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Richard B. Collins

University of Colorado Law School

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SACRED SITES AND RELIGIOUS FREEDOM ON GOVERNMENT LAND

*Richard B. Collins**

INTRODUCTION

Holy lands are significant in many religious faiths. Their sacred character can arise from human acts of consecration of buildings, shrines, and burial sites; from miraculous events; or from the presence of revered persons. Of late, we can add places of great tragedy. Or it can inhere in sites' natural condition.¹ Beliefs of the latter kind are usually held by long-established peoples. In the United States, Australia, New Zealand, and Canada, these beliefs are an important part of the faiths of original inhabitants—Native Americans, Aborigines, Maori, and First Nations, respectively. The central aim of this paper is to explain, evaluate, and compare legal protections for indigenous religions when a sacred site is found on government land in these nations.

The four nations have well-established and highly effective regimes of private land ownership. When a sacred site is owned by believers, or by tribal societies associated with them, protection is either straightforward or an internal question for the tribal society. Conversely, when a site is privately owned by others, legal protection of believers' interests in the site is limited or absent. Moreover, privately owned land is more likely to have been developed in ways that are inconsistent with a continuing sacred site, while much government land remains in a relatively natural state. Hence, legal protection for an active, religious interest in land not owned by believers mostly concerns land owned by governments.

In the nations under review, much land is owned by various levels of government, and all or most of the land was at one time the property of indigenous inhabitants. At the times when these governments purchased or seized the land from native peoples, traditional relig-

* Professor of Law, University of Colorado. The author thanks Kevin Noble Maillard and the other symposium organizers of the *University of Pennsylvania Journal of Constitutional Law* for arranging an inspiring conference, Professor Paul Rishworth of the University of Auckland for advice on international law, and Kevin Nelson (Colorado) and Lisa Fong (Auckland) for helpful research assistance.

¹ See Vine Deloria, Jr., *Sacred Lands and Religious Freedom*, in *FOR THIS LAND: WRITINGS ON RELIGION IN AMERICA* 203, 207-11 (James Treat ed., 1999) (discussing types of sacred land).

ions were being eclipsed by Christian conversions often aided by governmental policies, and governments directly suppressed some religious practices.² These actions weakened the influence of traditional religious interests on the selection of land that natives retained. In many situations, particularly in Australia, very little land was retained at all.³ As a result, many sacred sites were acquired from native peoples, and those that remain in any sort of undeveloped state are almost all government-owned.

In recent years, indigenous groups have had modest success in re-acquiring land. Some of the land has religious significance, which is often the reason why return of that particular land was sought.⁴ Political efforts to extend these gains are ongoing. However, the principal focus of this paper is on religious interests in land that remains in government ownership, and to a limited extent, in land privately owned by nonadherents of traditional religions.

I. RELIGIOUS ACCOMMODATION

A just state ought to recognize religious freedom claims by adherents of its minority faiths.⁵ In particular, religious claims of indigenous peoples should receive legal recognition, protection, and accommodation. Many people find the deepest meanings of their lives in religious practices, yet those practices for Maori, Native Americans, First Nations, and the Aboriginal peoples of Australia have a sorry history of repression.⁶

Legal protection for sacred sites on government land can be based either on laws and policies specifically designed to this end, or on general protections for religious freedom in statutes or constitutions. The four nations under review offer complex variations on these legal themes.

Many religious freedom claims are accommodated through political processes and by common law rules. This is obviously an easier path when a religious community comprises a large part of the electorate, as does Christianity in the nations examined here. Historically, this was not the case for indigenous religions in these nations,

² See A. GRENFELL PRICE, *WHITE SETTLERS AND NATIVE PEOPLES* (1950) (detailing missionary activities and messianic indigenous movements).

³ See HENRY REYNOLDS, *THE LAW OF THE LAND* (1987) (presenting the history of the disposition of Aboriginal land).

⁴ See *infra* notes 28-29, 59-65, 78, 109-10 and accompanying text.

⁵ See Universal Declaration of Human Rights, art. 18 (1948), at <http://www.un.org/rights/50/decla.htm> (last visited Jan. 9, 2003); *Religious Discrimination and Related Violations of Helsinki Commitments: Report to the OSCE Supplementary Human Dimension Meeting on Freedom of Religion*, International Helsinki Federation for Human Rights (Vienna, Mar. 22, 1999), at <http://www.ihf-hr.org/reports/osce99/99reldis01.htm#Overview> (last visited Jan. 9, 2003).

⁶ See *infra* notes 15, 90 and accompanying text.

and Christian dominance fostered policies to promote conversion of native people, thus suppressing their traditional faiths. Accommodation was usually to the political will of the powerful, rarely to unique needs of minority religions.⁷

More recently, there has been a shift, and political recognition of indigenous religions has increased significantly. Many religious groups in the four nations have become more tolerant of each other and more inclined to work in concert for accommodations for all faiths.⁸ One subject of this paper is to examine what has and has not been achieved politically.

When religious adherents do not succeed politically, they can seek judicial review of an adverse decision. When they do succeed politically, other persons affected may sue to challenge accommodations made to them. Another major change of recent decades has been greatly increased access of traditional religious groups to legislators, lawyers and courts. There are more legal challenges by native persons and groups and more political accommodations to indigenous groups that can be challenged by others. As a result, intense and fascinating religious conflicts have emerged in the law reports. When these disputes involve religious uses of government land, they are a central concern of this paper.

Defining religion can be a challenge in any dispute about religious freedom. So long as the issue is addressed politically, it is simply one of the terms of political discourse. But when judicial review is sought under statutes or constitutional provisions that protect religion but not culture or other ethical concerns or group interests, the distinction can become crucial to judicial resolution and can in turn raise difficult questions about equal treatment. The issue has special relevance to indigenous religions, which often have less distinct boundaries from culture than does Christianity. Conversely, when legal protections equate religion with culture, heritage, conscience, or other interests, religion can become relatively diminished in importance.

⁷ See, e.g., Raymond J. Demallie, *The Lakota Ghost Dance: An Ethnohistorical Account*, in DAVID G. HACKETT, *RELIGION AND AMERICAN CULTURE* 329, 333-35 (1995).

⁸ This willingness is illustrated by (a) the growth of interfaith groups, see, e.g., Hill Connections, *Social Justice Teachings, Documents, and More*, at <http://hillconnections.org/jt/inf.htm> (last visited Jan. 8, 2003); ReligiousTolerance.org, *Local Groups Promoting Interfaith Dialog*, at http://www.religioustolerance.org/tol_loca.htm (last visited Jan. 8, 2003); (b) by common cause to support legislation aiding all faiths, see, e.g., *infra* note 103 and accompanying text; and (c) by majority support for laws aiding minority faiths, see *infra passim*.

II. FOUR NATIONS⁹

A. New Zealand

New Zealand was first settled about a millennium ago by Maori, mariners from other parts of Polynesia. Like other societies with close ties to the land, Maori traditions attribute sacred character to places, flora, and fauna throughout the land they named Aotearoa.¹⁰ After European contact many Maori became Christians, but practice of their religion also continued, both apart from and accompanying Christian worship.¹¹

1. General Protections of Religious Freedom

For most of its history, New Zealand addressed issues of religious freedom under the rules and practices of its Westminster constitution and the common law.¹² The nation had familiar provisions for church tax exemptions and the like.¹³ Majority rule meant privileges for dominant Christians, yet by comparative world standards, there was and is a strong tradition of religious freedom.¹⁴ Crown land, comprising more than half the surface of the nation, includes many Maori sacred sites that received no distinct legal protection.¹⁵ Laws of recent vintage have substantially changed this legal landscape.

New Zealand has recently taken limited steps toward “higher law” rights. In 1990, Parliament enacted the Bill of Rights Act (BOR), a statutory declaration of rights worded similarly to other modern hu-

⁹ Because this paper was prepared for a North American audience and readership, it assumes greater background knowledge about the legal systems and indigenous peoples of Canada and the United States than about New Zealand and Australia.

¹⁰ See Andrew Sharp, *Blood, Custom, and Consent: Three Kinds of Māori Groups and the Challenges They Present to Governments*, 52 U. TORONTO L.J. 9 (2002) (describing the Maori people).

¹¹ See, e.g., Statistics New Zealand, 2001 Census of Population and Dwellings—Maori tables, Table 17a—Religious Affiliation, at http://www.stats.govt.nz/domino/external/web/Prod_Serv.nsf/htmldocs/Maori (click on “2001 Census of Population and Dwellings - Māori tables,” then on “Table 17a, Religious Affiliation.”) (last visited Jan. 9, 2003) (listing Christians, Maori-Christians, and Maori as separate categories of religious affiliation).

¹² See Constitution Act, 1986 (enacting modern version of Westminster constitution).

¹³ See Butterworths Laws of New Zealand, Religion and Churches 21-23.

¹⁴ See Paul Rishworth, *Coming Conflicts over Freedom of Religion*, in RIGHTS AND FREEDOMS—THE NEW ZEALAND BILL OF RIGHTS ACT 1990 AND THE HUMAN RIGHTS ACT 1993, at 225-28 (Grant Huscroft & Paul Rishworth eds., 1995).

