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I Saw That It Was Holy: The Black Hills and the Concept of Sacred Land

Richard Pemberton Jr.

"I Saw That It Was Holy": The Black Hills and the Concept of Sacred Land

Richard Pemberton, Jr.*

> "Hear me, four quarters of the world—a relative I am! Give me the strength to walk the soft earth, a relative to all that is! . . . With your power only can I face the winds."[1]
>
> Black Elk

> "I never want to leave this country; all my relatives are lying here in the ground, and when I fall to pieces I am going to fall to pieces here."[2]
>
> Shunkaha Napin (Wolf Necklace)

> "The more you think about this, the more meaning you will see in it."[3]
>
> Black Elk

I. The Origins of Difference: Religious and Cultural Assumptions

In 1877, Congress voted to transfer the ownership of the Black Hills from the Lakota and Dakota Indian nations[4] to the United States. No doubt government officials hoped that, in time,

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1. Black Elk Speaks 6 (John Neihardt ed. 1961).

2. Dee Brown, Bury My Heart At Wounded Knee 274 (1970).

3. Black Elk Speaks, *supra* note 1, at 204.

4. Throughout this article, I use several names when referring to its principal subjects. "Sioux" is the recognized name for the Indian tribes living in the Dakotas, but, like so many names Native American tribes bear, it is ethnocentric, inaccurate, and useful only for easy classification. In traditional times, the Sioux formed three major groups: the Santees, the Yanktons, and the Tetons. As an English convention, we now identify the various tribes as part of either the Lakota or Dakota nations. The Oglala tribe, referred to throughout my article, is a Lakota group, and claims the membership of the renowned Holy Man, Black Elk. At various times, I refer to "the Sioux nation," "the Lakota and/or Dakota peoples," "the Oglala," "the Great Plains Indians," and "the Black Hills people."

the Sioux would accept Congress' unilateral decision to seize the Hills as government property. Although over a century has passed since this theft of Indian land, the Lakota and Dakota nations still continue a legal and political struggle to regain the Hills.

The Indians' persistent effort to live and worship in the Hills is an essential expression of their cultural and spiritual identity. The Lakota and Dakota, like other American Indians, derive religious, cultural, and political values from their relationship to sacred tribal land. The Black Hills have deep spiritual meaning for the Lakota and Dakota peoples. They therefore reject the Anglo-European concept of property ownership upon which the United States bases its claim to ownership and control of the Hills. Instead, the Indians argue what they believe are their fundamental rights to regain the land which is central to their religion and culture, raising legal claims based on property rights and religious freedom theories.

To the outside observer, it would seem that the Lakota and Dakota nations already succeeded in their struggle to have their property claims recognized. In *United States v. Sioux Nation of Indians*,[5] the Supreme Court awarded the Indians substantial money damages for the loss of the Black Hills. This victory is apparent, not real. Most tribes comprising the Sioux nation have refused to accept the money. Exchanging land for dollars contradicts the Lakota and Dakota peoples' most fundamental religious and cultural convictions. Worse, the *Sioux Nation* precedent has barred subsequent legal efforts to gain rights to live and worship in the Hills free from the encroachment of white civilization.

Having failed to regain the land itself, the Lakota and Dakota peoples have tried to regain rights to worship in the Hills through the free exercise clause of the first amendment to the United States Constitution. The Indians have argued that lack of meaningful access to the Hills denies them religious freedom. South Dakota state courts and federal courts, like courts throughout the country considering similar Indian religious freedom cases, have denied these claims.

To deny Indians first amendment protection of religious beliefs and practices, these courts have defined religious faith and practices as Anglo-European religious traditions define them. In ways vital to the legal consequences of this ethnocentric perspective, Indian religion is distinct from the dominant culture's religious traditions. American Indians do not separate religion from

5. 448 U.S. 371 (1980). This case is discussed *infra* notes 64-90 and accompanying text.

culture, the sacred from the secular, belief from practice, or spirituality from traditional sacred lands. This inseparability, foreign to Western religion, has been ignored or denied by the courts, resulting in inadequate first amendment protection for American Indians.

Recognizing that existing first amendment precedent inadequately protected Indian religious freedom, Congress passed the American Indian Religious Freedom Act in 1978.[6] Congress intended the Act as a mandate to federal agencies and courts reviewing agency decisions to end the historical repression of Indian religious practices, ensuring Indian worshippers access to religious sites on lands they no longer own.

Rather than interpreting the first amendment in terms of the Act's requirement that Indian religions be respected, however, courts have treated the Act as a mere procedural formality. Courts have ruled that federal agencies deciding whether to develop land sacred to an Indian tribe fully comply with the Act if their official records reflect that the agency "considered" Indian religious interests. By refusing to adopt a more meaningful standard of judicial review, courts abdicate their responsibility to protect Indians' constitutional rights and grant power to rule on issues involving Indian religious freedom to federal agencies without competence or constitutional authority.

Some courts have gone further, justifying their refusal to protect the existence of or access to Indian religious sites on the ground that such protection would constitute government promotion of Indian religion, violating the establishment clause of the first amendment. The 1984 Supreme Court decision in *Lynch v. Donnelly*,[7] however, reinterprets the establishment clause to require the government to act affirmatively to accommodate all religions. Depending on its interpretation, *Lynch* may either weaken the judicial rationale for declining to protect Indian access to religious sites or reinforce courts' assumptions that because Christianity is the dominant American religion, the government should promote Christian traditions and symbols. The latter reading would further impede Indian efforts to achieve constitutional protection of their religions.

Whether through a theory of Indian property rights or one of Indian religious freedom, the government must recognize and protect Indian first amendment rights and the land interests those

6. 42 U.S.C. § 1996 (1982). The Act is discussed *infra* notes 132-41 and accompanying text.

7. 104 S. Ct. 1355 (1984), *reh'g denied*, 104 S. Ct. 2376 (1984).

rights imply. At this point in history, it seems unlikely that the government will return vast tracts of land to the American Indians. If, however, the government continues to deny Indians' rights to protect their cultural/religious interests in land, it will continue its historical suppression of Indian belief and life. For American Indians, the right to protect sacred land is not a matter of preference but of survival. Destroying sacred land means destroying Indian religion, tradition, and identity.[8]

A. Lakota/Dakota Religious Belief: Spirit and Nature Unified

Before his people lost the right to live and worship in the Black Hills, Henry Black Elk had a vision:

> I was still on my bay horse, and once more I felt the riders of the west, the north, the east, the south, behind me in formation, as before, and we were going east. I looked ahead and saw the mountains there with rocks and forests on them, and from the mountains flashed all colors upward to the heavens. Then I was standing on the highest mountain of them all, and round about beneath me was the whole hoop of the world. And while I stood there I saw more than I can tell and I understood more than I saw; for I was seeing in a sacred manner the shapes of all things in the spirit, and the shape of all shapes as they must live together like one being. And I saw that the sacred hoop of my people was one of many hoops that made one circle, wide as daylight and as starlight, 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.[9]

Black Elk sees a cosmos pulsating with energy, yet unified and concentric. He both witnesses and acts in the drama of his vision. Though he sees a world transcendent of space and time, he neither journeys exclusively into the landscape of his psyche nor into a nether world severed from the physical one he knows. Instead, he stands on Harney Peak in Paha Sapa (the Black Hills),[10] a place as real to the senses as to the spirit.

Indeed, the spatial dimensions of Black Elk's vision become its spiritual content. The four winds energize the universe through the struggle of their polarity, and order it because they share an original and common center.[11] Thus, every being on

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8. Although this article focuses on the Lakota and Dakota peoples' effort to regain the Black Hills, its arguments apply to the struggle of all American Indians to protect their sacred lands.

9. Black Elk Speaks, *supra* note 1, at 42-43 (footnote omitted).

10. *Id.* at 43.

11. James Walker, Lakota Myth 47-48, 58-89, 103-04 (1983).

earth circles the life source and has a place on the world's sacred hoop. Black Elk sees his own people as "one of many hoops that make one circle," drawing life and taking shelter under "one mighty flowering tree" in the center. The eternal pervades the temporal; the material world is of sacred character. As Black Elk concludes, "I saw that it was holy."

For Black Elk and his people, the 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.[12] Space, the physical and material dimension, has a sacred aspect. Lakota creation myths begin with the founding of the four directions. The circle and its center, poetically realized in Black Elk's vision, become the pattern of many Lakota rituals. Black Elk says, for example, that the Oglala Sun Dance is held during the full moon (itself a circle) of June and July, and that the rite originated when "[o]ur people were once camped in a good place, in a circle, of course."[13] The celebrants dance around a tree (symbolic of life's source), and move from each of the four directions into the center, back out again, and return to the center, "and in this way . . . ma[k]e a path in the shape of a cross."[14]

Not only space, but all forms in creation have a sacred character. Thus, Black Elk describes the many kinds of life celebrated in the Sun Dance:

> Also the moon lives twenty-eight days, and this is our month; each of these days of the month represents something sacred to us: two of the days represent the Great Spirit; two are for Mother Earth; four are for the four winds; one is for the Spotted Eagle; one is for the sun; and one for the moon; one is for the Morning Star; and four for the four ages; seven are for our seven great rites; one is for the buffalo; one for fire; one for water; one for the rock; and finally one is for the two-legged people.[15]

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12. For Plato, the objects comprising the natural world are imperfect imitations of ideal concepts incapable of physical embodiment. While the physical world represents these ideals, it is fundamentally unreal and a mere shadow of the ideal realm. Such qualities as Beauty and Truth are, therefore, paradigms never fully realized in nature. Plato's teachings influenced early Christian thought, and particularly the writings of Paul. When the Christian Reformation revived the New Testament's Pauline books, the Platonic dichotomy between body and soul, and between the physical and ideal worlds, was again expressed. Plato has influenced Western thought immensely. According to the American transcendentalist Ralph Waldo Emerson, "Plato is philosophy and philosophy is Plato." *See generally* Great Dialogues of Plato (W.H.D. Rouse trans., Eric Warmington & Philips Rouse eds. 1956).

13. Black Elk, The Sacred Pipe 67 (Joseph Epes Brown ed. 1971).

14. *Id.* at 81.

15. *Id.* at 80.

This eclectic symbolism expresses the Oglala's sense of an integrated creation. In the Judeo-Christian tradition, God forms the earth out of nothingness, and stands over it. The Lakota see the Great Spirit and Mother Earth as mutually creative forces. Indeed, one Lakota creation story tells that life began when the sun's warmth and life-giving power impregnated the earth.[16] Earthly life forms (the spotted eagle and the buffalo), natural elements (the winds, fire, water, rock and earth), the heavenly bodies (the moon, the morning star), the Great Spirit, and men and women are all celebrated in the Sun Dance. The Sun Dance also gives time a holy meaning. The moon's twenty-eight day cycle becomes the numerical pattern of the dance's symbolism as the Lakota celebrate Creation's four ages.

B. Lakota/Dakota Religion and the Land

To understand the relationship between the Lakota and Dakota nations and the Black Hills, one must first appreciate these people's relationship to the earth and how this formed their conception of land. Though discussions of nature's spiritual character for Indians have become cliché, few white people have evaluated their own beliefs in response to this differing perspective. The Plains Indians see the earth not only as Mother in the procreative sense, but as the source of all kinship. Thus, an Oglala prayer says: "O You, Grandmother and Mother Earth from which we have come, You are *wakan*, nourishing all things, and with You we are all relations."[17]

No sharp boundaries separate men and women from other life forms (indeed, "all relations" may refer to all members of the Oglala tribe, to all men and women, to all living beings, or to all forms, animate and inanimate, existing in the universe). As we

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16. Dr. Charles Eastman, a Santee Sioux physician on the Pine Ridge Reservation in South Dakota in the late nineteenth century, describes the creator in the Sioux creation story as neither an anthropomorphic being nor a pantheistic principle, but as one who "remains sublimely in the background." He continues:

> The Sun and the Earth, representing the male and female principles, are the main elements in his creation. . . . The enkindling warmth of the Sun entered into the bosom of our Mother, the Earth, and forthwith she conceived and brought forth life, both vegetable and animal. Finally there appeared mysteriously Ish-an-e-cha-ge, the First Born, a being in the likeness of man, yet more than man, who roamed solitary among animal people and understood their ways and language.

Walker, *supra* note 11, at 139. As Dr. Eastman reports the story, humans do not first appear as one of the animals, but as their brother and sister, and in communion with them. Humans are not given dominion over the earth, but the ability to live in harmony with its creatures.

17. Peter Matthiessen, In the Spirit of Crazy Horse 572 (1983).

are all relations *with* the Earth Mother, rather than merely through her, she is part of the holy life she creates. Black Elk articulates this bond between himself and other life forms, and the cosmic forces around him, with characteristic eloquence: "[W]hen the thunder clouds appeared I was always glad to see them, for they came as relatives now to visit me."[18] Later he writes, "[F]or now the thunder beings were like relatives to me and they had gone away when the frost came back until the grasses show their tender faces again."[19]

In nature, Black Elk sees both spiritual signs and personal connections. As his words about thunderclouds and frosts reveal, nature's forces do not always keep peace with one another. Opposite forces derive from a common origin, and together participate in the earth's creative and destructive cycles.

Lakota and Dakota belief in the sacredness of the earth is the basis for their belief in the holiness of particular places, such as the Black Hills, which they see as the center of creation's "great hoop." Black Elk remembers, "I saw far off the Black Hills and the center of the world where the spirits had taken me in my great vision."[20] Standing Bear explains:

> Of all our domain we loved, perhaps, the Black Hills the most. The Lakota had named these Hills *He Sapa*, or Black Hills, on account of their color. The slopes and peaks were so heavily wooded with dark pines that from a distance the mountains actually looked black. . . . It was a favorite winter haunt of the buffalo and the Lakota as well. According to a tribal legend these hills were a reclining female figure from whose breasts flowed life-giving forces, and to them the Lakota went as a child to its mother's arms.[21]

Thus, the Black Hills have a different meaning for the Oglala than for the tourists visiting them each year to photograph the white men's faces irreverently carved into Rushmore's rock. From the Hills flow the springs of the Lakota's spiritual life, and to them come the Lakota people, not as visitors but as children.

C. Space and Time in Judeo-Christian Traditions

Jewish and Christian traditions focus on the sacred character of time[22] in contrast to the holiness of place stressed by Lakota

18. Black Elk Speaks, *supra* note 1, at 180.
19. *Id.*
20. *Id.* at 230.
21. Matthiessen, *supra* note 17, at 43.
22. Abraham Heschel, prominent Jewish theologian and teacher, explains that:
> The Bible is more concerned with time than with space. It sees the world in the dimension of time. It pays more attention to generations,

and Dakota religions. This is not to say that Jews and Christians have no concept of sacred space. God's appearance to Moses on Mount Sinai, and the Jewish people's century-old longing to return to the Holy Land, as well as the prevalence of Christian shrines and cathedrals throughout the world, testify to the belief that God blesses those places where he encounters his people.[23]

Nonetheless, Christianity professes (and derives from Judaism) the belief that history, an expression of time, rather than nature, an expression of space, redeems. Theologian Paul Tillich thus writes about "the call of Abraham, implying the demand to separate himself from the spatial gods of his father's house and to follow the God of time. . . ."[24] Liberation from the spatial gods implies salvation through history. Tillich observes that in the Old Testament "it is obvious that God reveals himself not only *in* history but also *through* history as a whole. The gods of space are overcome; history has a beginning, a center, and an end."[25]

Though Tillich argues for a renewed Protestant awareness of nature's sacramental character, he notes that "[t]heology places a negative value-judgment upon the natural in the formal sense, which is viewed as corrupted, sinful, and fallen, in opposition to the supernatural, which is the redeemed, the restored, and per-

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> to events, than to countries, to things; it is more concerned with history than with geography. . . .
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> . . . .
>
> Holiness in space, in nature, was known in other religions. New in the teaching of Judaism was that the idea of holiness was gradually shifted from space to time, from the realm of nature to the realm of history, from things to events. The physical world became divested of any inherent sanctity. There were no naturally sacred plants or animals anymore. To be sacred, a thing had to be consecrated by a conscious act of man. The quality of holiness is not the grain of matter. It is a preciousness bestowed upon things by an act of consecration and persisting in relation to God.

Abraham Heschel, Between God and Man: An Interpretation of Judaism 216, 225 (1959). Rudolf Bultmann, a prominent twentieth century Christian theologian, reveals the Christian preoccupation with history even as he describes the manner in which Christ liberates Christians from the temporal process. The Christian salvation is both profoundly historical and radically ahistorical, for "although the advent of Christ is an historical event which happened 'once' in the past, it is, at the same time, an eternal event which occurs again and again in the soul of any Christian." Rudolf Bultmann, *History and Eschatology* in The Gifford Lectures 152-53 (1957).

