

1-1-2000

Ensuring the Full Freedom of Religion on Public Lands: Devils Tower and the Protection of Indian Sacred Sites

George Linge

Follow this and additional works at: <https://lawdigitalcommons.bc.edu/ealr>



Part of the [Environmental Law Commons](#), [Indigenous, Indian, and Aboriginal Law Commons](#), and the [Land Use Law Commons](#)

Recommended Citation

George Linge, *Ensuring the Full Freedom of Religion on Public Lands: Devils Tower and the Protection of Indian Sacred Sites*, 27 B.C. Env'tl. Aff. L. Rev. 307 (2000),
<https://lawdigitalcommons.bc.edu/ealr/vol27/iss2/5>

This Comments is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Environmental Affairs Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact abraham.bauer@bc.edu.

Ensuring the Full Freedom of Religion on Public Lands: Devils Tower and the Protection of Indian Sacred Sites

GEORGE LINGE*

Federal land management agencies historically have disregarded American Indian cries for protection of sacred sites on public lands, and the federal judiciary consistently has supported such action according to a formalistic interpretation of the Religion Clauses of the First Amendment. This Note takes issue with the pattern of religious oppression in the context of public land management by positing a more inclusive, "full," conception of religious freedom under the First Amendment. This Note then analyzes the recent controversy at Devils Tower National Monument as an important opportunity to break the trend and embrace Indian religious freedoms around sacred sites on public lands.

INTRODUCTION

Devils Tower National Monument (DTNM) is a site of conflicting uses.¹ Located in the rather remote corner of northeastern Wyoming, the National Monument nevertheless hosts hundreds of thousands of tourists each year, including more than 6,000 technical rock climbers annually in recent years.² Devils Tower—boasting some of the longest and most vertical continuous crack climbs in the world—is a climbing

* Editor-in-Chief, Boston College Environmental Affairs Law Review 1999–2000. I am grateful to Aviam Soifer for his guidance and insight.

¹ See National Park Service, *Devils Tower National Monument, Final Climbing Management Plan* (visited Nov. 5, 1998), <<http://www.nps.gov/planning/deto/detotoc.html>> [hereinafter "FCMP"], Purpose and Need for the Plan, Introduction; FCMP, Finding of No Significant Impact [hereinafter "FONSI"], parts G-18, G-20. According to John Dorst, Professor of American Studies at the University of Wyoming: "Devils Tower is a massive stump of striated, volcanic rock, perhaps most familiar as the landing site for those childlike aliens who descend from heaven in the techno-sublime mother ship of Steven Spielberg's *Close Encounters of the Third Kind*." JOHN DORST, LOOKING WEST 8 (1999).

² See MARY ALICE GUNDERSON, DEVILS TOWER: STORIES IN STONE 130 (1988); FCMP, *supra* note 1, Purpose and Need for the Plan, Current Climbing Use and Management; FCMP, *supra* note 1, Graphs and Tables, Registered Climbers at Devils Tower from 1989–1994.

mecca.³ The relatively undisturbed landscape of the National Monument also is home to sundry species of plant and animal life.⁴ Moreover, numerous Indian tribes believe that Devils Tower is imbued with sacred and cultural significance.⁵ Consequently, many Indians oppose climbing of any sort on the tower because they believe such activity is sacrilegious.⁶ Even so, many climbers want to continue climbing on the tower.⁷ Therein lies the rub, with the National Park Service (NPS) positioned among the conflicting sacred and recreational interests as the federal agency charged with managing DTNM.⁸

This Note: (1) examines the NPS's attempts to reconcile conflicting uses at DTNM through the Final Climbing Management Plan (FCMP) adopted in 1995 and modified in 1996;⁹ (2) presents the litigation that the FCMP engendered, *Bear Lodge Multiple Use Ass'n v. Babbitt*, in which the district court looked skeptically upon NPS efforts to protect Indian religious freedoms;¹⁰ and (3) suggests an alternative, more inclusive view of Indian religious practices and freedoms which would allow the NPS to protect Indian sacred interests at DTNM.¹¹

³ See FCMP, *supra* note 1, Graphs and Tables, Registered Climbers at Devils Tower from 1989–1994.

⁴ See FCMP, *supra* note 1, Environmental Consequences, Natural Resources.

⁵ See FCMP, *supra* note 1, Action Elements of the Final Climbing Management Plan, A Voluntary Closure to Climbing in June; FCMP, *supra* note 1, Environmental Consequences, Cultural Resources.

⁶ See FONSI, *supra* note 1, part E-1.

⁷ See *id.*, part A.

⁸ See FCMP, *supra* note 1, Purpose and Need for the Plan, Legal and Administrative Considerations.

⁹ See generally FCMP, *supra* note 1.

¹⁰ See generally 2 F. Supp. 2d 1448 (D. Wyo. 1998). On appeal, the Tenth Circuit entirely sidestepped the Constitutional issue by holding that the plaintiffs lacked standing to challenge the NPS's FCMP:

The named individual recreational climbers whose climbing activities have been undeterred by the FCMP have established no injury in fact and therefore do not have standing. Further . . . commercial climbing guide Andy Petefish did not substantiate his claim of economic injury as a result of the voluntary closure. . . . Even if other Bear Lodge members have elected not to climb in June, that decision is one of several choices available under the plan and is not an injury conferring standing. . . . In short, the Climbers "claim that the Constitution has been violated, [but] they claim nothing else. They fail to identify any personal injury suffered by them as a consequence of the alleged Constitutional error."

Bear Lodge Multiple Use Ass'n v. Babbitt, 1999 WL 261624, *7 (10th Cir. 1999) (citation omitted).

¹¹ See *infra* text accompanying notes 66–98.

Of course, to understand the sacred site controversy at Devils Tower, and more importantly, to understand where the dialogue around sacred site protection should be, one must first come to grips with the relevant history and precedents. To this end this Note examines two competing visions of the Religion Clauses of the First Amendment—one grounded in formalism, the other built upon an understanding of “full and equal”¹² or “full and free”¹³ religious freedom.¹⁴ This Note then traces the formalist line of reasoning through the relevant strand of sacred site precedents,¹⁵ including the Supreme Court’s 1988 decision in *Lyng v. Northwest Indian Cemetery Protective Ass’n*,¹⁶ while concomitantly juxtaposing a “full” understanding of religious freedom. This Note then unpacks the district court’s decisions in *Bear Lodge* to reveal its formalist underpinnings.¹⁷ Finally, this Note endorses “full” religious freedom—rather than traditional formalism—as the means to ensure Indian religious freedoms at Devils Tower and elsewhere.

I. THE CONFLICT AT DEVILS TOWER: AN ATTEMPT AT COMMON GROUND

A. Final Climbing Management Plan

In response to the conflict between climbers and Indian religious practitioners at Devils Tower, the NPS issued a Final Climbing Management Plan (FCMP) for DTNM in 1995.¹⁸ The stated objectives of

¹² James Madison’s Proposed First Amendment in *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS* 1 (Neil Cogan ed., 1997).

¹³ Thomas Jefferson’s Draft of the Virginia Constitution in 1 *THE PAPERS OF THOMAS JEFFERSON* 239 (Julian Boyd ed., 1950).

¹⁴ For purposes of this Note, ideas of “full and equal” and “full and free” religious freedoms are considered under the umbrella of “fullness” or simply “full” religious freedom.

¹⁵ See *Lyng v. Northwest Indian Cemetery Protective Ass’n, et al.*, 485 U.S. 439 (1988); *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983); *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), *aff’d* 455 F. Supp. 2d 141 (1977); *Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159 (6th Cir. 1980), *aff’d* 480 F. Supp. 608 (1979); *Inupiat Community of the Arctic Slope v. United States*, 548 F. Supp. 182 (D. Alaska 1982); *Crow v. Gullet*, 541 F. Supp. 785 (D. S.D. 1982); *Manybeads v. United States*, 730 F. Supp. 1515 (D. Ariz. 1989); *Havasupai Tribe v. United States*, 752 F. Supp. 1471 (D. Ariz. 1990), *aff’d, sub nom. Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991); *Attakai v. United States*, 746 F. Supp. 1395 (D. Ariz. 1990).

¹⁶ 485 U.S. 439 (1988).

¹⁷ See generally *Bear Lodge*, 2 F. Supp. 2d 1448.

¹⁸ See FCMP, *supra* note 1, Purpose and Need for the Plan, Introduction; FONSI, *supra* note 1, parts G-18, G-20.

the FCMP are: (1) "To preserve and protect the monument's natural and cultural resources for present and future generations"; (2) "To manage recreational climbing on the tower"; (3) "To increase visitor awareness of American Indian beliefs and traditional cultural practices at Devils Tower"; and (4) "To provide the monument with a guide for managing climbing use that is consistent with the NPS management policies and other monument management plans."¹⁹

The FCMP implemented a variety of measures to achieve these ends, from limiting the use of power drills and requiring camouflaged climbing gear, to regulating the placement of road signs.²⁰ The most significant and contentious aspects of the FCMP,²¹ however, concerned three different restrictions on technical rock climbing on Devils Tower.²²

1. The Stake Ladder Closure

First, the FCMP called for a mandatory year-round closure of the Old Stake Ladder Route due to the ladder's cultural and historical significance.²³ Two local ranchers, William Rogers and Willard Ripley, constructed a stake ladder in one of the cracks on the tower and recorded the first ascent on July 4, 1893.²⁴ The ladder remained and was climbed occasionally until the lower 100 feet of the ladder were removed for visitor safety in 1927.²⁵ The upper portion of the ladder was left intact and remains today as a memorial to the first recorded ascent of the tower.²⁶ The Wyoming State Historic Preservation Office (SHiPO) evaluated the historic stake ladder in 1994 and found it eligible for nomination to the National Register of Historic Places.²⁷ No negative effects to this historic resource are expected under the

¹⁹ FCMP, *supra* note 1, Purpose and Need for the Plan, Objectives.

