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2009 NOTE OF THE YEAR

A REDEEMABLE LOSS: *LYNG*, LOWER COURTS AND AMERICAN INDIAN FREE EXERCISE ON PUBLIC LANDS*

Rising above Arizona's desert plains, the San Francisco Peaks reach higher than any other mountain range in the state.[1] Named in honor of the medieval Italian Francis of Assisi[2]—a man venerated by the Catholic Church as the patron saint of animals and the environment[3]—the string of ancient volcanic summits contains impressive biological diversity and breathtaking natural beauty.[4] For the benefit of generations of Americans, the Peaks are federally protected as part of the Coconino National Forest.[5] Thus, the United States Forest Service ("Forest Service") oversees the area, which provides ample opportunity for recreational activities, such as hiking, skiing, and mountaineering.[6]

In addition to their aesthetic and recreational value to nature lovers, the Peaks are of central importance to the traditional religious

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* The title of this note borrows a short excerpt from a subtitle used by Bryan J. Rose. Bryan J. Rose, *A Judicial Dilemma: Indian Religion, Indian Land, and the Religion Clauses*, 7 VA. J. SOC. POL'Y & L. 103, 111 (1999).

[1] U.S. Forest Service, Welcome to the Volcanic Highlands (Peaks District), http://www.fs.fed.us/r3/coconino/recreation/peaks/rec_peaks.shtml (last visited Sept. 21, 2009).

[2] *See* JAMES A. HARDY, FLAGSTAFF VISITOR CENTER, THE HISTORY OF THE SAN FRANCISCO PEAKS IN FLAGSTAFF 2 (2007), *available at* http://www.flagstaffarizona.org/downloads/visitors/peaks_history.pdf.

[3] *See* Paschal Robinson, *St. Francis of Assisi*, THE CATHOLIC ENCYCLOPEDIA (2009), *available at* http://www.newadvent.org/cathen/06221a.htm (describing Francis of Assisi's love of animals and nature).

[4] *See generally* ROXANE GEORGE ET AL., COMMENTS ON DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR ARIZONA SNOWBOWL FACILITIES IMPROVEMENTS (2004), *available at* http://www.savethepeaks.org/images/stories/documents/deis_comments.pdf (discussing proposed improvements to skiing operations and their potential impact on the beauty of the San Francisco Peaks).

[5] *See* U.S. Forest Service, *supra* note 1 (discussing the protections and restrictions implemented by the U.S. Forest Service).

[6] *Id.*

practices of various American Indian groups. Whether they believe the mountains to be the exact spot of creation,[7] the "mother of humanity,"[8] a theologically necessary sacramental site,[9] or even the home of things divine,[10] the Hopi, the Navajo, the Hualapai, the Havasupai, and other tribes have directed religious observances toward the Peaks from time immemorial.[11]

No small prize, a cynic would find it unsurprising that the San Francisco Peaks have been the subject of extensive litigation. Unfortunately, good will between the Indians and the Forest Service is often not enough to overcome tensions between both parties' admittedly strong interests in the mountain range. When, in 2005, the Forest Service authorized the use of reclaimed sewage to augment snow manufacturing capacity and expand skiing operations in the Snow Bowl section of the Peaks, Native American groups responded with litigation in opposition to the plan.[12] After an unsuccessful effort at the district court level, the Indian plaintiffs secured a reversal in the United States Court of Appeals for the Ninth Circuit,[13] which granted relief on the basis of the Indians' claim under the Religious Freedom Restoration Act of 1993 ("RFRA").[14] Unfortunately for the Indian plaintiffs, their success was short lived. Barely a year later, the Ninth Circuit reheard the case en banc, and affirmed the district court's denial of relief.[15]

The scenario played out in *Navajo Nation v. U.S. Forest Service* is rather common. Practitioners of traditional Indian religions, despite having strong and identifiable religious interests in public lands, are staggeringly unsuccessful at vindicating their interests in American courts. Commonly, Indians who oppose federal land use decisions on religious grounds seek refuge in the First Amendment's Free Exercise Clause and its legislative offshoot: RFRA. Nonetheless, because federal courts consistently hold that neither source offers anything more than token protection for Indians confronted with federal actions carrying catastrophic religious consequences, some suggest courts

[7] Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1101 (9th Cir. 2008) (en banc) (Fletcher, J., dissenting), *cert. denied*, 129 S. Ct. 2763 (2009).

[8] *Id.* at 1100.

[9] *Id.* at 1099.

[10] *Id.*

[11] *Id.* at 1099–1102.

[12] Navajo Nation v. U.S. Forest Serv., 408 F. Supp. 2d 866 (D. Ariz. 2006), *rev'd in part*, 479 F.3d 1024 (9th Cir. 2007).

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

[14] 42 U.S.C. §2000bb (2006).

[15] Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1080 (9th Cir. 2008) (en banc), *cert denied*, 129 S. Ct. 2763 (2009).

have "effectively read American Indians out of RFRA" and placed them beyond certain First Amendment protections.[16] In light of our nation's history with respect to groups of indigenous American ethnicity, that our courts are reluctant to extend expansive free exercise guaranties to Indian religions is, perhaps, to be expected. However, it would seem prudent to tread lightly when taking actions that may effectively exclude entire religions from constitutional safeguards.

This Note explores possible reasons for the consistent failure of Native American free exercise challenges to federal land use policy. Part I provides a synopsis of Supreme Court free exercise jurisprudence, focusing on landmark cases and statutes that established the analytic framework for neutral laws of general applicability which incidentally burden religion. Part I also examines how Indian free exercise challenges to federal land use have fared at various stages of the development of free exercise jurisprudence. Furthermore, Part I discusses the current state of Indian free exercise rights in federal courts, and the extent to which lower courts faithfully apply Supreme Court precedent. Part II describes and criticizes two common explanations of Indian plaintiffs' lack of success: (1) courts assume a secular-religious distinction in free exercise cases and that this distinction is incompatible with Indian religion, and (2) courts fail to appreciate the grave importance of specific sites to Indian religions because site-specificity is not an essential concept in conventional Western religious thought. Part III argues that the most pressing impediment to Indian free exercise challenges is not culture clash, but a widespread, unduly expansive reading of *Lyng v. Northwest Indian Cemetery Protective Association.*[17] Part III suggests that the holding in *Lyng* was actually quite narrow, and that subsequent cases that rely on *Lyng* to deny relief involve factually dissimilar scenarios, which do not implicate the *Lyng* analysis.

I. INDIAN SACRED SITES AND FEDERAL LAND

Practitioners of traditional American Indian religions find themselves in an especially unique relationship with the U.S. Federal Government. Most Americans who subscribe to religious faiths embrace traditions with roots in the Middle East and Europe: imports to this continent.[18] The bulk of the remainder finds the closest

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[16] *Id.* at 1114 (Fletcher, J., dissenting).

[17] 485 U.S. 439 (1988).

[18] *See generally* GEOGRAPHY OF RELIGION: WHERE GOD LIVES, WHERE PILGRIMS WALK (Susan Tyler Hitchcock & John L. Esposito eds., 2006) (describing five major religions, their

geographic links to its religious heritage in and around modern day India, and throughout East Asia.[19] Thus, religiously significant lands, for the vast majority of Americans, lie far beyond the purview of U.S. federal authority. Indigenous to this continent, however, American Indians trace their religious traditions to sites scattered throughout the American landscape. As our nation moved westward, the Federal Government gained ownership over many of the lands inhabited or venerated by American Indians.[20] Though under federal control, scores of these lands remain religiously important to various American Indian peoples who continue to revere them as sacred sites.[21] Nevertheless, federal ownership of sacred sites gives rise to an obvious tension between Indian religious preferences and federal land ownership interests.[22] Despite the good will that may exist between the parties,[23] the Federal Government, as owner, has significant latitude to use and dispose of Indian sacred sites.[24] Consequently, American Indians often rely on constitutional limits on federal discretion when they choose to oppose federal land use that they believe negatively impacts their religious practices. Commonly, the First Amendment and corresponding religious freedom legislation frame the arena for such challenges, and, as such, the two provide this Note's analytical starting point.

Before continuing, it should be said that any general discussion of "Indian religion" in this Note does not imply that there is a single religion indigenous to the North American continent, nor is it intended to minimize the religious diversity among those who trace their ancestry to pre-Columbian America. It has been suggested, however, that several theological themes are common among Indian religious traditions. In fact, identifying such themes and exploring

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geographical connections, and the characteristics of their followers).

[19] *See* America.gov, Main Religious Affiliations in the United States, http://www.america.gov/st/diversity-english/2008/March/20080317160257zjsredna0.8236048.html (last visited Nov. 24, 2009).

[20] *See* Gavin Clarkson, *Not Because They Are Brown but Because of Ea:* Rice v. Cayetano, 24 HARV. J.L. & PUB. POL'Y 921, 925 (2001).

[21] *See* Kristin A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1063 (2005) [hereinafter *Sacred Sites*].

[22] *See id* (noting that the Federal Government has the legal power to destroy the sacred sites on the land).

[23] *See* Sandra B. Zellmer, *Sustaining Geographies of Hope: Cultural Resources on Public Lands*, 73 U. COLO. L. REV. 413, 433 (2002) (describing the "trust relationship" between the Federal Government and Indian Nations that is articulated by the Supreme Court in *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942)).

[24] *Sacred Sites*, *supra* note 21, at 1063.

their implications has been the focus of extensive scholarship.[25] Nonetheless, whether these characterizations are fair or accurate has little bearing on the thesis of this Note. In order to debunk explanations for the lack of Indian success in free exercise land use cases, this Note may, from time to time, concede such characterizations if they form an essential premise of a proffered explanation, but the author seeks to avoid generalization whenever possible.

A. Free Exercise of Religion: The Established Framework

As commentators aptly suggest, the Supreme Court's record on free exercise questions regarding neutral laws of general applicability fails to exemplify perfect uniformity.[26] The law and interpretations surrounding the Free Exercise Clause have undergone notable fluctuation. While the Court, over the first half of the last century, generally deferred to religious claimants when government actions restricted religious practice, the Court neglected to devise specific parameters within which to assess free exercise claims until the early 1960s.[27] Once established, the parameters observed by Supreme Court Justices and the pertinent legislative landscape underwent identifiable evolutions throughout the latter half of the twentieth century.[28] These evolutions continue to reverberate today, and they influence modern jurisprudential approaches to free exercise challenges of federal land use policy. A brief abstract of representative Supreme Court cases and legislative response informs this Note's discussion.

In 1963, the Supreme Court took the first step toward crystallizing an approach to free exercise and neutral laws that impact religious practices in *Sherbert v. Verner*.[29] In *Sherbert*, the Court assessed the constitutional implications of denying government benefits on the

[25] *See, e.g.*, JOSEPH EPES BROWN, THE SPIRITUAL LEGACY OF THE AMERICAN INDIAN (1982); PAUL B. STEINMETZ, PIPE, BIBLE, AND PEYOTE AMONG THE OGLALA LAKOTA (1990).

[26] *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1252–60 (3d ed. 2006) (tracing the evolution of strict scrutiny review for neutral laws of general applicability in free exercise cases and its eventual rejection by the Supreme Court in *Employment Division v. Smith*, 494 U.S. 872 (1990)); Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65, 75–86 (1996) (outlining the history of balancing free exercise rights); 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 (1989) (noting the Supreme Court's mixed conclusions on the correct level of scrutiny); Zellmer, *supra* note 23, at 479 (noting a shift in Supreme Court jurisprudence towards a more lenient form of scrutiny regarding laws that are neutral towards religion).

[27] CHEMERINSKY, *supra* note 26, at 1247.

[28] *Id.* at 1247–49 (discussing the drastic changes in free exercise law since the 1960s).

