Glenn Ching, Dedman V. Board of Land and Natural Resources: Native Hawaiian Sacred Site Claims, 10 University of Hawaii Law Review 365 (Winter, 1988)

In Dedman v. Board of Land and Natural Resources,1 the Hawaii Supreme Court held that geothermal development of an area considered sacred by Native Hawaiian worshippers of the volcano fire goddess, Pele, was not an unconstitutional infringement of their rights to exercise freely their religion as guaranteed by the first amendment to the United States Constitution 2 and article I, section 4 of the Hawaii Constitution. 3 In assessing whether an unconstitutional infringement of the Native Hawaiians' religious freedom had occurred, the court followed the United States Supreme Court's approach in Wisconsin v. Yoder. 4 The Hawaii Supreme Court concluded that, absent any showing by the Native Hawaiians that they had actually performed religious ceremonies and activities on the land, no discernible objective harm was evident, 5 and therefore, claimants had failed to establish that the requisite “substantial burden”' 6 on their religion was imposed by geothermal development of the region.

The concern raised by Dedman is that the Hawaii Supreme Court's adoption of Yoder's “objective harm”' test prejudicially excludes consideration of the intrinsic religious importance of Hawaiian sacred lands. This note focuses upon this concern. Section II discusses the factual background of Dedman. Section III outlines the relevant constitutional religious standards. Section IV comments on the Dedman decision and proposes that the shortcomings of the approaches *366 taken by courts in applying constitutional standards to Native American Indian sacred site controversies are relevant to an assessment of the Hawaii Supreme Court's analysis in Dedman. Section V discusses the future implications of the Dedman decision. Section VI concludes that Dedman will adversely affect future Native Hawaiian religious claims by advocating constitutional standards which preclude adequate consideration of unique Native Hawaiian theology.

[. . .]

II. Facts

On March 2, 1982, the Estate of James Campbell and True/Mid-Pacific Geothermal Ventures (Campbell) applied for a conservation district use permit with the Board of Land and Natural Resources (Board) for the purpose of conducting geothermal development activities in the Kahauale'a area on the Island of Hawaii. 7 The Board granted Campbell the permit on February 25, 1983. 8

In May of 1984, the Hawaii legislature directed the Board to reassess its decision to grant the permit. 9 On December 28, 1984, the Board reapproved the Kahauale'a area as a geothermal subzone. However, the Board directed Campbell to consider exchanging the Kahauale'a land for land in the Kilauea Middle East Rift Zone (KMERZ). 10 On August 10, 1985, Campbell applied for a conservation district use permit in the KMERZ. 11

*367 In October of 1985, the Board approved the land exchange, and amended its decision of December 28, 1984. Ralph Palikapu O'Kamohoalii Dedman and Dr. Noa Emmett Auwae Aluli

(Appellants) were granted intervenor status in November 1985 to participate in contested case hearings challenging the approval of the KMERZ as a geothermal resource subzone. 12 On April 9, 1985, the Board approved 9,014 acres of the KMERZ as a geothermal resource subzone. 13 On June 18, 1986, the Board approved Campbell's application for a conservation district use permit in the KMERZ, thereby permitting Campbell to explore, develop, and produce up to twenty-five megawatts of geothermally generated electricity and to explore for future additional development of seventy-five megawatts. 14

Appellants filed a motion to appeal to the Hawaii Supreme Court. Appellants contended that the Board's approval of geothermal development activities in the KMERZ constituted a deprivation of their federal and state constitutional rights to freedom of religion. 15

III. History of The Law

A. The First Amendment's Religion Clauses

The first amendment to the United States Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ....”' 16 Although the amendment consists of two identifiable clauses—the “establishment”' clause and “free exercise”' clause—the unitary objective of both clauses is to restrict governmental interference with religion. 17 The establishment clause precludes Congress from enacting laws which would favor or promote religion. 18 The free exercise clause prohibits government *368 from restraining religious beliefs and activities. 19 Neither clause is absolutely enforceable because absolute enforcement of either would often contradict the purpose of the other. Thus, the concept of neutrality, 20 that government should neither foster and promote, nor restrict or prohibit religious freedom, is used as a guide to balance these competing protections. The United States Supreme Court stated that the first amendment “requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used as to handicap religions, than it is to favor them.”' 21

B. The Free Exercise Clause

1. General Standards Developed by the United States Supreme Court

Since the landmark decision of Cantwell v. State of Connecticut, 22 the United States Supreme Court has consistently and unequivocally upheld the applicability of the first amendment to the states through the due process clause of the *369 fourteenth amendment. 23 The right to freedom of religion is not, however, absolute. For instance, the Court has with regularity differentiated between the absolute freedom of individual religious belief and the limited freedom of individual conduct regarding one's religious beliefs. 24 Moreover, in assessing the propriety of an infringement claim, the Court declines any attempt to define religion 25 and inquires only into whether the asserted religious infringement stems from legitimate and sincere religious beliefs.

In deciding the constitutionality of legitimate and sincere claims of religious infringements, the Court weighs the state's interests against the severity of the burden imposed upon religion. The Court employs various criteria in its balancing analysis and has established threshold levels which each side must attain in order to tip the scales in its favor and ultimately prevail. For instance, not all *370 religious burdens are unconstitutional. 26 An aggrieved party must show that the government's actions have “““‘substantially burdened”’ his or her religious freedom. 27 The Court has often interpreted “substantial burden”' to represent the “coercive effect”' of the government's actions in inhibiting the practice of religion. 28

The state must convince the Court that its secular interests outweigh the concomitant religious burden imposed. Failure to do so will result in the state regulation or practice being declared unconstitutional. 29 The Court has stressed that the government's burden is demanding and has remarked that “[t]he essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”' 30 One of the more important *371 factors taken into consideration, when balancing each side's interests and burdens, is whether the state could have fulfilled its objectives and satisfied its interests through an alternative means, thereby imposing a lesser burden on religious practices. When this situation arises, the Court will instead direct implementation of the “least restrictive means.”' 31

2. Native American Sacred Site Claims

The Native Hawaiians in Dedman sought to preserve the sanctity of volcanic lands where they believed the fire goddess, Pele, resided. Native American Indians have brought similar free exercise claims before the courts, arguing that certain lands or sites are sacred and indispensable to their religion, and therefore should not be disturbed by commercial or governmental development. 32 Because of the similarities between Native Hawaiian and Native American Indian *372 sacred site claims, an examination of the courts' treatment of Native American Indian sacred site claims serves as a useful background to an analysis of the Hawaii Supreme Court's decision in Dedman.

Native American sacred site cases have been decided predominantly in favor of the state, despite findings that American Indian sacred sites and religions had been infringed upon. 33 One reason for the pro-government outcomes is the courts' over-reliance on the concept of coercion in their assessment of the severity of the religious interference. 34 Unlike free exercise claims that involve the government conditioning the receipt of public benefits on an alteration of religious practices, 35 or a law requiring actions or compliance in violation of religious tenets, 36 sacred site claims are not based primarily upon allegations of governmental coercion. 37 Rather, the issue in such claims is to what extent the state may use publicly owned lands 38 when doing so violates American Indian *373 theology, and not whether the state is coercing its citizens to renounce their religious beliefs or practices. Nevertheless, courts have relied on findings of “lack of government coercion”' to sustain activities which infringe upon use of American Indian sacred sites and religious practices. 39

Moreover, even where free exercise infringements have been found, federal courts appear to have applied different standards in determining the constitutionality of the infringements, depending upon whether the claims involved sacred Indian sites. In Thomas v. Review Board of the Indiana Employment Security Division, 40 for example, the Supreme Court upheld the claim of a Jehovah's Witness despite the fact that the alleged infringement was caused indirectly. 41 In Hopi Indian Tribe v. Block, 42 however, the United States Court of Appeals for the District of Columbia held that a commercial development on land considered sacred by the Hopi Indians was constitutional because the government did not intend to burden the Hopis' exercise of their religion and the resulting infringement was not a direct result of the development. 43 The applicability of the conventional Yoder analysis 44 to the adjudication of Native American free exercise claims has been criticized. 45 A number of cases have arisen in which *374 Native Americans challenged various government sponsored projects on public lands on the grounds that such projects violated the sanctity of Native American religious sites, thus constituting an unconstitutional infringement on their freedom of religion. 46 The continuing debate focuses on whether the present Yoder analysis is adequate in all contexts, and whether a slightly modified or wholly new first amendment test is warranted in order to assure an equal and proper scope of constitutional protection for even the most unconventional religions. 47

The Ninth Circuit's holding in Northwest Indian Cemetery Protective Association v. Peterson 48 is the only decision to date concerning Native American sacred site free exercise challenges in which Native Americans have prevailed. In Peterson, an association of Northwest Indians 49 argued that road construction and timber harvesting within a portion of a national forest violated their constitutional free exercise rights. Notwithstanding the Ninth Circuit's application of the stringent "centrality"' standard, 50 the court affirmed the district court's conclusion that the proposed activities impermissibly burdened the Indian claimants' first amendment rights to free exercise of their religion. 51

Although courts generally have not appreciated the fragility of Native American *375 religions, Congress, on the other hand, has explicitly pronounced that these religions deserve special protection. For example, the American Indian Religious Freedom Act of 1978 (AIRFA) 52 expressed that the policy of the United States is:

[T]o 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. 53

The legislative history of the Act indicates that the aforementioned objective would be supported by "[insuring] that the policies and procedures of various Federal agencies, as they may impact upon the exercise of traditional Indian religious practices, are brought into compliance with the constitutional injunction that Congress shall make no laws abridging the free exercise of religion."' 54

AIRFA acknowledged the extraordinary needs of Native Americans regarding their religious beliefs and practices and affirmatively endorsed the use of novel approaches to satisfy those needs and ensure first amendment protections. 55 Although AIRFA formally recognized the need to guard against Native American religious infringement, the courts interpret the Act to do no more. In Crow v. Gullet, 56 the District Court for the District of South Dakota explicitly stated "the Act does not create a cause of action in federal courts for violation of rights of religious freedom."' 57

3. Free Exercise Clause Standards Developed by the Hawaii Courts

Article I, section 4 of the Hawaii Constitution is the counterpart to the first amendment to the United States Constitution. 58 The few Hawaii cases which have arisen under the free exercise clause have all been decided in favor of the state. 59 Prior to Dedman, however, none of the first amendment cases had arisen *376 under the “sacred site”' theory.

