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ARTICLES

RETHINKING PROTECTIONS FOR
INDIGENOUS SACRED SITES

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RETHINKING PROTECTIONS FOR INDIGENOUS SACRED SITES

Stephanie Hall Barclay* & Michalyn Steele**

Meaningful access to sacred sites is among the most important principles to the religious exercise of Indigenous peoples, yet tribes have been repeatedly thwarted by the federal government in their efforts to vindicate this practice of their religion. The colonial, state, and federal governments of this Nation have been desecrating and destroying Native American sacred sites since before the Republic was formed. Unfortunately, the callous destruction of Indigenous sacred sites is not just a troubling relic of the past. Rather, the threat to sacred sites and cultural resources continues today in the form of spoliation from development, as well as in the significant barriers to meaningful access Indigenous peoples face.

Scholars concerned about government failure to protect Indigenous sacred sites on government property have generally agreed that the problem stems from the unique nature of Indigenous spiritual traditions as being too distinct from non-Indigenous religious traditions familiar to courts and legislators, and therefore eluding protection afforded to other traditions. By contrast, this Article approaches the problem from an entirely different angle: we focus instead on the similarities between government coercion with respect to Indigenous religious exercise and other non-Indigenous religious practices. We illustrate how the debate about sacred sites unwittingly partakes in longstanding philosophical debates about the nature of coercion itself — a phenomenon that has previously gone unnoticed by scholars. This Article argues that whether or not one formally labels the government's actions as "coercive," the important question is whether the government is bringing to bear its sovereign power in a way that inhibits the important ideal of religious voluntarism — the ability of individuals to voluntarily practice their

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This article is dedicated to the grandmothers who kept the fires of faith burning against the winds of oppression and through the winters of assimilation. This article is also dedicated to Chief Wilbur Slockish and Carol Logan, and to the memory of Michael Jones and Chief Johnny Jackson. Their courageous examples continue to inspire others to help defend Indigenous sacred sites.

religious exercise consistent with their own free self-development. Indeed, this is precisely the sort of question courts ask when evaluating government burdens on non-Indigenous religious exercise. The failure to ask this same question about voluntarism for Indigenous religious practices has created a double standard, wherein the law recognizes a much more expansive notion of coercion for contexts impacting non-Indigenous religious practices, and a much narrower conception of coercion when it comes to Indigenous sacred sites.

This egregious double standard in the law ought to be revisited. Doing so would have two important implications. First, when government interference with religious voluntarism is viewed clearly, tribal members and Indigenous practitioners should be able to prove a prima facie case under statutes like the Religious Freedom Restoration Act much more easily. Second, this Article makes the novel claim that clearer understanding of the coercive control government exercises over sacred sites should animate a strong obligation under the government's trust responsibility and plenary power doctrine to provide more — rather than less — robust protection of Indigenous sacred sites.

INTRODUCTION

Government officials in this nation have been desecrating and destroying Native American sacred sites since before the Republic was formed.¹ At the hands of both public and private actors, graves have been despoiled, altars decimated, and sacred artifacts crassly catalogued for collection, display, or sale. Native American people have also faced hurdles, if not outright prohibitions, on accessing sites essential to their rites of worship.

Unfortunately, the callous destruction of Indigenous sacred sites is not just a troubling relic of the past. The threat to sacred sites and cultural resources continues today in the form of spoliation from development, as well as in the significant barriers Indigenous people face in accessing and preserving these sites and resources. For example, during construction of the U.S. border wall in 2020, Apache burial sites were “blown up.”² And in 2018, a federal court ruled that the government was allowed to bulldoze a Native American burial ground and desecrate an ancient stone altar where religious ceremonies had taken place,

¹ Throughout this Article, we use “Native American,” “American Indian,” and “Indigenous people” interchangeably. Our intent is to broadly encompass within these imprecise terms the many varied peoples whose traditional homelands fall within the borders of the United States, whether federally recognized American Indian tribes (as that term is used in federal law), state-recognized tribes, tribes still seeking legal recognition, Alaska Natives, or Native Hawaiians. Each of these Indigenous peoples has a distinct history and legal relationship with the United States; many share a common history of dispossession of sacred sites.

² *Native Burial Sites Blown Up for US Border Wall*, BBC NEWS (Feb. 10, 2020), <https://www.bbc.com/news/world-us-canada-51449739> [<https://perma.cc/DC56-Z4DQ>]; Erik Ortiz, *Ancient Native American Burial Site Blasted for Trump Border Wall Construction*, NBC NEWS (Feb. 12, 2020, 6:13 PM), <https://www.nbcnews.com/news/us-news/ancient-native-american-burial-site-blasted-trump-border-wall-construction-n1135906> [<https://perma.cc/K5CY-NWDU>]. The La Posta Band of Diegueno Mission Indians has filed a lawsuit in federal court seeking to temporarily halt the installation of the wall until the tribe can protect its religious and cultural heritage. Julie Watson, *Tribe Says New Border Wall Harming Burial Sites; Sues Trump*, AP NEWS (Aug. 12, 2020), <https://apnews.com/277668808d1209533cb2ae0ae5878599> [<https://perma.cc/SM4X-VKS9>].

merely to expand a road.³ As one scholar notes, “among all the Native American cultural and religious issues, protection of sacred sites is the one area where Native Americans have enjoyed by far the least success.”⁴ The problem is as follows: because tribes were divested of their traditional homelands by the government,⁵ Indigenous peoples are often placed in the difficult position of being beholden to the government to continue to engage in centuries-old practices and ceremonies.

These threats are particularly notable given strong protections for other non-Indigenous places of worship, including on government property. Multiple factors fuel this anomalous burden on Native people’s free exercise of their religion. Traditional religious liberty protections such as the Free Exercise Clause or Religious Freedom Restoration Act of 1993⁶ (RFRA) have been interpreted in ways that, so far, render them virtually toothless when it comes to protecting sacred sites. Some argue the Establishment Clause actually creates additional barriers to protecting these sacred spaces.⁷ And despite its assertion of sweeping plenary power over Indian affairs, the federal government has done little of consequence to protect the ability of tribes to access and preserve sacred sites.

Scholars concerned about government failure to protect Indigenous sacred sites have offered varied solutions, including modified judicial approaches,⁸ legislative proposals,⁹ regulatory reforms,¹⁰ alternative

³ See *Slockish v. U.S. Fed. Highway Admin.*, No. 08-cv-01169, 2018 WL 2875896, at *1 (D. Or. June 11, 2018); see also Plaintiffs’ Objections to Magistrate’s Findings and Recommendations at 17–18, *Slockish*, No. 08-cv-01169 (D. Or. Apr. 22, 2020).

⁴ Alex Tallchief Skibine, *Towards a Balanced Approach for the Protection of Native American Sacred Sites*, 17 MICH. J. RACE & L. 269, 270 (2012) [hereinafter Skibine, *Towards a Balanced Approach*] (citing Jessica M. Wiles, Note, *Have American Indians Been Written Out of the Religious Freedom Restoration Act?*, 71 MONT. L. REV. 471, 497–98 (2010)); see John Rhodes, *An American Tradition: The Religious Persecution of Native Americans*, 52 MONT. L. REV. 13, 23 (1991); Alex Tallchief Skibine, *Culture Talk or Culture War in Federal Indian Law?*, 45 TULSA L. REV. 89, 100–07 (2009); Rayanne J. Griffin, Comment, *Sacred Site Protection Against a Backdrop of Religious Intolerance*, 31 TULSA L.J. 395, 395 (1995).

⁵ See *infra* section I.B, pp. 1307–17.

⁶ 42 U.S.C. §§ 2000bb to 2000bb-4.

⁷ See, e.g., Anastasia P. Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 ARIZ. L. REV. 1291, 1293–94 (1996).

⁸ Skibine, *Towards a Balanced Approach*, *supra* note 4, at 275 (calling for a modified judicial approach that would offer only intermediate scrutiny in Indian sacred sites cases, rather than strict scrutiny).

⁹ *Id.* (“Concluding that *Lyng* may prevent the adoption of a broader definition of ‘substantial burden,’ this Article recommends amending the American Indian Religious Freedom Act (AIRFA).”).

¹⁰ See, e.g., Christy McCann, *Dammed if You Do, Damned if You Don’t: FERC’s Tribal Consultation Requirement and the Hydropower Re-licensing at Post Falls Dam*, 41 GONZ. L. REV. 411, 454–55 (2005); James A.R. Nafziger, *Protection and Repatriation of Indigenous Cultural Heritage in the United States*, 14 WILLAMETTE J. INT’L L. & DISP. RESOL. 175, 178 (2006); Marren

property rights models,¹¹ or reliance on international human rights law.¹² These scholars generally agree that the problem stems in significant part from government misunderstanding of Indigenous people's unique spiritual traditions.¹³ Courts have also noted the distinctive qualities of Indigenous religious practices regarding sacred sites, but

Sanders, *Ecosystem Co-management Agreements: A Study of Nation Building or a Lesson on Erosion of Tribal Sovereignty?*, 15 BUFF. ENV'T L.J. 97, 101–02 (2007–2008); Michelle Kay Albert, Note, *Obligations and Opportunities to Protect Native American Sacred Sites Located on Public Lands*, 40 COLUM. HUM. RTS. L. REV. 479, 509–10 (2009); Marcia Yablon, Note, *Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land*, 113 YALE L.J. 1623, 1626 (2004).

¹¹ Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1062–67 (2005) [hereinafter Carpenter, *A Property Rights Approach*] (arguing that courts have failed to recognize Indian property rights at sacred sites and evaluating a real property law approach to sacred sites cases); Kristen A. Carpenter, *Real Property and Peoplehood*, 27 STAN. ENV'T L.J. 313, 324–40 (2008) (arguing that First Amendment cases have failed to recognize the constitutive relationship between tribal nations and sacred sites and proposing that federal administrative policy should recognize the nonfungible nature of sacred sites in tribal identity and culture); Kristen A. Carpenter, Sonina K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1112–24 (2009) (criticizing judicial decisions on sacred sites under the First Amendment and RFRA and arguing for a cultural property approach grounded in Indigenous stewardship and cooperative governance).

¹² See, e.g., Rebecca Tsosie, *Conceptualizing Tribal Rights: Can Self-Determination Be Actualized Within the U.S. Constitutional Structure?*, 15 LEWIS & CLARK L. REV. 923, 925 (2011).

¹³ See, e.g., Kristen A. Carpenter, *Limiting Principles and Empowering Practices in American Indian Religious Freedoms*, 45 CONN. L. REV. 387, 387 (2012) (“[T]he Supreme Court’s Indian cases share a common and previously overlooked feature: in all of them, the Court assessed the Indian claims as too broad or too idiosyncratic to merit Free Exercise Clause protection”); Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 773 (1997) (“Professor Dussias chronicles a continuing failure by legal institutions to understand and respect Native American religious beliefs and practices”); Peter J. Gardner, *The First Amendment’s Unfulfilled Promise in Protecting Native American Sacred Sites: Is the National Historic Preservation Act a Better Alternative?*, 47 S.D. L. REV. 68, 68–69, 73–74 (2002) (emphasizing the unique importance of sacred spaces to Indigenous religious practice and the failure of courts to recognize this under the First Amendment); Jason Gubi, *The Religious Freedom Restoration Act and Protection of Native American Religious Practices*, MOD. AM., Fall 2008, at 73, 77 (observing the problem that unique Indigenous practices are misunderstood by government); Martin C. Loesch, *The First Americans and the “Free” Exercise of Religion*, 18 AM. INDIAN L. REV. 313, 315 (1993) (“Because most of the judicial decisions reflect serious misunderstandings about Indian spiritual beliefs, this section summarizes some of the prominent features of Indian spirituality. . . . The Court must recognize that Native American spiritual practice claims are different from the nonreligious practice claims other groups legitimately make upon the state.”); Skibine, *Towards a Balanced Approach*, *supra* note 4, at 273 (“While the degree of understanding among judges and justices may vary, one cannot deny a certain Western-centered aspect in the *Lyng* Court’s discussion of the burden on Native American practitioners. Such views, which are also reflected in both the district court and the Ninth Circuit en banc decisions in *Navajo Nation v. United States Forest Service*, suggest a lack of understanding about why sacred sites are important to Indian people. . . . [T]his view portrays Native religious activities at sacred sites as only about spiritual peace of mind. While such benefits are certainly part of the practice, they do not go to the heart of why these sacred places are important to Indian people or why management practices like cutting down trees and spilling recycled sewage water on sacred land are extremely disturbing to many Indian tribes.”).

courts have too often used this distinction as an excuse to deny traditional protections for religious exercise.¹⁴

While the unique nature of Indigenous spiritual practices is an important part of the problem that merits careful study,¹⁵ this Article approaches the problem from an entirely different angle.¹⁶ It argues that insufficient protection of sacred sites does not stem primarily from the government's inability to recognize the unique features of Indigenous practices. Rather, we assert that governments, courts, and scholars have failed to adequately acknowledge *similarities* between government interference with voluntary Indigenous religious exercise and interference with other non-Indigenous religious practices. Honing in on the government's effect on religious practice highlights troubling double standards that must be confronted if Indigenous use of sacred sites is to receive protection of the kind afforded to other religious groups. But to do so, we must begin by reconceptualizing our understanding of government coercion, at least as a doctrinal matter.

The primary justification for denying government protection of and access to sacred sites is the argument that no government coercion is involved in such denials. As the Supreme Court stated in *Lyng v. Northwest Indian Cemetery Protective Association*,¹⁷ by denying access to a sacred site, the tribal members would not be "coerced by the Government's action" through threat of penalties or denial of benefits "enjoyed by other citizens."¹⁸ This rationale, finding a lack of government

¹⁴ See, e.g., *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451–53 (1988); *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1210–11, 1214 (9th Cir. 2008); *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1063 (9th Cir. 2008); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 3d 77, 89–91 (D.D.C. 2017); *La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep't of the Interior*, No. 11-cv-00395, 2012 WL 2884992, at *8 (C.D. Cal. July 13, 2012); *S. Fork Band v. U.S. Dep't of Interior*, 643 F. Supp. 2d 1192, 1207–08 (D. Nev. 2009).

¹⁵ See Dussias, *supra* note 13, at 806 ("Native American plaintiffs attempting to vindicate their free exercise rights in federal court must first confront a fundamental problem. The First Amendment refers to the free exercise of *religion*, as if religion were wholly separable from other aspects of individuals' lives. Although this isolation of religion from other aspects of life may accurately reflect the Anglo-American perspective of the First Amendment's drafters, it is foreign to the Native American world view. While the Anglo-American world view tends to see law, religion, art, and economics as separate aspects of society, the Native American world view tends to see them as interdependent parts of an organic, unified whole. Indeed, no Native American language has a word that can be translated as 'religion.' Thus, attempting to isolate religion from other aspects of life is 'an exercise which forces Indian concepts into non-Indian categories.'" (footnotes omitted) (quoting *Lyng*, 485 U.S. at 459 (Brennan, J., dissenting))).

¹⁶ For a related and important argument about ways in which the rights of Indigenous peoples are not unique, see Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1793–95 (2019).

¹⁷ 485 U.S. 439.

¹⁸ *Id.* at 449. The Court accepted the arguments of the government's counsel that in building the road, "the Government" did not "put an objective burden on an individual's choice about what

coercion, has been repeated by numerous subsequent courts, government actors, and scholars.¹⁹ In *Navajo Nation v. United States Forest Service*,²⁰ for example, the Ninth Circuit sitting en banc said “a ‘substantial burden’ is imposed *only* when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions.”²¹

One phenomenon that has gone unnoticed by scholars is that the debate about sacred sites unwittingly engages longstanding philosophical debates about the nature of coercion itself. Our Article argues that regardless of whether we formally label the government’s actions as “coercive” or as something else, the important question is whether the government is bringing to bear its sovereign power in a way that inhibits the important ideal of religious voluntarism — the ability of individuals

course of conduct he or she was going to pursue.” Transcript of Oral Argument at 17–18, *Lyng*, 485 U.S. 439 (No. 86-1013).

¹⁹ See, e.g., *Snoqualmie Indian Tribe*, 545 F.3d at 1214–15; *Standing Rock Sioux Tribe*, 239 F. Supp. 3d at 91; *La Cuna De Aztlan*, 2012 WL 2884992, at *8; *S. Fork Band*, 643 F. Supp. 2d at 1208; Raymond Cross & Elizabeth Brenneman, *Devils Tower at the Crossroads: The National Park Service and the Preservation of Native American Cultural Resources in the 21st Century*, 18 PUB. LAND & RES. L. REV. 5, 33 (1997) (“The proposed closure of Devils Tower violates neither the coercion nor the endorsement test.”); Chad Flanders, *Substantial Confusion About “Substantial Burdens,”* 2016 U. ILL. L. REV. ONLINE 27, 28 (“In *Lyng*, the government planned on putting a road through a forest that was sacred to a Native American tribe. The tribe sued but lost because, while destroying the forest was certainly a bad thing for the tribe and a hindrance to them being able [to] practice their religion, it did not put pressure on them to violate their beliefs or change their religion. The action of the government was not of the form, ‘do this, or else pay a price.’ It is this element of coercion or pressure, essentially a threat by the government against you to make you act against your beliefs, which defines something as being a ‘burden’ under RFRA.” (footnotes omitted)); Anna Su, *Varieties of Burden in Religious Accommodation*, 34 J.L. & RELIGION 42, 44 (2019) (“Accordingly, courts and many scholars readily come to the conclusion that there is no burden involved if there is no issue of direct choice or any form of coercion.”); James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1416 (1992) (“[E]ven prior to *Smith*, the free exercise claimant faced something of a Catch-22. In order to demonstrate a burden, the government involvement or interference with the adherent’s religious practices had to be significant enough that it could potentially ‘coerce’ the adherent to abandon her faith. Yet such extensive involvement or interference would almost always signify that the government had a compelling interest in the law or practice in question, particularly considering what constituted ‘compelling’ in the Court’s eyes.”); Karly C. Winter, Note, *Saving Bear Butte and Other Sacred Sites*, 13 GREAT PLAINS NAT. RES. J. 71, 83 (2010) (“RFRA . . . faces many of the same problems as the First Amendment does in sacred site protection cases. Namely, that the destruction of a sacred site does not amount to coercion and so fails to provide a cause of action.”). See generally Amy Bowers & Kristen Carpenter, *Challenging the Narrative of Conquest: The Story of Lyng v. Northwest Indian Cemetery Protective Association*, in *INDIAN LAW STORIES* 489 (Carole Goldberg, Kevin K. Washburn & Philip P. Frickey eds., 2011).

²⁰ 535 F.3d 1058 (9th Cir. 2008).

²¹ *Id.* at 1069–70 (emphasis added) (citations omitted). For a thoughtful discussion of the development of the substantial burden standard in free exercise jurisprudence, see Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 937–42 (1989).

to voluntarily practice their religious exercise consistent with their own free self-development.²² Indeed, we illustrate how this is precisely the sort of question courts ask when evaluating government burdens on other forms of non-Indigenous religious exercise. And the failure to ask this same question for Indigenous religious practices has created a double standard, wherein the law recognizes a much more expansive notion of coercion in contexts impacting other religious practices, and a much narrower conception of coercion when it comes to Indigenous sacred sites. This egregious double standard in the law ought to be revisited.

Further, the *Lyng* conception of coercion treats tribal members as being on the same footing as other individuals exercising their religion in a predominantly private space, where government inhibitions on voluntary religious practice are the exception rather than the norm. But tribal members seeking access to federally owned sacred sites are not exercising their religion under a baseline of voluntary choice. Instead, because of the history of government divestiture and appropriation of Native lands, American Indians are at the mercy of government permission to access sacred sites. As such, they are subjected to a baseline of omnipresent government interference with the use of many of their most sacred sites. This baseline of coercion, so lightly dismissed as a legal insignificance in *Lyng*, is simply overlooked for Indigenous peoples.

Scenarios involving a baseline of coercion, or ongoing government interference with voluntary religious practice, are rarer than those involving the voluntary choice baseline but are not wholly unique to Indigenous sacred sites. In fact, we find a baseline of coercion in prison, the military, and even zoning requirements. Where government controls access to worship areas and resources, and it exerts decisive control over individuals' ability to use spaces of worship consistent with theological requirements, there is de facto coercion involved. In each of these contexts, government is obliged by law (both constitutional and statutory) to provide affirmative religious accommodations to ensure individuals in these spaces can practice their religion. Analyzing these scenarios highlights the acute injustice of the government's unwillingness to accommodate tribes in the coercive context where government controls access to their worship areas and resources.

Shifting the focus from the uniqueness of religious practice to the reconceptualized government coercion at play in these conflicts has a number of important implications. First, tribal members and Indigenous

²² For a discussion of religious voluntarism, see Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 517–18 (1968). Professor Donald Giannella explains: “Religious voluntarism thus conforms to that abiding part of the American credo which assumes that both religion and society will be strengthened if spiritual and ideological claims seek recognition on the basis of their intrinsic merit.” *Id.* at 517. This value includes avoiding “plac[ing religion] at a handicap.” *Id.* at 518.

practitioners should be able to prove a prima facie case under statutes like the Religious Freedom Restoration Act much more easily. RFRA requires a showing of a “substantial[] burden” on religious exercise.²³ Currently, courts have made it essentially impossible for tribal plaintiffs to demonstrate a substantial burden in the context of sacred sites owned by the government.²⁴ But when the baseline of government interference is understood, the opposite should be true.²⁵ The ongoing interference with voluntary religious exercise means that Indigenous religious exercise is being burdened *more*, not less, than religious exercise in the context of a baseline where voluntary choice is the default. Second, a clearer understanding of the coercive control government exercises over sacred sites, and the way in which this harms tribes, should animate a strong obligation under the government’s trust responsibility and plenary power doctrine to protect the sacred practices of tribal members. In order to give meaningful protection, the government must work to affirmatively protect and allow access to sacred sites over which the government has claimed coercive control. Some government officials have refused to accommodate tribal members’ access to sacred sites based on the argument that “preferential treatment” of tribes risks violating the Establishment Clause’s requirement of neutrality. But once one considers the unique disadvantage of tribal members compared to most other religious groups operating under a baseline of voluntary choice, it is clear that — rather than violating the Establishment Clause — affirmative religious accommodations are necessary to approximate any semblance of neutrality.

Part I of this Article describes the importance of sacred sites to Indigenous peoples, as well as the devastating history of government-sanctioned divestitures and spoliation of sacred sites. This history provides important context for why Indigenous sacred sites are more vulnerable to government interference with religious exercise. Part II of the Article recontextualizes the way in which the law ought to view coercion, highlighting situations where government interference is the baseline and affirmative accommodation is required to remove the interference. Part III of the Article provides a roadmap for how a correct conception of coercion will lead to a correct substantial burden analysis that should at least provide religious protections for Indigenous peoples

²³ 42 U.S.C. § 2000bb-1(a).

²⁴ Steven C. Seeger, Note, *Restoring Rights to Rites: The Religious Motivation Test and the Religious Freedom Restoration Act*, 95 MICH. L. REV. 1472, 1473 (1997) (“Despite this effort to restore religious freedom, [RFRA] has not fully achieved its remedial goals due to narrow judicial interpretations of the substantial burden requirement.”).

²⁵ Professor Frederick Gedicks has observed that religious activity and religious exercise are distinct liberty interests and should not be subsumed by analogies to speech interests. Frederick Mark Gedicks, *Towards a Defensible Free Exercise Doctrine*, 68 GEO. WASH. L. REV. 925, 932–34 (2000). Here, we are arguing that Indigenous exercise regarding sacred sites should be protected, and courts have focused too much on the uniqueness of Indigenous spiritual beliefs.

on par with the practices of other non-Indigenous religious groups. This Part further explains how natural limits on strict scrutiny analysis, and the sacred sites practices of Indigenous peoples themselves, should quell fears about the slippery slope argument that Indigenous peoples will be given a de facto veto power or religious servitude over the government's use of all federal lands. Part III also makes the novel claim that the federal government's plenary power and trust responsibilities actually empower and require it to provide more — rather than less — robust protection of Indigenous sacred sites.

