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Limiting Principles and Empowering Practices in American Indian Religious Freedoms

Kristen A. Carpenter

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Article

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Employment Division v. Smith *was a watershed moment in First Amendment law, with the Supreme Court holding that neutral statutes of general applicability could not burden the free exercise of religion. Congress's subsequent attempts, including the passage of Religious Freedom Restoration Act and Religious Land Use and Institutionalized Persons Act, to revive legal protections for religious practice through the legislative and administrative process have received tremendous attention from legal scholars. Lost in this conversation, however, have been the American Indians at the center of the* Smith *case. Indeed, for them, the decision criminalizing the possession of their peyote sacrament was only the last in a series of Supreme Court cases denying American Indian Free Exercise Clause claims. Moreover, the Supreme Court's Indian cases share a common and previously overlooked feature: in all of them, the Court assessed the Indian claims as too broad or too idiosyncratic to merit Free Exercise Clause protection and instead denied them through a succession of bright line formulations. Identifying the unrequited search for a "limiting principle" as a basis for analysis, this Article reassesses the religion cases and underlying theoretical questions of institutionalism and equality, in their Indian context. It then identifies two contemporary policy shifts—namely Congress's decision to entrust accommodation of Indian religious freedoms to federal agencies and its decision to do so at the tribal, versus individual, level—that have, in some respects, facilitated an "empowering practices" approach to American Indian religious liberties in the post-*Smith *era. Taking a descriptive and contextual approach, the Article illuminates opportunities for additional law reform in the American Indian context and also larger questions of institutionalism, equality, and pluralism in religious freedoms law.*

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KRISTEN A. CARPENTER*

I. INTRODUCTION

> *The [Supreme] Court in* Lyng *denied the Free Exercise claim in part because it could not see a stopping place. We uphold the RFRA claim in this case in part because otherwise we cannot see a starting place. If Appellants do not have a valid RFRA claim in this case, we are unable to see how any Native American plaintiff can ever have a successful RFRA claim based on beliefs and practices tied to land that they hold sacred.*[1]

Employment Division v. Smith[2] was a transformative moment in First Amendment law, with the Supreme Court holding that states may impose burdens on the exercise of religion through neutral states of general applicability.[3] Departing from previous case law holding that states had to demonstrate a compelling interest to sustain such infringements on religion, *Smith* inspired a groundswell of interfaith coalition building,[4] passage of the Religious Freedom Restoration Act[5] ("RFRA"), the

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* Associate Dean for Faculty Development, Associate Professor of Law, and Director of the American Indian Law Program, University of Colorado Law School. Thanks to the AALS Section on Law & Anthropology, NYU, Pepperdine, and Colorado Law Schools for workshop opportunities, and to Richard Allen, Amy Bowers, Alan Brownstein, Fred Cheever, Rick Collins, Perry Dane, Allison Dussias, Leslie Griffin, Chris Eisgruber, Marie Failinger, Matthew Fletcher, Greg Johnson, Sonia Katyal, Kati Kovacs, Sarah Krakoff, Steve Moore, Helen Norton, Angela Riley, Wenona Singel, Alex Skibine, Rebecca Tsosie, Deward Walker, Jace Weaver, Phil Weiser, Charles Wilkinson, Thatcher Wine, and Ahmed White, for comments and support.

[1] Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1048 (9th Cir. 2007), *rev'd en banc*, 535 F.3d 1058 (9th Cir. 2008).

[2] 494 U.S. 872 (1990).

[3] *Id.* at 888–89.

[4] *See* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 210 n.9 (1994) (listing dozens of secular and religious supporters of RFRA including Christian, Jewish, Sikh, Muslim, and Humanist organizations).

[5] Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb–bb4 (2006)) (restoring the substantial burden–compelling interest test to government activities that burden the exercise of religion, including through neutral statutes of general applicability).

Religious Land Use and Institutionalized Persons Act[6] ("RLUIPA"), and an entire body of legal scholarship.[7] Lost in this conversation, however, have been the American Indians who actually lost the right to practice their religion in *Smith*.[8] Some commentators have gone so far as to affirmatively deny an American Indian context for *Smith*.[9] Yet, for American Indians, the decision criminalizing the possession of sacramental peyote was devastating both on its own[10] and as the culminating case in a series of Supreme Court decisions denying American Indian Free Exercise Clause claims.[11] Moreover, in addition to RFRA's general restoration of

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[6] Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified at 42 U.S.C. § 2000cc) (extending free exercise protections to property owners and prisoners and adjusting certain definitions under RFRA).

[7] There is a great deal of scholarship surrounding the *Smith* case and the legislative responses to it. A number of these articles and books are cited throughout this Article. For criticism of *Smith* and support for RFRA, see, e.g., Doug Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883 (1994). For defense of *Smith* and criticism of RFRA, see, e.g., Marci A. Hamilton, Employment Division v. Smith *at the Supreme Court: The Justices, the Litigants, and the Doctrinal Discourse*, 32 CARDOZO L. REV. 1671 (2011). While this Article engages seriously with the Indian religion cases and others relevant to its analysis, it does not delve more broadly into the history or theory of the First Amendment, which is treated in an exceptionally rich literature by numerous experts in the field of constitutional law, and law and religion. For a few of the many sources see, e.g., JOHN T. NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, JR., RELIGIOUS FREEDOM: HISTORY, CASES, AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT 415–523 (3d ed. 2011); LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW (1988). Scholars have considered questions that are relevant to, but beyond the scope of, this Article, including the meaning of "religion" vis-à-vis a theory of the First Amendment. *See* Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357 (1996). For a treatment of religious minorities beyond American Indians, see Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222 (2003).

[8] Consider, for example, the three symposia devoted to the twentieth anniversary of the *Smith* decision. Of the twenty-five symposium articles, many of which were authored by leading scholars in law and religion, only two pieces focused on Indian religious freedoms and these two were authored by practitioners or students. *See* Symposium, *Criminal Law & the First Amendment*, 44 TEX. TECH L. REV. 1 (2011); Symposium, *The Twenty Year Anniversary of* Employment Division v. Smith*: Reassessing the Free Exercise Clause and the Intersection Between Religion and the Law*, 55 S.D. L. REV. 385, 385 (2010) (dedicating the symposium to *Smith* not because "the decision actually changed free exercise doctrine that much, but rather because the responses to it changed history"); Symposium, *Twenty Years After* Employment Division v. Smith*: Assessing the Twentieth Century's Landmark Case on the Free Exercise of Religion and How It Changed History*, 32 CARDOZO L. REV. 1655 (2011) (viewing the symposium as "an occasion to request new thinking to help chart doctrinal paths through the First Amendment's own real thicket of ambiguity and conflict in the Religion Clauses").

[9] In a recent article, the former Oregon Attorney General affirmatively *denied* any Indian context for *Smith*. *See* David B. Frohnmayer, Employment Division v. Smith*: "The Sky That Didn't Fall,"* 32 CARDOZO L. REV. 1655, 1657–58 (2011) ("This was not an Indian law case . . . . Galen Black was not a Native American. No discernible tribal treaty or general tribal interests were remotely involved. In fact, as an anthropological matter, the Indian tribes of the Pacific Northwest did not utilize peyote at all, because the substance is not indigenous to the climate or culture of the region.").

[10] *See* WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED 317 (2010) ("The injustice of *Smith* slapped many Native Americans in the face.").

[11] *See, e.g.*, Bowen v. Roy, 476 U.S. 693, 699–700 (1986) (holding federal government did not violate Free Exercise Clause by conditioning welfare benefits upon practice, use of social security

the substantial burden–compelling interest, there has been a virtual explosion of federal legislative and regulatory law directed specifically at accommodating American Indian religious freedoms. These legal developments have been largely unexplored by the law and religion scholars who aim to assess religious freedoms in the post-*Smith* era.[12]

The Indian religion cases may be explained by a number of factors, including the Court's narrowing of Free Exercise Clause protections generally after the high water marks of *Sherbert* and *Yoder*[13] and the Court's expansion of government property rights in the same era.[14] These points have been addressed in other scholarship, including my own work in the past.[15] But there is another point, so far under-theorized in the literature, that sheds light on the pre-*Smith* cases and post-*Smith* reforms: the unrequited search for a "limiting principle" in American Indian religious freedoms jurisprudence. In every Indian religion case, the Supreme Court assessed the Indian claims as too broad or too idiosyncratic to merit Free Exercise Clause protection and, instead, denied them through a succession of bright line formulations. For example, in *Lyng v. Northwest Indian Cemetery Association*,[16] the Court rejected Free Exercise Clause objections to government plans to build a road through an Indian sacred site, in part because the suit implicated "rather spacious tracts of

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number, prohibited by Abenaki Indian's religion); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 452–53 (1988) (holding federal government did not violate Free Exercise Clause by approving Forest Service plan that would destroy Indian sacred site); Emp't Div. v. Smith, 494 U.S. 872, 888–89 (1990) (holding that state government did not violate Free Exercise Clause through statute denying unemployment benefits to individuals discharged from work for possession of peyote).

[12] One exception is the very insightful article by my Colorado Law colleague Professor Richard Collins who evaluates accommodation of sacred sites claims through a comparative study of the United States, Canada, New Zealand, and Australia and concludes that indigenous peoples have fared better in political strategies than judicial review. *See* Richard B. Collins, *Sacred Sites and Religious Freedom on Government Land*, 5 U. PA. J. CONST. L. 241, 269 (2003) (discussing costs of religious accommodation on American Indians and others in society).

[13] *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1120 (1990) (criticizing *Smith* on a number of grounds including its "troubling" use of precedent); Kent Greenawalt, *Religion and the Rehnquist Court*, 99 NW. L. REV. 145, 154 (2004) (arguing that *Smith* marks a "crucial divide in free exercise law" and "sharply restricts the scope of the Free Exercise Clause").

[14] Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1062–67 (2005) (arguing that courts have failed to recognize Indian property rights at sacred sites and evaluating a real property law approach to sacred sites cases); Kristen A. Carpenter, *Real Property and Peoplehood*, 27 STAN. ENV. L.J. 313, 324–40 (2008) (arguing that First Amendment cases have failed to recognize the constitutive relationship between tribal nations and sacred sites, and proposing that federal administrative policy should recognize the non-fungible nature of sacred sites in tribal identity and culture); Kristen A. Carpenter et al., *In Defense of Property*, 118 YALE L.J. 1022, 1113–24 (2009) (criticizing judicial decisions on sacred sites under the First Amendment and RFRA and arguing for a cultural property approach grounded in indigenous stewardship and cooperative governance).

[15] *See* Carpenter, *A Property Rights Approach to Sacred Sites Cases*, *supra* note 14, at 1087.

[16] 485 U.S. 439 (1988).

public property."[17] While the Indians attempted to "stress the limits" of their claim, the Court could see "[n]othing in the principle for which they contend" that would prevent them from seeking "to exclude all human activity but their own from sacred areas of the public lands."[18] Instead, the Court held, the Indians would only have an actionable case if they could show that the government had "coerced" them into violating their religion, through the denial of a benefit or imposition of a sanction.

Similar concerns plagued *Bowen v. Roy*,[19] in which the Court said the plaintiff could not prevail on his objection to the use of a Social Security number on the grounds that it would "harm [the] spirit" of his daughter. The Court held that this claim, attributed to Abenaki Indian beliefs, was no more actionable than a "sincere religious objection to the size or color of the Government's filing cabinets."[20] And in *Smith*, Native American Church ("NAC") members failed on a challenge to a state statute prohibiting the possession of peyote, their religious sacrament, in part because of fears that widespread claims for religious drug use would follow.[21] Here, the Court held that states need not grant religious exemptions to neutral statutes of general applicability like this one.

It appears, then, that the Court's inability to discern a limit on the Indian religious practices in *Bowen*, *Lyng*, or *Smith* was a common factor leading to its outright denial of the claims in each. Of course, American Indians are not the only ones who face the slippery slope problem in free exercise cases. As Ira Lupu evocatively put it, "Behind *every* free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe."[22] The confounding question is whether and how to draw the line between the legitimate claim and the deviant one.[23] In many religion cases, judges are able to rely on their

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[17] *Id.* at 452–53.

[18] *Id.*

[19] 476 U.S. 693 (1986).

[20] *Lyng*, 485 U.S. at 452–53.

[21] Emp't Div. v. Smith, 494 U.S. 872, 888–89 (1990); *see also* Brief for Petitioner, Emp't Div. v. Smith, 494 U.S. 872 (1990) (No. 88-1213), 1989 WL 1126846 at *6, *21 (stating that peyote is "dangerous" and that "accommodating religious drug use would necessarily mean that highly dangerous drugs . . . could lawfully be in private hands, for use at private discretion. Each exemption . . . would compromise the regulatory goal of eliminating the presence, use and availability of dangerous drugs in our society").

[22] Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 947 (1989) (emphasis added).

[23] *Compare* Matthew L.M. Fletcher, *Sam Deloria: San Francisco Peaks Could Be the First Test of the Obama Administration's Support of the UN DRIP*, TURTLE TALK (Jan. 5, 2011, 12:45 PM), http://turtletalk.wordpress.com/2011/01/05/sam-deloria-san-francisco-peaks-could-be-the-first-test-of-the-obama-administrations-support-of-the-un-drip/ ("[Is] anyone . . . taking a stab at formulating a way for the executive branch . . . to give principled accommodation to Indian religious concerns without running afoul of the Establishment Clause? [I] think we need to write the formula ourselves instead of

personal experience and common sense. Courts typically know that a Christian individual's claim not to work on the Sabbath is a legitimate religious observance, will take just one day per week, and will not cause the working economy to grind to a halt.[24] But when it comes to the particulars of minority religions, it may be more difficult for the courts to evaluate the legitimacy and scope of particular practices, leading them to question both their own judicial competence and equality among plaintiffs, and to prefer bright line rules over nuanced analysis.[25]

American Indian religions perfectly illustrate this challenge.[26] From the perspective of many American Indians, the judicial concerns about the scope of their religions appear specious because the religions themselves specifically dictate and limit the practices.[27] These traditions are ancient in origin, tracing back to creation stories that place human beings on the earth and set forth values that will enable the people to thrive in their

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waiting for them to do it, and I think we need to understand their bewilderment and their need to understand the scope of any accommodation we ask for.").

[24] Sherbert v. Verner, 374 U.S. 398 (1963) (South Carolina violated the Free Exercise Clause when it denied unemployment benefits to an individual who refused to accept Saturday work in violation of her Seventh Day Adventist beliefs); Hobbie v. Unemp't Appeals Comm'n of Flor., 107 S. Ct. 1046, 1048 (holding that Florida violated the Free Exercise Clause when it denied unemployment benefits to an individual who, after conversion to Seventh Day Adventist church, was fired because she could not work on her Sabbath). Judicial notice of the practice does not, however, guarantee that the plaintiff will prevail. *See* Braunfield v. Brown, 366 U.S. 599, 601–09 (1966) (noting that "[e]ach of the appellants is a member of the Orthodox Jewish faith, which requires the closing of their places of business and a total abstention from all manner of work from nightfall each Friday until nightfall each Saturday," and then rejecting First Amendment challenges to a state statute penalizing work on Sundays).

[25] *See* Susanna Mancini, *The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence*, 30 CARDOZO L. REV. 2629, 2631 (2009) ("The practical result of this attitude is that crucifixes may be displayed in the public schools because secularized Christianity represents a structural element of the western constitutional identity, while the wearing of Islamic symbols is either banned or restricted because it represents values and practices that are cast as illiberal and undemocratic.").

[26] Walter Echo-Hawk has argued that, in light of judicial protection for other minority religious practices, including the ritual slaughter of Santeria, the Indian religion cases should not be viewed narrowly as "products of an insensitive court system that experienced inordinate difficult understanding and protecting a set of religions vastly different from those more familiar to American judges" but rather as "a form of discrimination and intolerance … propelled by forces of conquest and the mind-set of colonialism." ECHO-HAWK, *supra* note 10, at 274–75. Somewhat in contrast, Professor Richard Collins has argued that indigenous sacred sites claims:

> [R]eflect the extraordinary difficulty of committing the final say on issues of religious accommodations to judges. Lacking a workable metric to determine the importance and authenticity of religious claims, judges rest their decisions almost entirely on the adequacy of secular justifications for denying religious claims, and most contested claims lose.

Collins, *supra* note 12, at 269.

[27] *See* Justin B. Richland, *Hopi Sovereignty as Epistemological Limit*, 24 WICAZO SA REV. 89, 92–105 (2009) (describing limits on Hopi ceremonial knowledge and property among individuals, families, and clans within Hopi society).

surroundings.[28] Whether the religion calls for peyote, eagle feathers, burial rites, or access to sacred sites, the religions set forth the season, location, sacraments, prayers, and other aspects of ritual practice.[29] Tribal religious leaders, academic experts, and even, in some cases, published legislative constitutions and codes, can attest to these practices.[30] Contrary to the Court's fears in *Lyng*, for example, the Yurok, Karuk, and Tolowa Indians were not trying to reclaim the entire public lands or to exclude anyone from entry, but rather to protect the sacred "High Country" and "Medicine Rocks."[31] And contrary to the fears in *Smith*, the NAC carefully dictates the ritual ingestion of peyote and forbids extra-religious use as a sacrilege.[32] If taken seriously and understood, the tribal religions could provide at least some of the answers that the courts seem to seek.

Yet, the Court sees two problems with this approach to the question of where to draw the line: the problem of institutional competence and of equality. Institutionally, an assessment of limits based on religious tenets would engage the courts in theological inquiry beyond their competence.[33] Prior to *Lyng*, state and federal courts alike often used a "centrality" test to limit Free Exercise Clause relief to burdens on religious practices that were central to the religion.[34] Justice O'Connor rejected this test on grounds that it would require courts to "weigh the value of every religious belief and practice" allegedly threatened by a government program and to hold that "some sincerely held religious beliefs and practices are not 'central' to certain religions, despite protestations to the contrary from the religious objectors who brought the lawsuit."[35] Such an approach would "cast the Judiciary in a role that we were never intended to play."[36] Justice

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[28] *See* VINE DELORIA, JR., GOD IS RED: A NATIVE VIEW OF RELIGION 133–46 (3d ed. 2003) ("The Navajo legends begin with an account of the emergence of the Navajos or First People from the underworlds . . . .").

[29] *See* Amy Bowers & Kristen A. Carpenter, *Challenging the Narrative of Conquest: The Story of* Lyng v. Northwest Indian Cemetery Protective Association, *in* INDIAN LAW STORIES 489, 491–97 (Carole Goldberg et al. eds., 2011) (describing Yurok tribal rituals and cultural covenants).

[30] *See, e.g.*, General Provisions, Navajo Nation Code Tit. 1 (1995), § 205 (B)–(D) (identifying by name six sacred mountains and describing Navajo obligations to them); *see also* Carpenter, *A Property Rights Approach to Sacred Sites Cases*, *supra* note 14, at 1112–19 (providing examples of tribal law and custom on religious treatment of sacred sites in Zuni, White Mountain Apache, and Navajo tribes); *see also* Kristen A. Carpenter, *Individual Religious Freedoms in American Indian Tribal Constitutional Law*, *in* THE INDIAN CIVIL RIGHTS ACT AT FORTY 168–78 (Kristen A. Carpenter, Matthew L.M. Fletcher & Angela R. Riley eds., 2012) (reviewing tribal constitutional provisions on religious freedom); Angela R. Riley, "*Straight Stealing": Toward an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 106–08 (2005) (providing examples of religious law and custom embodied in legislative codes of Yankton Sioux, Pawnee, Eastern Cherokee, and Absentee Shawnee).

[31] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 452 (1988).

[32] Emp't Div. v. Smith, 494 U.S. 872, 913 (1990) (Blackmun, J., dissenting).

[33] *Id.* at 890 (majority opinion).

[34] *Lyng* at 457 (rejecting "centrality" analysis).

[35] *Id.*

[36] *Lyng*, 485 U.S. at 458.

O'Connor's reasoning resounds with a rich body of theoretical work in law and religion, noting that courts are generally encouraged to take a "hands-off" approach to substantive questions of religion, both because judges may not be experts in religious matters and to preserve the separation between church and state.[37] It is for these reasons that courts generally assume the sincerity of religious practice and do not delve into theological merits, this includes everything from church property to clergy hiring cases.

On the other hand, some scholars have argued that concerns about judicial competence in the religion arena may be overstated, much to the detriment of religious practitioners.[38] In this view, judges must often make decisions about complex areas outside of their legal training—from scientific to financial matters—and the religious nature of First Amendment cases should not obscure the judicial capacity to make reasoned decisions based on the trial evidence or appellate record. In the American Indian context, state and federal judges often made perfectly thoughtful decisions in the cases[39] leading up to *Lyng* and *Smith*, making it difficult to see the Supreme Court's unilateral denials of religious freedom as preferable to the earlier nuanced analyses. Moreover, as described in greater detail below, the federal government has for over two hundred years inserted itself into American Indian religion—originally through policies designed to eradicate tribal culture and more recently to reverse those policies.[40] Given federal regulation of religious peyote, eagle feathers, and sacred sites, it is rather late in the day to disclaim a judicial role in American Indian religious freedoms cases.

On the equality point, scholars have argued both that courts should not privilege religion itself over other fundamental liberty claims *and* that they should not indicate any preference among religious sects or individuals.[41] One can see strands of both equality arguments in the Indian religion cases. As Justice O'Connor said in *Lyng* and as Justice Scalia said in *Smith*, the American Indian plaintiffs in those cases were entitled to the same access to public lands and controlled substances as every other citizen.[42] The Free Exercise Clause does not provide a basis for extending special rights,

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[37] This scholarship is discussed in more detail in Part IV.

[38] *See generally* Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837 (2009).

[39] People v. Woody, 394 P.2d 813 (Cal. 1964) (evaluating peyote religion claims of NAC members); Frank v. Alaska, 604 P.2d 1068 (Alaska 1979) (evaluating funeral practices of Athabascan Indians).

[40] Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 774–75 (1997). For additional discussion, see *infra* Part II.

[41] *See generally* Andrew Koppelman, *Is It Fair to Give Religion Special Treatment*, 2006 U. ILL. L. REV. 571 (describing some of the scholarly debate on this issue).

[42] *Smith*, 494 U.S. at 878–79; *Lyng*, 485 U.S. at 449.

which could violate the Establishment and Equal Protection Clauses. Instead of privileging religion, the Constitution only prevents the government from coercion or discrimination based on religious belief. Under this view, *Smith* may have been decided correctly.[43] Other scholars argue, however, that even if *Smith* correctly treated religion as non-exceptional, it was still wrongly decided because it discriminated against American Indians vis-à-vis other groups that enjoy access to their sacraments.[44]

While laudable, even these nuanced views of equality often fail to capture the interests at stake in the American Indian context, in part because they remain grounded in the First Amendment's individual rights paradigm. To be sure, religious legal theory has begun to conceptualize group rights through a number of models, including, among others, the aggregated interests of members, minority rights, and church autonomy, all of which suggest important points of intersection for the American Indian context.[45] But these accounts of institutional and group rights do not recognize the unique status of history of Indian tribes.[46] While Indian tribes share some similarities with racial minorities and religious institutions, they are more properly described as pre-constitutional sovereigns with reserved rights over their citizens and territories.[47] Tribes are not bound by the Bill of Rights and may—as some tribes do—maintain theocratic forms of government.[48] Indian tribes generally retain rights of self-government and an ongoing, unique political relationship with the

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[43] *See, e.g.*, Leslie Griffin¸ *Smith and Women's Equality*, 32 CARDOZO L. REV. 1831, 1835 (hailing *Smith* as necessary for women's rights and equality as against the oppressive practices of religious groups).

[44] CHRISTOPHER L. EISGRUBER & LAWRENCE SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 95–96 (2007).

[45] *See* discussion *infra* Part IV.

[46] *See* Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 802 (2007) (arguing that "American Indian Tribes do not neatly fit into existing legal paradigms"); Sarah Krakoff, *Inextricably Political: Race, Membership and Tribal Sovereignty*, 87 WASH. L. REV. (forthcoming 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2169402 (observing that "courts uphold laws and policies that further the separate, and constitutionally based, political status of American Indian tribes").

[47] *See* Worcester v. Georgia, 31 U.S. 515, 519 (1832) (categorizing the Cherokee Nation as an independent territory, subject to the treaties with the United States, within which the laws of the state of Georgia can have no force); Cherokee Nation v. Georgia, 30 U.S. 1, 17–18 (1831) (stating that the Cherokee Nation can more accurately be described as "domestic dependent nation" than a foreign state or state of the union). For a discussion of contemporary federal Indian policy implementing these holdings, see *infra* Part IV.

[48] Talton v. Mayes, 163 U.S. 376, 381–82 (1896); Toledo v. Pueblo de Jemez, 119 F. Supp. 429 (D.N.M. 1954); *see generally* Robert Odawi Porter, *The Inapplicability of American Law to the Indian Nations*, 89 IOWA L. REV. 1596 (2004) (discussing how the Constitution does not regulate the conduct of Indian tribal governments).

United States.[49] Congress, in turn, has plenary authority in Indian affairs and an obligation to protect tribal resources under the federal Indian trust responsibility.[50]

This special relationship between Indian tribes and the United States has historically been a double-edged sword in the religion arena. In many American Indian communities, the traditional Indian religion is at the root of the tribal culture, social structure, subsistence practices, and even, in theocratic tribes, government.[51] Understanding that tribal survival was linked to these religious practices, the federal government actively suppressed American Indian religions as a means of eradicating tribes and assimilating their members into the Christian citizenry in the eighteenth and nineteenth centuries.[52] Today, as tribes recover from this legacy, Indian leaders have described the ability to practice their religion as critical to tribal "self-determination,"[53] and on the flip side, have decried threats to their religious practices as "genocide."[54] As the Indian legal and religious scholar Vine Deloria Jr. wrote, "There is no salvation in tribal religions apart from the continuance of the tribe itself."[55] In this regard, Indian religious claims against the federal government are not only about defending individual beliefs against government intrusion, but also about preserving tribal societies from extermination.

If the meaning of equality must be re-assessed in the Indian religion context, so too must the question of institutional role. *Smith* is famous for shifting religious accommodation from the judiciary to the legislature.[56]

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[49] *See* Worcester, 31 U.S. at 519; Cherokee Nation, 30 U.S. at 17–18. For a discussion of contemporary federal Indian policy implementing these holdings, see *infra* Part IV.

[50] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Nell Jessup Newton et al. eds., 2005) 398, 438–40 [hereinafter COHEN'S HANDBOOK].

[51] DELORIA, JR., GOD IS RED: A NATIVE VIEW OF RELIGION, *supra* note 28, at 211 ("The obvious benefit of a tribal religion is its coextensiveness with other functions of the community. Instead of a struggle between church and state, these become complementary aspects of community life.").

[52] *See* Dussias, *supra* note 40, at 773, 774–75.

[53] *See* Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814, 817 (10th Cir. 1999) ("[The] traditional religious uses of [Devils Tower] are . . . vital to the health of our nation and to our self-determination as a Tribe. Those who use the butte to pray become stronger. They gain sacred knowledge from the spirits that helps us to preserve our Lakota culture and way of life. They become leaders. Without their knowledge and leadership, we cannot continue to determine our destiny.").

[54] After the district court decided against the tribes in *Navajo Nation*, the Navajo Nation's President, Joe Shirley, was quoted as saying: "It is another sad day . . . [when] in the 21st Century, *genocide and* religious persecution continue to be perpetrated on Navajo people [and] other Native Americans . . . who regard the [San Francisco] Peaks as sacred." Cyndy Cole, *Snowmaking Opponents Now Targeting City Council*, ARIZ. DAILY SUN, Jan. 13, 2006, *available at* http://azdailysun.com/snowmaking-opponents-now-targeting-city-council/article_3cff71dc-acbf-59f9-8461-63548e54cfb5.html (emphasis added).

[55] *See* DELORIA, JR., GOD IS RED: A NATIVE VIEW OF RELIGION, *supra* note 28, at 194.

[56] *See, e.g.*, Michael W. McConnell, *Religious Freedom, Separation of Powers, and the Reversal of Roles*, 2001 BYU L. REV. 611, 613–15 (2001) (discussing Congressional attempts to protect minority religious interests in the wake of *Smith*). *Compare* Michael W. McConnell, *Institutions and*

As Justice Scalia wrote: "[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."[57] *Smith* and its defenders argued that the legislature is better suited than the courts to balance sensitive questions of religion and politics.[58] Yet critics argued that *Lyng*, *Smith*, and other decisions abdicated the judiciary's traditional role as a protector of minority rights, leaving religious minorities vulnerable to a political process in which they are, at worst, poorly represented, and at best, forced to use valuable community resources to vindicate rights that others take for granted.[59] This critique is surely apt in the American Indian context, where tribes have had to go it alone, lobbying for peyote, eagle feathers, and sacred sites protection.[60] Indeed, when the large inter-faith coalition famously pushed for the passage of RFRA to restore the traditional Free Exercise Clause test following *Smith*, it expressly declined to push the agenda of the NAC on grounds that peyote use was too controversial for a broad-based legislative effort.[61]

Interpretation: A Critique of City of Boerne v. Flores, 111 HARV. L. REV. 153, 195 (1997) (arguing that Congress should be permitted to adopt a more robust, protective interpretation of free exercise rights than those articulated by the Court), *and* Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 690–92 (1992) (defending the legislative accommodation model), *with* Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 600–03 (1991) (arguing that adjudication is preferable to legislation to address free exercise issues), *and* Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 776–79 (1992) (criticizing permissive accommodations under the legislative-accommodation model).

[57] *Smith*, 494 U.S. at 890.

[58] *See* Lupu, *Reconstructing the Establishment Clause*, *supra* note 56, at 600–02 (discussing the benefits of judicial adjudication of free exercise claims).

[59] *See* Alan Brownstein, *The Religion Clauses as Mutually Reinforcing Mandates: Why the Arguments for Rigorously Enforcing the Free Exercise Clause and Establishment Clause Are Stronger When Both Clauses Are Taken Seriously*, 32 CARDOZO L. REV. 1701, 1725 n.74 (2011) (discussing the difficulties that religious minorities face in protecting their rights through the political process).

[60] The Obama Administration's Indian policy has been critiqued on precisely these grounds. *See* Andrew Cohen, *If Obama Is Serious About American Indians, He'll Offer More than Just Eagle Feathers*, THE ATLANTIC, Dec. 2, 2011, *available at* http://www.theatlantic.com/national/archive/2011/12/if-obama-is-serious-about-american-indians-hell-offer-more-than-eagle-feathers/249311 (criticizing President Obama's focus on clarifying the rules of eagle feathers, while failing to address other major issues in American Indian policy).

[61] *See* Garrett Epps, *To an Unknown God: The Hidden History of* Employment Division v. Smith, 30 ARIZ. ST. L.J. 953, 1016 (1998). As Epps writes:

> [T]he NAC was kept at a distance from the ecumenical coalition that formed to push for passage of RFRA—a fact that NARF staff recall with resentment. Walter Echo-Hawk recalled that NAC was: "asked to pretty much please go away, get your own separate legislation. We're going to get ours, and once our rights are fixed, we'll be there to support you on yours. And they asked the Church to basically get their own coalition [and] get their own law, and not try to get their own amendment in this legislation. [NAC was] considered controversial and the whole drug politics and that sort of thing-and we felt snubbed and let down." The Church did not receive its legislative protection until nearly a year later, with the enactment of a statute

Yet the shift from judicial to legislative-regulatory accommodation also has particular ramifications in the American Indian context that scholars have not fully considered. Since the 1970s, Congress has repudiated its historical suppression of Indian religions and mobilized its plenary power and trust duties in support of tribal self-determination and religious freedoms.[62] Enactments and amendments to the American Indian Religious Freedom Act, National Historic Preservation Act, Bald Eagle and Golden Eagle Protection Act, and Native American Graves Protection and Repatriation Act now make it federal policy to preserve and accommodate the traditional religions of American Indians.[63] These statutes delegate to agencies, including the Bureau of Indian Affairs, Forest Service, Park Service, Army Corps of Engineers, and Fish and Wildlife Service, the obligation to manage resources—such as sacred sites, eagle feathers, human remains, and peyote plants—which are critical to American Indian religion.[64]

This legislative-regulatory framework in Indian religious matters has, in many respects, achieved what First Amendment litigation could not. Today, Congress and the agencies treat tribes as governments for whom religious cultural traditions are constitutive elements and work with them to negotiate accommodations.[65] The Clinton, Bush, and Obama administrations have ordered agencies to develop procedures and policies for accommodating tribal needs, and have issued special directives on

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protecting religious use of peyote by members of Indian tribes.