23. Christian scholars and teachers traditionally use the masculine pronoun when speaking of God. Several modern theologians have observed the sexist assumptions behind this use. *See, e.g.*, Mary Daly, Beyond God the Father: Toward a Philosophy of Women's Liberation (1975); Religion and Sexism: Images of Woman in the Jewish and Christian Traditions (Rosemary Radford Ruether ed. 1974).

24. Paul Tillich, The Protestant Era 22 (James Luther Adams trans. 1957).

25. *Id.*

fected."[26] This view places spirit and nature in opposition.

D. Anglo-European Religion: Spirit and Nature in Opposition

The Anglo-European attitude toward the land its citizens claimed to "discover" in America differs markedly from that of Native American culture. Along with rifles, plows, and the Bible, European colonists brought a legal tradition and cultural values regarding private property and its ownership. They also brought rich religious traditions, some reflecting a hostility toward the natural world and the natural in people. Jonathan Edwards, a prominent eighteenth-century American theologian, wrote:

> So long as men are in their natural state, they not only have no good thing, but it is impossible they should have, or do any good thing, as appears by Rom. 8:8. There is nothing in their nature, as they have it by the first birth, whence should arise any true subjection to God; as appears by Rom. 8:7. If there were anything truly good in the flesh, or in man's nature, or natural disposition, under a moral view, then it should be amended; but the Scripture represents as though we were to be enemies to it, and were to seek nothing short of its entire destruction, as has been observed.[27]

Because the flesh antagonizes the spirit, and, through its insatiable demands, dulls the soul's godly light, it must be mastered rather than indulged. Similarly, the natural world, as the theater of temptation and fall, of sin and damnation, must be subjugated and stripped of its trappings in order that it might become the stage for salvation's drama. Political philosopher Max Weber observed the Calvinist desire to control and rationalize the natural world:

> The Calvinist was fascinated by the idea that God, in creating the world, including the order of society, must have willed things to be objectively purposeful as a means of adding to His glory; not the flesh for its own sake, but the organization of the things of the flesh under His will. The active energies of the elect, liberated by the doctrine of predestination, thus flowed into the struggle to rationalize the world.[28]

The Puritans' hostility toward nature extended to the "natural person" as well. Paul's New Testament admonition to "crucify

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26. *Id.* at 99.

27. 3 Jonathan Edwards, *Original Sin*, in The Works of Jonathan Edwards 280 (Clyde Holbrook ed. 1970).

28. Richard Drinnon, Facing West: The Metaphysics of Indian-Hating and Empire Building 30 (1980) (quoting Max Weber, Protestant Ethic and the Spirit of Capitalism).

our old man"[29] in order to become the new meant that the natives of North America, wholly corrupt because utterly without the saving benefit of God's word, were savages, to be subjugated or annihilated. John Quincy Adams wrote to John Adams, summarizing the hopes of the new Yankees: "The whole continent of North America appears to be destined by Divine Providence to be peopled by one *nation*, speaking one language, professing one general system of religious and political principles, and accustomed to one general tenor of social usages and customs."[30]

Other Americans would conclude that any Indian not willing to yield to the destiny described by Quincy Adams should be persuaded by any means necessary. Historian Richard Drinnon concludes the Puritans "sought nothing less than to master the masterless 'natural man,' and, for good measure, the rest of nature."[31] If, in the context of Christian culture, the natural was the unredeemed part of the Christian, the natural was the whole of the Savage. What, therefore, must be redeemed or extirpated included native religion, language, livelihood, customs, and, if necessary, native populations.[32]

Along with a religious hostility to the natural world, the Europeans brought a dedication to cultural and legal concepts of private property.[33] Eighteenth-century philosopher David Hume

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29. *Romans* 6:6.

30. Drinnon, *supra* note 28, at 113.

31. *Id.* at 31.

32. Modern American society has, to a large extent, replaced its faith in the Calvinist God with a faith in technology's promises. It has abandoned its desire to control nature for divine purposes, wanting now to manipulate the physical world for its own sake, and for the material comforts and gains such manipulation yields. Sociologist Robert Heilbroner describes how modern social systems, whether capitalist or socialist, subordinate human needs to industrial imperatives, and thereby impoverish the human spirit:

> For industrial civilization achieves its economic success by imposing common values on both its capitalist and socialist variants. There is the value of the self-evident importance of efficiency, with its tendency to subordinate the optimum human scale of things to the optimum technical scale. There is the value of the need to "tame" the environment, with its consequence of an unthinking pillage of nature. There is the value of the priority of production itself, visible in the care both systems lavish on technical virtuosity and the indifference with which both look upon the aesthetic aspects of life. All these values manifest themselves throughout bourgeois and "socialist" styles of life, both lived by the clock, organized by the factory or office, obsessed with material achievements, tuned to highly quantitative modes of thought—in a word, by styles of life, that, in contrast with non-industrial civilizations, seem dazzlingly rich in every dimension except that of the cultivation of the human person.

Robert Heilbroner, An Inquiry Into The Human Prospect 77 (1974).

33. While centuries-old in Britain and Europe, these concepts originated in the ancient world. It is beyond this article's scope to trace that development, to thor-

thus argues for the centrality of private property ownership to civilization:

> No one can doubt, that the convention for the distinction of property, and for the stability of possession, is of all circumstances the most necessary to the establishment of human society, and that after the agreement for the fixing and observing of this rule, there remains little or nothing to be done towards settling a perfect harmony and concord.[34]

Among the problems in transposing Anglo-European property principles to the American soil was how to dispose of the property claims the Indians asserted. Under English common law, one who occupied a piece of land was presumed to own it.[35] That presumption, though rebuttable, was strong.[36] Because the Indians obviously occupied Americas' lands in some manner, the colonial, and then the United States' legal system, sought to define occupancy in such a way as to negate the Indians' property rights. The new Americans did not have to fashion legal doctrines out of whole cloth. Centuries before, English common law had recognized that a litigant's "improvement" of the land helped establish ownership of it.[37] Improvement of the land implied appropriating it in such a way that its natural condition was changed.[38] Because the Indians made few changes in the land's natural character, they were disadvantaged by European laws.

The Indians did, however, depend on the land for their livelihood and used the land in hunting, gathering, and, in some cases, agriculture. No matter how "primitive" the European settlers thought the Indian economy to be, they could not simply ignore tribal property rights under the tenets of English common law. Gradually, American jurists crafted a complex body of law which imperfectly reconciled the government's taking of Indian lands with the Anglo-Saxon doctrines of private property. The courts premised this law on the assumption that white ownership of America was both desirable and historically inevitable.

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oughly outline its character, or to present the views of Europe's own critics of Western property law. *See generally* Lawrence Becker, Property Rights: Philosophic Foundations (1977).

34. *Id*. at i (quoting 3 David Hume, Treatise of Human Nature, part II, § II).

35. Grant Nelson & Dale Whitman, Real Estate Transfer, Finance and Development: Cases and Materials 119-20 (1981).

36. *See* Becker, *supra* note 33, at 24-25.

37. For more current manifestation of this doctrine, see, e.g., Bradley v. Hess, 48 Or. App. 505, 617 P.2d 308 (1980); Burkhardt v. Smith, 17 Wis. 2d 132, 115 N.W.2d 540 (1962).

38. Lawrence Becker notes that by hunting the land one may also appropriate it. Becker, *supra* note 33, at 27.

II. The Expression of Difference: Land and the Law

A. Foundation Cases

Justice John Marshall's opinions in early United States Supreme Court cases involving Native American land rights are, like many of Marshall's decisions, the foundation of present legal doctrine on the subject.[39] In *Johnson v. M'Intosh*[40] the Chief Justice wrote that while the European discoverer did not automatically possess American Indian lands, "discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest."[41] Marshall bluntly conceded that "[t]he title by conquest is acquired and maintained by force. The conqueror prescribes its limits."[42] He went on to assert that

> [h]owever extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.[43]

Marshall extended the theory of *Johnson v. M'Intosh* in *Cherokee Nation v. Georgia*.[44] In *Cherokee Nation*, the Marshall Court allowed the state of Georgia to violate the terms of treaties ratified by Congress. Beginning in 1828, the Georgia legislature passed a

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39. Though Justice Marshall rejected the position of his contemporary, Andrew Jackson, that states could rightfully ignore the autonomy of Indian nations, some of Marshall's early decisions paved the way for the thinly disguised theft of Indian lands. Critical as I am of Justice Marshall's opinions in the early Indian property cases, I do not wish to misrepresent them as simplistic, or as wholly detrimental to the Indians' property rights. Had Marshall not been a strong Chief Justice, the tribes might have lost even more of their autonomy in the early nineteenth century than they did. Marshall despised the crudity of Andrew Jackson's open bigotry and genocidal intention toward the Indians and had contempt for Jackson's willful misunderstanding of legal precedent from America's colonial period defining the political relationship between the government and the sovereign Indian tribes.

40. 21 U.S. (8 Wheat.) 543 (1823).

41. *Id.* at 587.

42. *Id.* at 589.

43. *Id.* at 591.

44. 30 U.S. (5 Pet.) 1 (1831). *Cherokee Nation* came before the Supreme Court as a last and desperate attempt by the Cherokee nation to prevent its eviction from tribal lands that had been guaranteed them by treaty, and earlier, in 1732, by charter with Britain. The Indians lost their case, and were evicted in a series of forced marches, now known as the Trail of Tears, to distant western lands. United States soldiers and settlers "inspired" the Cherokee to leave by burning whole villages and murdering those willing to fight or unable to flee. Few Cherokee survived the march, which took place in the dead of winter, along uncharted paths, with few rations. Rennard Strickland, Fire and the Spirits 5, 8, 67 (1975); Grant Foreman, Indian Removal: The Emigration of the Five Civilized Tribes of Indians 229-312 (1953).

series of acts for the purpose of adding "the territory lying within [Georgia] and occupied by the Cherokee Indians" to Georgia's various counties, and to extend Georgia's laws into that territory.[45] The Cherokee filed a claim seeking to restrain the state from forcibly exercising its legislative power over an independent neighboring people.[46]

The *Cherokee Nation* Court faced the question of whether a state could seize land guaranteed to the Cherokee under United States treaty law without compensating them for the taking. The Marshall Court declined to face the issue squarely, holding that it could not interpose on the Cherokees' behalf given the form in which the Indians framed their case. Marshall wrote that the Cherokee were not asking the Court to decide the "mere question of [their] right" to occupy the land, but were requesting that the Supreme Court limit the autonomy of Georgia's legislature.[47]

Despite the Court's failure to address the issue raised by the Cherokees' claim, *Cherokee Nation*'s holding and dicta have become the foundation of doctrine governing Indian property and tribal status. Marshall's opinion articulated the concept of the "domestic dependent nation."[48] It is a difficult concept to grasp. On the one hand, Marshall writes that the Indians have an unquestionable right to the lands they occupy. On the other, he states that the United States "assert[s] a title [to Indian lands] independent of [the Indians'] will," which must take effect when the tribe's "right of possession ceases."[49] The relationship between the government and American Indians, writes Marshall, is that of a ward to its guardian.[50] This analogy persists today. Courts con-

45. *Cherokee Nation*, 30 U.S. at 7.

46. *Id.* at 2.

47. *Id.*

48. *Id.* at 2, 17.

49. *Id.* at 17.

50. *Id.* In contrast to *Cherokee Nation* is Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), decided one year after the publication of *Cherokee Nation*. In *Worcester*, the Marshall Court ruled that Georgia lacked the power to evict a white missionary from Cherokee tribal land. In *Cherokee Nation*, Marshall had held that given the posture of the case, the Court lacked the authority to decide whether a series of statutes passed by the Georgia legislature affected a transfer in the ownership of tribal property from the Cherokee Nation to the State of Georgia. *Cherokee Nation*, 30 U.S. at 20. In *Worcester*, Marshall felt that he had the case he needed to rule upon the Cherokee's right to retain their tribal land. He held that the Act under which Georgia prosecuted the missionary, Worcester, was "repugnant to the Constitution, laws and treaties of the United States." *Worcester*, 31 U.S. at 596. The Act, which was passed by Georgia on December 22, 1830, stated in relevant part:

> that all white persons residing within the limits of the Cherokee Nation, on the first day of March next, or at anytime thereafter, without a license or permit from his excellency the governor, or from such

tinue to conceive of the United States government as holding tribal property in trust for Indian tribes.

Marshall's balanced prose masks a sleight of hand, for he takes away from the Indians everything he seems to give them. He grants Indian nations sovereignty, but that independence is extinguishable at the United States' caprice. Notwithstanding condemnation of the United States' role in the historical conflicts underlying the *Cherokee Nation* case, the ward and guardian doctrine flourishes today.[51]

B. The Black Hills Cases

1. Origins of conflict over the Black Hills.

In none of the United States' dealings with the American Indian tribes has it acted upon its professed ideals. This nation's treatment of the Lakota and Dakota nations has been particularly ugly.

On April 29, 1868, in the aftermath of war between the na-

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agent as his excellency the governor shall authorize to grant such permit or license . . . shall be guilty of a high misdemeanor.

Id. at 523. In so ruling, Marshall held also that Georgia had no authority to extinguish the boundaries of territory guaranteed to the Cherokee in its treaty with the United States government.

The *Worcester* holding is somewhat inconsistent with *Cherokee Nation*, and may be thought to qualify the ward and guardian relationship *Cherokee Nation* establishes. In *Worcester*, Marshall ridiculed the "extravagant and absurd idea, that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or [to] occupy the lands from sea to sea." 31 U.S. at 544-45. Marshall concluded:

> [A] weaker power does not surrender its independence—its rights to self government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of [self] government, and ceasing to be a state. . . . The Cherokee Nation . . . is a distinct community occupying its own territory . . . in which the laws of Georgia can have no force, and the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of [C]ongress. The whole intercourse between the United States and this nation is by our [C]onstitution and laws, vested in the government of the United States.

Id. at 561. President Jackson is reported to have responded to Marshall's holding in *Worcester* by saying "Marshall has made his law, [now] let him enforce it." Strickland, *supra* note 44, at 8. True to his word, President Jackson refused to enforce Marshall's injunction, and the Cherokee were driven by General Winfield Scott and his troops from their tribal land. *Id*.; Joseph Burke, *The Cherokee Cases: A Study in Law, Politics and Morality*, 21 Stan. L. Rev. 500-31 (1969).

51. This doctrine appears in modified form in United States v. Sioux Nation of Indians, 448 U.S. 371 (1980). There, the Court says Congress may both act as a guardian for its Indian wards and acquire their property under the power of eminent domain, so long as it does not do both at the same time.

tions, the United States concluded a treaty with the Sioux.[52] Anxious to open the West to white settlers and gold explorers, the United States was eager to end its often unsuccessful battles with the skilled Plains warriors.[53] The treaty guaranteed the Indians "absolute and undisturbed use of the Great Sioux Reservation," which included the sacred Black Hills, and stated further that "[n]o treaty for the cessation of any portion or part of the reservation herein described . . . shall be of any validity or force . . . unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same."[54] In return, the Indians relinquished any claim to territory recognized as theirs under an earlier treaty.[55] This included all of what is now South Dakota, and parts of Nebraska, Wyoming, North Dakota, and Montana. In addition, they agreed not to oppose the construction of a railroad across the West and to allow construction of other roads across the Great Sioux Reservation.[56]

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52. Matthiessen, *supra* note 17, at 4-8. The "war" which the 1868 Fort Laramie treaty concluded was actually a series of skirmishes beginning in the early 1850's. Troubles between the Indians and the white people began almost as soon as the trappers and settlers moved onto the Great Plains. In 1837, a smallpox epidemic spread by the settlers killed thousands of Plains Indians. Pioneers and gold explorers, trekking across the Plains in ever greater numbers, slaughtered buffalo, antelope, and deer as they went, depleting the Indians' food supply. In 1851, the Sioux nation signed its first treaty with the United States government. The government violated the treaty almost immediately by building fortified trading posts on the Platte River. As the settlers' number increased so did hostilities. In 1866, Washington sent an expedition to begin opening the Bozeman Trail into Montana across the Sioux' tribal land. Crazy Horse, a great Oglala warrior and leader, defeated a cavalry attachment in 1866 at Big Piney Creek on the Powder River. In the following year, the United States Cavalry defeated the Plains warriors near the Big Horn River, but saw no opportunity for permanent victory over the Indians. Thus, in 1868, a United States commission negotiated the Fort Laramie treaty with Red Cloud and the Sioux nation. Matthiessen, *supra* note 17, at 7. For an eloquent account of the government's brutality and wars against the Plains Indians, see Dee Brown, Bury My Heart at Wounded Knee, *supra* note 2. Brown's sixth chapter, "Red Cloud's War," recounts the battles concluded by the 1868 treaty.

