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CASE COMMENTS

CONSTITUTIONAL LAW—*AMERICAN CIVIL LIBERTIES UNION v. CITY OF BIRMINGHAM*: ESTABLISHMENT CLAUSE SCRUTINY OF A NATIVITY SCENE DISPLAY

During the holiday season governments sometimes expend public funds to maintain seasonal displays on both public and private property. One such display is a nativity scene (or creche) which depicts the religious birth of Christ. The scene traditionally contains figures of Mary, Joseph, the Christ Child, wise men and barn animals.

The first amendment prohibits governments from making a law respecting an establishment of religion or prohibiting the free exercise thereof.¹ In *Lynch v. Donnelly*,² the United States Supreme Court first considered the constitutionality of a nativity scene displayed by a city in the context of the Christmas season. The Court held that the publicly owned nativity scene erected by the city in a private park did not violate the establishment clause.³ In *American Civil Liberties Union v. City of Birmingham*,⁴ the United States Court of Appeals for the Sixth Circuit held that the city of Birmingham violated the establishment clause of the first amendment when it displayed a nativity scene on the lawn of city hall because the scene, displayed without other nonreligious holiday symbols, had the effect of endorsing religion.

This comment examines the Sixth Circuit's holding in *ACLU* that a nativity scene, displayed by a city without other nonreligious symbols, violates the establishment clause of the first amendment. Part I discusses the facts and holding of *ACLU*. Part II traces the United States Supreme Court's decisions interpreting the establishment clause. Part III argues that the Sixth Circuit in *ACLU* misinterpreted the Supreme Court's decision in *Lynch* and explores the legal impact of *ACLU*. Part IV concludes that the Sixth Circuit narrowly confined *Lynch* to its particular facts by requiring a government display to contain secular symbols to pass constitutional muster.

I. *American Civil Liberties Union v. City of Birmingham*

The city of Birmingham annually displayed a nativity scene on the lawn of its city hall.⁵ The nativity scene contained figures of Mary, Jo-

1 U.S. CONST. amend. I. The first amendment provides, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" The establishment clause has been applied to the states through the fourteenth amendment. *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

2 465 U.S. 668 (1984).

3 *Id.* at 687. See *infra* notes 64-84 and accompanying text.

4 791 F.2d 1561 (6th Cir. 1986), *cert. denied*, 55 U.S.L.W. 3316 (U.S. Nov. 4, 1986) (No. 86-389). Because the Supreme Court denied certiorari, *ACLU* remains valid law in the Sixth Circuit.

The Second Circuit has come to an opposite conclusion. See *infra* notes 18 & 92. The Supreme Court should ultimately clarify the law regarding the constitutionality of religious displays.

5 791 F.2d at 1562.

seph, the Christ Child, three shepherds, and several lambs.⁶ The city exhibited the scene at city hall from late November through early January.⁷ The city purchased, displayed, maintained, and stored the creche with public funds.⁸ Micki Levin and the American Civil Liberties Union (ACLU), on behalf of residents of the city of Birmingham, brought an action to enjoin the city from displaying and maintaining the nativity scene, claiming that the city violated the first amendment.⁹

The United States District Court for the Eastern District of Michigan held that the city of Birmingham violated the establishment clause.¹⁰ The district court relied on the United States Supreme Court's decisions in *Lemon v. Kurtzman*¹¹ and *Lynch*.¹² In *Lemon*, the Supreme Court proposed a three prong test for reviewing establishment clause challenges: (1) whether the challenged government activity has a secular purpose; (2) whether the primary effect of the government activity advances or inhibits a religion; and (3) whether the activity creates an excessive entanglement of government with religion.¹³ The district court in *ACLU*, applying the *Lemon* test, found that the city failed prong one because it did not show a secular purpose for the creche.¹⁴ The court stated that the city failed prong two since the nativity scene showed "implicit government support" for religion.¹⁵ Finally, the court found that while the display did not result in excessive entanglement of the government with religion, the nativity scene would cause political divisiveness and thus the city also failed on prong three.¹⁶ Accordingly, the court granted a permanent injunction to prevent the city from "[e]recting, supporting, or maintaining a nativity scene on the lawn of the Birmingham city hall."¹⁷

The city of Birmingham appealed the judgment of the district court. The city, relying on *Lynch*, stressed that it did not fail the second prong of *Lemon* because it did not directly advance religion when it displayed the creche; it merely included the creche in the celebration of a national holiday. The city argued that whether it displayed the nativity scene alone or with other symbols of the Christmas holiday was unimportant.¹⁸ The ACLU contended that the Supreme Court in *Lynch* allowed a city to

6 *Id.*

7 *Id.*

8 *Id.*

9 The action was brought pursuant to 42 U.S.C. § 1983 (1982). To obtain standing under 42 U.S.C. § 1983, a showing of economic injury or injury to specific individual rights is not necessary. A party must demonstrate a sufficient personal stake in the controversy to warrant federal court jurisdiction. See, e.g., *Suarez v. Administrador Del Deporte de Puerto Rico*, 354 F. Supp. 320 (D.P.R. 1972); *DeJesus v. Ward*, 441 F. Supp. 215 (S.D.N.Y. 1977).

10 588 F. Supp. 1337, 1340 (E.D. Mich. 1984).

11 403 U.S. 602 (1971).

12 465 U.S. 668.

13 See *infra* notes 49-52 and accompanying text.

14 588 F. Supp. at 1339.

15 *Id.*

16 *Id.*

17 *Id.* at 1340.

18 *Id.* See *McCreary v. Stone*, 739 F.2d 726 (2d Cir. 1984), *aff'd by an equally divided Court sub. nom.*, *Board of Trustees v. McCreary*, 105 S. Ct. 1859 (1985) (a city did not violate the establishment clause when it maintained a creche on private property which was not displayed with secular symbols). See *infra* notes 92-105 and accompanying text.

display a nativity scene because the scene was only one part of a much larger Christmas display which included items unrelated to religion.¹⁹ The ACLU asserted that the city of Birmingham's nativity scene which the city displayed without any secular symbols of the Christmas holiday "send[s] an unmistakable signal to observers that the city officially endorses the religion Christianity."²⁰

The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the district court. The court held that while the district court erred in applying prongs one and three of the *Lemon* test,²¹ the district court correctly found the display's primary effect advanced Christianity and thus the city violated the second prong.²²

Applying the first prong, the Sixth Circuit noted that although the creche did have some religious significance in promoting the holiday spirit of joy and goodwill, it had a secular purpose.²³ The court explained that *Lynch* does not require a totally secular purpose.²⁴ Thus, the court concluded that the record did not support a finding that the city's actual purpose was to endorse religion. In reversing the district court's finding on the third prong that the display caused excessive administrative entanglement with religion, the court stated that, other than from the present parties, no other parties registered complaints about the creche and the display involved no church or religious entity.²⁵ To support its finding, the court, interpreting *Lynch*, stated: "In the absence of excessive political entanglement fostered by the challenged governmental action, political divisiveness alone cannot render otherwise permissible official conduct invalid."²⁶

The Sixth Circuit affirmed the district court's finding that the nativity scene had the effect of advancing the Christian religion.²⁷ The court distinguished *Lynch*, stating that:

When surrounded by a multitude of secular symbols of Christmas a nativity scene may do no more than remind an observer that the holiday has a religious origin. But when the nonreligious trappings—accretions of the centuries—are stripped away there remains only the universally recognized symbol for the central affirmation of a single religion—Christianity.²⁸

The court held that the unadorned creche on the lawn of city hall constituted a purely religious symbol, explaining that the Birmingham display called attention to a single aspect of the Christmas holiday—its religious origins.²⁹ The court found that the creche conveyed a message that the city endorsed Christianity and thus failed the "effects" prong of the

19 *ACLU*, 791 F.2d at 1564.

20 *Id.*

21 *Id.* at 1565.

22 *Id.* at 1567.

23 *Id.* at 1565.

24 *Id.* (quoting *Lynch*, 465 U.S. at 681).

25 791 F.2d at 1565.

26 *Id.* (construing *Lynch*, 465 U.S. at 682).

27 791 F.2d at 1566-67.

28 *Id.* at 1566.

29 *Id.* at 1566-67.

Lemon test. With these findings, a divided appellate court affirmed the district court's injunction preventing the city from displaying the nativity scene.

Judge Nelson, in dissent, commented that the court implicitly adopted a "St. Nicholas too" test.³⁰ Judge Nelson suggested that the majority incorrectly interpreted *Lynch* to permit a city to display a nativity scene only if the creche was a part of a larger display which contained secular symbols of Christmas. In noting this, Judge Nelson stated that "a city can get by with displaying a creche if it throws in a sleigh full of toys and a Santa Claus, too."³¹ Judge Nelson suggested that the majority's holding will be difficult to apply because a city or court must determine how many secular symbols would render a display constitutional. The dissent also criticized the majority for ignoring the traditional precedents which have accommodated religion.³² For these reasons, Judge Nelson concluded that the majority erred in holding that the city of Birmingham violated the establishment clause.

II. The Development of Approaches to Establishment Clause Analysis

A. Early Development

The first amendment provides that "Congress shall make no law respecting an establishment of religion"³³ The framers intended the establishment clause to constrain the federal government from establishing a particular national church.³⁴ Initially, the establishment clause did not apply to states, and consequently, five states had established churches at the time the Constitution was ratified.³⁵ The United States Supreme Court has applied several approaches to establishment clause analysis, ranging from absolutist to accommodationist. The absolutist approach prohibits governments from preferring one religion over another or religion over nonreligion.³⁶ The accommodationist approach

30 *Id.* at 1569.

31 *Id.*

32 *Id.* at 1568. The dissent gave examples of how the nation has historically accommodated religion: (1) the government has sold postage stamps depicting Mary and the infant Jesus; (2) the government hires chaplains for the armed forces, prisons, and Congress; (3) the national currency bears the motto "In God We Trust;" and (4) Congress enacted Christmas as a legal holiday. *Id.* at 1570.

33 U.S. CONST., amend. I.

34 Joseph Story wrote: "The real difficulty [in first amendment analysis] lies in ascertaining limits to which government may rightfully go in fostering and encouraging religion." 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1872 (2d ed. 1891). Although Story interpreted the establishment clause as merely prohibiting discrimination among Christian religions, recently the Supreme Court has interpreted Story as viewing the first amendment as a protection against an establishment of a particular national church. *Lynch* 465 U.S. at 678. See T. COOLEY, CONSTITUTIONAL LIMITATIONS 470-471 (1868) ("The American constitutions contain no provision which prohibit the authorities from . . . solemn recognition of a superintending Providence in public transactions [as long as] . . . care be taken to avoid discrimination in favor of one denomination or sect.").

35 Georgia, South Carolina, Massachusetts, Connecticut and New Hampshire had established churches when the Constitution was ratified.

36 *Everson*, 330 U.S. at 15. See *supra* note 1 and *infra* notes 38-40 and accompanying text.

prohibits government support for one religious sect over another.³⁷ The absolutist approach demands complete separation of church and state, while the accommodationist approach permits neutral government support for religion as a whole.

In *Everson v. Board of Education*,³⁸ the United States Supreme Court, for the first time, thoroughly examined the establishment clause. The Court applied an absolutist approach.³⁹ The Court, quoting Thomas Jefferson, stated that the establishment clause was intended to erect a "wall of separation between church and state."⁴⁰

In *McCullum v. Board of Education*,⁴¹ the Court also applied the absolutist approach. It noted, however, that the establishment clause does not require hostility towards religion or religious teachings because it would conflict with our national tradition as embodied in the free exercise clause.⁴²

The Supreme Court in *Zorach v. Clauson*⁴³ shifted its position and adopted the accommodationist approach. The Court upheld a statute which allowed students, at their parents' request, to attend religious services at a religious center during school hours. The Court stated that the statute accommodated sectarian needs, following the best of American traditions, by respecting the religious nature of citizens.⁴⁴ To do otherwise, the Court warned, would show the government had a callous indifference to religious groups and preferred nonreligious persons.⁴⁵

B. *The Lemon Test*

The United States Supreme Court returned to the absolutist position in the decade following *Zorach*.⁴⁶ In *Lemon v. Kurtzman*,⁴⁷ the Court, utilizing the policies behind the absolutist approach, set forth a three prong test to determine whether a particular government activity violates the establishment clause.⁴⁸ The *Lemon* test inquires into: (1) whether the challenged government activity has a secular purpose;⁴⁹ (2) whether the

37 See Note, Lynch v. Donnelly: *Breaking Down the Barriers to Religious Displays*, 71 CORNELL L. REV. 185, 187 (1985).

38 330 U.S. 1 (state statute authorizing school boards to finance transportation of school children to private religious schools did not violate the establishment clause).