I. THE HISTORY OF GOVERNMENT CALLOUSNESS AND COERCION REGARDING INDIGENOUS SACRED SITES

Justice Brennan articulated the truism that Native American religious practices are unlike those of other faiths, in part because of the “site-specific nature” of Indigenous “religious practice.”²⁶ While the use of sacred sites is an integral element of worship for Indigenous peoples, the importance of sacred sites is not wholly unique to them. The Western Wall in Jerusalem is the most holy site in the world for Jewish people.²⁷ The Shrine of Our Lady of Mariapoch, in Burton, Ohio, is a place of pilgrimage for Byzantine and Hungarian-American Catholics.²⁸ Members of the Church of Jesus Christ of Latter-day Saints find great religious significance in places like the Sacred Grove in upstate New York.²⁹ Among the five pillars of Islam is the Hajj, encouraging every able-bodied Muslim to make a pilgrimage to Mecca — the holiest city for Muslims — at least once in her lifetime.³⁰ Indeed, the philosopher

²⁶ *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 461 (1988) (Brennan, J., dissenting).

²⁷ *Western Wall*, ENCYCLOPEDIA BRITANNICA (Sept. 16, 2020), <https://www.britannica.com/topic/Western-Wall> [<https://perma.cc/X4B5-VRQ2>]. See Simone Ricca, *Heritage, Nationalism and the Shifting Symbolism of the Wailing Wall*, ARCHIVES DE SCIENCES SOCIALES DES RELIGIONS, July–Sept. 2010, at 169, 170, <https://journals.openedition.org/assr/22401> [<https://perma.cc/96PY-M5LM>], for a description of both the history of the symbolism of the wall to the Jewish faith, as well as efforts by Jewish Israel to distance the wall from historical Palestinian religion and influence.

²⁸ See *The Shrine Today*, SHRINE OF MARIAPOCH, <https://www.shrineofmariapoch.com/the-shrine-today.html> [<https://perma.cc/3TWQ-ASVR>].

²⁹ *Sacred Grove*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://history.churchofjesuschrist.org/subsection/historic-sites/new-york/palmyra/joseph-smith-family-farm-site-and-sacred-grove> [<https://perma.cc/LF4N-NXFA>]; see Russell E. Brayley, *Managing Sacred Sites for Tourism: A Case Study of Visitor Facilities in Palmyra, New York*, 58 TOURISM: INT'L INTERDISC. J. 289, 295–97 (2010), https://hrca.k.srce.hr/index.php?show=clanak&id_clanak_jezik=94052 [<https://perma.cc/G69N-M7VF>] (explaining the efforts by the Latter-day Saint Church to create meaningful religious experiences in upstate New York).

³⁰ THE QURAN 2:126 (Maulawi Sher 'Ali trans., 4th ed. 2015) (significance of the Kaaba shrine); *id.* 2:197–203 (instructions for pilgrimage); *id.* 3:97–98 (importance of Mecca); see also *Pillars of Islam*, OXFORD ISLAMIC STUD. ONLINE, <http://www.oxfordislamicstudies.com/article/opr/t125/e1859> [<https://perma.cc/58QS-USYY>].

Hegel articulates a Christian yearning for sacred sites based on the desire for embodiment of the infinite in a finite world.³¹ Religious practitioners often seek to escape the earthly mundane to commune with the Divine in specific places set aside and sanctified for that purpose.

But what is perhaps unique about sacred sites for Indigenous peoples in countries such as the United States is the extent of the obstacles that government has created and maintains to inhibit Indigenous use of these sacred sites. These obstacles, both historic and contemporary, have resulted in catastrophic interference with Indigenous spiritual practices related to particular sites — often operating as an effective prohibition on these practices.³²

A. The Significance of Sacred Sites to Indigenous Peoples

Although there is a wide variety of beliefs and disparate cultural-religious practices among the Indigenous peoples of the United States, some common elements of culture and custom are found broadly, or at least are prominent among Indigenous peoples. One commonly found cultural value is a sense of place and belonging as a fundamental element of Indigenous identity.³³ A closely related attribute is that there are particular locations that are integral to Indigenous spirituality — sacred sites.³⁴ Therefore, it is not enough to say that certain sites are regarded as sacred. For many native peoples, they are people *of* a particular place, and their particular homelands and landscapes are inextricably tied to their identity as peoples.³⁵ So too are particular places

³¹ GEORG WILHELM FRIEDRICH HEGEL, *THE PHILOSOPHY OF HISTORY* 409 (J. Sibree trans., Batoche Books 2001) (1837).

³² See FED. AGENCIES TASK FORCE, *AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT*, at i, 51–53 (1979) (“Native American people have been denied access to sacred sites on federal lands for the purposes of worship. When they have gained access, they have often been disturbed during their worship by federal officials and the public. Sacred sites have been needlessly and thoughtlessly put to other uses which has desecrated them.” *Id.* at i.).

³³ *Id.* at 51 (“The attachment of the Native American people to the land is a fact well noted in American history.”); Michael D. McNally, *From Substantial Burden on Religion to Diminished Spiritual Fulfillment: The San Francisco Peaks Case and the Misunderstanding of Native American Religion*, 30 *J.L. & RELIGION* 36, 39 (2015) (describing the role of sacred San Francisco peaks in the identity of one-quarter million Navajo); Skibine, *Towards a Balanced Approach*, *supra* note 4, at 273–74 (describing the connection between cultural identity and sacred sites).

³⁴ See Skibine, *Towards a Balanced Approach*, *supra* note 4, at 270; Albert, *supra* note 10, at 481–82.

³⁵ The Indigenous names of many tribes tie their identities as peoples to particular landscapes. For example, among the band of the Dakota people, “Sisseton” means “marsh dwellers,” and “Wahpeton” means “forest dwellers.” *Original Tribal Names of Native North American People*, NATIVE LANGUAGES OF THE AMS., <http://www.native-languages.org/original.htm> [https://perma.cc/86QK-JDTG]. “Hualapai” means “people of the pine trees” and “Havasupai” means “people of the blue-green water.” *Id.*

inextricably tied to spiritual and cultural rites and identity.³⁶ The cultural-religious practices may be impossible and beliefs and identity irreparably damaged when meaningful access to those sites is prohibited or interfered with. In other words, within these geographically specific identities are particular landmarks that not only define the homelands of peoples, but are also critical elements of the cultural and religious practices of those tribes.³⁷ Without access to particular sites, essential practice of native religion may not be merely burdened, but effectively prohibited altogether.³⁸

For many tribes, their particular rituals may not be performed elsewhere, so central is a particular place, feature, or landscape to the religious rite.³⁹ As Professor Alex Skibine and others have noted: “Native American religions are land based.”⁴⁰ To deprive tribal people of access to certain sites, or to compromise the integrity of those sites, is to effectively prohibit the free exercise of their religion. There is no adequate substitute and no adequate compensation for the deprivation. The religion is, for all intents and purposes, banned because the specific sites involved are so integral to the rites and beliefs of the people. For example, Utah’s Rainbow Bridge and the surrounding area is a place of “central importance” to the religion of the Diné, or Navajo, people as “incarnate forms of their gods.”⁴¹ The same site is also sacred to the Hopi, San Juan Southern Paiute, Kaibab Paiute, and White Mesa Ute peoples.⁴² The practices attached to that specific locale are not portable. They must be performed in those places or the essential rites and the animating beliefs behind the rites are, by compulsion, extinguished. Likewise, the existential consequences of sacred site desecration may not be quantified. For the Diné, “if humans alter the earth in the area of the Bridge, [their] prayers will not be heard by gods and their ceremonies will be ineffective to prevent evil and disease.”⁴³

³⁶ See Deward E. Walker, *Sacred Geography in Northwestern North America*, INDIANS.ORG, <http://www.indians.org/welker/sacred.htm> [<https://perma.cc/4YUH-DH9Z>] (overviewing what constitutes a sacred site and what the cultural and religious meanings are for the Native Americans of the area).

³⁷ See ANTHONY THORLEY & CELIA M. GUNN, SACRED SITES: AN OVERVIEW 9–10 (2008), https://sacrednaturalsites.org/wp-content/uploads/2011/10/Sacred_Sites_An_Overview.pdf [<https://perma.cc/N5U6-SBSQ>].

³⁸ *Id.* at 10.

³⁹ *Id.*

⁴⁰ Skibine, *Towards a Balanced Approach*, *supra* note 4, at 270.

⁴¹ Amber L. McDonald, Note, *Secularizing the Sacrosanct: Defining “Sacred” for Native American Sacred Sites Protection Legislation*, 33 HOFSTRA L. REV. 751, 751 (2004) (quoting *Badoni v. Higginson*, 638 F.2d 172, 177 (10th Cir. 1980)); see also PETER IVERSON, DINÉ: A HISTORY OF THE NAVAJOS 1 (2002).

⁴² See *Rainbow Bridge: History & Culture*, NAT’L PARK SERV. (June 5, 2015), <https://www.nps.gov/rabr/learn/historyculture/index.htm> [<https://perma.cc/F2JL-Q4D3>].

⁴³ See McDonald, *supra* note 41, at 751 (alteration in original) (quoting *Badoni*, 638 F.2d at 177).

The same essential nature of place in the practice of Indigenous religion is true for many sites, and has been well documented in the literature and litigation surrounding these issues. In another prominent example, Medicine Lake in northern California is regarded by the region's tribes, including the Pit River, Modoc, Shasta, Karuk, and Wintu peoples,⁴⁴ as made holy and imbued with healing powers by the Creator having bathed there after creation.⁴⁵ Access to that particular place and those particular waters is therefore integral to the practice of their religion. A coalition of affected tribes has been engaged in a prolonged struggle to protect the sacred lake from the efforts by the Bureau of Land Management (BLM) and the U.S. Forest Service to exploit the area's geothermal properties through leases with energy companies.⁴⁶ One report noted that tribal healers, or "[m]edicine men[,] . . . train there, and coming-of-age ceremonies are conducted there. Many Indians immerse themselves in the lake to cleanse the body and soul."⁴⁷ Recreators in the area mean "tribe members wait until nightfall to conduct ceremonies at the lake to avoid motor homes and boaters."⁴⁸ Tribal Chairman Gene Preston noted in 2002 that tribal practitioners "have to hide in the bushes and wait until everybody is gone and sneak out on the lake Our land was taken away initially with land claims, and now they are trying to take our culture and religion."⁴⁹ For these tribes, the place is so tied to the belief that it may be said to be the belief itself. The belief is inseparable from the integrity of and access to the place.

As these examples suggest, the American legal system has been inadequate in conceptualizing, describing, and quantifying the nature of the injury to Indigenous people when the government interferes with access to sacred sites. It is not only religious belief that is endangered or burdened by preventing access to sacred sites or facilitating their desecration. The cultural survival of Indigenous peoples as peoples likewise turns on the framing and response to these questions. As such, access to sacred sites presents a unique religious liberty concern. Given that the desecration of and divestiture of access to these sites has most broadly come at the hands of the federal government (discussed further

⁴⁴ Amy Corbin, *Medicine Lake Highlands*, SACRED LAND FILM PROJECT (Sept. 11, 2014), <https://sacredland.org/medicine-lake-highlands-united-states> [<https://perma.cc/HLE2-A3QM>].

⁴⁵ Kyle W. La Londe, *Who Wants to Be an Environmental Justice Advocate?: Options for Bringing an Environmental Justice Complaint in the Wake of Alexander v. Sandoval*, 31 B.C. ENV'T AFFS. L. REV. 27, 52 (2004).

⁴⁶ See Corbin, *supra* note 44.

⁴⁷ Dean E. Murphy, *U.S. Approves Power Plant in Area Indians Hold Sacred*, N.Y. TIMES (Nov. 28, 2002), <https://www.nytimes.com/2002/11/28/us/us-approves-power-plant-in-area-indians-hold-sacred.html> [<https://perma.cc/XB2L-TK4D>].

⁴⁸ *Id.*

⁴⁹ *Id.*

below), the federal government now exercises control over the religious practices of Indigenous peoples in uniquely troubling ways.

B. Government Disregard of Indigenous Religious Practices and Divestiture of Sacred Sites

Government disregard of Indigenous beliefs and practices has not been limited to sacred sites. The United States has a long and checkered history of pursuing policies designed to quell Indigenous beliefs, practices, language, and identity.⁵⁰ Just as surely as the policies of removal, allotment, and termination were “mighty pulverizing engine[s] to break up the tribal mass” of land holdings, these same policies were animated by the effort to break up the practice of tribal religion and separate Indigenous people from their vital traditions.⁵¹ The Establishment Clause notwithstanding, the federal government has a long history funding Christian missionary programs to evangelize Native Americans.⁵²

The government also passed the Indian Religious Crimes Code, laws first developed in 1883, which prohibited Indigenous religious ceremonies, including rites conducted by “medicine men,” on pain of imprisonment.⁵³ Burial practices, ritual adornments (such as face paint), and even the length of Native persons’ hair were matters of federal regulation.⁵⁴ The prescribed penalties administered by federal agents for these

⁵⁰ See generally Dussias, *supra* note 13; Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859 (2016).

⁵¹ See Riley & Carpenter, *supra* note 50, at 879 (quoting President Theodore Roosevelt, First Message to Congress (Dec. 1901), *reprinted in* U.S. BD. OF INDIAN COMM’RS, ANNUAL REPORT OF THE BOARD OF INDIAN COMMISSIONERS TO THE SECRETARY OF INTERIOR FOR 1904, at 6 (1905)).

⁵² See Nathan S. Chapman, *Forgotten Federal-Missionary Partnerships: New Light on the Establishment Clause*, 96 NOTRE DAME L. REV. (forthcoming 2020) (manuscript at 28), <https://ssrn.com/abstract=3496827> [<https://perma.cc/24PY-X9MR>]; Dussias, *supra* note 13, at 774 (“The federal government provided funding for Christian missionaries’ activities and, from 1869 to 1882, used members of Protestant religious groups as government agents on many reservations.”); Steve Talbot, *Spiritual Genocide: The Denial of American Indian Religious Freedom, from Conquest to 1934*, WICAZO SA REV., Fall 2006, at 7, 19 (describing forced governmental religious assimilation practices); Randi Dawn Gardner Hardin, Note, Knight v. Thompson: *The Eleventh Circuit’s Perpetuation of Historical Practices of Colonization*, 38 AM. INDIAN L. REV. 579, 595 (2014) (“[The federal government] aimed to eradicate Native American religious beliefs and instead impose Christianity upon Native Americans through colonization.”).

⁵³ Lee Irwin, *Freedom, Law, and Prophecy: A Brief History of Native American Religious Resistance*, 21 AM. INDIAN Q. 35, 35 (1997); Hardin, *supra* note 52, at 595 (“The United States has imposed several restrictive laws banning the practice of certain Native American religious activities, including outlawing ceremonies such as the Ghost Dance and Sun Dance seen throughout Plains tribal cultures.”).

⁵⁴ See Dussias, *supra* note 13, at 800 n.196; see also FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 175 n.347 (1942) (citing federal rules by the Commissioner of Indian Affairs banning Indigenous dances, rites, and “so-called religious ceremonies” (quoting Off. of Indian Affs., Circular No. 1665 (Apr. 26, 1921))); MICHAEL D. MCNALLY, DEFEND THE

crimes included withholding food rations and imprisonment for participants and practitioners.⁵⁵ “As late as 1971, Sun Dancers were being arrested” for violating an injunction against sun dancing.⁵⁶ In the 1940s, the Department of the Interior instituted policies that made the use of eagle feathers by Indigenous leaders a federal crime.⁵⁷ A number of tribal spiritual leaders have been prosecuted under these laws.⁵⁸

Among the most devastating of the federal efforts to suppress Indigenous religion, the government facilitated the forcible removal of generations of American Indian children from their homes, placing them in boarding schools aimed at rooting out their “savagism.”⁵⁹ The federal policy embodied the philosophy that to “save the man” required they “kill the Indian.”⁶⁰ With federal funding and approval, such schools often forbade these children from practicing their traditional religions, maintaining meaningful familial or tribal bonds, or speaking their native languages; instead, they were coerced to participate in Christian modes of worship and taught that to be “Indian” was to be inferior.⁶¹

SACRED: NATIVE AMERICAN RELIGIOUS FREEDOM BEYOND THE FIRST AMENDMENT 33–68 (2020) (discussing “Civilization Regulations” in the late nineteenth and early twentieth centuries).

⁵⁵ See Irwin, *supra* note 53, at 36.

⁵⁶ *Id.* at 42.

⁵⁷ *Id.*

⁵⁸ *Id.* One of these laws was later amended to provide an exception for religious feather use by federally recognized tribes. See 16 U.S.C. § 668a. Nonetheless, members of non-federally recognized tribes have still been prosecuted under this amended law. See, e.g., McAllen Grace Brethren Church v. Salazar, 764 F.3d 465, 468 (5th Cir. 2014). A petition has been filed to end the ban on religious exercise with respect to eagle feathers. See END THE FEATHER BAN, <https://endthefeatherban.org> [<https://perma.cc/R7UT-8NSQ>]; THE BECKET FUND FOR RELIGIOUS LIBERTY, PETITION BEFORE THE FISH AND WILDLIFE SERVICE DEPARTMENT OF THE INTERIOR: TO END THE CRIMINAL BAN ON RELIGIOUS EXERCISE WITH EAGLE FEATHERS AND TO PROTECT NATIVE AMERICAN RELIGIOUS PRACTICES (2018), <https://s3.amazonaws.com/becketnewsite/Becket-Eagle-Feather-Rulemaking-Petition-July-2018.pdf> [<https://perma.cc/KY4A-L34F>].

⁵⁹ DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875–1928, at x, 6 (1995); see also William Bradford, *Beyond Reparations: An American Indian Theory of Justice*, 66 OHIO ST. L.J. 1, 29 (2005) (“Beginning in the late nineteenth century, Indian children were spirited off to boarding schools where their hair was cut, their tribal clothing was exchanged for Western garb, and harsh abuses were meted out for speaking tribal languages or engaging in customary religious practices.”). See generally ADAMS, *supra*.

⁶⁰ Captain Richard Pratt was charged with leading the effort to “Americanize” American Indian children and founded the Carlisle Indian School to that end. See Richard H. Pratt, *The Advantages of Mingling Indians with Whites* (1892), in AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE “FRIENDS OF THE INDIAN” 1880–1900, at 260, 260 (Francis Paul Prucha ed., 1973). In a major speech on the subject, he said: “A great general has said that the only good Indian is a dead one In a sense, I agree with the sentiment, but only in this: that all the Indian there is in the race should be dead. Kill the Indian in him, and save the man.” *Id.* at 260–61.

⁶¹ Irwin, *supra* note 53, at 41; Danielle J. Mayberry, *The Origins and Evolution of the Indian Child Welfare Act*, JUD. NOTICE, no. 14, 2019, at 34, 37 (“In 1879, the United States began to provide funding for Indian boarding schools. . . . The philosophy for educating Indian students

To be sure, many advocating for these policies believed themselves to be acting in the best interest of the tribes, motivated by sympathy for their plight.⁶² But the policy of forced assimilation through religious reeducation alienated thousands of Indigenous people from their cultures, families, languages, lands, and lifeways.⁶³

The assimilationist perspective on Indian religious beliefs existed through much of federal Indian policy's history.⁶⁴ This perspective was typically reflected in laws, but it also sometimes tragically manifested itself in government violence against Indigenous peoples, including at events like the Wounded Knee Massacre.⁶⁵

Thankfully, many of these shameful, unconstitutional practices have become a relic of the past. But government-created obstacles for Indigenous access to sacred sites remain. Conflicts arise regarding use of sacred sites largely because so many of these sites are located on what is now government property.⁶⁶ To understand how so many Indigenous

was described by Richard Henry Pratt as ‘Kill the Indian, save the man.’”); Ann Piccard, *Death by Boarding School: “The Last Acceptable Racism” and the United States’ Genocide of Native Americans*, 49 GONZ. L. REV. 137, 141 (2013–2014) (“[T]he federal government’s mandatory boarding school . . . [was] designed not to educate those children but, instead, to instill in them the whites’ belief that everything ‘Indian’ was bad, inferior, and evil.”); Andrea Smith, *Boarding School Abuses, Human Rights, and Reparations*, 31 SOC. JUST., no. 4, 2004, at 89, 89–91; Winslow, *supra* note 7, at 1310 (“Native American children were . . . sent to Christian boarding schools supported with federal funds and staffed with teachers supplied by Christian groups.”).

⁶² See Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 629 (2009).

⁶³ See Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 12 (1995) (chronicling the “devastating” effects of the policy on Indigenous land); Michalyn Steele, *Indigenous Resilience*, 62 ARIZ. L. REV. 305, 316 (2020) (noting that the assimilationist policies of the United States “failed in [their] aim to eradicate tribes and [I]ndigenous identity” but “exacerbated the systemic poverty and intergenerational trauma from which many families and tribes are still working to heal”); Rennard Strickland, Lecture, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713, 718–21 (1986) (mapping the history of American cultural violence against American Indian people “under color of law,” *id.* at 719).

⁶⁴ See Hannibal Travis, *The Cultural and Intellectual Property Interests of the Indigenous Peoples of Turkey and Iraq*, 15 TEX. WESLEYAN L. REV. 415, 419 n.9 (2009) (referencing American Indian Religious Freedom Act of 1978, Pub. L. No. 95-341, 92 Stat. 469 (codified at 42 U.S.C. § 1996)).

⁶⁵ Among the atrocities committed in hostility to this spiritual resistance, surely the 1890 Wounded Knee Massacre stands out as a culmination of dehumanizing religious disenfranchisement. A Ghost Dance ritual was banned by federal agents managing tribal affairs both due to fears of its unifying effects among the people and the rejection of American values it seemed to represent. Dussias, *supra* note 13, at 795–97. The effort to enforce the ban on the Ghost Dance was soon bolstered by assembled troops from the U.S. Army. *Id.* at 797. More than 300 men, women, and children were massacred and buried in a mass grave, *id.* at 798, where “[m]any of the bodies were buried naked, having been stripped by whites who had gone out to collect ghost shirts,” *id.* at 799. The atrocity of the Wounded Knee Massacre happened in no small part as a result of official policies designed not merely to disregard Indigenous religion, but to extinguish it.

⁶⁶ See generally FED. AGENCIES TASK FORCE, *supra* note 32, at 51 (reporting that “[m]any of these [sacred sites] are now held by the federal government” and describing the conflicts that can arise from trying to effectively accommodate native religious uses).

sacred sites came to be within the control of the federal government, we turn again to legal and cultural history.

The tribes suffered the dispossession of a great many cultural, historical, and religious resources as a result of the legal doctrines giving the United States “the exclusive right . . . to extinguish’ Indian title . . . whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise.”⁶⁷ The doctrine of discovery, among other things, reserves to the sovereign the exclusive right to deal with the Indigenous peoples for their land.⁶⁸ Chief Justice John Marshall found support for adopting this doctrine in “the character and religion of its [Native American] inhabitants,” which he said “afforded an apology for considering them as a people over whom the superior genius of Europe might claim ascendancy.”⁶⁹ Under the doctrine of discovery, the Christian nation-states were entitled to tribal lands based on the fiction of voluntary cession.⁷⁰

Until 1871, the United States sought to negotiate treaties with the Indian nations to pursue a cessation of hostilities as well as to consolidate and clarify legal title to Indian lands.⁷¹ One of the earliest acts of

⁶⁷ *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941) (quoting *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 587 (1823)).

⁶⁸ See, e.g., *M’Intosh*, 21 U.S. (8 Wheat.) at 573 (adopting the rule that ownership of land comes by virtue of discovery of that land); see also *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 22 (1831) (supporting the idea “that discovery gave the right of dominion over the country discovered”).