²⁰ See FCMP, *supra* note 1, Action Elements of the Final Climbing Management Plan.

²¹ See FONSI, *supra* note 1, *passim*.

²² See FCMP, *supra* note 1, Purpose and Need for the Plan, Current Climbing Use and Management; FCMP, *supra* note 1, Action Elements of the Final Climbing Management Plan, A Voluntary Closure to Climbing; FCMP, *supra* note 1, Action Elements of the Final Climbing Management Plan, Raptor Nest Protection.

²³ See FCMP, *supra* note 1, Purpose and Need for the Plan, Current Climbing Use and Management; FCMP, *supra* note 1, Purpose and Need for the Plan, Climbing History; FCMP, *supra* note 1, Environmental Consequences, Cultural Resources, Historic Resources.

²⁴ See FCMP, *supra* note 1, Purpose and Need for the Plan, Climbing History.

²⁵ See *id.*

²⁶ See *id.*

²⁷ See *id.*; FCMP, *supra* note 1, Environmental Consequences, Cultural Resources.

FCMP since the route in which it is located will remain permanently closed to climbing.²⁸

2. The Raptor Closure

The FCMP also called for a mandatory seasonal prohibition against climbing on portions of the tower near raptor nesting sites to ensure the viability of the prairie falcon population.²⁹ Only one pair of prairie falcons is currently thought to nest on Devils Tower, and it is widely believed that climbing near potential or actual nesting sites disturbs the raptors and disrupts the fledging process.³⁰ Prairie falcons are not endangered or threatened, but they are protected under federal law in the Migratory Bird Treaty Act³¹ and the Migratory Bird Conservation Act,³² as well as under NPS regulations that prohibit frightening nesting or breeding wildlife.³³ According to the FCMP, "the goal of the raptor nest protection strategy is to allow falcons to freely select and establish nest sites and occupy their nest for the duration of the breeding season without being stressed by climbers on the tower."³⁴

3. The Sacred Site Closure

Finally, the FCMP requested that climbers voluntarily refrain from climbing on the entire tower throughout the month of June in deference to Indian sacred ceremonies.³⁵ Several Indian tribes recognize Devils Tower as a sacred site, and it is the location of sundry traditional sacred practices including prayer offerings, vision quests, the leaving of prayer bundles, sweatlodge rites, and the Sun Dance.³⁶ The goal of the "voluntary ban" is to mitigate the impacts of climbing on

²⁸ See FCMP, *supra* note 1, Purpose and Need for the Plan, Climbing History.

²⁹ See FCMP, *supra* note 1, Purpose and Need for the Plan, Current Climbing Use and Management; FCMP, *supra* note 1, Action Elements of the Final Climbing Management Plan, Raptor Nest Protection.

³⁰ See FCMP, *supra* note 1, Purpose and Need for the Plan, Current Climbing Use and Management; FCMP, *supra* note 1, Action Elements of the Final Climbing Management Plan, Raptor Nest Protection.

³¹ 16 U.S.C. §§ 703-712 (1994).

³² 16 U.S.C. § 715 (1994).

³³ See 36 C.F.R. § 2.2(a) (2) (1987).

³⁴ FCMP, *supra* note 1, Action Elements of the Final Climbing Management Plan, Raptor Nest Protection.

³⁵ See FCMP, *supra* note 1, Action Elements of the Final Climbing Management Plan, A Voluntary Closure to Climbing in June.

³⁶ See *id.*

Indian traditional cultural practices.³⁷ Because the NPS complied with the "voluntary ban" by refusing to issue commercial climbing permits in June, the voluntary ban was mandatory in effect vis-à-vis commercial guides.³⁸

B. *The FCMP Goes to Court*

No one has challenged the mandatory restrictions on climbing for purposes of ladder and raptor protection. A group of climbers and commercial guides, however, promptly filed suit against the de facto mandatory closure of Devils Tower for protection of Indian sacred sites on constitutional grounds.³⁹ Drawing from a jumbled quiver of inferences, they essentially argued that their right to climb on Devils Tower—wherever such a right comes from—may not be interfered with in order to ensure the Indians' ability to exercise their religion freely.⁴⁰ They concluded that the NPS's policy of not issuing recreational climbing permits (which, in fact, are issued at the Agency's discretion) compromises the constitutional guarantee of religious freedom.⁴¹

In the spring of 1996, the district court—citing Establishment Clause concerns about restricting climbers' rights in deference to religious interests—granted a preliminary injunction that forced the NPS to issue climbing permits for commercial climbing services in June.⁴² In December 1996, the NPS reviewed the FCMP and rescinded the de facto mandatory provision denying permits to commercial interests.⁴³ Rather than comply with the voluntary ban itself, the NPS reluctantly issued commercial climbing permits with the hope that the guides themselves would choose to comply.⁴⁴ Since November 1996, the NPS's restriction on climbing in June to protect Indian sa-

³⁷ *See id.*

³⁸ *See id.*

³⁹ *See Bear Lodge Multiple Use Ass'n v. Babbitt*, 2 F. Supp. 2d 1448, 1450 (D. Wyo. 1998).

⁴⁰ *See id.* at 1451–52.

⁴¹ *See id.*

⁴² *See id.*

⁴³ *See id.*

⁴⁴ Telephone Interview with Chas Cartwright, Superintendent of Devils Tower National Monument (Nov. 4, 1998).

cred interests in the tower has been left entirely to climbers' discretion.⁴⁵

Still, the same group of climbers and commercial guides again challenged the voluntary ban in April 1998.⁴⁶ This time the court upheld the NPS's voluntary policy.⁴⁷ In dicta that bordered on an advisory opinion, however, Judge Downes ominously asserted that any attempt to resuscitate the mandatory restriction on commercial climbing as a means to protect Indian sacred interests in Devils Tower would be "ill-conceived."⁴⁸

Judge Downes' statement reflects a consistently formal judicial vision of Indian religious freedom generally, and of sacred site protection specifically.⁴⁹ The next section of this Note addresses the roots of this formalism and posits an alternative theory of "full" religious freedom by which the NPS's attempt to protect Devils Tower as a sacred site would not be "ill-conceived."⁵⁰

II. TWO VISIONS OF RELIGIOUS FREEDOM

The Religion Clauses of the First Amendment figure prominently in the land-use controversy at Devils Tower.⁵¹ To what extent must or may the federal government allow Indians to exercise their religion freely on federal land, and within what limitations? Volumes have been written on the scope and interplay of the Free Exercise and Establishment Clauses,⁵² and there is a vein of scholarship specifically

⁴⁵ *Id.* Compliance has been roughly 85%, meaning the number of people climbing in June since the voluntary ban was implemented in 1996 is 85% less than the number of people who climbed in June 1995.

⁴⁶ See *Bear Lodge*, 2 F. Supp. 2d at 1448.

⁴⁷ See *id.* at 1456-57.

⁴⁸ *Id.* at 1452.

⁴⁹ See cases cited *supra* note 15.

⁵⁰ See *Bear Lodge*, 2 F. Supp. 2d at 1452.

⁵¹ "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I.

⁵² See, e.g., JESSE H. CHOPER, *SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES* (1995); BETTE NOVIT EVANS, *INTERPRETING THE FREE EXERCISE OF RELIGION: THE CONSTITUTION AND AMERICAN PLURALISM* (1997); MERRIL D. PETERSON AND ROBERT C. VAUGHAN, *THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM* (1990); *EQUAL SEPARATION: UNDERSTANDING THE RELIGION CLAUSES OF THE FIRST AMENDMENT* (Paul J. Weber ed., 1990); Aviam Soifer, *The Fullness of Time, in RELIGION AND THE LAW: OBLIGATION OF CITIZENSHIP AND DEMANDS OF FAITH* (Nancy Rosenblum ed. forthcoming 2000); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982); David C. Williams and Susan H. Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L. REV. 769 (1991); John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371 (1996).

regarding the application of the Religion Clauses to conflicts between Indians trying to preserve their traditional sacred sites and the developmental tendencies of the federal land management agencies.⁵³ Yet courts scarcely have considered the Indian claims in any but the strictest, most limiting terms.⁵⁴ There is, however, an alternative theory of "full" religious freedom which would support the NPS's effort to protect Indian sacred interests in Devils Tower.⁵⁵

A. *A Formal Vision of Religious Freedom*

Over the past two decades, the Federal Judiciary has heard a number of cases brought by Indians and affiliated groups trying to protect Indian sacred sites located on land managed by the United States government.⁵⁶ In every case, the Indian interest in protecting specific sites imbued with traditional sacred significance ultimately succumbed to the federal government's interest.⁵⁷

1. The Free Exercise Clause

The federal government, as owner/manager of public lands, routinely has acted or has permitted private actions that rendered Indian sacred sites inaccessible and unusable for religious ceremonies.⁵⁸ By flooding a valley⁵⁹ or a canyon,⁶⁰ for example, or by building a road

⁵³ See, e.g., Russel Lawrence Barsh, *The Illusion of Religious Freedom for Indigenous Americans*, 65 OR. L. REV. 363, 369-72 (1986); Celia Byler, *Free Access or Free Exercise?: A Choice Between Mineral Development and American Indian Sacred Site Preservation on Public Lands*, 22 CONN. L. REV. 397 (1990); Raymond Cross and Elizabeth Brenneman, *Devils Tower at the Crossroads: The National Park Service and the Preservation of Native American Cultural Resources in the 21st Century*, 18 PUB. LAND & RESOURCES L. REV. 5 (1997); Rebekah J. French, *Free Exercise of Religion on the Public Lands*, 11 PUB. LAND L. REV. 197 (1990); Rayanne J. Griffin, *Sacred Site Protection Against a Backdrop of Religious Intolerance*, 31 TULSA L.J. 395 (1995); Ann M. Hooker, *American Indian Sacred Sites on Federal Public Lands: Resolving Conflicts Between Religious Use and Multiple Use at El Malpais National Monument*, 19 AM. INDIAN L. REV. 133 (1994); Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 VT. L. REV. 145 (1996); Fred Unmack, *Equality Under the First Amendment: Protecting Native American Religious Practices on Public Lands*, 8 PUB. LAND L. REV. 165 (1987); Anastasia P. Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 ARIZ. L. REV. 1291 (1996).