39 *Id.* at 15.

40 *Id.* at 16 (citing *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

41 333 U.S. 203 (1948) (Illinois statute that permitted pupils to attend a religious class of their choice violated the establishment clause).

42 *Id.* at 211-12.

43 343 U.S. 306 (1952). See Note, *supra* note 37, at 188. Cf. *Everson*, 330 U.S. at 18 (the first amendment requires states to be neutral).

44 343 U.S. at 314. The Court listed examples of government conduct considered within the boundaries of the first amendment, including prayer in Congress and legislative enactment of Thanksgiving as a holiday. *Id.* at 312.

45 *Id.*

46 See *Engel v. Vitale*, 370 U.S. 421 (1962) (invalidated state law prescribing official prayer in public schools); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (invalidated state law requiring Bible reading in public schools).

47 403 U.S. 602 (1971).

48 See *infra* notes 56-63 and accompanying text.

49 403 U.S. at 612. See also *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *McGowan v. Maryland*, 366 U.S. 420 (1961) (validated Sunday closing law on grounds that its secular goal was to protect health and safety). A government activity that is motivated partially by a religious purpose

primary effect of the government activity advances or inhibits a religion;⁵⁰ and (3) whether the activity creates an excessive entanglement of government with religion.⁵¹ If an activity fails on any prong, it is unconstitutional.⁵² The Court stated that the policy supporting the three pronged test is to avoid political division along religious lines—"one of the principal evils against which the First Amendment was intended to protect."⁵³

In *Lemon*, a Rhode Island statute gave teachers of secular subjects in some nonpublic schools a fifteen percent salary supplement.⁵⁴ A second statute from Pennsylvania provided direct aid to elementary and secondary private schools for teaching secular subjects.⁵⁵

The Court, applying the first prong of the *Lemon* test, found that since both statutes were intended to enhance the quality of secular education in all schools covered by compulsory attendance laws, the statutes did not lack a secular purpose.⁵⁶ The Court, applying the "effects" prong, initially found that the activity had the effect of advancing religion. The Court, however, recognized that other restrictive factors existed that may have negated that finding.⁵⁷ Thus, the Court declined to make a determination under the effects prong since the statutes failed under the third prong.

The Court, applying the third prong, determined that the substantially religious character of the church related schools would produce a church-state entanglement of the type the establishment clause was designed to avoid.⁵⁸ The Court stated that, since parochial school teachers are subject to the direction of religious authorities, the states would have had to supervise school operations to verify that teachers did not inculcate religion which would create an enduring relationship between

may satisfy the first prong of *Lemon* if it is not motivated by a purpose to advance religion. See *Wallace v. Jaffree*, 105 S. Ct. 2479, 2490 (1985).

50 403 U.S. at 612. This is referred to as the "effects" prong. Those government actions which have a "direct and immediate effect" of advancing religion violate the establishment clause, while those which have an "indirect, remote, and incidental effect do not." See *Lynch*, 465 U.S. at 683 (citing *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973)).

51 403 U.S. at 613. See also *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (upheld government grants exempting from tax property used for religious purposes).

52 403 U.S. at 612. See *Mueller v. Allen*, 463 U.S. 77 (1983) (upheld a Minnesota statute which allowed state taxpayers to deduct expenses for tuition, textbooks and transportation for children attending elementary or secondary schools); *Larkin v. Grendels Den, Inc.*, 459 U.S. 116 (1982) (invalidated a Massachusetts statute allowing schools and churches to prevent the issuance of liquor licenses to premises within a five hundred foot radius of the church or school); *Stone v. Graham*, 449 U.S. 39 (1980) (struck down a Kentucky statute requiring the posting of a copy of the Ten Commandments on the walls of each public school classroom in the state on the grounds that the statute had a preeminently religious purpose); *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (invalidated amendments to New York's education and tax laws, establishing financial aid programs for qualified nonpublic schools and prohibiting tuition reimbursement for parents of children attending nonqualifying schools, because they violated the second prong).

53 *Lemon*, 403 U.S. at 622. See also Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969).

54 *Lemon*, 403 U.S. at 607-609.

55 *Id.* at 609-11.

56 *Id.* at 613.

57 *Id.*

58 *Id.* at 616.

church and state.⁵⁹ Additionally, the statutes produced entanglement by requiring the states to examine school records in order to determine how much of the total expenditure was attributable to secular education as opposed to religious activity.⁶⁰ Finally, the Court found the state programs presented a divisive political potential because the amount of aid the states directed to the private schools could have become an issue in an election campaign.⁶¹ The Supreme Court explained that the potential divisiveness of church-state entanglement is a threat to the normal political process.⁶² Moreover, the Court noted that while some entanglement between church and state is inevitable, lines must be drawn to prevent the de facto establishment of religion.⁶³ Thus, the Court held that the two statutes violated the establishment clause.

C. *The Lemon Test Applied to a Nativity Scene*

In *Lynch v. Donnelly*,⁶⁴ the Supreme Court had its first opportunity to consider the constitutionality of a nativity scene displayed by a city in the context of the Christmas season. The Court modified the *Lemon* test by incorporating the accommodationist approach. The Court held that the city of Pawtucket, Rhode Island did not violate the establishment clause when it erected a creche in the context of its annual Christmas celebration.

The city displayed the creche in a private park located in the heart of a shopping district.⁶⁵ The creche consisted of life sized figures traditionally present in the Christian story of Christ's birth. The city displayed the creche along with a Santa Claus house, a Christmas tree, and a banner labeled "Season's Greetings."⁶⁶ The creche had been part of the city's annual display for more than forty years.⁶⁷ Some members of the American Civil Liberties Union brought an action to enjoin the city from displaying the creche, alleging that the city, by including the creche in the display, supported Christianity and thus violated the establishment clause.⁶⁸ A district court upheld the challenge, enjoining the city from including the creche in the display, and the Court of Appeals for the First

59 *Id.* at 616-19.

60 *Id.* at 620.

61 *Id.* at 622-24.

62 *Id.* at 622.

63 *Id.* at 625.

64 465 U.S. 668 (1984). For discussion of the establishment clause and *Lynch*, see Cox, *The Lemon Test Soured: The Supreme Court's New Establishment Clause Analysis*, 37 VAND. L. REV. 1175 (1984); Crabb, *Religious Symbols, American Traditions and the Constitution*, 1984 B.Y.U.L. REV. 509; Dorssen and Sims, *The Nativity Scene Case: An Error of Judgment*, 1985 U. ILL. L. REV. 837; Long, *Does the Wall Still Stand?: Separation of Church and State in the United States*, 37 BAYLOR L. REV. 755 (1985); *Leading Cases of the 1983 Term—Constitutional Law: Establishment of Religion*, 98 HARV. L. REV. 87 (1984); Note, *Lynch v. Donnelly: Breaking Down the Barriers to Religious Displays*, 71 CORNELL L. REV. 185 (1985); Comment, *Lynch v. Donnelly: Supreme Court Approval of Publicly Sponsored Nativity Scene Displays Establishes an Unholy Alliance Between Church and State*, 37 RUTGERS L. REV. 103 (1984).

65 465 U.S. at 671.

66 The Pawtucket display included reindeer pulling Santa's sleigh, candy striped poles, carolers, cut-out figures of a clown, an elephant, a robot, and hundreds of colored lights. The city owned all components of the display. *Id.*

67 *Id.*

68 *Id.* See *Lynch v. Donnelly*, 525 F. Supp. 1150, 1157 (D.R.I. 1981).

Circuit affirmed.⁶⁹

The Supreme Court, returning to an accommodationist position, modified the second prong of the *Lemon* test by considering cases and statutes which have traditionally accommodated religion. The Court stated that "[the Constitution] affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."⁷⁰ The Court rejected the dictum in *Everson v. Board of Education* that "an impregnable wall of separation" exists between church and state, in favor of a position which allows governments to accommodate religion.⁷¹

After finding that the creche had a secular purpose⁷² and did not create excessive entanglement with religion,⁷³ the Court modified the second prong of the *Lemon* test, the effects prong, by considering government activities which have traditionally accommodated the religious heritage of the United States. The Court listed examples of governmental activity which have survived constitutional challenge although having the indirect effect of advancing religion: Sunday closing laws;⁷⁴ programs allowing students to be excused for religious instruction during school hours;⁷⁵ legislative prayers;⁷⁶ expenditure of funds allocated for textbooks;⁷⁷ transportation provided to students attending church sponsored schools;⁷⁸ federal grants given to church sponsored colleges and universities;⁷⁹ and tax exemptions for church properties.⁸⁰ The Court stated that the nativity scene did not advance religion any more than these traditional precedents.⁸¹ The Court characterized the display as a "passive symbol" with the primary effect of depicting the origins of Christmas.⁸² The Court's rationale for modifying the "effects" prong was that focusing exclusively on the religious component of any activity

69 465 U.S. at 672. See 691 F.2d 1029 (1st Cir. 1982).

70 465 U.S. at 673. The *Lynch* majority, prior to discussing *Lemon*, set forth the accommodationist approach. It appears, however, that the Court applied this approach only under the second prong of the *Lemon* test. It is unclear what effect the accommodationist approach will have on the first and third prongs.

71 330 U.S. at 18. See *supra* notes 38-40 and accompanying text.

72 Applying the first prong of *Lemon*, the Court stated that it will invalidate governmental action on grounds that a secular purpose is lacking only when the activity is motivated solely by religious considerations. The *Lynch* Court determined the creche did serve a secular purpose because it enabled the city to celebrate and depict the origins of Christmas. See 465 U.S. at 680-81.

73 Applying the third prong of the *Lemon* test, the Court noted that entanglement is a question of kind and degree. The Court found no excessive administrative entanglement, stating that no evidence was presented of contact with church authorities concerning the content, design, or maintenance of the exhibit prior to or after Pawtucket purchased the creche. Additionally, the Court noted that, apart from this lawsuit, no evidence existed of any political friction over the creche in the forty-year history of Pawtucket's Christmas celebration. Thus, the Court stated that political divisiveness alone cannot serve to invalidate otherwise permissible conduct. *Id.* at 684.

74 *McGowan v. Maryland*, 366 U.S. 420 (1961).

75 *Zorach*, 343 U.S. 306. See *supra* notes 43-45 and accompanying text.

76 *Marsh v. Chambers*, 463 U.S. 783 (1983).

77 *Board of Educ. v. Allen*, 392 U.S. 236 (1968).

78 *Everson v. Board of Educ.*, 330 U.S. 1 (1946).

79 *Tilton v. Richardson*, 403 U.S. 672 (1971) (construction grants to sectarian colleges); *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976) (noncategorical grants to sectarian colleges and universities).

80 *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

81 465 U.S. at 681-82.

82 *Id.* at 685.

would inevitably lead to its invalidation under the establishment clause.⁸³ The Court held the only benefit which the creche conferred on Christianity was indirect, remote, and incidental, and thus not unconstitutional.⁸⁴

III. Analysis of *ACLU*

A. *The Sixth Circuit's Misinterpretation of Lynch*

In *ACLU*, the Sixth Circuit found that the city of Birmingham's display had the effect of endorsing the Christian religion and thus was unconstitutional since it violated the second prong of the *Lemon* test. The *ACLU* court interpreted *Lynch* as holding that a city could display a creche only if the city accompanied the creche with other secular symbols.⁸⁵ Thus, the court held the city of Birmingham violated the establishment clause when it displayed a nativity scene on the front lawn of city hall without displaying additional secular symbols.⁸⁶

The Sixth Circuit in *ACLU* misinterpreted the majority's holding in *Lynch* for two reasons. First, *Lynch* requires courts to consider the degree to which the government activity benefits religion under the effects prong of *Lemon*.⁸⁷ The *Lynch* Court, modifying the second prong of *Lemon*, found that the creche benefited religion no more than those activities traditionally upheld by the Court.⁸⁸ The Sixth Circuit in *ACLU* failed to consider traditional precedents when it applied the second prong of *Lemon*. The court should have inquired into whether the creche, displayed without secular symbols, benefited religion anymore than those types of government activity traditionally permitted.