53. Chief Spotted Tail explained to the white commission that the government's roads, and the encroachment of settlers on tribal lands, had caused the battles:

> The Great Father has made roads stretching east and west. Those roads are the cause of all [of] our troubles. . . . The country we live in is overrun by whites. All our game is gone. This is the cause of great trouble. I have been a friend of the whites, and am now. . . . If you stop your roads we can get our game. That Powder River country belongs to the Sioux. . . . My friends, help us; take pity on us.

Brown, *supra* note 2, at 142.

54. Treaty of Fort Laramie (1851), *quoted in* Matthiessen, *supra* note 17, at 7. The text of the Treaty is not published in the public laws because the assent of all the tribes had not been obtained, and consequently the Treaty was not in proper form for publication. *See* 11 Stat. 749 (1859).

55. Matthiessen, *supra* note 17, at 7.

56. *Id.*

In the 1868 treaty, the government was willing to let the Indians keep the Black Hills. While the Lakota understood the sacred nature of the Hills and believed them to be the source of life, the government thought them inaccessible and of little economic worth. Six years later, however, Colonel George Custer led an expedition into the Hills, confirming earlier rumors that they were filled with gold. Unable or unwilling to keep the miners out, President Grant sent a commission from Washington to persuade the Indians to give up the Hills. Lakota leaders Sitting Bull and Crazy Horse rejected the government's offer of a "fair price," asserting instead the integrity of the land and its people. "One does not sell the land on which the people walk," Crazy Horse told the United States negotiators.[57]

Tensions between the gold miners and the Indians continued to mount. By 1876, more than 10,000 whites were living in Custer City in the southern Hills.[58] In late December, 1875, the Commissioner of Indian Affairs feared that Indian hunting parties camped outside of the reservation threatened the reservation system and the safety of the whites invading the Hills. He therefore ordered the Indian agents to notify all Indians living off the reservation that unless they returned to reservation land by January 31, 1876, the United States military would pursue them. Severe weather and an extreme shortage of food on the reservation made the hunters' compliance with these instructions impossible. Many of the runners sent out from the agencies to warn the hunting parties did not themselves return until weeks after the January 31st deadline.[59]

Impossible or not, the United States declared war upon the Indians. The government fared poorly, considering their superior numbers and weapons, losing a decisive battle to Red Cloud and Crazy Horse at Greasy Grass Creek (known to whites as Little Big Horn), where Custer was killed. Soon after, however, the United States got the upper hand, and the hostility culminated in the bloody massacre at Wounded Knee: two hundred or more Indian men, women and children were ambushed and slain by Custer's former regiment.[60]

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57. *Id*. at 10-11.

58. *Id*. at 11.

59. Brown, *supra* note 2, at 284-85.

60. Matthiessen, *supra* note 17, at 20. Matthiessen quotes Dr. Charles Eastman, a young Santee Sioux physician on Pine Ridge who witnessed the aftermath of the massacre:

> Fully three miles from the scene of the massacre we found the body of a woman completely covered with a blanket of snow, and from this point on we found them scattered along as they had been relentlessly

Meanwhile, Congress unilaterally changed the terms of the 1868 Fort Laramie treaty. In 1877, it enacted into law a treaty proposed by the Manypenny Commission.[61] The treaty provided that the Sioux nation would abandon the Black Hills and other lands west of the 103rd meridian, as well as their right to hunt in territories to the north, in exchange for subsistence rations only for so long as they might need them to survive.[62] This alteration violated the Fort Laramie treaty, which had stipulated that its terms could not be changed unless three-fourths of the adult male Sioux population agreed to the change. Fewer than ten percent of that population had signed the "agreement" proposed by the Manypenny Commission. Regardless, Congress enacted the "agreement" into law in 1877.[63] Despite its illegality, the new "treaty" marked the final loss of the Black Hills by the Sioux Nation.

2. The *Sioux Nation* case.

a. Legal history.

The Dakota and Lakota nations have continued to assert their right to live in the Hills from 1877 until today. In 1923, the tribes filed a petition with the court of claims alleging that the United States, in violation of the fifth amendment, had taken the Hills from them without rendering just compensation.[64] Nothing of substance happened in the case until 1942 when the court dismissed the claim.[65] The claims court unanimously held it had no authority to determine whether Congress had offered the Sioux an adequate price, and that "the Sioux' claim was a moral one not

> hunted down and slaughtered while fleeing for their lives. Some of our people discovered relatives or friends among the dead, and there was much wailing and mourning. When we reached the spot where the Indian camp had stood, among the fragments of burned tents and other belongings we saw the frozen bodies lying close together or piled one upon another. I counted eighty bodies of men who had been in council and who were almost as helpless as the women and babes when the deadly fire began, for nearly all their guns had been taken from them. . . . All this was a severe ordeal for one who had so lately put his faith in the Christian love and lofty ideals of the white man.

Id.

61. 19 Stat. 254 (1877).

62. United States v. Sioux Nation of Indians, 448 U.S. 371, 381 (1980); Matthiessen, *supra* note 17, at 13.

63. United States v. Sioux Nation of Indians, 448 U.S. 371, 381-82 (1980); Matthiessen, *supra* note 17, at 12-13.

64. United States v. Sioux Nation of Indians, 448 U.S. 371, 384 (1980) (citing Sioux Tribe v. United States, 97 Ct. Cl. 613, 658 (1942), *cert. denied*, 318 U.S. 789 (1943)). The tribes filed their petition under a special jurisdictional act providing them a forum for adjudicating all claims against the United States arising under treaty law (Act of June 3, 1920, ch. 222, 41 Stat. 738).

65. Sioux Tribe v. United States, 97 Ct. Cl. 613 (1942).

protected by the Just Compensation Clause."[66] Not at issue before the claims court was the question of whether any money sum could justify the United States' theft.

In 1946, Congress passed the Indian Claims Commission Act,[67] creating a new forum to hear tribal grievances against the government. The Sioux resubmitted their claim to the commission, and lost again. The tribe returned to the court of claims, filing a motion to vacate its affirmance of the Commission, contending the record was inadequate. This time, the court agreed.[68]

Not until 1974 did the plaintiffs overcome the last procedural obstacle and obtain a hearing on the substance of their compensation claim. By this time, the birth of the American Indian Movement, and the affirmation of traditional values, caused many tribes to reconsider their participation in the lawsuit. Equating land with money was never a Plains Indians value. The white culture's ruthless efforts over the nineteenth and twentieth centuries to displace those traditional values, including the allotment acts,[69] the continued theft of treaty lands,[70] and the termination policies of the 1950's,[71] however, had convinced many Indians that trying to col-

66. *Id.* at 658. The court here refers to the fifth amendment to the United States Constitution.

67. Ch. 959, § 1, 60 Stat. 1049 (1946) (codified at 25 U.S.C. § 70 (1982)).

68. *See* United States v. Sioux Nation of Indians, 448 U.S. 371, 385 (1980) (Court's statement of case history).

69. The General Allotment Act or Dawes Act of 1887, amended in 1891 and 1910, authorized the President to divide tribally-held lands into plots "not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land" whenever it was, in his opinion, advantageous for the Indians. 25 U.S.C. § 331 (1982). In the original act, each head of a family would be assigned a plot, each single person and orphan child was assigned one-eighth of a section, and the rest of the land was sold off as "surplus." Vine Deloria explains that the government thought "that the routine work of agriculture would provide the necessary training in thrifty habits that all 'civilized' peoples possessed." Vine Deloria & Clifford Lytle, American Indians, American Justice 9-10 (1983). The government also hoped the Indians would learn the virtues of capitalism. "As a consequence of the allotment policy," writes Deloria, "Indian landholdings were reduced from 138 million acres in 1877 to 48 million in 1934. Of this 48 million acres, nearly 20 million were desert or semiarid and virtually useless for any kind of annual farming ventures." *Id.* at 10.

70. The government accomplished this theft in various ways. In part, it did so through its allotment acts, *see* Deloria & Lytle, *supra* note 69, its treaty violations, *see supra* text accompanying notes 52-63, and its termination policies, *infra* note 71.

71. During the 1950's, Congress passed a body of confusing and inconsistent legislation whose purpose was to end the federal supervision of Indian tribes and to eliminate tribal dependence upon the United States government. Proponents of the termination policies hoped Indians, once freed from governmental supervision and financial assistance, would become assimilated into the dominant culture. To that end, Congress passed Resolution 108 (H. Con. Res. 108, 67 Stat. B132 (1953)), which declared that it was "the sense of Congress that, at the earliest possible time, all of the Indian tribes and the individual members thereof located within the states of

lect money for their loss of land was the best strategy available to them. Furthermore, litigating for money damages in a system predicated on the assumption that everything has a monetary equivalent may be the only form of justice available. American Indian scholar Vine Deloria, commenting on the lawsuit, observed:

> The purpose of the suit was to regain as much of the sacred land as possible and a money award, while distasteful, is still a means to that goal. Per capita distribution and the subsequent expenditure of over $100 million on consumer goods, however, would be a clear signal that the Sioux people have adopted the white man's wasteful ways.[72]

Despite the monetary remedial structure of the United States' legal system, and despite logical arguments in favor of suing for money, many tribes declined to participate in the lawsuit. Black Elk's Oglala Tribe, the largest of the Sioux bands, has, along with many other tribes, refused to accept the money eventually awarded to the tribes, just as the Oglala had earlier tried to dissociate itself from the lawsuit.[73]

b. The Sioux Nation *holding.*

In theory, and in cosmetic appearance, the Sioux nation won its compensation suit against the government. Over the dissent of conservative colleagues, the United States Court of Claims and Supreme Court affirmed the Indian Claims Commission's holding that the government's 1877 acquisition of the Black Hills constituted an unjust taking under the fifth amendment. The Sioux Nation was awarded substantial compensation. In practice, however, the legal theory of the case is dangerous precedent against Indian litigants. In holding for the Sioux nation, the Supreme Court applied legal doctrines and precedents whose premises are hostile to

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California, Florida, New York and Texas . . . should be freed from Federal supervision and control." Deloria & Lytle, *supra* note 69, at 17-18. Congress transformed that resolution into law by passing a number of acts which curtailed tribal authority, reduced federal assistance to the tribes, and phased some tribes out of existence. By 1958, many government officials realized that the policy had failed, and Secretary of the Interior Seaton announced that hereinafter, no tribe would be terminated without its consent. In 1970, President Nixon renounced termination as morally and legally unacceptable. Deloria & Lytle, *supra* note 69, at 15-21.

72. Matthiessen, *supra* note 17, at 606 (quoting Vine Deloria, Jr., in the L.A. Times, June 25, 1980).

73. In Oglala Sioux Tribe v. United States, 650 F.2d 140 (D.S.D. 1981), *cert. denied*, 455 U.S. 907 (1982), the Oglala tribe sought restoration of the Black Hills after the Supreme Court, in United States v. Sioux Nation of Indians, 448 U.S. 371 (1980), awarded them money damages for the government's illegal taking of the Hills in 1877. The tribe justified their demand for the land itself on the basis that they were not a party to the original compensation action. *See infra* text accompanying note 92.

the deepest convictions of the Lakota and Dakota people. The decision has effectively barred almost every subsequent property rights and religious freedom claim brought by the Black Hills People.[74]

In awarding a victory to the Sioux, the Indian Claims Commission assessed the fair market value of the lands taken from them at $17,533,484.[75] On appeal to the Supreme Court, the government challenged only portions of the Commission's ruling requiring payment of interest on that sum from the date of the taking until the Commission's decision. The government would owe interest only if its acquisition constituted a taking in violation of the fifth amendment. In concluding such a violation had taken place, the Supreme Court relied on the reasoning of a lower federal court decision, *Fort Berthold Reservation v. United States.*[76]

Fort Berthold held:

> Where Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to money, there is no taking. This is a mere substitution of assets or change of form and is a traditional function of a trustee.[77]

The *Fort Berthold* rationale contains implicit assumptions hostile to the Indian position. It equates land with money and derives from *Cherokee Nation*'s paternalistic establishment of the government as a trustee for its Indian wards. The *Fort Berthold* Court states it will not find against Congress unless the tribe "can show that moneys received from the sale of lands were so far below the fair market value as to amount to fraudulent conduct or gross negligence."[78] Under *Fort Berthold*, a court does not ask whether Congress has a right to seize Indian land, but whether it did so in the appropriate manner.[79] Adequate money compensation for the loss of land is presumed possible.

The adoption of *Fort Berthold* in *Sioux Nation* injures Indian interests. First, the decision perpetuates the assumption that Con-

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74. Justice Brandeis' oft-quoted observation seems applicable: "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficient. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

75. Sioux Nation v. United States, 33 Ind. Cl. Comm. 151, 362-63 (1974).

76. 390 F.2d 686 (Ct. Cl. 1968), *aff'd*, 204 Ct. Cl. 831 (1974).

77. *Id.* at 691.

78. *Id.* at 694.

79. 390 F.2d at 691. In *Fort Berthold*, the lower court sought to mitigate the effects of an earlier Supreme Court decision, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), without directly refuting its underlying premises.

gress acts justly when it exchanges sacred tribal land for money.[80] Second, *Sioux Nation* implicitly affirms an earlier precedent, *Lone Wolf v. Hitchcock*[81], relied on in *Fort Berthold*.[82] *Lone Wolf* held Congress has absolute authority to dispose of Indian lands as its sees fit, regardless of the provisions in treaties made with Indian tribes.[83] *Sioux Nation* concludes the effect of *Lone Wolf* is to grant Congress a good faith presumption in its taking of Indian lands.[84] To prove an unjust taking under the fifth amendment, *Sioux Nation* therefore requires Indian litigants must show not only an unjust result, but also Congress' bad intent.[85] To its credit,

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80. 448 U.S. at 416.

81. 187 U.S. 553 (1903). Like the Congressional Act of 1877 abolishing the terms of the Fort Laramie treaty, *Lone Wolf* arose when Congress enacted into law an "agreement" abolishing the terms of a treaty, which agreement the requisite number of Indians had failed to sign.

82. 390 F.2d at 691-92.

83. 187 U.S. at 567-68. The *Lone Wolf* decision marked a bitter day for American Indians. In it, the Supreme Court went further than *Cherokee Nation*, holding that

> Congress possess[es] a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests. . . . Plenary authority over tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.

Id. at 565. The Court thus ruled that the judiciary has no right to inquire into the adequacy of the compensation afforded to the Indians, and that it "must presume that Congress acted in perfect good faith in [its] dealings with the Indians." *Id*. at 568. "In any event," the Court continued, "as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation." *Id*.

84. *Sioux Nation* derives this interpretation from *Fort Berthold*. The *Fort Berthold* court distilled from *Lone Wolf* a distinction that the opinion arguably does not make: that so long as Congress *purports* to act in good faith, the courts cannot inquire into its real motives or the effect of its actions, but if Congress does not so purport, or if an act's legislative history belies Congress' good-faith claim, then the courts may find that Congress unjustly took Indian tribal land. The *Fort Berthold* court reached that interpretation by distinguishing between two kinds of congressional function: fiduciary authority and obligation as a trustee contrasted with the sovereign power of eminent domain. Judge Collins wrote:

> It is obvious that Congress cannot simultaneously (1) act as trustee for the benefit of the Indians, exercising its plenary powers over the Indians and their property, as it thinks is in their best interests, and (2) exercise its sovereign power of eminent domain, taking the Indians' property within the meaning of the Fifth Amendment of the Constitution. In any given situation in which Congress has acted with regard to the Indian people, it must have acted either in one capacity or the other. Congress can own two hats, but it cannot wear them both at the same time.

Fort Berthold, 390 F.2d at 691. Where Congress does not purport to give the tribe adequate consideration for a taking of land, it exercises its power as sovereign; where it does purport, it acts as trustee. In either case, it confiscates Indian land.

85. The *Sioux Nation* Court criticized, but did not overturn *Lone Wolf*, holding instead that the case was inapplicable for two reasons: 1) In *Lone Wolf*, Congress

the *Sioux Nation* Court writes that it must examine the complete factual and historical record to determine whether "a particular measure *was* appropriate for protecting and advancing the tribe's interests."[86] As applied to the 1877 taking of treaty lands, the *Sioux Nation* Court determined that Congress had acted with bad intent because it had never intended to compensate the Indians.[87] Therefore, the acquisition of Sioux lands constituted a taking in violation of the fifth amendment.

