAND. L. REV. 1261, 1303 (1995) (attributing the loss of farms during 1920–1930 to boll weevil infestation and encroachment by cities and mineral development). More recently, economic displacement resulted from the bank

Rural communities throughout the west are experiencing rapid change as the modern economy shifts from extractive industries to recreation and service-oriented pursuits, pushing ranchers, loggers, and miners aside to make way for the "new west."⁶⁵ Fishermen have experienced similar losses due to market forces, technological advances, and pollution of the waterways.⁶⁶

Political removal sanctioned by official governmental policy, however, has entirely different implications and consequences than economic displacement. Colonization and westward expansion have had significant, in some cases debilitating, impacts on the cultural integrity and the very survival of American Indian tribes. For those tribes that survived the initial onslaught, the government entered into treaties recognizing their right to self-governance. Federal policies that effectuate treaty provisions, while attempting to rectify the effects of imperialism and to support tribal sovereignty, address constitutional and political concerns in a way that policies favoring other land-based communities and individuals do not.⁶⁷

foreclosures of the 1980s. See THOMAS L. FREY & ROBERT H. BEHRENS, LENDING TO AGRICULTURAL ENTERPRISES 3-4 (1981); Mellencamp, *Rain on the Scarecrow*, *supra* note 52. See generally OFFICE OF TECHNOLOGY ASSESSMENT, RURAL AMERICA AT THE CROSSROADS: NETWORKING FOR THE FUTURE (1991), available at www.wws.princeton.edu/~ota/ns20/year_f.html (describing national decline in economic opportunities for rural communities).

65. Rasband, *supra* note 32, at 43-49, 52-61 (describing the changing face of western culture and the resulting displacement of rural communities). See generally Jan G. Laitos & Thomas A. Carr, *The Transformation of the Public Lands*, 26 ECO. L.Q. 140 (1999) (describing the shift from extraction to preservation and recreation and the demographic effects of the change).

66. See JOHN CRONIN & ROBERT F. KENNEDY, JR., THE RIVERKEEPERS 62-63 (1997) (describing loss of Hudson River fisheries due to pollution); Gregory Maxim, *Regulating California's Squid Fishing Industry—Heeding the Lessons of Cannery Row*, 29 MCGEORGE L. REV. 595, 595-98 (1998) (describing collapse of sardine fisheries in the 1940s and squid fisheries in the 1990s); Janet C. Neuman, *Run, River, Run: Mediation of a Water-Rights Dispute Keeps Fish and Farmers Happy—For a Time*, 67 U. COLO. L. REV. 259, 264-70 (1996) (describing loss of fisheries and effects on Indian tribes and farmers due to water diversion).

67. See *infra* Part IV (discussing constitutional implications of policies effectuating tribal sovereignty and resources). For a comparison of property rights under the Treaty of Guadalupe Hidalgo and American Indian treaties, see Klein, *supra* note 54, at 205-10, 247-53; Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615 (2000) [hereinafter Tsosie, *Sacred Obligations*].

C. *The Land's Significance to American Indian Tribes*

Although generalizations can only be made with caution, given the wide diversity of tribes and tribal interests, it is safe to say that land has tremendous significance to many Indian tribes.⁶⁸ Members of land-based tribes describe the land as the "mother" or "The Heart of Everything That Is."⁶⁹ A close relationship with the land "permeates American Indian life,"⁷⁰ sustaining the health and well-being of individual members and, in turn, the integrity and sovereignty of the tribe itself. Steven Emery, former general counsel of the Cheyenne River Sioux Tribe, describes the tribal traditions associated with the Black Hills as "the root of the solution to all of our societal ills."⁷¹

68. See *Wildman v. United States*, 827 F.2d 1306, 1309 (9th Cir. 1987) (citing FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 509 (1982)); see also Winona LaDuke, *Traditional Ecological Knowledge and Environmental Futures*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 127, 146 (1994) ("[indigenous peoples] see themselves as belonging to [the land] rather than it to them"); Robert A. Williams, Jr., *Large Binocular Telescopes, Red Squirrel Piñatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World*, 96 W. VA. L. REV. 1133, 1153 (1994) ("[w]ithout the land . . . there is no tribe").

69. See Alexandra New Holy, *The Heart of Everything That Is: Paha Sapa, Treaties, and Lakota Identity*, 23 OKLA. CITY U. L. REV. 317, 317 (1998); N. Scott Momaday, *A First American Views His Land*, NAT'L GEOGRAPHIC, July 1976, at 14; see also VINE DELORIA, JR., *FOR THIS LAND* 131 (1999) ("like a mother, [the land] shapes our species and, according to the peculiarity of the area, produces certain basic forms of personality and social identity which could not be produced in any other way"); Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D. L. REV. 246, 250-51 (1989) (describing Sioux Indians' relationship with the land); Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 276 (1996) (concluding that traditional American Indian world views have several common aspects, including "a perception of the land as essential to the identity of the people") [hereinafter Tsosie, *Tribal Environmental Policy*].

70. Allison M. Dussias, *Science, Sovereignty, and the Sacred Text: Paleontological Resources and Native American Rights*, 5 MD. L. REV. 84, 100 (1996) (quoting PAULA GUNN ALLEN, *THE SACRED HOOP: RECOVERING THE FEMININE IN AMERICAN INDIAN TRADITIONS* 119 (1986)). "The earth is the source and the being of the people, and we are equally the being of the earth. . . . The earth is not a mere source of survival. . . . the earth is being, as all creatures are also being: aware, palpable, intelligent, alive." *Id.* at 100-01 (quoting ALLEN, *supra*, at 119).

71. Statement of Steven C. Emery, Cheyenne River Sioux Indian Tribe, Transcript of Hearing on the Merits, at 100, *Bear Lodge Multiple Use Ass'n v. Babbitt*, 2 F. Supp. 2d 1448 (D. Wyo. 1998) (No. 96-CV-063-D) (discussing efforts to address alcoholism, educational issues and political survival); see also Kevin J. Worthen, *One Small Step For Courts, One Giant Leap For Group Rights: Accommodating The Associational Role of "Intimate" Government Entities*, 71 N.C. L. REV. 595, 596-97 (1993) (providing statistics on the loss of "Native Sons," and not-

American Indian religious beliefs, unlike western religious traditions, are often site-specific in nature and intimately associated with the land and its natural features. Viewed as a "sacred, living being,"⁷² the land "embod[ies] a divinity that it shares with everything that is part of nature, including human beings, animals, plants, rocks . . . everything."⁷³ In a famous speech attributed to Chief Seal'th (anglicized as "Seattle"), a stark distinction is drawn between the Eurocentric view of the land and his own:

How can one buy or sell the air, the warmth of the land? . . . Each pine tree shining in the sun, each sandy beach, . . . each humming bee is holy in the thoughts and memory of my people We are part of the earth and the earth is a part of us So when the Great Chief in Washington sends word that he wants to buy our land, he asks a great deal of us. The earth is not his brother but his enemy and when he has conquered it he moves on.⁷⁴

ing that American Indians are twice as likely as other Americans to die from suicide, homicide, or liver disease).

72. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 461 (1988) (Brennan, J., dissenting); see also NEIHARDT, *supra* note 1, at 36 and accompanying text; FRANK POMMERSHEIM, *BRAID OF FEATHERS* 35 (1995) (describing the land as a "sacred text" serving a "prophetic function in the life of the [Lakota] community").

73. Dussias, *supra* note 70, at 101 (quoting JAMAKE HIGHWATER, *THE PRIMAL MIND* 124 (1981)); see also Russel L. Barsh, *Grounded Visions: Native American Conceptions of Landscapes and Ceremony*, 13 ST. TH. L. REV. 127, 128 (2000) (explaining that "'religions' of indigenous peoples . . . are empirical statements about the dynamics of the biosphere, with an interwoven moral commentary. Teaching and insight . . . rely on experiencing particular places, where particular living processes can be observed.").

74. Chief Seattle, *How Can One Sell the Air? A Manifesto for the Earth*, in ENVIRONMENTAL DISCOURSE, *supra* note 18, at 12. Chief Seal'th's speech was given at the signing of The Treaty of Medicine Creek between the Suquamish-Duwamish Indians and Governor Stevens in December 1854. See Harry Anstead, *Humanity and Humaneness: Communities Coming Together on Issues of Human Relations to Achieve Social Justice for Indigenous Peoples*, 10 ST. THOMAS L. REV. 25, 30 n.35 (1997). It was transcribed by physician Henry Smith, whose account has been republished several times; great liberties have likely been taken with the text. See Paul S. Wilson, *What Chief Seattle Said*, 22 ENVTL. L. 1451, 1457-58 (1992). Heinmot Tooyalaket (Chief Joseph) of the Nez Perce made a similar observation when told to leave his native lands: "The earth and myself are of one mind. The measure of the land and the measure of our bodies are the same. . . . I never said the land was mine to do with it as I chose." DEE BROWN, *BURY MY HEART AT WOUNDED KNEE* 316 (1970). In contrast, the Eurocentric view of the land is epitomized by Blackstone: "There is nothing which so generally strikes the imagination . . . as the right of property; or that sole and despotic dominion which

Both the tribes' cultural and spiritual relationships to specific sites and natural resources and their relationship with the federal government are unique. In dealing with Indian Nations, the United States "has charged itself with moral obligations of the highest responsibility and trust."⁷⁵ The trust relationship places parameters on the discretion of federal agencies, and in some cases requires prioritization of Indian interests, particularly those that relate to treaty resources.⁷⁶ This unparalleled political and legal relationship is founded on the tribes' natural rights as "distinct, independent political communities" and "undisputed possessors of the soil, from time immemorial,"⁷⁷ and the United States' "conquest" and appropriation of tribal lands during westward expansion.⁷⁸

Although Indian tribes held legally recognized rights to occupy and use their aboriginal lands,⁷⁹ government initiatives dislocated Indian peoples from their historic homelands and confined them on reservations, many of which were far away

one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAW OF ENGLAND 2-11 (1766), *reprinted in* ROBERT C. ELLICKSON ET AL., PERSPECTIVES ON PROPERTY LAW 37-38 (2d ed. 1995).

75. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

76. See *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 (1979); see also Tsosie, *Sacred Obligations*, *supra* note 67, at 1671 (describing treaties as "sacred text" representing "moral obligations . . . to racially and culturally distinct groups that have been treated unjustly by the dominant society," and arguing that treaties should be used as "instruments of intercultural justice" to redress the pervasive effects of imperialism). The trust concept has not always worked in the tribes' favor, as it has been used to justify Congress's plenary power over Indian affairs, operating as a paternalistic outgrowth of the legal theory of conquest. See Philip P. Frickey, *Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1768 (1997).

77. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

78. *Id.*; *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823). The assumption that Indians were conquered is pure legal fiction with respect to most tribes. Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280, 2299 (1989). Although the trust relationship is not made explicit in the Constitution, the Commerce Clause recognizes three sovereigns: the federal government; state governments; and Indian tribes. U.S. CONST. art. I, § 8, cl. 3.

79. *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 345 (1941) (recognizing aboriginal title of ancestral lands occupied exclusively by the Indians); *M'Intosh*, 21 U.S. at 574 (recognizing continued tribal use and occupancy rights); cf. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955) (holding that aboriginal rights to possession and occupancy are not protected by the Fifth Amendment against intrusions by the United States).

from their sacred landscapes and burial grounds.⁸⁰ The forced migration of the Cherokee, Creek, Choctaw, Chickasaw, and Seminole Tribes from the Southeast to the Oklahoma Territory, now widely known as the Trail of Tears, is but one example.⁸¹ Similar incidents took place across the nation, affecting the Nez Perce, the Great Sioux Nation, and many others. Pursuant to treaties, and in some cases outright seizure with no treaty agreement, tribes ceded vast amounts of land to the United States.⁸² Altogether, tribes retain only about three percent of their aboriginal lands within the boundaries of reservations.⁸³

The pressure for land provided the subtext, if not the explicit objective, of federal Indian relations throughout the nineteenth century.⁸⁴ The treaty era effectuated the official government objective of isolating tribes by rupturing their ties to

80. See Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 83–85 (1993).

81. See Pommersheim, *supra* note 69, at 252 n.26 (citing G. FOREMAN, INDIAN REMOVAL (1932)); *id.* at 254; see also RENNARD STRICKLAND, FIRE AND THE SPIRITS 65–67 (1975).

82. *E.g.*, Treaty with the Sioux—Brule, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, and Santee and Arapaho, 1868, April 29, 1868, art. 2, 15 Stat. 635 [hereinafter Treaty of Fort Laramie] (setting apart reservation for “undisturbed use and occupation” of Great Sioux Nation, and providing that “no persons except those herein designated and authorized so to do . . . shall ever be permitted to pass over, settle upon, or reside in the territory described in this article”); see also *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980) (holding that Sioux Nation was entitled to compensation for abrogation of the Treaty of Fort Laramie); Pommersheim, *supra* note 69, at 254 (discussing importance of land base encompassed in Treaty of Fort Laramie).

83. Mary Christina Wood, *Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*, 25 ENVTL. L. 733, 740 (1995); see also CHARLES F. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW 8 (1987) (describing loss of tribal lands during allotment); L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 830 (1997) (describing tribal land loss).

84. See COHEN, *supra* note 68, at 132; FRANCIS PAUL PRUCHA, 1 THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 317 (1984). Early federal Indian policy cycled through four relatively distinct phases: the neutrality and non-intercourse era, which sought to secure neutrality and minimize hostilities with white settlers (1700s–early 1800s); the removal period, which attempted to isolate Indian peoples by moving them west of the Mississippi River (1830s–1861); the reservation era, which strived to contain tribes and provide them with lands for agricultural uses (1860s–late 1880s); and the allotment and assimilation period, intended to dismantle the tribal system and divy up reservation lands to individuals (1880s–1930s). See ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW 137–52 (3d ed. 1991).

the land and removing them to remote reservations.⁸⁵ By the close of the century, assimilation had become the cornerstone of federal Indian policy, effectuated largely through the General Allotment Act of 1887,⁸⁶ designed to “break up the tribal system” by selling off communally held reservation lands.⁸⁷ The laws of the allotment era attempted to impose western real property values on Indian people by allocating the land to individual tribal members and allowing its sale.⁸⁸ Allotment policies were infused with a paternalistic commitment to “civilize” Indian people and inspire “a sense of responsibility” through ownership of individual parcels of land, dissolving tribal cohesion in the process.⁸⁹

Allotment went far beyond the disbursement of Indian lands. The allotment era featured a variety of programs intended to force Indians to relinquish their own culture and become assimilated into Anglo society. Relocation programs placed Indians in jobs in urban centers away from their reservations and tribal communities and took Indian children away from their families to be educated at distant boarding schools.⁹⁰ Many of these schools, and many schools on the reservations, were operated by Christian ministries, with indoctrination in Christian religion as an explicit goal.⁹¹ According to federal

85. See WILKINSON, *supra* note 83, at 16–18 (noting that “isolation of Indian societies on the reservation was a common policy goal”).

86. 25 U.S.C. §§ 331–359 (1887) (popularly known as the General Allotment Act or “Dawes” Act).

87. See John Gibeaut, *Another Broken Trust*, A.B.A. J., Sept. 1999, at 40, 41 (discussing the General Allotment Act). The Act allotted land to tribal members and provided them, after a twenty-five year trust period, with fee title and United States citizenship. COHEN, *supra* note 68, at 130–32. Surplus lands which were not allotted to individual Indians were ceded to the government in exchange for federal compensation. *Id.* at 131.

88. See Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 13–14 (1995).

89. CARL SCHURZ, 1880 SECRETARY OF INTERIOR ANN. REP., reprinted in DOCUMENTS OF UNITED STATES INDIAN POLICY 152 (Francis Paul Prucha ed., 3d ed. 1990).

90. See VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 241 (1983) (describing schools); Cross, *supra* note 44, at 920 (describing job training programs). Professor Cross explains that separating children from their parents and their homes was intended to advance the mission of federal Indian education: “kill the Indian so as to save the man within.” Raymond Cross, *American Indian Education: The Terror of History and the Nation's Debt to the Indian Peoples*, 21 U. ARK. LITTLE ROCK L. REV. 941, 944 (1999).

91. Russel Lawrence Barsh, *The Illusion of Religious Freedom for Indigenous Americans*, 65 OR. L. REV. 363, 371 (1986); see also Susan Power, *Icarus*, in STORY 12, 21 (1997) (describing experiences of Thomas Iron Star, a Dakota boy at the Car-

agents, Christian education "cuts the cord that binds [Indians] to a Pagan life, places the Bible in their hands, substitutes the true God for the false one, Christianity in place of idolatry . . . cleanliness in place of filth, industry in place of idleness."⁹² By the late 1880s, almost half of the government-supported Indian schools were operated by religious groups, most of which were Catholic.⁹³

Meanwhile, to ensure the reform of "barbaric and heathen" tribal people, federal agents were directed to penalize those who engaged in traditional ceremonial practices.⁹⁴ Pueblo dances, viewed as sexually perverse and insidious, were to be controlled "by educational processes as far as possible, but if necessary, by punitive measures when its degrading tendencies persist."⁹⁵ Engaging in the Sun Dance, a Sioux Indian ceremony, was punishable by ten days' imprisonment or by withholding ten days' rations.⁹⁶

Assimilation and allotment policies can be described as "cultural genocide."⁹⁷ No other group in the United States has

lisle Indian School in Pennsylvania, through letters home to his sister in North Dakota: "He is their Shepard God and we are wild sheep who do not want to be caught and gathered in."); *Quick Bear v. Luepp*, 210 U.S. 50, 79–82 (1908) (upholding appropriations for Catholic schools on Sioux Indian reservations).

92. ROBERT H. KELLER, JR., *AMERICAN PROTESTANTISM AND UNITED STATES INDIAN POLICY 1869–82* 207 (1983) (quoting 1887 SUPERINTENDENT OF INDIAN EDUC. ANN. REP. 131) (alteration in original); see also Power, *supra* note 91, at 13 (describing school master's admonition to his pupil about idleness, "the true Indian problem"); see generally Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 776–90 (1997).

93. Dussias, *supra* note 92, at 784 (citing ROBERT H. KELLER, JR., *AMERICAN PROTESTANTISM AND UNITED STATES INDIAN POLICY, 1869–82*, at 208 (1983)). When asked why he did not want an agency school in the Wallowa Valley, Chief Joseph replied, "They will teach us to quarrel about God. . . . We do not want to learn that." BROWN, *supra* note 74, at 318.

94. Dussias, *supra* note 92, at 788–90; see Anastasia P. Winslow, *Sacred Standards: Honoring The Establishment Clause in Protecting Native American Sacred Sites*, 38 ARIZ. L. REV. 1291, 1310–11 (1996).

95. Dussias, *supra* note 92, at 802.

96. *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 817 (1999) (citing H. EXEC. DOC. NO. 1, pt. 5, at 28–31 (2d Sess. 1892), reprinted in FRANCIS PAUL PRUCHA, *AMERICANIZING THE AMERICAN INDIAN: WRITINGS BY THE "FRIENDS OF THE INDIAN"* (1973)).

97. Dean B. Suagee, *Trust Funds and Trust Lands: The Stories Beneath The Story*, 15 NAT. RESOURCES & ENV'T 51 (2000). See Draft U.N. Declaration on the Rights of Indigenous Peoples, Arts. 6–7, adopted by the U.N. Subcommission on Prevention of Discrimination and Protection of Minorities by resolution of Aug. 26, 1994, U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56 (1994) (recognizing the

survived such an extended course of officially sanctioned brutality, and no other group has been recognized as a separate sovereign, entitled to govern its own people and control its own destiny. Tribal sovereignty and the protection of cultural integrity and land-based resources are critical aspects of the federal trust responsibility, given the extensive backdrop of government involvement in Indian culture, religion, and property rights.

Many treaties explicitly recognize tribal governments as sovereign nations entitled to certain political rights, including the right to self-government.⁹⁸ Treaties also reflect the special place that the land holds for the tribes, with provisions for exclusive possession of tribal lands and non-exclusive use of off-reservation lands for hunting, fishing, and other subsistence practices.⁹⁹ To effectuate treaties, and to alleviate barriers to political, economic, and cultural autonomy posed by religious suppression, removal, and allotment, an array of twentieth century federal statutes promotes tribal self-determination with respect to land management, education, and other areas of governance.¹⁰⁰ Congress has explicitly recognized that reli-

loss of land and resources, and suppression of cultural values, as "cultural genocide").

98. See Tsosie, *Sacred Obligations*, *supra* note 67, at 1634. Tribal self-governance includes the power to choose and define a form of government, to define conditions of membership and regulate domestic relations of members, to levy taxes, and to regulate property and administer justice on matters within tribal jurisdiction. See Sylvia F. Liu, *American Indian Reserved Water Rights: The Federal Obligation to Protect Tribal Water Resources and Tribal Autonomy*, 25 ENVTL. L. 425, 447 n.131 (1995); cf. *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997) (citing *Montana v. United States*, 450 U.S. 544, 564 (1981)) (agreeing with general principle, but remarking that a tribe's inherent power does not reach "beyond what is necessary to protect tribal self-government or to control internal relations").

99. See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 422-23 (1980); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 666-69 (1979); Charles F. Wilkinson, *To Feel the Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa*, 1991 WIS. L. REV. 375, 383-89. Of course, non-treaty tribes may feel equally strong associations with the land, even though the relationship is not reflected in official government documents.

100. *E.g.*, Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450a-450n (1994); Indian Financing Act of 1974, 25 U.S.C. § 1451 (1994); Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701(4)-(5) (1994); Indian Forest Resource Management Act, 26 U.S.C. §§ 3101, 3104 (1994); American Indian Religion Freedom Act (AIRFA), 42 U.S.C. § 1996 (1994). The executive branch has also promoted a policy of American Indian self-determination since 1970. See President's Memorandum on Government-to-Government Relations with Native

gious practices are an integral part of tribal culture and identity and has agreed to protect tribal interests in their own distinctive culture and religion as a matter of national policy¹⁰¹ and international law.¹⁰² Along with tribal treaties, these statutes provide an expression of the government's trust relationship with tribes, as well as a recognition of international human rights norms.

II. CULTURAL RESOURCE PROTECTION STATUTES

Congress has recognized cultural resource protection as an important, even compelling, federal objective:

[T]he historical and cultural foundations of the Nation should be preserved as a living part of our community life and development The preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans.¹⁰³

American Tribal Governments, 30 WEEKLY COMP. PRES. DOC. 936 (Apr. 29, 1994); PRESIDENT'S RECOMMENDATIONS FOR INDIAN POLICY, H.R. DOC. NO. 91-363 (1970); *see also* Cross, *supra* note 44, at 893 (critiquing tribal self-determination as a contemporary legal concept).

101. 42 U.S.C. § 1996 (1994). AIRFA also represents an official acknowledgement of the history of governmental intolerance toward American Indian religions; H.R. REP. NO. 95-1308, at 2-3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1262, 1263-64.

102. *See* International Covenant on Civil and Political Rights, U.N. GAOR, 999 U.N.T.S. 171, 178-79, Multilateral Treaties Deposited With the Secretary-General, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) (providing that persons belonging to minority groups "shall not be denied the right . . . to enjoy their own culture, [and] to profess and practice their own religion," art. 27, and proclaiming the right of indigenous peoples to maintain their distinctive, spiritual relationship with traditional lands and resources, art. 25); *see also id.* art. 18 (providing a general right to freedom of religion "either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching . . . subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others"); *see also* Draft U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 97, Arts. 12-14, 25 (recognizing rights of indigenous peoples to maintain distinctive cultures, and providing for preservation of, and access to, cultural and religious sites).

103. 16 U.S.C. §§ 470(b)(2), (b)(4) (1994).

This secular policy is effectuated through the Archeological Resources Protection Act (ARPA),¹⁰⁴ the Native American Graves Protection and Repatriation Act (NAGPRA),¹⁰⁵ and the National Historic Preservation Act (NHPA).¹⁰⁶ In addition, federal decisions affecting cultural resources on public lands require environmental analysis pursuant to the National Environmental Policy Act (NEPA).¹⁰⁷ Together, these laws evidence Congress's goal of accommodating cultural resource use and protection, and they provide a means of promoting tribal sovereignty and redressing the continuing effects of a long history of suppression and displacement of Indian tribes.

A. Archeological Resources and Cultural Items

Between 1981 and 1984, an insurance salesman named Jack Harelson excavated tons of dirt from an ancient burial site on Bureau of Land Management (BLM) lands in Nevada, unearthing two-thousand-year-old funerary artifacts and baskets containing the mummified remains of two Indian children.¹⁰⁸ He subsequently buried the remains in his garden and displayed the artifacts in his home.¹⁰⁹ Harelson was arrested by state authorities in 1995 after his ex-wife and former business partners came forward with photographs of the dig.¹¹⁰

The state charged Harelson with the abuse of a corpse, but his conviction was ultimately reversed on statute of limitations grounds.¹¹¹ Harelson also faced a federal administrative penalty of \$2.5 million for destroying and appropriating archeological resources under ARPA, which prohibits the excavation, removal, alteration, or destruction of archaeological resources

104. 16 U.S.C. §§ 470aa–470ll (1994).

105. 25 U.S.C. §§ 3001–3013 (1994).

106. 16 U.S.C. §§ 470, 470a–470m, 470w (1994).

107. 42 U.S.C. §§ 4321, 4331–35, 4341–47 (1994).

108. Sean Whaley, *Man Fined \$2.5 Million*, LAS VEGAS REV.-J., Apr. 20, 1996, at 1B.

109. Roberta Ulrich, *Indian Artifacts, Two Bodies Turn up at Grants Pass Home*, OREGONIAN, Apr. 13, 1995, at A1.

110. Roberta Ulrich & Erica Gorski, *Jury Finds Man Guilty of Looting Artifacts*, OREGONIAN, Jan. 11, 1996, at A1.

111. *State v. Harelson*, 938 P.2d 763 (1997) (reversing conviction for abuse of a corpse on statute of limitations grounds, but upholding conviction for retaining or disposing of stolen property).

on federal or tribal lands.¹¹² Archaeological resources are defined as "any material remains of past human life or activities which are of archaeological interest," including graves and human remains.¹¹³ As the *Harelson* case demonstrates, the federal land manager may assess civil penalties in an amount that reflects restoration costs or the fair market value of lost or destroyed resources.¹¹⁴ Violators of ARPA may also be charged with criminal penalties, but prosecution has been thwarted in some cases by statutes of limitations and other defenses.¹¹⁵

Jack Harelson's exploits were no isolated incident. American Indian remains and burial grounds on public and private lands have been subject to abusive treatment throughout our

112. 16 U.S.C. § 470ee (1994); see Notice of Assessment from Ann J. Morgan, BLM State Director, to Jack Lee Harelson (Sept. 3, 1996) (on file with author). Under APRA, archeological resources may be excavated, but only pursuant to a permit obtained under regulations issued jointly by the Secretaries of Interior, Agriculture and Defense, and the Chairman of the Tennessee Valley Authority. TVA Protection of Archeological Resources: Uniform Regulations, 18 C.F.R. pt. 1312 (2001); Defense Protection of Archeological Resources: Uniform Regulations, 32 C.F.R. pt. 229 (2001); Forest Service, USDA Protection of Archeological Resources: Uniform Regulations, 36 C.F.R. pt. 296 (2000); and Secretary of Interior Protection of Archeological Resources: Uniform Regulations, 43 C.F.R. pt. 7 (2000). ARPA includes special provisions for notice and consultation with interested tribes before a permit may issue. 43 C.F.R. § 7.7.

113. 16 U.S.C. § 470bb(1) (1994); 43 C.F.R. § 7.3(a) (providing detailed regulatory definitions of terms). To be covered, items and remains must be at least one hundred years of age. 16 U.S.C. § 470bb(1). For the purposes of ARPA, public lands include lands within the national park system, national wildlife refuges, and the national forest system, as well as most other lands for which the United States holds fee title. 16 U.S.C. § 470bb(3).

114. 16 U.S.C. § 470ff(a) (1994) (authorizing civil penalties); see also 43 C.F.R. §§ 8365.1-5, 8360.0-7 (2000) (BLM authority to assess penalties); 36 C.F.R. § 296.16 (2000) (Forest Service authority to assess penalties).

