BOOK REVIEW

LIVING THE SACRED: INDIGENOUS PEOPLES AND RELIGIOUS FREEDOM

DEFEND THE SACRED: NATIVE AMERICAN RELIGIOUS FREEDOM BEYOND THE FIRST AMENDMENT. By Michael D. McNally. Princeton, N.J.: Princeton University Press. 2020. Pp. 376. $99.95.

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INTRODUCTION

In recent years, the Supreme Court has shown solicitude for religious freedom claims arising under the First Amendment and federal statutes.[1] Cases expanding the scope of free exercise and narrowing limitations on government establishment have favored religious belief and practice, even when arguably pitted against core concerns about public health and antidiscrimination.[2] Despite the current mood, however, the Court's precedents still deny religious freedom to American Indians, a point that Professor Michael McNally underscores in his new book *Defend the Sacred: Native American Religious Freedom Beyond the First Amendment* (p. xviii).

McNally's book is an important one. Indeed, in 2021, when both religious freedom and minority rights are front-burner issues, it is reasonable to ask why the Supreme Court has never extended the protections of the First Amendment to American Indians.[3] The two key cases

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[1] *See, e.g.*, Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2055 (2020) (expanding the ministerial exception to include teachers at religious schools); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2251, 2262–63 (2020) (holding that denying financial aid to religious schools under a state constitution violated the Free Exercise Clause); Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2372 (2020) (upholding administrative religious exemptions to the contraceptive mandate of the Affordable Care Act); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2074 (2019) (upholding use of public funds to maintain a memorial that was in the form of a cross as constitutional under the First Amendment).

[2] *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1724, 1732 (2018) (upholding a religious baker's refusal to serve gay customers on narrow grounds).

[3] This Review uses the terms "American Indian" and "Native American" somewhat interchangeably to refer to the original inhabitants of the Americas and their descendants. Other terms

are more than thirty years old and their legacy is mixed at best.[4] In *Lyng v. Northwest Indian Cemetery Protective Ass'n*,[5] the Court rejected Yurok, Karuk, Tolowa, and Hoopa Indians' claims that building a road through their prayer sites in a national forest would violate the Free Exercise Clause.[6] Reasoning that the "government simply could not operate if it were required to satisfy every citizen's religious needs and desires,"[7] Justice O'Connor wrote that the federal government could destroy the Indian sacred sites even if it would "virtually destroy the . . . Indians' ability to practice their religion."[8] The Court then held in *Employment Division v. Smith*[9] that a state could deny employment benefits to individuals who lost their jobs for violating a state prohibition on peyote possession, which they ingested as a sacrament in the Native American Church.[10] Because the Controlled Substances Act was a "neutral law of general applicability," according to Justice Scalia, its incidental effects on religion would not violate the Free Exercise Clause.[11]

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that appear in this Review are "Indian tribes" or "tribes," which usually refer to American Indians in the collective, and include the 573 "federally recognized tribes" listed on the Federal Register and those having a political relationship with the United States, as defined by the Constitution, treaties, and statutes. *See* Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 84 Fed. Reg. 1200 (Feb. 1, 2019). This Review also uses the term "Indigenous Peoples," which is gaining currency in the United States and acknowledges the connection between American Indians and similarly situated peoples around the world, from the Sami of Europe and Maya of Guatemala to the Ainu of Japan and the Khoisan of South Africa.

[4] Both cases — *Employment Division v. Smith*, 494 U.S. 872 (1990), and *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) — are described by Walter Echo-Hawk as among the "ten worst Indian cases ever decided." *See* WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED 273–358 (2010). A third case from this era held that the Free Exercise Clause did not mandate exempting an Abenaki Indian plaintiff from the requirement that he obtain a social security number for his daughter in order to receive benefits. *See* Bowen v. Roy, 476 U.S. 693, 695, 699–700 (1986).

[5] 485 U.S. 439 (1988).

[6] *Id.* at 441–42.

[7] *Id.* at 452.

[8] *Id.* at 451–52 (quoting Nw. Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 693 (9th Cir. 1986)).

[9] 494 U.S. 872 (1990).

[10] *Id.* at 890; *see also* Bowen v. Roy, 476 U.S. 693, 699–700 (1986) (holding federal government did not violate Free Exercise Clause by conditioning welfare benefits upon use of social security number in violation of Abenaki Indian's religion). *But see* Sherbert v. Verner, 374 U.S. 398, 399, 406–09 (1963) (finding South Carolina violated the Free Exercise Clause when it denied unemployment benefits to an individual who refused to accept Saturday work in keeping with her Seventh-day Adventist beliefs); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 138, 146 (1987) (holding that Florida violated the Free Exercise Clause when it denied unemployment benefits to an individual who, after conversion to Seventh-day Adventist church, was fired because she could not work on her Sabbath).

[11] *Smith*, 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982)).

Lyng and *Smith* have divided commentators. Some scholars of religious liberties suggest that these cases draw the right line, allowing government to regulate conduct, neutrally and fairly, right up to the point of private religious belief. To the extent that a religious practice may require special accommodations, these scholars argue for legislative or administrative measures, as in the Religious Freedom Restoration Act of 1993[12] (RFRA), which restored the substantial burden/compelling interest test to government activities that substantially burden religion.[13] Yet, other proponents of religious liberties have argued that the Court should "revisit" *Smith* and noted the upcoming *Fulton v. City of Philadelphia*[14] case as an opportunity to do just that.[15] In *Fulton*, the question is whether the city of Philadelphia may require Catholic Social Services, despite its religious objections, to place foster children with same-sex couples. Under *Smith*, the city's nondiscrimination ordinance would likely be immunized as a neutral law of general applicability, but challengers argue that since the ordinance burdens religion, it should be subjected to a strict scrutiny analysis under pre-*Smith* jurisprudence.

While Indigenous Peoples' cases arise in different contexts, they also test the American commitment to religious freedom, perhaps even more poignantly than other cases. Indigenous Peoples are not seeking to impose their religious beliefs or values on others. Rather, they seek the space to recover and revitalize their own religions following hundreds of years of suppression. Congress did afford certain legislative accommodations after *Lyng* and *Smith*, and, as described below, there are legislative protections for at least certain Indian sacramental interests, including peyote and eagle feather possession. Yet, these were achieved on a case-by-case basis and do not undo *Smith*'s potentially broader impact

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[12] 42 U.S.C. §§ 2000bb–2000bb-4 (2012), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997); *see* Garrett Epps, *To an Unknown God: The Hidden History of* Employment Division v. Smith, 30 ARIZ. ST. L.J. 953, 1016 (1998) (explaining the mobilization of a religious coalition to advance legislative repudiation of *Smith* and its exclusion of the Native American Church whose sacramental use of peyote was at issue in *Smith*). For scholarly critiques of *Smith*, see, for example, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990) (arguing "*Smith* is contrary to the deep logic of the First Amendment"); and Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 59–68 (arguing that deference to ostensibly neutral laws restricting religion creates a "legal framework for persecution," *id.* at 59). Following Laycock, scholars and advocates may wish to analyze whether regulations, plans, or programs destroying or desecrating American Indian sacred sites on the federal public lands are truly "neutral."

[13] *See City of Boerne*, 521 U.S. at 533, 536 (declaring RFRA unconstitutional as to the conduct of state and local governments).

[14] 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020).

[15] Lindsay See, *Symposium: In* Fulton*, the Court Has the Chance to Jettison* Employment Division v. Smith *— and the Pandemic Shows Why It Should Take It*, SCOTUSBLOG (Oct. 30, 2020, 5:16 PM), https://www.scotusblog.com/2020/10/symposium-in-fulton-the-court-has-the-chance-to-jettison-employment-division-v-smith-and-the-pandemic-shows-why-it-should-take-it [https://perma.cc/Q3CN-UTTQ].

on any other Indigenous religious practices, especially because the courts have interpreted RFRA very narrowly in the Indigenous Peoples' context, as also described below. In areas such as sacred sites protection, Indigenous Peoples' religions remain extremely vulnerable to burdensome government activities. The upshot is that even though our country was ostensibly founded on a promise of religious freedom, it quite frequently denies that promise to American Indians.

In early 2021, for example, a federal district court denied temporary injunctive relief to Apache plaintiffs seeking to stop the federal government from transferring sacred lands to a foreign mining company, on the grounds that it would violate the First Amendment and RFRA, among other laws.[16] Although the federal government claims to own and manage the land as part of the Tonto National Forest, the land is within Apache traditional territory and is arguably recognized as such under treaties.[17] "Chi'chil Bildagoteel," known in English as "Oak Flat," is the site of young women's coming-of-age ceremonies and other religious practices.[18] Rather stunningly, the court acknowledged that "the land in this case will be all but destroyed to install a large underground mine, and Oak Flat will no longer be accessible as a place of worship."[19] Nevertheless, it cited *Lyng* for the proposition that the federal government may destroy Indian sacred sites located on federal public lands, notwithstanding the First Amendment or RFRA.[20]

Other recent cases also reveal the difficulty of protecting Indigenous Peoples' religious freedom under current jurisprudential standards. In 2020, for example, tribes complained that the Department of Homeland Security failed to consult with them before blasting sacred sites and burial grounds as part of the border wall construction project.[21]

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[16] Apache Stronghold v. United States, No. CV-21-0050, 2021 WL 535525, at *1, *8 (D. Ariz. Feb. 12, 2021).

[17] *Id.* at *1.

[18] *Id.* at *7.

[19] *Id.* at *9.

[20] *Id.* at *10. After the district court decision, the U.S. Department of Agriculture issued a temporary reprieve of sorts, withdrawing the "Notice of Availability, Final Environmental Impact Statement, and Record of Decision" supporting transfer of Oak Flat, until impacts on federally recognized Indian tribes could be more fully studied. U.S. Dep't of Agric., Resolution Copper Project and Land Exchange Environmental Impact Statement (Mar. 1, 2021), https://www.resolutionmineeis.us [https://perma.cc/PZM4-3S8E]. This decision provides some time and space for concerned parties to work toward a political solution to protect Oak Flat permanently. Models include congressional legislation restoring Blue Lake to Taos Pueblo, as well as comanagement agreements and wilderness designations for tribal sacred sites, described below.

[21] *See* Christine Hauser, *Blasting in Construction of Border Wall Is Affecting Tribal Areas*, N.Y. TIMES (Feb. 15, 2020), https://www.nytimes.com/2020/02/11/us/trump-border-wall-arizona-native-americans.html [https://perma.cc/DDA9-JMPH]; *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/YNF2-C3WC]; Paulina Firozi, *Sacred Native American Burial Sites Are Being Blown Up for Trump's Border Wall, Lawmaker Says*, WASH. POST (Feb. 10, 2020, 5:14 AM),

"Consultation" is one of the post-*Lyng* legislative accommodations that is supposed to protect Indigenous religious freedoms. Under statutes like the National Historic Preservation Act[22] (NHPA), it gives tribal governments the right to receive notice and participate in government-to-government discussion regarding actions that would adversely impact sacred sites. Unfortunately, however, it fails to protect those sites in most cases. Even when federal land managers do consult with tribes regarding actions that will affect sacred sites, consultation has little chance of preventing destruction unless the department or agency is inclined to cooperate with the tribe. In cases such as the Standing Rock Sioux Tribe's opposition to the Dakota Access Pipeline and the Navajo Nation's opposition to development of the Arizona Snowbowl, courts construed statutory rights to consultation as entirely procedural and easily satisfied.[23] The agencies checked the consultation box under the NHPA or National Environmental Protection Act, and went ahead with desecrating the sites anyway, over the religious concerns and objections of tribes. Reviewing courts held that these agency decisions did not violate the First Amendment or RFRA.[24] While there appears to be some disagreement among federal courts with respect to the reach of RFRA in sacred sites cases,[25] the Supreme Court has not revisited its American Indian

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https://www.washingtonpost.com/immigration/2020/02/09/border-wall-native-american-burial-sites [https://perma.cc/TF3E-LQMW]. The most tribes could realistically claim under current law is a right "to consult" on projects. *See* Robert J. Miller, *Consultation or Consent: The United States' Duty to Confer with American Indian Governments*, 91 N.D. L. REV. 37, 48–53 (2015). The right of federally recognized tribes to "consult" on certain matters affecting them is recognized in various statutes and executive orders. *Id.* While achieving this right to consult was itself a hard-fought victory for tribes at the onset of the self-determination era, it has often proven expensive, bureaucratic, and ultimately ineffective in securing any substantive legal protections in areas ranging from religious freedom to intellectual property and environmental regulation. *See id.* at 64. Ultimately, agencies are free to offer minimal consultation procedures and go ahead with their proposed decisions as a matter of administrative discretion. *See id.* at 67. It is for this reason that many tribes are interested in the United Nations Declaration on the Rights of Indigenous Peoples' standard of "free, prior, and informed consent" (FPIC), which strives to improve consultation by envisioning best practices of notice and cooperation leading to mutual agreement. *Id.* at 67–68. FPIC is discussed throughout this Review.

[22] 54 U.S.C. § 302706(b).

[23] *See* Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1060 (9th Cir. 2007) (holding U.S. Forest Service's consultation process concerning effects on historic properties to which Indian tribes attached religious and cultural significance was substantively and procedurally adequate under the National Historic Preservation Act (NHPA)); Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d 4, 32, 37 (D.D.C. 2016) (denying the motion for preliminary injunction in part because the Tribe had not shown the government failed to meet the standard for consultation under NHPA).

[24] *See, e.g.*, Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1078 (9th Cir. 2008) (en banc).

[25] *Compare id.* at 1063, 1078 (declining to find that the use of recycled wastewater to create artificial snow imposed a "substantial burden" under RFRA), *with* Comanche Nation v. United States, No. CIV-08-849-D, 2008 WL 4426621, at *2, *17 (W.D. Okla. Sept. 23, 2008) (finding that construction of a warehouse did impose a "substantial burden" on Indigenous religious practices).

religious freedom jurisprudence since upholding the government's right to destroy Indian religions.

Walter Echo-Hawk has characterized the destructive powers and tendencies of the federal government vis-à-vis Indian tribes as comprising the "dark side of federal Indian law."[26] The image suggests that, even with enduring tribal resilience[27] and important legal victories,[28] there remains a shadow of conquest and colonization over the lives of Indigenous Peoples in the United States. In the search for daylight, many Indigenous people have turned to the field of human rights for new ways of addressing old problems in federal Indian law.[29] The United Nations Declaration on the Rights of Indigenous Peoples[30] (the Declaration) and the American Declaration on the Rights of Indigenous Peoples[31] recognize Indigenous Peoples' rights in substantive areas including land and culture, health and development, language, participation, and religion. An entire infrastructure at the United Nations and Organization of American States[32] exists to help realize those rights.[33]

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[26] ECHO-HAWK, *supra* note 4, at 31.

[27] *See generally* CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS (2005) (tracing tribal histories from the federal Indian "termination" policy of the 1950s to the "self-determination" policy of the 1970s).

[28] *See, e.g.*, McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020) (holding the reservation of the Muscogee (Creek) Nation, as created by treaty in 1832, was never disestablished).

[29] *See, e.g.*, WALTER R. ECHO-HAWK, IN THE LIGHT OF JUSTICE: THE RISE OF HUMAN RIGHTS IN NATIVE AMERICA AND THE U.N. DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 3–4 (2013).

[30] G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter the Declaration].

[31] Org. of Am. States, *American Declaration on the Rights of Indigenous Peoples*, AG/RES. 2888 (XLVI-O/16) (June 15, 2016), https://www.oas.org/en/sare/documents/DecAmIND.pdf [https://perma.cc/B9XP-F6YR]. While this Review largely focuses on the U.N. Declaration because of its global application and longer time since adoption, many of its arguments could apply to the American Declaration as well. Relevant provisions of the American Declaration include articles VI, XIII, XIV, XX, and XXXI, which articulate a robust set of Indigenous Peoples' rights to religion and spirituality, including sacred sites and ritual practices.

[32] For a description of U.N. mechanisms and procedures focused on Indigenous Peoples, see INT'L WORK GRP. FOR INDIGENOUS AFFS., THE INDIGENOUS WORLD 2019, at 582–88, 613–71 (David N. Berger ed., 2019).

[33] *See, e.g.*, Sanila-Aikio v. Finland, CCPR/C/124/D/2668/2015, Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2668/2015, ¶ 2.2 (U.N. Hum. Rts. Comm. Nov. 1, 2018); Käkkäläjärvi v. Finland, CCPR/C/124/D/2950/2017, Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2950/2017, ¶ 2.12 (U.N. Hum. Rts. Comm. Nov. 2, 2018) (extensively citing the Declaration in support of findings that by extending the pool of eligible votes for elections of the Sami Parliament, Finland improperly interfered with the Sami peoples' rights to political participation and to minority rights under articles 25 and 27 of the International Covenant on Civil and Political Rights). For a summary of these cases, see *UN Human Rights Experts Find Finland Violated Sámi Political Rights to Sámi Parliament Representation*, UNITED NATIONS HUM. RTS. (Feb. 4, 2019), https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24137&LangID=E [https://perma.cc/2KT3-CJSR].