⁶⁹ *M’Intosh*, 21 U.S. (8 Wheat.) at 573.

⁷⁰ See STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* 12–20 (2005); LINDSAY G. ROBERTSON, *CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS* 98–100 (2005); see also Janine Robben, *Myths, History and Destiny: Emerging Focus on Indian Law Is Sorting It All Out*, OR. ST. BAR BULL., June 2009, at 17, 18 (“Under Discovery, non-Christian people were not deemed to have the same rights to land, sovereignty and self-determination as Christians because their rights could be trumped upon their discovery by Christians.” (quoting Robert James Miller)); Alexis Zendejas, Note, *Deserving a Place at the Table: Effecting Change in Substantive Environmental Procedures in Indian Country*, 9 ARIZ. J. ENV’T L. & POL’Y 90, 94 (2019) (noting that under the doctrine of discovery, Christian countries have the right “to travel to other lands undiscovered by any other Christian country to ‘civilize’ and exercise dominion over the peoples of the non-Christian country”). Congress was empowered to decide whether to provide “gratuities for the termination of Indian occupancy of Government-owned land rather than making compensation for its value a rigid constitutional principle.” *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 291 (1955) (finding no compensable interest in the Tee-Hit-Ton Indians under aboriginal title claim for federal sales of timber from tribal homeland).

⁷¹ See Carla F. Fredericks & Jesse D. Heibel, *Standing Rock, the Sioux Treaties, and the Limits of the Supremacy Clause*, 89 U. COLO. L. REV. 477, 480–82 (2018) (noting that “the United States maintain[ed] and expand[ed] treaty relationships with tribes,” *id.* at 482, beginning with “its first Indian Treaty with the Delaware Nation in 1778,” *id.* at 480); Katharine F. Nelson, *Resolving Native American Land Claims and the Eleventh Amendment: Changing the Balance of Power*, 39 VILL. L. REV. 525, 543 (1994) (“[T]he United States had recognized [the Oneida Indian Nation of New York’s] right of possession in the 1784 Treaty of Stanwix and two subsequent treaties”); William Wood, *Indians, Tribes, and (Federal) Jurisdiction*, 65 U. KAN. L. REV. 415, 457 (2016) (“[A]fter 1871 . . . the United States stopped making treaties with Indian tribes”).

the First Congress of the United States was to pass the Trade and Nonintercourse Acts, prohibiting those not authorized by the federal government from trading with the Indian nations.⁷² During this Treaty Era, the United States negotiated over 370 treaties with Indian tribes, representing the cession, if not confiscation, of millions of acres of Indian lands.⁷³

These treaties, even those ratified by the Senate, were frequently renegotiated or unilaterally abrogated when it suited the United States to seek more of the lands the treaties guaranteed to the tribes.⁷⁴ After an 1871 rider to an appropriations bill halted treaty-making, new instruments were developed to further divest the tribes of lands.⁷⁵ At the time of the Dawes Act or General Allotment Act of 1887,⁷⁶ Indian tribes held around 138 million acres secured by treaty and executive order.⁷⁷ By

⁷² Act of July 22, 1790, ch. 33, 1 Stat. 137; Siegfried Wiessner, *American Indian Treaties and Modern International Law*, 7 ST. THOMAS L. REV. 567, 575 n.36 (1995) (“[T]he United States Congress passed Indian Trade and Nonintercourse Acts that prohibited any person’s or State’s purchase of Indian lands without the acquiescence by the federal government.”); Wood, *supra* note 71, at 474 n.239 (2016) (noting that Congress passed “six Indian Trade and Nonintercourse Acts . . . appl[icable] to ‘[all] Indian nation[s] or tribe[s] of Indians’” (quoting MARK EDWIN MILLER, FORGOTTEN TRIBES: UNRECOGNIZED INDIANS AND THE FEDERAL ACKNOWLEDGMENT PROCESS 26 (2004))).

⁷³ Joseph William Singer, Speech, *Indian Nations and the Constitution*, 70 ME. L. REV. 199, 204 (2018); David E. Wilkins, *Quit-Claiming the Doctrine of Discovery: A Treaty-Based Reappraisal*, 23 OKLA. CITY U. L. REV. 277, 280–81 (1998) (“Indians ceded millions of acres by treaty in return for blankets, food and trinkets” (quoting *Tee-Hit-Ton Indians*, 348 U.S. at 289–90)); see also Jon Reyhner & Jeanne Eder, *A History of Indian Education*, in TEACHING AMERICAN INDIAN STUDENTS 33, 37 (Jon Reyhner ed., 1992) (“From the first treaty in 1778 till 1871, when treaty making with Indian tribes ended, the United States entered into almost 400 treaties, of which 120 had educational provisions.”).

⁷⁴ Marren Sanders, *De Recto, De Jure, or De Facto: Another Look at the History of U.S./Tribal Relations*, 43 SW. L. REV. 171, 181 (2013) (“Over time the United States renegotiated the treaties with tribal governments, each time pressing Indian nations to give up more and more land.”); David E. Wilkins, *The Reinvigoration of the Doctrine of “Implied Repeals:” A Requiem for Indigenous Treaty Rights*, 43 AM. J. LEGAL HIST. 1, 12–13 (1999) (summarizing the impact of the Supreme Court’s *Lone Wolf v. Hitchcock* decision that “Indian treaties could be unilaterally abrogated,” *id.* at 13); Note, *Indian Canon Originalism*, 126 HARV. L. REV. 1100, 1115 (2013) (noting that the federal government has often “unilaterally abrogate[d] its treaty obligations to the Indian tribes”).

⁷⁵ Larry EchoHawk & Tess Meyer Santiago, *Idaho Indian Treaty Rights: Historical Roots and Modern Applications*, THE ADVOCATE, Oct. 2001, at 15, 15 (“The year 1871 officially ended treaty making when the House of Representatives attached a rider to the Indian Appropriations Act declaring that no more treaties could be concluded between the United States and neighboring Indian tribes. . . . After 1871, the United States . . . continued . . . acquiring [Indian] lands through statutory agreements”); Carl H. Johnson, *A Comity of Errors: Why John v. Baker Is Only a Tentative First Step in the Right Direction*, 18 ALASKA L. REV. 1, 14 (2001) (“Congress’s decision to terminate the treaty process with Indian tribes, in 1871, meant that relations with the many Native groups in Alaska would have to evolve along a different path. From the beginning, that relationship developed through the enactment of statutes.” (footnote omitted)).

⁷⁶ Ch. 119, 24 Stat. 388 (codified as amended in scattered sections of 25 U.S.C.).

⁷⁷ See *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 276 (1992) (Blackmun, J., concurring in part and dissenting in part).

1934, after implementation of the allotment policy, tribes had been divested of nearly 100 million additional acres of their remaining lands through opening so-called “surplus” lands to non-Indian settlement and government confiscation.⁷⁸

As a primary instrument leading to land divestiture, the General Allotment Act opened Indian lands to non-Indian settlement and sought to end tribal communal land ownership.⁷⁹ The Act included allotments even of treaty-protected Indian lands for Christian organizations to support their missionary efforts among the Indians.⁸⁰ As discussed above, representatives of Christian denominations were dispatched to act as federal agents managing the affairs of the Indians on behalf of the federal government.⁸¹

This dispossession of tribal lands and resources has had catastrophic consequences for the religious liberty interests of tribal people.⁸² While in the Western property paradigm, every parcel of land has a fair market

⁷⁸ *Native American Ownership and Governance of Natural Resources*, U.S. DEP'T OF THE INTERIOR: NAT. RES. REVENUE DATA, <https://revenue.data.doi.gov/how-revenue-works/native-american-ownership-governance> [<https://perma.cc/N5YS-L5EZ>] (“In 1887, tribes held 138 million acres. Just forty-seven years later, in 1934, they owned 48 million acres.”); *Land Tenure History*, INDIAN LAND TENURE FOUND., <https://iltf.org/land-issues/history> [<https://perma.cc/UU58-8Z8T>] (“Despite the original safeguards in place to help Indian people retain their land, the General Allotment Act caused Indian land holdings to plunge from 138 million acres in 1887 to 48 million acres by 1934 when allotment ended.”).

⁷⁹ Ryan Fortson, *Advancing Tribal Court Criminal Jurisdiction in Alaska*, 32 ALASKA L. REV. 93, 109 n.98 (2015) (“[T]he General Allotment Act . . . opened up the land to ownership by non-Indians and resulted in the virtual dissolution of large portions of many reservations.”); Kip I. Plankinton, *Final Regulations Implementing the Indian Mineral Development Act*, 23 COLO. LAW. 2119, 2119 (1994) (“Under . . . the General Allotment Act and other specific acts promulgated in the late 1800s and early 1900s, lands formerly held in communal ownership by various Indian tribes were parcelled out in severalty to Indian families to promote assimilation. Surplus lands left over after each eligible Indian had received an allotment were then opened to non-Indians for purchase or homesteading.”).

⁸⁰ Dussias, *supra* note 13, at 775 (noting that the government “allotted reservations to various religious groups for Christianization purposes”); see Scott A. Taylor, *The Native American Law Opinions of Judge Noonan: Do We Hear the Faint Voice of Bartólome de las Casas?*, 1 U. ST. THOMAS L.J. 148, 165 (2003) (acknowledging that “part of the impetus for the General Allotment Act came from the Christian missionary community of the United States”).

⁸¹ Bradford, *supra* note 59, at 29 (“[T]he U.S. posted Christian missionaries to the reservations as Indian agents with orders to ban tribal religions, initiate Christianization, and pacify political discourse.”); Dussias, *supra* note 13, at 777 (“[There was] long-standing government support for and reliance on missionaries as agents for implementing government policy toward the Indians. As early as 1776, Congress passed resolutions directing the establishment of missions among certain tribes and provided funding for missionaries’ salaries.” (footnotes omitted)).

⁸² Of course, dispossession of sacred sites was not the only catastrophic policy for Indigenous peoples. As discussed above, the 1883 Code of Indian Offenses outlawed the practices of traditional healers, or “medicine-men,” and criminalized any action to “prevent Indians from abandoning their barbarous rites and customs.” Irwin, *supra* note 53, at 36 (quoting Thomas J. Morgan, *Rules for Indian Courts*, reprinted in *AMERICANIZING THE AMERICAN INDIANS*, *supra* note 60, at 300, 302); see *id.* at 35–36.

value and acreages may be ultimately fungible, the same is not necessarily true across Indigenous cultures.⁸³ Specific sites, landscapes, and geographical features hold irreplaceable value and are central to the practice — the free exercise — of Indigenous religion.⁸⁴ Thus, the consequences of Indigenous dispossession of land were compounded by the fact that no money compensation can adequately redress the loss of access to sacred places and the vital rituals and values utterly unique to those places.⁸⁵

For many Indigenous peoples, the reality of government divestiture of land means that their most sacred sites are completely within the government's control.⁸⁶ These include places where sacred rituals must

⁸³ *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 461 (1988) (Brennan, J., dissenting) (noting that within the Native American belief system, “land is not fungible; indeed, at the time of the Spanish colonization of the American Southwest, ‘all . . . Indians held in some form a belief in a sacred and indissoluble bond between themselves and the land in which their settlements were located’” (omission in original) (quoting EDWARD H. SPICER, *CYCLES OF CONQUEST: THE IMPACT OF SPAIN, MEXICO, AND THE UNITED STATES ON THE INDIANS OF THE SOUTHWEST*, 1533–1960, at 576 (1962))); Gardner, *supra* note 13, at 77 (discussing “the longstanding conflict between two disparate cultures[:] the dominant western culture . . . views land in terms of ownership and use, [whereas for] Native Americans, . . . concepts of private property are not only alien, but contrary to a belief system that holds land sacred” (second alteration and omissions in original) (quoting *Lyng*, 485 U.S. at 473 (Brennan, J., dissenting))); Steven L. Winter, *An Upside/Down View of the Counter-majoritarian Difficulty*, 69 TEX. L. REV. 1881, 1905–19 (1991) (comparing Western tendencies to treat land as a resource to be used with the alternative perspective of Native Americans that the physical features of land are inseparable from religious and social life).

⁸⁴ Gardner, *supra* note 13, at 76 (“Where Western religions build structures to designate holy sites, Indian religions hold the land itself holy.”); Celeste Wilson, *Native Americans and Free Exercise Claims: A Pattern of Inconsistent Application of First Amendment Rights and Inconsistent Legislation for Natives Seeking Freedom in Religious Practice*, 8 THE CRIT 1, 28 n.5 (2015) (“Natives believe that the lands are the essence of Native life, religion, and cultural identity.” (citing Luralene D. Tapahe, Comment, *After the Religious Freedom Restoration Act: Still No Equal Protection for First American Worshipers*, 24 N.M. L. REV. 331, 338 (1994))).

⁸⁵ Carpenter, *A Property Rights Approach*, *supra* note 11, at 1098 (“[M]onetary compensation is not an adequate remedy for discontinued access to a unique sacred site.”); Allison M. Dussias, *Science, Sovereignty, and the Sacred Text: Paleontological Resources and Native American Rights*, 55 MD. L. REV. 84, 102 & n.113 (1996) (noting that “the Sioux found it difficult to understand a society for which ‘each blade of grass or spring of water has a price tag on it,’” *id.* at 102 (quoting JOHN (FIRE) LAME DEER & RICHARD ERDOES, *LAME DEER: SEEKER OF VISIONS* 36 (1972)), and refused a 1980 monetary award given after the Supreme Court ruled that the sacred Black Hills site was taken from them in abrogation of a treaty, *id.* at 102 n.113); Paul V.M. Flesher, *Administration of Native American Sacred Space on Federal Land: The Approach of “Equal Treatment,”* WYO. LAW., Dec. 2005, at 28, 28 (“[Monetary compensation] does not resolve the problem with regard to Native sacred sites because the goal is not money; it is access for worship and preservation of their pristine, natural character.”); Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1668 (2000) (explaining that “some groups would dispute the idea that monetary damages can be a satisfactory replacement” for loss of sacred sites).

⁸⁶ Barry Goode, *A Legislative Approach to the Protection of Sacred Sites*, 10 HASTINGS W.-NW. J. ENV'T L. & POL'Y 169, 170 (2004) (“[T]oday, many of these sites are no longer on Indian lands. As Native Americans were moved from their aboriginal lands, their culturally important sites came to be owned by federal, state, and local governments, private corporations and individuals.”).

be performed and can be performed in no other place.⁸⁷ Such places are central to Indigenous cosmology, health, medicine, and identity as the sites of creation and emergence.⁸⁸ And, unfortunately, the government has not often been a respectful neighbor, much less a faithful steward of these sacred spaces.

One paradigmatic example includes Paha Sapa, or the Black Hills, sacred to the Lakota as “the heart of everything that is” and the womb of Mother Earth.⁸⁹ The Black Hills are owned today primarily by a mix of the federal government and private landowners, but that provenance is the subject of great dispute and pain among the Lakota.⁹⁰ By the 1851 Treaty of Fort Laramie (the “1851 Treaty”), the Lakota people reserved the Black Hills, and the United States swore to keep the land clear of non-Indian settlement, “to protect the aforesaid Indian Nations against the commission of all depredations by the people of the said United States.”⁹¹

⁸⁷ See Robert Charles Ward, Comment, *The Spirits Will Leave: Preventing the Desecration and Destruction of Native American Sacred Sites on Federal Land*, 19 *ECOLOGY L.Q.* 795, 806 (1992) (“The Glen Canyon Dam, which created Lake Powell, flooded land beneath Rainbow Bridge, a huge and beautiful sandstone arch that is considered by the Navajo to be the home of some of their gods. According to the Navajo, filling Lake Powell to the capacity desired by the Bureau of Reclamation drowned the Navajo gods.” (footnote omitted)); see also *id.* at 807 (“Bear Butte is where the Lakota originally met with the Great Spirit and is a place where Lakota and Tsistsistas go for instruction and power. Bear Butte was owned by the State and managed by the Department of Game, Fish and Parks.” (footnote omitted)).

⁸⁸ See FED. AGENCIES TASK FORCE, *supra* note 32, at 52 (“The Native peoples of this country believe that certain areas of land are holy. These lands may be sacred, for example, because of religious events which occurred there, because they contain specific natural products, because they are the dwelling place or embodiment of spiritual beings, because they surround or contain burial grounds or because they are sites conducive to communicating with spiritual beings.”); see also McNally, *supra* note 33, at 39–41.

⁸⁹ Alexandra New Holy, *The Heart of Everything That Is: Paha Sapa, Treaties, and Lakota Identity*, 23 *OKLA. CITY U. L. REV.* 317, 318 (1998) (“According to Charlotte Black Elk, Oglala Lakota and great-granddaughter of Nicholas Black Elk, a spiritual covenant exists between the Lakota and Paha Sapa: ‘Wakan Tanka created the Heart of Everything That Is to show us that we have a special relationship with our first and real mother, the earth, and that there are responsibilities tied to this relationship.’” (quoting Avis Little Eagle, *Paha Sapa: Sacred Birthplace, Birthright of the Sioux Nation*, *INDIAN COUNTRY TODAY* (June 25, 1996), at B2)); Mark Van Norman et al., Current Issues in Indian Water Rights Panel (May 19, 1998), in *Panel Discussions from “Indian Nations on the Eve of the Twenty-First Century,”* 43 *S.D. L. REV.* 438, 455 (1998) (quoting discussion in which Mr. Tony Iron Shell of the Rosebud Sioux Tribe explained that as the Creator “started giving his blood to Mother Earth, which to us is the Black Hills, is the heart of the earth — as the blood started going into the Black Hills, some of the powers came out of the blood and made what we call takuskanskan, which is everything that moves, the planets, the sun, the stars”).

⁹⁰ See *U.S. Marshals Serv. v. Means*, 741 F.2d 1053, 1055 (8th Cir. 1984) (discussing a dispute between Lakota and the government regarding alleged illegal occupation of Black Hills land); *State v. Brave Heart*, 326 N.W.2d 220, 221 (S.D. 1982) (discussing a dispute between Lakota and a Department of Agriculture Forest Service Ranger over fire use on Black Hills property).

⁹¹ Treaty of Fort Laramie with Sioux, etc. art. 3, Sept. 17, 1851, in 2 *INDIAN AFFAIRS: LAWS AND TREATIES* 594 (Charles J. Kappler ed., 1904); see also Monte Mills, *Foreword: A “Coyote Warrior” and the “Great Paradoxes,” the Scholarship of Professor Raymond Cross*, *PUB. LAND &*

However, the United States did not or could not prevent the rapid influx of settler encroachment in the sacred territory.⁹² Speculation that the area contained gold fueled an acceleration of non-Indian settlement.⁹³ Negotiations to amend the 1851 Treaty to win cession of the Black Hills from the Lakota were marked by deception and coercion.⁹⁴ Threats of withheld rations, coupled with accusations of deceptive interpretation of proposed treaty terms into the Lakota language, marred the process.⁹⁵ While the 1851 Treaty specified the means by which its terms could be amended, ultimately, the United States asserted its right to unilaterally abrogate the treaty by invoking its expansive plenary power over Indian affairs.⁹⁶ By virtue of this coercion and deception,

RES. L. REV. (Special Issue) 1, 5 (2017) (explaining that the tribes first “reserved their rights to the area in the 1851 Treaty of Fort Laramie, which, as described by one commentator, represented ‘a formal recognition of what had been an informal arrangement since the fifteenth century . . . enclos[ing] 12 million acres containing many of the tribe’s sacred sites and traditional hunting grounds’” (quoting PAUL VANDEVELDER, *COYOTE WARRIOR: ONE MAN, THREE TRIBES, AND THE TRIAL THAT FORGED A NATION* 72 (2004))).

⁹² Allison M. Dussias, *Heeding the Demands of Justice: Justice Blackmun’s Indian Law Opinions*, 71 N.D. L. REV. 41, 64 (1995) (“By 1875, President Grant had decided that the United States Army would make no further efforts to resist the occupation of the Black Hills by trespassing settlers and prospectors, thus . . . abandoning the United States’ treaty obligations to the Sioux Nation.”); John P. LaVelle, *Rescuing Paha Sapa: Achieving Environmental Justice by Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation*, 5 GREAT PLAINS NAT. RES. J. 40, 46–47 (2001) (noting that “President Ulysses S. Grant[] surreptitious[ly] [decided] to ‘wink at’ the miners’ invasion of the Black Hills, and the United States Army [was complicit] in the President’s decision,” *id.* at 46, and that “[w]ith the Army’s withdrawal from its role as enforcer of the Fort Laramie Treaty, the influx of white settlers into the Black Hills increased,” *id.* at 47 (alteration in original) (quoting *United States v. Sioux Nation of Indians*, 448 U.S. 371, 378 (1980))).

⁹³ Dussias, *supra* note 92, at 64 (noting that, “following rumors of the discovery of gold in the Black Hills,” the land’s tranquility succumbed to the chaos of gold-mining white settlers); Cindy S. Woods, *The Great Sioux Nation v. the “Black Snake”: Native American Rights and the Keystone XL Pipeline*, 22 BUFF. HUM. RTS. L. REV. 67, 75 (2015–2016) (“[T]he subsequent discovery of gold in the Black Hills . . . brought thousands of white settlers into the sacred and sovereign territory of the Sioux nation.”).

⁹⁴ EchoHawk & Santiago, *supra* note 75, at 16 (“Fraud, bribery and deception accompanied much of the treaty making. . . . ‘[T]reaties were imposed upon [tribes] and they had no choice but to consent.’” (quoting *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970))); Fredericks & Heibel, *supra* note 71, at 500 (lamenting the “government coercion, and unfair dealings in the treaty process”).

⁹⁵ Fredericks & Heibel, *supra* note 71, at 507 (finding that, to get the land, Congress used “sell-or-starve” tactics, “which cut off food rations to the reservation agencies until the Sioux Nation agreed to sell the Black Hills”); *see also* Lori Murphy, Note, *Enough Rope: Why United States v. White Plume Was Wrong on Hemp and Treaty Rights, and What It Could Cost the Federal Government*, 35 AM. INDIAN L. REV. 767, 778 (2010–2011) (“The Indian treaties were written only in English, making it a certainty that semantic and interpretational problems would arise.” (quoting Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: “As Long as Water Flows, or Grass Grows Upon the Earth” — How Long a Time Is That?*, 63 CALIF. L. REV. 601, 610 (1975))).

⁹⁶ *Sioux Nation*, 448 U.S. at 414 n.28 (noting “Congress’ unilateral abrogation of the Fort Laramie Treaty”); Fredericks & Heibel, *supra* note 71, at 503 (“The unilateral revision to the Treaty

the United States claimed title to the Black Hills under the controversial 1868 Treaty of Fort Laramie.⁹⁷

The Lakota have challenged and disputed the circumstances and legality of the 1868 Treaty since it was implemented. Pressing their claims at the Court of Indian Claims, the Lakota eventually won their case at the U.S. Supreme Court in 1980, asserting that the land had been misappropriated by the United States.⁹⁸ While the Supreme Court agreed that the circumstances of the 1851 Treaty abrogation were egregious, it did not address the possibility of returning the Black Hills to the Lakota. Instead, the remedy available for the breach of the 1851 Treaty was money damages, with interest from the time of the taking.⁹⁹ In testament to the significance of the principle involved and the sanctity of the land at issue, the Lakota Nations have never accepted the significant money judgment, which sits untouched in an account for them in Washington, D.C.¹⁰⁰ The territory of the Lakota tribes includes some of the most impoverished areas of the United States.¹⁰¹ But they have

and establishment of arbitrary boundaries, along with the continued encroachment from settlers and the resulting destruction of the buffalo, worked together to ensure that the peace envisioned in the 1851 Treaty would never materialize.”).