Id. (footnotes omitted).

[62] Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 (2006); American Indian Religious Freedom Act, 42 U.S.C. § 1996 (2006).

[63] The American Indian Religious Freedom Act Amendments of 1994 provides, "it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the[ir] traditional religions." 42 U.S.C. § 1996. The National Historic Preservation Act declares that "the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development." 16 U.S.C. § 470(b)(2) (2006). The Bald Eagle and Golden Eagle Protection Act "permit[s] the taking, possession, and transportation of specimens . . . for the religious purposes of Indian tribes." 16 U.S.C. § 668a (2006). The Native American Graves Protection and Repatriation Act provides that inventory for human remains and associated funeral objects "shall be . . . completed in consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders." 25 U.S.C. § 3003(h)(1)(A) (2006).

[64] *See, e.g.*, 16 U.S.C. § 668b ("The Secretary of the Interior is authorized to enter into cooperative agreements with State fish and wildlife agencies or other appropriate State authorities to facilitate enforcement of [The Bald and Gold Eagles Protection Act].").

[65] *See* Carpenter, *Real Property and Peoplehood*, *supra* note 14, at 329–35, 364–38 (considering agency expertise in sacred sites matters); Kristen A. Carpenter, *Interpreting Indian Country in* State of Alaska v. Native Village of Venetie, 35 TULSA L.J. 73, 109, 111 (1999) (acknowledging the Department of the Interior's Bureau of Indian Affairs' expertise in American Indian affairs and President Clinton's Executive Order calling for increased collaboration between agencies and Indian tribal governments).

Indian sacred sites and eagle feathers.[66] The administrative process offers several mechanisms—consultation, notice and comment, hearings, accommodation plans, and co-management—by which tribes and the agencies engage in that process. Indeed, over the years, agencies and tribes have developed mutual relationships of trust and shared information with respect to lands and natural resources,[67] and have used those common interests to negotiate several notable religious accommodations over sacred sites, peyote, eagle feathers, and burial grounds.[68] Because of the political and secular nature of the relationship with tribes, Indian religious legislation is subject to rational basis review and thus often withstands challenges brought under the Equal Protection or Establishment Clauses.[69] For all of these reasons, I identify the current legislative-regulatory framework as an "empowering practices" approach to American Indian religious freedoms.

Still challenges remain. In the final analysis, Indian religious freedom is subject to Congressional authority and agency discretion, and sometimes the agencies decide to subordinate Indian religious needs to other stakeholder interests.[70] Moreover, the courts have struggled to determine how to interpret RFRA's substantial burden–compelling interest test in these cases.[71] Thus, while acknowledging the transformation of American Indian religious freedoms law, this Article highlights both successes and failures under the post-*Smith* legislative-regulatory framework. In particular, this Article acknowledges and identifies a number of opportunities for additional improvements to federal policy and judicial review in American Indian religious freedoms cases. These are important issues at a time when the United States has just recently adopted the United Nations Declaration on the Rights of Indigenous Peoples, with its many

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[66] *See infra* note 298 and accompanying text.

[67] *See* Carpenter, *Interpreting Indian Country*, *supra* note 65, at 111 & n.244.

[68] *See infra* Part IV.B.

[69] *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 553, 555 (1974) (applying rational basis review, not strict scrutiny, to federal legislation benefiting American Indians because it is a political rather than a race-based classification); United States v. Wilgus, 638 F.3d 1274, 1285–86 (10th Cir. 2011) (upholding eagle permit program against challenge by a non-Indian on the grounds that Congress has "a compelling interest" in "protection of the culture of federally-recognized Indian tribes"); Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1214–16 (5th Cir. 1991) (holding that NAC membership is a political classification).

[70] *See* Carpenter, *Real Property and Peoplehood*, *supra* note 14, at 324.

[71] *Compare* Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1071, n.13 (9th Cir. 2008) (rejecting tribal RFRA challenge to Forest Service decision to use treated wastewater on sacred site under standard enunciated in Lyng), *with* Comanche Nation v. United States, No. CIV-08-849-D, 2008 WL 4426621, at *20 (W.D. Okla. Sept. 23, 2008) (granting a preliminary injunction to prevent the federal government from constructing a "training support center" on lands sacred to the Comanche people, on the strength of the tribe's RFRA and NHPA claims, and noting disagreement between Ninth and Tenth Circuits on test for substantial burden under RFRA in sacred site cases).

provisions for indigenous religious, spiritual, and cultural freedoms,[72] and President Obama has called for legal reform to bring the United States into compliance.[73] In this regard, American Indians press the United States not only to deal with tribal issues,[74] but also to assess what it means to guarantee religious freedom in our intercultural society of overlapping identities and diverse world views.[75]

The Article aims to elaborate a new perspective on the cases, statutes, and regulations as a bridge to deeper understanding at the intersection of American Indian law and religious freedoms law. In this regard, the objectives of this Article are largely descriptive and contextual, rather than normative or strategic.[76] More specifically, I argue that with a better appreciation of the equality and institutional arguments, the truly transformative potential of the recent Indian religion statutes and regulations becomes clear. In the *Bowen-Lyng-Smith* era, American Indian religious freedoms were litigated primarily within an individual rights framework wherein the problem of "limiting principles" was an insurmountable hurdle. In the post-*Smith* statutes, an entirely new model has emerged. After centuries of religious oppression, the United States has finally promised religious liberty to Indian tribes and their citizens. With tribal governments and federal agencies at the table, the questions of scope and legitimacy that previously torpedoed Indian religious freedoms claims outright are now vetted and discussed by authorized parties as they work

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[72] *See* Declaration on the Rights of Indigenous People, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) (providing Articles 11 and 12, which assert the right to practice indigenous cultures, religions, and ceremonies; Article 25, which asserts the right to strengthen spiritual relationships with traditional territories; Article 31, which asserts the right to indigenous cultural heritage, traditional knowledge, and cultural expressions; and Article 34, which asserts the right to indigenous spiritual, cultural, and other institutions).

[73] President Barack Obama, Remarks by the President at the White House Tribal Nations Conference (Dec. 16, 2010), *available at* http://www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference.

[74] Felix S. Cohen, *The Erosion of Indian Rights, 1950–1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953) ("Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.").

[75] *See* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 103 (2d ed. Oxford U. Press 2004) (stating that "in a world of increasingly overlapping and integrated political spheres," we should consider the interests of "peoples," a term that "should be understood to refer to all those spheres of community, marked by elements of identity and collective consciousness, within which people's lives unfold—independently of considerations of historical or postulated sovereignty").

[76] In past work, I have advanced the normative argument that federal courts provide insufficient recognition of tribal property rights at sacred sites and suggested strategic approaches in several different models of advocacy grounded in property theory. For further discussion, see the articles cited *supra* note 14. Other scholars have suggested litigation and legislative approaches grounded in constitutional theory. *See, e.g.*, Alex Tallchief Skibine, *Toward a Balanced Approach for the Protection of Native American Sacred Sites*, 17 MICH. J. RACE & L. 269 (2012) (calling for intermediate scrutiny in Indian sacred sites cases).

toward meaningful religious accommodations. The post-*Smith* era thus reveals an "empowering practices" approach to American Indian religious freedoms.

This Article proceeds as follows: Part II provides background on American Indian religious practices and the law. Part III identifies the problem of "limiting principles" in Indian religious free exercise jurisprudence, arguing that the courts' inability to find a satisfactory limiting principle led them to establish bright lines denying American Indian religious freedoms in sacred sites, peyote, and other cases. Part IV suggests that recent developments in the legislative and administrative process empower agencies and tribes to advance religious freedom; although more is needed, these "empowering practices" offer a partial solution to the problem. This Article concludes in Part V with reflections on the broader lessons that the American Indian experience offers for questions of religious freedom and pluralism in the United States.

II. AMERICAN INDIAN RELIGIONS AND THE LAW

American Indians have rich spiritual traditions in which they conceptualize their place in the world, experience a connection with the supernatural, and develop values to order their communities.[77] In many native cultures, religion is interwoven with relationships, rituals, stories, and places.[78] Navajos, for example, have many practices identified as elements of the Navajo "religion" such as a spiritual ethic, cosmology, deities, creation story, ceremonial chantways, daily rituals, and sacred sites.[79] But in the Navajo language, it may be more meaningful to describe these practices as an entire way of living in harmony with one's surroundings, relatives, and circumstances.[80] James Zion explains that one of the fundamental principles of Navajo life is the phrase "*sa'ah naaghai bik'eh hozho*, which states that 'the conditions for health and well-being

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[77] *See* DELORIA, JR., GOD IS RED: A NATIVE VIEW OF RELIGION, *supra* note 28, at 67 ("[T]he gulf between religious reality and other aspects of community experience is not . . . wide."); Inés Hernández-Ávila, *Mediations of the Spirit: Native American Religious Traditions and the Ethics of Representation*, *in* NATIVE AMERICAN SPIRITUALITY: A CRITICAL READER 11, 13–14 (Lee Irwin ed., 2000) (discussing sweat lodge traditions in various Native American cultures).

[78] WILMA MANKILLER, EVERY DAY IS A GOOD DAY, REFLECTIONS BY CONTEMPORARY INDIGENOUS WOMEN 11–16 (2004).

[79] *See* LELAND C. WYMAN, THE RED ANTWAY OF THE NAVAHO 20–25 (1965) (detailing the ceremonies and traditions of the Navajo associated with the myth of the Red Antway); WILLIAM A. YOUNG, QUEST FOR HARMONY: NATIVE AMERICAN SPIRITUAL TRADITIONS 246 (2006) (delineating the beliefs of traditional Navajo spirituality and declaring that "[t]he Navajo world is a unity; no separate sphere of life denoted by a word equivalent to religion exists").

[80] *See* Barre Toelken, *The Demands of Harmony*, *in* I BECOME A PART OF IT: SACRED DIMENSIONS IN NATIVE AMERICAN LIFE 68–69 (D.M. Dooling & Paul Jordan-Smith eds., 1989) (asserting that different parts of nature according to the Navajo "naturally . . . go in the same category because they are ritually connected").

are harmony within and connection to the physical/spiritual world.'"[81]

Reflecting similar sentiments, one commentator writes, "Because of the unified nature of Native American traditional culture, it can be difficult to assign cultural dynamics to fragmented Western categories."[82] Yet, the oft-repeated mantra that Indians "have no word for religion"[83] is surely an over-generalization. The Cherokee Nation, for example, gives the word *dinelvdodi* as a direct translation of the English word religion.[84] Cherokee linguist Dr. Durbin Feeling writes, "The word '*dinelvlodi'* (*dinelvdodi*) is the object of one's belief. For religion, it could be anyone or anything. For the Christian, Christ Jesus is the basis for his belief or faith."[85] Among Cherokee individuals and communities, people follow a variety of religions from traditional tribal practices, like the Stomp Dance, to Christianity and other faiths.[86]

As these examples begin to suggest, American Indian religious experiences are quite diverse and they are evolving. These religions have also been poorly understood by outsiders.[87] Former Cherokee Principal Chief Wilma Mankiller once said that "stereotypes . . . particularly with regard to spirituality" persist "because of the dearth of accurate information about Native people."[88] The hundreds of tribal religions and cultures are often lumped into generalities about Indian relationships with the natural world, including the common impression that for Indians,

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[81] James W. Zion, *Navajo Therapeutic Jurisprudence*, 18 TOURO L. REV. 563, 603 (2002) (quoting Elizabeth L. Lewton & Victoria Bydone, *Identity and Healing in Three Navajo Religious Traditions: Sa'ah Naaghai Bik'eh Hozho*, 14 MED. ANTHROPOLOGY Q. 476, 478 (2000)).

[82] JOSEPH EPES BROWN, TEACHING SPIRITS: UNDERSTANDING NATIVE AMERICAN RELIGIOUS TRADITIONS xxi (2001).

[83] *See, e.g.*, THE PLURALISM PROJECT AT HARVARD UNIV., RESEARCH REPORT: NATIVE AMERICAN RELIGIOUS AND CULTURAL FREEDOM: AN INTRODUCTORY ESSAY (2005), *available at* http://pluralism.org/reports/view/176 (noting that "people from different Native nations hasten to point out that their respective languages include no word for religion" and instead maintain that the many aspects of life and culture "are ideally integrated into a spiritually-informed whole," making analogy to Western principles of religious freedom difficult).

[84] *English-Cherokee Word List Lookup*, CHEROKEE NATION, http://www.cherokee.org/AboutTheNation/Wordlist.aspx (search "English" for "religion"; then follow "Search" hyperlink) (last visited Sept. 12, 2012).

[85] Email from Dr. Durbin Feeling to Author (Jan. 9, 2012, 9:20 AM) (on file with author).

[86] *See, e.g.*, *Cherokee Stomp Dance*, CHEROKEE NATION, http://www.cherokee.org/AboutTheNation/Culture/General/24400/Information.aspx (last visited Sept. 12, 2012) ("There are nearly 300,000 Cherokee tribal citizens today. Although many choose to worship through other religious methods and denominations, including Indian Baptist and Methodist among others, many traditional Cherokee continue to worship at stomp dances and are members of one of the several stomp dance grounds located within the Cherokee Nation.").

[87] *See* Charles E. Little, *A Policy Agenda for Sacred Lands*, *in* SACRED LANDS OF INDIAN AMERICA 133, 133–35 (Jake Page ed., 2001) (explaining the difficulties presented to public land policymakers in determining the location and importance of tribal religious sites as a result of the strict confidential treatment afforded to traditional spiritual information and practices).

[88] MANKILLER, *supra* note 78, at 13.

"everything is sacred."[89] On the other hand, when scholars examine the specifics of any traditional tribal religion, they must take care to develop adequate cultural familiarity[90] and respect particular privacy norms.[91]

"Traditional tribal religions"[92] are those associated with the indigenous spiritual experience of each tribe, whether Navajo, Yurok, or Cherokee.[93] These religions often begin with a creation story that traces the group's origin as a distinct people to a place of emergence or migration.[94] The creation story often situates the tribe in a particular place in the natural landscape and sets forth a way of life—including values and practices—that allows the people to thrive there.[95] In many such stories,

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[89] *See* Frank Pommersheim, *Representing Native People and Indian Tribes: A Response to Professor Allegretti*, 66 FORDHAM L. REV. 1181, 1182 (1998) (stating that "the concept of the secular is largely unknown" in all Native American religions with which the author is familiar and asserting that such religions hold that "[a]ll of life and all action in life—indeed every breath—is sacred").

[90] *See* Mary C. Churchill, *Purity and Pollution: Unearthing an Oppositional Paradigm in the Study of Cherokee Religious Traditions*, *in* NATIVE AMERICAN SPIRITUALITY: A CRITICAL READER 205, 212–13 (Lee Irwin ed., 2000) (noting that early non-Indian observers commonly misinterpreted tribal rituals of the Cherokees and Chickasaws).

[91] *See* Christopher Ronwaniènte Jocks, *Spirituality for Sale: Sacred Knowledge in the Consumer Age*, *in* NATIVE AMERICAN SPIRITUALITY: A CRITICAL READER 61, 61–65 (Lee Irwin ed., 2000) (reflecting on "the bases upon which an American Indian community might decide what is or is not to be shared with outsiders" in the context of Iroquois Longhouse ceremonies and stories and pointing out that such revelations "can violate Native rules of privilege, designed to protect aspects of specialized knowledge and practice from dangerous exposure or misuse"); *see also* Debora L. Threedy, *Claiming the Shields: Law, Anthropology, and the Role of Storytelling in a NAGPRA Repatriation Case Study*, 29 J. LAND RESOURCES & ENVTL. L. 91, 118 (2009) (discussing that Navajo norms allowing disclosure about religious significance of sacred shields, as contrasted with Paiute/Ute norms preventing such disclosure, may have been determinative in repatriation matter). With these dynamics in mind, my own practice is to avoid writing about religious topics that I know to be confidential in tribal communities, to rely on interdisciplinary sources as a means of contextualizing and understanding specific tribal practices, and to emphasize indigenous sources.

[92] *Compare* VINE DELORIA, JR., FOR THIS LAND: WRITINGS ON RELIGION IN AMERICA 123 (1999) (describing Indians who "maintain a traditional religious life"), *with* George E. Tinker, *Around the Sacred Fire: Native Religious Activism in the Red Power Era: A Narrative Map of the Indian Ecumenical Conference*, 20 WICAZO SA REV. 203, 205–06 (2005) (reviewing JAMES TREAT, AROUND THE SACRED FIRE: RELIGIOUS ACTIVISM IN THE RED POWER ERA (2003)) (discussing the "much-contested" nature of the term "traditional" in Indian religious and other matters), *and* CLARA SUE KIDWELL ET AL., A NATIVE AMERICAN THEOLOGY x (2001) (arguing for a Native American theology that is "inclusive of all Natives (traditional, Christian neo-traditional, syncretic)").

[93] *See* BROWN, TEACHING SPIRITS, *supra* note 82, at 107–08 (describing various Native American tribal rituals as embodying "traditional values" and contrasting such practices against Western "mainstream culture").

[94] Laura Adams Weaver, *Native American Creation Stories*, *in* ENCYCLOPEDIA OF WOMEN AND RELIGION IN NORTH AMERICAN 83, 83 (2006) (asserting that origin stories typically begin with an "earthdiver" or "emergence" story); *see also* JACE WEAVER, NOTES FROM A MINER'S CANARY: ESSAYS ON THE STATE OF NATIVE AMERICA 218 (2010) ("Every native people has some form of an origin story.").

[95] *See* DELORIA, JR., FOR THIS LAND: WRITINGS ON RELIGION IN AMERICA, *supra* note 92, at 208 (illustrating how specific sites are sacred in Native American religious traditions because they are locations where "the sacred appeared in the lives of human beings," thereby tying the sanctity of the place to tribal experience).

the people and natural world are mutually dependent, with humans having obligations or covenants that they must perform in order to live in harmony with the plants, animals, waters, mountains, and other features of the natural world.[96] The traditional religion often pervades identity, kinship, governance, subsistence, and social order and often serves as a way to define and maintain the tribal existence, even in contemporary times.[97] As Hopi clan leaders declared in 1951, "Our land, our religion, and our life are one."[98]

American Indians across a number of tribes participate in the peyote religion which has roots in ancient traditions.[99] Indigenous use of peyote dates back to at least 1600 C.E., by the Huichol and Tarahumara Indians of Northern Mexico, and possibly back to the Aztecs in 8000 B.C.E.[100] In North America, Kiowa-Apaches, Kiowas, and Comanches used religious peyote in the 1860s,[101] and the NAC was officially chartered in 1918 in Oklahoma to "foster and promote the religious beliefs of the several tribes of Indians . . . with the practice of the Peyote Sacrament."[102] Practitioners attest to the healing power of the plant, the fellowship among peyotists, and the moral code of the NAC.[103] Today, the peyote religion is practiced in both urban and reservation settings, by inter-tribal and tribal groups.

Most legal disputes, of course, consider an individual practice or religious practitioner out of the larger tribal religious context.[104] Such practices include ceremonies to keep the world in balance,[105] heal those inflicted with illness,[106] and communicate with the creator.[107] Depending

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[96] *See id.* at 211 (explaining that Native ceremonies "involve a process of continuous revelation and provide the people with the necessary information to enable them to maintain a balance in their relationships with the earth and other forms of life").

[97] *See, e.g.*, Joel W. Martin, *Rebalancing the World in the Contradictions of History: Creek/Musk ogee*, *in* NATIVE RELIGIONS AND CULTURES OF NORTH AMERICA: ANTHROPOLOGY OF THE SACRED 85, 86 (Lawrence E. Sullivan ed., 2000) (stating that the Creek religion "is dynamic, truly historical, and continually innovative").

[98] JOHN D. LOFTIN, RELIGION AND HOPI LIFE 116 (2d ed. 2003).

[99] *See generally* ONE NATION UNDER GOD: THE TRIUMPH OF THE NATIVE AMERICAN CHURCH (Huston Smith & Reuben Snake eds., 1996); OMER C. STEWART, PEYOTE RELIGION: A HISTORY (1987).

[100] YOUNG, *supra* note 79, at 309.

[101] THOMAS CONSTANTINE MAROUKIS, THE PEYOTE ROAD: RELIGIOUS FREEDOM AND THE NATIVE AMERICAN CHURCH 23–24 (2010).

[102] YOUNG, *supra* note 79, at 309.

[103] MAROUKIS, *supra* note 101, at 59–60.

[104] *See, e.g.*, United States v. Friday, 525 F.3d 938, 942–43 (10th Cir. 2008) (upholding charges against an Arapaho man who shot an eagle, in violation of federal law, to provide it as an offering for the Arapaho Sun Dance).

[105] YOUNG, *supra* note 79, at 345–46.

[106] Lee Irwin, *Themes in Native American Spirituality*, 20 AM. INDIAN Q. 309, 321 (1996) (explaining how Odawa ceremonies "function to establish communal health that connects the Odawa to a larger spiritual community"); Douglas L. Winiarksi, *Native American Popular Religion in New England's Old Colony, 1670–1770*, 15 RELIGION & AM. CULTURE: J. INTERPRETATION 147, 163–64

on the tribe, there may be special rituals for major life events of individuals and the community (birth, adoption, coming-of-age, marriage, hunting, trading, diplomacy, going to war, and death); seasonal practices; daily prayers; food preparation; modes of dress and appearance; and other observations.[108] In many religions, there are leaders, such as priests, doctors, medicine women and men, chiefs, caciques and others, who have responsibility for leading religious practices and training others.[109] Today, traditional tribal religions may be maintained informally or institutionally, with varying degrees of participation by tribal citizens.

To a very significant extent, traditional religious practices are undertaken for the collective benefit of the tribe, as much as for any individual purposes. In *Northwest Indian Cemetery Protective Association v. Peterson*,[110] for example, the district court explained Yurok, Karuk, and Tolowa traditions: "Medicine women in the tribes travel to the high country to pray, to obtain spiritual power, and to gather medicines. They then return to the tribe to administer to the sick the healing power gained in the high country through ceremonies such as the Brush and Kick Dances."[111] As the court observed: "The religious power these individuals acquire in the high country lends meaning to these tribal ceremonies, thereby enhancing the spiritual welfare of the entire tribal community."[112] Many traditional tribal religious practices work toward this sense of collective renewal.[113] Former Cherokee Principal Chief Wilma Mankiller explained:

> Each year one Cherokee ceremony in a series was conducted in each settlement for the explicit purpose of rekindling relationships, requesting forgiveness for inappropriate conduct during the previous year, and cleansing the minds of Cherokee people of any negative thoughts towards each other

(2005) (discussing how the Wampanoag communicated with the spirit world through religious ceremonies in order to heal the sick).

[107] Frell M. Owl, *Who and What Is an American Indian?*, 9 ETHNOHISTORY 265, 281 (1962).

[108] *See, e.g.*, Kristen A. Carpenter, *Considering Individual Religious Freedoms Under Tribal Constitutional Law*, 14 KAN. J.L & PUB. POL'Y 561, 577 (2005) (noting that the hunting ceremonies for the Plains' Indians were conducted to ensure food and to maintain relationships with the natural world); Irwin *supra*, note 106, at 321 (explaining the role of "[g]iveaways, naming ceremonies, feasts, ghost suppers for the dead, elder councils, [and] spiritual get-togethers," in the Odawa community); Owl, *supra* note 107, at 281 (noting that ceremonies vary from tribe to tribe, and the Sun Dance is a common seasonal ceremony originated by the Plain Indians).

[109] *See* Owl *supra*, note 107, at 273 (discussing role of priests, medicine men, singers of tribal songs, drummers, and dancers in American Indian ceremonies); *see also* CONST. OF THE IROQUOIS NATIONS §§ 100–01, 103, *available at* http://www.indigenouspeople.net/iroqcon.htm (assigning duties related to the festivals of Thanksgiving to the Lords and appointed managers within the brotherhood).

[110] 565 F. Supp. 586 (N.D. Cal. 1983).

[111] *Id.* at 592 (internal citations omitted).

[112] *Id.* at 591–92.

[113] *Id.* at 591 n.4.

> . . . . The primary goal of prayer is to promote a sense of oneness and unity.[114]

These religious values are often inscribed in the tribe's customs and laws. The Iroquois Constitution, dating back to the fifteenth-century, for example, provides an extensive description of the purposes of certain ceremonies and ascribes to members of the community duties to support those ceremonies.[115] A contemporary Navajo Nation Resolution provides:

> This religion, Beauty Way of Life, holds this land sacred and that we, the Navajo People, must always care for it. Through this sacred covenant, this sacred ancestral homeland is the home and hogan of all Navajo people. Further, if the Navajo left their homelands, all prayers and religion would be ineffective and lost forever.[116]

At an even more particular level, the legislative code of the Navajo Nation identifies, by name, the six sacred mountains of the Navajo Nation and sets forth a standard of care owed to them by the Navajo people.[117] The significance of these mountains is traceable to the Navajo creation story and values formative in Navajo culture.

Notwithstanding the ancient origins of many tribal religions, Indians were often perceived as godless savages to the early Europeans who encountered them. Indeed, religion was a flashpoint in the conquest and colonization of North America. From the fourteenth century, monarchs invoked Christian theology and papal law in justification of their New World policies, using indigenous "heathenry" as a justification for military incursions and land seizures, for example.[118] At the same time, some Catholic thinkers argued that Indians were human beings entitled to a measure of natural law protection from the Spanish, if only the right to be conquered and converted for their own benefit.[119] In the sixteenth and seventeenth centuries, French and Spanish colonization efforts worked

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[114] MANKILLER, *supra* note 78, at 16–17.

[115] CONST. OF THE IROQUOIS NATIONS §§ 64, 100–03, *available at* http://www.indigenouspeople.net/iroqcon.htm. I discuss this Constitution extensively in Carpenter, *Individual Religious Freedoms in American Indian Tribal Constitutional Law*, *supra* note 30, at 169–70.

[116] Navajo Nation Council Res. CD-107-94 (Dec. 13, 1994).

[117] General Provisions, Navajo Nation Code Tit. 1 (1995), § 205 (B)–(D) (identifying six sacred mountains and Navajo obligations to them).

[118] *See id.* at 59–71 ("Unfortunately for the American Indian, the West's first steps toward this noble vision of a Law of Nations contained a mandate for Christian Europe's subjugation of all peoples whose radical divergence from European-derived norms of right conduct signified their need for conquest and remediation.").

[119] *See* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 16–19 (2d ed. 2004) (noting that lead figures in this discussion included Bartolomé de las Casas and Francisco Vitoria, who confirmed the humanity of the Indians of the Western Hemisphere).

closely with churches to establish missions across tribal communities, while some of the English colonies and colonists isolated Indians in "praying towns" so they could be instructed away from whites.[120]

Once the United States gained independence, federal lawmakers quickly grasped that the eradication of Indian cultures was a key step in "break[ing] up the tribal mass" and paving the way for political and geographic domination by states and the federal government.[121] At the same time, policymakers believed that encouraging Indians to "put aside all savage ways" would help them achieve "salvation" through Christianity.[122] These measures targeted individual Indians and whole tribes alike. Beginning in 1869, President Grant's "Peace Policy" provided contracts to Christian missions, assigning them to reservations and granting federal funding for the purpose of bringing civilization to the Indians.[123] Federally funded boarding schools with a mission to "Kill the Indian in him and Save the Man"[124] targeted the children of traditional Indian communities for removal from their families and educated them in English, Christianity, and manual labor skills.[125] In 1883, the Commissioner of Indian Affairs distributed a set of "Rules for Indian Courts" that defined as "Indian [O]ffenses" religious activities, including participation in the Sun Dance, scalp dance, war dance, and the practice of polygamy.[126]

Efforts to eradicate Indian religious practices became increasingly coercive at the turn of the century. In 1890, the U.S. Army shot and killed 300 Lakota people engaged in a revivalist religion called the Ghost

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[120] *See, e.g.*, COLIN CALLOWAY, NEW WORLDS FOR ALL: INDIANS, EUROPEANS, AND THE MAKING OF EARLY AMERICA 75–77 (1997) (discussing fourteen praying towns established by John Eliot in Massachusetts in the 1660s–1670s); DONALD A. GRINDE & BRUCE E. JOHANSEN, EXEMPLAR OF LIBERTY: NATIVE AMERICA AND THE EVOLUTION OF DEMOCRACY 73–91 (1991) (explaining Roger Williams's seventeenth century perceptions and activities regarding Narragansett and other Indian tribal religions).

[121] CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 19 (2005), (quoting President Theodore Roosevelt as imposing assimilation and allotment policies "as a mighty pulverizing machine to break up the tribal mass"); *see* Dussias, *supra* note 40, at 773–805 (describing assimilation programs that worked directly on religion).

[122] Report of Commissioner of Indian Affairs W.A. Jones (Oct. 16, 1902), *reprinted in* 2 WILCOMB E. WASHBURN, THE AMERICAN INDIAN AND THE UNITED STATES: A DOCUMENTARY HISTORY 724, 727 (1973) [hereinafter Report of Commissioner of Indian Affairs W.A. Jones].

[123] Dussias, *supra* note 40, at 776–87.

[124] DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875–1928 52 (1995).

[125] *See id.* at 21–24 (stating that the three aims of Indian education were to provide children with the rudiments of an academic education, teach individualization over tribal community interests, and promote Christianization); *see generally* TIM GIAGO, CHILDREN LEFT BEHIND: THE DARK LEGACY OF INDIAN MISSION BOARDING SCHOOLS (2006) (providing a first-hand account of a student's experience at an Indian boarding school); AWAY FROM HOME: AMERICAN INDIAN BOARDING SCHOOL EXPERIENCES, 1879–2000 (Margaret L. Archuleta et al. eds., 2000) (providing an historical and pictorial overview of Indian boarding schools in the nineteenth and twentieth centuries).

[126] Report of Commissioner of Indian Affairs W.A. Jones, *supra* note 122, at 344, 348–49.

Dance.[127] In 1902, the federal Indian Commissioner issued an order to reservation-based Indian agents providing: "Indian dances and so-called Indian feasts should be prohibited. In many cases, these dances and feasts are simply subterfuges to cover degrading acts and to disguise immoral purposes. You are directed to use your best efforts in the suppression of these evils."[128] In 1904, the federal government criminalized Indian religious dances, making, for example, the practice of the Sun Dance punishable by ten days in prison or ten days denial of food rations.[129] Around the same time, Indian Affairs declared peyote to be a narcotic and waged an assault on the peyote religion; in 1908 and 1909, for example, an Indian Affairs "investigator" reported that he had destroyed 176,400 peyote buttons, an act of incredible offense, sacrilege, and waste to the practitioners for whom it was a holy sacrament.[130] Into the 1920s, the federal government was still issuing directives for agents to suppress religious ceremonies in the Southwestern Pueblos.[131]

In response to the federal persecution of Indian religions, some traditional American Indian religious practitioners went underground, while some ceased practicing altogether, and still others resisted.[132] While the federal government expressly pursued the extermination of Indian *tribes*, as such, officials reported that they had no intention of "interfering with the Indian's personal liberty"; instead, they saw their actions, as a means of removing a "badge of servitude to savage ways and traditions which are effectual barriers to the uplifting of the race."[133] To the extent that the First Amendment applied at all to American Indian religions, it was to uphold the use of treaty payments to fund Christian mission schools

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[127] *See generally* JAMES MOONEY, THE GHOST-DANCE RELIGION AND WOUNDED KNEE (1973). Mooney visited Wounded Knee in December 1890. From interviews with survivors, Mooney described that as a medicine man blew on his whistle and the Indians convened in their sacred Ghost Shirts, the army opened fire: "The guns poured in 2-pound explosive shells at the rate of nearly fifty per minute, mowing down everything alive . . . . In a few minutes 200 Indian men, women, and children, with 60 soldiers, were lying dead and wounded on the ground . . . . [T]he pursuit was simply a massacre, where fleeing women, with infants in their arms, were shot down after resistance had ceased and when almost every warrior was stretched dead or dying on the ground . . . . Authorities differ as to the number of Indians present and killed at Wounded Knee [from 340-370 people]." *Id.* at 869–70.

