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Native American Religious Freedom as a Collective Right

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Native American Religious Freedom as a Collective Right

*Michael D. McNally**

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INTRODUCTION: THE STRENGTH OF STANDING ROCK AND THE WEAKNESS OF THE LAW

The 2016–17 encampment at Standing Rock, North Dakota has put on public display the impressive strength and ongoing vitality of traditional Native American religions, not to mention the spiritual grounding and rhetorical force of their resolve to defend the sacred. But intensive coverage has also put on display just how weak the legal remedies available to Native people are as they seek to defend sacred lands and waters.¹ In addition to the proposed pipeline's endangerment of drinking water by crossing the Missouri River a half mile upstream from the reservation boundary, the Standing Rock Sioux Tribe cited concerns about the pipeline's desecration of a veritable sacred district of gravesites, stone rings designating Lakota ancestral knowledge, Sitting Bull's traditional encampment, and the holy confluence of the Cannonball River and the Missouri. The enormous eddy that formed in Spring at this confluence fashioned large spherical sacred stones (hence Cannonball) until the Army Corps of Engineers built an enormous dam forming Lake Oahe.

1. For a discussion of how the Dakota Access Pipeline controversy exposes the weakness of treaty claims, see Carla F. Fredericks & Jesse D. Heibel, *Standing Rock, the Sioux Treaties, and the Limits of the Supremacy Clause*, 89 U. COLO. L. REV. 477 (2018).

The processes for tribal consultation and public consideration of adverse effects on cultural resources like sacred sites (and natural resources like water that are also cultural resources) ostensibly safeguarded by historical preservation and environmental law turned out, in this case, to be hoops to jump through, and the broader purposes of which can easily be exploited by pro-development environmental consultants, corporations, and agencies. One need not be a specialist to sense something amiss when, on July 16, 2016, the Army Corps of Engineers issued its formal “Finding of No Significant Impact” for the crossing of the Missouri. This finding formally concluded the review necessary under the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA) without a fuller Environmental Impact Statement process that NEPA requires when a federal action is more consequential for the human environment.² Playing the few legal cards available to it under NHPA, NEPA, and other laws relating to federal permitting of the crossing of waterways,³ the Standing Rock Sioux Tribe failed to persuade a federal court to issue a preliminary injunction blocking approval of the pipeline’s crossing of the Missouri River at Lake Oahe.⁴ Despite considerable available evidence that the Army Corps’ consultation with the Standing Rock Sioux Tribe fell short of standards set by Congress,⁵ and standard practice in the Obama Administration⁶ and clarified in the courts,⁷ the judge found the claims insufficient for a preliminary injunction.⁸

But the three federal agencies involved with the Dakota Access Pipeline approval immediately issued a halt to construction pending further review. And in December 2016, the Army Corps

2. National Historic Preservation Act, 54 U.S.C. §§ 300101 et seq., especially § 306108 (1966); National Environmental Policy Act, 42 U.S.C. §§ 4321–35 (1969).

3. Clean Water Act, 33 U.S.C. §§ 1251–1387 (2012); Rivers and Harbors Act, 33 U.S.C. § 403 (2012).

4. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs (Standing Rock I)*, 205 F. Supp. 3d 4 (D.D.C. 2016).

5. National Historic Preservation Act, 16 U.S.C. §§ 470a–et seq., amended by 16 U.S.C. §§ 470a(d), 470w(4) (1994); American Indian Religious Freedom Act, 42 U.S.C. § 1996 (2012) (amended 1994); Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000).

6. See Letters from the Advisory Council for Historic Pres. to Jo-Ellen Darcy, U.S. Army Corps of Eng’rs (May 19, 2016, Aug. 19, 2016).

7. See, e.g., *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995).

8. *Standing Rock I*, 205 F. Supp. 3d 4.

denied the remaining easement for the Missouri River crossing until alternatives were considered under an Environmental Impact Statement process, an action which drew the pipeline company's lawsuit challenging the decision. When President Trump took the reins of power, he issued a directive on day two of his administration for the Army Corps to grant the necessary easement and to expedite completion of the Dakota Access Pipeline. A range of challenges to Trump's directive in courts have extended the legal process through the time of this writing and will extend into the future. Whatever the final outcome, the Standing Rock/Dakota Access story begs a question: Why—and how—should Native peoples boldly perform prayer, ceremony, and encampment itself as protest, with the world watching and admiring their spiritual resolve, and not have any meaningful recourse under religious freedom law? Why, in other words, are we even talking about the legal weeds of environmental and historic preservation law and not about what many consider the American first freedom?

The answer to the *why* of the question is the starting point for this Article, but I will make quick work of it: Native American claims to sacred lands have consistently failed in the courts, either under the Free Exercise Clause of the First Amendment or under its statutory counterpart, the Religious Freedom Restoration Act (1993).⁹ Indeed, Standing Rock's downstream neighbor, the Cheyenne River Sioux Tribe, failed to block the Dakota Access Pipeline's completion with a religious freedom claim that was too little and too late to effect a preliminary injunction, since the district court judge found the religious freedom claims were nullified by a laches determination, and in any event unlikely to succeed on the merits, given the difficulty of establishing a substantial burden on religious exercise in sacred land case law.¹⁰

My answer to the *how* entails a more complex consideration of the distinctive contours of Native American religions as they relate,

9. Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-2000bb-4 (2012) [hereinafter RFRA]. On the First Amendment, see *Lyng v. Nw. Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980); *Sequoyah v. TVA*, 620 F.2d 1159 (6th Cir. 1980); *Crow v. Gullet*, 706 F.2d 856 (8th Cir. 1983), *cert. denied*, 464 U.S. 977 (1983). On RFRA, see *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008), *cert. denied*, 556 U.S. 1281 (2009).

10. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock II)*, 239 F. Supp. 3d 77 (D.D.C. 2017). For fuller treatment, see *infra* note 287.

or not, to the legal conceptualization of religion. The distinctiveness of Native religions has mattered not simply insofar as they are land-based, a point that has been made often, and well. More elementally, I will argue, what distinguishes Native religions and such legal claims to traditional religions like those of the Standing Rock Lakota/Dakota is that they are *collective* in shape.

Like so many begged questions, the one raised at Standing Rock is also a rhetorical one, and I will argue in this Article for an approach to the collective rights of Native American religious claims.

Because religious liberty protections have so often failed in the courts to deliver meaningful protections to distinctive Native American religious traditions, Native communities and their advocates have looked beyond the First Amendment and religious freedom law to accommodations under either federal Indian law, or under federal Indian law in concert with other legal regimes, such as historic preservation, environmental law, or Native specific statutes like the Native American Grave Protection and Repatriation Act (NAGPRA).¹¹ "Religion" has often been seen as a category too closely associated with the process of colonization and dispossession to meaningfully, much less legally, encompass the full reach or get at the thick weave of indigenous practices, beliefs, lifeways, and land relationships that are shot through with the religious without being solely, or plainly, religious. "We don't have a religion; we have a way of life," is a maxim often heard in Indian country. What is more, the growing momentum of legal discourses of tribal sovereignty, on the one hand, and of the rights of indigenous peoples in international law, on the other, have folded rights to "religion" into broader political and cultural rights to peoplehood. This is all to the good.

But a reluctance to speak of Native traditions in the language of religion has produced its own difficulties. The preferred everyday parlance of Native "spirituality" over "religion," or the legal parlance of "cultural resource" or "traditional cultural property" over "sacred site," can and does come at considerable expense to the protection of sacred places, practices, objects, and remains. For

11. Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-13 (2012).

“religion,” notwithstanding its indeterminacy, remains a powerful category word by virtue of its place in the U.S. Constitution and in discourses of American national identity. Native advocates have long understood a doubleness of religious freedom discourse: its power to *exclude* them from, say, sacred land protection together with the generative power of an appeal to religious freedom in getting accommodations and even legislation like NAGPRA through legislatures despite being fewer than two percent of the population.¹²

In what follows, I argue that religious rights protections for Native American places, practices, objects, and ancestral remains, can be understood more properly as collective rights of Native communities rather than as the private conscience rights of so many Native individuals. What I propose is an approach to Native American religious claims that aligns and conjoins such claims with elements of federal Indian law and with the emerging norms of indigenous rights in international human rights law. Oriented by theoretical insights from my field of religious studies, my argument draws on a critical reading of recent discussions in religious freedom law about group rights, but especially on federal Indian law’s elaboration of the special government-to-government relationship with Native American communities as collectivities, and what courts have identified as collective rights to religion under accommodations in the Bald and Golden Eagle Protection Act.¹³ If religious freedom arguments are read in light of these multiple sources of authority, rather than merely as making reference to religious freedom law, they may not be the non-starters that the signal decisions on Native American religious freedom made by the Supreme Court suggest to be the case.¹⁴ In this regard,

12. From the time that followers of the Peyote Way incorporated as the Native American Church and Pueblo leaders appealed to religious freedom to preserve ceremonial feast dances in the 1920s, Native leaders have understood both the value and costs of articulating their practices and beliefs in the category of religion. *See, e.g.*, THOMAS CONSTANTINE MAROUKIS, *THE PEYOTE ROAD: RELIGIOUS FREEDOM AND THE NATIVE AMERICAN CHURCH* (2010); TISA WENGER, *WE HAVE A RELIGION: THE 1920S PUEBLO INDIAN DANCE CONTROVERSY AND AMERICAN RELIGIOUS FREEDOM* (2009).

13. Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668–668d (2012) (amended 1962).

14. *See* RFRA §§ 2000bb–2000bb-4; *Bowen v. Roy*, 476 U.S. 693 (1986); *Lyng*, 485 U.S. 439; *Emp’t Div. v. Smith*, 494 U.S. 872 (1990).

I aim to suggest the promise of more intellectual commerce between the disparate fields of federal Indian law and religious freedom law.¹⁵

I am emboldened to make this argument, on the one hand, by my training in academic religious studies, a field whose critical turn has made it more keenly aware of the constructed, contested, and malleable nature of the category of religion, and by extension, the discourse of religious freedom. Religious studies scholars have also unearthed how that discourse has historically privileged the rights of some religious people over others, particularly along the lines of the individual right in contrast to the collective tradition. And, to be sure, scholarship on Native American religious traditions in particular takes pains to point out the often irreducibly collective nature of Native American religious claims. As the Lakota scholar Vine Deloria, Jr. famously wrote, “there is no salvation in tribal religions apart from the continuance of the tribe itself.”¹⁶

If what counts as *religion* is not given but arrived at through processes of deliberation and constellations of power that make some voices more authoritative than others, one time-honored axis along which this deliberation has aligned is the question of whether, as Durkheim famously argued, the sacred is an eminently social thing¹⁷ or whether, following Rudolf Otto, Mircea Eliade, or William James, it is elementally a matter of subjective experience.¹⁸

15. There has been surprisingly little intellectual commerce between the field of federal Indian law and that of religious freedom law. This is curious because key decisions shaping First Amendment Free Exercise interpretation in recent memory, especially *Smith* but also *Roy* and *Lynn* that led up to *Smith*, concern Native American religions—a correspondence that often goes unnoticed. It is curious also because much of the case law that has given shape to federal Indian law has concerned a profound indigenous regard for place, peoplehood, and lifeways, the urgency of which is as much spiritual or religious as it is economic or political.

16. VINE DELORIA, JR., *GOD IS RED: A NATIVE VIEW OF RELIGION* 196 (2007). As legal scholar Alex Tallchief Skibine puts it, the importance of sacred sites “is less about individual spiritual development and more about the continuing existence of Indians as a tribal people.” Alex Tallchief Skibine, *Towards a Balanced Approach for the Protection of Native American Sacred Sites*, 17 MICH. J. RACE & L. 269, 273 (2012).

17. ÉMILE DURKHEIM, *THE ELEMENTARY FORMS OF RELIGIOUS LIFE* (Carol Cosman trans., 2008) (1912).

18. MIRCEA ELIADE, *THE SACRED AND THE PROFANE: THE NATURE OF RELIGION* (Willard R. Trask trans., Harcourt Inc. 1959) (1957); RUDOLF OTTO, *THE IDEA OF THE HOLY: AN INQUIRY INTO THE NON-RATIONAL FACTOR IN THE IDEA OF THE DIVINE AND ITS RELATION*

If the latter cluster of viewpoints has generally carried the day in American legal interpretations of religion's definition, there is anything but a consensus among religious studies scholars that religion is, at base, a matter of private conscience or subjective experience—indeed there may just be consensus that it is, at base, a social phenomenon.

On the other hand, I am emboldened to make this argument by the confluence of four distinct legal developments. First, the Supreme Court's 2014 holding in *Burwell v. Hobby Lobby Stores, Inc.*, that for-profit corporations are considered persons with protectable religious exercise under the Religious Freedom Restoration Act (RFRA), makes clear that the legal reach of religious freedom is hardly constrained by the conventional wisdom that America's first freedom is keyed in the liberal vein to an individual's conscience alone.¹⁹ Given the highly charged political climate of *Hobby Lobby's* challenge to the Affordable Care Act, this may seem like an outlier or splitting of hairs, but the decision does suggest a development in a long history of religious freedom decisions that have cautiously engaged the rights of religious groups as groups. Indeed, a close reading of *Wisconsin v. Yoder*,²⁰ and a number of other cases, suggests that the Court's ruling in *Hobby Lobby* is no such outlier, and this can help frame a rethinking of what courts have done to flatten collective Native American claims in *Lyng v. Northwest Cemetery Protective Ass'n*²¹ and the Ninth Circuit's 2008 ruling in *Navajo Nation v. United States Forest Service*.²²

Second, legislative and administrative accommodations for Native American religions based on treaty relationships and the legal doctrine of federal trust responsibility, even those that extend to preserve and protect the religions, cultures, and languages of

TO THE RATIONAL (John W. Harvey trans., 1958) (1917); WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE: A STUDY IN HUMAN NATURE (1985).

19. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); see RFRA, §§ 2000bb-2000bb-4.

20. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

21. *Lyng v. Nw. Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

22. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008), *cert. denied*, 556 U.S. 1281 (2009). This is, to be sure, not entirely intuitive. Indeed, courts have begun to apply other elements of *Hobby Lobby* to Native American religious freedom claims in a manner that does not lean toward this particular outcome. See, e.g., *Oklevueha Native American Church of Hawaii, Inc. v. Lynch*, 828 F.3d 1012 (9th Cir. 2016). See *infra* note 277.

recognized Native communities, are based on the structure of nation-to-nation regard for the political status of tribes. An inquiry into the case law concerning a Native American religious accommodation to the Bald and Golden Eagle Protection Act suggests how effectual this view has been for religious rights of tribes.²³ In the Eagle Act accommodation cases, courts have recognized the priority of protections resting on this distinctive basis over the religious freedom rights of individuals, including Native American individuals.

Third, even if First Amendment and RFRA jurisprudence has largely confirmed the individual rights basis of religious freedom in findings against tribal claims, in a number of arenas, courts have made increasingly consistent use of a distinction between individual claims and what we might identify as the hybrid claims of collectives.

Fourth, there have been important developments in clarifying indigenous rights within international human rights law. The 2007 *United Nations Declaration on the Rights of Indigenous Peoples*, affirmed with reservations by the United States in 2010, clarifies how recognized international human rights protections, including religious rights, must be regarded in terms of collective, and not simply individual, rights, if they are to extend equally and justly to indigenous peoples and people.²⁴

A. Structure of Argument

The structure of the Article roughly follows this sequence in the argument. The first Part considers a consistent judicial misrecognition of Native American religious freedom claims to sacred lands heretofore as those merely of individual practitioners, through a consideration of major First Amendment cases and those weighing the corresponding statutory protections of the RFRA. This Part also examines contemporary discussions of an institutional turn in religious freedom law to help suggest that the judicial misrecognition is not inevitable in religious freedom law.

The second Part considers the shape of legislative accommodations specific to Native American communities under

23. Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668–668(d) (2012).

24. G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

statutes like the American Indian Religious Freedom Act (AIRFA), NAGPRA, and a number of administrative accommodations. In this Part, I argue that these statutes and regulations are properly understood as clarifications that religious accommodations for Native communities will conform more to the collective contours of federal Indian law than to the individual conscience contours of religious freedom law.

The third Part considers how courts have recognized the often collective shape to Native claims under such Native specific legislative and administrative religious accommodations, especially those under the Bald and Golden Eagle Protection Act.

The fourth Part considers how a more consistent approach to Native American religious freedom in the register of collective rights conforms to emerging norms of international law spelled out in the *United Nations Declaration on the Rights of Indigenous Peoples*.²⁵

The fifth and final Part concludes that an elaboration of the group rights of Native American religious freedom can draw support from the Supreme Court's 2014 recognition, in *Hobby Lobby*, that religious liberty rights can pertain to certain kinds of collectivities.

I owe a particular debt here to the work of Kristen Carpenter, who argues that, in American Indian religious freedom cases, courts worried about potential "slippery slopes" of concern in other minority religious freedom cases consistently overlook the internal "limiting principles" of indigenous religions that accompany virtually any claims that Native communities *qua* communities make, thus exaggerating the potentially unlimited nature of individual claims.²⁶ Carpenter views as a welcome development legislative and administrative accommodations in the wake of failed religious freedom claims in the courts, but she observes that such accommodations are always balanced against a range of other, often very powerful, non-Indian stakeholder interests.²⁷

25. *Id.*

26. Kristen A. Carpenter, *Limiting Principles and Empowering Practices in American Indian Religious Freedoms*, 45 CONN. L. REV. 387 (2012) [hereinafter Carpenter, *Limiting Principles*]; Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022 (2009); see also Skibine, *supra* note 16.

27. Carpenter, *Limiting Principles*, *supra* note 26, at 436-76.

With a general preference for the nation-to-nation and consultative model over that of the legislative-administrative accommodations model, together with a strong argument for the cultural property rights of tribes to sacred places, Carpenter implies, but does not expressly argue, that Native claims under the broader religious freedom protections of the First Amendment, RFRA, and RLUIPA, can and ought to be viewed in light of their collective nature.

In these pages, I wish to build on and extend Carpenter's work, to argue that Native religious freedom claims can gain further traction under the protections of the First Amendment, RFRA, and RLUIPA if those claims are construed as not merely individuals asserting rights of conscience but as collective rights. Of course, prevailing political theory in the liberal tradition, and not surprisingly most First Amendment jurisprudence, regards religious freedom, like the right to free speech, expression, and even assembly, as a right of individual citizens. But as a number of religious liberty scholars have argued, there are some compelling ways to think of the religious liberty of groups.²⁸

B. Timeliness of Argument in Light of Hobby Lobby

My argument draws sustenance as well from the Supreme Court's 2014 ruling in *Burwell v. Hobby Lobby, Inc.*, recognizing the religious freedom rights of a closely held for-profit corporation in its challenge to the contraceptive coverage mandate of the Affordable Care Act.²⁹ Importantly, the Court recognized the religious freedom of the corporation itself, a form of collective right expressly distinguished from the religious freedom rights of its aggregate members.³⁰ The Supreme Court's approach to RFRA in *Hobby Lobby* as a bold extension beyond the Court's jurisprudence under the First Amendment's Free Exercise Clause, together with its finding that closely held corporations have religious freedom rights, are departures that very well could carry some significant implications for courts' future reckoning with religious freedom claims by Native American communities, not simply as

28. See *infra* note 80.

29. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

30. *Id.*

aggregations of individuals or as analogues to religious congregations, but as forms of collective organization.

Although the *Hobby Lobby* majority insisted otherwise, it was a holding of what Justice Ginsburg, in dissent, called “startling breadth” in terms of its recognition of RFRA’s expansive reach.³¹ That breadth, that departure, is seen keenly when juxtaposed to a weighty appellate court decision that RFRA did not protect the claims of six American Indian nations to a sacred mountain, despite a district court holding in a different circuit that did find a RFRA protection for sacred lands.³²

In *Navajo Nation v. United States Forest Service (The San Francisco Peaks Case)*, 2008, the Ninth Circuit, sitting *en banc*, overrode its three-judge-panel decision to affirm federal approval of a scheme to spray treated sewage effluent from the City of Flagstaff as artificial snow to enhance recreational skiing on Arizona’s San Francisco Peaks, despite the claims by the Navajo, Hopi, and four other tribes that in thus desecrating their holy mountain, the Forest Service would violate their religious freedom rights under RFRA.³³ The Ninth Circuit majority indicated its holding did not question the sincerity of the asserted religious convictions or the ill effects of the sewage-to-snowmaking scheme that native practitioners would “feel,” but in a decision that had plenty to say about the nature of religion, the Ninth Circuit distinguished diminished “spiritual fulfillment” from a “substantial burden” on “religious exercise” under RFRA.

To settle the proper interpretation of “substantial burden” under the statute, the legal question at issue in the case, the Ninth Circuit turned to the Supreme Court’s 1988 holding in *Lyng v. Northwest Cemetery Protective Ass’n*, which found no First Amendment violation of the religious freedom of three California tribes when the U.S. Forest Service approved a logging road through a sacred precinct necessary for cosmic renewal ceremonies.³⁴ The High Court in *Lyng* took pains to acknowledge

31. *Id.* at 739 (Ginsburg, J., dissenting).

32. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008), *cert. denied*, 556 U.S. 1281 (2009); *Comanche Nation v. United States*, 393 F. Supp. 2d 1196 (W.D. Okla. 2008).

33. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058.

34. *Lyng v. Nw. Cemetery Protective Ass’n*, 485 U.S. 439 (1988).

both the sincerity of the tribal claims and to acknowledge the road would surely cause “spiritual disquiet,” but found no prohibition of free exercise of religion under the First Amendment because the government action had not coerced practitioners to depart from their religion.³⁵

Although the facts aligned – tribal sacred land claims on public lands – the Ninth Circuit dissent in the *San Francisco Peaks Case* took issue with whether *Lyng* should be controlling for an interpretation of RFRA, given Congress’s concerns in enacting RFRA in the first place. Be that as it may, I take the two cases as a starting point for this analysis because both decisions involve tribes as litigants and accept the factual findings about the sincerity and shape of the collective religious obligations and ceremonial duties on those sacred places. But in their conclusions, both cases flatten those collective claims on the one hand, into claims about spirituality of individual practitioners, and on the other project those specific claims into a potential slippery slope of idiosyncratic challenges by individuals claiming Native American religion as the basis for any number of claims. Despite a more expansive interpretation of Congress’s intent in RFRA on the matter in question in the Tenth Circuit,³⁶ the Supreme Court denied certiorari in the *San Francisco Peaks Case*, and Native efforts to protect access and integrity of sacred places on public lands have since struggled to gain traction in U.S. courts.³⁷

In *Hobby Lobby*, however, the Supreme Court did offer a considerably more expansive interpretation of RFRA. There, the Court held that Congress, in RFRA, intended to include closely held for-profit corporations in its definition of “persons” capable of protected “religious exercise.”³⁸ In *Hobby Lobby*, the Court found that the protected religious exercise in question was that of the closely held private corporation, one with over 13,000 employees, and not simply the individual members of the Green family who operate the corporation in a manner consistent with their evangelical Christian beliefs.

35. *Id.* at 452.

36. *Comanche Nation*, 393 F. Supp.2d 1196.

37. *See, e.g., Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs (Standing Rock II)*, 239 F. Supp. 3d 77 (D.D.C. 2017).

38. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 708 (2014).

Although the two sacred lands cases and Hobby Lobby's challenge to the Affordable Care Act present issues that are hardly identical, the contrast in the Court's findings about the relevance of RFRA is striking. This goes to the heart of a double standard – not simply an intellectual difficulty with the distinctive contours of Native American religions but a consistent and thorough misrecognition of Native claims to protect sacred places, practices, objects, ancestral remains, and other elements of cultural heritage.

I. JUDICIAL MISRECOGNITION OF NATIVE AMERICAN RELIGIOUS FREEDOM CLAIMS

As the dissenting opinions in both *Lyng* and the *San Francisco Peaks Case* make plain, courts have clearly not fully understood the distinctive facets of Native American religions, especially religious relationships to land. It is not easy to shoehorn the distinctive traits of Native American traditions of sacred land, peoplehood, and ways of life into the category of religion as it has been conventionally understood in the West and conceptually bounded in the discourses of the law. Native religions are many, not one, often with widely divergent beliefs even in one community. They are decidedly oral. They are oriented toward sacred lands in ways that defy most Christian analogies. They are integrated with other, less visibly religious, aspects of lifeways where the "sacred" is not clearly set apart from "profane" matters of economic livelihood or political organization. Religious beliefs and practices are often markedly local, rather than generally universal propositions disaggregated from everyday life on a particular landscape – no one tries to convert you to the Lakota religion, for example. Native religious freedom claims have typically involved forcibly -interrupted traditions, and efforts to renew those traditions have often prompted challenges to their "authenticity." Indeed, there is considerable legal literature that takes note of these distinctive contours.³⁹

39. See, e.g., LLOYD BURTON, *WORSHIP AND WILDERNESS: CULTURE, RELIGION, AND LAW IN THE MANAGEMENT OF PUBLIC LANDS AND RESOURCES* (2002); HUSTON SMITH, *A SEAT AT THE TABLE: HUSTON SMITH IN CONVERSATION WITH NATIVE AMERICANS ON RELIGIOUS FREEDOM* (Phil Cousineau ed., 2006); Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 VT. L. REV. 145 (1996);

I contend, however, that these intellectual difficulties are not driving the contrast between judicial interpretation of RFRA in the *San Francisco Peaks Case* and in *Hobby Lobby*. The driving issue, I believe, is a reluctance to reckon more fully with the collective nature of most Native religious freedom claims. Even Judge Fletcher's dissent in the *San Francisco Peaks Case* and Justice Brennan's in *Lyng*, for all their spirited chastening of the fundamental misunderstanding of the workings of Native American religious claims to sacred lands, fail to address the collective nature of the claimants themselves. Tribes, not individual practitioners, and collective obligations, not individual piety, form the basis of the claims.

A. First Amendment

The two key Supreme Court decisions on Native religious practice have been flagship cases by which the Rehnquist Court contained the reach, generally, of the First Amendment's free exercise protection. In its 1988 decision in *Lyng v. Northwest Cemetery Protective Ass'n*, the High Court upheld Forest Service approval of a logging road through California high country considered to be a sacred precinct to several Native nations.⁴⁰ The Supreme Court granted the sincerity of Yurok, Karok, and Tolowa beliefs about the high country, but reasoned that no religious exercise was unconstitutionally burdened by the government action.⁴¹

The Supreme Court built on *Lyng* in the 1990 case *Employment Division v. Smith*, where it found no First Amendment violation in the denial of unemployment benefits to two chemical dependency counselors fired for their involvement in the Native American Church.⁴² This was despite broad recognition in the courts of the Peyote Way as a bona fide religion and, in the case of the respondents in *Smith*, as a keystone of their own sobriety.⁴³

Howard J. Vogel, *The Clash of Stories at Chimney Rock: A Narrative Approach to Cultural Conflict over Native American Sacred Sites on Public Land*, 41 SANTA CLARA L. REV. 757 (2001).

40. *Lyng*, 485 U.S. 439.

41. *Id.* at 449–50.

42. *Emp't Div. v. Smith*, 494 U.S. 872 (1990).

43. *Id.*

Although a century of efforts in legislatures and courts had secured a solid recognition of the Native American Church as a disciplined moral tradition that involved sacramental ingestion of peyote, the Court transformed forty thousand devout practitioners of the Peyote Way into felons overnight.⁴⁴ The *Smith* decision is known for nullifying First Amendment challenges to “neutral laws of general applicability,” even when a government action has the effect of prohibiting religious exercise.⁴⁵ *Lyng* and *Smith* not only settled the particular questions at hand; they also foreclosed countless other Native American cases that might have come before courts. Native communities were not alone in their concern with the implications of the Supreme Court’s decision in *Smith*. First Amendment and religious organizations spanning the entire culture-wars spectrum came together and pressed Congress for a response to *Smith*, which they attained in the 1993 Religious Freedom Restoration Act (RFRA). However, the broad coalition that pressed for RFRA decidedly left the Native peyotist practices specifically at issue in *Smith* out of the statutory rejoinder to the decision, no doubt concerned that trying to right the particular wrong about the Peyote Way would jeopardize the coalition. As discussed below, Peyote Way practitioners secured their own statutory protections one year later, and the difference between RFRA and that result, an amendment to the American Indian Religious Freedom Act (AIRFA), is crucial to my purposes.⁴⁶

B. Religious Freedom Restoration Act

In RFRA, Congress expressly sought to restore what the Supreme Court in *Smith* had taken away: the application of judicial strict scrutiny to government actions, including neutral, generally applicable ones, that substantially burden religious exercise. The return to Supreme Court jurisprudence prior to *Smith* restores judicial interpretation of compelling state interest as “only those interests of the highest order.”⁴⁷

44. See MAROUKIS, *supra* note 12.

45. *Smith*, 494 U.S. at 901.

46. See *infra* note 140.

47. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

The Supreme Court returned the volley four years later, finding RFRA unconstitutional as applied to the states.⁴⁸ This prompted a number of state legislatures to enact their own RFRA statutes, and Congress itself passed the more narrowly tailored Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2000. Among other things, RLUIPA included an amendment to RFRA's definition of "religious exercise," more expansively including "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."⁴⁹ The Supreme Court affirmed RFRA's constitutionality with respect to federal laws in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* (2006), suggesting RFRA held considerable promise for Native American religious challenges to the many federal actions regulating their lives.⁵⁰

But even with the leg up offered by RFRA and the even more expansive definition of religious exercise included in RLUIPA, Native claims to sacred land protection under RFRA have generally failed because they have been largely foreclosed by the Ninth Circuit's decision in the *San Francisco Peaks Case*. There, the Ninth Circuit found that federal approval of an Arizona ski resort's plan to spray artificial snow made with treated sewage effluent did not "substantially burden" the religious exercise of the Navajo, Hopi, and other tribes who regard the San Francisco Peaks as a sacred mountain.⁵¹ The Ninth Circuit accepted ninety-odd detailed factual findings about the complex religious practices and beliefs associated with the San Francisco Peaks massif. Some of those beliefs, like Navajo concerns about contamination from water that had been in contact with the dead discharged from mortuaries and hospitals, were impervious to assurances of the purity of the water

48. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

49. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc-2000cc-5 (2018).

50. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

51. *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir., 2008), *cert. denied*, 556 U.S. 1281 (2009). An alternative finding by a lower court within the Tenth Circuit appealed to that circuit's RFRA precedent and expressly rejected the government's request to invoke the Ninth Circuit interpretation of substantial burden in *Navajo Nation*. It found a RFRA substantial burden because the development of a building at Fort Sill would obstruct a traditional view of Medicine Bluffs, a sacred site to the Comanche, and would significantly inhibit the "spiritual experience" of tribal members. *Comanche Nation v. United States*, 393 F. Supp. 2d 1196 (W.D. Okla. 2008). Still, as of this writing, no appellate court has risen to challenge the Ninth Circuit's view in *Navajo Nation* that tribes have no viable RFRA claims for threatened sacred sites.

measured in terms of parts per million. But the *en banc* majority determined that religious exercise was not “substantially burdened” under a narrow interpretation of what Congress meant by substantial burden in its passage of RFRA. The Ninth Circuit rejected a broader construal urged by the tribes in the case and engaged by the Tenth Circuit, and viewed “substantial burden” as a term of art referencing the Supreme Court’s pre-*Smith* First Amendment jurisprudence. Specifically, the Ninth Circuit majority applied the Court’s interpretation of “burden” from the *Lyng* decision—which of course involved claims under the First Amendment, not under RFRA—but which was found to be a controlling pre-*Smith* decision. This view prevailed over the argument that *Lyng*, cited centrally in *Smith* just two years later, was tantamount to the *Smith* jurisprudence that RFRA was clearly enacted to address. Instead of finding that religious exercise was substantially burdened, the Ninth Circuit found that merely the possibilities for “spiritual fulfillment” were “diminished.”⁵²

One could rightly argue that the transmutation of religious exercise into spiritual fulfillment is precisely what is likely to happen when complex land-based and intrinsically collective Native American traditions are assimilated conceptually within a discourse of religious freedom that naturalizes and universalizes Protestant Christian traditions of the interior, subjective and unmediated relationship between the faithful individual and God. If this is true, then the *San Francisco Peaks Case*, especially given the Supreme Court’s consideration and rejection of a petition for appeal, is perhaps a final nail in the coffin. As Judge Fletcher wrote in the Ninth Circuit’s original three-judge-panel ruling for the tribes, effectively drawing a line in the sand:

The Court in *Lyng* denied the Free Exercise claim in part because it could not see a stopping place. If Appellants do not have a valid RFRA claim in this case, we are unable to see how any Native American plaintiff can ever have a successful RFRA claim based on beliefs and practices tied to land that they hold sacred.⁵³

52. *Navajo Nation v. U.S. Forest Serv.*, 535 F. 3d at 1063.

53. *Navajo Nation v. U.S. Forest Service*, 479 F.3d 1024, 1048 (9th Cir. 2007), *rev'd in part en banc.*, 535 F. 3d. 1058 (9th Cir. 2008).

C. “Native Spirituality” and the Subversion of Religious Freedom
in *Lyng* and Navajo Nation

Other scholars have provided extensive analyses of the *Lyng* decision from a variety of important critical perspectives,⁵⁴ and elsewhere I provide a more detailed analysis of the workings of the discourse of spirituality in the *San Francisco Peaks Case*.⁵⁵ Here, I will only observe that while the First Amendment claims in *Lyng* and the RFRA claims in the *San Francisco Peaks Case* were those of tribes to sacred lands with attendant collective religious duties and obligations, the Supreme Court in *Lyng* and the Ninth Circuit in the *San Francisco Peaks Case* flattened those collective claims into those of so many individuals exercising a kind of protean “spirituality.”

The provenance of this judicial analysis harks back to the *Lyng* majority’s turn to a controlling, if only loosely related, 1986 Supreme Court decision. In *Bowen v. Roy*, the High Court found that a government requirement of a Social Security number for access to social services did not violate the religious freedom of an individual who claimed, as a matter of Native American religious belief, that having such a number would harm the spirit of his child.⁵⁶ While *Lyng*, like *Roy*, involved Native American religious claims, the analogical alignment that the *Lyng* majority saw in the two cases is dubious. *Roy* involved the claims of an individual, one with few connections to Native communities or teachings established by Native communities; *Lyng* involved tribal governments connecting religiously necessary collective obligations to a specific sacred place.

The courts took pains not to dispute the sincerity of the religious claims involved, but the *Lyng* and *Navajo Nation* courts viewed those claims as matters of subjective feeling, and the effect of the government actions as only matters of “diminished spiritual

54. See, e.g., Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061 (2005); Skibine, *supra* note 16; Vogel, *supra* note 39.

55. Michael D. McNally, *From Substantial Burden on Religion to Diminished Spiritual Fulfillment: The San Francisco Peaks Case and the Misunderstanding of Native American Religion*, 30 J.L. & RELIGION 36 (2015).

56. *Bowen v. Roy*, 476 U.S. 693 (1986).

fulfillment.” Even the spirited dissent by Justice Brennan in *Lyng*⁵⁷ and the lengthy, elaborately substantiated dissent by Judge Fletcher in *Navajo Nation*, for all their concern that the majorities had entirely misunderstood the nature and reach of Native American religions, did not challenge the underlying definitional assumption that religion is, in essence, a subjective matter.⁵⁸ Citing William James’s definition of religion as “the feelings, acts, and experiences of individual men [and women] in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine,” Judge Fletcher asserts “[r]eligious exercise sometimes involves physical things, but the physical or scientific character of these things is secondary to their spiritual and religious meaning. The centerpiece of religious belief and exercise is the ‘subjective’ and the ‘spiritual.’”⁵⁹ Fletcher’s view surely pertains to many contemporary religious phenomena, but, as I discuss below, religious studies scholars would hardly content themselves with such a view of an essence or even a thus configured “centerpiece” of religion.

More insidious still in these two cases is the slippage from the language of religion to a language of spirituality, and specifically nature spirituality, which is ineluctably subjective in mode, protean in texture, and in the case of claims to “sacred lands,” oriented toward “nature” in general rather than involving highly specific duties, obligations, and regulations with regard to highly specific places. Title I of the Navajo Nation’s own legal code codifies respect toward San Francisco Peaks and the other holy mountains that define Navajo land.⁶⁰ But the Ninth Circuit majority could only see

57. Justice Brennan argued in dissent that the majority had fundamentally misunderstood the idioms of Native religions. He doubted that the Native people would “derive any solace from the knowledge that although the practice of their religion will become ‘more difficult’ as a result of the Government’s actions, they remain free to maintain their religious beliefs.” *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 477 (1988) (Brennan, J., dissenting). “Given today’s ruling,” Justice Brennan continued, “that freedom amounts to nothing more than the right to believe that their religion will be destroyed.” *Id.*

58. *Lyng*, 485 U.S. at 470–71, 474–77 (Brennan, J., dissenting); *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1096 (9th Cir., 2008), *cert. denied*, 556 U.S. 1281 (2009).

59. *Navajo Nation v. U.S. Forest Service*, 535 F.3d at 1096 (Fletcher, J., dissenting) (citing WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* 31–32 (1929)).

60. *Navajo Nation Code Ann.* tit. 1, § 205 (B)–(D) (2010).

the accepted factual findings before it as constituting a nebulous mountain piety, one that had arguably been facilitated, in terms of access, by the ski resort's improvements.⁶¹ To inform its contention that Native claims to "spiritual fulfillment" would have no stopping place, the Ninth Circuit majority noted that the Coconino National Forest in question involves "approximately a dozen" mountains sacred to various tribes, as well as other landscapes "such as canyons and canyon systems, rivers and river drainages, lakes, discrete mesas and buttes, rock formations, shrines, gathering areas, pilgrimage routes, and prehistoric sites."⁶² The district court's factual findings in the case included a finding that the White Mountain Apaches, one of the plaintiff tribes, had made snow at Sunrise, a ski area they operate on a mountain on their reservation, with water from a lake that includes discharged treated wastewater.⁶³ The district court judge hastened to observe that one witness testified that Apaches held the entire White Mountain reservation to be sacred, and also that the ski area was one of the two major ski areas in Arizona and potentially in competition with the Snowbowl on San Francisco Peaks.⁶⁴ Thus conflating all mountains and all landscapes as sacred to the White Mountain Apaches, and blending all the complicated distinctions in belief and practice made by a sophisticated religious tradition into a single claim of Native spirituality that all nature is sacred, and hinting that some claims could be opportunistic or disingenuous, the district court could impugn the full reach of the burden on religion by the *San Francisco Peaks Case*.⁶⁵

In a telling, footnoted exchange with the dissent on the question of the subjective nature of religion, the Ninth Circuit majority wrote:

For all of the rich complexity that describes the profound integration of man and mountain into one, the burden of the recycled wastewater can only be expressed by the Plaintiffs as damaged spiritual feelings. Under Supreme Court precedent,

61. *Id.*

62. *Navajo Nation v. U.S. Forest Service*, 535 F.3d at 1066 n.7.

63. *Navajo Nation v. U.S. Forest Service*, 408 F. Supp. 2d 866, 897-98 (D. Ariz. 2006).

64. *Id.* at 898.

65. *Navajo Nation v. U.S. Forest Service*, 535 F.3d at 1066.

government action that diminishes subjective spiritual fulfillment does not 'substantially burden' religion.⁶⁶

In the case of *Lyng*, Justice O'Connor's majority opinion expressed a related concern about a slippery slope: if the Court recognized any one First Amendment claim to a sacred site by peoples deemed to regard everything as sacred, where would the subsequent claims end? "However much we might wish that it were otherwise," Justice O'Connor wrote, "government simply could not operate if it were required to satisfy every citizen's religious needs and desires."⁶⁷ "Spiritual fulfillment" as a species of religious exercise can be hindered without violating the Constitution, a potentiality that cannot serviceably define the realm of religious freedom protection because it implies no stopping place.

D. Religion as a Collective Category: Religious Studies Theory and First Amendment Law

A second development that emboldens the argument that Native religious claims should be considered assertions of collective rights is the recent critical turn in my own field, religious studies, and the lens this critical turn offers for interpreting some moments in formative judicial decisions on First Amendment religious freedom claims. For while the prevailing view of the First Amendment sees its religious rights as consisting chiefly of the inviolability of individual conscience as a tenet of liberal political philosophy, it does not comport with the best of religious studies thinking. Neither is it an unambiguous view of the First Amendment religion clauses, as a range of religious freedom scholars have increasingly argued in recent decades. I turn now to some core debates within the study of religion which, by their very presence, should make quick work of the intellectual surety of the often-implicit judicial pronouncements on the nature of religion.

Although scholars of religion for at least a century have not been able to agree on precisely what religion is, one thing most contemporary scholars of religion agree upon is that one cannot take as *given* what religion is. Especially in the last fifty years, the

66. *Id.* at 1070 n.12.

67. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988).

field of religious studies has organized itself as a conversation around the constructed nature of the category of religion. The eminent University of Chicago scholar, Jonathan Z. Smith, put the matter this way:

[W]hile there is a staggering amount of data, of phenomena, of human experiences and expressions that might be characterized in one culture or another, by one criterion or another, as religious—there is no data for religion. Religion is solely the creation of the scholar's study. It is created for the scholar's analytic purposes by his imaginative acts of comparison and generalization.⁶⁸

But the critical turn has extended beyond merely disclosing the making of “religion” as a category and raised awareness of how that making has served ongoing European and American projects of colonization and imperialism abroad and Protestant hegemony at home.⁶⁹ Scholars whose reference points for the negotiation of religious difference extend beyond the modern West to Islamic societies remind us of how culturally specific the liberal secularism touted as universal is and how many other discursive alternatives to “religious freedom” have addressed questions of religious diversity within a common polity.⁷⁰

Religious studies scholars have in recent decades turned critical attention to the historical emergence of the category of “religion” and its corollary, “religions.” Arguing not only that there is no “given” category of religion, much less a settled definition of such a given category, a position made some time ago by Wilfred Cantwell Smith, these scholars describe the “production” of the category and its uses in the dense social, economic, and political contexts of the West's colonialization and empire.⁷¹ Emerging from

68. JONATHAN Z. SMITH, *IMAGINING RELIGION: FROM BABYLON TO JONESTOWN* at xi (1982) (emphasis omitted).

69. See, e.g., TOMOKO MASUZAWA, *THE INVENTION OF WORLD RELIGIONS: OR, HOW EUROPEAN UNIVERSALISM WAS PRESERVED IN THE LANGUAGE OF PLURALISM* (2005); RUSSELL T. MCCUTCHEON, *MANUFACTURING RELIGION: THE DISCOURSE ON SUI GENERIS RELIGION AND THE POLITICS OF NOSTALGIA* (1997); ROBERT A. ORSI, *BETWEEN HEAVEN AND EARTH: THE RELIGIOUS WORLDS PEOPLE MAKE AND THE SCHOLARS WHO STUDY THEM* (2005).