The Hawaii Supreme Court, in Minami v. Andrews, 60 applied the Yoder analysis and found in Yoder a four-factor test to use in determining whether unconstitutional religious infringements had occurred:

According to Yoder ... to determine whether there exists an unconstitutional infringement of the freedom of religion, it would be necessary to examine [1] whether or not the activity interfered with by the state was motivated by and rooted in a legitimate and sincerely held religious belief, [2] whether or not the parties' free exercise of religion had been burdened by the regulation, [3] the extent or impact of the regulation on the parties' religious practices, and [4] whether or not the state had a compelling interest in the regulation which justified such a burden. 61

Minami involved a state statute requiring licensing of private schools. 62 Individuals affiliated with the Church of the Pacific operated a private school without the requisite license. Church personnel contended that applying for and obtaining a license impinged upon their religious beliefs and constituted a deprivation of their constitutional right to freedom of religion. 63 The Supreme Court of Hawaii disagreed and held that, under Yoder, the Church had not shown that refusal to comply with licensing requirements was a legitimate and sincerely held religious belief; that licensing would not unduly burden religious activities; and finally that the state did have a compelling interest in licensing private schools. 64

Minami set the precedent for a later decision by the Hawaii Intermediate Court of Appeals in State v. Blake. 65 The defendant Blake was convicted of knowingly possessing marijuana in violation of state law. 66 Blake contended that he practiced the Hindu Tantrism religion, which ostensibly advocated the use of marijuana, and that the state statute criminalizing marijuana unconstitutionally *377 infringed on his religious beliefs and practices. 67 The Intermediate Court of Appeals relied on the Minami test and accepted the sincerity of Blake's religious beliefs, but nevertheless determined that Hindu Tantric practices did not require the use of marijuana, nor was its use essential to the group's practices or beliefs. 68 The court held that Blake had failed to establish that smoking marijuana was an “integral part of [his] religious faith,”' 69 which, if prohibited, would cause a “‘virtual inhibition of the religion or the practice of the faith,”' 70 and concluded that he had failed to satisfy the burden requirement. 71

The Blake court did not analyze the state's interest in prohibiting the use of marijuana, nor whether the state's interests could have been achieved through less restrictive means. Nor did the court balance those interests against Blake's sincere religious beliefs in the use of marijuana. However, the court nonetheless concluded that the state did have a compelling interest in prohibiting the possession of marijuana which “overrides defendant's claimed religious interests.”' 72 The court also characterized Blake's belief in using marijuana as personal and not religious because marijuana was not “an intrinsic or essential part of Hindu Tantrism.”' 73

Koolau Baptist Church v. Department of Labor and Industrial Relations 74 was, *378 until Dedman, the most recent case involving the issue of free exercise rights. Koolau Baptist Church ran a private school and paid wages to its lay teachers and staff. Church officials contended that it was exempt from a state unemployment compensation statute which required employers, unless exempted, to contribute to a state unemployment compensation fund. 75 The church's primary argument against the statute was that it allowed the state to determine who would be exempt from the state unemployment tax, thereby promoting excessive entanglement with religion in violation of the establishment clause. 76 The Hawaii Supreme Court rejected this argument and held that the state had violated neither the establishment nor the free exercise clause.

The church's argument under the free exercise clause was that "[t]he function of the faculty or staff member of the church school is per se a religious exercise."' 77 The court cited several United States Supreme Court decisions for the proposition that a claimant must, at a minimum, expose an actual burden on his freedom to exercise his religious rights as a result of inclusion in a governmental program before the free exercise clause will justify an exemption. 78 The court then established that the burden must be substantial, "that is, one which would inhibit the practice of the religion and in effect be a coercion to forego the practice."' 79 The court concluded that claimants had not met the "substantial burden"' standard and found no free exercise violation. 80 Although the court discussed the balancing test, it found the test inapplicable because claimants had failed to establish the prerequisite substantial burden on their religion. 81

IV. Analysis

A. Narrative

In Dedman v. Board of Land and Natural Resources, 82 the Hawaii Supreme Court held that the state's statutory provisions providing for the development of geothermal energy 83 within sacred Hawaiian land imposed no substantial *379 burden on Native Hawaiian religious practices and were thus constitutional. The court determined that the United States Supreme Court's decision in Wisconsin v. Yoder 84 prescribed the appropriate constitutional standard in determining whether the claimants' first amendment rights to exercise their Hawaiian religion freely had been violated. Specifically, the court stated:

In order to find an unconstitutional infringement on [the Native Hawaiian's] religious practices, "it [is] necessary to examine whether or not the activity interfered with by the state was motivated by and rooted in a legitimate and sincerely held religious belief, whether or not the parties' free exercise of religion had been burdened by the regulation, the extent or impact of the regulation on the parties' religious practices, and whether or not the state had a compelling interest in the regulation which justified such a burden. 85

The court promptly dispensed with the need to ascertain whether the religious claims brought before it were legitimately and sincerely held. The court concluded that the issue did not arise because the opposition had mounted no challenge against the legitimacy and sincerity of the religious beliefs per se. 86

The court then focused on measuring the magnitude of the religious burden caused by geothermal development conducted in the KMERZ area and the propriety of the state regulation through which approval of the geothermal project was granted. The court required claimants to show not only a burden on their free exercise of religion, but that the burden was substantial, that is, one which had a “coercive effect”' and operated against them in the practice of their religion. 87 Apparently, the court concluded that the Hawaiian religious practitioners failed in this regard because they had not shown actual use of the land for religious ceremonies. This finding, coupled with the Board's conclusion that the extraction of geothermal energy would not adversely affect the eruptive nature of nearby Kilauea volcano, 88 served to deny the Hawaiian religious practitioners the requisite “substantial”' grounds necessary to sustain a first amendment cause of action. 89

Because the threshold substantial burden requirement had not been met, the court never reached the question of whether the state had a compelling interest *380 in maintaining the regulation. Nor did the court find it necessary to invoke the balancing test, whereby the alleged religious burden would have been weighed against the state's interest in regulating and promoting geothermal development. 90

B. Commentary

Judged by the standards set forth in Yoder, the Native Hawaiians' claims in Dedman may appear weak. The constitutional infringement claimed by the Native Hawaiians was not that the government had in some way compelled or coerced them to act or not to act in contravention of their religious beliefs. Rather, the alleged infringement was that the state had endorsed an interference with certain volcanic phenomena, including the release of geothermal energy, which the Native Hawaiians held sacred. The Dedman court, however, accepted the Board's finding that geothermal “tapping”' in the disputed area would not disrupt the volcanic activity of the region; 91 and the Native Hawaiians neither contradicted nor challenged the Board's findings in this respect.

Moreover, although the Native Hawaiians argued that geothermal development would interfere with various rituals and the training of young Hawaiians in traditional beliefs and practices (e.g. chant and hula), they offered no testimony that the disputed land had actually ever been used for religious purposes. 92 Absent such testimony, the court was able to conclude that the land itself was apparently not necessary for the Native Hawaiian religious practices. Thus, in the court's view, the claimants had not demonstrated that the proposed geothermal development posed an “objective danger to the free exercise of religion that the First Amendment was designed to prevent.”' 93

Finally, as an accommodation to Native Hawaiian religious beliefs, the Board relocated the geothermal site five to ten miles away from the Kilauea volcano, thus further undermining the allegation of a harmful impact on the Native Hawaiians' religious practices. On this basis, the court reasoned that the state had adopted the least restrictive means of promoting its compelling interest in *381 cultivating an independent source of electricity. 94

C. Analogy to Native American Indian Sacred Site Case Law

1. Similarity Between Native American Indian and Native Hawaiian Religious and Sacred Site Claims

Native American Indian and Native Hawaiian religions are similar in that fundamental religious beliefs and practices of both religions are inextricably linked to and dependent upon sacred sites. This subsection discusses the similarity in beliefs of both American Indians and Hawaiians towards their sacred sites, in order to demonstrate that recent criticisms of free exercise standards as applied to Native American Indian sacred site claims also apply to Dedman and Hawaiian sacred site claims.

