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EXTINCTION AND THE LAW: PROTECTION OF RELIGIOUSLY-MOTIVATED BEHAVIOR

FRED P. BOSSELMAN*

I. INTRODUCTION

Of all the words in the vocabulary, none is bleaker than extinction. The idea that future generations of one's descendants might not have access to the full range of opportunities available to us is profoundly depressing. The permanent abolition of an entire category of beings or things inspires a horror that far exceeds our dismay at any individual death or destruction.

Our abhorrence of extinction is reflected in laws that attach values to the continued existence of beings and things greater than can easily be explained by any quantifiable analysis. This can be seen, for example, in the laws that protect historic structures and endangered species.

Historic preservation laws protect artifacts of the built environment. Endangered species laws protect individual populations of plants and animals with distinct characteristics. But extinction also threatens things that do not fit into either category. For example, particular cultural behavior patterns typically cannot be attributed purely to genetics, and the artifacts that these behavior patterns create may symbolize, but do not embody, the behavior patterns themselves.

Part II of this Essay summarizes the legal methods by which we in the United States discourage extinction of beings and things. Part III examines the practices of the Amish as an example of cultural behavior patterns threatened by extinction. Part IV looks at how protection of the behavior patterns of religious groups like the Amish would be affected by the current interpretation of the religion clauses of the First Amendment and its emphasis on the accommodation of religion. Part V explores some of the practical problems in using the government's power to accommodate religion in order to protect from extinction the cultural behavior patterns of those counter-assimilationist religions most in need of protection.

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II. DISCOURAGING EXTINCTION

Concern about the extinction of wildlife grew during the 19th century with the recognition that something as ubiquitous as the passenger pigeon could vanish entirely.¹ The American Bison, under its popular name of "buffalo," symbolized the prairies of the West. When it was reported to be near extinction, the popular uproar persuaded the government to set aside Yellowstone National Park as a refuge for the last remaining animals.²

Duck hunters also played an important role in the early conservation movement. Wildlife sanctuaries and refuges proliferated during the early twentieth century, as hunters began to realize that their sport could disappear unless steps were taken to assure the continued survival of the target species.³

Many of the early wildlife sanctuaries were privately funded and maintained by groups like the National Audubon Society.⁴ State and federal involvement soon developed, when the idea of using hunting license revenues for conservation purposes spread rapidly throughout the country.⁵ The National Wildlife Refuge system and comparable programs at the state level were created primarily for the protection of waterfowl and other game species.⁶

1. The last wild passenger pigeon died in 1900. A captive specimen remained alive in the Cincinnati zoo until 1914. See ROBERT BENDINER, *THE FALL OF THE WILD, THE RISE OF THE ZOO* 19-20 (1981).

2. JAMES ISE, *OUR NATIONAL PARK POLICY: A CRITICAL HISTORY* 45 (1961); JOHN F. REIGER, *AMERICAN SPORTSMEN AND THE ORIGINS OF CONSERVATION* 131-32 (1975); THOMAS DUNLAP, *SAVING AMERICA'S WILDLIFE* 7 (1988). The availability of Yellowstone for this purpose was coincidental; the motivation of the initial designation of Yellowstone was "something to do with vague qualities compounded of admiration for scenery and morality" PAUL SHEPARD, *MAN IN THE LANDSCAPE* 249 (1967). See RODERICK NASH, *WILDERNESS AND THE AMERICAN MIND* 108-16 (rev. ed. 1973). For a discussion of the motivations behind the preservation of western land, see A. Dan Tarlock, *Environmental Protection: The Potential Misfit Between Equity and Efficiency*, 63 U. COLO. L. REV. 871, 876-78 (1992).

3. THOMAS A. LUND, *AMERICAN WILDLIFE LAW* 62 (1980). See DUNLAP, *supra* note 2, at 11. STEPHEN R. FOX, *THE AMERICAN CONSERVATION MOVEMENT: JOHN MUIR AND HIS LEGACY* 163-64 (1981). George B. Grinnell, *American Game Protection, in HUNTING AND CONSERVATION: THE BOOK OF THE BOONE AND CROCKETT CLUB* 201, 244-26 (George B. Grinnell & Charles Sheldon eds., 1925).

4. See generally FRANK GRAHAM, JR., *THE AUDUBON ARK: A HISTORY OF THE NATIONAL AUDUBON SOCIETY* (1990); JAMES B. TREFETHEN, *AN AMERICAN CRUSADE FOR WILDLIFE* 131-37 (1975); THOMAS G. PEARSON, *ADVENTURES IN BIRD PROTECTION* (1937); HANS HUTH, *NATURE AND THE AMERICAN: THREE CENTURIES OF CHANGING ATTITUDES* 185 (1957). Robert E. Jenkins, *Habitat Preservation by Private Organizations, in WILDLIFE AND AMERICA* 413 (Howard P. Brokaw ed., 1978).

5. FOX, *supra* note 3, at 164; Lynn A. Greenwalt, *The National Wildlife Refuge System, in WILDLIFE AND AMERICA, supra* note 4, at 399.

6. MICHAEL J. BEAN, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 119-23 (rev. ed. 1983); WILLIAM K. WYANT, *WESTWARD IN EDEN: THE PUBLIC LANDS AND THE CONSERVATION*

The early conservation movement also sought to preserve unique habitats as a whole. State and national park programs took charge of such places as the coral reefs off the coast of southern Florida and the remaining Sequoia stands in the Sierra Nevada.⁷ Park managers encouraged the public to visit and appreciate the country's natural wonders in the hope of fostering understanding and support of further conservation efforts.⁸

In addition to parks and refuges, conservationists sought to encourage what today would be called "sustainable" practices by the land-intensive industries such as agriculture and silviculture.⁹ The multiple use concept was formulated for the national forests with the objective of managing them for long range productivity, not only for timber, but also for wildlife and recreation.¹⁰ Private forest owners were encouraged to adopt similar practices, and farmers were taught how to maximize long range soil value through such programs as hedgerow and windbreak planting and wetland management—that produced secondary benefits for wildlife as well.¹¹

But these non-coercive programs were never in themselves sufficient to accomplish the purpose of halting wildlife's slide to extinction. New criminal statutes were adopted to establish such now-familiar constraints as hunting and fishing seasons, bag limits, and the prohibition of weapons of mass destruction.¹²

The murder of an Audubon sanctuary warden was a catalyst for the

MOVEMENT 118-19 (1982); Wendy Smith Lee, *The National Wildlife Refuge System*, in AUDUBON WILDLIFE REPORT 1986, at 413 (Amos Enos ed., 1986).

7. See ALFRED RUNTE, NATIONAL PARKS: THE AMERICAN EXPERIENCE 62-63 (2d ed. 1987). On the process by which South Florida parks were created see MARK DERR, SOME KIND OF PARADISE: A CHRONICLE OF MAN AND THE LAND IN FLORIDA 331 (1989).

8. RUNTE, *supra* note 7, at 111-12. See FREEMAN TILDEN, INTERPRETING OUR HERITAGE: PRINCIPLES AND PRACTICES FOR VISITOR SERVICES IN PARKS, MUSEUMS AND HISTORIC PLACES (1957); Clarence A. Schoenfeld, *Environmental Education and Wildlife Conservation*, in WILDLIFE AND AMERICA, *supra* note 4, at 471.

9. MARION CLAWSON, AMERICAN LAND AND ITS USES 101-02 (1972). See SAMUEL P. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920 (1969).

10. LUTHER H. GULICK, AMERICAN FOREST POLICY 30-31 (1951). For a more current view see A. Starker Leopold, *Wildlife and Forest Practice*, in WILDLIFE AND AMERICA, *supra* note 4, at 108.

11. BEAN, *supra* note 6, at 140-41; D. HARPER SIMMS, THE SOIL CONSERVATION SERVICE 14-22 (1970). DONALD C. SWAIN, FEDERAL CONSERVATION POLICY, 1921-33, at 144-59 (1963). Conservation practices have declined precipitously since the 1930s. See Dean Smith, *Soil Depletion in the United States: The Relationship Between the Loss of the American Farmer's Independence and the Depletion of the Soil*, 22 ENVTL. L. 1539 (1992); NATIONAL ACADEMY OF SCIENCES, IMPACTS OF EMERGING AGRICULTURAL TRENDS ON FISH AND WILDLIFE HABITAT (1982); Joel Kuperberg, *Reforming Private Land Use Practices*, in WILDLIFE AND AMERICA, *supra* note 4, at 442.

12. LUND, *supra* note 3, at 64-67. The Lacey Act of 1900 made interstate shipment of game killed in violation of state laws a federal crime. DUNLAP, *supra* note 2, at 37.

expansion of wildlife protection beyond the needs of hunting and fishing interests. The Great Egrets he was guarding were not game animals, but were being driven near extinction by the milliners who sought their white plumes to adorn the large hats worn by women around the turn of the century. The publicity surrounding this incident led to a variety of laws protecting certain highly visible birds and animals.¹³

In recent years, the fear of extinction has been extended far beyond the so-called "charismatic" species that first captured the public imagination.¹⁴ The public has become aware that scientists have discovered valuable medicinal compounds and agricultural products from obscure species of plants and invertebrates.¹⁵ For example, the Pacific Yew, a scrubby tree that grows in the shade of the charismatic Douglas Firs of the Pacific Northwest, has been found to produce a substance effective in treating ovarian cancer.¹⁶ The yew was being systematically burned in the process of clear-cutting the last of the firs for timber, and it might have become extinct in a few years had its value not been discovered in time.¹⁷

State and federal endangered species legislation now gives some degree of protection to a wide range of rare plants and animals.¹⁸ More importantly perhaps, these acts have been applied to entire habitats because of a recognition that protection cannot be provided to individual species unless the habitat on which they are dependent survives.¹⁹ In the regions where rare habitats are found, the application of these statutes has had a significant impact on the operation of industries such as min-

13. TREFETHEN, *supra* note 4, at 131-37; PETER MATTHIESSEN, *WILDLIFE IN AMERICA* 178-79 (1964); GRAHAM, *supra* note 4, at 50-56; PEARSON, *supra* note 4, at 140, 144-62.