¹⁵ Article 3 of the Treaty of Waitangi, made in 1840 between most Maori tribes and the Crown, provides broad protection for Maori interests, but like foreign treaties, it had not been judicially enforceable absent legislative recognition. In recent years, legislation has provided for indirect enforcement of the Treaty, and challenges have been made to the traditional rule. See *New Zealand Maori Council v. Ati'a-Gen.* [1987] 1 N.Z.L.R. 641, 666-67 (C.A.) (enforcing safeguards against actions inconsistent with the Treaty).

man rights codes, national and international.¹⁶ It includes strongly worded protections of religious freedom and equality. BOR section 13 affirms “the right to freedom of thought, conscience, religion, and belief.” Section 15, more functionally, affirms every person’s “right to manifest that person’s religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.” Section 19 states that every person has the right to freedom from discrimination on the grounds of “[r]eligious belief” and of “[e]thical belief, which means the lack of a religious belief, whether in respect of a particular religion or religions or all religions.”¹⁷ And section 20 affirms that a “person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.”¹⁸

Judicial enforcement of the BOR is limited by its section 4, which retains parliamentary supremacy by providing that no statute in conflict with a provision of the BOR shall be held invalid. At the same time, courts have opportunities for enforcement under section 6, which requires that when a statute can be given a meaning consistent with the BOR, “that meaning shall be preferred.” There are not yet settled precedents determining how these provisions should be applied.¹⁹

The Human Rights Act 1993 (HRA) followed, expanding the anti-discrimination section of the BOR and applying to private as well as public actors. HRA section 151, like section 4 of the Bill of Rights Act, barred invalidations of inconsistent statutes, but section 151 expired on December 31, 2001.²⁰ In 1993, Parliament enacted an apportionment plan for the House of Representatives itself that on its

¹⁶ Principally the Canadian Charter of Rights and Freedoms and the International Covenant on Civil and Political Rights. See Paul Rishworth, *The Birth and Rebirth of the Bill of Rights*, in *RIGHTS AND FREEDOMS*, *supra* note 14, at 14.

¹⁷ BOR § 19 incorporates these and other grounds of discrimination from the Human Rights Act, 1993, a comprehensive antidiscrimination statute. See *infra* note 20 and accompanying text.

¹⁸ See discussion *infra* text accompanying note 26.

¹⁹ The leading judgment relying on BOR § 4 is probably *Quilter v. Att’y-Gen.* [1998] 1 N.Z.L.R. 523 (C.A.) (finding Marriage Act in conflict with lesbian couples’ equality claim). See Paul Rishworth, *Reflections on the Bill of Rights After Quilter v. Attorney-General* (1998) N.Z. L. REV. 683. Leading judgments relying on BOR § 6 and BOR § 4 are *Moonen v. Film & Literature Bd. of Review* [2000] 2 N.Z.L.R. 9 (C.A.) (interpreting Film, Videos, and Publications Classification Act 1993 to impinge as little as possible on freedom of expression) and *Ministry of Transport v. Noort* [1992] 3 N.Z.L.R. 260 (C.A.) (finding that driver subjected to roadside sobriety test was entitled to consult a lawyer by telephone).

²⁰ See Paul Rishworth, *Review: Human Rights* (2001) N.Z. L. REV. 217, 217-19 (analyzing the function of section 151).

face requires a three-fourths vote of the House to alter.²¹ Under the theory of parliamentary supremacy, a future House could repeal this law by a simple majority, but it is quite unlikely to do so.

The BOR and Human Rights Act provisions on religious freedom and equality have been applied in decisions of the Court of Appeal (for most matters the nation's highest court), but none involved Maori religious interests or suggested how the court would approach a sacred sites claim.²² The most pertinent reported judgment is that of the High Court in *Zdrahal v. Wellington City Council*.²³ Appellant painted two swastikas on the outside of his house. Neighbors complained, and an officer served an abatement notice on him under a statute authorizing suppression of anything "noxious, dangerous, offensive, or objectionable to such an extent that it has . . . an adverse effect on the environment."²⁴ Appellant claimed interference with his freedom of religion, but the court dismissed his appeal, stating:

The appellant's religious views were, of course, entirely irrelevant. The question of appellant's motives or intentions in displaying the swastikas are not admissible to decide whether the matter or activity is offensive . . . [W]hether the appellant was motivated by genuine religious belief . . . mattered not.²⁵

This passage goes to the heart of the question of freedom to practice one's religion, as distinct from freedom of belief. Unless believers have some exemptions from legal requirements, their practices have no more freedom than is accorded other persons. Thus, until a higher court examines the question, the religious freedom provisions of the BOR do not offer great promise of protection for sacred sites.

It is more likely that provisions for religious equality will affect sacred site claims. Most claims will be by Maori, and the BOR expressly recognizes the right of "an ethnic, religious, or linguistic minority . . . to profess and practise the religion . . . of that minority."²⁶ More generally, BOR section 19(2) expressly allows measures "taken in good

²¹ Electoral Act, 1993, § 268.

²² See *Mendelsohn v. Centrepont Cmty. Growth Trust* [1999] 2 N.Z.L.R. 88 (appointing a public trustee to manage religious trust that had become paralyzed by dissension); *Quilter v. Att'y-Gen.* [1998] 1 N.Z.L.R. 523 (finding Marriage Act in conflict with lesbian couples' equality claim); *Re J (an Infant): B & B v. Dir.-Gen. of Soc. Welfare* [1996] 2 N.Z.L.R. 134 (sustaining medical guardianship of child against parents' religious freedom claims).

²³ [1995] 1 N.Z.L.R. 700.

²⁴ Resource Management Act, 1991, § 322(a)(ii). This part of the statute in effect codifies the common law of nuisance, and much of the reported judgment sounds in nuisance. Other parts of the statute are discussed below. See *infra* notes 30-50 and accompanying text.

²⁵ [1995] 1 N.Z.L.R. at 710. The judgment is peculiar because the quoted passage appeared before the Court turned to the Bill of Rights Act, and discussion of the Act was confined to freedom of expression, which was recognized as relevant but its limits justified under section 5. See *id.* at 710-11.

²⁶ Bill of Rights Act, 1990, § 20.

faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination" based on religious belief. This insulates from attack a number of important measures that specifically recognize Maori religious concerns, which are invoked in preference to the general provisions of the BOR.

2. *Political Actions Protecting Maori Sacred Sites*

New Zealand has a general program to settle Maori land and other claims against the Crown through the Waitangi Tribunal, an administrative court.²⁷ Religious issues have been prominent in a number of proceedings before the tribunal.²⁸ Tribunal reports require legislation to implement, but successive governments have sought to reach accommodations with tribes. Many of these have involved transfer of Crown land to Maori, and some religious sites have been returned in the process.²⁹

Turning to sites on government and private land, the Resource Management Act 1991 (RMA) consolidated many land use and planning laws into a single, complex, and somewhat controversial enactment of more than 400 sections.³⁰ Pertinently, RMA section 6 added explicit protection for wahi tapu, Maori sacred sites.³¹ Statutory recognition of wahi tapu is also found in at least seven other statutes.³² The term is explicitly defined only in section 2 of the Historic Places Act 1993 as "a place sacred to Maori in the traditional, spiritual, religious, ritual, or mythological sense."

²⁷ See Waitangi Tribunal, Treaty of Waitangi Act 1975, at <http://www.waitangi-tribunal.govt.nz/faq> (last visited Jan. 9, 2003). The Tribunal describes itself as "a permanent commission of inquiry." *Id.*

²⁸ See, e.g., Waitangi Tribunal, Te Roroa Claim, at <http://www.waitangi-tribunal.govt.nz/reports/reports.asp> (select "Nort Island - North") (last visited Jan. 9, 2003).

²⁹ See, e.g., Pouakani Claims Settlement Act, 2000; Ngati Turangitukua Claims Settlement Act, 1999; Ngai Tahu Claims Settlement Act, 1998; Waikato Raupatu Claims Settlement Act, 1995.

³⁰ See RMA-Net, at <http://www.rma.co.nz/frame.html> (last visited Jan. 9, 2003).

³¹ In accordance with New Zealand usage, Maori words are not italicized in this article. Wahi, also spelled waahi, wāhi and wāhi (different spellings to show that "a" is a long vowel), is rendered as *site* or *place* in Maori-English dictionaries. Tapu is the Maori cognate of the Tongan tabu, taken into English as *taboo* and into many other languages. However, the dictionary renders tapu as *sacred* or *forbidden*, a broader meaning than *taboo*. See THE REED DICTIONARY OF MODERN MAORI (P. M. Ryan ed., 2d ed. 1997). The *a* in *Maori* is also long, and many sources spell it *Māori* or *Māori*. See, e.g., MAORI L. REV. since July 1995. RMA § 42 and Second Schedule Part II ¶ 2 also refer to wahi tapu.

³² See Crown Forest Assets Act, 1989, §§ 18, 22; Biosecurity Act, 1993 §§ 57, 60, 72; Hazardous Substances & New Organisms Act, 1996, § 6; Treaty of Waitangi (State Enterprises) Act, 1988, § 10 (amending § 27-27D of State-Owned Enterprises Act 1986); Fisheries Act, 1996, § 121; Overseas Investment Act, 1973, Schedule 1, Part 1; Historic Places Act, 1993, §§ 2, 4-7, 22, 25-30, 32-35, 37, 39, 54, 85, 98, 103, 105, 106.

Reported decisions involving protection of wahi tapu under these statutes have mostly involved only RMA section 6(e), which provides: "[A]ll persons exercising functions and powers under [RMA] . . . shall recognise and provide for the following matters of national importance: . . . (e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga."

It is clear that "ancestral" in this provision refers to past as well as present ownership. This point was established in litigation under a predecessor statute.³³ However, the term further accentuates that the provision is distinctive to Maori interests because other religious claimants would usually have no prior ownership interest in a site.

While RMA section 6(e) recognizes wahi tapu, it does so in common with the Maori relationship with ancestral lands, water, and "other taonga" (treasures). The religious interest is listed with other heritage and cultural interests and is worded equally to them. Similarly, the statutory definition in section 2 of the Historic Places Act lists the Maori religious interest with traditional, ritual, and mythological interests, albeit modified throughout by "sacred."³⁴ Moreover, section 6(e) is but one part of section 6, which also lists a series of conservation goals and public access to waterways as other matters of national importance.³⁵

All of RMA section 6 is subordinate to section 5, which states the Act's purpose to be the sustainable management of resources. However, insofar as this is a conservation goal, it will often be compatible with sacred site claims against development.