Native American and Hawaiian religions regard religious sites as possessing inherent spiritual power. Presumed visitations to—or residence at—a particular site by a religious entity or power may determine the site's religious significance among the adherents. From a purely objective perspective, however, a more precise measure of a site's significance is simply the importance attached by the adherents to the site, and to the entities or powers believed to be associated with the site. Some sites are considered so significant that the very vitality and survival of the beliefs and practices which constitute the religion depends upon the continued existence of those sites.

For example, Navajo Indians believe their gods occupy stone formations in designated sacred site areas. 95 Likewise, the Hawaiian religion recognizes Pele as the Goddess of Fire or Volcano Goddess who occupies Kilauea Crater and whose spirit is omnipresent throughout the natural environmental surroundings. 96 Both Native American Indian and Hawaiian religious adherents contend *382 that tampering with sacred sites could result in death to the deities who reside there and a loss of the site's spiritual powers and significance. 97 Thus, the effect of such tampering could well be a weakening or even the complete extinction of the religion itself. 98

The immediate need to protect both Native American Indian and Hawaiian sacred sites has been recognized and explicitly addressed by the national government in the American Indian Religious Freedom Act of 1978 (AIRFA). 99 *383 AIRFA specifically includes "Native Hawaiians"' 100 in reaffirming Congress's and the government's duty to safeguard sacred sites and the traditional religious beliefs and practices unique to the Native Indian and Hawaiian cultures. Although no court has interpreted the Act to provide a cause of action, 101 such affirmative legislative action signifies that federal agencies must be more cognizant of the impact their policies and procedures may have on both Indian and Native Hawaiian religions. 102 Moreover, the Act recognizes that conventional constitutional approaches, which may adequately secure protection from religious infringement for Euro-American religions, may be unsatisfactory in safeguarding religious freedoms of less orthodox Native American and Native Hawaiian religions. 103

2. Inapplicability of Current Standards to Sacred Site Claims

Federal courts, in assessing the constitutionality of American Indian sacred site claims under the free exercise clause, have been criticized for: (1) overemphasizing the role of "centrality"'; 104 (2) failing to comprehend fully unorthodox religious principles; 105 and (3) inappropriately applying the Yoder balancing test. 106 Commentators contend that the above three shortcomings by courts are largely responsible for outcomes prejudicial to Native Americans.

The concept of centrality is that a religious group be afforded greater constitutional protection for those practices which are more directly related, and hence considered central, to their religious beliefs. 107 Thus, under this test, the religious value of a sacred site is measured by the importance of the ceremonies *384 and rituals performed there. 108 The flaw in applying the "centrality"' concept to Native American religions is that it fails to account for the intrinsic sacredness the ceremonial sites possess 109 irrespective of the actual use each site may or may not receive. 110 Moreover, the courts' apparent over-reliance on the centrality *385 concept, 111 not just as a single factor, but as the controlling factor in measuring the burden imposed on a Native American religion, deviates from conventional free exercise analysis 112 and results in erecting nearly insurmountable barriers to a successful claim of a substantial burden on religion. 113

*386 Commentators contend that courts which do not fully understand unorthodox Native American religious principles will inadvertently rely on conventional Judeo-Christian beliefs in their free exercise analysis. 114 As a result, courts resolve Native American religious issues from a wholly inappropriate Judeo-Christian perspective. 115 Courts have refrained from defining religion 116 and have construed the sincerity requirement broadly to allow all religious claims that are brought in good faith. 117 However, the courts' religious value judgments *387 remain an integral part of their decision-making process.

It has been argued that the centrality inquiry serves to promote a Judeo-Christian approach to determining the religious value of an Indian sacred site 118 and, as a result, undermines Native American religions which place as high a value on their sacred sites as more orthodox religions may place on, for instance, Jerusalem. Furthermore, even if a Native American claim can survive the centrality inquiry and establish a substantial burden on religion, any claimants would still need to overcome the balancing test of Yoder. Again, as with the centrality inquiry, if the court fails to review the extent of the infringement from the perspective of the affected Indian religion, then the outcome may well inappropriately favor the state.

Because courts have treated centrality as the threshold issue in Native American free exercise claims, and because most claims fail to cross this threshold, the majority of Native American claims are decided without benefit of a balancing of the government and religious interests at stake. 119 When the interests are balanced, however, the government generally prevails, although courts rarely fully explain why. 120

Furthermore, the balancing test under traditional free exercise analysis includes consideration of reasonable and available government alternatives. 121 *388 Courts frequently ignore this aspect of balancing altogether, however, once a determination is made that government interests outweigh the concomitant religious burden imposed. 122 One commentator suggests that the mechanical way in which courts go about denying Native American religious practices under the balancing test exhibits an "insensitivity to Native American religion [which] is inconsistent with the policy of religious toleration."' 123

3. Inapplicability of Current Standards to Dedman

The striking similarities between the Native American sacred site cases and Dedman strongly suggest that criticisms directed towards the inadequacy of the Yoder free exercise analysis as applied to Indian theology are equally relevant to Native Hawaiian religion. Thus, Native Hawaiian religion may not be receiving proper first amendment protection under the Yoder test, which arguably allows Judeo-Christian thinking and bias to influence the decision-making process.

The Dedman decision exemplifies the conventional Yoder analysis used in deciding Native

American freedom of religion claims. The primary shortcoming of the Yoder analysis is that courts, when considering the severity of the religious burden, either: (1) undervalue the importance of sacred sites because of a lack of understanding of the conceptually unique religious principles involved, or (2) interpret the Yoder “burden”' standard in such a way that it will rarely, if ever, be satisfied.

As to the first critique, the Hawaii Supreme Court in Dedman accepted the Native Hawaiian's religious beliefs, 124 and acknowledged the argument that “construction of geothermal energy plants will desecrate the body of Pele by digging into the ground and will destroy the goddess by robbing her of vital heat.”' 125 The court noted that the Native Hawaiians claimed that geothermal development “will interfere with their ritual practices, and will disable them from training young Hawaiians in traditional beliefs and practices.”' 126 Despite these arguments, however, the court held that the Native Hawaiians had not shown a “substantial burden”' on religious interests pursuant to Yoder. 127 The Dedman court reasoned that the Native Hawaiians had not shown an “objective”' burden, absent testimony that the land was actually used for religious *389 activities, and found that geological studies had revealed that the projected extraction of geothermal energy would have only a negligible effect on Kilauea's volcanic activity. 128

By relying on an “objective”' 129 showing of a burden on religion, the court implied, that because the Native Hawaiians did not extensively use the sacred area, and because no reduction in volcanic activity would occur, there was no substantial harm to religious interests. However, courts deciding Native American cases on similar grounds have been criticized for misunderstanding Native American theology. The claimed burden on religion is often one that cannot be “objectively”' shown but can only be characterized in terms of its subjective impact on beliefs and fully comprehended only by understanding the religion itself. 130 Thus, commentators have argued that while courts are willing under Yoder to concede that Indians' religious claims are legitimate, sincere, and rooted in religious belief, rarely will courts ever find that Indian claimants have shown a religious burden sufficient to invoke constitutional protection. 131

The Dedman court, like a number of courts that have decided sacred site claims, arguably overemphasized the “centrality inquiry”' and implied that the disputed site was only sacred insofar as religious practices were actually performed on it. The court thus ignored a core tenet of both Native American and Hawaiian religions: sites possess intrinsic sacredness independent of the actual use each receives. Moreover, the Dedman court's observation that one Pele worshipper considered it acceptable to worship Pele in her home 132 should not be used to defeat the Native Hawaiians' claims. 133

Absent a showing of substantial and objective religious harm, the Dedman court deemed it unnecessary to balance competing state and religious interests. *390 Neither did the court actively inquire as to whether geothermal development could be accommodated through an alternative means less intrusive to sacred lands. By neglecting these considerations, the Dedman court simply followed several federal courts in applying an analysis which is arguably unsuitable in the context of both Native Hawaiian and Native American Indian sacred site claims. 134

V. Impact

In Dedman, the Hawaii Supreme Court held that, where neutral state action poses no tangible objective harm to religious practices, such state action is constitutional under the free exercise clauses of both the United States and Hawaii Constitutions. Future claimants must therefore demonstrate not only that their religious beliefs are legitimate and sincere, but also that the government intrusion will substantially impair actual religious activities. Unless claimants can show more than a mere “assertion of harm”' 135 to religious practices, the state's actions will not be nullified.

By adopting an “objective harm”' analysis of the threshold “substantial burden”' requirement, the Dedman court made clear that alleged disruptions of—or interferences with—an individual's legitimate ability to sustain certain subjective religious beliefs are less worthy of constitutional protection than disruptions or interferences which are objectively manifested. Admittedly, an advantage to an “objective harm”' criterion is that if individuals are allowed to inhibit legitimate and reasonable governmental activity simply by claiming harm to their subjective religious beliefs, then the legislative power of government may be significantly threatened. 136

*391 Nevertheless, the Dedman court may have gone further than necessary in this respect. By requiring an initial showing of an objective harm before an alleged burden upon religion will be balanced against a state's interest, the Dedman court effectively held that no infringement or adverse effect upon a person's sincere and legitimate subjective religious beliefs will sustain a free exercise claim, absent a showing of some objective harm, regardless of the strength of the state's interests. Indeed, without a showing of an objective harm, the strength of the state's interests does not come into question. Thus, a significant impact of Dedman is that government can act in ways that genuinely infringe upon individuals' ability to sustain religious beliefs which are “central”' to their religion, without a showing that the interest supported by the governmental acts outweigh the burden thereby imposed.