By failing to expressly overrule *Lone Wolf*, *Sioux Nation* leaves jurists like Judge Bennett, who dissented against the court of claims opinion the Supreme Court affirmed, free to argue that "[t]he sense of the [*Lone Wolf*] opinion seems to be that Indian tribal property is simply not protected by the fifth amendment."[88] However objectionable the assumption behind this dissent, it seems a more accurate reading of *Lone Wolf* than that of either the majority court of claims or the Supreme Court opinion in *Sioux Nation*. Judge Bennett wrote:

> It may be that the thought then was that due process protects only 'persons' and 'private property' and that Indian tribes were not 'persons,' and Indian tribal property, owned communally, was not private property. . . . What the majority fails to consider is that *Lone Wolf* held that it was within Congress'

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set aside money for the "surplus" lands it seized from the unwilling Indians, but did not in the case before the Court, 448 U.S. at 412-14, and 2) *Lone Wolf*'s "presumption of congressional good faith ha[d] little to recommend it as an enduring principle" for deciding whether Congress acted fairly. *Id*. at 414.

In refusing to overrule *Lone Wolf*, however, the *Sioux Nation* Court assigns to the persecuted minority the burden of proving Congress' discriminatory intent. As Judge Nichols notes in an astute concurrence to the claims court's decision in *Sioux Nation v. United States*:

> *Lone Wolf* did undoubtedly say that when Congress 'purported' to give an adequate consideration in any exchange, it was not permissible to go behind its fact finding to ask if the consideration was really adequate, nor could the Court inquire into the evil motives that might be lurking in Congressional breasts.

601 F.2d at 1174. Nichols concludes: "The meaning of *Lone Wolf* and of *O'Brien* is that if the Congress spreads evidence on the public record, i.e. 'purports' to act in a fair and constitutional manner, this may not be refuted by unsupported inference, by gossip, or by hearsay." *Id*. at 1175.

Nothing in *Sioux Nation* seriously impairs Congress' ability to cover its tracks by spreading evidence on the public record about its good intent. Under this holding, the Court will not presume Congress' good faith, but it also refuses to inquire into the effect a congressional act has on an Indian tribe: "We do not mean to imply that a reviewing court is to second-guess, from the perspective of hindsight, a legislative judgment that a particular measure would serve the best interests of the tribe." 448 U.S. at 415. Historically, sums awarded in exchange for tribal lands appear pitifully small and calculated either to deceive the tribe about the government's real intent, or to mask the capricious exercise of governmental power.

86. 448 U.S. at 415.

87. *Id*. at 417-21.

88. *Sioux Nation*, 601 F.2d at 1177 (Bennett, J., dissenting).

> constitutional power to dispose of tribal property without regard to good faith or the amount of compensation.[89]

Justice Rehnquist, the lone Supreme Court dissenter in the *Sioux Nation* affirmance, endorses Judge Bennett's interpretation of the law. Rehnquist agrees that the Court must find against the Indians if Congress makes any pretense whatsoever of compensating them. In Rehnquist's opinion, Congress' unilateral decision to exchange the Sioux nation's sacred land, replete with game, for subsistence rations, constituted no injustice: "As the dissenting judges in the Court of Claims opinion under review pointedly state: 'The majority's view that the rations were not consideration for the Black Hills is untenable. What else was the money for?' "[90]

3. The Oglala Sioux and Homestake Mining.

a. Oglala I.

The *Sioux Nation* case has influenced all subsequent Black Hills' litigation. Under the res judicata doctrine, *Sioux Nation* has repeatedly barred claims of various tribes to live and worship in the Hills free from the harassment of encroaching "progress."

The mining industry, of increasing economic importance since the Gold Rush of the 1870's, and the tourist industry have overtaken the Hills. From the government's perspective, the Indians'

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89. *Id.* at 1177-78.

90. 448 U.S. at 435 (Rehnquist, J., dissenting) (quoting *Sioux Nation*, 601 F.2d at 1183). Although Justice Rehnquist bases his dissent upon the claim that the 1942 Court's decision denying additional monetary damages is res judicata, he goes on to address the merits of the Sioux nation's position. The subsistence rations, he concludes, were consideration enough for the Hills. Rehnquist argues that the majority rejects that conclusion, largely on the basis of revisionist history.

> There were undoubtedly greed, cupidity, and other less-than-admirable tactics employed by the Government during the Black Hills episode in the settlement of the West, but the Indians did not lack their share of villainy either. It seems to me quite unfair to judge by the light of "revisionist" historians or the mores of another era actions that were taken under pressure of time more than a century ago.

448 U.S. at 435. Such historians, Rehnquist thinks, perpetuate a one-sided and stereotyped view of how the Black Hills changed hands. In any event, Rehnquist quotes with approval historians of his own, who, while less "revisionist," present stereotypes of another sort:

> The Plains Indians seldom practiced agriculture or other primitive arts, but they were fine physical specimens. . . . They lived only for the day, recognized no rights of property, robbed or killed anyone if they thought they could get away with it, inflicted cruelty without a qualm, and endured torture without flinching.

Id. at 436-37 (quoting S. Morrison, The Oxford History of the American People 539-40 (1965)). At other points, Rehnquist argues that the Indian's "primitive" way of life inevitably yielded to the "march of progress." *Id.* at 436 (quoting R. Billington, Soldier and Brave xiii-xiv (1963)).

refusal to coexist with mining and tourists is unreasonable. To the Black Hills people, however, any defacement or plundering of Paha Sapa defiles creation's center, and insults both the Earth Mother and the Great Spirit. Motivated by these concerns, the Oglala tribe filed an action eighteen days after the Supreme Court published its *Sioux Nation* decision. The tribe alleged that in 1877 the United States had unconstitutionally exercised its power of eminent domain. The complaint stated the taking of tribal land was for a private rather than a public purpose, as miners reaped the profit of the government's treaty violation. The Oglala sought the restoration of the tribe's territorial rights to the Hills and money damages for waste and the removal of minerals. Finally, they moved for a temporary restraining order to prevent the United States from paying members of the tribe any part of the money award granted by the *Sioux Nation* decision.[91]

In its brief, the Oglala tribe emphasized that counsel for the Sioux nation did not receive authority to appeal on the Oglala tribe's behalf, and, therefore, the decision in *Sioux Nation* should not apply to them.[92] The federal court held against the Oglala, concluding "that Congress has deprived the district court of subject matter jurisdiction by expressly providing an exclusive remedy for the alleged wrongful taking through the enactment of the Indian Claims Commission Act."[93] Because the Sioux nation had, without the consent of its largest tribe gained a remedy through the Commission, the Oglala's claim was barred.[94]

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91. Oglala Sioux Tribe v. United States, 650 F.2d 140, 142 (D.S.D. 1981), *cert. denied*, 455 U.S. 907 (1982) (*Oglala I*).

92. 650 F.2d at 142 n.6.

93. *Id.* at 142.

94. Senator William Bradley of New Jersey introduced a bill before the United States Senate on July 17, 1985, which would re-establish a portion of the Great Sioux Reservation, as defined in the 1868 Fort Laramie Treaty. The proposed act is known as the "Sioux Nation Black Hills Act." S. 1453, 99th Cong., 1st Sess. (1985). The re-established reservation would include, with some exceptions, federally-held lands extending from the South Dakota-Nebraska border to a few miles north of the North Dakota-South Dakota border. It would run east from the 104 to the 103 degree of longitude west from Greenwich, except where the 103 meridian intercepts the Cheyenne River's north fork. The reservation would follow the river downstream to its junction with the river's south fork and then up the south fork until it intersects the 103 meridian. It would include the Black Hills area. S. 1453, 99th Cong., 1st Sess. § 4 (1985).

All of the land in the re-established area now held by the United States Park Service would become known as the Sioux Park, and would remain "equally accessible to all persons, both Sioux and non-Sioux." *Id.* § 11(a). In addition, lands within the Sioux Park which the Indians identify as "traditional religious or ceremonial sites" would be "excluded from public access to the extent necessary to preserve their primary religious uses and integrity." *Id.* § 11(b). Further, "any lands within the Sioux Park that are designated by the Sioux as a wildlife and wilderness sanctuary for living things which have a special sacred relationship to the Sioux

b. Oglala II.

The Oglala tribe next brought an action against Homestake Mining Company to quiet title to five acres in the Hills. The tribe sought to enjoin the company from carrying out its operations, and to recover damages for the company's continuing trespass on Oglala land for 106 years.[95] Again, the tribe lost. The federal district court held that *Oglala I* had disposed of the issues raised in this case. It noted that in *Oglala I*, the tribe had sought to quiet title to the Black Hills and to enjoin the United States and Homestake Mining from removing minerals from the Hills. In the present action, the tribe wished to quiet title to the acreage surrounding the mine, and to enjoin Homestake from interfering with the mine. The tribe continued to maintain that Congress unconstitutionally exercised its power of eminent domain in 1877, and, therefore, no private party could acquire title to the Black Hills from the United States. The tribe further insisted that since Manuel and Harney, the founders of Homestake Mining, had entered the Hills illegally prior to the 1877 Act, *Oglala I*, which addressed only the Act itself, was not res judicata.

The court rejected the latter argument, relying on a nineteenth-century case[96] that held the enactment of the 1877 Act validated the mining claims as of the date of enactment. The constitutional argument, said the *Oglala II* court, had been resolved in *Oglala I*, and was, therefore, res judicata[97]. Although *Sioux Nation* held that the 1877 taking violated the fifth amendment, it had provided an exclusive remedy in the form of mone-

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may be excluded from public access to the extent necessary to provide sanctuary." *Id.* § 11(c). Finally, the Act instructs the federal government to acquire, and then relinquish to the Sioux Nation, the state-owned lands at Bear Butte. *Id.* § 9(b).

Privately held lands within the re-established area would not be disturbed. *Id.* § 8(a). The Sioux Nation is, however, granted a right of first refusal to purchase those privately held lands if the owner should decide to sell. *Id.* § 8(b).

The funds appropriated for the Sioux by Congress in response to the *Sioux Nation* holding would be paid to the Indians "in compensation for the loss of use of its lands from 1877 to the effective date of [the Sioux Nation Black Hills] Act." *Id.* § 10(a).

The Sioux Nation Black Hills Act would translate into law the meaning of the Sioux Nation's relationship to the land. It explicitly recognizes the sacred meaning the Hills have for the Lakota and Dakota people. It recognizes also the inadequacy of a money award to compensate the Indian people, either for the Hills themselves or for the loss of their religious freedom as guaranteed by the first amendment *Id.* § 2(8), (9), (10). Those interested in helping the American Indian struggle for political and religious freedom should work to secure the Act's passage.

95. Oglala Sioux Tribe v. Homestake Mining Co., 722 F.2d 1407 (D.S.D. 1983) (*Oglala II*).

96. Noonan v. Caledonia Goldmining Co., 121 U.S. 393 (1887).

97. 722 F.2d at 1409.

tary compensation.[98]

Neither *Oglala I* or *II* addressed the issue of real importance to the Oglala. No spiritual or cultural argument the tribe could advance concerning its true feelings about the Hills, or its fundamental right to live and worship in them, would have legal relevance in United States courts. Instead, Indian litigants must argue foreign laws in their conqueror's courts, framing their spiritual claim within the legal language of the conqueror. It is not surprising that under such circumstances and against such odds, the Indians lose. One might wonder how well the United States government would fare if it were trying to litigate its claims in the tribunals of the Hills' original inhabitants. "The government is always making laws, so many laws, every day new laws," laments Oglala Chief Frank Fools Crow. "Then they break every one. They use the law to cheat people, but that is not the Indian way. We have one law, God's law: to live on this earth with respect for all living things, and to be happy with what God has given to us."[99]

However sound the res judicata arguments upon which the *Oglala I* and *Oglala II* courts based their decisions, and however important res judicata principles may be for the stability of our legal system, do *Oglala I* and *Oglala II* show respect for all living things in Paha Sapa? If judges hold that such questions have no legal relevance, they confess indifference to the achievement of justice, no matter how often they profess concern for its fulfillment in their opinions.

4. Religious freedom cases.

a. Indian perspectives on religious freedom.

At issue in each of the cases so far discussed, and implicit in Frank Fool Crow's contrast of the dominant culture's positivist law with the natural law[100] his people follow, is the meaning of religious freedom for Native Americans. By forcing Indians to isolate their property rights from their religious beliefs, our judiciary compels them to frame their arguments in a context antagonistic to their world-view.[101] For the Lakota and Dakota peoples, reli-

98. *Id.* at 1413.

99. *Quoted in* Matthiessen, *supra* note 17, at 529.

100. "Natural law" is law that accords with the purposes of God, or the Creator, and also with humanity's innate morality. "Positive law" is law enacted by legislative bodies. *See* Black's Law Dictionary 925, 1046 (5th ed. 1979).

101. Because Native Americans believe that people are in a relationship of unity with the life around them, a peoples' right to live on the land is determined by its connection with and understanding of the land, and of the life it supports. Vine Deloria explains that for the Indian:

gious liberty and property rights are inseparable. Government deprivation of sacred land is government restriction of religious freedom.

In theory, the United States affords all its citizens religious freedom under the first amendment. Because religious persecution drove many of Europe's great dissenters to America's shores, this nation has long recognized its citizens' right to practice their religions free from state coercion. From the time Europeans arrived in America, however, American Indian religious practices threatened the new immigrants' expansionist aspirations. Despite the dominant perspective of many historians, history still records many examples of the United States' oppression of Indian religious practices.[102]

> [t]o exist in a creation means that living is more than tolerance for other life forms, it is recognition that in differences there is the strength of creation. . . . Tribal religions find a great affinity among species of living creatures, and it is at this point that the brotherhood of life is a strong part of the Indian way. The Hopi, for example, revere not only the lands on which they live but the animals with which they have a particular relationship. The dance for rain, which involves the use of reptiles in its ceremonies, holds a great fascination for whites, primarily because they have considered reptiles . . . as their mortal enemy.

Vine Deloria, God is Red 103 (1973).

102. The government suppressed the religious practices of Indian tribes throughout the Americas. Its suppression of Lakota and Dakota religious practices included legislation against and policies designed to hinder many of the Dakotas' most sacred rites. In the 1890's, the United States passed laws prohibiting the Sioux Indians from conducting their ceremonies for the Keeping of the Souls, and even required that on a certain day of the year, all of the souls kept by the Sioux be released. *See* Black Elk, *supra* note 13, at 10 n.1. In 1881, the Sioux' most powerful rite, the Sun Dance, was forbidden on all Sioux reservations. Because the Sun Dance requires that the participants' flesh be pierced, missionaries sent to the reservations decried it as "cruel" and "sadistic." *See* Matthiessen, *supra* note 17, at 17. As late as 1975, the Sun Dance was again outlawed, this time by tribal chairman Dick Wilson, an anti-traditionalist backed by the United States government. *See* Matthiessen, *supra* note 17, at 129-51.

Many of the government's policies repressing Sioux' religious practices are difficult to document. Indian agents often subtly pressured Indians to abandon their rites. Rarely did this influence become articulated as official law or policy. A letter sent from the Department of the Interior to the superintendents of Indian reservations, however, provides one example. This letter was distributed among the Indians and typifies the policies government agencies advocated:

> To All Indians:
>
> Not long ago I held a meeting of Superintendents, Missionaries and Indians, at which the feeling of those present was strong against Indian dances. . . .
>
> . . . .
>
> No good comes from your "give-away" custom at dances and it should be stopped. It is not right to torture your bodies or to handle poisonous snakes in your ceremonies. All such extreme things are wrong and should be put aside and forgotten. You do yourselves and your

b. First amendment free exercise claims: the Yoder *standard.*

Because the Black Hills hold deep religious meaning for the Lakota and Dakota people, they have brought legal claims under the first amendment arguing that they are constitutionally entitled to be restored to their relationship with the Hills. These claims have been joined by the lawsuits brought by other American Indians under the first amendment.

Most typically, the Indian litigants are plaintiffs seeking a court injunction against the development of sacred land.[103] The land in question usually belonged to the Indian tribe before the European invasion, but has since been confiscated by the government and held as public land.[104] The defendants are usually governmental departments and agencies who have ordered the development, or who have granted a private developer the permits necessary to change the land's natural character.[105] The plaintiff tribes often join the private developers as defendants.[106]

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families great injustice when at dances you give away money or other property. . . .

. . . .

I urge you to come to an understanding and an agreement with your Superintendent to hold no gatherings in the months when the seed-time, cultivation of crops and the harvest need your attention, and at other times to meet for only a short period and to have no drugs, intoxicants, or gambling, and no dancing that the Superintendent does not approve.