This structure appears to diminish the relative importance of religious freedom by equating it to other cultural and environmental interests. Whether it will actually diminish protection of religious freedom is not clear from the face of the statute, though it could have that effect. The very broad interests protected by RMA section 6 will conflict with a correspondingly broad range of competing interests, and the balancing of interests required by RMA will therefore give a decisionmaker great opportunities to find section 6 interests to be outweighed, or, conversely in the present context, to decide that re-

³³ *Env'tl. Def. Soc'y v. Mangonui County Council* [1989] 3 N.Z.L.R. 257 (C.A.) (involving application to a zoning decision of section 3(1)(g) of the Town & Country Planning Act 1977, which stated that matters of national importance included the relationship of Maori to their ancestral land). Section 3(1) required these matters to be "recognised and provided for." Section 3 was similar to RMA section 6 but made no particular reference to wahi tapu. The Court's judgment held that the Planning Tribunal had given insufficient weight to section 3(1)(g) and to another factor and ordered a rehearing.

³⁴ See Historic Places Act, 1993, § 2 ("Wahi tapu' means a place sacred to Maori in the traditional, spiritual, religious, ritual, or mythological sense.").

³⁵ Resource Management Act, 1991, § 6.

ligious interests should outrank others. Officials must "recognise and provide" for wahi tapu but retain discretion to decide whether competing interests are more important. However, a decision interpreting the weaker requirement of a different statute that an agency "take into account" wahi tapu reasoned that "[o]ne does not 'provide for' a factor by considering and then discarding it."³⁶

A number of reported judgments addressed Maori sacred site claims under RMA section 6(e), but all were occasioned by review of applications for resource consent to development, and most involved land owned by private parties, state-owned enterprises, or local authorities. Maori sacred sites on undeveloped Crown land are likely to be found mostly on land administered by the Department of Conservation, which oversees parks, indigenous forests, wilderness areas, and reserves.³⁷ RMA's terms are broad enough for direct claims to sacred sites on such land, but none has yet become the subject of a reported dispute.

Nevertheless, reported judgments offer a good preliminary insight into the place of RMA section 6(e) in RMA applications. One important duty that has clearly emerged is for land planners and developers, public and private, to notify tangata whenua, the local Maori, of pending applications for resource consent, followed by a duty to consult.³⁸ While these are procedural requirements, they assure Maori the opportunity to present their substantive claims, including sacred site claims, and have them considered in the consent process. Planners and developers have an incentive to consult and to accommodate Maori wishes to reduce conflict over their proposals. If a party is dissatisfied with a decision, judicial review can be had in the Environment Court, an institution that bears some resemblance to an American administrative court. Its judgments can be appealed to the High Court, comparable in standing to a U.S. District Court, then to the Court of Appeal.³⁹

Maori religious objections have been raised against many land-planning decisions since 1991, and decisions have gone for and against them. Notably, a television tower proposal was defeated,⁴⁰ as was a housing development,⁴¹ while many other proposals were ap-

³⁶ *Bleakley v. Env'tl. Risk Mgmt. Auth.* [2001] 3 N.Z.L.R. 213 (H.C.) ¶ 72 (interpreting Hazardous Substances and New Organisms Act, 1996, § 6).

³⁷ See Conservation Act, 1987 (establishing Department of Conservation).

³⁸ See Kenneth Palmer, *Consultation with the Tangata Whenua Under the Resource Management Act* (1994) 1 B.R.M.B. 21.

³⁹ See Butterworths Laws of New Zealand, Courts 11-18.

⁴⁰ *TV3 Network Services, Ltd. v. Waikato Dist. Council* [1998] 1 N.Z.L.R. 360 (H.C.).

⁴¹ *Gill v. Rotorua Dist. Council* [1993] 2 N.Z.R.M.A. 604 (Planning Tribunal).

proved.⁴² A number of Maori sacred site claims concern waterways, where Maori ownership claims are also asserted.⁴³ In contexts not explicitly religious, two decisions made clear that statutory protections include values that are metaphysical and intangible but found those values outweighed by others.⁴⁴

The leading decision on Maori sacred sites is *Watercare Services, Ltd. v. Minhinnick*.⁴⁵ Watercare planned to build a major sewer line to serve Manukau City, the southern part of greater Auckland, with a total population over one million. The line was to cross an undeveloped, rocky shoreline that had once been inhabited by Maori. The company consulted local Maori leaders about possible religious or other objections and adjusted the line's route based on the consultations. A Maori blessing ceremony was held on the site.

Minhinnick and Black were local Maori who disagreed with those who had approved of the line. They sued in the Environment Court to stop the project under RMA section 6.⁴⁶ The court ruled against them, reasoning that to prevail, religious claims must be based on a reasonable person's viewpoint, a test that the plaintiffs' claim did not satisfy.⁴⁷ The court also emphasized the environmental importance of the sewer line. Both reasons implied that the court was weighing competing interests.

Minhinnick and Black appealed to the High Court, which reversed the Environment Court's ruling, stating that the legal test should be based on the viewpoint of Maori people in particular, reasonable Maori rather than reasonable persons generally.⁴⁸ The judgment said nothing about the importance of the sewer line, suggesting that the court was giving much less weight to competing interests. Watercare appealed to the Court of Appeal, which in turn re-

⁴² See, e.g., *Ngatiwai Trust Bd. v. New Zealand Historic Places Trust* [1998] N.Z.R.M.A. 1 (H.C.). See generally, Paul Beverly, *The Mechanisms for the Protection of Maori Interests Under Part II of the Resources Management Act 1991*, (1998) 2 N.Z. J. ENV. L. 121 (discussing statutory mechanisms for protecting Maori interests).

⁴³ See Ani Mikaere & Stephanie Milroy, *Review: Treaty of Waitangi and Maori Land Law*, (2000) N.Z. L. REV. 363, 381-83. The authors state, "At best, the Resource Management Act causes councils to consult with Maori, but the cognisance taken of that consultation is, in the eyes of many Maori, totally inadequate." *Id.* at 382. See also *Butterworths Laws of New Zealand, Maori Affairs* 143 (criticisms by Waitangi Tribunal).

⁴⁴ *Friends & Cmty. of Ngawha Inc. v. Minister of Corrections* (H.C., Wellington, AP 110/02, 20 June 2002) (prison site); *Bleakley v. Env'tl. Risk Mgmt. Auth.* [2001] 3 N.Z.L.R. 213 (H.C.) (holding that research on genetically modified organisms was justified because the benefits to be gained from knowledge outweighed other considerations).

⁴⁵ [1998] 1 N.Z.L.R. 294 (C.A.).

⁴⁶ The procedural vehicle was § 314(1)(a)(ii), which authorizes enforcement orders based on substantive provisions of the statute.

⁴⁷ *Minhinnick v. Watercare Servs., Ltd.* [1997] N.Z.R.M.A. 289 (E.C.).

⁴⁸ *Minhinnick v. Watercare Servs., Ltd.* [1998] 1 N.Z.L.R. 63 (H.C.).

versed, agreeing with the Environment Court.⁴⁹ The Court of Appeal also held that the sewer line had been previously approved during adoption of a district plan and was no longer subject to review. The objectors could have sued then to overturn the plan, but could not sue now.

Minhinnick illustrates several important issues about religious freedom claims. It is a clear case of important competing interests balanced against a religious claim that seems to an outsider to be of marginal importance to religious exercise. It poses the problem of the interests of individual believers or dissenters versus those of an organized group. And it poses the problem of the standard by which to judge a religious claim in relation to adherents versus outsiders. The debate about whether the viewpoint should be reasonable persons or reasonable Maori was a step removed from the underlying question of irreconcilable viewpoints of believers and other persons.⁵⁰ But of course any limit to the views of a reasonable person implies some factoring in of competing interests, and there is an inherent tension between lawyers' definitions of reasonableness and religious faith in things that cannot be proved.

B. Australia

Australia's Aboriginal peoples settled the continent an estimated 50,000-60,000 years ago, and they spread across the vast territory in separate societies isolated from one another.⁵¹ Traditional Aboriginal religious practices are closely tied to natural places and things. Efforts were made to convert Aboriginals to Christianity, but traditional faiths survived, both in concert with and apart from Christian worship.⁵²

Australia has a federal system under a written Constitution and the institution of constitutional judicial review, but no general bill of

⁴⁹ *Watercare Servs., Ltd. v. Minhinnick* [1998] 1 N.Z.L.R. 294, 307.

⁵⁰ The issue was explicitly recognized in *Mangakahia Maori Komiti v. Northland Reg'l Council* [1996] N.Z.R.M.A. 193, 216 (E.C.) (stating that the decision was "based on the weighing of considerations that may, in effect, be irreconcilable").

⁵¹ See Australian Indigenous Population, History, at <http://www.koori.iisds.com/history.htm> (last visited Jan. 2003) (summarizing early Aboriginal history).

⁵² See Adherents.com, *Religion in Australia*, at http://www.adherents.com/loc/loc_australia.html (last visited Jan. 9, 2003) (listing religious data from the 1996 census); Yuri Koszarycz, *Religion in Aboriginal Australia*, at <http://www.mcauley.acu.edu.au/~yuri/readings/charlesworth.htm> (last visited Jan. 2003) (quoting Max Charlesworth, *Introduction*, in RELIGION IN ABORIGINAL AUSTRALIA: AN ANTHOLOGY (Max Charlesworth et al. eds., 2d ed. 1992) (reviewing the history of Western attitudes and understanding about Aboriginal religion)).

rights.⁵³ An exception is the Constitution's provision on religion, which resembles the American First Amendment: "Commonwealth not to legislate in respect of religion. The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion."⁵⁴ However, this provision appears in the constitutional article titled "The States," and its primary function is a federalism provision, an allocation of power to the states rather than the Commonwealth (national) government. It is an individual rights guarantee only against the national government.⁵⁵ Hence, national protection of religious interests depends on statutes and other political acts rather than the Constitution. At the state level, only Tasmania has a bill of rights, and it is not entrenched.⁵⁶ However, in recent years Australian governments have taken a number of legislative steps to accommodate and protect Aboriginal religious and cultural interests. The historical record, however, is another matter.⁵⁷ One event of great importance, though outside the direct concern of this article, is recent legal recognition of Aboriginal land title.⁵⁸

The first pertinent statute was the Western Australia Aboriginal Heritage Act 1972. Its scope is broader than religion but confined to Aboriginal concerns.⁵⁹ It was followed by the national Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) (hereinafter Heritage Protection Act 1984). By protecting Aboriginal heritage, this enactment skirts the constitutional religion clause, relying on the constitutional provision according the Commonwealth government's power over Aboriginal issues.⁶⁰ The South Australia Aboriginal Heritage Act 1988 is similar to Western Australia's.⁶¹ The following year,

⁵³ See R.D. LUMB & G.A. MOENS, *THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA ANNOTATED* ¶¶ 33-37, 352, at 27-33, 229-230 (5th ed. 1995) (describing the Australian judicial system under the Constitution).