In the final analysis, the Hawaii Supreme Court's decision in Dedman appears to be consistent with the general analysis set forth in Yoder and with the majority of decisions that have addressed sacred site claims. Dedman broke no new ground, except insofar as the case involved a sacred site claim by Native Hawaiians.

Perhaps the most important impact of Dedman, however, is precisely that. Adherents to Native Hawaiian religion now know that a governmental act, which according to the Native Hawaiian's sincere belief system, threatens the very survival of a worshipped deity, is not necessarily prohibited by either the Hawaii or the United States Constitutions, regardless of the strength of the governmental interest behind the act.

VI. Conclusion

In Dedman v. Board of Land and Natural Resources, the Hawaii Supreme Court denied the claim of Native Hawaiians that interference with a sacred site unconstitutionally infringed upon their rights to religious freedom. By applying the traditional Yoder analysis in Dedman, the Hawaii court in effect held that governmental acts which, in the eyes of adherents to Native Hawaiian religion, *392 undermined the vitality of the religion and threatened the very life of a worshipped deity, were not unconstitutional absent a showing that the acts caused the claimants some “objective harm.”' Thus, the court implicitedly rejected a core belief of Native Hawaiian religion, namely that certain sacred sites have intrinsic religious value and significance, entirely apart from whether such sites have ever been actively used in the practice of the religion.

The Dedman decision is in accord with the majority of decisions of other courts that have addressed sacred site claims by adherents of non-traditional religions. The decision is also subject to the same criticisms that have been leveled against prior decisions in this area; the main criticism is that the application of the Yoder test to non-traditional sacred site claims may improperly deny claimants the full first amendment protections that they deserve and which the authors of the amendment arguably intended them to have.

The court's decision in Dedman appears unfortunate, given the uniqueness and fragility of Native Hawaiian religion, and given also that AIRFA clearly provides a basis upon which the court could have adopted a novel approach in order to protect the special needs of the claimants in this case. Although AIRFA may not provide a cause of action for violation of free exercise rights, the Act clearly expresses Congress's sensitivity to the special characteristics of Native American and Native Hawaiian religions, and Congress's desire that such religions be accorded the full first amendment protections which they deserve. By applying the traditional Yoder analysis to the Native Hawaiian claims in Dedman, the Hawaii Supreme Court arguably let pass an opportunity to implement Congress's intent as expressed in AIRFA and to provide other jurisdictions with a precedent for doing the same. 137

Footnotes

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69 Haw. ----, 740 P.2d 28 (1987).

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The first amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ....”' U.S. Const. amend. I.

3

This section states that “no law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof ....”' Haw. Const. art. I, § 4.

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406 U.S. 205 (1972). The United States Supreme Court in Yoder articulated an “objective”' harm threshold requirement as one of its essential criterion for finding an unconstitutional religious infringement. Id. at 218. The Hawaii Supreme Court had previously applied the constitutional standards of Yoder in deciding State ex rel. Minami v. Andrews, 65 Haw. 289, 651 P.2d 473 (1982).

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Dedman, 69 Haw. at ----, 740 P.2d at 33.

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Id. at ----, 740 P.2d at 33.

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Id. at ----, 740 P.2d at 30. The Kahauale'a region had already been classified as a geothermal resource subzone by the Board of Land and Natural Resources pursuant to its authority under Haw.Rev.Stat. § 205-5.1(b) (1985) which provides: “The board of land and natural resources shall have the responsibility for designating areas as geothermal resource subzones ....”' Because

Campbell desired to engage in geothermal development activities within a conservation district, Campbell was required to apply to the Board for a conservation district use permit under Haw.Rev.Stat. § 205-5.1(d) (1985), which reads, "If geothermal development activities are proposed within a conservation district ... the board of land and natural resources shall ... determine whether ... a conservation district use permit shall be granted to authorize the geothermal development activities described in the application."

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Dedman, 69 Haw. at ----, 740 P.2d at 30.

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This legislative mandate (Act 151, 1984 Haw.Sess. Laws § 3) was sparked by the occurrence of volcanic eruptions in the Kahauale'a area in June of 1983 which raised doubts as to the safety of tapping geothermal resources at the approved location and as to the Board's proposal in May 1984 of new administrative rules to guide the designation and regulation of geothermal resource subzones. Dedman, 69 Haw. at ----, 740 P.2d at 30. The Board's proposed rules were adopted in July and amended in August of 1984. Id. at ----, 740 P.2d at 30.

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Id. at ----, 740 P.2d at 30. The Board advocated the land exchange to relocate the geothermal project five to ten miles farther from the sacred Hawaiian lands in an effort to accommodate the Native Hawaiians' religious beliefs. Id. at ----, 740 P.2d at 33. The initial site was in close proximity to Volcano National Park whereas the revised location was in the Wao Kele'O Puna Natural Area Reserve. Id. at ----, 740 P.2d at 30.

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The permit requested permission to develop 100 megawatts of geothermally generated electricity. Id. at ----, 740 P.2d at 30-31.

12

Id. at ----, 740 P.2d at 31. The hearings were held from November 13-15 in Hilo, Hawaii. Id. at ----, 740 P.2d at 31.

13

Id. at ----, 740 P.2d at 31. The land exchange was completed on December 27, 1985, when the State and Campbell Estate exchanged deeds to the Kahauale'a and KMERZ land, respectively. Id. at ----, 740 P.2d at 31.

14

Id. at ----, 740 P.2d at 31. Granting of the permit was contingent upon preservation of archaeological sites and compliance with environmental conditions. Id.

15

Id. at ----, 740 P.2d at 31.

16

U.S. Const. amend. I.

17

Note, Indian Worship v. Government Development: A New Breed of Religion Cases, 2 Utah L. Rev. 313, 319 (1984) (The "[u]nitary purpose of the [religion] clauses [is] maximum freedom of religion with minimum governmental interference.").

18

See, e.g., Engel v. Vitale, 370 U.S. 421 (1962). The Engel Court held a New York public school board's program of daily classroom prayer unconstitutional because it violated the establishment clause. The Court repeated some of the essential purposes underlying the establishment clause:

The Establishment Clause ... is violated by the enactment of laws which establish an official religion .... When the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain .... [The establishment clause's] first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion ... showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who had contrary beliefs.
Id. at 431
19
J. Nowak, R. Rotunda, & J. Young, Constitutional Law § 17.6 (1986).
20
See id. at § 17.1.
21
Everson v. Board of Education, 330 U.S. 1, 18 (1947).
22
310 U.S. 296 (1940). The Court in Cantwell had to determine the constitutionality of a Connecticut statute which prohibited the solicitation of money for religious, charitable, or philanthropic causes unless the approval of the secretary of the Public Welfare Council was first received. The statute empowered the secretary with authority to determine whether a cause was religious or not. The Court ruled:
We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.
Id. at 303.
23
See, e.g., School District of Abington Township v. Schempp, 374 U.S. 203, 215 (1963); Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105 (1943).
24
See, e.g., Cantwell, 310 U.S. at 303, 304 ("Thus the [First] Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.'"); Bowen v. Roy, 106 S.Ct. 2147 (1986). In Braunfeld v. Brown, 366 U.S. 599 (1961), the Court said:
Certain aspects of religious exercise cannot, in any way, be restricted or burdened by either federal or state legislation .... The freedom to hold religious beliefs and opinions is absolute. However, the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions.
Id. at 603 (citations omitted). See also Reynolds v. United States, 98 U.S. 145, 166 (1879) ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.'"); Koolau Baptist Church v. Dep't of Labor, 68 Haw. ----, ----, 718 P.2d 267, 271 (1986) ("The door of the Free Exercise clause stands tightly closed against any governmental regulation of religious beliefs .... However the freedom

to act ... is not totally free from legislative restrictions.'").

25

See, e.g., Thomas v. Review Bd., Ind. Employment Sec. Div., 450 U.S. 707, 714-16 (1981). In upholding a Jehovah's Witness' right to collect unemployment compensation benefits after leaving a job for religious reasons, the United States Supreme Court stated "courts are not arbiters of scriptural interpretation,'" id. at 716, and "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.'" Id. at 714. The Court further emphasized its position of non-involvement in questions of religion by stating that "[c]ourts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.'" Id. at 715.

The courts have liberally defined religion. See, e.g., Welsh v. United States, 398 U.S. 333 (1970) (conventionality of practice is irrelevant as to whether or not the practice is religious). See generally Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C.Cir.1969) (court held Science of Dianetics is a religion entitled to first amendment protection), cert. denied, 396 U.S. 963 (1969); Malnak v. Yogi, 440 F.Supp. 1284 (D.N.J.1977) (court held transcendental meditation is a religion entitled to first amendment protection); Note, Native American Free Exercise Rights to the Use of Public Lands, 63 B.U.L.Rev. 141, 154-57 (1983).