⁹⁷ Treaty Between the United States of America and Different Tribes of Sioux Indians, Apr. 29–Nov. 6, 1868, 15 Stat. 635; see *Oglala Sioux Tribe of Pine Ridge Indian Rsrv. v. United States*, 650 F.2d 140, 141–42 (8th Cir. 1981) (“[T]he United States abandoned its [1868] treaty obligation with the Sioux Nation by passing the Act of February 28, 1877, 19 Stat. 254. That Act abrogated the Fort Laramie Treaty and ratified an agreement made by ten percent of the adult male Sioux population to cede the Black Hills to the United States in exchange for subsistence rations.”); Rita Lenane, Note, “*It Doesn’t Seem Very Fair, Because We Were Here First*”: *Resolving the Sioux Nation Black Hills Land Dispute and the Potential for Restorative Justice to Facilitate Government-to-Government Negotiations*, 16 CARDOZO J. CONFLICT RESOL. 651, 654 (2015) (“The history of the Sioux Nation’s legal claim to the Black Hills dates to the signing in 1868 of the Fort Laramie treaty and the United States government’s violation of that treaty six years later. Congressional legislation in 1877 abrogated the Fort Laramie treaty and took possession over much of the designated Sioux land, including the Black Hills. Over a hundred years later, the Supreme Court wrote that “[a] more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history.” (alteration in original) (quoting *Sioux Nation*, 448 U.S. at 388)).

⁹⁸ *Sioux Nation*, 448 U.S. at 381–90, 423–24. In 1876, the Manypenny Commission made an “‘agreement’ with the Sioux leaders,” *id.* at 383, that required “the Sioux [to] relinquish their rights to the Black Hills,” *id.* at 381. Congress “enact[ed] the 1876 ‘agreement’ into law as the Act of Feb. 28, 1877 . . . 19 Stat. 254. The Act had the effect of abrogating the earlier Fort Laramie Treaty, and of implementing the terms of the Manypenny Commission’s ‘agreement’ with the Sioux leaders.” *Id.* at 382–83.

⁹⁹ *Id.* at 424.

¹⁰⁰ Kimbra Cutlip, *In 1868, Two Nations Made a Treaty, the U.S. Broke It and Plains Indian Tribes Are Still Seeking Justice*, SMITHSONIAN MAG. (Nov. 7, 2018), <https://www.smithsonianmag.com/smithsonian-institution/1868-two-nations-made-treaty-us-broke-it-and-plains-indian-tribes-are-still-seeking-justice-180970741> [https://perma.cc/5N68-K7H8].

¹⁰¹ *Pine Ridge Indian Reservation*, RE-MEMBER, <https://www.re-member.org/pine-ridge-reservation.aspx> [https://perma.cc/NG9Q-TP9G] (“Oglala Lakota County, contained entirely within the boundaries of the Pine Ridge Reservation, has the lowest per capita income (\$8,768) in the country, and ranks as the ‘poorest’ county in the nation.” (emphasis omitted)).

not accepted the money, maintaining that Paha Sapa was never for sale.¹⁰²

This legal and historical background provides important context for contemporary disputes regarding access to and preservation of federally controlled Indigenous sacred sites. As we argue below,¹⁰³ this government course of dealings with the tribes gives rise to special governmental tools, including the plenary power doctrine and the trust responsibility, to redress these obstacles and facilitate Indigenous practices.

C. Potentially Applicable Tools for Indigenous Sacred Sites

Indigenous peoples have also turned to an array of legal tools, both statutory and constitutional, to seek to access and protect sacred sites. This section briefly surveys the most significant of these tools, including the National Historic Preservation Act¹⁰⁴ (NHPA), the National Environmental Policy Act of 1969¹⁰⁵ (NEPA), the American Indian Religious Freedom Act¹⁰⁶ (AIRFA), Executive Order 13,007,¹⁰⁷ and the Religious Freedom Restoration Act along with the First Amendment.

One way that government can attempt to protect sacred sites for future generations is by designating them on the National Register of Historic Places or as a U.S. National Historic Landmark.¹⁰⁸ The NHPA, passed in 1966, “did not contemplate the preservation of Native American history” but was amended in 1992 to provide for tribal historic preservation programs and to require better consultation with tribes about public lands development proposals.¹⁰⁹ As part of the expanded reach of NHPA, the Department of Interior manages a nomination process for designation to the National Register of Historic Places and U.S. National Historic Landmarks, for which sites of significance to tribes are eligible.¹¹⁰ Upon receipt of these nominations, Interior agencies evaluate the historic significance of nominated sites, and designation to the National Register could curtail some federal activities that might disrupt the sites.¹¹¹ Some Indigenous sacred sites have received these designations, such as White Eagle Park, “a place of historic and cultural

¹⁰² Cutlip, *supra* note 100.

¹⁰³ See *infra* section III.B, pp. 1351–58.

¹⁰⁴ Pub. L. No. 89-665, 80 Stat. 915 (1966) (codified as amended at 54 U.S.C. §§ 300101–307107).

¹⁰⁵ Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321–4347).

¹⁰⁶ Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified as amended at 42 U.S.C. §§ 1996–1996a).

¹⁰⁷ 61 Fed. Reg. 26,771 (May 24, 1996).

¹⁰⁸ See *National Register of Historic Places and National Historic Landmarks Programs*, NAT'L PARK SERV. [hereinafter *National Register*], https://www.nps.gov/history/tribes/NR_NHL.htm [<https://perma.cc/S5MB-8386>].

¹⁰⁹ Amanda M. Marincic, Note, *The National Historic Preservation Act: An Inadequate Attempt to Protect the Cultural and Religious Sites of Native Nations*, 103 IOWA L. REV. 1777, 1783 (2018) (describing impact of 1992 amendments); see 54 U.S.C. § 300101; S. REP. NO. 102-336, at 13 (1992).

¹¹⁰ *National Register*, *supra* note 108.

¹¹¹ *Id.*

importance to the Ponca Nation of Oklahoma,¹¹² and the Medicine Wheel/Medicine Mountain area in Wyoming, significant to numerous regional tribes including the Arapaho, Bannock, Blackfeet, Cheyenne, Crow, Kootenai-Salish, Plains Cree, Shoshone, and Lakota Nations.¹¹³ Sacred sites have also been designated as Traditional Cultural Properties (TCPs), recognizing their “special significance” and “associations with the cultural practices, traditions, beliefs, lifeways, arts, crafts, or social institutions of a living community.”¹¹⁴

NHPA requires reviews including archeological surveys associated with proposed government or government-permitted projects on lands covered by the statute.¹¹⁵ Tribes are able to weigh in on the scope and challenge the adequacy of these archeological surveys, in conjunction with their NHPA-sanctioned role as stakeholders in such projects.¹¹⁶ At the same time, some archeological surveys present an inherent cultural conflict for Indigenous groups seeking to avail themselves of NHPA’s process protections. Indigenous religious practices may require keeping the location and purpose of some sacred sites private, potentially limiting the reach of NHPA tools or tribal interest in the NHPA process.¹¹⁷

In reality, NHPA is not an especially effective tool for preserving or protecting access to Indigenous sacred sites for ceremonial purposes.¹¹⁸ Indigenous sacred sites are not significant primarily because of their historical import but for their religious-cultural meaning.¹¹⁹ Just as Indigenous people are not relics of a historical past, their places of religious exercise and identity ought not be limited in their value by their

¹¹² *Id.*

¹¹³ See Fred Chapman, *Medicine Wheel/Medicine Mountain: Celebrated and Controversial Landmark*, WYOHISTORY.ORG (Apr. 10, 2019), <https://www.wyohistory.org/encyclopedia/medicine-wheel> [https://perma.cc/5CDD-75PL].

¹¹⁴ *National Register*, *supra* note 108. Examples of Indigenous sacred sites designated as TCPs include Bassett Grove Ceremonial Grounds, Kuchamaa (Tecate Peak), and Nantucket Sound. *Id.*

¹¹⁵ 54 U.S.C. § 306101; *see also* 36 C.F.R. pt. 800 (2019).

¹¹⁶ 36 C.F.R. § 800.2(c)(2) (2019).

¹¹⁷ See Marincic, *supra* note 109, at 1785–86.

¹¹⁸ See Martin Nie, *The Use of Co-management and Protected Land-Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands*, 48 NAT. RES. J. 585, 586, 621–22 (2008). “Tribes seeking to use protected land designations, especially access management, to protect tribal values, may encounter special problems and challenges.” *Id.* at 586. For example, in designating the Medicine Wheel as a National Historic Landmark in 1969, the decision limited “timber harvesting activities in the Bighorn National Forest,” but did “not prohibit logging.” *Id.* at 622. This decision was controversial and led to litigation over the change to Bighorn National Forest. *Id.*

¹¹⁹ See Skibine, *Towards a Balanced Approach*, *supra* note 4, at 273–74 (“The preservation of these sites as well as tribal people’s ability to practice their religion there is intrinsically related to the survival of tribes as both cultural and self-governing entities.” (footnotes omitted)); *see also* Lyng v. Nw. Indian Cemetery Protective Ass’n, 485 U.S. 439, 461 (1988) (Brennan, J., dissenting) (“[F]rom the Native American perception . . . land is itself a sacred, living being.”).

historical or archeological interest. They are important for contemporary, ongoing use and access by Indigenous peoples.¹²⁰

Similarly, environmental laws may provide limited avenues of statutory protection for Indigenous sacred sites. NEPA requires environmental impact statements (EIS) for federal actions, necessitating detailed studies of anticipated impacts on the human environment, including impacts on tribal interests and resources.¹²¹ The NEPA-required EIS commissioned by the Forest Service provided one of the foundations for the claims brought by the Yurok, Karok, and Tolowa tribes in *Lyng* to corroborate their claims that the area in dispute was “an integral and indispensable part of Indian religious conceptualization and practice.”¹²² The EIS concluded that the proposed Forest Service road would do devastating damage to the sacred site, yet the Court said the road construction could continue.¹²³ Though ultimately ineffective at obtaining a favorable court result in *Lyng*, NEPA requires federal agencies to at least create a factual record mapping the impact of proposed actions on Indigenous religious practices and sacred sites; in *Lyng* this record proved persuasive in motivating the political branches to act to protect the site where the Court would not. Such review processes and the records they generate are vital for parties who wish to challenge proposed federal action harmful to sacred sites.

The political branches have taken direct, if somewhat ineffectual, steps to articulate the contemporary view that Indigenous sacred sites ought to be protected and managed in cooperation with tribal governments and Indigenous groups. AIRFA, enacted in 1978 at the height of the congressional agenda promoting the federal policy of tribal self-determination, includes soaring aspirational language:

[H]enceforth 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.¹²⁴

¹²⁰ See Lauryne Wright, *Focusing on American Indians in Cultural Resource Preservation Laws*, THE ADVOCATE, Aug. 2004, at 20, 22 (discussing the aim of preservation as the ongoing “exercise of traditional religions [and] access to sacred sites”).

¹²¹ See 42 U.S.C. § 4332(C); see also 40 C.F.R. § 1502.16(a)(5) (2019) (requiring EIS to consider “[p]ossible conflicts between the proposed action and the objectives of . . . Tribal . . . land use plans, policies and controls for the area concerned”).

¹²² *Lyng*, 485 U.S. at 442 (quoting the environmental impact statement).

¹²³ *Id.* at 441–42.

¹²⁴ American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified at 42 U.S.C. § 1996); see *id.* (acknowledging that “[f]ederal policies and regulations” have denied Native Americans “access to sacred sites required in their religions, including cemeteries”; banned the “possession of sacred objects necessary to the exercise of [their] religious rites and ceremonies”; and “banned” or “interfered with” their ceremonies).

But the Supreme Court held in *Lyng* that AIRFA created no cause of action or judicially enforceable right.¹²⁵ Instead, the Court noted Representative Morris Udall's observation from the legislative history that AIRFA was merely intended to convey the *sense of Congress* through a joint resolution, and as such, "ha[d] no teeth."¹²⁶ Subsequent efforts have attempted to shore up AIRFA, such as the 1994 amendments to decriminalize the use of peyote for bona fide traditional ceremonial purposes¹²⁷ and Executive Order 13,007 issued by President Bill Clinton in 1996.¹²⁸ The 1996 Executive Order directed federal agencies to seek to "(1) accommodate access to and ceremonial use of Indian sacred sites by religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites."¹²⁹ As with AIRFA, the Executive Order does not convey a right of action, but it is intended to guide the management of federal lands. Like any Executive Order, the scope of protection it offers varies with particular projects and decisionmakers. Taken together, these legal tools (at least as currently interpreted) have proven insufficient to protect sacred sites.

II. RECONCEPTUALIZING GOVERNMENT COERCION

A. Double Standards in the Concept of Coercion

The crux of the problem for protection of Indigenous sacred sites is as follows: because tribes were divested of their traditional homelands by the government, Indigenous peoples are often placed in the difficult position of being beholden to government to continue to engage in centuries-old practices and ceremonies.¹³⁰ Of necessity, this dynamic complicates and enmeshes the effort to protect sacred sites with the endeavor of carrying out government operations on federal lands.¹³¹ In

¹²⁵ See *Lyng*, 485 U.S. at 455.

¹²⁶ *Id.* (quoting 124 CONG. REC. 21,445 (1978) (statement of Rep. Morris K. Udall)).

¹²⁷ American Indian Religious Freedom Act Amendments of 1994, Pub. L. No. 103-344, 108 Stat. 3125 (codified at 42 U.S.C. § 1996a).

¹²⁸ Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996).

¹²⁹ *Id.*

¹³⁰ See, e.g., William M. Bryner, Note, *Toward a Group Rights Theory for Remediating Harm to the Subsistence Culture of Alaska Natives*, 12 ALASKA L. REV. 293, 300 n.32 (1995) (noting that Alaska Natives were "left alone . . . to continue their centuries-old way of life" (quoting *Katelnikoff v. U.S. Dep't of Interior*, 657 F. Supp. 659, 665 (D. Alaska 1986)) only after a "subsistence exemption to the Marine Mammal Protection Act" allowed them to do so (citing *Katelnikoff*, 657 F. Supp. at 665)).

¹³¹ See *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 282 F. Supp. 2d 1271, 1277 (D.N.M. 2002) (highlighting "the legitimate governmental objective of preserving Native American culture" (quoting *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1216 (5th Cir. 1991)); see also Michael D. McNally, *Native American Religious Freedom as a Collective Right*, 2019 BYU L. REV. 205, 206 (discussing the government's pipeline operation conflicting with the effort to preserve a "veritable sacred district of gravesites, stone rings designating Lakota ancestral

other words, Indigenous religious exercise is particularly vulnerable to government coercion.

But rather than making the government more cautious about the power it holds over Indigenous religious exercise, this dynamic has enabled the government to be more cavalier. For example, in the conflict over sacred sites in *Lyng*, parties brought a lawsuit challenging a decision by the U.S. Forest Service to engage in road construction and timber harvesting.¹³² The members of the Yurok, Karok, and Talowa tribes were seeking to protect what they described as their “most holy” site that had been “continuously used by them for generations.”¹³³ Along these lines, the Forest Service’s own study had concluded that the proposed intrusions from the construction and logging would be “potentially destructive of the very core of Northwest [Indian] religious beliefs and practices.”¹³⁴ The district court found that the area constituted the “center of the spiritual world” for these tribes,¹³⁵ and that the Forest Service’s proposed actions would “seriously impair” these religious practices,¹³⁶ and that the Forest Service “would not serve any compelling public interest” through its timber-harvesting plan.¹³⁷ Thus, the lower court held that this action would violate the tribal members’ free exercise rights.¹³⁸ The appellate court affirmed the district court’s free exercise decision.¹³⁹

However, in a five-to-three decision,¹⁴⁰ the Supreme Court reversed and ruled construction of the proposed road did not violate the First Amendment regardless of its effect on the religious practices.¹⁴¹ In dissent, Justice Brennan argued that “the competing claims that both the Government and Native Americans assert in federal land are fundamentally incompatible.”¹⁴² Failing to acknowledge this conflict, the majority famously stated that “[w]hatever rights the Indians may have to the use of the area, . . . those rights do not divest the Government of its

knowledge, Sitting Bull’s traditional encampment, and the holy confluence of the Cannonball River and the Missouri”).

¹³² *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 442–43 (1988).

¹³³ Brief for the Indian Respondents at *2, *Lyng*, 485 U.S. 439 (No. 86-1013), 1987 WL 880352.

¹³⁴ *Id.* at *11 (alteration in original) (quoting Joint Appendix at 193, *Lyng*, 485 U.S. 439 (No. 86-1013), 1987 U.S. S. Ct. Briefs LEXIS 601, at *43).

¹³⁵ *Nw. Indian Cemetery Protective Ass’n v. Peterson*, 565 F. Supp. 586, 594 (N.D. Cal. 1983).

¹³⁶ *Id.*

¹³⁷ *Id.* at 596.

¹³⁸ *Id.* at 597.

¹³⁹ *Nw. Indian Cemetery Protective Ass’n v. Peterson*, 795 F.2d 688, 692, 698 (9th Cir. 1986). The Ninth Circuit vacated a portion of the district court’s injunction that had been rendered moot, but otherwise affirmed the district court’s ruling. *See id.* at 698.

¹⁴⁰ Justice Kennedy did not participate in the decision. *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 441 (1988).

¹⁴¹ *See id.* at 451, 458.

¹⁴² *Id.* at 474 (Brennan, J., dissenting).

right to use what is, after all, *its* land.”¹⁴³ The irony of this statement is that such sites generally became government property only because Indigenous peoples were divested of *their* land.¹⁴⁴ Yet nowhere in the *Lyng* majority or dissent did the Court even acknowledge the reality that this sacred land now belongs to the government only because it was taken from Indigenous peoples, often by coercive means. If we imagine a world in which the government had, through a variety of means, obtained title to the majority of Christian pilgrimage sites in the country, it’s hard to believe that courts would so dismissively ignore the need of Christians to continue to access those sacred spaces.

The Court’s reasoning in *Lyng* highlights (and is perhaps the origin of) the government’s primary justification for denying protection of and access to sacred sites: the idea that no government coercion is involved in such denials. The Court reasoned that the road construction would not result in tribal members being “coerced by the Government’s action into violating their religious beliefs.”¹⁴⁵ The Court also noted that the government action would not “penalize religious activity.”¹⁴⁶ “The crucial word in the constitutional text is ‘prohibit,’”¹⁴⁷ the Court noted, explaining that the Free Exercise Clause “is written in terms of what the government cannot do to the individual.”¹⁴⁸

In contrast, the dissent in *Lyng* conceived of coercion as including passive prevention of religious exercise. Justice Brennan argued: “Ultimately, the Court’s coercion test turns on a distinction between governmental actions that compel affirmative conduct inconsistent with religious belief, and those governmental actions that prevent conduct consistent with religious belief. In my view, such a distinction is without constitutional significance.”¹⁴⁹ He went on to observe that “religious freedom is threatened no less by governmental action that makes the practice of one’s chosen faith impossible than by governmental programs that pressure one to engage in conduct inconsistent with religious beliefs.”¹⁵⁰

One phenomenon that has gone unnoticed by scholars is that this debate about what counts as government coercion unwittingly partakes of longstanding philosophical debates about the nature of coercion itself. The dissent’s argument has some similarity to Thomas Aquinas’s position articulated in *Summa Theologica*, in which he states that coercion

¹⁴³ *Id.* at 453 (majority opinion).

¹⁴⁴ *See supra* section I.B, pp. 1307–17.

¹⁴⁵ *Lyng*, 485 U.S. at 449.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 451.

¹⁴⁸ *Id.* (quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)).

¹⁴⁹ *Id.* at 468 (Brennan, J., dissenting).

¹⁵⁰ *Id.*

occurs when an agent — the coercer — makes something necessary for another individual — the coercee.¹⁵¹ In other words, an individual is being coerced when it becomes necessary for her to do something “against [her] inclination.”¹⁵² Aquinas argued that the very “notion of law” was that it “has coercive power.”¹⁵³ Some iterations of this classical view of coercion have been echoed by many other philosophers.¹⁵⁴ One common theme of these conceptions of coercion is the idea that coercive power exists where the coercer is interfering with the voluntary choice of the coercee. Sometimes this interference is done more indirectly, by making the choice more dangerous or costly. And sometimes the interference is direct and complete, such that voluntary choice simply becomes impossible. Imprisonment is an example of this latter type of coercion.

In contrast, the *Lyng* majority’s primary justification for denying government protection of and access to sacred sites is the idea that no government coercion is involved in such denials because no threats of penalties have been made. As the Supreme Court noted in its seminal decision in *Lyng*, by denying access to a sacred site, the government’s action was not coercing tribal members through threat of penalties or denial of benefits enjoyed by other citizens.¹⁵⁵ This argument is reminiscent of a narrower conception of coercion taken by philosophers like Robert Nozick, who argued that coercion required a threat of bringing about some negative consequence communicated to another party with

¹⁵¹ THOMAS AQUINAS, *SUMMA THEOLOGICA* pt. I, q. 82, art. 1, at 413 (Fathers of the English Dominican Province trans., Beniger Bros. 1948) (c. 1271).

¹⁵² *Id.*

¹⁵³ *Id.* pt. I-II, q. 96, art. 5, at 234.

¹⁵⁴ In *On Liberty*, John Stuart Mill appeared to treat “coercion” and “interference” as essentially interchangeable concepts. JOHN STUART MILL, *ON LIBERTY* 21 (4th ed. 1869) (describing “compulsion and control” ranging from “physical force in the form of legal penalties” to “the moral coercion of public opinion”). F.A. Hayek described coercion as involving the use of physical violence or the threat thereof against someone else’s person or property. But he argued that coercion encompassed more than that, including “control of the environment or circumstances of a person by another [so] that, in order to avoid greater evil, he is forced to act not according to a coherent plan of his own.” F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 20–21 (1960). He noted that this broader conception of coercion was necessary because “the threat of physical force is not the only way in which coercion can be exercised.” *Id.* at 135. Hans Kelsen similarly defines coercive power of the state broadly, to include a consequence executed against the will of the individual. HANS KELSEN, *PURE THEORY OF LAW* 34 (Max Knight trans., Univ. Cal. Press 1967) (1934). J. R. Lucas argued: “A man is being *coerced* when either force is being used against him or his behaviour is being determined by the threat of force.” J. R. LUCAS, *THE PRINCIPLES OF POLITICS* 57 (1966). He described “imprisonment” as “the paradigm form of coercion.” *Id.* at 60. “Even if it were not regarded as a penalty, it would still be effective in frustrating the efforts” of the imprisoned individual. *Id.*

¹⁵⁵ See *Lyng*, 485 U.S. at 449.

the intent of keeping the party from choosing to perform a specific action.¹⁵⁶ A number of theorists have since adopted this framework.¹⁵⁷

The *Lyng* majority's narrower conception of coercion has been repeated and even further narrowed by numerous subsequent courts in the statutory context of RFRA. For example, in *Navajo Nation v. United States Forest Service*, the Ninth Circuit refused to find a substantial burden where the government authorized 1.5 million gallons of recycled sewage water to be placed daily on the San Francisco Peaks in Arizona, despite the fact that thirteen different American Indian tribes viewed this as a grave desecration of a site sacred to them for pilgrimage and religious ceremonies.¹⁵⁸ The court explained that "there [was] no showing the government ha[d] coerced" the tribes under "threat of sanctions" or by "condition[ing] a government benefit," and thus no burden on the tribes' religious exercise.¹⁵⁹ Similarly, in *Snoqualmie Indian Tribe v. FERC*,¹⁶⁰ the plaintiffs alleged that a proposed hydroelectric dam would, among other things, deny them access to waterfalls necessary for their religious experiences.¹⁶¹ The court held that "[t]he Tribe's arguments that the dam interferes with the ability of tribal members to practice religion are irrelevant" because the government did "not coerce the Plaintiffs to act contrary to their religion."¹⁶² And in *Slockish v.*

¹⁵⁶ See Robert Nozick, *Coercion*, in PHILOSOPHY, SCIENCE, AND METHOD 440, 441–45 (Sidney Morgenbesser et al. eds., 1969). For a perspective critiquing a narrow conception of coercion, see Robert L. Hale, *Coercion and Distribution in a Supposedly Non-coercive State*, 38 POL. SCI. Q. 470, 470 (1923); see also BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 8–9 (1998); and ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY 15–19 (1958), which distinguished between positive and negative liberty. For other sources discussing the concept of coercion, see FREDERICK SCHAUER, THE FORCE OF LAW 1 (2015); ALAN WERTHEIMER, COERCION 172, 308 (1987), which draws out a two-pronged theory of coercion and its moral and legal effects from a wide array of private and criminal law cases; and Ekow N. Yankah, *The Force of Law: The Role of Coercion in Legal Norms*, 42 U. RICH. L. REV. 1195, 1196–200 (2008), which uses an alternative genealogy, including the work of Aristotle, H.L.A. Hart, Joseph Raz, and others, to explain the central role of coercion in a positivist conception of law.