⁵⁴ AUSTL. CONST. ch. V, The States, § 116.

⁵⁵ See LUMB & MOENS, *supra* note 53, ¶¶ 739-744, at 531 (noting the strictly federal scope of the guarantee). There is a good argument that the original purpose of the First Amendment's religion clauses was the same. See STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 26-27 (1999) (defending a federalist view of the First Amendment).

⁵⁶ See R.D. LUMB, *THE CONSTITUTIONS OF THE AUSTRALIAN STATES* 108 n.116 (2d ed. 1965) (describing freedom of religion in the Tasmanian Constitution Act).

⁵⁷ See HENRY REYNOLDS, *THE LAW OF THE LAND* (1987).

⁵⁸ See PETER BUTT ET AL., *MABO, WIK & NATIVE TITLE* 8-9 (4th ed. 2001) (discussing *Mabo* and *Wik* decisions of the High Court).

⁵⁹ See Aboriginal Heritage Act, 1972 (W.A.), at http://www.austlii.edu.au/au/legis/wa/consol_act/aha1972164 (last visited Jan. 9, 2003) (allowing for the preservation of places and objects of general importance to Aboriginals).

⁶⁰ See LUMB & MOENS, *supra* note 53, at ¶¶ 335-36, at 216-19 (describing federal power to legislate on the basis of race).

⁶¹ See Aboriginal Heritage Act, 1988 (S.A.), at http://www.austlii.edu.au/au/legis/sa/consol_act/aha1988164/index.html (last visited Jan. 9, 2003) ("for the protection and preservation of

the Northern Territory Aboriginal Sacred Sites Act 1989 became the first statute to address religion specifically.⁶²

The Australian government has also assisted Aboriginal tribes in reacquiring ownership of sacred sites. Most prominent was conveyance to the local tribe of the dramatic site commonly known as Ayers Rock, or Uluru to its Aboriginal owners. This was done pursuant to a complex agreement that commits management of the site to a trust board that has both Aboriginal and other members.⁶³ The site is a world-class tourist attraction, and many tourists want to climb the rock. This is considered wrong by the local tribe, but tribal income depends on tourists. The tribe decided to post signs that request visitors not to climb out of respect for Aboriginal religion, but climbing is nonetheless allowed for those who disregard the request. The tribe has explained that this makes respect for their religion a voluntary, and thus more meaningful, act.⁶⁴ Another complex series of disputes concerns mining in Aboriginal territory or affecting sacred sites. Compromises have been reached that do not satisfy advocates for either side.⁶⁵

Several disputes about Aboriginal sacred and other cultural sites have reached the Australian courts. Easily the most significant is that involving Hindmarsh Island in South Australia. The island is in a resort area south of Adelaide, a city of about one million. The island had been accessible only by ferries. The Chapman family, resort owners and developers, proposed to build a bridge to connect the island to the mainland. When they ran into financial difficulty, the South Australian government undertook to pay for part of the project.⁶⁶

A group of Aboriginal women from the local Ngarrindjerri Tribe protested on religious grounds, invoking the Heritage Protection Act

the Aboriginal heritage"); Aboriginal Heritage Act, 1972 (W.A.), *supra* note 59 ("for the preservation . . . of places and objects . . . used by or traditional to the original inhabitants of Australia").

⁶² See Northern Territory Aboriginal Sacred Sites Act, 1989, at http://www.austlii.edu.au/au/legis/nt/consol_act/ntassa453 (last visited Jan. 9, 2003).

⁶³ See ROBERT LAYTON, *ULURU: AN ABORIGINAL HISTORY OF AYERS ROCK* 105-119 (2001) (describing history of Uluru land claim); Australian Parks and Reserves, Uluru-Kata Tjuta National Park, at <http://www.ea.gov.au/parks/uluru> (last visited Jan. 9, 2003) (official web site for Uluru).

⁶⁴ See Australian Parks and Reserves, Uluru-Kata Tjuta National Park, *Please Don't Climb Uluru*, at <http://www.ea.gov.au/parks/uluru/no-climb/index.html> (last visited Jan. 9, 2003) (exhorting visitors to choose not to climb Uluru).

⁶⁵ See Andrew McWilliam, *Negotiating Desecration: Sacred Sites Damage and Due Compensation in the Northern Territory*, in 1 *AUSTL. ABORIGINAL STUD.* 2 (1998); KEN GELDER & JANE M. JACOBS, *UNCANNY AUSTRALIA: SACREDNESS AND IDENTITY IN A POSTCOLONIAL NATION* 17, 52 (1998) (describing disputes between mining interests and Aboriginals).

⁶⁶ See Neil Andrews, *Dissenting in Paradise?: The Hindmarsh Island Bridge Royal Commission*, (1998) 5 *CANBERRA L. REV.* 5, 16 n.49 (describing events stated in the text).

1984. When the Commonwealth Minister for Aboriginal Affairs attempted to commission a report, the Aboriginal women said that details of the island's sacred character could not be revealed to men. So the (male) Minister appointed a woman, Professor Cheryl Saunders of Melbourne University, to make the report. Her report found the women's claim to be genuine and important but did not reveal details to the Minister out of respect for the women's view that men should not be told. A sealed part of the report relating these details was reviewed by a female member of the Minister's staff.⁶⁷

Based on the report, the Minister issued an order under the Heritage Protection Act 1984 to forbid construction of the bridge for 25 years. The relevant statutory text is:

§ 10 (1) Where the Minister:

(a) receives an application made orally or in writing by or on behalf of an Aboriginal or a group of Aborigines seeking the preservation or protection of a specified area from injury or desecration;

(b) is satisfied:

(i) that the area is a significant Aboriginal area; and

(ii) that it is under threat of injury or desecration;

(c) has received a report under subsection (4) in relation to the area from a person nominated by him or her and has considered the report and any representations attached to the report; and

(d) has considered such other matters as he or she thinks relevant; he or she may make a declaration in relation to the area.

....

§ 11 A declaration under subsection 10(1) in relation to an area shall:

(a) describe the area with sufficient particulars to enable the area to be identified; and

(b) contain provisions for and in relation to the protection and preservation of the area from injury or desecration.

The Chapmans sought review in federal court, which overturned the order because the Minister did not have the facts before him when making the order.⁶⁸ Meanwhile, the South Australian government convened a Royal Commission to investigate the genuineness of the women's religious claim, and the resulting Commission report branded the claim to be a "fabrication."⁶⁹

The Commonwealth minister began the process of reexamining the women's claim on remand from the federal court, appointing a

⁶⁷ *Id.* at 11.

⁶⁸ *Tickner v. Chapman*, 57 F.C.R. 451; 133 A.L.R. 226 (1995); 1995 WL 1691084.

⁶⁹ See *Andrews*, *supra* note 66, at 20. See also *Aboriginal Legal Rights Movement v. State of South Australia I* [1995] 64 S.A.S.R. 551 (sustaining Commission's validity).

female judge as the new reporter.⁷⁰ However, Parliament preempted the question by amending the Heritage Protection Act 1984 to exempt the bridge project. The South Australian Royal Commission's report probably played a role in the amendment's enactment.⁷¹ In relevant part, the Hindmarsh Island Bridge Act 1997 (Cth) states: "The Heritage Protection Act does not authorise the making of a declaration in relation to the preservation or protection of an area or object from . . . the construction of a bridge, and associated works (including approaches to the bridge), in the Hindmarsh Island bridge area."⁷² On judicial review, the High Court of Australia, the nation's highest court, sustained the amendment's validity.⁷³ In due course the bridge was built and opened in March 2002.⁷⁴

The Hindmarsh dispute centered on two problems that have arisen in a number of sacred site disputes. One is the question of confidentiality.⁷⁵ The other is the problem of civil courts or other tribunals evaluating the sincerity and importance of religious claims.⁷⁶ The case also shows the problems that arise when religious issues are addressed in a vague statute that provides no guidance about standards for assessing claims. The dispute has been prominent, generating book-length dissents from the outcome, but most dwell on historical injustices to Aboriginal people rather than on how sacred site claims ought to be evaluated.⁷⁷

C. *The United States*

Native American adherents of traditional religions have had notable political successes in modern times. Some very significant sacred sites have been returned to tribal ownership,⁷⁸ and several statutes

⁷⁰ See *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs*, [1996] 189 C.L.R. 1; 138 A.L.R. 220; 1996 WL 1747209 (Austl.) (reviewing validity of the appointment).

⁷¹ See Andrews, *supra* note 66, at 12-14 (describing political effects of the report).

⁷² A later chapter in the tale was the failure of the Chapmans' suit against Professor Saunders and the Commonwealth to recover attorneys fees and other costs of suit. See *Chapman v Luminis*, [2001] F.C.A. 1106; 2001 WL 985712 (appeal pending; see http://www.fedcourt.gov.au/courtlists/lists_appeal.html) (last visited Jan. 9, 2003).

⁷³ *Kartinyeri v. Commonwealth* (1998) 195 CLR 337; 152 ALR 540; 1998 WL 1672663 (Austl.).

⁷⁴ See The Marina Hindmarsh Island, Latest News, at <http://www.murray-river.net/boating/marina-hindmarsh-island/news.htm> (last visited Jan. 9, 2003) (stating that bridge officially opened in March 2001).