26

See, e.g., United States v. Lee, 455 U.S. 252, 257 (1982). The Court held that the religious burden imposed on an Amish employer as a result of having to pay social security taxes was not unconstitutional when weighed against the compelling governmental interest in maintaining an effective tax system. In arriving at its decision, the Lee Court remarked:

To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated ... but there is a point at which accommodation would "radically restrict the operating latitude of the legislature."

Id. at 258.

27

See supra note 24. See also Prince v. Massachusetts, 321 U.S. 158 (1944) (held statute making it a crime for a girl under eighteen years of age to sell any newspapers, periodicals, or merchandise in public places as constitutional despite the fact that the girl was a Jehovah's Witness and believed it her religious calling to perform the work); Reynolds v. United States, 98 U.S. 145 (1878) (Mormon church which practiced polygamy as part of its religious faith was not exempt from federal statute outlawing such practice); Koolau Baptist Church v. Dep't of Labor, 68 Haw. ----, 718 P.2d 267, 272 (1986) (citing United States v. Lee).

28

See, e.g., School District of Abington Township v. Schempp, 374 U.S. 203, 223 (1963) ("[I]t is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion.'").

29

See, e.g., Sherbert v. Verner, 374 U.S. 398 (1963) (the possibility of the filing of fraudulent unemployment compensation claims and potential disruption to employers in scheduling Saturday work did not warrant denial of benefits under South Carolina unemployment compensation statute to claimant who, because of her religious beliefs, refused employment which required her to work on Saturdays, the Sabbath day of her faith); cf.Braunfeld v. Brown, 366 U.S. 599 (1961) (Pennsylvania criminal statute which prohibited the Sunday retail sale of specific commodities for secular purpose of setting aside one day each week for rest, recreation, and tranquility held constitutional, notwithstanding economic loss suffered by adherents of Orthodox Jewish faith whose religious tenets mandated that, in observance of Saturday Sabbath, they could not transact business).

30

Wisconsin v. Yoder, 406 U.S. 205, 215 (1972). See also Sherbert v. Verner, 374 U.S. 398, 406 (1963) ("It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitations ....'"). But cf. Bowen v. Roy, 106 S.Ct. 2147 (1986), wherein the court held:

The test applied in cases like Wisconsin v. Yoder ... is not appropriate in this setting. In the enforcement of a facially neutral and uniformly applicable requirement for the administration of welfare programs reaching many millions of people, the Government is entitled to wide latitude. The Government should not be put to the strict test applied by the [lower court]; that standard required the Government to justify enforcement ... [based on] the least restrictive means of accomplishing a compelling state interest. Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest.

Id. at 2156.

The Bowen lesser government standard test of reasonableness was later rejected by the Court in Hobbie v. Unemployment Appeals Comm'n of Fla., 106 S.Ct. 1046, 1049 (1987) ("We reject the argument again today ... '[s]uch a test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimal scrutiny' ....'" (citations omitted)).

31

See, e.g., Thomas v. Review Bd. of the Ind. Employment Security Div., 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.'"); Crow v. Gullet, 541 F.Supp. 785, 790 (D.S.D.1982) ("Even if the state's interest weighs heavier in this balance the regulation or restriction will be invalid if the state's interest can be achieved by less restrictive alternative means.'"), aff'd, 706 F.2d 856 (8th Cir.1983), cert. denied, 464 U.S. 977 (1983). But cf. Bowen v. Roy, 106 S.Ct. 2147 (1986).

32

See, e.g., Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F.Supp. 586 (N.D.Cal.1983), modified, 764 F.2d 581 (9th Cir.1985), cert. granted sub nom. Lyng v. Northwest Indian Cemetery Ass'n, 107 S.Ct. 1971 (1987); Crow v. Gullet, 541 F.Supp. 785 (D.S.D.1982), aff'd, 706 F.2d 856 (8th Cir.1983), cert. denied, 464 U.S. 977 (1983); Hopi Indian Tribe v. Block, 8 Indian L.Rep. 3073 (D.D.C.1981), aff'd sub nom. Wilson v. Block, 708 F.2d 735 (D.C.Cir.1983), cert. denied, 464 U.S. 956 (1983); Sequoyah v. Tennessee Valley Auth., 480 F.Supp. 608, (E.D.Tenn.1979), aff'd on other grounds, 620 F.2d 1159 (6th Cir.1980), cert. denied, 449 U.S. 953 (1980); Badoni v. Higginson, 455 F.Supp. 641 (D. Utah 1977), aff'd, 638 F.2d 172 (10th Cir.1980), cert. denied, 452 U.S. 954 (1981).

33

The Ninth Circuit, which prohibited timber harvesting within a sacred site, is the only federal appellate court which has decided in favor of Native American Indians. Northwest Indian

Cemetery Protective Association v. Peterson, 565 F.Supp. 586 (N.D.Cal.1983), modified, 764 F.2d 581 (9th Cir.1985), cert. granted sub nom. Lyng v. Northwest Indian Cemetery Association, 107 S.Ct. 1971 (1987).
34
See generally Note, supra note 15, at 325-26.
35
See, e.g., Hobbie v. Unemployment Appeals Comm'n of Florida, 107 S.Ct. 1046 (1987) (free exercise clause prohibits withholding of unemployment compensation benefits for Seventh-Day Adventist who is discharged for refusing to work on Saturday, her day of Sabbath); Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707 (1981) (Indiana's denial of unemployment compensation benefits to a Jehovah's Witness who refused to continue to work for his employer upon discovering he was participating in the manufacture of armaments, an activity abhorrent to his religion, was in violation of the free exercise clause); Sherbert v. Verner, 374 U.S. 398 (1963) (South Carolina could not deny unemployment compensation benefits to a Seventh-Day Adventist who refused employment which required her to work on Saturday, her Sabbath day).
36
See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972) (The Court held unconstitutional a compulsory school attendance law requiring every child to attend school until age sixteen. The Amish religious order successfully demonstrated that the law clearly violated their religious beliefs and practices.).
37
See generally Note, supra note 15, at 325-26 (courts generally find the element of coercion a major factor only in situations where government regulations require actions in violation of religious beliefs, or when receipt of government benefits is contingent upon a compromise of religious beliefs).
38
Note, Indian Religious Freedom and Governmental Development of Public Lands, 94 Yale L.J. 1447, 1454, 1455 n. 32 (1985) (common to this area is often a contention by the state or federal entity that Native Americans are making claims to public lands and therefore have no property interest and no claim under the first amendment). See, e.g., Hopi Indian Tribe v. Block, 8 Indian L.Rep. 3073 (D.D.C.1981), aff'd sub nom. Wilson v. Block, 708 F.2d 735 (D.C.Cir.1983) (Native American religious claims made to halt construction of a ski resort in the Coconino Mountains were defeated for lack of a property interest); Sequoyah v. Tennessee Valley Auth., 480 F.Supp. 608, 612 (E.D.Tenn.1979), aff'd on other grounds, 620 F.2d 1159 (6th Cir.1980), cert. denied, 449 U.S. 953 (1980) (free exercise claim was rejected where plaintiffs had no legal property interest in the land in question).
39
See supra note 26. See also Crow v. Gullet, 541 F.Supp. 785 (D.S.D.1982), aff'd, 706 F.2d 856 (8th Cir.1983), cert. denied, 464 U.S. 977 (1983) (where Indians retained access to sacred sites court found no coercion); Hopi Indian Tribe v. Block, 8 Indian L.Rep. 3073 (D.D.C.1981), aff'd sub nom. Wilson V. Block, 708 F.2d 735 (D.C.Cir.1983), cert. denied, 464 U.S. 956 (1983) (court found no coercion present where Navajo and Hopi Indian tribes could continue to enter sacred lands and allow expansion of a ski resort); Badoni v. Higginson, 638 F.2d 172 (10th Cir.1980), cert. denied, 452 U.S. 954 (1981) (government construction of Glen Canyon dam in Utah that caused flooding of the Rainbow Bridge National Monument, a Navajo Indian sacred

area, was not an unlawful attempt to regulate religion, not coercive, and found constitutional despite the complete destruction of a prominent Indian religious site).
40
450 U.S. 707 (1981).
41
Thomas, 450 U.S. at 718 (Court held unconstitutional Indiana's denial of unemployment benefits to claimant who refused to continue working for employer engaged in manufacture of products abhorrent to claimant's religion). The Court, noting that a state cannot pressure a Jehovah's Witness into violating his religious tenets in order to receive important public benefits, stated that “[w]hile the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.”' Id.
42
8 Indian L.Rep. 3073 (D.D.C.1981), aff'd sub nom. Wilson v. Block, 708 F.2d 735 (D.C.Cir.1983.), cert. denied, 464 U.S. 956 (1983).
43
Id.
44
See supra note 4.
45
See, e.g., Note, supra note 36, at 1471 (“[C]ourts have failed to protect Indian religions. Because native free exercise claims are unique in their emphasis on specific sites as the loci of spirits and spirituality, courts must approach the analysis of governmental development of sacred sites with a test that takes these considerations to account.”'); Note, Native Americans and the Free Exercise Clause, 28 Hastings L.J. 1509, 1509-10, 1535 (1977) (Yoder decision does not clearly articulate a uniform standard applicable to first amendment freedom of religion cases involving Native American religious practices) [hereinafter Note, Native Americans]; Note, supra note 15, at 336 (“By using the traditional religion tests in nontraditional ways, the courts have defeated the Indian claims of right of access to public property for worship purposes ....”'); Note, supra note 23 (unless the courts modify the Yoder balancing test in its application to unconventional Native American religious practices, such practices will wrongfully be left unprotected under the first amendment); Note, American Indian Sacred Religious Sites and Government Development: A Conventional Analysis in an Unconventional Setting, 85 Mich.L.Rev. 771 (1987) (the courts' application of conventional free exercise analysis to unique Native Americans' beliefs and practices is inadequate, and deprives Native Americans of full constitutional first amendment protection) [hereinafter Note, American Indian].
46
See supra note 30.
47
See supra note 43.
48
764 F.2d 581 (9th Cir.1985), modifying, 565 F.Supp. 586 (N.D.Cal.1983), cert. granted sub nom. Lyng v. Northwest Indian Cemetery Ass'n, 107 S.Ct. 1971 (1987).
49
The Association comprised Yurok, Karok, and Tolowa Indians who resided in the surrounding region. Northwest Indian Cemetery Protective Ass'n, 764 F.2d at 583.
50