14. The first step toward endangered species protection was land acquisition authority conferred by the 1964 Land and Conservation Act. DUNLAP, *supra* note 2, at 144. The first act entitled *Endangered Species* was enacted in 1966. MICHAEL BEAN, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 371 (1977).

15. Norman R. Farnsworth, *Screening Plants for New Medicines*, in *BIODIVERSITY* 83 (E.O. Wilson ed., 1988). See generally, OFFICE OF TECHNOLOGY ASSESSMENT, *TECHNOLOGIES TO MAINTAIN BIOLOGICAL DIVERSITY* 43-45 (1987); NORMAN MYERS, *A WEALTH OF WILD SPECIES: STOREHOUSE FOR HUMAN WELFARE* 89-141 (1983); Tracy Dobson, *Loss of Biodiversity: An International Environmental Policy Perspective*, 17 N.C. J. INT'L L. & COM. REG. 277, 283-84 (1992).

16. Douglas Daly, *The Tree of Life*, 94 AUDUBON 76 (1992).

17. Now that the substance has been discovered in the Pacific Yew, scientists are exploring the possibility of extracting it from other species of yew as well. N.Y. TIMES, April 21, 1992, § C, at 9, col. 5.

18. See, e.g., BEAN *supra* note 14, at 416-17; STEVEN LEWIS YAFFEE, *PROHIBITIVE POLICY: IMPLEMENTING THE ENDANGERED SPECIES ACT* (1982).

19. See BEAN, *supra* note 14, at 402-410. The wilderness movement represents a large scale effort to retain existing natural habitat. See SAMUEL P. HAYS, *BEAUTY, HEALTH AND PERMANENCE: ENVIRONMENTAL POLITICS IN THE UNITED STATES, 1955-85*, at 118-21 (1987); NASH, *supra* note 2, at 200-26; MARION CLAWSON, *THE FEDERAL LANDS REVISITED* 44-47 (1983).

ing, forestry, land development and agriculture.²⁰

As this abbreviated summary suggests, the public's desire to avoid the extinction of wildlife has led to a wide variety of legislative programs and private initiatives. In addition to the programs described above, other programs require public agencies to take steps to avoid causing damage to wildlife.²¹ Tax deductions are given to private individuals and companies who contribute to such charitable organizations as the Nature Conservancy, which has developed an extensive system of private reserves for rare habitats.²² And criminal penalties have been attached to the sale or export of endangered species or products derived from them.²³

Concern about the extinction of the built environment has roughly paralleled concern about the extinction of the natural environment. Initial interest centered on the threatened destruction of particular structures associated with our national independence, such as Philadelphia's Independence Hall and George Washington's home, Mt. Vernon.²⁴ Local groups took the initiative for these early projects.²⁵ The first regional private groups devoted to preservation formed early in the 20th century, spearheaded by the Society for the Preservation of New England Antiquities. Similar groups became active in states such as Virginia, New York and Pennsylvania.²⁶

At about the same time, concern was expressed about the pueblos and other prehistoric structures being discovered in the southwest. Although located on federal land, they were subject to theft and vandalism for lack of any legal rules to protect them.²⁷ Archaeologists began

20. Craig A. Arnold, *Conserving Habitats and Building Habitats: The Emerging Impact of the Endangered Species Act on Land Use Development*, 10 STAN. ENVTL. L.J. 1, 3 (1991); J. B. Ruhl, *Regional Habitat Conservation Planning Under the Endangered Species Act: Pushing the Legal and Practical Limits of Endangered Species Protection*, 44 SW. L.J. 1393, 1396 (1991).

21. 16 U.S.C. § 661.

22. Robert E. Jenkins, Jr., *Information Management For the Conservation of Biodiversity*, in BIODIVERSITY, *supra* note 15, at 231; NOEL GROVE, PRESERVING EDEN: THE NATURE CONSERVANCY 40 (1992). See also Konrad J. Liegal, *The Impact of the Tax Reform Act of 1986 on Lifetime Deductions for Appreciated Property for Conservation Purposes*, 74 CORNELL L. REV. 742, 748-49 (1989).

23. James C. Kilbourne, *The Endangered Species Act Under a Microscope: A Closeup Look from a Litigator's Perspective*, 21 ENVTL. L. 499, 572 (1991); Clark R. Bavin, *Wildlife Law Enforcement*, in WILDLIFE AND AMERICA, *supra* note 4, at 350.

24. WILLIAM J. MURTAGH, KEEPING TIME: THE HISTORY AND THEORY OF PRESERVATION IN AMERICA 28 (1988); JAMES M. FITCH, HISTORIC PRESERVATION: CURATORIAL MANAGEMENT OF THE BUILT WORLD 88-94 (1982); THOMAS F. KING, ANTHROPOLOGY IN HISTORIC PRESERVATION: CARING FOR CULTURE'S CLUTTER 13 (1977); CHARLES B. HOSMER, JR., PRESENCE OF THE PAST: A HISTORY OF THE PRESERVATION MOVEMENT IN THE UNITED STATES BEFORE WILLIAMSBURG 33-60, 86-87 (1965).

25. MURTAGH, *supra* note 24, at 30-33; HOSMER, *supra* note 24, at 67-68, 102-09.

26. HOSMER, *supra* note 24, at 65-69, 86, 93-94, 237-59.

27. ISE, *supra* note 2, at 144-46; MURTAGH, *supra* note 24, at 52-54.

calling attention to the need to protect our prehistoric heritage as well as our historic buildings.²⁸

Early in the 20th century, Congress took the first formal steps toward preventing the extinction of historical and archeological resources by passing the Antiquities Act, which authorized the government to designate sites of historic importance as national monuments.²⁹ The National Park Service was given responsibility for protecting what eventually became a substantial collection of properties, ranging from civil war battlefields to Hawaiian fishponds.³⁰

The depression of the 1930's spurred a revival of interest in the preservation movement.³¹ To some extent the motivation was economic, spurred by the example of the reconstruction of Williamsburg and its success as a tourist attraction.³² As their traditional economic bases withered, communities such as Key West and Savannah saw the public's fascination with the past as a source of economic development.³³

Franklin Roosevelt's administration conceived preservation of the built environment as one part of a larger program to enhance the beauty of the country through "pump-priming" efforts such as the Civilian Conservation Corps.³⁴ The creation in 1935 of the Advisory Board on National Parks, Historic Sites, Buildings and Monuments helped to consolidate the role of the National Park Service in conserving both the natural and the built environment.³⁵

After World War II, concern about extinction of the built environment was heightened by the destruction of places like Coventry, Lidice, Dresden and Nagasaki.³⁶ The horrors of modern warfare brought home to many Americans the value and fragility of places they had long taken for granted.

The National Trust for Historic Preservation was chartered in 1949

28. KING, *supra* note 24, at 18.

29. 16 U.S.C. § 431. MURTAGH, *supra* note 24, at 53; RUNTE, *supra* note 7, at 71; ISE, *supra* note 2, at 152.

30. KING, *supra* note 24, at 19; RUNTE, *supra* note 7, at 219-20; HAYS, *supra* note 9, at 196-97.

31. MURTAGH, *supra* note 24, at 55-58; KING, *supra* note 24, at 22.

32. See CHARLES B. HOSMER, JR., PRESERVATION COMES OF AGE: FROM WILLIAMSBURG TO THE NATIONAL TRUST, 1926-1949, at 11-73 (1981); Fiske Kimball, *The Restoration of Colonial Williamsburg In Virginia*, 78 ARCHITECTURAL RECORD 357 (1951). Williamsburg became the model for a number of other "Outdoor Museums." MURTAGH, *supra* note 24, at 35-36, 90-102.

33. JAMES M. FITCH, HISTORICAL PRESERVATION: CURATORIAL MANAGEMENT OF THE BUILT WORLD 41-42 (1982); MURTAGH, *supra* note 24, at 58-60.

34. HOSMER, *supra* note 32, at 578-716; ISE, *supra* note 24, at 360; MURTAGH, *supra* note 24, at 56-57.

35. MURTAGH, *supra* note 24, at 58; ISE, *supra* note 2, at 358.

36. CEVAT ERDER, OUR ARCHITECTURAL HERITAGE: FROM CONSCIOUSNESS TO CONSERVATION 181-82 (Ayfer Bakkalcioğlu trans., 1986); FITCH, *supra* note 33, at 375.

and has since served as the focal point for private initiative in the preservation area.³⁷ The Trust brought innovative ideas for adaptive reuse of old buildings, a movement that had previously assumed that preservation demanded museum-like replication of period conditions.³⁸ The Trust also encouraged the use of federal, state and local tax incentives as a means of promoting rehabilitation and reuse of historic structures.³⁹

Postwar preservation reflected a significant broadening of the scope of the preservation movement. The "George Washington Slept Here" mode of early preservation efforts, which preserved a structure because of its association with a famous individual or event, was supplemented by efforts to preserve a wide range of examples of the way daily life was lived.⁴⁰ This paralleled a movement by historians away from a focus on individual leaders and toward a more environmental perspective.⁴¹

Archaeologists similarly grew dissatisfied with filling warehouses with individual artifacts from future reservoir sites and became more concerned with an anthropological approach aimed at re-creating entire past environments.⁴² This required on-site analysis and preservation of antiquities rather than museum storage.⁴³

The new emphasis on preservation of representations of the ordinary way of life further broadened the base of the preservation movement. Groups like the Daughters of the American Revolution, which had been active in the early preservation efforts on the east coast, were joined by a wide range of other groups from all over the country.⁴⁴ African-Americans, among others, found a new interest in their roots, which soon became reflected in a desire to preserve evidence of their early history for future generations.⁴⁵ And Native Americans began to demand new respect for their role in the country's history.⁴⁶

37. MURTAGH, *supra* note 24, at 40-45; ISE, *supra* note 2, at 514.

38. MURTAGH, *supra* note 24, at 116-24.

39. *Id.* at 74-77.