⁷⁵ See, e.g., ANDREW GULLIFORD, SACRED OBJECTS AND SACRED PLACES: PRESERVING TRIBAL TRADITIONS 116-17 (2000) (discussing confidentiality).

⁷⁶ See *infra* notes 132-51 and accompanying text.

⁷⁷ See, e.g., HANNAH RACHEL BELL, MEN'S BUSINESS, WOMEN'S BUSINESS: THE SPIRITUAL ROLE OF GENDER IN THE WORLD'S OLDEST CULTURE (1996).

⁷⁸ See GULLIFORD, *supra* note 75, at 99-176 (identifying sacred sites that have been returned to tribal ownership).

and an executive order protect a range of Indian religious interests. The most general is the American Indian Religious Freedom Act of 1996 (AIRFA), which provides,

Henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise [their] traditional religions . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.”⁷⁹

The enactment did not create a judicially enforceable cause of action,⁸⁰ but it has had an effect on Executive Department policy. Important evidence of this is Executive Order 13007, protecting Indian sacred sites on federal land.⁸¹ Another statute of significance is the Native American Graves Protection and Repatriation Act, protecting Indian religious interests in funerary and ceremonial objects and creating legal interests in their recovery.⁸² The Peyote Sacrament Act of 1996⁸³ protects Indian religious use of peyote; it is duplicated in the laws of a number of states.⁸⁴

A less visible development is the policies engendered by the National Environmental Policy Act⁸⁵ and by the general trend toward management plans for public agencies.⁸⁶ These have led to programs to adopt systematic plans for national parks, monuments, forests, and other federal holdings. When a plan is prepared, both the general breadth of plans and the policies of AIRFA and the Executive Order protecting sacred sites generate federally funded examinations of Native American religious interests in government lands. They also generate accommodations to religious uses at the administrative level. Two of these plans were involved in prominent lawsuits described below, but many others have both created records of Indian religious interests and resulted in accommodations of them.

A currently important political issue concerns national parks and monuments. A longstanding administrative rule bans taking anything—animal, vegetable or mineral—from park land. The rule has

⁷⁹ 42 U.S.C. § 1996 (2000).

⁸⁰ See *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 455 (1988) (“Nowhere in the law is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights.”).

⁸¹ Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996).

⁸² 25 U.S.C. §§ 3001-3013 (2000). See Symposium, *The Native American Graves Protection and Repatriation Act of 1990 and State Repatriation-Related Legislation*, 24 ARIZ. ST. L.J. 1 (1992).

⁸³ 42 U.S.C. § 1996a(b)(1) (2000).

⁸⁴ See, e.g., IDAHO CODE § 37-2732A (Michie 2001); NEV. REV. STAT. § 453.541 (2001); TEX. HEALTH & SAFETY CODE ANN. § 481.111 (Vernon 1992).

⁸⁵ 42 U.S.C. §§ 4331-4335 (2000).

⁸⁶ See, e.g., *Bear Lodge Multiple Use Ass'n v. Babbitt*, 2 F. Supp. 2d 1448, 1450 (D. Wyo. 1998), *aff'd*, 175 F.3d 814 (10th Cir. 1999), *cert. denied*, 529 U.S. 1037 (2000) (describing National Park Service plan for managing rock climbing at sacred sites).

an exception for scientific work, but it specifically negates religious exceptions.⁸⁷ Over the past few years, proposals have been floated in the Interior Department to amend the rule to allow exceptions for Indian religious needs.⁸⁸ A prominent and controversial religious claim is that of Hopi religious adherents, who wish to gather baby eagles from nests on Wupatki National Monument.⁸⁹

Most advocates for Native American sacred sites and other religious interests would characterize the paragraphs above as overly positive. There have been many failures of political action, and inevitably many claims have been compromised.⁹⁰ In American popular consciousness, however, political action is small potatoes. Constitutional litigation and Supreme Court pronouncements are what matters. From this perspective, Native American religious freedom appears to have fared badly. Two losses in the Supreme Court are well known. In *Lyng v. Northwest Indian Cemetery Protective Association*,⁹¹ the Court rejected Indians' free exercise attack on a Forest Service plan to pave a logging road through the Chimney Rock area in northwestern California, traditionally used for Native religious exercises. Two years later, in *Employment Division v. Smith*,⁹² the Court sustained Oregon's ban on peyote applied to members of the Native American Church, for whom the plant is a sacrament. Moreover, the Court took the occasion to weaken its test to govern the Free Exercise Clause, apparently making it more difficult for all religions to gain protection for religious freedom.⁹³

Things fared little better in the lower courts. The California Supreme Court sustained constitutional liberty for the Native American Church,⁹⁴ but the decision was eclipsed by *Employment Division v.*

⁸⁷ 36 C.F.R. § 2.1 (2001) (provision "shall not be construed as authorizing the taking, use, or possession . . . for ceremonial or religious purposes").

⁸⁸ See National Park Service Management Policies, ch. 1, § 4 (2001), available at <http://www.nps.gov/policy/mp/chapter1.htm> (last visited Jan. 9, 2003) (allowing the "NPS decisionmaker" to decide on a case-by-case basis when something may be removed from a national park or monument).

⁸⁹ See Press Release, U.S. Dep't of the Interior, The National Park Service Issues a Proposed Rule Regarding the Hopi Collection of Golden Eaglets from Wupatki National Monument (Jan. 22, 2001), available at <http://www.nps.gov/wupa/pppressreleases/acf34d.htm> (last visited Jan. 9, 2003) (announcing proposed rule to allow gathering of eaglets for religious purposes).

⁹⁰ See, e.g., GULLIFORD, *supra* note 75, at 99-176 (discussing political action taken to obtain ownership of sacred sites and the success of such efforts); Russel Lawrence Barsh, *The Illusion of Religious Freedom for Indigenous Americans*, 65 OR. L. REV. 363 (1986) (arguing that the legal system does not protect Native Americans' religious freedom).

⁹¹ 485 U.S. 439 (1988).

⁹² 494 U.S. 872 (1990).

⁹³ *Id.* at 879.

⁹⁴ *People v. Woody*, 394 P.2d 813 (Cal. 1964).

Smith. Most other constitutional religious liberty claims by Native Americans have failed over the years.⁹⁵

The courts undercut Indian religious freedom from another direction in a case involving Devil's Tower National Monument.⁹⁶ The tower has been an important site for traditional religions of several tribes since time immemorial. As part of a management plan for the monument, the Park Service gathered comprehensive and powerful evidence of Indians' religious interests in the site. However, in recent years the monument has become a world-class destination for rock climbers. Religious adherents objected to climbers defacing the monument and sought its closure to climbing. The Park Service adopted a compromise. It banned commercial climbing during the month of June because the summer solstice and surrounding days are the most significant times for the faithful. The Service also established a system of informing individual climbers about the Indians' religious objections and asking them to refrain from climbing in June.⁹⁷ The tribes, for reasons similar to those of the Aboriginal owners of Ayers Rock/Uluru in Australia,⁹⁸ accepted the rules. But a group of commercial climbing guides sued, alleging that the rules were religious favoritism in violation of the Establishment Clause. A federal district judge agreed with respect to the June commercial closure, which was enjoined.⁹⁹ Rather than appeal, the Park Service withdrew the commercial closure rule. The guides' attack on the program of asking climbers to respect Indian objections failed, and that aspect of the program remains in force.¹⁰⁰

Negative outcomes in these prominent lawsuits mask positive aspects of the losing cases themselves. The Forest Service's planning

⁹⁵ See, e.g., *Conservation Law Found. v. FERC*, 216 F.3d 41 (D.C. Cir. 2000) (holding that the Federal Energy Regulatory Commission did not have to preserve water flows for canoes to reach sacred site when relicensing a project); *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 956 (1983) (sustaining approval to build private ski area on sacred mountain); *Attakai v. United States*, 746 F. Supp. 1395 (D. Ariz. 1990) (allowing range restoration plan affecting sacred sites); *Crow v. Gullett*, 541 F. Supp. 785 (D. S.D. 1982) (ceremonial use of state park); *Sequoyah Valley v. Tennessee Valley Auth.*, 480 F. Supp. 608 (E.D. Tenn. 1979) (flooding of sacred sites for reservoir); *Badoni v. Higginson*, 455 F. Supp. 641 (D. Utah 1977) (allowing damage of sacred sites at Rainbow Bridge National Monument).

⁹⁶ See *Bear Lodge Multiple Use Ass'n v. Babbitt*, 2 F. Supp. 2d 1448, 1450 (D. Wyo. 1998).

⁹⁷ See U.S. Department of the Interior National Park Service Rocky Mountain Region, Final Climbing Management Plan, available at http://www.nps.gov/deto/deto_climbing/detosumm.html (Feb. 1995). The Park Service plan also limited the placing of new climbing aids in the walls of Devil's Tower. *Id.*

⁹⁸ See Australian Parks and Reserves, *supra* note 64 (explaining that a voluntary ban on climbing was more appropriate for Australian Aboriginals because it made climbers' respect for Aboriginal religion more meaningful).

⁹⁹ *Bear Lodge Multiple Use Ass'n v. Babbitt*, 1996 (unreported opinion), quoted in JUDITH V. ROYSTER & MICHAEL C. BLUMM, NATIVE AMERICAN NATURAL RESOURCES LAW: CASES AND MATERIALS 30 (2002).

¹⁰⁰ See *id.*

process in *Northwest Indian Cemetery* produced a thorough and sympathetic chronicle of Indian religious interests in the Chimney Rock area, information that led to significant efforts to minimize the impact on religious uses, and the delay generated by the lawsuit was enough to scuttle the road politically. Before the case ended, Chimney Rock became part of a wilderness area.¹⁰¹ The outcome of *Employment Division v. Smith* led to enactment of the Peyote Sacrament Act.¹⁰² The Supreme Court's change of constitutional standard in the case also led to enactment of federal and state religious freedom restoration acts (RFRAs), which attempt to revive the legal test jettisoned by the Court and arguably expanded it.¹⁰³ The 1993 federal RFRA was held unconstitutional by the Supreme Court as applied to state governments.¹⁰⁴ But it continues in force as applied to the federal government, and internal federal policy is to comply with the Act.¹⁰⁵ Because Native American sacred sites are more often on federal land, the statute as truncated by the Court is more important to Indian religions than others.