115. See 16 U.S.C. § 470dd(d) (1994) (providing that violators shall be fined not more than \$10,000 or imprisoned not more than one year for knowing violations). Harelson was not charged with violating ARPA because the federal statute of limitations had run. Whaley, *supra* note 108, at 1B. Prosecutors have also had problems proving the requisite mens rea. *United States v. Lynch*, 233 F.3d 1139, 1140, 1143 (9th Cir. 2000) (holding that, to be convicted under the ARPA, defendant must have known, or have been in a position in which he reasonably should have known, that a human skull he removed was an "archeological resource", i.e., that it was over one hundred years old or possessed value). Due process and other constitutional challenges have been rejected, however. *United States v. Austin*, 902 F.2d 743, 744-45 (9th Cir. 1990) (rejecting arguments that ARPA was unconstitutionally vague or overbroad in allegedly reaching activities rooted in academic freedom); *United States v. Tidwell*, 191 F.3d 976, 979-80 (9th Cir. 1999) (rejecting vagueness defense and upholding conviction for trafficking in archaeological resources under ARPA and for trafficking in cultural items and theft of tribal property in violation of NAGPRA).

nation's history.¹¹⁶ Although the sanctity of the dead is a universal principal among human societies, state cemetery laws did not recognize unmarked graves or burial sites outside of consecrated graveyards until the 1980s, allowing looting and trade in Indian remains and funerary artifacts to go unchecked.¹¹⁷ NAGPRA was enacted in 1990 to address some of the more egregious acts¹¹⁸ and to ensure the repatriation of remains and cultural items to lineal descendants or appropriate tribes.¹¹⁹ The Pyramid Lake Paiute Tribe has demanded repatriation of the remains appropriated by Harelson, but reburial may not be possible because the skulls of the children are missing.¹²⁰

NAGPRA establishes rights of federally recognized tribes, Alaskan Native villages and Native Hawaiian organizations to

116. Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 39–45 (1992) (describing grave robbery and factors that supported it, including lucrative nature of trade in Indian artifacts and official policies calling for phrenologic study of Indian skulls). Ironically, Thomas Jefferson was one of the first to order archeological digs at Indian burial mounds in Virginia, and the Smithsonian Institution, established in 1846, supported its first excavation of Indian mounds that same year. Gerstenblith, *supra* note 4, at 573, 575 (citing Edward Friedman, *Antecedents to Cultural Resource Management*, in PROTECTING THE PAST 27–28 (George S. Smith & John E. Ehrenhard eds., 1991)).

117. Sherry Hutt & C. Timothy McKeown, *Control of Cultural Property as Human Rights Law*, 31 ARIZ. ST. L.J. 363, 366–69 (1999); *see also* Wana the Bear v. Cmty. Constr., Inc., 180 Cal. Rptr. 423, 426 (Cal. Ct. App. 1982) (concluding that California cemetery law did not protect a burial ground that was in disuse at the time the statute was enacted, allowing the developer to bulldoze a Miwok burial ground and obliterate over two hundred graves); Newman v. State, 174 So. 2d 479 (Fla. Dist. Ct. App. 1965) (reversing conviction for maliciously disturbing a grave for lack of evidence that a Seminole Indian skull had been taken wantonly or maliciously, noting the “unfamiliar . . . tribal burial customs involving as the setting a scene of disarray in a wild sawgrass and cypress swamp”); Town of Sudbury v. Dep’t of Pub. Utils., 218 N.E.2d 415, 424 (Mass. 1966) (holding that skeleton found at former Indian settlement was not at a “burial ground” and thus not protected under state statute).

118. H.R. REP. NO. 101-877, at 8–9 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4367, 4368; Wendy Crowther, *Native American Graves Protection and Repatriation Act: How Kennewick Man Uncovered the Problems in NAGPRA*, 20 J. LAND RESOURCES & ENVTL. L. 269, 270 (2000).

119. 25 U.S.C. § 3002 (1994); *see also* 43 C.F.R. pt. 10 (2000); 62 Fed. Reg. 41,292 (Aug. 1, 1997) (correcting amendments to final regulations). NAGPRA also requires federal agencies and museums, including federal, state, and local governments and educational institutions that receive federal funds, 25 U.S.C. § 3001(8) (1994), to inventory their collections and repatriate all remains and cultural items covered by the Act. 25 U.S.C. §§ 3003–05 (1994).

120. *Grave Looter Chooses Jail Sentence Over Service*, OREGONIAN, Jan. 23, 1998, at D02.

cultural items embedded in federal and tribal lands.¹²¹ As defined in NAGPRA, "cultural items" include funerary objects, sacred objects, and objects of cultural patrimony, as well as human remains.¹²² Sacred objects are "specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents."¹²³ Objects of cultural patrimony include objects with "ongoing historical, traditional, or cultural importance central to the Native American group or culture itself . . . which, therefore, cannot be alienated, appropriated, or conveyed by any individual."¹²⁴

If cultural items are discovered on federal or tribal lands, the person making the discovery must provide notice to the responsible federal official and to interested tribes.¹²⁵ Meanwhile, the activity that led to the discovery must cease.¹²⁶ It may be resumed thirty days after certification that notice has been received, but an ARPA permit is required if the activity would result in the excavation or removal of archeological resources.¹²⁷ The federal agency may be required to consult with tribes and develop a written plan of action in the course of issuing a permit.¹²⁸ Although tribal consent is not required for the

121. 25 U.S.C. §§ 3002–03 (1994). Section 3002 applies to discoveries made after November 16, 1990, the effective date of the Act. 25 U.S.C. § 3002(a) (1994). Federal lands include most lands controlled or owned by the United States. 25 U.S.C. § 3001(5) (1994); 43 C.F.R. § 10.2(f)(1) (2001). NAGPRA uses the term "Native American" to include "a tribe, people, or culture that is indigenous to the United States." 25 U.S.C. § 3001(9). An "Indian Tribe" includes "any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." § 3001(7). "Native Hawaiian" means "any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii." § 3001(10).

122. 25 U.S.C. § 3001(3) (1994).

123. § 3001(3)(C). NAGPRA defines funerary objects as those that "are reasonably believed to have been placed with individual human remains either at the time of death or later" as part of a death rite or ceremony. § 3001(3)(A)–(B).

124. § 3001(3)(D) (1994).

125. 25 U.S.C. § 3002(d) (1994); 43 C.F.R. § 10.4(b) (2001).

126. 25 U.S.C. § 3002(d).

127. 25 U.S.C. § 3002(c)–(d); 16 U.S.C. § 470cc (1994).

128. 43 C.F.R. § 10.4(d)(v), (e)(iii) (2001) (requiring notice and consultation with culturally affiliated tribes); *see also* *Yankton Sioux Tribe v. United States Army Corps of Eng'rs*, 83 F. Supp. 2d 1047, 1058–60 (D.S.D. 2000) (ruling that the discovery of remains exposed by the draw-down of water pursuant to the Lake Francis Case Annual Operating Plan subjected the Corps of Engineers to ongoing

issuance of a permit, lineal descendants and culturally affiliated tribes have the right to determine the disposition of excavated human remains or cultural items.¹²⁹

NAGPRA's preferential treatment for Native American cultural items has raised equal protection concerns.¹³⁰ When ancient human remains, believed to be over nine thousand years old, were discovered in the bank of the Columbia River near Kennewick, Washington, a group of scientists seeking to study the remains challenged the Corps of Engineers' decision to transfer the remains to Pacific Northwest Indian tribes for reburial.¹³¹ In the course of resolving a pre-trial motion, the court determined that the plaintiffs were unlikely to prevail on their equal protection claim. It found that "Congress reasonably could have concluded that state and local laws against abusing a corpse, vandalism, and grave-robbing were adequate to protect most modern cemeteries, but that special measures were required to address the unique problem of the theft and desecration of Native American cultural objects and remains."¹³² Therefore, according to the court, NAGPRA's provisions were justified by Congress's special obligation toward In-

duties with respect to the proper removal of the remains and the protection of embedded remains that could not be safely removed).

129. See 25 U.S.C. § 3002 (1994); 43 C.F.R. §§ 10.3, 10.5–10.6 (2001). If the Indian Claims Commission or Court of Claims has determined that the federal lands on which the discovery is made are the aboriginal lands of a tribe, that tribe has a presumptive right of ownership or control. 25 U.S.C. § 3002(a)(2)(C) (providing that the presumption can be overcome if another tribe shows a stronger cultural relationship). The term "cultural affiliation" is defined as "a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group." § 3001(2).

130. *Bonnichsen v. United States Dep't of Army*, 969 F. Supp. 628, 648–50 (D. Or. 1997).

131. *Id.* at 631. The Nez Perce Tribe and the Confederated Tribes of the Umatilla Indian Reservation participated in the case as *amicus curiae*. *Id.* at 632. Additional plaintiffs include a group describing themselves as representatives of Asatru, "one of the major indigenous, pre-Christian, European religions." *Id.* at 631–32. The Asatru plaintiffs, who claim to be affiliated with the remains, seek to study and reinter them "in accordance with native European belief." *Id.*

132. *Id.* at 649. The court indicated its belief that American Indians are not similarly situated with other groups: "The court is not aware of any significant market in cultural objects and remains stolen from predominantly Caucasian graveyards in the United States, or of museums exhibiting and cataloguing thousands of Caucasian skeletons, or of any parallel to the 'pot-hunters' who vandalize and desecrate Indian graves." *Id.*

dian tribes¹³³ and its direct interest in regulating the disposition of remains discovered on federal lands.¹³⁴

The court remanded the Corps' decision to repatriate, finding the agency had acted arbitrarily in concluding that the remains were affiliated with the tribes.¹³⁵ The Corps was directed to retain custody of the remains and store them in a manner that would preserve their potential scientific value, pending further investigation and the ultimate resolution of the case.¹³⁶ The Department of Interior subsequently weighed in with its conclusion that, based on geographic data and tribal oral histories, the remains, which were found near the tribes' aboriginal lands, are culturally affiliated with five Pacific Northwest tribes.¹³⁷

133. *Id.* (citing *Morton v. Mancari*, 417 U.S. 535, 554–55 (1974)). The court noted that it was addressing the equal protection issue at a preliminary stage of the case, but cautioned that plaintiffs face an “uphill battle to convince me that there is any merit to those contentions.” *Id.*; see also *Idrogo v. United States Army*, 18 F. Supp. 2d 25 (D.D.C. 1998) (dismissing equal protection claim brought by non-Indians to compel repatriation of the remains of Geronimo for lack of standing, finding that only direct descendants of Native American remains and affiliated tribes stand to be injured by NAGPRA violations).

134. *Id.*; see U.S. CONST. art. IV, § 3, cl. 2 (“Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .”).

135. *Bonnichsen*, 969 F. Supp. at 645.

136. *Id.* at 645, 654. At the time of NAGPRA's enactment, Congress was well aware of the tension between the scientific desire for studying ancient remains whose cultural affiliation could not be determined and the objectives of Indian tribes, but it failed to resolve the issue. See Crowther, *supra* note 118, at 275 (citing *Hearings on S. 1980 before the Senate Select Comm'n on Indian Affairs*, 101st Cong. 70 (1990) (statement of Professor Keith Kintigh)); Renee M. Kossalak, *The Native American Graves Protection and Repatriation Act: The Death Knell for Scientific Study?*, 24 AM. INDIAN L. REV. 129 (2000); see also *Na Iwi O Na Kupuna O Mokapu v. Dalton*, 894 F. Supp. 1397, 1417 (D. Haw. 1995) (allowing examinations to identify the cultural affiliation of remains pursuant to section 3005(b), which requires an agency or museum to “expeditiously return . . . items [in their collections] unless such items are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States”). The NAGPRA Review Committee, established by the Secretary of Interior and charged with overseeing implementation of certain portions of the NAGPRA, 25 U.S.C. § 3006 (1994), has proposed rules for the disposition of culturally unidentifiable remains. 65 Fed. Reg. 36,462 (June 8, 2000). The Committee called for the return, where appropriate, of remains recovered from tribal and aboriginal lands and of remains “for which there is a relationship of shared group identity with a non-[f]ederally recognized Native American group.” *Id.* at 36,463.

137. Aviva L. Brandt, *Judge Reactivates ‘Kennewick Man’ Case*, COLUMBIAN (Vancouver, Wash.), Oct. 26, 2000, at C2. The court has taken the matter under advisement, after hearing arguments in June 2001. See Andy Ogle, *Court to Rule on 9,000-year-old Kennewick Man*, NAT'L POST (Edmonton), June 19, 2001 at A2.

B. Federal Undertakings Affecting Historic Properties

The NHPA complements NAGPRA by requiring consultation for federal undertakings affecting historic properties, including burial grounds and sacred sites. Although its predecessor, the Historic Sites Act of 1935, only covered sites of "exceptional value," the NHPA reflects much broader concerns—the "preservation of an environment that truly represents the nation's social and historic diversity," not just structures built by the wealthy and powerful.¹³⁸ Public or private property is eligible for listing on the National Register of Historic Places if it meets any of the following criteria: (1) it is "associated with events that have made a significant contribution to the broad patterns of our history"; (2) it is "associated with the lives of persons significant in our past"; (3) it possesses high artistic values or distinctive characteristics of construction, or represents the work of a master; or (4) it may yield important historical information.¹³⁹

Traditional cultural properties associated with the practices or beliefs of a community, rooted in community history and important in maintaining cultural identity, may meet eligibility criteria.¹⁴⁰ The 1992 NHPA amendments explicitly provide that "properties of traditional religious and cultural importance" to American Indian tribes may be eligible,¹⁴¹ even though other religious properties are not covered unless they are "integral parts" of eligible districts or derive their "primary

138. KING, *supra* note 4, at 56.

139. 36 C.F.R. § 60.4 (2001). The Secretary of Interior, through the National Park Service (NPS), is responsible for determining eligibility for the National Register. See 16 U.S.C. § 470a(1) (1994); 36 C.F.R. pt. 60 (2000).

140. PATRICIA L. PARKER & THOMAS E. KING, U.S. DEPT OF INTERIOR, NATIONAL REGISTER BULLETIN 38, GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES 1 (1990) [hereinafter BULLETIN 38], available at <http://www2.cr.nps.gov/tribal/bull3803.html>. Traditional Cultural Properties (TCPs) are not limited to properties of interest to Indian tribes. See *id.* at 1 (defining the term "culture" to include "the traditions, beliefs, practices, lifeways, arts, crafts, and social institutions of any community, be it an Indian tribe, a local ethnic group, or the people of the nation as a whole").

141. 16 U.S.C. § 470a(d)(6) (1994). An Establishment Clause challenge to regulations implementing this provision was rejected in *Nat'l Mining Ass'n v. Slater*, 167 F. Supp. 2d 265, 296 (D.D.C. 2001). See generally *infra* Part IV (discussing Establishment Clause requirements).

significance from architectural or artistic distinction or historical importance."¹⁴²

Relatively undisturbed, culturally significant areas of the natural world, such as a mountain peak, butte, or valley, may be considered traditional cultural properties.¹⁴³ The inclusion of such properties within the Act's coverage has been controversial because of their spiritual aspects as well as their potentially sweeping geographic scope, as they may encompass large areas of land with few discrete, distinguishing physical features.¹⁴⁴ Examples include Devils Tower, a remarkable butte at the edge of the Black Hills, and Las Huertas Canyon in the Cibola National Forest.¹⁴⁵ As a result, identifying and managing traditional cultural properties can pose challenging situations for federal land managers.

1. Consultation Requirements for Historic Properties

The NHPA's primary mechanism for the protection of historic properties is procedural in nature. Section 106 of the Act provides that agencies must consider the effect of federal undertakings on districts, sites, structures, and objects eligible for inclusion on the National Register through detailed consultation requirements.¹⁴⁶ A wide variety of projects, activities and programs have been found to be "undertakings," including forest planning, rulemaking, land exchanges, construction of

142. 36 C.F.R. § 60.4 (2000). Likewise, properties that have achieved significance within the past fifty years are generally not eligible for the National Register. *Id.*

143. See BULLETIN 38, *supra* note 140, at 1; see also Dean Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 VT. L. REV. 145, 172-74 (1996) (discussing Mount Shasta and the Helkau Historic District of the Six Rivers National Forest).

144. Unlike other historic properties, "there may be nothing observable to the outsider about a place regarded as sacred by a Native American group." BULLETIN 38, *supra* note 140, at 11-12. In reaction to a controversy over a ski resort on Mount Shasta, a TCP, California Representative Wally Herger sponsored H.R. 563, providing that no property can be determined eligible for the National Register unless it contains physical evidence of human activity, such as artifacts. See Suagee, *supra* note 143, at 174. The Herger Bill, had it passed, would have rendered Mount Shasta and many other TCPs ineligible for the National Register. *Id.*

145. Litigation over the management of Devils Tower is discussed *infra* Part III.A. Las Huertas Canyon was the subject of *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995).

146. 16 U.S.C. § 470f (1994). See 36 C.F.R. Part 800 (2000) (specifying consultation requirements).

dams, fences and other structures, and permits for activities on federal, tribal, and private lands.¹⁴⁷ Agencies that fail to execute the NHPA's procedural responsibilities, along with their permittees, may be enjoined from proceeding with the undertaking in question.¹⁴⁸ Further, a permittee who has intentionally caused significant adverse effects to an historic property may be barred from receiving loans, licenses, or other assistance.¹⁴⁹

The federal action agency has responsibility for effectuating each step of consultation and ensuring that appropriate entities are involved during the process. The Advisory Council on Historic Preservation has issued detailed regulations prescribing each step of consultation.¹⁵⁰ From the outset, consultation

147. See 16 U.S.C. § 470w(7) (1994); Suagee, *supra* note 143, at 188 (collecting cases). Consultation may not be required, however, if the federal action is nondiscretionary, *Sac and Fox Nation of Missouri v. Babbitt*, 240 F.3d 1250, 1262–1263 (10th Cir. 2001), or authorizes “truly inconsequential activities” pursuant to a general or nationwide permit, *Vieux Carre Property Owners, Inc. v. Brown*, 875 F.2d 453, 465 (5th Cir. 1989).

148. *Pueblo of Sandia*, 50 F.3d at 856, 862–63 (reversing summary judgment for the Forest Service and reinstating claim for injunction of implementation of a forest management plan because Forest Service had failed to make a reasonable effort to identify TCPs within planning area); *Attakai v. United States*, 746 F. Supp. 1395, 1408–09 (D. Ariz. 1990) (issuing preliminary injunction against BIA for failing to consult with the SHPO and the Navajo tribe). *But see* *White Mountain Apache Tribe v. United States*, 46 Fed. Cl. 20, 28 n.9 (1999) (citing *Nat'l Trust for Historic Pres. v. Blanck*, 938 F. Supp. 908, 925 (D.D.C. 1996), and noting that “Congress did not intend the NHPA to create affirmative preservationist responsibilities”), *rev'd on other grounds*, 249 F.3d 1364 (Fed. Cir. 2001).

149. 16 U.S.C. § 470h-2(k) (1994). However, the assistance may be granted if it is “justified” under the circumstances. *Id.* The agency must “take into account the effects of the undertaking” on the property, and consider the Council’s opinion on the justification for granting assistance and the availability of mitigation measures. 36 C.F.R. § 800.9(c) (2000). Factors to be considered include the “circumstances under which the adverse effects . . . occurred and the degree of damage . . . to the property.” *Id.*

150. See 16 U.S.C. § 470i(a) (1994) (directing the establishment of the Advisory Council). For a step by step assessment of consultation requirements, see Sandra B. Zellmer, *The Protection of Cultural Resources on Public Lands: Federal Statutes and Regulations*, 31 E.L.R. 10689, 10691–93 (June 2001). The Advisory Council has been in the process of amending its regulations for several years, see 64 Fed. Reg. 27044 (May 18, 1999) (rule revising NHPA regulations); 65 Fed. Reg. 42834 (July 11, 2000) (reissuing revisions as a proposed rule); and final revised regulations became effective on January 11, 2001, 65 Fed. Reg. 77698 (Dec. 12, 2000) (codified at 36 C.F.R. pt. 800). A district court has upheld most of the new regulations against a variety of statutory and constitutional challenges. *Nat'l Mining Ass'n v. Slater*, 167 F. Supp. 2d 265 (D.D.C. 2001). However, the court invalidated revised sections 800.4(d)(2) and 800.5(c)(3), which require an agency to continue with consultation even if it has determined historic properties

should be conducted in tandem with the preparation of NEPA analyses,¹⁵¹ as historic and cultural resources are expressly included among the factors to be considered in environmental impact statements (EISs).¹⁵² Action agencies must consult with State Historic Preservation Officers (SHPO) on undertakings that may affect historic properties,¹⁵³ and must include interested tribes when traditional cultural properties may be affected, even if the property is outside reservation boundaries.¹⁵⁴

Disputes over the NHPA implementation typically center on the identification of historic properties, particularly traditional cultural properties, and the mitigation of adverse effects.¹⁵⁵ Good faith efforts to identify historic properties are required, including background research, ethnographic studies, interviews, and field surveys.¹⁵⁶ Tribal oral tradition should also be considered to establish the location and significance of a

are not present or will not be affected, as imposing substantive requirements beyond the statutory authority granted to the Council. *Id.* at 288–89.

151. 36 C.F.R. § 800.8 (2001); NEPA, 42 U.S.C. § 4332(C) (1994) (requiring consideration of the environmental effects and alternatives of major federal actions).

152. 40 C.F.R. § 1502.16 (2000); *see also* 40 C.F.R. § 1502.25 (2000) (providing that agencies must prepare environmental impact statements (EISs) concurrently and in an integrated fashion with related studies required by other environmental laws). For a detailed discussion of NEPA, *see infra* Part II.C.

153. 16 U.S.C. § 470a(b)(3)(I) (1994); *see also* 36 C.F.R. § 61.4(b) (2001). Within reservation boundaries, tribal governments can assume the functions that would otherwise be performed by SHPOs. 16 U.S.C. § 470a(d)(2) (1994) (providing for Tribal Historic Preservation Officers). For detailed treatment of the NHPA's provisions for tribal lands, *see* Suagee, *supra* note 143, at 181–85.

154. *See* 16 U.S.C. § 470a(d)(6)(B) (1994); *see also* *Attakai v. United States*, 746 F. Supp. 1395, 1408–09 (D. Ariz. 1990) (concluding that the Navajo tribe must be afforded an opportunity to participate as interested persons for sites on Hopi lands).

155. 36 C.F.R. § 800.4(a)(4) & (b) (2001). For the role of the Advisory Council in the resolution of these issues, *see* 36 C.F.R. §§ 800.4(c)(2), (d)(1) (2001) (specifying the role of the Council in identification); § 800.6(a)(1) (requiring that the Council receive notification of adverse effects, and, in some cases, be invited to participate in resolution of adverse effects).

156. 36 C.F.R. § 800.4(b)(1); BULLETIN 38, *supra* note 140, at 10–12. In *Pueblo of Sandia v. United States*, the court found that the Forest Service had ignored the BULLETIN 38 guidelines and sent only written inquiries to tribal representatives, in spite of receiving information that TCPs may be present in the affected area. 50 F.3d 856, 860–63 (10th Cir. 1995); *see also* *Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transp. Bd.*, 252 F.3d 246, 263–67 (3d Cir. 2001) (finding that the agency failed to properly consider views of the Advisory Council, Keeper of the National Register, and SHPO regarding eligibility of an historic railroad line).

place.¹⁵⁷ If an eligible property is identified, the action agency must then consult to determine whether the undertaking will have adverse effects on the property by “diminish[ing] the integrity of the property’s location, . . . setting, . . . feeling, or association.”¹⁵⁸ Examples of adverse effects include physical destruction, the introduction of visual, audible, or atmospheric elements that are out of character with the property, the alteration of the property’s setting, and the transfer of the property without adequate restrictions to ensure its long-term preservation.¹⁵⁹

If the agency proposes a finding of no adverse effect, it must consult with the parties in an attempt to resolve any disagreements with that finding.¹⁶⁰ If adverse effects are found, the selection of alternatives to avoid or mitigate those effects will be the subject of continuing consultations, typically culminating in a Memorandum of Agreement (MOA).¹⁶¹ The action agency may terminate consultation and go forward with the undertaking even if a MOA cannot be agreed upon, but it does so at its own peril.¹⁶² In *Muckleshoot Indian Tribe v. United States Forest Service*, the Ninth Circuit enjoined a land exchange after the parties had failed to reach agreement, finding that the Forest Service erred in concluding that photographing

157. *Pueblo of Sandia*, 50 F.3d at 860–61; see also *Hoonah Indian Ass’n v. Morrison*, 170 F.3d 1223, 1231–32 (9th Cir. 1999) (affirming the agency’s determination that routes taken by survivors of an 1804 battle was not eligible; although some tribal oral evidence supported eligibility of paths for inclusion in the National Register, there was “no physical marking, no documentation, and no well established tribal consensus, to establish exactly what . . . paths the retreating Kiks.adi had taken”). Information on the property’s location, character or ownership may not be disclosed if disclosure may cause a significant invasion of privacy, risk harm to the historic property, or inhibit practitioners’ use of a traditional religious site. 16 U.S.C. § 470w-3(a) (1994). Agencies are required to seek the views of Indian tribes regarding their confidentiality concerns and provide these views to the Council. 36 C.F.R. § 800.11(c)(2) (2001).

158. 36 C.F.R. § 800.5(a)(1) (2001).

159. 36 C.F.R. § 800.5(a)(2); see *Friends of Atglen-Susquehanna*, 252 F.3d at 256; *Muckleshoot Indian Tribe v. United States Forest Service*, 177 F.3d 800, 807–08 (9th Cir. 1999).

160. 36 C.F.R. § 800.5(c)–(d) (2001).

161. See 36 C.F.R. § 800.6 (2001). If the Advisory Council participates, it must also be a signatory to any resulting MOA. § 800.6(c)(1). Concerned tribes and other interested parties may be invited to be signatories. § 800.6(c)(2).

162. *Friends of the Altgen-Susquehanna*, 252 F.3d at 266–67 (finding that the agency had erred in terminating consultations and implementing a mitigation plan contained in an unexecuted MOA); *Muckleshoot Indian Tribe*, 177 F.3d at 808–09, 815.

and mapping a historic trail prior to transferring it to a private party would mitigate adverse effects to the site's significant features.¹⁶³ If the agency does proceed in the absence of an MOA, it must ask the Advisory Council to comment on the undertaking,¹⁶⁴ and the decision must be made by the head of the agency.¹⁶⁵

2. National Historic Landmarks

Section 110 goes beyond § 106 by providing substantive protection for properties designated by the Secretary of the Interior as National Historic Landmarks.¹⁶⁶ Landmarks include public or private properties of national historic significance that "possess exceptional value or quality in illustrating or interpreting the heritage of the United States in history, architecture, archeology, engineering and culture and . . . a high degree of integrity of location, design, setting, materials, workmanship, feeling and association."¹⁶⁷ Agencies must take steps to avoid harm to landmarks "to the maximum extent possible" and must provide the Advisory Council an opportunity to comment on federal undertakings affecting landmarks.¹⁶⁸

163. 177 F.3d at 808–09. The site was likely to be logged, and its historic features destroyed, if transferred without adequate restrictions. *Id.* Notably, the SHPO had concurred in the agency's proposal to document the trail, but the court indicated that there were other viable options, including imposing restrictive covenants or retaining the trail in federal ownership. *Id.*; 36 C.F.R. § 800.5(a)(2)(vii) (providing examples of adverse effects, including "[t]ransfer . . . of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance").

164. 36 C.F.R. §§ 800.6, 800.7(a) (2001).

165. 16 U.S.C. § 470h-2(l) (1994); *see* 36 C.F.R. § 800.7(c)(4) (2000). The decision must explain the rationale for proceeding with the undertaking and provide evidence that the agency considered the Council's comments. 36 C.F.R. § 800.7(c)(4).

166. 16 U.S.C. § 470h-2(f) (1994). All landmarks are designated by the Secretary of the Interior and listed in the National Register. *See* 16 U.S.C. § 470a(a)(1)(B) (1994); *see also* 36 C.F.R. pt. 85 (1995).

167. 36 C.F.R. 65.4(a) (2001). Sites "composed of integral parts of the environment not sufficiently significant by reason of historical association or artistic merit to warrant individual recognition but [that] . . . outstandingly commemorate or illustrate a way of life or culture" may be included. § 65.4(a)(5).