40. KING, *supra* note 24, at 29. See generally JOHN B. JACKSON, *DISCOVERING THE VERNACULAR LANDSCAPE* (1984).

41. *THE ENDS OF THE EARTH: PERSPECTIVES ON MODERN ENVIRONMENTAL HISTORY* (Donald Worster ed., 1988); Richard White, *American Environmental History: The Development of a New Historical Field*, 54 PAC. HIST. REV. 297 (1985). See RICE ODELL, *ENVIRONMENTAL AWAKENING: THE NEW REVOLUTION TO PROTECT THE EARTH* 37-51 (1980).

42. See generally Lewis R. Binford, *Archaeology as Anthropology*, 28 AM. ANTIQUITY 217 (1962).

43. KING, *supra* note 24, at 29-38.

44. ELIZABETH MULLOY, *THE HISTORY OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION, 1963-1973*, at 16, 48, 191-92, 197-99 (1976).

45. LELAND FERGUSON, *UNCOMMON GROUND: ARCHAEOLOGY AND EARLY AFRICAN AMERICA, 1650-1800* (1992); NORMAN L. CROCKETT, *THE BLACK TOWNS* (1979).

46. BRIAN W. DIPP, *THE VANISHING AMERICAN: WHITE ATTITUDES AND U.S. INDIAN POLICY* 325-26 (1991).

In 1966, the federal role in historic preservation increased dramatically with the passage of the National Historic Preservation Act.⁴⁷ The act created the National Register of Historic Places, provided funds for state and local historic preservation programs, and required consideration of historic resources in the evaluation of federal projects.⁴⁸ Tax incentives were subsequently offered for the rehabilitation of historic buildings.⁴⁹

Meanwhile, local governments were expanding their outlook on preservation. They protected historic districts by local ordinances, often because these areas provided significant economic benefits through enhanced land values and the attraction of tourists and conventions.⁵⁰ New York City pioneered a program for the designation of individual landmark buildings that drew attention to the wide range of structures the public sought to preserve.⁵¹

The passage of the National Environmental Policy Act strengthened the hand of opponents of both biological and historical extinction. It provided a forum in which all preservation issues could be considered in the context of major federal actions.⁵² Proponents of projects such as highways and dams found it necessary to accommodate the interests of neighborhoods they previously had ignored and creatures they never knew existed.⁵³

Although the initial programs for historic preservation concentrated on carrots, the need for sticks also became apparent. Laws authorizing the denial of demolition permits for historic buildings became widespread.⁵⁴ Ordinances often prohibited exterior alterations of historic structures without approval of an expert body.⁵⁵ Some ordinances pro-

47. 16 U.S.C. § 470-470w-6 (1966) (amended 1980); see Michael A. Mantell, *The National Historic Preservation Act*, in *MANAGING NATIONAL PARK SYSTEM RESOURCES* 99 (Michael A. Mantell ed., 1990).

48. See Angus E. Crane, *In Search of Timely Compliance with the National Historic Preservation Act*, 4 TUL. ENVTL. L.J. 200 (1990).

49. See, e.g., Final Rule, 45 Fed. Reg. 83,488 (1980).

50. MURTAGH, *supra* note 24, at 103-12. See Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 496-97, 504-17 (1981).

51. Elizabeth C. Gutman, *Landmarks as Cultural Property: An Appreciation of New York City*, 44 RUTGERS L. REV. 427, 431-40 (1992).

52. 42 U.S.C. § 4321 (1970).

53. See COUNCIL ON ENVIRONMENTAL QUALITY, *ENVIRONMENTAL QUALITY: THE THIRD ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY* 221-247 (1972). For an analysis of the effectiveness of federal review and comment procedures, see Rose, *supra* note 50, at 524-33.

54. 3A NORMAN WILLIAMS JR. & JOHN M. TAYLOR, *AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER* § 71B.08, at 44-49 (1985).

55. DANIEL R. MANDELKER, *LAND USE LAW* 435 (2d ed. 1988).

vided bonuses and other incentives for enhancing historic districts.⁵⁶

To a large extent, the movements to conserve the natural environment and the built environment developed on separate paths. However, the legal means used to implement their objectives show significant similarities. In both cases, a complex array of public and private programs evolved from the efforts of private organizations to preserve a few dramatic examples of environments facing extinction.⁵⁷

Could similar techniques be applied to the conservation of human cultural behavior patterns? Should they?

III. HUMAN EXTINCTION

World War II not only made us realize the threat war poses to the built environment; it also brought home the possibility of a far greater horror: genocide. Our confidence that the sophisticated veneer of our civilization reflected rationality of behavior was shattered by the realization that Hitler had enlisted wide support for a plan to wipe an entire people off the face of the earth.⁵⁸

Human extinction is not a new phenomenon. The Caribs and Caloosas, the Aztecs and the Arawaks, and many other populations that once inhabited the Western hemisphere no longer exist.⁵⁹ Easter Island stands as a tangible monument to the art and skill of a people who became extinct after their encounter with western civilization.⁶⁰

But the idea that a dictator could skillfully manipulate ancient prejudices—to the point that they overwhelmed the humanity and rationality with which we thought people were naturally endowed—forced us to reconsider our own values. The growing support for civil rights was at least in part a reaction to the war, as was the emerging movement

56. See, e.g., Norman Marcus, *Villard Preserv'd: Or, Zoning for Landmarks in the Central Business District*, 44 BROOK. L. REV. 1 (1977).

57. Joseph Sax has been exploring certain common elements in the early history of the natural conservation and historic preservation movements. See Joseph L. Sax, *Heritage Preservation as a Public Duty: The Abbe Gregoire and the Origins of an Idea*, 88 MICH. L. REV. 1142 (1990); Joseph L. Sax, *Is Anyone Minding Stonehenge? The Origins of Cultural Property Protection in England*, 78 CALIF. L. REV. 1543 (1990). See also Dobson, *supra* note 15, at 285-86.

58. GERALD REITLINGER, *THE FINAL SOLUTION: THE ATTEMPT TO EXTERMINATE THE JEWS OF EASTERN EUROPE, 1939-1945* (1961); RAUL HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS* (1961); RAINER C. BAUM, *THE HOLOCAUST AND THE GERMAN ELITE* 295-304 (1981); see HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 335-51 (2d ed. 1958).

59. See generally ALFRED W. CROSBY, *ECOLOGICAL IMPERIALISM: THE BIOLOGICAL EXPANSION OF EUROPE, 900-1900* (1986); WILLIAM H. MCNEILL, *PLAGUES AND PEOPLES* 199-217 (1976). For a current description of a more subtle but equally destructive impact, see P.F. KLUGE, *THE EDGE OF PARADISE: AMERICA IN MICRONESIA* (1991).

60. See generally SEBASTIAN ENGLERT, *ISLAND AT THE CENTER OF THE WORLD* (1970); J. DOUGLAS PORTEOUS, *THE MODERNIZATION OF EASTER ISLAND* 15-17 (1981).

to teach children appreciation and tolerance of the values of other cultures.

Today the risk that Americans would consciously cause the extinction of any specific population may seem remote. But extinction of human populations, like extinction of wildlife or structures, may result without conscious causation. Groups of people in the United States who share unique cultural behavior patterns are in danger of becoming extinct if present trends continue. One such group is the Old Order Amish.

Former Chief Justice Burger had occasion to describe the cultural behavior patterns of the Amish in his opinion in *Wisconsin v. Yoder*.⁶¹ He described the Amish as descendants of

[t]he Swiss Anabaptists of the 16th century who rejected institutionalized churches and sought to return to the early, simple, Christian life de-emphasizing material success, rejecting the competitive spirit, and seeking to insulate themselves from the modern world A related feature of Old Order Amish communities is their devotion to a life in harmony with nature and the soil, as exemplified by the simple life of the early Christian era that continued in America during much of our early national life Amish society emphasizes informal learning-through-doing; a life of "goodness," rather than a life of the intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporarily worldly society.⁶²

Consider, for example, one of the most dramatic and picturesque of the Amish institutions, the barn raising, as described by a neighbor of an Amish community:

I was invited to a barn raising near Wooster, Ohio. A tornado had leveled four barns and acres of prime Amish timber. In just three weeks the downed trees were sawn into girders, posts, and beams and the four barns rebuilt and filled with livestock donated by neighbors to replace those killed by the storm. Three weeks. Nor were the barns the usual modern, one-story metal boxes hung on poles. They were huge buildings, three and four stories high, post-and-beam framed, and held together with hand-hewn mortises and tenons. I watched the raising of the last barn in open-mouthed awe. Some 400 Amish men and boys, acting and reacting like a hive of bees in absolute harmony of cooperation, started at sunrise with only a foundation and floor and by noon, *by noon*, had the huge edifice far enough along that you could put hay in it.

A contractor who was watching said it would have taken him and a beefed-up crew all summer to build the barn if, indeed, he could find

61. 406 U.S. 205 (1972).

62. *Id.* at 210-11. See generally DONALD R. KRAYBILL, *THE RIDDLE OF AMISH CULTURE* (1989); JOHN A. HOSTETLER, *AMISH SOCIETY* (3d ed. 1980).

anyone skilled enough at mortising to do it.⁶³

The cultural behavior patterns reflected by an Amish barn raising cannot be preserved simply by preserving the barn itself. The values and training that produce the barn will continue to exist only if the Amish continue to exist as a viable community in numbers sufficient to reinforce their values and make their skills useful.