Tribal governments themselves have adopted legislation embracing the Declaration and also created institutions to realize its promise.[34]

One of the most exciting aspects of *Defend the Sacred*, in my view, is that it lays the groundwork for applying this global framework for Indigenous Peoples' human rights to the problem of religious freedom in the United States (p. 32). First, McNally observes that, despite the discouraging case law referenced above, American Indians have not given up on the First Amendment (p. 87). Rather, they continue, appropriately so, to insist on a right to practice Indigenous religions without government interference, under the Free Exercise Clause and statutes such as RFRA and the Religious Land Use and Institutionalized Persons Act of 2000[35] (RLUIPA) (p. 96). Noting the many categorical and practical limitations of religious freedom jurisprudence, however, the author also argues against beating a dead horse. It is time to try something new. Accordingly, McNally argues that lawmakers should reframe their understanding of "religious freedom" toward a model that affirmatively protects the collective rights of "peoples" to actually practice their religions (p. 19). He notes that the Declaration, with its recognition of the collective rights of Indigenous Peoples, including the right to maintain their distinctive spiritual relationship with lands, is a potential source for a paradigm shift in this regard (p. 295). This Review assesses McNally's analysis and then picks up where he leaves off, namely, in more fully articulating the potential for law reform guided by the Declaration, to bring about real change in religious freedom in the United States (p. 32).[36]

To date, our legal institutions have not managed to afford Indigenous Peoples the full protections of the Constitution and statutory law on religious freedom. The history of conquest and colonization, in which Indigenous Peoples' sacraments were outlawed and their lands taken, casts a very long shadow and renders many existing approaches to religious freedom unsatisfactory in the Indigenous Peoples' context today. When, for example, critics of the Court's establishment cases argue that religion should stay out of the public sphere,[37] they perhaps do not re-

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[34] *See* UNIV. OF COLO. L. SCH., NATIVE AM. RTS. FUND & UCLA SCH. OF L., PROJECT TO IMPLEMENT THE U.N. DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: TRIBAL IMPLEMENTATION TOOLKIT 9, 25, 28 (Mar. 1, 2020) (on file with the Harvard Law School library).

[35] 42 U.S.C. §§ 2000cc–2000cc-5.

[36] Another religious freedom scholar, writing in the Canadian context, ends like McNally with a call for implementation of the Declaration. *See* NICHOLAS SHRUBSOLE, WHAT HAS NO PLACE, REMAINS: THE CHALLENGES FOR INDIGENOUS RELIGIOUS FREEDOM IN CANADA TODAY 183 (2019).

[37] *See* HOWARD GILLMAN & ERWIN CHEMERINSKY, THE RELIGION CLAUSES: THE CASE FOR SEPARATING CHURCH AND STATE 18–19 (2020).

alize that many Indigenous sacred sites are now located on federal public lands because the United States took those sites from Indian tribes long ago. There is no "private" place for those religions to go. And scholars who laud the recent free exercise cases[38] rarely evaluate whether the Court's new approaches will finally extend religious liberty to American Indians at sacred sites, nor do they consider whether the new jurisprudence will address the historical policies or ongoing discrimination that have left American Indians uniquely without judicial protection for their religions to date.

In some respects, the circumstances — historical, political, cultural, and racial — facing Indigenous Peoples when they try to practice their religions are simply unlike those facing other people. The Declaration is potentially a very powerful tool for legal advocates and decisionmakers to use in these distinctive cases because it addresses the question of how to achieve religious freedom for Indigenous Peoples whose sacred lands, plants, and ceremonies have all been taken or harmed through histories of conquest and colonization. With its provisions for remedial and ongoing approaches to Indigenous rights, the Declaration could help the United States to address past harms and recognize the contemporary rights of Indigenous Peoples necessary to ensure their religious freedom.

Implementation of the Declaration is underway in countries such as Canada, New Zealand, and Mexico.[39] In the United States, various federal, state, and tribal legal institutions are already referencing the Declaration in Indian law matters.[40] More specifically, the Declaration's substantive provisions on land and religion, culture and spirituality, as well as its procedural provisions on political participation and free, prior, and informed consent (FPIC), all have salience in the religious freedom context. I argue that by embracing these provisions of the Declaration — or taking inspiration from them — advocates and lawmakers can help to make the United States a place where Indigenous Peoples have a right to survive, politically, culturally, and spiritually, and where Indigenous Peoples actually enjoy the freedom of religion.

This piece proceeds in three parts. Part I describes American Indian religions and McNally's assessment of First Amendment jurisprudence in the United States. Part II takes McNally's work as a launch pad for considering how the overall situation of Indigenous Peoples' religious freedom in the United States could be improved by embracing the Declaration in sacred sites cases and other contexts. Part III concludes with some reflections about how and why the United States might wish

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[38] Richard Garnett, *Symposium: Religious Freedom and the Roberts Court's Doctrinal Clean-Up*, SCOTUSBLOG (Aug 7, 2020, 9:57 AM), https://www.scotusblog.com/2020/08/symposium-religious-freedom-and-the-roberts-courts-doctrinal-clean-up/ [https://perma.cc/8298-M8SV] ("An important part of the Roberts court story, though, is that it has both continued and facilitated developments-for-the-better in law-and-religion.").

[39] *See infra* notes 175–181 and accompanying text.

[40] *See infra* section II.D, pp. 2138–49.

to advance a collective human rights approach to religious freedom, as embodied in the Declaration. Among other things, the Declaration offers a way to distinguish Indigenous religions and respect them on their own terms, while fostering a cooperative, pluralist approach to religious freedom more broadly.

I. THE FIRE

Professor McNally explains at the outset that the traditions linking Indigenous Peoples to the sacred have been poorly served "by the conventional wisdom about 'religion'" (p. 5). For a deeper understanding, McNally draws heavily from the scholarly writings of Vine Deloria, Jr., the late Sioux theologian and lawyer, as well as the wisdom of Suzan Shown Harjo, a Creek and Cheyenne activist with forty years of activism in the fields of culture and religion (p. 8). Deloria underscored the collective nature of Indigenous religions when he wrote that "[t]here is no salvation in tribal religions apart from the continuance of the tribe itself" (p. 7). Harjo has noted that Indigenous Peoples have "no one word for religion," a point that underscores both the multiplicity of local traditions versus universal institutions and the transcendent nature of lifeways that do not always align themselves with the belief/practice, secular/spiritual, or church/state distinctions of Anglo-American understandings (p. 8). Here I consider several examples of indigenous religious practices as background for the legal analysis that follows.

A. *American Indian Religions*

In the Cherokee language, the word for fire is *astila*. This word evokes the original light and heat of creation, the times in history that Cherokees reemerged from ashes like the mythical Phoenix, and the flame flowering at the center of contemporary Cherokee ceremonial life.[41] At each stomp ground in northeastern Oklahoma, a ceremonial fire burns as men take medicine, fast, and sing ancient songs of prayer and women care for camps, prepare traditional foods, and shake turtle shells in dances lasting all night long. Children drink lemonade and listen to stories, learning ancient traditions like playing stickball and

[41] For discussions of fire in Cherokee religion and culture, see, for example, JAMES MOONEY, MYTHS OF THE CHEROKEE 240–41 (1902) (recounting the origins of fire); RENNARD STRICKLAND, FIRE AND THE SPIRITS 3 (1975) (describing Cherokees as people of the fire); and CHADWICK CORNTASSEL SMITH, RENNARD STRICKLAND & BENNY SMITH, ᎥᎪᏢᏍᎬ ᏌᏊ ᎠᏥᎸ BUILDING ONE FIRE: ART AND WORLD VIEW IN CHEROKEE LIFE 9, 217–21 (2010) (identifying Cherokee artworks and cultural expressions embracing the sacred fire). *See also* David Comingdeer, *Native Peoples of Oklahoma – Cosmology & Religion, – 2.0.4 David Comingdeer Part 3*, YOUTUBE, at 0:15 (July 26, 2014), https://www.youtube.com/watch?v=oEfq-SAuQrs [https://perma.cc/QYP3-TGFL] (describing significance of fire at Cherokee ceremonial grounds).

calling dances. For Cherokees, as well as members of the Euchee, Muscogee, Shawnee, and other tribes, the ceremonial grounds are vibrant places where the people gather for prayer, ritual, and the hard work of keeping cultures alive.[42]

David Comingdeer is the Chief of the Echota Ceremonial Ground near Tahlequah. He has explained, "[t]he fire that we keep here, that we care for and protect here, that we hold our dances at and our meetings, our bloodline has kept that fire as far back as we know."[43] The fire has witnessed the people's suffering through war, famine, and the violent Removal of the Cherokee people from their homelands in the east. The fire has witnessed contemporary struggles to protect the Cherokee language and songs, traditional plants and medicines from cultural assimilation, environmental degradation, and internal disputes. Yet a small group of dedicated practitioners keeps the fire alive to this very day. Chief Comingdeer has said that, "[i]f we don't come together and continue to assemble at our respective fireplaces, square grounds, stomp grounds and continue to follow our rules and our regulations, then we will die as individuals — or we will survive as families, as warriors, as tribal towns, and communities."[44]

Indigenous religious practices range from Pueblo Feast Days and Lakota Sun Dances to Tlingit Potlatch and Yurok World Renewal ceremonies.[45] Religious societies and clans, including the Anishinabe Midewewin, Kiowa Gourd Society, and Hopi Kachina Clan, differ in terms of organization, structure, and purpose. Each of these is a deeply complex expression of Indigenous cosmologies and relationships among humans, nature, and the spirit world. Some Indigenous religious practices seek to keep the world in balance,[46] or create the conditions for fruitful growing seasons, while others might heal individuals afflicted with illness or communicate with the creator.[47] McNally notes that most Indigenous religions, unlike Christianity, Judaism, or Islam, are carried on in the oral tradition rather than reduced to a central text (p. 6). Similarly, as compared with world religions, few Indigenous religions

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[42] *See* Gregory H. Bigler, *Traditional Jurisprudence and Protection of Our Society: A Jurisgenerative Tail*, 43 AM. INDIAN L. REV. 1, 3 (2019) ("Within the Euchee, Muscogee, Cherokee and Shawnee, the stomp dances are part of a still-existing traditional religion.").

[43] David Comingdeer, *Native Peoples of Oklahoma – Cosmology & Religion – 2.02 David Comingdeer Part 1*, YOUTUBE, at 5:28 (July 26, 2014), https://www.youtube.com/watch?v=nRkQGjOKbDk [https://perma.cc/C4VM-KSLD].

[44] Comingdeer, *supra* note 41, at 4:22.

[45] For more extensive discussion of Indigenous Peoples' religions in the United States, see, for example, Kristen A. Carpenter, *Individual Religious Freedoms in American Indian Tribal Constitutional Law*, *in* THE INDIAN CIVIL RIGHTS ACT AT FORTY 159, 163–64, 190 (Kristen A. Carpenter et al. eds., 2012).

[46] WILLIAM A. YOUNG, QUEST FOR HARMONY: NATIVE AMERICAN SPIRITUAL TRADITIONS 135 (2006).

[47] *See id.*

have a formal institution or hierarchy, though an exception is the Native American Church, an intertribal religion with a national presence and local chapters that coordinate on various matters.[48]

Further, in many Indigenous religions, plants, animals, and features of the natural landscape are critical to religious belief and practice. Sacred sites, such as the Black Hills for the Lakota, High Country for the Yurok, and San Francisco Peaks for the Navajo, are unique places marking sites of creation, homes of deities, or habitats for sacramental plants and waters.[49] It is certainly the case that many world religions have sacred sites, often located outside of the United States — Jerusalem, Mecca, and the Vatican all come to mind. Yet, the tradition of ritual worship at a sacred site is a feature that sometimes distinguishes certain Indigenous religious rituals from others that can be practiced equally well in any church, temple, or mosque.[50] The inextricable connection among place, belief, and practice that characterizes many Indigenous Peoples' religions is all the more poignant when federal, state, and private parties have come to own many Indigenous sacred sites, and when these parties wish to use them for purposes not consistent with religious worship or practice.

Even allowing for the differences between Indigenous traditions and world religions, however, McNally eschews some of the recent terminology that could diminish the seriousness or validity of Indigenous religions. He notes, for example, that when the courts characterize Indigenous traditions as "spirituality" (pp. 72, 118), it is usually as a precursor to rejecting their claims under the First Amendment or RFRA. Moreover, "spirituality" evokes a kind of New Age commercialism that is more likely to distort and appropriate Indigenous religions than to describe them with any accuracy (pp. 105–07). Indigenous Peoples should not be excluded from the legal protection and rhetorical power associated with "religion."

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[48] Jay C. Fikes, *A Brief History of the Native American Church*, *in* ONE NATION UNDER GOD: THE TRIUMPH OF THE NATIVE AMERICAN CHURCH 165, 172 (Huston Smith & Reuben Snake eds., 1996).

[49] The religious significance of sacred sites and legal history of disputes surrounding them is covered more fully in VINE DELORIA, JR., GOD IS RED: A NATIVE VIEW OF RELIGION 276–79 (2d ed. 1992) and Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1067–85 (2005).

[50] As the Lakota people recount with respect to Mato Tipila or Devil's Tower National Monument:

> To honor the Great Spirit, the Lakota gathered at Mato Tipila for a sun dance. A mysterious woman appeared and gave the Lakota a pipe and taught them how to use it in prayer. As she headed back to the horizon, the woman turned into a buffalo calf. Since then, she's been known as "White Buffalo Calf Woman." Mato Tipila is remembered as the place where the Lakota received the pipe from the spirit world.

IN THE LIGHT OF REVERENCE – DEVILS TOWER, PART 1, at 21:13 (Sacred Land Film Project of Earth Island Institute 2001) (recounting this story).

In light of these realities, both social and legal, McNally makes "four key arguments on the problem of Native American religious freedom" (p. 295). First, "*religion* and *religious freedom* have been discourses available to those with power to exclude as well as to include, but because they are powerful discourses, they have also been significant to Native communities" (p. 295). Second, even when religious freedom claims fail in the courtroom, Native peoples have won victories through legislative and regulatory reforms (p. 295). Third, Native religious traditions are often collective rather than individualized, and U.S. laws tend to protect individualized and interiorized spirituality (p. 295). However, administrative policies that recognize the federal trust responsibility and Native people's inherent sovereignty, in addition to treaty provisions, have paved the way for some success. Perhaps most provocatively, McNally views a move toward international law and the Declaration as offering greater protections for collective rights (pp. 295–96). Fourth, advocacy styled around these instruments and concepts reflects "a spirited sense of peoplehood" (p. 295) that has emerged in contemporary cases and activism.

Ultimately, McNally lands on the concept that the religion of American Indians is tied to their "peoplehood" or their collective identity and self-determination (pp. 19, 224–95). This is a powerful frame, as I have argued before, in part because it reflects widespread viewpoints of Indigenous Peoples that their survival depends on the ability to practice certain religious traditions and ways of life.[51] Even if you could isolate an individual's right to his Navajo *beliefs*, for example, destroying the *practices* associated with a Navajo sacred site is arguably tantamount to genocide for its collective impact on the Navajo people.[52] At the very

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[51] I provide a detailed articulation of the "peoplehood" framework for application in Indigenous Peoples' sacred sites cases in Kristen A. Carpenter, *Real Property and Peoplehood*, 27 STAN. ENV'T L.J. 313, 348–63 (2008). *See also* Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1028–29 (2009); Kristen A. Carpenter, *The Interests of "Peoples" in the Cooperative Management of Sacred Sites*, 42 TULSA L. REV. 37, 37–55 (2006).

[52] After the federal district court in Arizona denied Navajo Nation's RFRA claims regarding the desecration of the San Francisco Peaks, Navajo Nation's President Joe Shirley was quoted as saying, "[i]t is another sad day . . . [when] in the 21st Century, genocide and religious persecution continue to be perpetrated on Navajo people [and] other Native Americans . . . who regard the [San Francisco] Peaks as sacred." Cyndy Cole, *Snowmaking Opponents Now Targeting City Council*, ARIZ. DAILY SUN (Jan. 12, 2006), https://azdailysun.com/snowmaking-opponents-now-targeting-city-council/article_3cff71dc-acbf-59f9-8461-63548e54cfb5.html [https://perma.cc/DK3V-8SPD]. From this perspective, the desecration of this cultural resource threatens the very survival of the Navajo people. Similarly, as I have previously articulated with respect to *Sequoyah v. Tennessee Valley Authority*, 620 F.2d 1159 (6th Cir. 1980):

> Cherokee claimants explained in litigation over a sacred site, "When this place is destroyed, the Cherokee people cease to exist as a people." They may not have meant that each individual tribal member would literally die, but rather that the loss of such sacred sites would make it difficult or impossible to maintain Cherokee worldviews and lifeways.

least, to use Justice Brennan's characterization in his *Lyng* dissent, quoted by McNally, it is a "cruelly surreal result" for the Court to say "government action that will virtually destroy a religion is nevertheless deemed not to 'burden' that religion" (p. 118).[53]

The framework of "peoplehood" is consistent with the distinctive status of Indigenous Peoples in the United States as collective identities and federally recognized tribes that maintain a unique legal relationship with the federal government — and their status as a matter of international human rights. As I describe in greater detail in Part III, the Declaration sets forth, for the first time ever, a global consensus on the affirmative, inherent rights of Indigenous Peoples and the obligations of nation-states to recognize them. The articles of the Declaration, which can be construed in the context of one another, make clear that the right of Indigenous Peoples to live as distinct peoples includes both self-determination and religious freedom, along with overlapping rights in the realms of life, land, culture, political participation, language, health, family, and so on.[54]

B. Legal History of American Indian Religions

After setting forth his central arguments, McNally articulates the need for legal reform by reflecting on the ways in which historical suppression of American Indian religions both informs and casts a legacy of discrimination over current claims. In the legal literature, Vine Deloria, Jr.,[55] and Professor Allison Dussias[56] have previously elucidated this legal history, which McNally helpfully updates from the perspective of contemporary religious studies.