[29] 374 U.S. 398 (1963).

basis of incompatibility between a citizen's religious practices and the requirements of the benefit program.[30] Granting the plaintiff relief,[31] the Court held that "any incidental burden on the free exercise of . . . religion [must] be justified by a 'compelling state interest. . . .'"[32] In turn, even in light of such a compelling interest, "it would plainly be incumbent upon [the state] to demonstrate that no alternative forms of regulation" would accomplish the same objective "without infringing First Amendment rights."[33] In other words, the Court employed a strict scrutiny analysis. Although the decision most obviously pertained to the relatively unique plaintiff whose religion stood as an obstacle to participation in a government program, the decision contains little language that suggests the court meant to limit the application of strict scrutiny, or any other part of its reasoning, to such scenarios.[34] In fact, the generality of the Court's wording suggests it contemplated broad application of *Sherbert* in subsequent cases, despite the fact that it proffered no concrete examples of other types of free exercise violations.[35]

In accordance with an expansive reading of *Sherbert*, and almost a decade after issuing the decision, the Supreme Court reaffirmed the strict scrutiny test and began to grapple with free exercise implications beyond the context of employment benefits. *Wisconsin v. Yoder*[36] upheld a Wisconsin Supreme Court decision that overturned the convictions of Amish parents who violated state compulsory education laws.[37] In accordance with Amish religious values that

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[30] *Id.*

[31] The plaintiff in *Sherbert* was a member of the Seventh-Day Adventist Church who abstained from work on Saturday because of her religious beliefs. She was denied "unemployment compensation benefits under the South Carolina Unemployment Compensation Act, which provide[d] that a claimant [was] ineligible for benefits if he [had] failed, without good cause, to accept available suitable work when offered him." *Id.* at 398 (quoting from the syllabus).

[32] *Id.* at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

[33] *Id.* at 407.

[34] The final section of the *Sherbert* opinion does contain a discussion of the decision's scope. Nevertheless, the discussion is primarily concerned with potential Establishment Clause implications of *Sherbert*, as well as dispelling suspicions that the Court may mean to impose a constitutional burden on states to provide unemployment benefit programs. *Id.* at 409–10. Thus, language such as "[t]his holding but reaffirms a principle . . . that no State may 'exclude individual[s] . . . *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation'" is best understood as a distillation of the decision, or an example of its application, as opposed to a pronouncement of the holding's narrowness. *Id.* at 410 (quoting Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).

[35] For example, the Court made the following observation: "For '[i]f the . . . effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.'" *Id.* at 404 (quoting Braunfeld v. Brown, 366 U.S. 599, 607 (1961)).

[36] 406 U.S. 205 (1972).

[37] *Id.* at 234. The Court determined that:

"emphasize[] informal learning-through-doing; a life of 'goodness,' rather than a life of intellect; . . . and separation from, rather than integration with, contemporary worldly society,"[38] the parents had held their teenage children out of secondary school because they believed education beyond eighth grade would remove the children "from their community . . . during the crucial and formative adolescent period of life."[39] Ultimately acceding to the Amish position, the Court engaged in a sophisticated inquiry into the nexus between established Amish lifestyles and the Amish faith. Writing for the majority, Chief Justice Burger observed that "the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction . . . intimately related to daily living."[40] Thus, to require removal of children from that traditional community under threat of criminal prosecution would, on its face, seriously interfere with religious practice by upsetting the Amish pattern of life: a sort of spirituality unto itself.[41]

Upon finding that the compulsory education law "unduly burden[ed] the free exercise of religion,"[42] the Court elaborated that in light of the "successful and self-sufficient" record of Amish communities, the state had fallen short of its burden to show "with [sufficient] particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish."[43] Grounded in the framework articulated by *Sherbert*, *Yoder* nonetheless stands out from its predecessor. Despite an apparent lack of familiarity with Amish religious principles, and for nearly a third of his rather lengthy opinion, Chief Justice Burger focused on Amish history, Amish culture, and Amish theology in an effort to understand the implications the compulsory education law

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> [I]n order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.

Id. at 214.

[38] *Id.* at 211.

[39] *Id.*

[40] *Id.* at 216.

[41] At times, Chief Justice Burger's discussion borders on the theological. He even goes so far as to quote from the Apostle Paul's Letter to the Romans, pointing out that the Amish read literally Paul's exhortation: "[B]e not conformed to this world." *Id.* at 216 (quoting *Romans* 12:2 (King James)).

[42] *Id.* at 220.

[43] *Id.* at 235–36.

would have on the Amish litigants' subjective religious practice.[44] He decided that while mainstream American society commonly distinguishes community relations from religious life in accordance with prevailing notions of a secular-religious division, the Amish make no such distinction.[45] Moreover, the desire to integrate the two is a key element in Amish religious practice rooted in a particular interpretation of the New Testament that the Amish believe to be incontrovertible.[46] In other words, upon gaining an appreciation of the subtleties of the religion at issue, Burger rested his opinion on the conclusion that unmolested life in an insular, traditional community is, to the Amish, religious enterprise itself.[47] He wrote: "In evaluating [the] claims we must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent."[48] Because he discerned a link between the two, and because the compulsory education law patently interfered with the latter, Burger invalidated the law, as applied to Amish parents, on the basis of *Sherbert*'s strict scrutiny test.[49] Such sophisticated analysis of the interplay between a law and a particular religion is absolutely unique in Supreme Court free exercise cases. After *Yoder*, the Court has refrained from making similar inquiries in free exercise cases, and usually passes over such concerns altogether.[50]

Yoder signifies a high-water mark in the history of the Supreme Court's deference to religious practitioners in more ways than one. In addition to being the Court's most recent attempt at theological inquiry, *Yoder* represents the last time the Supreme Court permitted a private party to prevail against any level of government on the basis of *Sherbert*'s strict scrutiny test for neutral laws that indirectly burden religious practice.[51] After *Yoder*, the Supreme Court's approach to the Free Exercise Clause underwent a change in emphasis. The Court "[i]n more recent years . . . [applies] a lenient form of scrutiny to

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[44] *Id.* at 209–13, 215–19.

[45] *Id.* at 215–16.

[46] *Id.* at 216.

[47] *Id.* at 216–17.

[48] *Id.* at 215.

[49] *Id.* at 234–35.

[50] *See infra* pp. 249–53 (discussing subsequent Supreme Court free exercises cases).

[51] *See infra* pp. 249–53. The Court's 1993 decision in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah* overturned a city ordinance that prohibited ritualized killing of animals, siding with practitioners of the Santería religion. 508 U.S. 520 (1993). However, the Court explicitly rejected strict scrutiny analysis for free exercise challenges to neutral laws. *Id.* at 531. Instead, the Court held that, because the law was adopted in response to plans by Santería practitioners to build a religious center, the law was not, in fact, neutral, but rather was a direct prohibition of religious exercise. *Id.* at 534–42. On this basis, the Court invalidated the ordinance in light of the City's failure to establish that the ordinance was narrowly tailored to a compelling interest. *Id.* at 546–47.

neutral laws of general applicability that incidentally burden the free exercise of religion."[52] The inception of this change lies in 1986's *Bowen v. Roy*,[53] which serves as the modern Court's touchstone in subsequent free exercise cases.[54]

The facts of *Bowen* present a rather remarkable scenario. After consulting with a tribal elder, Mr. Roy, a member of the Abenaki Indian tribe, came to the religious belief "that technology is 'robbing the spirit of man.'"[55] On this basis, he objected to the use of Social Security numbers as individual identifiers of human beings.[56] Believing that such a number would rob her of her spirit and "prevent her from attaining greater spiritual power," Roy refused to obtain a Social Security number for his daughter, Little Bird of the Snow.[57] Subsequently, various social welfare agencies denied Mr. Roy's family benefits pursuant to a federal law that required families enrolled in social welfare programs to provide the agencies with Social Security numbers.[58] Ruling in favor of the state, the Court posited that while precedent established absolute freedom of religious *belief*, freedom of individual religious *conduct* had discernible limits.[59] Namely, the First Amendment does not "require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family."[60] Applying this standard, the Court ascertained that "Roy may no more prevail on his religious objection to the Government's use of a Social

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[52] Zellmer, *supra* note 23, at 479.

[53] 476 U.S. 693 (1986).

[54] *See infra* pp. 249–51. The continuity of the Court's progress from early free exercise cases to tests currently employed has been the subject of substantial scholarly interest. *See, e.g.*, Eric D. Yordy, *Fixing Free Exercise: A Compelling Need to Relieve the Current Burdens*, 36 HASTINGS CONST. L.Q. 191, 192 (2009) (arguing that the development of free exercise doctrine has created extreme "confusion" throughout federal courts); Nicholas J. Nelson, Note, *A Textual Approach to Harmonizing* Sherbert *and* Smith *on Free Exercise Accommodations*, 83 NOTRE DAME L. REV. 801 (2008) (arguing that Supreme Court precedents show continuity). While some trace threads of commonality back through Supreme Court jurisprudence, a sizeable cadre of commentators suggests that contemporary judicial free exercise standards are not the true progeny of *Yoder* and *Sherbert*. *See, e.g.*, Thomas R. McCoy, *A Coherent Methodology for First Amendment Speech and Religion Clause Cases*, 48 VAND. L. REV. 1335 (1995); Nicholas Nugent, Note, *Toward a RFRA that Works*, 61 VAND. L. REV. 1027 (2008); Neelum J. Wadhwani, Note, *Rational Reviews, Irrational Results*, 84 TEX. L. REV. 801 (2006). Instead, they argue, modern free exercise approaches are best characterized as innovative and in tension with prior precedent. *See* McCoy, *supra*, at 1335–36; Nugent, *supra*, at 1027–29, 1054–56; Wadhwani, *supra*, at 819. The purpose of this Note, however, is not to rehash previously fought battles, and it leaves the continuity question unanswered.

[55] *Bowen*, 476 U.S. at 696.

[56] *Id.*

[57] *Id.*

[58] *Id.* at 695.

[59] *Id.* at 699.

[60] *Id.*

Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets."[61]

Importantly, the *Bowen* Court distinguished both *Sherbert* and *Yoder*.[62] Perhaps in doing so, the Court avoided a *Yoder*-like inquiry into the unique characteristics of Roy's religious beliefs, as theological discussion is completely absent from the decision. Choosing not to apply strict scrutiny in *Bowen*, the Court wrote: "In the enforcement of a facially neutral and uniformly applicable requirement for the administration of welfare programs reaching many millions of people, the Government is entitled to wide latitude."[63] "Absent proof of an intent to discriminate," the Court continued, "the Government meets its burden when it demonstrates that a challenged requirement for government benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest."[64]

On first pass, one might conclude that *Bowen*, a government-benefits case, requires the full *Sherbert* treatment. Nonetheless, and despite apparent factual similarities, the Court made clear that *Sherbert* is susceptible to qualification, and carved out a practical exception: if a government entity is confronted with substantial administrative challenges, courts will subject the government's internal administrative practices to lenient scrutiny, even in the face of genuine religious objections.[65]

Whatever the extent of compulsory strict scrutiny review that remained after *Bowen*, the Supreme Court announced in 1990 that free exercise challenges to neutral laws of general applicability—at least in the absence of other constitutional concerns—implicated nothing more than a rational basis test. In the famous *Employment Division v. Smith*,[66] the Court explicitly jettisoned any requirement that the State demonstrate a "compelling" purpose in order to justify neutral laws in the face of the Religion Clause challenges.[67] Writing for the majority, Justice Scalia proposed that the diversity of religious practice within the United States would create an unmanageable scope of possible exceptions to seemingly benign laws if the Court were to require that every law challenged under the Free Exercise

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[61] *Id.* at 700.

[62] *Id.* at 707–08.

[63] *Id.* at 707.

[64] *Id.* at 707–08.

[65] *Id.* at 707.

[66] 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2, 107 Stat. 1488.

[67] *Id.* at 884.

Clause "protect an interest of the highest order."[68] Confronted with the possibility that such a pronouncement conflicted with the dictates of *Sherbert* and *Yoder*, Scalia explained that past rulings did not stand for the proposition that religious preference provided a constitutional excuse "from compliance with an otherwise valid law. . . ."[69] Instead, he reasoned, past successful challenges to State action, such as *Yoder*, generally involved "not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as . . . the right of parents . . . to direct the education of their children."[70] Moreover, Scalia sought to diminish the scope of the holding in *Sherbert* by pointing out a string of cases from the 1980s in which the Court "declined to apply [the] *Sherbert* analysis."[71] On this basis he reasoned that any surviving element of *Sherbert* was constrained to "the unemployment compensation field."[72] Leaving open the possibility "that those seeking religious exemptions from laws [could] look to the democratic process for protection,"[73] *Smith* set out standards very deferential to government actors that foreclosed, for a time, the prospect of substantial relief for anyone but the most obviously and intentionally injured free exercise plaintiffs.[74]

Perhaps not unexpectedly, Congress reacted unfavorably to the Court's decision to dispense with strict scrutiny in free exercise cases. With the express purpose of "[restoring] the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*,"[75] Congress passed, and President Clinton signed, the Religious Freedom Restoration Act of 1993.[76] Most importantly, RFRA provides: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except" if the government shows "that application of the burden to the person (1) is in furtherance of a compelling governmental interest" and "(2) is the least restrictive means of furthering that compelling government interest."[77]

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[68] CHEMERINSKY, *supra* note 26, at 1258 (quoting Employment Div. v. Smith, 494 U.S. 888 (1990)).