[128] Report of Commissioner of Indian Affairs W.A. Jones, *supra* note 122, at 725.

[129] Dussias, *supra* note 40, at 800.

[130] MAROUKIS, *supra* note 101, at 40.

[131] *See* Dussias, *supra* note 40, at 803–05 (describing directives requiring, among others, "attendance at church and Sunday school by all Indian students," and that "no dances be held in March, April, June, July, or August").

[132] *See, e.g.*, CHARLOTTE COTE, SPIRITS OF OUR WHALING ANCESTORS: REVITALIZING MAKAH AND NUU-CHAH-NULTH TRADITIONS 56 (2010) (explaining that, from the 1880s to 1920s, "[p]otlatching went underground and coastal peoples began holding their ceremonies in secret locations or found innovative ways to conceal them").

[133] Report of Commissioner of Indian Affairs W.A. Jones, *supra* note 122, at 727.

on reservations against Establishment Clause challenges.[134]

While some support for Indian cultural traditions surfaced in the 1930s, federal policy began to change in earnest in the 1960s and 1970s.[135] Inspired both by tribal activism and federal policy changes, tribes nationwide started to revitalize their political, economic, and cultural institutions. In 1970, President Richard M. Nixon announced a federal policy in favor of tribal "self-determination," inspiring dozens of new statutes and programs to support tribal autonomy over education, economics, government, and culture.[136] The practice of tribal religions was an important component, particularly in light of historic persecution of Indian religions described above. In 1978, Congress passed the American Indian Religious Freedom Act ("AIRFA"), reversing federal policy. Reflecting the broader aims of the self-determination era, AIRFA provided:

> [I]t shall be the federal policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.[137]

Despite AIRFA and the religious revitalization of the self-determination era, certain legal and political obstacles still make it difficult to practice American Indian religions. Through the dark years of Indian removal, assimilation, and allotment, tribes lost ownership of many of their sacred sites, which were now slated for development by private or government owners.[138] In 1962, Congress added the golden eagle to the Bald Eagle Protection Act of 1940, which prohibits the killing of eagles and the possession of eagle parts, and has been interpreted to trump even Indian treaty rights to take eagles on their reservations.[139] In 1965, the

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[134] *See* Reuben Quick Bear v. Leupp, 210 U.S. 50, 81–82 (1908) (explaining that a prohibition against using federal monies for sectarian schools did not apply to use of treaty annuities to fund St. Francis Mission School on the Rosebud Sioux reservation).

[135] *See* WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS, *supra* note 121, at 58–60, 177–89, 263 (detailing federal reports that shed light on the plight of Indians and recommendations on how to improve their living conditions).

[136] *See id.* at 189–98 (explaining President Nixon's policies toward Indian affairs and the programs started by the Office of Economic Opportunity).

[137] American Indian Religious Freedom Act, 42 U.S.C. § 1996 (2006).

[138] *See* Carpenter, *A Property Rights Approach to Sacred Sites Cases*, *supra* note 14, at 1061 ("American Indians have been unsuccessful in challenging government actions that harm tribal sacred sites located on federal public lands.").

[139] *See* United States v. Dion, 476 U.S. 734, 743–46 (1986) (describing ways in which Congress tried to control Indian on-reservation hunting of eagles in the early 1960s).

federal government, following a number of states, criminalized the possession of peyote, the plant that serves as the main sacrament of the NAC.[140] Both the eagle and peyote legislation provided certain exemptions for American Indian religious use.[141] Nevertheless, these and other developments produced a number of lawsuits in which the courts tried to evaluate Indian religion claims against other competing interests.

III. LIMITING (JUDICIAL) PRINCIPLES

The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[142] In their application of this language, the federal courts have long struggled to determine the scope of free exercise rights as against other critical rights and interests. Cases that trigger such concerns include those in which free exercise claims would infringe on other citizens' rights to equal protection, property, or privacy; pose a threat to public safety, order, or peace; or impede the state's ability to carry out the business of government.[143]

In light of these competing concerns, it is clearly not the case that all government activities infringing on religion violate the First Amendment. As a means of sorting the wheat from the chaff, the Supreme Court has long held that only those activities imposing a "substantial burden" on religious activity trigger the protections of the Free Exercise Clause, and even in those cases, the government may demonstrate a "compelling interest" to sustain the activity.[144] The cases giving rise to this test—*Sherbert v. Verner*[145] and *Wisconsin v. Yoder*[146]—also gave rise to various attempts to discern limiting principles in the American Indian religion context.[147] In *Sherbert*, the Supreme Court held that South Carolina

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[140] In 1965, Congress listed peyote as a Schedule I hallucinogen on the list of controlled substances under the Controlled Substances Act. 21 U.S.C. § 812(c) (2006). State laws prohibiting and regulating peyote possession date back to the 1920's. THOMAS CONSTANTINE MAROUKIS, PEYOTE AND THE YANKTON SIOUX: THE LIFE AND TIMES OF SAM NECKLACE 181 (2004).

[141] *Dion*, 476 U.S. at 734; Native American Church, 21 C.F.R. § 1307.31 (2011).

[142] U.S. CONST. amend. I.

[143] *See, e.g.*, Cleveland v. United States, 329 U.S. 14, 15 (1946) (holding that Congress may prohibit the transportation of a woman across state lines for the purpose of polygamy); Prince v. Massachusetts, 321 U.S. 158, 159 (1944) ("There is no denial of equal protection of the laws in excluding children of a particular sect from [public proclaiming of religion in streets] as is barred also to all other children."); Jacobson v. Massachusetts, 197 U.S. 11, 39 (1905) (upholding the constitutionality of a Massachusetts statute requiring adults be vaccinated against certain diseases); Reynolds v. United States, 98 U.S. 146, 166 (1878) (holding that Congress has the constitutional power to prohibit polygamy even if it is part of one's religion).

[144] Emp't Div. v. Smith, 494 U.S. 872, 883 (1990).

[145] 374 U.S. 398 (1963).

[146] 406 U.S. 205 (1972).

[147] *Contra* Hamilton, Employment Division v. Smith *at the Supreme Court: The Justices, the Litigants, and the Doctrinal Discourse supra* note 7, at 1671–72 & n.2 (claiming that the argument of

violated the Free Exercise Clause when it denied unemployment benefits to an individual who refused to accept Saturday work in violation of her Seventh Day Adventist beliefs.[148] The Court first assessed the infringement on *Sherbert*'s religion:

> The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.[149]

Such an infringement on religious exercise could only be sustained if the government showed it had a "compelling state interest" in the activity.[150] The state's concerns that fraudulent religious objections would dilute the employment compensation fund or present scheduling problems were, in the Court's view, not compelling.[151]

In *Yoder*, Amish parents challenged Wisconsin's compulsory education rule as incompatible with their religious beliefs.[152] To balance the free exercise claims against the state's interest, the Court first evaluated the quality of the Amish claims that the complained of activity would infringe on religious beliefs.[153] While recognizing the "delicate" nature of the inquiry, the Court looked closely at the sources and tenets of the Amish religion, observing that "the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living."[154] The "Old Order Amish daily life and religious practice" were traceable to the community's "literal interpretation of the Biblical injunction from the Epistle of Paul to the Romans, be not conformed to this world."[155] As the Court observed, "This command is fundamental to the Amish faith" and created irreconcilable tensions with the obligation to send young people to public high school.[156] The state law violated the Free Exercise Clause because it "affirmatively compel[led the Amish], under

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leading academics that *Yoder* and *Sherbert* controlled *Smith* ignores a number of other important precedents).

[148] *Verner*, 374 U.S. at 403–04 (holding that the disqualification for benefits imposes burdens on the free exercise of religion).

[149] *Id.* at 404.

[150] *Id.* at 406.

[151] *Id.* at 407.

[152] Wisconsin v. Yoder, 406 U.S. 205, 207–09 (1972)

[153] *Id.* at 215.

[154] *Id.* at 215–16.

[155] *Id.* at 216 (internal quotation marks omitted).

[156] *Id.* at 216–17.

threat of criminal sanction, to perform acts undeniably at odds with the fundamental tenets of their religious beliefs."[157]

Following *Sherbert* and *Yoder*, federal appellate courts subsequently cited these passages for the proposition that judges should evaluate the "quality" of religious claims as a component of the substantial burden analysis.[158] In the American Indian context, the courts interpreted *Yoder* to mean the plaintiffs must show the government had infringed upon beliefs or practices that were central or indispensable to the religion.[159] These were the first limiting principles to apply in Indian religion cases.

A. *"Centrality" as Limiting Principle in Indian Religion Cases: 1964–1986*

Two state cases, *People v. Woody*[160] and *Frank v. Alaska*,[161] initially introduced the concept of centrality into American Indian religious freedoms analysis.[162] The Indians prevailed in both cases, with the courts showing little of the reluctance to analyze Indian religious practices that would stymie future claims.[163]

In *Woody*, California Supreme Court Justice Tobriner explained: "On April 28, 1962, a group of Navajos met in an Indian hogan in the desert near Needles, California, to perform a religious ceremony which included the use of peyote."[164] Police officers witnessed part of the ceremony and arrested Jack Woody and other participants who were later convicted of violating the state's prohibition on peyote possession.[165] Citing *Sherbert*, the court first examined whether the state law imposed a burden on Woody's exercise of religion.[166]

The *Woody* court observed that for members of the NAC, peyote was believed to embody the Holy Spirit and provide direct contact with God

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[157] *Id.* at 218.

[158] *See, e.g.*, Sequoyah v. Tenn. Valley Auth., 620 F.2d 1159, 1163 (6th Cir. 1980) (explaining that the test for Free Exercise Clause claims requires the evaluation of the "quality of the claims alleged to be religious" (internal quotation marks omitted)).

[159] *See id.* at 1164 (stating that the plaintiff's Cherokee religious claims "have fallen short of demonstrating that worship at the particular geographic location in question is inseparable from the way of life . . . , the cornerstone of their religious observance . . . , or plays the central role in their religious ceremonies and practices").

[160] 394 P.2d 813 (Cal. 1964).

[161] 604 P.2d 1068 (Alaska 1979).

[162] *See Woody*, 394 P.2d at 818 (holding a religious group's use of peyote was protected by the Constitution because the act was central to their religion); *Frank*, 604 P.2d at 1072–73 (finding a religion's use of moose meat was constitutionally protected because it was central to the faith).

[163] *Woody*, 394 P.2d at 817; *Frank*, 604 P.2d at 1071–73.

[164] *Woody*, 394 P.2d at 814.

[165] *Id.* at 814–15.

[166] *Id.* at 816.

through its ingestion in sacraments of the religion of the NAC.[167] Relying on the parties' testimony, expert anthropologists and NAC documents, the court described peyote practices in great detail. From sundown on Saturday to sunrise on Sunday, NAC members gathered to pray, sing, and drum, leading eventually to the "central event . . . consist[ing] of the use of peyote in quantities sufficient to produce a hallucinatory state."[168] At this point in the ritual, the sponsor passes a ceremonial bag from which most adults are permitted to take four buttons. Peyote produces feelings of brotherhood and love among members who revere it as a protector, teacher, and grandfather.[169] The ritual ends with a sunrise prayer and breakfast and the members depart, suffering "no aftereffects."[170] Even without written texts, the Court observed, Indians across the United States and Canada "follow surprisingly similar ritual and theology."[171]

Given the evidence, the *Woody* court concluded that peyote was "more than a sacrament."[172] NAC members devoted prayers to peyote itself, much like others did to the Holy Ghost.[173] Articles of incorporation for the NAC of California provided: "[W]e as a people place explicit faith and hope and belief in the Almighty God . . . . [W]e further pledge ourselves to work for unity with the sacramental use of peyote and its religious use."[174] In the court's view, forbidding the use of peyote would "remove the theological heart of Peyotism."[175] The state law prohibiting possession amounted to a substantial burden, indeed a "virtual inhibition," of the practice of Woody's religion.[176]

California, in turn, had failed to establish a compelling interest. The Attorney General argued the prohibition was necessary to protect Indians from the physical effects of peyote, the gateway effect to other drugs, and the "indoctrination of small children," but failed to substantiate any of these claims.[177] Harkening back to arguments of a previous generation, the state also claimed peyote would "obstruct[] enlightenment and shackle[] the Indian to primitive conditions,"[178] an argument that the court

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[167] *Id.* at 817.

[168] *Id.* Contemporary accounts by practitioners and scholars alike contest the notion that religious use of peyote causes hallucinations or visions. *See* MAROUKIS, *supra* note 101, at 83 (discussing how it is not common for Peyote to cause visions and delusions today, and asserting that the "vision thesis of earlier scholars has been overstated").

[169] *Woody*, 394 P.2d at 817–18.

[170] *Id.* at 817.

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.* at 815.

[175] *Id*. at 818.

[176] *Id.*

[177] *Id.* (internal quotation marks omitted).

[178] *Id.* (internal quotation marks omitted).

rejected.[179]

In an argument that foreshadowed the institutional concerns raised in *Smith*, California complained that the court's analysis inquired too far "into the bona fides" of religious belief, an inquiry that the Attorney General described as "difficult" and "repugnant to the spirit of our law."[180] The court clarified that it was not intruding into the "truth or validity of religious beliefs," which would be disallowed by the First Amendment.[181] Rather, it was the job of the court—using the evidence at hand—to "distinguish between those who would feign faith in an esoteric religion and those who would honestly follow it."[182] Courts had long made such judgments in conscientious objector cases, decisions that posed "no undue burden upon the trier of fact."[183]

The *Woody* court's description of peyote as "central" and "essential" arose in its distinction of the case from others where courts had upheld burdens on religion.[184] In *Reynolds v. United States*,[185] for example, the Court sustained a federal law banning polygamy against challenges by Mormons who argued their religion required plural marriage.[186] The *Woody* court wrote that while polygamy was a "basic tenet in the theology of Mormonism," it was "not essential to the practice of the religion."[187] Peyote, by contrast, was "the sole means by which [NAC members] are able to experience their religion."[188]

Other centrality cases followed. In *Frank*, the Alaska Supreme Court reversed the conviction of an Athabascan Indian who had been found guilty of violating game laws when he transported a moose, taken out of state season, for a funeral feast.[189] After the death of a young man in the Athabascan village of Minto, Carlos Frank gathered with twenty-five-to-thirty other men from the village, forming a hunting party to take a moose for the funeral feast or "potlatch."[190] Frank assisted in transporting the moose to Minto and was arrested for "unlawful transportation of game illegally taken."[191] Over 200 people attended the potlatch, which was believed to serve as the last meal shared by the living and the dead, helping to nourish the spirit of the dead for his journey and to ease the grief of his

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[179] *Id.*
[180] *Id*. at 820 (internal quotation marks omitted).
[181] *Id*. at 821.
[182] *Id*.
[183] *Id.*
[184] *Id*. at 817, 820.
[185] 98 U.S. 145 (1878).
[186] *Id.* at 166.
[187] *Woody*, 304 P.2d at 820.
[188] *Id.*
[189] Frank v. Alaska, 604 P.2d 1068, 1075 (Alaska 1979).
[190] *Id*. at 1069.
[191] *Id*.

family.[192]

The court reviewed testimony by elders and an anthropologist, several of whom analogized the serving of wild meat at a potlatch to communion in Catholic mass.[193] The court observed: "Native foods comprise almost all of the foods served at the funeral potlatch. In a culture without many formal rules this is an absolute requirement."[194] The *Frank* court found the "funeral potlatch is the most important institution in Athabascan life" and that food "is the cornerstone of the ritual."[195] Moreover, "[m]oose is the centerpiece of the most important ritual in Athabascan life and is the equivalent of sacred symbols in other religions."[196] The evidence made clear that the serving of moose meat was "deeply rooted" in the Athabascan religious tradition and that the state law infringed upon that practice by making it illegal.[197]

The burden then turned to the State to show a compelling interest in the hunting laws at issue in *Frank*. The State immediately turned down a slippery slope, claiming that if an exemption were allowed in this case, widespread disobedience would follow in the form of "poaching and creek robbing, . . . tragic confrontations between recreational hunters and Athabascans," and a "downward spiral into anarchy."[198] But the court wrote that "[j]ustifications founded only on fear and apprehension" could not overcome First Amendment rights.[199] Similarly, the fact "that there was but one funeral potlatch in Minto in 1975, and that one moose was needed for it," undermined the state's conservation argument.[200] There was no compelling interest in burdening the religious practice.[201]

Examining *Woody* and *Frank* in hindsight, several points are notable. The two state courts did not shy away from evaluating the nature of the religious claims based on the evidence provided, even when the government claimed that such analysis exceeded the judicial role. Further, the courts were willing to look at the specific parties in their larger religious and cultural context, assessing what the criminalization of peyote would mean for the NAC and how the prohibition of moose hunting would affect Athabascan villagers. With tens of thousands of peyote practitioners across the country, the peyote case was not just—or even primarily—about

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[192] *Id*. at 1069, 1072.

[193] *Id*. at 1072.

[194] *Id*. ("Native food means moose, bear, caribou, porcupine, fish, duck and berry dishes.").

[195] *Id.* at 1071.

[196] *Id.* at 1073.

[197] *Id.* at 1073–74.

[198] *Id.* at 1074 (internal quotation marks omitted).

[199] *Id.* (internal quotation marks omitted) (quoting Teterud v. Burns, 522 F.2d 357, 361–62 (8th Cir. 1975)).

[200] *Id.*

[201] *Id.*

Jack Woody. In this regard, *Woody* may have been analogous to *Yoder* in which the Court protected the "Amish way of life" as a collective, or at least aggregated the interest against state interference.[202] In *Frank*, the court situated Carlos Frank's actions in the Athabascan religion and experiences of the village of Minto following a young person's death.[203] Frank's religious obligations to help provide a moose for the funeral arose from his membership in the native village of Minto and participation in the Athabascan culture.[204] Viewed through the prism of collective interests, the centrality standard worked relatively well to preserve Indian religious freedoms in these cases. The federal courts would have a more difficult time with this standard.

In *Sequoyah v. Tennessee Valley Authority*,[205] the centrality standard worked to the tribal religious practitioners' detriment.[206] The Sixth Circuit reviewed Cherokee Indian claims that a federally funded dam project would violate the Free Exercise Clause by flooding ancient holy towns, burial grounds, and medicine gathering sites in the Little Tennessee River Valley.[207] Cherokee medicine men and elders testified that the area was "the birthplace of the Cherokee" people and the Cherokees' "connection with the Great Spirit."[208] Medicine men testified that they went to the valley several times a year to gather medicine and that flooding the lands would "destroy the spiritual strength of the Cherokee people."[209] For all of these reasons, the plaintiffs alleged that the action would result in "infringement on their right to worship . . . by the destruction of sites which they hold in reverence and in denial of access to such sites."[210]

The task for the court was how to decide whether and to what extent these claims were actionable under the Free Exercise Clause. Observing that "[o]rthodoxy is not at issue," the Sixth Circuit explained that the Cherokees would not be penalized for their lack of "written creeds" and

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[202] Wisconsin v. Yoder, 506 U.S. 205, 211 (1972). *But see* Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 422 (1987) (arguing that "individuals, not institutions, are always the ultimate source of religious conviction," and cases such as *Yoder* recognize the "aggregated rights" of individuals and not the interests of "the Amish").

[203] *Frank*, 604 P.2d at 1074.

[204] *Id.* at 1073; *see also id.* at 1071–73 (describing and explaining Frank's role in the Athabascan funeral customs).

[205] 620 F.2d 1159 (6th Cir. 1980).

[206] *Id.* at 1164 ("The claim of centrality of the Valley to the practice of the traditional Cherokee religion, as required by *Yoder*, *Woody* and *Frank*, is missing from this case."); *see also* BRIAN EDWARD BROWN, RELIGION, LAW, AND THE LAND: NATIVE AMERICANS AND THE JUDICIAL INTERPRETATION OF SACRED LAND 9–38 (1999) (discussing the *Sequoyah* case).

[207] *Sequoyah*, 620 F.2d at 1160.

[208] *Id.* at 1162.

[209] *Id.*

[210] *Id.* at 1160.

"man-made houses of worship."[211] Yet, even accepting the Cherokees' "sincerity," the court wrote that it still had to determine whether the Cherokees had stated a constitutionally cognizable First Amendment objection to the otherwise legal conduct of the government.[212] Citing *Yoder*, the Sixth Circuit evaluated the "centrality or indispensabilty" of each religious practice to the religion.[213] Here, the court noted that some of the religiously significant plants were available elsewhere and some Cherokees did not know the location of the sacred sites. In a passage that would presage concerns about geographic limits in future sacred sites cases, the court said that the plaintiffs "are now claiming that the entire Valley is sacred" even though "none of the affidavits state[] this explicitly."[214] Moreover, there was conflicting testimony even among Cherokees about the area's significance.[215] The Sixth Circuit concluded that the religious claims reflected "'personal preference' rather than convictions 'shared by an organized group.'"[216] This was because under *Yoder*, *Woody*, and *Frank*, the Cherokees had not shown the threatened practices and places to be "indispensab[le]" to their way of life, the "cornerstone" of their religious observance, or "central" to religious ceremonies.[217]

Today, of course, the fact pattern in *Sequoyah* would likely trigger the Native American Graves Protection and Repatriation Act of 1990, which provides to tribal governments a right of consultation with respect to the intentional excavation of American Indian graves on federal lands.[218] But in 1980, the Sixth Circuit struggled to appreciate the tribal nature of the claims in *Sequoyah*. The Eastern Band of Cherokees and United Keetoowah Band of Cherokee Indians were named plaintiffs and had tried to emphasize their collective interests, framing the claim in terms of "all those present or future Cherokee Indians who practice the traditional Cherokee religion."[219] The affidavit of religious practitioners Lloyd Sequoyah, Emmaline Driver, Willie Walkingstick, and Lloyd C. Owle also made clear that they were not litigating for themselves alone, arguing:

> When this place is destroyed, the Cherokee people cease to

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[211] *Id.* at 1163.

[212] *Id.*

[213] *Id.* at 1164.

[214] *Id.* at 1163.

[215] *See id.* (stating that the plaintiffs are in disagreement about the exact location of the religious sites).

[216] *Id.* at 1164 (quoting Wisconsin v. Yoder, 406 U.S. 205, 216 (1972)). In this regard, *Sequoyah* may have reflected *Yoder*'s distinction between "religion" and a "philosophy."

[217] *Id.*

[218] 25 U.S.C. § 3002(c) (2006) (stating that the intentional excavation of Native American human remains is permitted only if the appropriate Indian tribe is consulted).

[219] *Sequoyah*, 620 F.2d at 1160 (internal quotation marks omitted).

> exist as a people. . . . The white man has taken nearly everything away from us, our heritage, culture, traditions, and our way of life that is our religion. . . . [A]s the water backs over the once Cherokee land, our people will feel a great pain. The earth will cry . . . as water covers this beautiful, fruitful valley, members of our tribe will be in silence.[220]

But the court said "[s]imilar feelings" about places where their ancestors lived "are shared by most people to a greater or lesser extent."[221] In response to the Cherokee claims that they lost access to their sacred sites through the treaty and removal process, the court was sympathetic but ultimately deferred to the United States's current ownership.[222] The dissenting judge would have remanded to give the Cherokees the opportunity to brief the centrality standard and, in particular, to develop the record on "the role that this particular location plays in the Cherokee religion."[223]

In *Badoni v. Higginson*,[224] Navajo medicine men and leaders filed a claim to prevent further desecration of Navajo gods and sacred areas caused by recreation at Rainbow Bridge National Monument.[225] The federal district court held the plaintiffs had no cognizable Free Exercise Clause claim in part because the government's authority as an owner outweighed any claims by the Navajo medicine men.[226] Without the bright line of ownership, the Navajos could not differentiate their claims in a way that the government could be expected to manage. This might "lead to unauthorized and very troublesome results":

> A person might sincerely believe that he or a predecessor encountered a profound religious experience in the environs of what is now the Lincoln Memorial in Washington, D. C., and that experience might cause him to believe that the Lincoln Memorial is therefore a sacred religious shrine to him. That person, however, could hardly expect to call upon the courts to enjoin all other visitors from entering the Lincoln Memorial in order to protect his constitutional right to religious freedom.[227]

In the district court's view, the plaintiffs had "failed to demonstrate

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[220] BROWN, TEACHING SPIRITS, *supra* note 82, at 15 (alteration in original) (internal quotation marks omitted).

[221] *Sequoyah*, 620 F.2d at 1162–63.

[222] *Id.* at 1162–64.

[223] *Id.* at 1165 (Merritt, J., dissenting).

[224] 455 F. Supp. 641 (D. Utah 1977).

[225] *Id.* at 642–43.

[226] *Id.* at 647.

[227] *Id.* at 645.

"deep religious conviction[s], shared by an organized group and intimately related to daily living," as required by *Yoder*.[228] This was because, in the court's view, the few medicine men conducting the religious rites at Rainbow Bridge were "not recognized by the Navajo Nation as such"; their training had taken place years ago and was not "tribally organized or carried out."[229] Additionally, the plaintiffs had only "attended a combined total of nine religious ceremonies" at the Monument and had done so "only infrequently prior to 1965."[230] For all of these reasons, the court concluded:

> [T]here is nothing to indicate that at the present time the Rainbow Bridge National Monument and its environs has anything approaching deep, religious significance to any organized group, or has in recent decades been intimately related to the daily living of any group or individual. Rather, the record supplied by the plaintiffs is to the contrary.[231]

The district court decision in *Badoni* reveals one of the problems with pitting individual religious practitioners against the federal government in Indian religion cases: the court may lack sufficient context to assess the religious practices in the record. Without an appreciation of the ways in which medicine men served and were recognized by the larger community, for example, the *Badoni* court was left to count up Navajo medicine men who had visited Rainbow Bridge as a measure of the depth and significance of the religious practice.[232] Similarly, by counting visits to Rainbow Bridge, the court could not seem to understand that the ceremonies in question were never held periodically (such as once a month or year), but rather as the needs of an individual or family arose.[233] Missing was an assessment of how these practices and beliefs stemmed from the Navajo creation story, perpetuated Navajo culture and lifeways, and were critical to helping individuals and the community maintain the state of *hozho* that defined the right way of living for Navajos.

Interestingly, the Tenth Circuit held that the Navajos had presented religious claims of sufficient quality vis-à-vis *Yoder*:

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[228] *Id.* (citation omitted) (internal quotation marks omitted).

[229] *Id.* at 645–46.

[230] *Id.* at 646.

[231] *Id.*

[232] Interestingly in today's "ministerial exception cases" that give churches some latitude to discriminate in hiring, a much litigated question is who qualifies as a "minister." *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 707 (2012) (declining "to adopt a rigid formula for deciding when an employee qualifies as a minister"). Today, the Navajo Medicine Men's Association, along with the Diné Hataalii Association, is now recognized by the Navajo Nation as a partner in official governmental advocacy for religious freedoms in domestic and international tribunals.

[233] *Badoni*, 455 F. Supp. At 646 (internal quotation marks omitted).

> Rainbow Bridge and a nearby spring, prayer spot and cave have held positions of central importance in the religion of some Navajo people living in that area for at least 100 years. These shrines are regarded as the incarnate forms of Navajo gods, which provide protection and rain-giving functions. For generations Navajo singers have performed ceremonies near the Bridge and water from the spring has been used for other ceremonies. Plaintiffs believe that if humans alter the earth in the area of the Bridge, plaintiffs' prayers will not be heard by the gods and their ceremonies will be ineffective to prevent evil and disease.[234]

Accepting the Navajo practices at Rainbow Bridge as "central," the Tenth Circuit nonetheless agreed that the government's interests in water levels at Lake Powell outweighed the religious claims.[235] Here the problem was in the court's lack of institutional capacity to negotiate the contours of a negotiation between the Navajo Nation and United States. And the Navajos lost the case.

B. *The Bright Lines of "Objective Coercion" and "Ownership" in Free Exercise Cases 1986–1993*

Not long after *Sequoyah* and *Badoni*, the Supreme Court took up two cases, *Bowen* and *Lyng*, which changed the direction of Indian religion cases dramatically. The lower appellate courts had understood *Yoder* and *Sherbert* to require a "quality" test and applied it by looking for a claim that was "central" to a religion and then balancing such claim against the government interests. In *Bowen* and *Lyng*, however, the Court made clear that the judicial role was not to probe the quality of the religious claims at all—courts were institutionally ill-suited to intrude into the sphere of religion in this way. As I will argue here, in *Bowen* and *Lyng*, the Court replaced the nuanced "centrality" inquiry with bright lines that made it even more difficult, if not impossible, for Indian religious plaintiffs to obtain relief.

In *Bowen*, Stephen Roy challenged the federal requirement that his daughter obtain a Social Security number in order to receive welfare benefits, contending that the assigned number would rob their daughter of her spirit, in violation of their "Native American religious beliefs."[236] According to Roy, the daughter had been given her name "Little Bird of the Snow" in a ceremony in which her father and sister buried her placenta

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[234] Badoni v. Higginson, 638 F.2d 172, 177 (10th Cir. 1980).
[235] *Id*.
[236] Bowen v. Roy, 476 U.S. 693, 695 (1986).

and a small white bird appeared to them.[237] Her name became a sacred aspect of her identity, derived through a spiritual event. In addition, Roy had related religious concerns, which he attributed to Abenaki Indian beliefs, about the pervasiveness of technology in identifying human beings. "[T]he legend of Katahdin" described "great evil" that results from three related practices: "the widespread use of computers"; the "people's casual acceptance" of such use; and the "proliferation of weaponry" relying on computer technology, which made killing into a "sterile act."[238]

Because of these concerns, Roy refused to provide his daughter's Social Security number in the application process for benefits through the Aid to Families with Dependent Children program. He believed that it would harm her spirit and the purity necessary for her to become a "holy person."[239] As a result, the family had been denied benefits of between thirty-three and sixty-six dollars per month for several years by the time of the trial.[240] Roy argued that this government action violated the Free Exercise Clause by forcing them to choose between observing a requirement of their faith and receiving a government benefit (not unlike, of course, the claims in *Sherbert*).[241]

At trial, the government argued that Roy's beliefs were not "religious" in nature on grounds that these beliefs were generically Native American (versus Abenaki), philosophical, and irrational.[242] Yet, the court saw no reason why a belief had to be traceable to one tribe and cited to the testimony on the religious aspect of the Katahdin tradition.[243] The court also noted that religious beliefs did not have to be rational to be actionable under the First Amendment. Thus, the district court enjoined the government both from denying benefits to the Roys and from using their daughter's Social Security number until she turned sixteen, at which time the government indicated that it would have even greater concern about identifying her.[244]

The Supreme Court reversed, holding that the Free Exercise Clause did not compel the government to conform its conduct to the religious preferences of citizens.[245] While the Supreme Court formally accepted the sincerity of Roy's claims, everything about the opinion projected skepticism. Whereas the district court had noted Roy's Abenaki family lineage and described the religious beliefs in that context, the Supreme

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[237] Roy v. Cohen, 590 F. Supp. 600, 604 (M.D. Pa. 1984), *vacated*, 476 U.S. 693 (1986).
[238] *Id.* at 604–05 (internal quotation marks omitted).
[239] *Id.* at 605 (internal quotation marks omitted).
[240] *Id.*
[241] *Id.* at 603.
[242] *Id.* at 609.
[243] *Id.*
[244] *Id.* at 613–14.
[245] Bowen v. Roy, 476 U.S. 693, 699 (1986).