70. See TALAL ASAD, *GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM* (2009); SABA MAHMOOD, *POLITICS OF PIETY: THE ISLAMIC REVIVAL AND THE FEMINIST SUBJECT* (2005).

71. WILFRED CANTWELL SMITH, *THE MEANING AND END OF RELIGION* (1963).

Protestant theology and encounters with “world religions,” earlier generations of religious studies scholars regarded differences between traditions as the distinctive phenomena of a universal pan-human category of religion; the process of defining “religion” was part of a project of differentiating “good,” universal, spiritual, tolerant religion from bad, sectarian, material, tribal, or nationalistic commitments.

There has been a long-standing tension in theory of religion between those stressing religion’s elementally social or collective character, notably in the tradition of French sociologist Emile Durkheim or in the German critical tradition of Karl Marx, and those stressing its grounding in the subjective experience of the individual. Such theoretical insights took deeper root in Europe in the late nineteenth and twentieth centuries than they did in the United States, which boasted a relative flourishing of voluntary religion, propelled by powerful religious experience. But as scholars in religious studies have amply shown, the shape of American religion—and no less the definitional shape that religion took in American courts—was also part of a process of secularization, one which privileged the religious exercise of some, namely Protestants, over that of others, especially Roman Catholics.⁷²

Although courts were not a principal arena for the management of religious diversity in the United States until the 1940s, American religious historians observe that the discourse of religious freedom privileging individual, private belief over corporate practice was well honed in nineteenth century efforts to restrict the reach of Roman Catholic institutions, especially parochial schools.⁷³ Ironically, the discourse of religious freedom was that which authorized discrimination against the religious freedom of Catholics, since the Roman Catholic Church was deemed, despite considerable internal disagreement on the issue,

72. WILLIAM R. HUTCHISON, *RELIGIOUS PLURALISM IN AMERICA: THE CONTENTIOUS HISTORY OF A FOUNDING IDEAL* (2004).

73. See FINBARR CURTIS, *THE PRODUCTION OF AMERICAN RELIGIOUS FREEDOM* (2016); TRACY FESSENDEN, *CULTURE AND REDEMPTION: RELIGION, THE SECULAR, AND AMERICAN LITERATURE* (2007); DAVID SEHAT, *THE MYTH OF AMERICAN RELIGIOUS FREEDOM* (2011); TISA WENGER, *RELIGIOUS FREEDOM: THE CONTESTED HISTORY OF AN AMERICAN IDEAL* (2017).

to be monolithically against religious freedom and global in reach. For example, in a series of deeply anti-Catholic “Blaine Amendments” to state constitutions, governments were forbidden from any funding of parochial schools.⁷⁴

Indeed for scholars who, like Winnifred Fallers Sullivan, are deeply informed by this scholarship, there is no lack of skepticism that religious liberty, because of the particular instability of the category of religion, can be a meaningful discourse for the protection of freedoms for religious practitioners.⁷⁵ Indeterminacies aside, much of the recent scholarship at the juncture of religious studies, culture, and law has been so focused on the power inequities maintained by the discourse of religious freedom to have seemingly moved well *beyond* religious freedom as a viable strategy.⁷⁶

But it is precisely this religious studies insight into the discourse of religious freedom—the exclusions encoded into its presumed universalism, and the exclusions felt sharply in *Lyng*, and *Smith*—that emboldens me to think about how that discourse can be trained in new directions. For discourses don’t just function as airtight expressions of colonizers’ wishes; they involve contradictions, trade-offs, and in the end, consent, to continue to work. And as discourses go, that of religious freedom will not be disappearing anytime soon. Because it is ensconced in the first clauses of the Bill of Rights, “religion” will long be a term of power. For the student of religion, the category is never given, never natural; its meaning has shifted with time, and by extension, is plastic enough to countenance new possibilities.

74. See Press Release, U.S. Comm’n on Civil Rights, School Choice: The Blaine Amendments & Anti-Catholicism (June 1, 2007), <http://www2.law.umaryland.edu/marshall/usccr/documents/cr182b7620072.pdf>; Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38 (1992).

75. Winnifred Fallers Sullivan, *Religion Naturalized: The New Establishment*, in AFTER PLURALISM, 94–95 (Courtney Bender & Pamela Klassen eds., 2010); see also WINNIFRED FALLERS SULLIVAN, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* (2007); WINNIFRED FALLERS SULLIVAN, *PRISON RELIGION: FAITH-BASED REFORM AND THE CONSTITUTION*, (2011).

76. ELIZABETH SHAKMAN HURD, *BEYOND RELIGIOUS FREEDOM: THE NEW GLOBAL POLITICS OF RELIGION* (2013); *POLITICS OF RELIGIOUS FREEDOM* (Winnifred Fallers Sullivan et al. eds., 2015); ANNA SU, *EXPORTING FREEDOM: RELIGIOUS LIBERTY AND AMERICAN POWER* (2016).

E. Church Autonomy

Even beyond Native religious claims, there are moments in the mainstream of religious freedom jurisprudence where the courts have defined religion in ways that suggest not only the social fact but perhaps the legal force of religion's elementally collective nature. Although the liberal political philosophy undergirding the civil liberties in the Bill of Rights seems plain enough at first glance, the dissenting traditions of the radical reformation that informed the founders' approach to religion were decidedly communal. There is considerable contemporary debate among religious freedom scholars whether the First Amendment religion clause extends to protect the autonomy or religious freedom of churches and religious institutions, and if so, whether those protections pertain to the institution itself or are derivative of the rights of individual members.⁷⁷ And the Supreme Court's *Hobby Lobby* decision has amplified this debate in the context of RFRA.⁷⁸

In the 1980s, there was a period of considerable scholarly exchange on this question. Douglas Laycock identified a thread of First Amendment protection for what he called "church autonomy," drawing on a tradition of judicial deference in church property disputes.⁷⁹ Courts came to settle those cases by generally deferring questions of orthodoxy to the denominational juridical structures themselves.⁸⁰ In the 1980s, cases developing an interpretation of the "ministerial exception" to anti-discrimination

77. See, e.g., Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981); Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 99 WIS. L. REV. 99 (1989). For the problematic nature of trying to stabilize religious claims by deference to religious institutions, see Winnifred Fallers Sullivan, *Why Distinguish Religion, Legally Speaking?*, 51 SAN DIEGO L. REV. 1121 (2014).

78. See THE RISE OF CORPORATE RELIGIOUS LIBERTY (Micah Schwartzman et al. eds., 2016).

79. Laycock, *supra* note 77; see also, Frederick Schauer, Comment, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 85-86 (1998); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005).

80. This same reasoning would later inform some judicial regard that what congregations or dioceses did with their property was itself protectable religious free exercise, and this view was codified in the Religious Land Use and Institutionalized Persons Act of 2000, which clarified that what collective religious entities chose to do with their worship spaces was properly to be understood as religious exercise. 42 U.S.C. § 2000cc-5(7)(A).

statutes raised the question of where individual rights to religious free exercise end and where the rights of religious organizations begin. In *Corporation of Presiding Bishop v. Amos*, the Supreme Court had upheld the First-Amendment-rights logic of religious exemptions from the reach of anti-discrimination laws in particular situations.⁸¹ In *Amos*, a custodian at a Mormon facility was dismissed for failing to receive a “temple recommend,” a formal church commendation of conduct, and the Court held that the religious exemption from Title VII of the Civil Rights Act did not violate the Establishment Clause.⁸² In an article concerned with a liberal secularist bias against the rights of religious groups to self-definition, Frederick Gedicks argued that such cases “should be resolved by deferring to the group, even at the cost of infringing upon important individual and government anti-discrimination interests.”⁸³ Gedicks’s recognition that group rights extends beyond a social contract notion that groups’ rights are inferred from the rights of individuals was not meant to be illiberal. “[C]onstitutional recognition of a strong right of religious group autonomy in making membership decisions,” he argued, “is necessary to preserve religious pluralism and the individual autonomy that is at the heart of liberalism.”⁸⁴

The discussion of church autonomy was renewed in the wake of *Hosanna Tabor v. EEOC*, a 2012 Supreme Court ruling where a “ministerial exception” to employment provisions of the Americans with Disabilities Act was found to protect a Lutheran school from the claims of a dismissed teacher, even though the nature of her work was not primarily religious because she was a “called teacher,” as opposed to a “lay teacher,” and because the church claimed they trained her as a minister and considered her one.⁸⁵ Extrapolating from what the majority opinion considered a

81. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

82. *Id.*

83. Gedicks, *supra* note 77, at 105.

84. *Id.* at 105-06.

85. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC (Hosanna-Tabor)*, 565 U.S. 171 (2012); Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 328 (1990). See, e.g., PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* (2013); Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 NW. L. REV. COLLOQUY 175 (2011); Alan Brownstein, *Protecting the Religious Liberty of Religious Institutions*,

long history of government deference going back to the Magna Carta, the Court deferred in the case to a religious institution's own definitions for what constitutes a "minister" for the religious purposes it alone defines.⁸⁶

Richard Schragger and Micah Schwartzman took issue with a developing "religious institutionalism" in First Amendment thought. "Institutions do not, in themselves, give rise to any distinctive set of rights, autonomy, or sovereignty," they argued. "[W]hat might be called institutional or church autonomy is ultimately derived from individual rights of conscience."⁸⁷

Others welcomed *Hosanna Tabor* as "a clear case for the Church."⁸⁸ For Richard Horwitz, the decision signaled an "institutional turn" that need not rely on the unique rights of religious institutions but nonetheless asserts that religious institutions perform a "distinctive function." Religious "institutions are a constitutionally significant element of our infrastructure of public discourse," Horwitz writes, "not as God-given or 'natural,' but simply as important and well established These institutions developed alongside, and in some cases preexisted, the liberal state itself, and have long been coordinate parts of our broader social structure. The state—and its limits—formed with these institutions in mind. No mysticism is required to suggest that this might be constitutionally relevant."⁸⁹

As will be discussed below, *Hobby Lobby* introduces a Supreme Court holding that closely held private corporations have rights to the free exercise of religion that are distinct from the individual religious liberty rights of individual owners. But before we depart

21 J. CONTEMP. LEGAL ISSUES 201, 206 (2013); Richard W. Garnett, "The Freedom of the Church": (Towards) An Exposition, Translation, and Defense, 21 J. CONTEMP. LEGAL ISSUES 33 (2013); Paul Horwitz, *Defending (Religious) Institutionalism*, 99 VA. L. REV. 1049 (2013); Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 HARV. J.L. & PUB. POL'Y 821 (2012).

86. *Hosanna-Tabor*, 565 U.S. 171, 182–83 (2012).

87. Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 920 (2013). For some scholars, *Hosanna-Tabor* produced the right result, but less on the grounds of the Religion Clauses of the First Amendment than on the Assembly and other clauses. See, e.g., Ashutosh Bhagwat, *Religious Associations: Hosanna-Tabor and the Instrumental Value of Religious Groups*, 92 WASH. U. L. REV. 73 (2014); John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. 787 (2014); John D. Inazu, *The Freedom of the Church (New Revised Standard Version)*, 21 J. CONTEMP. LEGAL ISSUES 335 (2013).

88. Douglas Laycock, *Hosanna-Tabor and the Ministerial Exception*, 35 HARV. J.L. & PUB. POL'Y 839, 840 (2012).

89. Horwitz, *supra* note 85, at 1052.

from a discussion of the question of group rights to religious freedom under the First Amendment, we should attend to the 1972 Supreme Court decision that perhaps makes the most apt case for a more expansive view of Native American religious freedom as a group right.

The Supreme Court's decision in *Wisconsin v. Yoder*, widely acknowledged as the high-water mark of Free Exercise Clause jurisprudence, presented sufficient ambiguity to generate an important exchange about whether the First Amendment protected the rights of groups to religious liberty. The details of the case offer some sound analogies for collective rights of Native American religious freedom. Yoder was an Amish father who, along with two other families, was prosecuted for refusing to enroll children in public schools after eighth grade, per Wisconsin's compulsory education law.⁹⁰ The families took the issue to the courts, claiming that Wisconsin's law violated their free exercise of religion, and ultimately prevailed in a nearly unanimous decision. The Court applied a *Sherbert* analysis, first, determining that the Old Order Amish religion had been burdened by the generally applicable law and, secondly, weighing whether Wisconsin had made a sufficient showing of its "compelling government interest" in thus burdening Yoder's free exercise right. Most religious liberty commentators gravitate toward the decision's now quite remarkable pronouncement that religious freedom might in some cases outweigh compulsory education: "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."⁹¹

But the extensive balancing analysis undertaken to get there is suggestive for thinking about the group rights of Native American religious traditions. To be sure, the Court was specifically holding unconstitutional the criminalization of the non-complying parents under the Wisconsin compulsory education law; it was their individual religious exercise rights at stake. Still, the analysis turned on the broadly communal, and broadly religious, nature of the Amish traditional way of life and the threat that compulsory

90. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

91. *Id.* at 215. "We can accept it as settled, therefore, that, however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests." *Id.*

public education would have for the passing on of that Amish way of life. Perhaps this is rooted in a sentimental regard for the countercultural quaintness of the Amish, but, in any case, the Court held that First Amendment protections extended to the entire Amish way of life, having ascertained that this way of life was “inseparable and interdependent” with Amish religion and distinguished from merely “subjective” rejection of social values that are merely “philosophical and personal”:

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. . . . This command is fundamental to the Amish faith. Moreover, for the Old Order Amish, religion is not simply a matter of theocratic belief. . . . [R]eligion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community.⁹²

Ira Lupu has argued that “individuals, not institutions, are always the ultimate source of religious conviction,” and cases such as *Yoder* recognize the aggregated interests of individuals and not the interests of the Amish in general.⁹³ Still, the Court’s analysis turns on interpreting the claims of the *Yoder* parents in terms of the intergenerational passing on of a religious way of life going back centuries.⁹⁴

While Professor Lupu has understood that any apparent “group” rights in *Yoder* were purely associational and derivative of individual rights, Ronald Garet has interpreted *Yoder* in terms of its recognition of Amish “groupness” or “communality.”⁹⁵ Garet reads

92. *Id.* at 216.

93. Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 422 (1987).

94. Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State’s enforcement of a statute generally valid as to others.

Yoder, 406 U.S. at 235.

95. Ronald R. Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983).

Yoder together with one of the key Supreme Court cases affirming Native American tribal sovereignty, *Santa Clara Pueblo v. Martinez*, to argue that Courts have and can further extend a jurisprudence that promotes “communality” or “groupness” as among the key social goods.⁹⁶

*F. Group Rights to Native American Religious Freedom
as a Hybrid Bundle of Rights*

A further consideration in a discussion of group rights inspired by *Yoder* is whether a consideration of *Yoder*, or any other Free Exercise Clause ruling involving neutral laws of general applicability, should matter in light of the *Smith* decision.⁹⁷ But the Supreme Court’s ruling in *Smith* did not overturn *Yoder*; it merely distinguished the case as not controlling for *Smith*.⁹⁸ Justice Scalia’s majority opinion in *Smith* took pains to distinguish *Smith* from *Yoder*, since the Wisconsin compulsory education law in question was, like the Oregon controlled substance statute, a neutral law of general applicability.⁹⁹ Scalia reasoned that in *Yoder*, it was not religious freedom alone that tipped the scales, but religious freedom claims bundled together with other rights—parental rights in the case of *Yoder*—and Scalia saw no such bundle of rights present in the *Smith* case.¹⁰⁰

Alison Dussias argues that Native American religious freedom claims, at least those by federally recognized tribes or by members of those tribes, are indeed to be construed as hybrid matters of bundled rights of the sort Justice Scalia speaks about in the *Smith* ruling:

In the case of Indian religious practices, one can argue that other rights, in addition to speech and association rights, are also at stake, such as the right of tribes to have their sovereignty respected, as well as rights flowing from the trust relationship between tribes and the United States. . . . Because the federal-tribal relationship also has a constitutional basis, tribal religious rights claims can be understood as hybrid rights claims. Indeed,

96. *Id.*

97. *Emp’t Div. v. Smith*, 494 U.S. 872 (1990)

98. *Id.* at 881–82.

99. *Id.*

100. *Id.*

the Government cited its obligations pursuant to tribal rights as secular purposes underlying management plans at Rainbow Bridge National Monument and other public lands. Consequently, under the Smith hybrid rights doctrine, government actions that burden Indian religious exercise arguably are subject to compelling interest scrutiny even post-Smith, without need for consideration of RFRA, on the theory that they burden hybrid rights.¹⁰¹

I underscore Carpenter's point here. Indeed, whether or not courts will find their way to recognizing the typically collective nature of Native American claims to religious freedom, there ought to be judicial recognition that even a Native American individual's religious freedom rights are meaningfully bundled together in the federal government's special nation-to-nation relationship with recognized tribes.

II. LEGISLATIVE AND ADMINISTRATIVE ACCOMMODATIONS FOR COLLECTIVE NATIVE AMERICAN RELIGION

In this Part, I turn from judicial consideration of religious freedom law to statutory and administrative accommodations specific to Native American cultures and religions, protections that are specifically rooted not in the universal rights of religious freedom—though they appeal to that logic in substantive ways—but in the distinctive political status under federal Indian law of Native American communities, at least those receiving federal acknowledgement as American Indian tribes or Alaskan Native communities.

A. Legislative Accommodations

Although Native leaders and their advocates drew on the discourse of religion and religious freedom to gain congressional passage in 1978 of the American Indian Religious Freedom Act (AIRFA), the Native American Graves Protection and Repatriation Act (NAGPRA) of 1990, and AIRFA's Peyote Amendments of 1994, and although courts in certain high-profile cases interpreted those statutes as religious freedom laws, these protections decidedly

101. Allison M. Dussias, *Friend, Foe, Frenemy: The United States and American Indian Religious Freedom*, 90 DENV. U. L. REV. 347, 417-18 (2012).

relied for their logic on the distinctive political status of federally recognized Native American tribes and their members, and thus instances of collective rights. This stands in contrast with the view that such laws as AIRFA are primarily clarifications of religious freedom law, applying those protections to individuals in their capacity as religious practitioners of Native religions.¹⁰²

Even when certain courts came to interpret AIRFA or NAGPRA more in terms of the logic of religious freedom and thus delimited the reach of the respective statutes, the executive branch affirmed a number of procedural protections, notably President Clinton's Executive Order 13007 on American Indian Sacred Sites¹⁰³ and Executive Order 13175 on Consultation and Coordination with Indian Tribal Governments,¹⁰⁴ and regulatory changes in 1994 to protections under Section 106 of the National Historic Preservation Act.¹⁰⁵ These administrative actions may reference the importance of protecting sacred sites, or "religion," together with formal reversals of former federal policy criminalizing the practice of Native American religions, but they, too, turn on logic of the distinctive political status of federally recognized Indian tribes, tribal self-determination, and the government-to-government relationship between the United States and the tribes.

B. The Federal Trust Responsibility and Cultural/Religious Rights

The American Indian Movement and an American counterculture embracing "Indianness" did much to transform the political climate in which Native claims could be asserted by the

102. American Indian Religious Freedom Act, 42 U.S.C. § 1996; Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–13. (1990); 42 U.S.C. § 1996a(c)(3). Congress did not define Indian Tribe in AIRFA narrowly to include only those Native nations with formal federal recognition and specified as its consulting class "native traditional religious leaders[,]" not the governments of recognized tribes. 42 U.S.C. § 1996(2). Still, the 1994 Peyote Amendments to AIRFA did, for the purposes of those specific amendments. 42 U.S.C. § 1996a(c)(3).

103. Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996), *reprinted in* 42 U.S.C. § 1996 app. at 690–91 (2012).

104. Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000). This Executive Order was affirmed in President Obama's Memorandum on Tribal Consultation, 2009 DAILY COMP. PRES. DOC. 887 (Nov. 5, 2009).

105. Regulations were amended in 2004 under Section 106 of the National Historic Preservation Act. *See* 36 C.F.R. 800(c)(2)(ii) (2019).