[69] *Smith*, 494 U.S. at 878–79.

[70] *Id.*; *see also* CHERMERINSKY, supra note 26, at 1258 (quoting *Smith*, 494 U.S. at 881 (citations omitted).

[71] *Smith*, 494 U.S. at 883.

[72] *Id.* at 884.

[73] CHEMERINSKY, *supra* note 26, at 1259.

[74] *Id.*

[75] 42 U.S.C. § 2000bb(b)(1) (2006) (citations omitted).

[76] Pub. L. No. 103-141, § 2, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb); *see also* CHEMERINSKY, *supra* note 26, at 1263–64.

[77] CHEMERINSKY, *supra* note 26, at 1264 (citing 42 U.S.C. § 2000bb-1(a)–(b)).

Certainly, legislative efforts to counteract specific modes of constitutional interpretation raise a host of concerns by themselves.[78] Moreover, the Supreme Court has even held RFRA to be unconstitutional when applied to state governments, on the basis that Congress overreached and ran afoul of Fourteenth Amendment restrictions of its authority.[79] Nevertheless, the Court has yet to invalidate RFRA as unconstitutional as applied to the federal government. RFRA's constitutional durability aside, various federal courts entertain claims against the federal government pursuant to the RFRA's two-element test, when triggered by a showing of substantial burden on religion.[80] Thus, RFRA remains at least a possible avenue for challenging neutral federal actions under standards more deferential to individual religious practitioners than the stringent rules laid out in *Smith.*

B. The More Things Change, the More They Stay the Same: The Unsuccessful Track Record of Indian Plaintiffs

Notwithstanding the ebb and flow of the Supreme Court's approach, none of the various permutations it employed throughout the last half century contributed to significant success for Indian free exercise plaintiffs. While some criticize the internal consistency of the Supreme Court's progression from *Sherbert* to contemporary cases,[81] constitutional law over the years has been reliable in at least one respect: regardless of hypothesized emphases *de jure* or evolutionary shifts, practitioners of traditional Indian religions have a dismally unsuccessful record of challenging federal land use policy

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[78] Chief Justice Marshall's oft-quoted exhortation "[i]t is emphatically the province and duty of the judicial department to [s]ay what the law is" serves as the obvious starting point for criticism. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[79] *See* City of Boerne v. Flores, 521 U.S. 507 (1997) (holding that § 5 of the Fourteenth Amendment did not enable Congress to enlarge or to craft previously unrecognized constitutional rights). However, "[t]hree years [after *Boerne*], Congress responded once again. Outraged by the Court's decision in *City of Boerne*, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 [which] prohibits state and local government actions that impose a substantial burden on religious exercise, unless the government can prove these actions are the least restrictive means of furthering a compelling government interest." Sara Brucker, Navajo Nation v. United States Forest Service: *Defining the Scope of Native American Freedom of Religious Exercise on Public Lands*, 31 ENVIRONS ENVTL. L. & POL'Y J. 273, 280 (2008) (citing 42 U.S.C. §§ 2000cc to cc-5 (2006)) (footnote omitted).

[80] *See, e.g.*, Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1101 (9th Cir. 2008) (en banc) (applying RFRA in a free exercise claim against the federal government, despite the Act's unconstitutionality as applied to state governments), *cert. denied*, 129 S. Ct. 2763 (2009).

[81] *See, e.g.*, Yordy, *supra*, note 54, at 192 (arguing that the development of free exercise doctrine has created extreme "confusion" throughout federal courts); *see also* McCoy, *supra* note 54; Nugent, *supra* note 54; Wadhwani, *supra* note 54.

via the Free Exercise Clause.[82] While *Smith* may have expressly foreclosed relief in such cases—at least before Congress enacted RFRA—relief had become an unrealistic prospect for American Indians "[e]ven before *Smith* was decided," as "federal actions that impaired [American Indian] sacred sites . . . had been regularly upheld [by the] lower courts [which] almost uniformly rejected American Indians' free exercise claims. . . ."[83] Moreover, confronted with a pre-*Smith* Native American free exercise challenge to federal land use, the Supreme Court, itself, opted to part with compelling purpose requirements.[84] This section explores representative failures of American Indian plaintiffs over the past several decades, the grounds on which federal courts have denied relief, and the current state of relevant federal jurisprudence.

Even in the years leading up to *Bowen*, lower federal courts routinely disposed of Indian free exercise cases. *Sequoyah v. Tennessee Valley Authority*[85] is a representative lower court decision. In *Sequoyah*, the American Indian plaintiffs, who were members of the Cherokee Nation, sought "an injunction to prevent completion and flooding of the Tellico Dam on the Little Tennessee River in Monroe County, Tennessee."[86] The area to be flooded, considered "sacred homeland" by many Cherokee, held ancient artifacts of Cherokee settlement, including "sacred sites, medicine gathering sites, holy places and cemeteries. . . ."[87] The plaintiffs alleged that the "impoundment created by the dam . . . '[would] disturb the sacred balance of the land . . .' [and] cause 'irreversible loss to the culture and history of the plaintiffs.'"[88] Affirming the district court below, the United States Court of Appeals for the Sixth Circuit found that the plaintiffs' concerns for "cultural development" predominated over any religious interest they may have had in the river valley.[89] Writing that "[i]t is damage to tribal and family folklore and traditions, more than particular religious observances, which appears to be at stake,"[90] the Sixth Circuit denied relief on the obvious basis that the First Amendment protects only *religious* exercise.[91] The plaintiffs,

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[82] *See infra* pp. 253–61.
[83] Zellmer, *supra* note 23, at 480.
[84] *See infra* pp. 255–60.
[85] 620 F.2d 1159 (6th Cir. 1980).
[86] *Id.* at 1160.
[87] *Id.*
[88] *Id.*
[89] *Id.* at 1164.
[90] *Id.*
[91] *Id.* at 1165 ("Though cultural history and tradition are vitally important to any group of people, these are not interests protected by the Free Exercise Clause of the First Amendment.").

according to the court, had merely established a burden on the preservation of Cherokee cultural history.[92]

Despite *Sequoyah*'s popularity as an object of scholarly inquiry,[93] other federal courts disposed of myriad pre-*Smith* challenges to federal land use without finding that the "[Indian] interests [at stake] were more 'cultural and historic' than religious in nature."[94] For example, Hopi Indian plaintiffs in *Wilson v. Block*[95] sought to prevent expansion of skiing operations in the San Francisco Peaks on bases similar to those proffered by plaintiffs in *Navajo Nation.* Citing *Sequoyah*,[96] yet staking out a more nuanced analysis, the United States Court of Appeals for the District of Columbia held that a free exercise claimant may only enjoin federal land use policy if he establishes inter alia the "indispensability" or "centrality" of the area at issue to some aspect of his religious exercise.[97] Because the controversy centered on a small part of the vast San Francisco Peaks mountain range, and because the court found that the Indians could practice their religious ceremonies at locations besides the spot slated for development, the plaintiffs' claim failed the "indispensability" test.[98] Moreover, the court sought to explain the palpable tension between its holding and the holding in *Sherbert* by observing, as the Supreme Court would later echo in *Smith*, that *Sherbert* merely held "the government may not, by conditioning benefits, penalize [an individual's] adherence to religious belief."[99] Curiously, the court references *Yoder*, a case that seemingly extended *Sherbert* beyond government benefits scenarios, only as authority for the proposition that "where governmental action violates the Free Exercise Clause, the Establishment Clause ordinarily does not bar judicial relief."[100]

Other courts eschewed contorted analyses and denied Indian plaintiffs relief much more directly. *Baldoni v. Higginson*[101] is a straightforward example. Called upon to decide a challenge to the

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[92] *Id.*

[93] *See, e.g.*, 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, 807–08 (1997); Bryan J. Rose, *A Judicial Dilemma: Indian Religion, Indian Land, and the Religion Clauses*, 7 VA. J. SOC. POL'Y & L. 103, 119 (2000); Zellmer, *supra* note 23, at 480 n.320.

[94] Zellmer, *supra* note 23, at 480 n.320 (citing *Sequoyah*, 620 F.2d 1159).

[95] 708 F.2d 735 (D.C. Cir. 1983).

[96] *Id.* at 742.

[97] *Id.* at 744 (holding "that plaintiffs seeking to restrict government land use in the name of religious freedom must, at a minimum, demonstrate that the government's proposed land use would impair a religious practice that could not be performed at any other site").

[98] *Id.* (finding that the plaintiffs still had free entry to all but a small portion of the Peaks).

[99] *Id.* at 741.

[100] *Id.* at 747.

[101] 638 F.2d 172 (10th Cir. 1980).

National Park Service's management of the Rainbow Ridge National Monument and the Glen Canyon Dam Reservoir, the United States Court of Appeals for the Tenth Circuit agreed with the district court that the federal government had a compelling interest in maintaining and "assuring public access to this natural wonder."[102] Finding a compelling government interest, the court did not "reach the question whether the government action involved infringe[d] plaintiffs' free exercise of religion."[103]

Eventually, however, the Supreme Court issued a decision that lower courts almost universally adopted as the appropriate framework in which to resolve all Indian free exercise challenges to federal land use.[104] The 1988 decision in *Lyng v. Northwest Indian Cemetery Protective Association*[105] quickly became, and remains, "[t]he leading Supreme Court case on Native American religion on public lands and the Free Exercise Clause. . . ."[106] Premised on the Court's instinct that "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens,"[107] *Lyng* jettisoned strict scrutiny and subjected the government policy at issue in the case to mere rationality review.[108]

Facing a decision by the U.S. Forest Service to construct a logging road and commence timber harvesting in the Chimney Rock area of the Six Rivers National Forest in California, an Indian organization—along with individual Indians, nature organizations and the State of California—filed suit seeking to enjoin the government's plan.[109] The area had "historically been used by certain American Indians for religious rituals that depend upon privacy, silence, and an undisturbed natural setting."[110] The Court conceded, at least for the sake of

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[102] *Id.* at 178.

[103] *Id.* at 177 n.4.

[104] *See* Dussias, *supra* note 93, at 831–33 (identifying subsequent cases in which district courts relied on the holding in *Lyng v. Northwest Indian Cemetery Protective Association* to deny relief to Indian free exercise plaintiffs); *see also* Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1071–72 (9th Cir. 2008) (en banc) (finding *Lyng* to be "on point" with regard to the Indian plaintiffs' free exercise claim), *cert. denied*, 129 S. Ct. 2763 (2009); Kristen A. Carpenter, *Old Ground and New Directions at Sacred Sites on the Western Landscape*, 83 DENV. U. L. REV. 981, 989 (2006) [hereinafter *New Directions*] (observing that *Lyng* is part of the "legal framework applicable in many sacred sites disputes").

[105] 485 U.S. 439 (1988).

[106] Charlton H. Bonham, *Devils Tower, Rainbow Bridge, and the Uphill Battle Facing Native American Religion on Public Lands*, 20 LAW & INEQ. 157, 164 (2002).

[107] *Lyng*, 485 U.S. at 448 (quoting Bowen v. Roy, 476 U.S. 693, 699–700 (1986)).

[108] *Id.* at 450 (rejecting the notion that the government is required to provide a compelling justification for neutral actions that incidentally affect a group's ability to practice its religion).

[109] *Id.* at 439.