Court emphasized that Roy had only "recently" developed his religious objection to Social Security numbers through "recent" conversations with an Abenaki chief.[246] Similarly, when it came time to "determin[e] the breadth of Roy's religious concerns,"[247] the Court was skeptical about his reliability. Roy had originally testified that his daughter's spirit would be robbed if she were issued a Social Security number. But when new evidence at trial revealed that the government had already issued her a number, Roy seemed to change his tune. He testified that Little Bird's spirit was not actually robbed yet, but would be robbed by "widespread use" of the number.[248]

Roy's changing position heightened the Court's usual concerns about the slippery slope. As the majority wrote: "It is readily apparent that virtually *every* action that the Government takes, no matter how innocuous it might appear, is potentially susceptible to a Free Exercise objection."[249] For example, "someone might raise a religious objection, based on Norse mythology, to filing a tax return on a Wednesday (Woden's day)."[250] The Court was unconvinced that the government would have to accommodate beliefs of this nature, writing: "Roy may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets."[251]

Bowen stands for a clear bright line position: religious believers cannot compel the government to do anything under the First Amendment. To this end, the Court wrote that *Yoder* was not a suitable test to apply to "the enforcement of facially neutral and uniformly applicable requirement for the administration of welfare programs reaching many millions of people."[252] In hindsight, the Court was on a path toward articulating what it would say even more emphatically in *Smith*—that the substantial burden–compelling interest test does not apply to neutral statutes of general applicability. Thus, the Court's skepticism about Roy's claims, which it repeatedly described as "recent" and "unique," may have been

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[246] *Id.* at 696.

[247] *Id.*

[248] *Id.* at 697.

[249] *Id.* at 707 n.17; *see also* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 448–49 (1988) (describing Indian objections to government road construction through sacred site as indistinguishable from claims about Social Security number in *Bowen v. Roy*, to the extent that both would interfere with government's management of its own affairs).

[250] *Bowen*, 476 U.S. at 707 n.17; *see also* Hansen v. Dept. of Treasury, 528 F.3d 597, 602–03 (9th Cir. 2007) (rejecting religious objection to assignment of Social Security number); Ali v. Dixon, 912 F.2d 86, 89–90 (4th Cir. 1990) (holding that a prisoner has no free exercise objection to prison officials' refusal to use in personal interactions the prisoner's new name, obtained during conversion to Islam).

[251] *Bowen*, 476 U.S. at 700.

[252] *Id.* at 707.

only window dressing. The case may have come out the same way even if the Roys had more effectively articulated limits on the claims and remedies they sought.

That said, it is also true that the Roys' religious beliefs were not deeply articulated in terms of a tribal religion. The Abenakis are an ancient tribe with aboriginal lands in Vermont and New Hampshire, and treaties dating back to the 1700s.[253] Nevertheless, the Abenakis are not federally recognized and were not a party or amicus in the *Bowen* case. And there is little to suggest that Abenakis generally oppose Social Security numbers on religious grounds. While one Abenaki elder testified in the case, the brief of the National Congress of American Indians ("NCAI") pointed out that the Social Security Administration had failed to consult with tribal leaders.[254] As Walter Echo-Hawk has argued, "*Bowen* does not involve recognizable tribal religious beliefs. It involved an offbeat idiosyncratic religious belief . . . that was only incidentally described as Native American."[255] Despite the lack of agency consultation or a tribal presence in the litigation, *Bowen* has come to stand for the proposition that American Indian religious claims may *generally* be too broad or idiosyncratic for the government to accommodate as a matter of right under the First Amendment.[256] This reasoning would prevail in *Lyng.*

In *Lyng*, American Indian religious practitioners sued the United States Forest Service alleging that its plans to build a logging road through sacred sites would violate the Free Exercise Clause.[257] The Yurok, Karuk, and Tolowa tribes knew the mountainous area as the "High Country," a sacred space inhabited by spiritual ancestors where religious leaders went to gather medicine, engage in prayer, and otherwise prepare for tribal ceremonies.[258] These activities, conducted by a small number of religious leaders or "doctors," were necessary precursors to various religious dances undertaken by the tribal people in their villages.[259] These dances along with other religious duties comprised some of the tribal "cultural covenants"—set forth in the creation stories—designating the various responsibilities of human beings and the natural world to each other that

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[253] For sources on Abenaki culture and history, see COLIN CALLOWAY, THE WESTERN ABENAKIS OF VERMONT 1600–1800: WAR, MIGRATION AND THE SURVIVAL OF AN INDIAN PEOPLE 7 (1990); FREDERIC KIDDER, THE ABENAKI INDIANS: THEIR TREATIES OF 1713 AND 1717, AND A VOCABULARY 3–4 (Portland, Brown Thurston, 1859); FREDERICK MATTHEW WISEMAN, THE VOICE OF THE DAWN: AN AUTOHISTORY OF THE ABENAKI NATION 65 (2001).

[254] WISEMAN, *supra* note 253, at 47–48.

[255] ECHO-HAWK, *supra* note 10, at 525 n.4.

[256] *Id.*

[257] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 443 (1988).

[258] Bowers & Carpenter, *supra* note 29, at 489.

[259] *See id.* at 495–96.

would keep the world in balance.[260]

While the High Country was located in the tribes' aboriginal territory, it was not included in their reservations and, by the time of the case, was owned by the United States and managed by the Forest Service.[261] A Draft Environmental Statement was released by the Forest Service in 1974 which outlined possible land use plans for the "Blue Creek Unit" of the Six Rivers National Forest in Northern California.[262] The proposal ultimately called for "harvesting 733 million board feet of timber over the course of 80 years and required construction of 200 miles of logging roads in the areas adjacent to Chimney Rock."[263] Each day, an estimated seventy-six logging vehicles, as well as ninety-two other vehicles, would travel through the Chimney Rock area. In support of this activity, the government proposed constructing a new road to connect the towns of Gasquet and Orleans ("G-O road")." This road would cut through the High Country. [264]

When Indians raised concerns about possible damage to sacred sites, the Forest Service commissioned an expert study, which found the entire area to be "significant as an integral and indispensable part of Indian religious conceptualization and practice."[265] The Theodoratus Report went on to explain that specific sites are used for certain rituals, and "successful use of the [area] is dependent upon and facilitated by certain qualities of the physical environment, the most important of which are privacy, silence, and an undisturbed natural setting."[266] Because constructing a road along any of the available routes "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples," the Theodoratus Report recommended that the G-O road not be completed.[267]

Despite the findings and recommendations of its own experts, the Forest Service selected the logging and road plan described above. It did try to avoid certain sacred sites in selecting the route for the road and called for a half-mile buffer around sites identified in the Theodoratus Report.[268] Yet, the Forest Service rejected alternatives that would have

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[260] *See id.* at 494–95 (discussing the "cultural covenants," and how "[e]ach had a purpose in the chain of life").

[261] Bowers & Carpenter, *supra* note 29, at 498–505 (describing loss of tribal aboriginal territory leading up to the *Lyng* case).

[262] *Id.* at 505.

[263] *Id.*

[264] *Id.*

[265] Dorothea Theodoratus, *Cultural Resources of the Chimney Rock Section, Gasquet-Orleans in* Lyng v. Northwest Indian Cemetery Protective Association, *in* READINGS IN AMERICAN INDIAN LAW 302, 311 (Jo Carrillo ed., 1998) [hereinafter *Theodoratus Report*].

[266] *Id.*

[267] *Id.*

[268] *Id.*

avoided certain sacred sites, such as Chimney Rock, altogether because they required the purchase of private land, had soil stability problems, and would still have disturbed other Indian cultural sites.[269]

The Indian plaintiffs sued, alleging that the completion of the road would violate the Free Exercise Clause by degrading the sacred qualities of the high country and impeding its use for religious purposes.[270] More specifically, the plaintiffs argued that the visibility of the road, the noise associated with it, and the resulting environmental damage would all "erode the religious significance of the area" and "impair the success of religious and medicinal" activities.[271] The Indians were represented by six named religious practitioners and the Northwest Indian Cemetery Protective Association, a non-profit corporation created to represent the tribal interests in grave protection and other religious matters. The Yurok, Karuk, and Tolowa tribes did not appear as parties, possibly because they were not federally recognized and did not have well-developed governmental infrastructures at the time.[272] While the Indian communities coordinated their efforts and worked closely with their attorneys at California Indian Legal Services, they did not have the resources or organization that they have today. For example, in 1993, the Yurok Tribe adopted a constitution that sets forth its religious laws and cultural covenants, a legal instrument that was unavailable to lawyers at the time of the *Lyng* case.[273] Moreover, the Yurok Tribe has since developed considerable expertise in negotiating with federal agencies regarding land use disputes.

Despite the lack of formal tribal resources, the Yurok, Tolowa, and Karuk religious practitioners participated actively in the trial. Their testimony relied on oral tradition and it was very persuasive.[274] The district court looked to *Sherbert*, *Yoder*, *Sequoyah*, and *Badoni* to evaluate whether the Indians had shown a substantial burden on their religion. Distinguishing *Sequoyah*, the district court observed that here, the Indians had demonstrated that the area was indispensable and central to the practice of religion, and that the government use would seriously interfere

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[269] *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 443 (1988) (stating that the Forest Service decided not to adopt the recommendations).

[270] Nw. Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 592 (1983), *rev'd sub nom.* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

[271] *Id*.

[272] *See* Bowers & Carpenter, *supra* note 29, at 503 n.50 ("[T]he Yuroks, Karuks, and the Tolowa would not formalize their governments for several decades.").

[273] YUROK TRIBE [CONSTITUTION] Nov. 19, 1993 (U.S.), *available at* http://www.yuroktribe/org/government/councilsupport/documents/Constitution.pdf.

[274] *See Peterson*, 565 F. Supp. at 592–95 (finding that *Sherbert* and *Yoder* "support the conclusion that the proposed Forest Service actions impose an unlawful burden on the exercise of plaintiffs' religion," while distinguishing the case from *Sequoyah* and *Badoni*, where the court did not find in favor of the Indian plaintiffs).

therewith.[275] The court stated, "The Forest Service's own study concluded that intrusions on the sanctity of the Blue Creek high country are . . . potentially destructive of the very core of Northwest Indian religious beliefs and practices."[276] These included preparation for "'World Renewal' ceremonies, such as the White Deerskin and Jump Dances, which constitute the heart of the Northwest Indian religious belief system."[277] Citing *Yoder* and *Sherbert*, the Court concluded that the Forest Service's actions in the High Country would "impose an unlawful burden" on the Indians' religion.[278] Moreover, the government interests in the six-mile road project were not demonstrably "compelling."[279] Having failed the Free Exercise Clause test, the government's plan to build a road through the sacred high country was struck down.[280]

The Ninth Circuit heard the *Lyng* case twice, initially on direct appeal in 1985,[281] and again on rehearing in 1986.[282] Both times, the Ninth Circuit affirmed the district court's holding that the road construction and timber harvesting would impermissibly burden the Tolowa, Yurok, and Karuk peoples' religious freedoms.[283] Judge Canby reviewed and upheld the district court's findings that the G-O road would substantially infringe the Indians' religion.[284] On the compelling governmental interest prong, he went somewhat further than the district court, observing that the government "makes little attempt to demonstrate that compelling

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[275] *See id.* at 595 ("Unlike the present case, plaintiffs in *Sequoyah* did not claim that the area threatened with flooding played a central role in the practice of their religion, and in fact failed to demonstrate that there had been significant past use of the area for religious purposes." (internal citation omitted)).

[276] *Id.* (internal quotation marks omitted).

[277] *Id*. at 594.

[278] *See id.* at 595 (citation omitted) (internal quotation marks omitted) (referring to the court's finding in *Sherbert* that there was an unlawful burden on the plaintiff's free exercise of religion even though it constituted the denial of a benefit or privilege and was only an indirect result of welfare legislation within the State's general competence to exist).

[279] According to the court, the available timber in the Blue Creek Unit was too small to affect timber supplies and the timber industry would not suffer significantly without the project. Even if the government could demonstrate a compelling public interest, the court held that there were "means less restrictive of [the Indians'] First Amendment rights" than the government's proposed management plan for Blue Creek Unit. *Id*. at 596.

[280] *Peterson*, 565 F. Supp. at 595–96. The district court also decided claims under the Establishment Clause and numerous federal statutes. *Id*. at 597–98.

[281] Nw. Indian Cemetery Protective Ass'n v. Peterson, 764 F.2d 581, 583 (9th Cir. 1985), *rev'd sub nom*. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

[282] Nw. Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688 (9th Cir. 1986).

[283] *See Peterson*, 764 F.2d at 585–86 ("[The Ninth Circuit's] finding is sufficient to support the district court's conclusion that the proposed operations would interfere with the Indian plaintiffs' free exercise rights. . . . We also reject the government's argument that the free exercise clause cannot be violated unless the governmental activity in question penalizes religious beliefs or practices."); *Peterson*, 795 F.2d at 692–94 (explaining that the court agrees with the district court's conclusion that "the proposed operations would interfere with the Indian plaintiffs' free exercise rights").

[284] *Peterson*, 795 F.2d at 693.

governmental interests . . . require the completion of the paved G-O road or the logging of the high country."[285] The evidence did not justify the infringement of Indian religious freedoms.[286]

By the time *Lyng* reached the Supreme Court, however, the newly issued *Bowen* opinion had changed the analysis altogether. At oral argument, the government urged that "[a] believer's conclusion that government action impacts adversely [on] his belief system is not by itself sufficient to trigger constitutional protection, and that was really the holding of this Court joined by eight members in *Bowen v. Roy*."[287] And further, "the Government need not make any concessions whatever to the interests of the Indians in this case."[288] Here, the government took *Bowen* one step further, arguing in this case that it was not merely the government's management of internal affairs, but rights over its own property at stake. In this regard, a new limiting principle was emerging: the principle of ownership. As the Court put it: "Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land."[289]

As I have argued in detail elsewhere, it was thus in *Lyng* that ownership became an effective ban on Indian free exercise claims involving the public lands.[290] In my view, the Court announced this near absolute rule in response to fears about the scope of the Indians claims on federal property. The line of question occupied much of the discussion at oral argument, where the Justices questioned the size of the contested area and the extent to which the Indians were trying to exclude others from it.[291] The opening question to the Indians' attorney was "how many square miles or square feet there are involved?"[292] She answered, "admittedly it's a large area," and then tried to direct the Justices' attention to the location "where the conduct is occurring"—namely the six-mile road segment. [293] In response to questioning, Miles explained that the Indians were not trying to exclude Forest Service rangers, campers, hunters, motorcycles, jeeps,

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[285] *Id.* at 695.

[286] *Id.*

[287] Oral Argument, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (No. 86-1013) (1988), *available at* http://www.oyez.org/cases/1980-1989/1987/1987_86_1013#argument [hereinafter Oral Argument, *Lyng*].

[288] *Id.*

[289] *Lyng*, 485 U.S. at 453.

[290] *See* Carpenter, *A Property Rights Approach to Sacred Sites Cases*, *supra* note 14, at 1084–85 (discussing the Supreme Court's decision in *Lyng*, and how the decision "cleared up the role of ownership").

[291] *See* Oral Argument, *Lyng*, *supra* note 287 ("Not all religious practices have to be conducted at the particular site, and, so, it would not interfere with the Government's proposal at all unless you could show that, and not all land projects are going to seriously interfere with it.").

[292] *Id*.

[293] *Id*.

backpackers, Mormons, or the Boy scouts from the contested area.[294] One Justice asked whether "the claim could be made in the future, that any use, including that [use] by other non-Indians, of the Forest Service land would constitute a sufficient burden that it must be prohibited."[295] Miles responded that no applicable precedent would support such a claim, but the Justice's question signaled where the Court was going: it could not discern any workable limits on the Indians' claims.

Writing for the majority, Justice O'Connor reversed the Ninth Circuit's decision, holding that the Indians had no Free Exercise Clause claim.[296] The majority reasoned that *Lyng* was indistinguishable from *Bowen*, writing, "In both cases, the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs."[297]

The majority was unwilling to use the "centrality" test to distinguish *Lyng* from *Bowen*.[298] The dissent had advocated such an approach as a means of "balancing" the interests at stake and thereby addressing a "stress point in the longstanding conflict between two disparate cultures."[299] But the majority disagreed that the Court should act as the "arbiter" in determining which public lands are central to which religions and which government programs were sufficiently compelling to justify burdening those practices.[300] This would require the Court to "weigh the value of every religious belief and practice that is said to be threatened by any government program" and, in some cases, hold that "some sincerely held religious beliefs and practices are not 'central' to certain religions, despite protestations to the contrary from the religious objectors who brought the lawsuit."[301] Such an approach would, in the majority's view, "cast the Judiciary in a role that we were never intended to play."[302]

To Justice O'Connor, the facts of *Lyng* illustrated exactly why, beyond the institutional issues, a nuanced approach would be difficult. As she wrote: "government simply could not operate if it were required to satisfy every citizen's religious needs and desires."[303] Stating that "[o]ne need not look far beyond the present case"[304] to see why this was true, the Court then proceeded with a set of speculations going far beyond the actual *Lyng*

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[294] *Id*.
[295] *Id.*
[296] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 440–41 (1988).
[297] *Id.* at 449.
[298] *Id.* at 457–58.
[299] *Id.* at 473–74 (Brennan, J., dissenting).
[300] *Id.* at 457.
[301] *Id.*
[302] *Id.* at 458.
[303] *Id.* at 452.
[304] *Id.*

case:

> Respondents attempt to stress the limits of the religious servitude that they are now seeking to impose on the Chimney Rock area of the Six Rivers National Forest. While defending an injunction against logging operations and the construction of a road, they apparently do not *at present* object to the area's being used by recreational visitors, other Indians, or forest rangers. Nothing in the principle for which they contend, however, would distinguish this case from another lawsuit in which they (or similarly situated religious objectors) might seek to exclude all human activity but their own from sacred areas of the public lands. The Indian respondents insist that "*[p]rivacy* during the power quests is required for the practitioners to maintain the purity needed for a successful journey." Similarly: "The practices conducted in the high country entail intense meditation and require the practitioner to achieve a profound awareness of the natural environment. Prayer seats are oriented so there is an unobstructed view, and the practitioner must be surrounded by *undisturbed* naturalness." No disrespect for these practices is implied when one notes that such beliefs could easily require *de facto* beneficial ownership of some rather spacious tracts of public property. Even without anticipating future cases, the diminution of the Government's property rights, and the concomitant subsidy of the Indian religion, would in this case be far from trivial: the District Court's order permanently forbade commercial timber harvesting, or the construction of a two-lane road, anywhere within an area covering a full 27 sections (i.e. more than 17,000 acres) of public land.[305]

The upshot was that the government could not function if it might be forced to accommodate uses of this inscrutably broad nature. A bright line approach was preferable. *Lyng* was like *Bowen* in that in neither case had the government "coerce[d] individuals into acting contrary to their religious beliefs" by imposing a penalty or denying a benefit, as in *Yoder* and *Sherbert*.[306] Coercion became the new bright line. The Court held "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, [cannot] require

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[305] *Id.* at 452–53 (citations omitted).

[306] *Id.* at 450–51.

government to bring forward a compelling justification."[307] The Indian plaintiffs' claim was not actionable under the Free Exercise Clause.[308]

The plaintiffs in *Lyng* were devastated, fearing that their spiritual center of the Yurok universe would be destroyed, and not understanding why the First Amendment did not protect their religious freedom.[309] Two years later, Congress passed legislation effectively designating the High Country as a wilderness area where no further road construction could occur.[310] The six-mile segment was never built (suggesting that the result sought by the Indians did not actually cause government to grind to a halt).[311] Some commentators argue that this was the correct result, leaving it up to Congress and the Executive Branch to protect religions on a case-by-case basis.[312] Others criticize *Lyng* for narrowing free exercise rights and broadening the government's powers as an owner to the extent of immunizing the destruction of Indian religious practices on the federal lands.[313] In any event, it is clear that *Lyng* advanced some limiting principles on religious liberty: in order to show a "substantial burden," free exercise claimants must demonstrate that the government has "coerced religious belief" or "denied a benefit" and that the government's management of its land will not typically violate the Free Exercise Clause.

C. *The Ultimate Limit: Neutral Statutes of General Applicability*

In 1990, the Supreme Court decided *Employment Division v. Smith*,[314]

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[307] *Id.*

[308] *See supra* text accompanying note 231.

[309] *See* Bowers & Carpenter, *supra* note 29, at 526 ("When the *Lyng* opinion hit the banks of the Klamath River, the tribal communities were shocked, devastated, and despondent.").

[310] Smith River National Recreation Area Act, Pub. L. No. 101-612, 104 Stat. 3209 (1990) (codified at 16 U.S.C. § 460bbb (2006)).

[311] *See* Bowers & Carpenter, *supra* note 29, at 527.

[312] *See* Marcia Yablon, Note, *Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land*, 113 YALE L.J. 1623, 1629 (2004) ("In foreclosing judicial protection, the *Lyng* Court shut off one method of protecting sacred sites, but suggested another, more feasible method in its place—agency accommodation."). *Cf.* Zoë Robinson, *Rationalizing Religious Exemptions: A Legislative Process Theory of Statutory Exemptions for Religion*, 20 WM. & MARY BILL RTS. J. 133, 133, 162–64 (2011) (hypothesizing "that a person's religious freedom is dependent on their political power" or their ability to secure legislative accommodation for religious practices).

[313] *See, e.g.*, Carpenter, *A Property Rights Approach to Sacred Sites Cases*, *supra* note 14, at 1062–67 (outlining the *Lyng* decision and critiquing its implication that the government is a property owner with an almost absolute right to exploit federal lands, even where detrimental to Indians' sacred sites); S. Alan Ray, Comment, Lyng v. Northwest Indian Cemetery Protective Association*: Government Property Rights and the Free Exercise Clause*, 16 HASTINGS CONST. L.Q. 483, 504–06, 510–11 (1989) (criticizing *Lyng*'s analysis and narrowing of free exercise rights); *see also* Peggy Healy, Comment, Lyng v. Northwest Indian Cemetery Protective Association*: A Form-Over-Effect Standard for the Free Exercise Clause*, 20 LOY. U. CHI. L.J. 171, 171 (1988) ("The [*Lyng*] decision, if adhered to in future cases, portends a more restrictive interpretation of the free exercise clause, with profound implications for all religious groups.").

[314] 494 U.S. 872, 872 (1990).

the case that would ultimately inspire the enactment of RFRA. In *Smith*, the Supreme Court rejected the Free Exercise Clause claims of two individuals who were deemed ineligible for unemployment benefits after being fired from their jobs for having ingested peyote in ceremonies of the NAC.[315] The significance of peyote as a religious sacrament has been described above in *Woody*.

Some states had been regulating peyote since the 1920s, and the federal government put peyote on its list of controlled substances in 1967, which made it illegal to possess the plant, with regulatory exceptions for "nondrug use of peyote in bona fide ceremonies of the Native American Church."[316] States remained free to legislate without religious exemptions for Native Americans. Oregon prohibited the knowing or intentional possession of any controlled substance including peyote, and persons who violated the prohibition were guilty of a Class B felony. [317]

In 1983, Al Smith, a Klamath Indian, and Galen Black, a non-Indian, were fired from their jobs for religious use of peyote in ceremonies of the NAC. The state employment division determined that they had been fired for "misconduct" and were thus ineligible for benefits.[318] Finding that the state law made no exception for religious use of peyote, the Oregon Supreme Court held that this prohibition violated the Free Exercise Clause and that the State of Oregon could not deny Smith and Black benefits for this reason.[319]

The U.S. Supreme Court reversed, holding that the Free Exercise Clause neither prohibited Oregon from applying its drug laws to ceremonial ingestion of peyote nor stopped the state from denying claimants unemployment compensation for work-related "misconduct" based on use of peyote.[320] Justice Scalia, writing for the majority, held that states need not grant religious exemptions to neutral statutes of general applicability such as this one.[321] As in recent cases rejecting religious claims for tax exemptions, the Court held there was no religious entitlement to an exemption from government programs.[322]

The Court found the *Smith* facts akin to *Lyng* and *Bowen*, in which a religious claimant could not interfere with the government's management of its own affairs. By contrast, *Sherbert* and *Yoder* were unhelpful

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[315] *Id.* at 872.

[316] 21 C.F.R. § 1307.31 (2007).

[317] *Smith*, 494 U.S. at 874.

[318] *Id.* at 874.

[319] For an engaging treatment of the case, including coverage of the judicial decisions, contextual information on the parties and lawyers, and insight into the political dealings behind the litigation, see generally GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL (2001).

[320] *Smith*, 494 U.S. at 878–79.

[321] *Id.* at 883–84.

[322] *Id.* at 880 (citing United States v. Lee, 455 U.S. 252, 258–61 (1982)).

according to the majority because *Sherbert* was confined to the unemployment benefit context[323] and *Yoder* was a "hybrid" case based as much on the parents' fundamental interests in raising their children as in their free exercise rights.[324] Additionally, the religious plaintiffs' conduct was not criminally prohibited in either *Sherbert* or *Yoder*.

Concurring, Justice O'Connor would have found a substantial burden here on grounds that the state's interest in enforcing the peyote prohibition in *Smith* was unlike the government's management of its own affairs in *Bowen* or *Lyng*.[325] Justice Scalia disagreed that drug regulation was meaningfully different from Social Security Administration or public lands management, writing that the government interest was paramount in each.[326] While Justice O'Connor tried unsuccessfully to distinguish these, she concurred in the judgment upholding the Oregon laws on grounds that the state had a compelling interest in regulating drug possession.[327]

Justices Scalia and O'Connor agreed that the Court should not protect peyote possession because of its "centrality" to the NAC religion.[328] State courts had recognized peyote as the main sacrament in the NAC and thus recognized it as central and indispensable to the religion. But the Supreme Court had already rejected the centrality analysis as institutionally inappropriate for the judiciary in *Lyng*, a point that Justice Scalia reiterated in the majority opinion.[329] With centrality off the table, however, the *Smith* Court had no way to distinguish claims to peyote from any other religiously motivated claim to drugs. With the compelling interest test also off the table, the majority also could not distinguish the government's interest in regulating religious use of peyote from any other drug use. Citing *Lyng*, Justice Scalia conceded negative impacts on the Indian religion. In his view, the disfavoring of minority religions was an "unavoidable consequence of democratic government," which could only be remedied by the political process.[330]

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[323] *Id*. at 882–84.

[324] *Id.* at 881–82.

[325] *Id.* at 885 n.2.

[326] *See id.* ("[I]t is hard to see any reason . . . why the government should have to tailor its health and safety laws to conform to the diversity of religious belief, but should not have to tailor its management of public lands, or its administration of welfare programs." (citations omitted)).

[327] *Id.* at 907 (O'Connor, J., concurring).

[328] *See id.* at 885 ("The government's ability to enforce generally applicable prohibitions of socially harmful conduct . . . 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'" (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988))).

[329] *See id.* at 901 (O'Connor, J., concurring) ("The Court today gives no convincing reason to depart from settled First Amendment jurisprudence. There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion.").

[330] *Id.* at 890 (majority opinion).

Justice Blackmun's dissent took the majority to task on precisely these grounds, writing that the case could not be about the state's general interest in fighting the war on drugs or even its general interests in protecting citizens from the health and safety harms of illegal drugs. To meet the compelling interest test, a state's interest in burdening religious activity had to be more than merely abstract or speculative and, indeed, must be supported by evidence.[331] Here, the state had only once in its history prosecuted an individual for peyote possession and had presented no evidence that the religious use of peyote harmed anyone. In most of the preceding peyote cases from other jurisdictions, the courts had rejected (or the prosecutors had conceded) that religious use of peyote was not harmful.[332]

The dissent cited many factors tending to show how the NAC itself regulated and limited the religious practice. First, "[t]he carefully circumscribed ritual context" in which Smith and Black used peyote was "far removed from the irresponsible and unrestricted recreational use of unlawful drugs."[333] The NAC itself places "internal restrictions" on and engages in "supervision of, its members' use of [religious] peyote," which in the dissent's view, "obviate[d] the State's health and safety concerns" and distinguished the NAC from groups that claimed a religious exemption to smoke marijuana all day.[334] The federal Drug Enforcement Agency ("DEA") itself had recognized that the NAC strictly limited peyote use to ceremonies under the direction of a church leader, and maintained an absolute prohibition on use, sale, or possession for any non-sacramental purpose.[335] The Church's own doctrine forbids non-religious use of peyote.[336] Far from promoting the lawless and irresponsible use of drugs,

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[331] *Id.* at 911–12 (Blackmun, J., dissenting).

[332] *Id.* at 912 ("[T]he State failed to prove that the quantities of peyote used in the sacraments of the Native American Church are sufficiently harmful to the health and welfare of the participants so as to permit a legitimate intrusion under the State's police power." (quoting State v. Whittingham, 504 P.2d 950, 953 (Ariz. Ct. App. 1973))); People v. Woody, 394 P.2d 813, 818 (Cal. 1964) ("[A]s the Attorney General . . . admits, . . . the opinion of scientists and other experts is that peyote . . . works no permanent deleterious injury to the Indian." (internal quotation marks omitted)).

[333] *Smith*, 494 U.S. at 913 (Blackmun, J., dissenting).

[334] *Id.*

[335] *Id.* at 913–15 (citing Olsen v. Drug Enforcement Admin., 878 F.2d 1458, 1467 (D.C. Cir. 1989) ("[The DEA] finds that . . . the Native American Church's use of peyote is isolated to specific ceremonial occasions, [and so] an accommodation can be made for a religious organization which uses peyote in circumscribed ceremonies." (internal quotation marks omitted)); *id.* at 1464 (holding that "for members of the Native American Church, use of peyote outside the ritual is sacrilegious"); ROBERT M. JULIEN, A PRIMER OF DRUG ACTION 148 (3d ed. 1981) ("[P]eyote is seldom abused by members of the Native American Church."); J.S. Slotkin, *The Peyote Way*, *in* TEACHINGS FROM THE AMERICAN EARTH: INDIAN RELIGION AND PHILOSOPHY 96, 104 (Dennis Tedlock & Barbara Tedlock eds., 1975) ("[T]he Native American Church . . . refuses to permit the presence of curiosity seekers at its rites, and vigorously opposes the sale or use of Peyote for non-sacramental purposes.").

[336] *Smith*, 494 U.S. at 914 (Blackmun, J., dissenting).

the NAC's spiritual code—with its emphasis on brotherly love, self-reliance, familial responsibility, and abstinence from alcohol—"exemplifies values that Oregon's drug laws are presumably intended to foster."[337] Justice Blackmun pointed out that "[t]he use of peyote is, to some degree, self-limiting"[338] because it may cause vomiting and "other unpleasant physical manifestations" discouraging casual use.[339] For all of these reasons, peyote was unlikely to become anyone's recreational drug of choice.[340] Numerous sources attested to the lack of peyote abuse or trafficking either by NAC members or the general population.[341]

Finally, the dissent responded to the state's fears that "if it grants an exemption for religious peyote use, a flood of other claims to religious exemptions will follow."[342] This was, of course, a classic appeal to the slippery slope. As the dissent pointed out, this argument was not persuasive here.[343] The federal government and almost half of the states had a peyote exception and had not been deluged by other claims to religious exemptions.[344] Moreover, granting a religious exemption to religious users of peyote would not, as the majority suggested, obligate the state to allow religious claims to smoke marijuana "all day" or to use heroin.[345] The drugs had been proven harmful and trafficked illegally, and as Justice Blackmun said, there was no religious institution or tenet limiting the drug use in those cases.[346]

Allowing Oregon to "constitutionally prosecute . . . this act of worship" was particularly unfortunate, according to Justice Blackmun, in light of the government's recent reversal of its centuries' old policies and practices of persecuting Indian religions.[347] While Justice Blackmun was a dissenting view on the Court, developments following the decision would suggest that his views in favor of recognizing American Indian religious freedoms would prevail in the political process.

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[337] *Id.* at 914-16.

[338] *Id.* at 914 n.7.

[339] *Id.* (citation omitted).

[340] *See id.* at 916 ("Peyote simply is not a popular drug; its distribution for use in religious rituals has nothing to do with the vast and violent traffic in illegal narcotics that plagues this country.").

[341] *See id.* ("There is . . . practically no illegal traffic in peyote." (citing Olsen v. Drug Enforcement Admin., 878 F.2d 1458, 1463, 1467 (D.C. Cir. 1989))).

[342] *Id.*

[343] *See id.* at 917 ("This Court, however, consistently has rejected similar arguments in past free exercise cases, and it should do so here as well." (citing Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 835 (1989); Thomas v. Rev. Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 719 (1981) (same); Sherbert v. Verner, 374 U.S. 398, 407 (1963) (same)).