As stated above, many Indigenous Peoples' religious practices center on sacred sites and resources, including plants, animals, mountains, and other features of the natural world that have sacred meaning. From the beginning of European conquest and into early U.S. history, when settlers and governments took Indian lands and resources, legal institutions found ways to "legitimize" the dispossession. For example, in *Johnson v.*

Carpenter, Katyal & Riley, *supra* note 51, at 1051–52; *see also* BRIAN EDWARD BROWN, RELIGION, LAW, AND THE LAND: NATIVE AMERICANS AND THE JUDICIAL INTERPRETATION OF SACRED LAND 15 (1999).

53 The author quotes *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 472 (1988) (Brennan, J., dissenting).

54 *See, e.g.*, the Declaration, *supra* note 30, arts. 7, 8, 10, 11, 24, 25, 31.

55 *See* DELORIA, *supra* note 49; VINE DELORIA, JR., FOR THIS LAND: WRITINGS ON RELIGION IN AMERICA (1999).

56 *See* 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 (1997) (discussing how nineteenth-century Christianization policies continue to influence recent Native American free exercise jurisprudence).

M'Intosh[57] the U.S. Supreme Court held that the United States had an exclusive right to acquire indigenous lands "by purchase or by conquest."[58] In the 1800s, the federal government was removing whole tribes from their homelands, which of course included religious sites and cemeteries.[59] While tribes often tried to protect their sacred sites through treaty negotiations, as in the case of the the sacred Black Hills of the Great Sioux Nation, just as often the federal government broke these treaties. Sacred sites ended up under the ownership and jurisdiction of the federal government, which managed them as "public lands," including National Parks and Forests.[60] Early on, tribes were removed and excluded from their former lands by government officials seeking to secure them for conservation, recreation, and development.[61]

Beyond the taking of religiously significant lands, the federal government soon turned to prohibition of Indian religious rituals. Federal policy from 1883–1934 criminalized Indigenous religions through regulations and programs prohibiting Indian dances, prayers, and feasts, as well as the practices of medicine men (pp. 40–61). The idea was that by punishing Indians for practicing "heathenish" traditions, Indians would abandon their religions, and the government and churches would facilitate their assimilation into white Christian society (pp. 37–39, 41).[62] Federally funded boarding schools used the same logic when they forbade Indian languages and cut children's hair in order to "Kill the Indian to Save the Man" (pp. 39–40). On December 29, 1890, the U.S. Army infamously killed several hundred Lakota men, women, and children, who were engaging in a revivalist religion known as the Ghost Dance, leaving them to bleed in the snow (pp. 52–53). Prohibitions on the peyote religion and Pueblo feasts soon followed, which continued into the 1920s (pp. 54–57).

Federal policy officially reversed course in the 1930s when Commissioner of Indian Affairs John Collier was forced to take stock of the many economic, social, and cultural failures of the Indian assimilation policy (pp. 62–63). Criticizing the previous federal regulations as "Religious Crimes Code[s]," Collier announced in 1934 that "[n]o interference with Indian religious life or ceremonial expression will hereafter

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[57] 21 U.S. (8 Wheat.) 543 (1823).

[58] *Id.* at 587.

[59] *See* Sequoyah v. Tenn. Valley Auth., 620 F.2d 1159, 1164–65 (6th Cir. 1980) (rejecting Cherokee free exercise claims to sacred sites in Tennessee, an area from which most of the tribe had been removed via the "Trail of Tears" in the 1830s).

[60] For a discussion of the religious significance of sacred sites and legal history of disputes surrounding them, see sources cited *supra* note 49.

[61] *See, e.g.*, MARK DAVID SPENCE, DISPOSSESSING THE WILDERNESS: INDIAN REMOVAL AND THE MAKING OF THE NATIONAL PARKS 55–70 (1999) (describing federal measures to remove Indians from Yellowstone National Park).

[62] The author quotes Secretary of the Interior Henry Teller to Commissioner of Indian Affairs Hiram Price (Dec. 2, 1882), *in* COMM'R OF INDIAN AFFS., ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR (1883).

be tolerated. . . . The fullest constitutional liberty, in all matters affecting religion, conscience, and culture, is insisted on for all Indians" (p. 42 & n.37). Despite the emphatic nature of Collier's about-face, it took quite some time to undo the damage. Some of it would never be undone. Following the Indian "reorganization" of the 1930s, the federal government tried outright to "terminate" tribes in the 1950s, with additional deleterious effects on their religions and cultures (p. 25–26).

Finally, in the 1960s and 1970s a wave of American Indian activism ushered in a new "self-determination" movement (p. 26). McNally recounts how spiritual leaders called young people to action, instructing them after Sun Dances and other ceremonies (p. 174). Quoting interviews with Harjo, McNally reveals the early components of a strategy that would come to include protection of sacred places and burial sites, repatriation, museum reform, and respect (pp. 172–77). Informed by ceremony, the strategy would come to embrace religious freedom discourse in multiple sites of advocacy (pp. 172–77). This is a refreshing set of insights, revealing Indigenous agency in a way that challenges the dominant narrative of President Nixon's support for legislation to repatriate the sacred Blue Lake to Taos Pueblo in 1974, and his subsequent support for the American Indian Religious Freedom Act[63] (AIRFA) in 1978.

Acknowledging past "abridgement of religious freedom for traditional American Indians," AIRFA proclaimed that going forward, "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."[64] But AIRFA did not generally restore tribal ownership of sacred sites — Blue Lake was an exceptional example accomplished by separate legislation[65] — and it created no substantive claim or cause of action that American Indians could use when their religious freedom was threatened. These limitations became clear when several Indigenous Peoples' religious freedom cases reached the Supreme Court in the late 1980s and early 1990s.

The stories of Indigenous religious practitioners in *Lyng* and *Smith* have been told many times, by me among many others. McNally surmises, with some understatement, that "[e]fforts to make the language of religious freedom work for Native claims in the 'courts of the conqueror,' . . . have had disappointing results" (p. 177). Denying any substantive effect of AIRFA, the Court in *Lyng* and *Smith* also "crushed

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

[64] *Id.*

[65] H.R. 471, 91st Cong. (1970).

any meaningful possibility for court-enforced First Amendment protections" in Indigenous Peoples' sacred lands or religious sacrament cases (p. 177). At the time, and today, the applicable standard in Free Exercise Clause cases is that if a plaintiff demonstrates that a government activity or regulation imposes a substantial burden on religious practices, the government must respond with a compelling interest in its activity.[66] Otherwise, the governmental regulation violates the Constitution.[67] But the Court took a different approach in *Lyng*. In *Lyng*, the government's interest was in building a six-mile road in a timber project of marginal value, over the opinion of the Forest Service's own experts who thought it would be too destructive to the Indian religion.[68] Accordingly, in *Lyng*, it would have been hard to find a compelling interest in this activity, though in *Smith*, the public health and safety justification for regulating controlled substances may have met the standard.

In any event, the Court didn't let the analysis proceed that far in *Lyng* or *Smith*. When, in *Lyng*, Indigenous religious practitioners argued that construction of a logging road through their sacred High Country would fatally disrupt the practices of medicine people and religious dances, the Court wrote "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, [cannot] require government to bring forward a compelling justification."[69] The plaintiffs' claim was not actionable under the Free Exercise Clause.[70] The *Smith* Court held the Free Exercise Clause neither prohibited Oregon from applying its drug laws to religious use of peyote, nor stopped the state from denying unemployment compensation to individuals fired for peyote use.[71] Justice Scalia, writing for the majority, reasoned that states need not grant religious exemptions to neutral statutes of general applicability.[72]

Beyond the Indigenous Peoples who were devastated by *Lyng*[73] and *Smith*, other religious practitioners and their advocates were also concerned about the new limits on free exercise — if neutral laws of general applicability could freely prohibit free exercise, all religious practices

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66 Sherbert v. Verner, 374 U.S. 398, 403 (1963); NAACP v. Button, 371 U.S. 415, 438 (1963).

67 Wisconsin v. Yoder, 406 U.S. 205, 235–36 (1972).

68 Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 442 (1988).

69 *Id.* at 451–52.

70 *See infra* pp. 2142–43.

71 Emp. Div. v. Smith, 494 U.S. 872, 876, 878–79, 890 (1990).

72 *Id.* at 879.

73 Amy Bowers & Kristen Carpenter, *Challenging the Narrative of Conquest*: Lyng v. Northwest Indian Cemetery Protective Association, *in* INDIAN LAW STORIES 489, 526–28 (Carole Goldberg et al. eds., 2011) (discussing responses of Yurok and other tribal people to the *Lyng* case); Abby Abinanti, *A Letter to Justice O'Connor*, 1 INDIGENOUS PEOPLES' J.L. CULTURE & RESISTANCE 1, 21 (2004) ("I lived complying with your decision, but I never accepted it as anything but bending to brute, irresistible, and immoral force.").

were potentially vulnerable. As a result of their advocacy, in 1993, Congress passed RFRA based on findings that the Court's decision in *Smith* "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."[74]

RFRA's intent was "to provide a claim or defense to persons whose religious exercise is substantially burdened by government" and "to restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder*."[75] RFRA provides that "governments should not substantially burden religious exercise" even through a rule of general applicability, unless they can show the rule furthers a compelling governmental interest and is the least restrictive means of achieving that interest.[76] While, as noted earlier, RFRA has been held unconstitutional as to states, it still applies to conduct of the federal government.[77] RLUIPA expands religious freedom protections for prisoners and property owners.[78] It allows federal and state prisoners to seek religious accommodations pursuant to the same standard as set forth in RFRA.[79] It also limits the government's ability to rely on land-use regulation to interfere with religious institutions that have a property interest in their religious facility.[80] Following the passage of RFRA and RLUIPA, Indigenous religious practitioners and their advocates hoped they might be able to use these statutes to secure religious freedom at sacred sites on public lands. Yet, in *Navajo Nation v. U.S. Forest Service*,[81] when the Ninth Circuit reviewed claims made by several tribes and religious practitioners that desecration of a holy peak would violate their free exercise rights pursuant to RFRA, the court held that these claims were foreclosed by *Lyng*.[82]

To "defend the sacred," according to McNally, American Indians should not give up altogether on religion (p. 20).[83] Indeed, he shows that they have not given up on litigation invoking the Free Exercise

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[74] Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, § 2, 107 Stat. 1488, 1488 (1993) (codified at 42 U.S.C. § 2000bb).

[75] *Id.* § 2000bb(b) (citations omitted).

[76] *Id.* § 2000bb(a)(1)–(3), (5), § 2000bb(b) (citations omitted).

[77] *See supra* note 13 and accompanying text.

[78] 42 U.S.C. §§ 2000cc–2000cc-5.

[79] *Id.* § 2000cc-1(a).

[80] *Id.* § 2000cc(a)(1).

[81] 535 F.3d 1058 (9th Cir. 2008).

[82] *Id.* at 1073. While the Ninth Circuit in *Navajo Nation* reified *Lyng* by limiting RFRA claims on public lands to cases where the government "coerces" religious belief, *see id.* at 1071, a federal district court in *Comanche Nation v. United States*, No. CIV-08-849, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008), applied RFRA to protect an Indian sacred site, noting that the Tenth Circuit has declined to take the narrow view of "substantial burden" adopted by the Ninth Circuit in *Navajo Nation*, *id.* at *3 n.5, *17.

[83] "[W]hile I end up beyond the First Amendment, beyond RFRA, I maintain there's legal and political value in keeping 'religion' and 'religious freedom' in the mix" (p.20).

Clause or its contemporary statutory companions, RFRA and RLUIPA (pp. 69–126).[84] But to the extent that strategy has proven unsuccessful, as it has in many cases, American Indian religious practitioners have turned to other frameworks such as environmental protection, historic preservation, and treaty-based federal Indian law, to protect what is core and essential to their religions.[85] Additionally, they have sought legislative and regulatory accommodations, an approach Justice O'Connor suggested in *Lyng*:

> Nothing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen. The Government's rights to the use of its own land . . . need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents.[86]

In the 1990s and 2000s, American Indian religious freedom advocacy made great headway on accommodation. Post-*Smith* amendments to AIRFA permit possession of peyote by members of federally recognized Indian tribes for traditional Indigenous religious purposes (p. 191). Individual Indians have had some success in requesting accommodations for the religious use of sweat lodges in prisons (p. 90). The Native American Graves Protection and Repatriation Act[87] (NAGPRA) requires federally funded institutions to inventory and repatriate human remains, funerary objects, and ceremonial items to tribes and Native Hawaiian Organizations in many circumstances (p. 202–03). McNally characterizes NAGPRA and exceptions to the Bald Eagle and Golden Eagle Protection Act[88] as reflecting Indigenous Peoples' "collective rights" (p. 223). For example, the Eagle Act authorizes permits for ceremonial possession of eagle feathers "for the religious purposes of Indian Tribes" (p. 221). The Tenth Circuit, in a case rejecting a non-Indian's claim under the Eagle Act, wrote "we infer that Congress saw the statutory exception not as protecting Native American religion qua religion, but rather as working to preserve the culture and religion of federally recognized tribes" (p. 221).

Turning to sacred sites, McNally notes that in 1992, Congress amended the National Historic Preservation Act to include a right for tribes to "consult" on federal undertakings that would adversely affect

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[84] The author reviews American Indian claims in the contexts of the religious use of peyote; hair length and ceremonial foods and tobacco in prison; and sacred sites on the public lands, arising under the First Amendment, RFRA, and RLUIPA.

[85] Pp. 127–70 (environmental and historic preservation law); pp. 224–58 (sovereignty and treaty-based claims).

[86] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 453–54 (1988).

[87] 25 U.S.C. §§ 3001–3013.

[88] 16 U.S.C. §§ 668–668d.

certain properties eligible for protection (p. 142),[89] a provision the National Park Service has interpreted to include "traditional cultural properties" or certain Indian sacred sites.[90] In 1996, President Clinton issued an executive order pertaining to Indian sacred sites.[91] It requires federal agencies to "accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners" and "avoid adversely affecting the physical integrity of such sacred sites."[92] Procedurally, the agencies must give notice to tribal governments when federal management may affect sacred sites and consult with tribal leaders regarding such plans.[93]

These consultation provisions have led to some important accommodations at Devil's Tower National Monument (also known as "Lodge of the Bear") and Medicine Wheel National Forest.[94] But to the extent that the accommodation model devolves largely to agency discretion, it is a political creature. Indigenous Peoples' religious freedom at sacred sites located on public lands is especially vulnerable to competing interests for natural resource extraction, recreation access, and other uses that may conflict with their religious significance.[95]

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Defend the Sacred is an immensely validating book for advocates and community members immersed in Indigenous Peoples' religious freedom. First, it is a relief to see a religious studies scholar hold up Indian religions as religions (pp. 19–21). Ironically, perhaps, in the legal field both supporters and detractors of Indigenous claims in sacred sites cases, along with peyote, eagle feathers, and human remains cases, have claimed Indian spiritual practices are just too different from the religions contemplated for protection in the First Amendment.[96] Or, to state it more simply, there is an argument about whether Indian religions are actually religions at all. A similar debate about the origins, utility, and fit of "religion" terminology is ongoing in

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[89] National Historic Preservation Act Amendments of 1992, Pub. L. No. 102-575, § 4006(a)(6), 106 Stat. 4753, 4757 (1992) (codified as amended at 54 U.S.C. § 302706); *see also* Dean B. Suagee, *Historical Storytelling and the Growth of Tribal Historic Preservation Programs*, 17 NAT. RES. & ENV'T 86, 86–87 (2002) (describing 1992 amendments to the NHPA and implementing regulations).

[90] PATRICIA L. PARKER & THOMAS F. KING, NAT'L PARK SERV., NAT'L REG. BULL. 38, GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES 2 (1992).

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

[92] *Id.*

[93] *Id.*

[94] Kristen A. Carpenter, *Religious Freedoms, Sacred Sites, and Human Rights in the United States*, *in* UNDRIP IMPLEMENTATION: COMPARATIVE APPROACHES, INDIGENOUS VOICES FROM CANZUS 57, 63 (2020).

[95] *See id.* at 58.

[96] Stephanie H. Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 HARV. L. REV. 1294, 1295 (2021).

McNally's disciplinary home of religious studies. As he describes it, "critical religious studies" scholars have convincingly identified how "dominant discourse" around religion excludes minorities, privileging types of beliefs, practices, and organizations that serve "American imperialism" (pp. 14–15). According to McNally:

> The very notion of religious freedom can have baked into it a subtle but no less forceful discrimination that naturalizes and universalizes the individual, interior, subjective, chosen, belief-oriented piety characteristic of Protestant Christianity and enables such a piety to flourish at the expense of traditions characterized by community obligations, law, and ritualized practice. (p. 14).

American imperialism has justified anti-Catholic and anti-Islamic discrimination on grounds that both religions are antithetical to democratic institutions (p. 15). Quoting Professor Elizabeth Shakman Hurd, McNally explains that "religious freedom" is a "dominant discourse" that is simultaneously plastic and flexible, deployed in service of institutions. In these regards, religion is both difficult to determine with any precision or to protect as a matter of law (p. 15).

All of these insights are even more apt in the Indigenous Peoples context, wherein "the language of religious freedom" was deployed as "moral justification and call to arms" for domestic colonization of Native peoples and lands" (p. 16). According to Professor Tisa Wenger, "[t]he dominant voice in the culture linked racial whiteness, Protestant Christianity, and American national identity not only to freedom in general but to this [religious] freedom in particular" (p. 16). Nonwhite and non-Protestant, Indians were subject not only to U.S. regulation and prohibition of their own religious traditions — but also to the use of their religion and identity as a sword, justifying everything from the invasion of land to removal of children (pp. 16–17).