168. 16 U.S.C. § 470h-2(f) (1994); *see* 36 C.F.R. § 800.10 (2000). A separate provision of § 110 imposes programmatic responsibilities on federal agencies, directing them to establish preservation programs to ensure that their properties are managed in a manner that reflects "historic, archaeological, architectural, and cultural values." 16 U.S.C. § 470h-2(a) (1994). Secretary of the Interior's Stan-

The Medicine Wheel, an historic landmark in the Bighorn National Forest of Wyoming, is the subject of a Programmatic Agreement and Historic Preservation Plan executed by the Forest Service, interested tribes, and other consulting parties.¹⁶⁹ The wheel is constructed of limestone rocks and is roughly eighty feet in diameter with twenty-eight spokes radiating from a center cairn. It is visited by numerous tribes for traditional prayer offerings and vision quests.¹⁷⁰ The Historic Preservation Plan, one of the first of its kind, emphasizes traditional cultural values as the management directive for the area, and it closes a nearby road and requires consultation before timber harvest or other potentially disruptive activities may go forward.¹⁷¹ A Wyoming logging association has challenged the Plan as inhibiting its economic opportunities in violation of constitutional and statutory requirements.¹⁷² The Historic Preservation Plan is a suitable means of avoiding harm to a significant archeological and cultural landmark as directed by the NHPA,¹⁷³ but the crux of the association's claims will

dards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act, 63 Fed. Reg. 20,496 (Apr. 24, 1998). However, this provision may be satisfied when the agency prepares a management plan and commits substantial resources to preservation activities, even though deterioration of historic properties continues. *Nat'l Trust for Historic Pres. v. Blanck*, 938 F. Supp. 908, 924-25 (D.D.C. 1996).

169. U.S.D.A. FOREST SERVICE REGION 2, HISTORIC PRESERVATION PLAN FOR THE MEDICINE WHEEL NATIONAL HISTORIC LANDMARK AND VICINITY, signed by Forest Supervisor Larry Keown, the Advisory Council, the SHPO, the Medicine Wheel Alliance, the Medicine Wheel Coalition for Sacred Sites, the Federal Aviation Administration and Big Horn County Commissioners (Sept. 28, 1996) [hereinafter HISTORIC PRESERVATION PLAN] (on file with author). Members of the Medicine Wheel Coalition include Northern Cheyenne, Northern Arapaho, and Fort Peck Tribes. *Id.*

170. *Id.* At 10,000 feet elevation, the Medicine Wheel "is where Earth meets sky, where the secular and the ethereal converge." Pauline Arrillaga, *Sacred Sites Become Battlegrounds*, DENV. POST, July 16, 2000, at B2. Legend has it that Chief Joseph fasted at the Wheel after his people, the Nez Perce, fled the United States Army. *Id.*

171. HISTORIC PRESERVATION PLAN, *supra* note 169, at 23-24, 29-31, 52. The Plan is intended to promote continued traditional cultural uses and protect the area from inconsistent uses. *Id.* at 5.

172. *Complaint, Wyoming Sawmills, Inc. v. United States Forest Service*, No. 99-CV-31J (D. Wyo. Feb. 16, 1999). Plaintiffs allege violations of the Establishment Clause, NFMA, NEPA, and the Federal Advisory Committee Act, but they did not assert an NHPA claim. *Id.*

173. For additional discussion of the Medicine Wheel Plan, see Suagee, *supra* note 143, at 170.

turn on federal laws governing National Forest lands, as well as the First Amendment, discussed below.¹⁷⁴

C. NEPA and Executive Orders on Environmental Justice and Sacred Sites

Like § 106 of the NHPA, NEPA imposes procedural requirements, ensuring that agencies “look before they leap” by considering the effects of major federal actions on the environment, along with a range of reasonably available alternatives to the proposed action, through an environmental assessment or a more detailed environmental impact statement (EIS).¹⁷⁵ Although the statute does not require that the least environmentally degrading alternative be chosen,¹⁷⁶ NEPA urges agencies to use “all practicable means” to “preserve important historic, cultural, and natural aspects of our national heritage,” and to maintain “an environment which supports diversity and variety of individual choice.”¹⁷⁷

Effects which must be considered include “ecological . . . aesthetic, historic, *cultural*, economic, social, or health, whether direct, indirect, or cumulative.”¹⁷⁸ Guidance documents issued by the Council on Environmental Quality provide that NEPA analyses must also consider effects on minority and low income populations in accordance with Executive Order 12,898 on Environmental Justice.¹⁷⁹ The Executive Order pro-

174. See *infra* Parts III.B.2 (discussing the NFMA) and IV.C. (assessing constitutional claims).

175. 42 U.S.C. § 4332(2)(C) (1994); Part II.B.1, *supra* (discussing requirements of NHPA § 106).

176. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989). The agency should, however, identify the environmentally preferable alternative in its NEPA analysis, defined as the one that “[o]rdinarily . . . causes the least damage to the biological and physical environment . . . [and] best protects, preserves, and enhances historic, cultural, and natural resources.” Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 Fed. Reg. 18026, 18028 (1981).

177. 42 U.S.C. § 4331(b)(4) (1994).

178. 40 C.F.R. § 1508.8 (1977) (emphasis added); see § 1508.27 (specifying that impacts on cultural resources may be considered “significant,” triggering the need for an EIS); Thomas F. King, *What Should Be the “Cultural Resources” Element of an EIA?*, 20 ENVTL. IMPACT ASSESSMENT REV., 5–30 (2000) (explaining that consideration of cultural resources must be included in the NEPA analysis).

179. COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (1997), available at <http://ceq.eh.doe.gov/nepa/regs/ej/ej.pdf>. The CEQ Guidance states that “[a]gencies should recognize the interrelated cultural . . . factors that may amplify the natural

vides that each federal agency shall "to the greatest extent practicable and permitted by law . . . make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations" ¹⁸⁰ The Order explicitly includes American Indians within its scope. ¹⁸¹ Other guidance documents specify that impacts to cultural resources of interest to populations covered by the Order must be considered through NEPA. ¹⁸²

In addition, Executive Order 13,007 on Sacred Sites encourages agencies to accommodate "access to and ceremonial use of sacred Indian sites [by avoiding actions that would] adversely affect[] the physical integrity of such sacred sites." ¹⁸³ NEPA can serve as a useful tool for assessing impacts and considering alternatives to activities that may adversely affect sacred sites. Although both the Sacred Sites Order and the Environmental Justice Order expressly state that they create no legal rights or remedies, ¹⁸⁴ a failure to address cultural, his-

and physical environmental effects of the proposed agency action." *Id.* at 9. In addition, agencies should seek tribal representation during the NEPA process in a manner consistent with the government-to-government relationship, the federal trust responsibility, and treaty rights. *Id.*

180. Exec. Order No. 12,898, § 1-101, 59 Fed. Reg. 7629 (Feb. 11, 1994). The Order further directs each federal agency to develop its own agency-wide environmental justice strategy. *Id.* § 1-103.

181. *Id.* § 6-606 (requiring coordination with federally-recognized Indian tribes).

182. OFFICE OF FED. ACTIVITIES, UNITED STATES ENVTL. PROT. AGENCY, FINAL GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS IN EPA'S NEPA COMPLIANCE ANALYSES § 2.2.2 (1998), *available at* <http://es.epa.gov/oeca/ejepa.html>. The EPA Guidance explains that "potential effects to on- or off-reservation tribal resources (e.g., treaty-protected resources, cultural resources and/or sacred sites) may disproportionately affect the local Native American community and implicate the federal trust responsibility to tribes." *Id.* § 2.1.1.

183. Exec. Order No. 13,007, § 1(a)(1)-(2), 61 Fed. Reg. 26,771 (May 24, 1996). The Order defines "sacred site" rather narrowly, as "any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion" *Id.* § 1(b)(iii).

184. *Id.* § 4 (stating that the Order does not "create any right . . . enforceable at law or equity by any party against the United States . . ."); Exec. Order No. 12,898, § 6-609 ("[t]his order shall not be construed to create any right to judicial review . . ."). The Sacred Sites Order adds that it may not "be construed to im-

toric, and social effects, as directed by NEPA regulations, could be set aside as arbitrary and capricious.¹⁸⁵

III. ACCOMMODATING CULTURAL INTERESTS THROUGH PUBLIC LANDS STATUTES

The specific directives of the governing land management statutes are key to the resolution of controversies over cultural resources on public lands. Each of the relevant statutory schemes provides for cultural resource protection and access as appropriate components of the agency's mission, and each requires integration with the cultural objectives of the NHPA, NAGPRA, and NEPA.¹⁸⁶ The National Park Service Organic Act, in particular, emphasizes the conservation of park resources and values, including cultural values.¹⁸⁷ The BLM and National Forest System lands are governed by multiple-use sustained-yield principles pursuant to the Federal Land Policy

pair enforceable rights to use of Federal lands that have been granted to third parties through final agency action." Exec. Order No. 13,007, § 3.

185. Courts may set aside "arbitrary" and "capricious" agency decisions under the APA. 5 U.S.C. § 706(2)(A) (2000). Decisions are arbitrary if relevant factors are not considered and explained. *Motor Vehicle Mfrs. Ass'n v. State Farm Ins. Co.*, 463 U.S. 29, 50–57 (1983) (holding that agency had failed to consider relevant safety factors in deciding to rescind seatbelt requirements and was therefore arbitrary). Environmental justice and cultural concerns are relevant factors for consideration in the NEPA analysis. 40 C.F.R. §§ 1508.8, 1508.27 (2001); *see also* *Ross v. Federal Highway Admin.*, 972 F. Supp. 552, 562–63 (D. Kan. 1997) (finding that plaintiffs who alleged that a trafficway would interfere with spiritual, educational and aesthetic uses of the area came within the zone of interests protected by NEPA, and enjoining the project pending completion of a supplemental EIS), *aff'd*, 162 F.3d 1046 (10th Cir. 1998). *But cf.* *Citizens Concerned About Jet Noise, Inc. v. Dalton*, 48 F. Supp. 2d 582, 604 (E.D. Va. 1999) (rejecting environmental justice challenge to the NEPA analysis on the grounds that the Executive Order precluded review), *aff'd*, 217 F.3d 838 (4th Cir. 2000).

186. Culturally important resources are also found in wildlife refuges and other federal lands. *See, e.g.*, National Wildlife Refuge System Improvement Act of 1998, 16 U.S.C. § 668dd–ee (1994 & Supp. V 1999); Alaska National Interest Lands Conservation Act of 1980, 16 U.S.C. § 3142(c)(E) (1994) (requiring consideration of the potential impacts on Native culture and lifestyle resulting from the study of the Arctic National Wildlife Refuge); 10 U.S.C. § 2694 (2000) (calling for natural and cultural resource programs on Department of Defense lands). This Article focuses on three categories of public lands—the National Park System, the National Forest System, and public lands managed under FLPMA—managed by the principal federal land managers, the Park Service, Forest Service, and the BLM. Special provisions govern wilderness areas within these land categories. Wilderness Act, 16 U.S.C. §§ 1131–36 (1994).

187. 16 U.S.C. § 1 (1994).

and Management Act (FLPMA)¹⁸⁸ and the National Forest Management Act (NFMA),¹⁸⁹ respectively, each of which calls for conservation while allowing more intensive uses, such as mining, logging, and grazing.

Due to the great diversity of the public lands and resources and the wide range of interests that may be asserted, there can be no single, formulaic prescription for managing cultural resources. Each inquiry must be agency-specific as well as fact-specific. Although outcomes will vary among agencies in view of their statutory missions, with the Park Service tending more toward conservation and the BLM and Forest Service having an access-oriented bias, each agency possesses the necessary legal tools for reaching reasonable accommodations of cultural interests.

A. The Conservation Mandate of the National Park Service Organic Act

The National Park system plays a highly visible and critical role in providing recreational opportunities for people and habitat for wildlife species, but it is equally important in promoting cultural pluralism. By some estimates, over half of all units within the system commemorate historic events, persons, and places.¹⁹⁰ In many ways, the Park system serves as a national classroom for environmental and social studies, charting the course for our culturally diverse society by providing information about the natural and human history of each Park. Yet the National Park Service (NPS) also faces relentless pressure to provide access to rock climbers, rafters, mountain bikers, and hikers, often at the very same sites where cultural practices requiring an undisturbed setting occur. As a result, the NPS is forced to establish priorities and make highly controversial decisions in the management of culturally important sites.

National Park properties are managed pursuant to the Park Service Organic Act of 1916 "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by

188. 43 U.S.C. §§ 1701–02, 1711–23, 1731–48, 1751–53, 1761–71, 1781–84 (1994).

189. 16 U.S.C. §§ 1601, 1604 (1994).

190. See Winks, *supra* note 29, at 579.

such means as will leave them unimpaired for the enjoyment of future generations.”¹⁹¹ Congress’s purpose in establishing the National Park system, as clarified in subsequent amendments, emphasizes the cultural importance of the system: “[T]hese areas, though distinct in character, are united through their inter-related purposes and resources into one national park system as cumulative expressions of a single national heritage”¹⁹²

Individual units of the National Park system each have their own legislative directive, which supplements the general provisions of the Organic Act. For example, Yellowstone’s enabling act requires that regulations be adopted as necessary for the management of the park and “for the protection of the property therein, especially for the preservation from injury or spoliation of all . . . natural curiosities, or wonderful objects.”¹⁹³ Several park enabling acts explicitly provide for the protection and maintenance of cultural properties, including historic sites and structures, and even Christian churches.¹⁹⁴ Some specifically acknowledge the importance of the individual park unit to American Indians, and direct that the integrity of, and access to, traditional cultural properties be protected.¹⁹⁵

191. 16 U.S.C. § 1 (1994).

192. *Id.* § 1a-1. For a discussion of the history of the National Park System, see *supra* notes 22–30 and accompanying text.

193. 16 U.S.C. § 26 (1994).

194. The National Park System includes San Antonio Missions National Historical Park, 16 U.S.C. § 410ee (1994) (establishing the Park and authorizing cooperative management agreements with the Catholic Archdiocese), as well as Christ Church, an Episcopal Church in Boston, and St. Joseph’s Catholic Church in Philadelphia. See Winslow, *supra* note 94, at 1317. In addition, there are chapels in numerous parks, including the Grand Canyon, Yellowstone, and Yosemite. *Id.*

195. See, e.g., Zuni-Cibola National Historic Park Establishment Act of 1988, 16 U.S.C. § 410pp-4, pp-6 (1994) (establishing a Zuni-Cibola advisory committee to guide Park management and authorizing the Secretary, upon request, to temporarily close areas “to protect the privacy of religious activities by Indian people.”); 16 U.S.C. § 460uu-47(c) (1994) (authorizing temporary closure “to protect the privacy of religious activities in such areas by Indian people” in the El Malpais National Monument and Conservation Area); California Desert Protection Act of 1994, 16 U.S.C. § 410aaa-75(a) (1994) (recognizing that the Timbisha Shoshone people have long utilized areas of the desert for “traditional cultural and religious purposes” and directing the Secretary to ensure access by authorizing temporary closures upon request); 16 U.S.C. § 460jjj-1 (1994) (requiring the Secretary to ensure protection of Indian “religious and cultural sites” and provide access to sites for traditional uses in Jemez National Recreational Area); Timbisha Shoshone Homeland Act, Pub. L. No. 106-423, 114 Stat 1875, § 5(e) (Nov. 1, 2000) (providing for specified lands within Death Valley National Park to be

NPS regulations and policies require the conservation of park resources and values,¹⁹⁶ including, among other things, archeological resources, cultural landscapes, ethnographic resources, and historic and prehistoric sites, structures, and objects.¹⁹⁷ Activities that impair the integrity of park resources or values are generally prohibited.¹⁹⁸ An adverse impact is likely to constitute an impairment if it affects “the integrity of park resources or values . . . whose conservation is . . . [k]ey to the natural or cultural integrity of the park or to opportunities for enjoyment of the park”¹⁹⁹ Management policies specify that the NPS plays a stewardship role and therefore must not only avoid impairment but must also take affirmative steps to protect the integrity of park resources.²⁰⁰

Meanwhile, the Organic Act’s directive for enjoyment of park resources, along with more specific NPS policies, recognizes that providing access to culturally important resources is an appropriate objective as well.²⁰¹ Accommodations for reli-

taken into trust for the tribe, and establishing special use areas within parklands for traditional practices).

196. 36 C.F.R. § 1.5(a) (2001) (listing protection of cultural values, subsistence uses and species conservation as factors to consider in issuing closures or use restrictions); § 2.1(a) (prohibiting the possession, destruction or disturbance of various natural resources, including cultural or archeological resources); *see also* NAT’L PARK SERV., 2001 MANAGEMENT POLICIES, *available at* <http://www.nps.gov/refdesk/mp/index.html>; NAT’L PARK SERV., DIRECTOR’S ORDER #28: CULTURAL RESOURCE MANAGEMENT (1998), *available at* <http://www.nps.gov/refdesk/DOrders/DOrder28.html>.

197. NAT’L PARK SERV., 2001 MANAGEMENT POLICIES, *supra* note 196, § 1.4.6; *see also id.* ch. 5 (cultural resource management); NAT’L PARK SERV., DIRECTOR’S ORDER #28, *supra* note 196.

198. *See* NAT’L PARK SERV., 2001 MANAGEMENT POLICIES, *supra* note 196, § 1.4.4; *see also id.* § 5.3.5 (committing to “the long-term preservation of, public access to, and appreciation of, the features, materials, and qualities contributing to the significance of cultural resources.”); *id.* § 1.4.3 (providing “[t]he ‘fundamental purpose’ of the national park system . . . begins with a mandate to conserve park resources and values”).

199. *Id.* § 1.4.5; *see also id.* at 47 (stating that the NPS “will preserve and foster appreciation of the cultural resources in its custody, and will demonstrate its respect for the peoples traditionally associated with those resources, through appropriate programs of research, planning, and stewardship”); 36 C.F.R. § 2.1 (2001) (providing for the preservation of cultural and archeological resources).

200. NAT’L PARK SERV., 2001 MANAGEMENT POLICIES, *supra* note 196, § 5.3.1 (stating that the NPS “will employ the most effective concepts, techniques, and equipment to protect cultural resources against theft, fire, vandalism, overuse, deterioration, environmental impacts, and other threats, without compromising the integrity of the resources”).

201. *Id.* § 8.2 (noting that “[e]njoyment of park resources and values . . . is part of the fundamental purpose of all parks”); *id.* § 8.5 (stating that requests for

gious groups in parks are commonplace and have not resulted in serious disruptions of the federal management agenda. The NPS has long supported Christian Ministries in the parks by allowing their use of park structures and other facilities,²⁰² and religious activities regularly take place on the National Mall in Washington, D.C., including an outdoor Mass conducted by Pope John Paul II.²⁰³ NPS policies specifically acknowledge: "site-specific worship is vital to Native American religious practices . . . [thus NPS] will be as unrestrictive as possible in permitting Native American tribes access to park areas to perform traditional religious, ceremonial, or other customary activities at places that have been used historically for such purposes"²⁰⁴ If necessary, however, the superintendent of an individual park unit may restrict the use of an area to protect natural and cultural resources.²⁰⁵

Given the central role that the Park system plays in our national heritage, it is no surprise that government actions affecting American Indian cultural interests within National Parks and Monuments have been highly controversial. Recent decisions to protect cultural properties and accommodate traditional practices have triggered a variety of challenges from non-Indian users of the public lands.

"religious access by [non-Indian] entities, including nonrecognized Indian groups," will be considered individually); *id.* § 8.6.3 (authorizing the use of appropriate areas within parks for "religious activities, and other public expressions of views protected under the First Amendment of the U. S. Constitution . . .").

202. Raymond Cross & Elizabeth Brennenman, *Devils Tower at the Crossroads: The National Park Service and the Preservation of Native American Cultural Resources in the 21st Century*, 18 PUB. LAND & RES. L. REV. 5, 26 n.95 (1997).

203. *O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979) (rejecting Establishment Clause claim, noting that Mall had traditionally been open for expressive activities, and noting that expenditures for police, sanitation, and related services served a legitimate governmental function).

204. NAT'L PARK SERV., 2001 MANAGEMENT POLICIES, *supra* note 196, § 8.5; *see also* NAT'L PARK SERV., RETHINKING THE NATIONAL PARKS FOR THE 21ST CENTURY, *supra* note 26, at § V ("[NPS] should help conserve the irreplaceable connections that . . . indigenous people have with the parks Efforts should be made to connect these peoples with parks . . . to strengthen their living cultures includ[ing] access . . . to sacred sites and the use of ecologically sustainable cultural practices and traditions.").

205. 36 C.F.R. §§ 1.5, 13.30 (2001); NAT'L PARK SERV., 2001 MANAGEMENT POLICIES, *supra* note 196, § 5.3.1.6 (requiring superintendents to "set, enforce, and monitor carrying capacities to limit public visitation to, or use of, cultural resources that would be subject to adverse effects from unrestricted levels of visitation or use").

In *Bear Lodge Multiple Use Ass'n v. Babbitt*, commercial rock climbers challenged the Climbing Management Plan for Devils Tower National Monument, which includes a variety of measures to accommodate American Indian traditional practices at the site.²⁰⁶ Devils Tower, also known as *Mato Tipila* or *Bear Lodge*, is considered a traditional cultural property, based on tribal oral history and ethnographic studies, and is protected under the NHPA.²⁰⁷ It has great significance to northern plains tribes as a vital cultural resource and pilgrimage site for sun dances and vision quests, practices which require solemnity and solitude.²⁰⁸ Romanus Bear Stops, a traditional leader of the Cheyenne River Sioux Tribe, explained that his people experience spiritual renewal at the Tower: "by going there, we are nurturing ourselves and preserving our culture Our traditional, cultural and spiritual use of *Mato Tipila* is vital to the health of our nation and to our self-determination as a Tribe."²⁰⁹

Devils Tower takes on even greater significance given its location in the Black Hills, a highly important area in the history and spirituality of northern plains tribes.²¹⁰ The Great Sioux Nation reserved the area in the Treaty of Fort Laramie of 1868.²¹¹ Just a few years later, in 1877, Congress abrogated that treaty,

206. 2 F. Supp. 2d 1448 (D. Wyo. 1998), *aff'd*, 175 F.3d 814 (10th Cir. 1999), *cert. denied*, 529 U.S. 1037 (2000). I was counsel of record for the United States in the *Bear Lodge* case. Of course, the observations that appear in this Article are my own and do not represent the position of my former client.

207. *Bear Lodge*, 2 F. Supp. 2d at 1450 n.1; *see also* Lloyd Burton & David Ruppert, *Bear's Lodge or Devils Tower: Inter-Cultural Relations, Legal Pluralism, and the Management of Sacred Sites on Public Lands*, 8 CORNELL J.L. & PUB. POL'Y 201, 206-08 (1999) (detailing ethnohistory of the area).

208. *Bear Lodge*, 175 F.3d at 816. Vision quests are highly solitary activities, while a select group of practitioners participate in the Sun Dance. *See* DELORIA, JR. & LYTLE, *supra* note 90, at 117, 282; Cross & Brenneman, *supra* note 202, at 41.

209. Aff. of Romanus Bear Stops in Opp'n to Mot. for Prelim. Inj. ¶¶ 16, 20, *Bear Lodge Multiple Use Ass'n v. Babbitt*, (D. Wyo. May 7, 1996) (No. 96-CV-063-D); *see also* Raymond J. DeMallie, *Foreward to* MARY ALICE GUNDERSON, *DEVILS TOWER: STORIES IN STONE*, at ix (1988) (explaining that the "soaring height of the tower inevitably makes it, in human perception, a link between earth and sky").

210. *See* Richard Pemberton, Jr., *'I Saw That It Was Holy': The Black Hills and the Concept of Sacred Land*, 3 LAW & INEQ. 287 (1985); *see also* BROWN, *supra* note 74, at 274 ("The ten nations of the Sioux are looking toward . . . [the Black Hills] as the center of their land." (quoting Tatoke Inyanke (Running Antelope))); NEIHARDT, *supra* note 1, at 230 ("I saw far off the Black Hills and the center of the world where the spirits had taken me in my great vision." (quoting Black Elk)).

211. *See* Treaty of Fort Laramie, *supra* note 82.

after an expedition led by General George Armstrong Custer discovered gold in the Black Hills, greatly increasing the pressure for exploration and settlement of the area.²¹² The Supreme Court subsequently concluded that the 1877 statute resulted in a taking of the Black Hills for which the Sioux were entitled to compensation,²¹³ but the tribes have refused to accept the monetary award and continue to press for the return of the land.²¹⁴

The NPS crafted the Climbing Management Plan in response to a dramatic increase in rock climbing in recent years.²¹⁵ It specifies various restrictions on climbing routes and equipment to protect the butte from erosion and other physical effects of climbing.²¹⁶ Reflecting tribal concerns, the initial version of the Climbing Plan imposed a mandatory climbing closure on commercial guides during the month of June to accommodate tribal practices during the summer solstice.²¹⁷ In addition, it provided for NPS interpretive programs to inform visitors of the site's significance as well as signs advising visitors of tribal values associated with the site.²¹⁸

The district court granted a preliminary injunction against the implementation of the commercial climbing closure, concluding that the plaintiffs were likely to succeed on the merits of their constitutional claims as to that provision.²¹⁹ The NPS

212. Custer and his men entered the area in spite of language in the treaty providing that "[n]o white person or persons shall be permitted to settle upon or occupy any portion of the territory, or without the consent of the Indians to pass through the same." Treaty of Fort Laramie, *supra* note 82, art. 16. See BROWN, *supra* note 74, at 273-313 (describing the conflict over the Black Hills).

213. United States v. Sioux Nation, 448 U.S. 371 (1980).

214. Pemberton, Jr., *supra* note 210, at 292-93.

215. Climbing at Devils Tower increased from 312 climbers in 1973 to over 6,000 annually at the time the Plan was adopted in 1995. See Bear Lodge Multiple Use Ass'n v. Babbitt, 2 F. Supp. 2d 1448, 1450 n.1 (D. Wyo. 1998).

216. *Id.* Provisions to protect raptors during the nesting season were also adopted. *Id.*

217. The initial Plan was adopted after extensive consultations with tribes and other interested parties, and its closure provisions were viewed as an acceptable compromise by most participants. *Id.*

218. *Id.* at 1450. The sign, posted at the base of the Tower, states: "The Tower is sacred to American Indians. Please stay on the trail." See Bear Lodge, 175 F.3d at 820 n.9.

219. Bear Lodge Multiple Use Ass'n v. Babbitt, No. 96-CV-063-D, slip op. (D. Wyo. June 8, 1996) (order granting preliminary injunction). Plaintiffs raised a variety of statutory and constitutional theories in their lawsuit, but their motion for preliminary injunction rested solely on the Establishment Clause. *Id.* at 4 n.5. The Establishment Clause claim is discussed in detail, *infra* Part IV.C.4.

subsequently amended the Climbing Plan, omitting the commercial closure provision and replacing it with a voluntary measure, requesting that all visitors avoid climbing during June. A Wyoming federal district court upheld the amended Plan as consistent with constitutional requirements as well as NPS closure policies.²²⁰ On appeal, the Tenth Circuit dismissed the complaint on the grounds that the climbers had suffered no concrete injury due to either the voluntary closure or the interpretive program and, therefore, lacked standing to challenge the Plan.²²¹ Although it did not reach the merits of the claims, the Tenth Circuit clearly recognized the importance of the site to American Indian culture and religion.²²²

Similar claims were asserted in *Natural Bridge & Arch Society v. National Park Service*, a challenge to the General Management Plan for Rainbow Bridge National Monument, located in Utah.²²³ Rainbow Bridge is a 290-foot high sandstone arch held sacred by the Navajo, Hopi, San Juan Southern Paiute, Kaibab Paiute, and White Mesa Ute, who have long utilized the area for traditional cultural practices, including prayer and healing ceremonies.²²⁴ It is surrounded almost entirely by the Navajo Reservation. Visitor access to Rainbow Bridge has increased exponentially since Glen Canyon Dam was constructed

220. *Bear Lodge*, 2 F. Supp. 2d at 1456–57 (citing NPS management policies, which provide “[p]erformance of traditional activities at a particular place will not be a reason for prohibiting the use of that area by others except where temporary closings are authorized by law. . . .”). 36 C.F.R. § 13.30 (2001) (specifying closure requirements); NAT’L PARK SERV., 2001 MANAGEMENT POLICIES, *supra* note 196, §§ 8.2, 8.5 (explaining current policies regarding closures and Native American use). Although the NPS has broad discretion to control commercial activities in the parks through special use permits and concession contracts, 16 U.S.C. § 20 (1994) (providing for concessions); 16 U.S.C. §§ 5951, 5966 (Supp. V 1999) (providing for commercial use authorizations), a closure applicable only to commercial climbers must be a rational allocation of uses among visitors, reasonably necessary to protect park resources. *Wilderness Pub. Rights Fund v. Kleppe*, 608 F.2d 1250, 1254 (9th Cir. 1979) (affirming NPS allocation of eighty percent of its rafting permits to commercial guides).