[110] *Id.*

argument, that construction of the logging road and timber harvesting operations would "'virtually destroy the Indians' ability to practice their religion.'"[111] Notwithstanding the harsh consequences that the Court conceded would fall on the plaintiffs, the Court employed a mode of analysis that was extremely deferential to government interests. Mindful of the prospect of tension with *Sherbert* and *Yoder*, Justice O'Connor, in her majority opinion, analogized the facts at issue in *Lyng* to the facts upon which the Court had decided *Bowen*, several years earlier.[112] Extending *Bowen* beyond scenarios that simply implicated internal administrative procedures of the federal government, O'Connor observed that the plaintiffs in *Lyng* presented a challenge that alleged only damage to "training" and subjective "religious experience of individuals."[113] Looking to precedent, O'Connor asserted that the Court had already "rejected this kind of challenge in [*Bowen*]."[114] Ultimately adopting the view that "[t]he crucial word in the constitutional text [of the Free Exercise Clause] . . . is 'prohibit,'"[115] O'Connor reiterated *Bowen's* central conclusion: the Constitution places no affirmative obligation on the government to foster the spiritual development and practice of individuals.[116]

Perhaps because the facts of *Lyng*—members of an insular and unconventional religious community seek privacy to practice their faith, free from government intrusion—intuitively feel close to the situation confronted by the Amish parents in *Yoder*, Justice O'Connor was not satisfied to leave all to the tidy reasoning outlined above. Attempting to distinguish prior precedent favorable to the Indian interests, O'Connor went on to assert that *Lyng* leaves *Sherbert* and *Yoder* intact while correctly applying *Bowen*, by making the following tortured distinction:

> It is true that this Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment . . . . This does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have

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

[112] *Id.* at 448.

[113] *Id.*

[114] *Id.*

[115] *Id.* at 451.

[116] *See id.* at 452 ("However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires."); *see also* Bowen v. Roy, 476 U.S. 693 (1986).

> no tendency to coerce individuals into acting contrary to their religious beliefs, require the government to bring forward a compelling justification for its otherwise lawful actions.[117]

Assuming this formulation of constitutional law is correct, it remains of little help to lower courts seeking to sort out the vanishingly small difference between "indirect coercion or penalties" and "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce."[118] From this language it is unclear if the Court means that "incidental effects" are simply incapable of coercion or if the Court means that "incidental effects" that do not coerce implicate only the most lenient forms of judicial scrutiny.

Most importantly, however, the opinion leaves one to work forward through its reasoning to understand the basis for the easily excised and quoted language repeated above. Confronted with the option of extending one of two active, yet adverse, lines of cases to the case before it—the *Sherbert/Yoder* line-of-cases versus the *Bowen* line—the Court chose to extend *Bowen* and its progeny. Once deciding that *Bowen* should apply, the "[implication] that incidental effects of government programs . . . which have no tendency to coerce . . . require the government to bring forward a compelling justification"[119] became untenable. Nevertheless, the reader must page forward to find the reasoning that supports the Court's choice of *Bowen*, instead of *Sherbert/Yoder*, as the desirable framework within which to resolve the instant controversy.

Not surprisingly, the Court attempted to marshal all available support for its choice of framework, and O'Connor devoted the remainder of her opinion to an explanation of the Court's decision to extend *Bowen* to the instant case.[120] The decision to adopt *Bowen*'s deferential approach and decline to "exten[d] . . . *Sherbert* and its progeny," she reasoned, turned on the nature of the relief that the application of *Sherbert/Yoder* would sanction.[121] The Indians in the case had emphasized the centrality of privacy in the Chimney rock area to their religious practice.[122] Despite their stated intention of merely enjoining the construction of a road, and despite finding that the Indians "[did] not *at present* object to the area's being used by

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[117] *Lyng*, 485 U.S. at 450–51.
[118] *See id.* at 451.
[119] *Id.* at 450.
[120] *Id.* at 452–58.
[121] *Id.* at 452.
[122] *Id.* at 442.

recreational visitors,"[123] O'Connor deduced that "[n]othing in the principle for which [the Indians] contend . . . 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."[124] This, according to the opinion, amounted to subjecting the federal government to a "religious servitude," imposed on "what is, after all, *its* land."[125] In other words, the opinion reasons that a court should apply the rationality review of *Bowen*, and not the strict scrutiny of *Sherbert/Yoder*, when the application of strict scrutiny review would result in "*de facto* beneficial ownership of some rather spacious tracts of public property" by private individuals.[126] Confronted with the plaintiffs' claim, which was, in principle, indistinguishable from an assertion of an absolute right to exclude, the Court extended *Bowen* beyond the administrative headaches of social security offices to avoid the untenable result of extending "*Sherbert* and its progeny"[127] to the facts in *Lyng*.[128] Once the Court decided that *Bowen* should control, the dictates of *Bowen* required that the Indians in *Lyng* had to demonstrate coercion or penalty for their case to be decided via a compelling purpose test.[129]

Although *Lyng* gives limited practical guidance as to its application,[130] the decision and an expansive understanding of its

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[123] *Id.* at 452.

[124] *Id.* at 452–53 (emphasis added).

[125] *Id.* at 453.

[126] *Id.* Justice O'Connor later writes: "[I]n so diverse a society as ours" the "First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not [directly] prohibit the free exercise of religion." *Id.* at 452.

[127] *Id.*

[128] Some commentators characterize the holding in *Lyng* as "a property law holding [that] provides that the federal government's rights *as an owner* trump any interests that the Indians have in using their sacred sites." *Sacred Sites*, *supra* note 21, at 1064; *see also* Dussias, *supra* note 93, at 823 (observing that "[i]n the twentieth century, property rights have continued to play a role in defining Native American free exercise rights" and that "federal courts have subordinated the free exercise rights of Native American plaintiffs to property rights"); *id.* at 824 (In Indian free exercise cases "the plaintiffs' lack of a property interest in the land" has been "determinative"); Marcia Yablon, Note, *Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land*, 113 YALE L.J. 1623, 1633 (2004) (noting "critics [have] focused on the fact that the *Lyng* Court's concerns and decision were based on Anglo-American conceptions of property"). However, it seems that such criticism overstates its case. *Bowen* cannot reasonably be construed as a property law holding, and, according to the Court, the facts in *Lyng* "cannot be meaningfully distinguished from [*Bowen*]." *Lyng*, 485 U.S. at 449. Thus, it appears more reasonable to understand *Lyng* as solely a reading of the Constitution, devoid of bundle-of-sticks metaphors. *Id.* at 452. Moreover, construing ownership interest as dispositive in the occasional lower court free exercise case does little to advance the argument that the Supreme Court's decision in *Lyng* finds its foundation in the conventions of the common law.

[129] *Lyng*, 485 U.S. at 450–51.

[130] *See* discussion *supra* pp. 255–58.

pertinence to sacred site cases animates subsequent federal jurisprudence.[131] *Havasupai Tribe v. United States*[132] is representative of lower courts' dispositions of sacred site cases in the wake of *Lyng*.[133] Seeking to enjoin the government's plan to engage in uranium mining in the Kaibab National Forest, the plaintiffs, members of the Havasupai tribe, filed suit claiming that the plan violated their right to free exercise of religion.[134] Instead of alleging interference with sacramental practice—the theory advanced in *Lyng*—the Indians in *Havasupai* asserted that the site chosen for uranium mining was "the embodiment and center of the Havasupai Tribe universe."[135] Thus, as opposed to interference with sacramental validity via deprivation of needed privacy, the alleged harm in *Havasupai* was a veritable act of metaphysical destruction. Nevertheless, after finding that "[t]he case of *Lyng* . . . [was] applicable to the instant case,"[136] the district court held that the dictates of *Lyng* prohibited the application of a compelling justification test.[137] The plaintiffs attempted to distinguish *Lyng* by arguing that the destruction of the sacred site was "coerc[ive]."[138] However, the court dismissed this argument after finding "no distinction from *Lyng* which necessitate[d] a different result."[139] Regardless of the appropriateness of the outcome, at least one thing about *Havasupai* is undeniable: the court drew analogy to *Lyng* almost entirely on the basis of the extent of the potential damage to the plaintiffs' religious practice.[140] Based upon this conflation,[141] the *Havasupai* court decided that *Lyng* stood for the mind-bending proposition that if the government could show that its contemplated actions would destroy an entire Native American religion by obliterating its most sacred site, the government actions needed only be subjected to the most lenient versions of scrutiny. Consider the following quotation from *Havasupai*:

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[131] *See* Dussias, *supra* note 93, at 831–33 (discussing subsequent case law); *see also* Zellmer, *supra* note 23, at 480–81 (discussing *Lyng* and its effects).

[132] 752 F. Supp. 1471, 1485 (D. Ariz. 1990).

[133] *See* discussion *infra* pp. 260–66.

[134] *Havasupai*, 752 F. Supp. at 1475.

[135] *Id.* at 1485.

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

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] The decision makes a passing assertion that "plaintiffs [were] not penalized for their beliefs, nor [were] they prevented from practicing their religion." *Id.* Yet, this language, taken from *Lyng*, is not a prospective situs of analogy within the facts of *Lyng*. Instead, it articulates a *standard* imposed because of certain facts in the case. *See* discussion *supra* pp. 257–58.

> Plaintiffs here, as in *Lyng*, assert that their religious and cultural belief systems are intimately bound up with the Canyon Mine site. Plaintiffs assert their belief that [the proposed uranium mining] operations will destroy their religion. The Supreme Court, in *Lyng*, made the same assumption in reaching its conclusion of no first amendment violation. Accordingly, the court finds and concludes that no first amendment violation is present in this case.[142]

Despite their early record of tenuous applications of *Lyng*,[143] lower federal courts have eagerly extended their readings of the case beyond the context of sacred sites on federal lands. For example, in granting the government's motion for summary judgment, the court in *Miccosukee Tribe v. United States*[144] held that the government's failure to alleviate flooding in the ancestral homeland of the Miccosukee—an area to which the tribe held a perpetual lease from the state of Florida—posed no constitutional problem in light of *Lyng*.[145]

Even RFRA has done very little to improve the prospects of Indian free exercise plaintiffs. One need not look past *Navajo Nation* for an example.[146] In order to show a right of action under RFRA, a plaintiff must demonstrate satisfaction of the threshold issue: the contested government action would or has "substantially burdened" the plaintiff's religious exercise.[147] Once established, RFRA plaintiffs prevail unless the government can justify the substantial burden within the rubric of a compelling purpose and least restrictive means test.[148] Although any framework that mandates strict scrutiny seems especially deferential to plaintiffs,[149] restrictive construction of the threshold requirement of substantiality sets a high bar for RFRA claims.

The "substantiality" requirement played the part of a scrupulous gatekeeper, indeed, in *Navajo Nation*. Despite conceding the

[142] *Havasupai*, 752 F. Supp. at 1485.

[143] *See, e.g.*, discussion *supra* pp. 259–60.

[144] 980 F. Supp. 448 (S.D. Fla. 1997).

[145] *Id.* at 464 ("[T]he First Amendment does not require the government to assist any group in the exercise of its religion." (citing Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)).

[146] *See* Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058 (9th Cir. 2008) (en banc) (holding that proposed use of recycled wastewater to make artificial snow for a commercial ski resort in a national park considered sacred by some Indian tribes was not a substantial burden to free exercise of religion by tribal members within the meaning of RFRA), *cert. denied*, 129 S. Ct. 2763 (2009).

[147] *See* discussion *supra* pp. 251–52.

[148] *See* discussion *supra* pp. 251–52.

[149] The adage "strict in theory, fatal in fact" comes to mind.

"long-standing religious and cultural significance [of the San Francisco Peaks to at least thirteen] Indian tribes,"[150] and that spraying "recycled wastewater"[151] on the Peaks (in the form of artificial snow to be used for skiing operations) was an irreparable desecration and an obliteration of all sacramental integrity for the Indians,[152] the court reasoned that the government's plan did not—in fact, could not—rise to the level of things "substantially burdensome."[153] Twenty years after the Supreme Court decided the case, and in the face of an act of Congress which arguably preempted the decision,[154] the Ninth Circuit reached its conclusion in *Navajo Nation* by importing the ghost of *Lyng* into RFRA's "substantial burden" element.[155] The court's inquiry mirrored the *Havasupai* opinion in that *Navajo Nation* emphasized the extreme harm to the plaintiffs' religious interests as determinatively analogous to *Lyng*, yet neglected to track *Lyng*'s analysis.[156]

Beginning from the premise that RFRA's express restoration of *Sherbert* and *Yoder*

> lead[s] to the following conclusion: Under RFRA, a "substantial burden" is imposed only when individuals are

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[150] *Navajo Nation*, 535 F.3d at 1064.