In a work published after McNally's book, Mohawk religious studies scholar Chris Jocks identifies another important tension.[97] In many Indigenous communities, religious training and ritual practice is a collective responsibility more than an individual freedom.[98] When tribal members start articulating a right to practice, or not to practice, it may corrode basic community norms that keep Indigenous identity and lifeways alive.[99]

These are important and complicated critiques. Following Wenger, if whiteness is synonymous with religious freedom, and vice versa, Indigenous Peoples remain the other, red and pagan. Legal scholars will

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[97] Chris Jocks, *Restoring Congruity: Indigenous Lives and Religious Freedom in the United States and Canada*, *in* TRADITIONAL, NATIONAL, AND INTERNATIONAL LAW AND INDIGENOUS COMMUNITIES 81, 81–103 (Marianne O. Nielsen & Karen Jarratt-Snider eds., 2020).

[98] *Id.* at 98–99.

[99] *See id.*

be reminded of Professor Cheryl Harris's article, making a similar critical point about "Whiteness as Property."[100] To the extent that Indigenous Peoples are still excluded from religious freedom, the law is perpetuating deep structural inequities. Moreover, following Jocks, "religious freedom" may not fully resonate with Indigenous norms and values, thereby raising questions about its utility in Indigenous Peoples' cases, which are only underscored by the holdings of *Lyng* and *Smith*.

These are also important questions for Indigenous Peoples and their lawyers to consider. The First Amendment of the U.S. Constitution protects "religion"[101] — it does not use the terminology that might be more immediately meaningful to some Indigenous communities.[102] Indeed, the entire exercise of asserting Indigenous Peoples' claims in the U.S. legal system is one of navigating mismatches of language and worldview, at the behest of Indigenous clients who wish to survive in settler-colonial societies whose laws have so often been constructed in institutions excluding them.[103] Indigenous Peoples and their lawyers quite often find themselves in the position of having to use the settler-colonial law, even while they try to reform it toward a concept of justice informed by Indigenous norms and values.

In this spirit, my own view is that "religion" and "religious freedom" — as understood by scholars and protected by the Constitution — must come to include Indigenous Peoples' experiences. I have previously made a similar point with respect to "property," noting that Indigenous Peoples' interests in lands, including sacred sites, should be eligible for the legal protections of property law, despite cultural differences.[104] Whatever the merits of observations that Indian spiritual attachments are uniquely land-based, for example, the government does not seem inclined to sanction the destruction of other groups' places of worship. We can appreciate the difficulties of translation, and work

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[100] *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

[101] U.S. CONST. amend. I; *see also* SHRUBSOLE, *supra* note 36, at 20–21 (interrogating use of the word "religion" in the Canadian Indigenous Peoples' context).

[102] McNally considers, for example, the framework of 'cultural sovereignty' advanced by Wallace Coffey and Professor Rebecca Tsosie, as it might give rise to "religious sovereignty" for Indigenous Peoples (p. 228). He also discusses "religion as culture" (p. 131) as protected in several statutes (pp. 131–42). These points about "culture," its salience among Indigenous Peoples and effectiveness in certain laws (like NHPA and NAGRA) are well-taken (and also addressed in the Canadian context by SHRUBSOLE, *supra* note 36, at xvii). Yet, these statutes have limited substantive and procedural reach and there is no right to culture in the U.S. Constitution, thus suggesting that religion and culture should continue to complement one another in the law and discourse. Colloquially, Indigenous Peoples might use religion and culture interchangeably — or prefer other terms altogether. *Cf.* Bigler, *supra* note 42, at 6 (using the term "ways" to describe ceremonial and spiritual practices of the Euchee people).

[103] *Cf.* Kristen A. Carpenter & Eli Wald, *Lawyering for Groups: The Case of American Indian Tribal Attorneys*, 81 FORDHAM L. REV. 3085, 3099–100 (2013) (identifying the problem of using case law based on racist attitudes about Indians in contemporary cases).

[104] *See* Carpenter, *supra* note 49, at 1065–66.

toward more nuanced legal arguments, while still insisting that it is unfair to deny American Indians and their religions the protections of the First Amendment.

Accordingly, I appreciate McNally's transcendence of the "are they or aren't they" approach to Indigenous Peoples' religions. He acknowledges the complexities of using the term "religion" to describe Indigenous Peoples' ceremonial lifeways but takes his "main cues . . . from the claim-making of Native nations" (p. 17). He notes, in a posture that seems both descriptive and normative, that in the voices of Indigenous Peoples themselves "religion and religious freedom are not simply used to exclude those at the margins; they are reworked creatively from the margins, their indeterminacy a possibility and not just a limit" (p. 18).

Ultimately, this approach leads McNally to tell a story of Indigenous Peoples' agency and advancement in engaging with religious freedom discourse, especially when considered against the entire history of Indigenous Peoples' experiences in the United States. One of the great strengths of his work is the way he interweaves his perspective from religious studies with the experiences of Indigenous activists. The reader can appreciate that McNally has been present in real-world events through various observations. He identifies the rhetoric so often deployed against Indigenous Peoples in sacred sites cases, along the lines of "this isn't really about Native religion — these people are just making up these religious freedom claims in a last ditch effort to protest the pipeline" (p. 6). McNally deflates such claims both by calling them out as a discursive strategy and using his disciplinary training to explicate aspects of Indigenous religions. The fact that Indigenous religions are diverse and dynamic, local versus universal, and embodied in ritual more than belief, does not, in McNally's view, delegitimate them. In response to implications drawn in cases ranging from Standing Rock to Mauna Kea of "new" and therefore less legitimate manifestations of the "sacred," McNally turns to scholars such as Professor Greg Johnson who show that Indigenous religions are alive and as generative as others (p. 18).[105]

McNally also broadens the picture and updates the literature with respect to earlier publications in the field. In addition to the Supreme Court's problematic Free Exercise Clause cases, there have been victories for Indigenous Peoples in the realm of treaty litigation, prisoners' rights, and repatriation, achieved through the courts, agencies, and Congress, respectively. Indeed, Indigenous Peoples' religious freedom in the major categories of peyote possession, eagle feathers, and prisoners' rights have seen major advancements through statutory accommodations and judicial interpretation alike.

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[105] The author cites GREG JOHNSON, RELIGION IN THE MOMENT: TRADITION, PERFORMANCE, AND LAW IN CONTEMPORARY HAWAI'I (forthcoming).

If there is a place where *Defend the Sacred* could have done more, it is in analyzing the relationship between Indigenous and non-Indigenous claims under the First Amendment and RFRA. It was, after all, an Indian case, *Employment Division v. Smith*, in which the Court announced a low-water mark for Free Exercise Clause jurisprudence.[106] And even while the Roberts Court has decided case after case in favor of non-Indigenous religious practitioners and institutions, the *Smith* rule remains in place such that exemptions from generally applicable and nondiscriminatory laws that burden some religious practices are not required by the Free Exercise Clause. Few of the non-Indigenous cases have contextual resonance with the more typical Indigenous religion cases — involving sacred sites, peyote, eagle feathers, or prison sweat lodges — but it would be worth at least brief consideration of how the trends may converge or depart from one another.

Indigenous religious freedom advocates hoped RFRA and RLUIPA would be transformative for practitioners of minority religions, whose practices tended to be burdened by neutral statutes of general applicability.[107] In 2006, Chief Justice Roberts in one of his first religious freedom cases, *Gonzalez v. O Centro Espírita Beneficente União do Vegetal*,[108] wrote that the government had failed to show a compelling interest in prosecuting religious adherents for drinking a sacramental tea containing ayahuasca, a controlled substance under the Controlled Substance Act.[109] The cases then turned to Christian contexts.[110] In the 2014 case of *Burwell v. Hobby Lobby Stores, Inc.*,[111] the Court, again applying RFRA, arguably expanded religious freedom to corporations in a decision allowing family-owned businesses to deny contraceptive coverage to female employees based on their owners' religious beliefs.[112] In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,[113]

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106 *See supra* p.2104.

107 *See, e.g.*, Cutter v. Wilkinson, 544 U.S. 709, 712, 715 (2005) (explaining that under RLUIPA, the government had to show a compelling interest in burdens on religious exercise by prisoners adhering to Wicca, Asatru, and Satanist religions).

108 546 U.S. 418 (2006).

109 *Id.* at 423, 439.

110 *See* GILLMAN & CHEMERINSKY, *supra* note 37, at xiii (arguing that "whether self-consciously or not, the five conservative justices are interpreting the Constitution to further Christian religious beliefs").

111 573 U.S. 682 (2014).

112 *See id.* at 689–91. In *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020), the Court upheld a Trump Administration rule that exempted employers from having to provide contraceptive insurance coverage if they had a religious- or conscience-based objection to contraceptives. *Id.* at 2372-73. The Court reasoned that the rule involved questions of statutory construction and administrative discretion, rather than constitutional requirements. *Id.* at 2382.

113 565 U.S. 171 (2012).

the Court found a "ministerial exception" that allowed religious institutions to discriminate based on race, sex, religion, sexual orientation, age, and disability for choices they make as to their "ministers."[114]

Recently, in *Espinoza v. Montana Department of Revenue*,[115] the Court considered a Montana law allowing parents of children attending private school, whether secular or religious, to receive a tax credit of up to $150.[116] The Montana Supreme Court invalidated the tax credit law as violating the "no-aid" clause of the Montana state constitution.[117] When the case reached the U.S. Supreme Court, Chief Justice Roberts held that the Free Exercise Clause did not permit the state to make the tax credit available to parents who sent their children to secular private schools while denying it to parents who sent their children to religious schools.[118]

Critics of the Court's recent religion cases argue that they impermissibly require governments to provide aid to religion and allow institutions to discriminate under the guise of religious liberty.[119] In the highly anticipated upcoming case of *Fulton v. City of Philadelphia*,[120] the Court will consider whether Philadelphia violated the Free Exercise Clause by barring a Catholic organization from participating in the city's foster care program.[121] The organization refused to certify same-sex couples as foster parents in violation of the city's antidiscrimination policy.[122] Followers of the Court's religion jurisprudence have observed that *Fulton* presents an opportunity to revisit *Smith* and its holding that the government need not justify neutral rules of general applicability that incidentally burden religion.[123]

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114 *See id.* at 188–89.

115 140 S. Ct. 2246 (2020).

116 *Id.* at 2251 (citing MONT. CODE ANN. §§ 15-30-3103(1), 3111(1) (2019)).

117 *Id.*

118 *Id.* at 2262–63. *Espinoza* builds on *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 137 S. Ct. 2012 (2017), which held that Missouri violated the Free Exercise Clause when it gave secular private schools aid for playgrounds but denied the same assistance to religious schools. *Id.* at 2014, 2024.

119 *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2058–59, 2064, 2066 (2020) (holding teachers at Catholic elementary schools, arguably dismissed because of their age or health status, could not sue their religious employers because of the "ministerial exception," *id.* at 2064, to antidiscrimination laws grounded in the First Amendment); Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020) (holding employment discrimination based on sexual orientation or gender identity violated Title VII, while leaving open the possibility of exemptions for religious employers under RFRA).

120 140 S. Ct. 1104 (2020) (mem.) (granting certiorari).

121 Amy Howe, *Case Preview: Court Will Tackle Dispute Involving Religious Foster-Care Agency, LGBTQ Rights*, SCOTUSBLOG (Oct. 28, 2020, 4:00 PM), https://www.scotusblog.com/2020/10/case-preview-court-will-tackle-dispute-involving-religious-foster-care-agency-lgbtq-rights [https://perma.cc/U9GL-4332].

122 *Id.*

123 *See* See, *supra* note 15.

Even if the *Fulton* Court were to overrule *Smith*, at the potential expense of LGBTQ rights and local governance generally, there is no guarantee that Indigenous Peoples' own religious freedom would be better protected. Beyond the question of neutral statutes of general applicability, the Court in *Lyng* seemed to articulate alternative bases for the right to destroy Indigenous sacred sites — the fact that they are owned by the federal government, combined with some skepticism about the legitimacy and scope of the Indigenous religions themselves.[124] The many interest groups seeking to keep the public lands broadly open for natural resource extraction and other exploitative land uses will almost certainly challenge any attempts to overrule *Lyng*, even if *Fulton* overrules *Smith*.

As we anticipate these cases, as well as *Fulton*-type challenges to programs arguably burdening Christianity, it is worth considering if religious freedom and antidiscrimination are reconcilable in a way that would make room for Indigenous Peoples' claims. Several scholars have articulated "compromise" positions to address longstanding tensions. For example, Professor Noah Feldman would allow for religious expressions in public places but would draw the line at public funding for religion.[125] Feldman's approach could conceivably work in the Indigenous religious freedom context if Indigenous Peoples' claims to sacred sites on the public lands were allowed to proceed under the substantial burden/compelling interest test. That is, if courts would allow that desecrating or denying access to Indigenous Peoples' sacred sites constituted coercion under the Free Exercise Clause or RFRA, requiring the government to show a compelling interest in the burdensome activity could afford meaningful legal protection. Similarly, while Indigenous Peoples are not usually seeking government funding for their religions, it would be helpful for the courts to permit more robust accommodations of Indigenous Peoples' religious freedom at their sacred sites located on the public lands.[126]

In another attempt at compromise, Professors Chris Eisgruber and Larry Sager argue for a more capacious approach to religious "equality" in which, for example, types of practice that would be allowed for majority religions (the sacrament of wine) would also be protected in minority religious contexts (the sacrament of peyote).[127] Such an approach

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[124] *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450–51, 453 (1988).

[125] *See, e.g.*, NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM — AND WHAT WE SHOULD DO ABOUT IT 237 (2005).

[126] For example, in *Bear Lodge Multiple Use Association v. Babbitt*, 175 F.3d 814 (10th Cir. 1999), the National Park Service initially tried to ban commercial rock climbing for one month when Lakota sun dances took place at Devils Tower National Monument. *Id.* at 820. But after an Establishment Clause challenge, the Park Service watered down the accommodation plan so that it would only ask for, rather than require, compliance with the accommodation. *Id.*

[127] *See, e.g.*, CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 95–96 (2007).

could indeed help to remedy differential treatment of majority and minority sacramental practices, including in the prison context. Yet, it remains unclear if the protection of unique sites of Indigenous worship — that exist in the natural landscape and were taken through conquest and colonization — have an adequate analog in First Amendment jurisprudence such that a more conscientious approach to equality would be enough to guarantee religious freedom.

New research by Professors Stephanie Barclay and Michalyn Steele both updates this analysis by looking at recent cases and calls for closer attention to the Court's use of "coercion" in Free Exercise Clause cases.[128] They argue that the Court's tendency to use a narrow standard for coercion in Indigenous religious claims and a broad one for non-Indigenous claims has created a double standard. For all religious practitioners, the authors write, "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 religious exercise consistent with their own free self-development."[129] A clearer (and more equal) understanding of coercion would help Indian religious practitioners make a case for a substantial burden under RFRA and also support legislative and regulatory approaches to sacred sites cases.

I like Barclay and Steele's approach particularly because it takes head-on one of the difficult aspects of Indigenous Peoples' religious freedom cases in the United States, namely, how to apply uniform standards to cases that are contextually different. McNally notes, for example, that legal decisionmakers have failed to see how applicable legal standards "fit" with Indigenous religions as they are lived (p. 16). Precedents informing the Supreme Court in *Lyng* came from contexts that were arguably different. In *Sherbert*,[130] the Court held that the government could not deny unemployment benefits to a Seventh-day Adventist whose religion prohibited work on a Saturday,[131] and it held in *Yoder*[132] that the government could not penalize the Amish for failing to send their kids to public schools.[133] Those "coercive activities" would impose "substantial burdens" on religious exercise and the government would have to show a "compelling interest" in imposing such a burden.

When it came to *Lyng*, however, the Court did not see how building a road through sacred sites would coerce religion,[134] implying that the

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128 Barclay & Steele, *supra* note 96, at 1295.

129 *Id.* at 1295–96.

130 Sherbert v. Verner, 374 U.S. 398 (1963).

131 *Id.* at 398–402.

132 Wisconsin v. Yoder, 406 U.S. 205 (1972).

133 *Id.* at 207.

134 *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 449 (1988).

Indians could believe whatever they wanted, no matter what the government did to their sacred site or the rituals associated with it.[135] Of course, as McNally has said, Indigenous religions cannot be reduced to belief; the rituals are the religion (p. 285). If the Court were to define coercion in the way that Barclay and Steele advocate, using "religious voluntarism" to bridge the gap between "belief" and "practice,"[136] perhaps the sacred sites cases could fit more comfortably within a mainline approach to the First Amendment and RFRA. Barclay and Steele do not explicitly consider what such an approach might mean for cases like *Fulton* and antidiscrimination concerns. I am not sure I have the answer to that either, but in the next Part, I suggest a human rights approach that seeks to contextualize Indigenous Peoples' religious freedom within the history of conquest and colonization that has impacted them in the United States.

As noted in the Introduction, there is a fundamental and largely unresolved issue associated with Indigenous Peoples' religious freedom in the United States. That is how to apply the First Amendment in light of the history of conquest and colonization, in which Indigenous Peoples' religious sacraments were once outlawed as immoral and their sacred sites taken by others. Contemporary ramifications include a general societal and judicial perception that Indigenous Peoples' sacraments are less legitimate than others — and the somewhat unique arrangement in which federal and state governments own and control many Indigenous Peoples' religious sites. To the extent that the Declaration addresses the obligations of governments to recognize Indigenous Peoples' rights following conquest and colonization, it should be used to enhance our interpretation and application of the First Amendment in the Indigenous Peoples' context.

II. THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

In 2007, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples (p. 259).[137] The

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[135] *Id.* (noting that even if the government were to destroy the sacred site, the individuals would not "be coerced by the Government's action into violating their religious beliefs; nor would [the] governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens").

[136] *See* Barclay & Steele, *supra* note 96, at 1295, 1307–08 (introducing voluntarism as a bridge between belief and practice and then later describing historical coercion of Indigenous Peoples' religious freedom).

[137] The Declaration was adopted by the General Assembly in 2007 with 143 countries in favor, 11 abstaining, and 4 against. The Declaration, *supra* note 30, art. 10; *see* ECHO-HAWK, *supra* note 29, at 3 (describing the Declaration as "a landmark event that promises to shape humanity in the post-colonial age").

Declaration reflected decades of negotiation among nation-states, informed by Indigenous Peoples' advocacy, culminating in the recognition of Indigenous Peoples as subjects of international law, with certain individual and collective rights. While the United States originally voted against the Declaration, President Obama reversed this position and endorsed the Declaration in 2010.[138] In 2014, all 193 member states of the United Nations expressed support for the Declaration and committed to its implementation in the Outcome Document of the World Conference on Indigenous Peoples.[139] Accordingly, the Declaration operates as a standard-setting document articulating a worldwide consensus on human rights in the Indigenous Peoples' context.[140] In the United States, Canada, New Zealand, Australia, and other countries around the world, government representatives, Indigenous Peoples, and even mainstream political parties are assessing how to implement the Declaration today, with an eye to meeting global norms on human rights.[141]

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[138] *See* Press Release, White House, Off. of the Press Sec'y, Remarks by the President at the White House Tribal Nations Conference (Dec. 16, 2010), https://obamawhitehouse.archives.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference [https://perma.cc/8ECH-FC8X] [hereinafter Obama White House Press Release] (announcing President Obama's support for the Declaration).

[139] G.A. Res. 69/2 (Sept. 22, 2014).

[140] *See Setting the Standard: Domestic Policy Implications of the UN Declaration on the Rights of Indigenous Peoples: Hearing Before the S. Comm. on Indian Affs.*, 112th Cong. (2011) (statement of Donald Laverdure, Principal Deputy Assistant Secretary for Indian Affairs); Megan Davis, Commentary, *Indigenous Struggles in Standard-Setting: The* United Nations Declaration on the Rights of Indigenous Peoples, 9 MELBOURNE J. INT'L L. 439, 440 (2008) (discussing how adoption of the Declaration "provides an opportunity to expound upon indigenous peoples' experiences of standard-setting" in the United Nations).

[141] For example, in 2020, the Democratic Party Platform specifically connected the freedom of religion with international human rights and the Declaration, as follows:

> Democrats believe that freedom of religion and the right to believe — or not to believe — are fundamental human rights. We will never use protection of that right as a cover for discrimination. We reject the politicization of religious freedom in American foreign policy, and we condemn atrocities against religious minorities around the world — from ISIS' genocide of Christians and Yezidis, to China's mass internment of Uyghurs and other ethnic minorities, to Burma's persecution of the Rohingya, to attacks on religious minorities in Northeast Syria.
>
> Democrats believe that the United States should serve as a model for countries around the world when it comes to safeguarding and promoting the rights of Indigenous peoples. We will reaffirm the Obama-Biden Administration's support for, and strive to advance the principles of, the United Nations Declaration on the Rights of Indigenous Peoples. Consistent with the Declaration, the United States should urge the United Nations and the Organization of American States to create mechanisms that include the formal participation of Tribal nations.

DEMOCRATIC NAT'L CONVENTION, 2020 DEMOCRATIC PARTY PLATFORM 84 (2020), https://www.demconvention.com/wp-content/uploads/2020/08/2020-07-31-Democratic-Party-Platform-For-Distribution.pdf [https://perma.cc/9MUS-2V6X].

Fundamentally, the Declaration recognizes Indigenous Peoples' rights to live as distinct peoples, with rights of equality, self-determination, land, culture, and so on.[142] More specifically, the Declaration affirms Indigenous Peoples' rights to their religious traditions, ceremonies, and properties, including traditional knowledge, sacred sites, plants, and medicines.[143] As McNally notes, advocates will have to be careful in their approach. The Declaration is not yet broadly implemented in U.S. law and has been only sparsely cited in the courts.[144] Yet, as I will argue below, all three branches of the federal government, along with Indian tribes themselves, have advanced its implementation in ways that portend an influential and significant future.

A. Understanding the Declaration Generally

As a recent report described: "[T]he Declaration is an instrument representing the collective human rights aspirations of indigenous peoples from across the globe and the formal embrace of those aspirations by a vast majority of U.N. member states, which voted for or subsequently expressed support for it."[145] In the big picture, the Declaration recognizes that individual peoples have human rights, as individuals and collectives, and sets minimum standards for nation-states to meet those rights. The Declaration is one of the first affirmative statements of what it would take for states to remedy past harms to Indigenous Peoples and move into a cooperative lasting relationship with them. This is an instrument in whose drafting states participated and whose implementation many of them seek wholeheartedly today. No matter how one might decide to use it specifically, the Declaration is a powerful legal tool, available to all who wish to advance Indigenous rights from the perspectives of human dignity, peace, and justice.

1. Substance and Procedure of the Declaration. — The Declaration consists of a preamble and forty-six articles setting forth Indigenous Peoples' rights as well as state obligations. Perhaps most fundamentally, the Declaration recognizes Indigenous Peoples' rights to self-

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142 *See, e.g.*, the Declaration, *supra* note 30, arts. 2, 3, 7, 8, 27, 28.

143 *See, e.g.*, *id.* arts. 11, 12, 24, 25, 31.

144 *Cf.* SHRUBSOLE, *supra* note 36, at 162 (suggesting that the Declaration may have both "[p]otential and [l]imits" in the Indigenous Peoples' religious freedom arena).

145 KRISTEN CARPENTER ET AL., IMPLEMENTING THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES IN THE UNITED STATES: A CALL TO ACTION FOR INSPIRED ADVOCACY IN INDIAN COUNTRY 59 (2019), http://lawreview.colorado.edu/wp-content/uploads/2020/03/UNDRIP.pdf [https://perma.cc/3FD6-KS3A].

determination as well as to live as distinct peoples, as in the following provisions:

> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[146]
>
> Indigenous peoples . . . have the right to autonomy or self-government in matters relating to their internal and local affairs . . . .[147]
>
> Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples . . . .[148]
>
> Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and . . . juridical systems or customs, in accordance with international human rights standards.[149]

Turning to other substantive provisions, the Declaration acknowledges that Indigenous Peoples' societies are individual and collective in nature, comprise both rights and responsibilities, and are shaped by intergenerational relationships among humans and with the natural world.[150] The Declaration further recognizes Indigenous Peoples' current rights to land, environment, and natural resources, while also requiring restitution for certain takings of their lands and resources in the past.[151] Article 37 provides for the recognition of rights in treaties and other agreements entered into by nation-states and Indigenous Peoples,[152] including of course the hundreds of Indian treaties recognized as the "Supreme Law of the Land" in the U.S. Constitution's Treaty Clause.[153]

Several provisions of the Declaration might be described as procedural in nature. Article 5 speaks to political "participation" by providing that "Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State."[154] The United Nations' Human Rights Committee has referenced the Declaration to contextualize political participation and minority rights under the International Covenant on Civil and Political Rights[155] (ICCPR) in the context of

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146 The Declaration, *supra* note 30, art. 3.

147 *Id.* art. 4.

148 *Id.* art. 7, ¶ 2.

149 *Id.* art. 34.

150 *See id.* arts. 1, 13, 25, 35.

151 *See id.* arts. 25–29.

152 *Id.* art. 37.

153 *See* Miller, *supra* note 21, at 37, 45; 2 CHARLES J. KAPPLER, INDIAN AFFAIRS: LAW AND TREATIES (1904) (providing examples of treaties with Indian tribes).

154 The Declaration, *supra* note 30, art. 5.

155 International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

Indigenous Peoples' rights.[156] This provision is potentially provocative in the United States where Indigenous Peoples do not currently have their own representation in the U.S. Congress, even while certain treaties recognize such a right.[157]

Of particular relevance in the United States, and in the religious context, where many tribal governments wish to improve the federal-tribal "consultation" process, the Declaration sets forth a standard of "free, prior and informed consent" (FPIC). Article 19 provides:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.[158]

Other articles call for FPIC in particularized situations. Article 11 calls for redress, potentially including restitution, with respect to Indigenous Peoples' "religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs."[159] Article 28 prescribes redress, "includ[ing] restitution or, when this is not possible, just, fair and equitable compensation" in the case of lands including sacred sites taken without the "free, prior and informed consent" of Indigenous Peoples.[160]

In the United States, both government and corporate entities have begun to embrace FPIC in relations with tribes, not only to honor international standards but in the hopes of avoiding expensive litigation (and protests) that arises when projects occur over the objections of tribes.[161]

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156 *See, e.g.*, Sanila-Aikio v. Finland, CCPR/C/124/D/2668/2015 ¶ 6.9, Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2950/2017 (U.N. Hum. Rts. Comm. Nov. 1, 2018); Käkkäläjärvi v. Finland, CCPR/C/124/D/2950/2017 ¶ 9.9 Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2950/2017 (U.N. Hum. Rts. Comm. Nov. 2, 2018).

157 *See, e.g.*, Lindsey Bark, *Teehee Nominated as Cherokee Nation's Delegate to Congress*, CHEROKEE PHOENIX (Aug. 23, 2019, 12:00 PM), https://www.cherokeephoenix.org/Article/index/103477 [https://perma.cc/XF6D-6QS5] (explaining that while the Cherokee Nation's right to a congressional delegate is referenced in article XII of the 1785 Treaty of Hopewell and in article VII of the 1835 Treaty of New Echota, this right had never been realized in practice).

158 The Declaration, *supra* note 30, art. 19.

159 *Id.* art. 11, ¶ 2.

160 *See id.* art. 28, ¶ 1. *See generally* U.N. Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples, Free, Prior and Informed Consent: A Human Rights-Based Approach, U.N. Doc. A/HRC/39/62 (Aug. 10, 2018) (elaborating on FPIC within a human rights context and providing examples of good practices).

161 *See* WASH. STATE OFF. OF THE ATT'Y GEN., *Tribal Consent & Consultation Policy* (May 10, 2019), https://www.atg.wa.gov/tribal-consent-consultation-policy [https://perma.cc/Z3B6-P9HH]; Frank Hopper, *State Attorney General Announces Free, Prior and Informed Consent Policy with Washington Tribes*, INDIAN COUNTRY TODAY (May 21, 2019), https://indiancountrytoday.com/news/state-attorney-general-announces-free-prior-and-informed-consent-policy-with-washington-tribes-tCS6UGajiEuGVf-Z3JVQgQ [https://perma.cc/H62D-8495]; CARLA F. FREDERICKS ET AL., FIRST PEOPLES WORLDWIDE, SOCIAL COST AND MATERIAL LOSS:

A consent-based paradigm between the federal government and Indian tribes is both historically resonant with the treaty relationship and can help to inspire a cooperative and negotiated approach to conflicts going forward. I will elaborate further on these possibilities in the sacred sites arena below.

2. The Status and Role of the Declaration in U.S. Law. — The Declaration is a "resolution" of the U.N. General Assembly and, as such, serves as a formal expression of the will of that body, comprised of the U.N. member states. Typically, General Assembly resolutions lack binding status as a matter of international law.[162] Yet the Declaration has legal significance. First, as an authoritative statement of human rights by the U.N. General Assembly, the Declaration elaborates U.N. member states' obligations to promote and respect human rights under the U.N. Charter.[163] The Declaration also helps to contextualize universal human rights standards in the Indigenous Peoples' context. For example, while the Universal Declaration of Human Rights of 1948 recognizes a human right to religion,[164] the Declaration potentially contextualizes that right in terms of the need for remedial attention to past deprivations of religious properties and ongoing access to sacred sites.[165] The Declaration is a source of interpretation for human rights treaties to which the United States is a party, including ICCPR and the International Covenant on the Elimination of All Forms of Racial Discrimination.[166] And, in some respects, the Declaration has begun to contribute to customary international law.[167] In the United States, the Declaration may

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THE DAKOTA ACCESS PIPELINE 12–13 (2018), https://www.colorado.edu/program/fpw/sites/default/files/attached-files/social_cost_and_material_loss_0.pdf [https://perma.cc/2LLX-6SEN].

[162] *See, e.g.*, Stephen M. Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customary International Law*, 73 AM. SOC'Y INT'L L. PROC. 301, 301 (1979).

[163] *See* U.N. Charter, art. 1, ¶ 3; *id.* art. 55(c); *cf.* Louis B. Sohn, *The Human Rights Law of the Charter*, 12 TEX. INT'L L.J. 129, 133 (1977) (affirming the U.N. Universal Declaration of Human Rights of 1948 as interpretive of states' human rights obligations under the U.N. Charter).

[164] G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 18 (Dec. 10, 1948).

[165] The Declaration, *supra* note 30, art. 11, ¶ 2.

[166] *See, e.g.*, Sanila-Aikio v. Finland, CCPR/C/124/D/2668/2015 ¶¶ 2.2, 6.8, Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2950/2017 (U.N. Hum. Rts. Comm. Nov. 1, 2018); Käkkäläjärvi v. Finland, CCPR/C/124/D/2950/2017 ¶¶ 2.12, 6.3, Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2950/2017 (U.N. Hum. Rts. Comm. Nov. 2, 2018).

[167] *See* Int'l L. Ass'n, *Rights of Indigenous Peoples*, ¶ 2, Res. No. 5/2012 (Aug. 26–30, 2012); *see also id.* ¶¶ 3–10.

be cited by federal courts, agencies, legislatures, and other bodies, and is of course especially relevant in Indigenous rights cases.[168]

B. Opportunities for Implementation

By its own terms, the Declaration anticipates implementation by nation-states, as in article 38's statement that "[s]tates in consultation and cooperation with Indigenous Peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration."[169] A great deal of important research has been done about how to realize international human rights norms in domestic settings. Setting aside their utility as international bargaining chips among states, human rights instruments are really only meaningful to the extent that they improve the lives of real people. Accordingly, scholars have studied various models ranging from treaty enforcement to sociological processes that can induce compliance with, and sensitivity to, human rights in law and society.[170] In my own work with Professor Angela Riley, I have studied the ways in which Indigenous Peoples interact with international human rights norms, in a "jurisgenerative" process of multi-site engagement, interpretation, and influence.[171]

Larger issues of the dynamics and purposes of human rights implementation at home are beyond this Review. Yet in his book McNally opens the door for certain questions when he notes that "[a]s rich as the possibilities are of the United Nations Declaration on the Rights of Indigenous Peoples and its implementation apparatus for protecting Native religions . . . , the approach is slow to grow domestic legal teeth in the United States" (p. 32). I appreciate the opportunity here to try to put some teeth on the possibilities.

As Walter Echo-Hawk has noted, the Declaration could be implemented either wholesale or piecemeal with various degrees of explicit citation or implicit influence.[172] An explicit wholesale approach would

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168 *See, e.g.*, Pueblo of Jemez v. United States, 350 F. Supp. 3d 1052, 1094 n.15 ("Both international law and other common-law countries' law recognize aboriginal title.") (citing the Declaration, *supra* note 30; *Mabo v Queensland [No. 2]* (1992) 175 CLR 1 (Austl.)).

169 The Declaration, *supra* note 30, art. 38.

170 *See, e.g.*, Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 502 (2005) (arguing that international treaties influence through rule of law regimes within state parties and through consequences of treaty membership, including foreign aid, investment, and politics); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 690–99 (2004) (evaluating several areas in which human rights instruments influence through theories of coercion, persuasion, and acculturation).

171 Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173, 177, 206 (2014).

172 *See* ECHO-HAWK, *supra* note 29, at 5–6. At least one tribal nation, the Muscogee (Creek) Nation, has adopted the Declaration, as translated into its own language, as a matter of tribal law. *Mvskoke Este Catvlke Vhakv Empvtakv Enyekcetv Cokv (Declaration on the Rights of Indigenous*

build on previous statements by President Obama and the State Department expressing support for the Declaration as a whole and calling on agencies to exercise their responsibilities consistently with it.[173] Going further, the United States could follow the examples of either Canada or New Zealand toward a more robust and enforceable implementation of the Declaration.[174] In the case of Canada, there has been national legislation proposed,[175] and provincial legislation passed,[176] to bring the country's laws into "align[ment]" with the Declaration.[177] Canada's example follows the country's "Truth and Reconciliation" process that elucidated the nation's historical treatment of Indigenous Peoples and recommended steps, including implementation of the Declaration, to begin to redress injuries inflicted over centuries.[178] In another approach, the government of New Zealand is working on "national action plans" to implement the Declaration through deep consultation with Maori people and other stakeholders in the country.[179] New Zealand, together with Maori leaders, recently invited the United Nations Expert Mechanism to provide advice on how to approach such a plan in a way

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Peoples), MUSKOGEE (CREEK) NATION DIST. CT. (Mar. 16, 2019), https://creekdistrictcourt.com/wp-content/uploads/2019/08/Mvskoke-DRIP-031619.pdf [https://perma.cc/UX3M-DXXD]; *A Tribal Resolution of The Muscogee (Creek) Nation Adopting A Declaration on The Rights of Indigenous Peoples and Directing Said Declaration into The Mvskoke Language*, MUSKOGEE (CREEK) NATION DIST. CT. (Sept. 24, 2016), https://creekdistrictcourt.com/wp-content/uploads/2019/08/TR16-149.pdf [https://perma.cc/TLY2-MUAG].