Both RFRA and the Free Exercise Clause have been invoked by Indians prosecuted for killing animals protected by federal environmental laws. The most prominent statute is the Eagle Protection Act, which bans killing eagles or possessing or selling eagle parts.¹⁰⁶ However, eagle feathers are important to many Indian religions, as well as culturally important to a still larger Native American population. The statute has a limited exception for Indian religious uses, but it does not satisfy demands within Native America. As a result, there have been a significant number of federal prosecutions of Indians under the Act, and these in turn have generated religious freedom defenses. Some have been rejected on the ground that the defendant did not appear to have a sincere religious interest at stake.¹⁰⁷

¹⁰¹ See *Lyng v. N.W. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 442-45 (1988).

¹⁰² 42 U.S.C. § 1996a(b)(1) (2000). See also Biomaterials Access Assurance Act of 1994, 140 CONG. REC. 7,155 (1994).

¹⁰³ The federal statute is 42 U.S.C. § 2000bb (2000). Nine states have enacted similar statutes, and Alabama has adopted a constitutional amendment. See ALA. CONST. amend. 622, and statutes, at <http://www.religious-freedom.org/rflawal.html> (on file with author).

¹⁰⁴ *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that RFRA as applied to state government was an unconstitutional extension of federal power).

¹⁰⁵ See *Kikumura v. Hurley*, 242 F.3d 950 (10th Cir. 2001) (holding the unconstitutional sections of RFRA severable and the act constitutional as applied to the federal government); *Young v. Crystal Evangelical Church*, 141 F.3d 854, 856 (8th Cir. 1998) (holding RFRA constitutional pursuant to the "Bankruptcy Clause and the Necessary and Proper Clause of Article I of the Constitution").

¹⁰⁶ 16 U.S.C. §§ 668-668a (2000).

¹⁰⁷ See *United States v. Sandia*, 188 F.3d 1215 (10th Cir. 1999) (holding that defendant's sale of birds negated defense that birds were taken for religious purposes); *United States v. Hugs*, 109 F.3d 1375 (9th Cir. 1997) (finding burdens on Native American religion imposed by the Eagle Protection Act were warranted as the Act served a compelling government interest).

Recently, the Tenth Circuit held that non-Indians have a RFRA claim to share in the exception unless the Government can justify preferential treatment of Indians.¹⁰⁸

D. Canada

The most spectacular political success of an indigenous group has to be Canada's establishment of Nunavut, a vast northern territory governed by its Inuit inhabitants based on an agreement with the Crown enacted as a statute.¹⁰⁹ Other First Nations in Canada have also made important gains in land ownership,¹¹⁰ and a number of lawsuits involve land claims.¹¹¹ When land is indigenously controlled, religious questions are an internal matter for tribal owners.

Canada and Canadian provinces have no legislation directly concerned with sacred sites on Crown lands. A number of enactments provide for protection of heritage sites,¹¹² but to date no reported

¹⁰⁸ *United States v. Hardman*, 297 F.3d 1116 (10th Cir. 2002) (concluding that exceptions to the Eagle Protection Act could not be limited to members of federally recognized tribes, unless the government could show that limit was the least restrictive means of advancing the government's compelling interest).

¹⁰⁹ Nunavut Settlement Act of June 10, 1993, ch. 28., 1993 S.C. 1191 (Can.); *see also* Information Gateway to Nunavut, <http://www.nunavut.com> (last visited Jan. 9, 2003) (discussing what has occurred under the Nunavut Settlement Act).

¹¹⁰ *See, e.g.*, Yukon First Nations Land Claims Settlement Act of July 7, 1994, ch. 34, 1994 S.C. (Can.) (validating land claim agreements in the Yukon Territory), at <http://www.laws.justice.gc.ca/en/Y.2.3> (last visited Jan. 9, 2003); Sechelt Indian Band Self-Government Act of March 15, 1986, ch. 27, 1986 S.C. 941 (Can.) (enabling the Sechelt Indians to "exercise and maintain self-government on Sechelt lands"); Cree-Naskapi Act of June 14, 1984, ch. 18, 1984 S.C. 425 (Can.), at <http://laws.justice.gc.ca/en/C-45.7/> (last visited Jan. 9, 2003) (providing for a local "Cree and Naskapi local government, for the administration, management, and control of . . . land"); James Bay and Northern Quebec Claims Settlement Act of July 14, 1977, ch. 32, 1975 S.C. 879 (Can.), at <http://www.canlii.org/qc/sta/c67/whole.html> (last visited Jan. 9, 2003) (establishing a territory for the Crees and Inuit); Nisga'a Final Agreement Act of April 26, 1999, ch. 32, 1999 S.B.C. (B.C.) (establishing Nisga'a land ownership); Act Approving the Agreement Concerning James Bay and Northern Quebec of June 9, 1976, ch. 46, 1976 S.Q. (Que.) (accepting the agreement between Crees, Inuit, and Quebec for the purchase of land), at <http://www.canlii.org/gc/sta/c67/whole.html> (last visited Jan. 9, 2003); *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

¹¹¹ *See, e.g.*, *Xeni Gwet'in First Nations v. British Columbia*, [2002] B.C.C.A. 434 (C.A. Br. Col.) (authorizing land claim to proceed); *Chippewas of Sarnia Band v. Canada*, [2000] 195 D.L.R. (4th) 135 (C.A. Ontario 2001) (denying Indian band's land claim to much of City of Sarnia); *Squamish Indian Band v. Canada*, [2000] 100 A.C.W.S. (3d) 520, 2000 A.C.W.S. LEXIS 48082 (Fed. Ct.) (denying Indian bands' claim to government land); *Poplar Point Ojibway Nation v. Ontario*, [1993] 39 A.C.W.S. (3d) 232, 1993 A.C.W.S. LEXIS 32873 (Ontario Div. Ct.) (dismissing claim that burial sites should include waterfall and surrounding valley).

¹¹² *See* Parks Canada Agency Act of Dec. 3, 1998, ch. 31, § 6, 1998 S.C. 5 (Can.) (establishing agency responsible for protected heritage areas); Mackenzie Valley Resource Management Act of June 18, 1998, ch. 25 § 64(1), 1998 S.C. 22 (Can.) (requiring government to seek and consider advice of First Nations regarding heritage resources before using land or water); Dep't of Canadian Heritage Act of June 15, 1995, ch. 11 § 4, 1995 S.C. 1-2 (Can.) (authorizing minister to protect "areas of natural or historical significance").

dispute has invoked one of these statutes to assert a religious claim regarding government land. At least one First Nations treaty expressly protects religious rights, and the Canadian Charter of Rights and Freedoms (hereinafter "the Charter") gives constitutional recognition to indigenous treaty rights.¹¹³

But no reported religious rights claim has been made under this or another treaty clause.

The Charter's text provides grounds to assert constitutional religious freedom claims. "Freedom of conscience and religion" are entrenched as "fundamental freedoms."¹¹⁴ The Charter's guarantee of constitutional equality bans discrimination based on religion, and affirmative action is expressly allowed.¹¹⁵ No reported judgments involve any significant religious claim by a First Canadian. However, the text equates religious interests with matters of conscience, and equality bans can be deployed against religious accommodations. Application of these provisions in other cases suggests that they will not be important to Native religious interests. Canada's Supreme Court has ordered accommodations in limited circumstances.¹¹⁶ But in most reported decisions, religious claims have lost out to competing interests. Some losses occurred under the justification provision of Charter section 1, others by finding possible accommodations of religion to be forbidden preferences under section 15.¹¹⁷

E. International Law

Adherents of indigenous religions can invoke several provisions of the International Covenant on Civil and Political Rights (ICCPR), adopted by the United Nations General Assembly in 1966.¹¹⁸ Relevant provisions are similar to those of the New Zealand Bill of Rights Act 1990, which was adapted from the international standards.¹¹⁹ ICCPR article 18 guarantees religious freedom, article 27 provides that relig-

¹¹³ See *Regina v. Sioui*, [1990] 70 D.L.R. (4th) 427 (finding treaty right to cut trees and light fires in otherwise restricted areas).

¹¹⁴ Constitution Act, R.S.C., app. B, schedule B (1982) (Can.) ("Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression.").

¹¹⁵ *Id.* at § 15.

¹¹⁶ See *Central Alberta Dairy Pool v. Alberta*, [1990] 72 D.L.R. (4th) 417 (ordering employer to accommodate religious holiday).

¹¹⁷ See David M. Brown, *Freedom from or Freedom For?: Religion as a Case Study in Defining the Content of Charter Rights*, (2000) 33 U.B.C. L. REV. 551 (concluding that post-Charter Canadian court decisions increasingly regard religion as a private, not a public, concern); John Von Heyking, *The Harmonization of Heaven and Earth?: Religion, Politics, and Law in Canada*, (2000) 33 U.B.C. L. REV. 663, 676-95 (arguing that courts' concentration on secularization is misguided).

¹¹⁸ See G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1976), at <http://heiwwww.unige.ch/humanrts/instree/b3ccpr.htm> (last visited Jan. 9, 2003).

¹¹⁹ See Rishworth, *supra* note 16.

ious minorities “shall not be denied” the right to practice their religion, and articles 2 and 4 forbid discrimination based on religion.¹²⁰ ICCPR established the U. N. Human Rights Committee (HRC), a court-like body whose members are appointed by vote of member states. HRC hears claims brought by individuals who have exhausted state remedies, but only when the state against which a claim is made consents to its jurisdiction.¹²¹

The four nations considered here have agreed to ICCPR.¹²² The United States has not agreed to its optional protocol allowing individuals to bring claims against member states,¹²³ and American courts have not entertained ICCPR claims.¹²⁴ However, New Zealand, Australia and Canada have signed the optional protocol.¹²⁵ As a result, decisions of the Human Rights Committee and of national courts review claims made under ICCPR provisions.¹²⁶ However, no published decision has been found that reviews a religious rights claim of the sort considered in this paper against one of these nations.