The court noted that “[t]he Indians have to show that the area at issue is indispensable and central to their religious practices and beliefs and that the proposed governmental actions will seriously interfere with or impair those religious practices.’" Id. at 585. The centrality standard is designed to provide greater constitutional protection for religious practices that are central to beliefs. Courts have generally associated sacred sites as being central to beliefs only in cases where the site was considered irreplaceable in terms of the importance of ceremonies and rituals actually performed there. Native Americans have criticized the use of the centrality standard as an inaccurate measure of a sacred site's religious value. Native American Indians contend that centrality fails to account for a sacred site's intrinsic religious value and is overemphasized in application. See infra note 110.

51

764 F.2d at 586.

52

42 U.S.C. § 1996 (1982).

53

Id.

54

S.Rep. No. 709, H.R. Rep. No. 1308, 95th Cong., 2d Sess. 1 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 1262. See generally Note, Native American Free Exercise Rights, 63 B.U.L.Rev. 141, 152-54 (1983).

55

For discussion of AIRFA, see Note, supra note 15, at 319-21.

56

541 F.Supp. 785, 793 (D.S.D.1982), aff'd, 706 F.2d 856 (8th Cir.1983), cert. denied, 464 U.S. 977 (1983).

57

541 F.Supp. at 793.

58

See supra note 3.

59

See, e.g., Koolau Baptist Church v. Dep't of Labor and Indus. Relations, 68 Haw. ---- 718 P.2d 267 (1986) (church sponsored school was not exempt from taxation under state unemployment compensation law because plaintiffs had failed to show a substantial burden on their religion); State ex rel. Minami v. Andrews, 65 Haw. 289, 651 P.2d 473 (1982) (a state statute requiring private schools to obtain a license was held as no infringement on religion); Medeiros v. Kiyosaki, 52 Haw. 436, 478 P.2d 314 (1970) (court held a noncompulsory public grade school film series on family life and sex education was not coercive and found no violation of the free exercise clause); State v. Blake, 5 Haw.App. 411, 695 P.2d 336 (1985) (law proscribing possession of marijuana did not violate defendant's rights to freely exercise Hindu Tantrism, a religion which condoned but did not require the use of marijuana for religious purposes).

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65 Haw. 289, 651 P.2d 473 (1982).

61

Id. at 291, 651 P.2d at 474.

62

See Haw.Rev.Stat. § 298-6.

63
Minami, 65 Haw. at 290, 651 P.2d at 474.
64
Id. at 291-92, 651 P.2d at 474-75.
65
5 Haw.App. 411, 695 P.2d 336 (1985).
66
See Haw.Rev.Stat. § 712-1249 (1976).
67
State v. Blake, 5 Haw.App. 411, 412, 695 P.2d 336, 337 (1985).
68
Id. at 417, 695 P.2d at 339.
69
Id. at 417, 695 P.2d at 340 (citing People v. Mullins, 50 Cal.App.3d 61, 70, 123 Cal.Rptr. 201, 207 (1975)).
70
5 Haw.App. at 417, 695 P.2d at 340.
71
The Blake court's interpretation of the Minami "burden"' requirement imposed on those alleging religious infringements could be considered excessive particularly in light of the broad protections afforded under the first amendment and the fact that the "burden"' requirement was extracted from a California Supreme Court decision and not a United States Supreme Court decision. Blake, 5 Haw.App. at 417, 695 P.2d at 340.
See generally Note, Native Americans, supra note 43, at 1533 ("[P]urpose underlying the free exercise clause ... is to guarantee the widest possible exercise of religious practices consistent with ordered liberty."'). The United States Supreme Court recognizes broad first amendment protections:
The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them and of the lack of any one religious creed on which all men could agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views .... The first amendment does not select any one group for preferred treatment. It puts them all in that position.
United States v. Ballard, 332 U.S. 78, 87 (1943). See also Note, Soul Rebels: The Rastafarians and the Free Exercise Clause, 72 Geo.L.J. 1605, 1616 (1984) ("'[P]art of the raison d'etre for the safeguards afforded religion under our Constitution is the protection of unpopular or unorthodox religious sects."').
72
Blake, 5 Haw.App. at 418, 695 P.2d at 340.
73
Id.
74
68 Haw. ----, 718 P.2d 267 (1986).
75
Id. at ----, 718 P.2d at 269.
76
Id. at ----, 718 P.2d at 273.

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Id. at ----, 718 P.2d at 272.
78
Id.
79
Id.
80
Id. at ----, 718 P.2d at 273.
81
Id.
82
69 Haw. ----, 740 P.2d 28 (1987).
83
The relevant statutes were Haw.Rev.Stat. §§ 205-5.1 and 205-5.2. Haw.Rev.Stat. § 205-5.2 was facially neutral towards religion and empowered the Board of Land and Natural Resources with the authority to designate areas as geothermal resource subzones. Haw.Rev.Stat. § 205-5.1 conferred upon the Board authority to grant permits for geothermal development.
84
406 U.S. 205 (1972).
85
Dedman, 69 Haw. at ----, 740 P.2d at 32 (1987) (quoting State ex rel. Minami v. Andrews, 65 Haw. 289, 291, 651 P.2d 473, 474 (1982)).
86
Id. at ----, 740 P.2d at 32.
87
Id. at ----, 740 P.2d at 32-33.
88
Claimants had contended that extraction of geothermal energy would "'desecrate the body of Pele [Hawaiian goddess] by digging into the ground and [[[would] destroy the goddess by robbing her of vital heat,"' interfering with their rituals and traditional beliefs and practices. Id. at ----, 740 P.2d at 32.
89
Id. at ----, 740 P.2d at 33.
90
Only cursory mention was made of the state's interest in neutrality towards religion. The court relied on the oft quoted constitutional interpretation that the free exercise clause was "written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government,"' in support of the constitutionality of the state's approval of geothermal development. Id. at ----, 740 P.2d at 33 (quoting Sherbert v. Verner, 374 U.S. 398, 412 (1983)).
91
Dedman, 69 Haw. at ----, 740 P.2d at 33. Hence, the sacred effects associated with volcanic activity—e.g., heat, steam, and magma—would continue unabated.
92
Id. at ----, 740 P.2d at 33.
93

Id. at ----, 740 P.2d at 33 (quoting Wisconsin v. Yoder, 406 U.S. at 218, 92 S.Ct. at 1534).
94
69 Haw. at ----, 740 P.2d at 33.
95
Note, supra note 23, at 160-61.
96
Dedman, 69 Haw. at ----, 740 P.2d at 31 (1987). See also In re the Designation of the Kilauea Middle East Rift, Island of Hawaii, as a Geothermal Resource Subzone; Finding of Fact, Conclusion of Law, Decision and Order, Dedman v. Board of Land and Natural Resources, 69 Haw. ----, 740 P.2d 28 (1987) (Board of Land and Natural Resources, State of Hawaii, G.S. No. 9/26/85-5). Based on the testimony of Dr. Noa Emmett Auwae Aluli and Ralph Palikapu O'Kamohoalii Dedman, the Board of Land and Natural Resources pronounced the following findings of fact:
Pele practitioners believe Pele is a living god, whose presence is manifested in periodic and frequent volcanic eruptions. Pele is believed to also be present in the sacred area surrounding the Kilauea Volcano in kinolau (alternate body forms) such as ferns, certain shrubs and trees, and certain volcanic land forms and features, such as significant pu'u (hills).
Id. at 36 (citing testimony of Dr. Emmett Aluli, TR. Ex. 2, G.S. No. 9/26/85-5).
Pele practitioners testified that Pele is also the heat, water, steam, smoke, and vapor present in and throughout the Kilauea Volcano and its rift zones.
Id. at 36 (citing Intervenors Aluli and Dedman, Ex. 2, G.S. No. 9/26/85-5).
[T]estimony indicat[ed] that Pele is a spiritual concept central to the lives and psychological survival of the believers, and that Pele provides inspiration, strength and a focus for their lives.
Id. at 36 (citing Intervenors Aluli and Dedman, Ex. 2, and Pre-Hearing Statements, G.S. No. 9/26/85-5).
Dr. Aluli and Palikapu Dedman testified that they consider any activity impermissible within the area considered to be Pele's abode. They believe that geothermal exploration and development is an offense against Pele, a desecration of her body and being, because this activity involves drilling into Pele's body and removing her energy. They believe this activity will take Pele and kill her forever.
Id. at 37 (citing testimony of Dr. Emmett Aluli, G.S. No. 9/26/85-5).
[Aluli and Dedman] also testified that they believe that offenses against Pele will cause Pele to retaliate violently in the form of volcanic eruptions, earthquakes and tsunami.
Id. at 37 (citing testimony of Mr. Dedman, G.S. No. 9/26/85-5).
[Aluli and Dedman] testified that they believe that geothermal exploration and development will threaten and probably prevent the continuation of all essential ritual practices associated with Pele and thereby impair the ability of Pele practitioners to train young Hawaiians in the traditional Hawaiian beliefs and practices. They believe therefore that Hawaiian religion and culture will not be conveyed to future generations and will therefore die.
Id. at 37 (citing Intervenors Aluli and Dedman, Ex. 2, G.S. No. 9/26/85-5).
97
See, e.g., Note, supra note 36, at 1448 ("Adherents of traditional religions claim ... fear that development [of sacred sites] will undermine the religious power of sacred sites, inhibit communication with spirits, prevent the collection of healing herbs, and even kill tribal deities.'").
98