1970s; so too did the legal context. Under President Nixon, the United States formally adopted a policy of Indian self-determination and a series of court decisions firmed up a legal basis for that policy, elaborating on two principles, treaty and trust that went deep into the legal past.¹⁰⁶ The specific nation-to-nation obligations spelled out in hundreds of different treaties, with what the courts recognized as “domestic dependent nations,” were interpreted to create a special federal trust responsibility with those tribes as a guardian to a ward.¹⁰⁷ Although it is not surprising that such a paternalistic approach has provided a source of federal power, including a source of power to intervene in tribal affairs to protect the rights of individual tribal members,¹⁰⁸ it has also served as a source of tribal rights, especially when courts have held the United States accountable to the “highest fiduciary standards” in its trustee role.¹⁰⁹

And while the federal trust responsibility applies in fairly plain legal fashion to management of natural and economic resources, it has also been understood to extend to cultural resources, including languages and religions of tribes.¹¹⁰ Rooted in treaties, the trust relationship also distinguishes the federal government’s relationship with federally recognized tribes from its treatment of other minority populations, including, vexingly, Native communities not formally recognized by the United States.

There have been equal protection, due process, voting rights, and other civil rights challenges to this approach to federal Indian law and policy. In a series of cases in the 1970s, even as it was ruling otherwise in *Regents of the University of California v. Bakke*,¹¹¹ the Supreme Court made clear, in *Morton v. Mancari* (1974), that it was the political, rather than racial, character of American Indian status that had animated federal Indian law and justified the Bureau of

106. President Richard M. Nixon, Special Message on Indian Affairs, 1970 PUB. PAPERS 564 (July 8, 1970); Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified at 25 U.S.C. §§ 450-450n (2012)).

107. *Cherokee Nation v. State of Georgia* 30 U.S. (5 Pet.) 1 (1831). For application to Native religions, see *United States v. Hardman*, 297 F.3d 1116, 1128-29 (2002).

108. See, e.g., *Seminole Nation v. United States*, 316 U.S. 286 (1942).

109. See, e.g., *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1972).

110. See, e.g., cases cited *infra* note 176.

111. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

Indian Affairs's hiring preference for Indians.¹¹² In a cluster of related rulings in 1977,¹¹³ 1978,¹¹⁴ and 1979,¹¹⁵ the Supreme Court suggested that laws that "might otherwise be constitutionally offensive" might be acceptable if they are enacted pursuant to the United States' trust relationship.¹¹⁶ To underscore the non-racial basis of its reasoning, the Court in *Morton v. Mancari* made explicit that the focus on members of federally recognized tribes, rather than on American Indians generally, suggested the political and non-racial basis for the unique relationship.¹¹⁷ The approach has broadly safeguarded other Indian laws supporting tribal self-determination, such as the 1975 Indian Self-Determination and Education Assistance Act, which recognized the tribes as contractors, akin to states and local governments, for federal programs; and the Indian Child Welfare Act of 1978, passed in the same year as AIRFA, that privileged adoption and foster placement of Native children within tribes.¹¹⁸

The context of these other legal developments in the 1970s is crucial to understanding how AIRFA, NAGPRA, and the AIRFA Peyote Amendments of 1994 appear not simply as conventional

112. *Morton v. Mancari*, 417 U.S. 535 (1974).

The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion. . . . Here, the preference is reasonably and directly related to a legitimate, nonracially based goal. This is the principal characteristic that generally is absent from proscribed forms of racial discrimination.

Id. at 554.

113. *United States v. Antelope*, 430 U.S. 641 (1977).

The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although extending to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.

Id. at 645.

114. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

115. *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation (Yakima Indian Nation)*, 439 U.S. 463 (1979).

116. *United States v. Hardman*, 297 F.3d 1116, 1128 (2002) (quoting *Yakima Indian Nation*, 429 U.S. at 501).

117. The *Morton* Court noted that because the preference applied "only to members of 'federally recognized' tribes," the preference could be seen to not be directed toward a racial group. *Morton*, 417 U.S. at 553 n.24.

118. Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n. Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-63 (2012).

religious freedom protections for individuals, but as protections for a particular species of religious exercise by tribes as collectives. In this regard, the statutes remain wedded to the notion that Native Americans possess a special political and legal status that distinguishes many Native protections from the civil liberties applying to all American citizens.

C. The American Indian Religious Freedom Act (1978)

Amid other efforts to support tribal self-determination in Washington, formal congressional endorsement of religious and cultural rights was clearly not a priority for all tribal leaders, concerned as tribal leaders were at the time with addressing abject poverty and related social ills plaguing reservation communities. Furthermore, the conceptualization of federal Indian law has tended to partition off religious and cultural rights from other aspects of tribal sovereignty. But for Suzan Harjo and others in the coalition that worked to craft and secure passage of AIRFA, religious and cultural freedoms were “atmospheric” of other dimensions of tribal self-determination and sovereignty advanced in the fields of economic development, education, and jurisdiction.¹¹⁹ As Harjo put it: “This is part of the big stuff, and it’s foundational, it’s fundamental, it’s atmospheric, it’s contextual to everything else. If the traditional Indians stop being the traditional people and our religions and cultures and languages cease to exist, there are no more Native people.”¹²⁰

For this reason, Native leaders sought a broad United States declaration formally disclaiming the civilization regulations that, for fifty years, had criminalized Indian religions under assimilation policies, or that placed “religious infringements” “result[ing] from the lack of knowledge or the insensitive and inflexible enforcement of Federal policies and regulations premised on a variety of laws.” These infringements include laws “designed for such worthwhile purposes as conservation and preservation of natural species and resources but were never intended to relate to Indian religious

119. Interview with Suzan Shown Harjo, Director, Morning Star Institute (Oct. 21, 2009).

120. *Id.*

practices and, therefore, were passed without consideration of their effect on traditional American Indian religions."¹²¹ AIRFA's formal restatement of policy reads as follows:

On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.¹²²

To the policy declaration was added a process for federal agencies to "evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices," calling for an executive branch report to Congress after the first year.¹²³

What is more, AIRFA's congressional findings specify some of the distinctive contours of Native religions that have been denied by U.S. policies: "access to sacred sites required in their religions, including cemeteries" and "use and possession of sacred objects necessary to the exercise of religious rites and ceremonies."¹²⁴ For these reasons, not to mention the plain language of the policy directive, AIRFA could be read as a statutory clarification that the First Amendment, if it were to effectively protect traditional Native religions, would fully protect "access to [sacred] sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."¹²⁵ And, to be sure lawyers representing claimants in its first ten years advanced such a reading, AIRFA grafted a variety of Native claims to free exercise jurisprudence and secured for their clients clear First Amendment

121. American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified at 42 U.S.C. § 1996 (2012)).

122. 42 U.S.C. § 1996 (2012).

123. Pub. L. No. 95-341, § 2, 92 Stat. at 470. Significantly, the consulting class of AIRFA are "native traditional religious leaders" and not tribal governments.

124. *Id.* at 469. Later, by way of the 1994 amendment, Congress added a clause protecting peyote use specifically. 42 U.S.C. § 1996a (2012).

125. 42 U.S.C. § 1996.

free exercise rights to sacred lands or to sacred practices.¹²⁶ Although there were some hopeful signs elsewhere in the lower courts, most of these cases claiming that AIRFA clarified First Amendment rights wound up failing in various appellate courts.¹²⁷

The Supreme Court's holding in *Lyng* put the final nail in the coffin to the fuller reading of AIRFA as a clarification of how the First Amendment should be applied to Native American claims. The *Lyng* Court found, "[n]owhere in the law is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights," and found in AIRFA's legislative history a statement by its sponsor, Representative Udall, that "the bill would 'confer special religious rights on Indians,' would 'not change any existing State or Federal law,' and in fact 'has no teeth in it.'"¹²⁸

D. A Finer-Grained Reading of AIRFA

That courts found AIRFA could not hold water as a statutory enactment of First Amendment religious freedom protections for Native people led many to conclude AIRFA was a legislative failure, another empty promise to Native people, who were again tragically undermined. Consider, for example, Andrew Gulliford's discussion of the "Failure of the American Indian Religious Freedom Act" in an otherwise nuanced treatment of sacred site

126. *E.g.*, *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983); *Crow v. Gullet*, 706 F.2d 856 (8th Cir. 1983); *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980); *Sequoyah v. TVA*, 620 F.2d 1159 (6th Cir. 1980).

127. For a fuller list of litigation on the basis of AIRFA in its first decade, see Sharon O'Brien, *A Legal Analysis of the American Indian Religious Freedom Act*, in HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM 27 (Christopher Vecsey ed., 1991).

128. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 455 (1988) (quoting 124 CONG. REC. 21,444-45 (1978) (statement of Rep. Udall)). In his dissent, Justice Brennan agreed AIRFA "does not create any judicially enforceable rights" but added:

[T]he absence of any private right of action in no way undermines the statute's significance as an express congressional determination that federal land management decisions are not 'internal' Government 'procedures,' but are instead governmental actions that can and indeed are likely to burden Native American religious practices. That such decisions should be subject to constitutional challenge, and potential constitutional limitations, should hardly come as a surprise.

Id. at 471 (Brennan, J., dissenting).

management: "With the vote on AIRFA, Congress recognized Indian religious beliefs but made no real effort to protect those beliefs and practices. Legislators passed a useless law."¹²⁹

This view is apt in part. Even as the advisory, procedural resolution of Congress that the *Lynx* Court said it was, AIRFA was not taken very seriously by the two Reagan administrations and, arguably, others, thereafter. But AIRFA has hardly been the failure that this common reading of it suggests. In at least four respects, AIRFA proved to be a remarkable legislative accomplishment, and one that helps understand how Native religious rights can be construed as collective rights.

First, AIRFA grafted into the federal trust responsibility a specific concern for the religious and cultural rights of the tribes. This was explicit in AIRFA's wording: U.S. policy would "protect and preserve for American Indians their inherent right[s]."¹³⁰ Especially given its acknowledgement that the United States had formerly pursued policies expressly designed to undermine Native religions, AIRFA's policy redirection was no small matter. But AIRFA's preamble also took pains to suggest there were a host of inadvertent ways that federal policies had the effect of undermining Native religions. Importantly, Congress did not define Indian tribe in AIRFA narrowly to include only those Native nations with formal federal recognition, and specified as its consulting class "native traditional religious leaders," not the governments of recognized tribes.¹³¹

Second, AIRFA mandated the thorough policy review of the various federal agencies and report to Congress, helping set the agenda for accommodations and actions that would extend its protections. As President Carter's liaison with the tribes, Suzan Shown Harjo was tapped to guide this process, and engaged a

129. ANDREW GULLIFORD, SACRED OBJECTS AND SACRED PLACES: PRESERVING TRIBAL TRADITIONS 101-02 (2000). A better reading of AIRFA on this score is found in BURTON, *supra* note 39.

130. 42 U.S.C. § 1996. As I discuss below, AIRFA's extension of the federal trust responsibility to protect and preserve Native American religions would become even clearer when AIRFA was amended in 1994.

131. *Id.* The 1994 Peyote Amendments to AIRFA did define "Indian tribe," for the purposes of those specific amendments, in such a way that tied the peyote provisions to members of federally recognized tribes. 42 U.S.C. § 1996a(c)(2) (2012).

parallel study and implementation project by the Native American Rights Fund and the American Indian Law Center which was able to more thoroughly survey and consult in the field with the religious leaders.¹³² From its consultation, the study identified the following key issues where federal policies infringed on Native religions: (1) “preservation of and access to sacred” sites, (2) “the right to religious use of peyote,” (3) “the right to recover religious objects,” (4) “the right to cross borders freely for religious purposes,” (5) “the rights of incarcerated Indians,” (6) the “right to religious privacy,” (7) “the rights of Indian students,” and (8) “the right to traditional hair styles” in schools, prisons, reformatories, and military service.¹³³ Within several years of AIRFA’s passage, the public record included formal recognition of the range of religious infringements that government actions directly or indirectly placed on Native communities, laying the groundwork for the subsequent legislative and administrative accommodations on sacred sites, ceremonial peyote use, repatriation of human remains from museums and scientific collections, and return of ceremonial items and objects of cultural patrimony.¹³⁴

Third, AIRFA created language for subsequent administrations to breathe meaningful life into its provisions and to relate it to other review and consultation processes, such as those under environmental and historic preservation laws, toward more integrated and serious federal consideration of tribal claims. In 1996, in the spirit of AIRFA and out of a concern to expand minimal readings of its provisions as they were intended to apply to federal agencies, President Clinton signed Executive Order 13007.¹³⁵ The Executive Order mandated that agencies managing federal lands would: “(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites.

132. See “We Also Have a Religion”: *The American Indian Religious Freedom Act and the Religious Freedom Project of the Native American Rights Fund*, ANNOUNCEMENTS (Native Am. Rights Fund, Boulder, Colo.), Winter 1979.

133. *Id.* at 8–9.

134. U.S. DEP’T OF INTERIOR, FEDERAL AGENCIES TASK FORCE: AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT (1979).

135. Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996), reprinted in 42 U.S.C. § 1996 app. at 690–91 (2012).

Where appropriate, agencies shall maintain the confidentiality of sacred sites.”¹³⁶

Fourth, the language of Executive Order 13007 further elaborated the consultation logic of AIRFA to “ensure reasonable notice” of “proposed actions or land management policies that may restrict future access to or ceremonial use of, or adversely affect the physical integrity of, sacred sites,” and aligned such consultation with a 1994 Executive memorandum, “Government-to-Government Relations with Native American Tribal Governments.”¹³⁷ This was not just a culture of consultation; the momentum gained through AIRFA’s passage carried into a government-wide statutory, not just regulatory, tribal consultation provision in the Archaeological Resources Protection Act of 1979¹³⁸ and in an amendment to the Section 106 Review process of the National Historic Preservation Act (1966) providing that federal agencies consult with tribes where they make a religious or cultural claim to a significant place.¹³⁹ President Clinton’s Executive Order on “Consultation and Coordination with Indian Tribal Governments” extends and clarifies what proper consultation with tribal sovereigns should look like, as a matter of policy.¹⁴⁰

In sum, while a plain reading of AIRFA, or one shaped by the courts’ interpretation, finds it lacking legal teeth for the full-fledged protections that religious freedom suggests in constitutional law, AIRFA set in motion a procedural mechanism for federal accommodations of religious and cultural concerns of sovereign tribes as collectivities. To be sure, in the absence of specific legal causes of action, and thus judicial review, beyond those under the Administrative Procedure Act, such procedural mechanisms rely for their effect more on the diligence of the federal agency involved, and under various administrations that may or may not consider Native rights a priority among competing goods.

136. *Id.* § 1(a).

137. *Id.* § 2(a) (citing Presidential Memorandum on Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951 (Apr. 29, 1994), reprinted in 25 U.S.C. § 5301 app. at 488 (2012)).

138. 16 U.S.C. § 470cc(c) (2012).

139. 16 U.S.C. § 470a(d)(6)(B) (2012) (“In carrying out its responsibilities under section 470f of this title, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties described in subparagraph (A).”).

140. Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000).

Still, they place considerations of Native religious and cultural rights on a footing quite other than that of the individual civil liberty basis on which religious freedom has generally been seen to rest. AIRFA directs the United States to consult (and ultimately to make agreements) with tribal governments to accommodate what practices, places, objects, and beliefs those nations indicate are urgent to them without necessarily having to make a showing that they are protectable facets of “religious” exercise under religious freedom jurisprudence. Such an approach can honor the porous boundaries between tribal religions and tribal cultures, economies, politics, land-bases, or identities. And as suggested by the confidentiality that characterizes those consultation processes – one of the issue areas of friction identified through the AIRFA review process between Native religions and federal agency policies—the tribes can relate matters to them and seek accommodations without violating the secrecy that often accompanies tribal religious beliefs, practices, and institutions or without exposing sacred places, practices, beliefs, or objects to unwelcome voyeurism on the public record.¹⁴¹

E. AIRFA’s 1994 Peyote Amendment

Importantly, if AIRFA was not to be a binding clarification that the First Amendment would apply to the distinctive contours of Native religions, the distinctive contours of AIRFA as a policy statement of the federal trust responsibility to the tribes proved that it was friendlier terrain for distinctly Native religious concerns than the broader religious freedom protections of RFRA. Recall that it was shared outrage at the Supreme Court’s stripping of the First Amendment’s free exercise protection in *Employment Division v. Smith* that unified a coalition of religious groups across the culture-wars spectrum and secured near-unanimous support for RFRA.¹⁴² But for all its references to *Smith*, RFRA did not expressly reinstate the broad rights to ceremonial peyote use won so ably by practitioners of the Native American Church in dozens of state statutes and through a broad range of court-backed protections of

141. See *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995).

142. See *supra* Section I.A.

Peyotism.¹⁴³ In the words of James Botsford, a Wisconsin attorney representing members of the Native American Church at the time, “[w]e took the hit and were not in the huddle.”¹⁴⁴

Having already begun specifically to consult with leaders of the Native American Church as part of the policy review mandated by AIRFA, and desiring to make any peyote protection “Scalia-proof,” as James Botsford put it, the strategy was to “make it an Indian right, rooted in the trust relationship” and resting on the distinctive legal and political status of the tribes and their members, which would also immunize it from equal protection challenges under civil rights law.¹⁴⁵ The 1994 Amendment to AIRFA, as Congress passed it, provided that:

Notwithstanding any other provision of law, the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion is lawful, and shall not be prohibited by the United States or any State. No Indian shall be penalized or discriminated against on the basis of such use, possession or transportation, including, but not limited to, denial of otherwise applicable benefits under public assistance programs.¹⁴⁶

And its definitions section made clear that “Indians” referred to members of federally recognized tribes and that “Indian religion” meant “any religion . . . which is practiced by Indians, and . . . the origin and interpretation of which is from within a traditional Indian culture or community.”¹⁴⁷

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

144. James Botsford and Walter Echo-Hawk, Remarks at “Roundtable on Native American Religious Freedom,” (May 2009). For an account of the effort, see James Botsford and Walter Echo Hawk, *The Legal Tango: The Native American Church v. the United States of America*, in *ONE NATION UNDER GOD: THE TRIUMPH OF THE NATIVE AMERICAN CHURCH* 123–55 (Huston Smith & Reuben Snake eds., 1996).

145. James Botsford and Walter Echo-Hawk, *supra* note 144.

146. 42 U.S.C. § 1996a(b)(1) (2012).

147. *Id.* § 1996a(c). The statute’s definitions section reads in part:

(1) the term “Indian” means a member of an Indian tribe; (2) the term “Indian tribe” means any tribe, band, nation, pueblo, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act, (43 U.S.C. 1601 et seq.)), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; (3) the term “Indian religion” means any religion— (A) which is practiced by Indians,

Such definitional language was not only crafted to persuade Congress that there would be no slippery slope to gratuitous or untoward peyote use. It was expressly keyed to the logic of federal Indian law's recognition of the special political and legal status of members of tribes with rights based on the treaty and trust relationship. This logic could be undone, the coalition feared, by opening the door to those claiming *only* religious freedom rights to peyote use. And to be sure, there are any number of others claiming religious freedom exemptions to controlled substance laws that have looked to AIRFA's "Peyote Amendment" for similar equal protection sustenance of their claims.¹⁴⁸ In one such case, the Supreme Court agreed with the RFRA claim by members of a religious community of South American origin to ceremonial ingestion of hoasca, which like peyote was regulated under federal controlled substance laws.¹⁴⁹ Lawyers from the coalition representing the Native American Church agreed not to interfere with the RFRA claim, but took pains to work against any equal protection claim made by O Centro Espírita Beneficente União do Vegetal with respect to the AIRFA peyote exemption.¹⁵⁰

F. Native American Graves Protection and Repatriation Act (1990)

The coalition that convinced Congress to recognize religious freedom effectively as a facet of Indian law for Peyotist tribal members was successful in part because it was largely the same circle of advocates, lawyers, tribal spiritual and political leaders, and allies who had recently won congressional passage of two repatriation statutes: the National Museum of the American Indian Act (1989) (NMAI Act)¹⁵¹ and the better known Native American Graves Protection and Repatriation Act (NAGPRA).¹⁵²

and (B) the origin and interpretation of which is from within a traditional Indian culture or community.

Id.

148. *See, e.g., Oklevueha Native Am. Church of Haw., Inc. v. Lynch*, 828 F.3d 1012 (9th Cir. 2016).

149. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

150. James Botsford & Walter Echo-Hawk, Remarks at "Roundtable on Native American Religious Freedom," Vermillion, S.D. (May 2009).

151. National Museum of the American Indian Act, 20 U.S.C. §§ 80q to 80q-15 (2012).

152. Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-13 (2012).

Basically, the NMAI Act legislatively made provisions for the repatriation of human remains and other items as part of the storied transfer of more than 800,000 objects in the Heye Collection from New York City's then-decrepit Museum of the American Indian to the Smithsonian Institution, a transfer that occasioned the creation of the Washington Mall's magnificent National Museum of the American Indian. Under the NMAI Act, the flagship national museums of the Smithsonian were to inventory, identify, and consider for return to tribes or lineal Indian descendants the tens of thousands of Native American human remains, and a variety of objects, in their collections.¹⁵³ But perhaps the bigger story is what NMAI Act negotiations with the Smithsonian enabled: swift passage the following year of a remarkable NAGPRA statute requiring that the repatriation process extend to all federally funded museums and government agencies, extending the items to be inventoried, identified, and considered for return beyond human remains and burial objects to several other categories of "cultural items."¹⁵⁴ These categories, later added by amendment to the NMAI act, most notably include "sacred objects," defined as those "needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents," and "cultural patrimony," defined as "an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual."¹⁵⁵ NAGPRA required, under penalty, "expeditious return" of "culturally identified" human remains and specified cultural items from the collections of museums and agencies to lineal descendants, in those cases where a clear line of descent could be drawn to human remains, or to tribes and Native Hawaiian organizations who could show "cultural affiliation by a preponderance of the evidence," which statutorily was not limited to scientific evidence, but could include "oral traditional"

153. 20 U.S.C. §§ 80q to 80q-15.