III. CONFLICTS, COSTS, AND EQUALITY

A. Judicial and Political Accommodations

Much popular rhetoric about religious freedom is carried on in absolutes. Americans opposed to accommodating religious practices invoke Jefferson’s “wall of separation” metaphor and carry it to its logical extreme: no tax exemptions, or subsidies, or public displays or

¹²⁰ G.A. Res. 2200A, *supra* note 118.

¹²¹ See Ian Malkin, *Establishing Supervised Injecting Facilities: A Responsible Way To Help Minimise Harm*, (2001) 25 MELBOURNE U. L. REV. 680, 712-13.

¹²² See International Covenant on Civil and Political Rights, Dec. 16, 1966, T.S. No. 1057, 407, at http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_4.html (last visited Jan. 9, 2003).

¹²³ See *Ballentine v. United States*, No. Civ. 1999-130, 2001 WL 1242571, at 13 n.23 (D. V. I. 2001); Optional Protocol to the International Covenant on Civil and Political Rights, March, 23, 1976, T.S. No. 999, 171, at http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_5.html (last visited Jan. 9, 2003).

¹²⁴ See, e.g., *Igartua De La Rosa v. United States*, 32 F.3d 8, 10 n.1 (1st Cir. 1994) (finding that ICCPR neither establishes privately enforceable rights under U.S. law nor overrides constitutional limitations).

¹²⁵ See Optional Protocol, *supra* note 123.

¹²⁶ See J. S. Davidson, *Intention and Effect: The Legal Status of the Final Views of the Human Rights Committee*, (2001) N.Z. L. REV. 125, 127-28 (stating that “decisions of the HRC have great moral authority”); Gerald P. Heckman, *Unfinished Business: Baker and the Constitutionality of the Leave and Certification Requirements Under the Immigration Act*, (2002) 27 QUEEN’S L. J. 683, 705-06; Gillian Triggs, *Australia’s Indigenous Peoples and International Law: Validity of the Native Title Amendment Act 1998* (Cth) (1999) 23 MELBOURNE U. L. REV. 372, 375 (arguing that international human rights decisions are not binding but are a “crucial guide for legal decisions”).

prayers, and so on.¹²⁷ On their side, religious adherents often argue either as though accommodations impose no costs on others, or that all such costs are compelled. In the context of Native American religions, opponents of accommodation have argued favoritism,¹²⁸ and proponents have claimed that any defeat shows the “failure” of legal protections.¹²⁹ Both positions ignore the nature of the issue. Making no accommodations would heavily disadvantage religion by banning it absolutely from public life, privileging alternative forms of self-expression and community.¹³⁰ Failure to consider costs of accommodation places a legal system on a slippery slope to protecting religious practices that no society can tolerate, such as those involving physical harm to persons. Accommodation ought to be made when there are truly no costs to others, but this is rare¹³¹ and is readily achieved in most instances under current laws and politics of the four nations.

The jurisprudence of religious freedom recognizes that governments’ religious accommodations often impose costs on other persons.¹³² Accordingly, a general issue is how to weigh the need for a religious accommodation against the costs that its recognition would entail for others. The issue was reflected in the form of the U.S. Supreme Court’s rule for applying the Free Exercise Clause between 1963 and 1990. According to that test, governmental action that significantly burdened religious freedom had to be justified by a “compelling” state interest.¹³³ A version of the test endures in federal and state religious freedom restoration statutes.¹³⁴ Although phrased as a governmental interest, costs imposed by religious accommodations fall on other persons, not solely on a disembodied government.¹³⁵ Some costs are spread broadly through the tax system, others fall on discrete interests, but all costs fall on someone.

A less focused form of the issue appears in New Zealand’s Resource Management Act 1991, which establishes Maori religious and cultural issues as “matters of national importance” in a statute that identifies other significant concerns to be weighed against Maori in-

¹²⁷ See, e.g., Freedom From Religion Foundation, <http://www.ffrf.org/> (last visited Jan. 9, 2003).

¹²⁸ See *Bear Lodge Multiple Use Ass’n v. Babbitt*, 2 F. Supp. 2d 1448 (D. Wyo. 1998).

¹²⁹ See, e.g., GULLIFORD, *supra* note 75, at 101-02 (detailing alleged failure of legislation aimed at protecting Native American religions).

¹³⁰ See Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1141-49 (1990).

¹³¹ See Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1479-80 (1999).

¹³² See *id.*

¹³³ See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* §§ 17.6, 17.8 (6th ed. 2000).

¹³⁴ See *supra* note 103 and accompanying text.

¹³⁵ See Volokh, *supra* note 131, at 1479-80.

terests.¹³⁶ On judicial review, the courts have posed the accommodation issue in terms of reasonableness,¹³⁷ which some have criticized as an inherently secular perspective.¹³⁸

The Australian Commonwealth statute protecting Aboriginal heritage is yet less exact, authorizing a protective order when the minister finds a threat to an Aboriginal interest and "has considered such other matters as he or she thinks relevant."¹³⁹ As stated above, Canadian judgments interpreting the Charter have tended to find religious claims outweighed by competing interests.¹⁴⁰

Comparing and weighing religious and secular interests, and interests of different religions, is readily addressed in the ordinary political process, which regularly must decide among competing interests of every sort. That process of course favors dominant religions. By contrast, making a juridical issue out of religious freedom is daunting because of the traditions of judicial role and reasoning. Substantively, it seems to require judicial evaluation of the importance of religious claims and comparing incomparables. Procedurally, it requires vesting the decision in judges who must necessarily be either adherents of the faith or outsiders to it, and matters of faith are surely among the most severe tests of judicial impartiality.

Judges are well suited to identify the costs a religious accommodation imposes on other persons, and American judges have often done this both in evaluating claims of religious freedom and in deciding when a political accommodation constitutes an invalid preference or "establishment." But weighing competing values has led to many difficulties and to widespread and continuing dissatisfaction with religion clauses jurisprudence.¹⁴¹ In Free Exercise cases, evaluation of the religious interest is the most elusive question. American judges undertook to decide whether a religious claim was sincere, but claims that a religious interest was substantially burdened were, as a formal matter, accepted uncritically.¹⁴² Even the sincerity issue was treated gingerly, and once it was established, the opinions made the entire process appear to depend on evaluation of the "governmental interest." Yet most claimants lost. In opinion after opinion, the Court recited allegedly dire consequences to a religious interest but found it

¹³⁶ See *supra* notes 32-36 and accompanying text.

¹³⁷ See *supra* notes 34-50 and accompanying text.

¹³⁸ See Von Heyking, *supra* note 117, at 682 (discussing "reasonable limits" under Canadian Charter § 1).

¹³⁹ See *supra* text accompanying notes 67-68.

¹⁴⁰ See *supra* note 117 and accompanying text; *supra* text accompanying note 116; Central Alberta Dairy Pool v. Alberta, [1990] 72 D.L.R. (4th) 417.

¹⁴¹ See STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM (1999).

¹⁴² See NOWAK & ROTUNDA, *supra* note 133, § 17.6 at 1380-81.

outweighed by a competing interest.¹⁴³ In the context of Native sacred sites, the Court accepted that Native Americans' religious interest in the Chimney Rock area was so important that its degradation could be "devastating" to the faith, yet found the interest outweighed.¹⁴⁴ It is hard to escape the suspicion that the justices were evaluating the religious interest more critically than they admitted. On the other hand, their openly sitting in formal judgment on the importance of a religious claim would be worse.

These difficulties contributed to the Supreme Court's abandonment of the compelling interest test for Free Exercise cases in *Employment Division v. Smith*.¹⁴⁵ The Court's opinion said it is "horrible to contemplate" comparing the significance of a religious practice with the importance of a public law,¹⁴⁶ and inquiry into the importance of a religious practice would be beyond any "principle of law or logic."¹⁴⁷ That was in the context of the unique finality of the Court's judgments, nearly impossible to modify by political means. Judicial accommodations in New Zealand and Australia can be adjusted by ordinary legislative means, and Canada's by the Charter's special provision for legislative override,¹⁴⁸ easing the consequences of an error in judgment. The RFRA statutes generated by *Employment Division* are, like their New Zealand and Australian counterparts, subject to political review.¹⁴⁹

Judges under statutory regimes face the same problems of comparing religious accommodation needs with costs they impose on other persons, and they have the same reluctance to evaluate religious claims as under regimes of judicial finality. However, it is conceivable that the availability of legislative override makes judges less wary of evaluating religious claims and more willing to order accommodations than under regimes of constitutional finality.¹⁵⁰ Moreover, when statutory protections achieve judicial recognition, they have the very important effect of shifting the burden of obtaining legislative

¹⁴³ See Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 756 (1992) (discussing accommodation cases); McConnell, *supra* note 130, at 1110 (labeling the free exercise compelling interest test "a Potemkin doctrine").

¹⁴⁴ *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988).

¹⁴⁵ 494 U.S. 872 (1990).

¹⁴⁶ *Id.* at 889-90 n.5.

¹⁴⁷ *Id.* at 887.

¹⁴⁸ Constitution Act, *supra* note 114, § 33 (allowing overrides by ordinary legislation for renewable periods of five years, but overrides have been rare because Charter judgments provide opponents with powerful political arguments). See also PETER W. HOGG, 2 CONSTITUTIONAL LAW OF CANADA 36-8 to 36-11 (Loose-leaf ed. 1997).

¹⁴⁹ See *supra* notes 16-19, 55-56 and accompanying text.