[344] *Smith*, 494 U.S. at 917.

[345] *Id.* at 917–18.

[346] *See id.* ("[T]he Ethiopian Zion Coptic Church . . . teaches that marijuana is properly smoked 'continually all day.'" (citing *Olsen*, 878 F.2d at 1464)).

[347] *Id.* at 920.

IV. EMPOWERING (ADMINISTRATIVE) PRACTICES

The *Smith* and *Lyng* opinions struck many American Indians as heartless and unjust.[348] They could not understand why their religious practices should be exempt from the protections of the First Amendment. As the dissenting opinion in *Smith* indicated, these decisions also seemed like a throwback to the eighteenth and nineteenth centuries when federal and state lawmakers *were* actively persecuting American Indian religions as part of a policy in favor of American Indian cultural assimilation.[349] Yet dicta in both *Lyng* and *Smith* offered the suggestion of a new way forward: legislative and administrative accommodation of Indian religions. As Justice O'Connor wrote in *Lyng*:

> Nothing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen. The Government's rights to the use of its own land . . . need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents.[350]

In *Smith*, Justice Scalia admitted that the legislative process might leave minority religious practitioners at "a relative disadvantage," but that was an unavoidable consequence of democratic government that must be preferred to a system in which each conscience is a law unto itself and in which judges weigh the social importance of all laws against the centrality of all beliefs. Still he suggested: "[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."[351]

Few American Indians would have predicted governmental sensitivity or solicitude following these decisions. And yet, in the post-*Bowen*-*Lyng*-*Smith* era, Congress passed a number of statutes calling for the accommodation of American Indian religious freedoms. Enactments and amendments to the American Indian Religious Freedom Act, National Historic Preservation Act, Bald Eagle and Golden Eagle Protection Act, and Native American Graves Protection and Repatriation Act now make it federal policy to preserve and accommodate the traditional religions of

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[348] *See* Bowers & Carpenter, *supra* note 29, at 525 (noting American Indians' reaction to and criticism of *Lyng* decision).

[349] *See Smith*, 494 U.S. at 920 n.10 (Blackmun, J., dissenting) ("Oregon's attitude toward respondents' religious peyote use harkens back to the repressive federal policies pursued a century ago: In the government's view, traditional practices were not only morally degrading, but unhealthy. Indians are fond of gatherings of every description, a 1913 public health study complained, advocating the restriction of dances and 'sings' to stem contagious diseases." (internal quotation marks omitted)).

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

[351] *Smith*, 494 U.S. at 890.

American Indians.[352] These statutes delegate to agencies, including the Bureau of Indian Affairs, Forest Service, Park Service, Army Corps of Engineers, and Fish and Wildlife Service, the obligation to manage resources—such as sacred sites, eagle feathers, burial grounds, and peyote plants—which are vital to American Indian religion.[353]

Two things are critical about the post-*Lyng* and post-*Smith* laws. First, Congress explicitly created an institutionally appropriate framework for the accommodation of Indian religious claims, giving federal agencies delegated authority to become experts in the religious questions that so stymied the courts in earlier cases. This first point is elaborated in detailed discussion below about the agency process in sacred sites, eagle feathers, burial grounds and human remains, and peyote matters.

Second, Congress explicitly referenced the rights of *tribes* as an aspect of its interest in accommodating Indian religious freedoms and placed in tribal governments the opportunity and responsibility to engage with the United States in religious accommodations. As I have suggested above, a revealing and understudied aspect of *Bowen*, *Lyng*, and *Smith* is that none of these cases involved tribes as parties. Also described above, few of the tribes potentially implicated in *Bowen* or *Lyng* were federally recognized at the time of the cases. In *Smith*, neither the NAC nor the Klamath Tribes were parties. In fact, the history of the *Smith* case suggests that the NAC, as an organization, was actually leery of the case.[354] The Klamath Tribe, which had signed treaties with the United States in the 1850s, had been "terminated" by the government in 1954, only to be restored in 1986, a few years before *Smith*. It is probably not coincidental that all three of these cases started in the 1980s—just when the federal government was beginning to recognize tribal self-determination, but before the tribes had gathered significant political, financial, and organizational strength as governments.[355]

Additionally, of course, First Amendment litigation has classically been framed in terms of individual rights, making it unclear what role tribes have to play in religious freedoms jurisprudence. Religious legal theory work in the post-*Smith* era has evaluated collective rights and

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[352] *See supra* note 60 and accompanying text.

[353] *See, e.g.*, 16 U.S.C. § 668b (2006) (stating that "[t]he Secretary of the Interior is authorized to enter into cooperative agreements with State fish and wildlife agencies or other appropriate State authorities to facilitate enforcement of [The Bald and Gold Eagles Protection Act]").

[354] *See* Epps, *supra* note 61, at 1006 ("[T]he Native American Church was incensed at Al Smith because no one regarded him as a member of the Church . . . . [T]he church that we represented at the time and still represent is the very hard core . . . the very traditional peyote practitioners and they had never heard of Al Smith . . . ." (first alteration in original) (internal quotation marks omitted)).

[355] *See* Bowers & Carpenter, *supra* note 29, at 502–33 (linking Yurok participation in *Lyng* to the emergence of tribal self-determination).

interests by conceptualizing individual practitioners in the aggregate,[356] as minority faiths,[357] associational groups,[358] enclave communities,[359] and cultural interests.[360] Some scholars suggest that the modern realities of multiculturalism and pluralistic interests in religion and culture are chipping away at the classic foundation of individual rights.[361] From this literature, there are many useful themes for comparison with the American Indian situation, such as the social exclusion of minority groups,[362] counter

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[356] *See, e.g.*, Kathleen M. Sullivan, *The New Religion and the Constitution*, 116 HARV. L. REV. 1397, 1411 (2003) ("However discrete or insular minority sects might be one by one, cross-religious alliances are possible, and the political lobbying power of religious interests in the aggregate makes up for any sect's weakness operating alone."); *see also* Ira Lupu, *Free Exercise Exemption and Religious Institutions*, *supra* note 199, at 422 & n.119 (1987) (arguing that "individuals, not institutions, are always the ultimate source of religious conviction," and cases such as *Yoder* recognize the "aggregated interests" of individuals and not the interests of "the Amish").

[357] *See, e.g.*, Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919, 923 (2004) ("[T]he protection and equal status of minority faiths and adherents is a significant purpose of religious freedom, even if not the sole or conclusive one."); *see also* Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222, 224 (2003) ("[H]istory reveals that . . . the First Amendment often has failed to provide equal liberty to religious minorities."); Samuel J. Levine, *Toward a Religious Minority Voice: A Look at Free Exercise Laws Through a Religious Minority Perspective*, 5 WM. & MARY BILL RTS. J. 153, 160 (1996) ("The continuing increase in religious minorities suggests that more than ever courts must appreciate religious minority perspectives to ensure that the law evolves concurrently with our country's changing religious landscape."); Rosalie B. Levinson, *The Dark Side of Federalism in the Nineties: Restricting Rights of Religious Minorities*, 33 VAL. U. L. REV. 47, 55 (1998) ("[T]he whole purpose of the Bill of Rights was to withdraw certain subjects, such as religious liberty, from the will of the majority."); Suzanna Sherry, *Religion and the Public Square: Making Democracy Safe for Religious Minorities*, 47 DEPAUL L. REV. 499, 501 (1998) (stating that minority religious group interests are not always represented in public policy decisions); David E. Steinberg, *Religious Exemptions as Affirmative Action*, 40 EMORY L.J. 77, 78 (1991) ("[J]ust as the Court has allowed the use of racial classifications to benefit racial minorities, the Court should also authorize the use of religious exemptions to accommodate members of minority religious groups.").

[358] *See, e.g.*, Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 ST. JOHN'S J. LEGAL COMMENT. 515, 522 (2007) (asserting that religious institutions are more than voluntary associations).

[359] *See* Nomi M. Stolzenberg, Board of Education of Kiryas Joel Village School District v. Grumet*: A Religious Group's Quest for Its Own Public School*, *in* LAW AND RELIGION: CASES IN CONTEXT 203, 207 (Leslie C. Griffin ed., 2010) (discussing formation of Satmar Jewish enclave in Monroe Township).

[360] *See, e.g.*, András Sajó, *Constitutionalism and Secularism: The Need for Public Reason*, 30 CARDOZO L. REV. 2401, 2417 (2009) (describing scholars who discuss "the role of religions in the national culture, and propose a rethinking of the constitutional role of religions in constitutional law by granting recognition to religion as *culture*").

[361] There is a very rich literature on this topic, which I can only begin to hint at here. *See, e.g.*, Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231 (2011).

[362] *See, e.g.*, STEPHEN M. FELDMAN, PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE 282–86 (1997) (providing examples of the social exclusion of minority religious groups).

majoritarian challenges of the political process,[363] and the enduring power, not always benign, of religious institutions.[364] Cases considering the illiberal beliefs of certain religious groups,[365] jurisdictional claims of religious enclave communities,[366] and desire of religious bodies to enjoy a protected sphere of authority[367] are all highly resonant with the Indian cases and may suggest new directions for advocacy.

One line of analysis suggests some intersection between the uncertain role of tribes in religious freedoms jurisprudence and the courts' reluctance to probe the limits of Indian religious claims. In several cases, courts have begun to conceptualize the rights of religious institutions through a theory of "church autonomy"[368] in which judges defer, to some extent, to religious decisions about clergy hiring, theological disputes, and distribution of property.[369] Professor Richard Garnett has suggested a conception of institutional religious rights as a matter of constitutional interpretation, in which:

> "[S]eparation of church and state" would seem to denote a structural arrangement involving institutions, a constitutional order in which the institutions of religion . . . are distinct from, other than, and meaningfully independent of, the institutions of government. What is "at stake," then, with separation is not so much—or, not only—the perceptions,

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[363] *See* BRUCE LEDEWITZ, AMERICAN RELIGIOUS DEMOCRACY: COMING TO TERMS WITH THE END OF SECULAR POLITICS 157 (2007) ("Secularists tend to overlook the importance of religion and its historical role in American public life.").

[364] *See* Marci A. Hamilton, *The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-Up*, 29 CARDOZO L. REV. 225, 227–30 (2007) (asserting that child sex abuse is often covered up by the church, and clergymen are shielded by the "ministerial exception").

[365] *See, e.g.*, Ofrit Liviatan, *Faith in the Law—The Role of Legal Arrangements in Religion-Based Conflicts Involving Minorities*, 34 B.C. INT'L & COMP. L. REV. 53, 54–55 (2011) (stating that religious minorities' liberty is infringed by illiberal sentiments).

[366] *See* Stolzenberg, *supra* note 356, at 207 (discussing formation of Satmar Jewish enclave in Monroe Township).

[367] *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct 694, 712 (2012) (Alito, J., concurring) (stating that religious groups must be free to govern themselves and determine who is qualified to serve in positions of religious importance); *see also* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 341 (1987) (Brennan, J., concurring) ("[R]eligious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: 'select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions.'" (quoting Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981))).

[368] *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch*,.132 S. Ct. at 705–06 (recognizing "ministerial exception" to employment discrimination laws for a religious institution and its ministers); *see also* Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 10–12 (2011) (situating the "ministerial exception" in "church autonomy" scholarship).

[369] *See generally* Lund, *supra* note 365 (surveying church autonomy cases).

> feelings, immunities, and even the consciences of individuals, but a distinctions [sic] between spheres, the independence of institutions, and the "freedom of the church."[370]

In this regard, judges' reluctance to probe the substance of religious claims may be linked to institutional church autonomy and church-state separation arguments.[371] Perhaps, then, the courts are treating Indian religious groups like other religious groups, from which the courts also try to maintain a respectful distance in recognition of the structural relationship between church and state.[372] Tribal courts have, to some extent, taken this approach: when asked to decide competing claims to religious resources and ceremonies among tribal members, some tribal courts have deferred to traditional spiritual authorities in the tribal community.[373]

Yet, there are pragmatic, conceptual, and doctrinal differences that distinguish American Indians from other theories of groups or institutional rights, and other instances of deference to church autonomy.[374] As

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[370] Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, *supra* note 355, at 523; Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273 (2008) (arguing that "the independence and autonomy of churches, and of religious institutions and associations generally are seen as deriving from the free-exercise or conscience rights of *individual persons*" (emphasis added)).

[371] *See* LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1185–89 (1988) (describing three different views, evangelical, secular, and separate spheres, that may explain judicial reluctance to entertain religious questions). For a sampling of the "hands-off" literature and its various theoretical underpinnings, see generally Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, *supra* note 38 (describing symposium and scholarship devoted to the "hands-off approach to religious doctrine"); Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843 (1998); Samuel J. Levine, *Rethinking the Supreme Court's Hands-Off Approach to Questions of Religious Practice and Belief*, 25 FORDHAM URB. L.J. 85 (1997).

[372] Jared A. Goldstein, *Is There a 'Religious Question' Doctrine: Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 499—501 (2005).

[373] Two disputes about religious freedoms in the court of the Cheyenne-Arapaho Tribes illustrate deference to traditional spiritual authorities. *See, e.g.*, In re Sacred Arrows, 3 Okla. Trib. 332 (1990) (observing that the Tribal Court cannot decide who the Arrow Keeper is, a question better left "to the Headsmen, Chiefs, and the Cheyenne tribal members themselves . . . in accordance with traditional practice and procedure"); *see also* Redman v. Birdshead, 9 Okla. Trib. 495 (2006) (noting a conflict in tribal constitution simultaneously providing for free exercise rights and prohibiting tribal court jurisdiction "over traditional matters such as the conduct of ceremonies," usually decided by spiritual leaders in the tribal community). For a deeper discussion of the challenges, both substantive and procedural, of assessing tribal customary law beyond the religion context, see MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW 87–88 (2011) (describing the role of customary and codified law in tribal justice systems); Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 HOUS. L. REV. 701 (2006); Matthew L.M. Fletcher, *Looking to the East: The Stories of Modern Indian People and the Development of Tribal Law*, 5 SEATTLE J. SOC. JUST. 1 (2006); Matthew L.M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence*, 13 MICH. J. RACE & L. 57 (2007); Matthew L.M. Fletcher, *The Supreme Court's Legal Culture War Against Tribal Law*, 2 INTERCULTURAL HUM. RTS. L. REV. 93 (2007).

[374] This, too, is a literature that I can only reference briefly here. In previous works, I have examined in more detail American Indian group rights vis-à-vis political theory, surveying leading

described above, American Indians have experienced a particular and pronounced history of federal intervention into tribal religious matters. While attempts to disentangle the government from such involvement are ongoing, they are also incomplete. Federal courts can and should defer to tribal courts regarding religious matters arising on reservations, and tribal courts may, in some cases, be able to defer to religious institutions that will be best able to decide internal theological questions.[375] But when it comes, for example, to sacred sites located on federal public lands, the United States is not yet in a position to disclaim a role in regulating or reviewing religious access, whether through a theory of church or tribal autonomy. Until the federal government comprehensively restores ownership of sacred sites and burial grounds to tribes, fully repatriates all of the human remains and religious artifacts in federal possession, and decriminalizes peyote and eagle feather use, it will probably play a role in accommodating American Indian religious practices.[376]

The second distinction is conceptual. Most of the institutional or group rights arguments referenced above still stay relatively close to the liberal democratic conception that rights are held by individuals, whether as associated individuals or incorporated entities.[377] By contrast, from an indigenous perspective, tribal members relate to one another through a fabric of kinship and cultural relations that link them to a particular place on the natural landscape. The fundamentally collective nature of tribal interests is especially pronounced in matters of religion wherein, as previously described, the primary purpose of tribal religion is for the

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works of western liberalism, nationhood, peoplehood, human rights, multiculturalism, minority, and indigenous rights. *See, e.g.*, Carpenter, *Individual Religious Freedoms in American Indian Tribal Constitutional Law*, *supra* note 30, at 159–61, 173; Carpenter et al., *In Defense of Property*, 118 YALE L.J. 1022, 1050–61 (2009); Carpenter, *Real Property and Peoplehood*, *supra* note 14, at 348–55; *see generally* Riley, *(Tribal) Sovereignty and Illiberalism*, *supra* note 44 (discussing American Indian rights and liberalism). The U.N. Declaration on the Rights of Indigenous Peoples has numerous articles recognizing the collective rights of indigenous peoples, including religious liberty and practice. *See* Declaration on the Rights of Indigenous People, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement.

[375] Native Am. Church of N. Am. v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959) (holding that there is no federal cause of action for a First Amendment case arising on a reservation); Toledo v. Pueblo de Jemez, 119 F. Supp. 429 (D.N.M. 1954) (same).

[376] On occasion, the United States has returned sacred sites to tribes. For example, federal legislation restored Blue Lake to the Taos Pueblo. Pub. L. No. 91-550, 84 Stat. 1437, 1438 (1970); *see generally* R.C. GORDON-MCCUTCHAN, THE TAOS INDIANS AND THE BATTLE FOR BLUE LAKE (1991) (providing a detailed historical account of the return of Blue Lake to the Taos people). Today, Lakota people are trying to raise enough money to purchase a portion of their sacred Black Hills. *See* ICTMN Staff, Tribes Reach Deal to Purchase Black Hills Sacred Site, INDIAN COUNTRY TODAY, (Sept. 4, 2012), http://indiancountrytodaymedianetwork.com/2012/09/04/tribes-reach-deal-to-purchase-black-hills-sacred-site-132613.

[377] *See* AVIAM SOIFER, LAW AND THE COMPANY WE KEEP 1–6 (1995) (surveying existing bases for group rights in U.S. law and calling for additional legal protection of such groups).

survival of the tribe itself and not for individual salvation. Again and again, tribal leaders articulate a relationship between tribal religious traditions and contemporary tribal self-determination.[378] To survive as Indian people, they must survive collectively.

Finally, from a doctrinal perspective perspective, tribes are sovereign entities whose existence pre-dates the Constitution. They are not bound by the Bill of Rights[379] and may even maintain theocratic forms of government.[380] Tribes interact with the United States through a "government to government" relationship. Originating in the treaties between American Indian and European governments (later the United States), this relationship is effectuated today through the federal Indian trust responsibility.[381] The trust responsibility has been interpreted as a fiduciary obligation to manage Indian resources with the highest degree of care, through legislative and executive actions.[382] Today, federal and tribal governments alike are committed to a policy of tribal "self-determination"

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[378] *See* Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814, 817 (10th Cir. 1999) (discussing the relationship between ceremonies at Bear Lodge and Lakota as self-determination); *see also* GELYA FRANKS & CAROLE GOLDBERG, DEFYING THE ODDS: THE TULE RIVER TRIBE'S STRUGGLE FOR SOVEREIGNTY IN THREE CENTURIES 26–27 (2010) (describing Yokuts tribal creation story as a "[s]ource of [n]ative [s]overeignty"); Cyndy Cole, *Snowmaking Opponents Now Targeting City Council*, ARIZ. DAILY SUN (Jan. 12, 2006), http://azdailysun.com/snowmaking-opponents-now-targeting-city-council/article_3cff71dc-acbf-59f9-8461-63548e54cfb5.html ("It is another sad day . . . [when] in the 21st Century, genocide and religious persecution continue to be perpetrated on Navajo people [and] other Native Americans . . . who regard the Peaks as sacred." (quoting Navajo Nation President Joe Shirley Jr.)).

[379] Talton v. Mayes, 163 U.S. 376, 381–82 (1895) (holding the right to grand jury under the First Amendment inapplicable in capital case before Cherokee Nation court); Toledo v. Pueblo de Jemez, 119 F. Supp. 429 (D.N.M. 1954) (holding the First Amendment inapplicable to actions of tribal council against Protestant members of Pueblo); *see generally* Robert Odawi Porter, *The Inapplicability of American Law to the Indian Nations*, 89 IOWA L. REV. 1596 (2004) (noting the U.S. Constitution does not regulate the conduct of Indian tribal governments).

[380] See Gloria Valencia-Weber, *Three Stories in One: The Story of* Santa Clara Pueblo v. Martinez, *in* INDIAN LAW STORIES 463 (Carole Goldberg, Kevin K. Washburn & Philip P. Frickey, eds., Thomson Reuters 2011) (citing work by Rina Swentzell, a member of the Santa Clara Pueblo and noting Indian Civil Rights Act of 1968 did not interfere with tribal rights to organize as theocracies). By virtue of their own norms or adoption of the Indian Civil Rights Act, many tribes do have a Free Exercise Clause and maintain a pluralistic religious society. I have examined this point in scholarship explaining dozens of tribal constitutions. *See generally* Kristen A. Carpenter, *Individual Religious Freedoms in American Indian Tribal Constitutional Law*, *supra* note 30.

[381] *See* Cherokee Nation v. Georgia, 30 U.S. 1, 17–18 (1831).

[382] *Compare* Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942) (maintaining that in establishing a treaty with the Indians, the U.S. government has charged itself with the "moral obligations of the highest responsibility and trust" and that its conduct should therefore be judged by "the most exacting fiduciary standards"), *with* United States v. Navajo Nation, 537 U.S. 488, 504–14 (2003) (rejecting Navajo Nation's claim that the Secretary of the Interior breached trust duties when he approved tribal coal leases containing below market royalty rates in a set of transactions including private communications with coal company).

in which tribes exercise autonomy over internal affairs.[383] The trust responsibility is interpreted as a partnership between the federal and tribal governments where these political partners join forces to protect the separate existence of Indian tribes.[384] Congress legislates in Indian Affairs pursuant to its "plenary authority"[385] and increasingly uses this power to foster the political, economic, and cultural aspects of tribal self-determination.[386]

What is so transformative about the contemporary statutes recognizing American Indian religious freedoms is that they begin to address the pragmatic, conceptual, and doctrinal situation of American Indians. Congress realizes that, after hundreds of years of religious suppression, it now has a duty to foster tribal self-determination. To do so, it must accommodate Indian religion on a collective basis to reflect tribal cultural practices. Moreover, Congress has the doctrinal power to legislate in the area of tribal religions—whether sacred sites, eagle feathers, burial grounds and human remains, or peyote—pursuant to its plenary power and trust responsibility.[387] The upshot is that, in addition to protections available under the First Amendment and RFRA, tribal *governments*, as

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[383] *See, e.g.*, Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 (2006) (stating Congressional findings on the federal government's historical and special obligation to American Indians, including their right to self-government); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62–68 (1978) (discussing cases and statutes furthering tribal self-determination).

[384] *See* CHARLES F. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW 14 (1987) (describing the reservation system as reserving "islands of tribalism largely free from interference by non-Indians or future state governments").

[385] Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."); United States v. Kagama, 118 U.S. 375, 384–85 (1886) (identifying the federal legislative "power" over Indian affairs as a basis for upholding criminal statute).

[386] NELL JESSUP NEWTON ET AL., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 22.02 (2005) [hereinafter HANDBOOK OF FEDERAL INDIAN LAW] (discussing the enactment of the Indian Self-Determination and Education Assistance Act to continue Congress's legal and moral obligation in assisting Indian people as well as allow tribal self-determination).

[387] The purpose of my Article, which is largely conceptual and descriptive, is not to provide a normative justification for American Indian legislative exemptions. Yet, as I acknowledge in the discussion below, such challenges do come up, particularly in Equal Protection grounds. Professor Kevin J. Worthen has argued that the preferential treatment of American Indian religious practitioners vis-à-vis other religious practitioners is justifiable, in terms of equality and liberty, on the following grounds: "(1) [American Indian religions] were created here and exist only here; (2) their beliefs are often unique and culture-encompassing; and (3) those beliefs often revolve around sacred sites which are located only here . . . [and (4) n]o group in the United States has been dispossessed of as much land, or in such a systematic manner as have Native Americans . . . [and the] massive land deprivation has been particularly devastating to Native American religion because of the intimate connection Native Americans have between land and religion." Kevin J. Worthen, *Eagle Feathers and Equality: Lessons on Religious Exceptions from the Native American Experience*, 76 U. COLO. L. REV. 989, 1007. For a discussion of equality and liberty interests in Free Exercise Clause cases, see CHRISTOPHER L. EISGRUBER & LAWRENCE SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007).

such, are now empowered to work with the agencies to develop accommodations that are carefully crafted to reflect the real religious needs of their citizens. American Indian individuals are, in many (though not all) cases, no longer out on their own in trying to assert religious freedoms.

Of course there are downsides to legislating at the tribal level. Some tribes are, in fact, theocracies and establish a certain tribal religion.[388] But in others, the tribal government is *not* synonymous with a tribal religion or religious institution.[389] In many tribal communities, there are several religions practiced and perhaps even competition among religions.[390] Political leaders may not have access to confidential religious information and there may even be tension between religious practitioners and elected tribal leadership, as in any community.[391] Tribes without federal recognition are typically not even covered by federal Indian statutes, including the religion statutes.[392] For these reasons, advocates often insist that traditional tribal religious leaders be invited to consultations with federal agencies, in addition to governmental representatives. Despite these and other challenges, however, the presence of tribal governments has often improved and enhanced the ability of American Indian religious practitioners to articulate the scope and norms of tribal religions, as I describe in several examples below.

In this Part, I describe the evolution and enactment of these statutes, along with their administration in regulatory contexts. I argue that tribal governments now have the opportunity to work with the agencies on religious freedoms matters and that they are using these opportunities to bring tribal religious law and custom to bear on religious accommodations. These developments reflect what I call an "empowering practices"

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[388] Riley, *(Tribal) Sovereignty and Illiberalism*, *supra* note 44, at 845; *see also* Gloria Valencia-Weber, Santa Clara Pueblo v. Martinez*: Twenty-five Years of Disparate Cultural Visions*, 14 KAN J.L. & PUB. POL'Y 49, 52 (2004) (describing the relationship between religion and government at Santa Clara Pueblo).

[389] *See* Carpenter, *Individual Religious Freedoms in American Indian Tribal Constitutional Law*, *supra* note 30, at 159–93 (surveying tribal constitutions, including some that establish religion and others that prohibit religious establishment); *see also* VINE DELORIA, JR., SINGING FOR A SPIRIT: A PORTRAIT OF THE DAKOTA SIOUX (1999) (describing traditional Dakota religious leaders and Episcopalians in Deloria family).

[390] *See, e.g.*, Toledo v. Pueblo de Jemez, 119 F. Supp. 429, 430 (D.N.M. 1954) (claims by Protestant Pueblo members that they were denied certain rights unless they adopted Catholicism).

[391] Historically, for example, the Navajo Nation outlawed peyote practice, a position which has recently changed, as described below.

[392] *See, e.g.*, Snoqualmie Indian Tribe v. FERC, 545 F.3d 1207, 1216 (9th Cir. 2008) (concluding that consultation requirements of National Historic Preservation Act did not apply in sacred site case where tribe lacked federal recognition); Marc Dadigan, *Fish and Wildlife Service Denies an Indian her Feathers*, HIGH COUNTRY NEWS (Apr. 7, 2011, 10:15 AM), http://www.hcn.org/greenjustice/blog/fish-and-wildlife-service-denies-an-indian-her-feathers (recounting the story of a traditional Wintu religious practitioner who is not entitled to participate in the eagle permitting program, and thus denied religious access to eagle feathers required for her religion because her tribe is not federally recognized).

approach to American Indian religious freedoms occurring at the intersection of administrative practice, federal Indian law, and tribal religious practice.[393] At its best, the empowering practices approach has the potential to develop accommodations that are meaningful to tribes and address the problems of content and scope that presented such problems in the cases described above. In this Part, I highlight both the statutory provisions, administrative mechanisms (rulemaking, hearing, land management plan, advisory committee, etc.), and particular religious practices at issue to suggest both successful models of "limiting practices" and opportunities for improvement. In several examples, I discuss briefly the ways in which these statutes and regulatory models comply with the Establishment Clause, often furthering a secular purpose of public lands management, endangered species conservation, or the preservation of tribal culture. For the most part, however, I leave detailed discussion of these and other questions about judicial review for a follow-up article.

A. *AIRFA and RFRA*

As a backdrop to the wave of 1990s statutes, recall that Congress passed the AIRFA to set forth a nationwide policy on American Indian religious freedoms. Therefore, acknowledging the need for a national policy in favor of Indian religious freedom, Congress stated its respect for the "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."[394]

Consistent with the spirit of the First Amendment, AIRFA focused primarily on American Indian religion in terms of individual liberties.[395] But it also expressly acknowledged the link between Indian religious belief and Indian "cultures" and the Indian "way of life."[396] Subsequent legal instruments would go even further in connecting Indian religious liberty with tribal rights, and indeed, self-determination and self-government. In 1994, President Clinton issued an Executive Order calling for all departments and agencies of the United States to consult with tribal governments on federal lawmaking matters that affect the tribes, in

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[393] While this Article does not deeply look at administrative law, this Section draws on my previous works addressing the administrative law aspects of the agency process in Indian law. *See* Carpenter, *Interpreting Indian Country*, *supra* note 65, at 83–153 (analyzing judicial review of agency interpretation in Indian law cases); Carpenter, *Property and Peoplehood*, *supra* note 14, at 329–35, 364–38 (considering agency expertise in sacred sites matters).

[394] 42 U.S.C. § 1996 (2006).

[395] *Id.* (stating that the policy of the United States will be to protect and preserve individual liberties such as "freedom to believe, express, and exercise the tradition religions").

[396] 42 U.S.C. § 1996a(1) (2006).

fulfillment of the trust responsibility.[397] President Clinton's 1994 Executive Order has since been replaced by Executive Order 13,175 on Consultation and Coordination with Indian Tribal Governments of 2001, which emphasizes the obligation of consultation with tribal governments.[398] The order, confirmed by both Presidents Bush and Obama,[399] highlights the federal government's commitment to tribal sovereignty, self-government and self-determination and to the "government-to-government" relationship between the United States and Indian nations.[400]

In 1993, Congress passed RFRA based on findings that the Court's decision in *Smith* "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."[401] RFRA's intent is "to provide a claim or defense to persons whose religious exercise is substantially burdened by government" and "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*."[402] RFRA provides that "governments should not substantially burden religious exercise" even if the burden results from a rule of general applicability, unless it can show the burden on religion furthers a compelling governmental interest and is the least restrictive means.[403] RFRA does not define the term "substantial burden," but defines the "exercise of religion" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[404] RFRA has been ruled unconstitutional as applied to state governments[405] but still applies to the federal government.[406]

In this regard, RFRA has potential in American Indian religion cases, which often occur in federal contexts, such as in the management of the public lands, the regulation of controlled substances, the regulation of endangered species, and otherwise. On the other hand, while RFRA's plain language contemplates "religious exercise" without reference to any

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[397] Exec. Order No. 13,175, 3 C.F.R. 304 (2000).

[398] *Id.*

[399] President Bush's 2004 Memorandum and President Obama's 2009 Memorandum are available at http://www.bia.gov/WhoWeAre/AS-IA/Consultation/Templates/index.htm.

[400] Rebecca Tsosie, *The Conflict Between the "Public Trust" and "Indian Trust" Doctrines: Federal Public Land Policy and Native Nations*, 39 TULSA L. REV. 271, 288 (2003).

[401] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2, 107 Stat. 1488, 1488 (1993) (codified at 42 U.S.C. § 2000bb (2006)).

[402] 42 U.S.C. § 2000bb(b) (citations omitted).

[403] 42 U.S.C. §§ 2000bb(a)(1)–(3), (5).

[404] 42 U.S.C. § 2000bb-2(4). This definition was provided in the RLUIPA, which amended RFRA in 2000. Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified at 42 U.S.C. § 2000cc).

[405] *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (holding that the RFRA violated the separation of powers doctrine).

[406] *See* Gonzalez v. O Centro Espirita Beneficenta Uniao do Vegetal, 546 U.S. 418, 424 (2006) (noting that the RFRA restricts the federal government from substantially burdening the practice of religion, despite its inapplicability to the states).

specific practice, the legislative history is somewhat ambiguous with respect to American Indian religions.[407] As a result, perhaps, the federal courts seem unsure about RFRA's application to these religious claims.