⁵⁴ See cases cited *supra* note 15.

⁵⁵ See *infra* text accompanying notes 68-100.

⁵⁶ See cases cited *supra* note 15.

⁵⁷ See *id.* Sadly, this pattern will be unremarkable to anyone with an elementary sense of American history.

⁵⁸ See *id.*

⁵⁹ See generally *Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159 (6th Cir. 1980).

⁶⁰ See generally *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980).

through a high alpine area,⁶¹ the government has made it impossible in practice for Indians to exercise their religion.⁶² In each case, however, a federal court held that such destructive government activity was not an improper burden on the Indians' freedom to exercise their religious beliefs within the guarantees of the First Amendment.⁶³ This conclusion—that rendering the practice of religion impossible does not burden the free exercise of that religion—seems plausible only if one distinguishes *free* exercise of religion from *full* exercise of religion.

2. The Establishment Clause

Another popular argument against protecting Indian sacred sites is couched in a view of the Establishment Clause as a limiting principle conspiring against “religious servitudes”⁶⁴ on the land. On this formalistic view, government protection of Indian sacred sites is a virtual *per se* violation of the constitutional prohibition against establishment of religion.⁶⁵ In a passage cited by the Tenth Circuit in *Badoni v. Higginson*, Judge Learned Hand stated the formal construction of the Establishment Clause: “The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities. . . . We must accommodate our idiosyncrasies, religious as well as secular, to the compromise necessary in communal life.”⁶⁶ It is this formalism that led Judge Downes to offer his “ill-conceived” assertion.⁶⁷ But there is an alternative, more inclusive approach to religious freedom which supports NPS's efforts to protect Indian religious practices at Devils Tower.

⁶¹ See generally *Lyng v. Northwest Indian Protective Ass'n.*, 485 U.S. 439 (1988).

⁶² See, e.g., *Lyng*, 485 U.S. 439; *Badoni*, 638 F.2d 172; *Sequoyah*, 620 F.2d 1159.

⁶³ See, e.g., *Lyng*, 485 U.S. 439; *Badoni*, 638 F.2d 172; *Sequoyah*, 620 F.2d 1159.

⁶⁴ *Lyng*, 485 U.S. at 452. See *Badoni*, 638 F.2d at 179.

⁶⁵ See, e.g., *Lyng*, 485 U.S. at 452; *Badoni*, 638 F.2d at 179.

⁶⁶ *Badoni*, 638 F.2d at 179 (quoting Judge Hand's opinion in *Otten v. Baltimore and O. R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)).

⁶⁷ *Bear Lodge Multiple Use Ass'n. v. Babbitt*, 2 F. Supp. 2d 1448, 1452 (D. Wyo. 1998).

B. A Full Vision of Religious Freedom

1. Fullness and Free Exercise

In opposition to the formalist interpretation, some have argued that freedom, equality, and fullness are concrescent terms that ought to function in unison to ensure practical protection of the free exercise of religious beliefs,⁶⁸ which has been termed the "first liberty," "first freedom," and "the most inalienable and sacred of all human rights."⁶⁹ Chief among the supporters of this expanded, realistic construction of religious freedom are two veritable edifices of the American discourse on rights and freedoms: Thomas Jefferson and James Madison.⁷⁰ As Jefferson toiled over the Declaration of Independence in Philadelphia during the summer of 1776, he also found time to prepare a draft of the Virginia Constitution, a task he considered much more important.⁷¹ The terminology used by Jefferson in the Religion Clause in his draft of the Virginia Constitution is significant: "All persons shall have *full and free* liberty of religious opinion; nor shall any be compelled to frequent or maintain any religious institution."⁷² Over the course of the same dramatic summer, James Madison, who was to become Jefferson's close friend and political ally,⁷³ proposed a Religion Clause to the Virginia Declaration of Rights arrived at independently but which bore a remarkable resemblance to Jefferson's language:

That religion, or the duty to which we owe our Creator, and the manner of discharging it, being under the direction of reason and conviction only, not of violence or compulsion, all men are *equally* entitled to the *full and free* exercise of it, according to the dictates of conscience, and therefore, that no man or class of men ought, on account of religion, to be invested with the peculiar emoluments or privileges, nor sub-

⁶⁸ See Soifer, *supra* note 52, at 17; Witte, *supra* note 52, at 403–05.

⁶⁹ Witte, *supra* note 52, at 389 (citations omitted).

⁷⁰ The genesis of thought is a murky inquiry at best, and there is ample evidence to suggest that Madison and Jefferson borrowed extensively from Roger Williams. For a more nuanced discussion of the intellectual relationship between Williams, Madison, and Jefferson and the generation of "fullness," see Soifer, *supra* note 52, at 7–16.

⁷¹ See Soifer, *supra* note 52, at 9.

⁷² Boyd, *supra* note 13 (emphasis added).

⁷³ One of the bedrooms at Monticello is named "Mr. Madison's room" as a testament to the amount of time Madison spent at Jefferson's estate. See ROBERT F. TEDESCHI, JR., *THE U.S. CONSTITUTION AND FASCINATING FACTS ABOUT IT* 8 (6th ed. 1997).

jected to any penalties or disabilities unless, under color of religion, the preservation of equal liberty and the existence of the state be manifestly endangered.⁷⁴

Thirteen years later Madison again invoked fullness in an effort to protect religious freedom, this time in his proposed First Amendment: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the *full and equal* rights of conscience be in any manner, or on any pretext, infringed."⁷⁵ Of course, the First Amendment as adopted does not contain fullness language.⁷⁶ Yet some think that the deletion of the word *full* was nothing more than stylistic editing rather than a content-based reduction intended to alter the meaning of the guarantee of religious freedom.⁷⁷

The lack of fullness, however, has made a great difference in free exercise jurisprudence.⁷⁸ It is generally accepted that people should be free to exercise their religious beliefs in keeping with the most basic guarantee of equality. A guarantee of freedom and equality, however, is "an empty form having no substantive content of its own."⁷⁹ Indeed, "'equal' seems only to require even-handed process."⁸⁰ Fullness, however, imbues the parchment rights of freedom and equality with "substantive content."⁸¹ Fullness considers the practical reality of equality and freedom, rather than simple-minded adherence to the

⁷⁴ WILLIAM C. RIVES, 1 HISTORY OF THE LIFE AND TIMES OF JAMES MADISON 141-42 (1970) (emphasis added).

⁷⁵ Cogan, *supra* note 12, at 1 (emphasis added).

⁷⁶ "Full and equal" language appeared in other contexts, however. The 1866 Civil Rights Act stated in the first paragraph: "Citizens of every race and color . . . shall have the same right . . . to *full and equal* benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens" Civil Rights Act, 1866, ch. 31, 14 Stat. 27-30 (emphasis added). The 1875 Civil Rights Act contains similar language: "All persons . . . shall be entitled to the *full and equal* enjoyment of accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement." Civil Rights Act, 1875, ch. 114, 18 Stat. 335 (emphasis added). More recently, the Americans With Disabilities Act of 1990 asserted as its general rule: "No individual shall be discriminated against on the basis of disability in the *full and equal* enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." Americans With Disabilities Act of 1990, Pub. L. No. 101-336, § 302(a), 104 Stat. 355 (1990) (emphasis added).

⁷⁷ See Michael McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1482 (1991); Soifer, *supra* note 52, at 15.

⁷⁸ See, e.g., Soifer, *supra* note 52, at 36-37; Westen, *supra* note 52, at 596.

⁷⁹ Westen, *supra* note 52, at 596.

⁸⁰ Soifer, *supra* note 52 at 17.

⁸¹ *Id.*; Westen, *supra* note 52 at 596.

theoretical strictures of formal reasoning.⁸² Put another way, fullness ensures the effect of freedom and equality in one's quotidian existence.⁸³

It is in the application of freedom and equality to people's lives and circumstances that fullness makes all of the difference.⁸⁴ "Full and free" or "full and equal" expression of religious beliefs is distinct from a formalistic interpretation of the Free Exercise Clause. And nowhere is this more apparent than in the strand of cases involving Indian attempts to protect sacred sites.⁸⁵

2. Fullness and Establishment

It is not the purpose of the Establishment Clause to wring the vestiges of fullness from the Free Exercise Clause by preventing the government from ensuring the practice of religion.⁸⁶ Rather the Establishment Clause provides an assurance against government-imposed religion, and it prevents one religion from trampling the rights of others.⁸⁷ The Establishment Clause decidedly does not require the subordination of religious interests to contrary secular interests such as rock climbing.⁸⁸

The disestablishment of religion was a response to a general fear that one set of religious beliefs might come to overwhelm all others, thereby rendering the free exercise of those subordinated beliefs profoundly meaningless.⁸⁹ Disestablishment thus functions as a mechanism supporting the "first freedom" embodied in the Free Exercise Clause.⁹⁰ Madison suggested as much in his Memorial and Remon-

⁸² See Soifer, *supra* note 52, at 17; Westen, *supra* note 52, at 596.