¹⁵⁷ Scott Anderson, *Coercion*, STAN. ENCYCLOPEDIA OF PHIL. (Oct. 27, 2011), <https://plato.stanford.edu/entries/coercion/#Aqu> [<https://perma.cc/57AV-N4G5>] ("Though a few subsequent writers, like Michael Bayles . . . and Gunderson . . . following Bayles[,] and Grant Lalmond . . . have accepted direct force as equally a means of coercion, Nozick's restriction of the topic to the use of threats . . . has been the much more frequently accepted view, whether explicitly or implicitly." (footnote omitted)).

¹⁵⁸ *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008); see *id.* at 1081 (Fletcher, J., dissenting).

¹⁵⁹ *Id.* at 1063 (majority opinion).

¹⁶⁰ 545 F.3d 1207 (9th Cir. 2008).

¹⁶¹ *Id.* at 1213.

¹⁶² *Id.* at 1214; see also *Holly v. Jewell*, 196 F. Supp. 3d 1079, 1090 (N.D. Cal. 2016) ("[T]he *Burwell v. Hobby Lobby Stores, Inc.* majority opinion clearly stands for the proposition that RFRA provides broad protection for religious freedom . . ."); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 3d 77, 77 (D.D.C. 2017) ("The government action here . . . does not

United States Federal Highway Administration,¹⁶³ a district court held that even where the government physically destroyed an ancient stone altar used in tribal ceremonies and bulldozed a sacred burial ground, the government had done nothing to “burden” any Indigenous religious beliefs.¹⁶⁴ In other words, unless the government is affirmatively threatening a tribe with penalties or denying them a generally available government benefit, then there is “nothing to see here” in terms of government coercion, and no actionable burden on free exercise.

Highlighting these divergent and deep-seated conflicting views about coercion is important for a few reasons. First, it highlights that defining what constitutes government coercion is not as straightforward and universally obvious as the *Lyng* majority and subsequent courts somewhat casually and uncritically suggest.¹⁶⁵

Second, and more importantly, regardless of whether one formally labels the government’s actions as “coercive” as a philosophical matter, the important doctrinal question is whether the government is bringing to bear its sovereign power in a way that inhibits the important ideal of religious voluntarism — the ability of individuals to voluntarily practice their religious exercise consistent with their own free self-development.¹⁶⁶ Indeed, as discussed in sections II.B and II.C below, this is precisely the sort of question courts ask when evaluating government burdens on other forms of religious exercise. And the failure to ask this same question for Indigenous religious practices in accessing sacred sites has created a double standard, wherein the law recognizes a much more expansive traditional notion of coercion for non-Indigenous religious practices, and the narrower conception of coercion, in the tradition of Nozick, when it comes to Indigenous sacred sites.

Third, assuming acceptance of the importance of religious voluntarism, the *Lyng* conception of coercion treats tribal members as though they are no different than other non-Indigenous individuals, all free to exercise their religion in a context where voluntary choice is the default. But tribal members seeking access to federally owned sacred sites are not exercising their religion in such a voluntary baseline context and are not, therefore, similarly situated. Instead, Indigenous practitioners are

impose a sanction on the Tribe’s members for exercising their religious beliefs, nor does it pressure them to choose between religious exercise and the receipt of government benefits.”).

¹⁶³ No. 08-cv-01169, 2018 WL 2875896 (D. Or. June 11, 2018).

¹⁶⁴ See *id.* at *1 (quoting *Slockish v. U.S. Fed. Highway Admin.*, No. 08-cv-01169, 2018 WL 4523135, at *5 (D. Or. Mar. 2, 2018) (findings and recommendations of the magistrate judge)).

¹⁶⁵ See *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 438, 449 (1988).

¹⁶⁶ For a discussion of religious voluntarism, see Giannella, *supra* note 22, at 517–18, which argues that “[r]eligious voluntarism thus conforms to that abiding part of the American credo which assumes that both religion and society will be strengthened if spiritual and ideological claims seek recognition on the basis of their intrinsic merit,” *id.* at 517, and that this value includes avoiding “plac[ing] religion] at a handicap,” *id.* at 518.

subjected to a baseline of omnipresent government interference with their religious exercise.¹⁶⁷ They are at the mercy of government to protect sacred sites and allow access in ways that are consistent with religious theological requirements.¹⁶⁸ This baseline of government interference means tribal members are not on the same footing with those whose voluntary worship is predominantly accomplished in private space. This interference with religious practices is simply being overlooked for Indigenous peoples. Notably, as discussed below in section II.C, in other analogous contexts where other non-Indigenous religious practices are common, such as prison or the military, our law has recognized and dealt with an analogous baseline of passive government interference by requiring government to offer affirmative accommodations. Indigenous peoples should be entitled to the same protections, and the government should be required to offer similar affirmative accommodations.

B. Active Interference Where the Baseline Is Voluntary Choice

The government has a number of tools in its tool kit when it comes to exerting sovereign power over individuals in contexts in which voluntary choice is the baseline. Government can offer carrots — incentivizing private action with a government benefit for doing what it wants. It can threaten with sticks — a penalty for refusing to do what the government wants. These carrots and sticks are likely the most common tools the government employs in a context where the baseline is voluntary choice. The Supreme Court has recognized these tools as being constrained by the government’s responsibility not to improperly burden religious exercise. In *Sherbert v. Verner*,¹⁶⁹ the Court held that a denial of employment benefits constituted a substantial burden on the religious exercise of a Seventh-day Adventist.¹⁷⁰ And in *Wisconsin v. Yoder*,¹⁷¹ the Court held that threatening Amish families who kept their children out of public school with a small criminal fine also constituted a substantial burden.¹⁷² Along these lines, Justice Gorsuch recently noted, “the Free Exercise Clause doesn’t easily tolerate”¹⁷³ the government decreasing the “voluntary choice by individuals” regarding their religious practices.¹⁷⁴ That is true regardless of whether the government puts only a “thumb on the scale” by giving benefits to those who are not

¹⁶⁷ See Samuel D. Brooks, Note, *Native American Indians’ Fruitless Search for First Amendment Protection of Their Sacred Religious Sites*, 24 VALPARAISO U. L. REV. 521, 530 (1990).

¹⁶⁸ See *id.*

¹⁶⁹ 374 U.S. 398 (1963).

¹⁷⁰ See *id.* at 404, 410.

¹⁷¹ 406 U.S. 205 (1972).

¹⁷² See *id.* at 207–08, 218.

¹⁷³ *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2278 (2020) (Gorsuch, J., concurring).

¹⁷⁴ *Id.* (quoting *McDaniel v. Paty*, 435 U.S. 618, 640 (1978)).

religious groups, or by putting a “gun to the head” through more severe consequences for religious practices.¹⁷⁵

Sometimes, the government can forego carrots and sticks and instead use sheer force to require an individual to conform his or her behavior to government requirements. In other words, the government can use its sovereign power to make voluntary action impossible, rather than just make it costlier with carrots and sticks. Consider the paradigmatic example of forceful government coercion: the arrest of an individual by police.¹⁷⁶ Force is a power the government uses much less frequently than carrots and sticks, and thus it is the exception and not the rule for government-created burdens on religious exercise. But it is the exception because it impinges on the value of religious voluntarism *more*, not less.

When America was governed by colonial England, brute force was a tool used more frequently to punish or inhibit the exercise of religion than it is now. Virginia, for example, imprisoned some thirty Baptist preachers between 1768 and 1775 in part because of their undesirable “evangelical enthusiasm.”¹⁷⁷ Horsewhipping Baptist ministers was also practiced in the colony.¹⁷⁸ In a 1768 collection of newspaper tracts, a collection that included writings of “The American Whig,” one passage stated that established religions entail maintenance “by the infliction of temporal punishments on transgressors” of religious requirements.¹⁷⁹ In England, Samuel Fisher in 1662 described four ways of treating those who dared “dissent[] from the publick Establishment of Religion and its Laws.”¹⁸⁰ These methods included attempts “to Impoverish, Imprison, Banish and Destroy all Dissenters.”¹⁸¹ Fisher argued that the English establishment, in calling for the “suppress[ion] . . . of both [dissenters’] Pulpits and their Presses,”¹⁸² were acting like the “Papists” who burned books they viewed as “her[e]tical” and sometimes “condemned” dissenting religious leaders “to be burned as an obstinate Heretick.”¹⁸³

Happily, these uses of force against religious individuals are far less common today. But some modern cases still involve a higher level of government coercion. For example, the Eighth Circuit case of *McCurry*

¹⁷⁵ *Id.*

¹⁷⁶ LUCAS, *supra* note 154, at 89.

¹⁷⁷ Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part 1: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2166 (2003).

¹⁷⁸ *Id.* at 2119.

¹⁷⁹ The American Whig, *No. XV*, PARKER’S GAZETTE, June 20, 1768, reprinted in 1 A COLLECTION OF TRACTS FROM THE LATE NEWS PAPERS, &C. 240, 243 (New York, John Holt 1768), <https://quod.lib.umich.edu/cgi/t/text/text-idx?c=evans;cc=evans;q1=No8490;rgn=main;view=text;idno=No8490.0001.001> [<https://perma.cc/22QB-WLJK>].

¹⁸⁰ SAMUEL FISHER, THE BISHOP BUSIED BESIDE THE BUSINESSE pt. 1, at 36 (n.p. 1662).

¹⁸¹ *Id.*

¹⁸² *Id.* at 35.

¹⁸³ *Id.* at 36.

*v. Tesch*¹⁸⁴ provides a particularly striking example of how jarring an affirmative act of brute force can be when the baseline is voluntary choice. There, a Christian church operated a school but did not comply with all of the state laws.¹⁸⁵ The state court entered an injunction and subsequent order that authorized the government to install locks on the entrances to the building and secure the building to make sure it was being used only for appropriate purposes.¹⁸⁶ The Eighth Circuit held that preventing worshippers from using the building for religious activities during non-authorized times interfered with the members' free exercise rights¹⁸⁷: "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."¹⁸⁸ Further, the court held that:

This principle applies with particular force to *places*, such as church buildings, which have a special spiritual significance to the persons who wish to worship there. . . . Even if the state were to padlock the church and open it only when persons wished to enter in order to hold religious services, the burden on religious freedom would be less drastic than the action taken here.¹⁸⁹

Thus, the court easily found a burden on religious exercise in this case because the government had made it physically impossible for the churchgoers to access their worship space consistent with their theological requirements.

Compare that outcome to *Slockish*,¹⁹⁰ a case dealing with a site sacred to the people of the Confederated Tribes of Grande Ronde and Confederated Tribes and Bands of the Yakama Nation.¹⁹¹ In a 2008 highway widening project, the government bulldozed a sacred "ancestral burial ground[,]," "destroyed a sacred stone altar" used in religious ceremonies, cut down old growth trees that offered privacy for sacred rituals, and "removed safe access to the site[]." ¹⁹² One tribal leader described this site as one that "never had walls, never had a roof, and never

¹⁸⁴ 738 F.2d 271 (8th Cir. 1984).

¹⁸⁵ *Id.* at 272.

¹⁸⁶ *Id.*

¹⁸⁷ *See id.* at 275–76.

¹⁸⁸ *Id.* at 275 (quoting *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76–77 (1981) (alteration in original)).

¹⁸⁹ *Id.* (emphasis added).

¹⁹⁰ No. 08-cv-01169, 2018 WL 4909901 (D. Or. Oct. 10, 2018).

¹⁹¹ *See Judge Rules Against Tribal Members Who Filed Suit over Sacred Site near Mount Hood*, YAKIMA HERALD (Mar. 6, 2018), https://www.yakimaherald.com/news/local/judge-rules-against-tribal-members-who-filed-suit-over-sacred-site-near-mount-hood/article_cf197bec-2108-11e8-9200-d960156159c.html [<https://perma.cc/Y2W7-RMD2>].

¹⁹² *Slockish v. U.S. Federal Highway Administration*, BECKET FUND FOR RELIGIOUS LIBERTY, <https://www.becketlaw.org/case/slockish-v-u-s-federal-highway-administration> [<https://perma.cc/G59S-3BY7>]; *see* Plaintiffs' Motion for Summary Judgment at 5–6, 15–16, 18, 34, *Slockish v. U.S. Fed. Highway Admin.*, No. 08-cv-01169 (D. Or. Dec. 14, 2018).

had a floor,” but was “just as sacred as a white person’s church.”¹⁹³ In contrast to *McCurry*, however, the court failed to protect the tribes’ religious freedom.¹⁹⁴ The exhibits below provide some illustrations of the elements at issue in this sacred site, both before and after construction.

Figure 1: *Slockish* Ancient Stone Altar at Sacred Site¹⁹⁵



¹⁹³ Plaintiffs’ Motion for Summary Judgment, *supra* note 192, at 4; Elizabeth Backstrom, *Tribal Chief Says Highway Project Destroyed Religious Freedoms*, SPOKANEFAVS (June 2, 2013), <https://spokanefav.com/tribal-chief-says-highway-project-destroyed-religious-freedoms> [<https://perma.cc/NN6B-EC54>].

¹⁹⁴ See *Slockish v. U.S. Federal Highway Administration*, *supra* note 192 (noting that, as of April 2020, tribal legal challenges have failed).

¹⁹⁵ Photograph of *Slockish* Ancient Stone Altar at Sacred Site, in Plaintiffs’ Response to Defendant’s Motion for Partial Summary Judgment at exhibit 14, *Slockish v. U.S. Fed. Highway Admin.*, No. 08-cv-01169 (D. Or. Aug. 7, 2017).

Figure 2: *Slockish* Sacred Site Prior to Highway Widening¹⁹⁶



Figure 3: *Slockish* Sacred Site After Highway Widening¹⁹⁷



¹⁹⁶ Photograph from Google Street View taken in September 2007, *in* Plaintiffs' Motion for Summary Judgment, *supra* note 192, at 19.

¹⁹⁷ After Widening — 2017 (ECF 292-5-4) (photograph), *in* Plaintiffs' Motion for Summary Judgment, *supra* note 192, at 19.

The government's physical destruction made it impossible for the tribal plaintiffs to access the sacred site consistent with their theological requirements.¹⁹⁸ Nevertheless, the court held that the plaintiffs "ha[d] not established that they are being coerced to act contrary to their religious beliefs" by "threat of sanctions" or "a governmental benefit . . . being conditioned upon conduct that would violate their religious beliefs."¹⁹⁹ "Without these critical elements," the court explained, plaintiffs "cannot establish a substantial burden" on their religious exercise.²⁰⁰

These cases highlight the double standard that applies to protection of sacred spaces for other religious traditions as opposed to Indigenous sacred sites and the inadequacy of the current coercion framework. When the government has created an obstacle that physically impedes the ability of Christian worshippers to access their sacred spaces, we view this as a particularly egregious burden on religious exercise. But when the government desecrates, destroys, and removes access to Indigenous sacred sites — making previous religious ceremonies physically impossible at those locations — the coercion evaporates.

If it really were the rule that the only types of coercive action were threats of penalties or losses of benefits, this would lead to absurd results. Rather than encourage the government to act less coercively to avoid liability under religious freedom law with respect to Native American religious liberty rights, such a limited understanding of coercion would, in fact, encourage the government to act *more* coercively to avoid liability.²⁰¹ For example, courts universally acknowledge that there was a substantial burden in *Yoder*, where Amish families were forced to choose between keeping their children out of school or facing a five-dollar criminal fine.²⁰² But under the *Slockish* court's reasoning (shared by most other courts adjudicating sacred site conflicts),²⁰³ there would be a substantial burden only if the government threatened a fine or penalty, and there would be no substantial burden if the government forcibly rounded up the children and sent them to a public boarding

¹⁹⁸ Backstrom, *supra* note 193.

¹⁹⁹ *Slockish v. U.S. Fed. Highway Admin.*, No. 08-cv-01169, 2018 WL 2875896, at *1 (D. Or. June 11, 2018) (quoting *Slockish v. U.S. Fed. Highway Admin.*, No. 08-cv-01169, 2018 WL 4523135, at *5 (D. Or. Mar. 2, 2018) (findings and recommendations of magistrate judge)).

²⁰⁰ *Id.* (quoting *Slockish*, 2018 WL 4523135, at *5 (findings and recommendations of magistrate judge)).

²⁰¹ Justice Scalia illuminated this absurdity during the *Lyng* oral arguments. In response to the government counsel's assertion that there would be no constitutional problem in the federal government prohibiting the building of any houses of worship on federally owned land upon which people lived as long as the people "have absolutely no right in the land," Justice Scalia summed up the principle: "It's not the Government can do anything with its land; the Government can do anything with its land so long as it doesn't give individuals rights in the land[.]" Transcript of Oral Argument at 23, *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (No. 86-1013).

²⁰² See *Wisconsin v. Yoder*, 406 U.S. 205, 207-08, 218 (1972).

²⁰³ See *supra* note 14 and accompanying text.

school without giving the parents a choice. And, as discussed above, that is precisely what the government did to Native American families from the 1880s to the 1930s.²⁰⁴

This sort of theory, if applied in an evenhanded way elsewhere in the law, would authorize a variety of extreme and troubling actions. As long as the government simply used forceful compulsion without threatening a penalty or denying benefits, it could confiscate religious relics,²⁰⁵ mock individuals for their religious beliefs,²⁰⁶ stop individuals from praying in their own homes,²⁰⁷ or forcibly remove religious clothing²⁰⁸ — all without any recognition of government coercion. Such an understanding of coercion would turn common sense on its head.

Thus, while threats of penalties or loss of benefits are the most common sticks the government wields as means of influencing private behavior, they are not the only tools. Naked force is an even stronger instrument of *government* power. Regardless of whether the government action receives the formal label of “coercion,” courts have rightly recognized that force used to make religious exercise impossible easily qualifies as a substantial burden for non-Indigenous religious practices. The same recognition should be true for Indigenous practices. In *Slockish*, the government did not actively threaten penalties if the tribal plaintiffs performed ceremonies at their ancient stone altar. The government bulldozed the site and scattered the stones from which the altar had been

²⁰⁴ See Charla Bear, *American Indian Boarding Schools Haunt Many*, NPR (May 12, 2008, 12:01 AM), <http://www.npr.org/templates/story/story.php?storyId=16516865> [<https://perma.cc/7WF9-44FD>] (“Children were sometimes taken forcibly, by armed police.”); Margaret D. Jacobs, *A Battle for the Children: American Indian Child Removal in Arizona in the Era of Assimilation*, 45 J. ARIZ. HIST. 31, 31 (2004) (describing how the government would surround Native American camps with troops and take the children away to boarding school with military escort). In an 1887 case, the Alaskan federal district court denied the habeas petition of an Indigenous Alaskan woman who sought to regain custody of her eight-year-old son who had been forced to attend a government-funded Presbyterian school. *In re Can-ah-couqua*, 29 F. 687, 687, 690 (D. Alaska 1887). The court required the child to stay at the school and gave the mother only limited visitation rights. *Id.* at 690.

²⁰⁵ The Fifth Circuit found a substantial burden where a government worker was prohibited from bringing her religious article of faith, a kirpan, to work. See *Tagore v. United States*, 735 F.3d 324, 330 (5th Cir. 2013). But under the court’s theory, it would have been at liberty to simply confiscate the item and leave the plaintiff with no choice.

²⁰⁶ See *Mack v. Loretto*, 839 F.3d 286, 292, 304 (3d Cir. 2016) (finding the plaintiff had sufficiently pleaded to survive a motion to dismiss as to claims related to an incident where a prison official put a sticker that read “I LOVE BACON” on the back of a Muslim inmate and made statements like “there is no good Muslim, except a dead Muslim!,” *id.* at 292).

²⁰⁷ See *Sause v. Bauer*, 859 F.3d 1270, 1274 (10th Cir. 2017) (assuming that “defendants violated . . . rights under the First Amendment when . . . [police officers] repeatedly mocked” a woman and “ordered her to stop praying”).

²⁰⁸ See Dell Cameron, *Muslim Woman Sues California Police Who “Forcibly” Removed Her Hijab*, DAILY DOT (Feb. 29, 2020, 7:46 AM), <https://www.dailydot.com/irl/kirsty-powell-hijab-long-beach-police-lawsuit> [<https://perma.cc/3NA7-8TXM>]; Complaint at 3–5, *Powell v. City of Long Beach*, No. 16-cv-2966 (C.D. Cal. Apr. 29, 2016); Notice of Settlement, *Powell*, No. 16-cv-2966 (C.D. Cal. June 28, 2017).

built, making worship there as impossible as though the government had padlocked a Christian church shut or burned it to the ground.

We have been discussing affirmative tools of coercion used in the context where voluntary choice is the baseline. But none of these affirmative acts are necessary to create coercion in unique contexts where government interference with voluntary choice is the default, and uninhibited voluntary action is the exception. These scenarios, and their similarities to the context of government-owned sacred sites, are discussed below.

*C. Active Accommodation Where the
Baseline Is Passive Government Interference*

There are some legal contexts in which the government so wholly occupies the field that its interference with voluntary choice is the baseline, and removal of this coercive interference is the exception.²⁰⁹ In such circumstances, religious individuals are unable to voluntarily perform their desired religious practices unless the government affirmatively acts to lift its coercive power through a religious accommodation. As discussed below, this baseline of interference is the reality of government ownership of sacred sites. But this baseline is not wholly unique to sacred sites. Rather, it also applies in other contexts, such as prisons, the military, and to some extent zoning. Notably, in each of these contexts where more non-Indigenous religions are subject to the government's coercive power, the relevant legal framework creates an affirmative duty on the government to offer fairly robust religious accommodations to protect religious voluntarism. Some of these affirmative requirements come from constitutional protections, and some from statutory protections. After studying the legal frameworks used in these other settings, the lack of an affirmative obligation in the context of Indigenous sacred sites becomes striking and even less justifiable.²¹⁰

i. Prison. — The penal setting is the quintessential context in which the omnipresent coercive power of the government is obvious and undeniable. Government officials control the minute details of most inmates' lives, from when and what they eat to what they wear and where

²⁰⁹ Cf., e.g., Giannella, *supra* note 22, at 523 (posing a thought experiment about what religious liberty would look like in a collective society where all resources are controlled by the government).

²¹⁰ This Article is not solely making a constitutional argument about Indigenous sites. It is arguing about double standards in the law, both statutorily and constitutionally. In prison, the constitutional standard for religious protection is, currently, quite low. But our democratic process recognized the need for affirmative accommodation in the prison space in order for religion to be exercised, thus in some ways rectifying problems that could result from the low constitutional standard. See *infra* pp. 1334–35. Nonetheless, our democratic process provided the same solution to the sacred sites problem with RFRA (at least when sacred sites are impacted by federal government). But the courts have interpreted that protection away with their crabbed view of what counts as a substantial burden on that religious exercise.

they sleep. Of course, there are some religious exercises that inmates can likely perform voluntarily regardless of the coercion exerted upon them, including praying in their cell. But there are many other spiritual practices that are rendered impossible unless the government acts affirmatively to provide the resources or authorization for the religious practice to take place. Such cases have involved government refusals to provide a prisoner with religious scented oils,²¹¹ to enable a prisoner to attend a worship service,²¹² to give prisoners access to religious leaders,²¹³ or to offer religious meals such as kosher diets that are not otherwise available.²¹⁴ In all of these cases, courts have recognized a government duty to affirmatively provide these sorts of accommodations, even though these affirmative accommodations might, at times, require the government to expend significant additional resources.²¹⁵

Notably, none of those cases involved the government threatening penalties or denying generally available benefits. Beyond the initial coercive act of incarcerating the inmate, the government did not have to act affirmatively to make the religious exercise impossible. All officials need to do is ignore or deny requests for religious exercise, and the baseline of interference with voluntary choice will continue. And yet all of those cases involved coercion that courts easily recognized as burdening religious exercise in ways that were problematic.