If at the end of one year the reports which I receive show that you are doing as requested, I shall be very glad for I will know that you are making progress in other and more important ways, but if the reports show that you reject this plea, then some other course will have to be taken.

. . . .

February 24, 1923 Sincerely yours,
(signed) CHAS. H. BURKE
Commissioner

United States Interior Dep't Circular No. 1665, *Indian Dancing*, April 26, 1921.

103. *See* Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 371 (1983), *cert. denied*, 104 S. Ct. 739 (1984); New Mexico Navajo Ranchers v. ICC, 702 F.2d 227 (D.C. Cir. 1983); Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981); Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980); Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586 (N.D. Cal. 1983); Crow v. Gullet, 541 F. Supp. 785 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983); Inupiat Community v. United States, 548 F. Supp. 182 (D. Alaska 1982), *aff'd*, 746 F.2d 570 (9th Cir. 1984).

104. *See* Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980); Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159 (6th Cir. 1980); Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983); Crow v. Gullett, 541 F. Supp. 785 (D.S.D. 1982).

105. *See* cases cited *supra* note 103.

106. *See, e.g.*, New Mexico Navajo Ranchers Ass'n v. I.C.C., 702 F.2d 227, 228 (D.C. Cir. 1983); Inupiat Community v. United States, 548 F. Supp. 182, 184 (D. Alaska 1982).

The federal courts deciding these cases have created a pattern of case law centered around the Supreme Court's decision of *Wisconsin v. Yoder*.[107] In *Yoder*, the Supreme Court held the Amish were not required to comply with Wisconsin's compulsory school attendance law because the law conflicted with their religious beliefs. The Court held Amish compliance with the law would violate their rights under the free exercise clause of the first amendment.[108] Amish parents were allowed to take their children out of school once those children had completed the eighth grade. The *Yoder* Court found: 1) the Amish had proved Wisconsin's compulsory attendance law burdened their religious practices; and 2) the state's interest in extending the benefit of secondary education to all children was not sufficiently compelling to justify the burden it placed on the beliefs of the Amish people.[109]

Ironically, federal courts generally use *Yoder* to hold *against* Indian religious freedom claims.[110] Scrutinizing the approaches these courts take shows how legal precedent is construed against American Indians in order to promote the dominant culture's conceptions of private property and religion.

While Indian litigants' lack of legal title to the land they wish to protect does not bar their action under the first amendment, it lowers the weight federal courts give to their claims.[111] Under *Yoder*'s standards, the court considering a free exercise claim first decides whether the government's practices burden the exercise of the plaintiffs' religion.[112] If such a burden is found, the government action in question violates the free exercise clause unless the government can prove an interest of "sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."[113]

Courts have found against Indian litigants under each of the two prongs of the *Yoder* test. Where the governmental action the

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107. 406 U.S. 205 (1971).

108. *Id*. at 215-19, 229-34.

109. *Id*.

110. *See, e.g.*, Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980); Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159 (6th Cir. 1980); Crow v. Gullet, 541 F. Supp. 785 (D.S.D. 1982); Inupiat Community v. United States, 548 F. Supp. 182 (D. Alaska 1982). In Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586 (N.D. Cal. 1983), the court used *Wisconsin v. Yoder* to rule in the Indians' favor.

111. *See* Badoni v. Higginson, 638 F.2d 172, 176 (10th Cir. 1980); Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159, 1164 (6th Cir. 1980); Inupiat Community v. Tennessee Valley Auth., 548 F. Supp. 182, 187-88 (D. Alaska 1982).

112. *See* Badoni v. Higginson, 638 F.2d 172, 176 (10th Cir. 1980); Inupiat Community v. United States, 548 F. Supp. 182, 188 (D. Alaska 1982).

113. Badoni v. Higginson, 638 F.2d 172, 176-77 (10th Cir. 1980) (quoting *Yoder*, 406 U.S. at 214).

Indians seek to enjoin is arguably compelling, courts tend to find against the Indians on that ground.[114] Thus, the United States Court of Appeals for the Tenth Circuit ruled the government's interest in maintaining the Glen Canyon dam and reservoir on the Colorado River in southern Utah outweighed the religious interest of the Indian plaintiffs. The plaintiffs had sought to prevent the flooding of a 160-acre tract of land vital to their religious beliefs and practices.[115] In *Inupiat v. United States*,[116] a federal district court held the government's interest in opening an area lying from three to sixty-five miles offshore in the Beaufort and Chukchi seas to development and oil exploration outweighed the Inupiat people's religious interest in the area.

In cases where the government's purpose seems less compelling, courts have ruled against Indians on the grounds that their religious freedom is not burdened. In *Wilson v. Block*,[117] the appeals court held the government's decision to permit private entrepreneurs to build a ski slope on certain hills in the San Francisco Peaks considered sacred by the Navajo and Hopi Indian tribes did not burden the Indians' religious freedom.[118]

The *Wilson* court reached this result through a curious analysis. The court acknowledged the Peaks play an important role in the religious life of the Navajo and Hopi peoples.[119] Nonetheless, it held the ski slope's development would not burden the Indians' religious beliefs or practices.[120] The court drew a distinction between "offending" and "penalizing" adherence to religious belief.[121] The government may offend religious belief, but it may not penalize it. In order to penalize religious belief, the government must either exact a penalty for religious conduct, or condition the receipt of a government benefit on conduct inconsistent with the recipient's religious beliefs.[122] If the government so penalizes religious belief or conduct, its action violates the free exercise clause. In finding no such penalty, the *Wilson* court either ignored or dismissed the plaintiffs' testimony that the ski slope's construction *would* penalize their religion, and would lead eventually to the de-

114. *See* Badoni v. Higginson, 638 F.2d 172, 177 (10th Cir. 1980); Crow v. Gullet, 541 F. Supp. 785, 794 (D.S.D. 1982); Inupiat Community v. United States, 548 F. Supp. 182, 189 (D. Alaska 1982).

115. Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980).

116. 548 F. Supp. 182 (D. Alaska 1982).

117. 708 F.2d 735 (D.C. Cir. 1983).

118. *Id.* at 742, 744-45.

119. *Id.* at 740.

120. *Id.* at 741.

121. *Id.*

122. *Id.*

struction of religious practices upon which their present way of life and their culture depend.[123]

The *Wilson* court, along with other federal courts ruling on Indians' attempts to protect land under the first amendment, required the plaintiffs to prove not only that the land in question is central to their religious beliefs, but that it is "indispensable" to them.[124] *Yoder* imposes no such requirement, but merely requires that a religious group prove the government action violates a tenet "central" to its religion.[125] The difficulty of proving "indispensability" is enormous. Proof that the land forms the basis of Indian religious life, and has done so for centuries, does not satisfy even this first prong of the *Yoder* test as it is applied to Indian cases.

In addition, courts make subtle and ethnocentric distinctions between Indian culture and Indian religion in order to deny the Indians the injunctive relief they seek.[126] Thus, in *Sequoyah v. Tennessee Valley Authority*,[127] the Sixth Circuit wrote:

> the overwhelming concern of the [Cherokee] affiants appears to be related to the historical beginnings of the Cherokees and their cultural development. It is damage to tribal family folklore and traditions, more than particular religious observances, which appears to be at stake. . . . [C]ultural history and tradition . . . are not interests protected by the Free Exercise Clause.[128]

The plaintiffs in *Sequoyah* had, in fact, shown that they worshipped in the valley the government wished to flood, that the valley was a place of religious pilgrimage, and that it was a source of healing herbs and medicines used to effect spiritual as well as biological cures.[129] Nonetheless, the court reached its decision by imposing a division between the Indians' "religion" and their "culture."[130] Such a division contradicts the plaintiffs' testimony about how they understand their own religion. Thus, the *Yoder* test, when applied to Indian plaintiffs seeking to protect sacred land, is applied more stringently.[131]

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123. *Id.* at 740, 741. As the case was presented as one for summary judgment, the court was obliged to consider the facts in the light most favorable to the non-moving party, the Indian plaintiff.

124. *Id.* at 744.

125. 406 U.S. at 213-15.

126. *See, e.g.*, Wilson v. Block, 708 F.2d 735, 744 (D.C. Cir. 1983); South Dakota v. Brave Heart, 326 N.W.2d 220, 223 (S.D. 1982).

127. 620 F.2d 1159 (6th Cir. 1980). *Sequoyah* holds that the flooding of a valley sacred to the Cherokee did not violate the Cherokee's first amendment rights under the free exercise clause.

128. *Id.* at 1164-65.

129. *Id.* at 1164-65.

130. *Id.* at 1162, 1164.

131. The Amish, as well as the plaintiffs in *Sequoyah*, *Wilson*, and *Badoni*, al-

c. *American Indian Religious Freedoms Act.*

The unique relationship between religion and land in American Indian cultures may mean that Indians require a unique cause of action protecting their religious freedom and access to sacred lands. Historically, however, United States policy has been to uproot rather than to nurture that relationship.[132] Thus, little legislation protecting Indian religious freedom was passed until 1978. In response to the Civil Rights Movement and the success of the American Indian Movement and similar organizations, Congress passed the American Indian Religious Freedoms Act (AIRFA).[133]

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leged the government's action threatened to undermine their religious beliefs. Can these cases be reconciled? Is public school education of Amish children between the ages of 14 and 16 more burdensome upon Amish religious freedom than forever depriving an Indian tribe of land that forms the basis for its religion? Is the right to educate one's children in the Amish faith somehow more "religious" and less "cultural" than Indians' right to visit the graves of their ancestors, and to gather sacred herbs at the place where they have for centuries gathered them?

132. *See supra* note 102.

133. The Act reads as follows:

> Whereas the freedom of religion for all people is an inherent right, fundamental to the democratic structure of the United States and is, guaranteed by the First Amendment of the United States Constitution;
> Whereas the United States has traditionally rejected the concept of a government denying individuals the right to practice their religion and, as a result, has benefited from a rich variety of religious heritages in this country;
> Whereas the religious practices of the American Indian (as well as Native Alaskan and Hawaiian) are an integral part of their culture, tradition and heritage, such practices forming the basis of Indian identity and value systems; . . .
> Whereas the lack of a clear, comprehensive, and consistent Federal policy has often resulted in the abridgment of religious freedom for traditional American Indians;
> Whereas such religious infringements result from the lack of knowledge or the insensitive and inflexible enforcement of Federal policies and regulations premised on a variety of laws; . . .
> Whereas such laws and policies often deny American Indians access to sacred sites required in their religions, including cemeteries;
> Whereas such laws at times prohibit the use and possession of sacred objects necessary to the exercise of religious rites and ceremonies; . . .
> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.
> SEC. 2 The President shall direct the various Federal departments, agencies, and other instrumentalities responsible for administering relevant laws to evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices. . . .

Though passed to acknowledge the integrity of Indian religious practices, courts have held the Act is only a proclamation. It creates no remedy for an injured tribe and imposes no legal penalties on the injuring party. It merely announces Congress' wish that Native Americans be allowed to worship free from state or private interference. Were the Act's principles enforced by our judiciary, it could significantly enhance Native American religious freedom. Unfortunately, courts have interpreted the Act to reflect the dominant culture's religious views and to continue suppressing American Indian religious practices. The Act reads, in relevant part, that

> it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise [their] traditional religions, including, but not limited to, access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.[134]

Indian litigants have brought causes of action under the AIRFA in tandem with free exercise first amendment claims.[135] Federal courts generally hold that the AIRFA gives Indians no independent cause of action, as that was not what Congress intended the Act to do.[136] At best, the AIRFA simply directs the attention of federal agencies to Indian first amendment rights. It requires those agencies to "consider" the complaints of Indian tribes before developing public land.[137]

It is not clear at this time what standard federal courts will use when reviewing the decision of a federal agency in light of the requirements imposed by the AIRFA. The courts have not yet de-

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Approved August 11, 1978.

Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified in part at 42 U.S.C. § 1996 (1982)).

134. *Id.*

135. *See e.g.* Wilson v. Block, 708 F.2d 735, 745 (D.C. Cir. 1983); Badoni v. Higginson, 638 F.2d 172, 180 (10th Cir. 1980); Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 597 (N.D. Cal. 1983); Crow v. Gullet, 541 F. Supp. 785 (D.S.D. 1982).

136. Crow v. Gullet, 541 F. Supp. 785, 794 (D.S.D. 1982); Wilson v. Block, 708 F.2d 735, 746-47 (D.C. Cir. 1983). The *Wilson* court writes that the AIRFA requires federal agencies "to learn about, and to avoid unnecessary interference with, traditional Indian religious practices," but does not "declare the protection of Indian religions to be an overriding Federal policy, or grant Indian religious practitioners a veto on agency action." *Id.* at 746.

137. An agency complies with the AIRFA "if, in the decision-making process, it obtains and considers the views of Indian leaders, and if, in project implementation, it avoids unnecessary interference with Indian religious practices." Wilson v. Block, 708 F.2d 735, 747 (D.C. Cir. 1983). If building a ski slope on a hill sacred to the Indians is not "unnecessary interference" with their religious practices, one wonders what is. In light of the *Wilson* court's holding, it would appear that an agency need do no more than conduct a *pro forma* inquiry into complaints brought before it by Indian tribes. No matter what the result of the agency's decision, the court will not disturb that decision, provided some sort of nominal inquiry has been made.

termined under what circumstances and how far they may probe the findings of the agency decisionmaker. In *Northwest Indian Cemetery Protective Association v. Peterson*,[138] a federal district court went so far as to hold that even when the agency unconsitutionally violates Indian religious freedom, it may still have complied with the AIRFA. If the agency provides a forum where members of the complaining tribe are allowed to speak, and if its records reflect that it has noted the Indian tribe's complaints, the agency is considered to have met the requirements of the AIRFA, regardless of whether the substance of its ruling reflects that consideration.[139]

In *New Mexico Navajo Ranchers Association v. ICC*,[140] the D.C. Circuit appears to impose a higher standard of review. There, the court held the Interstate Commerce Commission (ICC) had violated the AIRFA when it failed to investigate the Navajo ranchers' allegations that a company proposing to construct a railroad line had dealt unconscionably with Navajo landowners. The proposed rail line would have run across land of sacred and historic significance to the Navajo. The Navajo plaintiffs argued the railroad company had used coercive tactics to obtain grants of right of way. The court found the ICC had too readily accepted "the railroad's assurances that it would take appropriate steps to mitigate the damage to historic and sacred sites."[141]

The precedential value of this case for Indian plaintiffs to halt development on sacred land is ambiguous. The *Navajo Ranchers* plaintiffs owned most of the land across which the proposed railroad would have run. Further, the court was troubled that the railroad had acted unconscionably in dealing with the landowners. How this case applies where Indians cannot claim title to the land is unclear.

d. Constitutional rights and administrative agency discretion.

At present, it appears the unarticulated working standard is that where the agency has made a *pro forma* inquiry into the impact of its proposed action on American Indian religious practices, the agency's decision will be upheld by the courts. Yet it is courts rather than executive agencies who bear the ultimate responsibility for ensuring that government action does not violate the consti-

138. 565 F. Supp. 586, 597-98 (N.D. Cal. 1983).
139. *Id.*; *see also* Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983).
140. 702 F.2d 227 (D.C. Cir. 1983).
141. *Id.* at 232.

tutional rights of United States citizens.[142] Congress passed the AIRFA to ensure recognition of American Indians' first amendment rights. Courts are constitutionally obligated to go beyond a *pro forma* inquiry into whether the agency in question "considered" the impact its decision would have upon American Indian religion. Federal agencies are not competent to determine a party's constitutional rights under the free exercise clause of the first amendment. The Interior Department,[143] the Department of Agriculture,[144] and state park, forest, and game departments[145] lack the requisite authority and expertise to make final determinations in matters involving religious freedom.

The Administrative Procedure Act[146] (APA) specifies the scope of judicial review of agency decisions. The Act requires the reviewing court to "decide all relevant questions of law, interpret constitutional and statutory provisions and determine the meaning or applicability of the terms of an agency action."[147] When reviewing an agency's decision, the court examines both factual and legal conclusions of the agency decisionmaker.[148] When considering the factual basis of an agency's decision, the reviewing court asks if the record contains substantial evidence to support the agency's findings.[149] When considering whether the agency has correctly interpreted a federal statute and whether its legal conclusions conform with the laws and Constitution of the United States, the reviewing court must make its own determination after considering the agency's view.[150]

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142. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

143. *See, e.g.*, Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980).

144. *See, e.g.*, Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983); Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586 (N.D. Cal. 1983).

145. *See, e.g.*, Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980); Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586 (N.D. Cal. 1983); Crow v. Gullet, 541 F. Supp. 785 (D.S.D. 1982); Inupiat Community v. United States, 548 F. Supp. 182 (D.S.D. 1982).