Second, *Lynch* requires courts, when examining the constitutionality of a nativity scene, to consider the full context of the government activity. Focusing exclusively on the religious component of any activity inevitably leads to its invalidation.⁸⁹ Courts must consider a nativity scene in the context of the Christmas season and not consider the physical context of the creche.⁹⁰ The Supreme Court in *Lynch* noted that a nativity scene has traditionally been used to depict the historical origins of Christmas.⁹¹

In *McCreary v. Stone*,⁹² the Second Circuit correctly recognized the

83 *Id.* at 680.

84 *Id.* at 683.

85 *ACLU*, 791 F.2d at 1566.

86 *Id.* at 1567.

87 465 U.S. at 684.

88 *Id.* at 681-82.

89 *Id.* at 680.

90 *Id.*

91 *Id.* at 686.

92 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided Court sub. nom.*, Board of Trustees v. McCreary, 105 S. Ct. 1859 (1985). In *McCreary*, a civic group sought to display a creche in a public park during the holiday season. The Second Circuit held that the neutral accommodation of the creche in a public forum was not a violation of the establishment clause. *Id.* at 729. The court applied the *Lemon* test. First, the court reasoned that the open forum policy, which allowed access to the park for both religious and nonreligious speech, constituted a secular purpose. Second, the court considered the *Lynch* analysis under the primary effects prong and found that the physical context within which the display of the creche was situated did not impermissibly advance religion. Third, the court found that the creche did not foster entanglement with religion because the city did not continuously monitor the display.

Lynch majority's directive to consider the creche in the context of the Christmas season.⁹³ The Second Circuit stated: "The Supreme Court did not decide the Pawtucket case [*Lynch*] based on the physical context within which the display of the creche was situated; rather, the Court consistently referred to the creche 'in the context of the Christmas season.'"⁹⁴

The Sixth Circuit in *ACLU* recognized the *Lynch* directive,⁹⁵ yet the court failed to apply it.⁹⁶ In finding that the creche violated the establishment clause, the court in *ACLU* focused exclusively on the religious aspect of the creche when it considered the physical context of the creche, rather than on the setting of the Christmas season.⁹⁷ In *Lynch*, the Supreme Court neither stated nor suggested that the presence of secular symbols in the Pawtucket display somehow legitimized an otherwise unconstitutional display. Since the Supreme Court allowed a city to display a nativity scene with secular symbols, why would one without such symbols be unconstitutional?⁹⁸ The endorsement of religion is the same in either case. Because *Lynch* did not contain language suggesting that the inclusion of secular symbols purified the Pawtucket display, the Sixth Circuit in *ACLU* should not have found that the absence of secular symbols rendered the Birmingham display unconstitutional under the effects prong of *Lemon*.

B. Impact of *ACLU*

The Sixth Circuit in *ACLU* interpreted *Lynch* to require the inclusion of additional secular symbols to withstand an establishment clause challenge. The *ACLU* majority has adopted an absolutist approach because any act or symbol with religious significance displayed alone has the direct effect of advancing religion. Once a government engages in such activity it can either add secular symbols or cease the activity. Judge Nelson's dissent in *ACLU* addressed the problems with the majority's reasoning.⁹⁹ Judge Nelson recognized that the court's logic dictated " 'A St.

93 *Id.* at 729.

94 *Id.*

95 *ACLU*, 791 F.2d at 1566.

96 *Id.* at 1566-67.

97 On the four occasions that the panel cited *Lynch* as authority, three of the citations referred to Justice O'Connor's concurring opinion. Moreover, the Sixth Circuit seized upon Justice O'Connor's passing references to the creche's physical context, ignoring the thrust of Justice O'Connor's argument. Justice O'Connor stated, "The central issue in this case is whether Pawtucket has endorsed Christianity by its display of the creche." *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring). Justice O'Connor went on to state that "[t]he display serves a secular purpose—celebration of a public holiday with traditional symbols." *Id.* at 693. Thus, Justice O'Connor analyzed the creche in the context of the traditional Christmas season. See generally Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 150 (1987).

98 See *ACLU*, 791 F.2d at 1567 (Nelson, J., dissenting).

99 *Id.* at 1569. The physical context argument presents logical difficulties in addition to the "Santa Claus too" dilemma. For example, may a city display an unadorned creche in one locality, if it also maintains secular seasonal displays in other parts of the city? How physically proximate to the creche must the secular display stand? The physical context classification is artificial and only invites frivolous litigation. The more cogent reading of *Lynch*, including both the majority and concurring opinions, focuses on the creche in the context of the Christmas season. Such analysis will avoid litigation over a matter of a few feet and provide courts with clear guidelines.

Nicholas too test'—[that is] a city can get by displaying a creche if it throws in a sleigh full of toys and a Santa Claus, too."¹⁰⁰ The problem with the majority's holding is that a city will have difficulty determining how many secular symbols are necessary to have a constitutional display.

By narrowly construing the effects prong of the *Lemon* test to prohibit any government activity which has the appearance of benefitting religion, the Sixth Circuit's holding would also require courts to invalidate various activities which currently appear to benefit religion in general or one particular faith.¹⁰¹ For example, governments would have to remove religious paintings from the National Gallery¹⁰² and censor public school literature, history books and art. Moreover, courts would have to declare congressional acts unconstitutional which employ chaplains for the armed forces, prisons and Congress,¹⁰³ recognize Christmas as a national holiday,¹⁰⁴ and proclaim "In God We Trust" as the country's national motto.¹⁰⁵

IV. Conclusion

The Supreme Court rejected the absolutist approach in favor of an accommodationist approach which seeks to determine whether the challenged conduct, in reality, tends to establish a religion. *Lynch* requires a modification of the effects prong of the *Lemon* test by applying traditional precedential analysis. Additionally, *Lynch* requires that a court consider a creche in the context of the Christmas season. The *ACLU* court incorrectly interpreted *Lynch* because it focused exclusively on the religious aspect of the creche absent additional secular symbols. The court in *ACLU* did not modify its *Lemon* "effects" analysis with traditional factors or consider the creche in the context of the Christmas season. The consequences of the *ACLU* decision are far reaching¹⁰⁶ and exceed constitutional boundaries.

Shauna S. Brennan
James P. Gillespie
Daniel P. Mascaro
Howard F. Mulligan

¹⁰⁰ *Id.*

¹⁰¹ See *Lynch*, 465 U.S. at 678.

¹⁰² More than 200 paintings depicting religious messages are regularly exhibited in Washington. *Id.* at 677 n.4.

¹⁰³ 2 U.S.C. §§ 61d & 84-2 (1982) (compensation for congressional chaplains); Exec. Order No. 12396, 47 Fed. Reg. 55897 (1982), reprinted in 3 U.S.C. § 301 note (1982) (delegation of Presidential authority to Secretary of Defense to appoint chaplains). See also 32 C.F.R. § 65 (1985) (nomination of chaplains for military service).

¹⁰⁴ 5 U.S.C. § 6103 (1982) (declaring Christmas day as a legal holiday). The *Lynch* majority stated that the creche was no more an advancement of religion than Christmas as a national holiday. *Lynch*, 465 U.S. at 683. It follows that if the creche constitutes a violation of the establishment clause, Christmas as a legal holiday would likewise violate the Constitution.

¹⁰⁵ 36 U.S.C. § 186 (1982) (declaring national motto "In God We Trust"). See also 31 U.S.C. § 5112 (1982) (originally enacted as Act of March 3, 1887, ch. 396, § 3, 24 Stat. 635) (authorizing placement of motto on currency).

¹⁰⁶ See *supra* notes 99-105 and accompanying text.

CONSTITUTIONAL LAW—NORTHWEST INDIAN CEMETERY PROTECTIVE ASSOCIATION V. PETERSON: INDIAN RELIGIOUS SITES PREVAIL OVER PUBLIC LAND DEVELOPMENT

The first amendment prohibits the government from imposing burdens upon the free exercise of religion.¹ While religious beliefs are protected absolutely,² the courts have restricted religious practices where governmental interests are overriding.³ In one class of free exercise cases, the federal courts have evaluated the claims of North American Indians⁴ whose sacred sites are located upon public lands slated for development by the federal government.⁵ To evaluate the Natives' claims, the courts have used a centrality test⁶ as well as the traditional free exercise test.⁷ In *Northwest Indian Cemetery Protective Association v. Peterson*,⁸ the United States Court of Appeals for the Ninth Circuit held that the governmental interests in a proposed land development project did not justify the burden imposed on the Native Americans' free exercise rights. *Peterson* represents the first federal circuit court case in which the Indians' interests have prevailed.⁹ Because the court, however, required a showing of the centrality of the Natives' religious practices,¹⁰ *Peterson* may not indicate a breakthrough for Native American religious rights.

This comment examines the *Peterson* decision. Part I sets forth the facts and holding of *Peterson*. Part II outlines the traditional analysis of free exercise claims. Part III then examines how the courts have applied the free exercise clause to Indian claims in cases concerning public land. Finally, Part IV analyzes the *Peterson* holding in light of previous free exercise decisions, and Part V concludes that due to the *Peterson* court's limited definition of a protectible religious practice, the decision does not further Native religious interests.

I. *Northwest Indian Cemetery Protective Association v. Peterson*

In *Peterson*, seven nonprofit associations, four American Indians, and two Sierra Club members brought suit to enjoin the United States Forest Service from constructing a stretch of road and allowing timber harvest-

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

2 See *infra* note 100.

3 See *infra* notes 103-111 and accompanying text.

4 The following terms will be used interchangeably in this comment: "North American Indians," "Indians," "Natives," and "Native Americans."

5 See, e.g., *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688 (9th Cir. 1986); *Wilson v. Block*, 708 F.2d 735 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (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.), *cert. denied*, 449 U.S. 953 (1980); *Crow v. Gullet*, 541 F. Supp. 785 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir.), *cert. denied*, 464 U.S. 977 (1983).

6 See *infra* notes 96-101 & 113-139 and accompanying text.

7 See *infra* notes 45-112 and accompanying text.

8 795 F.2d 688 (9th Cir. 1986).

9 See *supra* note 5. See also *infra* notes 118-129 & 140-149 and accompanying text.

10 *Peterson*, 795 F.2d at 691.

ing in the Blue Creek Unit of the Six Rivers National Forest.¹¹ Three tribes of Indians used an area within the Unit for religious purposes.¹² The plaintiffs argued that the projects would impair the Natives' use of the area thus imposing undue burdens on the Indian plaintiffs' free exercise rights.¹³

The Blue Creek Unit lies in the Siskiyou Mountains of Northern California, located in the Six Rivers National Forest. The Blue Creek Unit contains an area known as the "high country." The Yurok, Karok, and Tolowa Indians, who live in the surrounding region, use specific sites within the high country for prayer and religious purposes.¹⁴ In addition, the Native Americans consider the entire area of the high country sacred and the sole source of spiritual power for the Native healers and religious leaders, permitting them to fill roles central to the religions.¹⁵ The religious use of the high country depends on its pristine nature.¹⁶

The United States Forest Service, headed by R. Max Peterson, manages the Six Rivers National Forest.¹⁷ In 1981, the Forest Service proposed permitting timber harvesting in the Blue Creek Unit, including part of the high country.¹⁸ In 1982, the Forest Service proposed the construction of a 6.02 mile stretch of the Gasquet-Orleans (G-O) road through the high country.¹⁹ The plaintiffs objected to the proposed projects and exhausted their administrative remedies.²⁰ The plaintiffs then filed an action in the United States District Court for the Northern District of California to halt the proposed development.²¹ Their complaint alleged, *inter alia*, that the decisions to construct the road and to allow timber harvesting in the Blue Creek Unit violated the first amendment of the Constitution, because the projects would violate the sacred qualities of the area and impair its successful use for religious purposes.²² The Natives claimed these actions would impose undue burdens on their free exercise rights.²³ The defendants conceded that the Indians' use of the high country deserved first amendment protection.²⁴

11 Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586 (N.D. Cal. 1983).