Indeed, Congress specifically recognized that the simple fact of government “indifference, ignorance, . . . or lack of resources,” meant that “some [prison] institutions restrict religious liberty in egregious and unnecessary ways.”²¹⁶ As a result, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000²¹⁷ (RLUIPA). This law creates a presumption that the government must not remain in a state

²¹¹ *Nance v. Miser*, 700 F. App'x 629, 631–32 (9th Cir. 2017) (finding that denial of scented oils constituted substantial burden).

²¹² *Greene v. Solano Cnty. Jail*, 513 F.3d 982, 988 (9th Cir. 2008).

²¹³ *Murphy v. Collier*, 139 S. Ct. 1475, 1475 (2019) (granting a stay of execution after state denied petitioner access to a Buddhist spiritual leader in the execution room); *Gutierrez v. Saenz*, No. 19-8695, 2020 WL 3248349, at *1 (U.S. June 26, 2020) (staying execution pending disposition of the petition for writ of certiorari).

²¹⁴ *United States v. Sec'y, Fla. Dep't of Corr.*, 828 F.3d 1341, 1343–44 (11th Cir. 2016).

²¹⁵ See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 730 (2014) (“[B]oth RFRA and its sister statute, RLUIPA, may in some circumstances require the Government to expend additional funds to accommodate citizens’ religious beliefs.”); *Beerheide v. Suthers*, 286 F.3d 1179, 1191 (10th Cir. 2002) (holding that Colorado Department of Corrections lacked even a “valid penological interest[]” where a kosher diet would have increased the annual food budget by “.158 percent”); Plaintiff-Appellant’s Opening Brief at 18, *Rich v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 525 (11th Cir. 2013) (No. 12-11735) (noting that in Texas, Michigan, and Indiana, the cost of providing a kosher diet ranges from \$28,324 to \$272,000 per year).

²¹⁶ 146 CONG. REC. 16,699 (2000) (joint statement of Sens. Hatch and Kennedy).

²¹⁷ 42 U.S.C. §§ 2000cc to 2000cc-5.

of passive “indifference” toward religion²¹⁸ but must instead affirmatively act to accommodate prisoners so that they can practice their religion.²¹⁹

In *Yellowbear v. Lampert*,²²⁰ for example, a prison denied a prisoner’s request to access a sweat lodge, which meant it was physically impossible for a prisoner to access the sacred space needed for his religious exercise.²²¹ And the government’s refusal to affirmatively remove the coercion through an accommodation made it an “eas[y]” case for the Tenth Circuit to find a substantial burden.²²² In other similar cases, courts have noted that “[t]he greater restriction (barring access to the practice) includes the lesser one (substantially burdening the practice).”²²³ Making religious practice physically impossible by opting to continue the passive baseline of coercion rather than an active religious accommodation is an obvious case where religious voluntarism has been defeated.

To be sure, prison officials can and do engage in affirmative acts of coercion above and beyond the passive baseline of coercion. They can do things like confiscate religious items²²⁴ or forcibly shave an inmate’s unauthorized hair growth.²²⁵ And prison officials can also threaten additional penalties in prison.²²⁶ But these affirmative coercive acts simply pile on top of the existing baseline of passive interference with voluntary choice.

²¹⁸ 146 CONG. REC. 16,699 (2000) (joint statement of Sens. Hatch and Kennedy).

²¹⁹ The prisoner must demonstrate a substantial burden, and government must provide an accommodation unless the government demonstrates it has a compelling interest in not providing the accommodation, and this interest cannot be accomplished in some other, less restrictive way. 42 U.S.C. § 2000cc-1(a).

²²⁰ 741 F.3d 48 (10th Cir. 2014).

²²¹ *Id.* at 53.

²²² *Id.* at 56.

²²³ *Haight v. Thompson*, 763 F.3d 554, 565 (6th Cir. 2014); *see also Nance v. Miser*, 700 F. App’x 629, 631–32 (9th Cir. 2017) (finding that denial of scented oils constituted substantial burden because it “prohibit[s] religious] exercises”); *Koger v. Bryan*, 523 F.3d 789, 799 (7th Cir. 2008) (“[A] regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable.” (omission in original) (quoting *C.L. for Urb. Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003))); *Murphy v. Mo. Dep’t of Corr.*, 372 F.3d 979, 988 (8th Cir. 2004) (“To constitute a substantial burden, the government policy or actions: ‘must significantly inhibit or constrain conduct or expression . . . ; must meaningfully curtail a [person’s] ability to express adherence to his or her faith; or must deny a [person] reasonable opportunities to engage in those activities’” (alterations in original) (quoting *Weir v. Nix*, 114 F.3d 817, 820 (8th Cir. 1997))); *Shaw v. Norman*, No. 07cv443, 2008 WL 4500317, at *13 (E.D. Tex. Oct. 1, 2008) (finding that “confiscation of [religious] items” is a substantial burden because it “[t]akes away the very items [plaintiff] need[s] to practice his religion”).

²²⁴ *Shaw*, 2008 WL 4500317, at *13.

²²⁵ *Warsoldier v. Woodford*, 418 F.3d 989, 996 (9th Cir. 2005) (acknowledging the government’s concession that “physically forc[ing] an inmate] to cut his hair” would constitute a substantial burden).

²²⁶ *Holt v. Hobbs*, 135 S. Ct. 853, 859, 862 (2015) (holding that a prison violated RLUIPA in requiring a Muslim prisoner to either shave his beard or face disciplinary action).

2. *Military*. — The military is another context in which the government exerts a significant amount of control over service members' lives, including regulations about their hairstyles, use of phones while walking, types of beverages and food that may be consumed, and even appropriate times for using pockets.²²⁷ Particularly when members of the military are deployed, certain aspects of their religious practice would no longer be possible if the government simply remained indifferent to those religious needs, rather than affirmatively accommodating them.

Unsurprisingly, then, courts and scholars have long interpreted the Religion Clauses to require affirmative action by government to accommodate religious exercise of the men and women in the military.²²⁸ This has included making a provision for chaplains to facilitate the religious exercise of service members subject to the restrictions of military life. Chaplaincies exist within the Department of Defense (“DOD”), the Veterans Administration (“VA”), and the Department of Justice.²²⁹ Courts have held that affirmative accommodation in the form of such chaplaincy services are required “under the Establishment Clause . . . [and] the Free Exercise Clause” to facilitate the religious exercise of service members.²³⁰ Courts have also said that religious accommodations for service members must extend beyond DOD; otherwise, hospitalized veterans receiving care at VA hospitals could be forced “to choose between accepting the medical treatment to which their military service has entitled them and going elsewhere in order to freely exercise their chosen religion.”²³¹ Courts have observed the “vital” nature of these affirmative religious accommodations so that voluntary religious choice is protected and members of the military will not be effectively barred from practicing their religion.²³²

²²⁷ See, e.g., Air Force Instruction 36-2903, § 2.13.7 (2020) (“Do not stand or walk with hand(s) in pocket(s), except to insert or remove an item Do not consume food and/or beverage while walking in uniform While walking in uniform use of personal electronic media devices, including ear pieces, speaker phones or text messaging is limited to emergencies or when official notifications are necessary”); Geoffrey Ingersoll, Brian Jones & Paul Szoldra, *The 10 Most Ridiculous Military Regulations, Customs, and Courtesies*, BUS. INSIDER (July 9, 2013, 2:47 PM), <https://www.businessinsider.com/the-10-most-ridiculous-military-regulations-2013-7> [<https://perma.cc/Z0FK-HV3S>].

²²⁸ See Wilber G. Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426, 429–33 (1953); cf. National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 528, 129 Stat. 726, 814 (2015) (finding that religious diversity “contributes to the strength of the Armed Forces”).

²²⁹ See *Baz v. Walters*, 782 F.2d 701, 709 (7th Cir. 1986); *Katcoff v. Marsh*, 755 F.2d 223, 225 (2d Cir. 1985); cf. 42 U.S.C. § 2000cc-1(a) (protecting the free exercise rights of persons “residing in or confined to an institution,” such as prisons and hospitals).

²³⁰ *Katcoff*, 755 F.2d at 234; see also *Baz*, 782 F.2d at 709 (noting that “[t]he V.A. provides a chaplain service,” in part, to avoid constitutional “free exercise problem[s]”).

²³¹ *Baz*, 782 F.2d at 709.

²³² *Katcoff*, 755 F.2d at 237 (recognizing chaplaincy services as “vital” to “the efficiency of the [military] as an instrument for our national defense”); see *Carter v. Broadlawns Med. Ctr.*, 857 F.2d

Affirmative religious accommodations have a long pedigree in the military context. Starting in 1758, during the French and Indian War, Colonel George Washington saw that his Virginia militia included non-Anglicans, such as Baptists, and requested that Virginia create a chaplain corps that could minister to the varied faith-specific needs of his troops.²³³ Virginia responded to Washington's call with both Anglican chaplains and chaplains from minority religious groups, and it specifically protected minority chaplains' ability to "celebrate divine worship, and to preach to soldiers."²³⁴ Later, as commander of the Continental Army, Washington showed the success of his original effort by "giv[ing] every Regiment an Opportunity of having a chaplain of their own religious Sentiments."²³⁵

Every chaplain is duty-bound to respectfully provide for the "nurture and practice of religious beliefs, traditions, and customs in a pluralistic environment to strengthen the spiritual lives of [Service Members] and their Families"²³⁶ — including those who do not share the chaplain's beliefs and may even oppose them. Thus, if a Hindu service member needs a copy of the Vedas or a Catholic service member needs a rosary or a Muslim service member needs a prayer mat, then a Baptist chaplain for those service members must willingly and promptly provide for those religious needs. And if a Baptist chaplain cannot perform a requested religious ceremony, such as a Catholic sacrament, he will find a priest who can.²³⁷

Further, the military even sends chaplains wherever service members go, including outside of secure military facilities. One example is Chaplain Emil Kapaun, to whom President Obama posthumously awarded the Medal of Honor.²³⁸ Chaplain Kapaun, a Catholic, was on the front lines of the Korean War and, during a particularly heavy fire-fight, stayed with his men.²³⁹ He and many fellow soldiers were eventually captured.²⁴⁰ At the prison camp, Kapaun regularly visited, prayed for, and served the men to keep their spirits up.²⁴¹ Kapaun did

448, 454 (8th Cir. 1988) (recognizing VA hospital chaplains as important "to help patients get well or at least to provide the best care possible for those who would not get well").

²³³ 1 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 268–69 (1950).

²³⁴ *Id.*

²³⁵ *Id.* at 271.

²³⁶ Army Reg. 165-1 § 3-2(a) (2015); accord Air Force, Instruction No. 52-101 § 1 (2019); OPNAV, Instruction No. 1730.1E § 4(a) (2012).

²³⁷ See Army Reg. 165-1 § 3-2(b)(5).

²³⁸ See Colleen Curtis, *President Obama Awards Medal of Honor to Father Emil Kapaun*, WHITE HOUSE BLOG (Apr. 11, 2013, 4:29 PM), <https://obamawhitehouse.archives.gov/blog/2013/04/11/president-obama-awards-medal-honor-father-emil-kapaun-o> [<https://perma.cc/UZA5-X44E>].

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

not survive the camp.²⁴² One of those who did later reported that it was Kapaun's prayers and service that "kept a lot of us alive."²⁴³ These chaplains, and other sorts of religious resources the government is obligated to affirmatively provide to servicemembers, also keep the principle of religious voluntarism alive. Without this affirmative outlay of resources to actively facilitate worship, many religious exercises would be impossible in this highly coercive context.

The military also often acts to affirmatively provide places of worship for service members. Even in the time of COVID-19, the Navy issued guidance affirming that it will not "restrict attendance at places of worship where attendees are able to appropriately apply COVID-19 transmission mitigation measures."²⁴⁴

Statutory protections such as RFRA have also been used to require accommodation in the military context. For example, a federal court required the Army to accommodate a Sikh serviceman wearing a small turban and a beard.²⁴⁵ One year later, the Army issued new regulations stating that Sikh soldiers will not be forced to give up their religious turbans, unshorn hair, or beards throughout their military career.²⁴⁶

3. *Zoning.* — Zoning regulations in a municipality are another context where the government so completely occupies the field that government interference is generally the baseline, at least with respect to land use. As Professor Donald Giannella has observed, "zoning of land" is one area in which "the state plays an important and often decisive role in the allocation of economic uses or resources."²⁴⁷

Zoning decisions affect religious denominations of all types when it comes to being able to access, build, or expand their places of worship. And, unsurprisingly, the relevant legal framework requires the government to affirmatively accommodate religious land use to avoid the burdens that would otherwise result without such accommodations.²⁴⁸ For example, in *International Church of the Foursquare Gospel v. City of*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ Memorandum from Gregory J. Slavonic, Acting Under Sec'y of the Navy, to Commandant of the Marine Corps & Chief of Naval Operations (July 8, 2020), <https://firstliberty.org/wp-content/uploads/2020/07/SECDEF-MEMO.pdf> [<https://perma.cc/GZ7C-KBJG>]; see also Caleb Parke, *Navy Updates Order After Religious Freedom Complaint from Law Firm, Chaplains*, FOX NEWS (July 6, 2020), <https://www.foxnews.com/us/navy-coronavirus-religious-freedom-restrictions> [<https://perma.cc/2MKS-MWA6>].

²⁴⁵ *Singh v. Carter*, 168 F. Supp. 3d 216, 218–19, 236 (D.D.C. 2016).

²⁴⁶ Memorandum from Eric K. Fanning, Sec'y of the Army (Jan. 3, 2017), <https://s3.amazonaws.com/becketpdf/Army-Directive-2017-03-Policy-for-Brigade-Level-Approval-of-Certain-Requests-for-Religious-Accommodation.pdf> [<https://perma.cc/JP8S-AJ3H>].

²⁴⁷ Giannella, *supra* note 22, at 526.

²⁴⁸ The legal framework at issue here is statutory. See Religious Land Use and Institutionalized Persons Act of 2000 § 2(a)(1), 42 U.S.C. § 2000cc(a)(1).

San Leandro,²⁴⁹ the government refused the plaintiffs' application to rezone their parcel of land such that they could build a church for their growing congregation.²⁵⁰ The Ninth Circuit recognized that the right to "a place of worship . . . consistent with . . . theological requirements" is "at the very core of the free exercise of religion."²⁵¹ It therefore held that preventing plaintiffs from building a place of worship could constitute a substantial burden on the religious exercise.²⁵²

Similarly, the Second Circuit has observed the type of coercive power the government is able to bring to bear in the zoning context, above the ordinary government pressure of threatened penalties or denials of benefits. The court stated:

When a municipality denies a religious institution the right to expand its facilities, it is more difficult to speak of substantial pressure to change religious behavior, because in light of the denial the renovation simply cannot proceed. Accordingly, when there has been a denial of a religious institution's [zoning] application, courts appropriately speak of government action that directly *coerces* the religious institution to change its behavior²⁵³

To be sure, the government's zoning power does not exert a coercive baseline with respect to many types of religious practices. But government's unwillingness to affirmatively accommodate religious groups in this context will often be the decisive factor in the ability of groups to have a place of worship consistent with theological requirements. As such, government power inhibiting the ability of religious groups to identify and use their desired places of worship becomes the baseline.

4. *Sacred Sites*. — As with zoning conflicts, in disputes over sacred sites, the "core" right of Indigenous peoples to use their desired places of worship, consistent with their theological requirements, is also at issue.²⁵⁴ Though courts generally have not acknowledged it, a similar baseline of interference with voluntary choice exists in the context of sacred sites, at least with respect to the desired access and use of those sites by Indigenous peoples.

²⁴⁹ 673 F.3d 1059 (9th Cir. 2011).

²⁵⁰ *Id.* at 1061, 1064–65.

²⁵¹ *Id.* at 1069 (quoting *Vietnamese Buddhism Study Temple in Am. v. City of Garden Grove*, 460 F. Supp. 2d 1165, 1171 (C.D. Cal. 2006)).

²⁵² *Id.* at 1061, 1070; *see also* *Harbor Missionary Church Corp. v. City of San Buenaventura*, 642 F. App'x 726, 727 (9th Cir. 2016) (finding that city's denial of permit prevented church from conducting its homeless ministry, and district court erred in concluding this was not a substantial burden); *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1226 (C.D. Cal. 2002) ("Preventing a church from building a worship site fundamentally inhibits its ability to practice its religion. Churches are central to the religious exercise of most religions. If Cottonwood could not build a church, it could not exist.").

²⁵³ *Westchester Day Sch. v. Village of Mamaroneck*, 504 F.3d 338, 349 (2d Cir. 2007).

²⁵⁴ *Foursquare Gospel*, 673 F.3d at 1069 (quoting *Vietnamese Buddhism Study Temple in Am.*, 460 F. Supp. 2d at 1171).

Specifically, because of the history of government divestiture of tribal lands discussed above, many sacred sites of Indigenous peoples are entirely within the control of the government. Such a scenario is not unlike the prison and military contexts, where the property is owned by the government and the occupants of those coercive spaces are at the mercy of the government to provide resources and space for religious worship.²⁵⁵

Because the government now owns so many Indigenous sacred sites, the passive baseline of interference exists, in part, because of the vast array of regulations that exist to protect the government's land against unauthorized uses.²⁵⁶ Individuals who unlawfully use or damage BLM land could be subject to fees, penalties, requirements to rehabilitate the land, and even imprisonment.²⁵⁷ These penalties also apply to unauthorized development of public lands.²⁵⁸ Thus, the government need not affirmatively threaten new penalties regarding religious exercise in a specific case — the baseline is that this threat already exists for anyone who attempts to use federal property in unauthorized ways.

In *Lyng*, the Supreme Court reasoned that a substantial burden could not be at issue because the government land involved the government's own "internal affairs."²⁵⁹ But the government's running of its own prisons or its own military are certainly just as much the government's "internal affairs." Yet elsewhere when private individuals find themselves within those more coercive baselines, where government interference

²⁵⁵ Notably, government coercion historically extended to many other aspects of Indigenous ways of life, including restrictions on what they could eat, where they could travel, whether they could hunt, and (as discussed above) their ability even to participate in other religious ceremonies. See *supra* pp. 1307–09.

²⁵⁶ In *United States v. Nelson*, 592 F. App'x 593 (9th Cir. 2015), the Ninth Circuit upheld a district court judgment ordering the defendant either to complete reclamation of federal land or to pay the costs of such reclamation when the defendant remained on federal land after his permit to use a mill site expired. *Id.* at 593. In *United States v. Kahre*, No. 10-CV-1198, 2012 WL 2675453 (D. Nev. July 5, 2012), BLM initiated a trespass action against the defendants after discovering that the defendants had a locked gate, a partial fence, and two buildings on federal land but were not using the land for mining or any other permissible purpose. *Id.* at *1. It appears that the defendants had a permit to mine on the site at one point, but it had expired. *Id.* The court found the defendants in violation of BLM regulations and granted the government's requests for injunction, ejection, declaratory judgment, restoration (or reimbursement for restoration), and conditional damages. *Id.* at *4. Similarly, in *United States v. McClure*, No. CV-04-3047, 2006 WL 2818354 (E.D. Wash. Sept. 28, 2006), the defendant took up residence on National Forest System lands without proper authorization. *Id.* at *1. The defendant had been granted a limited permit that allowed certain mining operations, but remained on the land after his permit expired. *Id.* The court ordered defendant to terminate his residential occupancy and remove all vehicles, structures, and other personal property. *Id.* at *5. The court banned defendant from the land in question and authorized the government to seize his property or forcibly remove him if he failed to comply with the court's instructions. *Id.*

²⁵⁷ 43 C.F.R. § 2808.11 (2020).

²⁵⁸ *Id.* § 9262.1.

²⁵⁹ *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 448 (1988) (quoting *Bowen v. Roy*, 476 U.S. 693, 699 (1986)).

with religious exercise is more common, the law requires government accommodation of religion.

At least one lower court has recognized that government coercion is magnified in the context of Native American sacred sites. In *Comanche Nation v. United States*,²⁶⁰ the Army attempted to build a warehouse on federal land near Medicine Bluffs, a Native American sacred site.²⁶¹ But Native Americans sued under RFRA, arguing that the warehouse would occupy “the central sight-line to the Bluffs” — the place where they stood to center themselves for meditation — making their “traditional religious practices” impossible.²⁶² The court explained that a substantial burden resulted where the government action “inhibit[ed]” or “den[ie]d” reasonable opportunities to engage in religious activities.²⁶³ Under these facts, the court held that the government’s physical interference with religious exercise “amply demonstrate[d]” a “substantial burden on the traditional religious practices of Plaintiffs.”²⁶⁴ But this court’s decision is the exception that demonstrates that the approach followed by virtually every other court is flawed, in that it fails to recognize the government interference at issue with sacred sites.

Native American sacred sites are not the only ones located on government property. One source estimates there are around seventy churches within the national parks,²⁶⁵ including an active Catholic church in Grand Canyon Village.²⁶⁶ Of these churches, over half are government owned.²⁶⁷ An active chapel in Yellowstone National Park was even constructed with government funds.²⁶⁸ The Ebenezer Baptist Church in which Martin Luther King Jr. preached is located on

²⁶⁰ No. CIV-08-849, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008).

²⁶¹ *Id.* at *17.

²⁶² *Id.*

²⁶³ *Id.* at *3 (quoting *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996)).

²⁶⁴ *Id.* at *17.

²⁶⁵ Margot Hornblower et al., *Funds for Historic Missions Scuttled*, WASH. POST (Feb. 18, 1979), <https://www.washingtonpost.com/archive/politics/1979/02/18/funds-for-historic-missions-scuttled/e2b29cdf-f9e9-4c02-89f8-fa32ccff3ff1> [<https://perma.cc/FWC7-77RQ>].

²⁶⁶ NAT’L PARK SERV., U.S. DEP’T OF THE INTERIOR, NATIONAL HISTORIC LANDMARK NOMINATION — REGISTRATION FORM, GRAND CANYON VILLAGE, GRAND CANYON NATIONAL PARK (1996), <https://npgallery.nps.gov/GetAsset/84bf2bo2-7d17-4998-8d79-e6eedeo7fb7> [<https://perma.cc/KE2P-SP4J>]; Ana Rodriguez-Soto, *Chapel Ministers to Souls Who Visit, Live amid Grand Canyon Splendor*, NAT’L CATH. REP. (Aug. 15, 2017), <https://www.ncronline.org/news/earthbeat/chapel-ministers-souls-who-visit-live-amid-grand-canyon-splendor> [<https://perma.cc/E8G9-WKJ2>]. Ana Rodriguez-Soto discusses an active, ministering church on national park land. It is “the only Catholic church within a national park.” Rodriguez-Soto, *supra*; see Howard Kramer, *Chapels of the National Parks*, COMPLETE PILGRIM (Apr. 23, 2017), <http://thecompletepilgrim.com/chapels-national-parks> [<https://perma.cc/SHD9-2FW8>].

²⁶⁷ Hornblower et al., *supra* note 265.