⁸³ See Soifer, *supra* note 52, at 17; Westen, *supra* note 52, at 596.

⁸⁴ It is not my position that ensuring fullness of the free exercise guarantee necessarily trumps a competing showing of a compelling interest. No constitutional right is so absolute. Where the government offers a substantial compelling interest, the right to full and free exercise of one's religion must give way in the manner of other constitutionally guaranteed rights.

⁸⁵ See cases cited *supra* note 15.

⁸⁶ See, e.g., Choper, *supra* note 52, at 97-100; Evans, *supra* note 52, at 210; Weber, *supra* note 52, at 61.

⁸⁷ See, e.g., Choper, *supra* note 52, at 97-100; Evans, *supra* note 52, at 210; Weber, *supra* note 52, at 61.

⁸⁸ See, e.g., Choper, *supra* note 52, at 97-100; Evans, *supra* note 52, at 210; Weber, *supra* note 52, at 61.

⁸⁹ See James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in 8 THE PAPERS OF JAMES MADISON 298 (Robert A. Rutland & William M.E. Rachal eds., 1973).

⁹⁰ See *id.*

strance: "A just Government . . . will be best supported which protects his person and property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another."⁹¹ Jefferson also believed that disestablishment was a means to free exercise rather than a check on religious liberty.⁹² In his words, the Establishment Clause prohibited government

from intermeddling with religious institutions, their doctrines, discipline, or exercises . . . [and from] the power of effecting any uniformity of time or matter among them. Fasting and prayer are religious exercises; the enjoining of them an act of discipline. Every religious society has a right to determine for itself the times for these exercises, and the objects proper for them, according to their own particular tenets.⁹³

Only after this "first freedom" is ensured may the Establishment Clause be invoked to limit the tyranny of a particular group's religious exercise over another's.⁹⁴

Several early drafts of the First Amendment framed disestablishment in terms of the relationships between sects of religious beliefs: "Congress shall make no law establishing one religious sect or society in preference to others";⁹⁵ "Congress shall make no law establishing any particular denomination of religion in preference to another."⁹⁶ In light of these early drafts, the Establishment Clause should be understood to enhance and ensure the fullness of one's freedom to exercise religious beliefs rather than as a limiting principle.⁹⁷ Moreover, the Free Exercise Clause and the Establishment Clause should be allowed to function together as "an interlocking and interdependent shield" in the protection of full religious freedom.⁹⁸ Fullness of religious exercise, emboldened by the supporting rather than limiting dis-

⁹¹ *Id.*

⁹² See Witte, *supra* note 52, at 401 (citing Letter from Thomas Jefferson to Rev. Samuel Miller (1808), reprinted in 11 THE WRITINGS OF THOMAS JEFFERSON 428-29 (1904)).

⁹³ Witte, *supra* note 52, at 401 (citing Letter from Thomas Jefferson to Rev. Samuel Miller (1808), reprinted in 11 THE WRITINGS OF THOMAS JEFFERSON 428-29 (1904)).

⁹⁴ See, e.g., Choper, *supra* note 52, at 97-100; Evans, *supra* note 52, at 210; Weber, *supra* note 52, at 61; Madison, *supra* note 89, at 298.

⁹⁵ Version first rejected by the Senate, then reconsidered and passed by the Senate on Sept. 3, 1789. 1 Journal of the First Session of the Senate 70 (1802), as cited in Witte, *supra* note 52, at 402.

⁹⁶ Version rejected by the Senate on Sept. 3, 1789. *Id.* at 117.

⁹⁷ See Witte, *supra* note 52, at 403.

⁹⁸ *Id.* at 404.

establishment of one religion vis-à-vis another, would suggest that communal life must accommodate as much as possible our sundry religious "idiosyncrasies," not vice-versa.⁹⁹ In the context of Indian sacred site protection, however, the courts have adopted a dichotomous conception of the First Amendment Clauses, which sets the Establishment Clause and the Free Exercise Clause at cross-purposes.¹⁰⁰

III. THE EARLY PRECEDENTS

A. *American Indian Religious Freedom and Restoration Act*

After years (centuries?) of neglecting Indian sacred and cultural interests, Congress passed the American Indian Freedom and Restoration Act (AIRFA) in 1978.¹⁰¹ AIRFA was intended to force government agencies to recognize, consider, and respect traditional Indian religious practices.¹⁰² However, Rep. Morris K. Udall (D-AZ), cosponsor of the bill, asserted at the time of AIRFA's passage that the Act "had no teeth" because AIRFA did not create any legal rights.¹⁰³ Instead, AIRFA "depends on Federal administrative good will for its implementation."¹⁰⁴

Since AIRFA was passed into law, several Indian groups have brought suits against public land management agencies in order to force the government to respect their religious interests.¹⁰⁵ Because AIRFA is toothless,¹⁰⁶ however, Indian plaintiffs have relied solely on the Free Exercise Clause of the First Amendment to support their claims.¹⁰⁷ The following discussion of these cases reveals the evolution of a test for determining the extent to which the federal government may interfere with Indian religious practices without violating the Free Exercise Clause.¹⁰⁸

⁹⁹ See *Badoni v. Higginson*, 638 F.2d 172, 179 (10th Cir. 1980) (quoting Judge Hand's opinion in *Otten v. Baltimore & O. R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)); see generally Soifer, *supra* note 52.

¹⁰⁰ See, e.g., *Lyng v. Northwest Indian Cemetery Protective Ass'n.*, 485 U.S. 439 (1988); *Badoni*, 638 F.2d 172 (10th Cir. 1980).

¹⁰¹ 42 U.S.C. § 1996 (1988).

¹⁰² See Hooker, *supra* note 53, at 137.

¹⁰³ *Id.* at 133, 137; 124 Cong. Rec. 21,444, 21,445 (1978).

¹⁰⁴ Barsh, *supra* note 53, at 369-72.

¹⁰⁵ See cases cited *supra* note 15.

¹⁰⁶ See *supra* text accompanying note 100.

¹⁰⁷ See Hooker, *supra* note 53, at 137.

¹⁰⁸ See cases cited *supra* note 15; see also Hooker, *supra* note 100, at 137-38.

1. *Sequoyah v. Tennessee Valley Authority*

In one of the original sacred site claims brought following passage of AIRFA, Cherokee plaintiffs contested plans for the Tennessee Valley Authority's (TVA) Tellico Dam.¹⁰⁹ The same dam which focused attention on the tiny snail darter and unveiled the power of the Endangered Species Act¹¹⁰ also stirred contemporary jurisprudence regarding Indian religious freedoms.¹¹¹ Plaintiffs in the fabled snail darter case trumpeted the fatal effects of damming a watershed: the water temperature would be altered, migratory spawning patterns would be disrupted, traditional feeding behaviors would be obsolete, and so forth.¹¹² And they won.¹¹³ The Supreme Court held that building the Tellico Dam would violate the Endangered Species Act by destroying the last known habitat of the endangered snail darter.¹¹⁴ The Tellico Dam project was later exempted from compliance with the ESA (and also notably from the Supreme Court decision construing the ESA) by a shotgun act of Congress shepherded by Senator Howard Baker (R-TN), clearing the way for the subsequent collision between the dam and Indian religious practices.¹¹⁵

The plans for Tellico Dam called for the impoundment of water in the Tellico Reservoir on the Little Tennessee River, thereby flooding the Little Tennessee River Valley.¹¹⁶ Cherokee plaintiffs asserted that some of the land in the valley was sacred to their religion and a vital part of their religious practices.¹¹⁷ Flooding the valley and burying these sacred sites deep under water, the Cherokee contended, would deny them access to sacred sites indispensable to their religious practices.¹¹⁸ For all practical purposes, construction of the Tellico Dam and the concomitant flooding of the Valley would prevent the Cherokee from exercising their religion. Judge Robert L.

¹⁰⁹ *Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159 (6th Cir. 1980), *aff'd* 480 F. Supp. 608 (1979).

¹¹⁰ *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978).

¹¹¹ *See infra* text accompanying notes 133-75.

¹¹² *See generally Hill*, 437 U.S. 153 (1978).

¹¹³ *See id.*

¹¹⁴ *See id.*

¹¹⁵ *See Sequoyah v. Tennessee Valley Auth.*, 480 F. Supp. 608, 610 (E.D. Tenn. 1979). For a more thorough discussion and analysis of the ESA-TVA controversy, see ZYGMUNT J.B. PLATER, ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE LAW AND SOCIETY 672-86 (2d ed. 1998).

¹¹⁶ *See Sequoyah*, 480 F. Supp. at 610.

¹¹⁷ *See id.* at 610-11.

¹¹⁸ *See id.*

Taylor recognized this in his opinion for the district court: "The Court assumes that the land to be flooded is considered sacred to the Cherokee religion and that active practitioners of that religion would want to make pilgrimages to this land as a precept of their religion."¹¹⁹ Moreover, the court conceded that impoundment of the Tellico Reservoir would prevent access to this sacred land.¹²⁰

By construing the guarantee of the Free Exercise Clause very narrowly, however, Judge Taylor allowed the Tellico Dam project to continue unimpeded.¹²¹ "An essential element to a claim under the Free Exercise Clause," Judge Taylor reasoned, "is some form of governmental coercion of actions which are contrary to religious belief."¹²² And in this case Judge Taylor found: "The impoundment of the Tellico Dam has no coercive effect on plaintiff's religious beliefs or practices."¹²³ Judge Taylor concluded his analysis by stating the great egalitarian principle to be found in flooding the Little Tennessee River Valley: "The flooding of the Little Tennessee will prevent everyone, not just plaintiffs, from having access to the land in question."¹²⁴

Legal formalism clearly carried the day in Judge Taylor's opinion in *Sequoyah*. In the strictest literal sense, flooding the Valley would not coerce the Cherokee to act in a manner contrary to their religious beliefs.¹²⁵ Moreover, everybody—except perhaps adventurous scuba divers—was denied access to the land on equal terms.¹²⁶ Such a stunted view of the constitutional guarantee hardly protects the Cherokee in the exercise of their religion. By the terms of this decision, the government does not violate the Free Exercise Clause when it engages in or permits activity which knowingly renders the exercise of religion impossible.¹²⁷

A consideration of fullness, whether directly or obliquely, vis-à-vis the Cherokee's right to exercise their religion freely is entirely lacking in Judge Taylor's decision in *Sequoyah*. The opinion did not consider the practical effect that impounding the Tellico Reservoir would have on the Cherokee's ability to practice their religion effectively, or at all,

¹¹⁹ *Id.* at 611.