12 *Id.* at 591.

13 *Id.* at 592.

14 *Peterson*, 795 F.2d at 690.

15 *Id.*

16 *Id.* at 692.

17 *Peterson*, 565 F. Supp. at 590.

18 *Peterson*, 795 F.2d at 690.

19 *Id.* This was the last section to be completed of a paved road from Gasquet, California to Orleans, California.

20 *Id.* The plaintiffs appealed the Forest Supervisor's selection of a timber harvesting plan to the Regional Forester. The Regional Forester denied the appeal, and the plaintiffs appealed that decision to the Chief of the Forest Service. Brief for Appellant at 7, Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688 (9th Cir. 1986). The Chief denied the appeal and directed implementation of the plan. *Id.* at 8.

After the Regional Forester adopted a plan for the construction of the 6.02 mile stretch of the G-O road, the plaintiffs appealed the decision to the Chief of the Forest Service. The Chief denied the appeal and affirmed the decision. *Id.* at 10. Subsequently, the Secretary of Agriculture issued a memorandum refusing further review of the Chief of the Forest Service. *Id.*

21 *Peterson*, 565 F. Supp. at 590.

22 *Id.* at 592.

23 *Id.* at 594.

24 *Id.*

However, the defendants claimed that overriding governmental interests supported the development.²⁵

The district court found that the Indians' use of the high country was central and indispensable to the Indian plaintiffs' religion²⁶ and that the proposed development would interfere with the Native plaintiffs' free exercise rights.²⁷ Additionally, the district court ruled that the interests of the Forest Service either would not be served by the proposed projects or did not constitute the paramount interests necessary to justify infringement of the plaintiffs' freedom of religion.²⁸ Therefore, the district court held that the Forest Service decisions violated the first amendment.²⁹ The district court issued an injunction preventing the construction of the road and any timber harvesting in the high country.³⁰ The government appealed.³¹

The United States Court of Appeals for the Ninth Circuit made a de novo review of whether the Indian plaintiffs had a valid first amendment claim.³² The court began the analysis of the facts by setting forth its view of the two prong test as developed by other courts in the prior Native American land-claim free exercise cases.³³ According to the court, the Natives bore the initial burden of demonstrating that the construction of the G-O road would create a burden on their rights.³⁴ To demonstrate a

25 Defendants assert that construction . . . of the G-O road would (1) increase the quantity of timber accessible to harvesting in the Blue Creek Unit; (2) stimulate employment in the regional timber industry; (3) provide recreational access to the Blue Creek Unit as well as permit through recreational traffic on the G-O road; (4) further the efficient administration of Six Rivers National Forest by the Forest Service; and (5) increase the price of bids on future timber sales in the Orleans area of the . . . National Forest by decreasing the cost of hauling such timber to timber mills . . .

Id. at 595.

26 *Id.* at 594. The district court relied heavily upon a report prepared at the request of the Forest Service by Dr. Dorothea Theodoratus, Cultural Resources of the Chimney Rock Section, Gasquet-Orleans Road, Six Rivers National Forest (1979). This report identified the indirect and direct adverse impact which construction of the road would have on the spiritual and physical well-being of the Indians living nearby. *Peterson*, 565 F. Supp. at 591-92.

27 The district court found that construction and timber harvesting would damage the salient qualities of the high country. Such intrusion could destroy the core of Northwest Indian religious beliefs and practices. *Id.* at 594.

28 The construction of the road would not improve access to timber in the Blue Creek Unit and would not increase jobs. The increased recreational access, in addition, was insufficient to support infringement of first amendment rights. The district court found that the Forest Service administration already operated efficiently, and the increase in competition for timber was too speculative and did not constitute a paramount interest. *Id.* at 595.

29 *Id.* at 597.

30 *Id.* at 606.

31 *Peterson*, 795 F.2d at 691. While appeal was pending, Congress enacted the California Wilderness Act of 1984, Pub. L. No. 98-425, 98 Stat. 1619 (codified in scattered sections of 16 U.S.C.) The Act placed most of the high country out of the reach of logging. The Act left open, however, a 1200 foot-wide corridor for completion of the G-O road. *Id.*, 16 U.S.C. § 1132 (Supp. III 1985). Congress did not take any position on whether the road should be completed. See H.R. REP. No. 40, 98th Cong., 1st Sess. 32 (1984); S. REP. No. 582, 98th Cong., 2d Sess. 29 (1984).

The appeal was submitted and argued July 9, 1984, and decided June 24, 1985. The appellants petitioned for rehearing. The court withdrew its decision, granted a rehearing, and rendered a decision on July 22, 1986.

32 *Peterson*, 795 F.2d at 691 n.3.

33 *Id.* at 691. See *infra* text accompanying notes 61-63.

34 *Id.* at 691-92 (citing *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 223 (1963); *Wilson v. Block*, 708 F.2d 735, 740 (D.C. Cir. 1983)). Note that with the passage of the California Wilderness Act of 1984 the area at issue was limited to the proposed route of the G-O

burden, the Indians had to prove three things: (1) that they used the high country for religious purposes and considered the area sacred; (2) that the high country was central and indispensable to the beliefs and practice of their religion; and (3) that the proposed actions would impair or seriously interfere with those practices.³⁵

A review of the district court findings convinced the court that the G-O road, if built, would burden the Indians' free exercise rights.³⁶ The court rejected the government's contention that the free exercise clause could not be violated unless the governmental activity penalized the Native Americans' religious beliefs or practices. Instead, the court stated that any governmental activity which makes the exercise of first amendment rights more difficult or which impedes religious observance would be invalid, even if the burden created was only indirect.³⁷

The majority distinguished *Bowen v. Roy*,³⁸ a case decided shortly

road plus small parcels of the high country which were not declared wilderness areas and therefore possibly subject to timbering. See *supra* note 31.

35 *Peterson*, 795 F.2d at 692 (citing *Wilson v. Block*, 708 F.2d 735, 742-44 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983); *Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159, 1164 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980); and *Crow v. Gullet*, 541 F. Supp. 785, 792 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir.), *cert. denied*, 464 U.S. 977 (1983)).

36 *Peterson*, 795 F.2d at 693. The court accepted the district court's findings that the high country was the location of rituals "central and indispensable" to the Indians' religion; that the pristine environment of the high country made religious experiences possible; that the proposed road would seriously damage the qualities which made the high country sacred to the Indians and would be inconsistent with the Indians' religious practices; and that a significant number of Indian healers and religious believers considered the high country the source of the spiritual power which allowed them to fill central traditional Indian religious roles. *Id.* at 692-93. See also *infra* notes 61-63 and accompanying text for the test the court applied.

37 *Peterson*, 795 F.2d at 693 (citing *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Scott v. Rosenberg*, 702 F.2d 1263, 1273-74 (9th Cir. 1983), *cert. denied*, 465 U.S. 1078 (1984)).

38 106 S. Ct. 2147 (1986). In *Bowen*, two parents of an Indian child applied for Aid to Families with Dependent Children benefits. They refused to comply with the statute requiring that they provide the state welfare agency with their daughter's social security number on the grounds that doing so would violate their Native American religious beliefs. The parents challenged the constitutionality of this requirement under the free exercise clause, objecting that the use of their daughter's number might harm her spirit. The Court rejected this claim stating:

Never to our knowledge has the Court interpreted the First Amendment to require the government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family. The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.

106 S. Ct. at 2152 (emphasis in original).

More troublesome to the Indian plaintiffs in a public land case, however, is a modification on the second prong of the *Yoder* test proposed by Chief Justice Burger in a plurality opinion appended to the judgment of the Court. *Id.* at 2153. See also *infra* note 53 and accompanying text. The Chief Justice wrote that the Court had "repeatedly" emphasized a distinction between cases involving government compulsion of religion and those which involved government regulation "that indirectly and incidentally calls for a choice between a governmental benefit and adherence to religious beliefs," and concluded that the two types of cases were "slightly different." *Id.* at 2156. The Chief Justice then proposed that the nature of the cognizable burden—direct or indirect—"is relevant to the standard the Government must meet to justify the burden." *Id.*

This modification was not a part of the holding of *Bowen*, and at least as many members of the Court were against it as were for it. It therefore bears little precedential value. If adopted, however, the modification increases the already heavy burden that Indians must currently bear in a free exercise claim.

See also *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring) ("[T]he 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.").

before *Peterson*, and stated that while the Indians' ability to practice their religion would virtually be destroyed if the road was built, the plaintiff in *Bowen* could continue to practice his religion despite the offense to his religious sensibilities caused by the government's internal business practices.³⁹ The Natives' claim in the present case therefore properly sought relief under the free exercise clause, and the second prong of the traditional balancing test applied.

After determining that any relief granted the Indians would not violate the establishment clause because the injunction merely accommodated, rather than established, the Native Americans' religion,⁴⁰ the court evaluated the governmental interests.⁴¹ The court weighed the level of the government's interest in the construction of the road against the burden to be placed on the Indians' religious freedom.⁴² In order to balance such burdens in its favor, the government had to prove a "paramount" or "compelling" interest so as to justify the infringement on the Indians' constitutional rights.⁴³ Because the government failed to demonstrate interests sufficient to satisfy the requirements of the balancing test, the court affirmed the injunction granted by the district court.⁴⁴

II. The Traditional Free Exercise Test

The first amendment to the United States Constitution prohibits the government from establishing or abridging religion.⁴⁵ In 1940, the Supreme Court interpreted the due process clause of the fourteenth amendment⁴⁶ to incorporate the free exercise clause found in the first amendment.⁴⁷ Thus, both the federal and state governments must abide by the free exercise clause.

The Supreme Court developed a two prong balancing test to iden-

39 *Peterson*, 795 F.2d at 693.

40 *Id.* at 694. The government argued that, if the court allowed the injunction, the Forest Service would be administering the high country as a religious shrine for the Indians' benefit. The court disagreed, noting that the injunction restricted only timber harvesting and road construction in the high country: "The Forest Service remains free to administer the high country for all other designated purposes including outdoor recreation, range, watershed, wildlife and fish habitat and wilderness." *Id.* Nor did the court require the Forest Service to police the conduct of visitors to the high country to prevent their interference with Indian religious observances. *Id.* The court also noted that the injunction was a remedy for a violation of the free exercise clause which the establishment clause did not bar: "Accommodating the free exercise of religion is a valid purpose of governmental action, and the promotion of that liberty is a permissible primary effect." *Id.*

41 *Id.* See *infra* text accompanying notes 62-63.

42 *Id.* at 695.

43 In fact, the court agreed with the district court that the government interests shown "fell far short of constituting the 'paramount interests' necessary to justify infringement of plaintiffs' freedom of religion." *Id.* at 694 (quoting *Peterson*, 565 F. Supp. at 596). The government merely urged the court to defer to the judgment of the Secretary of the Interior concerning the proper uses of the high country. The court criticized this argument because it failed to consider the controlling free exercise standard of a compelling government interest. *Id.* Nor was the court satisfied that the government was able to show that the same ends could not be accomplished by some less restrictive means which would place less of a burden on the Indians' religious rights. *Id.* at 695.

44 *Id.* at 698.

45 See *supra* note 1.

46 U.S. CONST. amend. XIV. The fourteenth amendment provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

47 *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (holding that the states are bound by the free exercise clause).

tify free exercise violations in two landmark cases.⁴⁸ In *Sherbert v. Verner*,⁴⁹ the Supreme Court held that South Carolina could not withhold the benefit of unemployment compensation from the claimant because she chose to adhere to a religious tenet.⁵⁰ The Court first concluded that denial of unemployment compensation infringed upon Sherbert's free exercise right since she was forced to choose between a benefit and a religious practice.⁵¹ The Court next found that the state's interest in preventing potential fraudulent claims did not justify this infringement on free exercise.⁵²

In *Wisconsin v. Yoder*,⁵³ the Supreme Court held that a statute compelling school attendance until age sixteen violated the free exercise clause as applied to the Amish.⁵⁴ Addressing the Amish claim of infringement of a free exercise right, the Court initially inquired whether the tenets were "rooted in religion"⁵⁵ and sincerely held.⁵⁶ The Court

48 Professor Tribe has identified three major policies which underlie the religion clauses: (1) the protection of voluntary religious beliefs and conduct; (2) the maintenance of government neutrality towards religion; and (3) the ensurance of separation of church and state. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-4 at 818-19 (1978). Tribe asserts that the judicial tests or methods of inquiry into the free exercise clause draw their rationale from these broad policies. This case comment limits discussion to the free exercise doctrine.