173 *See* Obama White House Press Release, *supra* note 138; U.S. Dep't of State, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples (Jan. 12, 2011), https://2009-2017.state.gov/s/srgia/154553.htm [https://perma.cc/M4PT-2EGW].

174 A resolution of the National Congress of American Indians, representing over 200 tribal governments, called for a federal commission to study and implement the Declaration in the United States. Nat'l Cong. of Am. Indians, *Calling on the United States and Tribal Nations to Take Action to Support Implementation of the UN Declaration on the Rights of Indigenous Peoples* (Nov. 2020), https://www.ncai.org/attachments/Resolution_lfCGCaluXOaNlfwekwVbulbmCJvJMYegisezqHBKAKoThFKYmBQ_PDX-20-056%20SIGNED.pdf [https://perma.cc/ME2Y-TERE].

175 Jorge Barrera, *Canada Could Be 1st Country to Harmonize Laws with UN Declaration on Rights of Indigenous Peoples*, CBC NEWS (Apr. 1, 2019, 4:24 PM), https://www.cbc.ca/news/indigenous/undrip-canada-bill-c-262-1.5080102 [https://perma.cc/7C4T-K7JH].

176 Declaration on the Rights of Indigenous Peoples Act, S.B.C. 2019, c 44 (Can.).

177 *Id.* art. 3.

178 *Truth and Reconciliation Commission of Canada*, GOV'T OF CAN. (Dec. 15, 2020), https://www.rcaanc-cirnac.gc.ca/eng/1450124405592/1529106060525 [https://perma.cc/WDC7-5ZPD].

179 Michael Neilson, *New Zealand Aims to Be First with UN Declaration on Rights of Indigenous Peoples Plan*, N.Z. HERALD (Apr. 17, 2019, 9:27 PM), https://www.nzherald.co.nz/nz/news/new-zealand-aims-to-be-first-with-un-declaration-on-rights-of-indigenous-peoples-plan/37SIZRT3CQB4UWRWMXFYDXG2SY [https://perma.cc/2U4J-LPND]; *UN Declaration on the Rights of Indigenous Peoples*, TE PUNI KŌKIRI (Jan. 19, 2021), https://www.tpk.govt.nz/en/whakamahia/un-declaration-on-the-rights-of-indigenous-peoples [https://perma.cc/7L6Z-S6AH].

that respects Indigenous, national, and international norms.[180] In the federal district of CDMX (Mexico City), a year-long public constitutional process led to a new constitution expressly incorporating and adopting the Declaration in its entirety.[181] In some countries, high courts have referenced the Declaration directly in cases concerning Indigenous Peoples' land rights.[182]

In the next subsections, I identify the Declaration's religious freedom provisions and ways that they could be specifically considered by the federal courts, national legislature, and administrative agencies.

C. The Declaration's Religious Freedom Provisions

McNally has argued that the Declaration's "development as authoritative law" would benefit from "making clearer associations with [U.S.] religious freedom law" (p. 32). The point is well taken and here I identify specific articles of the Declaration that pertain to religious freedom and then discuss their potential application in the federal judicial, legislative, and administrative agency arenas.

Article 11 contemplates remedies for past dispossessions of real, intellectual, and personal property with religious significance, providing that "States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to . . . religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs."[183]

Article 12 speaks to the ongoing practice of religious traditions, including at sacred sites, as follows:

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[180] *See* Office of the High Comm'r for Human Rights, Advisory Note on the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP): New Zealand Country Engagement Mission (July 14, 2019) (noting that the purpose of the Expert Mechanism is "to support the drafting of a strategy, action plan or other measure, including objectives, key focus areas and specific measures to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples in New Zealand"). The source can be downloaded by clicking on "New Zealand" at this link: https://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/RequestsUnderNewMandate.aspx [https://perma.cc/YN52-6P86].

[181] *See* CONSTITUCIÓN POLÍTICA DE LA CIUDAD DE MÉXICO [POLITICAL CONSTITUTION OF MEXICO CITY] Feb. 5, 2017, art. 57; *Mexico City's New Constitution*, CCN (Sept. 7, 2016), https://ccn-law.com/ccn-mexico-report/mexico-citys-new-constitution/ [https://perma.cc/46JS-9FK6]; *see also* Office of the High Comm'r for Human Rights, Mecanismo de Expertos Sobre los Derechos de los Pueblos Indígenas [Expert Mechanism on the Rights of Indigenous Peoples], Nota de Cooperación Técnica Dirigida al Gobierno de la Ciudad de México [Technical Cooperation Note Addressed to the Government of Mexico City] (2018), https://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Session12/Notadecooperaci%c3%b3nt%c3%a9cnica_MRIP_CiudaddeMexico.pdf [https://perma.cc/9RVT-9BH9].

[182] *See* Aurelio Cal v. Att'y Gen. of Belize, Supreme Court of Belize (Claims No. 171 and 172 of 2007) (Oct. 18, 2007), https://elaw.org/content/belize-aurelio-cal-et-al-v-attorney-general-belize-supreme-court-belize-claims-no-171-and-17 [https://perma.cc/64Z6-B5AP].

[183] The Declaration, *supra* note 30, art. 11.

> Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.[184]

Article 25 further amplifies that "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard."[185]

It is worth noting too, as McNally does, several additional articles that could apply in religious contexts (pp. 282–86). For example, article 31's discussion of traditional knowledge and plants medicine could resound with some of the claims in *Navajo Nation v. U.S. Forest Service* that pollution of the waters on the San Francisco Peaks would contaminate the plants collected by Navajo Medicine Men for use in religious ceremonies.[186] And articles 13 and 14, regarding Indigenous Peoples' rights to "revitalize, use, develop and transmit" their languages, are deeply implicated in the possibility of carrying on religious traditions, which may be uniquely practiced in the Indigenous language.[187] Article 19, requiring "free, prior and informed consent" for measures affecting Indigenous Peoples,[188] should also apply to legislation and regulations affecting their sacred sites and religions.

D. Using the Declaration in the Religious Freedom Context

1. The Declaration in the Courts. — Litigants and judges alike could start right now referencing the Declaration in religious freedom cases involving Indigenous Peoples.[189] As Professor Philip Frickey wrote a decade before the Declaration was adopted, international law can serve

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184 *Id.* art. 12.

185 *Id.* art. 25.

186 *Id.* art. 31; Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1096 (9th Cir. 2008) (Fletcher, J., dissenting).

187 The Declaration, *supra* note 30, arts. 13–14. *See generally* Kristen A. Carpenter & Alexey Tsykarev, *Language as a Human Right*, 24 UCLA J. INT'L L. & FOREIGN AFFS. 49, 54 (2020) (describing Indigenous Peoples' language rights as a cross-cutting human rights issue). My hope and belief is that courts will treat questions of terminology, as for example between religion and culture, with some sensitivity and nuance — as in *United States v. Wilgus*, 638 F.3d 1274, 1293 (10th Cir. 2011), wherein the Tenth Circuit referenced Congress's intent in the Eagle Act to protect "the religion and culture" of tribes (p. 221). Ultimately, when courts need more contextual information, the best resources are found in Indigenous Peoples' own laws, customs, and traditions, as referenced in article 11 and other articles, as opposed to any attempt to impose English-language definitions on Indigenous ways of life.

188 The Declaration, *supra* note 30, art. 19.

189 *See* Pueblo of Jemez v. United States, 350 F. Supp. 3d 1052, 1094 n.15 (D.N.M. 2018) ("Both international law and other common-law countries' law recognize aboriginal title." (citing the Declaration, *supra* note 30)).

as an important interpretive force in Indian law cases, for reasons tied to legal history and the constitutional allocation of power among federal, state, and tribal governments.[190] When Indian tribes were foreign governments, it was international law that ostensibly gave the United States exclusive or plenary authority to engage with them through treaties and allowed for Chief Justice Marshall's domestication of the law of nations.[191] In light of these origins, as captured in the Commerce Clause, Treaty Clause, and trade and intercourse statutes, and further elaborated in federal Indian common law, "the Constitution is inextricably linked to international law on issues of Indian affairs."[192] In this light, Frickey explained:

> [I]nternational law concerning the rights of indigenous peoples becomes more than simply a set of externally derived norms that do not bind the United States without its formal consent. Instead, these norms have true linkage to our Constitution and provide a domestic interpretive backdrop for both constitutional interpretation and quasi-constitutional interpretive techniques . . . . [I]nternationalizing our understanding of federal Indian law would revive a Constitution now moribund in the field and would provide further legitimacy to interpretive techniques that have long been at the heart of federal Indian law, but that today have less force in the Supreme Court.[193]

At the time, Frickey was writing specifically about reviving canons of construction for treaty and statutory interpretation. But since his article was published, the applicability and resonance of his points has only expanded as the Declaration moved from aspirational draft to widely accepted document, and as some Supreme Court Justices have become more open to global conceptions of law.[194]

Beyond the Indian law context, the Court has cited international law and comparative legal practice as a guide for interpreting the Constitution with respect to human rights in contemporary society.[195] For example, in *Roper v. Simmons*,[196] the Court held that the Eighth Amendment's prohibition on cruel and unusual punishment should be

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190 *See* Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 36–37 (1996).

191 *See id.* at 57–58.

192 *Id.* at 37; *see id.* at 75–80 (arguing that because the U.S. Supreme Court originally decided the status of Indian nations in the context of international law, norms of international human rights law should continue to "provide an interpretive backdrop" in contemporary Indian law matters, *id.* at 77); *see also* Note, *International Law as an Interpretive Force in Federal Indian Law*, 116 HARV. L. REV. 1751, 1756 (2003).

193 Frickey, *supra* note 190, at 37.

194 *See* Adam Liptak, *Justice Breyer Sees Value in a Global View of Law*, N.Y. TIMES (Sept. 12, 2015), https://nyti.ms/1UOK7G4 [https://perma.cc/XVG9-4ARA].

195 *See* HURST HANNUM, DINAH L. SHELTON, S. JAMES ANAYA & ROSA CELORIO, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE 471–73 (6th ed. 2018).

196 543 U.S. 551 (2005).

interpreted so as to preclude the death penalty for individuals who committed crimes when they were juveniles.[197] *Roper* was a departure from U.S. precedent applying the death penalty in such cases, requiring new analysis of the Eighth Amendment. To reach its result, the Court considered not only practices of the U.S. states but also the global community's evolving viewpoint on executing minors for crimes. Justice Kennedy explained: "The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."[198]

In terms of international law, the *Roper* Court considered the ICCPR, as well as several treaties interpreted as prohibiting the juvenile death penalty.[199] Comparatively, the Court observed that only seven other nations, each of which had subsequently abolished or disavowed the practice, had imposed the death penalty on minors since 1990.[200] Similarly, the Court's decision in *Lawrence v. Texas*,[201] striking down a state sodomy law, relied on foreign legislative materials and judicial decisions in analyzing the human "liberty" aspects of same-sex intimacy.[202]

Note that the Court's analyses in *Roper* and *Lawrence* did not hinge on the question whether the cited materials were binding law internationally or in the United States. There is a significant and interesting debate about whether the Declaration has become, or is becoming, international custom,[203] one of the four categories of international law considered binding by the International Court of Justice.[204] Yet judges' freedom to use the Declaration either implicitly or explicitly as an interpretive device does not depend on answering that question. On the one hand, the *Roper* Court cited directly to the ICCPR, which is an international treaty that has been formally signed and ratified by the United

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197 *Id.* at 578.

198 *Id.*

199 *Id.* at 576.

200 *Id.* at 577.

201 539 U.S. 558 (2003).

202 *Id.* at 576–77; *see also* William D. Araiza, *Foreign and International Law in Constitutional Gay Rights Litigation: What Claims, What Use, and Whose Law?*, 32 WM. MITCHELL L. REV. 455, 456 (2006).

203 *Cf.* Int'l L. Ass'n Sofia Conf., Res. 5/2021, *Rights of Indigenous Peoples*, 542 (2012) (noting that although the Declaration "as a whole cannot yet be considered as a statement of existing customary law," it nevertheless contains "several key provisions which correspond to existing State obligations under customary international law"). *See generally* Megan Davis, *To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On*, 19 AUSTL. INT'L L.J. 17, 40–44 (2012) (detailing both sides of the debate as to the Declaration's character).

204 There are four classic sources of international law: international treaties or conventions, international custom or customary international law, general principles of law, and secondary sources such as judicial opinions and authoritative scholarship. *See* Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, 1060.

States.[205] Yet the *Roper* Court was not citing the ICCPR for any actionable claim. And of course the ICCPR can apply in Indigenous Peoples' cases too, as described below. More to the point, however, the Court's decision was fundamentally about the Constitution — domestic law — and the international references were made for their interpretive rather than binding effect.

The First Amendment — and related statutes — would benefit similarly from international and comparative law insights in the Indigenous Peoples context. Like juvenile death penalty and same-sex intimacy cases, Indigenous sacred sites cases involve the freedoms of vulnerable individuals and groups, situations that call for a close look at humanity and dignity. Moreover, the Court's thirty-year-old jurisprudence regarding religious freedom for Indigenous Peoples has been widely criticized and the federal appellate courts appear split on how to apply RFRA in sacred sites cases.[206] The *Lyng* rule — that the federal government may destroy sacred sites on public lands without violating the First Amendment — has failed, rather spectacularly, to quell ongoing conflicts throughout the country. This is unsurprising because Indigenous Peoples are simply not going to agree that the government can destroy their religions.[207]

During the months-long occupation at Standing Rock, North Dakota, when Indigenous Peoples protested the construction of an oil pipeline on and near Indigenous prayer sites and burial grounds,[208] the pipeline company and other project owners incurred costs of at least $7.5 billion, with at least $38 million in costs to taxpayers and local citizens, and huge losses for banks and other parties.[209] At the same time, many protesters were injured or arrested,[210] and litigation over environmental issues is ongoing, four years after the original protests.[211]

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[205] *See Roper*, 543 U.S. at 576.

[206] *See* sources cited *supra* note 82.

[207] *See, e.g.*, Greg Johnson, *Engaged Indigeneity*, *in* SIV ELLEN KRAFT ET AL., INDIGENOUS RELIGION(S): LOCAL GROUNDS, GLOBAL NETWORKS 154, 167–68 (2020) ("Hawaiians are ritually stubborn and aesthetically driven, so no amount of state arrogance or ignorance is likely to deter ahu [stone altars] construction and consecration for long." *Id.* at 168.).

[208] Kristen A. Carpenter & Angela R. Riley, *Standing Tall*, SLATE (Sept. 23, 2016, 1:30 PM), https://slate.com/news-and-politics/2016/09/why-the-sioux-battle-against-the-dakota-access-pipeline-is-such-a-big-deal.html [https://perma.cc/7T2U-4GQZ].

[209] FREDERICKS ET AL., *supra* note 161, at 3–4.

[210] *See* Elizabeth Hampton, *"Thus in the Beginning All the World Was* America*": The Effects of Anti-protest Legislation and an American Conquest Culture in Native Sacred Sites Cases*, 44 AM. INDIAN L. REV. 289, 295–96 (2019) (explaining law enforcement's use of tear gas, pepper spray, tasers, rubber bullets, and water cannons against protesters, of whom over 700 were arrested for trespass and other infractions).

[211] *See* Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 440 F. Supp. 3d 1, 7–8 (D.D.C. 2020), *appeal docketed*, No. 20-5201 (D.C. Cir. July 13, 2020).

Given all of these realities — religious, economic, and social — it does not appear that the Court's precedents on religious freedom at sacred sites are functioning very well in practice. Among other modes of analysis, there may be some value in undertaking a *Roper*-like examination of First Amendment jurisprudence that includes global standards for the treatment of Indigenous Peoples' religious freedom at sacred sites. In addition to the Declaration and its ability to inform ICCPR and the Committee on the Elimination of Racial Discrimination, nations and industries are developing laws and policies to protect Indigenous religious traditions at sacred sites.[212] These insights have the potential to inform both substantive and procedural aspects of current law and suggest new pathways for the future.

Any court confronted with a religious freedom claim involving Indigenous Peoples could consult the Declaration's article 12. It provides: "Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites."[213]

Indigenous Peoples' religious rights include, according to article 12, the very things that have been excluded by the Court's free exercise jurisprudence — the right to practice (versus just believe) and the right to maintain, protect, and access sacred sites (versus have them destroyed).

The claim that Indigenous Peoples' religious freedom may depend on a spiritual relationship with a place in the natural landscape has been viewed skeptically by courts in nearly every sacred site case, even when the claim is bolstered by the testimony of religious practitioners, expert

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[212] *See, e.g.*, *Mission and Vision*, FOREST STEWARDSHIP COUNCIL U.S., https://us.fsc.org/en-us/what-we-do/mission-and-vision [https://perma.cc/4538-BZZX] (including Indigenous Peoples' rights as one of the Forest Stewardship Council's ten principles for FSC-certified forests around the world); JONAS BENS, THE INDIGENOUS PARADOX: RIGHTS, SOVEREIGNTY, AND CULTURE IN THE AMERICAS 155–60 (Bert B. Lockwood ed., 2020) (discussing an Inter-American Court of Human Rights case recognizing Indigenous Peoples' "sacred and spiritual relationship . . . to the land," *id.* at 156).