146. The Administrative Procedure Act is codified at 5 U.S.C. §§ 1-5701 (1982).

147. 5 U.S.C. § 706 (1982).

148. The scope of judicial review of an agency's factual conclusions is considered in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). Review of an agency's legal conclusions is considered in NLRB v. Hearst, 322 U.S. 111 (1944).

149. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

150. The *Hearst* Court writes: "Undoubtedly questions of statutory interpretation . . . are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute." NLRB v. Hearst, 322 U.S. 111, 130-31 (1944). *See also* Henry Hart Jr. & Albert Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1345-47 (10th ed. 1950). Under the Hart/Sacks analysis, the more the agency's decision has to do with general legal principles, the more active a role the reviewing court should assume. "Of course, there may be hierarchies of purpose reflected in a statute. . . . The more general the question, the more persuasive are the arguments that the court should make the determination after considering the agency's view." *Id.* at 1346.

Questions of law and questions of fact are not easily separated. An agency's legal conclusions will derive from its factual determinations just as its factual determinations depend upon interpretation of statutes relevant to its decision.[151] The Supreme Court has, nonetheless, distinguished factual from legal issues, holding a reviewing court has greater discretion and responsibility when considering legal questions.[152]

The APA directs courts to set aside agency actions found to be "contrary to constitutional right, power, privilege or immunity."[153] Because the AIRFA specifically addresses the constitutional rights of American Indians, courts should subject agency decisions made under the Act to the de novo review required of questions of law. The Supreme Court has gone further, holding that when it is necessary to protect a constitutional right properly asserted, a court reviewing an agency decision must determine if the procedure used to determine the underlying facts was adequate. For example, the Court has said agencies may not deprive persons of constitutionally protected rights or liberties without giving them a substantive evidentiary hearing.[154] Assuming federal agencies have the authority to decide whether Indians' first amendment rights are violated, courts must subject agency legal conclusions to the appropriate standard of review.[155]

Under that standard, the reviewing court must independently determine whether the agency's proposed action conflicts with Indian peoples' constitutionally protected religious freedom. The reviewing court would, therefore, examine the record to determine

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151. *See* Roy Schotland, *Scope of Review of Administrative Action—Remarks Before the D.C. Circuit Judicial Conference*, 34 Fed. B.J. 54 (1975).

152. NLRB v. Hearst, 322 U.S. 111, 130-31 (1944).

153. 5 U.S.C. § 706 (1982).

154. *See, e.g.*, Greene v. McElroy, 360 U.S. 474 (1959), holding that an executive agency may not fashion security programs whereby persons are deprived of their civilian employment without being given an opportunity to challenge effectively the evidence upon which an adverse determination might rest. Such programs deny the employee's "liberty" and "property" without "due process of law" in violation of the fifth amendment. *Id*. at 492, 500-02. *See also* Goldberg v. Kelly, 397 U.S. 254 (1970), holding that state and municipal agencies may not terminate public assistance payments to a recipient without affording him or her the opportunity for an evidentiary hearing to termination because such termination denies the recipient procedural due process under the fifth amendment.

155. Even under the lower standard of review appropriate for a review of an agency's factual determinations, courts reviewing agency decisions under the AIRFA have failed to meet their obligation. Rather than examining the record to see if the agency's conclusions are supported by "substantiality of evidence," Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951), the courts have upheld agency decisions where the agency's records reflect that it "considered" the Indian tribe's complaints, regardless of whether its ruling is properly supported. *See supra* text accompanying note 139.

whether the agency's proposed act conforms to Congress' mandate that Indians be guaranteed access under the first amendment to religious sites, and that they enjoy the freedom to worship through ceremonies and traditional rites.[156]

By empowering executive agencies to decide with finality the legitimacy of a tribe's religious claims to public land, our courts offend the constitutional rights of tribal members. As presently interpreted, the Act restricts the court's inquiry into first amendment issues once an executive agency has ruled that its decision conforms to the Act.[157] The agency is, of course, inclined to so rule since it has itself initiated the action of which the Indians complain. Though Indian litigants may still bring actions under the free exercise clause against executive agencies and private developers in federal court, the agency's self-determined compliance with the AIRFA will serve as prima facie evidence that it has not violated the Indians' constitutional rights. This interpretation of the AIRFA restricts rather than enhances the religious freedom of American Indians. Should executive agencies become the final arbiters of whether their own actions violate the AIRFA, the Act will have the unintended and ironic effect of undermining American Indians' first amendment rights. Though the courts insist that the Act has no teeth,[158] they interpret it in such a way that it gnaws at the liberty of those whom it is designed to protect.

e. Black Hills first amendment cases.

(1) *Crow v. Gullet*

Two cases concerning the Black Hills exemplify judicial interpretation of Indian religious rights under the first amendment. The first is *Crow v. Gullet*.[159] In 1982, the chiefs and holy men of the Lakota Nation brought a class action suit against the state of South Dakota. The plaintiffs contended that the state had defaced a religious site vital to Lakota religion, and this defacement impinged on Lakota religious freedom guaranteed the Lakota by the free exercise clause. The Indians brought their action under the

156. For text of AIRFA, see *supra* note 133.

157. *See, e.g.*, Wilson v. Block, 708 F.2d 735, 747 (D.C. Cir. 1983); Crow v. Gullett, 541 F. Supp. 785, 793 (D.S.D. 1982).

158. *See, e.g.*, Crow v. Gullet, 541 F. Supp. 785 (D.S.D. 1982); Wilson v. Block, 708 F.2d 735, 746-47 (D.C. Cir. 1983). The *Wilson* court quotes the following excerpt from the congressional record: "[The resolution] simply says to our managers of public lands that they ought to be encouraged to use these places. It has no teeth in it." 708 F.2d at 747 (quoting from 124 Cong. Rec. 21, 445 (1978)).

159. 541 F. Supp. 785 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983).

AIRFA.[160]

Bear Butte, the religious site at issue, stands at the eastern edge of the Black Hills. Of all ceremonial sites in the Black Hills, Bear Butte is most important to Lakota religion. It towers over the earth, austere and majestic. Two holy men testifying for the plaintiffs explained that Lakota men met with the Great Spirit on Bear Butte.[161] Each year, male vision seekers of the Black Hills tribes journey there to fulfill the Vision Quest, one of the seven sacred rites of the Oglala Sioux.[162] Black Elk calls the rite "crying for a vision." Before climbing the Butte, the vision seeker enters

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160. 541 F. Supp. at 793.

161. Men are the principal participants in Lakota and Dakota vision quests. *See* Black Elk, *supra* note 13, at 44; William Powers, Oglala Religion 91-93 (1977); William Powers, Yuwipi: Vision and Experience in Oglala Ritual 48-52 (1982). Most American Indian cultures have traditionally considered it less important for women to seek visions. *See* Carolyn Niethammer, Daughters of the Earth: The Lives and Legends of American Indian Women 235-37 (1977). Women, however, participate actively in many religious practices. Niethammer writes that among the Nez Perce tribes of northern Idaho, and the Menominee, Potowatomi and other central Algonkin groups living around the northern Great Lakes, children or young people of both sexes participated in vigils in which they fasted and waited for visions. Further, young women of the southeast Salish communities often sought after visions, though young men did so in greater numbers. Joseph Epes quotes Black Elk as saying, "[I]n the old days we all—men and women—'lamented' [sought visions] all the time." Black Elk, *supra* note 13, at 44. Though Epes records Black Elk's description of the vision quest from the perspective of its male participants, Black Elk also told Epes that "our women . . . 'lament' after purifying themselves in the *Inipi*; they are helped by other women, but they do not go up on a very high and lonely mountain." *Id*. at 46.

Women play an important role in Lakota legend. The Lakota received the sacred pipe from the powerful Buffalo Calf Woman, who instructed the people in its use before she left them. *See* Powers, Oglala Religion, *supra*, at 3-9. Because male anthropologists have ignored the lives of American Indian women, non-Indians know little about Indian women's religious practices. For an account of Indian women's lives, see generally Niethammer, *supra*.

162. Although only one person participates in a vision quest, it must be done under the supervision of a sacred woman or man. The pilgrim performs the quest "to gain power or to seek a vision which will help explain unsolicited visions or to help prophesize the outcome of a hunting or war expedition." Powers, Oglala Religion, *supra* note 161, at 91.

The pilgrim tells the sacred person of his intention to seek a vision. If the holy person decides to guide the would-be pilgrim, the two seal their sacred relationship by smoking the pipe.

The sacred person prepares a place on the hill by instructing that a pit be dug and be covered over with brush. "Saplings are imbedded in the earth at the four directions, and they are connected at the ground by means of a string of tobacco offering prepared in advance by the youth's relatives. The four directional poles are decorated with colored cloth, each color symbolizing one of the four directions." *Id*. at 92.

The vision seeker leaves the pit to pray and meditate. He must say prayers while facing in each of the four directions. During his quest, the animals and birds may visit him. Black Elk instructs that "[t]he 'lamenter' should . . . notice if one of the little birds should come, or even perhaps a squirrel. . . . All of these people are important, for in their own way they are wise and they can teach us two-leggeds

the purification (or sweat) lodge. There, he prepares for the journey and affirms his connection with the powers of the universe. He neither eats nor drinks while undergoing purification. He then travels to the mountain's foot, where, after making further preparations, he begins his walk up the Butte. He finds a sacred, isolated place from which to seek visions through prayer to Wakan-Tanka. He leaves sacred offerings on the Butte, as well.[163]

While the vision seeker, or "lamenter," may pray for many things, Black Elk explains the "most important reason for 'lamenting' is that it helps us to realize our oneness with all things, to know that He may give to us knowledge of Him who is the source of all things, yet greater than all things."[164] To realize this oneness through his visions, the seeker must be isolated from all human noise and distraction. Wakan-Tanka teaches the pilgrim through earth's creatures and heaven's bodies. The eagle, the morning star, the sun, the wind and the birds which ride it inspire and participate in the seeker's visions.[165]

Since the state of South Dakota opened Bear Butte Park to the public, tourists have desecrated the site and disrupted the ceremonies. They gape at the vision seekers from wooden platforms the Park Service has constructed for that purpose, and snap cameras despite the Lakota taboo against photographing any part of the rite. Campers disrupt the vision seekers' prayerful contempla-

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much if we make ourselves humble before them." Black Elk, *supra* note 13, at 58. The seeker may also be visited by Thunder-Beings, emanating from the west:

> In the evenings the Thunder-beings may come, and although they are very terrifying, they bring much good, and they test our strength and endurance. . . . I remember one time when I "lamented," and a great storm came from the place where the sun goes down, and I talked with the Thunder-beings who came with hail and thunder and lightning and much rain, and the next morning I saw that there was hail all piled up on the ground around the sacred place, yet inside it was perfectly dry. I think that they were trying to test me.

Id. at 59-60.

163. See Black Elk's account of the vision quest in "Crying for a Vision." Black Elk, *supra* note 13, at 44-66.

164. *Id.* at 46.

165. After the vision quest ends, the sacred advisor returns for the pilgrim. The holy person and the pilgrim together interpret the pilgrim's vision. Black Elk gives the following example of a "lamenter's" account:

> I arose in the middle of the night, and again walked to each of the four directions, returning to the center each time, continually sending my voice. Just before the morning star came up, I again visited the four quarters, and just as I reached the place where the sun rises, I saw the Morning Star, and I noticed that at first it was all red, and then it changed to blue, and then into yellow, and finally I saw that it was white, and in these four colors I saw the four ages. Although this star did not really speak to me, yet it taught me very much.

Id. at 63; *see also* Powers, Oglala Religion, *supra* note 161, at 91-93.

tion with careless shouts and blaring electronic sound equipment. They steal for souvenirs the offerings the worshippers leave on the Butte. Recently, the Park Service escalated the invasion and began tearing up the sacred ground at the Butte's base to construct access roads and parking lots.

The South Dakota court's holding in *Crow v. Gullet* fundamentally misunderstands and disregards the Black Hills' place in Lakota religion. Even if the court had applied the same legal standard to the Lakota's claim as it would in a case involving Anglo-European Americans, it would perpetuate the inequality between American Indian religious practitioners and their Christian counterparts. If our courts fail to recognize the Native people's religious veneration for the land, they cannot protect American Indian religious practices, which do not separate land and spirit as Western religions do. *Crow v. Gullet*, however, does less than that. It affords the Black Hills people none of the protection courts have traditionally granted to Christian groups.[166]

"It is clear to this court," writes Judge Brogue, author of the *Crow v. Gullet* decision, "that plaintiffs have no property interest in Bear Butte or in the State Park."[167] The Lakota people's century-old religious use of the Butte results in no property interest recognized under state or federal law. Though the Lakota's lack of a property interest is not, in theory, determinative of their right to worship at the Butte,[168] the court's opinion turns on that issue. "For many years," writes Judge Brogue, "the State has administered this area as a state park. During this time it appears that plaintiffs' religious practices managed to coexist with the diverse developments that occurred there."[169] This statement assumes Lakota religious practices have survived because the state's intrusions have been slight, rather than because the Lakota's religious beliefs have been strong.

The *Crow* court's opinion posits a distinction between religious belief and practice. Judge Brogue reasons that the Indians may believe anything they like—the state has not and will not coerce them into abandoning their religion. Yet neither will it force

166. Chris Spotted Eagle, Oglala film maker and creator of the film "Our Sacred Land," tells how the government's treatment of the Bear Butte vision seekers demonstrates the inequality perpetuated between Christian and Native American worshippers: "Imagine if we flip things around, and we had Indian people dominating the Christian churches. There would be signs on the church aisles saying, 'Don't photograph the Christians.' We Indians would stroll in there with our popcorn and watch you practice your religion." Northern Sun News, Nov. 1984, at 6, col. 4.

167. 541 F. Supp. 785, 791 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983).

168. See cases cited *supra* note 111.

169. 541 F. Supp. at 791.

the outside world to accommodate itself to Indian religious practices. Any effort the state makes in that direction is wholly gratuitous. Brogue writes:

> This Court also rejects plaintiff's claim that the free exercise clause obligates defendants to control the actions of the general public at the Butte which may interfere with plaintiffs' religious practices. . . . The first amendment does not require defendants to police the actions of tourists, even though defendants voluntarily urge tourists to respect the religious practices of plaintiffs at the Butte.[170]

The court applied the balancing test to reject the plaintiffs' other claims as well, holding the government's interest in maintaining the park for tourists outweighed whatever minimal restrictions its policies placed upon the worshippers. The construction of roads and parking lots, reasoned the court, does not adversely affect Bear Butte's spiritual significance, as that sort of "progress" helps everybody reach the site more easily. Similarly, in the court's view, the tourists' viewing platforms actually help foster privacy for the worshippers because they give the tourists designated places to stand.[171] The court concluded that the Lakota

> failed to show that the construction projects now in progress . . . have burdened any rights protected by the free exercise clause. . . . We conclude that the free exercise clause places a duty upon a state to keep from prohibiting religious acts, not to provide the means or environment for carrying them out.[172]

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170. *Id.* at 791-92. In so holding, the court quotes Brief for Appellant at 4, Badoni v. Higginson, 638 F.2d 172, 179 (10th Cir. 1980), that the first amendment "gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. . . . [Were it otherwise, the Monument would become a government shrine.]" (brackets appear in original). One wonders whether, under this holding, a court's decision to enjoin members of the public from desecrating a Christian church or interrupting its services would amount to an impermissible interference of state with church. I need not further belabor the double standard perpetuated by these cases involving American Indian religion.

171. 541 F. Supp. at 791. The Court cites Hopi Indian Tribe v. Block, 8 Indian L. Rep. (Am. Indian Law. Training Program) 3073 (D.D.C. June 15, 1981) as precedent. In that case, the Hopi tribe sought to enjoin the development of the Arizona Snow Bowl, a skiing facility in the San Francisco Peaks and the Conconino National Forest. The Hopi claimed the free exercise of their religion required that the mountains remain free of human disturbances. In holding against the tribe, the court wrote:

> [Plaintiffs] are essentially claiming that anyone asserting a religious interest in government property . . . has a constitutional right to demand that the government grant them access to it, yet restrict the rights of the public to, and any development of, this property in order to facilitate the exercise of their religious beliefs. This Court will not extend the First Amendment to such limits.

8 Indian L. Rep. at 3075.

172. 541 F. Supp. at 791.