221. *Bear Lodge*, 175 F.3d at 821–22.

222. *See id.* at 816–17 (describing American Indian interests in Devils Tower and other sacred sites, and congressional efforts to recognize and accommodate cultural interests).

223. *See* Complaint, *Natural Bridge and Arch Society v. Nat’l Park Service* (No. 2000CV-0191J) (D. Utah filed Mar. 3, 2000).

224. *See* Maryann Watkins, *Rainbow Bridge—The Navajo Connection* (1997), at <http://my.erinet.com/ghost/navajo.htm>; NAT’L PARK SERV., RAINBOW BRIDGE NATIONAL MONUMENT (2001), at www.nps.gov/rabr/home.htm.

in 1963, creating Lake Powell and allowing access by boat to areas previously undisturbed.²²⁵

The Rainbow Bridge Plan asks visitors to respect the long-standing beliefs of American Indian tribes by not approaching or walking under the Bridge. In addition, visitors are directed to stay on the marked trails to prevent erosion, which is a significant problem in and around the Monument, and to avoid visitor use conflicts that arise by virtue of the sheer number of people at the site.²²⁶ The adverse effects of uncontrolled visitor use on cultural resources, traditional uses by tribes closely affiliated with the site, and natural features of the area, are well-documented.²²⁷ The Rainbow Bridge Management Plan is a legitimate exercise of authority to allocate use and protect park resources under the Park Service Organic Act and the NHPA.²²⁸ Like the revised Climbing Plan for Devils Tower, the Rainbow Bridge Management Plan is a reasonable means of accommodating American Indian cultural interests.²²⁹

Cultural disputes over park resources are not limited to the access and use of sacred lands. Tribal hunting, gathering, and fishing practices implicate cultural and religious interests as well.²³⁰ The NPS is currently engaged in a controversial decision-making process regarding the collection of golden eagle

225. See Mem. Br. of Fed. Defs. in Supp. of Mot. to Dismiss and in Opp'n to Pls.' Challenge at 10–11, *Natural Bridge and Arch Society* (No. 2000CV-0191J) (Feb. 14, 2001) [hereinafter Mem. Br.].

226. See NAT'L PARK SERV., RAINBOW BRIDGE NATIONAL MONUMENT (2001), at www.nps.gov/rabr/changes.htm; Mem. Br., *supra* note 225, at 6, 8–9. According to the plaintiff in *Natural Bridge and Arch Society*, although signs surrounding the site request “voluntary compliance,” visitors who approach the Bridge are threatened with arrest if they step off a trail; meanwhile, the trail itself has been concealed with boulders. See *id.*; see also Jim Woolf, *Lawsuit: Park Service Rules Promote Religion at Rainbow Bridge Monument*, SALT LAKE TRIB., Mar. 7, 2000, at A12. Dispositive motions are pending in the District of Utah. MOUNTAIN STATES LEGAL FOUNDATION, *Legal Cases: Natural Bridge and Arch Society v. Nat'l Park Serv.* (2001), at www.mountainstateslegal.org/legal_cases.cfm?legalcaseid=53.

227. See Mem. Br., *supra* note 225, at 8–11 (citing detailed findings from the Management Plan EIS).

228. See *Muckleshoot Indian Tribe v. United States Forest Serv.*, 177 F.3d 800, 807–08 (9th Cir. 1999) (enjoining proposed land exchange due in part to agency's failure to mitigate effects as specified in the NHPA regulations); NAT'L PARK SERV., 2001 MANAGEMENT POLICIES, *supra* note 196, § 5.3.1.6 and ch. 5 at 47.

229. See *infra* Part IV.C (analyzing accommodation of the Establishment Clause).

230. See generally Michelle L. LeBeau, *Federal Land Management Agencies and California Indians: A Proposal to Protect Native Plant Species*, 21 ENVIRONS ENVTL. L. & POL'Y J. 27 (1998) (discussing significance and effects of Indian gathering practices and federal management approaches).

chicks at Wupatki National Monument, an area historically used by the Hopi Tribe. A proposed rule would allow Hopi to gather eaglets, considered messengers between the physical and spiritual worlds, so that they may be reared and sacrificed for ceremonial purposes.²³¹ The environmental assessment for the proposal recognizes that “[t]he collection of golden eaglets from specific geographic areas is a fundamental part of Hopi religion, and there is an ancestral and historical connection between the Hopi Tribe and Wupatki National Monument.”²³²

The proposal has been criticized as opening the door to hunting in the Parks, a practice generally prohibited.²³³ NPS regulations provide, however, that permits may be granted in certain limited circumstances, including where Indian treaties specify rights to take wildlife or fish.²³⁴ Further, NPS management policies proclaim that the agency “supports the limited and controlled consumption of natural resources for traditional religious and ceremonial purposes, and is moving toward a goal of greater access and accommodation.”²³⁵

The Wupatki proposal illustrates one of the more difficult aspects of accommodating cultural interests in public lands: what approach should the agency take when access to cultural resources may interfere with the preservation of those re-

231. Proposed Rule: Religious Ceremonial Collection of Golden Eaglets From Wupatki National Monument, 66 Fed. Reg. 6516 (Jan. 22, 2001); Mark Shaffer, *Hopis Hopeful on Eagle Plan*, ARIZ. REPUBLIC (Phoenix), Oct. 31, 2000, at B5.

232. NAT'L PARK SERV., ENVIRONMENTAL ASSESSMENT, PROPOSED RULE: RELIGIOUS CEREMONIAL COLLECTION OF GOLDEN EAGLETS IN WUPATKI NATIONAL MONUMENT at 4 (2001), available at <http://www.nps.gov/wupa/pphtml/facts.html>.

233. THE HUMANE SOCIETY OF THE UNITED STATES, BABBITT WANTS TO ALLOW EAGLE TAKING ON PARK LANDS (2001). NPS regulations prohibit “possessing, destroying . . . or disturbing” wildlife, fish or plants, or the parts or products of any of these items, with few exceptions. 36 C.F.R. § 2.1(a), (d) (2001).

234. 36 C.F.R. § 2.1(d) (2001) (allowing the “taking, use or possession of fish, wildlife or plants for ceremonial or religious purposes . . . where specifically authorized by Federal statutory law, treaty rights, or in accordance with § 2.2 [wildlife protection] or § 2.3 [fishing].” Hunting may occur “where such activity is specifically authorized as a discretionary activity under Federal statutory law if the superintendent determines that such activity is consistent with public safety and enjoyment, and sound resource management principles.” § 2.2(b)(2); see also § 2.1(c) (allowing personal use of certain plants and items); § 2.5(b) (allowing a specimen collection permit for the purpose of research).

235. See NAT'L PARK SERV., 2001 MANAGEMENT POLICIES, *supra* note 196, § 8.9. For a discussion of various proposals to allow traditional gathering practices for members of tribes with “ancestral affiliations” to the federal lands, see LeBeau, *supra* note 230, at 35.

sources?²³⁶ The NPS's explicit statutory directive is to "conserve the scenery and the natural and historic objects and the wild life" but also to allow use and enjoyment of National Park System properties.²³⁷ The conservation mandate appears to be the first order of business, followed by "enjoyment"—not only for present but also for future generations.²³⁸

There is little question that the Park Service Organic Act and its implementing regulations and guidance allow the protection, and even prioritization, of culturally important resources in appropriate cases. Undoubtedly, difficult decisions will have to be made in situations like the Hopi's request to collect eaglets at Wupatki. These decisions will necessarily reflect the provisions of any relevant treaties, the specific historic ties and cultural needs of the tribes, and the long-term significance and nature of effects to the resource.

Where tribes have cultural ties to the resources at issue, reasonable and timely closures or other measures that allow traditional ceremonies to take place undisturbed by other visitors are apt management tools in the allocation and preservation of park resources. By the same token, sustaining resources for the long-term may, at times, require that access be curtailed if necessary to satisfy conservation needs. This is not inconsistent with the philosophies of many tribes, who strive to manage natural resources to ensure that the "seventh generation" can still enjoy them, and the NPS should be able to resolve conflicts through consultation with tribes in most cases.²³⁹ Absent treaty rights, a well-documented, unequivocal need to protect the resource from adverse impacts will likely be an ac-

236. Cf. JOSEPH L. SAX, *PLAYING DARTS WITH A REMBRANDT* 8 (1999) (noting that inaccessibility is often a more pervasive problem than destruction, at least with respect to cultural resources like fine art owned by private parties). Although cultural practices generally do not cause the type of degradation attributable to mining, logging, and even rock climbing, they can contribute to the phenomenon of "loving our parks to death." See generally Cheever, *supra* note 30, at 637 (observing that the "American people are 'loving their parks to death'").

237. 16 U.S.C. § 1 (1994).

238. See Winks, *supra* note 29, at 596-97; Cheever, *supra* note 30, at 646-48.

239. See Tsosie, *Tribal Environmental Policy*, *supra* note 69, at 228 (citing Oren Lyons, *An Iroquois Perspective*, in *AMERICAN INDIAN ENVIRONMENTS: ECOLOGICAL ISSUES IN NATIVE AMERICAN HISTORY* 171, 173 (Christopher Vecsey & Robert W. Venables eds., 1980)); Williams, *Large Binocular Telescopes*, *supra* note 68, at 1153-54. The NHPA specifically requires consultation. See discussion *supra* Part II.B.

ceptable ground for denying access, especially if the land manager has explored other alternatives in consultation with the affected tribe and determined that no less restrictive options are available. Tribes that have treaty rights to hunt, fish or gather the resources in question, however, cannot be denied those rights, unless Congress itself abrogates the treaty.²⁴⁰

The Wupatki proposal would allow the gathering of eaglets under a special use permit, which would include specified gathering times and collection limits.²⁴¹ The environmental assessment for the proposal concluded that these conditions would be sufficient to protect park resources from impairment, and that golden eagle populations would experience only "negligible" long-term impacts.²⁴² Although it does not appear that treaty rights are implicated, the proposal would allow the Hopi to engage in traditional religious ceremonies on ancestral lands, with long-term beneficial effects for Hopi culture.²⁴³ In light of the Hopi's long-standing connection with the area, the nature of the traditional cultural uses at stake, and the tailored nature of the permit requirements, the proposal seems a suitable exercise of statutory authority.

B. Cultural Resource Management on Multiple Use Lands

Mining, grazing, and logging are common practices on BLM and Forest Service lands. These activities extract valuable resources, but they can also disrupt cultural activities and degrade or even destroy associated resources.²⁴⁴ The BLM has taken steps to protect cultural interests by restricting mining in the California Desert Conservation Area (CDCA), while the

240. See *United States v. Dion*, 476 U.S. 734, 739 (1986) (requiring a clear and plain congressional intent to abrogate treaty rights); see also Sandra B. Zellmer, *Indian Lands as Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereignty Come First*, 43 S.D. L. REV. 381, 400-05 (1998) (discussing interplay between Endangered Species Act, wildlife conservation principles, and Indian treaty rights).

241. ENVIRONMENTAL ASSESSMENT, *supra* note 232, at 22. The Hopi have obtained eagle collection permits pursuant to the Eagle Protection Act, 16 U.S.C. § 668a (1994). See ENVIRONMENTAL ASSESSMENT, *supra* note 232, at 3.

242. ENVIRONMENTAL ASSESSMENT, *supra* note 232, at 3.

243. *Id.* at 22-23.

244. See, e.g., *Northwest Indian Cemetery Protective Association v. Peterson*, 565 F. Supp. 586, 596 (N.D. Cal. 1983), *aff'd in relevant part*, 764 F.2d 581 (9th Cir. 1985), *rev'd sub nom.* *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), discussed *infra* Part IV.A.

Forest Service has adopted a plan to restrict logging and other disruptive activities near the Medicine Wheel. Both decisions were a result, in part, of the NHPA, but both were informed by the management requirements of FLPMA and the NFMA as well.

1. The BLM

Glamis Corporation owns numerous mining claims within the BLM's El Centro district in the CDCA.²⁴⁵ It has proposed to develop these claims through its Imperial Mine Project, a cyanide heap-leach gold mine and associated facilities covering nearly 1,600 acres of land. Up to 150 million tons of ore would be mined and leached, with 300 million tons of waste rock to be deposited on stockpiles.²⁴⁶ The mine would adversely affect the Indian Man-Running Pass area, a culturally important area where members of three federally recognized tribes, the Quechan Tribe, the Colorado River Indian Tribes, and the Ft. Mojave Indian Tribe, come "to seek knowledge and spiritual power."²⁴⁷ Citing these concerns, the BLM, in January 2001, issued a precedent-setting decision denying Glamis's plan to proceed with mining under FLPMA and special provisions gov-

245. See Press Release—Final EIS/EIR for Imperial Project Gold Mine, available at http://www.ca.blm.gov/news/glamis_imperial_final_eis.html (last visited Dec. 12, 2000).

246. See *id.*

247. U.S. BUREAU OF LAND MANAGEMENT, IMPERIAL PROJECT, FINAL ENVIRONMENTAL IMPACT STATEMENT (Sept. 2000), at 3.6.2.4 [hereinafter IMPERIAL FEIS], available at http://www5.ca.blm.gov/ads-cgi/viewer.pl/pdfdocs/imperial/Vol-1_gw.pdf; see *Council Seeks Halt to Proposed Imperial Mine Project*, at <http://www.achp.gov/casearchive/newsimperialmine.html> (last visited Mar. 11, 2002); Letter from Courtney Ann Coyle to Douglas Romoli, BLM, 5–8 (Apr. 12, 1998) (discussing Imperial project's impact on the Quechan's sacred landscapes and pathways in the Indian Pass area, including the Trail of Dreams, used for "religious pilgrimages associated with the Keruk ceremony, the most important and deeply religious" of ceremonies) (on file with author). The Indian Pass-Running Man area, an area of traditional cultural concern, encompasses the project area and beyond, extending 8.2 miles in length and 2.5 miles in width. *Id.* at 9. The FEIS states, "The data are insufficient to determine whether the Indian Pass-Running Man [Area] should stand alone as a potential TCP, or should be evaluated as part of a larger complex. . . . Regardless, the evidence is clear that the [Area] should be treated as a significant resource." IMPERIAL FEIS, *supra*, at 3.6.2.4. Fifty-five sites within and near the project area have been evaluated as eligible for the National Register. *Id.* at 3.6.2.1.

erning the CDCA, but the decision has since been called into question by the Bush administration.²⁴⁸

FLPMA addresses mining claims and other activities on BLM lands. Congress enacted FLPMA in 1976 to coordinate over a century's worth of piecemeal, disjointed statutes and executive orders governing the public lands and resources, and to declare that the public lands would be retained in federal ownership unless it was determined, after following extensive planning procedures, that disposal would serve the national public interest.²⁴⁹ The statute provides for land acquisition, sale, and withdrawal, roads and rights-of-way, and the processing of mining claims.²⁵⁰ It also establishes a comprehensive management scheme for public lands managed by the BLM.²⁵¹

Pursuant to FLPMA, the BLM must recognize and balance a variety of "interests as diverse as the lands themselves . . . in a dynamic, evolving manner."²⁵² The statute allows for the designation and management of "areas of critical environmental concern" to protect important cultural and physical values.²⁵³

248. The BLM's decision represents the first time that the development of mining claims has been denied under FLPMA absent a formal mineral contest to determine whether claims have been perfected. See Record of Decision for the Imperial Project Gold Mine Proposal (Jan. 17, 2001) [hereinafter Glamis ROD], available at http://www5.blm.gov/ads-cgi/viewer.pl/pdfdocs/glamis/Glamis_ROD_final_1-01.pdf. Secretary Gale Norton has directed the BLM to revisit the decision. Tony Perry, *Hot Spot in Battle Over Mining Environment*, L.A. TIMES, Oct. 31, 2001, at B1.

249. 43 U.S.C. § 1701(a) (1994).

250. 43 U.S.C. §§ 1713–21 (1994) (land acquisition and disposition); § 1744 (recordation of mining claims); §§ 1761–70 (rights-of-way).

251. 43 U.S.C. § 1702(c) (1994) (defining "multiple use").

252. *Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 738 (10th Cir. 1983).

253. 43 U.S.C. §§ 1702(a), 1712(c)(3) (1994). The Departmental Manual provides that "The Federal Government has a statutory, administrative, and ethical responsibility to conserve and ensure the protection of nationally important cultural and natural features. The BLM's long-term management mission is to provide the opportunity for a diverse public to use, share, and appreciate these significant cultural and natural resources while protecting and conserving them for future generations." 135 D.M. 1, 1.3(D) (1999); see *Strategic Paper on Cultural Resources at Risk* (2000), at <http://www.blm.gov/heritage/index.htm> (describing cultural resource and tribal consultation programs). The BLM's Manual on Native American Coordination directs the agency to avoid unnecessary interference with religious practices and to consult with tribes to ensure that their concerns about BLM programs are met. BLM MANUAL RELEASE NO. 8-58, H-8160-1—GENERAL PROCEDURAL GUIDANCE FOR NATIVE AMERICAN CONSULTATION (1990) [hereinafter MANUAL H-8160-1], available at <http://lm0005.blm.gov/nhp/efoia/wo/handbook/h8160-1.html>.

FLPMA also provides that “[i]n managing the public lands, the Secretary [of Interior] *shall*, by regulation or otherwise, take any action necessary to *prevent unnecessary or undue degradation* of the lands.”²⁵⁴ This provision is most frequently raised in the context of disturbances to natural resources due to extractive activities like grazing and mining. BLM regulations governing surface disturbances during mining operations have long defined “unnecessary or undue degradation” by focusing only on the “unnecessary” prong: “surface disturbance[s] greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character.”²⁵⁵ This narrow interpretation reflects the historic federal policy of encouraging hard-rock mining on public lands under the 1872 General Mining Law, which allows citizens to locate mining claims by discovering a valuable mineral deposit on federal lands “open to location.”²⁵⁶

Signaling that change was afoot, a 1999 Solicitor’s Opinion on the Regulation of Hard Rock Mining noted that “the conjunction ‘or’ between ‘unnecessary’ and ‘undue’ speaks of a Secretarial authority to address separate types of degradation.”²⁵⁷ Subsequently, in November 2000, the regulatory definition of “unnecessary [or] undue degradation” was amended to clarify that the term “undue” has independent meaning: “operators must not cause *substantial irreparable harm* to significant resources.”²⁵⁸ Under the revised regulations, “conditions, activities, or practices” would be prohibited if they fail to comply

254. 43 U.S.C. § 1732(b) (1994) (emphasis added).

255. Surface Management, 43 C.F.R. § 380905(k) (2000).

256. 30 U.S.C. § 22–24, 26–28, 29, 30, 33–35, 37, 39–43, 47 (1994); *see also* 43 U.S.C. § 1701(a)(12) (1994) (declaring congressional intent that “public lands be managed in a manner which recognizes the Nation’s need for domestic sources of minerals”); § 1732(b) (stating FLPMA does not “in any way amend the Mining Law of 1872” except as provided by the “unnecessary or undue degradation” standard and certain other specified provisions, including the CDCA Act). The Mining Act expressly provides that mineral lands are open to occupation and purchase “[e]xcept as otherwise provided,” and then only “under regulations prescribed by law.” 30 U.S.C. § 22 (1994).

257. Memorandum from U.S. Department of the Interior, Office of the Solicitor to Secretary Babbitt and Acting Director, BLM, M-36999 (Dec. 27, 1999), *superseded by* Memorandum from United States Department of the Interior, Office of the Solicitor to Secretary Gale Norton, M-37007 (Oct. 23, 2001) [hereinafter Solicitor’s Opinion].

258. Mining Claims Under the General Mining Laws; Surface Management 65 Fed. Reg. 69998, 70001 (Nov. 21, 2000) (emphasis added).

with performance standards or other laws related to environmental protection or result in "substantial irreparable harm to significant scientific, *cultural*, or environmental resource values of the public lands that cannot be effectively mitigated."²⁵⁹ The revised regulations, which were prospective in nature and thus would not have applied to Glamis, have since been suspended by Secretary of the Interior Gale Norton.²⁶⁰

Rather than relying on FLPMA, however, the Solicitor's Opinion concluded that the agency has authority to deny approval for Glamis's plan of operations under the special "undue impairment" standard of the CDCA Act.²⁶¹ Under the BLM's management plan for the CDCA, the affected area is designated for limited use, "giving priority to the protection of sensitive natural, scenic, ecological and cultural resources."²⁶² The Advisory Council for Historic Preservation reviewed the proposal pursuant to the NHPA, concluding that the mine would destroy the cultural resources of the project area and that mitigation measures proposed by Glamis would not compensate for the devastating impacts on traditional cultural values of the affected Indian tribes.²⁶³ The Council recommended that the

259. *Id.* at 70115 (to be codified at 43 C.F.R. § 3809.5) (emphasis added).

260. *Id.* at 69998 (providing an effective date of Jan. 20, 2001); *id.* at 70039 (stating that pre-existing performance standards would apply to plans of operations submitted prior to the rules' effective date). The Bush Administration suspended the revised regulations and reinstated pre-existing 3809 regulations. Final Rule: Mining Claims Under the General Mining Laws, 66 Fed. Reg. 54834 (Oct. 30, 2001). A variety of challenges to the 3809 regulations were lodged. Christian Bourge, *Court Allows Mining Changes to Take Effect*, AM. METAL MKT., Jan. 23, 2001, at 2001 WL 8177009, at *6 (reporting denial of preliminary injunction against revised regulations in suit brought by mining interests and the state of Nevada); Christine Dorsey, *Nevada Drops Mining Lawsuit*, LAS VEGAS REV.-J., Nov. 30, 2001, at 1D (reporting that Nevada and other mining interests have dismissed their claims, while the Mineral Policy Center has amended its complaint to challenge the rules approved by Secretary Norton).

261. Solicitor's Opinion M-36999, *supra* note 257 (citing 16 U.S.C. § 1781(f) (1994) (providing for regulations to protect scenic, scientific and environmental values within the CDCA from "undue impairment")). A plan of operations is required by the 3809 regulations. Surface Management, 43 C.F.R. § 3809.1-4 (2000).

262. See Glamis ROD, *supra* note 248, at 13 (describing Limited Use category (Class L) as "specifically intended for the protection of 'sensitive, natural, scenic, ecological, and cultural resource values' [which] provides for 'generally lower-intensity, carefully controlled multiple use of resources, while ensuring that sensitive values are not significantly diminished'").

263. See *Council Seeks Halt to Proposed Imperial Mine Project*, ADVISORY COUNCIL ON HISTORIC PRESERVATION, Oct. 19, 1999, available at <http://www.achp.gov/casearchive/newsimperialmine.html>.

BLM take whatever legal means available to deny approval for the project.²⁶⁴

The final EIS for the project ultimately determined that any option that allowed mining would fail to mitigate harm to the site, and designated the “no action” alternative, *i.e.*, denial of the company’s proposed plan of operations, as the preferred alternative.²⁶⁵ The record of decision, issued by former Secretary of the Interior Bruce Babbitt in January 2001, denied Glamis’s plan on the grounds that the mine and associated facilities would cause unavoidable harm to cultural, historic, and visual resources and that negative impacts would outweigh the economic benefits of the project.²⁶⁶ Glamis filed suit against the Department of Interior and the BLM, asserting FLPMA, CDCA Act, and Establishment Clause claims in an attempt to have the decision set aside.²⁶⁷ Subsequently, in keeping with its reinstatement of the pre-existing regulations, the Department of Interior issued a new solicitor’s opinion, stating that mining may go forward in spite of adverse impacts and directing the California office of the BLM to review Glamis’s project.²⁶⁸

The denial of Glamis’s plan is based on a reasonable interpretation of the CDCA Act’s prohibition against undue impairment and FLPMA’s provisions requiring the Secretary to take action, “by regulation or otherwise,” to prevent undue degrada-

264. *See id.*

265. *See* Notice of Availability of FEIS, 65 Fed. Reg. 67396 (Nov. 7, 2000); Press Release, *supra* note 245 (describing “no action” as the BLM’s preferred alternative “based on the finding that the company’s proposed action, even with the application of additional mitigation measures, would result in significant adverse impacts to Native American archeological and cultural resources considered sacred to the nearby Quechan Indian Tribe and other sensitive resources”).

266. *See* Glamis ROD, *supra* note 248. Glamis claims the mine would yield 1.1 million ounces of gold worth \$300 million. *Babbitt Kills Bid to Dig Gold Mine Near Indian Sacred Sites*, L.A. TIMES, Jan. 18, 2001, at A16.

267. Complaint for Declaratory and Injunctive Relief, Glamis Imperial Corp. v. United States Dept. of Interior, No. 1:01CV00530 (D.D.C. Mar. 12, 2001). Glamis had previously filed a lawsuit challenging the Solicitor’s Opinion, but it was dismissed for lack of final agency action. *Glamis Imperial Corp. v. Babbitt*, No. 00CV1934W, slip op. (S.D. Cal. Oct. 31, 2000).

268. Memorandum from United States Department of the Interior, Office of the Solicitor to Secretary Gale Norton, M-37007 (Oct. 23, 2001). This opinion concludes that Interior should not “deny a plan of operations unless and until it completes rulemaking to establish standards for the meaning of ‘undue impairment.’” *Id.* at 21.

tion of the land.²⁶⁹ Further, the decision to protect the Tribes' traditional cultural resources and accommodate their ability to utilize the site is consistent with the area's limited use designation, the provisions of the Mining Act, and the congressional objectives of the NHPA, as well as the executive orders on sacred sites and environmental justice.²⁷⁰ As discussed below, it is also a constitutionally appropriate accommodation of cultural and religious interests.²⁷¹

2. The National Forest System

The lands within the National Forest System are administered pursuant to the NFMA and its predecessors, the Forest Service Organic Act of 1897²⁷² and the Multiple-Use Sustained-Yield Act of 1960 (MUSYA).²⁷³ In comparison with the Park Service Organic Act and FLPMA, the forest management statutes say little about cultural resources. The statutes, however, do grant discretion to consider intangible values in managing forest resources.²⁷⁴ National Forest System lands are to be managed for multiple uses of watersheds, timber, fish and wildlife, range, recreation, and wilderness, with the resources being maintained "in perpetuity" without impairment of productivity.²⁷⁵ The MUSYA directs the Forest Service to make the "most judicious use of the land for some or all of the re-

269. *Chevron, Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 837 (1984); see also *Udall v. Tallman*, 380 U.S. 1 (1965) (deferring to agency interpretation of regulations and secretarial orders).

270. See discussion *supra* note 34 (discussing hard rock mining requirements); *supra* notes 181–182, 184 (describing executive orders); see also MANUAL H-8160-1, *supra* note 253, at Chapter IV.F (BLM Manual provisions acknowledge that, under FLPMA, Indian tribes are not to be regarded as "just another public" whose interests ought to be considered. In their relations with Federal agencies, Indian tribes have special rights as sovereign governments.").

271. See *infra* Part IV.C.3 (applying accommodation analysis).

272. 16 U.S.C. §§ 473–478, 479–482, 551 (1994).

273. 16 U.S.C. §§ 528–531 (1994).

274. 16 U.S.C. § 1601(a)(2) (1994) (requiring a Renewable Resource Assessment that evaluates, *inter alia*, opportunities for improving the "yield of tangible and intangible goods and services"); see also 16 U.S.C. § 1604(b) (requiring an "interdisciplinary approach to achieve integrated consideration of physical, biological, economic and other sciences").

275. 16 U.S.C. § 475 (1994) (providing for establishment of National Forests to secure water flows and timber supply); § 528 (providing for recreation, range, timber, watershed, wildlife and fish, as well as for mineral resources); § 529 (providing for wilderness); § 1604(e) (incorporating uses specified in MUSYA, 16 U.S.C. §§ 528–529 (1994)).

sources," in a manner that allows it to "conform to changing needs and conditions."²⁷⁶ It further specifies that "some land will be used for less than all of the resources" and calls for "harmonious and coordinated management of the various resources . . . with consideration being given to the[ir] relative values."²⁷⁷ The NFMA provides for comprehensive planning and public participation in the management of forest resources and requires that forest uses be consistent with land and resource management plans.²⁷⁸

Regulations governing Forest Service activities provide that cultural resources should play a vital role in the management of the National Forests. Specifically, "physical, biological, economic, and social effects," including cultural resource values, must be considered during the planning process.²⁷⁹ Regional plans and forest plans are to be based on multiple-use sustained-yield principles, including "[p]reservation of important historic, cultural, and natural aspects of our national heritage . . . [and] protection and preservation of the inherent right of freedom of American Indians to believe, express, and exercise their traditional religions."²⁸⁰ The planning regulations provide for the identification and protection of "significant cultural resources" in National Forests.²⁸¹ The evaluation of management alternatives must satisfy NEPA and the NHPA and

276. 16 U.S.C. § 531(a) (1994).