[151] The dissent points out that not even the Forest Service characterizes "[t]he effluent that emerges after [several steps of wastewater] treatment . . . [as] pure water." *Id.* at 1083 (Fletcher, J., dissenting). Instead, the reclaimed wastewater retains detectable concentrations of "enteric bacteria, viruses, and protozoa, including Cryptosporidium and Giardia." *Id.* (quoting a Final Environment Impact Statement (FEIS), issued by the Forest Service, concerning the proposed expansion of skiing operations in the Snow Bowl area). Judge Fletcher continued: "[T]he treated sewage effluent must be free of 'detectable fecal coliform organisms' in only 'four of the last seven daily reclaimed water samples' . . . [and t]he FEIS acknowledges that the treated sewage effluent also contains 'many unidentified and unregulated residual organic contaminants.'" *Id.* (quoting ARIZ. ADMIN. CODE § R18-11-303(B)(2)(a) (2008)).

[152] *Id.* at 1064 (majority opinion). It would be nearly impossible to lay out concisely the precise reasons each Indian plaintiff opposed the use of treated wastewater on the peaks. The religious theologies of American Indians and American Indian groups is a subject that could barely receive just treatment in a series of weighty books. By way of a superficial depiction in the interest of brevity, it appears from *Navajo Nation* that the main concern among the plaintiffs was that the introduction of recycled wastewater—not even characterized as "pure" in the government's estimation—to the Peaks offended a sense of environmental purity which was crucial to the plaintiffs' religious practice. *See id.*

[153] *Id.* at 1070 (holding that under Supreme Court precedent, diminishment of "spiritual fulfillment" is not a "substantial burden" on free exercise of religion).

[154] RFRA mandates a compelling purpose test in all cases of substantial burden. 42 U.S.C. § 2000bb-1 (2006). *Lyng*, though postulating a catastrophic impact to the plaintiffs' religious practice, declined to use the compelling purpose test. *See generally* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

[155] *Navajo Nation*, 535 F.3d at 1071 (asserting that "[t]he Court held the government plan, which would 'diminish the sacredness' of the land to Indians and 'interfere significantly' with their ability to practice their religion, did not impose a burden 'heavy enough' to violate the Free Exercise Clause." (quoting *Lyng*, 485 U.S. at 447–49)).

[156] *Id.* at 1069–73.

> forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*),[157]

the court quickly disposed of the Indians' claim, because

> [t]he use of recycled wastewater on a ski area that covers one percent of the Peaks does not force the Plaintiffs to choose between following the tenets of their religion and receiving a governmental benefit [and] . . . does not coerce the Plaintiffs to act contrary to their religion under the threat of civil or criminal sanctions.[158]

On its own, the premise asserted is exceedingly tenuous. The court gives no reason to support its assertion, other than contending that because RFRA references "a body of Supreme Court case law that defines what constitutes a substantial burden . . . Congress incorporated into RFRA ['substantial burden' as] a term of art" which includes only denial of government benefits and civil or criminal sanctions.[159]

The claim is implausible. Nowhere does either *Sherbert* or *Yoder* use the term "substantial burden," and neither decision purports to lay out an exhaustive set of scenarios deemed sufficiently "substantial" to jeopardize free exercise rights.[160] More importantly, however, neither does the Act. Instead, the Act clearly states that it restores a test.[161] It takes an impossibly strained reading of the Act to find that when Congress articulated a standard by which to judge all future cases, it really intended to enunciate a comprehensive list of eligible plaintiffs.[162]

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[157] *Id.* at 1069–70.

[158] *Id.* at 1070.

[159] *Id.* at 1074.

[160] *See generally* Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963). *Sherbert* does make occasional use of the phrase "substantial infringement," and though the decision held that forcing a choice between government benefits and religious practice substantially infringed free exercise, nowhere does the use of the phrase suggest a limitation of the decision's scope to the context of government benefits. *Sherbert*, 374 U.S. at 406–09.

[161] *See* 42 U.S.C. § 2000bb (2006).

[162] *Id.* The claim that "substantial burden" is used as a "term of art" becomes even more tenuous when one simply looks at the previous section of the Act. While Congress chose to encase "neutral" in quotation marks—probably because of its established meaning within constitutional law—quotation marks surround "substantial burden" nowhere in the Act. *Id.* Moreover, if Congress intended "substantial burden" to have a specific definition, it stands to reason that Congress would have included "substantial burden" in the definition section of the Act. 42 U.S.C. § 2000bb-2.

The opinion goes on to argue that because "the dissent cannot point to a single Supreme Court case where the Court found a substantial burden on the free exercise of religion outside the *Sherbert/Yoder* framework," RFRA's "substantial burden" standard does not cover government actions beyond the *Sherbert/Yoder* framework.[163] However, the court overlooks a fatal flaw in its own syllogism: the Supreme Court did not use, nor find satisfied, the term of art "substantial burden" in *Sherbert* or *Yoder*.[164] Obviously, the plaintiffs prevailed in both *Sherbert* and *Yoder*, but in neither case did the Supreme Court use the same analytical framework, nor the specific language, that RFRA statutorily enshrined decades later.[165] Most obviously, RFRA adds an additional step not contemplated in Supreme Court decisions of the sixties and seventies: if a government action "substantially burdens" a person's religious exercise, *then it may only survive judicial scrutiny if the government satisfies the compelling purpose test the Court articulated in* Sherbert *and* Yoder.[166] In other words, RFRA includes prior precedents as some of the latticework within new statutorily created scaffolding, but the precedents do not form the entire edifice of the Act.[167]

Perhaps recognizing that an entire decision should not turn on so tenuous a deduction, the court retreated to familiar territory. Finding *Lyng* to be "on point" because the Indian plaintiffs "contended . . . the construction 'would cause serious and irreparable damage to [their] sacred areas,'"[168] the court reasoned that spraying reclaimed wastewater on the San Francisco Peaks "did not impose a burden 'heavy enough'"[169] to violate free exercise rights under the *Lyng*

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[163] *Navajo Nation*, 535 F.3d at 1075.

[164] *Yoder*, 406 U.S. 205; *Sherbert*, 374 U.S. 398.

[165] *See generally Yoder*, 406 U.S. 205; *Sherbert*, 374 U.S. 398.

[166] "The purposes of this chapter are—(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened . . . ." 42 U.S.C. § 2000bb(b) (2006). "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest." *Id.* § 2000bb-1(b). In other words, unless the substantial burden is justifiable in the *Sherbert/Yoder* framework, it will not survive under RFRA review.

[167] Moreover, an interpretation of RFRA, such as the Ninth Circuit's in *Navajo Nation*, renders RFRA a completely ineffective law. *Navajo Nation*, 535 F.3d 1058. *Smith* does not purport to overrule *Sherbert* or *Yoder*. *See generally* Employment Div. v. Smith, 494 U.S. 872 (1990). If all RFRA does is reinstate *Sherbert* and *Yoder*, then its passage was superfluous. Unavoidably, RFRA, under the Ninth Circuit's understanding, is impotently duplicative and fails to change any part of the judicial landscape.

[168] *Navajo Nation*, 535 F.3d at 1071 (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 442 (1988)).

[169] *Id.* *Navajo Nation* quotes *Lyng*'s "heavy enough" language several times and assumes the Court in *Lyng* decided the case the way it did because "the government plan, which would 'diminish the sacredness' of the land to Indians and 'interfere significantly' with their ability to

standard.[170] The court went on to emphasize the following memorable language: "Whatever rights the Indians may have to the use of the area . . . those rights do not divest the Government of its right to use what is, after all, its land."[171]

Quotations and conclusions tend to wobble, however, when courts amputate their contextual legs. The quoted statement from Justice O'Connor's *Lyng* opinion meant not to affirm a dogmatic principle that the government has an absolute right to trod heavily over American Indian interests in public lands, or to suggest that the government's right makes every resulting burden insubstantial.[172] Nor is the statement the result of a well-reasoned substantial burden analysis, as *Navajo Nation* may characterize it:[173] the *Lyng* Court explicitly stated that the burden on the plaintiffs, whatever it may have been, was immaterial to the outcome of the case.[174] Instead, the language is a conclusion based on different criteria—the result of the Supreme Court's application of *Bowen*'s standards to the facts of *Lyng*—an application of one precedent among available others.[175]

Even if *Lyng* is relevant to RFRA, it follows that the decision only mandates a similar result in *Navajo Nation* if on the facts of *Navajo Nation* the court can draw sufficient analogy to *Lyng*. The court must be able to conclude that "[n]othing in the principle for which" the plaintiffs in *Navajo Nation* "contend . . . would distinguish [*Navajo Nation*] from another lawsuit [seeking] . . . to exclude all human activity but [the plaintiffs'] from sacred areas of the public lands."[176]

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practice their religion, did not impose a burden 'heavy enough' to violate [free exercise rights]." *Id.* However, careful reading of *Lyng* makes clear that the Court's decision did not turn on a failure by the plaintiffs to show that the government's plan was sufficiently burdensome. Instead, the Court denied relief in *Lyng* because "[w]hatever rights the Indians may have to the use of the area, . . . those rights do not divest the Government of its right to use what is, after all *its* land." *Lyng*, 485 U.S. at 453. In other words, when a plaintiff seeks to divest the government of its interest in public land by asserting an individual right to exclude, no burden on the plaintiff's rights may tip the scales in his favor. *See id.* at 452–53.

[170] The argument made in *Navajo Nation* also makes the assumption that *Lyng* is directly applicable to RFRA cases. *Navajo Nation*, 535 F.3d at 1071. The assumption never, in the majority's opinion, became anything more than just that: an assumption. *See id.* Nevertheless, *Navajo Nation* was wrongly decided, even if the court correctly assumed that *Lyng* was relevant, because of the majority's overestimation of the scope of the Supreme Court's holding.

[171] *Navajo Nation*, 535 F.3d at 1072 (quoting *Lyng*, 485 U.S. at 453).

[172] *See* discussion *supra* pp. 256–59.

[173] *Navajo Nation*, 535 F.3d at 1072.

[174] *Lyng*, 485 U.S. at 452 ("One need not look far beyond the present case to see why the analysis in [*Bowen*], but not respondents' proposed extension of *Sherbert* and its progeny, offers a sound reading of the Constitution.").

[175] *See* discussion *supra* pp. 256–59.

[176] *Lyng*, 485 U.S. at 452–53. Judge Fletcher emphasized this point in his opinion in the later overturned *Navajo Nation I*. *See* Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1047 (9th Cir. 2007), *rev'd en banc*, 535 F.3d 1058 (2008) ("In *Lyng*, the Court was unable to

Such analogy, however, fails necessarily in this case because the Indians sought relatively modest relief. The plaintiffs merely sued to enjoin the government from sanctioning a plan to spray treated sewage effluent on their sacred sites.[177] They did not seek to exclude any of the non-Indians *currently present* in the San Francisco Peaks, or to prevent the physical expansion of skiing areas.[178] Nor did they assert an interest, such as privacy, that had potential to "exclude all human activity but their own"[179] from any public lands.[180] Instead, the majority in *Navajo Nation* was blinded, like other federal courts in the past,[181] by correlating levels of harm in *Navajo Nation* and in *Lyng*.[182] Discovering this single point of commonality, the court assumed that it should reach a result similar to the result in *Lyng*: the obliteration of an indigenous American religion. This shorthand version of how federal courts are to vindicate free exercise interests, however, skips a sophisticated analytical progression that should lie somewhere in between.[183]

Evidently, not only is *Lyng* a highly influential decision in the realm of Indian free exercise and public lands cases, but so influential

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distinguish the plaintiffs' claim from one that would have required the wholesale exclusion of non-Indians from the land in question . . . . By contrast, Appellants in this case do not seek to prevent use of the Peaks by others. A developed commercial ski area already exists, and Appellants do not seek to interfere with its current operation. There are many other recreational uses of the Peaks, with which Appellants also do not seek to interfere. Far from 'seek[ing] to exclude all human activity but their own from sacred areas of the public lands,' . . . [a]ppellants in this case are not seeking to exclude any of the extensive human activity that now takes place on the Peaks." (citation omitted) (first alteration in original)).