¹²⁰ *See id.* at 612.

¹²¹ *See Sequoyah*, 480 F. Supp. at 611–12.

¹²² *Id.* at 611.

¹²³ *Id.* at 612.

¹²⁴ *Id.*

¹²⁵ *See id.*

¹²⁶ *See Sequoyah*, 480 F. Supp. at 612.

¹²⁷ *See id.*

for that matter. Had Judge Taylor cleared his eyes of the formalist myopia, he would have seen clearly that his decision left the Cherokee's freedom to exercise their religion vacuous. Without consideration of fullness, the Cherokees' right to free exercise is meaningless.

The district court gave greater credence to the Cherokee's free exercise claim than the claim received on appeal.¹²⁸ The appellate court discarded the Cherokee's claim for lack of centrality.¹²⁹ While Judge Lively's opinion for the Sixth Circuit recognized that the Cherokee beliefs constituted a religion, he found that the sacred sites to be flooded by the Tellico Dam project were not central to the Cherokee religion and therefore not protected under the First Amendment.¹³⁰

In his concise, tepid dissent from the Sixth Circuit's decision in *Sequoyah*, Judge Merritt described sacred site protection as "a confusing and essentially uncharted area of the law under the Free Exercise Clause."¹³¹ Future cases and decisions further obfuscated any Indian right to practical, full, and free exercise of religion.¹³²

2. *Badoni v. Higginson*

Badoni v. Higginson involved claims similar to those of the Cherokee that were defeated in *Sequoyah*.¹³³ In fact, these two nearly contemporaneous cases reinforce one another.¹³⁴ *Badoni* also involved Indian opposition to a dam and reservoir project which flooded sacred sites.¹³⁵ In *Badoni*, Navajo plaintiffs claimed that, by impounding Colorado River water behind Glen Canyon Dam, the federal government drowned some of their gods and rendered sacred prayer spots inaccessible, thereby denying Navajo religious practitioners the ability to exercise their religion freely.¹³⁶

Writing for the district court, Judge Aldon J. Anderson granted summary judgment for the government because the Navajo did not

¹²⁸ See *Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159, 1163-65 (6th Cir. 1980).

¹²⁹ *Id.*

¹³⁰ See *id.* Although insulting, this centrality inquiry—premised on a subjective evaluation of another's religious convictions—appeared in other sacred site cases until Justice O'Connor effectively rejected it in *Lyng*. See *Lyng*, 485 U.S. at 449.

¹³¹ *Sequoyah*, 620 F.2d at 1165 (Merritt, J., dissenting).

¹³² See, e.g., *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983); *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980).

¹³³ See *Badoni v. Higginson*, 455 F. Supp. 641, 643 (D. Utah 1977).

¹³⁴ See *id.*

¹³⁵ See *id.*

¹³⁶ See *id.*

present a cognizable free exercise claim, holding that they had no property interest in Glen Canyon.¹³⁷ Alternatively, Judge Anderson found that even if the Navajo did exhibit a cognizable right, it still would be trumped by the government's compelling interest in maintaining Glen Canyon Dam and Reservoir as a major multi-state water and power project.¹³⁸

The Tenth Circuit rejected the district court's conclusion that the Navajo's free exercise claim was dependent upon an assertion of property rights.¹³⁹ After positing that the proper inquiry is whether the government action created a burden in the form of a coercive effect on the Navajo's free exercise of religion, Judge Logan escaped this thread of inquiry by finding a compelling interest for the government's action: "The government's interest in maintaining the [water] capacity of Lake Powell . . . outweighs plaintiff's religious interest."¹⁴⁰ Judge Logan reasoned that ensuring the ability of the Navajo to exercise their religion freely would require drawing down the reservoir to a level which would adversely impact the water supply for the arid Upper Basin States of the Colorado River Project (Colorado, New Mexico, Utah, and Wyoming).¹⁴¹ Even if Lake Powell burdened the Navajo free exercise of religion, Judge Logan concluded, such a burden is justified: "The government has shown an interest of a magnitude sufficient to justify the alleged infringements."¹⁴² The free exercise of religion, like many constitutional claims, is trumped by a showing of a compelling interest.¹⁴³

The Navajo brought a second claim in *Badoni*.¹⁴⁴ They asserted that the government implicitly sanctioned desecration of an indispensable sacred site by permitting and encouraging tourists to visit Rainbow Bridge (the featured physical attraction at Rainbow Bridge National Monument), thereby denying the Navajo their right to engage in the free exercise of religious ceremonies at that sacred site.¹⁴⁵ As a remedy, the Navajo proposed some measure of accommodation such

¹³⁷ See *id.* at 644–45.

¹³⁸ See *Badoni*, 455 F. Supp. at 645–46.

¹³⁹ See *Badoni v. Higginson*, 638 F.2d 172, 176 (10th Cir. 1980).

¹⁴⁰ *Id.* at 177.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ See *Badoni*, 638 F.2d at 177–78.

¹⁴⁵ *Id.*

as closing the Monument to general public access "on reasonable notice when religious ceremonies are to be held there."¹⁴⁶

The district court rejected this claim because the Navajo lacked property rights.¹⁴⁷ The Tenth Circuit, however, did not find the lack of property rights decisive.¹⁴⁸ The court determined that the government did not violate the Navajo's right to exercise their religion freely because the government action did not compel or coerce the Navajo to violate the tenets of their religion.¹⁴⁹ Rather, the government action merely rendered the practical exercise of their religion impossible: "The government here has not prohibited plaintiff's free exercise in the area of Rainbow Bridge; plaintiffs may enter in the Monument on the same basis as other people."¹⁵⁰

Badoni relied on formal doctrine to undercut the Navajo's constitutionally guaranteed right to the free exercise of religion.¹⁵¹ Such disingenuous judicial formalism speaks loudly to the lack of fullness in the First Amendment. Had the Tenth Circuit considered the Navajo claim in the "full and equal" or "full and free" context Madison and Jefferson proposed, the outcome of this case would have been quite different.¹⁵² Fullness of the Navajo right to exercise their religion freely would ensure substantive content and effectiveness of that right so as to require protection of Rainbow Bridge as a practical sacred site.¹⁵³ Without fullness, the Free Exercise Clause becomes a mere parchment right as it applies to Navajo religious practitioners at Rainbow Bridge.¹⁵⁴

The Tenth Circuit also invoked the Establishment Clause in rejecting the Navajo request for government protection of their sacred site.¹⁵⁵ Judge Logan found unacceptable the Navajo request that the government monitor public access to Rainbow Bridge in order to allow the Navajo to engage in important religious ceremonies at that sacred site:

¹⁴⁶ *Id.* at 178.

¹⁴⁷ See *Badoni v. Higginson*, 455 F. Supp. 641, 644-45 (D. Utah 1977).

¹⁴⁸ See *Badoni*, 638 F.2d at 176.

¹⁴⁹ See *id.* at 178.

¹⁵⁰ *Id.*

¹⁵¹ See *id.*

¹⁵² See *supra* text accompanying notes 66-99.

¹⁵³ See *id.*

¹⁵⁴ See *id.*

¹⁵⁵ See *Badoni*, 638 F.2d at 178-79. This move set the stage for future sacred site decisions, especially *Bear Lodge*. See *Bear Lodge Multiple Use Ass'n v. Babbitt*, 2 F. Supp. 2d 1448 (D. Wyo. 1998).

They seek government action to exclude others from the Monument, at least for short periods of time, and to control tourist behavior. . . . Issuance of regulations to exclude tourists completely from the Monument for the avowed purpose of aiding plaintiff's conduct of religious ceremonies would seem a clear violation of the Establishment Clause."¹⁵⁶

Judge Logan asserted the following inquiry vis-à-vis Establishment Clause jurisprudence, as set forth by the Supreme Court in *Abington v. Schempp*:

The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion, then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.¹⁵⁷

Finding that the requested government regulation and limitation of tourist behavior and volume had no secular purpose and would serve to recreate Rainbow Bridge National Monument as "a government-managed religious shrine," Judge Logan concluded that such action would violate the Establishment Clause.¹⁵⁸

3. Cases following *Sequoyah* and *Badoni*

a. *Crow v. Gullett*

Sequoyah and *Badoni* provided the guiding principles for decisions in subsequent cases of sacred site protection.¹⁵⁹ In *Crow v. Gullett*, for example, the district court considered Lakota and Tsistsistas claims that construction projects at Bear Butte and regulation of Indian ac-

¹⁵⁶ *Badoni*, 638 F.2d at 178–79.

¹⁵⁷ *Id.* at 179 (quoting *School Dist. of Abington v. Schempp*, 374 U.S. 203, 222 (1963)). Although the two-pronged purpose and effect test set forth in *Abington* resembles both the Lemon and O'Connor tests, it is worth noting that in *Bear Lodge* the district court specifically applied only the Lemon and O'Connor tests. See *infra* text accompanying notes 223–39.