277. *Id.*

278. 16 U.S.C. § 1604(i) (1994).

279. 36 C.F.R. § 219.12(4)(h) (2000); *see* 7 C.F.R. § 3100.43(a) (2000) (stating that the "Department of Agriculture is committed to the management—identification, protection, preservation, interpretation, evaluation and nomination—of our prehistoric and historic cultural resources for the benefit of all people of this and future generations"). Recent revisions to the Forest Service regulations continue to recognize cultural values in planning, *see* 65 Fed. Reg. 67514, 67550-58 (Nov. 9, 2000), although they specify that "ecological sustainability" takes first priority. 36 C.F.R. § 219.2(a) (2001). The new regulations are undergoing review by the Bush Administration, and deadlines for forest plan revisions have been extended pending review. *See* 66 Fed. Reg. 27555, 27556 (May 17, 2001).

280. 36 C.F.R. § 219.1(b)(5)–(6) (2000); *see* NATIONAL FOREST SERVICE, HERITAGE—IT'S ABOUT TIME (1999) (stating that "[h]eritage resources are fundamentally linked" to sustainable forest management strategies), *available at* http://www.fs.fed.us/recreation/heritage/heritage_strategy.shtml.

281. *See* 36 C.F.R. § 219.24 (2000) (requiring planning to protect significant cultural resources from destruction); *see also* § 219.27(b)(1) (2000) (requiring management measures so that vegetative manipulation shall be "best suited to the multiple-use goals established for the area, considering potential environmental, biological, [and] cultural resource . . . impacts").

must be coordinated with the SHPO.²⁸² The regulations direct the planning officer to consult with tribes early on in the decision-making process to ensure that treaty and trust resources are identified and that tribal information and concerns are considered.²⁸³

Although the Forest Service has not always prioritized American Indian resources,²⁸⁴ like its sister agencies, the Forest Service has issued several controversial decisions in the past few years protecting cultural resources. In one notable example, the Bighorn National Forest adopted measures to restrict logging near the Medicine Wheel, a traditional cultural property and National Historic Landmark, invoking its authorities under the NHPA and the NFMA. The Forest Service's Historic Preservation Plan requires consultation with affiliated tribes before allowing activities that might harm the spiritual value of the site, and closes a road within the viewshed of the Medicine Wheel.²⁸⁵

In *Wyoming Sawmills, Inc. v. United States Forest Service*, a commercial logging company challenged the Historic Preservation Plan,²⁸⁶ alleging that it inhibits economic opportunities and gives the tribes "veto power over anything that happens" within the 18,000-acre area of consultation.²⁸⁷ Similar claims

282. 36 C.F.R. § 219.24 (2000); *see also* 36 C.F.R. § 219.21(a)(1) (2001) (directing planning officers to "[d]escribe and analyze, as appropriate, . . . cultural and American Indian tribe and Alaska Native land settlement patterns; . . . and other appropriate social and cultural information").

283. *See* 36 C.F.R. § 219.1(b)(9) (2001) (requiring that forest plans be coordinated with "other Federal agencies, State and local governments, and Indian tribes"); 7 C.F.R. § 3100.43(d) (2000) (stating that the Department "is committed to consideration of the needs of American Indians, Eskimo, Aleut, and Native Hawaiians in the practice of their traditional religions"); *see also* 36 C.F.R. § 219.15 (2001) (directing planning officers to consult with tribes to assist in the "early identification of treaty rights, treaty-protected resources, and American Indian tribe trust resources; . . . and [t]he consideration of tribal concerns and suggestions during decision-making").

284. *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988); *Muckleshoot Indian Tribe v. United States Forest Service*, 177 F.3d 800, 807-08 (9th Cir. 1999); *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995).

285. *See* HISTORIC PRESERVATION PLAN, *supra* note 169; Part II.B.2, *supra* (discussing the NHPA's provisions for National Historic Landmarks).

286. Complaint, *Wyoming Sawmills, Inc. v. United States Forest Service*, No. 99-CV-31J (D. Wyo. Feb. 16, 1999); *see also* <http://www.mountainstateslegal.org> (last visited Mar. 11, 2002).

287. Pauline Arrillaga, *Sacred Indian Sites Pit Almighty Buck Against Almighty Logging*, L.A. TIMES, July 23, 2000, at B1. Briefs have been filed in the district of Wyoming. *Id.*

have fared poorly in recent judicial opinions. In *Independent Petroleum Ass'n v. United States Forest Service*, industry groups challenged the Forest Service's decision to forego oil and gas leasing on the Rocky Mountain Front Range in the Lewis and Clark National Forest to protect the Blackfeet Tribe's sacred sites and the aesthetic "value and spirituality of place."²⁸⁸ Their constitutional and statutory claims were rejected by the district court, which found that the decision was based on valid management criteria for protecting "the pristine scenery and diverse resources" of the area.²⁸⁹ The Ninth Circuit affirmed the decision.²⁹⁰

In both cases, the NFMA provides sufficient authority to withdraw portions of the National Forest System lands or otherwise restrict logging and mineral location and leasing in order to protect cultural resources.²⁹¹ The NFMA specifically allows that some land may be used for fewer than all permissible activities in order to ensure "harmonious and coordinated management" of the various resources, given their relative values.²⁹² The traditional cultural values of the tribes deserve recognition and even prioritization in both cases. With respect to the Medicine Wheel, the NHPA adds support for protecting

288. See http://www.mountainstateslegal.org/legal_cases_category_home.cfm (last visited Mar. 11, 2002); Sherry Devlin, *429,000 Acres Closed to Hard Rock Mining*, MISSOULIAN, Feb. 4, 1999, at A1; Tom Laceky, *Red Tape Seals Off Sacred Lands*, L.A. TIMES, Oct. 19, 1997, at B1.

289. *Rocky Mountain Oil & Gas Ass'n v. United States Forest Service*, No. 98-22-H-CCL, opinion and order at 5-6 (D. Mont. Mar. 7, 2000), *aff'd*, No. 00-35349, 31 ENVTL. L. REP. 20,617 (9th Cir. May 03, 2001), *pet. for cert. pending*, No. 01-213 (Aug. 1, 2001).

290. See *id.*; see also *infra* Part IV.C (discussing resolution of Establishment Clause claim).

291. See 16 U.S.C. § 531(a) (1994); 36 C.F.R. §§ 219.1(b), 219.27(b)(1) (2001); see also FLPMA, 43 U.S.C. §§ 1714(c),(d),(i) (1994) (providing for the withdrawal of public lands).

292. 16 U.S.C. §§ 531(a) (1994); see also § 551 (requiring regulations to preserve the forests from destruction due to mining). Forest Service efforts to prohibit hard rock mining, however, raise more difficult issues. § 428 (requiring that no rule or regulation prohibit "proper and lawful purposes, including that of prospecting, locating and developing the mineral resources"); *United States v. Weiss*, 642 F.2d 296 (9th Cir. 1981) ("Secretary may adopt reasonable rules and regulations which do not impermissibly encroach upon the right to use and enjoyment of . . . claims for mining purposes"); *United States v. Shumway*, 199 F.3d 1093, 1106 (9th Cir. 1999) (citing *Weiss*, and stating that use of National Forest lands by miners may be regulated "only to the extent that the regulations are 'reasonable' and do not impermissibly encroach on legitimate uses incident to mining and mill site claims").

Historic Landmarks and traditional cultural properties.²⁹³ Like the Front Range decision, as long as the Medicine Wheel Plan is consistent with the land management plan for the Bighorn Forest and is well-documented, rational, and based on a thorough consideration of relevant data regarding the tribal interests at stake and effects on cultural and other natural resources, it satisfies statutory requirements.²⁹⁴ Further, the Medicine Wheel Plan's requirements will likely survive constitutional scrutiny as a reasonable accommodation of American Indian interests.

IV. CONSTITUTIONAL ACCOMMODATION OF CULTURAL INTERESTS

Constitutional challenges to federal actions affecting sacred sites and cultural practices at the Medicine Wheel, Devils Tower, and other areas have been raised by tribes as well as non-Indian users of the public lands. Many of these challenges have been centered on the First Amendment's religion clauses: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"²⁹⁵ Tribal practitioners have asserted free exercise rights in seeking to access or preserve cultural resources, while other interests allege Establishment Clause and occasionally equal protection violations when accommodations are made for tribal interests.

The two religion clauses are not mutually exclusive, nor are they in perfect equipoise. Between them lies a realm of discretionary activity—a "channel between the Scylla and Charybdis"—where accommodations for the preservation and use of cultural and spiritual properties are allowed, even if not constitutionally mandated.²⁹⁶ Accommodations for American Indian traditional cultural practices involving federal public lands and resources come well within this realm, and may, in some cases, be required under treaties, constitutional require-

293. 16 U.S.C. §§ 470h-2(f), 470a(d)(6) (1994).

294. *Motor Vehicle Manufacturers Ass'n v. State Farm Ins. Co.*, 463 U.S. 29, 43 (1983).

295. U.S. CONST. amend. I.

296. *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting); *Gillette v. United States*, 401 U.S. 437, 461 (1971) ("[D]espite a general harmony of purpose between the two religious clauses of the First Amendment, the Free Exercise Clause no doubt has a reach of its own." (citing *Abington School Dist. v. Schempp*, 374 U.S. 203, 222–23 (1963))).

ments, or statutory provisions. Further, because American Indian tribes are not similarly situated to other groups, equal protection principles are generally satisfied by tribal accommodations.

A. *What is Religion?*

Neither the Free Exercise nor the Establishment Clause apply unless the practice at issue is religious. Specifying a definition of religion is both difficult and controversial, as religiosity is a highly complex and elusive concept with no clearly settled parameters. Although "[n]o specification of essential conditions will capture all and only the beliefs, practices, and organizations that are regarded as religious,"²⁹⁷ courts tend to focus on two common features. One is whether the practice or belief centers on a "Supreme Being" or "ultimate concern"²⁹⁸ that represents "a sentience beyond the human and capable of acting outside of the observed principles and limits of natural science, and . . . that makes demands of some kind on its adherents."²⁹⁹ Typically, this means that a belief will be seen as religious if it "occupies a place in the life of its possessor paral-

297. Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 763 (1984). See *Wash. Ethical Soc'y v. District of Columbia*, 249 F.2d 127, 129 (D.C. Cir. 1957) ("Reference to standard sources of definitions discloses that the terms 'religion' and 'religious' in ordinary usage are not rigid concepts" and are "by no means free from ambiguity."); STEPHEN CARTER, *THE CULTURE OF DISBELIEF* 17-18 (1994) (noting the danger in placing definitional parameters on religion, but also the necessity of making such an attempt in order to have an intelligent conversation about the First Amendment); Michael A. Paulsen, *Religion, Equality and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 333 (1986) (arguing that distinguishing religious and non-religious effects is a "cosmological quagmire"); see also Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357, 358 (1996) (cautioning that rigid definitions of religion "would ultimately themselves be a threat to religious liberty . . . increas[ing] the probability of unreceptivity to new variants of religion").

298. *United States v. Seeger*, 380 U.S. 163, 187 (1965) (citing PAUL TILLICH, *THE SHAKING OF THE FOUNDATIONS* 57 (1948)); Greenawalt, *supra* note 297, at 763; see also Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1056 (1978) (suggesting that religion should embrace "whatever is for the individual an 'ultimate concern'").

299. CARTER, *supra* note 297, at 17; see also Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 594-97 (analyzing the "ultimate concern" criterion). Professor Carter adds that this concept infers "a tradition of group worship . . . a religious community struggling together toward the ultimate." CARTER, *supra*, at 17.

lel to that filled by the orthodox belief in God.”³⁰⁰ In contrast, philosophical views and personal moral codes are typically not viewed as religious in nature.³⁰¹ The second consideration is whether the practice or belief involves extra-temporal consequences. It will likely be seen as religious if it reaches beyond the actor’s lifetime “in some meaningful way . . . either by affecting eternal existence or by producing a permanent and everlasting significance and place in reality.”³⁰²

Under either definition, belief systems most similar to traditional western religions, with regular and organized patterns of worship directed at one God, are most likely to be treated as religions for First Amendment purposes.³⁰³ Less familiar, minority religions have received inadequate protection. This is particularly true of American Indian practices and beliefs. Ceremonies that are closely associated with a particular natural site “remain exotic and incomprehensible to the courts” because they defy comparison to western belief systems.³⁰⁴ Practices and beliefs that appear salvation-oriented to an outsider can have highly significant cultural and communal purposes, and vice versa.³⁰⁵ Because these practices and beliefs are not readily compartmentalized, but are viewed by the practitioner as integral to all facets of individual and tribal life, they cannot be pigeonholed as exclusively religious or strictly secular.³⁰⁶

300. *Seeger*, 380 U.S. at 165–66.

301. *See* *Welsh v. United States*, 398 U.S. 333 (1970) (discussing statutory exclusion from mandatory military service).

302. John H. Garvey, *Is There a Principle of Religious Liberty?*, 94 MICH. L. REV. 1379, 1383 (1996); Choper, *supra* note 299, at 594–97.

303. Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 273 n.253 (1989); Lupu, *supra* note 297, at 358.

304. Cross & Brenneman, *supra* note 202, at 41 n.183 (citing DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 740 (3d ed. 1993)). To an outsider, a healing ceremony, like the Navajo Blessing Way, would seem to have little to do with either of the relevant criteria, but surely it has religious meaning to the practitioner.

305. *See* Cross & Brenneman, *supra* note 202, at 41 (noting that the Sun Dance and related practices of northern plains tribes at Devils Tower are “fundamentally non-commemorative in character and non-salvation directed”); DELORIA, JR. & LYTLE, *supra* note 90, at 117, 282 (explaining that, unlike the Christian religion, which focuses on individual salvation, tribal practices are group-oriented; even solitary practices like vision quests are meant to strengthen the individual to facilitate a greater contribution to the people).

306. *See* Pemberton, Jr., *supra* note 210, at 288–89 (“American Indians do not separate religion from culture, the sacred from the secular, belief from prac-

Judicial attempts to categorize American Indian beliefs and practices have resulted in strained and artificial dichotomies and inappropriate results. Some courts fail to recognize that site-based practices are religious and therefore protected under the Free Exercise Clause, while others harbor a mistaken perception that accommodations for Indian ceremonies have a wholly religious purpose and effect, ignoring their cultural, historic, and political dimensions in finding a violation of the Establishment Clause.³⁰⁷ The multi-faceted nature of traditional cultural practices, and the contextual nuances of each particular controversy, are key to the resolution of both free exercise claims and Establishment Clause challenges.

B. The Free Exercise of Religion

The Free Exercise Clause is at the heart of religious freedom, prohibiting the government from compelling the affirmation of a religious belief or discriminating against individuals or groups because of their religious views.³⁰⁸ Laws that facially discriminate or exhibit hostility toward religion have long been subject to strict scrutiny: they must be narrowly tailored to serve compelling interests.³⁰⁹ Even laws that appear neutral can be subject to strict scrutiny if they are not, in fact, neutral in both intent and application.³¹⁰

tice, or spirituality from traditional sacred lands.”). Pemberton explains that, for Black Elk and his people:

[T]he sacred and the secular, the divine and the material creation, are joined. The Platonic dichotomy between soul and body informing European thought does not govern in Lakota belief. The eternal pervades the temporal; the material world is of sacred character.

Id. at 291.

307. See Pemberton, Jr., *supra* note 210, at 288–89.

308. See *Sherbert v. Verner*, 374 U.S. 398, 402 (1963); see also *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that state action compelling school children to salute the flag was unconstitutional as to those students whose religious beliefs forbade saluting a flag).

309. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); see also *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (“[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”).

310. See *Lukumi Babalu Aye*, 508 U.S. at 520 (invalidating ordinances that prohibited the slaughter of animals within city limits, as the plain language and legislative history of the ordinances demonstrated that the city’s object was to suppress the Santeria religion).

Supreme Court jurisprudence has shifted over time with regard to laws that are truly neutral toward religion. For many years, the threshold inquiry was whether the impact of the law on the objector's sincere religious beliefs was substantial; if so, the law would be upheld only if it represented a compelling governmental interest and the least burdensome means of accomplishing that objective.³¹¹ An oft-cited example is *Wisconsin v. Yoder*, where the Supreme Court applied strict scrutiny to strike down compulsory education requirements that would "gravely endanger" the free exercise of Amish religious beliefs and parental rights to raise and educate their children in the faith of their choice.³¹²

In more recent years, the Court has departed from this position, applying a lenient form of scrutiny to neutral laws of general applicability that incidentally burden the free exercise of religion. In *Bowen v. Roy*, parents descended from the Abenaki Tribe objected to the Social Security system, claiming that to assign a number to their daughter would rob her of her spirit and inhibit her spiritual growth.³¹³ In rejecting their claim, the Court concluded that religion-neutral requirements need only be supported by a rational basis.³¹⁴ Subsequently, in *Employment Division, Department of Human Resources v. Smith*, Oregon laws that penalized sacramental peyote use by denying unemployment benefits to practitioners terminated from their jobs for using peyote were upheld.³¹⁵ The practitioners argued that strict scrutiny should be applied whenever a law destroys the central tenets of a religion.³¹⁶ The Court disagreed, concluding that any inquiry into the degree of the bur-

311. *Yoder*, 406 U.S. at 220; see *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987) (concluding that the denial of benefits to a woman who became a Seventh-day Adventist, and consequently refused to work on Saturdays, failed strict scrutiny); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981) (holding that denial of benefits to a claimant who quit his job because his religious beliefs forbade participation in production of armaments failed strict scrutiny); *Sherbert*, 374 U.S. at 403, 406 (invalidating a law that disqualified a Sabbatarian from receiving unemployment benefits because of her refusal to work on Saturday, applying strict scrutiny even though her ability to engage in religious practices was not directly prohibited but was effectively discouraged).

312. *Yoder*, 406 U.S. at 220.

313. 476 U.S. 693, 696 (1986).

314. *Id.* at 707-08.

315. 494 U.S. 872, 883-85 (1990).

316. *Id.* at 883 (citing *Sherbert*, 374 U.S. at 402).

den is inappropriate: "courts must not presume to determine the place of a particular belief in a religion."³¹⁷ Although the freedom to hold religious beliefs has been described as "absolute,"³¹⁸ conduct posing a threat to public safety, the Court noted, has never been free from restriction, even when motivated by religious concerns.³¹⁹

Even before *Smith* was decided, federal actions that impaired sacred sites and inhibited access to the public lands for traditional cultural practices had been regularly upheld. The lower courts have almost uniformly rejected American Indians' free exercise claims to access public lands, in many cases concluding that the government action at issue did not affect practices that were truly religious in nature.³²⁰ The Ninth Circuit's

317. *Smith*, 494 U.S. at 887.

318. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

319. *Smith*, 494 U.S. at 879 ("The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities." (quoting *Minersville School Dist. Bd. of Educ. v. Gobitis*, 310 U.S. 586, 594-595 (1940))). The *Smith* Court also cited *Reynolds v. United States*, 98 U.S. 145 (1878), which upheld bigamy laws as applied to defendants whose religion commanded the practice of polygamy. *Id.* The *Reynolds* Court, in turn, relied on Thomas Jefferson's reply to the Danbury Baptist Association, in which he stated, "the legislative powers of the government reach actions only, and not opinions . . . [M]an . . . has no natural right in opposition to his social duties." *Id.* at 164 (quoting 8 THE WORKS OF THOMAS JEFFERSON 113 (1858)); see also *Braunfeld v. Brown*, 366 U.S. 599, 603, 607 (1961) (upholding Sunday closing laws even though such laws imposed hardship on Orthodox Jewish shopkeepers and customers on grounds that laws imposing indirect burdens on religious practices are valid if the state cannot otherwise accomplish its secular goals); *United States v. Ballard*, 322 U.S. 78, 86 (1944); *Cantwell*, 310 U.S. at 303-04 ("[The] freedom to believe . . . is absolute but, in the nature of things, the . . . [freedom to act] cannot be."); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Ala. and Coushatta Tribes v. Big Sandy Indep. School Dist.*, 817 F. Supp. 1319, 1334 (E.D. Tex. 1993).

320. See, e.g., *United States v. Means*, 858 F.2d 404 (8th Cir. 1988); *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983); *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980); see also *Sequoyah v. Tenn. Valley Auth.*, 620 F.2d 1159 (6th Cir. 1980) (rejecting Cherokees' claim that free exercise rights would be violated by the flooding of the Little Tennessee River, finding that interests were more "cultural and historic" than religious in nature); *Inupiat Cmty. v. United States*, 548 F. Supp. 182 (D. Ark. 1982) (rejecting claim that religious interests were affected by offshore mineral exploration and development). Post-*Smith* claimants have fared no better. See *W. Mohegan Tribe v. New York*, 100 F. Supp. 2d 122 (N.D.N.Y. 2000) (finding that imposition of fees for access to state park did not violate rights of non-federally recognized tribe); *Miccosukee Tribe v. United States*, 980 F. Supp. 448 (D. Fla. 1997) (holding that government's failure to alleviate flooding in areas leased by Tribe near Everglades National Park did not impermissibly impact free exercise rights); *Havasupai Tribe v. United States*, 752 F. Supp. 1471, 1476 (D. Ariz. 1990); *Crow v. Gullet*, 541 F. Supp. 785 (D.S.D. 1982) (rejecting Lakota Na-

opinion in *Lyng v. Northwest Indian Cemetery Protective Ass'n* represented a brief departure from this trend, but the Supreme Court ultimately reversed the Court of Appeals, rejecting a free exercise challenge to the Forest Service's decision to build a timber road through a sacred site.³²¹ Because the agency had a legitimate reason to build the road and had not coerced religious practitioners to abandon their beliefs, its decision was upheld in spite of its "devastating effects" on religious practices.³²² To hold otherwise, opined the Court, would impose a "religious servitude" and "could easily require *de facto* ownership of some rather spacious tracts of public property."³²³ Moreover, "government simply could not operate if it were required to satisfy every citizen's religious needs and desires The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion."³²⁴

As the Court indicated in *Lyng*, and made resoundingly clear in *Smith*, neutral decisions governing the management of public lands need only have a rational basis, even when they cause severe effects on religions.³²⁵ In the wake of *Smith*, few

tion's challenge to state action that interfered with religious practices at Bear Butte State Park).

321. *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 565 F. Supp. 586, 596 (N.D. Cal. 1983), *aff'd in relevant part*, 764 F.2d 581 (9th Cir. 1985), *rev'd sub nom.* *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). The Ninth Circuit had found that the road would cause serious damage to areas which were indispensable to the religious practices of the Yurok, Karuk, Tolowa, and Hoopa Indian tribes, and that there was no compelling interest in building the road. 764 F.2d at 586-87.

322. *Lyng*, 485 U.S. at 451.

323. *Id.* at 452-53.

324. *Id.* at 452. The *Lyng* Court also rejected the tribes' claims based on the American Indian Religious Freedom Act of 1979 (AIRFA), which voices the federal policy of protecting Indians' "inherent right of freedom to believe, express, and exercise . . . traditional religions . . . including but not limited to access to sites, use and possession of sacred objects" *Id.* at 454-55 (citing 42 U.S.C. § 1996 (1994)). According to the Court, AIRFA creates no legally enforceable rights but simply directs agencies to consider religious concerns. *See Lyng*, 485 U.S. at 455 (citing statement of the bill's sponsor, Representative Udall: the Act "has no teeth"); *see also* *Conservation Law Found. v. FERC*, 216 F.3d 41, 50 (D.C. Cir. 2000) (finding that Federal Energy Regulatory Commission (FERC) need not require minimum stream flows in relicensing a hydroelectric project even if increased flows would inhibit access to religious sites; AIRFA calls upon federal agencies to consider, but not to defer to, Indian religious values).

325. *See* *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872, 890 (1990); *see also Lyng*, 485 U.S. at 450-51; *Bowen v. Roy*, 476 U.S. 693 (1986).

free exercise challenges will trigger a more probing form of review. Strict scrutiny will be invoked where the decision in question coerces adherence to a religion or directly targets and penalizes religious beliefs or practices; such actions are not religion-neutral and *Smith* simply does not apply.³²⁶ Likewise, a decision or regulation that appears facially neutral will be subject to more rigorous review if it is not, in fact, neutral but is intended to impact religions.³²⁷ Strict scrutiny may also be applied where individualized exemptions from generally applicable regulations are available but have not been extended to religious proponents; the government cannot grant exemptions for those who suffer secular hardship but not to "cases of 'religious hardship' without compelling reason."³²⁸

As for neutral regulations, the *Smith* Court indicated that strict scrutiny may be required for "hybrid" free exercise claims coupled with another fundamental right, such as freedom of speech or equal protection.³²⁹ The importance of communicating one's religious beliefs, rather than simply practicing one's religion, was emphasized in the *Smith* opinion as a justification for differentiating hybrid claims.³³⁰ Thus, religious groups that disseminate information to persuade others to accept their beliefs and to gain converts could assert hybrid claims if their communicative speech were restrained.³³¹ This scenario is not likely to be raised by American Indian practitioners, who generally prefer to be left alone; the idea of proselytizing or at-

326. *Smith*, 494 U.S. at 877-78.

327. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny."); *Bowen*, 476 U.S. at 707-08 (noting that rational basis would apply to facially neutral regulations absent proof of an intent to discriminate against religious beliefs or practices).

328. *Lukumi Babalu Aye*, 508 U.S. at 537 (quoting *Smith*, 494 U.S. at 884).

329. *Smith*, 494 U.S. at 881-82. The Court indicated that cases involving free speech may receive strict scrutiny because they "advert[] to the non-free-exercise principle involved." *Id.* at 881 n.1. In other words, *Smith* deprives the Free Exercise Clause of much of its independent meaning; only interests based on other fundamental rights will be protected when impacted by a neutral law. See CARTER, *supra* note 297, at 129-30.

330. *Smith*, 494 U.S. at 881-82.

331. See, e.g., *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949 (D.C.Cir. 1995); *United Christian Scientists v. Christian Science Bd. of Dirs.*, 829 F.2d 1152 (D.C. Cir. 1987).

tempting to gain converts is foreign and unappealing.³³² Cases involving spiritual activity on public lands, however, could require strict scrutiny by implicating the rights of association and of parents to raise their children as they see fit.³³³

A few years after *Smith* was handed down, Congress enacted the Religious Freedom Restoration Act (RFRA) in an attempt to restore the compelling state interest test of *Yoder* "in all cases where free exercise is substantially burdened."³³⁴ In *City of Boerne v. Flores*, a church brought a RFRA challenge to a zoning board's denial of its building permit pursuant to a city ordinance restricting building in an historic district.³³⁵ The Court held that Congress's attempt to prescribe a legal standard for analyzing free exercise claims exceeded its authority to enforce the law under section 5 of the Fourteenth Amendment.³³⁶

The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the mean-

332. See DELORIA, JR. & LYTLE, *supra* note 90, at 114 (explaining that tribal religious leaders hold their "religious secrets very firmly to themselves" out of humility and a belief that the higher spirits would guide others as appropriate).

333. See Worthen, *supra* note 71, at 605–09 (proposing that free exercise claims may invoke strict scrutiny when asserted in tandem with rights of association). Notably, *Wisconsin v. Yoder*, 406 U.S. 205, 219 (1972), applying strict scrutiny to invalidate laws that undermined the rights of Amish parents to educate their children, has never been overruled; it was explained as a hybrid case in *Smith*, 494 U.S. at 881–82. Given the strong relation between traditional cultural practices and tribal identity, American Indian practitioners would likely have strong claims for associational and parental rights. See *Alabama and Coushatta Tribes of Texas v. Trustees of Big Sandy Independent School Dist.*, 817 F. Supp. 1319, 1334 (E.D. Tex. 1993) (holding that Indian families had stated a valid constitutional claim that school's prohibition on long hair unduly burdened parental rights to guide their children's education and upbringing, raising free exercise and free speech concerns).