[213] The Declaration, *supra* note 30, art. 12.

witnesses, and so on.[214] Professing that they mean "no disrespect,"[215] the courts have asked what happens if an Indian tribe suddenly declares a religious attachment to the Lincoln Memorial[216] or has a religious feeling about every hill, river, and rock in the Southwest.[217] These judicial concerns could be alleviated by reference to Indigenous laws, customs, and traditions specifically elaborating on the sacred or religious nature of certain sites,[218] as in articles 11, 12, 26, and 27 of the Declaration.

Additionally, courts could reference article 25's provision that Indigenous Peoples "have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters . . . and other resources."[219] Stating this another way, when a government such as the United States decides to build a road through a sacred site as in *Lyng*, even on lands the government has come to claim as its own, it is burdening a right, more specifically the right of Indigenous Peoples to a distinctive spiritual relationship with lands. While federal ownership of sacred sites (or the past taking of Indian lands through conquest) has been treated as dispositive against Indigenous claims in the United States, articles 12 and 25 affirm an obligation to recognize Indigenous Peoples' spiritual relationships with sacred sites despite the absence of formal title. This may not answer the question under RFRA, perhaps,

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214 Most Indigenous religions are maintained in the oral traditions of their people, which are often presented via affidavits or other testimony in court proceedings on sacred sites. *See, e.g.*, Edmund J. Ladd, *Achieving True Interpretation*, *in* ZUNI AND THE COURTS (E. Richard Hart ed., 1995), *reprinted in* READINGS IN AMERICAN INDIAN LAW 324, 324–27 (Jo Carrillo ed., 1998) (regarding the challenges of Zuni testimony in a sacred site case). However, ancient (codices and rock writings), historic (the notebooks of Cherokee medicine men in their own syllabary or oral recordings of Hopi priests), and contemporary religious sources have been available as well. *See, e.g.*, A CHEROKEE VISION OF ELOH' (Howard L. Meredith & Virginia E. Milan eds., Wesley Proctor trans., 1981).

215 Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 453 (1988) ("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.").

216 Badoni v. Higginson, 455 F. Supp. 641, 645 (D. Utah 1977).

217 *See* Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1066 n.7 (9th Cir. 2008). To no avail, the dissent pointed out that the Navajo religion recognizes "various degrees" of sacred sites, but only a few such sites are "particularly" sacred — one of which was at issue in the case. *Id.* at 1097–98 (Fletcher, J., dissenting).

218 For example, the Fundamental Law of the Navajo Nation, which has been codified and published, specifically names the tribe's sacred mountains: "The six sacred mountains, Sisnaajini, Tsoodził, Dook'o'ooslííd, Dibé Nitsaa, Dził Na'oodiłii, Dził Ch'ool'í'í, and all the attendant mountains must be respected, honored and protected for they, as leaders, are the foundation of the Navajo Nation." *See* NAVAJO NATION CODE ANN. tit. 1, § 205(B) (2014). In other tribes this information may be held by religious leaders well known to be experts.

219 The Declaration, *supra* note 30, art. 25. In addition, article 24 makes clear that Indigenous Peoples have the right to traditional medicines, including the conservation of medicinal plants, a right that would have been relevant in the *Navajo Nation* case in which religious practitioners contended the reclaimed water would contaminate medicinal plants. *See id.* art. 24; *Navajo Nation*, 535 F.3d at 1103 (Fletcher, J., dissenting).

of whether the government can then show a "compelling interest" in such burdensome activity, but it could help to inform the first prong of the test on determining whether the activity constitutes a "substantial burden."

Article 26 goes further, providing: "[s]tates shall give legal recognition and protection to [Indigenous] lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned."[220] This article can help direct courts to consider tribes' own customs, laws, and traditions identifying and regulating their sacred sites.[221] As McNally notes, the Tenth Circuit's decision in *United States v. Corrow*[222] is an excellent example referencing Navajo traditional law (pp. 112–13, 121). If courts are sincerely struggling to determine whether, for example, Navajo Holy Sites and the Lincoln Memorial are equally susceptible to Indigenous religious freedom claims, these sources can provide authoritative guidance.

2. The Declaration in Congress. — Congress could reform existing legislation and federal programming to align with the Declaration's articles on religion and religious freedom. Consider, for example, the Native American Graves Protection and Repatriation Act of 1990[223] (NAGPRA), a federal statute that anticipated many of articles 11 and 12's provisions on human remains and ceremonial objects.[224] Often described as "human rights legislation,"[225] NAGPRA could be an excellent model for legislation that implements the Declaration with respect to sacred sites, as mentioned under articles 11, 12, 19, 25, 28, and 31.

Enacted after advocacy by Indigenous leaders, including Suzan Harjo and Walter Echo-Hawk, NAGPRA completely transformed attitudes and practices regarding Indigenous Peoples' human remains and sacred objects (pp. 200–18). Historically, pursuant to the Antiquities Act of 1906[226] and the Archaeological Resources Protection Act of 1979,[227] the United States asserted ownership over Indigenous Peoples' human remains and artifacts, granted permits to excavate them, and proceeded to collect, store, research, and display them in museums (p. 212). As a result, by 1990, there were thousands of deceased Indigenous Peoples

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220 The Declaration, *supra* note 30, art. 26.

221 YUROK TRIBE CONST. pmbl.; NAVAJO NATION CODE ANN. tit. 1, §§ 201–206. In tribes without written laws on religion, religious leaders and practitioners may be available to provide expert testimony, though in some cases this is limited by privacy and confidentiality norms.

222 119 F.3d 796 (10th Cir. 1997).

223 25 U.S.C. §§ 3001–3013.

224 *See id.*

225 *See, e.g.*, Jack F. Trope & Walter R. Echo-Hawk, *Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 36–37 (1992).

226 Pub. L. No. 59-209, 34 Stat. 225 (1906) (codified as amended at 54 U.S.C. §§ 320301–320303).

227 16 U.S.C. §§ 407aa–407mm.

and captive religious objects in the custody of national and nationally funded institutions (p. 200).

NAGPRA recognized the human dignity of Indigenous Peoples' human remains and the ongoing religious needs associated with ritual items. It provides a right of consultation and repatriation regarding newly discovered remains, as well as a right of notice and repatriation regarding remains and cultural patrimony in federally funded institutions, and prohibits trafficking.[228]

NAGPRA is a terrific model for legislation in the sacred sites context that could be informed by reference to the Declaration. Sacred sites legislation could create both restitutionary provisions for spiritual and religious properties taken without FPIC and ongoing protections for lands with spiritual significance to Indigenous Peoples. Building on language akin to President Clinton's executive order 13,007, which states that land managers must "avoid adversely affecting" sacred sites on the public federal lands,[229] Congress could set a similar standard for sacred sites on tribal and federal lands, and provide a cause of action to tribes and religious practitioners to seek injunctive relief to enforce the provision.

Sacred sites legislation could also transform statutory requirements for "consultation" into a standard of "free, prior, and informed consent." Such measures could be achieved via new legislation, or by amending AIRFA, NHPA, NAGPRA, RFRA, or RLUIPA to provide greater procedural and substantive protections for Indigenous Peoples' rights and duties to sacred sites.

Alternatively, Congress could consider case-by-case legislation, informed by the Declaration, to deal with ongoing threats to sacred sites and to remedy actions previously taken without FPIC. Recall that article 10 provides "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return."[230] In some cases, the government is still removing Indigenous Peoples from their lands, including diminishing possessory or use rights related to religious practices. An example is Congress's recent decision to authorize a land swap that enabled a multinational mining company to acquire Oak Flats, an Apache sacred site.[231]

To the extent that sacred sites have already been taken without FPIC or in violation of Indigenous laws, article 11 provides that states shall

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[228] *See* 25 U.S.C. § 3005.

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

[230] The Declaration, *supra* note 30, art. 10.

[231] Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 3003, 128 Stat. 3292, 3732–41 (2014).

provide redress, which may include restitution, for "religious and spiritual property taken without [Indigenous Peoples'] free, prior and informed consent or in violation of their laws, traditions and customs."[232] A best practice includes Congress's legislative return of the sacred Blue Lake to the Taos Pueblo people in the 1970s.[233] A similar restitutionary practice could be applied with respect to the sacred Black Hills of the Sioux Nation, taken in violation of the Treaty of Fort Laramie.[234] While the Supreme Court awarded monetary compensation in 1980, the various tribes and bands of the Sioux Nation have refused to take the money because of the non-fungible nature of sacred sites.[235]

The value of Indigenous Peoples' sacred sites is reflected in article 28's hierarchy of remedies for land takings, providing for actual restitution of land and, only "when this is not possible," equitable compensation.[236] Yet there are also opportunities for innovation as opposed to outright return of all of the public lands where sacred sites are located. For example, acting upon his authority under the Antiquities Act, President Obama created Bears Ears National Monument, a 1.35–million acre tract of land, much of which has religious significance to tribes.[237] In a notable innovation, the Bears Ears Proclamation created a commission of five tribes to provide guidance to federal land managers and "ensure that management decisions affecting the monument reflect tribal expertise and traditional and historical knowledge."[238] Upon taking office, President Trump reduced the size of Bears Ears by eighty-five percent,[239] in a set of actions that are still being contested in the courts.[240]

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232 The Declaration, *supra* note 30, art. 11.

233 WILKINSON, *supra* note 27, at 206–20.

234 James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), *The Situation of Indigenous Peoples in the United States of America*, ¶ 76, U.N. Doc. A/HRC/21/47/Add.1 (Aug. 30, 2012), http://unsr.jamesanaya.org/wp-content/uploads/2008/03/2012-report-usa-a-hrc-21-47-add1_en.pdf [https://perma.cc/ TD4E-T2E6]; 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/KR2S-LZE4]; *UN Official Calls for US Return of Native Land*, BBC (May 5, 2012), https://www.bbc.com/news/world-us-canada-17966113 [https://perma.cc/3FVE-V7Z6].

235 *See* Carpenter, Katyal & Riley, *supra* note 51, at 1113 n.421.

236 The Declaration, *supra* note 30, art. 28.

237 Proclamation No. 9558, 82 Fed. Reg. 1139, 1139–40, 1143 (Dec. 28, 2016).

238 *Id.* at 1144; *see also* EDGE OF MORNING: NATIVE VOICES SPEAK FOR THE BEARS EARS (Jacqueline Keeler ed., 2017) (documenting the relationship between Indigenous Peoples and Bears Ears through interviews).

239 Julie Turkewitz, *Trump Slashes Size of Bears Ears and Grand Staircase Monuments*, N.Y. TIMES (Dec. 4, 2017), https://www.nytimes.com/2017/12/04/us/trump-bears-ears.html [https://perma.cc/V4KZ-C8BG].

240 *See NRDC et al. v. Trump (Bears Ears)*, NRDC (Jan. 22, 2021), https://www.nrdc.org/court-battles/nrdc-et-v-trump-bears-ears [https://perma.cc/ZVP6-3CTU].

3. The Declaration in the Agencies. — Finally, and perhaps most immediately, federal agencies, too, have the power to appeal to the Declaration in their administration of sacred sites and other resources on the public lands. Notably, the Advisory Council for Historic Preservation, which advises the President and Congress, has issued statements supporting the use of the Declaration in policy and published extensive guidance on complying with its terms in the management of sacred sites.[241] The Forest Service[242] and Fish and Wildlife Service[243] both reference the Declaration in their policies.

Section 106 of the NHPA requires that federal agencies "consult" with any Indian tribe or Native Hawaiian organization that attaches traditional religious and cultural significance to historic properties that may be affected by an undertaking.[244] However, in many cases, perhaps most infamously in *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*,[245] the courts have construed the consultation obligation quite narrowly — it is procedural in nature and requires only minimal process.[246] Agencies such as the Forest Service and Army Corps of Engineers have sent notice and engaged in varying types of consultation with tribes, thereby arguably satisfying the statutory process required of them. But when the agencies fail to create the conditions for meaningful consultation or disregard the substantive information elicited in consultations, and go ahead with a project over the objections of the tribe,

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[241] *See* ADVISORY COUNCIL ON HISTORIC PRES., ACHP PLAN TO SUPPORT THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (2013), https://www.achp.gov/sites/default/files/guidance/2018-07/ACHPPlantoSupporttheUnited-NationsDeclarationontheRightsofIndigenousPeoples.pdf [https://perma.cc/DS3Y-BZXM] ("The ACHP will incorporate information about, and the principles within, the Declaration in future policy and program initiatives regarding the protection and preservation of historic properties of religious and cultural significance to Indian tribes and NHOs and in efforts to improve federal agency Section 106 consultation with Indian tribes and NHOs." *Id.* at 2.); *United Nations Declaration on the Rights of Indigenous Peoples*, ADVISORY COUNCIL ON HISTORIC PRES., https://www.achp.gov/indian-tribes-and-native-hawaiians/united-nations-declaration-rights-indigenous-peoples [https://perma.cc/PM9V-5868].

[242] USDA OFF. OF TRIBAL RELS. & USDA FOREST SERV., USDA POLICY AND PROCEDURES REVIEW AND RECOMMENDATIONS: INDIAN SACRED SITES 10 (2012), https://www.fs.fed.us/spf/tribalrelations/documents/sacredsites/SacredSitesFinalReportDec2012.pdf [https://perma.cc/KYZ4-P3YN] (recognizing article 12 of the Declaration).

[243] FISH & WILDLIFE SERV., *Part 510 Working with Indian Tribes* § 2 (2016), https://www.fws.gov/policy/510fw1.pdf [https://perma.cc/9ADD-SD5G].

[244] 54 U.S.C. § 302706(b).

[245] 205 F. Supp. 3d 4 (D.D.C. 2016).

[246] For example, in *Standing Rock*, a reviewing court rejected the tribe's request for a preliminary injunction against oil development activities that, they alleged, would disturb prayer sites in violation of the NHPA's requirement that the agency undertaking the action must consult with tribes "that attach religious or cultural significance to [affected] property." *Id.* at 8 (alteration in original) (quoting 54 U.S.C. § 302706(b)); *see also id.* at 22, 37. The court reasoned that "[o]nce this [consultation] is done, Section 106 is satisfied. In other words, the provision does not mandate that the permitting agency take any particular preservation measures to protect these resources." *Id.* at 8.

they risk both violating human rights and ending up in expensive lawsuits or protests.

Under the standards of article 19, perfunctory consultation is inadequate.[247] Consultation regarding sacred sites must occur with full notice and participation, through an ongoing government-to-government relationship, and aim toward the negotiation of affirmative agreements regarding the substantive standard of care and treatment for sacred sites.[248]

If this sounds like a high bar, recall that there are several examples of good practices in this regard. For example, in *Bear Lodge Multiple Use Association v. Babbitt*,[249] the National Park Service superintendent and others engaged in sustained and meaningful consultation with tribal cultural practitioners and local stakeholders regarding the impacts of rock climbing and recreation on a rock tower known as "Bear Lodge," a sacred site to Plains people.[250] The final management plan called for a voluntary ban on climbing during the month of June when the Lakota Sun Dance took place, as well as interpretive signage and programs educating tourists about sacred sites, such that they would know how not to disrupt sweat lodges or take down prayer bundles.[251] In *Wyoming Sawmills Inc. v. U.S. Forest Service*,[252] the U.S. Forest Service took a similarly inclusive and effective approach to management of Medicine Wheel, an ancient prayer site for tribes, leading to a memorandum of agreement and management plan limiting forestry and road building in the sacred area and providing for ongoing consultation with tribes regarding future developments.[253]

Bear Lodge and Medicine Wheel, with their advance notice, mutual respect, relational approach, and management agreements, reflect progress toward meeting the requirements for consultation under the Declaration. These practices contrast sharply with the consultation in *Standing Rock*, wherein the agencies failed to reach any agreement with the tribes and went ahead with the developments anyway, a practice

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247 *See* the Declaration, *supra* note 30, art. 19.

248 *See id.*

249 175 F.3d 814 (10th Cir. 1999).

250 *See id.* at 819.

251 *See id.* at 820. An earlier accommodation plan was more robust, requiring rather than asking rock climbers to refrain from climbing Devils Tower each June while the Lakota Sun Dance took place. *See id.*

252 383 F.3d 1241 (10th Cir. 2004).

253 *Id.* at 1244–45; *see also id.* at 1252 (upholding memorandum of agreement and historic preservation plan between Forest Service and American Indian religious practitioners providing for protection of sacred lands and ongoing consultations before any additional undertakings in Medicine Wheel).

that fails to comply with the standard of free, prior, and informed consent as envisioned by the Declaration.[254]

III. THE FUTURE

I have argued that the project of defending the sacred, as advanced by McNally, may be aided by reference to the Declaration when courts, Congress, and agencies consider the religious freedom of American Indians. This opens the door for many and much broader conversations. One of them concerns the nature of a human right to religion.[255]

The modern human rights tradition is, in important ways, traceable to a worldwide aspiration to protect religious liberties. After World War II, it was the then-recent history of Nazi Germany's persecution and murder of over six million Jewish people, based on their religion, that prompted the formation of the United Nations, the drafting of its Charter, and the adoption of the Universal Declaration of Human Rights of 1948.[256] World leaders understood that the U.N.'s commitments to peace and human dignity could be realized only with baseline protections for religion. Yet the diplomatic process was characterized by competing viewpoints about how religious freedom might be achieved.

As many scholars have recounted, the United States and European states took a leading role in the development of the Universal Declaration,[257] and this included shaping its provisions on religious freedom.[258] While earlier drafts of the Universal Declaration conceived of

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[254] U.N. Human Rights Council, Free, Prior and Informed Consent: A Human Rights Approach — Study of the Expert Mechanism on the Rights of Indigenous Peoples, U.N. Doc. A/HRC/39/62 (Aug. 10, 2018) (providing guidance on implementing the safeguard of "free, prior and informed consent").