[177] *See Navajo Nation*, 535 F.3d at 1062–63.

[178] *Id.*

[179] *Lyng*, 485 U.S. at 452–53.

[180] *Navajo Nation*, 535 F.3d 1058. Admittedly, one could conjure a "parade of horrors" scenario in which the Indians who venerate the San Francisco Peaks begin with injunctions against the use of recycled wastewater, but ultimately assert a right to exclude others from Coconino National Park. However, any fears of such a Trojan horse approach are unfounded because even this Note's narrow reading of *Lyng*'s scope still prohibits exclusion of anyone from public lands on the basis of free exercise rights. *See* discussion *supra* pp. 255–60.

[181] *See, e.g.*, Havasupai Tribe v. United States, 752 F. Supp. 1471 (D. Ariz. 1990) (holding that a modified plan for operations of a uranium mine located in a national forest area held sacred by plaintiff Indian tribe did not violate their right to freely exercise their religion).

[182] *Navajo Nation*, 535 F.3d at 1071 (finding that the Court's decision in *Lyng* was applicable).

[183] *See* discussion *supra* pp. 256–59. Although not reaching *Lyng*-like prevalence in Indian religion and public lands cases, *Navajo Nation*'s has proved convenient support for disposing of free exercise suits. *See, e.g.*, Ruiz-Diaz v. United States, No. C07-1881RSL, 2008 WL 4962685, at *5 (W.D. Wash. Nov. 18, 2008); Comanche Nation v. United States, No. CIV-08-849-D, 2008 WL 4426621, at *3 (W.D. Okla. Sept. 23, 2008); *see also* Snoqualmie Indian Tribe v. Fed. Energy Regulatory Comm'n, 545 F.3d 1207 (9th Cir. 2008) (finding that a decision by the Federal Energy Regulatory Commission to grant a license to run a hydroelectric project for forty years did not substantially burden the Indian tribes' free exercise of religion).

is *Lyng* that it "gives us a legal framework"[184] that lower courts utilize even when doing so is illogical or antithetical to a federal statute.[185] Some commentators, however, point to *Lyng*, not as the seminal case that initiated a cascade throughout lower courts that "effectively denies the availability of First Amendment" and RFRA "relief in many, if not most, cases in which [Indian] religious activities take place on public lands,"[186] but as evidence tending to show a trend of tragic irreconcilability between Indian religious interests and the schema of American civil rights. Instead of characterizing *Lyng* as a point of origin, they argue that the decision is a result of a conflict between underlying dynamics of American legal philosophy and the unconventional theologies (at least from a Western perspective) of various Indian religions. The following section explores some of these critiques.

II. PREVAILING EXPLANATIONS: WHY INDIAN PLAINTIFFS FAIL

A. A Problem of Categories?[187]

> Native American plaintiffs attempting to vindicate their free exercise rights in federal court must first confront a fundamental problem. The First Amendment refers to the free exercise of *religion*, as if religion were wholly separable from other aspects of individuals' lives.[188]

Even the most basic of comparisons—which assumes the religious conventions among Indian groups to be indistinguishable—reveals a stark contrast between Indian theological principles and prevailing religious mores. Most obviously, "Native Americans' concept of a supreme deity traditionally has not followed the exclusive monotheistic pattern of the Christian religion."[189] Instead of calling God a name like Yahweh or Jesus—or even Allah or Vishnu—American Indians "have used an adjective, not a noun, to refer to their concept of God, reflecting [a sense of God as] an indefinable presence."[190] Not until Christians "translated" Indian theological concepts was the Indian perception of God expressed as the now

[184] *New Directions*, *supra* note 104, at 989.
[185] *See* discussion *supra* pp. 259–61.
[186] *Sacred Sites*, *supra* note 21, at 1063.
[187] Dussias, *supra* note 93, at 806 (This language is a modification of a subheading in Dussias' article.).
[188] *Id.* at 806 (footnote omitted).
[189] Anastasia P. Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 ARIZ. L. REV. 1291, 1296 (1996).
[190] *Id.*

ubiquitous noun: "Great Spirit."[191] Perhaps because this understanding places a premium on presence as opposed to entity, Indian theology proves a poor implement with which to draw lines of distinction between the religiously sublime and the secularly vulgar. In fact, it has been suggested that such distinctions—in many ways central to Western religious philosophy—are impossible to make on the basis of Indian metaphysics.[192]

Nonetheless, further exegesis of such contrast is only of interest to philosophers and theologians. According to noteworthy weight of legal scholarship, however, the contrast has had a substantial impact on the manner in which courts apply the First Amendment and RFRA in Indian free exercise cases.[193] Indian theology's blurred lines between the secular and religious elements of human experience explain why Indians regularly fail to vindicate their free exercise interests in American courts, or so the explanation goes.

As popularly characterized, the most widespread American perspectives easily "isolat[e] . . . religion from other aspects of life."[194] One need not go through the trouble of unearthing the religious inclinations of the drafters of the Bill of Rights to conclude that not only do such perspectives spill into our cultural lexicon—it is safe to assume that a wealth of Americans have positive feelings toward the oft-repeated phraseology: "separation of church and state"—but that such perspectives may resonate in the minds of our judges who, as Americans, have been exposed to such points of view. Moreover, the actual construction of the First Amendment may require that legal analysis follow a trajectory which, as a foundational matter, isolates religion and religious exercise from the more numerous non-religious aspects of citizens' lives. Because the First Amendment protects not only religious interests, but goes on to lay out freedoms of speech, the press, assembly, and petition, in a disjunctive list,[195] one could at least reasonably argue that the amendment's organization makes inescapable the conclusion that constitutional structure draws a religious-secular distinction.[196]

Moreover, such a religious-secular distinction has proven to be quite amenable to conventional American religious customs.[197] Yet,

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[191] *Id.*

[192] *See* Dussias, *supra* note 93, at 806.

[193] *See* discussion *infra* pp. 267–71.

[194] Dussias, *supra* note 93, at 806.

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

[196] *See, e.g.*, Rose, *supra* note 93, at 112.

[197] *See id.* (arguing that the "doctrinal structure courts have developed to ensure the protection of religious freedoms," which presupposes a secular-religious distinction, serves religions that make such a distinction but does not "ensure the protection of religious freedom

theologies that treat "law, religion, art and economics . . . as interdependent parts of an organic, unified whole" may be fatally foreign to a legal rubric that presumes protectable religious exercise is distinct from those aspects of life.[198] Thus, commentators have suggested that Indian plaintiffs' record of failure is the inevitable result of a scheme of free exercise jurisprudence that "attempt[s] to isolate religion from other aspects of life [and thereby] 'forces Indian concepts into non-Indian categories.'"[199] In other words, because Indian religion places insubstantial emphasis on where religious stops and secular begins, Indian claims cannot withstand the scrutiny of a legal inquiry that requires plaintiffs to show, prima facie, the precise borders bounding their religious worlds. A spiritual practice that does not constrain itself to neatly defined limits, but embraces all elements of human life, the explanation concludes, is without category in U.S. constitutional law.[200] Ultimately, a practice the law does not categorize as religious does not enjoy the protections the law affords to practices falling within such a category. Because Indian religious practice tends to be holistic, embracing not only personal experience of the divine, but also concepts such as community, culture and even ecology, it is simply too large and cumbersome a thing to accommodate in a scheme that prefers neat compartmentalization.[201]

This explanation is not without empirical roots. Federal courts have denied Indians relief on the basis that an alleged religious

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. . . in the context of Indian religion").

[198] Dussias, *supra* note 93, at 806. Dussias goes on to say: "[C]ontemporary Native Americans seeking to vindicate their free exercise rights may face the initial hurdle of fitting their beliefs and practices into Anglo-American categories that treat religion as separable from culture and the sacred as separable from the secular." *Id.* at 810.

[199] *Id.* at 806 (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 459 (1988) (Brennan, J., dissenting) (quoting D. THEODORATUS, CULTURAL RESOURCES OF THE CHIMNEY ROCK SECTION, GASQUET-ORLEANS ROAD, SIX RIVERS NATIONAL FOREST (1979))).

[200] *Id.* at 806–07.

[201] Some scholars have even gone so far as to suggest that not only does U.S. constitutional law prefer neat compartmentalization, but that the secular-religious distinction enshrined in the Constitution is actually a theological concept, born out of late eighteenth-century American religious conventions. According to this view, the distinction is the deciding factor in subsequent Indian free exercise cases. *See, e.g.*, Rose, *supra* note 93, at 113–16. Establishment Clause concerns aside, such an explanation rests on an interpretive technique that places a premium on popular conceptions in force at the time the Bill of Rights was written. Similar techniques have been strongly criticized. *See, e.g.*, Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, NEW REPUBLIC, Aug. 27, 2008, at 32–33, *available at* http://www.tnr.com/booksarts/story.html?id=d2f38db8-3c8a-477e-bd0a-5bd56de0e7c0. In any event, the issue of whether any type of originalism is a mandatory interpretative technique is far from settled, and there is little to suggest that any federal judge who has ever denied an Indian plaintiff relief did so based on such an understanding of the Constitution and eighteenth-century religious practices.

interest was more akin to cultural practice and historical preference.[202] Nevertheless, the explanation is at best incomplete because it overlooks at least one glaring inconsistency: early in the development of free exercise doctrine, in *Wisconsin v. Yoder*,[203] the Supreme Court actually sided with religious practitioners who believed their religious exercise to be "inextricably intertwined with culture and tradition."[204] Apparently, the fact that the Amish made no distinction between religious and secular, something Chief Justice Burger conceded in the majority opinion,[205] did not prove a fatal flaw in their case. Moreover, instead of treating the all-encompassing nature of Amish religion as something that had to be explained away in the face of a hypothesized categorization problem, the all-encompassing nature of Amish religion formed the basis of the majority opinion.[206] As a threshold issue, Burger wrote, "we must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent."[207] After delving into a very able discussion of some unique elements of Amish theology,[208] the Court resolved the question in the affirmative, triggering strict scrutiny review and holding in favor of the Amish parents.[209] Accordingly, *Yoder* tends to support the proposition that U.S. constitutional law can actually be favorable to religious practitioners who decline to see anything secular about the world. Furthermore, the lack of a distinction between religion and non-religion can serve as a basis upon which courts vindicate free exercise rights, as opposed to an insurmountable obstacle.

Not even the years intervening between the Court's decision in *Yoder* and more modern times, nor the Court's proclivity to minimize the scope of *Sherbert* and its progeny, make the veracity of the discussed critique any more conceivable. The most credible form of the argument[210] finds its grounding in the structure of the First

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[202] *See, e.g.*, Sequoyah v. Tenn. Valley Auth., 620 F.2d 1159 (6th Cir. 1980).

[203] 406 U.S. 205 (1972).

[204] Dussias, *supra* note 93, at 809.

[205] *See Yoder*, 406 U.S. at 216 ("[T]he record in this case abundantly supports the claim 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 . . . . [T]he Old Order Amish religion pervades and determines virtually their entire way of life. . . .").

[206] *Id.* at 215.

[207] *Id.*; *see also* Ray, *supra* note 26, at 508 (arguing that "*Yoder* made clear that the Free Exercise Clause protects not only specific religious practices from unwarranted interference, but 'modes of life' that are 'inseparable' from those practices as well").

[208] *See* discussion *supra* pp. 246–48.

[209] *Yoder*, 406 U.S. at 234–35.

[210] By this I mean to distinguish the type of argument laid out above from the similar argument that the Bill of Rights is imbued with theological principles. *See* discussion *supra* note

Amendment. It holds that the amendment's disjunctive formulation, coupled with its listing of religious interests separately from speech, assembly, etc., mandates a compartmentalized notion of First Amendment rights.[211] Even if the approach of the Court has changed over the years, the text of the First Amendment has not. It follows that if it truly exists, any hypothesized problem of categories should have had the same effect on the outcome of *Yoder* as on the outcome of *Sequoyah*. Yet, the holdings in the two cases stand in contrast.