The issue in *Wisconsin v. Yoder* was whether state laws mandating compulsory attendance in high school should be applied to Amish children despite Amish families' objections. The court cited expert testimony "that compulsory high school attendance could not only result in great psychological harm to Amish children, because of the conflicts it would produce, but would also . . . ultimately result in the destruction of the Old Order Amish church community as it exists in the United States today."⁶⁴

In the *Yoder* case, the only interest groups that would have been disadvantaged by tolerance to the Amish were teachers and other people who believe in the universal value of higher education. But the groups were adversely affected only in a diffuse and insignificant way. What if the actions taken to benefit the Amish were to have the direct effect of depriving other people of benefits they would otherwise expect to obtain? A modest but typical example is presented by a current controversy in central Illinois, as described on December 8, 1991, in the *Chicago Tribune*:

The merchants and outdoorsmen who want a bicycle trail built through the flat farmland of eastern Illinois are finding they have a wider chasm to bridge than the Kaskaskia River valley that winds through the area.

Their plan to attract bicyclists, some of whom would arrive in skintight Lycra outfits riding sleek, high-tech machines, is not sitting well with the humble, plain-clothed Amish farmers who ply the roads in horse-drawn buggies.

But it's not the visitors who keep on riding that worry the Amish, nor those who stop to buy some of their wares, but the curious ones who will stop, stare and interfere with their lives.⁶⁵

The state of Illinois has already spent \$325,000 of the taxpayers' money buying the old Penn Central right of way between Lovington and

63. Gene Logsdon, *The Barn Raising*, in *AMISH ROOTS: A TREASURY OF HISTORY, WISDOM, AND LORE* 78-79 (John A. Hostetler ed., 1990). See also FREDERIC KLEES, *THE PENNSYLVANIA DUTCH* 393-96 (1950). The Amish are also famous quiltmakers. See RACHEL PELLMAN & KENNETH PELLMAN, *THE WORLD OF AMISH QUILTS* (1984); ROBERT BISHOP & ELIZABETH SAFANDA, *A GALLERY OF AMISH QUILTS: DESIGN DIVERSITY FROM A PLAIN PEOPLE* (1976).

64. 406 U.S. at 212. For the Amish perspective on the litigation, see STEVEN M. NOLT, *A HISTORY OF THE AMISH* 256-63 (1992).

65. Hugh Dellios, *Amish See Proposed Bike Trail as Threat*, CHI. TRIB., Dec. 8, 1991, § 2, at 1.

Oakland, including the stretch through Amish country. While the state has put off an immediate decision, it will eventually need to decide whether to proceed with the bike trail or to accede to the Amish request that it not be built, thereby disappointing the expectations of those seeking outdoor recreation and casting great doubt on the wisdom of the land acquisition.⁶⁶ At that point, it will be necessary to consider the First Amendment issues alluded to earlier.

IV. EXTINCTION AND RELIGION

In the *Yoder* case, Chief Justice Burger justified tolerance for the Amish with the following admonition:

We must not forget that in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles. There can be no assumption that today's majority is "right" and the Amish and others like them are "wrong." A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.⁶⁷

This proposition bears a striking resemblance to one of the primary reasons given for preventing the extinction of biological species: that their particular combination of genes may hold unique benefits for future human populations, e.g., more productive crops or more effective medicines.⁶⁸ Similarly, we preserve models of the built environment so that they may inspire creative ideas for future generations who may find that our present solutions don't answer their needs.⁶⁹ It may be, therefore, that the experience with preservation of the natural and built environment will be useful in analyzing possible ways to help the Amish.

Most of the people who desire to protect the behavior patterns that produce the Amish barn raising probably have little interest in the theological concerns of the Amish, nor would they care whether the behavior was motivated by religion at all. It is the behavior that people seek to protect, not the convictions from which it originated. But many of the "odd and erratic" behavior patterns that we might choose to preserve from extinction would be engaged in by a group, like the Amish, on the basis of religious conviction. Protection of such behavior patterns would thus undoubtedly raise issues under the First Amendment.

66. *Id.* For an example of a federally supported trail program, see the Ice Age National Scenic Trail, 16 U.S.C.A. § 1244(a)(10) (West Supp. 1991).

67. 406 U.S. at 223-24.

68. Dobson, *supra* note 15.

69. See JOHN J. COSTONIS, *ICONS AND ALIENS: LAW, AESTHETICS, AND ENVIRONMENTAL CHANGE* 46-51 (1989).

The *Yoder* case is one of the few in which a religious group has prevailed in the Supreme Court on a free exercise claim.⁷⁰ At the time, the decision seemed quite significant.⁷¹ Although in *Sherbert v. Verner*⁷² the Court had said that only a "compelling interest" could justify regulation of religion, the Court had been easily "compelled" by various purposes, and in other contexts the Court had expressed strong support for compulsory school attendance laws.⁷³

Scholarly commentary on the *Yoder* opinion has typically been puzzled, if not actually hostile. Robert Bork and Walter Berns have both accused the Court of "establishing" the Amish religion as an official religion of the United States.⁷⁴ Other commentators have expressed concern that protection for the "less acculturated" religions will adversely and unfairly affect mainline religious denominations.⁷⁵ And some have attributed the Amish victory to the unique hardships imposed by Amish life, which would reduce the likelihood that insincere claimants would adopt the Amish religion in order to avoid school.⁷⁶ Only a few commentators have praised *Yoder* as an example of "liberal generosity."⁷⁷

Surprisingly, perhaps, few people have paid much attention to the emphasis the *Yoder* opinion gave to the Amish's evidence that public

70. See Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 30 (1985); Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 756 n.51 (1992) ("Yoder is the only truly countercultural free exercise decision . . ."). If Chief Justice Burger represented the counterculture, who represented the culture?

71. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 856-57 (1st ed. 1978).

72. 374 U.S. 398 (1963).

73. The court emphasized the importance of compulsory school attendance in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). See also *Ambach v. Norwick*, 441 U.S. 68, 77 (1979), discussed in Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992).

74. WALTER BERNS, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* 38 (1976); ROBERT H. BORK, *THE TEMPTING OF AMERICA* 248 (1990). See also Shelly K. Wessels, *The Collision of Religious Exercise and Governmental Nondiscrimination Policies*, 41 STAN. L. REV. 1201, 1205-06 (1989).

75. Angela C. Carmella, *A Theological Critique of Free Exercise Jurisprudence*, 60 GEO. WASH. L. REV. 782, 788 (1992). See also Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 59 (1989). For a statistical analysis of the prevalence of free exercise victories by marginal religions, see Frank Way and Barbara J. Burt, *Religious Marginality and the Free Exercise Clause*, 77 AM. POL. SCI. REV. 652 (1983).

76. Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. REV. 299, 325-27.

77. WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* 295 (1991). See also Ronald R. Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1065 (1983) (*Yoder* recognizes groups' rights to communality); John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 792 (1986) (alleviates special suffering of the Amish); David E. Steinberg, *Religious Exemptions as Affirmative Action*, 40 EMORY L.J. 77, 78 (1991) (*Yoder* justified by analogy to racial preferences); Steven D. Smith, *The Restoration of Tolerance*, 78 CAL. L. REV. 305, 353 (1990) (*Yoder* an example of tolerance).

secondary education of their children would lead to the extinction of the Amish way of life. In a recent analysis, Professors Glendon and Yanes recognize the importance of this element of the case.⁷⁸ They point to the careful case preparation that produced convincing evidence on the extinction issue,⁷⁹ and suggest that it was the Court's recognition of the centrality of the Amish' educational practices to the continuation of their way of life that persuaded the Court to reach the result it did.⁸⁰

The best evidence of the importance of the extinction argument to the *Yoder* result comes from the so-called "second Amish case," *United States v. Lee*.⁸¹ Here poor preparation of the case led to a unanimous decision rejecting the Amish' claim that they should be exempt from paying social security taxes on grounds that they refused to accept social security benefits.⁸² Obviously, the inconvenience or even unfairness associated with forcing the Amish to pay taxes for benefits they refused to accept did not compare in the seriousness of its impact to the threat to their educational system and their way of life.

The urgency of the underlying free exercise issue has recently been aggravated by the Supreme Court's reinterpretation of the "free exercise" clause in *Employment Division v. Smith*, in which the Court upheld denial of unemployment compensation benefits to Native American drug counselors convicted of using peyote in violation of state criminal laws.⁸³ The Court now proposes to leave to the political process all restrictions that do not "attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs. . ." by defining them as "neutral regulations of general applicability" and thus not violative of the free exercise clause.⁸⁴

The majority in *Smith* concedes that

it may fairly be said that leaving accommodation [of religion] to the political process will place at a relative disadvantage those religious

78. Mary A. Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 504-06 (1991).

79. *Id.* at 505.

80. *Id.* at 506-7. See also Michael J. Sandel, *Freedom of Conscience or Freedom of Peace*, in ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY 74 (James Davison Hunter & Os Guinness eds., 1990); Stephen L. Pepper, *The Case of The Human Sacrifice*, 23 ARIZ. L. REV. 897, 932 n.69 (1981).

81. 455 U.S. 252 (1982).

82. William Bentley Ball, *Accountability: A View from the Trial Courtroom*, 60 GEO. WASH. L. REV. 809, 814-15 (1992).

83. 494 U.S. 872 (1990). The *Yoder* case was distinguished as a case based on both the free exercise clause and on the right of parents to control their childrens' education. *Id.* at 881, n.1, 895. For a concise treatment of peyotism see EDWARD F. ANDERSON, PEYOTE: THE DIVINE CACTUS (1980).