²⁶⁸ Kramer, *supra* note 266 (listing chapels in national parks, including active chapels in Yosemite National Park, Grand Canyon National Park, Great Smoky Mountains National Park, Grand Teton National Park, and Yellowstone National Park).

government-leased property.²⁶⁹ Congress passed a law establishing a National Historical Park around four of the Southwest's famous Catholic mission churches.²⁷⁰ Indeed, one such mission — San Xavier del Bac — remains an important pilgrimage site that thousands visit each year in ceremonial cavalcades or cabalgatas.²⁷¹

Looking at these examples more closely, we see that Native American sacred sites are often treated differently than other religiously significant sites.²⁷² This differential treatment often suggests government skepticism about the sanctity of the sites or the sincerity of the religious assertions by Indigenous people.²⁷³ For example, in *Slockish* the sacred ancestral site was known to the tribal members as *Ana Kwna Nchi nchi Patat* (the “Place of Big Big Trees”) and was traditionally the site of religious ceremonies.²⁷⁴ Yet the government's briefing in the case

²⁶⁹ *Ebenezer Baptist Church*, NAT'L PARK SERV., https://www.nps.gov/malu/planyourvisit/ebenezer_baptist_church.htm [<https://perma.cc/M73M-B5KH>]; NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, NATIONAL REGISTER OF HISTORIC PLACES INVENTORY — NOMINATION FORM, MARTIN LUTHER KING, JR., HISTORIC DISTRICT (LANDMARK) (1976), <https://npgallery.nps.gov/GetAsset/obc62707-772d-4de3-8c3a-3406f803b23f> [<https://perma.cc/L7MP-TYBH>]; Realty Actions; Sales, Leases, etc.: Georgia, 60 Fed. Reg. 22,405, 22,405–06 (May 5, 1995).

²⁷⁰ Stacey L. Mahaney, Comment, *The California Missions Preservation Act: Safeguarding Our History or Subsidizing Religion?*, 55 AM. U. L. REV. 1523, 1530 (2006) (“In establishing the San Antonio Missions National Historical Park, Congress authorized the Park Service to preserve and interpret the secular dimension of the missions by entering into a cooperative agreement with the Archdiocese of San Antonio.” (footnote omitted)); Sandra B. Zellmer, *Sustaining Geographies of Hope: Cultural Resources on Public Lands*, 73 U. COLO. L. REV. 413, 456 n.194 (2002) (“The National Park System includes San Antonio Missions National Historical Park” (citing 16 U.S.C. § 410ee)).

²⁷¹ BERNARD L. FONTANA, A GIFT OF ANGELS: THE ART OF MISSION SAN XAVIER DEL BAC 41 (2010) (“Mission San Xavier has evolved into an important destination for thousands of pilgrims who visit the church each year, many of them walking several miles or more to get there to pray or leave a votive offering alongside a favorite saint.”); *Mission San Xavier del Bac, Tucson*, GPSMYCITY, <https://www.gpsmycity.com/attractions/mission-san-xavier-del-bac-6562.html> [<https://perma.cc/B7VP-5FJP>] (“The Mission is a pilgrimage site with thousands of pilgrims who visit the church each year many of them walking or riding on horseback cabalgatas.”); *History, SAN XAVIER DEL BAC MISSION*, <http://www.sanxaviermission.org/History.html> [<https://perma.cc/7XZ8-RN87>] (“Some 200,000 visitors come each year . . .”).

²⁷² Rhodes, *supra* note 4, at 51 n.151 (“American Indian subcultures have been treated differently by whites. There was a racial difference; the whites came as conquerors, and Indian values were not as easily understood or sympathized with by the larger culture.” (quoting WILLIAM A. HAVILAND, *CULTURAL ANTHROPOLOGY* 31–32 (3d ed. 1981))).

²⁷³ Gardner, *supra* note 13, at 78 (noting that Native Americans “seem to continue to face substantial obstacles to their Free Exercise rights in federal courts, seemingly encountering skepticism over their beliefs and practices”); Allison M. Dussias, *Friend, Foe, Frenemy: The United States and American Indian Religious Freedom*, 90 DENV. U. L. REV. 347, 355 (2012) (noting “skepticism about the legitimacy of Indian religions: ‘[M]any non-Indian officials [believe] that because Indian religious practices are different than their own[,] . . . they somehow do not have the same status as a “real” religion’” (alterations and omission in original) (quoting 123 CONG. REC. 39,300 (1977) (statement of Sen. James Abourezk))).

²⁷⁴ *Slockish v. U.S. Fed. Highway Admin.*, No. 08-CV-01169, 2018 WL 4523135, at *2 (D. Or. Mar. 2, 2018).

consistently refused to refer to this location as sacred, calling it dismissively a place that simply had “trees and rocks” that the tribal members could find elsewhere.²⁷⁵ It is hard to imagine the government referring to something like San Xavier del Bac as a location simply involving “mortar and stones” that could be built or found elsewhere. Rather, this approach typifies the historic view government has long taken with regard to Native American religious practices: that they are primitive and arbitrary, and thus unworthy of, or too ineffable for, protection or preservation.²⁷⁶

III. AN ALTERNATIVE APPROACH TO PROTECTING INDIGENOUS SACRED SITES

Shifting the focus from uniqueness of religiosity to the baseline of interference with religious voluntarism animating these sacred site conflicts has a number of important implications. First, when coercion is reconceptualized as we have suggested, tribal members should be able to prove a prima facie substantial burden much more easily. Indeed, they would be able to demonstrate a substantial burden on the same footing as in cases like *McCurry*, where the government had padlocked a Christian church.²⁷⁷ This prima facie case is relevant both to statutes like RFRA and (potentially) the constitutional First Amendment analysis. Second, a clearer understanding of the coercive control government exercises over sacred sites, and the way in which this threatens the very existence of tribes, should create a strong obligation under the government’s trust responsibility and plenary power doctrine to protect the sacred practices of tribal members. Some government officials have refused to provide robust protections for tribal members’ access to sacred sites based on the argument that “preferential treatment” of Indigenous peoples risks violating the Establishment Clause’s requirement of neutrality. But once one considers the unique disadvantage tribal members face when operating under a baseline of government interference, compared to most other religious groups exercising their religion with a baseline of voluntary choice, one understands that affirmative religious accommodations are necessary to effectuate government neutrality —

²⁷⁵ Response to Plaintiffs’ Objections to Findings and Recommendations at 21, *Slockish*, No. 08-CV-01169 (D. Or. June 11, 2018); see *id.* at 21–23.

²⁷⁶ Gardner, *supra* note 13, at 77 (acknowledging “a notion of Native American cultures as primitive”); Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109, 217–18 (“Official government statements and documents from the [late 1800s through the mid-twentieth century] reflect a striking intolerance of native religion and culture, both of which were deemed primitive and paganistic.”).

²⁷⁷ See *supra* pp. 1327–28.

just as these sorts of accommodations are necessary in contexts like the military or prison.

A. *Eliminating Disfavored Treatment*

In other religious exercise conflicts under RFRA, courts seem less preoccupied with the language of coercion than in the Indigenous sacred sites context.²⁷⁸ As described above, in adjudicating Native claims, courts have often used an extremely narrow substantial burden test, finding that “a ‘substantial burden’ is imposed *only* when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*).”²⁷⁹

But whether or not we label the government’s actions as “coercion” as a doctrinal matter, the word choice is less important than the underlying content of the concept. We propose bringing the substantial burden test for Indigenous sacred sites into line with the test used for non-Native religions. Our Article argues that issues flowing from this errant substantial burden analysis would be resolved if the Supreme Court more clearly articulated the coherent unifying theory that underlies its various substantial burden decisions. That theory, we argue, ought to be guided by using the principle of religious voluntarism.

The government has substantially burdened religious exercise, or exerted coercion for doctrinal purposes against a religious believer, when it has substantially interfered with a religious individual’s ability to voluntarily act on his or her theological commitments. Interference with voluntary choice might take an indirect form, by making that choice costlier through threatened penalties or denied government benefits. But sometimes the interference might be much more direct and simply make that voluntary choice impossible, rather than costly. When that occurs, the interference is even *greater* than threatened penalties, and the substantial burden should be even easier to find. As the Supreme Court has noted, both “indirect” penalties and “outright prohibitions” can be a substantial burden (at least in the context of Western religious traditions).²⁸⁰ After all, the language of the First Amendment refers to a “prohibit[on]” on the “free exercise” of religion.²⁸¹ This suggests that forceful prohibition of religious practices should be the classic violation

²⁷⁸ For example, the government did not identify a “coercive” action regarding religious exercise in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014), or *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1723–24 (2018).

²⁷⁹ *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069–70 (9th Cir. 2008) (emphasis added).

²⁸⁰ *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017) (quoting *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 450 (1988)).

²⁸¹ U.S. CONST. amend. I.

of the Constitution, and other indirect forms of interference with free exercise are a logical extension or application of this principle, not vice versa.

The substantial burden in *Yoder* may mark the outer bounds of the type of interference that simply makes a choice costlier. There, Amish families were forced to choose between keeping their children out of public school or facing a five-dollar criminal fine.²⁸² The criminal nature of that fine increased the level of interference with voluntary religious exercise. But at some point, particularly when dealing with noncriminal penalties, a government consequence would likely be de minimis enough as to not constitute any meaningful interference with voluntary religious choice. In contrast, on the opposite end of the spectrum, when the government leaves no “degree of choice in the matter,”²⁸³ the “coercive impact”²⁸⁴ of the government action should “easily” give rise to a substantial burden.²⁸⁵

In other words, the classical, broader conception of coercion that has been used in contexts affecting non-Indigenous religious practices (discussed in section II.C) should be applied across the board. This reconceptualization would resolve the current double standard where courts employ the narrower, Nozick-style conception of coercion solely for religious conflicts involving Indigenous sacred sites.

So how would this paradigm shift change the analysis if we revisited some of the prominent cases dealing with sacred sites? Under *Lyng*, the tribal members alleged that the government construction of a road in the Chimney Rock area would “physically destro[y] the environmental conditions and the privacy without which the [religious] practices cannot be conducted,”²⁸⁶ and thus eliminate the “Indians’ ability to practice their religion” in this space.²⁸⁷ The Court acknowledged that it was “undisputed that the Indian respondents’ beliefs are sincere and that the Government’s proposed actions will have severe adverse effects on the practice of their religion.”²⁸⁸ Under a metric of government coercion that assesses whether government has interfered with an individual’s

²⁸² *Wisconsin v. Yoder*, 406 U.S. 205, 207–08 (1972).

²⁸³ *Yellowbear v. Lampert*, 741 F.3d 48, 56 (10th Cir. 2014).

²⁸⁴ *Id.* at 55.

²⁸⁵ *Id.* at 56.

²⁸⁶ *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 449 (1988), 1987 WL 880350 (alterations in original) (quoting Brief for Respondent State of California at *19, *Lyng*, 485 U.S. 439 (No. 86-1013), 1987 WL).

²⁸⁷ *Id.* at 451 (quoting *Nw. Indian Cemetery Protective Ass’n v. Peterson*, 795 F.2d 688, 693 (9th Cir. 1986)).

²⁸⁸ *Id.* at 447.

ability to voluntarily act consistently with their religious beliefs, this evidence should have been enough to find a substantial burden. And yet, no burden whatsoever was found.²⁸⁹

One argument the government made in *Lyng* was that no “sites where specific rituals take place” were actually disturbed.²⁹⁰ The implication is that unless the religious site itself is physically destroyed, then nearby government activities making the ceremonies impossible are irrelevant. But that would be tantamount to the government saying in *International Church of the Foursquare Gospel* that no substantial burden flowed from zoning restrictions as long as the parishioners could still go stand on their land and sing hymns.²⁹¹ But that is decidedly not what the court held. Instead, it noted that “at the very core of the free exercise of religion” is the ability to have “a place of worship” that would be “consistent with . . . theological requirements.”²⁹² In that case, as in *Lyng*, the individuals were seeking to use their sacred sites in a manner consistent with their theological requirements, free from government activity that interfered with those requirements. And that interference constituted a substantial burden.²⁹³

Note that there is a subtle but important difference between this approach and one that is, as the Supreme Court feared, measuring the unconstitutionality of the government action by measuring the degree of the effects “on a religious objector’s spiritual development.”²⁹⁴ The former accepts as a given the theological requirements the religious objector has set forth (assuming they are sincere), and then assesses on an objective basis the interference with this desired practice.²⁹⁵ On the other hand, the latter approach seems to stray more into theological questions about how spiritually detrimental the impact will be on the

²⁸⁹ *Id.* at 476 (Brennan, J., dissenting) (“[T]he Court holds that a federal land-use decision that promises to destroy an entire religion does not burden the practice of that faith . . .”).

²⁹⁰ *Id.* at 454 (majority opinion).

²⁹¹ See *Int’l Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1066–70 (9th Cir. 2011).

²⁹² *Id.* at 1069 (emphasis added) (quoting *Vietnamese Buddhism Study Temple in Am. v. City of Garden Grove*, 460 F. Supp. 2d 1165, 1171 (C.D. Cal. 2006)).

²⁹³ *Id.* at 1070.

²⁹⁴ *Lyng*, 485 U.S. at 451.

²⁹⁵ See Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 1771, 1794 n.135, 1808 (“[C]ourts can . . . employ secular metrics for substantiality that do not take theological importance into account.” *Id.* at 1794 n.135.); Marc O. DeGirolami, *Substantial Burdens Imply Central Beliefs*, 2016 U. ILL. L. REV. ONLINE 19, 19 (“There are two crucial reasons for deference to the claimant as to the quality of the burden. First, courts simply are not competent institutions to evaluate religious beliefs and practices. . . . Second, courts should defer not merely because they are poor judges of religion or are likely to make mistakes, but because even if they were good judges of religion they would risk excessively entangling church and state with too searching an inquiry.”); Steven D. Smith & Caroline Mala Corbin, Debate, *The Contraception Mandate and Religious Freedom*, 161 U. PA. L. REV. ONLINE 261, 279 (2013) (“Without some objective evaluation of burden, all burdens would become eligible for accommodation.”).

religious believer. Indeed, perhaps the case turned out the way it did in *Lyng* because of some unartful statements from litigants that seemed to bleed into this second approach.²⁹⁶ And as the Supreme Court rightly noted, there are significant constitutional problems with adopting a test under which a court must decide which religious practices are “‘central’ or ‘indispensable’ to which religions.”²⁹⁷

But this risk is avoided when one measures the objective consequences of government interference (rather than subjective spiritual consequences). Objective consequences involve things like the size of the monetary cost of engaging in the religious practice or the government use of force to make the practice physically impossible consistent with the religious practitioner’s theological requirements.²⁹⁸

This focus on subjective effects to one’s religious sensibilities is relevant to the rulings in both *Bowen v. Roy*²⁹⁹ and *Navajo Nation v. United States Forest Service*. For example, in *Bowen*, Stephen J. Roy, a member of the Abenaki Tribe, objected to the requirement that his daughter, Little Bird of the Snow, obtain a Social Security number in order to qualify for welfare benefits.³⁰⁰ “Prior to trial, the parties agreed that Little Bird of the Snow did not have a Social Security number”;³⁰¹ the case was argued at trial as one of religious interference. The objective burden was clear: Roy felt that requiring his daughter to obtain a Social Security number as a condition of obtaining benefits would prevent her future religious power from being fully realized, and would thus impose a clear objective burden — the denial of government benefits — on her desired religious exercise.³⁰²

However, on the final day of the trial, it was discovered that Little Bird of the Snow did in fact have a Social Security number³⁰³ and the litigants’ arguments shifted. On appeal to the Supreme Court, instead

²⁹⁶ See, e.g., Reply Brief for the Petitioners at *6, *Lyng*, 485 U.S. 439 (No. 86-1013), 1987 WL 880360 (“The ‘prohibition’ rather flows from the fact that the Indians’ religious practices require ‘an interaction of the utmost sensitivity between the [believer] and the homogeneous, untrammelled environment, and if even “one feature of this interaction is disturbed, the flow of power is blocked” — in sum, the practice is forcibly prevented.’” (alteration in original) (quoting Brief for Respondent State of California, *supra* note 286, at *20)). Counsel for the government made sure to portray the opposing argument this way, claiming that “[t]he only link between what the Government has done in the practice here, we think, is the link that Respondents believe that their practices will just not be spiritually effective anymore,” Transcript of Oral Argument at 47, *Lyng*, 485 U.S. 439 (No. 86-1013), and that granting the plaintiffs’ request would allow “any believer [to just] come into court and say . . . that the entry of non-believers into the area offends, will make their practices impossible, and the court will have to accept that,” *id.* at 48.

²⁹⁷ *Lyng*, 485 U.S. at 457 (quoting *id.* at 475 (Brennan, J., dissenting)); see *id.* at 457–58.

²⁹⁸ See *supra* section II.C, pp. 1333–43.

²⁹⁹ 476 U.S. 693 (1986).

³⁰⁰ *Id.* at 695–96.

³⁰¹ *Roy v. Cohen*, 590 F. Supp. 600, 608 (M.D. Pa. 1984), *vacated sub nom. Bowen*, 476 U.S. 693.

³⁰² *Id.* at 603–04.

³⁰³ *Id.* at 608.

of arguing that requiring Little Bird of the Snow to obtain a Social Security number would directly interfere with her religious practice, Roy argued that the government's use of a number that it already had in its possession would constitute a "great evil."³⁰⁴ This argument essentially amounted to a claim that the government was, itself, engaging in a sacrilege that diminished spirituality. But the claim did not point to any objective interference with a desired religious exercise Little Bird of the Snow wished to perform. As Chief Justice Burger explained: "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."³⁰⁵

Another salient example is that of *Navajo Nation v. United States Forest Service*. There, the free exercise claim of a Navajo Tribe involved an objection to the use of recycled wastewater on a sacred site.³⁰⁶ The Ninth Circuit concluded no substantial burden was at issue, and it observed that "[t]he only effect of the proposed upgrades is on the Plaintiffs' subjective, emotional religious experience. That is, the presence of recycled wastewater on the Peaks is offensive to the Plaintiffs' religious sensibilities. To plaintiffs, it will spiritually desecrate a sacred mountain . . ."³⁰⁷ Had the tribal plaintiffs in that case pointed more clearly to a religious exercise they wanted to perform on the mountain that would have been physically impossible with the wastewater, the case may have turned out differently. But because they focused on the desecration of the mountain in general — again a sacrilege the government engaged in — the court could not point to an objective substantial burden.

While that distinction between objective or subjective consequences may be a closer question in a case like *Lyng*, it should not be a hard case at all in cases like *Slockish*. This, again, is the recent case where the government bulldozed a Native American sacred burial ground, destroyed an ancient stone altar used in religious ceremonies, cut down old growth trees that offered privacy for sacred rituals, and removed safe access to the site.³⁰⁸ Yet using the warped substantial burden analysis from *Lyng*, which recognizes only a Nozick-type of coercion, the court held that the plaintiffs "have not established that they are being coerced to act contrary to their religious beliefs" because there was no "threat of sanctions" or conditioning of "a governmental benefit" on "conduct that

³⁰⁴ Brief for the Appellants at *4–5, *Bowen*, 476 U.S. 693 (No. 84-780), 1985 WL 669030.

³⁰⁵ *Bowen*, 476 U.S. at 699.

³⁰⁶ *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1062 (9th Cir. 2008).

³⁰⁷ *Id.* at 1070.

³⁰⁸ *Slockish v. U.S. Federal Highway Administration*, *supra* note 192; see *Slockish v. U.S. Fed. Highway Admin.*, No. 08-CV-01169, 2018 WL 4523135, at *2 (D. Or. Mar. 2, 2018).

would violate their religious beliefs.”³⁰⁹ Nothing was stopping the plaintiffs, the government argued, from still visiting the site or believing it to be sacred.³¹⁰ If the government bulldozed a cathedral, nothing would prohibit parishioners from still visiting that site and saying prayers while standing atop a pile of rubble. But no one would seriously say that the government had not interfered with religious exercise in that case. It should be no different for an Indigenous sacred site that, as one tribal leader explained, “never had walls, never had a roof, and never had a floor,” but was “just as sacred as a white person’s church.”³¹¹ *Slockish* thus illustrates the dangerous logical conclusions of the warped and categorical conception of coercion the Court adopted in *Lyng*.

Of course, one natural concern (shared by the Supreme Court) is that recognizing the substantial burdens at issue in sacred site conflicts means that private citizens would be given “a veto over public programs” or a “religious servitude” on government property.³¹² The Court went on to say: “No disrespect for these practices is implied when one notes that such beliefs could easily require *de facto* beneficial ownership of some rather spacious tracts of public property,” resulting in no small “diminution of the Government’s property rights.”³¹³

But allowing Indigenous peoples to demonstrate a substantial burden on their religion on the same basis as other religious groups does not provide them with a trump card over government land, or in any way guarantee that they will always win their case. Rather, it simply shifts the analysis to the government to demonstrate that it has a justification for the substantial burden sufficient to satisfy strict scrutiny.³¹⁴ It also incentivizes the government to narrowly tailor its means to reduce burdens on Indigenous religious exercise. The more expansive the religious claim is for the property at issue, and the fewer options the government has to accomplish its goals through other avenues, the more likely the government will win its case, notwithstanding the finding of a substantial burden.

That’s likely one reason *Lyng* instinctually strikes many as a hard case: the tribes were claiming that building the road anywhere within an area covering 17,000 acres would burden their religion.³¹⁵

³⁰⁹ *Slockish v. U.S. Fed. Highway Admin.*, No. 08-CV-01169, 2018 WL 2875896, at *1 (D. Or. June 11, 2018) (quoting *Slockish*, 2018 WL 4523135, at *5).

³¹⁰ *See id.*

³¹¹ Plaintiffs’ Motion for Summary Judgment, *supra* note 192, at 4; Backstrom, *supra* note 193.

³¹² *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 452 (1988).

³¹³ *Id.* at 453.

³¹⁴ *See* Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(b) (“Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person — (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”).

³¹⁵ *Lyng*, 485 U.S. at 452–53.

Ultimately, the Court determined that the government had been very “solicitous” of Indigenous religious exercise, and short of “abandoning its project entirely, and thereby leaving the two existing segments of road to dead-end in the middle of a National Forest, it is difficult to see how the Government could have been more solicitous.”³¹⁶ These are all reasons why the government likely would have had a very strong case under strict scrutiny analysis (though it would have had to argue that it had a compelling interest in building that particular road). But rather than allowing this more transparent sort of analysis to proceed, the Court smuggled these intuitions into substantial burden analysis. The result essentially categorically freed the government from having to justify any sort of harm to sacred sites under RFRA, even if the actions were not at all “solicitous” to Indigenous peoples.

The destruction of the Native American burial ground and ancient stone altar in *Slockish* exemplifies this problem. There, the sacred site was very small compared to the land in *Lyng*: it measured approximately 100 meters long by 30 meters wide.³¹⁷ And in *Slockish*, the government could have widened its highway by expanding the other side of the road or by building a protective retaining wall near the sacred site, thereby protecting the area where religious ceremonies were performed.³¹⁸ The government was willing to do precisely that to preserve wetlands down the road.³¹⁹ But it cut down the trees, demolished the stone altar, and bulldozed the Native American site with impunity.³²⁰ Under *Lyng*’s framework, the *Slockish* court concluded it could not ask for any justification for this callous government action.³²¹

There are other problems with the current “it’s my land, so I’ll destroy it if I want to” approach. The text of RFRA applies to “all . . . implementation of [federal law]” — foreclosing any blanket carve-out for federal land management decisions.³²² Further, the government is already subject to a multitude of legal restrictions with respect to how it uses its own land. Requiring the government to carefully consider less restrictive alternatives under strict scrutiny is not unlike the analysis the government is already required to engage in under numerous environmental protection statutes, such as the National Environmental Policy

³¹⁶ *Id.* at 454.

³¹⁷ Plaintiffs’ Objections to Magistrate’s Findings and Recommendations, *supra* note 3, at 4.

³¹⁸ Plaintiffs’ Response to Defendant’s Motion for Partial Summary Judgment, *supra* note 195, at 15.

³¹⁹ *Id.*

³²⁰ *Id.* at 32, 35.