This holding derives from the court's belief 1) that the Butte "belongs" to the state, and the vision seekers come to it at the state's sufferance; and 2) that the integrity and undefiled appearance of the Butte has nothing to do with the Lakotas' ability to practice their religion. By American Indian standards, both assumptions are palpably false.[173]

Judge Brogue concluded the AIRFA "does not create a cause of action in federal courts for violation of rights of religious freedom."[174] Congress did not intend the Act to provide American Indians with any rights which they did not already have under the first amendment.[175]

This interpretation is correct in legal theory, but wrong as to congressional intent. As a proclamation, the AIRFA does not create religious rights for Indians apart from those guaranteed them under the first amendment. By passing the Act, however, Congress was seeking to ensure full recognition of those first amendment rights. The AIRFA sends a message to the courts that the purpose of the free exercise clause is to protect the religious freedom of every citizen. It contains an implicit criticism of past precedent and a mandate to the courts to avoid defining religion solely in terms of the beliefs and practices of the dominant culture. Rather than provide new religious rights, the Act urges a full and meaningful recognition of those religious rights American Indians already have under the Constitution, but are being denied. The *Crow v. Gullet* decision demonstrates the failure of the Act to rectify this blindness.

(2) *South Dakota v. Brave Heart*.

South Dakota v. Brave Heart,[176] follows the rationale of *Crow v. Gullett* and holds that South Dakota's open fire law did not prevent the free exercise of Lakota religious practices. While the Indians may believe whatever they like, *Brave Heart* says, they may not burn a fire on park land, no matter how important fire is to the practice of their belief. The *Brave Heart* plaintiffs applied for and were denied a fire permit for a religious ceremony by the For-

173. The district court also found that the state's denying the Lakota the right to camp in the traditional campground during the construction did not violate their freedom of religion. "In both *Badoni v. Higginson* and *Sequoyah v. Tennessee Valley Authority*," writes Judge Bogue, "the . . . Native Americans' right to free exercise of religion was not unduly burdened even though their access to sacred ceremonial sites was completely barred by the permanent flooding of the sites for dam and reservoir projects." Crow v. Gullet, 541 F. Supp. 785, 792 (D.S.D. 1982).

174. *Id*. at 793.

175. *Id*.

176. 326 N.W.2d 220 (S.D. 1982).

est Service. Fire plays a crucial role in the Lakota Sun Dance Ceremony.[177] The Lakota ignored the Forest Service ruling and burned a fire during these ceremonies.[178] Law enforcement officers arrested Dewey Brave Heart and other worshippers for violating the state's open fire laws. The worshippers were convicted and subsequently appealed. The Supreme Court of South Dakota affirmed their conviction, relying on the Park Service's argument that dry weather conditions justified denial of the Lakota's application for a permit. Though the Park Service's concern for land protection has merit, the court's holding goes beyond balancing values to favor the Park Service. *Brave Heart* extends past precedent in a way harmful to all Lakota religious practices, leveling criminal penalties against people attempting to practice their religion.[179]

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177. Black Elk Speaks, *supra* note 1, at 88.

178. 326 N.W.2d at 221.

179. Dewey Brave Heart and the other defendants are part of a growing movement in the Lakota/Dakota community to reclaim the Hills by returning to them. Unwilling to accept the Supreme Court's decision in *Sioux Nation* that a money award compensates Indians for the government's theft of their land, many Lakota and Dakota people have established camps in the Black Hills National Forest. The most important of these is Yellow Thunder Camp, established by Lakota people on April 4, 1981, on National Forest land about twelve miles southwest of Rapid City, South Dakota. Matthiessen, *supra* note 17, at 526. The Lakota founded Yellow Thunder Camp as a traditional community, in harmony with nature and centered around Lakota spiritual beliefs. *Id*. at 526-31. Yellow Thunder Camp was founded upon the principles that:

> 1) Spirituality is the essential foundation of Lakota culture and life; any setting voided of this traditional spiritual centrality is not Lakota.
> 2) The sacred Paha Sapa [Black Hills] has always been central to Lakota spirituality, which requires the intrinsic access to and occupancy of this area.
> 3) Lakota spirituality is a constant and ongoing aspect of Lakota life; all aspects of traditional Lakota life carry a spiritual significance on a day to day, or even a moment to moment basis. . . . The imposition of any other condition upon Lakota people is to effectively deny them the right to cultural existence.

Oyate Wicaho (publication of Dakota American Indian Movement), Vol. 4, Jan.-Mar. 1983, at 8, col. 4. On April 22, 1981, the members of Yellow Thunder Camp applied to the United States Forest Service for a special use permit allowing them to establish a religious, cultural and educational community in an 800-acre area of the Black Hills National Forest. United States Marshals Service v. Means, 724 F.2d 642 (8th Cir. 1983). The Forest Service denied the request on August 24, 1981, and ordered the camp members to leave the site by Sept. 8, 1981. The camp members made a timely administrative appeal. *Id*. On September 9, 1981, the United States filed an action against the named principals of Yellow Thunder Camp, claiming that they illegally occupied the lands and seeking injunctive and declaratory relief. On September 15, the camp members counter-sued Forest Service officials, contending the Forest Service's denial of their special use permit was arbitrary, racially-motivated, and violated their rights under the first amendment free exercise clause and the AIRFA.

In December, 1985, District Judge Donald O'Brien ruled that the Forest Service's denial of the campers' permit violated their first amendment right to freely

Brave Heart cites *Sioux Nation* as dispositive of the issue of the Indians' property right to live and worship in the Hills. Aware of this precedent, the Lakota had argued, in the alternative, that they had first amendment rights to practice their religion in the Hills.[180] The *Brave Heart* defendants maintained that "fires are an essential ingredient of the Lakota religious rituals, specifically the pipe and sweat lodge ceremonies, and traditional feasts performed and celebrated in their camps."[181] They argued further that "by depriving them of the use of fire, the state 'stole the heart' of the religious ceremonies, the 'center of the [Lakota] universe,' the 'bread and wine' of their communion with the Creator."[182] Implicit in the court's rejection of the defendants' arguments is the distinction courts make between those practices which are "indispensable" and those which are merely "central" to Indian religion.[183]

The *Brave Heart* court writes that the Indians failed to prove the "indispensability" of open fires to their religious practices. "There was no evidence that these ceremonies . . . could not have been performed using a stove, sparkproof incinerator or established fireplace. . . . The record does not show that such alternatives to open fire . . . would have interfered with the free exercise of appellant's religion."[184] To receive first amendment protection, *Brave Heart* requires Indian litigants to go beyond the *Yoder* test of centrality to prove their religious practice has no alternative form of expression.

Brave Heart fails to understand how the substance of religious belief and the form of its expression are inseparable. In effect, the court is requiring Indians to change the content of their religion to conform with South Dakota's open fire laws. The penalty for refusing to compromise beliefs was severe: Dewey Brave Heart and his co-defendants were convicted of criminal charges.[185]

In a concurring opinion to *Brave Heart*, Justice Henderson distinguishes between Lakota religion and Lakota political and cultural life to argue that the defendants suffered no infringement

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practice their religion. The court ordered the Forest Service to issue the permit after the court approves the campers' plan for the use of the land. United States v. Means, No. 81-5131 (D. S.D. Dec. 9, 1985); Means v. Mathers, No. 81-5135 (D. S.D. Dec. 9, 1985).

180. 326 N.W.2d at 222.

181. *Id.*

182. *Id.* at 222-23.

183. *See supra* text accompanying notes 124-125; Wilson v. Block, 708 F.2d 735, 744 (D.C. Cir. 1983).

184. 326 N.W.2d at 223.

185. *Id.*

of their first amendment rights.[186]

> One of the campers testified that the camp was set up in a spiritual way but that he and his family's main purpose in going to the Hills was political in nature, namely that the Black Hills still belonged to the Sioux. . . . Further, this camper stated he wanted to draw attention to the Indian people's opposition to settlement of money in exchange for the Black Hills to the Federal government. He testified that life was poor on the reservation and that he just wanted to go to the Black Hills to camp.[187]

The appellants based their defense on the argument that for those Lakota people living and worshipping at the camp, "the secular and religious cannot be separated."[188] The theft "sale" of the Black Hills had offended both the political and religious convictions of the Lakota people. They lost not only property rights, but also religious freedom. The campers' political motives and their religious motives for living in the Hills are fundamentally the same.

Brave Heart interprets the first amendment so as to make it inapplicable to American Indian religious practices. The Anglo-European distinction between "practice" (something people do) and "belief" (in context of these cases, something which people may freely think, so long as they do not act upon it) flies in the face of Lakota religion and way of life. For Black Elk's people, spirit and deed, like Creator and creation, exist together and receive a single expression.

f. Indian religious freedom and the establishment clause.

(1) *Lemon v. Kurtzman*: The traditional approach.

Under *Crow* and *Brave Heart*, the first amendment free exercise clause fails to protect Lakota religious freedom. *Crow* interprets the AIRFA consistent with previous state and federal court interpretations of the first amendment, perpetuating the cultural bias of the decisions the Act intended to remedy.[189] The courts

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186. *See supra* text accompanying notes 126-130.

187. 326 N.W.2d at 223-24.

188. *Id.* at 222.

189. Senator Edward Kennedy, an early supporter of the act, has complained that it has failed in its effect:

> On August 11, 1978, Congress passed the American Indian Religious Freedom Act to emphasize our recognition of the constitutional protections inherent in Native American religions. Underlying this Act was the understanding that American Indian religious practices are an integral part of the Indian culture, tradition, and heritage. In the Act, we condemned "the lack of a clear, comprehensive and consistent Federal policy . . . often result[ing] in the abridgment of religious

have gone further, however, concluding government protection of Indian religious practices on public lands would violate the first amendment establishment clause. In both *Crow* and *Brave Heart*, the suggestion that government act to ensure the Lakota can practice their religion free from state or private interference was held to promote Indian religious practices in violation of the first amendment.[190]

In reaching this conclusion, the courts rely on the test set out by the Supreme Court in *Lemon v. Kurtzman*.[191] Under this standard, the establishment clause is violated if a government law or conduct lacks a significant secular purpose, if its primary effect is to advance or inhibit religion, and if it creates an excessive entan-

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> freedom for traditional American Indians." Three years later, the situation is sadly unchanged. . . .
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> . . . .
>
> For far too long, Americans have perpetuated a double standard in their view toward religions—exhibiting the proper respect for western religious practices and their practitioners, while treating Native American religions in an insensitive and even sacrilegious manner. For example, in my own state of Massachusetts, the congregation of the historic Old North Church is given the protections that their religious beliefs and activities deserve. Yet at Rainbow Bridge in southern Utah, tourists are given unrestricted access to Native American religious sites. They are permitted to photograph the sacred ceremonies and to consume alcoholic beverages at sacred locations.
>
> In Tennessee, the TVA removed and arranged for the proper reburial of hundreds of burial remains threatened by the opening of the Tellico Dam. Yet 1,100 Indian remains, many of them recent burials, were "stored" in local museums as "archaeological relics" rather than returned to their tribe for reburial. . . .

From the offices of Senator Edward Kennedy, released to the press on April 21, 1982.

190. Crow v. Gullet, 541 F. Supp. 785 (D.S.D. 1982); South Dakota v. Brave Heart, 326 N.W.2d 220 (S.D. 1982). In contrast to these decisions, there is precedent allowing a government to act, in certain circumstances, to benefit a group's religious practices. In Amico v. New Castle County, 101 F.R.D. 472 (D.C. Del. 1984), a district court ruled a county zoning ordinance specifying that massage parlors, adult book stores and adult entertainment centers "shall not be permitted within . . . 2800 feet of a school, church or other place of worship" did not violate the first amendment establishment clause. *Id*. at 477 n.4. In *Amico* the court applied the *Lemon v. Kurtzman* test discussed *infra* text accompanying note 192. Because the county asserted a compelling state interest in protecting children from the influence of the sex industry, the state met its burden even if the zoning restriction benefited churches. *Id*. at 494-96.

In Arno v. Alcoholic Beverages Control Comm'n, 377 Mass. 83, 384 N.E.2d 1223 (1979), the state court held a statute prohibiting the granting of a liquor license to premises located within 500 feet of a church or school did not violate the establishment clause. The purpose of the statute, reasoned the court, was to safeguard the health and welfare of persons attending the church. *Id*. at 87, 384 N.E.2d at 1228.

Had it been so inclined, the *Crow* court could have held in favor of the Lakota on similar grounds. Restricting tourist access to Bear Butte during religious ceremonies would undoubtedly protect the Indians' welfare and help preserve the historical and environmental integrity of the Butte.

191. 403 U.S. 602, 604 (1971).

glement of government with religion.[192]

(2) *Lynch v. Donnelly*: A new approach to the establishment clause.

In *Lynch v. Donnelly*,[193] decided in 1984, the Supreme Court reinterpreted the *Lemon* standard. *Lynch* held that no single criterion, including the *Lemon* test, can determine the constitutionality of a government act which benefits a religion. The Court will not enforce the establishment clause mechanically to invalidate all government conduct benefiting a religion but will scrutinize the challenged legislation or conduct to determine whether, in reality, it establishes a religious faith or tends to do so.[194]

Lynch v. Donnelly arose when residents of Pawtucket, Rhode Island, and individual members of the American Civil Liberties Union challenged the city of Pawtucket's Christmas display as a violation of the establishment clause. The Pawtucket residents objected to the city's inclusion of a crèche, or nativity scene, depicting Christ's birth. The crèche is displayed each year in a Pawtucket park owned by a non-profit organization. City workers erect the display, in cooperation with Pawtucket's retail merchants.[195]

The federal district and appeals courts permanently enjoined the city from including the crèche in its Christmas display. The Supreme Court overruled the lower courts; despite the obvious religious significance of the crèche, Pawtucket had not violated the establishment clause.[196]

The *Lynch* Court observed that total separation between church and state is not possible, as no segment of our society, least of all religion, is free from government's influence. Further, it ruled the Constitution does not require complete separation of church and state, but "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."[197] *Lynch*, however, cuts in two directions. The case requires that government not only tolerate, but actively accommodate all religions, while also ensuring its accommodation does not lead to the endorsement or establishment of any particular religion. Indeed, if the government were not willing to accommodate all reli-

192. *Id.* at 612-13. *See also* Lynch v. Donnelly, 104 S. Ct. 1355 (1984), discussed *infra* at text accompanying notes 193-212.
193. 104 S. Ct. 1355 (1984), *reh'g denied*, 104 S. Ct. 2376 (1984).
194. *Id.* at 1361-62.
195. *Id.* at 1358.
196. *Id.* at 1356.
197. *Id.* at 1359.

gions, the Court suggests the government would be at "war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion."[198] Pervasive in our history, writes the Court, "is the evidence of accommodation of all faiths and all forms of religious expression, and hostility toward none."[199]

On its face, *Lynch*'s requirement of accomodation ought to help American Indians achieve religious freedom. Under *Lynch*, American Indian religious freedom litigants should face a less stringent burden of proof than the courts have thus far imposed on them under the free exercise standard of *Yoder*. While *Lynch* and *Yoder* were decided under different clauses of the first amendment, both address the issue of how far the government may involve itself in the religious life of its citizens. The *Yoder* court set the standard for determining when a law or government act violates a group's religious freedom under the free exercise clause.[200] The *Lynch* Court articulated a standard for determining when a law or government act establishes a religion in violation of the establishment clause. If, under *Lynch*, the government has an obligation to accommodate the religious beliefs of all groups, then its refusal to do so amounts to a violation of the free exercise clause under *Yoder*.

Lynch should also strengthen the AIRFA's mandate by requiring that courts not only "consider," but attempt to "accommodate" American Indian religious practices. In *Crow*, for example, the court held that requiring South Dakota to halt its construction of the parking lot and to regulate the conduct of the tourists near Bear Butte would amount to government establishment of religion.[201] Under *Lynch*, courts would inquire whether the government's accommodation of the Indians' requests would, in fact, promote or establish the Lakota religion as a national faith. Halting the construction of a parking lot and restricting tourist conduct at and access to the Butte clearly does not present that threat. *Lynch* approved as constitutional a display depicting the origin of Christianity. This government action in support of an already widely-held religion is far more threatening as a tacit endorsement of that religion than is a court injunction requiring only that the state and private citizens refrain from interfering with the practice of a minority religious group. In *Lynch*, the government was ac-

198. *Id.* (quoting McCollum v. Board of Educ., 333 U.S. 203, 211-12 (1948)).

199. 104 S. Ct. at 1361. This assertion is untrue. American Indian religions have been and continue to be the targets of governmental hostility. *See supra* note 102.

200. *See supra* text accompanying notes 107-113.