84. 494 U.S. at 879, 882.

practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.⁸⁵

In concurring in the result, Justice O'Connor was sharply critical of that statement and pointed out that "[t]he history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish."⁸⁶

The majority's determination to leave most religion issues to the political process also implies the likelihood that the Court may relax the strict "separation of church and state" principle it has previously employed in many establishment clause cases.⁸⁷ Indeed, the Court said that "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well," citing state statutes that have exempted certain religious practices from otherwise neutrally applicable criminal laws.⁸⁸

Few recent opinions have been as widely criticized as *Smith*.⁸⁹ Scorn has been heaped on the reasoning of the majority opinion from every ideological quarter,⁹⁰ even by people who agree with the result.⁹¹ The Court's attempt to portray the opinion as consistent with earlier cases has been especially criticized, with one commentator calling it "an

85. *Id.* at 890. Numerous lower court decisions have followed *Smith* in upholding the application of licensing and zoning regulations to religious facilities. See, e.g., *Health Services Division v. Temple Baptist Church*, 814 P.2d 130 (N.M. Ct. App. 1991); *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991).

86. 494 U.S. at 902.

87. Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, 842-45 (1992).

88. 494 U.S. at 890. Only the free exercise clause, not the establishment clause, was at issue in the case, but the majority in dicta used language supportive of an "accommodationist" position on the establishment clause. See *supra* note 85. Justice Scalia tried unsuccessfully to find a majority for such an interpretation of the establishment clause in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 38 (1989). See also *Lee v. Weisman*, 112 S. Ct. 2649 (1992).

89. For a list of critical commentary on *Smith*, see Lupu, *supra* note 70, at 754 n.44.

90. Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 7-23; Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671, 687-93 (1992); Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 231-37 (1991); Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 570-574 (1991); Lupu, *supra* note 70, at 754-59; Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 215-216 (1992); McConnell, *supra* note 73, at 139.

91. Jesse H. Choper, *The Rise and Decline of the Constitutional Protection of Religious Liberty*, 70 NEB. L. REV. 651, 670-80 (1991); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 309 (1991). See Michael W. McConnell, *Accommodation of Religion: An Update and a Response to Critics*, 60 GEO. WASH. L. REV. 685, 726 (1992).

almost Orwellian" rewrite of history.⁹² In particular, no one seems willing to accept the *Smith* opinion's characterization of *Yoder* as an opinion dependent on a conjunction of free exercise rights and some amorphous parental right to control the education of children.⁹³

If future Courts abandon the search for a simple bright line rule, a more realistic and useful way of distinguishing *Yoder* would be to recognize it as a case in which the fear of causing extinction overrode strong public purposes. The legitimacy of this analysis can be seen from an examination of a similar case in which an extinction argument was recently rejected, *Lyng v. Northwest Indian Cemetery Protective Association*.⁹⁴ In an opinion by Justice O'Connor for a five justice majority, the Court ruled against a free exercise challenge to the paving of a Forest Service road that would have attracted visitors to Chimney Rock, an area used by Indian tribes for religious ceremonies. The Court said that even if it were assumed that the road would virtually destroy the Indians' religion, the Indians could not have "a veto over public programs that do not prohibit the free exercise of religion."⁹⁵

The *Lyng* opinion has been characterized as evidence of the Court's indifference to the extinction of Indian religions.⁹⁶ However, a more charitable reading of the opinion would emphasize the Court's repeated recognition that the Forest Service had engaged in an open and exhaustive process of weighing a wide range of alternative actions and policies in terms of their impact, not only on Indian religions, but on a whole range of other environmental issues. The Court also acknowledged that

92. James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91 (1991). See also McConnell, *Free Exercise*, *supra* note 90, at 1120-28; David C. Williams and Susan H. Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L. REV. 769, 842-43 (1991).

93. Laycock, *supra* note 90, at 37; McConnell, *supra* note 90, at 1121; Gedicks, *supra* note 90, at 687; Choper, *supra* note 91, at 675-76. On the other hand, a few commentators seem at least satisfied with the result of the reinterpretation. See Martha Minow, *The Free Exercise of Families*, 1991 U. ILL. L. REV. 925, 928-29 ("[R]eligion and family come to seem like separate realms, deserving distinctive recognition and constitutional defense."). David Smolin, writing from an Evangelical Christian viewpoint, agrees that the parents' right to control their children is fundamental. "State power to educate children, or to remove children from their home, includes the power to attempt cultural genocide." David M. Smolin, *Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry*, 76 IOWA L. REV. 1067, 1101-02 (1991). See James McBride, *There is No Separation of God and State: The Christian New Right Perspective on Religion and the First Amendment*, in *CULTS, CULTURES AND THE LAW: PERSPECTIVES ON NEW RELIGIOUS MOVEMENTS* 206 (Thomas Robbins et al. eds., 1985).

94. 485 U.S. 439 (1988).

95. 485 U.S. at 452. "The catalog is lengthy of instances where the Supreme Court has had difficulty bringing into focus the social dimension of human personhood, and also the kinds of communities that nourish this aspect of an individual's personality." MARY A. GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 114 (1991).

96. "One might think that the government would have to give some substantial justification to destroy a religion." McConnell, *supra* note 73, at 125-26. See also 485 U.S. at 459 (Brennan, J., dissenting.)

the Forest Service had gone a long way toward trying to reach a compromise with an Indian group that sought, in the Court's words, "*de facto* beneficial ownership of some rather spacious tracts of public property."⁹⁷ Although the Court said judges should not weigh the "centrality" of various religious beliefs,⁹⁸ the Court clearly believed that as long as the Indians retained the right to visit their sacred sites, they would not be effectively prohibited from exercising their religion.⁹⁹

Dicta in both *Lyng* and *Smith* suggest that the Court will allow legislatures a wide range of discretion in the adoption of measures designed to accommodate religion.¹⁰⁰ This has aroused concern that the more successful a religious group is in obtaining legislative accommodation, the less likely it is to need that protection to preserve its practices from extinction.¹⁰¹

But if we examine the actual result of *Lee*, *Lyng* and *Smith*, we find that in each instance a legislative body eventually reversed the Court's decision, and the claims of these small religious groups prevailed in the end.¹⁰² While these three examples do not prove that there is no reason to be concerned about potential favoritism to mainline religions, they at least suggest the utility of exploring how government programs could be used in a manner that fairly considers the legitimate fears of extinction of

97. 485 U.S. at 453. The court described the attempt extending over more than a ten year period to resolve the dispute during review of the road's environmental impact statement. *Id.* at 442-43, 454-55. It pointed out the "Indians themselves were far from unanimous in opposing" the road and that "it seems less than certain that construction of the road will be so disruptive that it will doom their religion." *Id.* at 451.

98. *Id.* at 457.

99. *Id.* at 453. See Ronald R. Garet, *Dancing to Music: An Interpretation of Mutuality*, 80 KY. L.J. 893, 946-47 (1991-92). The Australian government has had a difficult time dealing with many of the Aborigine tribes because the tribes believe that even telling outsiders the location of sacred sites is a violation of their religion. See FRED P. BOSSELMAN, IN THE WAKE OF THE TOURIST: MANAGING SPECIAL PLACES IN EIGHT COUNTRIES 80-89 (1978).

100. Although there is some doubt whether the logic of *Smith* requires any particular readjustment in establishment clause thinking, see McConnell, *supra* note 73, at 166-68, many commentators have assumed that the current court has a majority in favor of a more relaxed supervision of government accommodations of religion. See Lupu, *supra* note 70, at 762-66; Laycock, *supra* note 87. See also ARLIN M. ADAMS & CHARLES J. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES 58-65 (1990). But see Mary A. Glendon, *Law, Communities, and the Religious Freedom Language of the Constitution*, 60 GEO. WASH. L. REV. 672, 682-83 (1992).

101. Christopher E. Smith & Linda Fry, *Vigilance or Accommodation: The Changing Supreme Court and Religious Freedom*, 42 SYRACUSE L. REV. 893, 939-40 (1991); Sullivan, *supra* note 90, at 216; Lupu, *supra* note 90, at 611; Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 359-60 (1986).

102. The Oregon legislature reversed *Smith* by exempting Indian use of peyote from drug laws in 1991. OR. REV. STAT. § 475.992(5). See Sullivan, *supra* note 90, at 216 n.98. Congress reversed *Lee* when it "carefully designed an exemption from the self-employment tax" for the Amish. Lupu, *supra* note 70, at 777, citing 26 U.S.C. § 1402(g). And the road project that generated the *Lyng* decision was defunded in 1989. McConnell, *supra* note 91, at 742 n.257.

small religious groups.¹⁰³

Part of such an inquiry should include an examination of the government programs which have been used to avoid the extinction of the natural and the built environment to see if they would be effective in dealing with human cultural behavior patterns. In regard to plants, animals or buildings, these programs are non-interactive; that is, the objects of preservation are presumably unaware that the government seeks to protect them.¹⁰⁴ With human cultural behavior patterns, we must ask whether any program designed to protect them would have a feedback effect on the humans who are aware that the government is seeking to protect them. And we must evaluate not only our own perceptions of equitable treatment for all religious groups but the perceptions of the groups themselves.

V. ACCOMMODATING COUNTER-ASSIMILATIONISTS

The environmental conservation and historic preservation move-

103. Professor Lupu argues that accommodations that are sect-specific, ad hoc and less visible are most likely to be discriminatory. Lupu, *supra* note 70, at 778. He cites no empirical evidence to support that assumption.