154. 25 U.S.C. §§ 3001-13.

155. *Id.* § 3001.

information or expert opinion.¹⁵⁶ To these provisions was added the criminalization of trafficking in the protected items and tribal control of any human remains and cultural items subsequently excavated on tribal lands or federal lands in aboriginal tribal territories.¹⁵⁷ Finally, NAGPRA created a Review Committee, including appointees from both tribal and scientific communities, to resolve the many contested or competing claims sure to result.¹⁵⁸

I cannot here undertake the fuller treatment warranted by the NMAI Act and NAGPRA, and particularly the lengthy subsequent struggles over their regulations. I could in any case add little to two very fine book length treatments that treat NAGPRA not merely as a “legal event,” in the words of Kathleen Fine-Dare, but as a “cultural and political process . . . one that will be shaped for long years to come.”¹⁵⁹ Greg Johnson brings theoretically-informed religious studies attentiveness to the making of religion in that legal process, though importantly he distinguishes his line of analysis from the presumptions of suggesting that there is in the doing a mere “invention of tradition.”¹⁶⁰ With a careful review of NAGPRA’s legislative history, the complex claims of different Native Hawaiian organizations, and, in subsequent work, the ongoing deliberations of the NAGPRA Review Committee, Johnson shows how the NAGPRA process has generated a large body of strategically-positioned religious speech, whereby Native practitioners lay claim, on the one hand, to the specific obligations, practices, and beliefs unique to their respective collective traditions, and to the universally applicable human rights discourse of religion on the other.¹⁶¹ In this process, Congress and administrative bodies remarkably find themselves debating definitions of religiously charged categories like “sacred object,” “cultural patrimony,” and the evidentiary weight of divinatory and oral traditions. Following

156. 43 C.F.R. 10.2 (e) (referencing 25 U.S.C. § 3005 (a)(4)).

157. 25 U.S.C. § 3002 (c).

158. *Id.* § 3006.

159. KATHLEEN S. FINE-DARE, *GRAVE INJUSTICE: THE AMERICAN INDIAN REPATRIATION MOVEMENT AND NAGPRA* 7 (2002).

160. GREG JOHNSON, *SACRED CLAIMS: REPATRIATION AND LIVING TRADITION* (2007).

161. *Id.*; see also Greg Johnson, *Apache Revelation: Making Indigenous Religion in the Legal Sphere*, in *SECULARISM AND RELIGION MAKING* 170, 170–86 (Markus Dressler & Arvind-Pal S. Mandair eds., 2011).

the lines of Johnson's analysis, I would emphasize the manner with which the "religious freedom" protections of NAGPRA are strategically conformed to the structure of a collective right.

G. NAGPRA in the Courts: "Religion" v. "Science"

With its considerable reach, NAGPRA has produced no small amount of litigation, and court interpretations have both strengthened and weakened its various provisions.¹⁶² In perhaps the highest profile challenge to the protections of NAGPRA, *Bonnichsen v. United States*, a physical anthropologist claimed that a federal decision to repatriate the 9,300-year-old remains of so-called "Kennewick Man," found in 1996 on federal land along the Columbia River, to a group of area tribes that considered him an ancestor according to customary determinations of kinship and lineage, violated the statute itself.¹⁶³ In its ruling in favor of the scientist, the Ninth Circuit not only recognized his standing to sue under NAGPRA, which the U.S. had argued was only authorized for tribal claimants, but agreed that the oral traditional evidence presented by the tribes could not have been found reasonably to outweigh the genetic and archeological scientific evidence placing the remains several thousand years before the tribes in question had arrived in the region. Specifically, the court held that for the purposes of NAGPRA and by using the statute's own definitions, the remains are not "Native American."¹⁶⁴ Still, the *Bonnichsen* decision took pains to show how the federal decision to repatriate the remains to the tribes had gone too far in valorizing the evidentiary weight of oral tradition, particularly as "the record as a whole does not show where historical fact ends and mythic tale begins," over scientific evidence suggesting no "group identity" between the remains and the tribes in question.¹⁶⁵ So if there are elements of the NAGPRA process, such as definitional discussions of what counts as a "sacred object" or appeals to visionary

162. See *United States v. Tidwell*, 191 F.3d 976 (9th Cir. 1999); *Pueblo of San Ildefonso v. Ridlon*, 103 F.3d 936 (10th Cir. 1996); *United States v. Corrow*, 941 F. Supp. 1553 (D.N.M. 1996).

163. *Bonnichsen v. United States*, 357 F.3d 962 (9th Cir. 2004), amended by 367 F.3d 864 (9th Cir. 2004).

164. *Id.* at 972.

165. *Id.* at 979; see also *Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1143-44 (D. Or. 2002) (District Court holding).

experience as evidence of affiliation in repatriation proceedings, which suggest its texture as a religious freedom statute, judicial interpretations, too, have stressed NAGPRA's religious leanings.

H. NAGPRA: A Finer-Grained Reading

But as with AIRFA, a closer reading of NAGPRA requires us not only to distinguish, as Greg Johnson has, between "strategic" appeals to the universality of religious freedom, and also to the culture-specific funerary and ceremonial traditions of burial, but also to see how the combination of those two religious discourses have been grafted legally onto the discourse of collective tribal rights under federal Indian law. Just as AIRFA's Peyote Amendment was, after the wizing process of AIRFA's narrow reading by the courts and the RFRA coalition's exclusion, strategically positioned not as an amendment to RFRA, where the logic of religious freedom would place it, but as an amendment to AIRFA, where the logic of federal Indian law would keep it immune from the condemning logic of the *Smith* decision,¹⁶⁶ NAGPRA took its place as a cultural/religious facet of a broader agenda promoting tribal sovereignty.

First, NAGPRA on its face is hard to view primarily as a religious freedom statute. Native proponents have regarded it as a basic human rights law for its fundamental acknowledgement of the humanity of deceased Native American persons, regarded hitherto as archeological resources in the Antiquities Act of 1906¹⁶⁷ and even the Archeological Resources Protection Act of 1979.¹⁶⁸

Second, in the typical taxonomy of legal studies, NAGPRA is regarded as a cultural property law, not a religious freedom law, one which ultimately rests on the questionability of title that federally funded museums or agencies could ever have, under common law, to human remains, or under the terms of contract and property law, to items of cultural patrimony. Indeed, the ability to go to courts on the basis of these property claims, even without the repatriation statutes, arguably brought the parties to the table to shape the legislation in the first place.

166. *Emp't Div. v. Smith*, 494 U.S. 872, 878-90 (1990).

167. Antiquities Act of 1906, 16 U.S.C. §§ 431-33 (1906).

168. Archeological Resources Protection Act, 16 U.S.C. §§ 470aa-mm.

Third, the procedural approach to federally recognized Indian tribes and Hawaiian organizations aligns NAGPRA and NMAI with the federal trust responsibility to preserve and protect the cultures, religions, and traditions of tribes, and with the consultative framework becoming a government-to-government relationship. Thus, grounded in this trust responsibility, the statute's privileging of arguably "religious" tribal claims and the regulatory apparatus's determinations about "sacred objects" and their disposition, can proceed without plainly violating the First Amendment's Establishment Clause. This logic and the case law that develops it will be the subject of Part III.

Through AIRFA, NAGPRA, and other measures considered in this Part, Congress and federal agencies have meaningfully extended the trust responsibility beyond the merely economic and natural resources of the tribes to the realm of cultural resources. These cultural resources include the traditional religions of Native communities with whom the U.S. acknowledges a nation-to-nation relationship. Clearly there are problematic elements of this structure, notably the controversial process for federal acknowledgement and the often ambiguous legal status of federally non-recognized tribes, a group that includes tribes like those treaty signatories recognized by the Commonwealth of Virginia and enjoying some measure of distinctive political status as a result, but which remain unacknowledged by the U.S., and thus outside the ambit of the protections discussed in this Part. But a closer look at these statutes shows how the legislative and executive branches have articulated a logic for recognizing Native cultural and religious rights that is collective in nature: religious in texture, but the legal shape of which conforms to the special political status of the group. In the next Part, I turn to judicial affirmation of this logic and this structure in case law.

III. JUDICIAL DISTINCTIONS BETWEEN COLLECTIVE AND INDIVIDUAL NATIVE AMERICAN RELIGIOUS EXERCISE

In this Part, I turn from legislative and administrative accommodations of Native religious practices and beliefs that draw upon the discourse of religious freedom but that structurally tie those accommodations to the collective rights of Native nations and their members, to judicial recognition of this structure of Native

religious rights as collective, not merely individual, matters. Courts have articulated this distinction with some consistency as they have rejected a wide range of challenges, including religious freedom challenges, to legislative and administrative religious accommodations within eagle protection. This Part will consider those in depth, along with several other notable cases where courts have found their way to identifying the distinctly collective shape of certain Native American religious claims.

A. Eagle Act Accommodations

Although eagles have been protected under the Migratory Bird Treaty Act and the Endangered Species Act, Congress in 1940 expressly passed the Bald Eagle Protection Act to criminalize the hunting, trafficking, bartering, and possession of eagle parts, even a single feather, making it punishable by a fine of up to \$5,000 and up to one year in prison.¹⁶⁹ The act was amended in 1962 to the Bald and Golden Eagle Protection Act (Eagle Act) to include golden eagles because the two species are largely indistinguishable when immature.¹⁷⁰ More importantly, the amended act enabled the Secretary of the Interior to establish regulations for exceptions “for the religious purposes of Indian tribes.”¹⁷¹ Subsequently, the National Eagle Repository was established as a catchment and distributor for found eagle carcasses together with a permit application process in which the U.S. Fish and Wildlife Service, on a first-come, first-served basis, scrutinizes whether the applicant is an Indian who is authorized to participate in “*bona fide* tribal religious ceremonies.”¹⁷² According to the regulations, permitted

169. Bald Eagle Protection Act of 1940, 54 Stat. 250 (1940) (current version at 16 U.S.C. § 668 (2012)); Migratory Bird Treaty Act, 16 U.S.C. §§ 703–12 (2012); Endangered Species Act, 16 U.S.C. §§ 1531–44 (2012).

170. Protection of Bald and Golden Eagles Act, 16 U.S.C. §§ 668–668(d) (2012) *amended by* Pub. L. No. 87-884, 76 Stat. 1346.

171. *Id.* § 668(a).

172. 50 C.F.R. § 22.22 (2017). In weighing permit applications, the government considers “(1) The direct or indirect effect which issuing such permit would be likely to have upon the wild populations of bald or golden eagles; and (2) Whether the applicant is an Indian who is authorized to participate in *bona fide* tribal religious ceremonies.” *Id.* The process limits one pending application per applicant at one time and requires the following information on the application form:

eagle parts are not transferable except as those “from generation to generation or from one Indian to another in accordance with tribal or religious customs[.]”¹⁷³ Wait times and restrictions have caused significant problems for applicants who may wait from six to nine months for loose feathers and two to four years for eagle carcasses.¹⁷⁴

Not surprisingly, because eagle feathers, claws, wings, and other parts are of clear ritual and religious significance to so many Native religious traditions, the permit process to operationalize this accommodation has brought numerous legal challenges.¹⁷⁵ Some have argued that the permit process violated their treaty rights.¹⁷⁶ Others have challenged various aspects of the permitting process as a violation of their religious freedom under the First Amendment or RFRA.¹⁷⁷ For the purposes of this Article, I focus on cases where

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- (1) Species and number of eagles or feathers proposed to be taken, or acquired by gift or inheritance.
 - (2) State and local area where the taking is proposed to be done, or from whom acquired.
 - (3) Name of tribe with which applicant is associated.
 - (4) Name of tribal religious ceremony(ies) for which required.
 - (5) You must attach a certification of enrollment in an Indian tribe that is federally recognized under the Federally Recognized Tribal List Act of 1994

Id.

173. 50 C.F.R. § 22.22(b)(1) (2017).

174. Exceptions to the first-come, first-served basis are made where death ceremonies or other emergencies are claimed by applicants. *United States v. Hardman*, 297 F.3d 1116, 1123 n.12 (10th Cir. 2002).

175. See, e.g., Tina S. Boradiansky, *Conflicting Values: The Religious Killing of Federally Protected Wildlife*, NAT. RESOURCES J. 709 (1990); Michael Davidson, *United States v. Friday and the Future of Native American Religious Challenges to the Bald and Golden Eagle Protection Act*, 86 DENV. U.L. REV. 1133 (2009); Antonia M. De Meo, *Access to Eagles and Eagle Parts: Environmental Protection v. Native American Free Exercise of Religion*, 22 HASTINGS CONST. L.Q. 771 (1995). Fewer studies have paid attention to the concerns of this section. See Carpenter, *supra* note 26; Matthew Perkins, *The Federal Indian Trust Doctrine and the Bald and Golden Eagle Protection Act: Could Application of the Doctrine Alter the Outcome in U.S. v. Hugs?* 30 ENVTL. L. 701 (2000). For an excellent article see Kathryn E. Kovacs, *Eagles, Indian Tribes, and the Free Exercise of Religion*, 47 LOY. L.A. L. REV. 53 (2013).

176. See, e.g., *United States v. Dion*, 476 U.S. 734 (1986); *United States v. Abeyta*, 632 F. Supp. 1301 (D.N.M. 1986); *United States v. Thirty Eight (38) Golden Eagles or Eagle Parts*, 649 F. Supp. 269 (D. Nev. 1986).

177. See, e.g., *United States v. Friday*, 525 F.3d 938 (10th Cir. 2008) (explaining that repository timetable causes eagle carcasses to become religiously impure); *United States v. Hugs*, 109 F.3d 1375 (9th Cir. 1997) (discussing whether the permit system’s procedural awkwardness violated religious freedom); *United States v. Gonzalez*, 957 F. Supp. 1225 (D.N.M. 1997) (discussing whether permit application requirement to disclose proposed ceremonial use violates religious secrecy).

a variety of religious freedom challenges under RFRA have been asserted by practitioners of Native American religions who, by virtue of their identity, are excluded from the accommodation regime, which is restricted to members of federally recognized tribes. In these cases, a range of circuit courts can be said to have, after scrupulous consideration of competing religious claims, consistently acknowledged the collective nature of the Native American religious rights accommodated under the Eagle Act. The question of religion in these cases becomes a question not of the sincerity or particularities of the religious practice or whether or not the religious exercise is burdened, but a question of balancing the state's compelling interest in the Eagle Act's religious accommodation, to safeguard the collective religious rights of federally recognized tribes and their members under the federal trust responsibility, with the asserted rights to individual religious exercise advanced by litigants, including Native American religious practitioners.

Courts in these cases have agreed that the United States actually has two compelling interests in play, and a charge to strike an optimal equipoise between those potentially competing interests. The first, obviously, is protecting wild populations of eagles. This was confirmed to remain a compelling interest even given the return of bald eagle populations since passage of the Act. As one court put it, "the bald eagle would remain our national symbol whether there were 100 eagles or 100,000 eagles."¹⁷⁸ The second is the government's compelling interest of "preserving Native American culture and religion," which courts have said springs from established federal Indian law's two streams of treaty and trust: the specific nation-to-nation obligations, spelled out in over 370 different treaties, to quasi sovereign, domestic, dependent nations, on the one hand, and a federal trust relationship with those tribes, on the other, as a guardian to a ward.¹⁷⁹

Challenges have included those of Native claimants who were not enrolled members of recognized tribes and thus ineligible for the accommodation. In *Gibson v. Babbitt*, a Florida District Court

178. *Hardman*, 297 F.3d at 1128.

179. *Id.* at 1128–29. The *Hardman* court cites *Rupert v. Dir., U.S. Fish & Wildlife Serv.*, 957 F.2d 32 (1st Cir. 1992) and *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991).

judge reluctantly rejected the claim to eagle feathers by Harvey “Fire Bird” Gibson, a decorated veteran and sincere native religious practitioner who was a lineal descendant of Native people removed in the Trail of Tears, but who was not a member of a federally recognized Indian Tribe.¹⁸⁰ The Eleventh Circuit affirmed, concluding that the permit restriction to members of recognized tribes was the least restrictive means to furthering the government’s compelling interest: “by providing bald and golden eagle parts to federally recognized Indian tribes, the United States . . . is fulfilling a pre-existing treaty obligation to the tribes.”¹⁸¹

Three years later, in *U.S. v. Antoine*, the Ninth Circuit followed the same line of reasoning in rejecting a religious freedom challenge to the Eagle Act brought by a member of a Canadian First Nation, even though his tribe enjoyed specific treaty rights straddling the border between the United States and Canada.¹⁸² Leonard Antoine served a two-year prison sentence for bringing eagle feathers without a permit into the United States for a potlatch ceremony.¹⁸³ A member of the Cowichan Band of Salish in Canada, Antoine was ineligible for a permit as he was not a member of an Indian tribe recognized by the United States.¹⁸⁴ The Ninth Circuit concluded Antoine “was excluded, not because of his faith, but because he was not a member of a recognized Indian tribe.”¹⁸⁵

While noting the paternalism implied in this approach, we should observe how the *Antoine* court recognized a federal trust obligation to preserve and protect the religions and cultures of federally recognized tribes that is compelling enough to justify a burden on the practice of those same religions when such claims are made by individuals whose practice is not conjoined structurally by their membership in a recognized tribe.

The exclusions based on enrollment and federal recognition ought appropriately to trouble those concerned with the religious freedom of all Native American tribes, not just the five hundred

180. *Gibson v. Babbitt*, 72 F. Supp. 2d 1356 (S.D. Fla. 1999).

181. *Gibson v. Babbitt*, 223 F.3d 1256, 1258 (11th Cir. 2000) (citing *Gibson*, 72 F. Supp. 2d at 1360).

182. *United States v. Antoine*, 318 F.3d 919 (9th Cir. 2003).

183. *Id.* at 919–20.

184. *Id.*

185. *Id.* at 924; see also *United States v. Vasquez-Ramos*, 522 F.3d 914 (9th Cir. 2008).

some who have formal legal stature as “federally recognized tribes.” Still, I want to call attention to the way the Ninth and Tenth Circuits legally distinguish between the religious freedom claims of individuals, keyed to universal discourses on religious beliefs and rights of private conscience, and those asserted by association with the distinctive political status of federally recognized tribes and the cultural and religious heritage that are woven into peoplehood.

If courts have emphasized the political, rather than racial, identity of those Native people eligible for Eagle Act exemptions, they have also distinguished the political from the religious aspects of that identity, as elaborated in the Maine case cited in *Antoine*.¹⁸⁶ In *Rupert v. Director, U.S. Fish and Wildlife Service*, Erwin Rupert, a white pastor of an “all race” church that follows Native American religious customs, asserted that he had organized a religious community fashioned as the “Tribe of the Pahana,” a loose reference to a Hopi prophecy.¹⁸⁷ When a permit application citing his tribal identity as Pahana was turned down, Rupert challenged the Eagle Act as a violation of the First Amendment’s Establishment Clause, citing an unconstitutional “denominational preference” for some Native American religious groups against his own.¹⁸⁸ The First Circuit affirmed the District Court for Maine in holding against Rupert,¹⁸⁹ drawing distinctions that have informed courts’ reluctance to grant Establishment Clause challenges to the statutory religious exemption won by tribes in 1994 for peyote use and for federal accommodations to Native communities in the management of sacred places on public lands.¹⁹⁰

What about the many sincere non-Native practitioners whose practice of Native religions is in demonstrable relationship to recognized tribal communities, or who marry tribal members and raise children in the traditions of those Native communities? In a

186. *Rupert v. Director, U.S. Fish & Wildlife Serv.*, 957 F.2d 32 (1st Cir. 1992).

187. *Id.* at 33.

188. *Id.*

189. The First Circuit cited *Morton v. Mancari*, 417 U.S. 535 (1974) and *United States v. Antelope*, 430 U.S. 641 (1977), to suggest that the “rational basis” or “rational relationship” was sufficient to tie the government’s treatment of “Native Americans differently from others in a manner that arguably creates a religious classification” to its compelling interest in “protecting a dwindling and precious eagle population and protecting Native American religion and culture. *Rupert*, 957 F.2d at 35.