¹⁵⁸ *Badoni*, 638 F.2d at 179.

¹⁵⁹ See generally *Badoni*, 638 F.2d 172; *Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159 (6th Cir. 1980), *aff'd* 480 F. Supp. 608 (1979).

cess to Bear Butte violated their free exercise rights.¹⁶⁰ Chief Judge Bogue, writing for the district court, did not question the validity or centrality of the religious claims: "In this case there is no dispute that plaintiffs' practices at Bear Butte are based on a system of beliefs that is religious and is sincerely held by plaintiffs."¹⁶¹ Nonetheless, Judge Bogue concluded: "The Free Exercise Clause places a duty upon a state to keep from prohibiting religious acts, not to provide the means or the environment for carrying them out."¹⁶² Relying on the district court opinions in *Sequoyah* and *Badoni*, Judge Bogue found it significant that the Indians had no legal property interest in the Bear Butte area, and also that Indians could successfully complete their vision quests despite the alleged distractions.¹⁶³ Moreover, Judge Bogue determined that the government had demonstrated a compelling interest in completing the construction of a road and a parking lot.¹⁶⁴

b. *Inupiat Community v. United States*

In *Inupiat Community v. United States*, the district court considered Inupiat opposition to oil development in large portions of the Beaufort and Chukchi seas on the grounds that development would disrupt their hunting and gathering lifestyle, which they claimed was inextricable from their religious beliefs.¹⁶⁵ Judge Fitzgerald failed to recognize the Inupiat claims because the Inupiat offered no explanation of either the religious significance of the hunting grounds or how the proposed development would interfere with the free exercise of their religion.¹⁶⁶ Moreover, Judge Fitzgerald found that the government has a compelling interest in developing oil exploration.¹⁶⁷ In conclusion, Judge Fitzgerald also cited Establishment Clause problems in the tension between "religious servitudes" and public access: "The Supreme Court has held repeatedly that the First Amendment

¹⁶⁰ Crow v. Gullet, 541 F. Supp. 785 (D.S.D. 1982), *aff'd* 706 F.2d 856 (8th Cir. 1983).

¹⁶¹ *Id.* at 790.

¹⁶² *Id.* at 791.

¹⁶³ *See id.* at 791-92.

¹⁶⁴ *See id.* at 792-93.

¹⁶⁵ Inupiat Community of the Arctic Slope v. United States, 548 F. Supp. 182 (D. Ala. 1982), *aff'd* 746 F.2d 570 (9th Cir. 1984).

¹⁶⁶ *See id.* at 188-89.

¹⁶⁷ *See id.* at 189.

may not be asserted to deprive the public of its normal use of an area."¹⁶⁸

c. *Wilson v. Block*

In *Wilson v. Block*, Hopi and Navajo opposed a Forest Service decision to permit the expansion of the Snow Bowl ski area in the San Francisco Peaks area of Arizona.¹⁶⁹ Hopi and Navajo asserted that the Peaks were sacred land, and neither the district court nor the appeals court questioned the sincerity of the Indians' religious claims.¹⁷⁰ Yet the D.C. Circuit affirmed a district court ruling that government permitting of a ski area on Forest Service land did not violate the Free Exercise Clause because the government did not burden the Indians' religion by denying access to the sacred sites or impairing their ability to conduct ceremonies.¹⁷¹

The D.C. Circuit "consider[ed] separately the effects of development upon their beliefs and upon their religious practices."¹⁷² Judge Lumbard found that the development of the ski area did not penalize faith and therefore did not burden religious belief.¹⁷³ With regard to practice, Judge Lumbard applied the *Sequoyah* test for indispensability: "We hold that plaintiffs seeking to restrict government land use in the name of religious freedom must, at a minimum, demonstrate that the government's proposed land use would impair a religious practice that could not be performed at any other site."¹⁷⁴ Judge Lumbard found that expansion of the ski area would not trample on indispensable sacred land because the Hopi and Navajo plaintiffs could perform their ceremonies in other parts of the Peaks.¹⁷⁵

¹⁶⁸ *Id.*

¹⁶⁹ *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983).

¹⁷⁰ *See id.* at 740.

¹⁷¹ *See id.* at 742-46.

¹⁷² *Id.* at 740.

¹⁷³ *See id.* at 742.

¹⁷⁴ *Wilson*, 708 F.2d at 744.

¹⁷⁵ The *Wilson* court explicitly "declined to follow those cases [*Crow*, *Badoni*, *Sequoyah*] which have placed primary reliance upon the government's property interest and which have held, apparently, that the Free Exercise Clause can never supersede the government's ownership rights and duties of public management." *Id.* at 744 n.5.

IV. THE SUPREME COURT SPEAKS: *LYNG V. NORTHWEST INDIAN CEMETERY PROTECTIVE ASSOCIATION*

The Supreme Court denied certiorari to *Sequoyah*, *Badoni*, and *Wilson*. In 1987, however, the Supreme Court heard arguments in *Lyng v. Northwest Indian Cemetery Protective Association*.¹⁷⁶ The result was Supreme Court affirmation of the doctrine evidenced in *Sequoyah*, *Badoni*, and *Wilson*, which denied protection to Indian sacred sites.¹⁷⁷

A. Lower Court Proceedings

Two lower courts (the District Court for the Northern District of California and the Court of Appeals for the Ninth Circuit) rejected the prevailing doctrine of *Sequoyah* and *Badoni* and enjoined a Forest Service proposal to build a road and to permit logging in the Chimney Rock section of the Six Rivers National Forest in Northern California because the Chimney Rock area historically was used for religious purposes by Yurok, Karok, and Tolowa Indians.¹⁷⁸ The lower courts accepted the findings of a study commissioned by the Forest Service:

'Successful [religious] use of the [area] is dependent upon and facilitated by certain qualities of the physical environment, the most important of which are privacy, silence, and an undisturbed natural setting.' The study concluded that constructing a road along any of the available routes 'would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples.' Accordingly, the report recommended that the road not be completed.¹⁷⁹

Relying largely on the conclusions presented in this study, both lower courts held that construction of the road would violate the Indians' rights as guaranteed by the Free Exercise Clause.¹⁸⁰ Although neither court determined that construction of the road was designed purposefully to coerce, compel, penalize, or otherwise disrupt the

¹⁷⁶ 485 U.S. 439 (1988).

¹⁷⁷ See *infra* text accompanying notes 190-201.

¹⁷⁸ *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 565 F. Supp. 586 (N.D. Cal. 1983), *aff'd* 795 F.2d 688 (9th Cir. 1986).

¹⁷⁹ *Lyng*, 485 U.S. at 442.

¹⁸⁰ See *Northwest Indian*, 565 F. Supp. at 591.

Indian religious practices, the practical effect of constructing the road through the Chimney Rock area—that the Indians would be unable to exercise fully their religious beliefs—was enough to render the project unconstitutional.¹⁸¹

It should be clear that a formalist tack was available to the lower courts that heard *Lyng*.¹⁸² They could have rationalized the constitutionality of the road through the sacred site by adhering to the strict theories advanced in previous sacred site protection cases and concluded that the Indians' free exercise of religion was not infringed because the Indians could still visit the site and engage in their ceremonies.¹⁸³ At least in this case the Indians would not have to dive under water to reach their sacred sites.¹⁸⁴

Moreover, the courts could have posited that the Indians' religious rights were not singled out for mistreatment, nor were the Indians compelled to act in violation of their beliefs.¹⁸⁵ Such arguments had been used in other cases to demonstrate the continuing freeness (if not fullness) of Indian religious practices in spite of government dam building or other such actions.¹⁸⁶ Remarkably, the lower courts broke ranks from the common theories in sacred site cases and invoked fullness vis-à-vis the Indians' right to exercise their religion.¹⁸⁷ Construction of the road technically might not have extinguished the freedom of Indians to exercise their religion, but it would have restricted their exercise of religion in practical and effective ways.¹⁸⁸ Both the district court and the court of appeals, therefore, implicitly found that construction of the road violated the Free Exercise Clause because such government action would deny the Indians fullness with their freedom.¹⁸⁹ The triumph of a Jeffersonian/Madisonian conception of full religious freedom, however, was short-lived.¹⁹⁰

¹⁸¹ See *id.*

¹⁸² See generally *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), *aff'g* 455 F. Supp. 141 (1977); *Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159 (6th Cir. 1980), *aff'g* 480 F. Supp. 608 (1979).

¹⁸³ See generally *Badoni*, 638 F.2d 172; *Sequoyah*, 620 F.2d 1159.

¹⁸⁴ See generally *Badoni*, 638 F.2d 172; *Sequoyah*, 620 F.2d 1159.

¹⁸⁵ See generally *Badoni*, 638 F.2d 172; *Sequoyah*, 620 F.2d 1159.

¹⁸⁶ See generally *Badoni*, 638 F.2d 172; *Sequoyah*, 620 F.2d 1159.

¹⁸⁷ See *Northwest Indian Cemetery Protective Ass'n v. Peterson* 565 F. Supp. 589, 591 (N.D. Cal. 1983).

¹⁸⁸ See *id.*

¹⁸⁹ See *id.*

¹⁹⁰ See *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449–50 (1988). See also *supra* text accompanying notes 66–75.