49 374 U.S. 398 (1963).

50 *Id.* at 403-06. Because Sherbert, a Seventh Day Adventist, refused to work on Saturday, her sabbath, she lost her job. She was unable to find a job not requiring work on Saturday. The South Carolina Unemployment Commission denied Sherbert unemployment compensation on the basis that her refusal to take jobs requiring Saturday work was not "good cause" under the Compensation Act. The South Carolina Supreme Court found that the statute placed no restriction upon Sherbert's free exercise rights nor did it prevent her from practicing her beliefs. The United States Supreme Court framed the issue in the form of a balancing test:

If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate. . . ."

Id. at 403 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

51 *Id.* at 404. ("Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."). In effect, this quote makes clear that the same test applies to both direct and indirect burden claims. See also *infra* notes 92-95 and accompanying text.

52 *Id.* at 406-09.

53 406 U.S. 205 (1972).

54 *Id.* at 234. Respondents, members of the Old Order Amish, declined to send their children, ages 14 and 15, to school after the eighth grade for religious reasons. By sending their children to high school, respondents believed that they would have opened themselves up to church censure and would have endangered the church's, their children's, and their own salvation. They contended that the high schools taught worldly values (competitiveness, self-distinction, worldly success, and intellectual and scientific accomplishment) which conflict with Amish religious values (goodness, community welfare, learning through doing, and separation from society). Pursuant to a complaint made by the school district administrator for public schools, a Wisconsin county court convicted respondents of violating the state's compulsory education law and imposed a fine of \$5.00 each. *Id.* at 208. The statute also provided for imprisonment up to three months for failure to send children age 7-16 to school. *Id.* at 207-08 n.2. Experts testified that the Amish religion and way of life were intertwined and that to separate the children from the community during their adolescence and expose them to worldly values would endanger the continued existence of the religion. *Id.* at 209-13. Wisconsin agreed that respondents' beliefs were sincerely held and rooted in religion, but it argued that the state interest in universal education outweighed respondents' free exercise rights. *Id.* at 219.

55 *Id.* at 215.

56 *Id.* at 209.

concluded that the tenet of "be not conformed to this world"⁵⁷ was rooted in religion and sincerely held.⁵⁸ Furthermore, the Court found that the Amish had met their burden of proving the infringement.⁵⁹ Finally, the Court balanced the infringement against the state's interest in universal education. The benefit of less than two more years of school did not outweigh the threat of secularization of the children, especially when the children continued to receive a vocational type of education which prepared them for life in an Amish community.⁶⁰

These two cases spawned the traditional two prong test used by courts to evaluate free exercise claims. First, the individual's religious beliefs must have been infringed upon.⁶¹ Second, if the individual has established an infringement, the government must show that a "compelling state interest" outweighed the infringement of the free exercise right in order to prevail⁶² and that the "least restrictive means" were used to accomplish that governmental objective.⁶³

A. *The First Prong: Infringement on Religion*

To establish a free exercise violation, the individual first must show that the practice in question was "rooted in religion,"⁶⁴ that the belief was sincerely held,⁶⁵ and that the government action placed a burden upon that belief or practice.⁶⁶ Some cases, predominantly those involving a nontheistic religion,⁶⁷ suggest a fourth explicit requirement that the beliefs and practices be "central" to a bona fide religion.⁶⁸

1. Belief that is Rooted in Religion

Courts have struggled in their attempts to define religion because "a determination of what is a religious belief or practice entitled to constitu-

⁵⁷ *Romans* 12:2 (King James).

⁵⁸ *Yoder*, 406 U.S. at 219. Wisconsin readily conceded these findings. *Id.*

⁵⁹ The Court stated:

The conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child.

Id. at 218.

⁶⁰ *Id.* at 221-29.

⁶¹ See *Yoder*, 406 U.S. at 215-19; *Sherbert*, 374 U.S. at 403-06; and *infra* notes 64-101 and accompanying text.

⁶² See *Yoder*, 406 U.S. at 221; *Sherbert*, 374 U.S. at 403, 406-09; and *infra* notes 102-12 and accompanying text.

⁶³ *Sherbert*, 374 U.S. at 407 ("[I]t would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.") (footnote omitted). See also *infra* notes 102-12 and accompanying text.

⁶⁴ See *Yoder*, 406 U.S. at 215 and *infra* notes 69-85 and accompanying text.

⁶⁵ See *Yoder*, 406 U.S. at 235 and *infra* notes 86-90 and accompanying text.

⁶⁶ See *supra* note 5 and *infra* notes 91-95 and accompanying text.

⁶⁷ A nontheistic belief is a religious belief which does not center around the existence of a god or gods. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1539 (1976).

⁶⁸ See *infra* notes 96-101 & 117-139 and accompanying text.

tional protection may present a most difficult question."⁶⁹ It appears that only in sham claims can the courts comfortably determine which claims merit first amendment protection.⁷⁰

The Supreme Court has avoided defining religion under the first amendment but has stated what religion is not. In *Yoder*, the Court stated that had the Amish claims been based on their subjective or philosophical evaluation, their claims would not rest on religious belief.⁷¹ Lower courts have not been so reluctant. For example, the Third Circuit in *Africa v. Commonwealth of Pennsylvania*⁷² held that the revolutionary movement known as MOVE was not a religion because it did not address fundamental and ultimate questions,⁷³ was not comprehensive in nature, and did not have the defining structural characteristics of other religions.⁷⁴ In either case, the first amendment demands government neutrality towards all religions.⁷⁵

In *United States v. Seeger*,⁷⁶ the Supreme Court attempted to define the term religion as used in a statute granting exemptions from the military draft.⁷⁷ The Court compared the importance of a practice in a non-theistic religion to the importance of God in a theistic religion. This "parallel" test⁷⁸ illustrates an early attempt by the courts to bring non-theistic religions within the protection accorded to traditional religions.⁷⁹

69 *Yoder*, 406 U.S. at 215 (citing *Welsh v. United States*, 398 U.S. 333, 351-61 (1970) (Harlan, J., concurring in result)).

70 *Theriault v. Carlson*, 495 F.2d 390, 395 (5th Cir. 1974) (first amendment does not extend to so called religions which are obviously shams and absurdities and whose members are patently devoid of religious sincerity), *cert. denied*, 419 U.S. 1003 (1974); *United States v. Kuch*, 288 F. Supp. 439, 445 (D.D.C. 1968) (extrinsic evidence proved that the claim of religion was only a tactical pretense to obtain exemption from federal drug regulations).

71 *Yoder*, 406 U.S. at 216. The facts in *Yoder* do implicate a Supreme Court definition of religion—the question is *which* facts, because the Court noted the following: Shared belief by an organized group, belief related and identified in religious literature, the beliefs pervaded the Amish lives, and this system of beliefs had existed for over three centuries. *Id.* at 215-17. For an interesting discussion on the dichotomy announced in *Yoder*, see Freeman, *The Misguided Search for the Constitutional Definition of "Religion"*, 71 GEO. L.J. 1519 (1983).

72 662 F.2d 1025 (3d Cir. 1981), *cert. denied*, 456 U.S. 908 (1982).

73 Fundamental and ultimate questions include questions of right and wrong and life and death.

74 *Africa*, 662 F.2d at 1032-36. *See also* *Women's Servs., P.C. v. Thone*, 483 F. Supp. 1022, 1034 (D. Neb. 1979) ("Whatever else non-theistic religion is, it has at least two essential qualities: tenets and organization."), *aff'd*, 636 F.2d 206 (8th Cir. 1980).

75 *Africa*, 662 F.2d at 1031 ("We must avoid any predisposition toward conventional religions so that the unfamiliar faiths are not branded mere secular beliefs.").

76 380 U.S. 163 (1965).

77 *Seeger* did not belong to an orthodox religious sect. The Court held that *Seeger's* beliefs took on the meaning of "religion" in the draft statute according to his "own scheme of things." *Id.* at 185.

78 The *Seeger* Court defined the test as "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption." *Id.* at 166. *See also* *Welsh v. United States*, 398 U.S. 333, 340 (1971).

79 *See also* *Brown v. Dade Christian Schools*, 556 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978); *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1160 (D.C. Cir.), *cert. denied*, 396 U.S. 963 (1969); and *Women's Servs., P.C. v. Thone*, 483 F. Supp. 1022 (D. Neb. 1979), *aff'd*, 636 F.2d 206 (8th Cir. 1980); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-6 (1978); Boyan, *Defining Religion in Operational and Institutional Terms*, 116 U. PA. L. REV. 479 (1968); Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 1973 DUKE L.J. 1217, 1245; Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805, 831 (1978); and Comment, *Defining Religion: Of God, the Constitution, and D.A.R.*, 32 U. CHI. L. REV. 533, 550-51 (1965).

One Supreme Court decision has suggested that the courts should accept the individual's claim of religious belief as *prima facie* evidence of that belief. In *Thomas v. Review Board*,⁸⁰ the Supreme Court addressed the problem of discerning a protectible religious belief. Thomas, a Jehovah's Witness initially employed to fabricate sheet steel for a variety of purposes, was transferred into a department that produced solely for the military. When Thomas discovered the department's sole military purpose, he asked to be transferred or laid off. Management denied both requests, so Thomas quit and applied for unemployment compensation. Although the hearing referee found that Thomas quit due to his religious beliefs, he found that this did not constitute good cause.⁸¹

The U.S. Supreme Court held that the Indiana Supreme Court had improperly relied on facts that Thomas was struggling with his beliefs⁸² and that not all members shared in Thomas' belief.⁸³ In addition, the Court did not believe that the interests advanced by Indiana outweighed Thomas' free exercise rights.⁸⁴ Based on this analysis, the Court reversed the lower court's ruling.⁸⁵

2. Belief that is Sincerely Held

To prevent individuals from abusing the free exercise clause, courts require the belief to be sincerely held.⁸⁶ The courts cannot require a claimant to prove the truth of that belief. In *United States v. Ballard*,⁸⁷ the Court held that the district court properly withheld the issue of the truth of the defendant's religious tenets when it only submitted the issue of "honest and good faith" belief to the jury.⁸⁸

The *Thomas* decision, on the other hand, implicates a change in the first prong, making the sincerity of the belief the primary focus rather than whether the belief is rooted in religion.⁸⁹ Contrary to *Thomas*, later

80 450 U.S. 707 (1981). In *Thomas* the Court stated that "the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id.* at 714. See also *Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981) ("Once belief is established as sincere, it would seem undisputable that [the claim] must be 'rooted in' that belief, at least in part."); *Stevens v. Berger*, 428 F. Supp. 896, 899 (E.D.N.Y. 1977) ("A religious belief can appear to every other member of the human race preposterous, yet merit the protections of the Bill of Rights.").

81 *Thomas*, 450 U.S. at 712.

82 *Thomas*, 450 U.S. at 715 ("Courts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.").

83 *Id.* at 716 ("[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith.").

84 *Id.* at 718-19. The state interests advanced were the burden on the fund if personal reasons allowed people to leave jobs and collect compensation and avoidance of a detailed probing by employers into an applicant's religious beliefs and practices.

85 *Id.* at 720.

86 See, e.g., *U.S. v. Lee*, 455 U.S. 252, 257 (1982); *Thomas*, 450 U.S. at 716; *Yoder*, 406 U.S. at 235.

87 322 U.S. 78 (1944).

88 In *Ballard*, respondents were convicted for using and scheming to use the mails to defraud through means of false representations, pretenses, and promises about the I Am movement (healing power over incurable diseases). The Supreme Court reversed and remanded on grounds other than truth of the belief. *Id.* at 88. The Court stated: "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs." *Id.* at 86.