104. The Court has agreed to hear a case in the 1992-93 term that presents still another interaction of religious and environmental issues arising out of the application of an "animal rights" ordinance to bar a Caribbean-based religious practice of animal sacrifice. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 723 F. Supp. 1467, *aff'd mem.*, 936 F.2d 586, *cert. granted*, 112 S. Ct. 1472 (1992). See Gerald V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245 (1991). For a sympathetic view of Santeria see MIGENE GONZALEZ-WIPPLER, *SANTERIA, THE RELIGION: A LEGACY OF FAITH, RITES AND MAGIC* (1989). See also James R.P. Ogloff and Jeffrey E. Pfeifer, *Cults and the Law: A Discussion of the Legality of Alleged Cult Activities*, 10 BEHAVIORAL SCIENCES AND THE LAW 117, 135 (1992). For more negative perspectives on such practices see LARRY KAHANER, *CULTS THAT KILL: PROBING THE UNDERWORLD OF OCCULT CRIME* 111-29 (1988). The potential for abuse of sect-specific religious exemptions exists, but courts have had little difficulty rejecting claims of non-native Americans that they have adopted Indian religions, thus entitling them, for example, to engage in Indian rituals, *Rupert v. Director, United States Fish and Wildlife Service*, 957 F.2d 32 (1st. Cir. 1992), *Rupert v. City of Portland*, 605 A.2d 63 (Me. 1992), or to use peyote. *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991). Claims by churches that they should be exempt from historic preservation laws have proved troublesome when the laws limit the group's rights to make liturgically-based structural changes. See *First Covenant Church of Seattle v. City of Seattle*, 787 P.2d 1352 (Wash. 1990), *vacated and remanded*, 111 S. Ct. 1097 (1991) (for further consideration in light of *Smith*). See also *Society of Jesus of New England v. Boston Landmarks Commission*, 564 N.E.2d 571 (Mass. 1990) (interpreting state constitution). But where the church's motivation was economic gain, the Second Circuit rejected its objections, citing *Smith*. *Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), *cert. denied sub nom. Committee to Oppose Sale v. Rector, Wardens v. City of New York*, 111 S. Ct. 1103 (1991). See Alan C. Weinstein, *The Myth of Ministry vs. Mortar: A Legal and Policy Analysis of Landmark Designation of Religious Institutions*, 65 TEMP. L. REV. 91 (1992); Richard F. Babcock and David A. Theriaque, *Landmarks Preservation Ordinances: Are the Religion Clauses Violated by Their Application to Religious Properties*, 7 J. LAND USE & ENVTL. L. 165 (1992); Thomas Pak, Note, *Free Exercise, Free Expression and Landmarks Preservation*, 91 COLUM. L. REV. 1813 (1991); Gutman, *supra* note 51, at 455-65.

ments have evolved along independent but parallel paths. Both have expanded the reach of governmental involvement to include a similar range of programs:

1. Land acquisition and management by all levels of government;¹⁰⁵
2. Development of official criteria for defining subjects worthy of conservation, such as the National Register and the list of endangered species;¹⁰⁶
3. Tax incentives;¹⁰⁷
4. Economic tradeoffs for conservation efforts in the form of such devices as "mitigation" for permits or transfer of densities;¹⁰⁸
5. Impact analysis and redesign of projects undertaken by, or requiring the approval of, government agencies;¹⁰⁹ and
6. Criminal penalties for serious violations of rules designed to prevent extinction.¹¹⁰

It is clear that government acquisition and management of a "reservation" of land for the Amish would be completely unacceptable to the Amish themselves. Even the designation of the Amish on a "register" or "list" of appropriate beneficiaries of government assistance might well conflict with their distrust of the impersonal bureaucratic structures of modern industrial society.¹¹¹ On the other hand, the Amish would not object, I assume, if the government waived the requirements for building permits and fees for their barn raisings, since some of them have gone to jail rather than pay such fees.¹¹²

To the extent that those benefits were required to be provided to the Amish under the free exercise clause they would be supportive of the underlying Amish belief in tolerance and non-interference in the affairs of other people. As Professor McConnell has put it, "The ideal of free exercise is counter-assimilationist; it strives to allow individuals of different religious faiths to maintain their differences in the face of powerful pressures to conform."¹¹³ But benefits inevitably carry with them some

105. *Supra* notes 6, 7, 29 and 30.

106. *Supra* notes 18, 19 and 48.

107. *Supra* notes 22 and 49.

108. *Supra* notes 20 and 56.

109. *Supra* note 52.

110. *Supra* notes 12, 23, 54 and 55.

111. See KRAYBILL, *supra* note 62, at 225-28. In common with other ethnic groups, the Amish aggressively defend their neighborhood as much out of a negative perception of modern trends as out of nostalgia for the past. "The attachment to place seems less an unselfconscious association of habitual action and local ways of life, and more a strategy for resisting the alienation and isolation of modern life through the self-conscious creation of meaning." J. NICHOLAS ENTRIKIN, *THE BETWEENNESS OF PLACE: TOWARDS A GEOGRAPHY OF MODERNITY* 64 (1991).

112. Gene Logsdon, *Henry Hershberger and the Building Permit*, in *AMISH ROOTS*, *supra* note 63, at 164-65.

113. McConnell, *Free Exercise*, *supra* note 90, at 1139. For a discussion of the ethical issues involved in discrimination against counter assimilationist groups, see Richard H. McAdams, *Relative Preferences*, 102 *YALE L.J.* 1, 97-99 (1992). For contrasting views on the inevitability of univer-

element of government endorsement, which creates the basic paradox: Can counter-assimilationists whose beliefs center on rejection of the values of the majority of society survive the admiration of that same majority?

As part II of this paper indicated, we have developed a history of intervention to forestall the extinction of beings and things. Are there analogues from that experience that would be useful to us in addressing the Amish?

One of the more counter-assimilationist beings in North America is *ursus horribilis*, the grizzly bear. Its encounters with *homo sapiens* have often proved unpleasant for both species.¹¹⁴ Have we learned lessons from our experience in dealing with the grizzly bear that might be usefully applied to the Amish?

Historically, our first reaction to this bear was to clear space on the wall for a magnificent hunting trophy. The challenge that the animal presented to hunters made it a highly valued target well into the 20th century.¹¹⁵ As evidence of the species' decline mounted, however, efforts were made to preserve the populations remaining in certain areas, including Yellowstone and Glacier National Parks and the national parks in Alaska.¹¹⁶ Because of the popularity of these parks with human hikers and campers, the potential interaction with grizzly bears tended to become a dominant factor in the experience of those park visitors who ventured off the main roads.¹¹⁷

In addition, because grizzly bears occupy an enormous range, the territory of the bear populations that encompassed these national parks also encompassed many square miles of surrounding lands, much of which was used for ranching, agriculture, forestry or human settlement.¹¹⁸ Occupants of this land sometimes found the bears' proximity a

sal assimilation, see Karst, *supra* note 101, at 332 *et seq.*, and FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920, at 239-44 (1984).

114. W.J. SCHOONMAKER, THE WORLD OF THE GRIZZLY BEAR 140 (1968).

115. *Id.* at 176; C. B. Penrose, *An Encounter with a Grizzly Bear*, in HUNTING AND CONSERVATION: THE BOOK OF THE BOONE AND CROCKETT CLUB 66 (George B. Grinnell & Charles Sheldon eds., 1925). Regarding continued hunting of Grizzlies, see *Fund for Animals, Inc. v. Turner*, 1991 U.S. Dist. LEXIS 13426 (D.D.C. 1991) (enjoining sport hunt of grizzly bear in Montana).

116. In 1975, the species was classified as threatened under the Endangered Species Act. 40 Fed. Reg. 31734-36 (1975). There are now less than 1000 grizzly bears in the lower 48 states. John Balzar, *Man May Prove to be More than the Grizzly Can Bear*, L.A. TIMES, April 15, 1992, at A1. On April 20, 1992, the Fish and Wildlife Service undertook a study of potential endangered status, 57 Fed. Reg. 14,378 (1992).

117. DAN R. SHOLLY WITH STEVEN M. NEWMAN, GUARDIANS OF YELLOWSTONE: AN INTIMATE LOOK AT THE CHALLENGE OF PROTECTING AMERICA'S FOREMOST WILDERNESS PARK 81-83 (1991).

118. The grizzlies in the Yellowstone area have expanded their range into nearby federal lands.

hazard, or at least a nuisance.¹¹⁹

Very early in the process, human occupants of the grizzly bears' territory sometimes sought to use the bear as a tourist attraction by forcing the bears to fight with bulls.¹²⁰ At a later and less brutal stage, people would simply drive to the town dump at sundown to watch the bears scavenge for garbage.¹²¹ Even the national park rangers would use artificial means to satisfy the desire of the park visitors for a "close-up shot" for their cameras.¹²²

Bears that became assimilated to the proximity of humans, however, soon suffered several undesirable behavioral changes, including a loss of self-sufficiency in the wild and a tendency to search for human food in unwelcome places, such as campers' tents.¹²³ Conservation biologists and wildlife managers quickly came to the conclusion that the only way to preserve the grizzly bear was by the strict separation of bears and humans.¹²⁴

Now consider another analogy, this time from the built environment. When the French gave up their territorial claims in North America early in the 19th century they left a substantial settlement of what became French-Americans in New Orleans, many on whom lived in a section of town known as the *vieux carre* or French Quarter.¹²⁵ The architectural style of the buildings carried forward many elements of

Kurt J. Repanshek, *Grizzlies on the Way Back But Aren't Out of the Woods Yet*, L.A. TIMES, Oct. 6, 1991, at B5.

119. ANDY RUSSELL, *GRIZZLY COUNTRY* 213-16 (1967). "Rural areas adjacent to the remaining bear sanctuaries . . . generate significant land-user opposition to protecting both habitat and the bears themselves." Repanshek, *supra* note 118, at B5. See Kevin Bixby, *Predator Conservation, in BALANCING ON THE BRINK OF EXTINCTION: THE ENDANGERED SPECIES ACT AND LESSONS FOR THE FUTURE* 199, 205-06 (Kathryn A. Kolm ed., 1991); Joseph L. Sax & Robert B. Keiter, *Glacier National Park and Its Neighbors: A Study of Federal Interagency Relations*, 14 *ECOLOGY L.Q.* 207, 214-15 (1987); RICHARD J. TOBIN, *THE EXPENDABLE FUTURE: U.S. POLITICS AND THE PROTECTION OF BIOLOGICAL DIVERSITY* 156-60 (1990).