B. Justice O'Connor's Majority Opinion

The Supreme Court disputed neither the sincerity of the Indians' religious claims nor the study's conclusion that the government's proposed action would have a severe, adverse, and perhaps even fatal, effect on the Indians' ability to exercise their religion.¹⁹¹ However, in what Justice Brennan in dissent called a "cruelly surreal result,"¹⁹² the majority reversed the lower courts and held that destroying a sacred site essential to the exercise of religion does not burden the exercise of religion.¹⁹³

Justice O'Connor, writing for the majority, dismissed any need for a compelling interest showing by the government.¹⁹⁴ Instead, O'Connor asserted that in this case neither would the Indians be "coerced by the Government's action into violating their religious beliefs; nor would governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."¹⁹⁵ Although the government action would render the Indians' free exercise right meaningless by destroying a sacred site where that free exercise takes place, the Court found that building a road was merely the "incidental effect" of a government program.¹⁹⁶

Justice O'Connor explicitly rejected any legal accounting for the effects of the government action on religious practice:

The crucial word in the constitutional text is "prohibit": "For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.¹⁹⁷

The rationale for such line-drawing, which banishes any effects test, altogether suffers from the Court's failure to consider the Free

¹⁹¹ See *Lyng*, 485 U.S. at 449.

¹⁹² *Id.* at 472 (Brennan, J. dissenting).

¹⁹³ See *id.* at 450–51.

¹⁹⁴ See *id.* at 447, 450.

¹⁹⁵ *Id.* at 449.

¹⁹⁶ See *Lyng*, 485 U.S. at 450.

¹⁹⁷ *Id.* at 451.

Exercise Clause in the context of fullness. Echoing Learned Hand's earlier admonition that people accommodate their lives to the machinations of contemporary politics and popular culture, O'Connor wrote: "However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires."¹⁹⁸ Fearing creation of a "religious servitude" on a tract of federal land,¹⁹⁹ the Court propounded the government's property interest in National Forest land: "Whatever rights [under the Constitution] the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, its land."²⁰⁰

O'Connor also expounded on the purported egalitarian premise underlying formal line-drawing: "The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion."²⁰¹ In that single sentence, the Court recognized that the Indians' right to exercise their religious beliefs deserved equality and freedom. Any practical enforcement of those constitutional promises, however, was entirely lacking in the Court's consideration. An effects test that considers the practicality and fullness of the Indians' right to exercise their religious beliefs is essential to ensure that equality and freedom do not go gently into the night.

C. Justice Brennan's Dissent

Justice Brennan's powerful dissent in *Lyng* included an implicit recognition of fullness. Joined by Justices Marshall and Blackmun, Brennan scoffed at the hypocrisy of a ruling which allows the Indians a "freedom [that] amounts to nothing more than the right to believe that their religion will be destroyed,"²⁰² and "leaves Native Americans with absolutely no constitutional protection against perhaps the gravest threat to their religious practices."²⁰³ Brennan challenged the Court's hair-splitting formalism, including its distinction between governmental actions which coerce, compel, or prohibit religious activity and governmental actions which render religious activity impossible:

¹⁹⁸ *Id.* at 452.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 453.

²⁰¹ *Lyng*, 485 U.S. at 452.

²⁰² *Id.* at 477 (Brennan, J., dissenting).

²⁰³ *Id.* at 459.

Ultimately the Court's coercion test turns on a distinction between governmental actions that compel affirmative conduct inconsistent with religious belief, and those governmental actions that prevent conduct consistent with religious belief. In my view, such a distinction is without constitutional significance. . . . Religious freedom is threatened no less by governmental action that makes the practice of one's chosen faith impossible than by government programs that pressure one to engage in conduct which is inconsistent with religious beliefs. Both common sense and our prior cases teach us, therefore, that governmental action that makes the practice of a given faith more difficult necessarily penalizes that practice and thereby tends to prevent adherence to religious belief.²⁰⁴

After all, Brennan implied, there can be hardly any action more inconsistent with one's religious beliefs than one that makes it impossible to practice at all.²⁰⁵

Justice Brennan rejected "the Court's premise that the form of the government's restraint on religious practice, rather than its effect, controls our constitutional analysis."²⁰⁶ Instead, Brennan posited a constitutional inquiry based upon the harm to which the religious practitioners are subjected rather than the style in which the government implements that harm.²⁰⁷ To do otherwise, in Brennan's words, allows for a "cruelly surreal result: governmental action that will virtually destroy a religion is nevertheless deemed not to 'burden' that religion."²⁰⁸

D. Cases following *Lyng*

1. *Manybeads v. United States*

In *Lyng*, the Supreme Court affirmed the doctrine posited in *Sequoyah* and *Badoni*. *Lyng*, in turn, proved dispositive in subsequent district court decisions involving Indian claims to protect sacred sites

²⁰⁴ *Id.* at 468–69.

²⁰⁵ *See id.*

²⁰⁶ *Lyng*, 485 U.S. at 467.

²⁰⁷ *Id.* at 467–68.

²⁰⁸ *Id.* at 472 (Brennan, J., dissenting).

from destruction by governmental action.²⁰⁹ In *Manybeads v. United States*, for example, Navajo plaintiffs challenged the Navajo-Hopi Relocation Act, which required that Navajo move to another district within the federal reservation system.²¹⁰ Writing for the district court, Judge Carroll found *Lyng* dispositive and relied on *Lyng*'s "religious servitude" finding: "However much plaintiffs may desire to permanently reside where they now do that option is not available to them. To hold otherwise would afford plaintiffs rights, benefits and privileges not enjoyed by other citizens."²¹¹

2. *Attakai v. United States*

In *Attakai v. United States*, Navajo challenged Department of the Interior and Bureau of Indian Affairs construction projects on grounds that the governmental agencies interfered with the ability of the Navajo to practice their religion by irreparably disturbing and destroying religious sites.²¹² Judge Carroll again recognized both that the Navajo claims were grounded in sincerely held bona fide religious belief, and that the construction projects would seriously interfere with or impair some of plaintiffs' religious practices.²¹³ Once again, however, Judge Carroll applied the principles of the recent *Lyng* decision and concluded that *Lyng* was dispositive:

The fact that a person's ability to practice their [sic] religion will be virtually destroyed by a governmental program does not allow them to impose a religious servitude on the property of the government. . . . There has been no evidence that the government has denied plaintiffs the right to physically visit or use any of those shrines or the other sites involved in this action.²¹⁴

²⁰⁹ See *Havasupai Tribe v. United States*, 752 F. Supp. 1471 (D. Ariz. 1990), *aff'd, sub nom.* *Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991); *Attakai v. United States*, 746 F. Supp. 1395 (D. Ariz. 1990); *Manybeads v. United States*, 730 F. Supp. 1515 (D. Ariz. 1989).

²¹⁰ *Manybeads*, 730 F. Supp. 1515.

²¹¹ *Id.* at 1517-18.

²¹² See 746 F. Supp. at 1395.

²¹³ *Id.* at 1403.

²¹⁴ *Id.* at 1403-04.

3. *Havasupai Tribe v. United States*

In *Havasupai Tribe v. United States*, the Havasupai Tribe challenged Forest Service authorization of a mining operation on grounds that the mine will "deny them access to sacred sites and destroy the very essence of their religious and cultural system."²¹⁵ Judge Strand, like Judge Carroll, assumed the truth of the plaintiffs' assertions about the religious sanctity of the Canyon Mine site and the adverse effects upon the Havasupai belief system, but still found *Lyng* dispositive.²¹⁶ In this case, as in *Lyng*, "plaintiffs are not penalized for their beliefs, nor are they prevented from practicing their religion."²¹⁷

Judge Strand's opinion also adopted the property rights reasoning of *Lyng*: "Whatever rights the Indians may have to use the area . . . those rights do not divest the Government of its right to use what is, after all, its land."²¹⁸ Judge Strand then invoked *Lyng*'s "religious servitude" trope: "Giving the Indians a veto power over activities on federal land would 'easily require de facto beneficial ownership of some rather spacious tracts of public property.'"²¹⁹

With these decisions, the legacy of *Sequoyah* and *Badoni*, as amplified by the Supreme Court through *Lyng*, seemed to control sacred site jurisprudence.²²⁰ The failure of any attempt by Indian groups to protect sacred sites on federal land on the basis of religious freedom seemed preordained no matter how meritorious the claim or how destructive the government's activity.²²¹ And then the *Bear Lodge* case slipped into the mix.

V. A GASP FOR FULLNESS: *BEAR LODGE*

The *Bear Lodge* litigation, which concerned restrictions on climbing at Devils Tower, reflects the flip-side of the previous cases. In all of the previous sacred site protection cases, the court considered Indian challenges to government programs which denied their right to the free exercise of their religion.²²² In *Bear Lodge*, the district court ac-

²¹⁵ 752 F. Supp. 1471, 1476 (D. Ariz. 1990); *aff'd, sub nom*, *Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991).

²¹⁶ *See id.* at 1485.

²¹⁷ *Id.*

²¹⁸ *Id.* at 1486 (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 453 (1988)).

²¹⁹ *Id.* (quoting *Lyng* 485 U.S. at 453).

²²⁰ *See cases cited supra* note 15; *see also* Hooker, *supra* note 53, at 137-38.

²²¹ *See cases cited supra* note 15; *see also* Hooker, *supra* note 100, at 137-38.

²²² *See cases cited supra* note 15.

knowledge that it confronted the converse: whether the government went so far in enabling the Indians' free exercise of religion as to breach the Establishment Clause.²²³

This inquiry succeeds only insofar as the Establishment Clause may be understood to work at cross-purposes to the Free Exercise Clause. Whereas the Establishment Clause exists to support rather than negate the religious liberty set forth in the Free Exercise Clause, as previously argued, however, the climbers' rights argument should fail.²²⁴ The climbers do not suggest that the National Park Service is favoring one religion over another, nor do they suggest that the government has a compelling interest in allowing climbing on Devils Tower. They merely posit that allowing Indians to freely and fully exercise their religious beliefs hinders the climbers' engagement in a secular activity.²²⁵ The Establishment Clause should not be brought to bear in a manner so inimical to its purpose.