190. *Id.* at 32.

cluster of cases centered on *Hardman* and *Wilgus* that took nine decisions and thirteen years to wend their way through courts, the Tenth Circuit showed its uneasiness with the quick work the other three circuits had made of such religious freedom claims in favor of established federal Indian law.¹⁹¹ If the Tenth Circuit ultimately came along with them in its fifth and final 2011 decision in *Wilgus*, it wrestled more directly with the question of supporting the collective tribal rights to religious traditions at the expense of individual rights:

This case requires us to navigate the treacherous terrain at the intersection of the federal government's obligations, on the one hand, to refrain from imposing burdens on the individual's practice of religion, and, on the other, to protect key aspects of our natural heritage and preserve the culture of Native American tribes.¹⁹²

B. *United States v. Hardman* and *United States v. Wilgus*

A network that went up and down courts in the Tenth Circuit illustrates well the complexity of weighing accommodations meant to protect tribal collective religions with the individual rights to practitioners of Native religion. Beginning in the late 1990s, the Tenth Circuit heard three different cases on appeal from district courts in Utah and New Mexico, and in three-judge-panel decisions affirmed the conviction of two and threw out the conviction of the third. In each case the question of religious freedom claims became a question of identity and of the consequent justifiability of a permitting process that privileged members of federally recognized Indian tribes above other sincere practitioners of Native American religions.

Raymond Hardman was non-Native, though his ex-wife and two children were enrolled members in a Washington tribe, and he lived on a Utah reservation.¹⁹³ In 1993, after he had brought his children's maternal grandfather to Arizona for ceremonial burial, he was given eagle feathers to hang in the truck for cleansing

191. *United States v. Wilgus*, 638 F.3d 1274 (10th Cir. 2011); *United States v. Hardman*, 297 F.3d 1116 (10th Cir. 2002).

192. *Wilgus*, 638 F.3d at 1277.

193. *Hardman*, 297 F.3d at 1118-19.

purposes. Upon return to Utah, Hardman approached the Wildlife Division for a permit, but was told he would not qualify and was found by a magistrate judge to be in violation of the Migratory Bird Treaty Act, a decision that was affirmed by a federal district court.¹⁹⁴

Like Hardman, Samuel Ray Wilgus was not of Native descent. Raised a Baptist, he became in the 1980s a practitioner of Native religions and received religious instruction from Southern Paiute tribal members who were leaders in the Native American Church.¹⁹⁵ In 1998, Wilgus was arrested for possessing 141 eagle feathers, several of which had been given him to mark his religious progress in the Native American Church. Wilgus challenged his conviction as a violation of his religious freedom.

A third litigant, Jose Luis Saenz, a lineal descendant of the Chiricahua Apache, was not an enrolled member of any recognized tribe. Historically, many Chiricahua were absorbed into other Apache communities, but the community itself has not been formally recognized as a tribe.¹⁹⁶ In 1996, law officials searching his home on another matter seized ceremonial items that included eagle feathers for which he did not have a permit. Although the criminal charges against him were dropped, he petitioned for the return of the confiscated feathers, which was the issue in the case.¹⁹⁷ The District Court for New Mexico ordered the return of the feathers based on its interpretation of the religious exception for Indian tribes under the Eagle Act. The United States appealed, saying the court had not deferred to the executive branch's narrower interpretation of the Eagle Act as applying to members of federally recognized tribes. A three-judge panel in 2001 agreed with the District Court, affirming Saenz's right, under RFRA, to the returned feathers.¹⁹⁸

194. *Id.*; United States v. Hardman, No. 99-CR-166-B (D. Utah 1999); Migratory Bird Treaty Act, 16 U.S.C. §§ 703-12. Although he brought a RFRA defense in the appeal of the magistrate's decision to the district court, his subsequent appeal turned on discriminatory enforcement under the equal protection clause and on the First Amendment Free Exercise and Establishment Clauses.

195. United States v. Hardman, 622 F. Supp. 2d 1129, 1132 (D. Utah 2009).

196. *Hardman*, 297 F. 3d at 1119-20.

197. *Id.*

198. *Id.* at 1118-20.

The Tenth Circuit decided to vacate its 2001 panel rulings in each case for a rehearing *en banc*. In 2002, it released a decision that affirmed Saenz's RFRA right to the returned feathers. In the cases of *Hardman* and *Wilgus*, the Tenth Circuit agreed the U.S. had compelling interests of protecting eagles and of "preserving Native American culture and religion in-and-of-themselves and in fulfilling trust obligations to Native Americans,"¹⁹⁹ but concluded the government had insufficiently demonstrated that the permitting process was the least restrictive means to advance those compelling interests, leaving "far too many questions unanswered."²⁰⁰

Specifically the court found only "speculative" the government's claim that opening up eligibility to all "sincere practitioners of Native American faiths that hold eagle feathers sacred," regardless of their racial identity or political status, would "result in an increased wait substantial enough to endanger Native American cultures" requiring factual knowledge about the numbers of people involved, and the effect of the resurgence of eagles on the supply for the repository system.²⁰¹

Significantly, the Tenth Circuit also volunteered a potential rethinking of Native American religions as religions. It pondered the possibility that extending the eagle permit process to any sincere practitioner of a Native American religion, whatever race or political status, might allow "a wider variety of people to participate in Native American religion," and "foster Native American culture and religion by exposing it to a wider array of persons."²⁰² It thus remanded the combined *Hardman* and *Wilgus* cases back to district court to gather more facts in pursuit of settling these questions.²⁰³

A concurring opinion expressed concern that the district court would be misled in its inquiry on remand. Judges Murphy and Briscoe found unclear the "contours of the government's compelling interest in protecting Native American culture,"²⁰⁴

199. *Id.* at 1129.

200. *Id.* at 1134.

201. *Id.* at 1133.

202. *Id.*

203. *Id.* at 1131.

204. *Id.* at 1138 n.3 (Murphy & Briscoe, JJ., concurring)

taking issue with the trajectory suggested by the court's suggestion that Native American religions would be protected and strengthened by opening their practice up to any and all:

The majority intimates that the interest can be limited to the maintenance of the viability of Native American cultural practices as a historical legacy within the contours of our modern culture. . . . Under this view, the government's interest in protecting Native American culture would be furthered to the exact same extent if the available supply of eagle parts were distributed equally to all adherents of relevant Native American religions, without regard to whether the adherents were, in fact, Native Americans.²⁰⁵

The concurring judges saw the contours of the government's interest "a little differently: guaranteeing members of sovereign and semi-autonomous Indian nations the ability to carry on their traditional way of life" and clarified the government's task on remand to garner evidence that further delay in providing eagle feathers would "hinder the ability of Native Americans to engage in their traditional way of life."²⁰⁶

On remand, the District Court for Utah took in facts and expert testimony estimating populations of both eagles and adherents of Native religions, together with their likely identities to assess the impacts of extending eligibility to non-members of recognized tribes and considered two alternative regulatory schemes: the one that Wilgus's lawyers suggested, extending management of repository feathers to the recognized tribes, and also one of the court's own making, extending permit eligibility to all sincere practitioners whatever their identity.

Holding in 2009 that the latter alternative was a less restrictive means for the government to pursue its compelling interest,²⁰⁷

205. *Id.*

206. *Id.*

207. *United States v. Hardman*, 622 F. Supp. 2d 1129, 1153 (D. Utah 2009). The judge found Wilgus's suggested alternative regulatory scheme, allowing enrolled members of federally recognized tribes to give their feathers to whomever they like, unworkable because it was impossible to enforce. But he found persuasive that another discussed alternative, allowing non-Native adherents to apply directly to the Repository, would be a less restrictive means, since natural resource managers could ask any nonnative to produce a permit, and since government concerns that a black market would ensue are speculative.

Federal District Judge Dee Benson ruled that the Eagle Act as applied to Hardman and Wilgus violated RFRA.²⁰⁸ In so doing, Judge Benson extended the reconceptualization of Native American religion even beyond that countenanced by the Tenth Circuit's 2002 decision,²⁰⁹ and certainly disregarded the cautionary direction of Judge Murphy's concurring opinion.²¹⁰ Judge Benson concluded that the newly gathered evidence, including scholarship on Native American religions, only further complicated the government's calculus about the religious interests of recognized tribes: "Native American religions are neither hierarchical nor homogenous, and there is considerable disagreement among tribes holding eagle feathers sacred regarding the appropriate role—if any—of persons who are not tribal members in tribal worship."²¹¹

Citing a 2003 meeting of Arvol Looking Horse, the Lakota Keeper of the White Buffalo Calf Pipe, and other northern plains spiritual leaders discussing the "protection from the abuse and exploitation of our ceremonies," the judge noted "abundant evidence . . . that some tribes do not welcome the participation of non-Native Americans in traditional Native American religious practices."²¹² But citing a response to that declaration by leaders of a Sun Dance that welcomed non-Natives, the judge noted the "equally vehement conviction of other individuals and tribes that individual belief is enough to warrant inclusion in Native American religious rituals." Following the testimony of Raymond Bucko, a scholar of Native American religions, the judge concluded "[t]here is no single, coherent approach even within a particular tribe as to whether non-Native American adherents should be permitted to participate in Native American religions and possess the eagle feathers necessary to do so fully."²¹³ Noting that Wilgus and Hardman's religious practice was connected to Native community members, the judge asserted:

208. *Id.*

209. *United States v. Hardman* 297 F.3d 1116 (10th Cir. 2009) (en banc).

210. *Id.* at 1136-40 (Murphy & Briscoe, JJ. concurring).

211. *Hardman*, 622 F. Supp. 2d at 1153.

212. *Id.* at 1136-37.

213. *Id.* at 1138.

The Paiutes of Cedar City and the Hopi Tribe in Arizona who gave feathers to Mr. Wilgus and Mr. Hardman would presumably feel that a permitting system that allowed them to transfer feathers to those they deemed worthy protected and promoted their culture and religious beliefs. . . . Other tribes would no doubt feel their interests harmed Whatever policy it chooses, the government will have furthered its compelling interest with regard to some tribes and frustrated it with regard to others.²¹⁴

“The government’s task of fostering Native American culture is a perilous one,” Judge Benson wrote.²¹⁵

Noting that Judge Benson’s 2009 ruling moved even further from holdings in the other appellate courts, the United States appealed in the case of *Wilgus*.²¹⁶ In 2011, a three-judge panel of the Tenth Circuit reversed in favor of the United States and against *Wilgus*.

Procedurally, the 2011 decision took into account the Tenth Circuit’s 2009 holding in *United States v. Friday*, that the least restrictive means analysis would not be merely a question of fact but one of law, and deepened its review of the lower court’s reasoning.²¹⁷ But the key move made by the panel in 2011 was to settle on a controlling interpretation of the government’s compelling interest with regard to protecting Native American religion, which presented two different options as it came out of the en banc decision in *Hardman*. The 2011 decision opted for the “protection of the culture of federally-recognized Indian tribes” as the controlling construal of the trust responsibility, rather than the language in the majority opinion of its holding in *Hardman*: that of “preserving Native American culture in-and-of-[itself]” potentially “as a thing separate and apart from those Indian tribes to whom the government owes a trust obligation.”²¹⁸ The 2011 *Wilgus* court found this not only in better keeping with the initial formulation in *Hardman*, citing the typical grounding for the special federal relationship with the tribes and the Supreme Court’s holdings in *Morton v. Mancari* and other Indian law cases, but also with its

214. *Id.* at 1139.

215. *Id.* at 1139 n.10.

216. The United States did not appeal in the case of *Hardman*, perhaps because of his having children who were members of a federally recognized tribe.

217. *United States v. Friday*, 525 F.3d 938 (10th Cir. 2008).

218. *United States v. Wilgus*, 638 F.3d 1274, 1285 (10th Cir. 2011).

interpretation of congressional purpose in the Eagle Act itself, noting the statute authorizes permits

“for the religious purposes of Indian tribes” [when it could have read] “for the purposes of Native American religion.” Such wording would have been a clear indication to courts that Congress saw itself as protecting and promoting Native American religion per se, rather than as expressed in the religion of federally-recognized tribal members. But Congress specifically chose to tie the exception to “Indian tribes,” rather than individual practitioners. From this we infer that Congress saw the statutory exception not as protecting Native American religion qua religion, but rather as working to preserve the culture and religion of federally-recognized tribes.²¹⁹

The 2011 *Wilgus* Court also elaborated on the implications of embedding its understanding of the compelling interest in the religious exemption to the Eagle Act in keeping with the principles of federal Indian law made clear in *Mancari*. The first implication is that this steers clear of Fourteenth Amendment challenges:

[E]ven though we are not considering an equal protection or due process attack on the Eagle Act, we note that the language of the exception to the possession ban in the Eagle Act refers specifically to “the religious purposes of Indian tribes.” 16 U.S.C. § 668a. The Act thus draws a distinction between Native Americans and non-Native Americans based on the “quasi-sovereign” status of the tribes.²²⁰

The second implication is that the holding steers clear of violations of the Establishment Clause, based on the Supreme Court’s conclusion in *Mancari* that federally recognized tribes are political, rather than religious or racial, in nature.²²¹

Having clarified its controlling interpretation of the government’s compelling interest in protecting religions of federally recognized tribes, the three judge panel turned to the least

219. *Id.* at 1286 (emphasis omitted).

220. *Id.* at 1286–87.

221. To this, in a note, the implication was added that this interpretation of federally recognized tribal religions keeps the courts from having to make the choice the district court had signaled between advancing some and frustrating some religious interests of federally recognized tribes with different postures toward non-Native adherents. *Id.* at 1288 n.5.

restrictive means analysis and considered an alternative raised by *Wilgus* to let enrolled members of recognized tribes determine whether they can grant feathers to others.²²² The panel also considered an alternative to open the permit process to all sincere adherents of Native religions, the option identified as less restrictive by the district court.²²³ The former alternative was discounted as unenforceable and conducive to developing a black market; the latter was seen to depart from the compelling interest as interpreted by the Tenth Circuit. It would “harm the very population that [the exemption] was designed to help” by increasing already lengthy wait times, “[a]nd it would do so in order to help non-tribal practitioners of Native American religion, a group not encompassed within the compelling governmental interest supporting the Eagle Act.”²²⁴

The court found the current permit process to be the least restrictive means: “[b]y allowing only members of federally-recognized tribes an essential though otherwise prohibited commodity (eagle feathers and parts), the United States ensures that those tribes are able to continue to practice their traditional culture to the greatest extent possible.”²²⁵

C. Courts Recognizing Collective Rights to Native Religions

In the Eagle Act accommodation cases, we have a sustained, decade-long conversation about what manner of thing a Native American religion is, translated into the technical language of the law in cases forced to make difficult judgments involving competing claims to Native American religious exercise.

The First, Ninth, Tenth, and Eleventh Circuits chose to view the asserted religious freedom claims through the refracting lens of established federal Indian law, with its insistence on tribal identities as political, not racial or religious, and rooted in collective rights based in treaty obligations and a federal trust obligation to

222. Because the alternative that the district court had chosen emerged in the proceedings but was presented by neither party, the Tenth Circuit challenged the district court’s conclusion that another regulatory scheme was less restrictive. “A statute that asks whether a regulation is the least restrictive means of achieving an end is not an open-ended invitation to the judicial imagination.” *Id.* at 1289.

223. *Id.*

224. *Id.* at 1293.

225. *Id.* at 1295.

members of those tribes. Through the proverbial back door of established Indian law, these courts have determined that the collective rights of tribes to their particular Native religions would outweigh the religious rights of individual practitioners of Native religions. It is also true that the claims to religious freedom by Fire Bird Gibson, Cowichan Salish Canadian Leonard Antoine, Ray Hardman, and Samuel Ray Wilgus were found sincere and troublingly burdened. This reiterates that Native American religions were not matters of collective rights alone, but practices and communities that could extend beyond the boundaries of tribal membership. If all this is true and (for the moment) settled, the cases also show how contingent are those references to the collective rights to religion when squared with individual rights to Native religions by Native Americans whose claims do not clearly align with the federally recognized tribes.

Contingent, indeed. Still pursuing his religious rights to take an eagle for the Northern Arapaho Sun Dance after the Tenth Circuit had rebuffed his efforts to undo a conviction for a previous eagle hunt,²²⁶ Winslow Friday – or rather the Northern Arapaho Tribe on his behalf – sought a permit in 2009 to take two bald eagles for ceremonial purposes on the Wind River Reservation, a reservation which is complexly shared by two tribes, the Eastern Shoshone and Friday’s Northern Arapaho. As the U.S. Fish and Wildlife Service was processing the Northern Arapaho Tribe’s application for a permit, the Eastern Shoshone Tribe raised an issue with a contemplated permit, citing that tribe’s cultural and religious objections to eagle hunting on the reservation and the compelling government interest of the federal government’s trust responsibility to preserve and protect its tribal religion.²²⁷ The Fish and Wildlife Service made a compromise determination, allowing “the [Northern Arapaho Tribe] to take a live eagle for religious purposes in a manner that would avoid . . . burdening the religious and cultural beliefs and practices of the [Eastern Shoshone Tribe]”

226. *United States v. Friday*, 525 F.3d 938 (10th Cir. 2008). Friday was prevented from acquiring an eagle through the permit and distribution process under BGEPA, citing the need for a ritually pure eagle.

227. *N. Arapaho Tribe v. Ashe*, 92 F. Supp. 3d 1160, 1165-66 (D. Wyo. 2015).

and issuing a permit for taking two bald eagles within Wyoming, but expressly not on the Wind River Reservation.²²⁸

When the Northern Arapaho Tribe challenged the agency's decision under the Free Exercise Clause, the Federal District Court for Wyoming agreed that Northern Arapaho free exercise rights were violated in the compromise decision, drawing support from the Supreme Court's ruling in *Hobby Lobby* and *Holt* to expressly rethink a 2012 district court determination that an Arapaho man's rights under RFRA were not violated because the compromise was "the least restrictive means of achieving its compelling governmental interests in protecting eagle populations and in protecting the religions and cultures of both the [Northern Arapaho Tribe] and the [Eastern Shoshone Tribe]."²²⁹ Specifically, the rethinking turned on the proper weighing of the compelling government interest of "fostering and protecting the culture and religion of federally-recognized Indian tribes" established in *Hardman* in light of the Supreme Court's clarification of compelling government interest in *Hobby Lobby* and *Holt*.²³⁰ I note that *Hobby Lobby* and *Holt*, evaluations of RFRA and RLUIPA did not address the value of a compelling government interest to the First Amendment.

The Wyoming opinion drew support from a case in Texas that had led to the Fifth Circuit's 2014 reevaluation, in light of *Hobby Lobby*, of the logic of *Hardman* and *Wilgus* in support of the federal government's restriction of eagle feather access under the Eagle Act to members of federally recognized tribes. In this case, *McAllen Grace Brethren Church v. Salazar*, a member of the federally unrecognized Lipan Apache tribe and pastor of a church that engages in renewal of Native American traditions, brought a religious freedom challenge that a district court found inconsistent

228. *Id.* (citing the record at 533).

229. *Id.* at 1167. *Ashe* noted that a November 5, 2012, Court Order affirming "the current permit reflects the least restrictive means of furthering the [Defendants'] compelling interests." *Id.* An additional claim under the Administrative Procedure Act was rejected by the district court.

230. *Id.* at 30, 37. The District Court for Wyoming also cited *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), a RFRA case, as prompting a rethinking of the compelling government interest of preserving and protecting the religions and cultures of federally recognized tribes, but failed to acknowledge the Tenth Circuit's affirmation of this *Hardman* logic in its 2011 ruling in *Wilgus*, which did not view *O Centro* in this light.

with the case law considered above.²³¹ But on appeal, the Fifth Circuit reversed and remanded, drawing on developments from *Hobby Lobby* to chart a different direction in weighing the compelling interest of the federal trust responsibility. In its regulations, the Fifth Circuit found:

[T]he government must show that the challenged law *as applied to the claimant* satisfies the compelling interest Therefore, “general statements of its interests” are not sufficient to demonstrate a compelling governmental interest; rather, the interests need to be closely tailored to the law. Where a regulation already provides an exception from the law for a particular group, the government will have a higher burden in showing that the law, as applied, furthers the compelling interest.²³²

Noting that the United States had argued its accommodations under the Eagle Act do not spell out a group right, per se, since they apply to individual tribal members, the Fifth Circuit nevertheless emphatically endorsed the compelling interest of the federal trust responsibility to “Indian tribes.” The Fifth Circuit observed that “‘Indian tribes’ in this particular section” were not defined by Congress when it created the Eagle Act accommodation in 1962. But because “the [Interior] Department’s approach has not been entirely uniform on this,” the court found, “we cannot definitively conclude that Congress intended to protect only federally recognized tribe members’ religious rights in this section.”²³³

The Fifth Circuit took pains also to align its recognition of Pastor Soto’s rights in terms of his membership in the Lipan Apache Tribe, and to note that while that tribe is not currently federally recognized, it is recognized in the Texas State Senate, and by reference to an 1838 Treaty, has “lived in Texas and Northern Mexico for 300 years and . . . had a ‘government to government’ relationship with the Republic of Texas, the State of Texas, and the United States government.”²³⁴ The Court also noted that the Lipan Apache tribe, as a non-profit, was, among the four hundred

231. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5th Cir. 2014).

232. *Id.* at 472 (emphasis added) (citations omitted).

233. *Id.* at 473.