B. *Sacred Sites*

Sacred sites cases demonstrate some of the most palpable changes to federal law and policy in religious freedoms in the post-*Smith* era. The term "sacred sites" encompasses a variety of places and features on the natural landscape with religious significance for certain tribes.[408] Sacred sites often mark the place of creation or emergence for a tribe; they may be locations where deities are believed to reside or where contemporary prayers and ceremonies take place.[409] Most sacred sites are unique places and the religious activities that occur there cannot be replicated elsewhere.[410] Some places, such as rock formations or mountains, may be perceived as living beings.[411] Tribal religions often instill in the people the obligation to care for certain sacred sites, both through specific ceremonies and respectful conduct.[412] Having lost title to their sacred sites through generations of conquest and colonization, tribes now find themselves in the challenging position of having to contest the current owners—whether public or private—to gain access for religious purposes and to protect their sacred sites from desecration. As *Lyng* demonstrates, it is difficult for Indian religious practitioners to prevail in these cases, which arise

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[407] *See* Epps, *supra* note 61, at 1016 (discussing how the interfaith coalition advocating for RFRA declined to push the peyote access issue); *see also* Anastasia P. Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 ARIZ. L. REV. 1291, 1315 & nn.198–99 (1996) ("Congress was assured that RFRA would not create a cause of action on behalf of Native Americans seeking to protect sacred sites. The Senate report stated that RFRA would not overrule *Lyng* and that, under *Lyng*, strict scrutiny does not apply to government actions involving only management of internal government affairs or the use of the government's own property or resources."); *see also* Thiry v. Carlson, 78 F.3d 1491 (10th Cir. 1996) (denying RFRA relief to a Native American couple challenging road construction through the gravesite of their infant).

[408] *See* ANDREW GULLIFORD, SACRED OBJECTS AND SACRED PLACES: PRESERVING TRIBAL TRADITIONS 67–69 (2000) (discussing a variety of sacred sites found in the natural environment of the United States); CHARLES E. LITTLE ET AL., SACRED LANDS OF INDIAN AMERICA 8 (Jack Page ed., 2001) (noting that natural cultural landmarks are considered "holy" sites by a variety of tribes).

[409] *See, e.g.*, Steve Young, *Sioux Tribes Seek to Buy Sacred Land in S.D.*, USATODAY.COM (Aug. 18, 2012, 5:44 PM), http://usatoday30.usatoday.com/news/nation/story/2012-08-18/black-hills-sale-sioux-tribes/57130396/1?utm_source=dlvr.it&utm_medium=twitter&dlvrit=206567 (describing a sacred site to the Lakota, Dakota, and Nakato tribes as being "home to their creation story and essential to their culture and beliefs"); *Tribe: S Calif Quarry Plan Imperils Sacred Site*, NATIVE AM. TIMES (Aug. 17, 2011), http://www.nativetimes.com/life/culture/5867-tribe-s-calif-quarry-plan-imperils-sacred-site (describing a tribe's objection to building along the Luiseno reservation because it "would be built at the spot that they consider the site of the world's creation").

[410] *See* Young, *supra* note 409 (noting that there are religious and cultural ceremonies tied to the disputed sacred site).

[411] *See* GULLIFORD, *supra* note 408, at 70 (linking rock formations with ancestral connotations and transubstantiation).

[412] *See id.* at 68 (explaining that for most native people the word sacred connotes respect).

frequently in the federal courts.[413]

In 1992, Congress extended the protections of the National Historic Preservation Act ("NHPA") to certain American Indian sacred sites.[414] As amended, the NHPA provides, "Properties of traditional religious and cultural importance to an Indian tribe [("TCP")] . . . may be determined to be eligible for inclusion on the National Register" of Historic Places.[415] Like other federal historic sites, a TCP does not enjoy any automatic protection from development or otherwise. Rather, the protections of the NHPA are generally procedural.[416] Similarly, in the American Indian context, the 1992 amendments provide that federal agencies are directed to consult "with any Indian tribe . . . that attaches religious and cultural significance" to a TCP regarding federal "undertakings" that may affect it.[417]

The NHPA's TCP provisions are enhanced by several instruments, including President Clinton's 1996 Executive Order 13,007 on Indian sacred sites.[418] Substantively, the Executive Order urges federal agencies to "accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and . . . [to] avoid adversely affecting the physical integrity of such sacred sites."[419] Procedurally, the agencies must give notice to tribal governments when federal management may affect sacred sites and consult with tribal leaders regarding such plans.[420] Significantly, the Executive Order notes that the responsibility to identify sacred sites to the agencies belongs to "an Indian tribe or individual determined to be an appropriately authoritative representative of an Indian religion."[421]

Federal land management agencies, including the National Park Service and U.S. Forest Service, have developed internal guidelines in

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[413] Many of the well-known sacred sites cases are cited throughout this paper. For some recent and ongoing cases, see Plaintiff's Memorandum in Support of Motion for Summary Judgment at 1, Karuk v. Kelley, No. CV-10-2039 WHA (N.D. Cal. Feb. 22, 2011), 2011 WL 2444668 (discussing tribal challenge to Forest Service management of sacred lands in the Orleans district of Six Rivers National Forest that was also the subject of *Lyng*). *See also* Slockish v. U.S. Fed. Highway Admin., 682 F. Supp. 2d 1178, 1201–02 (D. Or. 2010) (dismissing a portion of claim by hereditary Chief of the Klickitat Tribe regarding damage to sacred lands caused by highway on Mt. Hood, Oregon for lack of standing).

[414] National Historic Preservation Act, 16 U.S.C. § 470 (2006); *see also* Dean B. Suagee, *Historical Storytelling and the Growth of Tribal Historic Preservation Programs*, 17 NAT. RESOURCES & ENV'T 86, 86–87 (2002) (describing 1992 amendments to the NHPA and implementing regulations).

[415] 16 U.S.C. § 470a(d)(6)(A) (2006).

[416] *See* Morris Cnty. Trust for Historic Pres. v. Pierce, 714 F.2d 271, 278–79 (3d Cir. 1983) ("NHPA, like NEPA, is primarily a procedural statute . . . .").

[417] 16 U.SC. § 470a(d)(6)(B).

[418] Exec. Order No. 13,007, 3 C.F.R. 196 (1996).

[419] *Id.*

[420] *Id.*

[421] *Id.* § 1(b).

favor of sacred site protections.[422] The National Park Service's Management Policies manual provides that the Park Service "will develop and implement its programs in a manner that reflects knowledge of and respect for the cultures of Native American tribes or groups with demonstrated ancestral ties to particular resources in parks." Procedurally, the policy provides that, through its Superintendents, the Park Service will consult with tribes regarding administration of parks including sacred sites.[423] Substantively, the Park Service is to undertake "decisions [that] reflect knowledge about and understanding of potentially affected Native American cultures and people, gained through research and consultations with the potentially affected groups."[424]

The United States Forest Service's National Resource Guide to American Indian and Alaska Native Relations, which was issued in 1997, acknowledges federal obligations at sacred sites arising from the government-to-government relationship, tribal sovereignty, and the fact that the Forest Service lands are often adjacent to tribal lands.[425] While Forest Service lands "are public" and "most Indian title to these lands has been extinguished," the Forest Service nevertheless must "be concerned where there are [t]ribal rights reserved by treaty, [s]piritual and cultural values and practices."[426] The Forest Service Guide instructs its employees to "[w]alk the land with American Indians . . . to gain an understanding and appreciation of their culture, religion, beliefs, and practices."[427] The substantive goal is to "[i]dentify and acknowledge [Indian] cultural needs . . . [and c]onsider these values an important part of management of the national forests."[428] As described below, a number of recent controversies compelled Secretary of Agriculture Thomas Vilsack to request that the Forest Service issue a new study and report in 2010.

These post-*Lyng* evolutions in administrative law have been tested in a number of cases. For present purposes, it is perhaps most helpful to juxtapose the Tenth Circuit's decision in *Bear Lodge Multiple Use Association v. Babbitt*[429] and the Ninth Circuit's decision in *Navajo Nation*

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[422] For BLM Policies, see Bureau of Land Management, "8120–Tribal Consultation Under Cultural Resource Authorities" (Dec. 3, 2004) [hereinafter Bureau of Land Management Manual], *available at* http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_manual.Par.80216.File.dat/8120.pdf; Bureau of Land Management, "H-8120-1–General Procedural Guidance for Native American Consultation" (Dec. 3, 2004), *available at* http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_handbook.Par.38741.File.dat/H-8120-1.pdf.

[423] Bureau of Land Management Manual.

[424] *Id.*

[425] FOREST SERVICE, FOREST SERVICE NATIONAL RESOURCE GUIDE TO AMERICAN INDIAN AND ALASKA NATIVE RELATIONS xi (Apr. 1997), *available at* http://www.fs.fed.us/people/tribal/.

[426] *Id.* at 36.

[427] *Id.* at 59.

[428] *Id.*

[429] 175 F.3d 814 (10th Cir. 1999).

v. Forest Service.[430] *Bear Lodge* involved the National Park Service's management of Devils Tower National Monument.[431] Devils Tower has long been a sacred site to a number of Plains tribes and is named accordingly in each tribal story (e.g., *Mato Tipila* or the "Lodge of the Bear" in Lakota). As one Lakota story tells:

> To honor the Great Spirit, the Lakota gathered at *Mato Tipila* for a sun dance. A mysterious woman appeared and gave the Lakota a pipe and taught them how to use it in prayer. As she headed back to the horizon, the woman turned into a buffalo calf. Since then she's been known as White Buffalo Calf Woman. *Mato Tipila* is remembered as the place where the Lakota received the pipe from the spirit world.[432]

Consequently, for the Lakota and other tribes, Devils Tower is important as a place where human beings interacted with the sacred, learned religious traditions, and acquired values important to their identity. Lakota people go to Devils Tower for individual prayers and visions, to leave offerings, and to conduct the Sun Dance, a collective, multi-day ceremony of sacrifice conducted every summer. They continue to keep the pipe as one of their most sacred religious traditions.[433]

The tribal presence at Devils Tower is evident not only in these religious traditions, but also in the political history of the place. Devils Tower was originally reserved to the Great Sioux Nation with the Black Hills in the Treaty of Fort Laramie of 1868,[434] which was soon thereafter violated by the United States.[435] Devils Tower became a National Monument in 1906, and is now managed by the Park Service.[436] By the 1990s, Devils Tower became an exceedingly popular destination for rock climbers, hikers, tourists, and motorcycle enthusiasts—whose various uses of the tower made it difficult for Indian religious practitioners to keep *Mato Tipila*, as they put it, "in the light of reverence."[437] The noise, litter, presence, and curiosity of these other users all made it difficult to conduct religious ceremonies requiring quiet, solicitude, and care for the tower.[438]

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[430] 535 F.3d 1058 (9th Cir. 2008).

[431] *Bear Lodge*, 175 F.3d at 815.

[432] IN THE LIGHT OF REVERENCE (Sacred Land Film Project of Earth Island Institute, 2001) (recounting this story).

[433] *See* CHIEF ARVOL LOOKING HORSE, WHITE BUFFALO TEACHINGS (2001).

[434] Treaty of Fort Laramie, 15 Stat. 635 (1868).

[435] Ray H. Mattison, *Devil's Tower History & Culture: The First 50 Years*, NAT'L PARK SERV., http://www.nps.gov/deto/historyculture/upload.First_50_Years.pdf (last updated July 23, 2012) ("The Treaty of 1868 guaranteed this region to the Indians. In 1874, in violation of this treaty, General George A. Custer led a reconnaissance expedition into the Black Hills.").

[436] *Bear Lodge*, 175 F.3d at 819.

[437] IN THE LIGHT OF REVERENCE, *supra* note 432 (statement of Lakota Elder Johnson Holy Rock).

[438] *Id.*

In addition, the climbers were threatening nesting raptors and the environmental quality of the Tower itself.[439]

The Park Service was obligated to manage these conflicting uses at Devils Tower by the NHPA, the National Park Service Organic Act and the Presidential Proclamation, which established Devils Tower as a National Monument.[440] The Park Superintendent initiated a planning process in which nineteen federally recognized tribes were invited to consult on a government-to-government basis. Other invited participants included local governments in Wyoming, organizations representing rock climbers, local and national environmental organizations, and American Indian interests, and a number of locally involved individuals.[441] The Park Service held hearings at numerous venues, including Indian reservations, and also convened a "Work Group" of leaders representing the various interests.

Through this process, the Park Service produced a "Draft Climbing Management Plan" that listed four objectives: (1) preserving the monument's natural and cultural resources; (2) managing recreational climbing; (3) increasing visitor awareness of American Indian beliefs and traditional cultural practices at Devils Tower; and (4) providing the monument with a guide for managing climbing consistent with other Park Service and Devils Tower management policies.[442]

After considering six alternatives for achieving those objectives—representing a spectrum of approaches from allowing more rock climbing to banning it altogether—the Park Service settled on a middle ground: the prohibition of commercial rock climbing during the month of June when the most American Indian religious ceremonies were conducted.[443] The Climbing Management Plan also called for educational programs on Indian religious and cultural uses and for mitigation of climbing's effects on the environment through reduced use of pitons and closure of routes near raptor nests.[444] The plan was published in the

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[439] U.S. DEP'T OF INTERIOR, NAT'L PARK SERV., DRAFT CLIMBING MANAGEMENT PLAN AND ENVIRONMENTAL ASSESSMENT, DEVILS TOWER NATIONAL MONUMENT, WYOMING (1994) [hereinafter DRAFT CLIMBING MANAGEMENT PLAN], *available at* http://digitalcommons.usu.edu/cgi/viewcontent.cgi?article=1362&context=govdocs.

[440] *See Bear Lodge*, 175 F.3d at 817 n.7, 819 (citing 16 U.S.C. § 1a-1; Proclamation No. 458, 34 Stat. 3236 (Sept. 24, 1906)).

[441] *See* DRAFT CLIMBING MANAGEMENT PLAN, *supra* note 439 (listing the organizations, businesses, and individuals who were contacted in the development of the Climbing Management Plan and Environmental Assessment).

[442] *Id.*

[443] *See Bear Lodge*, 175 F.3d at 819 (acknowledging the FMCP's efforts to ask climbers to voluntarily refrain from climbing during the month of June).

[444] *See* Bear Lodge Multiple Use Ass'n v. Babbitt, 2 F. Supp. 2d 1448, 1450 (D. Wyo. 1998) ("To protect against any new physical impacts to the tower, the FCMP provides that no new bolts or fixed

Federal Register for public notice and comment, under the Administrative Procedure Act, yielding hundreds of comments both in support and opposition to the plan.[445] After a lawsuit was filed by a group of rock climbers who challenged the plan on Establishment Clause grounds, the NPS changed the climbing ban to a voluntary closure, which was ultimately upheld in the Tenth Circuit on grounds that the climbers suffered no injury and lacked standing to sue.[446]

In this process, the Park Service specifically recognized tribal interests, in addition to those of individual Indian religious practitioners. As one Lakota leader explained, religious use of Bear Lodge is "vital to the health of our nation and to our self-determination as a Tribe."[447] Accordingly, the National Park Service website lists the federally recognized Indian tribes with historic relations to Devils Tower and provides education on the cultural, linguistic, and religious traditions of each.[448] This is indicative of the respect that the Park Service has tried to show for the tribal religions associated with Devils Tower. Second, when it was time to engage in consultation on the Climbing Management Plan, the Park Service granted formal and informal measures of respect to the relevant tribes. It provided notice of consultation meetings to nineteen federally recognized tribes,[449] and also invited participation by representatives of the Medicine Wheel Coalition who were authorized by their own tribal governments.[450] As Lloyd Burton notes, the Park Service Superintendent held five meetings over the year, personally travelled to tribal communities, allowed tribal representatives to take time to debrief with their constituents, and undertook other measures to "preserve a government-to-government relationship with the larger group of tribes" interested in Devils Tower.[451]

The Climbing Management Plan was also revealing because the basis for the compromise between American Indian and other uses of Devils Tower was found in the tribal religions themselves.[452] While some

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pitons will be permitted on the tower . . . . [However, NPS] will not enforce the voluntary closure, but will instead rely on climbers' self-regulation and a new 'cross-cultural educational program . . . .'").

[445] *Bear Lodge*, 175 F.3d at 819.

[446] *Id.* at 822; *see also* Access Fund v. U.S. Dep't of Agric., 499 F.3d 1036, 1043–44 (9th Cir. 2007) (holding Forest Service ban on rock climbing at Washoe sacred site did not violate the Establishment Clause because it had "a secular purpose—preservation of a historic cultural area").

[447] *Bear Lodge*, 175 F.3d at 817.

[448] George L. San Miguel, *How Is Devils Tower a Sacred Site to American Indians*, NAT'L PARK SERV. (Aug. 1994), http://www.nps.gov/deto/historyculture/sacredsite.htm.

[449] *See* DRAFT CLIMBING MANAGEMENT PLAN, *supra* note 439, at 53 (listing nineteen federally recognized tribes).

[450] LLOYD BURTON, WORSHIP AND WILDERNESS, CULTURE, RELIGION AND LAW IN PUBLIC LANDS MANAGEMENT 131 (2001).

[451] *Id.* at 131 & nn. 18, 20.

[452] *See* Natural Arch & Bridge Soc'y v. Alston, 98 F. App'x. 711, 716 (10th Cir. 2004) (upholding National Park Service's plan asking tourists to refrain from walking under a sandstone bridge out of

American Indians may have preferred complete closure of Devils Tower on grounds that any climbing was sacrilegious, some rock climbers advocated for no restrictions whatsoever.[453] But the members of the Work Group were ultimately willing to compromise on closure during June, the month of the summer solstice, a time of the year that Lakota leaders describe as sacred and when most of the ceremonies take place.[454]

The incorporation of tribal religious values into determinations about the content and scope of the accommodation may have helped the Devils Tower Climbing Management Plan succeed where other attempts have failed. Following adoption of the plan, no tribe or individual American Indian challenged the Devils Tower Climbing Management Plan in court. A group of rock climbers did, however, sue under the Establishment Clause, but the federal district court upheld the plan, ruling it did not violate the Establishment Clause because it advanced secular purposes, did not have the primary effect of advancing religion, and did not entangle the government with religion.[455] On appeal, the Tenth Circuit affirmed, but not on the merits. It held that because the plan made the climbing restrictions "voluntary" and the plaintiff climbers had continued climbing, they suffered no injury and therefore lacked standing to sue.[456]

Attempts to invoke the slippery slope against this religious accommodation also failed. Lakota people generally describe the Black Hills as "sacred."[457] Yet this particular accommodation only involved one butte located within the Black Hills. Undaunted by this fact, the Mountain States Legal Foundation ("Mountain States") argued for a writ of certiorari on grounds that such accommodations would end development across the western United States. This was because the government owned upwards of ninety-percent of the property in some counties and American Indians could claim anything to be "sacred."[458] Mountain States argued that if the *Bear Lodge* accommodation served as precedent, it could end "tourism, forestry, ranching, mining, and oil and gas exploration and development" throughout the public lands, and "many rural western counties would be

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respect for Native American religious beliefs on grounds that plaintiffs had not suffered an actual injury and thus lacked standing to bring Establishment Clause challenge).

[453] BURTON, *supra* note 450, at 129–35 (describing the consultation and negotiation process leading to the final climbing management plan).

[454] *See* CHIEF ARVOL LOOKING HORSE, *supra* note 433.

[455] Bear Lodge Multiple Use Ass'n v. Babbit, 2 F. Supp. 2d 1448, 1454−57 (D. Wyo. 1998) (applying *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and its articulation of the Establishment Clause test).

[456] Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814, 821–22 (10th Cir. 1999) (applying *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and its articulation of the standing test).

[457] *See* Alexandra New Holy, *The Heart of Everything that Is: Paha Sapa, Treaties, and Lakota Identity*, 23 OKLA. CITY U. L. REV. 317, 317 (1998).

[458] Petition for Writ of Certiorari at 27, Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814 (10th Cir. 1999) (No. 99−1045), 1999 WL 33640033 at *27.

devastated" by the loss of revenue streams associated with such activities.[459] But both the district court and Tenth Circuit had confined their analysis to the terms of the plan as actually drafted to pertain only to Devils Tower itself and rejected the climbers' lawsuits,[460] and the Supreme Court denied certiorari.[461]

While early studies showed substantial compliance with the plan, rock climbers can, of course, still climb on Devils Tower even during the Sun Dance.[462] The accommodation at Devils Tower is modest, though still remarkable in light of the current state of American Indian religious freedoms. Individual religious practitioners, along with tribal governments, negotiated an accommodation that reflected in significant respects their own religious traditions, developed a very solid record on their religious views and practices, and defeated attempts to challenge the religious claims through slippery slope arguments. The Park Service was able to incorporate tribal customs and values into an accommodation plan that would afford religious freedom while also meeting statutory obligations to conserve and protect the Tower's physical features. In these respects, *Bear Lodge* represents major progress over a case like *Lyng*.

Navajo Nation by contrast, reads almost like a replay of *Lyng* and raises some questions about the effectiveness of the new sacred sites laws. This case arose when the Forest Service decided to permit the use of sewage effluent in ski area snowmaking on the San Francisco Peaks, which are sacred not only to the Navajo, but also the Hopi, Havasupai, Hualapai, and a number of other tribes.[463] The tribes had claimed that spraying one of their most holy mountains with the sewage effluent would interfere with specific religious practices, such as Navajo healing ceremonies relying on plants and medicines collected from the mountain,[464] and entire religious belief systems, including the Hopi ceremonial cycle based on the kachinas' seasonal migrations from the Peaks to the Hopi villages.[465] The Forest Service had gleaned extensive knowledge of these religious interests—and those of other tribes—through the NHPA and National Environmental

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[459] *Id.*

[460] *Bear Lodge*, 175 F.3d at 821 ("Even if other Bear Lodge members have elected not to climb in June, that decision is one of several choices available under the plan and is not an injury conferring standing."); *Bear Lodge*, 2 F. Supp. 2d at 1456−57 ("[T]he voluntary climbing ban[] is a policy that has been carefully crafted to balance the competing needs of individuals using Devil's Tower National Monument while, at the same time, obeying the edicts of the Constitution.").

[461] Bear Lodge Multiple Use Ass'n v. Babbitt, 529 U.S. 1037 (2000).

[462] *See* BURTON, *supra* note 450, at 143 (describing that since 1995 "80 percent of the recreational climbers who would have otherwise climbed the tower agree[d] not to" do so).

[463] *See* Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1081 (9th Cir. 2008) ("The Forest Service has acknowledged that the Peaks are sacred to at least thirteen formally recognized Indian tribes, and that this religious significance is of centuries' duration.").

[464] *Id.* at 1063.

[465] Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1034 (9th Cir. 2007).

Policy Act ("NEPA") consultation process. In fact, the Forest Service made "more than 500 contacts" and held over forty meetings to determine the impact on the tribes.[466]

While there were a number of religious and cultural concerns, the tribes objected most vociferously to the use of "reclaimed water" for the ski area snowmaking.[467] Reclaimed water is sewage from homes, hospitals, and elsewhere, that has been treated to a point where it is classified "A+" by the state department of environmental quality.[468] As a practical matter, reclaimed water can be used for landscape irrigation, but is non-potable. The tribes complained that this water would pollute the mountain, plants, and springs thereon, thereby violating religious requirements of purity for religious resources gathered there.[469]

To the Hopis, for example, polluting the water was extremely grave because the San Francisco Peaks are the mountain home of the kachinas who bring water to the corn that is the lifeblood of Hopi sustenance, and are involved in specific ceremonies and an entire religious way of life. In addition, the Hopis had "shrines" on the mountains that would be desecrated.[470] For the Navajos, the plants that they gathered from the Peaks, which are kept in medicine bundles and used in healing ceremonies, would be contaminated. Their concerns were further exacerbated by religious taboos against handling materials that have come in contact with the dead, as would the sewage from hospitals and other sources.[471]

Thus the consultation process revealed the impact on the tribes. But despite finding that several of the proposals would have an "[a]dverse effect" on the tribes' religious practices, the Forest Service decided to select an alternative for development that included snowmaking using reclaimed water over 205 acres of the mountain, as well as construction of a pipeline, water reservoir, ski lodge, and new trails.[472] In short, the Forest Service and tribes had not arrived at a compromise. The mitigating activities announced by the Forest Service, including attempts to protect religious shrines and the use of the chairlift during the summer, were wholly inadequate to address the concerns about the reclaimed water.[473] As justification for this decision to harm the Indian religions, the Forest Service cited its statutory mandate to promote "multiple uses" of the public lands and its limited responsibilities to Indian tribes under *Lyng*.[474] The

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[466] *Navajo Nation*, 535 F.3d at 1065−66.
[467] *Id.* at 1082.
[468] *Id.* at 1065.
[469] *Navajo Nation*, 479 F.3d at 1039.
[470] *Id.* at 1035.
[471] *Id.* at 1040.
[472] Navajo Nation v. U.S. Forest Serv., 408 F. Supp. 2d 866, 871, 879 (D. Ariz. 2006).
[473] *Id.* at 880.
[474] Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1071−73, 1107 (9th Cir. 2008).

tribes sued, arguing that the Forest Service's plan imposed a substantial burden on religion and was not justified by a compelling governmental interest under RFRA.

The Ninth Circuit agreed with the Forest Service, holding that the "sole effect of the artificial snow is on the [American Indians'] subjective spiritual experience," which did not constitute a "substantial burden" under RFRA.[475] Under *Lyng*, which the court held to govern the case, the court determined that there was no governmental coercion of Indian belief. Additionally, the Ninth Circuit said that it could not distinguish this mountain from dozens of other mountains, entire rivers and canyons, and upwards of 40,000 prehistoric sites throughout the southwest.[476] The dissent pointed out that the Navajo religion has a very small number of sacred sites, exactly one of which was at issue in the case.[477] But the majority, interpreting RFRA through the lens of *Lyng*, held that the Forest Service was free to desecrate, contaminate, and even destroy the Navajo sacred site, in part because there was no other workable approach to the government's management of its own land.[478] The bright line of *Lyng* would prevail.

There are at least four lessons to draw by contrasting *Bear Lodge* and *Navajo Nation*. First, for all of its relative advantages over the courts, using the federal agency process to secure religious practices is still difficult—and still, in the final analysis rests on agency discretion. As numerous commentators have observed, the agency process demands that traditional American Indians try to translate their religious practices in a foreign setting, participating in bureaucratic hearings and disclosing to government officials information that would otherwise only be discussed in tribal religious contexts—or not at all.[479] This process is particularly

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[475] *Id.* at 1063 (internal quotation marks omitted).

[476] *Id.* at 1066 n.7.

[477] *Id.* at 1098 (Fletcher, J., dissenting).

[478] *See id.* at 1071 n.13 (noting that although *Lyng* was a Free Exercise Clause case and not an RFRA case, this difference is of no material consequence in deciding the case at hand, as the test used in *Lyng* was indicated by Congress to be a workable test that struck a balance between religious liberty and government interests).

[479] *See generally* Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame*?, 24 AM. INDIAN L. REV. 21, 25 (1999) (discussing the tension between traditional Native American views of productive consultations, such as where success is measured by the adoption of the advocated outcome or a discussion leading to an unforeseen outcome that is still satisfactory to the majority, and federal agencies' tendency to measure success only in procedural terms). *See, e.g.*, Christy McCann, *Dammed if You Do, Damned if You Don't: FERC's Tribal Consultation Requirement and the Hydropower Re-Licensing at Post Falls Dam*, 41 GONZ. L. REV. 411, 434 (2006) (addressing the two competing views of federal-tribal consultation requirements: skeptical, where consultation is regarded as perpetuating the betrayal of Native Americans by white men; and optimistic, which views the government as recognizing the importance of and making every effort to incorporate Native Americans' views and interests in federal planning). For a survey of best practices, see SHERRI HUTT & JAIME LAVALLEE, NAT'L ASS'N OF TRIBAL

fraught in light of this same federal government's history of persecuting these very same tribal religions.[480] Agency officials, like Park Superintendent Deb Liggett in *Bear Lodge*, can try to mitigate these effects through personal efforts to put religious practitioners at ease and meet in reservation communities, but even the most heroic efforts will not make the consultation process a comfortable, pleasant, or risk-free experience for tribal participants. It also imposes dignitary harms of a kind rarely experienced by religious practitioners in the United States—in which individuals must undergo an inquisition of sorts to be free to conduct their religions. As American Indian advocate Suzan Harjo recently argued, the consultations over the San Francisco Peaks revealed many stress points where, for example, the Hopi participants did not feel as if they were speaking the same language as the Forest Service—particularly when they were repeatedly asked to quantify or measure their religious claims in metrics not meaningful to them.[481] The challenges of the consultation process can make it difficult to arrive at a meaningful accommodation, as the *Navajo Nation* case might suggest.

Second, the Forest Service's "multiple use" mandate creates special challenges in the accommodation of Indian sacred site practices. The Park Service, for example, operates under a statutory mission to "conserve" the national parks and monuments for future generations.[482] The Forest Service's "multiple-use" mandate, by contrast, provides that the forests are to be managed "for outdoor recreation, range, timber, watershed, and wildlife and fish purposes."[483] Needless to say, perhaps, the Park Service's conservation mandate is closer to the spirit of many Indian religious practices than is the Forest Service's multiple-use mandate. Congress has

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HISTORIC PRES. OFFS., TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION, NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS (2005), *available at* http://www.nps.gov/hps/tribal/download/Tribal_Consultation.pdf.

[480] *See Bear Lodge*, 175 F.3d at 817 ("In 1890 for example, the United States Calvary shot and killed 300 unarmed Sioux men, women and children en route to an Indian religious ceremony called the Ghost Dance; these included individuals from the Intervenors' tribe.").

[481] *See* Suzan Shown Harjo, *The USDA's Culture War Against Sacred Places*, INDIAN COUNTRY TODAY, Feb. 15, 2012, *available at* http://www.indiancountrytodaymedianetwork.com/ict_sbc/usdas-culture-war-against-sacred-places (addressing communication issues encountered by Forest Service officials and Hopi Elders); *see also* Stewart Macaulay, *Popular Legal Culture: An Introduction*, 98 YALE L.J. 1545, 1547 (1989) (explaining that different legal ideas will be encountered as different factors are considered—in this context, particularly religion and the amount of experience that individuals have in interacting with police, administrative agencies, or courts).

[482] National Park Organic Act, 16 U.S.C. § 1 (2006).

[483] Multiple Use Sustained Yield Act of 1960, 16 U.S.C. § 528 (2006); *see also* Federico Cheever, *The United States Forest Service and National Park Service: Paradoxical Mandates, Powerful Founders, and the Rise and Fall of Agency Discretion*, 74 DENV. U. L. REV. 625, 628 (1997) ("The Park Service and the Forest Service are different. The Forest Service authorizes logging, oil and gas development, mining and hunting in the national forests. The Park Service (with a few exceptions) permits none of these uses in National Parks." (citation omitted) (footnotes omitted)).

not provided guidance to help the Forest Service prioritize among the multiple uses either as a general matter or in specific contexts, nor has Congress explicitly suggested how to reconcile Indian religions with incompatible uses like snowmaking on the San Francisco Peaks.

The Forest Service is not unaware of these problems. Following *Navajo Nation*, U.S. Department of Agriculture ("USDA") Secretary Thomas J. Vilsack requested that the Forest Service produce a report to evaluate compliance with Executive Order 13,007 and to study "unintended consequences of land management decisions" affecting sacred sites.[484] The USDA's Office of Tribal Relations and the Forest Service formed a team to conduct over fifty "listening sessions" with tribal leaders and traditional practitioners throughout the country.[485] The USDA also conducted an employee survey and surveyed relevant law and policy. The responses suggested that "Forest Service managers would benefit from more explicit policy language to protect Sacred Sites" and that the Agency has sufficient "discretion" under existing law to provide greater protection of sacred sites.[486] The Draft Report recommended several measures to address these issues, including: "improv[ing] relationships through communication, training, staffing, and accountability"; reviewing and revising directives such as Executive Order 13,007; and "improv[ing] on-the-ground Sacred Site protection through partnerships, access, and protections."[487] The Report was clearly a step in the right direction, and may lead to real changes in policy and attitude.