³²¹ See *Slockish v. U.S. Fed. Highway Admin.*, No. 08-CV-01169, 2018 WL 4909901, at *6 (D. Or. Oct. 10, 2018); see also Plaintiffs’ Objections to Magistrate’s Findings and Recommendations, *supra* note 3, at 18.

³²² 42 U.S.C. § 2000bb-3(a).

Act,³²³ Section 404 of the Clean Water Act,³²⁴ and Section 4(f) of the Department of Transportation Act.³²⁵ In fact, as discussed below, protected species often receive far more accommodations and protections from the government as it uses its land than Indigenous peoples receive for their most sacred practices. The government has also already committed itself to “(1) accommodat[ing] access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid[ing] adversely affecting the physical integrity of such sites” under Executive Order 13,007 on Indian Sacred Sites.³²⁶ And the government has committed to protect sacred locations of many other religious groups, including “historic mission churches in the southwest, small churches in the Shenandoah Valley, . . . Arlington National Cemetery, and even historic churches in cities.”³²⁷ These are precisely the sorts of values that RFRA would enforce under a more equitable understanding of coercion.

In sum, recognizing substantial burdens for tribes would not give them a veto, nor would requiring the government to carefully consider alternatives with its own land use be an anomalous requirement under the law. But categorically refusing to allow Native Americans to make any *prima facie* case of a substantial burden gives the government a blank check to run roughshod over Indigenous religious exercise with respect to these sites. Allowing this disparity to go unchecked will mean that Indigenous sacred sites will continue to suffer from a troubling double standard rooted in divergent concepts of coercion under the substantial burden analysis.

B. *Justifications for Special Protections*

Two fundamental (and related) principles of federal Indian law have not received adequate attention in the search for expanded tools to protect Indigenous religious exercise and use of sacred sites. This section seeks to draw these principles more fully into the discussion analyzing the conflicts this Article describes and contemplating potential solutions.

As an initial matter, the federal-tribal trust doctrine means that the United States is charged to act as a trustee for the benefit of federally recognized tribes, much like a guardian to a ward.³²⁸ This federal trust doctrine is an entrenched principle of federal Indian law that arises not only from treaties, although treaties impose their own obligations on the

³²³ Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4347).

³²⁴ 33 U.S.C. § 1344.

³²⁵ 49 U.S.C. § 303.

³²⁶ Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996).

³²⁷ Eric W. Treene, *Religion, the Public Square, and the Presidency*, 24 HARV. J.L. & PUB. POL’Y 573, 588 (2001).

³²⁸ See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (describing tribes as unique aggregations, not as foreign nations but as “domestic dependent nations,” and describing their relationship to the United States as resembling “that of a ward to his guardian”).

United States, but more specifically from the federal government's "course of dealing" with the Indian tribes.³²⁹ That course of dealing with regard to the lands and resources of the tribes is echoed in the course of dealing with the tribes' religious exercise rights.³³⁰ As discussed above in Part I, the federal government so thoroughly inserted itself into every aspect of tribal religious life and practice over the course of its dealings with the tribes — even regulating the hairstyles, dancing, face paint, and other practices of tribal members — that those dealings may also have given rise to a responsibility of trust in accommodating tribal religious exercise.³³¹ The role of government in Indigenous religious life has been so pervasive and detrimental that, as in *United States v. Kagama*,³³² "there arises the duty of protection, and with it, the power," presumably to protect.³³³

The scope and actionability of that trust responsibility are certainly debatable, but the responsibility and the political power to carry it out through protective legislation exist.³³⁴ At a minimum, the obligation of trust thus owed to the tribes has not yet been fully explored as a foundation for the federal government's facilitation of Indigenous free exercise.³³⁵

In evaluating the source of congressional authority to enact the Major Crimes Act imposing federal jurisdiction on major felonies committed by Indians, the Court insisted that this course of dealing was its own source of legislative authority as a consequence of the "helplessness" it had fostered in the tribes in dealing with states.³³⁶ The inability of the tribes to guide decisionmaking or practice their religion at particular sites in the pervasive control of the federal government has fostered a

³²⁹ See *United States v. Kagama*, 118 U.S. 375, 384 (1886); see also, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567–68 (1903). But see *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 73–74 (1977) ("The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." (quoting *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946) (plurality opinion))). See generally Wood, *supra* note 276.

³³⁰ See *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

³³¹ See, e.g., Letter from William Arthur Jones, Comm'r of Indian Affs., to Superintendent, Round Valley, California (Jan. 11, 1902) (on file with the National Archives, Records of the Bureau of Indian Affairs) (giving the infamous Haircut Order, "direct[ing] to induce . . . male Indians to cut their hair").

³³² 118 U.S. 375.

³³³ *Id.* at 384.

³³⁴ See *United States v. Lara*, 541 U.S. 193, 201 (2004).

³³⁵ Compare, e.g., *Nw. Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 690–91 (9th Cir. 1986), *rev'd sub nom. Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (tying water and fishing rights to government obligation of trust to tribes, but tying religious concerns to the American Indian Freedom of Religion Act of 1978 instead), with *United States v. Hardman*, 297 F.3d 1116, 1128–29 (10th Cir. 2002), and *Northern Arapaho Tribe v. Ashe*, 92 F. Supp. 3d 1160, 1184–88 (D. Wyo. 2015) (tying Indian free exercise of religion to the government's obligation of trust to tribes).

³³⁶ See *Kagama*, 118 U.S. at 375.

similar kind of legal helplessness that depends on the federal government if it is to be safeguarded. In *Kagama*, the Court found that the legislative power to enact the Major Crimes Act did not emanate from the Indian Commerce Clause of the Constitution, nor any other particular constitutional clause or principle.³³⁷ In 2004, the Court again considered the breadth of federal legislative power over Indian affairs and affirmed the efficacy of the trust responsibility doctrine and its concomitant principle, the plenary power doctrine.³³⁸

The plenary power doctrine holds that Congress can legislate broadly with regard to the tribes, seemingly untethered to any limiting enumerated power, as an aspect of its own nationality.³³⁹ In other words, the United States asserts a preconstitutional *Indian affairs* power as an inherent attribute of its national sovereignty, like the power to manage immigration, control national security, and conduct foreign affairs.³⁴⁰ These twin doctrines, two sides of the same legal coin, uniquely situate the federal government in relation to the tribes and underpin the responsibilities and powers of the federal government with regard to tribes.³⁴¹ There is no legal basis nor justification for the plenary power doctrine except to empower the United States to act in the best interest of the tribes. The federal government is therefore responsible to act in the best interests of the tribes under the federal trust doctrine, and has broad power to do so, pursuant to the plenary power doctrine.

Too often, these doctrines have combined to the detriment of tribes as the federal government has used its broad powers not to protect, but to harm tribal interests in furtherance of its own interests.³⁴² But it need not be so. Because the federal government has a long history of harming the tribes' religious exercise, there may be an attendant power supplementing other political powers to rectify this harmful past. Scholars have wrestled with how to regard the plenary power doctrine in modern jurisprudence.³⁴³ The roots of the doctrine are planted firmly in notions

³³⁷ *Id.* at 380.

³³⁸ *See Lara*, 541 U.S. at 201.

³³⁹ *Id.*

³⁴⁰ *See* Matthew L.M. Fletcher, *Preconstitutional Federal Power*, 82 TUL. L. REV. 509, 514–29 (2007); *see also* Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. REV. 666, 680–81 (2016).

³⁴¹ *See* sources cited *supra* note 340.

³⁴² *See* Steele, *supra* note 340, at 682 (“In practice [the plenary power doctrine] has meant that Congress has had a free hand to legislate and regulate with regard to Indian affairs . . . Congress has enacted legislation intended to empower tribes, such as the Indian Self-Determination Act, the Tribal Law and Order Act, and the Indian Healthcare Improvement Act; Congress has also acted to the detriment of tribal self-governance through termination acts and unilateral treaty abrogation.”).

³⁴³ *Compare* Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 163 (2002) (arguing that the plenary power doctrine “constitutes a racist American relic of ‘white man’s burden’ arguments employed to justify American colonialism” (footnote omitted) and rather than representing reasoned constitutional analysis, is “an unprincipled

of Indigenous inferiority and the presumption that the tribes were legal incompetents in need of guardianship.³⁴⁴ At the same time, the doctrine provides the basis for many of the modern programs and services carried out for the benefit of tribes.³⁴⁵ Having been the instrument of past religious oppression, the federal government could draw upon this history and power to find it has a special obligation to act for the benefit of tribes in facilitating their free exercise of religion. Courts have rarely, if ever, found Congress to exceed its “plenary, but not absolute” power over Indian affairs. That leaves Congress with an opportunity to thread the needle of facilitating free exercise without running afoul of the Establishment Clause. This could take the form of legislation mandating equitable protections for Indigenous claims involving federal lands. Courts have been broadly deferential to Congress in reviewing statutes enacted to carry out the trust responsibility pursuant to the plenary power doctrine and presumably, such an enactment for the protection of particular places or the facilitation of religious accommodations would be within the power of Congress.

At a minimum, the special relationship between federally recognized tribes and the federal government ought to mean that these tribes are not similarly situated to other users of federally controlled land for purposes of potential Establishment Clause limitations on preferential access to religious sites within those lands. A more just and modern iteration of the plenary power doctrine ought to include the federal government’s power to redress past offenses against tribal free exercise. In effect, the trust responsibility and plenary power could combine with and augment the Free Exercise Clause to support broad power, and responsibility, to protect Indigenous sacred sites and practices.

One example where the government failed to take this approach involved disputes over protections for tribes’ use of Devils Tower. For the Northern Plains and other tribes, Devils Tower, called variously “Bear’s Tipi,” “Bear Lodge,” “Tree Rock,” and other translations of Indigenous

assertion of raw federal authority based on nothing more than the naked power to effectuate it”), with Fletcher, *supra* note 340, at 524–25 (“While plenary power once created untold hardships for Indian people, Congress had [by the mid-1980s] begun using its plenary power, in most instances, to enact statutes for the benefit of Indian tribes and Indian people. Undermining the theoretical foundations of federal plenary power might serve to limit federal authority over Indian affairs, but it might also destroy much of what Indian people and tribes relied upon as their best hopes for a remedy.” *Id.* at 524.), and Michalyn Steele, *Congressional Power and Sovereignty in Indian Affairs*, 2018 UTAH L. REV. 307, 345 (“Whatever the wisdom, extravagance, or folly of the plenary power doctrine’s origins, federal law has long asserted a plenary power in Congress over Indian Affairs. . . . While plenary power has often been misused by the federal government . . . it has also been neglected when tribes have needed the protection that is within the power of Congress to offer.”).

³⁴⁴ Clinton, *supra* note 343, at 176.

³⁴⁵ Fletcher, *supra* note 340, at 524–25.

names, is a highly sacred site of ceremony.³⁴⁶ The religious significance of the site stems from legends about how the column of rock came to be formed, vital rites associated with the formation, and the breadth and depth of tribal connection to it from time immemorial.³⁴⁷ Many traditional stories have similar themes: A bear attacked tribe members, they ran away to the top of a stone mound or tree trunk, and the Great Spirit elevated the rocks higher and higher until the bear could no longer reach them.³⁴⁸ The marks on the side are the result of the bear's claws as it tried to get up the rock.³⁴⁹ Variations on this theme usually include six to seven members who eventually become seven stars of the formation known familiarly as the Pleiades, or the Seven Sisters.³⁵⁰ These stories have profound religious and cultural significance for many Indigenous tribes;³⁵¹ as Young-Bird of the Cheyenne tribe said about the tribe's narrative: "This is a true story. It happened."³⁵² The National Park Service (NPS) noted that "archaeological evidence has revealed that the ancestors to the Lakota people inhabited the Devils Tower area as far back as 1000 A.D., while ancestors to the Shoshone people inhabited the area in the 1500's."³⁵³

Rituals at so-called Devils Tower are an important aspect of the religious significance tied to the tower.³⁵⁴ The many religious rites include the Sun Dance, the sweat lodge, and personal rites "such as vision quests, fasting, and praying."³⁵⁵ These rights are embedded in cultural and religious history and require "isolation and privacy . . . for the proper employment of the rites."³⁵⁶ Tourist activities, including rock

³⁴⁶ *American Indians*, NAT'L PARK SERV.: DEVILS TOWER (Dec. 19, 2019), <https://www.nps.gov/deto/learn/historyculture/americanindians.htm> [<https://perma.cc/48G2-QEFK>]; see Hannah Trim, *Devils Tower — Climbing on Sacred Land*, COLO. COLL.: INDIGENOUS RELIGIOUS TRADITIONS, <https://sites.coloradocollege.edu/indigenoustraditions/sacred-lands/devils-tower-climbing-on-sacred-land> [<https://perma.cc/W37W-DXNW>].

³⁴⁷ *A Sacred Site to American Indians*, NAT'L PARK SERV.: DEVILS TOWER (Oct. 5, 2016), <https://www.nps.gov/deto/learn/historyculture/sacredsites.htm> [<https://perma.cc/FH6K-MWT6>]; *First Stories*, NAT'L PARK SERV.: DEVILS TOWER (Mar. 17, 2019), <https://www.nps.gov/deto/learn/historyculture/first-stories.htm> [<https://perma.cc/PVY3-T25T>]; *The Legend of Devils Tower*, INDIAN COUNTRY TODAY (Feb. 6, 2017), <https://indiancountrytoday.com/archive/the-legend-of-devils-tower-cj44KnmC8UqnYw2-fWoO8Q> [<https://perma.cc/825M-TJYP>].

³⁴⁸ *First Stories*, *supra* note 347.

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *A Sacred Site to American Indians*, *supra* note 347.

³⁵² *First Stories*, *supra* note 347.

³⁵³ *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 816 (10th Cir. 1999).

³⁵⁴ JEFFERY R. HANSON & SALLY CHIRINOS, NAT'L PARK SERV., ETHNOGRAPHIC OVERVIEW AND ASSESSMENT OF DEVILS TOWER NATIONAL MONUMENT, WYOMING 22–23, 28 (1997), <http://npshistory.com/series/archeology/rmr/9/report.pdf> [<https://perma.cc/8E86-E7JF>]; *A Sacred Site to American Indians*, *supra* note 347.

³⁵⁵ HANSON & CHIRINOS, *supra* note 354, at 22.

³⁵⁶ *Id.* at 31; *Bear Lodge*, 175 F.3d at 816 ("Vision Quests are intense periods of prayer, fasting, sweat lodge purification, and solitude designed to connect with the spiritual world and gain insight.

climbing, disturb many Indigenous sacred activities at the site.³⁵⁷ Many tribal members have expressed concern “about the climbing activity taking place on the tower.”³⁵⁸ For these members, Devils Tower “is a major center of power and climbing on it is not only sacrilegious, but also dangerous to those who do not ‘respect’ it.”³⁵⁹

A report by the NPS in 1991 recommended a total ban on climbing activity on Devils Tower to protect and respect the religion and culture of the Indigenous people.³⁶⁰ Thereafter, the NPS created a committee to review current practices on climbing Devils Tower, and it invited tribes with a vested interest to participate.³⁶¹ The result was a sort of compromise between recreational climbers, climbing guides/vendors, and the Indigenous tribes.³⁶² Despite the fact that some tribal members preferred a complete, year-round shutdown of Devils Tower,³⁶³ the tribes agreed to a proposal by the NPS to issue a strong recommendation that no person climb Devils Tower during June, when most tribes conduct their religious rituals.³⁶⁴ To help facilitate the ban, the NPS originally made it a policy to issue no commercial climbing permits during the month of June.³⁶⁵ However, this policy was challenged under the Establishment Clause as effectuating a religious preference for Indigenous religion.³⁶⁶ As a result, the NPS subsequently dropped the mandatory ban on climbing and agreed to issue permits, making the request to respect Indigenous worship during June only voluntary.³⁶⁷

The government has taken protective measures in other contexts that may serve as guides. The NPS enforces a mandatory climbing ban during March to protect the prairie falcon.³⁶⁸ Access to areas on the summit

Sun Dances and Vision Quests, as well as individualized prayer offerings and sweat lodge ceremonies, require solemnity and solitude.”).

³⁵⁷ HANSON & CHIRINOS, *supra* note 354, at 31.

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.* at 33; see NAT’L PARK SERV., FINAL MANAGEMENT CLIMBING PLAN/FINDING OF NO SIGNIFICANT IMPACT 49 (1995), <https://www.nps.gov/deto/planyourvisit/upload/DETO-FCMP-1995-accessible.pdf> [<https://perma.cc/5Q5D-CY8F>].

³⁶¹ NAT’L PARK SERV., *supra* note 360, at 8.

³⁶² See Mindy Sink, *Religion and Recreation Clash at Park*, N.Y. TIMES, July 1, 1996, at A8, <https://www.nytimes.com/1996/07/01/us/religion-and-recreation-clash-at-park.html> [<https://perma.cc/B8BY-HRWW>].

³⁶³ HANSON & CHIRINOS, *supra* note 354, at 31.

³⁶⁴ Sink, *supra* note 362, at A8; Maggie Mullen, *Climbers Ignore Native Americans’ Request at Devils Tower*, WYO. PUB. MEDIA (June 30, 2017), <https://www.wyomingpublicmedia.org/post/climbers-ignore-native-americans-request-devils-tower#stream/0> [<https://perma.cc/N9V2-U56J>].

³⁶⁵ *Bear Lodge Multiple Use Ass’n v. Babbitt*, 175 F.3d 814, 820 (10th Cir. 1999).

³⁶⁶ *Id.*; see DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 742–43 (6th ed. 2011).

³⁶⁷ *Bear Lodge*, 175 F.3d at 820.

³⁶⁸ NAT’L PARK SERV., *supra* note 360, at 28, 57; see also 36 C.F.R. §§ 1.5, 2.2 (2019). Penalties for violating NPS policies include up to six months of jail time and paying the cost of proceedings. 18 U.S.C. § 1865(a).

edge of Devils Tower above the nest sites “will be closed each year,” during March.³⁶⁹ The NPS provides these protections because there is evidence that “climbers cause prairie falcons to fail to successfully fledge young from Devils Tower in some years.”³⁷⁰ The prairie falcon’s nesting interests — important and legitimate — merit a mandatory climbing ban and the NPS is empowered by the Migratory Bird Treaty Act to act to protect those interests.³⁷¹ Similarly actionable considerations drawn from the important protection afforded threatened species ought to be authorized for the protection of Indigenous practices.

The government’s unwillingness to offer a more robust affirmative accommodation to tribes out of Establishment Clause concerns is misguided for two reasons. First, the government’s desire to remain neutral between the tribes and other religious groups, focusing on only a modern snapshot of treatment, fails to take into account the unique disadvantages tribes face when seeking to exercise their religion given the context of a coercive baseline. Just as government must be more affirmatively protective of religious exercise for groups like prisoners or military members in order for that exercise to be possible at all,³⁷² so must government be more protective of religious practices regarding Indigenous sacred sites. Without this special protection, the religious exercises of tribal members will be obstructed in decidedly non-neutral ways when compared to the practices of groups exercising their religion in a voluntary choice baseline.

Second, the trust relationship authorizes, and even requires, treating tribes differently. Even if neutrality were the rule required by the Establishment Clause for government relations vis-à-vis religious groups,³⁷³ the tribes are not religions per se. Thus, no such duty of neutrality should apply to the federal government. Nor are the tribes races, which would limit the scope of federal legislation to narrowly tailored measures in service of compelling governmental interests.³⁷⁴ The tribes have a sui generis, government-to-government relationship with the United States, and the United States can negotiate compacts and

³⁶⁹ NAT’L PARK SERV., *supra* note 360, at 28.

³⁷⁰ *Id.* at 33.

³⁷¹ *Id.* at 58; see 16 U.S.C. §§ 703–712.

³⁷² See 42 U.S.C. § 2000cc-1 (providing for the protection of religious exercise of institutionalized persons); Dep’t of Def., Instruction No. 1300.17, Religious Liberty in the Military Service, § 1.2 (2020), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/130017p.pdf> [<https://perma.cc/DJP2-2DD2>] (providing for the accommodation of service members’ religious practices).

³⁷³ And at least one of the authors disagrees that this would be the proper standard here, particularly as an abstract concept divorced from specific historical and factual moorings. See, e.g., Stephanie H. Barclay, Brady Earley & Annika Boone, *Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis*, 61 ARIZ. L. REV. 505, 555–59 (2019); Stephanie H. Barclay, *Untangling Entanglement*, 97 WASH. U. L. REV. 1701, 1726–27 (2020); see also EDWARD A. ZELINSKY, *TAXING THE CHURCH: RELIGION, EXEMPTIONS, ENTANGLEMENT, AND THE CONSTITUTION* 156 (2017).

³⁷⁴ See, e.g., *Morton v. Mancari*, 417 U.S. 535, 553–54 (1974).

agreements, enforceable at law in the best interests of the tribes. The plenary power over Indian affairs, in conjunction with the Free Exercise Clause and related legislation such as RFRA, could be construed in tandem to protect the interests of the tribes in their sacred sites. Because of the plenary power doctrine and the trust responsibility, the federal government has additional legislative resources to achieve creative, tailored solutions that could address the interests of tribes in accessing sites without running afoul of the Establishment Clause, and without imposing a religious servitude on federal lands.

The federal government could use its broad powers to designate certain sites and locales as set-asides for the benefit of tribes. Such a designation, like other federal designations, could carry with it both substantive and procedural rights for the tribes as stakeholders in the disposition and development of federal lands, and a cause of action empowering tribes to subject destructive actions to more searching review. This would be an incredibly complex and difficult undertaking, complicated not only because all federal land-use designations are complicated, but also because the specific locations and purposes of many ceremonial sites are considered to be sacred, private knowledge. Imposing a federal sacred-site designation would require some level of disclosure that may violate the principles of some Indigenous peoples, but enough of a showing could be made to facilitate protection.

Additionally, as Skibine has argued, there must be some limiting principle for defining which sites are sacred and subject to the special protections of the trust responsibility.³⁷⁵ Further work on the scope of these limiting principles is warranted. But the need for further work does not negate the ability of the federal government to more actively seek ways to facilitate and protect free exercise interests of Indigenous groups who have unique obstacles to their practices precisely because of their site-specific needs and fraught historical relationship with the government.

CONCLUSION

The current approach the law takes towards sacred sites is a refusal to recognize any government coercion regarding the religious exercise of Native Americans because tribal members are not being affirmatively threatened with sanctions or loss of a government benefit. This type of reasoning has been adopted by courts to deny constitutional and statutory protections. Moreover, it has influenced the government in its policymaking, encouraging the government to be more hesitant to voluntarily act to protect sacred sites for Indigenous peoples.

But this position applies a conception of coercion that does not apply to other sorts of religious practices. Resolving that double standard

³⁷⁵ Skibine, *Towards a Balanced Approach*, *supra* note 4, at 300.

would make clear that when government does things like bulldoze or blow up sacred sites, it is using force in a way that is more coercive, not less. Further, the very reality of government ownership of sites means that the government is always operating with a baseline of coercion, even if just passively, with respect to such sites. In such a context, it takes an affirmative act of government to allow religious exercise to occur. Courts that ignore the coercion in these cases are mistakenly treating tribal members as being on the same footing with other individuals who exercise their religion with a baseline of voluntary choice. Because courts and government officials in sacred site cases are looking for affirmative acts of only some forms of coercion (penalties) in the wrong context — under a baseline where coercion is ongoing so long as the government is passive — they have been blind to the omnipresent, baseline coercion that has wreaked havoc on the sacred practices of tribal members.

The alternative approach this Article offers would rectify this egregious double standard in the law. Doing so would have two important implications. First, when coercion is viewed clearly, tribal members and Indigenous practitioners should be able to prove a *prima facie* case under statutes like the Religious Freedom Restoration Act much more easily. Second, clearer understanding of the coercive control government exercises over sacred sites should create a strong obligation under the government's trust responsibility and plenary power doctrine to provide more — rather than less — robust protection of Indigenous sacred sites.