Judge Downes recognized the climbers' argument, however, and applied both the *Lemon* test and Justice O'Connor's endorsement test from her concurrence in *Lynch*.²²⁶ According to the *Lemon* test: "A government action does not offend the Establishment Clause if it (1) has a secular purpose, (2) does not have the principal or primary effect of advancing or inhibiting religion, and (3) does not foster an excessive entanglement with religion."²²⁷ Essentially, the O'Connor test holds: "Government impermissibly endorses religion if its conduct has either (1) the purpose or (2) the effect of conveying a message that religion or a particular religious belief is favored or preferred."²²⁸

Unlike the Court's free exercise jurisprudence in the area of sacred site protection which explicitly rejects the effect of government action on one's ability to exercise one's religious beliefs, both *Lemon* and Justice O'Connor's *Lynch* concurrence consider the purpose and effect of the government action. Consequently, Judge Downes held: "Plaintiffs can succeed . . . only if they show that the action has no clear secular purpose or that despite a secular purpose the actual

²²³ See *Bear Lodge Multiple Use Ass'n v. Babbitt*, 2 F. Supp. 2d 1448, 1451 (D. Wyo. 1998).

²²⁴ See *supra* text accompanying notes 86–100.

²²⁵ See *Bear Lodge*, 2 F. Supp. 2d at 1450–52.

²²⁶ See *id.* at 1453–54.

²²⁷ *Id.* at 1454 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)).

²²⁸ *Id.*

purpose is to endorse religion.”²²⁹ Citing the Supreme Court’s decision in *Amos*, which found that a government action need not be wholly unrelated to religion, the court determined that “it is a permissible . . . purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions.”²³⁰ As to the purpose element, Judge Downes found:

While the purposes behind the voluntary climbing ban are directly related to Native American religious practices, that is not the end of the analysis. The purposes underlying the ban are really to remove barriers to religious worship occasioned by public ownership of the Tower. This is in the nature of accommodation, not promotion, and consequently is a legitimate secular purpose.²³¹

As to the effect element, Judge Downes found: “Actions step beyond the bounds of reasonable accommodation when they force people to support a given religion.”²³² Judge Downes, however, also cited *Badoni*: “The exercise of First Amendment freedoms may not be asserted to deprive the public of its normal use of an area.”²³³ “If the NPS is, in effect, depriving individuals of their legitimate use of the monument in order to enforce the tribes’ rights to worship,” he continued, “it has stepped beyond permissible accommodation and into the realm of promoting religion. The gravamen of the issue then becomes whether climbers are allowed meaningful access to the monument.”²³⁴ Because the ban is voluntary and not coercive, the climbers are not denied meaningful access.

As to the excessive entanglement element, the Court looked at “the character and the purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.”²³⁵ In this case, Judge Downes found that the NPS serves only a custodial function by creating an atmosphere more conducive to worship.²³⁶ Based

²²⁹ *Bear Lodge*, 2 F. Supp. 2d at 1454.

²³⁰ *Id.* (quoting *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987)).

²³¹ *Id.* at 1455.

²³² *Id.*

²³³ *Id.* (quoting *Badoni v. Higginson*, 638 F.2d 172, 179 (10th Cir. 1980)).

²³⁴ *Bear Lodge*, 2 F. Supp. 2d at 1455.

²³⁵ *Id.* at 1456.

²³⁶ *See id.*

on these findings, Judge Downes upheld the "voluntary ban."²³⁷ As noted, however, he warned that a mandatory ban on climbing—a mandatory restriction on climbers' access to Devils Tower—would not pass constitutional muster.²³⁸ Consideration of the Indians' right to exercise their religious beliefs in the context of Madison's and Jefferson's "full and equal" or "full and free" construction, however, would mandate protection of the Indians' sacred interest in Devils Tower. To do less denies Indians substantive content—fullness—with their theoretical free exercise of religion.

VI. CONCLUSION

Americans like to think of themselves as the progenitors of freedom and equality in the modern age. The Pilgrims sailed west, according to our national mythology, to escape tyranny and persecution in the Old World. In the New World, they established a shining "city upon a hill" which we celebrate as the global model for democratic principles. "All men are created equal," we reassure ourselves, comforted with the notion that we, as a nation, proclaimed this concept to the world. "Let freedom ring. . . ."

Yet American history is littered with the detritus of battles fought—both literally and in cultural discourse—over the extension of myriad aspects of freedom and equality to various groups. Nearly every American generation since the Revolution is identified with a rights revolution, from the antebellum struggle against slavery and the women's suffrage movement to late twentieth century struggles for equal access to places of public accommodation or to the benefits of marriage. These struggles suggest a darker side of the democratic, egalitarian national heritage we embrace so proudly.

Our periodic fights for rights have played out on a number of fronts: voting booths, streets and sidewalks, battlefields, churches, reservations, Greenwich Village bars, and lunch counters in North Carolina. And eventually—all too slowly—America's rights revolutions have been contested in the political arena and in court. We may take pride in some of the outcomes of these struggles—a broader right to vote, for instance—but we also should wonder at the limited scope of the egalitarian, freedom-bound nature of our city upon a hill. We are inclined to forget the resistance to expanded conceptions of freedom and equality, and the sustained battles that had to be fought. Ensuring

²³⁷ See *id.* at 1456–57.

²³⁸ See *id.* at 1452.

freedom and equality in the United States has not been as easy as the Declaration of Independence suggests.

Nowhere in American history or contemporary culture are the concepts of freedom and equality more corrupted than vis-à-vis American Indians. The tortured legacy of genocide haunts our national conscience, yet our "conquest" is revered in American mythology and celebrated in popular culture. The "Trail of Tears" and the great buffalo hunts are merely some of the most prominent, concerted American efforts to curtail the Indians' very existence in order to make room for our city upon a hill. Even today, battles are being fought around Indian freedom and equality and basic cultural survival. The Indians are losing once again. We should be ashamed at our failure to protect fully the free exercise of religion.

purpose is to endorse religion."²²⁹ Citing the Supreme Court's decision in *Amos*, which found that a government action need not be wholly unrelated to religion, the court determined that "it is a permissible . . . purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."²³⁰ As to the purpose element, Judge Downes found:

While the purposes behind the voluntary climbing ban are directly related to Native American religious practices, that is not the end of the analysis. The purposes underlying the ban are really to remove barriers to religious worship occasioned by public ownership of the Tower. This is in the nature of accommodation, not promotion, and consequently is a legitimate secular purpose.²³¹

As to the effect element, Judge Downes found: "Actions step beyond the bounds of reasonable accommodation when they force people to support a given religion."²³² Judge Downes, however, also cited *Badoni*: "The exercise of First Amendment freedoms may not be asserted to deprive the public of its normal use of an area."²³³ "If the NPS is, in effect, depriving individuals of their legitimate use of the monument in order to enforce the tribes' rights to worship," he continued, "it has stepped beyond permissible accommodation and into the realm of promoting religion. The gravamen of the issue then becomes whether climbers are allowed meaningful access to the monument."²³⁴ Because the ban is voluntary and not coercive, the climbers are not denied meaningful access.

As to the excessive entanglement element, the Court looked at "the character and the purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority."²³⁵ In this case, Judge Downes found that the NPS serves only a custodial function by creating an atmosphere more conducive to worship.²³⁶ Based

²²⁹ *Bear Lodge*, 2 F. Supp. 2d at 1454.

²³⁰ *Id.* (quoting *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987)).

²³¹ *Id.* at 1455.

²³² *Id.*

²³³ *Id.* (quoting *Badoni v. Higginson*, 638 F.2d 172, 179 (10th Cir. 1980)).

²³⁴ *Bear Lodge*, 2 F. Supp. 2d at 1455.

²³⁵ *Id.* at 1456.

²³⁶ *See id.*

on these findings, Judge Downes upheld the “voluntary ban.”²³⁷ As noted, however, he warned that a mandatory ban on climbing—a mandatory restriction on climbers’ access to Devils Tower—would not pass constitutional muster.²³⁸ Consideration of the Indians’ right to exercise their religious beliefs in the context of Madison’s and Jefferson’s “full and equal” or “full and free” construction, however, would mandate protection of the Indians’ sacred interest in Devils Tower. To do less denies Indians substantive content—fullness—with their theoretical free exercise of religion.

VI. CONCLUSION

Americans like to think of themselves as the progenitors of freedom and equality in the modern age. The Pilgrims sailed west, according to our national mythology, to escape tyranny and persecution in the Old World. In the New World, they established a shining “city upon a hill” which we celebrate as the global model for democratic principles. “All men are created equal,” we reassure ourselves, comforted with the notion that we, as a nation, proclaimed this concept to the world. “Let freedom ring. . . .”

Yet American history is littered with the detritus of battles fought—both literally and in cultural discourse—over the extension of myriad aspects of freedom and equality to various groups. Nearly every American generation since the Revolution is identified with a rights revolution, from the antebellum struggle against slavery and the women’s suffrage movement to late twentieth century struggles for equal access to places of public accommodation or to the benefits of marriage. These struggles suggest a darker side of the democratic, egalitarian national heritage we embrace so proudly.

Our periodic fights for rights have played out on a number of fronts: voting booths, streets and sidewalks, battlefields, churches, reservations, Greenwich Village bars, and lunch counters in North Carolina. And eventually—all too slowly—America’s rights revolutions have been contested in the political arena and in court. We may take pride in some of the outcomes of these struggles—a broader right to vote, for instance—but we also should wonder at the limited scope of the egalitarian, freedom-bound nature of our city upon a hill. We are inclined to forget the resistance to expanded conceptions of freedom and equality, and the sustained battles that had to be fought. Ensuring

²³⁷ See *id.* at 1456–57.

²³⁸ See *id.* at 1452.