See, e.g., Wilson v. Block, 708 F.2d 735, 740-41 n. 2 (D.C.Cir.1983), aff'g Hopi Indian Tribe v. Block, 8 Indian L.Rep. 3073 (D.D.C.1981), cert. denied, 464 U.S. 956 (1983). In attempting to halt expansion of a ski resort on land considered sacred by the Hopi Indians, the chairman of the Hopi tribe argued:

[I]f the expansion is permitted, we will not be able successfully to teach our people that this is a sacred place .... The basis of our existence as a society will become a mere fairy tale to our people. If our people no longer possess this long-held belief ... a direct and negative impact upon our religious practices [will result].

Badoni v. Higginson, 638 F.2d at 177 (10th Cir.1980), aff'g 455 F.Supp. 641 (D.Utah 1977), cert. denied, 452 U.S. 954 (1981) (Navajo plaintiffs claimed that damming of the Colorado River and the resultant flooding of a sacred site tract of land would drown some of plaintiffs' gods).

99

42 U.S.C. § 1996 (1982).

100

Id.

101

See, e.g., Crow v. Gullet, 541 F.Supp. 785, 793 (D.S.D.1982), aff'd, 706 F.2d 856 (8th Cir.1983) cert. denied, 464 U.S. 977 (1983). See generally Note, supra note 36, at 1457-58.

102

See Note, supra note 15, at 320-21.

103

See Note, supra note 36, at 1457-58.

104

See e.g., Developments—Religion and the State, 100 Harv.L.Rev. 1606 (1987). The author argues that the courts have misused the concept of centrality because:

By rejecting Native Americans' free exercise claims because they are not based on practices essential to their religious life or on beliefs recognized as genuinely religious, courts discriminate against Native American claimants .... The inability of courts to comprehend Native American religious practice undermines courts' ability to give due weight to Native American claims: the centrality test's distinction between central and peripheral religious rituals has little meaning to Native Americans because they do not—and courts therefore should not—rank the importance of the rituals that comprise their religious life.

...

Id. at 1735.

105

See infra note 113.

106

See infra notes 118-22.

107

See generally Note, supra note 15, at 323-34; Note, supra note 23, at 163-67.

108

See infra note 106.

109

The importance of sacred sites to Native American religions cannot be overstated. For example, Navajo Indians believe that some of their gods inhabit natural rock formations while other gods have transformed themselves into other natural phenomena. Ceremonies are conducted on sacred sites to communicate with and elicit favors from the gods. The Cherokee Indians also similarly believe that sacred sites are essential to communicating with spiritual forces. See generally K. Luckert, Navajo Mountain and Rainbow Bridge Religion (1977); Note, supra note 23.

110

Note, American Indian, supra note 43, at 780 n. 65 (1987) ("It might be argued that intrinsic characteristics of the sites themselves may call for their protection, regardless of the quantity of practices carried on at those sites.'"); see, e.g., Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159 (6th Cir.1980), aff'g. 480 F.Supp. 608 (E.D.Tenn.1979), cert. denied, 449 U.S. 953 (1980) (Cherokee Indians sought to enjoin the completion of the Tellico Dam on the Little Tennessee River claiming that the resultant flooding would consume what some Cherokee Indians regard as their "Jerusalem.'"). For discussion and description of this case, see generally Note, American Indian, supra note 43, at 783-85.

See also id. at 784 n. 90 (1987) (Cherokee Indians sought to protect not only religious practices but the intrinsic sacred character of the site itself); Note, supra note 23, at 161 ("The Cherokee practice their religion, in part, by worshipping the valley itself; they believe that prayer to and at sacred sites facilitates direct communication with the supernatural world.'"); Wilson v. Block, 708 F.2d 735 (D.C.Cir.1983), cert. denied, 464 U.S. 956 (1983) (Navajo Indians believed the San Francisco Peaks possessed the body of living gods).

Another potential reason commentators suggest Native American religious sites receive less constitutional protection than their orthodox counterparts involves the location and surroundings of sacred sites. Judeo-Christian sites are for the most part found in the Middle East, which not only removes the United States from having jurisdiction over these sites, but surrounds the site with an aura of mysticism which accompanies a distant foreign land. Note, supra note 36.

The Judeo-Christian sites again normally possess sacred significance only to the extent that they represent historical religious events. On the other hand, Native American religious sites are often found within national parks or other federal lands; the difficulty in relating to the spiritual significance of religious sites, which are in these locales and which are predominantly thought of and used for recreation and other leisure time activities, becomes that much more pronounced. Nevertheless, one commentator who assessed this situation said "[a]n examination of the religious interests at stake in Indian claims ... illustrates that the Indian claims are not out of the ordinary .... For example, Christians could begin to comprehend the devastation to religion caused by the destruction of a sacred site if they imagine a proposal to construct a ski resort on the Mount of Olives.'" Note, supra note 36, at 1464 n. 83 (1985).

Commentators suggest that unconventional Native American religions are not understood and are therefore oftentimes deprived of constitutional protections. Note, supra note 36. For example, it has been noted that Judeo-Christian belief in a supreme immortal deity is unrelated to a specific and irreplacable site; that removal, destruction or intrusion of the site cannot destroy or damage the religious belief. However, sacred sites in Native American religions play a much more dominant role in all facets of religious belief, preeminently in the very fact that many Native American religious beliefs are premised on concepts that their god(s) or various other forms of spiritual powers reside at the site itself. Hence, destruction or alteration of the sacred site could result in an eviction of the occupying of the spiritual forces. Id. at 1448-49. The danger exists that "[a] religion may be destroyed when the cosmology upon which it is founded is undermined.'" Id. at 1448 n. 7. It is particularly because Indian sacred sites do play such a vital role in sustaining their religious beliefs, that the free exercise clause should extend to protect these interests. After all, "[t]he freedom to believe and worship embodied in the First

Amendment is rendered meaningless if government destroys the object of belief.'" Id. at 1468.
111
See generally Note, supra note 15, at 323-34 (Author commented that "'technically 'centrality' is a prerequisite to, and not part of, the 'burden' analysis.'").
See also Note, supra note 23. It has been contended that the Sequoyah and Badoni courts, in holding against the Indians' religious claims, misinterpreted the relationship between the concept of centrality and whether the Native American practices were intimately related to daily life: "Centrality and an intimate relation between belief and daily conduct are thus two different concepts. In describing Amish practices as intimately related to daily living, the Yoder Court did not manifest an intent to expand or modify the requirements for a finding of centrality.'" Id. at 166.
112
See, e.g., Note, supra note 15, at 328-29 ("Pleading and proving centrality have been widely required only in Indian cases.'"). The author compared the major non-Native American free exercise cases which have abstained from centrality analysis with Native American sacred site cases which, in contrast, have overwhelmingly relied on centrality. Id. at 329 n. 119.
113
Note, American Indian, supra note 43, at 778 n. 49 ("Courts in the sacred site cases, however, did not treat the centrality inquiry merely as a threshold issue in a free exercise claim, but instead transformed the inquiry into the controlling factor in determining whether claimants' practices were burdened.'"). See also Note, supra note 15, at 324 (in order to sustain a first amendment free exercise claim, plaintiffs who alleged a substantial burden on their religion must be prepared to demonstrate under the demanding and dominant centrality standard that the religious burden, if allowed to continue, will cause the extinction of the religion). See, e.g., People v. Mullins, 60 Cal.App. 61, 70, 123 Cal.Rptr. 201, 207 (1975) ("[I]t must be established that such practice is an integral part of a religious faith and that the prohibition ... results in a virtual inhibition of the religion or the practice of the faith.'"); cf. Frank v. State, 604 P.2d 1068, 1073 (Alaska 1979) (Athabascan Indians were entitled under free exercise clause to kill a moose for a religious funeral ceremony when the moose was considered "the centerpiece of the most important ritual in Athabascan life'" and was "needed for proper observance of [the] sacred ritual.'").
"Centrality'" by nature and application excludes consideration of fundamental concepts of Indian theology. Thorough understanding of Indian religious principles is absolutely essential to an accurate assessment of the religious burden imposed. Overemphasis of the centrality standard distorts the court's perception of the true religious burden and neutralizes the severity of the infringement. See, e.g., Note, supra note 14, at 329-30. The author reprimands the use of centrality in the Native American situation:
The centrality test, however, as formulated, and applied in the Indian cases, effectively denies protection to Indian religious practices despite the first amendment intent to protect religious exercise. Further, it is questionable whether a religion test with the burden of proof that is practically impossible to carry is a practical help in assuring religious freedom. If no practice can be shown to be important enough to be protected, then the religion clauses ensure nothing.
Id.
114
See generally Note, supra note 36. Current free exercise analysis evolved as a by-product of individuals bringing claims for exemption from governmental activity. It is contended by some that this analysis is not suited for Native American sacred site claims, that it only "tends to limit