89 *Thomas*, 450 U.S. at 715.

decisions have required the religious belief and practice to be "central" to that religion in order to merit first amendment protection.⁹⁰

3. Burden on Religion

The claimant bears the burden of proving an "infringement," "burden," or "coercive effect," but no formal test for a *de minimis* burden exists.⁹¹ Burdens violating the free exercise of religion may either be direct or indirect.⁹² In *Sherbert*, the Supreme Court held that the burden or infringement on the religious practice need not rise to the level of prohibition; merely impeding the exercise will suffice.⁹³ As the Supreme Court stated in *Braunfeld v. Brown*,⁹⁴ "if the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."⁹⁵

4. Centrality

The courts have used various terms, such as central religious concepts,⁹⁶ "cardinal principle,"⁹⁷ and "integrally related,"⁹⁸ to describe the necessary importance of the religious practice to the individual. Professor Tribe suggests that centrality has always been important in evaluating free exercise claims.⁹⁹ Another author has suggested that the distinction between beliefs and practices finds its rationale in this factor.¹⁰⁰ Whether or not the claimant must assert centrality, it seems apparent from the case law that the more central a practice is to the religion, the less likely that a governmental interest will override the claimant's free

90 For the implications of the centrality doctrine to this comment, see *infra* notes 117-39 and accompanying text.

91 "While there is no formal test for a *de minimis* burden, there must be a substantial burden—that is, one which would inhibit the practice of the religion and, in effect, would constitute coercion to forego the practice." NOWAK, ROTUNDA, & YOUNG, CONSTITUTIONAL LAW, 3D ED. § 17.6 at 1068 (West 1986).

92 *Id.* at 1068 ("Such burdens may be 'direct' in the sense that an activity essential to the religious practice is prohibited, or 'indirect' in that the regulation makes the practice of religion more difficult.").

93 *Sherbert*, 374 U.S. at 404.

94 366 U.S. 599 (1960).

95 *Id.* at 607. *Braunfeld* upheld the Blue Laws under the free exercise clause. Braunfeld and other Orthodox Jewish merchants sought to enjoin the enforcement of these laws which carried a criminal penalty. Braunfeld argued economic injury; the Court held, however, that providing a uniform day of rest outweighed Braunfeld's claim. *Braunfeld*, 366 U.S. at 607. See also *McGowan v. Maryland*, 366 U.S. 420, 455 (1961) (upheld the constitutionality of Sunday Blue Closing Laws under the establishment clause).

96 *Yoder*, 406 U.S. at 210.

97 *Sherbert*, 374 U.S. at 406.

98 *Lakewood, Ohio Cong. of Jehovah's Witnesses v. Lakewood*, 699 F.2d 303, 306 (6th Cir.) (a zoning ordinance which forbade the religious sect from building in an all residential area was not unconstitutional since building a church was not a "fundamental tenet"), *cert. denied*, 464 U.S. 815 (1983).

99 TRIBE, *supra* note 48, § 14-11, at 863. See also *infra* notes 117-39 and accompanying text.

100 Galanter, *Religious Freedom in the United States: A Turning Point?* 1966 Wis. L. Rev. 217, 274. As the Supreme Court noted in *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940): "[T]he Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."

exercise right.¹⁰¹

B. *The Second Prong: Compelling State Interest and Least Restrictive Means*

Once the infringement on religion has been determined, the individual asserting his religious rights will prevail unless the government puts forth a compelling governmental interest. Furthermore, where governmental action interferes with or burdens a fundamental right, the government must use the "least restrictive means" to accomplish the compelling state interest. Thus, a compelling governmental interest exists if no alternative means of regulation would accomplish the governmental purpose without infringing on the free exercise right.¹⁰²

The courts have found compelling governmental interests in the areas of education,¹⁰³ family unity,¹⁰⁴ elimination of discrimination,¹⁰⁵ child welfare,¹⁰⁶ Sunday closing laws,¹⁰⁷ defense of country,¹⁰⁸ drug regulation,¹⁰⁹ and discipline.¹¹⁰ Perhaps the *Yoder* Court best expressed the magnitude of the governmental interest necessary to outweigh free exercise claims: "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."¹¹¹

101 See, e.g., *McDaniel v. Paty*, 435 U.S. 618 (1978); *Quaring v. Peterson*, 728 F.2d 1121 (8th Cir. 1984), *aff'd sub nom.*, *Jensen v. Quaring*, 105 S. Ct. 3492 (1985); *Windsor Park Baptist Church v. Arkansas Activities Ass'n*, 658 F.2d 618 (8th Cir. 1981).

102 *Sherbert*, 374 U.S. at 407.

103 *Palmer v. Board of Educ.*, 603 F.2d 1271 (7th Cir. 1979) (holding that a Jehovah's Witness, a teacher in the public school system, could not disregard a prescribed school curriculum of civics because of her beliefs since a state's interest in good citizens is paramount), *cert. denied*, 444 U.S. 1026 (1980).

104 *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878) (the Court upheld a law prohibiting polygamy even as applied to a Mormon whose religion required him to engage in this practice).

105 *E.E.O.C. v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986) (health insurance provided only to heads of the household discriminated even though based in the Bible); *Wilmington Christian School v. Board of Educ.*, 545 F. Supp. 440 (D. Del. 1982) (refusal to sell public facilities to a private school justified by purpose of integration); and *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974) (belief against interracial dating causing the expulsion of violators is discriminatory), *aff'd*, 529 F.2d 514 (4th Cir. 1975).

106 *Prince v. Massachusetts*, 321 U.S. 158 (1944) (state can prevent children from working although religion has tenet of proselytizing).

107 *Braunfeld v. Brown*, 366 U.S. 599 (1961) (Sunday Blue Laws, though causing economic injury to practice of observing Sabbath on Saturday, justified by providing uniform day of rest). See also *McGowan v. Maryland*, 366 U.S. 420 (1961).

108 *Gillette v. United States*, 401 U.S. 437 (1971) (defense of country overrides conscientious objection to a particular war).

109 *United States v. Middleton*, 690 F.2d 820 (11th Cir. 1982) (conviction for possession and importation of marijuana upheld against a member of the Ethiopian Zion Coptic Church even though marijuana is essential to religious practice), *cert. denied*, 460 U.S. 1051 (1983). See also, *Native American Church v. United States*, 468 F. Supp. 1247 (S.D.N.Y. 1979), *aff'd*, 633 F.2d 205 (2d Cir. 1980); *Randall v. Wyrick*, 441 F. Supp. 312 (W.D. Mo. 1977); and *United States v. Kuch*, 288 F. Supp. 439 (D.D.C. 1968). But see *People v. Woody*, 61 Cal. 2d 889, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

110 *Madyun v. Franzen*, 704 F.2d 954 (7th Cir.) (female guard could frisk Islamic prisoner even though his religion commands that only his mother and wife could touch him), *cert. denied*, 464 U.S. 996 (1983); *Hatch v. Goerke*, 502 F.2d 1189 (10th Cir. 1974) (school could enforce short hair length rules on Indian student); and *Marshall v. District of Columbia*, 392 F. Supp. 1012 (D.D.C. 1975) (governmental interest in portraying groomed police officers).

111 *Yoder*, 406 U.S. at 215. See also *Thomas v. Collins*, 323 U.S. 516, 530 (1945) ("Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.").

In addition to showing a "compelling state interest," the Court requires the government to proceed with the "least restrictive" means available to serve that interest.¹¹² The purpose of this additional requirement comports with the practice of protecting fundamental rights and maintaining government neutrality without offending the establishment clause.

III. Free Exercise Law in Indian Claims Regarding Public Lands

In the American Indian claims involving religious sites on public lands, courts have applied the traditional free exercise test.¹¹³ However, in evaluating the infringement prong, courts have relied more heavily upon centrality than in other types of free exercise cases.¹¹⁴ This development has evoked much criticism.¹¹⁵ Critics have also attacked judicial application of the second prong of the balancing test to Indian claims involving specific religious sites, on the grounds that it does not adequately assess Indian religious claims.¹¹⁶ The *Yoder* test, as currently applied, has impeded Indian free exercise rights on public lands.

A. The Centrality Requirement

In examining Native American free exercise claims involving public lands under the first prong of the traditional test, courts have emphasized that worship at the sites at issue must be central to the religions of the Indians to warrant enjoining development of that land.¹¹⁷

*Sequoyah v. Tennessee Valley Authority*¹¹⁸ was the first federal circuit opinion to evaluate an American Indian free exercise claim involving public land use. In *Sequoyah*, the Sixth Circuit required that Natives seeking to enjoin government development of public lands prove that the lands in question played a central role in their religion.¹¹⁹ The court noted that the plaintiffs had a religion within the meaning of the Constitution and did not question the sincerity of their adherence to that religion.¹²⁰ The Sixth Circuit then applied the two pronged test and sought to evaluate "the constitutional validity of a claim based on the Free Exercise Clause."¹²¹ The court used *Yoder* and two previous state court decisions involving Indian free exercise claims¹²² (although not involving

112 *Thomas*, 450 U.S. at 718 ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."). See also *supra* note 63 and *Church of God v. Amarillo Indep. School Dist.*, 511 F. Supp. 613 (N.D. Tex. 1981) (school's policy of limiting the number of excused absences for religious holidays violated free exercise because the older policy of making up work was less restrictive), *aff'd*, 670 F.2d 46 (5th Cir. 1982).

113 See *infra* notes 118-53 and accompanying text.

114 See *infra* notes 117-39 and accompanying text.

115 See *infra* notes 124 & 137 and accompanying text.

116 See *infra* note 136 and accompanying text.

117 See *supra* notes 96-101 and accompanying text.

118 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

119 *Sequoyah*, 620 F.2d at 1164. The plaintiffs, three Cherokee Indians and two Cherokee organizations, sued to enjoin construction of a TVA dam which would flood lands held sacred by the Cherokees.

120 *Id.* at 1163.

121 *Id.* at 1164.

122 *Id.* at 1164 (citing: *Frank v. Alaska*, 604 P. 2d 1068 (Alaska 1979) (overturned conviction of

public land use), to formulate a prerequisite to relief. The court held that those seeking to impede government action must prove that the religious practices or beliefs allegedly burdened occupy a position of "centrality or indispensability" in their religion.¹²³ The court concluded that the plaintiffs had "fallen short" of demonstrating that worship at the sites to be flooded was indispensable or central.¹²⁴ Absent this proof, the court held that "plaintiffs have not alleged infringement of a constitutionally cognizable First Amendment right."¹²⁵

In *Wilson v. Block*,¹²⁶ which involved Hopi and Navajo Indian plaintiffs, the United States Court of Appeals for the District of Columbia Circuit relied upon *Sequoyah's* centrality analysis in evaluating a free exercise claim. The court held that "plaintiffs seeking to restrict government land use 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."¹²⁷ The court concluded that *Sequoyah's* analysis was appropriate solely in cases involving the significance of a geographic site for religion,¹²⁸ and that the plaintiffs had not met *Sequoyah's* standard.¹²⁹

Indian who shot moose out of season because moose was used in religious funeral feast); *People v. Woody*, 61 Cal. 2d 889, 394 P. 2d 813, 40 Cal. Rptr. 69 (Cal. 1964) (overturned conviction of Indian peyote user because peyote was used in religious ceremony)).

123 *Id.* at 1164.

124 *Id.* at 1164. See also Galanter, *Religious Freedom in the United States: A Turning Point?*, 1966 WIS. L. REV. 217, 274-78. The article finds a distinction between those religious claims involving central religious issues and those involving religious issues on the "periphery" of the claimant's religion. Galanter, however, concludes that

To determine what is central or essential to all religion would reintroduce the discarded and unworkable notion that some activities are by nature secular and some religious Just as the religious character of an activity is dependent on a particular religious perspective, so is its centrality or essentiality.

Id. at 277 (emphasis in original).

For criticism of *Sequoyah's* stipulation that the Indians had to allege that the religious practices at issue were "central," see Stambor, *Manifest Destiny and Indian Religious Freedom: Sequoyah, Badoni and the Drowned Gods*, 10 AM. IND. L. REV. 59 (1982).

125 *Sequoyah*, 620 F.2d at 1165. The court found that the plaintiffs did not demonstrate "that worship at the particular location is inseparable from the way of life (*Yoder*), the cornerstone of their religious observance (*Frank*), or plays the central role in their religious ceremonies and practices (*Woody*)." *Id.* at 1164.

126 708 F.2d 735 (D.C. Cir.), cert. denied, 464 U.S. 956 (1983).