334. 42 U.S.C. § 2000bb(b)(1) (1994).

335. 521 U.S. 507 (1997).

336. *Id.* at 536. Section 5 provides that "The Congress shall have power to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]." U.S. CONST. amend. XIV, § 5. The Court concluded that the enforcement power of Section 5, being remedial in nature, allows Congress to preserve rights already protected by the Fourteenth Amendment but does not allow it to go beyond the Court's restrictive but authoritative interpretation of the Free Exercise Clause, as applied to the states through the Fourteenth Amendment. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

ing of the Free Exercise Clause cannot be said to be enforcing the Clause.³³⁷

By its own terms, the Fourteenth Amendment applies only to the states, leaving some question as to whether RFRA has continuing force as applied to federal actions.³³⁸ In *Boerne*, the Court specifically noted that "the most far reaching and substantial of RFRA's provisions" were those which "impose[d] its requirements on the States."³³⁹ Several circuit courts have held or at least assumed that RFRA is constitutional as applied to federal actions.³⁴⁰ In addition, the Clinton Administration took the position on at least one occasion that RFRA had continuing force for federal actions.³⁴¹ Although the Supreme Court has

337. *Boerne*, 521 U.S. at 519. The Court found that RFRA was not a "remedial" statute, because it lacked any "congruence" or "proportionality" to its purported remedial purpose; instead, Congress had impermissibly attempted "a substantive change in constitutional protections." *Id.* at 533. In contrast to the Fourteenth Amendment, the Fifth Amendment, applicable to the federal government, has no explicit enforcement clause.

338. U.S. CONST. amend. XIV, § 1. See Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 U. ARK. LITTLE ROCK L. REV. 715, 728 (1998) ("The application of RFRA to federal law obviously does not rest on Section 5 and could not have been intended to do so, since the Fourteenth Amendment is only concerned with state action.").

339. *Boerne*, 521 U.S. at 516.

340. See *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 832 (9th Cir. 1999) (finding that the application of federal copyright laws did not violate RFRA); *In re Young*, 141 F.3d 854, 856 (8th Cir. 1998) (holding that Congress had the authority to compel strict scrutiny with regard to federal affairs and therefore RFRA continues to apply to federal bankruptcy laws in spite of *Boerne*); see also *Adams v. Comm'r*, 170 F.3d 173, 175 n.1 (3d Cir. 1999) (noting that "courts that have addressed the question . . . have found that RFRA is constitutional as applied to the federal government"), *cert. denied*, 528 U.S. 1117 (2000); *Alamo v. Clay*, 137 F.3d 1366, 1368 (D.C. Cir. 1998) (assuming that RFRA continues to apply to the federal government); *Hartmann v. Stone*, No. 97-5269, 1998 WL 415999, at *4 n.1 (6th Cir. July 7, 1998) (noting, without deciding, that RFRA may still apply to federal actions).

341. See *United States v. Sandia*, 6 F. Supp. 2d 1278, 1279 (D.N.M. 1997), *aff'd*, 188 F.3d 1215 (10th Cir. 1999). In *Sandia*, a member of the Jemez Pueblo was prosecuted under the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668 (1994), the Migratory Bird Treaty Act, 16 U.S.C. § 703-712 (1994), and the Lacey Act, 16 U.S.C. § 3371 (1994), for the possession and sale of body parts from protected bird species. The government agreed that Congress had the power to require, through RFRA, that wildlife conservation laws be implemented in a manner "respectful of religious exercise," but that the sale of eagle parts was not a religious activity. *Id.* at 1279. The district court found that *Boerne* invalidated RFRA in its entirety. *Id.* at 1281. The Tenth Circuit refused to reach the RFRA issue, affirming the conviction on the grounds that the commercial sale of protected wildlife did not implicate any religious rights. 188 F.3d at 1218.

not resolved the issue, it has on numerous occasions directed that constitutionally flawed provisions be severed from the remaining provisions if, on balance, the statute remains capable of functioning independently.³⁴² Thus, *Boerne* should not be read as invalidating the law in its entirety.

Congress has since amended RFRA to limit its scope to federal actions by striking references to state and local governments.³⁴³ Even as limited to federal actions, RFRA's strict scrutiny test raises constitutional concerns. Congress may grant protection for individual liberties beyond the minimum "floor" required by the Constitution as interpreted by the courts, but it may do so only if it had the constitutional power to act in the first place.³⁴⁴ The Treaty Power may be the most plausible source of power to provide additional protection for religious freedom, in order to implement the International Convention on Civil and Political Rights.³⁴⁵ Yet RFRA, as ap-

342. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987); *INS v. Chadha*, 462 U.S. 919, 931-32 (1983).

343. 42 U.S.C. § 2000bb-2, *amended by* Pub. L. No. 106-274, 114 Stat 803, § 7, Sept. 22, 2000. The amendment was passed in conjunction with a new statute, the Religious Land Use and Institutionalized Persons Act, which forbids state and local governments from imposing land use restrictions that substantially burden the religious exercise of persons, assemblies or institutions, unless the restriction is the "least restrictive means" to achieve a "compelling governmental interest." 42 U.S.C. § 2000cc(a)(1). The Act also protects the rights of institutionalized persons to practice their faith. 42 U.S.C. § 2000cc-1. In an attempt to avoid the strictures of *Boerne*, the Act relies in large part on the Commerce Clause and the Spending Clause as its constitutional bases. *See* 42 U.S.C. §§ 2000cc(a)(2), 2000cc-1(b); *see also* S. 2869, 106th Cong. (2d Sess. 2000), 146 CONG. REC. S7774 (July 27, 2000) (Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000) ("[T]he bill applies only to the extent that Congress has power to regulate under the Commerce Clause, the Spending Clause, or Section 5 of the Fourteenth Amendment."); *id.* at S7775-76 (stating that the Act is a valid exercise of congressional power to enforce the Fourteenth Amendment as a "prophylactic rule" to remedy "a widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes," and asserting that strict scrutiny is consistent with *Smith* because it affects "hybrid" rights of free speech and free exercise).

344. *Young*, 141 F.3d at 860 (citing, *inter alia*, the National Defense Authorization Act for Fiscal Years 1988 and 1989, 10 U.S.C. § 774 (2000), which entitles members of the military to wear religious headgear, even though such a right is not compelled by the Free Exercise Clause under Supreme Court precedent; *Goldman v. Weinberger*, 475 U.S. 503 (1986)).

345. *See* International Covenant on Civil and Political Rights, *supra* note 102 (discussing Covenant's guarantees for religious freedom); *see also* *Missouri v. Holland*, 252 U.S. 416 (1920) (upholding the Migratory Bird Treaty Act as valid exercise of treaty power); Jeri Nazary Sute, *Reviving RFRA: Congressional Use of Treaty-Implementing Powers to Protect Religious Exercise Rights*, 12 EMORY INT'L

plied to federal action, arguably tramples separation of powers; the judiciary, not Congress, has the power to "say what the law is."³⁴⁶ Further, to the extent Congress can be viewed as revising the Free Exercise Clause through RFRA, it has utilized inappropriate means in contravention of Article V of the Constitution, which prescribes specific procedures for constitutional amendments.³⁴⁷

If RFRA, as limited to federal actions, should survive constitutional scrutiny, decisions that incidentally but substantially affect religious beliefs by restricting access to public lands, or by interfering with religious practices by altering the landscape, would be subject to strict scrutiny. Decisions allowing logging, grazing, road-building, and other discretionary activities pale in comparison to American Indian religious interests and "fall far short of constituting the 'paramount interests' necessary to justify infringement of plaintiffs' freedom of religion."³⁴⁸ Although there is some language in *Lyng* indicating that the federal prerogative to control the public lands may be viewed as a compelling governmental interest,³⁴⁹ the Court spe-

L. REV. 1535, 1570 (1998) (arguing that RFRA is an appropriate vehicle to fulfill the United States' obligations under the Covenant); David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129 (1999) (exploring means of implementing the Covenant).

346. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (1803). In *Boerne*, the Court remarked that RFRA "contradicts vital principles necessary to maintain separation of powers and the federal balance." 521 U.S. at 536. "The judicial authority to determine the constitutionality of the laws . . . is based on the premise that the 'powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten . . .'" *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997) (quoting *Marbury*, 5 U.S. (1 Cranch) at 176).

347. See U.S. CONST. art. V; *Boerne*, 521 U.S. at 529 ("If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.'" (quoting *Marbury*, 5 U.S. (1 Cranch) at 177)). For a more in-depth analysis of the validity of RFRA as applied to federal action, see Edward J.W. Blatnik, *No RFRAF Allowed: The Status of the Religious Freedom Restoration Act's Federal Application in the Wake of Boerne v. Flores*, 98 COLUM. L. REV. 1410 (1998) (concluding that RFRA, even as limited to federal action, circumvents Article V's requirements for constitutional amendment).

348. *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 565 F. Supp. 586, 596 (N.D. Cal. 1983) (quoting *Sherbert v. Verner*, 374 U.S. 398, 406 (1963)).

349. *Lyng*, 485 U.S. at 453. The federal government's power over its property is often described as plenary in nature, subject to few limitations. See *Kleppe v. New Mexico*, 426 U.S. 529, 541 (1976); *United States v. San Francisco*, 310 U.S. 16, 29 (1940); *Camfield v. United States*, 167 U.S. 518, 525 (1897); see also U.S.

cifically noted that the Forest Service had taken "many other ameliorative measures" to alleviate the effects of the road on sacred sites.³⁵⁰ If a federal agency did not take such measures, the decision could be struck down under RFRA for failing to adopt the least restrictive means of achieving the governmental objective.

C. The Establishment Clause and Equal Protection

To the extent that governmental actions facilitate cultural interests that are religious in nature, they may be vulnerable under the Establishment Clause. Governmental actions that relate to American Indian religious interests fall roughly into two categories. Governmental actions that are protective of cultural resources or allow access to public lands for cultural practices should survive traditional Establishment Clause review, as the purpose and effects of such actions are primarily cultural, historical, or political rather than religious. On the other hand, actions designed to accommodate religious interests by lifting burdens imposed by governmental practices or ownership of sacred sites may be viewed as predominantly religious in nature. Such actions may run afoul of traditional Establishment Clause analysis, even though they pose little danger of establishing or endorsing an American Indian religion. This second category of action should be reviewed under an accommodation analysis that encourages sensitivity toward Indian interests in cultural resources while advancing religious freedom and equality.

1. The Purposes of Anti-Establishment

By prohibiting the government from passing laws "respecting the establishment of religion," the Establishment Clause of the United States Constitution is unparalleled among the constitutions of the nations of the world. It is unique among the provisions of the Bill of Rights as well, in that it reaches be-

CONST. art. IV, § 3, cl. 2 (authorizing the federal government to "make all needful Rules and Regulations respecting" federal lands).

350. *Lyng*, 485 U.S. at 454. The Court remarked that a contrary holding might allow practitioners to "seek to exclude all human activity but their own from sacred areas of the public lands," resulting in "*de facto* beneficial ownership" and significantly diminishing the government's property rights. *Id.* at 452-53.

yond individual freedoms to address group-related interests and institutions. Naturally, a bar on the establishment of a government sponsored religion safeguards individual religious freedom, but it goes much further, ensuring against governmental control over religion and religious groups and vice versa.

The writings of Thomas Jefferson and Roger Williams, calling for a "wall of separation" between church and state, were influential in the formulation of the Establishment Clause.³⁵¹ Volumes have been written on the original intent underlying the Establishment Clause,³⁵² and the framers' understanding of the Clause and their objectives in including it in the Bill of Rights provide an important interpretive tool.³⁵³ Even so, strict originalism is not a definitive response to constitutional construction, as a rigid approach to constitutional interpretation undermines its enduring nature as a living charter for governance.³⁵⁴ Equal protection for all races, for example, could result only through an evolutionary construction of the Fourteenth Amendment—one rooted in the text of the Amendment but sensitive to context and the overarching purposes of the Bill of Rights—in that the framers, many of whom were slave owners, could not have intended to extend full equality to all. As for the Establishment Clause itself, it is by no means clear that, collectively, the draftsmen had only one meaning or motivation

351. *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947); see also MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS* (1954); Thomas Jefferson, *Freedom of Religion at the University of Virginia*, in *THE COMPLETE JEFFERSON* 958 (Saul K. Padover ed., 1943). Williams, a colonial Puritan leader, founded Providence, Rhode Island in 1636, having been banished from Massachusetts for questioning authorities. Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U. L. REV. 455 (1991).

352. See CARTER, *supra* note 297, at 115–20; see also *supra* text accompanying notes 26–32 (collecting and discussing scholarship).

353. See Harold J. Berman, *The Religion Clauses of the First Amendment in Historical Perspective*, in *RELIGION AND POLITICS*, 64–72 (W. Laswon Taitte ed., 1989).

354. See CARTER, *supra* note 297, at 119; see generally Stephen Carter, *Originalism and the Bill of Rights*, 15 HARV. J.L. & PUB. POL'Y 141 (1992). Jefferson, a firm believer in the "sovereignty of the living generation," *THE POLITICAL WRITINGS OF THOMAS JEFFERSON* 16 (Merrill D. Peterson ed., 1993) [hereinafter *THE POLITICAL WRITINGS*], wrote "we have not yet so far perfected our constitutions as to venture to make them unchangeable." *Constitutions and Change, Letter to Major John Cartwright*, in *THE POLITICAL WRITINGS*, *supra*, at 210.

when it came to the relationship of church and state.³⁵⁵ The intent of even one of the framers, Thomas Jefferson, is extremely difficult to pinpoint, as he appears to have been motivated by multifarious concerns and a view of religion that was far too nuanced to force into a conceptual box.³⁵⁶

To the extent that one can discern the original intent underlying the Clause, the primary thrust appears to have been protecting religion from government, given the colonists' experiences with government oppression of religions that were not state-approved.³⁵⁷ The framers voluntarily divested government of power over religions, providing religious groups with an independence and vitality necessary to a democracy. Organized religions were thought to impede the potential for tyranny by the majoritarian government by acting as an independent voice for civil liberty³⁵⁸ and an intermediary between the citizen and the government.³⁵⁹

355. James Madison, a sponsor of the Bill of Rights in the First Congress, appears to have been primarily concerned about equality among religions and non-religion, rather than a need for strict separation between church and state. See James Madison, *Memorial and Remonstrance against Religious Assessments* (1785), in ARLIN M. ADAMS & CHARLES J. EMMERICH, *A NATION DEDICATED TO RELIGIOUS LIBERTY* 104 (1990). Roger Williams, whose writings were influential to the draftsmen of the First Amendment, advocated governmental neutrality to express his ideals of religious tolerance—the individual believer's ability to worship without state interference. See HOWE, *supra* note 351, at 1–31. Ironically, Williams employed a nature-based metaphor to express his desire for a wall between the “garden of the Church and the wilderness of the world,” see ADAMS & EMMERICH, *supra*, at 6, reflecting a common colonial sentiment—untamed wilderness, like the vices of society, was a corrupting influence.

356. See EUGENE R. SHERIDAN, *JEFFERSON AND RELIGION* 8–9, 35–38 (1998) (noting that Jefferson was accused of being an infidel because he insisted that law and virtue did not flow from supernatural revelations but from reason, intellect and social obligation, a common theme of the Enlightenment).

357. See CARTER, *supra* note 297, at 115–20; Madison, *supra* note 355, at 104.

358. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 342 (1987) (remarking that solicitude for churches “often furthers individual religious freedom as well”). Notably, the civil rights laws of the 1960s, which serve as a cornerstone of our modern, pluralistic democracy and republican, representative government, grew out of the firestorm of protest facilitated by religious leaders, particularly Reverend Martin Luther King, Jr.

359. See CARTER, *supra* note 297, at 35–37; Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 740–41 (1992). De Tocqueville was impressed with the functioning of the young American republic because it provided both individual liberty tempered by “virtuous standards of behavior” and a meaningful replacement for European aristocracies by allowing churches to stand unimpeded as a bulwark against government tyranny. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 290–95, 513–17 (J.P. Mayer ed., 1969). “Despotism may be able to do

Modern Establishment Clause jurisprudence recognizes that the Clause serves the additional, equally important function of safeguarding against improper influence by organized religions over government, reflecting the bipartite concern that "a union of government and religion tends to destroy government and to degrade religion."³⁶⁰ It inhibits, "as far as possible, the intrusion of either [the church or the state] into the precincts of the other."³⁶¹ Just as the government may not restrain religion, neither may it promote any particular religion, or even religion over non-religion.³⁶² To achieve its objectives, the Establishment Clause generally prohibits the government from giving religious organizations a leg up through special treatment, whether in the form of direct benefits or exemptions from otherwise applicable requirements.³⁶³

As absolute as these principles may sound, in today's pluralistic, interdependent society, there can be no such thing as an impregnable "wall" between church and state. "[T]otal separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable."³⁶⁴ Although eighteenth century American society was relatively homogenous, with religion almost uniformly equated with Christianity, we now have a very different picture, with diverse demographic dimensions and a commitment to pluralism beyond anything the framers could have envisioned. Strict governmental neutrality may have been appropriate in early

513-17 (J.P. Mayer ed., 1969). "Despotism may be able to do without faith, but freedom cannot." *Id.* at 294.

360. *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

361. *Lynch v. Donnelly*, 465 U.S. 668, 672 (1984) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)).

362. *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 696 (1994) (plurality opinion) (the government may not favor "religious adherents collectively over nonadherents"); *School Dist. of Abington v. Schempp*, 374 U.S. 203, 216 (1963) ("[T]his Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another.").

363. *See Kiryas Joel*, 512 U.S. at 696; *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

364. *Lynch*, 465 U.S. at 673 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)). Although the Court had initially embraced the "wall" metaphor in *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 18 (1947), it has since backed away from such an extreme view. *See McCollum v. Bd. of Educ.*, 333 U.S. 203, 247 (1948) (Reed, J., dissenting) ("A rule of law should not be drawn from a figure of speech."); *Lynch*, 465 U.S. at 673 ("No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government.").

American law, where the social order was largely determined by private influences, but in the modern regulatory state, government plays such a pervasive role in the lives of its citizens that complete neutrality cannot serve the objectives of the religion clauses.³⁶⁵ Strict neutrality would, in many cases, require “callous indifference”³⁶⁶ or even outright hostility toward religious needs, thereby undermining the guarantees of the Free Exercise Clause without promoting the objectives of the Establishment Clause.

2. Determining Whether Governmental Benefits Establish Religion

Given the complexities of religion in American life, the Supreme Court has admonished that Establishment Clause analysis “cannot easily be reduced to a single test.”³⁶⁷ The three-pronged “*Lemon* test,” however, has long been employed as an aid in discerning whether government action satisfies the Establishment Clause: (1) it must have a secular purpose; (2) its effect must be primarily secular; and (3) it must not result in an excessive entanglement with religion.³⁶⁸ In *Lemon*, the Court applied this analytical framework to invalidate a state program that reimbursed private schools for instructional materials and salaries used to teach secular subjects.³⁶⁹

365. CARTER, *supra* note 297, at 133; see also Sandra Zellmer, *The Devil, the Details and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 AZ. ST. L. J. 941, 955–56 (2000) (discussing the rise of the modern administrative state after the New Deal).

366. *Lynch*, 465 U.S. at 673 (citing *Zorach v. Clauson*, 343 U.S. 306, 314–15 (1952)).

367. *Kiryas Joel*, 512 U.S. at 720 (O'Connor, J., concurring). Justice O'Connor added, “It is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular Clause. . . . But the same constitutional principle may operate very differently in different contexts.” *Id.* at 718; see also *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) (noting that constitutional analysis is not a “legalistic minuet in which precise rules and forms must govern. [Instead we must] examine the form of the relationship for the light that it casts on the substance.”).

368. *Lemon*, 403 U.S. at 612–13. The second and third prongs of this test have been further refined in subsequent cases, with entanglement being utilized as a means of determining whether the effects of the action improperly advance or endorse religion. See *Agostini v. Felton*, 521 U.S. 203 (1997), discussed *infra*, note 383 and accompanying text.

369. *Lemon*, 403 U.S. at 607.

The program in question in *Lemon* required funds to be used only for secular purposes, satisfying the first requirement.³⁷⁰ But the purpose of the law need not be exclusively secular. So long as a plausible secular reason motivates the action in question, it will survive this facet of the analysis even if it is, in part, based on religious concerns or coincides with religious beliefs.³⁷¹ For example, Sunday closing laws have been upheld, even though they provide an unmistakable benefit to Christian churches and churchgoers; according to the Court, a uniform day of rest advances secular goals of promoting public health, safety, and well-being.³⁷² Likewise, programs that reflect historic interests³⁷³ or allow religious groups open access to public fora provide unobjectionable "incidental" benefits to religion.³⁷⁴ In those rare cases where a government program

370. *Id.* at 620–24.

371. See *Lynch v. Donnelly*, 465 U.S. 668, 681 (1984) (stating that a violation of the first prong of *Lemon* will be found "only when . . . the statute or activity was motivated wholly by religious considerations"); see also *Bowen v. Kendrick*, 487 U.S. 603 (1988) (finding that the Adolescent Family Life Act served a permissible purpose even though the goal of reducing problems associated with teenage sexuality coincided with beliefs of certain religious organizations).

372. See *McGowen v. Maryland*, 366 U.S. 420, 444–45 (1961).

373. See *Lynch*, 465 U.S. at 680 (concluding that a city's display of a crèche had a secular purpose of commemorating a "significant historical religious event long celebrated in the Western World"); *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (upholding provision for legislative chaplain as advancing historic interests). In *ACLU v. Capitol Square Review & Advisory Board*, 243 F.3d 289, 307 (6th Cir. 2001), the Sixth Circuit held that Ohio's seal, "In God all things are possible," used on state documents and prominently displayed at the capitol, "legitimately serves a secular purpose in boosting morale, instilling confidence and optimism, and exhorting the listener or reader not to give up." Like legislative prayer, the national anthem, the motto "In God We Trust" on United States currency, and the reference to God in the Pledge of Allegiance, it "reenforc[es] the citizen's sense of membership in an identifiable state or nation." *Id.* "Judged by historical standards, adoption of the motto no more represents a step toward an establishment of religion than does our own practice of opening each session of court with a crier's recitation. . . . 'God save the United States and this Honorable Court.'" *Id.* at 300 (citing *Marsh*, 463 U.S. at 786). Of course, historical usage alone will not save an otherwise unconstitutional provision, as "no one acquires a vested or protected right in violation of the Constitution by long use." *Walz v. Tax Comm.*, 397 U.S. 664, 678 (1970).

374. *Widmar v. Vincent*, 454 U.S. 263, 273–74 (1981); see *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (rejecting district's argument that it could not allow church access to school premises to show a film with religious content without violating the Establishment Clause, and holding that district violated free speech by denying access); see also *Capitol Square Review & Advisory Board*, 515 U.S. at 762–63 (holding that state did not violate Establishment Clause by permitting Ku Klux Klan to display unattended cross on grounds of capitol; the activ-

was invalidated for having a non-secular purpose, it was plainly motivated by predominant or solely religious concerns.³⁷⁵

The second prong of the *Lemon* test requires that the government action have a primary effect that "neither advances nor inhibits religion."³⁷⁶ This factor effectively recasts the subjective inquiry of the first prong, requiring that the action have a secular intent, as a more objective test focused on the outward manifestation and impact of governmental action. Effects are determined with reference to the character of the institutions benefited (are they predominantly religious?)³⁷⁷ and the nature of the aid provided (is it ideological?).³⁷⁸ For example, a system of providing income tax benefits to parents of children attending parochial schools violates the Establishment Clause unless it is sufficiently restricted to assure that it will not advance the schools' sectarian activities.³⁷⁹ Non-ideological programs that benefit entities that are predominately non-religious in nature are not invalid, however, just because incidental benefits may also flow to religious institutions, even if those benefits are substantial.³⁸⁰ If

ity was protected by the Free Speech Clause, its expression was made on property open to the public and permission was requested through the same process required of other groups).

375. See, e.g., *Texas Monthly v. Bullock*, 489 U.S. 1, 15 n.4 (1989) (invalidating tax exemptions for religious publications as "intended to benefit religion alone"); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 223-24 (1963) (invalidating program of Bible readings in schools where state admitted that readings were a sectarian exercise); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (invalidating "moment of silence" adopted for the purpose of encouraging school prayer); cf. *Church of Lukumi Babalu, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (finding Free Exercise violation where record was clear that ordinances prohibiting animal sacrifice were intended to suppress "the central element of the Santeria worship service[s]," noting that the Court would look beyond facial neutrality to determine the true motive under both the Free Exercise and Establishment Clauses).

376. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). See *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987).

377. *Hunt v. McNair*, 413 U.S. 734, 743-44 (1973).

378. *Wolman v. Walter*, 433 U.S. 229, 244 (1977); *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 18 (1947).

379. See *Comm. for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 780-81 (1973) (finding establishment where tuition reimbursement section of New York statute had direct and immediate effect of advancing religion by providing financial support for sectarian institutions).

380. See *Bowen v. Kendrick*, 487 U.S. 603, 604-05 (1988) (holding that Adolescent Family Life Act did not have a "primary effect of advancing religion," even though it directed grants to religious organizations providing counseling on teenage sexuality and did not expressly require that funds be used for only secular

the Establishment Clause were construed so strictly as to forbid the extension of all governmental benefits to religious groups, "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair."³⁸¹

The *Lemon* Court did not squarely address whether the school funding program at issue had secular effects, skipping this step once it had determined that the program ran aground on the shoals of the third prong—the surveillance needed to ensure that the parochial schools were properly using the funds resulted in an excessive entanglement between church and state.³⁸² The "excessive entanglement" inquiry examines "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."³⁸³ Not all entanglements advance or inhibit religion. Because some interaction between church and state is "inevitable," entanglement will not be viewed as excessive simply because there is some level of involvement between the two.³⁸⁴ Establishment entails "sponsorship, financial support, and active involvement of the sovereign in religious activity."³⁸⁵ Thus, excessive entanglement has only been found where a government aid

purposes; Act created a mechanism for policing grants to ensure that funds were not used for impermissible purposes by requiring potential grantees to disclose exactly what services they intended to provide and how they would be provided); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8, 12 (1992) (upholding program providing interpretive services to deaf child in parochial school, implying that it had permissible effects because it neutrally provided benefits to a broad class of citizens; "[d]isabled children . . . are the primary beneficiaries," thus, there is no establishment "just because sectarian institutions may also receive an attenuated financial benefit").

381. *Widmar v. Vincent*, 454 U.S. 263, 274–75 (1981) (quoting *Comm. for Pub. Educ. v. Regan*, 444 U.S. 646, 658 n.6 (1980), and *Roemer v. Maryland Pub. Works Bd.*, 426 U.S. 736, 744 (1976)).

382. *Lemon v. Kurtzman*, 403 U.S. 602, 613, 620–24 (1971).

383. *Id.* at 615; see *Agostini v. Felton*, 521 U.S. 233 (1997) (noting that the first two factors overlap with those used to determine whether the effect is permissible).

384. *Agostini*, 521 U.S. at 233.

385. *Walz v. Tax Comm'n.*, 397 U.S. 664, 668 (1970). In *Walz*, the Court upheld New York's exemption from real property taxes for realty owned by non-profit associations, including religions, reasoning that it created "only a minimal and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other." *Id.* at 676; see also *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 16 (1947) (Establishment Clause prevents State from "participat[ing] in the affairs of any religious organizations or groups and vice versa").

program required "comprehensive, discriminating and continuing state surveillance" by inspecting the content of a religious organization's programs,³⁸⁶ or resulted in a "fusion of governmental and religious functions" by delegating important, discretionary powers to religious bodies.³⁸⁷

In the aftermath of *Lemon*, the three-pronged test has been criticized as "extraordinarily unhelpful" to courts struggling to resolve Establishment Clause challenges, resulting in overly rigid yet unpredictable outcomes.³⁸⁸ No readily accepted formula has come to the fore as a workable replacement, but there have been refinements to the test in subsequent cases.³⁸⁹ Absent an overt religious purpose, the emerging trend appears to support a more general inquiry into the "practical details of the [governmental] program's operation"³⁹⁰ in an attempt to re-

386. *Lemon*, 403 U.S. at 619.