One could reasonably point out that the Amish fall under the broad umbrella of the Christian tradition, and, as such, American judges are more familiar with Amish religion, even if it falls as far to the side of the mainstream as traditional Indian practices. Thus, the Amish need not overcome the hurdle of "translating" their religious ideology into concepts more readily understood in American courts.[212] Yet, such an observation does little to preserve the explanation. To say that Indian claims fail because Indians practice a holistic religion that holds every aspect of life to be religious in nature, as courts conclude from time to time,[213] is to overcome the "translation" impediment. More importantly, even if one assumes that courts have a perfect understanding of Indian theology, Indians are no better off in American courts if the explanation is accurate. Because the problem is one of a scheme of categories unable to accommodate unwieldy concepts—not a lack of understanding—a sophisticated appreciation of just how unwieldy a concept is does not enable a limited system to accommodate it any better. Thus, if constitutional law could not accommodate religious exercise which recognizes no difference between things religious and things secular, then, barring the possibility that *Yoder* was wrongly decided—an exceedingly uncommon suggestion—the Amish would be just as unsuccessful at vindicating their religious interests in American courts as American Indians.

B. Site-Specific Exercise

Another popular explanation for Indians' consistent failures to vindicate their religious interests in federal courts keys in on a unique aspect of American Indian theology: "Indian religious beliefs, unlike western religious traditions, are often site-specific in nature and

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[211] *See, e.g.*, Rose, *supra* note 93, at 112.

[212] Dussias, *supra* note 93, at 815–16.

[213] *Id.*

intimately associated with the land and its natural features."[214] Perhaps more than in any other religion, "[a] close relationship with [sacred] land[s] 'permeates American Indian life.'"[215] While "Westerners link events to the dates on which they occurred[,] Indians are more concerned with places where the events occurred."[216] For example, the entire Western calendar centers on the date of Christ's birth.[217] Christian celebrations are held on anniversaries and days chosen via calculations based on lunar calendars.[218] Even Westerners' veneration of secular events tracks dates, instead of locations. For instance, the minds of most Americans undoubtedly associate national independence more closely with July 4 than with Philadelphia's Independence Hall. The French celebrate Bastille *Day*, not the Bastille. Indian religious practice, on the other hand, may focus on the birth*places* of gods, the site of creation, the site of a special historical event, etc.[219] Some commentators go so far as to suggest that Indians have notions of land and progress that stand in stark and irredeemable contrast with Western norms.[220] While conventional religions practiced in the U.S. may look to religious sites with varying degrees of urgency,[221] no mainstream American religion's theology so

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[214] Zellmer, *supra* note 23, at 432.

[215] *Id.* at 431 (quoting Alice M. Dussias, *Science, Sovereignty, and the Sacred Text: Paleontological Resources and Native American Rights*, 55 MD. L. REV. 84, 100 (1996) (quoting PAULA GUNN ALLEN, THE SACRED HOOP: RECOVERING THE FEMININE IN AMERICAN INDIAN TRADITIONS 119 (1986))).

[216] Adam Grieser et al., *Reconsidering Religion Policy as Violence:* Lyng v. Northwest Indian Cemetery Protective Association, 10 SCHOLAR 373, 388 (2008).

[217] Give or take a few years. *See* JOHN P. MEIER, A MARGINAL JEW: RETHINKING THE HISTORICAL JESUS vol. 1, ch. 11 (1991).

[218] Consider Easter: celebrated the first Sunday that follows the 14th day of the paschal moon. U.S. NAVAL OBSERVATORY, EXPLANATORY SUPPLEMENT TO THE ASTRONOMICAL ALMANAC 581 (P. Kenneth Seidelmann ed., 1992).

[219] *See, e.g.*, Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1099–1103 (9th Cir. 2008) (en banc) (Fletcher, J., dissenting), *cert. denied*, 129 S. Ct. 2763 (2009).

[220] For example, Anastasia Winslow argues that while "Christian teachings discuss the environment as a commodity to be used and controlled . . . Native Americans see the world as a place of gods, spirits, and living beings." Winslow, *supra* note 189, at 1298. Winslow also asserts that Indian ideas about land, ecology and industrial progress contradict God's command in *Genesis* 1:28: "Be fruitful and multiply, and replenish the earth, and subdue it; and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth." *Id.* at 1297 (quoting *Genesis* 1:28); *see also id.* at 1299 ("Concepts of time may affect peoples' attitudes toward industrialization. People applying linear concepts of time see process as progress. Thus, progress may be identified with an increase in the number of . . . forests cleared . . . . Linear-oriented populations may see themselves as moving ahead, while others are moving in circles . . . ." (footnote omitted)).

[221] For example, Muslims facing toward Mecca while in prayer, and the Hajj, bear at least some similarity to the practice of the Indians in *Navajo Nation* who "communicate[d] with higher powers through prayers and songs focused on the Peaks." *Navajo Nation*, 535 F.3d. at 1081–82 (Fletcher, J., dissenting). Furthermore, the concept of the Promised Land, given to the Israelites in their covenant with God, has had substantial effects on Jewish religious history. *See generally Genesis* 15:18–21 (New American Standard) (stating God's promise of the Holy Land

completely reduces to a metaphysical relationship with holy places as those of various traditional Indian religions.[222]

This epistemological difference between the Western worldview and Indian theology, the explanation goes, manifests as a judicial disconnect. Because the concept is radically foreign to them, American courts fail to grasp the overriding importance of site-specificity to Indian religious practice.[223] Thus, American courts are especially inept arbiters when called upon to give qualitative assessments of the "substantiality" of a "burden" on Indian religious exercise.[224] Stated differently, American courts impose on Indians the impossible task of expressing in the vocabulary of Western Civilization—the only vocabulary American courts understand—the Indian concept of supremely important site-specificity which, as American missionaries noted, "appear[s] to have," in the Western vernacular, "no corresponding words."[225]

Though such an explanation may hit on notable differences between the ways Western and Indian civilizations resolve existential questions, and though courts have, in the past, grossly misconceived

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to Abraham). To a lesser extent, Christians have placed devotional emphasis on some of the places where Jesus of Nazareth is thought to have walked, for example: the *Via Dolorosa*. Dalya Alberge, *Study Shines Light on the Final Steps of Christ*, COURIER, Apr. 10, 2009, http://www.news.com.au/couriermail/story/0,23739,25317546-5013016,00.html. Nonetheless, Judaism survived numerous periods of exile from the Holy Land and unsuccessful crusades did not mean the end of Christianity. The destruction of Mecca would not prevent Muslims from worshipping Allah. However, even courts concede that the defilement of a physical site could spell the end of traditional Indian religions. *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988) ("[W]e can assume that the threat to the efficacy of at least some religious practices is extremely grave."); *id.* (assuming that "the proposed government operations would virtually destroy the plaintiff Indians' ability to practice their religion . . . ." (quoting Nw. Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 693 (9th Cir. 1986), *rev'd sub nom. Lyng*, 485 U.S. 439)).

[222] *Cf.* Grieser et al., *supra* note 216, at 388 (asserting that Indian "groups become closely linked with their local environments, and noting that without a link to their surroundings, Indians lose connections with their histories [and] their [religious] traditions"). One might observe that members of the Hindu religion emphasize a metaphysical link between life and the River Ganges in ways similar to how the *Navajo Nation* Indians emphasized a metaphysical link between life and the San Francisco Peaks. This may be the case, but several things should be noted as well: (1) the River Ganges in not located on United States public lands, (2) to the knowledge of the author, American Hindus have not attempted to vindicate unique free exercise interests in American courts, and (3) although there appears to be no way to confirm the suspicion, there are probably exceedingly few, if any, Hindu judges in the United States.

[223] *See id.* at 389 ("The Supreme Court's ruling in *Lyng* ignores these native cultural concepts of land."); *see also* Martin W. Ball, *"People Speaking Silently to Themselves": An Examination of Keith Basso's Philosophical Speculations on "Sense of Place" in Apache Cultures*, 26 AM. INDIAN Q. 460 (2002) (informing much of the argument presented in Grieser et al., *supra* note 216).

[224] *Cf.* Grieser et al., *supra* note 216, at 389.

[225] Dussias, *supra* note 93, at 812 (discussing the inability of Christian missionaries to adequately translate Native American texts due to the lack of necessary Christian concepts).

the importance of specific sites to Indian claimants,[226] the hypothesis fails the most obvious of tests. *Lyng*, "[t]he leading Supreme Court case on Native American religion on public lands and the Free Exercise Clause,"[227] recognized that construction of a logging road through the Chimney Rock site may have "'virtually destroy[ed] the . . . Indians' ability to practice their religion."[228] Nonetheless, the Court held that "the Constitution simply [did] not provide a principle that could justify upholding [the Indians'] legal claims."[229] In other words, *Lyng* gave the importance of specific location a most generous benefit of the doubt: something the proffered explanation characterizes as impossible. Despite doing what the critique hypothesizes to be impossible and accepting the catastrophic effect of the logging road on religious practices, the Court still rejected the Indians' claim. The record of the lower courts reveals the explanation to be even more tenuous. After *Lyng*, conceding the obliteration of entire Indian religions became a refrain among the lower courts in free exercise cases decided in favor of the government.[230] Evidently, failure of courts to appreciate the impending destruction of Indian religions via desecration of sacred sites is not the only thing that produces outcomes favorable to the state.

III. THE PROBLEMS OF LIMITED COMPARISONS: DRAWING FALSE ANALOGIES TO *LYNG*

A. *"Pluritas non est ponenda sine necessitate"*[231]

Little about the discussed critiques, beyond the occasional bit of commendable theological dexterity, proves especially helpful. Each explanation falls apart under light scrutiny, and, even if true, each explanation affirms the proposition that Indian religion is irreconcilable with the scheme or administration of American civil rights—not a terribly heartening state of affairs for Indians or their allies. If Indians' losing record in federal courts results from

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[226] *See, e.g.*, Wilson v. Block, 708 F.2d 735, 744–45 (D.C. Cir. 1983) (holding that because the Indian plaintiffs failed to demonstrate that their religious ceremonies could not be physically practiced elsewhere, the plaintiffs failed to establish a free exercise violation).

[227] Bonham, *supra* note 106, at 164.

[228] Lyng v. Nw. Indian Cemetery Protective Ass'n, 458 U.S. 439, 451–52 (1988) (alteration in original) (quoting Nw. Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 693 (9th Cir. 1986)). Put differently, "the logging and road-building projects at issue in [*Lyng*] could have devastating effects on traditional Indian religious practices." *Id.*

[229] *Id.* at 452.

[230] *See* discussion *supra* pp. 260–66.

[231] "Plurality should not be posited without necessity." Encyclopædia Britannica Online, Ockham's razor, http://www.britannica.com/EBchecked/topic/424706/Ockhams-razor (last visited Sept. 23, 2009).

something less systemic, however, a possibility remains that Indians may yet vindicate free exercise rights in American courts.

Survey of Indian free exercise on public lands cases calls for conclusions markedly less fatalistic than those advanced in the theologically based critiques discussed *supra*. While the Indian free exercise line of jurisprudence shows itself to be especially invariable, the obvious commonality among decisions has little to do with irredeemable culture clash. Instead, Indian claims tend to fail on the basis of the following commonly recited refrain: "*Lyng* is on point, and *Lyng* countenances would cause serious and irreparable damage to Indian religious practice." As things stand, lower courts—except in some ultimately overruled decisions—have yet to find a case involving Indians and public lands in which they do not judge *Lyng* to be resoundingly analogous.[232] Such analogies are usually, and tenuously, drawn from three similarities between *Lyng* and the case at bar: (1) the case involves Indians asserting free exercise rights, (2) the case involves public lands, and (3) the challenged government action would have a devastating impact on the Indian plaintiffs' religious experience. The practice of lower courts, then, is to satisfy this checklist, assert that once the checklist is satisfied *Lyng* prohibits strict scrutiny review (or, in RFRA cases, that *Lyng* prohibits finding any sort of burden on religious practice), and dismiss a plaintiff's claim.