127 *Id.* at 744 (footnote omitted). Upon review of the plaintiffs' contention that the district court had erred in applying *Sequoyah* to the case, the *Wilson* court distinguished *Sequoyah's* analysis from traditional first amendment precepts, holding that religion was not to be judged on the basis of the theological importance of the activity, and that courts were not to dictate the required aspects of a religion. The *Wilson* court held that *Sequoyah* applied only to Indian free exercise land claims. *Id.* at 743.

The court's limitation of *Sequoyah* solely to land claims, however, seems puzzling, for *Sequoyah* borrowed the terminology of central and indispensable from claims not involving public land use.

128 The plaintiffs argued that *Sequoyah* did not provide the applicable constitutional standard to their case, but that *Sherbert* and *Thomas* did. The court disagreed, interpreting *Sherbert* and *Thomas* to apply only in cases which considered "whether the government may legally condition benefits on a decision to forego or adhere to a religious practice." *Wilson*, 708 F.2d at 743. "Those cases did not purport to create a benchmark against which to test all indirect burden claims." *Id.* The court stated in *Wilson* that the government had not "conditioned any benefit upon conduct proscribed or mandated by the plaintiffs' beliefs." *Id.* at 741.

The *Wilson* court cited, *inter alia*, *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Geller v. Secretary of Defense*, 423 F. Supp. 16 (D.D.C. 1976); and *Unitarian Church W. v. McConnell*, 337 F. Supp. 1252 (E.D. Wis. 1972), *aff'd*, 474 F.2d 1351 (7th Cir. 1973), *vacated and remanded on other grounds*, 416 U.S. 936 (1974) to support the principle that courts should avoid judicial evaluations of the religious significance of religious practices and beliefs.

This centrality requirement has been applied in most cases¹³⁰ involving Indian religious practice at sites on public lands.¹³¹ Some authorities claim that the centrality requirement comes from a questionable reading of precedent,¹³² that it is inconsistent with non-Indian religious cases,¹³³ and is also inconsistent when compared with nonpublic land Indian free exercise claims.¹³⁴ However, the centrality modification upon the *Yoder* test appears solidly entrenched in Native American claims involving pub-

¹²⁹ *Wilson*, 708 F.2d at 745.

¹³⁰ The only case not to apply a centrality analysis in an Indian free exercise claim was *Badoni v. Higginson*, 455 F. Supp. 641 (D. Utah 1977), *aff'd*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981) (applied the traditional two-pronged test and held that the plaintiffs' allegations did not constitute a cognizable first amendment claim). See *supra* notes 140-44 and accompanying text.

¹³¹ See *United States v. Means*, 627 F. Supp. 247 (D.S.D. 1985) (centrality applied in holding that denial of a special use permit for access to religious sites in the Black Hills National Forest, under then current Forest Service procedures, violated free exercise rights); *Inupiat Community of Arctic Slope v. United States*, 548 F. Supp. 182 (D. Alaska 1982), *aff'd*, 746 F.2d 570 (9th Cir. 1984), *cert. denied*, 106 S. Ct. 68 (1985) (*Sequoyah* cited in denying Inupiat Eskimos an injunction of government development of ice-covered waters in the Arctic Ocean, which would have allegedly destroyed a sacred area, although the court did not explicitly apply a centrality analysis); *Crow v. Gullet*, 541 F. Supp. 785 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir.), *cert. denied*, 464 U.S. 977 (1983) (centrality applied to alleged free exercise infringements regarding government projects to improve public access to a sacred geological formation; injunction of further development denied).

The *Means* court held that, after determining centrality, three factors must be weighed in deciding "whether a neutrally based rule violates the free exercise clause." 627 F. Supp. at 258. The factors were "(1) the magnitude of the rule's impact upon the the exercise of the religious belief, (2) the existence of a compelling governmental interest justifying the burden imposed upon such exercise, and (3) the extent to which recognizing an exemption would impede governmental objectives sought to be advanced." *Id.* See also *E.E.O.C. v. Pacific Press Pub. Ass'n*, 676 F.2d 1272 (9th Cir. 1982) (E.E.O.C. action involving wage discrimination and retaliatory discharge allegations, both relating to religious beliefs).

¹³² See *Stambor*, *supra* note 124, at 68.

[T]he [*Sequoyah*] court relied on language in *Yoder* and two state cases, *Frank v. Alaska* and *People v. Woody*, to support its thesis that even if plaintiffs' claims were religious, they were not entitled to free exercise protection unless the disputed practices were central to the religion. None of the cases, however, provides solid authority for the court's 'centrality' test.

¹³³ See Note, *Indian Worship v. Government Development: A New Breed of Religion Cases*, 1984 UTAH L. REV. 313, 328-29.

¹³⁴ Many courts have not applied *Sequoyah*'s explicit centrality analysis in non-public land Indian free exercise claims. Cases decided after the *Wilson* decision have been consistent with *Wilson*'s restriction of the centrality analysis to land claims. See, e.g., *Teterud v. Burns*, 522 F.2d 357, 360 (8th Cir. 1975) (Indian prisoner did not have to prove that long hair, in contravention of prison regulations, was "an absolute tenet of the Indian religion") (footnote omitted); *United States v. Abeyta*, 632 F. Supp. 1301 (D.N.M. 1986) (Indian who killed eagle for religious purpose not subjected to centrality analysis); *Oneida Indian Nation of N.Y. v. Clark*, 593 F. Supp. 257 (N.D.N.Y. 1984) (Indian not subjected to centrality analysis in her allegation that adherence to religious practices prevented timely filing of an affidavit); *Cole v. Fulcomer*, 588 F. Supp. 772 (M.D. Pa. 1984) (hair length in prison; no centrality), *rev'd on other grounds*, 758 F.2d 124 (3d Cir.), *cert. denied*, 106 S. Ct. 253 (1985); *Gallahan v. Hollyfield*, 516 F. Supp. 1004 (E.D. Va. 1981) (hair length in prison; no centrality), *aff'd*, 670 F.2d 1345 (4th Cir. 1982); *State v. Whittingham*, 19 Ariz. App. 27, 504 P. 2d 950 (1973) (did not require centrality to reverse convictions of Native American Church members who used peyote), *cert. denied*, 417 U.S. 946 (1974); *Solomon v. Coughlin*, 456 N.Y.S. 2d 125, 89 App. Div. 2d 1045 (1982) (Indian protesting prison directive requiring cutting the hair of all new inmates; centrality not applied in denying claim); *Whitehorn v. State*, 561 P. 2d 539 (Okla. Crim. App. 1977) (centrality not explicitly required in peyote case); *Smith v. Employment Div.*, 301 Or. 209, 721 P.2d 445 (1986) (Indian drug counselor discharged for taking sacramental peyote; centrality not applied); *Black v. Employment Div.*, 301 Or. 221, 721 P.2d 451 (1986) (no explicit centrality analysis in evaluating discharge of Indian drug counselor for taking sacramental peyote); *State v. Brave Heart*, 326 N.W. 2d 220, 222 (S.D. 1982) (Indians attempted to prove that burning an open fire in forest preserve was an "essential" part of their religion; court denied first amendment defense on grounds the Indians failed to allege that enforcement of statute at issue denied them a free exercise right), *dismissed*, 460

lic lands. Courts may well have undertaken a centrality analysis without making the issue a requirement for a cognizable claim in evaluating claims stemming from traditionally recognized Western religions.¹³⁵ Arguably, when courts deal with religions outside the scope of a Judeo-Christian conception of religious belief the inquiry may properly become explicit. However, the centrality or indispensability requirement for Native claims may be an inappropriate inquiry because it applies a concept apparently drawn from Western religions to religions that may not have a comparable "center."¹³⁶ Additionally, authorities have suggested that the centrality analysis must necessarily be subjective, perhaps to the point of being an undesirable judicial inquiry.¹³⁷

The centrality requirement applies only after the claim has been identified as "rooted in religion." Therefore, courts have entertained the notion that Indian beliefs are cognizable under the first amendment to some extent, as demonstrated by their application of the centrality analysis in the first place.¹³⁸ The burden of proving centrality, however, weighs heavily on the plaintiff. Failure to meet this requirement has

U.S. 1064 (1983). *But see Frank and Woody, supra* note 122, which courts have interpreted to require an explicit centrality analysis.

The judicial discussions of centrality appear to suggest centrality is not required for relief. Rather, courts seem to emphasize that the religious practice or belief at issue be connected to a bona fide religion. The centrality language of *Whitehorn v. State*, 561 P. 2d 539, 547 (Okla. Crim. App. 1977) is illustrative: "[U]se of peyote by the Native American Church is an intricate part of their constitutionally protected religious beliefs and therefore should be protected from governmental interference."

135 L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-11 at 863 (1978). Professor Tribe has observed that "in one sense the factor of centrality has always been important to the free exercise clause The belief-action distinction, it has been suggested, was partly an implicit affirmation that it was belief, prayer, and worship which comprised the central and essential core of religion." *Id.* (citing *Galanter, supra* note 124, at 274).

For an example of centrality applied implicitly, see *Yoder*, 406 U.S. at 215 (declares that the beliefs and practices were "inseparable" from the Amish way of life, but does not require them to be so to qualify for relief).

136 See Pemberton, "I Saw That it Was Holy": *The Black Hills and the Concept of Sacred Land*, 3 *LAW & INEQUALITY* 287, 290-97 (1985); Note, *Indian Religious Freedom and Governmental Development of Public Lands*, 94 *YALE L.J.* 1447, 1471 (1985) (to effectuate first amendment protection of religion, judicial system must analyze free exercise in the context of the particular religion).

137 *Galanter, supra* note 124 at 277 ("To determine what is central or essential to *all* religion would reintroduce the discarded and unworkable notion that some activities are by nature secular and some religious. Depending upon one's point of view, virtually any activity can be religious . . .") (emphasis in original).

138 Cf. Congress has passed the American Indian Religious Freedom Act (AIRFA), Pub. L. 95-341 § 1, 92 Stat. 469 (1978) (codified at 42 U.S.C.A. § 1996 (1981)), which provides:

On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise 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.

The Act was initially regarded as a major step forward in enabling Indians to get redress for their injuries. See, e.g., Note, *The American Indian Religious Freedom Act*, 25 *ARIZ. L. REV.* 429 (1983); Note, *The First Amendment and Indian Religious Claims: An Approach to Protecting Native American Religion*, 71 *IOWA L. REV.* 869 (1986); Note, *The American Indian Religious Freedom Act—An Answer to the Indian's Prayers?* 29 *S.D.L. REV.* 131 (1983).

Some district courts, however, have held that AIRFA did not create any cause of action for Indians beyond those already recognized under the first amendment. See *Crow v. Gullet*, 541 F. Supp. 785, 793-94 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir.), *cert. denied*, 464 U.S. 977 (1983); *Hopi v. Block*, 8 *Indian L. Rep.* 3073, 3076 (D.D.C. 1981), *aff'd sub. nom.*, *Wilson v. Block*, 708 F.2d 735 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983). See also Michaelson, *American Indian Religious Freedom*

spelled defeat for the majority of Indian public land claims.¹³⁹

B. Yoder's Second Prong: *The Role of Compelling Government Interests in Indian Free Exercise Claims Involving Public Land Use*

Few courts have reached the second prong in an Indian public land context. This can be attributed in part to the stringent centrality requirement applied to these cases. Those Native American claims reaching the second prong have not fared well when balanced against government interests, even though recognized as protectible rights under the first prong.

In *Badoni v. Higginson*,¹⁴⁰ the United States Court of Appeals for the Tenth Circuit examined a Navajo claim seeking to enjoin the government from continually flooding the base of the Rainbow Bridge National Monument.¹⁴¹ The district court found that the plaintiffs had not made a cognizable first amendment claim¹⁴² and granted summary judgment for the government. The circuit court accepted, for the purposes of the proceeding, the premise that the government had infringed upon plaintiffs' first amendment rights.¹⁴³ In exploring the second prong, the court concluded that the government's interest in maintaining Lake Powell at a level that intruded into the monument outweighed the religious interests of the Indians,¹⁴⁴ for the Lake was an important part of a multi-state water storage and power generation project.