234. *Id.* at 473–74 (citing S. Con. Res. 438, 81st Leg., R.S. (Tex. 2009)).

federally unrecognized tribes, one of only fifty that had received federal funding.²³⁵

The limited nature of this ruling is underscored in Judge Jones's concurrence:

Soto is without dispute an Indian and a member and regular participant in the Lipan Apache Tribe, which, although not federally recognized, has long historical roots in Texas. The panel opinion discusses—and is also limited by—Soto's RFRA claim based on his and his tribe's status. No more should be read into the RFRA protection intended by this decision. Both the conservation of eagles and the way of life of federally recognized Indian tribes are of signal national importance, as indicated by decades of federal law and regulations. . . . Broadening the universe of "believers" who seek eagle feathers might then seriously endanger the religious practices of real Native Americans. Soto's status does not eliminate the potential problems, which will be explored at trial, but cabins this case to Native American co-religionists.²³⁶

In this regard, the Fifth Circuit draws on *Hobby Lobby* to bring heightened attention to some of the contradictions of the federal recognition process and to, in effect, extend the logic of the nation-to-nation trust responsibility with Indian tribes in a particular case, rather than to elevate rights to the mere practice of a Native American religion by non-Native practitioners in general. In other words, *McAllen* adds weight to eagle feather claims by members of non-recognized tribes with compelling cases toward recognition, like state recognition or treaties, and may steer Eagle Act enforcement and administration accordingly. Indeed after the Fifth Circuit's reversal and remand to the district court, Interior Secretary Sally Jewell signed a settlement agreement with Pastor Soto and specifically listed members of his church and three other groups involved in the litigation, recognizing their right to possess eagle feathers and their eligibility to apply to the repository for further eagle parts.²³⁷ Although the agreement committed the

235. *Id.* at 474 n.12 (citing U.S. Gov't Accountability Office, GAO-12-348, Indian Issues: Federal Funding for Non-Federally Recognized Tribes 10 (2012)).

236. *Id.* at 480 (Jones, J., concurring).

237. Settlement Agreement, *McAllen Grace Brethren Church v. Jewell*, No. 7:07-cv-00060 (S.D. Tex. June 13, 2016).

Interior Secretary to consider and seek public comment on a petition to modify the existing Eagle Act regulations, the agreement also contained the reach of any exemptions to those regulations at this time to the listed members of the Grace Brethren Church, the Native American New Life Center, the San Antonio Indian Fellowship, and the South Texas Indian Dancers Association. Such would presumably not extend to non-native practitioners asserting solo claims or for such self-proclaimed tribal entities as Erwin Rupert's Tribe of Pahana.²³⁸

IV. INTERNATIONAL LAW AND COLLECTIVE RELIGIOUS RIGHTS OF INDIGENOUS PEOPLES

If the Eagle Act accommodation cases are potentially seen as mere instances of judicial reasoning about Native religions as group rights sneaking in through the back door, and in ways that were explicitly locked out of the house in the Ninth Circuit's *San Francisco Peaks* decision discussed above, we can turn more forthrightly to the front door reasoning of international human rights law, especially as clarified in the 2007 *U.N. Declaration on the Rights of Indigenous Peoples* (UNDRIP).²³⁹ Although the category of religion has received less elaboration in international human rights law as it has in the context of U.S. law, UNDRIP makes very clear that where indigenous peoples are concerned, rights to religion must be seen as collective as well as individual.²⁴⁰

Religious freedom is of course consistently articulated in the major international human rights instruments. Article 18 of the *Universal Declaration of Human Rights* (UDHR) (1948) provides that: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching,

238. See *Rupert v. Dir.*, U.S. Fish & Wildlife Serv., 957 F.2d 32 (1st Cir. 1992).

239. G.A. Res. 61/295, *supra* note 24. Here I will not elaborate on two other relevant instruments, the International Labour Organization *Indigenous and Tribal Peoples Convention 169* (1989) and the Organization of American States' *Working Draft Declaration on the Rights of Indigenous Peoples*.

240. For implications of applying UNDRIP to domestic U.S. law, see WALTER R. ECHO-HAWK, *IN THE LIGHT OF JUSTICE* 222-79 (2013).

practice, worship and observance.”²⁴¹ Article 4(2) of the *International Convention on Civil and Political Rights* (ICCPR) (1976), ratified by the United States, clarifies that rights of religious conscience are, along with rights to life, freedom from slavery and torture, among the non-derogable rights that cannot be suspended in states of emergency.²⁴²

But the legal force for indigenous peoples of human rights to religion has been very much qualified in international law. This owes, in part, to a substantive problem: indigenous claims to traditional lands, traditional livelihoods, and traditional forms of governance can be meaningfully religious, and not simply or plainly economic, political, or cultural. It owes also to a structural problem: that indigenous peoples as *peoples* are betwixt and between the effective units of international human rights law. On the one hand, the nation states under Article 1 of both the ICCPR and the International Covenant of Economic, Social, and Cultural Rights are the “peoples” with rights of self-determination, but are individuals within those nation states who enjoy human rights on the other. Even as aggregates of such individuals with internationally recognized “minority rights,” indigenous peoples and their claims have often been illegible.²⁴³

But in the last decades, international human rights law is increasingly recognizing that such universal human rights, in order truly to be universal, must apply in distinctive ways to the world’s indigenous peoples as collective rights. The UNDRIP, with its insistence on rights of peoples, not merely indigenous people, makes this boldly plain. UNDRIP begins as follows in Article I: “Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.”²⁴⁴

241. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 18, (Dec. 10, 1948).

242. International Covenant on Civil and Political Rights, art. 4(2), Dec. 19, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

243. For a fuller discussion, see Michael D. McNally, *Religion as Peoplehood: Native American Religious Traditions and the Discourse of Indigenous Rights*, in *HANDBOOK OF INDIGENOUS RELIGION(S)* 52 (Greg Johnson & Siv Ellen Kraft eds., 2017).

244. G.A. Res. 61/295, *supra* note 24, at art. 1.

The Declaration engages, rather than avoids, the category of religion in its elaboration of collective rights, but unlike the terse words of the First Amendment religion clauses and other human rights instruments, the Declaration elaborates on what protection of “religious traditions” might entail in terms of the collective practices of indigenous communities. Article 12 reads:

Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.²⁴⁵

And this more explicit elaboration on rights pertaining to religious and spiritual traditions follows a broader discussion of cultural rights in Article 11: “Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.”²⁴⁶

If these two articles key into its specifically religious provisions, UNDRIP does not content itself with a view of indigenous religions as merely or plainly religious. In fact, religious or spiritual considerations are clearly mentioned in five other provisions protecting various elements of culture²⁴⁷ and implicitly present in further considerations of rights to oral traditions, philosophies, and languages,²⁴⁸ culturally inflected medicine,²⁴⁹ and traditional ecological knowledge.²⁵⁰ Most salient here is UNDRIP’s explicit recognition in Article 25 of rights to “maintain and strengthen” an indigenous people’s “spiritual relationship” with traditional “lands, territories, waters and coastal seas and other resources and

245. *Id.* at art. 12.

246. *Id.* at art. 11.

247. *Id.* at arts. 25, 31, 34–36. For a fuller discussion, see McNally, *supra* note 194.

248. G.A. Res. 61/295, *supra* note 24, art. 13.

249. *Id.* at art. 24.

250. *Id.* at art. 31.

to uphold their responsibilities to future generations in this regard.”²⁵¹

When UNDRIP was adopted nearly unanimously by the General Assembly in 2007, the United States was alone with Canada, Australia, and New Zealand in refusing to do so. But in 2010, the United States formally adopted UNDRIP with reservations, but with no reservations directly related to religious or cultural matters. Indeed in the accompanying statement, the U.S. committed itself to:

[P]romoting and protecting the collective rights of indigenous peoples as well as the human rights of all individuals. The United States underlines its support for the Declaration’s recognition in the preamble that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess certain additional, collective rights. The United States reads all of the provisions of the Declaration in light of this understanding of human rights and collective rights.²⁵²

Angela Riley and Kristen Carpenter have offered framing of how international institutions, domestic nations, and indigenous peoples themselves are operationalizing the aspirations of UNDRIP in this “jurisgenerative moment.”²⁵³ Perhaps most important are the subtle ways that the language and norms of UNDRIP gain legal traction as they gradually come to animate the arguments and conversations about indigenous rights at each level. I won’t elaborate fully here, except to point out that at the international level, the United Nations has taken important structural steps to hardwire indigenous peoples’ representation into its work. This occurs through bodies like the Permanent Forum on Indigenous Issues, the Special Rapporteur on the Rights of Indigenous Peoples, the newly charged Expert Mechanism on the Rights of Indigenous Peoples, through high profile events like the 2014 World

251. *Id.* at art. 25.

252. U.S. DEP’T OF STATE, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples (Jan. 12, 2011) <https://2009-2017.state.gov/s/srgia/154553.htm>.

253. Kristen Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CAL. L. REV. 173 (2014).

Conference on Indigenous Peoples at the General Assembly,²⁵⁴ and more focused measures to incorporate indigenous issues centrally into the work of the U.N.²⁵⁵

There is not yet express elaboration in UNDRIP or its implementation apparatus as to how religious rights of indigenous peoples are to be implemented as collective rights. And if, in the near term, U.S. courts are reluctant to engage the non-binding UNDRIP in their interpretation of U.S. law,²⁵⁶ the clarifications of the *Declaration* can, and increasingly will, inform the making of U.S. law and policies in recognizing the collective nature of Native American religious freedom.

V. *BURWELL V. HOBBY LOBBY STORES, INC.* (2014)

In 2014, the U.S. Supreme Court ruled that under RFRA, the religious exercise of three closely held corporations was unlawfully burdened by the contraceptive mandate under the Affordable Care Act, and the 5-4 decision – one of “startling breadth” in the view of Justice Ginsburg’s dissent – turned on a holding that closely held for-profit corporations are “persons” capable of “religious exercise” that triggers RFRA’s strict scrutiny analysis when burdened.²⁵⁷

254. See G.A. Res. 69/2 (Sept. 22, 2014). U.N. General Assembly, Outcome Document of the High Level Plenary Meeting of the General Assembly Known as the World Conference on Indigenous Peoples, A/Res/69/2 (22 September, 2014). This document includes the revised mandate of the Expert Mechanism on the Rights of Indigenous Peoples to better promote and monitor the operationalizing of UNDRIP.

255. See, e.g., G.A. Res. 71/321 (Sept. 8, 2017) U.N. General Assembly, *Enhancing the Participation of Indigenous Peoples’ Representatives and Institutions in Meetings of Relevant United Nations Bodies on Issues Affecting Them* A/71/L.82 (Sept. 2017). Consider also how indigenous concerns increasingly inform the periodic review, monitoring, and reporting mechanisms related to other U.N. instruments like the *Convention to Eliminate All Forms of Racial Discrimination*. *Id.*

256. A brief database search survey of 59 federal court cases that invoke UNDRIP were overwhelmingly dismissive, often with *pro se* litigants raising the Declaration in a decidedly non-starter manner. Still, a good case can be made that UNDRIP clarifies how religious rights are properly to be seen as collective, not just individual, under binding human rights instruments like ICCPR and the UDHR.

257. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (holding that the religious freedom of a retail chain with 13,000 employees, which is owned by a family that believes life begins at conception, and the religious freedom of two other corporations was unlawfully violated by the contraception coverage requirement under the Affordable Care Act). Affordable Care Act of 2010, 26 U.S.C. § 5000A(f)(2); §§ 4980H(a), (c)(2).

The *Hobby Lobby* ruling clears ground in two important respects for courts' consideration of Native American religious exercise claims under RFRA as matters of collective, not just individual, religious liberty. First, the *Hobby Lobby* Court proposed a novel reading of RFRA not merely as a restorative action following *Smith* but as a law passed "in order to provide very broad protection for religious liberty," indeed extending beyond protections the Supreme Court had allowed for First Amendment free exercise accommodations prior to its 1990 decision in *Smith*.²⁵⁸ Second, on the premise of this expansive view of Congress's intent in RFRA, the Court held that RFRA's language of "persons," whose religious exercise implicates RFRA, could include for-profit corporations.²⁵⁹ In substantiating that view against the arguments of a vigorous dissent and considerably settled matters of corporate law, the *Hobby Lobby* Court elaborates on the nature of a corporation's religious exercise to suggest that for-profit corporations, like the many religious congregations and religious associations that organize as non-profits, exercise religion that is more than the sum of the aggregate parts. In other words, as an artificial person, the corporation is not simply an individual, but a collective entity.

A. RFRA's Expansive Reach in Hobby Lobby

To orient its settling of the key legal question in *Hobby Lobby* of whether a closely held for-profit corporation could qualify as a "person" whose religious exercise was protected under RFRA, the Supreme Court took the position that Congress passed RFRA to "provide very broad protection for religious liberty," that "Congress went far beyond what this Court has held is constitutionally required,"²⁶⁰ and that RFRA did more than merely restore the compelling government interest analysis that had held sway in the Supreme Court's First Amendment free exercise jurisprudence prior to its 1990 *Smith* decision. In other words, to square the conclusion that at least certain for-profit corporations have religious liberty rights despite the Supreme Court's explicit rejection of such claims under the First Amendment,²⁶¹ the *Hobby*

258. *Hobby Lobby*, 573 U.S. at 693.

259. *Id.*, slip. op. at 19–31.

260. *Id.* at 684, 706.

261. *Id.* at 739–72 (Ginsburg, J., dissenting).

Lobby Court had to assert that the legislated religious freedom protections of RFRA were meant to go beyond those of the First Amendment as the Supreme Court had allowed them before *Smith*. In dissent, Justice Ginsburg identified this as an “errant premise” after which the Court “falters at each step of its analysis.” Justice Ginsburg wrote, “[p]ersuaded that Congress enacted RFRA to serve a far less radical purpose, and mindful of the havoc the Court’s judgment can introduce, I dissent.”²⁶²

If this was a puzzling departure from the High Court’s two previous rulings on RFRA, in which it had taken pains to either contain the statute’s reach by finding it unconstitutional as applied to the states²⁶³ or as only providing narrow protections to generally applicable federal laws,²⁶⁴ the very departure in *Hobby Lobby* carries significant implications for the concerns of this Article.

To return to the *San Francisco Peaks* case, the Ninth Circuit majority in *Navajo Nation* had taken the approach of the *Hobby Lobby* dissent that the proper context for interpreting RFRA’s language of “substantial burden” was a narrow congressional intent that RFRA simply restore the *status quo ante* of First Amendment free exercise jurisprudence prior to *Smith*. The Ninth Circuit turned to *Lyng*, which predated *Smith* by two years, as the controlling precedent for the interpretation of “substantial burden.”²⁶⁵ Because the *Lyng* court had found that government approval of a logging road through precincts sacred to three California claimant tribes did not “prohibit” their First Amendment protected free exercise, the Ninth Circuit reasoned that the threshold of a “substantial burden” of religious exercise under RFRA was not crossed by government approval of a ski area’s snowmaking with treated wastewater on a mountain sacred to the claimant tribes. And despite a varying holding on that legal question in a Tenth Circuit sacred land decision,²⁶⁶ the Supreme Court denied certiorari in 2009.²⁶⁷

262. *Id.* at 740 (Ginsburg, J., dissenting).

263. See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

264. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

265. *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1071-74 (9th Cir. 2008); *Hobby Lobby*, 573 U.S. at 748-49 (Ginsburg, dissenting).

266. *Comanche Nation v. United States*, 393 F. Supp. 2d 1196 (W.D. Okla. 2008).

267. *Navajo Nation v. U.S. Forest Service*, 556 U.S. 1281 (2009) (per curiam), *cert. denied*.

Faced with a fairly plain narrative that RFRA followed *Smith* directly and was expressly intended to restore the First Amendment free exercise jurisprudence on neutral laws of general applicability which the Court took away in *Smith*, the *Hobby Lobby* Court supported its expansive interpretation of congressional intent in RFRA on two bases. First, against a conventional view that its decision in *City of Boerne* restricted RFRA by declaring it unconstitutional as applied to the states, the *Hobby Lobby* majority found in that holding an acknowledgment of RFRA's broad reach as applied to the federal government: "[w]e held that Congress had overstepped its Section 5 authority because '[t]he stringent test RFRA demands' 'far exceeds any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*.'"²⁶⁸

Where the dissenting opinion of Justice Ginsburg, who had joined the *City of Boerne* decision argued otherwise on this point, the *Hobby Lobby* majority asserted that the "stringent test" in question, the least restrictive means test, did not inhere in pre-*Smith* free exercise precedent.²⁶⁹ Justice Ginsburg found in error the *City of Boerne's* decision that the least restrictive means requirement "was not used in the pre-*Smith* jurisprudence that RFRA purported to codify."²⁷⁰

Next, the *Hobby Lobby* Court turned to a provision of RLUIPA, which Congress ironically passed as a more narrowly tailored response to the constraints of *City of Boerne*. Because the provision amended RFRA's definition of "religious exercise" by deleting an original reference to First Amendment holdings prior to *Smith* and by expanding the definition of "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief,"²⁷¹ the *Hobby Lobby* Court understood Congress's intent in RFRA "to effect a complete separation from the First Amendment case law."²⁷² The Court also cited RLUIPA's

268. *Hobby Lobby*, 573 U.S. at 695 (citing *City of Boerne*, 521 U.S. at 533-34).

269. *Id.* at 736.

270. *Id.* at 749-50 (Ginsburg, J., dissenting).

271. RLUIPA, 42 U.S.C. § 2000cc-5(7)(A).

272. *Hobby Lobby*, 573 U.S. at 748 (Ginsburg, J., dissenting). The dissent found implausible the suggestion that RLUIPA's alteration did more than simply relieve courts of the impossible task of determining the "centrality" of a particular religious exercise. Justice

statement that this newly defined “exercise of religion” “be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this act and the Constitution.”²⁷³

The following year, in *Holt v. Hobbs*, the Supreme Court unanimously reversed lower court rulings and found a Muslim inmate was entitled to grow a beard for religious purposes even though it violated the regulations of an Arkansas corrections facility.²⁷⁴ In that case, the inmate’s religious freedom claims were made under RLUIPA, but the High Court related the two statutes, noting RLUIPA thus allows “prisoners ‘to seek religious accommodations pursuant to the same standard as set forth in RFRA.’”²⁷⁵ What is important for our purposes is that the Supreme Court in *Holt* found erroneous the lower courts’ appeal to First Amendment cases to hold that the grooming policy did not substantially burden Holt’s practice of Islam, underscoring its *Hobby Lobby* holding that Congress intended RFRA and RLUIPA to expand religious freedom protections beyond the First Amendment and applying that logic to the substantial burden analysis:

[T]he District Court erred by concluding that the grooming policy did not substantially burden petitioner’s religious exercise because “he had been provided a prayer rug and a list of distributors of Islamic material, he was allowed to correspond with a religious advisor, and was allowed to maintain the required diet and observe religious holidays.” . . . In taking this approach, the District Court improperly imported a strand of reasoning from cases involving prisoners’ First Amendment rights.²⁷⁶

Ginsburg cited *Rasul v. Myers*, 563 F.3d 527, 535 (D.C. Cir. 2009) (Brown, J., concurring): “The amendment in no way suggests that Congress meant to expand the class of entities qualified to mount religious accommodation claims.” *Hobby Lobby*, 573 U.S. at 748 (Ginsburg, J. dissenting).

273. RLUIPA, 42 U.S.C. § 2000cc-3(g).

274. *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015).

275. *Holt v. Hobbs*, No. 13-6827, slip op. at 3 (U.S. 2015) (citing *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006)).

276. *Holt*, slip op. at 7 (citation omitted) (citing *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 351-52 (1987) and *Turner v. Safley*, 482 U.S. 78, 90 (1987)).

When the *Holt* court held the particular reasoning found in those cases, “the availability of alternative means of practicing religion,” to be “a relevant consideration,” it made an important distinction.²⁷⁷ The error was not tied to *this particular* strand of reasoning, but to *a strand of reasoning from cases involving prisoners’ First Amendment rights*, because “RLUIPA provides greater protection.”²⁷⁸

B. Substantial Burdens in the Wake of Hobby Lobby

It must be said that when afforded the opportunity in a similarly aligned 2016 case, courts have invoked *Hobby Lobby* and *Holt* to narrow, not broaden, their approach to what counts as a substantial burden.²⁷⁹ In *Oklevueha Native American Church of Hawaii, Inc. v. Lynch* (2016), the Ninth Circuit found the controlled substance regulations did not substantially burden a religious group in its religiously motivated access to marijuana and trigger RFRA protections.²⁸⁰ Despite its deliberately indigenous name, *Oklevueha* only nominally aligns with *Navajo Nation*, since it is not a sacred lands case and more importantly since it involves a decidedly non-Native religious group.²⁸¹ Notably, the “Native” Native American Church filed an amicus brief against the *Oklevueha* effort to associate their claims with hard won accommodations for the Native American Church, emphasizing that the Native American Church has no ceremonial regard for

277. *Id.*

278. *Id.* at 7-8.

279. For more on how *Hobby Lobby* and *Holt* have been applied in the context of Eagle Act cases to broaden the RFRA religious freedom rights of individuals excluded, see *supra* note 222 for discussion of *McAllen Grace Brethren Church v. Salazar* (2016).