120. Horace Bell, *Bull-and-Bear Fights*, in BESSIE D. HAYNES & EDGAR HAYNES, *THE GRIZZLY BEAR: PORTRAITS FROM LIFE* 75 (1966).

121. M.P. Skinner, *The Hungry Grizzlies of Yellowstone Park*, in *THE GRIZZLY BEAR*, *supra* note 120, at 347.

122. SHOLLY, *supra* note 117, at 81. See JOSEPH L. SAX, *MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS* 86 (1980).

123. SHOLLY, *supra* note 117, at 82.

124. THOMAS MCNAMEE, *NATURE FIRST: KEEPING OUR WILD PLACES AND WILD CREATURES WILD* 30-34 (1987). Daniel Glick, *Grizzlies Come Back*, *NEWSWEEK*, Sept. 7, 1992, at 60. But see Geoffrey O'Gara, *A Grizzly's Place*, *SIERRA*, Sept.-Oct. 1992, at 57. Currently a private entrepreneur is proposing to build a zoo called "Grizzly Park" just outside Yellowstone as a refuge for "nuisance bears." Ann Vileisis, *Will Gateway Zoo Lure Yellowstone's Grizzlies?*, *HIGH COUNTRY NEWS*, Apr. 20, 1992, at 4.

125. NATHANIEL C. CURTIS, *NEW ORLEANS: ITS OLD HOUSES, SHOPS AND PUBLIC BUILDINGS* 21-44 (1933).

18th century French design.¹²⁶

Local attempts to preserve the ambiance of the French Quarter began early in the 20th century and provided some of the leading cases on the validity of historic preservation as a public purpose.¹²⁷ A separate board was created to review all applications to demolish or modify buildings in the quarter, and new buildings also had to meet strict design criteria. Even today, new public works projects in the quarter are likely to generate litigation.¹²⁸

From many perspectives, the preservation of the French Quarter has been successful beyond the wildest dreams of its original proponents. The area is a major tourist attraction that has been seen by millions; property values are high, and businesses in the area are thriving.¹²⁹ The architectural design elements that originally characterized the area have been retained and embellished.¹³⁰

In other ways, of course, today's French Quarter bears few resemblances to the area occupied by the early French settlers. More effort could be made to acquaint the visitors with the history of the settlers and the relationship of the design elements to the historical environment in which they originated. But the quibbling of purists cannot seriously detract from the fact that the French Quarter of New Orleans is one of the world's great tourist attractions in which historic preservation is a key element.¹³¹

Is the French Quarter an appropriate model for the Amish, or is it the grizzly bear? Thousands of visitors come to places such as Shipshewana, Indiana, and Intercourse, Pennsylvania, attracted both by the beautiful quilts and handicrafts made by the Amish people and by the opportunity to observe a simpler way of life.¹³² But the Amish try to keep that observation at a distance, discouraging photography or other

126. *Id.* at 47-125; MARY CABLE, *LOST NEW ORLEANS* 10 (1980).

127. JACOB MORRISON, *HISTORIC PRESERVATION LAWS* 33-35 (2d ed. 1965); HOSMER, *supra* note 32, at 290-306; MURTAGH, *supra* note 24, at 59, 105; Rose, *supra* note 50, at 139.

128. The construction of an aquarium on the levee adjacent to the French Quarter was the focus of lengthy litigation. See *Vieux Carre Property Owners, Residents and Associates, Inc. v. Brown*, 948 F.2d 1436 (5th Cir. 1991).

129. New Orleans officials estimate that at least 10% of the city's revenue is derived from tourism. JOHN E. ROSENOW & GERRELD L. PULSIPHER, *TOURISM: THE GOOD, THE BAD AND THE UGLY* 139 (1980).

130. OLIVER EVANS, *NEW ORLEANS* 5 (1959) ("[E]verything in New Orleans looks much older than it is In five years a house . . . will have a look . . . of having been gently and gradually caressed for generations by fine fingers of fungi."). See LLOYD VOGT, *NEW ORLEANS HOUSES: A HOUSE-WATCHERS' GUIDE* 13 (1985).

131. See FITCH, *supra* note 24, at 52; Rose, *supra* note 50, at 512.

132. See Rick Black, *Shadow from Developers Dims Amish Paradise*, CHI. TRIB., May 10, 1992, at A21 (Amish settlements in Lancaster County, Pa. are under heavy development pressure).

visitor activities that they would consider invasive of their privacy.¹³³ This produces a tension within the Amish community itself between those who profit from the visitors' spending and those who object to their distracting influence; but such tensions are inherent in counter-assimilationist behavior patterns.¹³⁴

So should the state satisfy the desires of outdoor recreationists for a bike trail, or should it respect the concerns of the Amish for their privacy? Public land managers are likely to find this issue less difficult than the discussion at the theoretical level has suggested. They will include the interests of the Amish in a process that will seek to accommodate all interest groups.¹³⁵ Compromises are inevitable in such a process, and if the Amish choose not to participate, the public agencies will seek to represent their interests along with those of the wildlife and other groups unable to participate directly.¹³⁶

This is not to suggest that the process of public land management

133. Gideon L. Fisher, *Tourists in Lancaster County*, in *AMISH ROOTS*, *supra* note 63, at 172-74; KRAYBILL, *supra* note 62, at 34-38.

134. NOLT, *supra* note 64, at 277-83; KRAYBILL, *supra* note 62, at 235-60; HOSTETLER, *supra* note 62, at 282-91. Most rural ethnic communities face similar conflicts about the degree of assimilation they should embrace. Allen G. Noble, *The Immigrant Experience in the Nineteenth Century and Afterwards*, in *TO BUILD IN A NEW LAND: ETHNIC LANDSCAPES IN NORTH AMERICA* 399-401 (Allen G. Noble ed., 1992). Religious groups span the full spectrum from aggressive assimilationism to determined counter-assimilationism, and the Amish are by no means the most extreme in their counter-assimilationist behavior. See *AMISH ROOTS*, *supra* note 63, at 166-67. For example, nineteenth century courts struggled to resolve the legal status of the Shakers, whose vow of celibacy led them to maintain their community by adopting young children whose parents could not afford to keep them. See CAROL WEISBROD, *THE BOUNDARIES OF UTOPIA* 55-58 (1980). Ralph Michael Stein, *A Sect Apart: A History of the Legal Troubles of the Shakers*, 23 *ARIZ. L. REV.* 735 (1981); Barbara Taback Schneider, *Prayers for our Protection and Prosperity at Court: Shakers, Children and the Law*, 34 *YALE J.L. & HUMAN.* 33 (1992). Like the Amish, the Shakers were famous craftsmen. See EDWARD D. ANDREWS & FAITH ANDREWS, *WORK AND WORKMANSHIP: THE ECONOMIC ORDER OF THE SHAKERS* 146-50 (1974). Unlike the Amish, some other branches of the original Anabaptist religious movement have maintained their individuality while practicing a greater degree of assimilation. See Joseph W. Eaton, *The Hutterite Accommodation to Social Change*, in *COMMUNES: CREATING AND MANAGING THE COLLECTIVE LIFE* 509 (Rosabeth Moss Kanter ed., 1973). For a study of an aggressively assimilationist religious group, see M. JAMES PENTON, *APOCALYPSE DELAYED: THE STORY OF THE JEHOVAH'S WITNESSES* (1985). See also HAROLD BLOOM, *THE AMERICAN RELIGION: THE EMERGENCE OF THE POST-CHRISTIAN NATION* 159-70 (1992).

135. KRAYBILL, *supra* note 62, at 233-34. See RUTHERFORD H. PLATT, *LAND USE CONTROL: GEOGRAPHY, LAW, AND PUBLIC POLICY* 265-66 (1991). See also JOHN C. FREEMUTH, *ISLANDS UNDER SIEGE: NATIONAL PARKS AND THE POLITICS OF EXTERNAL THREATS* 29-36 (1991). For a discussion of the British experience with similar processes, see PHILIP LOWE ET AL., *COUNTRYSIDE CONFLICTS: THE POLITICS OF FARMING, FORESTRY AND CONSERVATION* (1980).

136. Tarlock, *supra* note 2, at 891-94. The National Park Service has advocated an approach to regional planning that relies on interagency and intergovernment cooperation. Sax & Keiter, *supra* note 119, at 221-22, 253. Gustav A. Swanson, *Wildlife on the Public Lands*, in *WILDLIFE AND AMERICA*, *supra* note 4, at 429. For a description of the problems inherent in such a process, see MICHAEL FROME, *REGREENING THE NATIONAL PARKS* 209-223 (1992); GLEN O. ROBINSON, *THE FOREST SERVICE: A STUDY IN PUBLIC LAND MANAGEMENT* 224-38 (1975); Mary A.M. Walters, *Reconciling Conflict: The National Parks and the External Threats Dilemma* (unpublished manuscript on file with *Chicago-Kent Law Review*).

always works smoothly. As the *Lyng* case demonstrates, it can be slow, costly and ultimately unsuccessful.¹³⁷ Continued improvement in the ways public land managers interrelate with their neighbors and user groups is a high priority, but these processes already exist, and religious interests are being accommodated along with every other interest group.¹³⁸

This type of multi-faceted analytical process is commonly referred to as "holistic," and the word is suggestive of the increasing recognition that a complex world in which everything seems to be interrelated can be analyzed only by equally complex processes.¹³⁹ Paradoxically, however, the fear and frustration inspired by this same complexity has caused many people to search for some absolutes to serve as guideposts through this complexity.¹⁴⁰ Promoters of absolutes are not hard to find, whether it is the absolute protection of endangered species, the absolute reliance on utilitarian ethics, or the absolute maintenance of a wall between church and state.¹⁴¹ But in practice, even the exponents of these absolutes compromise them in order to reach results.¹⁴²

How should this process relate to religious values? The contrast between the absolute and the holistic parallels the relationship between the

137. 485 U.S. 439 (1988). See also *supra* note 97. The Fish and Wildlife Service is currently undertaking the complex process of obtaining public involvement in a recovery plan for the Grizzly Bear in Washington. Eric Pryne, *Grizzly Recovery in State Fighting a Bad Reputation: Program Eventually Could Affect 10,000 Square Miles of Federal Land*, SEATTLE TIMES, May 5, 1992, Final Edition, at B4.