Regardless of whether *Lyng* is rightly or wrongly decided, *Lyng* functions on a level unappreciated by lower courts. As opposed to a factually sensitive analysis that clearly delineated when, how and to what degree government actions might burden religious interests in

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[232] *See, e.g.*, Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058 (9th Cir. 2008) (en banc); *see also* South Fork Band v. U.S. Dep't of Interior, No. 3:08-CV-00616-LRH-RAM, 2009 WL 249711, at *13 (D. Nev. Feb. 3, 2009) (denying the Indian plaintiffs' claim that the government's digging of a 2,000-foot-deep pit on their religious sites violated the RFRA); Miccosukee Tribe of Indians of Fla. v. United States, 980 F. Supp. 448, 465 (S.D. Fla. 1997) (holding that the federal government did not need to provide compelling justification for its failure to alleviate flooding on Indian religious sites and, subsequently, did not infringe upon the plaintiffs' First Amendment rights); Havasupai Tribe v. United States, 752 F. Supp. 1471, 1485–86 (D. Ariz. 1990) (denying the plaintiffs' claim that uranium mining near one of their most sacred sites would violate their free exercise rights); Attakai v. United States, 746 F. Supp. 1395, 1403–04 (D. Ariz. 1990) (dismissing the Indian plaintiffs' claim that the federal government's construction of fences and livestock watering facilities on their religious sites violated the First Amendment). However, federal courts more readily distinguish *Lyng* in land and free exercise cases not involving Indians. *See, e.g.*, Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144, 168-169 (3d Cir. 2002) (holding that *Lyng* was distinguishable from the plaintiffs' claim and enjoining the defendants from removing eruv markers on utility poles, which were used by the Jewish plaintiffs on the Sabbath); Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d. 1203, 1227 (C.D. Cal. 2002) (enjoining the defendants from turning the Christian plaintiffs' property into commercial retail space and noting that, unlike *Lyng*, the defendants did not own the property in question).

the scheme of American law, *Lyng* turns on a single fact: the plaintiffs had asserted a right that would have enabled them "to exclude all human activity but their own from sacred areas of the public lands."[233] Because a state of affairs in which private citizens could assert "*de facto* beneficial ownership of some rather spacious tracts of public property"[234] was, as the Court quite reasonably concluded, untenable, the Court utilized a form of scrutiny favorable to the government.[235] The shorthand version of the *Lyng* analysis invented by lower courts, however, glosses over this crucial element of the decision, and devolves into an exercise in matching-up practical results of cases. The *Lyng* Court employed an approach deferential to the government (even in the face of catastrophic religious harm) not because the case involved Indian plaintiffs or public lands, and certainly not because the proposed government action risked irreversible religious harm, but instead because the plaintiffs had asserted a right to exclude all human activity but their own from the government's land.[236] It follows that courts may draw an accurate analogy to *Lyng* only when plaintiffs assert, based on free exercise interests, rights to exclude others from public lands.[237] Stated differently, the harshness of *Lyng* is constitutionally required only when plaintiffs seek to usurp the benefits of public ownership, and *Lyng* offers little instruction on weighing the substantiality of burdens.[238] Thus, Indian free exercise plaintiffs fail consistently for

[233] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S.439, 452–53 (1988).

[234] *Id.* at 453.

[235] *Id.*

[236] *See* discussion *supra* pp. 256–60.

[237] *Employment Division v. Smith* does make several references to *Lyng*. *See, e.g.*, 494 U.S. 872, 885 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2, 107 Stat. 1488 (citing *Lyng* 485 U.S. at 451). The language from *Lyng* cited to, and partially quoted, in *Smith* ("Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.") is conclusory—based on a consideration of plaintiffs' assertion of rights to exclude others from public lands in the scheme of constitutional law—not prescriptive. *See Smith*, 494 U.S. at 885 (quoting *Lyng*, 485 U.S. at 451); *see also* discussion *supra* pp. 256–60. In other words, while *Lyng* supports the Court's observation in *Smith* that it had not always applied strict scrutiny in free exercise cases, the support stops there. Moreover, even if *Smith* were to lend some credibility to the lower courts' reading of *Lyng* in First Amendment cases, importing *Lyng* into RFRA cases via *Smith*—which RFRA explicitly preempts—seems especially perverse. Furthermore, it is worth noting that the continuity between *Lyng* and *Smith* is not beyond dispute. Justice O'Connor, who authored the majority opinion in *Lyng*, chose to write a concurring opinion in *Smith* rather than join the majority. *Smith*, 494 U.S., at 881–907 (O'Connor, J., concurring). Justice O'Connor argued the majority misinterpreted "settled First Amendment precedent." *Id.* at 903. In addition, at least a majority of Congress and one sitting president seem to have found the case to be wrongly decided when they passed and signed RFRA in 1993. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §2000bb (2006)).

[238] *See* discussion *supra* pp. 255–59.

one very simple reason: lower courts misread the majority opinion in *Lyng*. Logically, however, *Lyng* is analogous to only a small subset of Indian free exercise cases. It is not dispositive of all.

Accordingly, popular critiques of Indian free exercise jurisprudence prove to be imprecise. A more principled investigation uncovers the wide scope of *Lyng*'s application in the lower courts as the pressing impediment to Indian plaintiffs, and seeks to understand why lower courts so consistently misapply the decision.

B. Circumscribed: The Lower Courts' Perspective

Buddhists tell a story about some blind men and an elephant.[239] Asked to describe the elephant, each man walks up to the creature, feels the contours of a different part of its body, and gives, in description, what seems to his mind a well-reasoned simile.[240] The man who touches the elephant's head says that the elephant is like a water-pot, the man who grabs the tip of its tusk: like a peg.[241] The story needs no religious context to convey a clear meaning: when confronted with novelty, human beings are apt to focus on similarities of the lowest order between the known and the unknown; between the comfortable and the awkward. Relieved to happen upon an easily-understood point of reference, human inquiry stops abruptly.

It would seem that federal courts are not immune from such limitations, and subject matter novel to the minds of federal judges tends to captivate their applications of Supreme Court precedent. The U.S. Census Bureau characterizes barely more than 1.5% of the population of the United States as American Indian/Alaska Native.[242] A sizable number of those so characterized live in decidedly American Indian enclaves,[243] where the cultures are presumably isolated, to some extent, from broader American society. Even if one assumes that half of the people characterized as American Indian/Alaska Native by the U.S. Census Bureau practice distinctly traditional American Indian religions,[244] American Muslims would

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[239] *See* DHAMMAPALA, THE UDANDA COMMENTARY 878-80 (Peter Masefield trans., The Pali Text Society 2d vol. 1995).

[240] *Id.*

[241] *Id.*

[242] STELLA U. OGUNWOLE, U.S. CENSUS BUREAU, WE THE PEOPLE: AMERICAN INDIANS AND ALASKAN NATIVES IN THE UNITED STATES 2 (2006), *available at* http://www.census.gov/prod/2006pubs/censr-28.pdf.

[243] *Id.* at 14.

[244] Because of the variance of spiritual practice among American Indians, an accurate estimate of the number of Indians who adhere to traditional Indian religions strikes the author as impossible to make. Nonetheless, some have tried. *See, e.g.*, BARRY A. KOSMIN ET AL., AMERICAN RELIGIOUS IDENTIFICATION SURVEY 10 (2001) ("Native Americans . . . [have] a religious profile very similar to white, non-Hispanic Americans: 20% self-identified as Baptist,

outstrip observant Indians by more than two-to-one.[245] The number of American Buddhists might exceed the number of traditionally religious Indians by more than one million.[246] In addition to these statistics, Native Americans appear to be underrepresented on the federal bench, to say the least.[247] So, the subject of Native American religion, as a product of sheer demographics, is an unfamiliar one to judges and, probably, to most of the country.

Most importantly, however, Indians seeking to vindicate a right to exercise freely a traditional religion carry with them into federal court something at least as unique as it is unfamiliar: spirituality extraordinarily different from the religions practiced by nearly all American pluralities, the rough edges of which have yet to be filed down by millennia of Western Civilization and focused in the vision of the law.[248] Confronted with such a foreign element at the heart of a free exercise case—the simplest of which require judges to navigate a maddening maze of Supreme Court jurisprudence, fraught with internal tension and the occasional legislative mandate fired across the Court's bow[249]—federal judges are in a position not unlike that of the blind men in the Buddhist fable: uncomfortably unsure of what, exactly, an elephant is like or its place among things slightly more familiar. Resting one hand on the top of the elephant's head, and with the other, tipping over a water-pot called *Lyng v. Northest Indian Cemetery Protective Association*, courts make the first obvious conclusion: similarity (both involve Indians, free exercise and public lands). Confronted with two alternatives, one difficult and one convenient, courts decline probing the similarity in greater depth; lest the Pandora's box of free exercise jurisprudence spring open unexpectedly, lest a searching embrace of the animal's head prompt it to stampede. Instead of chancing an outcome that might not fit within the virtually unknowable landscape of free exercise—a very real

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17% as Catholic and 17% indicated no religious preference. Only 3% indicated their primary religious identification as an 'Indian' or tribal religion.").

[245] *See* Council on American-Islamic Relations, About Islam and American Muslims, http://sun.cair.com/AboutIslam/IslamBasics.aspx (last visited November 20, 2009) (estimating that there are 7 million Muslims living in the United States). Compare this figure with the Census Bureau's estimate of 4.5 million American Indians in the United States. OGUNWOLE, *supra* note 242, at 2.

[246] *See* The Pluralism Project at Harvard University, Statistics, http://pluralism.org/resources/statistics/index.php (last visited Sept. 16, 2009).

[247] The first Native American judge, Frank Howell Seay, was not appointed until 1970. *See* Judges of the United States Courts, Milestones of Judicial Service, http://www.fjc.gov/servlet/tGetInfo?jid=2137 (last accessed Sept. 23, 2009).

[248] *See* discussion *supra* pp. 266–73.

[249] *See* discussion *supra* pp. 245–52.

possibility considering the improbability of discerning much of help in established precedent and legislative policy[250]—courts grasp at straws to show that the Supreme Court, in fact, already decided the difficult case at bar, preordaining a result in the instant case. Thus, lower courts apply *Lyng* in even the most unfounded of scenarios because it seems to offer the prospect of factual analogy in an area of the law that consists almost exclusively of convoluted theory, and requires an analysis that lies uncomfortably close to speculation. Because the prevalent misapplication of *Lyng* effectively disposes of hard cases, recognizing dissimilarity between *Lyng* and those hard cases proves exceedingly inconvenient. Because Supreme Court jurisprudence on Indian free exercise contains only one point of comparison, courts easily make the oversight that sends them down the more convenient path.

The utility of a widespread misapplication of the law does not justify the misapplication, even if guidance from higher courts is especially scant or unhelpful. Widespread misapplication of the law, however, does justify more guidance from higher courts. If the Supreme Court were to take on an Indian free exercise and public lands case and distinguish *Lyng*, the misconception that *Lyng* is a sort of catch-all that "effectively denies the availability of First Amendment" and RFRA "relief in many, if not most, cases in which [Indian] religious activities take place on public lands"[251] would be blown completely off its hinges. Because the existence of merely one Supreme Court precedent rooted in facts similar to Indian free exercise and public lands cases prompts lower courts' common misarticulation of the law, a broader and more varied base of precedents, rooted in facts of Indian free exercise and public lands cases, would do much to alleviate the all-or-nothing (perhaps more accurately stated as a nothing-or-nothing) misconception.[252]

In the end, at least one important conclusion becomes clear: fatalism over the prospects of protecting Indian free exercise within the framework of U.S. Constitutional law is unfounded. The source of Indians' consistent losing records is not an inability on the part of the Constitution or the courts to accommodate Indians' unique brand of religious exercise. Instead, the source is a commonly made legal

[250] *See* Yordy, *supra* note 54 (arguing that the development of the free exercise doctrine has created extreme "confusion" throughout federal courts).

[251] *Sacred Sites*, *supra* note 21, at 1063.

[252] The Supreme Court's denial of certiorari to the Indians' appeal of *Navajo Nation* is an obvious lost opportunity. 129 S. Ct. 2763 (2009). Nonetheless, there is little about *Navajo Nations* that makes it stand apart from cases that deny relief on the basis of faulty analogies to *Lyng*. Taking on a future Indian free exercise case and issuing a decision that tracks *Lyng*'s subtleties would be just as useful.

error: misarticulating *Lyng* and applying the decision beyond the stretches of feasible analogy. So common is the error that lower courts conflate its prevalence with great strength of precedent, while abrogating the holding of the underlying case.

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