Third, the contrast between *Bear Lodge* and *Navajo Nation* suggests the need for more "teeth" in the agency accommodation process. Here too reform may be necessary. One possibility is to require agencies and participants in the consultation process to enter into a memorandum of agreement outlining the terms of an agreed-upon accommodation. Some tribal agency accommodations have voluntarily used this model, including the U.S. Forest Service's successful agreement at Medicine Wheel National Forest.[488] But in other instances, including the Forest Service in the San Francisco Peaks Consultation, the agencies seem to perceive and treat information gleaned from the consultation process as merely advisory. This approach conflicts with a growing sentiment, perhaps best reflected in

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[484] U.S. DEP'T of AGRIC., DRAFT REPORT TO THE SECRETARY, USDA'S OFFICE OF TRIBAL RELATIONS AND FOREST SERVICE POLICY AND PROCEDURES REVIEW: INDIAN SACRED SITES i (July 2011), *available at* http://www.fs.fed.us/spf/tribalrelations/documents/sacredsites/20110712_SACRED_SITES_DRAFT_REPORT_ TO_SECRETARY.pdf.

[485] *Id.*

[486] *Id.* at ii.

[487] *Id.*

[488] *See* Wyo. Sawmills Inc. v. U.S. Forest Serv., 383 F.3d 1241, 1244 (10th Cir. 2004) (describing the Memorandum of Agreement between Forest Service and American Indian religious practitioners providing for closure of road to Medicine Wheel except for traditional religious practitioners' access).

recommendations of the National Congress of American Indians, that the Forest Service go beyond mere "communication" and incorporate a concept of "seeking agreement" in the consultation process.[489] Moreover, fostering tribal-agency agreements with respect to religious accommodations would advance compliance with the UNDRIP's mandate that "states shall consult and cooperate in good faith" with indigenous peoples" and "obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."[490]

And finally, it is unclear what effect RFRA has on *Lyng* or in other Indian religion cases. Given the agencies' discretion over substantive accommodations and the procedural nature of NHPA and NEPA requirements, it is clear that the Ninth Circuit's approach will not actually require any protection of Indian religious freedom at sacred sites. In fact, *Navajo Nation* merely reifies *Lyng* by limiting RFRA claims on public lands to facts where the government "coerces" religious belief.[491] More promisingly, in *Comanche Nation v. United States*,[492] a federal district court in Oklahoma recently applied RFRA to protect an Indian sacred site, noting that the Tenth Circuit has declined to take the narrow view of "substantial burden" adopted by the Ninth Circuit in *Navajo Nation*.[493] The district court followed *Thiry v. Carlson*,[494] in which the Tenth Circuit articulated the test for a substantial burden under RFRA as requiring a showing that the government regulation:

> [M]ust significantly inhibit or constrain conduct or expression that manifests some central tenet of . . . [an individual's] beliefs; must meaningfully curtail [an individual's] ability to express adherence to his or her faith;

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[489] Letter from NCAI to Sec'y Tom Vilsack, U.S. Dep't of Agriculture, Chief Thomas Tidwell, U.S. Forest Serv. & Dir. Fred Clark, U.S. Forest Serv. 9 (Oct. 17, 2011) (on file with author).

[490] U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 19, U.N. Doc. A/RES/61/295 (Sep. 13, 2007); *see also* Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365, 371 (1989) (querying whether Indian tribes ever consented to American government); Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J. CIV. RTS. & CIV. LIBERTIES 45, 47 (2012) (arguing that "the fundamental question of tribal consent continues to haunt Indian affairs, and will continue to do so unless it is rectified").

[491] Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1071, n.13 (9th Cir. 2008) (noting that although *Lyng* was a free exercise case and not an RFRA case, this difference is of no material consequence in deciding the case at hand, as the test used in *Lyng* was indicated by Congress to be a workable test that struck a balance between religious liberty and government interests).

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

[493] *See id.* at *20 (granting a preliminary injunction to prevent the federal government from constructing a "training support center" on lands sacred to the Comanche people, on the strength of the tribe's RFRA and NHPA claims, and noting that the Tenth Circuit has declined to adopt the narrow test for substantial burden advanced by the Ninth Circuit in *Navajo*).

[494] 78 F.3d 1491 (10th Cir. 1996) (quoting Werner v. McCotter, 49 F.3d. 1476, 1480 (1995)).

> or must deny [an individual] reasonable opportunities to engage in those activities that are fundamental to [an individual's] religion.[495]

This standard would suggest broader judicial review than *Lyng*'s coercion test.[496]

C. *Eagle Feathers*

In many American Indian religions, eagles are thought to link humans with the spirit world. A member of the Sisseton-Wahpeton Dakota Oyate, Angelique EagleWoman, explains, "the eagle takes our prayers to the Great Spirit, Wakan Tanka, for us."[497] In Hopi religion, "[t]he eagle serves as the link between the spiritual world and the physical world of the Hopi, a connection that embodies the very essence of Hopi spirituality and belief."[498] In the Arapaho tradition, an individual who pledges to sponsor the Sun Dance may be required to provide an eagle for the ceremony, and this offering of "[t]he eagle is seen as a gift of the Creator."[499] Depending on the tribe and religious ceremony, an individual may need to take a live eaglet or adult eagle, or possess a single feather, wing, or other eagle part to fulfill his or her religious obligations or beliefs.

Unfortunately for the many Lakota, Hopi, Arapaho, and other Indian people whose religion requires use of eagles and eagle parts, it is now a federal crime to "take[], possess[], s[ell], purchase[], barter[], offer[] for sale, purchase, or barter, transport[], export[], or import" bald and golden eagles.[500] Originally enacted in 1940, the Bald and Golden Eagle Protection Act ("Eagle Act") imposes a sweeping prohibition on such activities, and punishes the "taking" of an eagle by a fine of up to $5,000 and one year in prison.[501] The Eagle Act has been held to nullify even treaty rights to hunt eagles on the reservation in part because of the fear that American Indians will hunt eagles "to extinction."[502] Numerous American Indians have been prosecuted for violating the Eagle Act and related federal statutes such as the Endangered Species Act and Migratory

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[495] *Id.* at 1495 (quoting Werner v. McCotter, 49 F.3d. 1476, 1480 (1995)).

[496] *Id.* In *Thiry*, the court noted some potential tension with *Lyng*, but still articulated the broader RFRA test under which the Thirys' challenge to government relocation of their child's gravesite failed. *Id.* at 1496.

[497] Featherproject, *Angelique EagleWoman: The Importance of Eagle Feathers*, YOUTUBE (July 19, 2010), http://www.youtube.com/watch?v=PNwP66amEmM&feature=related.

[498] Religious Ceremonial Collection of Golden Eaglets from Wupatki National Monument, 66 Fed. Reg. 6,516, 6,517 (proposed Jan. 22, 2001) (to be codified at 36 C.F.R. pt. 7).

[499] United States v. Friday, 525 F.3d 938, 942–43 (10th Cir. 2008).

[500] Bald and Golden Eagle Protection Act, 16 U.S.C. § 668b(b) (2006).

[501] *Id.*

[502] United States v. Dion, 476 U.S. 734, 738 & n.5 (1986).

Bird Treaty Act.[503] While the bald eagle has recently been "delisted" as an endangered species, the federal government maintains interests in protecting both bald and golden eagles, which are each symbols of national identity and are essential for American Indian religions.[504]

Since 1962, the Eagle Act has authorized the Secretary of the Interior to administer a permitting process that allows Indians limited opportunities to take and possess eagles and eagle parts for religious purposes.[505] To obtain a permit, an individual must apply to the U.S. Fish and Wildlife Service ("USFWS"), which is, in turn, required to evaluate certain threshold questions of Indian status and religious practice.[506] The regulations provide that USFWS will "investigat[e]" applications to determine whether "the applicant is an Indian who is authorized to participate in *bona fide* tribal religious ceremonies."[507] An "Indian" is defined as a citizen of a federally recognized tribe, while the term "bona fide tribal religious ceremonies" is not defined.[508] To substantiate their claims, applicants must provide a "certificate of enrollment in an Indian tribe" that "must be signed by an tribal official who is authorized to certify that an individual is a duly enrolled member of that tribe" and must specify the "name of [the] tribal religious ceremony" for which the eagle is required.[509] If the agency determines that the applicant has proven his Indian status and bona fide religious purpose, then the permit may be granted. In most cases, it will be a permit to receive and possess an eagle feather, wing, or complete carcass sources from the USFWS's National

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[503] *See* U.S. Fish & Wildlife Serv., *Native American Talks About the Importance of Eagle Feathers*, YOUTUBE (Mar. 28, 2011), http://www.youtube.com/watch?v=O9SFuM1FpOo ("Reginald Dale Akeen pleaded guilty in December 2009 to a felony violation of the Migratory Bird Treaty Act. . . . [A]s part of his plea agreement, Akeen agreed to speak on video about the significance of the feathers of eagles and other birds to Native Americans and about the fact that he broke the law.").

[504] *See* U.S. Fish & Wildlife Serv., *Bald Eagle Recovered!*, FWS.GOV, http://www.fws.gov/midwest/eagle/ (last visited Sept. 25, 2012) (discussing that although the bald eagle was removed from the federal list of threatened and endangered species, there are current legal protections that still remain for bald and golden eagles).

[505] *See* Bald and Golden Eagle Protection Act, 16 U.S.C. § 668(a) (2006) ("Whenever . . . the Secretary of the Interior shall determine that it is compatible with the preservation of the bald eagle or the golden eagle to permit the taking, possession, and transportation of specimens thereof for . . . the religious purposes of Indian tribes . . . he may authorize the taking of such eagles . . . .").

[506] U.S. DEP'T OF INTERIOR, THE NATIVE AMERICAN POLICY OF THE U.S. FISH & WILDLIFE SERVICE 5 (1994), http://www.fws.gov/nativeamerican/graphics/Native_Amer_Policy.pdf.

[507] 50 C.F.R. § 22.22 (2011); *see also* Protection of Bald Eagles and Golden Eagles, 28 Fed. Reg. 975, 976 (Feb. 1, 1963) ("Whenever the Secretary determines that the taking and possession of bald or golden eagles for the religious purposes of Indian tribes is compatible with the preservation of such birds, he may issue permits . . . to those individual Indians who are authentic, bona fide practitioners of such religion.").

[508] 50 C.F.R. § 22.22.

[509] *Id.*

Eagle Repository in Colorado.[510] These are parts of eagles that have been accidentally killed and donated to meet American Indian religious needs. Occasionally, an individual will receive a permit to take a live eagle if required for a ceremony.

The eagle permit process has been successful, to some extent. As of 2008, the Eagle Repository reported that it made approximately 1,700 to 1,800 annual shipments of eagles or eagle parts to applicants.[511] It has granted two tribal permits to the Navajo tribe and one annually recurring permit to the Hopi tribe to take live golden eagles.[512] Challenges to the eagle permitting process, including those by non-Indians, have failed, with the courts recognizing a compelling governmental interest in both eagle conservation and the religious practices of federally-recognized tribes. [513]

On the other hand, Indian religious practitioners have lodged a number of complaints regarding the eagle permit process, including that: it is not well-noticed; it is fraught with delay and supply problems making it impossible to receive eagles in time for religious ceremonies (the USFWS itself estimates a five-year wait for an immature golden eagle);[514] it often provides eagle carcasses and parts that are dirty, diseased, or insect-infested such that religious purity is missing; and it invades privacy by requiring disclosure of religious and personal identity information to federal officials.[515]

For some of the reasons described above, some American Indians continue to take eagles without a permit or purchase them illegally, leading to criminal prosecutions for what they perceive to be activities compelled by their religion.[516] In various cases, the federal appellate courts have

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[510] *See* Jay Wexler, *Eagle Party*, 14 GREEN BAG 2d 181, 182 (2011), *available at* http://www.greenbag.org/archive/green_bag_tables_of_contents.html ("Applying to the [National Eagle] Repository is the only way to legally get hold of any part of either [bald or golden] eagle[s] in the United States.").

[511] United States v. Friday, 525 F.3d 938, 944 (10th Cir. 2008).

[512] *Id.* at 945.

[513] *See* United States v. Wilgus, 638 F.3d 1274, 1285 (10th Cir. 2011) (citing national interest in eagles and religious interests of federally recognized tribes as a compelling interest to sustain eagle permit program against RFRA challenge by non-Indian); United States v. Hardman, 297 F.3d 1116, 1127–29 (10th Cir. 2002) (en banc) ("[T]he government's general interests in preserving Native American culture and religion in-and-of-themselves and in fulfilling trust obligations to Native Americans [are] compelling interests.").

[514] *Id.* at 953; U.S. FISH & WILDLIFE SERV., ORDERING EAGLE PARTS AND FEATHERS FROM THE NATIONAL EAGLE REPOSITORY 3 (2007), *available at* http://www.fws.gov/forms/3-200-15b.pdf.

[515] *See, e.g.*, United States v. Tawahongva, 456 F. Supp. 2d 1120, 1124 n.7 (D. Ariz. 2006) (noting that "traditional" Hopi "believe it an affront" to have the government exercise authority over them); *Friday*, 525 F.3d at 944–45 (summarizing problems with federal interference, supply, delay, and quality).

[516] *See, e.g.*, *Tawahongva*, 456 F. Supp. 2d at 1127 ("Defendant testified he believes his permission to take eagles is conferred by his acting in accordance with the tenets of his religious faith, i.e., that properly preparing feathers and prayer objects prior to taking the eagles, as he was taught by his uncles, should be the only 'permit' required to take the eagles.").

upheld the eagle permitting process against First Amendment and RFRA challenges. And yet, a number of these opinions have voiced concern.

In *United States v. Friday*,[517] for example, the Tenth Circuit upheld the conviction of a Northern Arapaho man who took an eagle on the reservation for an upcoming Sun Dance.[518] His relative had pledged to sponsor the Sun Dance and thus acquired an obligation for the family to provide an eagle, an obligation that Winslow Friday believed he was fulfilling.[519] Friday did not know of the eagle permitting process or of the repository program in Denver.[520] From the USFWS's own testimony, it was unclear (or perhaps unlikely) that even if Friday had applied, he would have received a pure eagle, as religiously required, or received any eagle in time for the Sun Dance.[521] The USFWS had issued very few permits to take live eagles, and even in these cases, only permitted the taking of golden eagles.[522]

While the district court agreed that the government *could* regulate the taking of eagles for religious purposes, it was extremely concerned about the way in which the permit process was managed, stating: "It is clear to this Court that the Government has no intention of accommodating the religious beliefs of Native Americans except on its own terms and in its own good time."[523] Yet, the Tenth Circuit upheld the conviction on the grounds that Friday could not challenge the "futility" of a permitting program that he had not even tried to use.[524] The Tenth Circuit allowed that if Friday, or some similarly situated practitioner, applied and was unable to obtain a "pure" eagle—if religiously required, or unable to obtain an eagle in time for a ceremonial use—he or she might have a RFRA claim in the future.[525]

The Department of Justice ("DOJ") has begun to address these issues. In 2011, it issued a memorandum formally asking for tribal input on two questions: (1) whether the DOJ should formalize its internal policy in favor of accommodating American Indian religious use of eagle feathers; and (2)

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[517] 525 F.3d 938 (10th Cir. 2008).

[518] *Id.* at 945.

[519] *Id.*

[520] *Id.* at 953

[521] *Id.* at 953–54 ("Native Americans charged with violating the Eagle Act could make an as-applied challenge to the Act's permitting system without applying for permits if they demonstrated that 'it would have been futile . . . to apply for permits.'" (quoting United States v. Hardman, 297 F.3d 1116, 1121 (10th Cir. 2002) (en banc)). The court then noted that if Mr. Friday was unable to obtain a "pure eagle," he, like the defendants in *Hardman*, may have had an RFRA claim. *Id.*

[522] *Id.* at 945 ("While it was [the relative]'s responsibility to ensure that the tribe had the eagle it needed for the dance, the Fridays believe obligation to be familial, so Winslow was responsible for helping however he could.").

[523] United States v. Friday, No. 05-CR-260-D, 2006 WL 3592952, at *5 (D. Wyo. Oct. 13, 2006).

[524] *Friday*, 525 F.3d at 951.

[525] *Id.* at 953–54.

whether the DOJ should support tribal governments that seek to become more active in wildlife enforcement.[526] After consultation with tribes around the country, Attorney General Eric Holder issued a new Memorandum indicating that the DOJ would no longer prosecute enrolled members of federally recognized tribes when they possess eagle feathers, find molten feathers in the wild, gift eagle feathers, provide them to crafts people, or travel with them.[527] The DOJ will continue to prosecute for killing eagles or possessing eagle carcasses without a permit, even by enrolled tribal members on the reservation for religious purposes. Yet, prosecutors are encouraged to use discretion and "consider whether prosecution of particular cases would be more appropriated be handled by tribal prosecutorial authorities in lieu of federal prosecution."[528]

These and other initiatives have shown a willingness to consult both with individual religious practitioners and tribes, on a government-to-government basis, about eagle regulation.[529] Through the Office of Tribal Justice, the DOJ has signaled its willingness to help tribes implement or develop legislative codes on eagle regulation.[530]

Given that many, though certainly not all, religious uses of eagles occur *in* reservation communities, it seems particularly appropriate to defer to tribal government jurisdiction. Winslow Friday, for example, took his eagle from a tree on the reservation and used it for a Sun Dance occurring on the reservation.[531] Historically, the Northern Arapaho tribe would have had exclusive jurisdiction over his hunting and the Sun Dance itself. The tribal code had potentially relevant provisions governing hunting on the reservation.[532] The case was federal only because of the reach of the Eagle

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[526] U.S. DOJ, REQUEST FOR TRIBAL INPUT ON: (1) DOJ CONSIDERATION OF POLICY REGARDING EAGLE FEATHERS; AND (2) FEDERAL/TRIBAL TRAINING PROGRAM ON ENFORCEMENT OF WILDLIFE AND OTHER ENVIRONMENTAL LAWS 2, 5 (2011), *available at* http://www.justice.gov/otj/pdf/Eagle%20Feathers%20-%20DOJ%20Request%20for%20Tribal%20Input.pdf.

[527] *See* Off. of the Att'y Gen., Memorandum on Possession or Use of the Feathers or Other Parts of Federally Protected Birds for Tribal Cultural or Religious Purposes, Oct. 12, 2012, at 1–3, *available at* http://www.justice.gov/ag/ef-policy.pdf.

[528] *Id.* at 4.

[529] *See, e.g.*, *Eagle Summit on March 18*, U.S. FISH & WILDLIFE SERV., http://www.fws.gov/mountain-prairie/tribal/tracks/022010.html (last visited Sept. 11, 2012) (detailing the Colorado Commission of Indian Affairs invitation to the Tribal Council and other tribal members to participate in an Eagle Summit to discuss eagle permits, eagle population management, and the possession of eagle feathers).

[530] *See E-mail from Montana Wyoming Tribal Leaders Council to Tribal Eagle Feathers Workgroup, FW: Eagle Feathers Update and Conference Call—May 20th, 1–3p.m. EDT*, MONTANA WYOMING TRIBAL LEADERS COUNCIL, http://www.mtwytlc.org/component/content/article/114-announcements/1683-fw-eagle-feathers-update-and-conference-call-may-20th-1-3pm-edt.html (last visited Sept. 11, 2012) (reporting on an annual meeting of tribal leaders during which the Office of Tribal Justice Director Tracy Toulou spoke regarding "eagle feathers related issues").

[531] *Friday*, 525 F.3d at 945.

[532] *See Friday*, 525 F.3d at 943 (discussing tribal hunting regulations that forbid the taking of eagles).

Act to federal and tribal lands. Notwithstanding the federal law, however, there was clearly a tribal law element of the case. Testimony in the Tenth Circuit involved extensive (and potentially conflicting) evidence on tribal law and custom regarding the taking of a bald eagle for the Sun Dance, evidence that the Tenth Circuit declined to rule on.[533] Following the Tenth Circuit's decision, the U.S. Attorney's office—perhaps appreciating this history and the tribal nature of the incident—decided to transfer Winslow Friday's case to the Northern Arapaho Tribal Court.[534] Friday entered a guilty plea, paid a $2,500 fine, and had his hunting privileges on the reservation revoked for a year.[535]

Friday and the current state of eagle feather regulation reveal a strong current of tribal interests in a set of cases that had historically been adjudicated as individual rights, either under the First Amendment or criminal law. While many problems remain in the permitting process, the agencies' willingness to recognize tribal law regulations and jurisdiction is promising. As Steven Moore, a prominent American Indian law attorney, remarked after the *Friday* case, "In this modern era of tribal sovereignty, more and more authority for regulating these kinds of activities needs to be turned away from the United States and to tribes."[536]

Finally, in an interesting turn of events, the USFWS recently issued a permit to the Northern Arapaho tribe, allowing it to take two bald eagles per year for religious purposes.[537] This is the first permit to kill a bald eagle ever issued in the United States and it has been granted to effectuate American Indian religious freedoms in fulfillment of RFRA and the federal trust responsibility to Indian tribes.[538] As USFWS recognized, this is a "controversial" decision in light of the eagle's "iconic" status as the

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[533] *See id.* at 942–43. Though the court acknowledged the extensive evidence on tribal law and custom that was presented, it held no weight in the court's analysis other than being used as background information. *Id.*

[534] *See Northern Arapaho Man Who Shot Eagle for Sun Dance Pleads Guilty*, BUFF. POST (Dec. 23, 2009, 9:41 AM), www.buffalopost.net/?p=5233.

[535] *Id.*

[536] *Id.*

[537] David Yeargin, *Bald Eagle Take Permit Issued for Religious Purposes*, U.S. FISH & WILDLIFE SERV. (Mar. 15, 2012, 11:30 AM), http://www.fws.gov/news/blog/index.cfm/2012/3/15/Bald-Eagle-Take-Permit-Issued-for-Religious-Purposes. While the permit would seem to have great promise, one potential limitation is that it does not allow the Northern Arapaho to take eagles on the reservation—raising the question of where, if anywhere, Northern Arapaho people will be allowed to exercise this religious accommodation. *See* Michael Winter, *Wyoming Tribe Gets OK to Kill 2 Bald Eagles for Ceremonies*, USA TODAY (Mar. 13, 2012), http://content.usatoday.com/communities/ondeadline/post/2012/03/wyo-indian-tribe-gets-ok-to-kill-bald-eagles-for-ceremonies/1#.UGIYdlFTCYQ (stating that "the [USFWS] issued the permit Friday, allowing the tribe to kill two bald eagles off the Wind River Indian Reservation").

[538] *Id.*

symbol of American identity.[539] Yet, it is difficult to know how this permit might be implemented given that it forbids the killing of eagles on the reservation and Wyoming law forbids taking them off of the reservation.

Despite their limitations, the Northern Arapaho permit and the DOJ Memorandum on Eagle Feathers both reveal a willingness to negotiate with tribes over the limits of eagle conservation and religious use.[540] The new permit suggests that USFWS now recognizes that the limited taking of eagles by tribal members, at least in the Northern Arapaho context, is religiously necessary and will not threaten the entire species.[541] The agency's statements also suggest that USFWS has come to appreciate the relevance of tribal custom as a meaningful factor in guiding regulatory decisions. For instance, USFWS Regional Supervisor Matt Hogan said upon issuance of the permit: "We're really talking about Native Americans who have had a longtime, customary traditional relationship with eagles—in some cases thousands of years. . . . We're constantly trying to balance the conservation of the species with the religious needs of Native Americans."[542] To that end, the Northern Arapaho tribe has recently amended its tribal code setting forth the tribe's role in allocating eagle take rights for traditional ceremonial purposes.[543]

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[539] *Id.* The decision was quickly covered in major media outlets, including *CNN*, *MSNBC*, *The Washington Post*, and *The Huffington Post*. *E.g.*, Steve Hendrix & Dana Hedgpeth, *For Va. Eagle, Death Is Beginning of Journey*, WASH. POST, Mar. 19, 2012, at A01; Eric Fiegel, *Feds Grant Native American Tribe Permit to Kill Bald Eagles for Religious Purposes*, CNN BELIEF BLOG (Mar. 15, 2012, 10:33 PM), http://religion.blogs.cnn.com/2012/03/15/feds-grant-permit-to-kill-bald-eagles/; Ben Neary, *Northern Arapaho Given Permit to Kill Bald Eagles***,** NBCNEWS.COM, http://www.msnbc.msn.com/id/46729054/ns/us_news-environment/t/northern-arapaho-given-permit-kill-bald-eagles/ (last updated Mar. 14, 2012); *Northern Arapaho Tribe Receives Permit to Kill 2 Bald Eagles for Religious Purposes*, HUFFINGTON POST GREEN (Mar. 13, 2012, 4:57 PM**)**, http://www.huffingtonpost.com/2012/03/13/northern-arapaho-tribe-permit_n_1342933.html.

[540] *See* Neary, *supra* note 539 ("Congress recognized [the culturally unique way Native American tribes value bald eagles and other wildlife] when they passed the Bald and Golden Eagle Protection Act and required the Service to consider religious uses by tribes a priority for issuing take permits under the law.").

[541] *See* Ben Neary, *Wyoming Tribe Says First Bald Eagle Kill Permit Is a Victory for American Indian Sovereignty; Tribe: Bald Eagle Permit a Victory for Tradition*, CANADIAN PRESS, Mar. 17, 2012 ("[O]nly a few tribes have intact ceremonies involving eagles and . . . only a few individuals within those tribes have a religious need to kill wild birds.").

[542] Tristan Ahtone, *Wyoming Tribe Wins Right to Hunt Two Bald Eagles*, NPR (Mar. 19, 2012), http://www.npr.org/2012/03/19/148919990/wyoming-tribe-wins-right-to-hunt-two-bald-eagles.

[543] Title 13 of the Northern Arapaho Code is notable for its extensive discussion of the relationship between eagles and religious freedoms (including as a matter of federal law), the role of the tribe vis-à-vis individual tribal members in eagle take permits, the protection of tribal ceremonies, confidentiality of religious matters, ramifications for religious freedoms of tribal property, and treaty rights between Arapaho and Shoshones on the reservation. *See* NORTHERN ARAPAHO CODE, Tit. 13, Religious Freedom (Nov. 2, 2010), *available at* http://www.northernarapaho.com/sites/northernarapaho.com/files/NA%20Code%20Title%2013%20Freedom%20of%20Religion%2011-2-10.pdf.

D. *Burial Sites, Funerary Objects, and Human Remains*

Like people around the world, American Indians conduct funeral rites and care for the gravesites of deceased relatives. Religious norms may prescribe specific values and traditions associated with treatment of the dead. For example, some Native Hawaiians express an intergenerational relationship between the ancestors and living human beings. Ancestors nourish the earth through the *mana* or power contained in their bones, while the living have obligations to care for gravesites, bring offerings to the ancestors, and recite personal lineages going back for generations.[544] Since the mid-nineteenth century, however, Native peoples have struggled to protect gravesites against encroaching settlers—who acquired their lands including cemeteries—and gravediggers—who excavated Native graves for their scientific or curiosity value.

As *Sequoyah* reveals, American Indian tribes first struggled to protect their cemeteries because they lost title to their lands during European and American conquest and colonization.[545] The Cherokee Nation lost almost all of its aboriginal territory in the East through dozens of treaties with England, France, and later, the United States, culminating in the 1838 "Trail of Tears," in which Cherokees were forcibly removed from their remaining treaty-guaranteed lands in Georgia.[546] The Cherokees explicitly referenced their ancestors' graves among the reasons why they did not want to leave their homeland.[547] When the United States nonetheless acquired Cherokee lands, it distributed them either to state governments or individual citizens.[548] By 1980, when *Sequoyah* was decided, the Cherokee burial grounds in the Tennessee River Valley had been owned by non-Cherokees for over one hundred years, and its new owners had the legal authority to destroy the graces if they wished.[549]

American Indian graves have also been looted by government and

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[544] *See* Edward Halealoha Ayau, *Rooted in Native Soil*, 7 FED. ARCHAEOLOGY, Fall-Winter 1995, *available at* http://www.nps.gov/archeology/cg/fd_fa_win_1995/soil.htm (remarking that the living "are guided in part by a belief that the ancestors may exact retribution for failure to protect them from those who would steal their mana").

[545] *See* DAVID HURST THOMAS, SKULL WARS: KENNEWICK MAN, ARCHAEOLOGY, AND THE BATTLE FOR NATIVE AMERICAN IDENTITY 21 (2000) (noting that as a result of the Indian Removal Act of 1830, many Indians "lost their land, their homes, and their livestock").

[546] *Id.*

[547] *See, e.g.*, *Resolutions from Aquohee District*, 3 CHEROKEE PHX. & INDIANS' ADVOC., Sept. 11, 1830, at 2, *available at* http://www.wcu.edu/library/DigitalCollections/CherokeePhoenix/Vol3/no18/3no18_p2-c5A.htm (last visited Sept. 8, 2012) ("It has been frequently asserted that we are willing and even desirous to go to the west. We assure our friends it is not so. We have our homes, we have our families, we love to dwell by our father's graves.").

[548] *See* Sequoyah v. Tenn. Valley Auth., 620 F.2d 1159, 1163 (6th Cir. 1980) (noting that the few Cherokee expeditions back to former lands were merely educational experiences pertaining to their cultural heritage).

[549] *Id.*

individual parties. During the 1800s, federal agencies were directed to collect Indian human remains as scientific specimen.[550] In 1868, for example, the U.S. Surgeon General ordered army personnel to collect Indian skulls for craniology studies taking place at the Army Medical Museum.[551] One army surgeon shared that he acquired the head of a recently deceased Sioux man by severing it from the body before the man could be buried by his family.[552] This story was replayed many times over. For example, in 1900, "Arles Hrdlicka led an expedition to Larson Bay, Alaska, and in front of the anguished villagers, dug up and departed with the remains of 800 Koniag people."[553] In another instance, the Nebraska State Historical Society came to possess the remains of over 400 dead Pawnee Indians.[554]

Well into the twentieth century, government-sponsored and private parties looted Indian graves in the name of art, science, and education.[555] By the late 1980s, thousands of human skeletons and many more funerary artifacts were housed in federally funded museums and other locations. The National Museum of Natural History had in its collection 19,250 human skeletal remains of Native Americans.[556]

For American Indians, the disinterment of ancestral remains causes personal and collective grief, disrupting the cycle of life, obligations to ancestors, and religious beliefs.[557] Moreover, the loss of religious and cultural items, such as ceremonial rattles, regalia, and figurines, has made it difficult to conduct contemporary religious ceremonies requiring those

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[550] This history was studied and documented in detail when Congress considered the legislation that would become the Native American Graves Protection and Repatriation Act. *See, e.g.*, ROBERT E. BIEDER, A BRIEF HISTORICAL SURVEY OF THE EXPROPRIATION OF AMERICAN INDIAN REMAINS (1990), *reprinted in* S. 1021 & S. 1980: Hearing Before the Select Comm. on Indian Affairs of the S., 101st Cong. 278–363.

[551] Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 40 (1992) (noting that as a result of the directive, "[i]n ensuing decades, over 4000 heads were taken from battlefields, burial grounds, POW camps, hospitals, fresh graves, and burial scaffolds across the country").

[552] THOMAS, *supra* note 545, at 57.

[553] WINONA LADUKE, RECOVERING THE SACRED: THE POWER OF NAMING AND CLAIMING 77 (2005).

[554] *See id.* at 79.

[555] *See* THOMAS, *supra* note 545, at 140–42 (detailing the proliferation and efforts of looters and public and private museums in seizing and/or documenting Indian culture); *Pot Hunters Head to Hoosegow*, ART MARKET MONITOR (June 12, 2009), http://artmarketmonitor.com/2009/06/12/pot-hunters-head-to-hoosegow/ (noting that "pot hunting" for Native American treasures is a pastime in many rural communities in the history-rich region).

[556] SMITHSONIAN INST., NAT'L MUSEUM OF NATURAL HIST., REPATRIATION OFF., ANTHROPOLOGY DEP'T, http://anthropology.si.edu/repatriation/faq/index.htm (last visited Sept. 8, 2012).