the range [[[of protection] of the free exercise clause to societally mainstream or nonthreatening beliefs, or to the aspects of nontraditional beliefs that are similar to Euro-American practices.'" Id. at 1462. An even more fundamental reason for the purported lack of judicial understanding, with respect to the sanctity of Native American religious sites, is the presence of a national sense of "civil religion'" within the governmental structure, based in part on Judeo-Christian beliefs and prominent throughout the Declaration of Independence, Constitution, and Pledge of Allegiance. Id. at 1463.
See also Note, supra note 15. One unique aspect of the American Indian religious sacred site claims is that almost always, the claims are rooted not only in sincere religious beliefs, but also in terms of cultural and historical preservations. Often perplexing and foreign to the non-Indian observer is the conceptual framework in which Native Americans comprehend life and religion. For instance, Christian religions perceive the world in a linear manner, relying on the life and teachings of Jesus Christ to establish everlasting principles which serve as benchmarks to guide everyday life. In contrast, Native American religions are less concerned with abiding by biblical oriented concepts and depend more on the use of sacred sites as a source of spiritual renewal and a means of exercising their religion. Id. at 319-20. The courts tend to gravitate towards an inquiry into the usefulness of the land and weigh Indian religious interests against governmental interests.
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See infra note 113.
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Because of the courts' need to protect minority religions, courts must avoid defining religion in other than the broadest sense. One commentator has stated that the Court's opinion in Reynolds v. United States, 98 U.S. 145 (1878), highlights the need for judicial self-restraint in that it "expressed clear contempt for the Mormon Church and thus demonstrated that underlying the hostility toward polygamy was hostility toward an unpopular religious faith.'" Note, Developments—Religion and State, 100 Harv.L.Rev. 1606, 1736 (1987). The Reynolds Court upheld an anti-polygamy statute which had the effect of stripping the Mormon faith of a long-standing and pervasive religious practice.
117
Although the courts have applied a very low sincerity threshold standard, in rare instances claims have been denied for lack of sincerity. For example, in United States v. Kuch, 28 F.Supp. 439 (D.D.C.1968), the court rejected as insincere a religious claim brought by adherents of the Neo-American Church. The adherents called themselves Boo Hoos, had a three-eyed toad for a church symbol, and stated that "victory over Horseshit'" was their motto. See also Dobkin v. District of Columbia, 194 A.2d 657 (D.C.1963) (Sabbatarian who was routinely open for business on Sabbath held not to have sincere religious beliefs).
118
Note, supra note 36. One commentator argued that the centrality approach "'narrows the scope of the free exercise protection to familiar and well-documented religious tenets, despite the Supreme Court's statement that the First Amendment knows no orthodoxy."' Id. at 1461.
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See, e.g., Wilson v. Block, 708 F.2d 735, 745 (D.C.Cir.1983) (plaintiffs failed to show religious burden, therefore, the court abstained from deciding whether ski resort expansion onto sacred Indian land was justified by a compelling governmental interest or whether a lesser restricted means of achieving that interest existed); see also Dedman, 69 Haw. ----, 740 P.2d 28 (1987) (the

Hawaii Supreme Court never addressed the balancing test, nor did it discuss the state's interest in geothermal energy development).
Even if courts reach the balancing test, courts at times apply the test incorrectly as to sacred site claims. In Badoni v. Higginson, 638 F.2d 172 (10th Cir.1980), aff'g 455 F.Supp. 641 (D. Utah 1977), cert. denied, 452 U.S. 954 (1981), Navajo tribal members challenged the flooding of the Rainbow Bridge National Monument, resulting from damming of the Colorado River, claiming violation of their free exercise rights because the flooding had drowned their gods and denied them access to a sacred prayer spot. Id. at 176. Although the court agreed that the Navajo Indians had a religious interest at stake, it held, "the government's interests in maintaining the capacity of [the lake] at a level that intrudes into the Monument outweighs plaintiffs' religious interest."' Id. at 177. However, the court's reasoning was that because the government's interest was so compelling, it need not even ascertain whether the free exercise rights of the Navajo Indians had been trampled upon. Id. at 178.
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See generally Note, supra note 23, at 173-76.
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Wisconsin v. Yoder, 406 U.S. at 235; Sherbert v. Verner, 374 U.S. at 407. However, absent a showing by the aggrieved parties of an unconstitutional infringement on religion, a state need not show that its means could not have been accomplished by "less restrictive alternatives."' Native American sacred site decisions are inequitably one-sided; challengers must overcome an almost insurmountable burden (because most courts perceive the burden from orthodox religious principles and not from unique Native American religious precepts), while in contrast, unless this burden is satisfied, government need only rationally justify its interest.
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See generally Note, supra note 23, at 173-76.
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Id. at 175.
124
Dedman, 69 Haw. at ----, 740 P.2d at 32 (1987).
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Id. at ----, 740 P.2d at 32.
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Id. at ----, 740 P.2d at 32.
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Id. at ----, 740 P.2d at 33.
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Id. at ----, 740 P.2d at 33.
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The court stated that "[t]here is simply no showing of the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent."' Id. at ----, 740 P.2d at 33.
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See supra notes 109 & 113. The courts' misunderstanding of Indian (or Hawaiian) theology likely results in judges inadvertently resorting to traditional orthodox religious principles which are wholly inadequate to an accurate assessment of Indian (or Hawaiian) religious burdens.
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See infra note 129.
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Dedman, 69 Haw. at ---- n. 2, 740 P.2d at 31 n. 2.
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Cf. Frank v. State, 604 P.2d 1068 (Alaska 1979). An Athabascan Indian who had violated Alaskan game laws by taking a moose out of season for the purpose of a religious funeral ceremony was protected by the free exercise clause. The court commented that a practice need not be "absolutely necessary"' to the religion but that "[i]t is sufficient that the practice be deeply rooted in religious belief to bring it within the ambit of the free exercise clause and place on the state its burden of justification."' Id. at 1072-73; Teterud v. Burns, 522 F.2d 357 (8th Cir.1975). In Teterud, a Cree Indian challenged a prison regulation prohibiting his wearing of long-braided hair, claiming it violated his rights of freedom of religion. The court held that the defendant need not show that wearing long-braided hair was a religious tenet practiced by all Cree Indians. Id.
134
See, e.g., Wilson v. Block, 708 F.2d 735, 745 (D.C.Cir.1983) (plaintiffs failed to show religious burden, therefore, the court abstained from deciding whether ski resort expansion onto sacred Indian land was justified by a compelling governmental interest or whether a lesser restrictive means of achieving that interest existed).
135
The Dedman court stated that "[t]o invalidate the Board's actions based on the mere assertion of harm to religious practices would contravene the fundamental purpose of preventing the state from fostering support of one religion over another."' Dedman, 69 Haw. at ----, 740 P.2d at 33.
136
The United States Supreme Court directly addressed this concern in Braunfeld v. Brown:
To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature .... [W]hen entering the area of religious freedom, we must be fully cognizant of the particular protection that the Constitution has accorded it .... If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the state regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.
366 U.S. 599, 606-07 (1961). See also Reynolds v. United States, 98 U.S. at 166-67. In Reynolds, the Court upheld the government's statutory prohibition of polygamy notwithstanding Mormon religious tenets which advocated plural marriages:
Can a man excuse his practices to the contrary [of the laws of society] because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.
Id.
137
On the eve of publication, the United States Supreme Court denied the petition for writ of certiorari that arose from Dedman. Dedman v. Bd. of Land and Natural Resources, 69 Haw. $1r,

740 P.2d 28 (1987), cert. denied, 56 U.S.L.W. 3737 (1988). The Court also reversed, in a five to three decision, Northwest Indian Cemetery Protective Ass'n. Northwest Indian Cemetery Protective Ass'n v. Peterson, 764 F.2d 581 (9th Cir.1985), rev'd sub nom. Lyng v. Northwest Indian Cemetery Ass'n, 56 U.S.L.W. 4292 (1988).

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