138. Amish objections have stalled a highway in Pennsylvania. See KRAYBILL, *supra* note 62, at 233-34. See also Michael J. Bean, *Recent Court Decisions Affecting Wildlife*, in AUDUBON WILDLIFE REPORT 1989-1990, at 155, 174-75 (William J. Chandler ed., 1989) (interaction of Indian religions and wildlife).

139. The word "holistic" has become very popular. The LEXIS law review data base lists 149 articles in which the term is used between 1988 and 1991, inclusive. See, e.g., Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1201 (1991); A. Dan Tarlock, *Earth and Other Ethics: The Institutional Issues*, 56 TENN. L. REV. 43, 44, 52 (1988); Lakshman Guruswamy, *Integrating Thoughtways: Reopening of the Environmental Mind?*, 1989 WIS. L. REV. 463, 480; Glendon & Yanes, *supra* note 78, at 534, 543-44.

140. See, e.g., DANIEL COHEN, *THE NEW BELIEVERS: YOUNG RELIGION IN AMERICA* 13-15 (1975); PENTON, *supra* note 134, at 257-61; BLOOM, *supra* note 134, at 218-33; FURIO COLUMBO, *GOD IN AMERICA: RELIGION AND POLITICS IN THE UNITED STATES* 92-93 (1984); R. LAURENCE MOORE, *RELIGIOUS OUTSIDERS AND THE MAKING OF AMERICANS* 129-30 (1986).

141. On the Endangered Species Act, see John Dingell, *Foreword to DANIEL J. ROHLF, THE ENDANGERED SPECIES ACTS: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION* 1, 5-6 (1989). On utilitarianism, see Leonard G. Ratner, *The Utilitarian Imperative: Autonomy, Reciprocity and Evolution*, 12 HOFSTRA L. REV. 723 (1984). And on religion, see Mark Tushnet, *'Of Church, State and the Supreme Court': Kurland Revisited*, 1989 SUP. CT. REV. 373, 400 (advocating a "rigid and easily applied test").

142. Neal Devins, *Fundamentalist Christian Educators v. State: An Inevitable Compromise*, 60 GEO. WASH. L. REV. 818, 835-37 (1992). See also McNAMEE, *supra* note 124, at 37-43 (compromise by conservationists); Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481, 493 (1983) (compromise by property owners); Gutman, *supra* note 51, at 440-47 (compromise by preservationists and religious groups).

theological and the pastoral functions that most religions perform.¹⁴³ While national media highlight the theological hostilities among religious groups, at the grass roots level the local representatives of those same groups often spend far more time on pastoral counseling than theological disputation.¹⁴⁴ These local representatives may be working cooperatively with each other to solve local problems at the same time as their national spokesmen are consigning each other to perdition in the media.¹⁴⁵

Quiet and effective pastoral counseling and negotiation undoubtedly play an invaluable if unquantifiable role in resolving problems that government would otherwise need to address with taxpayer dollars. Whether on the streets of Los Angeles or the prairies of central Illinois, these pastoral activities of religion accommodate even those who recognize no religious affiliation.¹⁴⁶ It would be both unfair and unrealistic to take an absolute position against the inclusion of religious groups in the processes for resolving public issues. And to the extent that religious groups can be encouraged to use their expertise in the cool pastoral medium instead of the hot theological medium, the resolution of these disputes will be made easier.¹⁴⁷

Not all religious groups choose to participate in these processes. Some groups counsel humility in situations in which others counsel militance. If the Amish turn the other cheek to aggravations that would bring lawsuits from the Scientologists, shall we demand judicially enforced equality of "rights" among groups to whom such rights may rep-

143. For the roots of the mixture of theological and pastoral aspects of Christianity see II TIMOTHY.

144. HARTZELL SPENCE, *THE CLERGY AND WHAT THEY DO* 88-93 (1961); DAVID K. SWITZER, *THE MINISTER AS CRISIS COUNSELOR* 15-28 (1974); LESLIE E. MOSER, *COUNSELING: A MODERN EMPHASIS IN RELIGION* 1-2 (1962).

145. Glendon & Yanes, *supra* note 78, at 537-39, quoting *Bowen v. Kendrick*, 487 U.S. 589 (1988). See also William H. Rehnquist, *The Adversary Society*, 33 U. MIAMI L. REV. 1, 18 (1978) ("There are times when the claims of the individual should be subordinated to those of the *Species*, even if the species is not government itself but a private institution which serves a useful purpose.").

146. John Morell, *Councils Work for Peace Among Races, Faiths and Cultures*, L.A. TIMES, May 14, 1992, at E7. See ADAMS & EMMERICH, *supra* note 100, at 50-51; see SWITZER, *supra* note 144, at 258-60. Such a role for religious groups is certainly consistent with the original understanding of the First Amendment. See Harold J. Berman, *Religious Freedom and the Challenge of the Modern State*, in ARTICLES OF FAITH, *supra* note 80, at 40, 47-48. Smith, *supra* note 90, at 154-56. But see LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (1986). On the right of religious groups to discriminate in membership decisions, see Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99; Bernard Roberts, *The Common Law Sovereignty of Religious Lawfinders and the Free Exercise Clause*, 101 YALE L.J. 211 (1991).

147. Paul Tillich, *The Impact of Pastoral Psychology on Theological Thought*, in *THE MINISTRY AND MENTAL HEALTH* 13 (Hans Hofmann ed., 1960). The changing role of women in mainline religion may have an impact. See SARA MAITLAND, *A MAP OF THE NEW COUNTRY: WOMEN AND CHRISTIANITY* 90-95 (1983). Lawyers also spend much more of their time in counseling than in litigation. GLENDON, *supra* note 95, at 175.

resent far different values?¹⁴⁸ On the other hand, are we willing to say it is wrong for legislators or administrators to reward groups like the Amish when their self-sufficiency reduces the cost of our administrative and judicial bureaucracies?¹⁴⁹ Such rewards are not endorsements of religious beliefs but endorsements of cultural behavior patterns that bring social or economic benefits to society as a whole. Similarly, even if they are coercive, disincentives to the abuse by religious groups of expensive judicial and administrative processes should not be treated as punishment of religious beliefs. Rather, the disincentives can be understood as merely designed to allocate the costs imposed by the cultural believers' behavior patterns on the believers themselves.

When extinction is threatened by a government policy or action, however, the ominous responsibility for that consequence must weigh heavily on the decisionmaker and must be assigned a high priority in the decisionmaking process. The more we realize the interrelated complexity of the world, the more appropriate Chief Justice Burger's admonition seems: "There can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong.'"¹⁵⁰

Will a bike path cause the extinction of the central Illinois Amish?¹⁵¹ Probably not, although extinctions often result from the cumulative impact of many small activities rather than cataclysmic events. But public land managers are accustomed to accommodating highly diverse interest groups with devices like physical buffers, use restrictions, dress codes and a wide range of other techniques that can be employed to

148. On the issue of whether the Constitution grants rights to religious groups rather than individuals, see Glendon & Yanes, *supra* note 78, at 544. See generally Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985). If the government provided a religious group with especially preferential treatment, could the group challenge it as too much of an entanglement? See Laycock, *supra* note 90, at 696, 698-99. For a recent update on Scientology see Nikos Passas & Manuel Escamilla Castillo, *Scientology and Its 'Clear' Business*, 10 BEHAVIORAL SCI. AND THE LAW 103 (1992).

149. It may be tempting to suggest that there should be a negative correlation between the extent to which a religious group exercises its right to free exercise and the scope of its right. Thus a group like the Scientologists, which appears to take advantage of the openness to litigation of our system of justice, seems less deserving than a group like the Amish that is extremely reluctant to litigate. But this temptation needs to be avoided for two reasons. First, a religious group that is truly being persecuted should not be hesitant to rely on the protection of the courts. Second, the right of free exercise belongs to the individual, not to the group, and cannot be denied to a person on the basis of how many other people from the same denomination have claimed a similar right. See Lupu, *supra* note 90, at 591. But see *supra* note 148. See also Carol Weisbrod, *Family Church and State: An Essay on Constitutionalism and Religious Authority*, 26 J. FAM. L. 741, 745-47 (1987-88).

150. *Wisconsin v. Yoder*, 406 U.S. 205, 210 (1972). See DAVID EHRENFELD, *THE ARROGANCE OF HUMANISM* 262 (1978); Glendon & Yanes, *supra* note 78, at 541-47.

151. For a current perspective on the Illinois Amish, see David Young, *Sweeping up Tourist Trade: Arcola Banks on Amish, Raggedy Ann, Broomcorn*, CHI. TRIB., July 30, 1992, at C2. See also DOYLE YODER & LESLIE A. KELLY, *AMERICA'S AMISH COUNTRY* 94-99 (1992).

allow coexistence even with counter-assimilationists.¹⁵² If public land managers can resolve the competing interests of raft tour operators and fly fishing enthusiasts—the great battle of “Row v. Wade,” as Chris Duerksen has christened it¹⁵³—they can accommodate both the bicyclists and the Amish.

152. See, e.g., Joseph L. Sax, *Ecosystems and Property Rights In Greater Yellowstone: The Legal system in Transition*, in ROBERT B. KEITER & MARK S. BOYCE, *THE GREATER YELLOWSTONE ECOSYSTEM: REDEFINING AMERICA'S WILDERNESS HERITAGE* 77 (1991).

153. Chris Duerksen, *Conservation: Row v. Wade*, *AMERICAN ANGLER*, Mar.-Apr. 1992, at 14.