In *Crow v. Gullet*,¹⁴⁵ the United States District Court for South Dakota held that government projects undertaken to improve public access to a geological formation held sacred by Indians did not constitute an infringement of a cognizable first amendment right.¹⁴⁶ However, the court nevertheless examined plaintiffs' allegation that the temporary closing to overnight camping of an area traditionally used by the plaintiffs for religious purposes unduly burdened their religious practices.¹⁴⁷ The court proceeded to apply the second prong and held that excluding people from the site was the least restrictive means¹⁴⁸ of accomplishing compelling state interests in management of the park where the monument was located.¹⁴⁹

Litigation: Promise and Perils, 3 J. L. & REL. 47, 52 (1983) (argues that AIRFA is "basically a toothless congressional resolution").

139 See *Wilson*, *supra* note 126; *Sequoyah*, *supra* note 118; *Inupiat*, *supra* note 131; *Crow*, *supra* note 131.

140 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

141 The government had flooded the monument's base though maintenance of Lake Powell, a reservoir created and regulated by a dam, allegedly damaging Indian sacred sites near the Rainbow Bridge.

142 455 F. Supp. 641 (D. Utah 1977).

143 The circuit court viewed the facts in the light most favorable to the plaintiffs. *Badoni*, 638 F.2d at 177.

144 *Id.*

145 541 F. Supp. 785 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir.), *cert. denied*, 464 U.S. 977 (1983).

146 *Crow*, 541 F. Supp. at 794.

147 *Id.* at 791.

148 *Id.* at 792. The access facility projects complained of included construction of roads, bridges, and parking lots.

149 The state interests the court identified were "in preserving the environment and the resource [the geological formation] from further decay, in protecting the health, safety, and welfare of park

The holdings in *Badoni* and *Crow* indicate that cognizable site-specific Native free exercise claims bear an extreme burden in overwhelming government interests in use, management, or development of public lands. One court has regarded the concept of restricting government conduct with public land on free exercise grounds as troublesome.¹⁵⁰ A court must decide why some, through means designed to protect their religion, may restrict uses of lands held by the government for the benefit of many.¹⁵¹ Although Indian plaintiffs trying to win a free exercise claim involving public land use bear a difficult burden, some hope remains.

In *United States v. Means*,¹⁵² the district court found that the removal of 800 acres from the Black Hills National Forest, for Native American religious purposes, was a necessary accommodation under the free exercise clause because the government could not establish a compelling interest to counterbalance the Indians' cognizable free exercise rights in the land.¹⁵³

IV. Analysis of the *Peterson* Decision

In affirming the district court's injunction, the Ninth Circuit became the first to find in favor of the Indians in a land-based free exercise claim at the circuit court level.¹⁵⁴ While the result is sound, the court makes assumptions concerning the components of the two prong balancing test which may be invalid.

The requirement that the Natives prove that the high country is "indispensable and central to their religious practices and beliefs"¹⁵⁵ stems from a questionable reading of precedent. While in *Sherbert*, the Court termed the burdened religious belief as a "cardinal principle of her religious faith,"¹⁵⁶ and the belief held by the Amish in *Yoder* as "firmly

visitors, and in improving public access to this unique geological and historical landmark." *Id.* at 794.

150 See *Badoni*, 455 F. Supp. at 645 ("To hold that a person may assert First Amendment rights to the disruption of property rights by others, even if that other person is a government, could and likely would lead to unauthorized and troublesome results.").

151 See *Crow*, 541 F. Supp. at 791 ("[T]he 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."). See also *Clark v. Wolff*, 347 F. Supp. 887 (D. Neb.) (dietary rights of Black Muslim prisoners did not require that prison affirmatively provide for religious demands to avoid a free exercise violation), *aff'd*, 468 F.2d 252 (8th Cir. 1972).

152 627 F. Supp. 247 (D.S.D. 1985).

153 *Id.* at 264. The court granted the Indians a special use permit in view of *Chess v. Widmar*, 635 F.2d 1310 (8th Cir. 1980) (mutual accommodation of some student groups required by the free exercise clause did not violate establishment clause), *aff'd sub. nom.*, *Widmar v. Vincent*, 454 U.S. 263 (1981), and *O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979) (allowed Pope John Paul II to say mass in national park as a lawful accommodation of the free exercise clause that did not violate establishment clause).

154 For cases wherein the courts' holdings favored the government, see *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983), *supra* notes 126-129 and accompanying text; *Crow v. Gullet*, 541 F. Supp. 785 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983), *supra* notes 145-49 and accompanying text; *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), *supra* notes 140-44 and accompanying text; and *Sequoiah v. Tennessee Valley Auth.*, 620 F.2d 1159 (6th Cir. 1980), *supra* notes 118-25 and accompanying text.

155 *Peterson*, 795 F.2d at 693. See *supra* note 26.

156 *Sherbert*, 374 U.S. at 406.

grounded in . . . central religious concepts,"¹⁵⁷ the Court in *Thomas* did not apply the same amount of scrutiny to the free exercise claim. In applying the *Yoder* test, the Court found *Thomas*' beliefs to be burdened, despite the fact that *Thomas* was "struggling" with those beliefs and the beliefs were not shared by all members of *Thomas*' religious sect.¹⁵⁸

One reading of *Thomas* suggests that the question should not be whether the religious belief in question is central, but rather whether that belief is sincerely held. This would relax somewhat the centrality requirements developed in *Sequoyah* for public land cases. Not all courts have agreed. In *Wilson*, the Court of Appeals for the D.C. Circuit distinguished the relaxed requirements of *Thomas*.¹⁵⁹ The *Wilson* court said the applicable standard was set forth in *Sequoyah*.¹⁶⁰ The *Sequoyah* standard requires those claiming a burden on their free exercise rights by virtue of the government's use or control of public land to demonstrate that the land at issue is indispensable to some religious practice, and that no other site would provide an effective substitute.¹⁶¹

This argument defies logic. *Sequoyah* purported to derive its two step analysis, including the centrality requirement, from *Sherbert* and *Yoder*.¹⁶² *Thomas* modified the *Yoder* analysis by making the threshold test one of sincerity of belief rather than centrality of belief.¹⁶³ *Thomas* should, therefore, modify that portion of the *Sequoyah* test purportedly based on *Sherbert* and *Yoder*. The foundation upon which the test in *Sequoyah* rests shifted in *Thomas*; the *Sequoyah* test likewise should reflect that shift lest it lose support entirely.

The lack of application of centrality analysis to free exercise claims which do not involve government controlled public lands further weakens its application. In cases seeking restoration of governmental benefits denied due to religious-based non-compliance with governmental requirements, the standard becomes one of sincerity of belief.¹⁶⁴ Cases which seek exemptions from governmental rules or other affirmative regulations do not require a finding of centrality before granting the exemption.¹⁶⁵ Native American free exercise claims which involve other

157 *Yoder*, 406 U.S. at 210.

158 *Thomas*, 450 U.S. at 715-16.

159 *Wilson*, 708 F.2d at 743 ("*Sherbert* and *Thomas* considered only whether the government may legally condition benefits on a decision to forego or to adhere to religious belief or practice. Those cases did not purport to create a benchmark against which to test all indirect burden claims.").

160 See *Sequoyah*, 620 F.2d at 1164.

161 The Court also required the beliefs in question to be "rooted in religion" in order to be protected by the free exercise clause. *Thomas*, 450 U.S. at 713.

162 See *supra* notes 122-25 and accompanying text.

163 In *U.S. v. Lee*, 455 U.S. 252 (1982), the Supreme Court considered a free exercise case which concerned payment of social security taxes by an Amish employer on behalf of his Amish employees. The employer argued that the exemption from the tax payment requirement given Amish self-employed workers should be extended to cover Amish employees. The Court accepted that *Lee*'s religious beliefs objecting to payment of such taxes were sincerely held. *Id.* at 257. The Court quoted *Thomas* to support its view that it is not the place of the courts to determine the proper interpretation of a person's faith. *Id.*

In *Yoder*, sincerity was not at issue because the State stipulated that the *Yoder*'s religious beliefs were sincerely held. *Yoder*, 406 U.S. at 209.

164 See *Lee*, 455 U.S. at 257, and *Yoder*, 406 U.S. at 209, *supra* note 163.

165 The court in *Woody* found that the use of peyote was the "theological heart" of Peyotism. 61 Cal. 2d at 722, 40 Cal. Rptr. at 74, 394 P.2d at 818. The court nowhere implied that such a finding

disputes with the government, such as the right to use an otherwise illegal drug in a religious service, do not hinge on a finding of centrality.¹⁶⁶

Courts appear to have singled out Indian free exercise land use claims for application of the centrality requirement. This treatment results directly from the *Sequoyah* decision, a questionable standard when announced, which is even more questionable in light of *Thomas*. Courts should reconsider the requirement that an Indian religious land claim be indispensable and central to Indian religious beliefs following the Supreme Court's decision in *Thomas v. Review Board*. This would perhaps serve to even out any subliminal prejudices held against Native religions by courts more familiar with Judeo-Christian religious traditions.¹⁶⁷

Peterson found in favor of the Indians, not because of any change in the application of the test taken from *Wilson* and *Sequoyah*, but because a strong claim held by the Indians to the high country outweighed the relatively weak governmental interests at stake. No multimillion dollar dam already stood as in *Sequoyah* and *Badoni*; no existing ski area operated as in *Wilson*. Instead, the government sought access to a comparatively fungible resource, timber, the harvesting of which the district court found "would not significantly affect timber supplies."¹⁶⁸ The Indian free exercise claim balanced against this interest survived application of even the rigorous *Wilson-Sequoyah* test. As the circuit court stated in *Peterson*, however, when it distinguished the case at bar from previous unsuccessful Indian land-claim cases, "[i]nherent in the adoption of a balancing test is the distinct possibility that, on a different record, the Indians may prevail."¹⁶⁹

The question remains whether *Peterson* reflects a breakthrough for Indian religious land claims, or merely reflects a fortuitous set of facts applied to a difficult balancing test. The answer depends on future courts' recognition of the significance of the *Thomas* decision. Absent such recognition, future Indian claims will probably go the way of *Sequoyah* and *Badoni*: to a "watery grave."

V. Conclusion

Peterson represents the first United States Court of Appeals decision

was any sort of threshold requirement in order for a religious claim to be protected by the free exercise clause. See also *In Re Grady*, 61 Cal. 2d 877, 39 Cal. Rptr. 912, 394 P.2d 728 (1964), decided the same day as *Woody*, wherein the court annulled the conviction of a "self-styled preacher" for possession of peyote. A new trial was granted, since "[u]nlike the situation in *Woody* . . . the defendant here has not proved that his asserted belief was an honest and bona fide one." 61 Cal. 2d at 888, 39 Cal. Rptr. at 913, 394 P.2d at 729. The absence of a centrality requirement in the California Supreme Court's own interpretation of its holding in *Woody* suggests that centrality is not the key to the free exercise analysis. While the peyote may have been central to the Indian's religious beliefs in *Woody*, it is by no means clear that centrality was required.

¹⁶⁶ See *supra* notes 132-34 and accompanying text.

¹⁶⁷ See Stambor, *supra* notes 124 & 132 and accompanying text.

This subliminal prejudice may exist because of the differing orientations between most Indian and traditional (Judeo-Christian) religions. See, e.g., Note, *Indian Worship v. Government Development: A New Breed of Religion Cases*, 1984 UTAH L. REV. 313, 319-320; Note, *Indian Religious Freedom and Governmental Development of Public Lands*, 94 YALE L.J. 1447, 1451 (1985).

¹⁶⁸ *Peterson*, 565 F. Supp. at 596. "Moreover, the regional timber industry will not suffer greatly without access to timber in the Unit." *Id.*

¹⁶⁹ *Peterson*, 795 F.2d at 695.

to hold that governmental interests did not override Indian free exercise rights in a case which involved the development of public land at Indian religious sites. Despite the novelty of the *Peterson* holding, the court's analysis followed the analysis of previous Indian free exercise claims in which the Indians' interests did not prevail. Because most Indian religions have been found worthy of first amendment protection, there is no need for such a strict application of the centrality requirement. The *Peterson* analysis still reflects too much emphasis on the importance of the centrality test to free exercise claims, especially Indian free exercise claims. Indians' religious interests will benefit from this decision only if courts follow the *Peterson* holding in conjunction with a more relaxed definition of a protectible religious practice, such as that advanced in *Thomas v. Review Board*.

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