[255] *See* CHRISTOPHER MCCRUDDEN, LITIGATING RELIGIONS: AN ESSAY ON HUMAN RIGHTS, COURTS, AND BELIEFS 125–27 (2018).

[256] See Press Release, Gen. Assembly, Lessons of Second World War Must Continue to Guide United Nations Work, General Assembly Told During Meeting Marking Seventieth Anniversary, U.N. Press Release GA/11641 (May 5, 2015).

[257] *See* MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, at xx, 32–34 (2001) (describing Eleanor Roosevelt's representation of the United States in the drafting of the Universal Declaration on Human Rights); LYNN HUNT, INVENTING HUMAN RIGHTS: A HISTORY 22–26 (2007) (tracing the human rights movement to Enlightenment thinking and articulations of rights in the French and American Revolutions); *see also* Samuel Moyn, *The Universal Declaration of Human Rights of 1948 in the History of Cosmopolitanism*, 40 CRITICAL INQUIRY 365, 369 (2014) ("Even for . . . Western Europeans, commitment to human rights quickly became another rationale for shelter under America's cold war wing — though it bore unexpected fruit much later in contemporary European human rights culture.").

[258] LINDE LINDKVIST, RELIGIOUS FREEDOM AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 20 (2017) (explaining that, while certain advocates, together with Communist states, advanced a view of religious freedom that would have included "the rights of religious groups and institutions," "the American states (spearheaded by the United States) and France effectively

collective rights and externally focused practices, some Western powers perceived these as threatening terms as they came with support of the Soviet Union and other communist countries.[259] Eleanor Roosevelt for the United States, aided by representatives from the United Kingdom, France, and Lebanon and others, pushed for language that would more narrowly protect "inner . . . freedom."[260] While individual freedom of thought or belief was "absolute or sacred," private or public manifestations thereof could be made to yield to the needs of society.[261]

The ultimate text of the Universal Declaration reflects a compromise position, stating: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."[262]

In regards to the protection for religious activity in "public" (versus only in private) and the explicit reference to religious "practice" (and not just belief), the U.S. Supreme Court's holding in *Lyng* may have been out of step with world norms even if it had been decided earlier. Yet the holding did reflect the United States' position during the 1940s and 1950s, which advanced the idea of religious freedom as matters of internal individual concern rather than external collective practice. These 1940s to 1950s values reflected American discomfort with collective rights generally, and minority rights specifically, as human rights.[263]

Since the adoption of the Universal Declaration, there have been important iterations of religious freedom in conventions to which the United States is a party. These agreements reflect the growing prominence of minority rights and racial equality in international law.

For example, nearly twenty years after the Universal Declaration, the majority of U.N. member states, including the United States, joined the multilateral ICCPR, which entered into force in 1966. The ICCPR reflects both individual and community rights, occurring in private and public, in belief and practice: "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom . . . either individually or in community with others and in public

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defeated all such proposals"); *see also id.* at 120 (noting American and French opposition to minority rights, as well as the right to establish religious and cultural institutions, in the debates over human rights taking place in the 1940s and 1950s).

259 *See id.* at 24–26.

260 *Id.* at 7.

261 *Id.* at 27.

262 *See* G.A. Res. 217 (III) A, *supra* note 164, art. 18.

263 LINDKVIST, *supra* note 258, at 120–28. For a more extensive exposition of tensions between certain conceptions of human and minority rights, see generally MAKAU MUTUA, HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE (2002); and Anna Spain Bradley, *Human Rights Racism*, 32 HARV. HUM. RTS. J. 1 (2019).

or private, to manifest his religion or belief in worship, observance, practice and teaching."[264]

The right "to manifest" one's religion under the ICCPR, moreover, is "subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[265] This provision again reflects interests broader than "belief" and seems more akin to RFRA or *Yoder* and *Sherbert*'s requirements for a very high degree of government justification for activities that burden religion — versus immunizing any neutral rule of general applicability as in *Smith*.[266]

Finally, the ICCPR characterizes the right to religion as *both* a matter of individual equality and minority rights. Article 26 provides: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground [including] . . . religion."[267] And article 27 states: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."[268] The ICCPR has often been applied to the situation of Indigenous Peoples.[269] Government actions burdening Indigenous Peoples' religions may violate both articles 26 and 27.

Turning even more specifically to sacred sites as places of worship, the Human Rights Council has provided guidance: the right to freedom of thought, conscience, religion, or belief includes the freedom "to worship or assemble in connection with a religion or belief and to establish and maintain places for these purposes."[270] The Council has urged nation-states:

> [t]o exert the utmost efforts, in accordance with their national legislation and in conformity with international human rights and humanitarian law, to ensure that religious places, sites, shrines and symbols are fully respected

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[264] International Covenant on Civil and Political Rights, *supra* note 155, art. 18, ¶ 1.

[265] *Id.* art. 18, ¶ 3.

[266] *See* Heather Greenfield, Comment, *International Law, Religious Limitations, and Cultural Sensitivity: The Park51 Mosque at Ground Zero*, 25 EMORY INT'L L. REV. 1317, 1341 (2011).

[267] International Covenant on Civil and Political Rights, *supra* note 155, art. 26.

[268] *Id.* art. 27.

[269] *See* BENS, *supra* note 212, at 12 (describing the Human Rights Committee's application of article 27 to Indigenous Peoples, albeit with some difference over whether to give effect to individual versus collective claims).

[270] Human Rights Council Res. 6/37, U.N. Doc. A/HRC/RES/6/37, ¶ 9(g) (Dec. 14, 2007).

> and protected and to take additional measures in cases where they are vulnerable to desecration or destruction.[271]

Human rights are, of course, not only about religious freedom. Beginning with the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960,[272] the United Nations has provided guidelines for recognizing and effectuating "self-determination" by previously colonized peoples.[273] In many examples, peoples and territories previously subjugated by European nations claimed their independence.[274] But the trajectory for self-determination has been different for Indigenous Peoples. For example, as a matter of practicality and aspiration, Indigenous Peoples have not typically sought the kind of independence obtained by African nations.[275] Especially in settler-colonial states, such as the United States, where colonization is a structure rather than an event,[276] it has not been possible or even desirable to break away entirely from the colonizing country or its descendants.[277] Rather, many Indigenous Peoples are seeking to live in a relationship of mutual respect with the governments and citizens of the country they now inhabit.

Human rights law has evolved accordingly. In addition to recognizing individual rights and state sovereignty, instruments such as the Declaration recognize the rights of peoples and nonstate actors who have a legitimate set of collective concerns.[278] The Declaration sets forth the minimum standards for recognizing the rights of Indigenous Peoples, including both remedial and ongoing components that will allow them to recover and thrive in relationship with others.

As the United States comes to terms with its increasingly pluralist society and its specific history of colonization, it will need to account for the realities experienced by Indigenous Peoples. Assuming the federal government will not be returning the entirety of the United States to

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[271] *Id.* ¶ 9(e).

[272] G.A. Res. 1514 (XV) (Dec. 14, 1960). This resolution is also known as the Declaration on Decolonization.

[273] *See* BENS, *supra* note 212, at 15. For a recent description of Indigenous Peoples vis-à-vis colonial theory, see *id.* at 6.

[274] For an overview of "decolonization" as conceived by the United Nations, see *United Nations and Decolonization*, UNITED NATIONS, https://www.un.org/dppa/decolonization/en/about [https://perma.cc/HA7U-KC3Y].

[275] *See* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 80–81 (1996) (describing Indigenous Peoples' self-determination without secession or the creation of new states).

[276] The seminal article on settler colonialism is Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 387 (2006) (explaining that, unlike imperial forms of colonialism, settler colonialism is characterized by the arrival of a settler population that attempts to replace the institutions and values of the Indigenous population with the settler population's own institutions and values).

[277] *See* Angela R. Riley & Kristen A. Carpenter, *Decolonizing Indigenous Migration*, 108 CALIF. L. REV. 63, 108 (2021).

[278] *See* Carpenter & Riley, *supra* note 171, at 178 & n.5, 179.

Indigenous nations, there will be issues about religious freedom on public lands, like the ones at Standing Rock. Given the commitment of the United States to religious freedom, it seems deeply unfortunate that we allow these issues to fester into conflict, requiring Indigenous Peoples to put their bodies and lives on the line if they want to enjoy religious liberty.[279]

The evolution of international human rights law can help guide resolution in the religious freedom sphere. A fundamental concern of human rights law is to protect individuals, groups, and peoples from abuses by the state.[280] Such abuse (or coercion) can be understood as problematic because it impedes individual and collective freedoms, both individual development and collective self-determination.[281] Also foundational to human rights law is, of course, equality.[282] The Declaration provides in its opening articles that Indigenous Peoples have individual and collective human rights, including equality, such that there is no justification for the government affording religious freedom to certain individuals and groups while denying it to American Indians.[283] Additionally, the Declaration, like the other human rights instruments cited above, supports a focus on religious *practice*, versus a narrower focus on *belief*, providing in article 12 rights to "manifest, practise, develop and teach spiritual and religious traditions," all of which are affirmative acts that cannot be protected by a standard in which the government merely refrains from infringing upon belief.[284]

Religious freedom, in particular, is also evolving from a narrow sphere of protected belief of the individual to broader protections for religious practices, including for minorities and peoples. In the United States, tribal governments are leading the way in such innovation. Using their own lawmaking authority, tribes have articulated spiritual values in a way that transcends some of the categorical and definitional limits on "religion" identified by McNally. For example, the

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[279] For news coverage of law enforcement use of tear gas, water cannons, and sound weapons against protestors at Standing Rock, see, for example, Joshua Barajas, *Police Deploy Water Hoses, Tear Gas Against Standing Rock Protesters*, PBS NEWS HOUR (Nov. 21, 2016, 10:08 AM), https://www.pbs.org/newshour/nation/police-deploy-water-hoses-tear-gas-against-standing-rock-protesters [https://perma.cc/LDQ9-WDRL]; and Wes Enzinna, *I Witnessed Cops Using Tear Gas, Rubber Bullets, and Sound Cannons Against Anti-pipeline Protesters*, MOTHER JONES (Oct. 31, 2016), https://www.motherjones.com/politics/2016/10/standing-rock-protests-pipeline-police-tasers-teargas/ [https://perma.cc/W6GE-LLG3].

[280] *See* HANNUM, SHELTON, ANAYA & CELORIO, *supra* note 195, at 2–3.

[281] *See* G.A. Res. 217 (III) A, *supra* note 164, art. 18.

[282] *See id.* art. 7.

[283] The Declaration, *supra* note 30, arts. 1–2.

[284] *See id.* art. 12.

Fundamental Law[285] of the Diné, or Navajo, which specifically identifies and names the six Navajo sacred mountains, also explains: "We, the Diné, the people of the Great Covenant, are the image of our ancestors and we are created in connection with all creation."[286] Further, "the fundamental laws placed by the Holy People remain unchanged. Hence, as we were created with living soul, we remain Diné forever."[287] The Yurok Tribe's constitution states: "Our people have always lived on this sacred and wondrous land along the Pacific Coast and inland on the Klamath River, since the Spirit People, Wo-ge', made things ready for us and the Creator, Ko-won-no-ekc-on Ne-ka-nup-ceo, placed us here."[288] Accordingly, the Yurok people have "[f]rom the beginning . . . followed all the laws of the Creator, which became the whole fabric of our tribal sovereignty[,]" a worldview that animates the Yurok people's commitment to "[p]reserve forever the survival of our tribe and protect it from forces which may threaten its existence . . . ."[289]

The Ho-Chunk Nation has expressly cited international human rights law in its provisions on language, culture, and religion, as follows:

> The Ho-Chunk Nation formally adopts the following rights and measures as outlined [in] the United Nations Declaration on the Rights of Indigenous Peoples held on September 13, 2007:
>
> The Ho-Chunk Nation asserts its basic language rights which include:
>
> The right to be educated in our Native Tongue, the Ho-Chunk Language.
>
> The right to have the Ho-Chunk Language recognized in the Ho-Chunk Nation Constitution and laws of the Ho-Chunk Nation.
>
> The right to live free from discrimination on the grounds of the Ho-Chunk Language. . . .
>
> In keeping with Article 27 of the International Covenant on Civil and Political Rights of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations, the Ho-Chunk Nation declares all persons within our tribal jurisdiction belonging to non-Ho-Chunk racial, ethnic, political or linguistic minorities shall not be denied the right to enjoy their own culture, practice their own religion, or use their own language.[290]

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[285] RAYMOND D. AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE 44–45 (2009) (describing Navajo courts' use of Navajo Fundamental Law).

[286] Diné Bi Beenahaz'áanii, 1 N.N.C. §§ 201–206, tit. 1, ch. 1, § 1 (2002).

[287] *Id.*

[288] YUROK TRIBE CONST. pmbl., https://yurok.tribal.codes/Constitution/Preamble [https://perma.cc/83AF-64FR]. The constitution goes on to state that its purposes include "[u]phold[ing] and protect[ing] our tribal sovereignty which has existed from time immemorial and which remains undiminished." *Id.*

[289] *Id.*

[290] 7 H.C.C. § 4 (2015) (amended 2016), https://ho-chunknation.com/wp-content/uploads/2019/10/7HCC4-Language-and-Culture-Code-08.09.16.pdf [https://perma.cc/CR27-ZHWE].

The Ho-Chunk Code potentially models both the assertion of Indigenous rights and nondiscrimination for others. Finally, the constitution of the Iroquois Nations, or "The Great Binding Law, Gayanashagowa," sets forth the "duties" of individuals to the tribal ceremonies (rather than individual rights to practice religion).[291] From a collective survival perspective, this version of religious freedom is consistent with the Declaration's recognition that Indigenous Peoples have the right not only to spiritual resources but also to "uphold their responsibilities to future generations in this regard."[292]

These examples from tribal governments begin to address some of the challenges that have eluded resolution in the U.S. legal system in the religious freedom arena; namely, the reconciliation of cultural practices with nondiscrimination, protection of sacred lands, and the recognition of collective duties. Today, we have an incredible opportunity in the religious freedom realm to meet standards for equality and nondiscrimination, as well as to promote societal harmony, by effectuating the religious freedom of all.

CONCLUSION

A recent book by Professor Cutcha Risling Baldy, a young Hupa scholar and religious practitioner, speaks poignantly to the religious traditions of her people. The Hupa people, one of the tribes in the *Lyng* case, suffered over a century of religious suppression, land dispossession, and genocidal acts during the California Gold Rush.[293] Legal impediments, along with poverty and social inequality,[294] made it nearly or actually impossible to practice Hupa religion until very recently. In the last ten years, Hupa religious traditions, including girls' coming-of-age ceremonies, have once again "become part of the living, vibrant . . . practices of the Hupa people."[295] Now practicing their spirituality, Hupa people can see a future for their people.[296]

Around the country, other tribes are similarly revitalizing their religions for the next generation of tribal survival. For example, as Professor Charles Wilkinson has written, the Siletz people of Oregon recently held the first "full, formal Nee Dosh in a traditional dance

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[291] IROQUOIS NATIONS CONST. §§ 100–103; *see also* MATTHEW L.M. FLETCHER, THE GHOST ROAD: ANISHINAABE RESPONSES TO INDIAN HATING 132–143 (2020) (discussing Hoopa tribal law approaches to protecting sites for the White Deerskin Dance, a "world-cleansing" ceremony that helps to address community conflict).

[292] The Declaration, *supra* note 30, art. 25; *see also* Carpenter, *supra* note 45, at 169–70.

[293] *See* CUTCHA RISLING BALDY, WE ARE DANCING FOR YOU: NATIVE FEMINISMS AND THE REVITALIZATION OF WOMEN'S COMING-OF-AGE CEREMONIES 51–72 (2018).

[294] *Id.* at 127.

[295] *Id.* at 146.

[296] *Id.* at 152.

house" in over a century.[297] In the Cherokee Nation, elder Crosslin Smith has just published a new book describing healing traditions learned from his ancestors.[298] The protests at Standing Rock and Mauna Kea have revealed religious revitalism among younger generations, both specific to tribal traditions and linked to global Indigenous networks.[299]

Indigenous Peoples have suffered terribly to reach this moment when revitalization of their religions is becoming possible. It is time for the courts, agencies, and Congress to find a way to include them in our nation's protections for religious freedom. Through their continued advocacy, Indigenous Peoples may help the Constitution of the United States and other laws come to embrace a vibrant, diverse set of religious beliefs and practices that allows all of us to develop as human beings, with the dignity and freedom to live in relationship and understanding with one another.

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[297] CHARLES WILKINSON, THE PEOPLE ARE DANCING AGAIN: THE HISTORY OF THE SILETZ TRIBE OF WESTERN OREGON 364–65 (2010).

[298] *See* CROSSLIN FIELDS SMITH, STAND AS ONE: SPIRITUAL TEACHINGS OF KEETOOWAH (2018); *see also Crosslin Smith*, *The Old Ways*, OSIYO, https://osiyo.tv/crosslin-smith-old-ways [https://perma.cc/YHW2-UWY5].

[299] *See generally* Siv Ellen Kraft, *Indigenous Religion(s) — In the Making and on the Move: Sámi Activism from Alta to Standing Rock*, *in* INDIGENOUS RELIGION(S): LOCAL GROUNDS, GLOBAL NETWORKS 59, 72–88 (2020) (discussing Sámi activism in support of Lakota religious practices and protests at Standing Rock).