387. *Larkin v. Grendel's Den*, 459 U.S. 116, 126–27 (1982) (citing *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963)). In *Larkin*, the Court invalidated a Massachusetts statute because it delegated power to religious bodies to veto applications for liquor licenses near churches, thereby "fusing" governmental and religious interests, and it lacked an effective means of ensuring that the power would be used for neutral purposes. *Id.* at 125–27; see also *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 702 (1994) (finding that a state's creation of a special school district for a religious community unconstitutionally delegated political power based on religious criterion, "resulting in a purposeful and forbidden 'fusion of governmental and religious functions'") (citing *Larkin*, 459 U.S. at 126).

388. CARTER, *supra* note 297, at 110 (it is "a lemon indeed"). First Amendment scholars have criticized the *Lemon* test from the moment it was issued. See *id.* The popularity of *Lemon* has waned in Supreme Court jurisprudence as well, and some of the more recent opinions fail to mention *Lemon* at all. See, e.g., *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001) (assessing Establishment Clause issue with no reference to *Lemon*); *Rosenberger v. Univ. of Virginia*, 515 U.S. 819 (1995) (analyzing Establishment Clause issue with *Lemon*-like test, but citing *Lemon* only in dissent); *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (plurality opinion; *Lemon* mentioned only in concurrence); *Marsh v. Chambers*, 463 U.S. 783 (1983) (*Lemon* discussed only in dissent); see also *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 397 (1993) (Scalia & Thomas, J.J., concurring) (criticizing *Lemon*).

389. *Lemon* continues to serve as guiding judicial precedent, as it has for the past thirty years, see *Kiryas Joel*, 512 U.S. at 710–11 (Blackmun, J., concurring), and it was recently applied to strike a school's policy of allowing student-led prayer before football games in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 314 (2000), over heavy criticism from dissenting Justices Rehnquist, Scalia and Thomas, *id.* at 319–20. The lower courts continue to cite and apply the *Lemon* test as a matter of course. See, e.g., *Bear Lodge Multiple Use Assoc. v. Babbitt*, 2 F. Supp. 2d 1448, 1454 (D. Wyo. 1998) (citing *Bauchman v. West High Sch.*, 132 F.3d 542, 551 (10th Cir.1997)); *ACLU v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 305–06 (6th Cir. 2001).

390. *Rosenberger*, 515 U.S. at 839.

solve the fundamental question whether the program, in reality, establishes or endorses a religion or religious faith.³⁹¹ In keeping with this trend, in *Agostini v. Felton*, a school aid case, the entanglement prong was subsumed into a broader inquiry into the program's effect, which looked at the character of the benefited groups, the nature of the aid, and the resulting relationship between the government and religious groups.³⁹² These considerations help determine whether the program at issue could be viewed, from an objective standpoint, as an endorsement of religion via governmental indoctrination, entanglement, or non-neutral selection processes which define aid recipients by reference to religion.³⁹³ In other words, if a challenged governmental benefit is "sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices," establishment may be found.³⁹⁴

391. *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984).

392. 521 U.S. 233 (1997) (upholding a program that placed public employees in religious schools to provide disadvantaged children with remedial instruction); *Mitchell v. Helms*, 530 U.S. 793, 808 (2000) (noting that, at least for purposes of evaluating school aid cases, *Agostini* recast the entanglement prong "as simply one criterion relevant to determining a statute's effect"). *Agostini* overruled *Aguiar v. Felton*, 473 U.S. 402 (1985), which held that the use of government funds to pay salaries of public employees who taught in parochial schools inevitably entangled church and state, as it would require pervasive monitoring by authorities to ensure that employees did not inculcate religion. The Court has been especially willing to depart from *Lemon* in cases involving school funding and prayer. See *Mitchell*, 530 U.S. at 807 (citing *Tilton v. Richardson*, 403 U.S. 672, 678 (1971) ("candor compels the acknowledgement that we can only dimly perceive the boundaries of permissible government activity in this sensitive area")). However, the endorsement approach has carried over to other contexts. See *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573, 601 (1988) (applying endorsement test to invalidate government display of a crèche).

393. *Agostini*, 521 U.S. at 235; see also *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring) (advocating an endorsement test); *County of Allegheny*, 492 U.S. at 601 (finding that a prominent display of a crèche on the courthouse steps violated the Establishment Clause by improperly endorsing a patently Christian message).

394. See *County of Allegheny*, 492 U.S. at 597 (citing *School Dist. of Grand Rapids v. Ball* 473 U.S. 373, 390 (1985)); see also *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Lee v. Weisman*, 505 U.S. 577 (1992) (holding that school's provision for "nonsectarian" graduation prayer to be given by a clergyman constituted an improper endorsement of religion); *Texas Monthly v. Bullock*, 489 U.S. 1 (1989) (finding that Texas's sales tax exemption for periodicals promulgating the teaching of religious sects impermissibly endorsed religious belief); *Estate of Thornton v. Caldor*, 472 U.S. 703, 711 (1985) (O'Connor, J., concurring) (finding that a statute unlawfully advanced religion by bestowing an advantage on Sabbatarians "without according similar accommodation to ethical and religious beliefs and practices of other private employees, . . . [t]he message con-

Under both *Agostini* and *Lemon*, the context of a particular case, including historic circumstances, special relationships, the coercive impact of the government action, and the location of the activity at issue is of critical importance.³⁹⁵ When considering challenges to governmental actions affecting American Indian cultural resources, the complex nature of the relationship with the land and resources at issue, as well as the significance of the resources and practices to tribal culture and sovereignty, are highly relevant. The United States Code is replete with provisions demonstrating the federal government's legitimate political purposes with respect to tribal culture and sovereignty.³⁹⁶ Some statutes, like the NHPA, specifically promote historic, political, and cultural policies by protecting traditional practices and sacred sites.³⁹⁷

Although legislative provisions cannot save an otherwise unconstitutional governmental action, they demonstrate that

veyed is one of endorsement of a particular religious belief, to the detriment of those who do not share it"); *Lynch*, 465 U.S. at 678.

395. See *Agostini*, 521 U.S. at 232; *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971); see also *Marsh v. Chambers*, 463 U.S. 783 (1983); *Larson v. Valente*, 456 U.S. 228 (1982). Programs allowing school prayer seem especially susceptible to invalidation, given the relatively malleable nature of children and the likelihood that students feel coerced to participate in school activities for fear of being stigmatized as an "outsider" if they do not. See *Lee*, 505 U.S. at 592.

396. 25 U.S.C. § 3601 (1994) (acknowledging federal responsibilities toward tribal sovereignty in fulfilling the government to government relationship with tribes, and noting the importance of culture and identity to tribal sovereignty); 25 U.S.C. § 2901 (1994) ("United States has the responsibility to act together with" American Indians "to ensure the survival of these unique cultures"); 25 U.S.C. § 2001(c)(2) (1994) (educational standards must take into account "the specific cultural heritage of each tribe"); 25 U.S.C. § 1901 (1994) (the cultural and social standards of Indian communities and families are important to tribal integrity). See also Memorandum on Government to Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22951 (1994) (agency activities which may affect tribal rights or resources must be "implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty").

397. See NHPA, 16 U.S.C. § 470-1 (1994); 36 C.F.R. § 60.4 (2001) (protecting tribal interests in traditional cultural properties); *Nat'l Mining Ass'n v. Slater*, 167 F. Supp. 2d 265, 296 (2001) (rejecting Establishment Clause challenge to NHPA regulations regarding traditional cultural properties); see also AIRFA, 42 U.S.C. § 1996 (1994) (adopting policy "to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions . . . including but not limited to access to sites . . . and the freedom to worship through ceremonials and traditional rites"); Exec. Order 13007, 61 Fed. Reg. 26771 (May 24, 1996) (agencies "shall, to the extent practicable, . . . (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites").

there are numerous reasons for recognizing and even prioritizing Indian interests.³⁹⁸ In many cases, including the Forest Service's decisions to protect the Medicine Wheel and to prohibit mineral leasing on the Front Range, actions that facilitate cultural interests pursuant to the NHPA and other relevant statutes will only incidentally implicate religion. The Medicine Wheel Plan should be upheld, as was the Front Range decision in *Independent Petroleum Ass'n v. United States Forest Service*, where the Ninth Circuit concluded that the Establishment Clause was satisfied under *Lemon* and the endorsement test.³⁹⁹ Specifically, the Ninth Circuit found that the primary purpose and effect of the decision was to protect the area from impacts to aesthetics, wildlife, and other surface resources, not to advance Indian religious beliefs, and that the government had lawfully accommodated religious practices in its decision-making processes without entangling itself with religion.⁴⁰⁰

Similarly, the Medicine Wheel Plan does not endorse Indian religions, nor does it entangle the Forest Service with religion; rather, it protects the unique, historic attributes of the area.⁴⁰¹ Members of the general public could not reasonably believe that their religious choices were somehow being disapproved or prejudiced, and non-adherents would not be induced to "join up" as a result of this decision. Further, the Plan's consultation requirements, crafted in response to the NHPA's requirements, are a far cry from delegating absolute "veto power" to religious practitioners or otherwise endorsing or entangling the government with religion. To the extent that the decision

398. See *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 471 n.5 (1988) (Brennan, J., dissenting) (noting that the NHPA and other resource protection statutes provide evidence of the government's legitimate interests in recognizing and prioritizing tribal interests in public lands and resources).

399. See *Rocky Mountain Oil & Gas Ass'n v. United States Forest Service*, No. 00-35349, 2001 WL 470022 (9th Cir. May 3, 2001), *petition for cert. filed*, No. 01-213 (Aug. 1, 2001). The court rejected the statutory claims for lack of standing, concluding that plaintiffs could show no concrete injury as the Forest Service maintained discretion to authorize the leasing of its lands for mineral exploration under the NFMA and the mining laws. *Id.* at *1.

400. *Id.* (citing *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 453-54 (1988), and *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 144-45 (1987)). It also concluded that, in light of "the many secular considerations cited in the Forest Service's Record of Decision, a 'reasonable observer' would not view the decision as an endorsement of religion." *Id.* at *2 (citing *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 778-79 (1995) (O'Connor, J., concurring)).

401. See HISTORIC PRESERVATION PLAN, *supra* note 169.

facilitates Indian religions, it satisfies both *Lemon* and the endorsement analysis of *Agostini*.

3. Accommodating Religion by Removing Burdens

Opponents may view governmental actions that accommodate religion by removing or diminishing burdens on cultural practices as being primarily motivated by religious interests. By reflecting sensitivity to cultural interests that have great spiritual meaning to Indian practitioners, the Park Service's actions at Devils Tower, Rainbow Bridge, and Wupatki, as well as the BLM's denial of Glamis's mining plan, are vulnerable under *Lemon*, so the argument goes, because they have a religious purpose. Under a fair and reasoned application of *Lemon* and *Agostini*, however, each of these decisions is motivated by lawful cultural, historic, and political objectives. Even so, courts lacking familiarity with tribal cultures might be likely to find an Establishment Clause violation.⁴⁰² To avoid unnecessary constraints that may flow from overly restrictive judicial constructions of the "purpose" prong, courts should analyze governmental decisions that remove religious burdens under an alternative accommodation framework. Accommodations tailored to alleviate obstacles to religions that experience government-imposed burdens promote both religious liberty and governmental neutrality toward religion.

The Free Exercise Clause sometimes compels accommodations that remove burdens on religion, and the Establishment Clause allows reasonable accommodations, even those that are not mandated. The Constitution has never required governmental action to be totally unrelated to religion—"that would amount to a requirement 'that the government show a callous indifference to religious groups.'"⁴⁰³ The First Amendment it-

402. See, e.g., *Badoni v. Higginson*, 638 F.2d 172, 179 (10th Cir. 1980) (speculating that restrictions on visitor use at Rainbow Bridge at the request of Navajo members would establish religion); *Bear Lodge Multiple Use Assoc. v. Babbitt*, No. 96-CV-063-D, slip op. (D. Wyo. June 8, 1996) (issuing preliminary injunction order against commercial climbing closure).

403. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987) (citing *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)). In *Gillette v. United States*, the Court noted that "[n]eutrality' in matters of religion is not inconsistent with 'benevolence' by way of exemptions from onerous duties . . . so long as an exemption is tailored broadly enough that it reflects valid secular purposes." 401 U.S. 437, 454 (1971).

self explicitly singles out religion from other individual and institutional concerns. In order to give weight to both clauses, it is necessary in some cases to treat religion differently than secular entities and activities.⁴⁰⁴ In other words, governments "may (and sometimes must) accommodate religious practices . . . without violating the Establishment Clause."⁴⁰⁵

The fact that accommodations are focused on, and advance, religious interests does not require their invalidation. The Supreme Court has upheld numerous governmental programs that provide significant aid to religious interests in the name of removing burdens on those interests. *Corporation of Presiding Bishop v. Amos* is a leading example, where an exemption for religious organizations from Title VII's prohibition against employment discrimination was upheld as a reasonable accommodation of religion.⁴⁰⁶ The Court found the exemption permissible "to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."⁴⁰⁷ For similar reasons, conscientious objectors may be exempted from the draft even though, by implication, those without such objections, many of which are grounded on religious beliefs, would be more likely to be conscripted and perhaps even killed in military conflict.⁴⁰⁸ Exemp-

404. See Michael W. McConnell, *The Problem of Singling out Religion*, 50 DEPAUL L. REV. 1, 11 (2000) ("The only constitutional regime that would not 'single out' religion would be one that deconstitutionalized . . . religion . . .").

405. *Amos*, 483 U.S. at 334 (quoting *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 144-45 (1987)); see also *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (judicial exemption of Amish children from compulsory attendance at high school); *Walz v. Tax Comm'n.*, 397 U.S. 664 (1970) (tax exemption for churches).

406. See *Amos*, 483 U.S. at 335. Although Title VII initially exempted only religious activities of religious organizations from its anti-discrimination requirements, the 1972 amendment at issue in *Amos* extended the exemption to all activities of religious organizations. See *id.* at 332 n.9.

407. *Id.* at 335. See *Zorach*, 343 U.S. at 313-14 (upholding school release time program, and stating, "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.").

408. See *Gillette v. United States*, 401 U.S. 437, 454 (1971); see also *Selective Draft Law Cases*, 245 U.S. 366, 389-90 (1918) (upholding exemptions for clergy and theology students, and stating "we pass without anything but statement the proposition that [the exemptions are] an establishment of a religion . . . because we think its unsoundness is too apparent to require us to do more"). The exemption at issue in *Gillette* provided that "Nothing contained in this title . . . shall be construed to require any person to be subject to combat training and ser-

tions from military dress codes for religious head coverings are acceptable, as were exemptions from general criminal laws for the sacramental use of wine during Prohibition.⁴⁰⁹ Provisions for military chaplains have also been allowed, at least when soldiers are stationed where services of their own denominations are not available.⁴¹⁰

Professor Ira Lupu cautions that any accommodation other than one necessary to satisfy the Free Exercise Clause runs the risk of impoverishing the Establishment Clause by ignoring its underlying purpose of equality among religions and between religion and non-religion.⁴¹¹ Lupu poses a legitimate concern. The problem is, current Supreme Court jurisprudence very nearly renders the Free Exercise Clause itself devoid of meaning, at least with respect to seemingly neutral governmental decisions that impose far heavier burdens on groups with non-mainstream religious beliefs. The Court itself has on numerous occasions recognized that activities that are not compelled under *Lyng* and *Smith* are allowable under the Establishment Clause without *per se* endorsing or establishing a religion.⁴¹²

vice in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." 401 U.S. at 441.

409. *Bd. of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 726 (1994) (Kennedy, J., concurring) (discussing, with approval, DEPT. OF AIR FORCE, REG. 35-10, ¶ 2-28(b)(2) (Apr. 1989) ("Religious head coverings may be worn underneath military headgear if they do not interfere with the proper wearing, functioning, or appearance of the prescribed headgear. . . ."); National Prohibition Act, § 3, 41 Stat. 308 ("Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed"), *repealed by* Liquor Law Repeal and Enforcement Act, § 1, 49 Stat. 872.

410. *Katcoff v. Marsh*, 755 F.2d 223, 234 (2d Cir. 1985) (upholding provision for military chaplains where none were otherwise available to enlistees, and expressing belief that failure to provide a chaplaincy "would deprive the soldier of his right under the Establishment Clause not to have religion inhibited and of his right under the Free Exercise Clause to practice his freely chosen religion"); *see* *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 296-98 (1963) (Brennan, J., concurring) (noting that military and prison chaplains may be acceptable); *cf.* *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (upholding provision for legislative chaplain as grounded in history and "part of the fabric of our society").

411. Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 580-83 (1991); Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 747-51 (1992).

412. *McGowen v. Maryland*, 366 U.S. 420, 444-45 (1961); *Gillette v. United States*, 401 U.S. 437, 454 (1971); *see also* *Texas Monthly v. Bullock*, 489 U.S. 1, 18 n.8 (1989) ("[W]e in no way suggest that *all* benefits conferred exclusively upon

Governmental entities should not be restricted to accommodating only those free exercise rights that are legally enforceable: "it is hardly impermissible for Congress to attempt to accommodate free exercise *values*, in line with 'our happy tradition' of 'avoiding unnecessary clashes with the dictates of conscience.'"⁴¹³

It is especially critical that federal land managers preserve traditional cultural properties from degradation and eradicate barriers to American Indian access and use of the sites, in recognition of their historic, political, and legal ties to the lands in question, and the site-specific nature of their religious practices. Accommodations that protect cultural resources or allow access to them are a suitable response to burdens imposed by federal ownership of sites that had long been utilized by American Indians as aboriginal lands. These accommodations also respond to the government's intentional suppression of tribal religions and the more ubiquitous and equally detrimental historic circumstances of colonization. In some instances, Congress has explicitly adopted special provisions to alleviate burdens to Indian interests in traditional cultural properties located on federal lands.⁴¹⁴ In others, the land management agency has protected cultural and religious values through its land management plans.⁴¹⁵ Even if other visitors may at times be inhibited from using particular areas or resources, accommodations for tribal uses and protections for cultural resources are reasonable means of allocating limited resources in the face of conflicting demands. The protection of cultural resource values is an essential element of American Indian culture and

religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause."); *Employment Div., Dept. of Human Res. v. Smith*, 494 U.S. 872, 890 (1990) (implying that discretionary accommodations are permissible by remarking that "to say that a nondiscriminatory religious-practice exemption is permitted . . . is not to say that it is constitutionally required").

413. *Gillette*, 401 U.S. at 453 (quoting *United States v. Macintosh*, 283 U.S. 605, 634 (1931) (Hughes, C.J., dissenting); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 294-99 (1963) (Brennan, J., concurring) (emphasis added)).

414. See *supra* note 195 (listing statutes).

415. *Bear Lodge Multiple Use Ass'n v. Babbitt*, 2 F. Supp. 2d 1448, 1449-50 (D. Wyo. 1998) (citing *Devils Tower National Monument Climbing Management Plan*); *Ancient and New Cultures Clash in Chaco Canyon*, SEATTLE TIMES, Jan. 12, 1997, at K4 (reporting that officials closed the "great kiva" at Chaco Culture National Historic Park, a sacred site to Pueblo and Navajo people, to prevent desecration by tourists).

sovereignty and should become an essential element of federal public lands policy.

Although the Court has cautioned that, “[a]t some point, [permissible, as opposed to required] accommodation may devolve into ‘an unlawful fostering of religion,’” it has not defined that point with any precision.⁴¹⁶ The key to a lawful accommodation appears to be the lifting of a burden, and it is tempting to suggest that this, in and of itself, could serve as the lynchpin of accommodation analysis, in keeping with the Court’s trend away from multi-factor tests in favor of an approach that considers the overall effect of the program in question. Yet as simple as such an inquiry might seem, the line between burden removal and benefit conferral is likely too fine, in many cases, to draw a meaningful distinction between the two.⁴¹⁷ Without more detailed guidance, governmental entities will be reluctant to accommodate any activities that have religious connotations, and courts will be left to make *ad hoc*, even unprincipled, determinations.

4. A Template for Accommodation of Cultural Interests on Public Lands

If a governmental action appears to lift a burden on religion by singling out religious interests for special preferences or exemptions, certain factors can serve as guideposts for determining whether that action is a permissible accommodation. First, the exemption or preference must be made available to all similarly situated religious and secular recipients in need of similar treatment. If so, the exemption will likely overcome constitutional challenges so long as it meets two additional cri-

416. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987) (quoting *Hobbie v. Florida Unemployment Appeals Comm’n*, 480 U.S. 136, 145 (1987)); *County of Allegheny v. ACLU*, 492 U.S. 573, 601 (1989) (finding the Establishment Clause was violated by the display of a crèche, rejecting arguments that the crèche could be justified as an “accommodation” of religion: “Government efforts to accommodate religion are permissible when they remove burdens on the free exercise of religion. The display of a crèche in a courthouse does not remove any burden on the free exercise of Christianity.”). *Id.* at 601 n.51 (citing *Amos*, 483 U.S. at 348 (O’Connor, J., concurring in judgment) (citation omitted)).

417. The difficulty of such line-drawing exercises has been noted in other contexts. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1024–26 & n.11–12 (1992) (questioning the efficacy of a takings analysis that turns on whether government actions prevent public harms or confer public benefits).

teria—it does not place an undue burden on non-beneficiaries, and it does not excessively entangle the government with religious affairs. The first two factors reflect the need to ensure neutrality and even-handedness in religious matters.⁴¹⁸ They are derived from the general principles of *Amos*,⁴¹⁹ and more specifically from *Texas Monthly, Inc. v. Bullock*, where the Court invalidated a sales tax exemption for religious publications because there was no “concrete need” to accommodate the religious activity in question and no showing of a legitimate purpose for alleviating the tax burden on religions.⁴²⁰ The third criterion helps define the point when, in attempting to craft an appropriate response to religious burdens, government sensitivity becomes government endorsement, as feared in *Lemon* and *Lynch*.⁴²¹ Rather than striking any governmental action that either has a religious purpose, as a strict application of *Lemon* might entail, or that seems to have gone “too far” in endorsing a religion, these factors provide guiding principles that are faithful to the purposes of both religion clauses, while addressing equal protection concerns under the Fifth and Fourteenth Amendments.

The first factor entails the most extensive analysis where accommodations provide special treatment to select groups.

418. See *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (characterizing neutrality as a “prominent” concern in school aid cases like *Agostini v. Felton*, 521 U.S. 233 (1997)); *Rosenberger v. Univ. of Virginia*, 515 U.S. 819, 846 (1995) (O’Connor, J., concurring) (“Neutrality, in both form and effect, is one hallmark of the Establishment Clause.”). But see *Mitchell*, 530 U.S. at 868, 880–87 (Souter, J., dissenting) (stating that neutrality should not be the central factor in resolving Establishment Clause questions, but instead merely one indicia of a permissible purpose and effect).

419. 483 U.S. at 334; see also *Hobbie*, 480 U.S. at 145–146 & n.10 (1987) (concluding that the provision of generally available unemployment benefits to religious observers who must leave their employment “due to an irreconcilable conflict between the demands of work and conscience neutrally accommodates religious beliefs and practices, without endorsement”); *Sherbert v. Verner*, 374 U.S. 398, 409 (1963) (“[T]he extension of unemployment benefits to Sabbatarians in common with Sunday worshipers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent th[e] involvement of religious with secular institutions . . .”).

420. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 11–15, 18 (1989) (“[T]he state has adduced no evidence that the payment of a sales tax . . . [would] inhibit religious activity.”); see also *McConnell*, *supra* note 404, at 698–708 (discussing *Texas Monthly*). Cf. *County of Allegheny v. ACLU*, 492 U.S. 573, 601 (1989) (rejecting argument that the display of a crèche was needed to remove burdens on the free exercise of Christianity).

421. *Lynch v. Donnelly*, 465 U.S. 668, 679–81 (1984); *Lemon v. Kurtzman*, 403 U.S. 602, 620–24 (1971).

Equal protection requires that similarly situated parties be treated in similar fashion, and forbids decisions based on “race, religion, or other arbitrary classification.”⁴²² It is nothing new to envelope equal protection considerations within the rubric of Establishment Clause analysis. The Supreme Court frequently raises themes of neutrality and evenhandedness in Establishment Clause cases, and has pointed out that “an important index of secular effect” is whether the governmental benefits are available to “a broad spectrum of groups.”⁴²³ Given the “domination of our politics by citizens raised in the mainstream religions,”⁴²⁴ accommodations for non-mainstream religions may be necessary to level the playing field and bring about some measure of equality. Exemptions from generally applicable laws for such religions will often be acceptable by virtue of the fact that “neutral” laws reflect the values of the dominant reli-

422. *United States v. Armstrong*, 517 U.S. 456, 464 (1996). Although the Equal Protection Clause is found in the Fourteenth Amendment, applicable only to the States, the Due Process Clause of the Fifth Amendment has been construed to impose equal protection requirements on the federal government. See Akhil Reed Amar, *Constitutional Rights in a Federal System: Rethinking Incorporation and Reverse Incorporation in Patterson and Gitlow*, in *BENCHMARKS: GREAT CONSTITUTIONAL CONTROVERSIES IN THE SUPREME COURT* 71, 79–86 (Terry Eastland ed., 1995); Steven G. Calabresi, *A Madisonian Interpretation of the Equal Protection Doctrine*, 91 *YALE L.J.* 1403, 1426–29 (1982); Kenneth L. Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 *N.C. L. REV.* 541, 546–52 (1977). This approach is not universally accepted among constitutional scholars. See LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* 115–16 (1991); Frickey, *supra* note 76, at 1759–63.

423. *Widmar v. Vincent*, 454 U.S. 263, 274 (1981). In this regard, the Court has found two factors “especially relevant”: (1) the benefit should not “confer any imprimatur of state approval on religious sects or practices”; and (2) it must be “available to a broad class of nonreligious as well as religious speakers.” *Id.* See *Larson v. Valente*, 456 U.S. 228 (1982) (using equal protection analysis in invalidating exemption for religious groups from requirement that charitable organizations register and report on fundraising activities); see also *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (requiring equal access for religious display); *Rosenberger*, 515 U.S. at 839; *Lamb's Chapel v. Ctr. Moriches Union Sch. Dist.*, 508 U.S. 384, 393 (1993) (requiring equal access to school facilities when church wished to show religious oriented films on family values). In *Kiryas Joel*, 512 U.S. at 696, the Court agreed that “proper respect for both the Free Exercise and the Establishment Clause compels the State to pursue a course of ‘neutrality’ toward religion. It should favor neither one religion over others nor religious adherents collectively over nonadherents.” Accordingly, courts find entanglement where a religious community receives special governmental authority rather than being treated “as one of many communities eligible for equal treatment under a general law.” *Id.* at 696, 703.

424. CARTER, *supra* note 297, at 126. See Kathleen Sullivan, *Religion and Liberal Democracy*, 59 *U. CHI. L. REV.* 195, 216 (1992).

gious traditions.⁴²⁵ If the political branches of the government refuse to accommodate the beliefs and practices of minority religions, the political processes, where majority beliefs and practices are most likely to be acknowledged and even prioritized, will place less familiar religions at a relative disadvantage.⁴²⁶ Indeed, "[w]ithout exemptions, some religious groups will likely be crushed by the weight of majoritarian law and culture."⁴²⁷

Where groups are not similarly situated, there is no reason to apply strict scrutiny. "The proper inquiry is whether Congress has chosen a rational classification to further a legitimate end."⁴²⁸ In other words, accommodations for groups with

425. See CARTER, *supra* note 297, at 125, 128–29; see also McConnell, *supra* note 404, at 721 ("the peculiar circumstances of minority religions and the danger of religious majoritarianism make it necessary to buttress the political checks with constitutional protections when the objection is based on adherence to religion").

426. *Employment Div., Dept. of Human Res. v. Smith*, 494 U.S. 872, 890 (1990); ("[L]eaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that [is an] unavoidable consequence of democratic government"); CARTER, *supra* note 297, at 129 (responding to *Smith* by explaining that the Free Exercise Clause was crafted precisely for the purpose of countering this "unavoidable consequence"); Sullivan, *supra* note 424, at 216 ("[N]ot a single religious exemption claim has ever reached the Supreme Court from a mainstream Christian religious practitioner. Mainstream Christianity does not need judicial help."). But see Ira Lupu, *Uncovering the Village of Kiryas Joel*, 96 COLUM. L. REV. 104, 114–19 (1996) (pointing out the potential pitfalls of preferences for "minority" religions, and noting that Hasidic Jews, for example, have a fair amount of political clout in New York).