[557] *See* KENN HARPER, GIVE ME MY FATHER'S BODY: THE LIFE OF MINIK, THE NEW YORK ESKIMO 27 (2000) (giving an Eskimo's description of his feelings upon seeing the remains of his people in five barrels upon arrival to New York City).

items.[558] After 300 Lakota people participating in the religious Ghost Dance were killed by the U.S. Army at Wounded Knee in 1890, for example, army and private individuals took personal effects both from bodies still on the field and from the mass grave.[559] When the items were publicly exhibited one hundred years later, it caused "great anguish and suffering to the victims' descendants and the entire Sioux nations."[560]

Early legal advocacy to protect gravesites and recover cultural patrimony met many hurdles.[561] State cemetery protection laws rarely extended to Indian burial sites[562] and federal law, such as the Archaeological Resources Protection Act, treated Indian artifacts on public lands as nationally owned property.[563] In the 1980s, American Indian advocates, led by Walter Echo-Hawk, Suzan Harjo, and others, initiated a campaign to address these religious, cultural, and dignitary harms through federal legislation.[564] In 1990, Congress passed the Native American Graves Protection and Repatriation Act ("NAGPRA").[565] Like other post-*Smith* religious freedoms statutes, NAGPRA addresses individual and tribal claims,[566] which seems appropriate given the nature of the harms and issues described above. By its very terms, it also requires agencies to work with tribes to effectuate tribal religious norms, for example, repatriating "sacred objects . . . which are needed by traditional Native American religious leaders for the practice of traditional Native American religions

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[558] Notice of Intent to Repatriate Cultural Items in the Possession of the Denver Art Museum, Denver, CO, 66 Fed. Reg. 32,373, 32,374 (June 14, 2001), *available at* http://www.gpo.gov/fdsys/pkg/FR-2001-06-14/pdf/01-14992.pdf ("These three cultural items also are needed by the Zuni Bow Priest, a traditional religious leader, for ceremonial installation at the appropriate Ahayu:da shrine in accordance with the practice of Zuni traditional religion.").

[559] LADUKE, *supra* note 553, at 101.

[560] *Id.* at 105.

[561] *E.g.*, Onondaga Nation v. Thacher, 189 U.S. 306, 306–08 (1903) (recounting the Onondaga Nation's attempt to recover wampum belts from state custody and the court's denials thereof); Kim Dayton, "*Trespassers, Beware!": Lyda Burton Conley and the Battle for Huron Place Cemetery*, 8 YALE J. L. & FEMINISM 1–2 (1996) (recounting the story of Lyda Burton Conley who used both the law and her shotgun to protect her mother's grave from development).

[562] *See, e.g.*, Wana Bear v. Cmty. Constr., Inc., 180 Cal. Rptr. 423, 424 (Cal. Ct. App. 1982) (holding that California cemetery protection law doesn't apply to protect Miwok Indian burial ground from excavation for development); Newman v. State, 174 So. 2d 479, 480, 483–84 (Fla. Dist. Ct. App. 1965) (quashing conviction for removing a Seminole Indian skull because the action was not proven to have been done "wantonly and maliciously" as required by a Florida law).

[563] Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470cc–ee (2006).

[564] James Riding In et al., *Protecting Native American Human Remains, Burial Grounds, and Sacred Places: Panel Discussion*, 19 WICAZO SA REV. 169, 173 (2004).

[565] Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048 (1990).

[566] *E.g.*, Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3002(a) (2006).

by their present day adherents."[567]

NAGPRA has three major features. First, in the case of discoveries of human remains and cultural items made on federal lands after 1990, NAGPRA gives ownership to lineal descendants, to the tribe, or to Native Hawaiian organization; it also provides a right of tribal consultation for any intentional excavations of such items.[568] Second, NAGPRA prohibits trafficking in American Indian human remains and cultural items, which is punishable by fines and imprisonment.[569] Third, NAGPRA requires federal agencies and federally funded museums to inventory and repatriate certain items to tribes after consultation.[570]

Many museums, art dealers, archaeologists, and others initially opposed NAGRPA. They feared, among other things, that human skeletons and other objects with scientific, educational, and aesthetic value to the public would be returned wholesale to tribes, leaving museums, labs, and other institutions empty of their most precious resources.[571] While thousands of repatriations have taken place, these fears have gone unrealized.[572] First, NAGPRA places significant procedural and substantive hurdles in front of successful repatriations. It takes museums and tribes time, money, and expertise to complete the inventory, notice, consultation, and claims processes. [573] Second, NAGPRA has, in some instances, facilitated cooperation among museums and tribes, or among scientists and tribes.[574] Such interactions are typically characterized by a substantial investment in time and the development of mutual respect among the parties. As one curator put it, working with tribes works best

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[567] *Id.* § 3001(3)(C); *see also* GREG JOHNSON, SACRED CLAIMS: REPATRIATION AND LIVING TRADITION 90–92, 97–99, 102 (2007) (reflecting on Native Hawaiian advocacy before NAGPRA review committee on issue of "sacred objects").

[568] Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3002 (2006).

[569] Native American Graves Protection and Repatriation Act, 18 U.S.C. § 1170 (2006).

[570] Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3003–05 (2006).

[571] *E.g.*, ELIZABETH WEISS, REBURYING THE PAST; THE EFFECTS OF REPATRIATION AND REBURIAL ON SCIENTIFIC INQUIRY, 67–81 (2008) (arguing that NAGPRA has diminished the number of skeletal remains available for study, reduced funds for scientific research, and infringed on scientific freedom).

[572] MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? 16–18 (2003).

[573] *E.g.*, T.J. Ferguson et al., *Repatriation at the Pueblo of Zuni, Diverse Solutions to Complex Problems*, *in* REPATRIATION READER: WHO OWNS AMERICAN INDIAN REMAINS? 239, 262–63 (Devon A. Mihesuah ed., 2000).

[574] *See, e.g.*, Miranda J. Brady, *A Dialogic Response to the Problematized Past*, *in* CONTESTING KNOWLEDGE: MUSEUMS AND INDIGENOUS PERSPECTIVES 133, 133–37 (Susan Sleeper-Smith ed., 2009) (reflecting on the Smithsonian Institution's National Museum of the American Indian adopting a more collaborative model); Brian D. Jones & Kevin A. McBride, *Indigenous Archaeology in Southern New England: Case Studies from the Mashantucket Pequot Reservation*, *in* CROSS-CULTURAL COLLABORATION: NATIVE PEOPLES AND ARCHAEOLOGY IN THE NORTHEASTERN UNITED STATES 265, 265–66, 278–80 (Jordan E. Kerber ed., 2006) (providing an example of a tribe funding to hire archaeologists and historians to conduct scientific and academic research, as well as assisting in the repatriation process).

when museums treat "consultation as a process not a destination."[575]

Some museums have, for example, adopted "special handling" procedures to respect tribal norms on the appropriate treatment of human remains or sacred objects in their collections (for example, covering them with a blanket, allowing tribal members to bless them with sage, or avoiding handling by a member of one gender or the other).[576] Museum officials have gained from tribal leaders valuable information about the objects in their possession.[577] Museums can try to "give back" to the Indian communities that are willing to share valuable knowledge with them, by loaning sacred objects for religious use or study.[578] After years of consultation leading to a successful repatriation, museum officials have even been invited to reburial ceremonies occurring in tribal communities.[579]

Assessing and implementing Native religious norms into administrative accommodations is a challenging process, contested among tribes and among religious practitioners or groups in the Native community.[580] Two mechanisms have been particularly useful: the NAGPRA Review Committee and the agency rulemaking process. The Review Committee is established under NAGPRA "to monitor and review the implementation of the inventory and identification process and repatriation activities."[581] The Review Committee makes annual reports to Congress on compliance and also hears disputes on factual matters to resolve repatriation issues between Indian tribes, Alaska Native villages and corporations, and Native Hawaiian organizations with museums and Federal agencies.[582] Constituted as an "advisory committee" under the Federal Advisory Committee Act, the NAGPRA Review Committee is governed by administrative law, as well as religious freedoms and federal Indian law. Review Committee members are appointed by the Secretary of the Interior from nominations by Indian tribes, Native Hawaiian organizations, traditional Native American religious leaders, national museum organizations, and scientific organizations.[583] The NAGPRA

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[575] Bridget M. Ambler, Curator of Material Culture, Remarks at the Univ. of Colo. Law Sch., (Oct. 11, 2011).

[576] *Id.*

[577] *Id.*

[578] *Id.*

[579] Ken Gewertz, *The Long Voyage Home: Peabody Returns Native American Remains to Pecos Pueblo*, HARV. U. GAZETTE (May 20, 1999), *available at* http://news.harvard.edu/gazette/1999/05.20/indian.remains.html.

[580] *See, e.g.*, Na Lei Alii Kawananakoa v. Hui Malama I Na Kupuna O Hawai'I Nei, 158 F. App'x 53 (9th Cir. Dec. 6, 2005) (involving a suit between Native Hawaiian organizations regarding disposition of cultural items).

[581] Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3006(a) (2006).

[582] *Id.* § 3006(c).

[583] *Id.* § 3006(b)(1).

Review Committee's composition is meant to lend both substantive expertise and political balance in policy determinations, such as the eternally complicated question of determining when it is appropriate to allow scientific study on items covered by NAGPRA.[584]

Following one recent and now infamous case, a rule by the Department of the Interior resolved a major issue of broad contention. In *Bonnichsen v. United States*,[585] anthropologists and archaeologists challenged the applicability of NAGPRA to an 8,000 year-old skeleton found in the aboriginal territory of several tribes in the Columbia River Plateau near Kennewick, Washington.[586] When the skeleton was initially discovered by two teenagers, it was turned over to the Army Corps of Engineers. The court stated: "The experts compared the physical characteristics of the remains—e.g., measurements of the skull, teeth, and bones—with corresponding measurements from other skeletons. They concluded that Kennewick Man's remains were unlike those of any known present-day population, American Indian or otherwise."[587] This examination evoked earlier "science" that had classified Indians' according to craniometry and other disciplines that required used the study and measurement of dead Indian bodies to substantiate claims about Indian racial inferiority.[588] It also contradicted their religious obligations to rebury the individual they called the "Ancient One."[589] The tribes argued that according to their religious beliefs:

> When a body goes into the ground, it is meant to stay there until the end of time. When remains are disturbed and remain above the ground, their spirits are at unrest. . . . To put these spirits at ease, the remains must be returned to the ground as soon as possible.[590]

The Department of Interior had decided that the tribes had a right to rebury the Ancient One's remains, a ruling that the scientists challenged.[591] The Ninth Circuit vacated the Interior's decision, holding that the scientists had a right to study the skeleton under an Archaeological Resources Protection Act because the remains did not fall under NAGPRA's

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[584] *See* Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Mgmt., 455 F. Supp. 2d 1207, 1224 (D. Nev. 2006) (holding that BLM's decision not to repatriate remains to tribe, and instead to allow scientific study on grounds that the remains were culturally unidentifiable, was arbitrary and capricious).

[585] 367 F.3d 864 (9th Cir. 2004).

[586] *Id.* at 870.

[587] *Id.* at 871.

[588] ECHO-HAWK, *supra* note 10, at 249.

[589] *Bonnichsen*, 367 F.3d at 870 n.8 (quoting Bonnichsen v. United States, 217 F. Supp. 2d 1116, 1121 (D. Or. 2002)).

[590] *Id.* (quoting *Bonnichsen*, 217 F. Supp. 2d at 1121).

[591] *Id.* at 868.

purview.[592] This was because NAGPRA defined "Native American" as "of, or relating to, a tribe, people, or culture that is indigenous to the United States."[593] Given the evidence about the skull and other measurements, the court was unconvinced that the skeleton was indigenous.[594] Moreover, the court noted with some incredulity the government's argument that even "remains as old as 100,000 or 150,000 years, close to the dawn of *homo sapiens* . . . would be 'Native American' under the government's interpretation of NAGPRA."[595] The archaeological evidence showed no human settlements in the relevant region dating back 9,000 years, and the court was not compelled by the tribes' oral traditions that showed a connection to "the Ancient One."[596] Stating that "the government's . . . interpretation . . . has no principle of limitation beyond geography" and that Congress did not intend NAGPRA to apply to remains of "such great antiquity,"[597] the Ninth Circuit held that the government's determination that the remains were Native American and covered by NAGPRA must fail.[598] The court ordered that the skeleton (which had already been reburied) be made available to the scientists.[599]

In the aftermath of *Bonnichsen*, the Department of the Interior issued regulations dealing with the disposition of "culturally unidentifiable human remains," an issue that had previously been left open under NAGPRA.[600] These regulations provide that if an agency or museum is unable to provide a "right of possession," culturally unidentifiable remains are to be repatriated first to the tribe from which the remains were removed or to the Indian tribe or tribes "that are recognized as aboriginal to the area from which the remains were removed."[601] This was exactly the standard proposed by the Columbia River Tribes in *Bonnichsen*.[602] Its adoption by the Department of the Interior suggests that what may look to the courts like a limitless tribal religious norm—in this case, an obligation to take care of ancestral remains within the aboriginal territory—can ultimately serve to inform administrative policy after consultation with tribes.

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[592] *Id.* at 880.

[593] *Id.* at 875 (citing Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001(9) (2006)).

[594] *Id.* at 880.

[595] *Id.* at 876 n.17.

[596] *Id.* at 880–82.

[597] *Id.* at 876 n.17.

[598] *Id.* at 882.

[599] *Id.*

[600] 43 C.F.R. § 10.11(c)(1) (2011).

[601] *Id.* § 10.11(c)(1).

[602] *Bonnichsen*, 367 F.3d at 870.

E. *Peyote*

This review of legislative and administrative accommodations of Indian religion ends where it began: with religious use of peyote. As the earlier discussions of *Woody* and *Smith* make clear, peyote is the sacrament of the NAC, deeply revered for its spiritual and healing powers. *Smith* was controversial because it provided that states could outlaw peyote possession even for religious use.[603] True, as Professor Marci Hamilton often points out, many states legislated in favor of peyote exemptions following *Smith*.[604] But this hardly ensured widespread religious liberty for NAC members. To the contrary, these laws created a "patchwork" effect in which twenty-eight states had an exemption for religious use and the rest made peyote possession a felony.[605] As Walter Echo-Hawk argued, "NAC members became subject in twenty-two states to arrest, incarceration, and discrimination solely because of their form of worship."[606] Not only were peyote practitioners forbidden from practicing *in* those states, but they could not transport peyote *across* those states.[607] Given that peyote grows only in Texas (and Mexico), it became very difficult to obtain the sacrament.[608] Moreover, the state rules varied, with some, like Texas, imposing a "25 percent Indian blood-quantum-requirement" and others using different measures of eligibility.[609] As a result of outright prohibitions, legal uncertainty, and continuing societal ignorance about peyote, NAC members were left to "pray in fear" after *Smith*.[610]

After the broad-based coalition of religious and secular organizations declined to push for peyote-specific protections in RFRA, well-known peyote leaders such as Reuben Snake partnered with legal services organizations and the Native American Religious Freedom Project to push

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[603] *See* Emp't Div. v. Smith, 485 U.S. 660, 671 (1988) (finding that the First Amendment does not extend protection to conduct, including the use of peyote, that the States have validly proscribed), *superseded by statute*, 108 Stat. 3125 (1994) (codified at 42 U.S.C. § 1996a (2006)) ("[T]he use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes . . . is lawful, and shall not be prohibited by the United States or any State.").

[604] Hamilton, Employment Division v. Smith *at the Supreme Court: The Justices, the Litigants, and the Doctrinal Discourse*, *supra* note 7, at 1693; *see also* Marci A. Hamilton, *Power, the Establishment Clause, and Vouchers*, 31 CONN. L. REV. 807, 820 n.73 (1999) (listing examples of federal and state statutes that provide exemptions for peyote use in religious ceremonies).

[605] *See* MAROUKIS, *supra* note 101, at 208 (discussing the AIRFA Amendments of 1994, which eliminated disparities between states in the treatment of religious peyote use by Indians).

[606] ECHO-HAWK, *supra* note 10, at 317.

[607] *See* MAROUKIS, *supra* note 101, at 205–06 (discussing how, after *Smith*, the states could prosecute the possession of peyote, even if intended for religious use).

[608] *Id.* at 5.

[609] *See id.* at 200–01 (discussing lawsuits in Texas and in New York that challenged the Indian-blood requirements for the use of peyote in religious ceremonies).

[610] ECHO-HAWK, *supra* note 10, at 317, 532 n.164 (quoting Robert Billie White Horse, President of the Native American Church of Navajoland).

for more responsive federal legislation.[611] This effort required a nationwide grassroots effort, reaching peyote organizations and Indian tribes across the United States. Elected leaders, even those from tribes that had not always supported peyote, testified in support of the bill. In 1994, Congress passed amendments to the AIRFA, providing "the use, possession, or transportation of peyote by an Indian for bona fide . . . traditional Indian religion is lawful, and shall not be prohibited by the United States or any State."[612] Under the AIRFA amendments, "Indian" is defined as a member of a federally recognized tribe.[613] This statutory approach had the welcome effect of overruling *Smith* and it was also consistent with accommodating Indian religious in the context of *tribal* self-determination.

Still, challenges remain. The AIRFA Amendments create potential inconsistency with an earlier regulatory exception, stating that "[t]he listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration."[614] The regulations had sometimes been interpreted to include and protect NAC members who were either non-Indian or of Indian heritage but not eligible for citizenship in their tribes.

Access to peyote by non-Indians raises a number of issues. NAC members and leaders are, for example, deeply concerned about instances in which non-Indians have claimed to create a new "Native American Church" and sought exemptions for the "religious use" of peyote.[615] The "Oklevueha Native American Church"—an organization run by a non-Indian peyote activist named James Mooney who was arrested in 2006 for possession of 12,000 peyote buttons—has been particularly aggressive.[616] Mooney has argued that state and federal laws violate equal protection and RFRA by limiting peyote exemptions to members of federally recognized tribes, claims that have thus far been unsuccessful.[617] In one case, the DOJ

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[611] HUSTON SMITH & REUBEN SNAKE, ONE NATION UNDER GOD: THE TRIUMPH OF THE NATIVE AMERICAN CHURCH 139–40 (1996); *see also id.* at 125–39 (describing the history of Indian religious use of peyote and how it has been affected by European jurisprudence from the early European colonization of America through the Supreme Court's decision in *Smith*).

[612] 42 U.S.C. § 1996a(b)(1) (2006).

[613] *Id.* §§ 1996a(c)(1)–(2).

[614] 21 C.F.R. § 1307.31 (2012).

[615] *See* State v. Mooney, 98 P.3d 420, 422 (Utah 2004) (overturning conviction of non-Indian who possessed peyote and claimed membership in "Oklevueha Earthwalks Native American Church").

[616] MAROUKIS, *supra* note 101, at 223.

[617] *See, e.g.*, Complaint for Declaratory Judgment and Injunctive Relief at 8–11, Oklevueha Native Am. Church v. Holder, No. 2:10-CV-00892 (D. Utah Sept. 13, 2010) (alleging that the government violated the RFRA and the Fourteenth Amendment by refusing to allow members of the NAC to use peyote in religious ceremonies).

agreed to drop the charges if Mooney "agreed to never acquire, use, or distribute Peyote."[618]

Many American Indians find Mooney's litigation strategy worrisome and his conduct offensive. First, if successful, Mooney could eviscerate the federal statutory protection for peyote use that American Indians fought so hard to obtain after *Smith*. Second, Mooney's use of peyote in his own brand of ceremony violates their beliefs about the sanctity of the plant. For NAC members, peyote is a deity that must be carefully harvested and transported, never wasted, and only taken in a religious ceremony.[619] Because of the very small geographic area where peyote can grow, as well as overharvesting problems, peyote supplies are already quite low. Non-Indian use jeopardizes the plant, creates extra demand, and raises the price.[620] Additionally, when federal agents seize peyote from individuals not protected by law, they destroy the plant—leading to the desecration and loss of thousands of peyote buttons that would have otherwise been used in a NAC meeting.[621] Finally, Mooney and others similarly situated threaten to raise the kind of concerns articulated in *Smith*, that certain individuals are merely using religious arguments as a shield for illicit drug use.

Mooney's challenges reveal much about the current state of American Indian religious freedoms.[622] It would be very difficult for the NAC to prevail, under the First Amendment or RFRA alone, on an argument that American Indians should have an exclusive exemption for peyote use. A "church autonomy" argument might protect the NAC in its internal affairs—for example, in affirming the Church's right to select certain individuals as roadmen or divide property according to church rules. But some NAC leaders and members desire to limit non-Indian access to peyote as a general matter. On this point, the Utah court held that tribal affiliation is immaterial to the legality of the ingestion of peyote by an

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[618] MAROUKIS, *supra* note 101, at 224.

[619] *See, e.g.*, *Non-Natives Using Peyote*, NATIVE AM. CALLING (Sept. 30, 2010), http://www.nativeamericacalling.com/nac_past2010.shtml (national radio call-in show featuring differing perspectives on non-Indian peyote use, as in *Oklevueha*).

[620] *See* MAROUKIS, *supra* note 101, at 225–28 (describing the ecological and economic factors that have led to a decline in peyote harvest, and a concurrent increase in the price of peyote over the past fifty years).

[621] *See Non-Natives Using Peyote*, *supra* note 619.

[622] While *Mooney* is generally perceived at one end of a continuum of legitimacy in religious use of peyote, there are more nuanced and complicated questions raised, for example, by the religious use of peyote by American Indians lacking enrollment status or by non-Indian relatives of tribal members. For discussion of these issues in the eagle feather context, see Alex Tallchief Skibine, *Culture Talk or Culture War*, 45 TULSA L. REV. 89, 96–97 (2009).

individual.[623] But other courts have held that that NAC membership is a political classification that withstands free exercise and equal protection challenges by non-Indians.[624] Moreover, the DOJ and DEA have been quite sympathetic to the NAC in its quest to preserve the statutory exemption for members of federally recognized tribes. The DOJ has worked to prosecute Mooney and others, and the DEA, after consultation with tribal and NAC leaders, has proposed amending the regulations to conform with AIRFA, such that the exemption for peyote possession will be available only for members of federally recognized tribes.[625] As scholar Thomas Maroukis argues, "This represents a moving away from a First Amendment defense of Peyote use to the argument that the exemption comes from the unique trust relationship between American Indian nations and the federal government."[626]

V. CONCLUSION

Perhaps in an ideal world, there would be no role for federal courts, legislators, or agencies in American Indian religion.[627] Tribal people would be truly free to live out their own spiritual visions and dreams as communities sharing the landscapes that give rise to a different and beautiful way of life.[628] But this is not the reality that we inhabit, at least not today. Through generations of conquest and colonization, the federal government has inserted itself into every aspect of American Indian tribal life, and has only begun to disentangle itself from the previous suppression of American Indian religion. Increasingly, the government has shown its support for the American Indian perspective that religious freedom is tied

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[623] *See* Utah v. Mooney, 98 P.3d 420, 428 (Utah 2004) (holding that bona fide religious use of peyote by members of the NAC cannot serve as a basis for the prosecution of members, irrespective of tribal membership).

[624] *See* Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1214–16 (5th Cir. 1991) (holding that NAC membership is a political classification).

[625] MAROUKIS, *supra* note 101, at 222–23.

[626] *Id.* at 224. *Cf.* Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 434 (2006) ("[I]f any schedule I substance is in fact *always* highly dangerous in any amount no matter how used, what about the unique relationship with the Tribes justifies allowing their use of peyote? Nothing about the unique political status of the Tribes makes their members immune from the health risks the Government asserts accompany any use of a schedule I substance.").

[627] Those who call for external oversight of religious institutions, *see, e.g.*, Caroline Mala Corbin, *The Irony of* Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 106 NW. L. REV. 951, 969–70 (criticizing Supreme Court cases that fail to protect the civil rights of ministers against discrimination by religious institutions) and of tribal governments, *see, e.g.*, Robert Clinton, *Federal Review of Tribal Activity Under the Indian Civil Rights Act*, 68 N.D. L. REV. 657, 657 (2002) (considering whether additional federal judicial review would strengthen the case for indigenous self-governance), might start from a different premise.

[628] *See* James (Sákéj) Youngblood Henderson, *Postcolonial Indigenous Legal Consciousness*, 1 INDIGENOUS L.J. 1, 2 (2002) (arguing that indigenous peoples must "dream and articulate impossible visions" in furtherance of a post-colonial reality).

to tribal self-determination, and that religious and cultural experiences give tribal members the values that shape their collective and separate existence as nations within the nation. Yet, so long as the United States continues to own sacred sites and regulate religious rituals, there will still be a long way to go in ensuring that American Indians enjoy religious liberties at the individual and tribal level.

Given this reality, what are the lessons to draw about limiting principles and empowering practices in American Indian religious freedoms? First, I am not entirely persuaded that courts are institutionally incapable of assessing the basic beliefs and practices of tribal religions in free exercise cases. Like religious freedoms scholar Richard Garnett and others, I see this inquiry as requiring the evaluation of testimony and documents, no more or no less difficult than the analysis of other complex or specialized matters like the science behind toxic torts or financial transactions giving rise to mortgage-backed securities. Admittedly, American Indian religions reflect a different world view than other world religions. Yet, the state courts in *Woody* and *Frank*, and even the federal appellate court in *Lyng*, showed sensitivity and sensibility as they analyzed Indian practices without intruding into a forbidden religions sphere. The rhetoric about limitless Indian religious claims in *Bowen*, *Lyng*, and *Smith* may be more about acceding to the power of conquest than about true institutional incompetence.[629] In any event, the Supreme Court's inability or unwillingness to evaluate American Indian religious claims on their own terms was a major factor explaining the *Bowen-Lyng-Smith* trilogy—a factor that has been largely overlooked in previous scholarship examining *Smith* generically as a religion case.

I am persuaded, however, that Congress and the Executive Branch, when motivated to address Indian issues, are better situated than the courts to negotiate with tribal governments over the contours of religious accommodation. The legislative and administrative framework created in the post-*Smith* era empowers tribes and agencies, taking religious norms as a baseline, to work together and find solutions to seemingly intractable problems. The Departments of Justice and the Interior, and agencies such as the Park Service, Fish and Wildlife Service, have increasingly shown their willingness to work closely on matters of eagle feathers, peyote, sacred sites, and burial grounds to fashion accommodations that allow for some restoration of religious freedoms to American Indians while balancing the needs of competing stakeholders. I have suggested several

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[629] *See* ECHO-HAWK, *supra* note 10, 274–75 (arguing that the Indian cases are not only about "an insensitive court system that experienced inordinate difficulty understanding and protecting a set of religions vastly different from those more familiar to American judges" but also about the fact that "the courts were captive to larger, more powerful forces that resulted in the near eradication of tribal religion—that is, settler-state policies animated by religious discrimination against tribal religions").

reforms in this Article, including the requirement for agencies to enter into consensual agreements with tribes; the expansion of tribal government jurisdiction over eagle feather and peyote matters; and the formation of expert, representative, interdisciplinary national advisory committees to provide insight on complex religious matters. Together, these reforms would improve the legal framework in the spirit of self-determination, religious freedoms, and human rights.

Beyond the American Indian context, it seems that for many individuals and groups, RFRA and RLUIPA are working relatively well to effectuate religious freedoms. The statutory version of the substantial burden/compelling interest test has successfully protected even minority religions in recent RFRA cases.[630] Of course, as religious rights scholar Ira Lupu has argued, one problem with the legislative accommodation model is that "[r]eligious liberty cannot be captured in a simple test or phrase or statutory formula."[631] American Indian tribes have worked relatively well with agencies to develop richly nuanced accommodations of tribal-specific religions in ways that broad brush legislation might not. An interesting follow-up project to this one would be to assess the extent to which other religious groups have worked successfully with agencies to fashion particularized accommodations of religion, and whether the American Indian context is typical or exceptional in this regard. Relatedly, the American Indian context also illustrates Alan Brownstein's point about the costs of the accommodation model on religious minorities.[632] At best, these groups must now expend significant political capital and resources negotiating for the fundamental liberties that members of majority faiths enjoy without conflict. The American public may want to evaluate whether this is a justifiable cost to impose on minority religious practitioners.

The costs are particularly high for American Indians. Tribal leaders have spent significant time and resources lobbying Congress and the agencies on sacred sites and eagle feathers at the same time that reservation residents are facing crushing poverty, violent crime, jurisdictional battles, land claims, and other matters requiring tribal leaders' attention. Moreover, in the administrative process, tribal interests often still lose out to parties with more financial resources and political clout. The Ninth Circuit's decision in *Navajo Nation* casts serious doubt on the extent to

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[630] *See* Cutter v. Wilkinson, 544 U.S. 709, 713–14 (2005) (discussing Wicca, Asatru, and Satanism); *Gonzalez*, 546 U.S. at 418–19 (discussing the "UDV" religion).

[631] Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565, 577 (1999).

[632] *See* Alan Brownstein, *The Religion Clauses as Mutually Reinforcing Mandates: Why the Arguments for Rigorously Enforcing the Free Exercise Clause and Establishment Clause Are Stronger When Both Clauses Are Taken Seriously*, 32 CARDOZO L. REV. 1701, 1725 & n.74 (2011) (arguing that religious minorities must expend significant political capital to protect their rights).

which the courts will serve as a backstop to ensure that American Indians, and possibly other Americans, are protected in their enjoyment of fundamental freedoms. As constitutional scholar Jesse Choper has argued, the accommodation model is generally problematic when courts abdicate to the political process a traditionally perceived purpose of legislative actions: to protect minority rights from majoritarian tyranny.[633] To this end, the Tenth Circuit's broader approach to RFRA, as applied in the district court's *Comanche Nation* case, seems much more promising, if not completely tested, at this point.

Whether under RFRA or RLUIPA—or perhaps new amendments to the Indian religion statutes—Indian religious practitioners still need some guarantee of judicial review if they are to enjoy meaningful religious freedoms. This will require additional work by advocates and scholars. RFRA and RLUPA are silent on American Indian issues, while the Indian-specific religion statutes have few substantive enforcement mechanisms. Even as Congress has legislated in favor of "tribal" interests in religion and courts have begun to assess the autonomy interests of religious "organizations," it remains somewhat unclear where exactly American Indian organizations, tribal governments, the NAC—and perhaps even certain non-Indian religious institutions and groups—fit under the Free Exercise Clause or RFRA.[634] By the same token, Congress has not exactly clarified the extent to which it expects agencies to be bound by the new Indian religion policies.[635] Further work at the intersection of Indian law and religious freedoms law could elucidate these questions.

Finally, the American Indian example suggests that all three branches of government can treat issues of institutionalism and equality with nuance toward a broader conception of religious freedom. Certainly, American Indians may be unique entities in religious freedoms jurisprudence and beyond. But they also crystallize the question of what religious freedom means in our country. If religious freedom is about individual rights construed in terms of formal equality and a limited judicial role, American Indians will find themselves excluded from the promise of the First Amendment and RFRA. But if religious freedom is about something

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[633] *See* Jesse H. Choper, *The Rise and Decline of Constitutional Protections of Religious Liberty*, 70 NEB. L. REV. 651, 685–88 (1991), *cited in* DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS, JR. & MATTHEW L.M. FLETCHER, CASES AND MATERIALS ON FEDERAL INDIAN LAW 752 (2011).

[634] *See, e.g.*, Brett G. Sharffs, *The Autonomy of Church and State*, 2004 BYU L. REV. 1217, 1220 (2004) (arguing that religious "autonomy" literature has three concerns, the autonomy of the church, the state, and the individual).

[635] For briefs in *Te-moak Tribe of Western Shoshone v. United States*, currently on appeal to the Ninth Circuit regarding the BLM's obligations to tribes at sacred sites, see Turtle Talk, *Briefs in* Te-Moak Tribe et al. v. Interior (June 13, 2010, 2:06 PM), http://turtletalk.wordpress.com/2012/06/13/briefs-in-te-moak-tribe-et-al-v-interior/.

more—perhaps pluralism and a courageous commitment to make space for the religious beliefs that inspire both individuals and groups within our nation—then its promise will encompass the first Americans as well as those who followed.[636]

[636] *See* BURTON, *supra* note 450, at 291 (linking accommodation of tribal religious practices to the broader tradition of religious pluralism in the United States); *see also* THOMAS BANCHOFF, DEMOCRACY AND THE NEW RELIGIOUS PLURALISM (2007) (examining views on religious pluralism, including tolerance and accommodation).