201. 541 F. Supp. 785 (D.S.D. 1982).

tively involved in setting up the nativity scene; in *Crow*, the plaintiffs asked only that the government not interfere with their religious practices. While civil libertarians who oppose *Lynch* justifiably fear that the city of Pawtucket is promoting Christian beliefs through its display of a crèche, it would require a more active imagination to suppose that the federal government stands on the threshold of establishing American Indian beliefs as a national faith.[202]

The Court's acknowledgment that no part of society, least of all religious institutions, can exist apart from government should also benefit American Indian litigants.[203] In *Lynch*, Justice Burger cites numerous examples of church/state intersection. He refers to the inscription on United States currency, art galleries supported by public revenues which display Christian paintings, and presidential proclamations of National Prayer Days.[204] He quotes with approval Justice Douglas' observation that governmental action has "follow[ed] the best of our traditions" and "re-

202. Yet this is exactly what the courts addressing the religious freedom claims of American Indian litigants claim to fear. In *Crow*, Judge Bogue writes that the government already risks "being haled into court" by members of the public claiming that it "has become 'excessively entangled' with religion." Crow v. Gullet, 541 F. Supp. 785, 794 (D.S.D. 1982). In Inupiat Community v. United States, 548 F. Supp. 182 (D. Alaska 1982), the federal court speculates an injunction restricting offshore oil drilling in a restricted area sacred to the Inupiat people would, if carried to its ultimate, create "a vast religious sanctuary over the Arctic seas beyond the state's territorial waters. A claim to such a large area based on such non-specific grounds cannot provide the sort of 'serious obstacle' contemplated by *Yoder*." *Inupiat*, 548 F. Supp. at 189. Such fears seem especially exaggerated in light of the facts of *Lynch*.

203. The *Lynch* court seems to recognize the artificiality of placing life in religious and secular compartments. American Indians have long voiced this position. Vine Deloria explains that because Native Americans understand religion in spatial rather than temporal categories, they do not sever religion from other aspects of community experience as Christians often do:

> A religion defined according to temporal considerations is placed continually on the defensive in maintaining its control over historical events. If, like the Hebrews of the Old Testament, political, economic, and cultural events can be interpreted as religious events, the religious time and the secular time can be made to appear to coincide. If, however, the separation becomes more or less permanent, as in Christianity and Western concepts of history, then religion becomes a function of political interpretations as in the Manifest Destiny theories of American history, or it becomes secularized as an economic determinism as in Communist theories of history. Either way the religion soon becomes helpless to intervene in the events of real life, except in a peripheral and oblique manner.

Deloria, *supra* note 101, at 82.

204. President Reagan proclaimed May 2nd as the National Day of Prayer on January 30, 1985. The President remarked, "We are all God's handiwork, and it is appropriate for us as individuals and as a nation to call to Him in prayer." Minneapolis Star & Tribune, Feb. 1, 1985, at A11, col. 4.

spect[ed] the religious nature of our people."[205] If, as the Court says, the government already accommodates the Christian religion, then it should also accommodate the practices of repressed minority faiths.

Upon closer inspection, however, *Lynch* has troubling implications for American Indian litigants. Throughout his opinion, Justice Burger indicates the nativity scene at issue passes constitutional muster because it depicts a religious belief inseparable from "our" cultural heritage, and, by implication, inseparable from our governmental institutions. The Court first explains the crèche was part of an annual Christmas display representing secular as well as spiritual values. Justice Burger wrote "[w]hen viewed in the proper context of the Christmas Holiday season, it is apparent that, on this record, there is insufficient evidence to establish that the inclusion of the crèche is a purposeful or surreptitious effort to express some kind of governmental advocacy of a particular religious message."[206]

The secular context in which the creche is displayed somehow qualifies its religious implications. The Court is claiming the Christmas season plays so central a role in American culture that its symbols transcend the tenets of specific denominations or creeds. "The City," writes Justice Burger, "like the Congresses and Presidents . . . has principally taken note of a significant historical religious event long celebrated in the Western World."[207] This rationale derives from the assumption that Christian symbols are so pervasive in our culture that an injunction ordering Pawtucket to remove its crèche would be inconsistent with a universally shared "American" culture expressed through long-established practices. Such practices include government aid to students attending church-sponsored schools, and tax exemptions for church properties.[208]

If interpreted narrowly, *Lynch* holds that in order for a reli-

205. 104 S. Ct. at 1361 (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)).

206. 104 S. Ct. at 1362-63.

207. *Id*. at 1363. To prove that "[o]ur history is replete with official references to the value and invocation of Divine guidance," the court recounts the origin and significance of Thanksgiving. *Id*. at 1360. American Indians do not share Justice Burger's enthusiasm for the holiday. Thanksgiving has become a day of mourning for the Sioux people.

208. 104 S. Ct. at 1363. The court also cites McGowan v. Maryland, 366 U.S. 420 (1961), in which Sunday closing laws were sustained even though one of their effects was to make it more likely that citizens would respect religious institutions. The plaintiffs in *Crow* asked the court to forbid the drinking of alcohol at Bear Butte during the times when the religious ceremonies were taking place in order to foster respect for their religious practices. The court denied their request. *See supra* text accompanying notes 159-175.

gious symbol displayed by the government to be constitutional, it must be displayed along with secular symbols.[209] Under a broader reading of the case, the display is constitutional because it embodies the beliefs and values of most American people. Like the Christian art in the National Gallery and the prayers that begin each session of Congress, nativity scenes are believed to reflect universal religious values. The state's promotion of Christian symbols thus derives from Christianity's historical significance to the Western world, and the ubiquity of Christian symbols justifies their proliferation.[210] Under this interpretation of *Lynch*, American Indian litigants would be disadvantaged. Their religious symbols and practice have not merged with the secular values of the dominant culture as have Christian symbols and practices.[211] Unless the Supreme Court is willing to grant minority religions the same protection *Lynch* affords to Christians, its holding, in fact, sanctions the imposition of a national religion.[212]

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209. 104 S. Ct. at 1364. The Court found it significant that the Pawtucket Christmas display included a Santa Claus house, reindeer pulling Santa's sleigh, etc.

210. The Court's reasoning here is tautological. It justifies Pawtucket's alleged establishment of Christianity on the grounds that our government is now and always has been in the business of promoting Christian symbols. One might argue the significant accommodation the government now makes to Christianity compels the court to limit severely any further government establishment of that faith.

211. Of course, Native American religions have a historical significance on the American continent which Christianity lacks. Whether our courts will recognize this significance depends upon their willingness to acknowledge that religious beliefs centering around the land itself command the same respect and accommodation as do religious beliefs implicit in European history.

212. The Court's most recent decisions interpreting the establishment clause have affirmed the principles advanced in Lemon v. Kurtzman, and narrowed the *Lynch* holding. In Wallace v. Jaffree, 105 S. Ct. 2479 (1985) (decided June 4, 1985), the Court, by a 6-3 margin, struck down Alabama's law allowing a "moment of silence for voluntary prayer" in its public schools. Justice Stevens wrote the Alabama statute was an endorsement of religion lacking any clear secular purpose, and thus, violated of the first amendment. *Id.* at 2489-93. The statute thus flunked *Lynch*'s so-called "reindeer test." Justice Stevens stressed the record reflected that the legislature's sole intent was to "endorse" religion. *Id.* Read together, *Lynch* and *Wallace* suggest that the government must accommodate but may not endorse a religion. The distinction is, at best, subtle.

The Court held in Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216 (1985), and in Aguilar v. Felton, 105 S.Ct. 3232 (1985), that public school districts may not fund the education of non-public (or religious) school students at the public's expense. In *Grand Rapids School Dist.*, the Court struck down two programs instituted in Michigan in which public and sectarian private schools shared teachers and resources. In *Aguilar*, the Court held New York City's practice of using federal funds to pay the salaries of public school teachers teaching in parochial schools to be unconstitutional. Under the New York program struck down by the Court, public school teachers instructed educationally deprived children from low-income families attending parochial schools.

Among the dissenters in these cases, Justice Rehnquist was the most radical. He wrote that the Court's adherence to the "wall" metaphor between church and

Lynch may either help or hurt American Indians, depending upon the political and moral bent of the courts interpreting it. The Indian community will therefore have to decide whether relying on *Lynch* is politically wise, given the agenda of the forces now active in urging a return to a church-state integration. To say, as does *Lynch*, that Christian symbols are merged with our national heritage is true in a limited sense. They are the heritage of those who have governed this nation, and thereby defined its values. They are alien, however, to American Indians, and many other American citizens. Reconciliation between people of differing cultures cannot happen so long as a government, like William Blake's tyrant Urizen, decrees in the name of cultural unity:

> One command, one joy, one desire
> One curse, one weight, one measure
> One King, one God, one Law.[213]

g. *Pillar of Fire v. Denver: Protection of religiously important property.*

Unless courts recognize and protect the religious interests American Indians have in particular places, *Lynch v. Donnelly* will be of little help to them. Though sacred space is a concept foreign to the dominant culture, there is some scant precedent holding that property rights may have spiritual basis. In *Pillar of Fire v. Denver Urban Renewal Authority*,[214] the Colorado Supreme Court held religious faith and tradition can invest certain structures and land sites with significance deserving of first amendment protection.[215] The case arose when a church initiated proceedings to prohibit Denver's urban renewal authority and the district court from proceeding further to condemn the church's building. The church petitioners claimed the site was the birthplace of their church, and was still used for religious services. The state supreme court ruled the urban renewal authority could not demolish the building until a court hearing was held to weigh governmental goals against the church's right to maintain the building.[216]

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state "blinds itself to the first 150 years' history of the Establishment Clause." *Grand Rapids School Dist.*, 105 S. Ct. at 3232.

213. William Blake, *The [First] Book of Urizen*, II:38-40, in Major British Poets of the Romantic Period 61 (William Heath ed. 1973).

214. 181 Colo. 411, 509 P.2d 1250 (1973), *aff'd*, 191 Colo. 238, 552 P.2d 23 (1976).

215. *Id.* at 419, 509 P.2d at 1254.

216. After that hearing, in Denver Urban Renewal Auth. v. Pillar of Fire, 191 Colo. 238, 552 P.2d 23 (1976), the state supreme court sustained the lower court's finding against the church. The church apparently failed to establish to the trial court's satisfaction that the site was the church's birthplace. The record also reflected that church members had actually attempted to sell the church at one time, and that services were held there only occasionally. Although most American In-

In *Wilson v. Block*, as part of the holding that the National Forest Service's decision to permit private interests to build a ski resort on government-owned mountain peaks sacred to the Navajo and Hopi Indian tribes did not violate the Indians' first amendment rights, the circuit court ruled *Pillar of Fire* did not apply to the facts before it. The *Wilson* court wrote "[a] governmental taking of privately-owned religious property . . . involves different considerations than does a claimed First Amendment right to restrict the government's use of its own land."[217] The court did not consider how the government came to "own" the peaks in the first place. The Indians' religious practices on the peaks pre-date the government's acquisition of them.[218]

The *Wilson* court's conclusion that the Indians' lack of title to the San Francisco Peaks materially distinguishes their claim from the claim of the plaintiffs in *Pillar of Fire* is logical under the tenets of Anglo-American property law. From the Indians' standpoint, however, the court sets up a tautology. Because the tribes no longer "own" their sacred lands, they must prove that the government burdens their religious practices in order to protect those lands from exploitation. Once in court, Indian litigants learn that because they do not own the land they wish to protect, their first amendment argument is crippled. The legal system defines "property interest" in such a way that the Indians usually lack it, and "religious freedom" in such a way that the Indians almost always have it, even when the government deprives them of access to the land from which their faith derives. The judiciary's reasoning is not linear but circular. It confirms Black Elk's obser-

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dian litigants would have a better case than that of the plaintiffs in *Pillar of Fire*, the church's failure to win might encourage courts to make the Indians' burden of proof a difficult one.

217. 708 F.2d 735, 742 n.3 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 956 (1983), *cert. denied*, 464 U.S. 1056 (1984).

218. The Hopi, like the Lakota and Dakota Sioux, understand "title investment" to land differently than does the United States legal system:

> This land [tribal land the government proposed to "buy" from the Hopi to strip-mine] was granted to the Hopi by a power greater than man can explain. Title is invested in the whole makeup of Hopi life. Everything is dependent on it. The land is sacred and if the land is abused, the sacredness of Hopi life will disappear and all other life as well.
>
> To us, it is unthinkable to give up control over our sacred lands to non-Hopis. We have no way to express exchange of sacred lands for money. It is alien to our ways.

Robert Coulter & Steven Tulberg, *Indian Land Rights*, in The Aggressions of Civilization: Federal Indian Policy Since the 1880s 208 (Sarah Cadwalader & Vine Deloria, Jr. eds. 1984) (quoting Indian Law Resource Center, *Report to the Hopi Kikmongwis and Other Traditional Hopi Leaders* 162-63).

vation that "[t]here is much power in the circle,"[219] and William Blake's assertion that power's form is a "fearful symmetry."[220]

III. Conclusion: The Meaning of Difference

The deep entrenchment of Anglo-European concepts of property ownership, and precedents such as *Sioux Nation* and *Oglala I* and *II*, make it unlikely the Lakota and Dakota peoples will regain legal title to the Black Hills.[221] Their struggle to live and worship in the Hills, and to protect them from development and desecration, will, however, continue. Indian tribes throughout the Americas persist in asserting their cultural and religious identity as they fight to preserve their traditions, their faith, and their lands. Protecting sacred land they no longer own is an especially difficult task for American Indians. The dominant culture defines interests in property almost entirely in terms of legal title to it. Arguing the first amendment free exercise clause gives them access to religious land sites is the most promising and creative strategy available to Indian litigants. Further, this argument is the most accurate legal expression of the Indians' relationship to the land.

The courts' present unwillingness to accommodate American Indian religious beliefs and practices under the first amendment reveals their hostility to Indian religion and their indifference to the land the Indians seek to protect. Courts will provide Indians with meaningful first amendment protection only when they understand and acknowledge the relationship between Indian religion and traditionally sacred tribal land. The AIRFA should be seen as Congress' mandate that all branches of the government, including the courts, extend to American Indians the religious freedom they have historically been denied. *Crow*'s holding, that the AIRFA has been complied with if a state or federal agency's records merely "note" Indian religious concerns, radically misinterprets the Act. The Act should not and cannot be understood apart from the first amendment. It is more than a mere procedural formality with which government agencies must comply. The Act mandates that courts assume the responsibility for protecting Indian religious freedom under the first amendment.

Lynch reaffirms that responsiblity by directing the government to actively accommodate the religious beliefs of all American

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219. Black Elk, *supra* note 13, at 92.

220. William Blake, *The Tyger*, in Major British Poets of the Romantic Period, *supra* note 213, at 56.

221. *But see supra* note 94 for discussion of proposed act which would give the Indians greater control over the Hills.

citizens. If courts narrowly read *Lynch* as an endorsement of the dominant culture's religious values, the case will undermine the freedom of minority religious groups. Worse, in a bitterly ironic twist, *Lynch* could be used to institute the same religious intolerance that drove Europeans to America's shores, a flight that prompted the new Americans to persecute Native religions upon arrival.

The legal conflicts between American Indians and the dominant culture derive from fundamental inconsistencies in their respective world-views. Given the white culture's numerical and technological advantages, Indian people have, of necessity, examined and learned from those practices and approaches of the dominant culture they found valuable or helpful to their survival. That adaption was one of synthesis, not replacement. Throughout, American Indians retained their traditional world-view, a view which affirms their identity as a people.

In contrast, white Americans have failed to learn from or respond to Indian beliefs and practices. What in the story of this struggle for Indian religious freedom and the sanctity of the Black Hills calls for such a response from our society? Why is such a response so urgently needed? I believe a society faced with annihilation ought to show a penchant for self-examination. A century ago, the Black Hills Indians faced such a threat, and, in order to survive, have struggled to this day to voice their convictions in a language intelligible to their oppressor. Though persecuted, imprisoned, killed and ignored, the Lakota and Dakota people have not been silenced. They continue to press their claims in the courts of their conquerors, and, to renew commitment to their own vision of justice in their own culture.

The same technology that made European Americans dominant on this continent now threatens our own survival. Similarly, our concept of land as an objective resource from which to reap economic gain now imperils our existence. Around us looms the specter of ecological catastrophe. It is now our turn to consider the beliefs of the first American culture, and to question the integrity of our own values, as articulated by our legal and cultural institutions. If we wish to live, and the mounting evidence of our driving death-instinct makes this conclusion far from certain, then we must learn respect for all life. As a small step toward that end, we must recognize the legal, moral and religious claims of the Black Hills Indian tribes. We must do so not to become better "liberals," nor for the sake of emulating practices and adopting beliefs that are not our own, but to affirm the importance the land

has for us all, building a foundation for humanity's survival.[222]

222. I dedicate this article to Dennis Banks and Leonard Peltier, who are in prison for resisting the government's war against their people and their land. They live their peoples' struggle for freedom.