427. CARTER, *supra* note 297, at 129 (citing Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671, 690 (1992)). The effects on minority religions go beyond inhibiting the free exercise of religion, serious as that is. "[M]ajoritarian dominance could radicalize some believers into destabilizing, antisocial activity, including violence." *Id.* Whether or not the activities in question are truly violent, the representatives of the majority tend to believe they are, at least in the context of Indian relations. As a result, in some instances, Indian religious practitioners have been quite literally, physically crushed. For example, the rise in popularity of the Ghost Dance during the period of dislocation and hopelessness following the Battle of the Little Bighorn was viewed by the United States as subversive and threatening; the suppression of that movement resulted in the massacre of hundreds of Indian people at Wounded Knee. See Dussias, *supra* note 92, at 796–98.

428. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338–39 (1987); see Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 380–81 (1949) (concluding the Establishment Clause could be read as a type of Equal Protection Clause); see also Michael J. Mannheimer, *Equal Protection Principles and the Establishment Clause: Equal Participation in the Community as the Central Link*, 69 TEMP. L. REV. 95, 118–19 (1996); Jonathan E. Nuechterlein, *The Free Exercise*

unique attributes are acceptable so long as they are tailored to reflect the relevant differences. The Supreme Court has indicated its approval of a form of affirmative religious action to alleviate special burdens on conscientious objectors who wish to avoid the draft and on military members who wish to wear religious headgear.⁴²⁹ Such accommodations satisfy equal protection and are consistent with both the Establishment and Free Exercise Clauses, even if not actually compelled under *Smith* and *Lyng*.

American Indian tribes, with their unique political, historic, and cultural attributes, are not situated similarly to other groups. Under *Morton v. Mancari*, federal preferences for tribal members are not discriminatory because they are based on the special governmental relationship with Indian tribes.⁴³⁰ In *Mancari*, the Court upheld a Bureau of Indian Affairs (BIA) employment policy that benefited "qualified" Indians, concluding that it was "not even a 'racial' preference . . . [but a] criterion reasonably designed to further the cause of Indian self-government . . . directed to participation by the governed in the governing agency."⁴³¹ As a result, the Court held that the policy satisfied equal protection concerns by reasonably effectuating legitimate political goals.⁴³²

Mancari provides a reasoned approach to equal protection issues involving tribal accommodations, but the case is not without its flaws. Although the Court described the employ-

Boundaries of Permissible Accommodation Under the Establishment Clause, 99 YALE L.J. 1127, 1129-34 (1990); Paulsen, *supra* note 297, at 324-25.

429. See *Gillette v. United States*, 401 U.S. 437 (1971) (holding that exemptions from military conscription for persons opposed to war does not violate the Establishment Clause or result in de facto discrimination among religions); *Bd. of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 726 (1994) (Kennedy, J., concurring) (discussing, with approval, DEPT. OF AIR FORCE, REG. 35-10, allowing religious head coverings).

430. 417 U.S. 535, 551 (1974); see *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500 (1979) ("It is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive.") (quoting *Mancari*, 417 U.S. at 551); see also *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 304 n.42 (1978) (explaining that the strict scrutiny test applicable to race-based admission preferences does not apply to American Indian educational programs, which are "not racial at all").

431. *Id.* at 553-54. The Court noted that the preference "is granted to Indians not as a discrete racial group, but, rather, as member of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion. . . . the legal status of the BIA is truly sui generis." *Id.* at 554.

432. See *id.* at 554-55.

ment preference as applicable "only to members of 'federally recognized' tribes,"⁴³³ the BIA's policy also required individuals to have "one-fourth or more degree Indian blood."⁴³⁴ Blood quantum requirements are inexorably race-based, categorizing beneficiaries by their innate characteristics.⁴³⁵ According to *Adarand Constructors, Inc. v. Pena*,⁴³⁶ all racial classifications, including affirmative action programs, must satisfy strict scrutiny. Decisions based on race may pass *Adarand* muster, but only if they serve compelling interests by remediating disadvantages imposed by past governmental practices.⁴³⁷

Aguably, even decisions based solely on tribal membership could be vulnerable under *Adarand*. The federal recognition process turns in part on race-related criteria, and many federally recognized tribes include blood quantum in their membership qualifications.⁴³⁸ This practice is, to a large extent, a hold-over from the 1930s, when federal officials urged that racial criteria be included in tribal constitutions as a means of limiting expenditures on Indian communities.⁴³⁹ Of course, just be-

433. *Mancari*, 417 U.S. at 553 n.24.

434. *Id.* at 553-54 and n.24. "To be eligible for preference in appointment, promotion, and training, an individual must be one-fourth or more degree Indian blood and be a member of a Federally recognized tribe." *Id.* at 553 n.24 (citing 44 BIA Manual 335, 3.1). The statute that allows the BIA to establish such preferences goes even further, including among qualified Indians "persons of one-half or more Indian blood", even if they are not members of federally recognized tribes. See 25 U.S.C. § 479 (1994).

435. Frickey, *supra* note 76, at 1762 (discussing *Mancari*, 417 U.S. 535). Strict scrutiny applies when distinctions are based on immutable characteristics of discrete, insular minorities. *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

436. 515 U.S. 200 (1995).

437. *Adarand*, 515 U.S. at 554. Racial preferences must also be narrowly tailored to achieve the governmental interest. *Id.* In *Adarand*, the Court concluded that federal programs designed to alleviate the effects of past discrimination by providing contracts to minority businesses failed this exacting level of scrutiny. *Id.* According to the Court, however, strict scrutiny is not necessarily "fatal in fact." *Id.*

438. See 25 C.F.R. § 83.7(e) (2001) (requiring, among other things, a tribal membership roll containing evidence that all members descended from a historic Indian tribe); see also *Montoya v. United States*, 180 U.S. 261, 266 (1901) (defining tribes seeking federal recognition as "bod[ies] of Indians of the same or similar race, united in community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory").

439. See Barsh, *supra* note 91, at 139; see also Russel L. Barsh, *The Challenge of Indigenous Self-Determination*, 26 U. MICH. J.L. REFORM 277, 301 (2000) (criticizing the recognition process as perpetuating imperialistic notions of tribalism).

cause a person meets blood quantum requirements does not compel them to enroll in a tribe; being a tribal member is not an immutable characteristic of one's race. At base, tribal status and the United States' relationship with federally recognized tribes are predominately political rather than racial, and strict scrutiny should not apply.

Although racially sensitive affirmative action programs have fallen out of vogue,⁴⁴⁰ the rational basis test of *Mancari* has continuing force for federal actions that affect the unique interests of federally recognized tribes, such as self-governance and access to tribal lands and resources.⁴⁴¹ Where the activity, resource, or area in question is the subject of a federal Indian treaty, Supreme Court precedent plainly provides that governmental actions to effectuate treaty rights do not violate equal protection because such actions are rationally—even compellingly—related to the government's legal and political commitments.⁴⁴² As for those sites or resources that are not addressed in treaties, accommodations that protect cultural properties or facilitate traditional uses by members of federally recognized tribes should be upheld as rational, even if there is no direct showing that the measure is necessary to alleviate

440. Compare *Adarand*, 515 U.S. at 554, and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (finding that a city's requirement that prime contractors subcontract a percentage of their construction contracts to minority businesses failed strict scrutiny), with *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (upholding requirement that ten percent of federal funds for public works projects be used to procure services from minority-owned businesses as a properly tailored remedy to cure the effects of prior discrimination), and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (Powell, J., concurring in the judgment in part and dissenting in part) (indicating that a public entity may be presumed to have "a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination"). Interestingly, the very same Justices who take a restrictive stance on racial affirmative action, Rehnquist, Scalia and Thomas, support religious accommodation. See Lupu, *supra* note 297, at 113 (noting dichotomy).

441. *Williams v. Babbitt*, 115 F.3d 657, 664 (9th Cir. 1997) (explaining that, under *Morton v. Mancari*, 417 U.S. 535 (1974), special protections for Indian land, political institutions, and culture are constitutionally acceptable but questioning whether preferences for Native Alaskan livestock herding, a non-traditional activity, would satisfy equal protection).

442. *Washington v. Wash. Fishing Vessel Ass'n*, 443 U.S. 658, 673–74 (1979) (holding that treaty language securing a "right of taking fish . . . in common with all citizens of the Territory" secured the right to harvest an equitable share, and expressly rejecting argument that treaties that provide fishing rights to Indians that were not also available to non-Indians violate equal protection principles).

burdens imposed by particular governmental actions at that site.⁴⁴³

Several circuit courts, following *Mancari*, have approved accommodations for American Indian tribes. In *Rupert v. United States Fish & Wildlife Service*, the First Circuit upheld a law that allowed members of federally recognized tribes, but not other persons, to use eagle feathers for religious purposes, finding that this "denominational preference" had a rational relationship to the legitimate government interest in tribal culture.⁴⁴⁴ In *Peyote Way Church of God v. Thornburgh*, the Fifth Circuit extended the *Mancari* rationale even further, approving an exemption for Native American Church members from criminal liability for the possession of peyote, noting that the "government cannot at once fulfill its constitutional role as protector of tribal Native Americans and apply conventional separatist understandings of the establishment clause to that same relationship."⁴⁴⁵

On the other hand, if the accommodation is for non-federally recognized tribes or other groups asserting interests in the public lands, it will likely have to satisfy strict scrutiny under *Adarand*.⁴⁴⁶ Government actions that promote tradi-

443. *Bonnichsen v. United States Dept. of the Army*, 969 F. Supp. 628 (D. Or. 1997). Determining whether sites or resources are of "traditional" interest to a tribe may be difficult, given the sensitive and confidential nature of information about ceremonial practices and beliefs. Agencies should be guided by federal provisions for identifying traditional cultural properties and cultural items through ethnographic studies, geographic and historic data, treaties, and tribal oral histories. See *supra* Parts II.A. and B. (discussing the NHPA and NAGPRA provisions).

444. 957 F.2d 32, 35-36 (1st Cir. 1992).

445. *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210, 1217 (5th Cir. 1991). Although the exemption did not explicitly require it, the court assumed that Native American Church membership was limited to members of federally recognized tribes, and cited both *Morton v. Mancari*, 417 U.S. 535 (1974), and *Larson v. Valente*, 456 U.S. 228 (1981), to justify the application of rational basis review. *Id.* at 1214-16; cf. *Olsen v. Drug Enforcement Administration*, 878 F.2d 1457 (D.C. Cir. 1989), (rejecting Ethiopian Zion priest's establishment and equal protection challenges to peyote exemption, concluding that priest's petition for marijuana exemption was lawfully denied given distinctions between the two substances). But see *United States v. Boyll*, 774 F. Supp. 1333, 1340 (D.N.M. 1991) (invoking free exercise and equal protection to dismiss indictment for importing peyote against non-Indian member of Native American Church because it offends "the very heart of the First Amendment" to exclude persons from a religious sect due to their race); *Kennedy v. Bureau of Narcotics*, 459 F.2d 415 (9th Cir. 1972) (finding that the peyote exemption violated due process, as it was unrelated to the regulation's purpose of protecting public health).

446. 515 U.S. 200 (1994). The distinction between federally and non-federally recognized tribes and tribes can result in exclusionary and sometimes

tional, historic connections to an area advance legitimate interests in the site's historic and cultural attributes. To the extent that the government acts to alleviate government-imposed obstacles to the practices at issue, its interests will generally be compelling as well as secular, and strict scrutiny should be satisfied so long as the accommodation is narrowly tailored to redress the particular burden or obstacle.

Once the first factor of the accommodation analysis is resolved, the remaining considerations—requiring no undue burden on others and no excessive entanglement—come into play. The second criterion calls for a balancing test to determine whether an accommodation results in an exorbitant burden on non-beneficiaries. The level of burden that would be considered “undue” has not been specified by the courts with any precision, but it appears that the burden must not be grossly disproportionate to the benefit to religious interests.⁴⁴⁷ In other words, if non-beneficiaries experience substantial hardships while the benefit to religious interests is minimal, the accommodation may not stand.⁴⁴⁸ In *Estate of Caldor*, for example, the Court invalidated an “absolute and unqualified” requirement that employers adjust the work schedule of employees who wished to observe the Sabbath because there were no exceptions for employers who would incur “substantial economic burdens.”⁴⁴⁹ There, the significance of the burden on non-

irrational line-drawing. For example, in the Establishment Clause context, the children of a member who practices traditional ceremonies at a sacred site may not be accommodated to as great an extent if they themselves are not members, even if their parent has a strong desire to pass spiritual knowledge along to them. Yet a proposal to extend access to sacred sites for all American Indians regardless of tribal affiliation was defeated in 1994, largely due to equal protection concerns. See Winslow, *supra* note 94, at 1339 (discussing the demise of the Native American Cultural Protection and Free Exercise of Religion Act, S. 2269, 103rd Cong., (1994)). These concerns were perhaps overrated, in that, in cases like the example above, a federal land manager should be able to accommodate the children's practices even though strict scrutiny applies, given their historic and cultural associations with the site.

447. *Texas Monthly v. Bullock*, 489 U.S. 1, 15, 18 n.8 (questioning accommodations that “markedly” or “substantially” affect non-beneficiaries).

448. *Id.*; *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985); see also McConnell, *supra* note 404, at 703 (concluding that accommodations that impose costs on non-beneficiaries “disproportionate to the alleviation of a burden on religious practice could be a form of favoritism for religion,” and noting that *Caldor* “suggests an upper bound on the accommodation principle”).

449. *Caldor*, 472 U.S. at 710. The Court observed that other employees could be seriously disadvantaged as well: “[e]mployees who have earned the privi-

beneficiaries and the government's failure to consider whether other alternatives might alleviate hardships without undermining the program's objectives caused the accommodation to fail Establishment Clause analysis.⁴⁵⁰

Conversely, if the accommodation removes a significant government-imposed deterrent from the free exercise of religion, it will likely be upheld, even if non-beneficiaries experience hardship.⁴⁵¹ The Title VII exemption at issue in *Amos* "prevented potentially serious encroachments on protected religious freedoms," and was therefore legitimate even though it would have an adverse effect on persons holding or seeking employment.⁴⁵² Allowing access to sacred sites and cultural resources on public lands and protecting the resources from destruction provide substantial benefits to tribes as an important step toward removing government-imposed deterrents on tribal religious practices. Even if non-beneficiaries are burdened, in most cases, their burdens are not likely to be undue or disproportionate.

Finally, as in traditional *Lemon/Agostini* analysis, federal actions that remove impediments to the use and preservation of sacred sites must avoid excessive entanglement with religion to ensure that the government does not end up controlling the religious activity and that the religious group or practitioner

lege through seniority to have weekend days off may be forced to surrender this privilege to the Sabbath observer. . . ." *Id.* at 710 n.9.

450. *Id.* at 710 (noting that the statute in question provided Sabbatarians with a day off regardless of whether the employer had made other reasonable proposals to accommodate their needs). In *Kathoff v. March*, 755 F.2d 223, 235 (2d Cir. 1985), the court stated that "the test of permissibility [for providing military chaplains] is whether, after considering practical alternatives, the chaplaincy program is relevant to and reasonably necessary for the Army's conduct of our national defense." It rejected plaintiffs' arguments that a civilian program could provide the same services in all instances, but remanded for a determination whether military chaplains are "reasonably necessary" in cities like Washington, D.C., where private services may be readily available. *Id.* at 236.

451. See *Texas Monthly*, 489 U.S. at 15 ("when government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens non-beneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion, . . . it 'provide[s] unjustifiable awards of assistance to religious organizations' and cannot but 'convey' a message of endorsement' to slighted members of the community") (quoting *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring in judgment)) (emphasis added).

452. See *id.* at 19 n.8 (citing *Amos*, 483 U.S. 348 (O'Connor, J., concurring in judgment)).

does not assume governmental powers over non-adherents. Accommodations should simply let religious practices occur uninhibited by government: "A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose."⁴⁵³

In *Badoni v. Higginson*, the Tenth Circuit surmised that, if the Park Service were to exclude non-Indian visitors from Rainbow Bridge National Monument at the behest of Navajo tribal members, or allow religious practitioners to control the use of the area, it could unlawfully entangle the agency with religious affairs.⁴⁵⁴ As *Badoni* was a Free Exercise case, the court's dictum holds scant precedential weight for Establishment Clause challenges. The Supreme Court's subsequent opinion in *Lyng*, which gave its blessing to the "many ameliorative measures" adopted to alleviate adverse effects on sacred sites,⁴⁵⁵ and in *Mancari*,⁴⁵⁶ further dispel the concerns voiced in *Badoni*. Accommodations for tribes should only be found to entangle the government with religion if practitioners are given absolute power to control the use of the public lands or to unilaterally veto lawful activities of the land management agency or other visitors. Short of such "fusion," tribal accommodations will not unduly involve or entangle the government with religion.⁴⁵⁷

453. *Amos*, 483 U.S. at 337 (emphasis added). "It cannot be seriously contended that [the religious exemption from Title VII] impermissibly entangles church and state; the statute effectuates a more complete separation of the two and avoids the kind of intrusive inquiry into religious belief that the District Court engaged in this case." *Id.* at 339.

454. *Badoni v. Higginson*, 638 F.2d 172, 179 (10th Cir. 1980). Tribal members alleged that the construction of Glen Canyon dam and impoundment of Lake Powell had inundated many of their sacred shrines and diminished the integrity of Rainbow Bridge, a sacred site, by allowing it to be accessed by greater numbers of tourists. *Id.*

455. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 455 (1987) (noting that the Forest Service had chosen the route furthest from spiritual sites, and taken additional steps to minimize visible and audible intrusions; "[n]othing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen").

456. *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974).

457. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126-27 (1982); *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 695-96 (1994).

5. Resolving Contemporary Conflicts over Accommodation

The National Park Service's provisions for cultural interests at Devils Tower, Rainbow Bridge, and Wupatki National Monuments accommodate the unique interests of federally recognized tribes without imposing undue burdens or entangling government with religion. In the Devils Tower case, the district court applied an amalgamation of the *Lemon/Agostini* endorsement test and accommodation analysis to the amended Climbing Management Plan to assure itself that the Establishment Clause was satisfied.⁴⁵⁸ It found that the voluntary climbing provision of the amended Plan had a secular purpose of accommodating, not promoting, Indian religious practices by removing barriers imposed by government ownership of the site. It also concluded that, as amended, the Plan did not endorse or advance religion, nor did it excessively entangle the NPS with tribal worship.⁴⁵⁹ However, it cautioned, "If the NPS is, in effect, depriving individuals of their legitimate use of the monument in order to enforce the tribes' rights to worship, it has stepped beyond permissible accommodation and into the realm of promoting religion."⁴⁶⁰

The court reached the correct result, but by requiring the Plan to meet both the *Lemon/Agostini* test and accommodation analysis, and by prohibiting *any* burden on other users of the public lands, it imposed an unnecessarily rigorous form of scrutiny.⁴⁶¹ If the Tenth Circuit had reached the merits of the Climbing Plan, it could have clarified the proper role of accommodation analysis—as an alternative to *Lemon/Agostini*, rather than an additional hurdle. The voluntary climbing provision easily qualifies as a lawful accommodation, as it allevi-

458. *Bear Lodge Multiple Use Ass'n v. Babbitt*, 2 F. Supp. 2d 1448, 1454–56 (1998).

459. *Id.* at 1455–56. As for entanglement, the court determined that tribes "are not solely religious organizations, but also represent a common heritage and culture." *Id.* at 1456. In addition, it found that, by simply providing an atmosphere more conducive to worship, the government's involvement in religion was limited to a mere custodial function. *Id.*

460. *Id.* at 1455. Relying on *Badoni v. Higginson*, 638 F.2d 172, 179 (1980), the court stated that the "[e]xercise of First Amendment freedoms may not be asserted to deprive the public of its normal use of an area." *Id.*

461. The court remarked, "[t]he principle that the government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Id.* at 1455.

ates burdens on site-specific tribal practices imposed by governmental control of land that once belonged to the tribes, while imposing no undue burden on non-Indian visitors and no entanglement.

The district court's unduly restrictive stance resulted in a preliminary injunction against the mandatory closure provision adopted in the original Plan.⁴⁶² A mandatory closure arguably extends farther than is necessary to remediate governmental burdens on Indian religions, as climbers on the butte do not physically prevent ceremonies from taking place at the base of the butte. Actual obstruction of cultural practices, however, is not an absolute necessity to support an accommodation.⁴⁶³ Where the government's ownership of the area poses obstacles, both physical and psychological, to American Indian access and use of an area that had once been tribal lands, accommodations are justified. Tribal elders testified about the historic importance of the area, as well as the disturbing aural and visual effects of the use of pitons and bolts on the butte and of climbers yelling to each other, occasionally using vulgar language.⁴⁶⁴ The elders also stated that children visiting Devils Tower had difficulty understanding traditional tribal values that instill respect for the natural setting when climbers were ascending and conquering the Tower.⁴⁶⁵ Educational programs and traditional ceremonies at the Tower and throughout the Black Hills, according to tribal elders, are critical to maintaining both individual and tribal integrity in a dualistic world, helping sustain the people in the face of conflicting pressures imposed by mainstream society.⁴⁶⁶

462. *Bear Lodge Multiple Use Ass'n v. Babbitt*, No. 96-CV-063-D, slip op. (D. Wyo. June 8, 1996) (order granting preliminary injunction).

463. *Texas Monthly v. Bullock*, 489 U.S. 1, 11-15, 18 (1989); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987).

464. Transcript of Preliminary Injunction Hearing, *Bear Lodge Multiple Use Ass'n*, 96-CV-063-D (May 13, 1996); Defendants' Witness List and Summary of Testimony for Preliminary Injunction Hearing at 11, *Bear Lodge Multiple Use Ass'n*, 96-CV-063-D (May 13, 1996) (testimony of Johnson Holy Rock).

465. *In Light of Reverence*, Bullfrog Films (2001) (depicting cultural and educational events, including a 500 mile run to four points in the Black Hills, culminating at Devils Tower, and Indian peoples' views on the discordant effect of visible, audible climbers while attempting to teach traditional customs and values).

466. *Id.* (interviewing Johnson Holy Rock); Statement of Steven C. Emery, Cheyenne River Sioux Indian Tribe, Transcript of Hearing on the Merits at 100, *Bear Lodge Multiple Use Ass'n v. Babbitt*, 2 F. Supp. 2d 1448 (D. Wyo. 1998) (No.

A mandatory climbing closure to alleviate conflicts while tribal activities take place would be a reasonable accommodation, no less so than the accommodation upheld in *Amos*.⁴⁶⁷ Such a closure would not excessively entangle the NPS in religious affairs, but would instead lessen government involvement in the individual worship and ceremonial practices of tribal members. However, a ban that spans an entire month, when traditional practices only occur for a week or two, may be excessive in light of the burden imposed on other park visitors.⁴⁶⁸ Likewise, the closure provisions of the original Plan, which banned commercial but not casual climbing, imposed a relatively heavy burden on commercial guides without providing proportional benefits to tribal interests. Commercial climbers and their clients do not appear to cause any greater impediments to tribal ceremonies than casual, recreational climbers. As such, the commercial/non-commercial distinction in the original Plan may not have been a reasonable accommodation, as more appropriately tailored alternatives are available.

Like the revised Climbing Management Plan, the NPS's resolution of visitor use conflicts at Rainbow Bridge and its proposal for allocating resources at Wupatki National Monuments are appropriate accommodations. The Natural Arch Society's constitutional claims against the Management Plan for Rainbow Bridge are clearly playing off the Tenth Circuit's dicta in *Badoni*,⁴⁶⁹ which also involved Rainbow Bridge. The Management Plan is a reasonable means of protecting the fragile resources at the Monument, while accommodating closely associated cultural interests of federally recognized tribes. Indeed, the NPS could in all likelihood take additional measures to accommodate traditional uses at Rainbow Bridge, if reasonably necessary to mitigate the loss of so many sacred sites due to the flooding of Glen Canyon.⁴⁷⁰ Similarly, the eaglet collection pro-

96-CV-063-D) (discussing efforts to address alcoholism, educational issues and political survival).

467. *Amos*, 483 U.S. at 335 (upholding Title VII exemption for religious entities).

468. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985).

469. See Complaint, *Natural Bridge and Arch Society v. Nat'l Park Service* (No. 2000CV-0191J) (D. Utah filed Mar. 3, 2000). For discussion of *Badoni*, see *supra* notes 454-455 and accompanying text.

470. See *Texas Monthly v. Bullock*, 489 U.S. 1, 15 (1989); *Caldor*, 472 U.S. at 710.

posal at Wupatki National Monument reflects the distinctive connection between the Hopi and the area without disproportionately burdening other visitors or entangling the NPS with religious affairs.⁴⁷¹

The BLM's denial of Glamis's proposed mining plan is also an appropriate accommodation of the California Tribes' cultural, historic, and political interests. It alleviates burdens imposed by government ownership of the site and by the extant impairment of the Tribes' ability to use sacred sites in the area caused by the BLM's approval of nearby mining operations.⁴⁷² Although the decision imposes a hardship on other users of the public lands, particularly Glamis Corporation, as the Advisory Council noted, there are no other available alternatives that would avoid destroying the cultural resources at the site and associated practices.⁴⁷³ The denial of the plan in no way provides tribal religious leaders with governmental powers over other parties. Thus, the decision is an appropriate means—and perhaps the only means—of meeting the requirements of the NHPA, FLPMA, and the CDCA Act, and of accommodating tribal interests while protecting critical resources from the physical, aural, and audible degradation caused by mining.

CONCLUSION

The nation's public lands and natural resources hold tremendous significance to many Americans and to American culture and heritage. Our collective history, literature, and art have promoted a connectivity to the land that is unique among developed nations. This sentiment, as expressed in the law during the course of the country's development and westward expansion, also served as an instrument of imperialism and, ultimately, colonization of the indigenous populations. American

471. See *Rupert v. United States Fish & Wildlife Serv.*, 957 F.2d 32 (1st Cir. 1992).

472. See discussion *supra* Part III.B. (discussing the mining proposal and its effects).

473. See *id.* If the BLM stands by the decision, Glamis may attempt to seek compensation for the loss of its property interests by raising Fifth Amendment takings claims, likely in the Court of Federal Claims rather than district court. See 28 U.S.C. § 1491(a)(1) (1994). See generally Michael Graf, *Application of Takings Law to the Regulation of Unpatented Mining Claims*, 24 *ECOLOGY L.Q.* 57 (1997) (concluding that reasonable limitations on "conditional" rights of perfected, but unpatented, mining claimants do not violate the Fifth Amendment).

Indians' claims to the protection and use of public lands and resources are politically and culturally distinct, and their interests are entitled to special consideration by federal land managers. The use of a particular site on public lands may be critical to a tribe's identity and its very survival as a community and a sovereign political unit, having consequences that simply are not shared with other interested individuals and groups. No other group has experienced overt and extended suppression of their religious and traditional cultural practices by the United States government. No other group has been forcibly removed from their native lands and yet retained rights to off-reservation resources, many of which are situated on what are now public lands. No other group has sustained a sovereign existence within the United States, with a right to establish and maintain its own government and to control its own destiny as a community.

The cultural resource protection statutes, along with the public lands laws, provide ample grounds for protecting culturally important sites and accommodating traditional cultural practices. Although accommodation is generally not compelled by the Free Exercise Clause in the wake of the *Lyng* and *Smith* cases, it may be required when linked with other fundamental constitutional rights, such as free speech, or with Indian treaty provisions. Even where accommodations are not required by law, exemptions or preferences for tribal use of cultural resources generally will not offend either Establishment Clause or equal protection principles. Alleviating the burdens imposed by past governmental practices and removing obstacles for tribes with historic ties to land now owned and managed by federal agencies are particularly apt governmental roles. Accommodations of cultural interests on public lands may advance the religious interests of Indian practitioners, but such actions and policies have much broader, constitutionally acceptable purposes and effects, as evidenced by numerous treaties, federal statutes, and executive policies reflecting the government's historic and political relationship with tribes.

There can be no rigid formula for defining what is reasonable in any given case, but accommodations that are tailored to reflect the historic and cultural affiliation with a site or resource, and are responsive to long-term public needs and any physical impacts to the resource, should withstand constitutional and statutory challenges. Where use of a cultural re-

source interferes with conservation goals, short-term use must give way to long-term considerations, unless specific treaty provisions mandate access in a particular case. In the end, the federal agency must make the hard choices, and cannot allow uses that substantially impair the resources or delegate complete control or veto power to religious entities. Where tribal cultural interests are implicated, tribes must be full consulting partners throughout the decision-making process, and all available means for accommodating cultural uses and protecting the resources must be considered and embraced to the greatest extent possible.