¹⁵⁰ See Volokh, *supra* note 131, at 1487-90.

action from religious adherents to objectors, an effect of great significance to faiths with small memberships.¹⁵¹

B. Equality

The *Employment Division* Court substituted a Free Exercise test that allows courts to overturn statutes only when the "object" of the law is to prohibit free exercise.¹⁵² A later case described this as a prohibition on discrimination against a religious practice.¹⁵³ New Zealand, Australia and Canada also have explicit protections against religious discrimination,¹⁵⁴ and employment discrimination statutes often ban religious discrimination.¹⁵⁵ This may seem a more judicially manageable standard, as courts regularly deal with discrimination claims. However, these are straightforward only when religious claimants seek the same treatment as others (such as protection against exclusion from employment because of religion, according all religions like tax exemptions, and requiring that religious groups have use of public facilities equally with similar secular groups).¹⁵⁶ Claims that religious equality requires accommodation pose unique conceptual problems because there is no agreed or logical point of neutrality against which to measure discrimination.¹⁵⁷ The distinction is explicit in some anti-discrimination statutes.¹⁵⁸

When government acts to accommodate religious freedom generally, it treats religious and secular interests differently. When government acts to accommodate a particular religious practice, it treats religious groups differently as well. Thus governments' accommodations of religious practice can be labeled preferences or privileges or discrimination, and when costs are imposed on other persons, they can attack accommodations on equality grounds. Many efforts by American governments to aid religious groups are met with challenges under the Establishment Clause, and many challenges succeed.¹⁵⁹ Under the First Amendment, there are formal tensions between the Establishment Clause, prohibiting undue religious

¹⁵¹ See *id.* at 1481-83.

¹⁵² 494 U.S. at 878.

¹⁵³ *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

¹⁵⁴ See *supra* notes 17, 20, 54, 115 and accompanying text.

¹⁵⁵ See, e.g., 42 U.S.C. § 2000e-1 (2000).

¹⁵⁶ See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Larson v. Valente*, 456 U.S. 228, 244 (1982) (The "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

¹⁵⁷ See STEVEN D. SMITH, *GETTING OVER EQUALITY: A CRITICAL DIAGNOSIS OF RELIGIOUS FREEDOM IN AMERICA* (2001).

¹⁵⁸ See, e.g., 42 U.S.C. § 2000e(j) (2000) (requiring employers to make reasonable accommodations for religious needs).

¹⁵⁹ See NOWAK & ROTUNDA, *supra* note 133, at § 17.4.

preferences; and the Free Exercise Clause, protecting religious freedom.¹⁶⁰ Canada's and New Zealand's rights provisions pose the same difficulty.¹⁶¹

Yet both general and special accommodations are essential to meaningful religious freedom. As noted above, without general accommodations, religious exercise is banned from public life and disfavored compared with other forms of community and expression. Without accommodations for the distinctive needs of particular faiths, religions with little political clout fare much less well than those that have it. Sacred sites of indigenous religions are clear evidence of this proposition. Without some recognition of these sites, native religions are significantly impaired.

The conceptual core is what religious equality should mean. One can take the familiar view that general laws equally applied to all persons are the correct point of neutrality. It would follow that religious tax exemptions or prohibitions on bridges or television towers or bans on climbing or peyote are discriminations against secular interests or against other religions. But this seems wrong. The ideal of religious freedom ought to be equality between religions and at least equality between religion and other cultural activities. To achieve this ideal, government must necessarily accommodate religious exercises in ways that a narrower viewpoint labels favoritism. The fundamental complaint of adherents of indigenous religions is their long years of disadvantage compared with Christianity and with secular activities. To achieve a reasonable degree of religious equality requires distinctive accommodations to meet the needs of each faith. Native American prisoners need sweat lodges, others need copies of the Bible or the Koran, atheists need none of these. Meeting these religious needs is forbidden preferences only to a blinkered concept of religious freedom.

Another variant on the problem is encountered when majoritarian preferences are challenged as religious preferences or establishments. For example, the seven-day week is a rule of religious origin that is now almost universal. Contests usually surface in disputes over Sunday-closing laws, but a relentlessly logical secularist can plausibly argue that the calendar ought to be organized to prefer no faith.¹⁶² No logic about equality can solve these issues. Canadian and American jurisprudence has attempted the lame dodge of requiring

¹⁶⁰ See *id.* at § 17.1 ("The Natural Antagonism Between the Two [Religion] Clauses").

¹⁶¹ See *supra* notes 17, 117 and accompanying text.

¹⁶² See *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 311 (Belzil, J., dissenting) ("With the Lord's Day eliminated, will not all reference in the statutes to Christmas, Easter, or Thanksgiving be next? What of the use of the Gregorian Calendar? Such an interpretation would make of the *Charter* an instrument for the repression of the majority at the instance of every dissident.").

Sunday laws to have a "secular purpose," satisfied by desire for a day of rest.¹⁶³ It is more realistic to address the issue in terms of costs and burdens, as the political process does. An accommodation that would disrupt the seven-day week itself would impose very large burdens on others and would surely be rejected under any conceivable protection for religious freedom. One that would exempt dissenters from punishment for Sunday trading imposes lighter costs on supporters of Sunday closing, but it would rarely involve a competing command of religion or conscience.¹⁶⁴

In anti-discrimination law, the closest analogy to religious accommodation is law mandating accommodations for disabled citizens.¹⁶⁵ These provisions are usually statutory rather than entrenched, thus subject to political adjustment. They often include explicit cost-benefit considerations.¹⁶⁶ Their principal difference from statutes requiring religious accommodation is that evaluating the degree of burden and whether a handicap is genuine is not troubled by the reluctance to sit in judgment of religious claims.

Where does this analysis take the concept of religious freedom? While a broad view of religious equality is the right theory and a useful basis for political debate, it cannot supply an adjudicative solution to particular problems about which accommodations should be compelled and the larger number that should be allowed in the political process. Because so many accommodations are unique to one faith, there is no benchmark for equivalence. Each particular accommodation will impose its own distinctive costs on nonadherents. The concept of religious equality can provide only an abstract backdrop for particular decisions. Despite the difficulties posed, weighing a proposed accommodation against the costs it imposes on others is unavoidable.

Does this mean that the U.S. Supreme Court erred in abandoning its previous "compelling interest" test in favor of its discrimination standard? This question has no easy answer. With RFRA in place, U.S. federal courts are back in the business of evaluating federal accommodations and their costs under a statutory standard that has a legislative safety valve if the courts misjudge a case badly enough to provoke a legislative override. Many American states now have stat-

¹⁶³ See *Braunfeld v. Brown*, 366 U.S. 599 (1961); *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Big M*, [1985] 1 S.C.R. 295.

¹⁶⁴ See *Braunfeld*, 366 U.S. at 599 (holding that economic burden on those who observe another Sabbath did not violate the Free Exercise Clause).

¹⁶⁵ See *McConnell*, *supra* note 130, at 1140.

¹⁶⁶ See 42 U.S.C. § 12112(b)(5) (2000); Disability Discrimination Act, 1992, § 11 (Cth) (Austl.); Human Rights Act, 1993, § 29 (N.Z.). But see Constitution Act, 1982, *supra* note 114, at c. 11, § 15(1) (disability discrimination banned in Charter); *Eaton v. Brant County Bd. of Educ.*, [1997] 1 S.C.R. 241, 272 (judicial standard of reasonable accommodation of disabilities).

utes to the same effect.¹⁶⁷ The Sacred Sites executive order and AIRFA impose duties on the federal Executive to favor accommodations to Native American religious needs, again subject to possible legislative alteration.

New Zealand has the potential for a similar general regime under its Bill of Rights Act, and protection for Maori interests (religious and other) is considerably stronger, though again subject to legislative review.

Perhaps these arrangements should be left in place long enough to evaluate their effectiveness. However, the courts of each nation should not lose track of the ultimate goal of religious equality, broadly conceived.

CONCLUSION

In recent decades, Maori, Aborigines, Native Americans, and First Canadians have had greater success in asserting interests in sacred sites on government land by political means than by judicial action. And judicial action has fared better under ordinary statutes than under regimes of judicial finality. Both conclusions seem counterintuitive for minority religions that need accommodations very different from those desired by Christians. They reflect the extraordinary difficulty of committing the final say on issues of religious accommodations to judges. Lacking a workable metric to determine the importance and authenticity of religious claims, judges rest their decisions almost entirely on the adequacy of secular justifications for denying religious claims, and most contested claims lose.

Statutes creating presumptive and procedural protections for indigenous faiths have a better record of success because judges can risk requiring an accommodation knowing that if for unforeseen reasons the cost proves too great, it can be adjusted by political means. Under New Zealand's Resource Management Act, Australia's Aboriginal Heritage Act, American RFRA's, or perhaps the Canadian Heritage Act, indigenous religions have the opportunity to obtain an accommodation by much easier means than gaining a specific statutory right, particularly when a statutory right would have to come from a national legislature. Victories under these laws can be politically overridden, and in dramatic cases like Hindmarsh Island this has come to pass. Critics thus seek entrenched rights, insulated from politics. But the American experience before 1990, with an entrenched and strongly worded right on paper that almost never obtained judicial accommodations in practice, should temper their judgment.

¹⁶⁷ See *supra* note 103 and accompanying text.

Among the four nations, Maori rights are best protected for the obvious reason that Maori constitute a much larger share of the electorate than their counterparts (although there is considerable religious diversity among Maori).¹⁶⁸ As a device for retaining political override but minimizing its impact, Canada's section 33 right may be best because the political cost of invoking it seems unusually high, yet judges know it is there and may thus be less risk-averse than their pre-1990 American counterparts. However, Canadian judges have given less weight to religious claims under the Charter than decisionmakers in the other nations, so section 33's insularity has protected secular interests rather than religious.¹⁶⁹ Meaningful legal protection for indigenous faiths in the four nations is relatively new. With experience, we shall gain a better understanding of how effective are the various legal regimes to protect Native sacred sites and religious freedom generally.

¹⁶⁸ See 2001 census data, at http://www.stats.govt.nz/domino/external/web/Prod_Serv.nsf/htmldocs/Maori (last visited Jan. 9, 2003) (one-seventh of the population is Maori, but few name Maori religion as their religious affiliation).

¹⁶⁹ See *supra* accompanying text at note 117.