280. *Oklevueha Native American Church of Hawaii, Inc. v. Lynch*, 828 F.3d 1012, 1016-18 (9th Cir. 2016).

281. *Id.* at 1012. A reasonable person visiting a webpage affiliated with the group could very well conclude that *Oklevueha* is a decidedly non-Native religious group. Membership, which costs \$200, or \$30 for members of federally recognized tribes, “provides you a means to receive your constitutional rights in attending earth based indigenous American Native spiritually empowering and healing ceremonies—especially Native American Church indigenous ceremonies that involve sacraments (peyote, cannabis, ayahuasca, etc [sic]) that are otherwise illegal for Non-Members to partake and or be in possession of.” *Why Being a Member of Oklevueha Native American Church will Benefit You*, OKLEVUEHA NATIVE AMERICAN CHURCH, <https://nativeamericanchurches.org/joining-oklevueha-why-and-how/> (last visited Jan. 19, 2019).

marijuana.²⁸² Nevertheless, in holding that the controlled substance laws did not substantially burden the Oklevueha practitioners, the Ninth Circuit turned to its *Navajo Nation* position that “substantial burden” be interpreted in light of *Lyng*: absent unless the government action coerces a practitioner into acting contrary to belief. The Ninth Circuit relied on the fact that Oklevueha practitioners considered Peyote their key sacrament, cannabis being merely a substitute and that “foregoing cannabis [was] not contrary to their religious beliefs.”²⁸³

But in its effort to distinguish *Oklevueha* from *Hobby Lobby* and instead to tie it to *Navajo Nation*, a Harvard Law Review Case Comment argues the Ninth Circuit conflated two different senses of substantial burden:²⁸⁴

There are at least two things that “substantial” could modify. First, it could be that the government has to put substantial or heavy pressure on you to violate your religious beliefs [such as the large fine in *Hobby Lobby*]. But it could also be that the government has to pressure you to violate your religious beliefs in some substantial or serious way. For example, maybe the government is asking you to violate a particularly important tenet of your religion, not just some discretionary one.²⁸⁵

In *Navajo Nation*, the Ninth Circuit found no substantial burden because the government action was not substantial in the manner of its burden; the court rejected an argument that Forest Service approval of the sewage to snowmaking plan forced the tribes to act contrary to their religion, a position that I argue above is not an accurate conclusion from the accepted facts in that case.²⁸⁶ In *Oklevueha*, however, it was the practice of using cannabis, which the

282. Brief for the National Council of Native American Churches et al. as Amici Curiae Supporting Appellees at 8–9, *Oklevueha*, 828 F.3d 1012 (No. 14-15143).

283. *Oklevueha*, 828 F.3d at 1016.

284. Case Comment, *Religious Freedom Restoration Act – Substantial Burden – Ninth Circuit Holds that Federal Cannabis Prohibition is Not a Substantial Burden – Oklevueha Native American Church of Hawaii, Inc. v. Lynch*, 828 F.3d 1012 (9th Cir. 2016), 130 HARV. L. REV. 785 (2016).

285. *Id.* (citing Chad Flanders, *Substantial Confusion about “Substantial Burdens,”* 27 U. ILL. L. REV. 28–29 (2016)).

286. *See supra* note 54.

court noted was non-obligatory, that was insufficiently substantial, not the burden of government regulation of cannabis.²⁸⁷

The Case Comment goes on to argue that, by rendering its holding in *Oklevueha* as consistent with its holding in *Navajo Nation*, the Ninth Circuit “enshrined” its substantial burden standard “as among the most demanding in the nation by linking *Navajo Nation*’s ‘act contrary’ rule to the language of religious *obligation*, which previous Ninth Circuit cases had not explicitly done.”²⁸⁸

C. *Whither the RFRA Claim in Standing Rock II?*

Similarly questionable logic was applied in the second round of the Dakota Access Pipeline case, when the D.C. District Court judge found the Cheyenne River Sioux Tribe’s argument unavailing that Army Corps’ approval of the Missouri River pipeline crossing violated Lakota religious freedom rights under RFRA.²⁸⁹ As briefly discussed at the outset of this Article, the district court found primarily that the tribes’ request for a preliminary injunction and temporary restraining order was nullified by *laches*, since the tribes did not bring the RFRA claim a half year earlier in their initial motions for a preliminary injunction.²⁹⁰ But despite forceful arguments of the tribes that *Hobby Lobby* had rendered *Navajo Nation* and *Lyng* no longer controlling for such cases, the court found that the RFRA claim would be unlikely to succeed on the merits.²⁹¹ The Cheyenne River Sioux Tribe had argued, first, that unlike *Navajo*, the spiritual contamination of the only ritually pure water available for Lakota ceremonies would “foreclose” the practice of Lakota religion. Because the United States

287. *Oklevueha*, 828 F.3d at 1017.

288. Case Comment, *supra* note 284, at 790–91.

289. *Standing Rock Sioux Tribe v. United States Army Corps of Engineers (Standing Rock II)*, 239 F. Supp. 3d 77, 88 (D.D.C. 2017).

290. *Id.* at 83 (“[L]aches bars the preliminary-injunctive relief requested (but not the RFRA claim itself) and that the Tribe’s substantial-burden position is unlikely to achieve success on the merits. Having so decided, the Court need not consider the remaining three factors of the preliminary-injunction analysis—irreparable harm, balance of equities, and public interest.”).

291. *Id.* at 100 (“The Court holds that *Lyng* likely prevents the Tribe from showing that the Corps’ decision to grant an easement to Dakota Access to operate an oil pipeline under Lake Oahe constitutes a substantial burden on its members’ free exercise of religion. The Tribe, accordingly, is unlikely to succeed on the merits of its RFRA claim.”).

has systematically deprived the Tribe of access to other water sources as a function of its more than 200-yearlong campaign to dispossess the Lakota people of their aboriginal lands and resources. . . . [T]he Tribe and its members here are more closely analogous to the prisoners whose only options in the exercise of their religion are closely controlled by the government.²⁹²

Secondly, Cheyenne River argued that where the *Lyng* court “could not vindicate Indian religious adherents’ challenge to a government sanctioned project on the government’s own land because to do so would imply in the Indian religious believer “*de facto* beneficial ownership of some rather spacious public property,” the Lakota tribes had an “*actual* legal ownership interest in the waters of Lake Oahe” and the U.S. had “a fiduciary [responsibility] in the protection of those waters for the Tribe’s benefit.”²⁹³ Finally, and most importantly, Cheyenne River took pains to argue *Navajo Nation* was “no longer good law” in light of *Hobby Lobby* and *Holt* for reasons argued above, and also because, as in the case with *Oklehueva*, “the real question that RFRA presents is ‘whether the [government regulation] imposes a substantial burden on the ability of the plaintiff to [act] in accordance with *their religious beliefs*,’ not ‘whether the religious belief asserted in a RFRA case is reasonable.’”²⁹⁴

The D.C. District Court rejected these arguments, instead finding a direct line from *Navajo Nation* and especially *Lyng*, in which the court found a tight analogy: “incidental, if serious impact on a tribe’s²⁹⁵ ability to practice its religion because of spiritual desecration of a sacred site.”²⁹⁶ Remarkably, the D.C. District Court

292. Cheyenne River Sioux Tribe’s Motion for Preliminary Injunction at 34, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 239 F. Supp. 3d 77 (D.D.C. 2017) [hereinafter CRST Motion].

293. *Id.* at 33–34.

294. *Id.* at 34–36 (citing *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014)) (brackets in the original).

295. Note, however, the slippage between the D.C. court’s discussion of a “tribe’s” religious practice and the cited rendering of the burden in *Lyng* as a matter of interference “with private persons’ ability to pursue spiritual fulfillment.” *Standing Rock II*, 239 F. Supp. 3d at 92 (citing *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 449 (1988)).

296. *Id.* at 93; see also *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (rejecting RFRA claim for a federal prisoner objecting to government’s extracting of DNA tissue samples).

judge found additional support for the analogy with *Lyng* in the fact that the land in question under Lake Oahe was flatly “federal land,”²⁹⁷ obscuring the treaty claims, court protected water rights, flooding of hundreds of thousands of acres of Lakota lands, and the implicated federal trust responsibility that other courts, in other contexts, had taken into account over and over again.²⁹⁸ The Court cited multiple authorities for the applicability of *Lyng* to RFRA cases and held that *Hobby Lobby* and *Holt*, while extending RFRA’s religious freedom beyond the constraints of First Amendment law prior to *Smith*, did not do so in a manner that would advance Cheyenne River’s specific claims.²⁹⁹ *Hobby Lobby*, the court agreed, showed Congress intended in RFRA “to effect a complete separation from First Amendment case law” with regard to the definition of “exercise of religion,”³⁰⁰ but *Hobby Lobby* did not, the court held, change anything about the “substantial burden” analysis, and thus does not change the result because the Tribe “here faces no such coercion or sanction.”³⁰¹ And where *Holt* had made clear that Congress in RLUIPA meant to lower the standard for a substantial burden under First Amendment analysis,³⁰² the district court held this “does not impliedly overrule *Lyng* or otherwise undermine its relevance here.”³⁰³

But as Cheyenne River had argued, there is a distinction to be made between its case and that decided in *Navajo Nation*, following *Lyng*.³⁰⁴ In those cases, the spiritual fulfillment of individuals was the rendering of the burdened practice: “the only effect of the

297. *Standing Rock II*, 239 F. Supp. 3d at 98 (“As the pipeline runs through the land under the lake, rather than the lake’s waters, the Court first discusses ownership of the land and then turns to the Tribe’s interest in the water.”).

298. See *South Dakota v. Bourland*, 508 U.S. 679 (1993); *Sioux Nation v. United States*, 448 U.S. 371 (1980); *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809 (8th Cir. 1983).

299. RFRA’s legislative history references to *Lyng* in understanding that pre-*Smith* substantial burden standards should still apply in judicial interpretations of RFRA, and approving appeals by appellate courts to *Lyng* in RFRA and RLUIPA cases. *Standing Rock II*, 239 F. Supp. 3d at 93 (citing S. Rep. No 103-111 at 8-9 (1993); 139 Cong. Rec. S14461 at S14470 (Statement of Sen. Orrin Hatch, Oct 27, 1993)).

300. *Id.* at 96 (citing *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 696 (2014)).

301. *Id.* at 96-98.

302. CRST Motion, *supra* note 292, at 35 (citing *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015)).

303. *Standing Rock II*, 239 F. Supp. 3d at 98.

304. CRST Motion, *supra* note 292, at 35 (citing *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1070 (9th Cir. 2008)).

proposed [government action] is on the Plaintiffs' subjective, emotional religious experience.' In short the court held that the burden imposed upon the Indian's religious practice was too weakly connected to the government regulation."³⁰⁵ In *Hobby Lobby*, by contrast, the real question that RFRA presents is "'whether the [government regulation] imposes a substantial burden on the ability of the plaintiff to [act] in accordance with their religious beliefs', not 'whether the religious belief asserted in a RFRA case is reasonable.'"³⁰⁶ The illogic of a tidy distinction between subjective, emotional experience and substantially burdened free exercise, Cheyenne River argued, is borne out even more clearly in the prisoner cases:

Unless one is an observant Jew, the burden of being forced to eat food that is not prepared in a kosher kitchen must seem subjective and emotional, rather than objective and rational. Yet the courts . . . did not apply a test of whether the belief was objective and rational to determine whether it substantially burdened prisoners forced to choose between eating non-kosher food or violating their religious beliefs. To apply such a test would be to question the validity of keeping kosher or observing halal practices, which the law does not permit.³⁰⁷

The religious obligation standard signaled anew by *Holt v. Hobbs* could be a game-changer for how sacred lands claims, when there are—and there usually are—compelling accepted facts of religious obligation akin to those accepted in the *Navajo Nation* case, can pass the threshold of the substantial burden analysis. This would be particularly compelling in a case that should arise in a different circuit, perhaps especially within the Tenth Circuit, where *Comanche Nation v. United States* applies a more expansive view of substantial burden than in the Ninth Circuit's *Navajo Nation* case.³⁰⁸

But even within the Ninth Circuit or other circuits holding its view of substantial burden, the Supreme Court's recognition in *Hobby Lobby* of the religious exercise of a for-profit corporation,

305. *Id.* (brackets in the original).

306. *Id.* at 35–36 (citing *Navajo Nation*, 535 F.3d at 1070; *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014)) (brackets in the original).

307. *Id.* at 36 (citations omitted).

308. *Comanche Nation v. United States*, No. CIV-08-849-D (W.D. Okla. 2008).

could propel a view toward sacred land claims, or other claims advanced by tribes, as matters of collective rights.

D. Hobby Lobby and Collective Rights

As “persons,” corporations as an entity are, strictly speaking, legal individuals, and collectives only in the abstract, that exercise religion. But ambiguities about corporations as legal individuals emerged in the Court’s reasoning. In dicta, the *Hobby Lobby* majority related its view of the ostensible collectivity involved:

A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. . . . [P]rotecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control these companies.”³⁰⁹

The dissent, concerned about the “immoderate” view of RFRA as inclusive of for-profit corporations’ religious exercise, worried about an ambiguity in the collective nature of corporations as legal persons. The dissent argued that the Court had potentially run afoul of the Establishment Clause by privileging the owners’ beliefs over the wide range of religious beliefs of the collective that makes up a for-profit corporation (in contrast with religious communities that incorporated not for profit making but expressly for shared religious goals).³¹⁰

If the Supreme Court has found that such for-profit corporations as Hobby Lobby, which is comprised of more than 13,000 people, are “persons” exercising religious freedom rights, it seems time for courts to conceive of the religious freedom claims of American Indian tribes and Alaskan Native and Native Hawaiian

309. *Hobby Lobby*, 573 U.S. 682 at 706–07.

310. *Id.* at 745–46. (Ginsburg, J., dissenting) (“The exemption sought by Hobby Lobby and Conestoga would override significant interests of the corporations’ employees and covered dependents. . . . In sum, with respect to free exercise claims no less than free speech claims, ‘your right to swing your arms ends just where the other man’s nose begins.’”) (quoting Chafee, *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 957 (1919)).

communities, accordingly—not as aggregations of so many indigenous individuals but as collective religious freedom rights of the collectivities.

The analogy between for-profit corporations and sovereign tribal governments is hardly airtight, to say the obvious. There are distinctive traits of sovereignty to the over 550 federally recognized tribes with their various constitutions, or even to the more corporate models of the legal communities formed under the Alaska Native Claims Settlement Act,³¹¹ and even in certain contexts, to the legal entities— typically non-profit corporations — through which non-recognized tribes organize.³¹² But where they depart has little to do with the analogical point here. If the collective rights logic of the Supreme Court’s holding in *Hobby Lobby* can distinguish the protected religious exercise of the corporate expression of a collectivity of 13,000 diverse individuals, it can apply to legal expression of Native communities, even taking into account the internal diversity of their members. This is emphatically not to flatten all the arguments this Article has advanced in the preceding parts into a *Hobby Lobby* framework, but the *Hobby Lobby* moment does place in stark relief how doable it is for courts to recognize the collective rights of Native American religious freedom.³¹³

311. Alaska Native Claims Settlement Act, 43 U.S.C. ch. 33 (2012).

312. These can be, as in the case of the Lipan Apache Tribe of Texas, at the time of this writing, recognized by state governments but not by the federal government. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5th Cir. 2014).

313. Perhaps this is even more doable in light of the seating of Brett Kavanaugh and especially Neil Gorsuch to the Supreme Court. When a judge in the Tenth Circuit, Justice Gorsuch, joined the majority in the *Hobby Lobby* case, but further endorsed a view of RFRA’s expansive reach in a concurring opinion: “RFRA is indeed something of a ‘super-statute.’” *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d. 1114, 1157 (10th Cir. 2013) (Gorsuch, J., concurring). By one count, Judge Gorsuch had heard nearly seventy claims involving federal Indian law of which he authored sixteen opinions. Matthew L.M. Fletcher, *Neil Gorsuch Indian Law Record as Tenth Circuit Judge*, TURTLE TALK (Feb. 1, 2017, 12:17 PM), <https://turtletalk.blog/2017/02/01/neil-gorsuch-indian-law-record-as-tenth-circuit-judge/>. In one of those opinions he submitted to his Supreme Court confirmation process, a RFRA case involving prison sweat lodge access, Gorsuch showed a clear appreciation for the distinctive significance of Native American religions. *See Yellowbear v. Lampert*, 741 F.3d 48 (10th Cir. 2014).

CONCLUSION: THE COLLECTIVE RIGHTS
OF NATIVE AMERICAN RELIGIOUS FREEDOM

In this Article, I have argued that where Native American sacred claims have consistently faltered under judicial applications of religious freedom law, this has not been simply because, as many have argued, Native religions have distinctive contours that are hard to comprehend in the register of Judeo-Christian religions. They have faltered also because courts have consistently misrecognized claims to *collective* religious obligations and duties advanced by tribes themselves and flattened them into mere practices of an interiorized, subjective, and individual spiritual fulfillment—spiritual, not religious. And this judicial record has had the effect of discouraging Native communities from boldly bringing religious freedom claims to safeguard sacred places, practices, objects, and ancestral remains, turning instead to remedies under environmental law, cultural property law, and federal Indian law. But for all the intellectual and legal difficulties of fitting distinctive Native American traditions into the category of “religion,” religion and religious freedom remain power words in American culture and law, as we have seen in *Hobby Lobby* and other recent decisions.

Courts and lawmakers, I have argued, can do better to ensure the religious freedom of Native Americans by reckoning more fully with the distinctively *collective* shape of so many Native sacred claims, especially when tribes are the litigants, wedding the robust protections for religious freedom, especially under RFRA as the Supreme Court interpreted it in *Hobby Lobby*, with the collectivist protections of federal Indian law.

The long-established government-to-government relationship between the U.S. and federally recognized tribes distinguishes Native nations from other, merely religious, communities. Such an approach, I have argued, is neither altogether novel nor as perilous as recognizing collective rights elsewhere in religious freedom law. Statutes like NAGPRA and AIRFA, together with AIRFA’s Peyote Amendment, have grafted the substantive protection of religion into the structural logic of federal Indian law and have stood up in the courts because of the special political relationship with the recognized tribes. For their part, courts too have distinguished the distinctively collective shape of tribal religious interests from

those of individuals, as seen especially in the case law on accommodations under the Bald and Golden Eagle Protection Act. Although such recognitions of the collective rights of Native American religious freedom have relied on the distinction of federal acknowledgement that excludes a significant number of Native American communities and their members from fuller religious freedom, this problem is not insurmountable; reasonable distinctions can be and have been made by courts to include members of at least some specific Native communities that lack federal recognition but that are recognized by states.³¹⁴

I have also argued that the current state of federal Indian law on these questions need not define the horizon of legal imagination here. The *United Nations Declaration on the Rights of Indigenous Peoples*, although it is a non-binding instrument, makes explicit that religious freedom rights elsewhere enumerated in binding international human rights instruments must be regarded as collective and not just individual rights if they are to meaningfully apply to indigenous peoples.³¹⁵

So, what might a more systematic regard for the collective rights of Native American religious freedom look like?

Courts considering Native American free exercise claims under the First Amendment can consider bundling religious free exercise rights with obligations to recognized tribes under federal Indian law. In its *Employment Div. v. Smith* holding, the Supreme Court distinguished *Smith* from precedents like *Wisconsin v. Yoder* and *Sherbert v. Verner* by saying the latter were never considerations of religious freedom rights alone, but those rights bundled with other rights, like free speech or parental rights.³¹⁶ At the very least, as Kristen Carpenter suggests, courts could invoke the special relationship to the tribes.³¹⁷ Similarly, as courts hear tribal claims

314. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5th Cir. 2014)..

315. Although the Canadian Supreme Court did not fully engage such an argument, the Ktunaxa First Nation's challenge to a proposed ski resort on sacred lands in British Columbia raised the possibility of conceptually conjoining Canada's recognition of collective aboriginal rights under Section 35(1) of the *Constitution Act* with the Canadian Charter's 2(a) protections of religious freedom for all Canadians. See *Ktunaxa Nation v. British Columbia*, [2017] 2 S.C.R. 386 (Can.).

316. *Emp't Div. v. Smith*, 494 U.S. 872, 881 (1990).

317. Carpenter, *Limiting Principles*, *supra* note 27, at 417-18.

under RFRA, they should regard those claims not solely as religious freedom claims of individuals but of tribes, or of individuals as members of tribes, that implicate the United States' government-to-government relationship and trust responsibility to protect and preserve the religions and cultures of those tribes and their members.³¹⁸

And where it comes to sacred land claims by tribes that are so crucial to Native American religious freedom, courts should rethink just how controlling *Navajo Nation* and *Lying* should be in the wake of the Supreme Court's *Hobby Lobby* ruling that Congress intended RFRA to go well beyond the pre-*Smith* jurisprudence. As I argue above, the Native claims to sacred lands could very well have prevailed in *Navajo Nation* were the case adjudicated in the wake of *Hobby Lobby*.

Congress can do more to enact narrowly-tailored legislative accommodations to promote fuller religious freedom for Native Americans, along the lines of the UNDRIP and more immediately along the lines of the Peyote Amendment of 1994 to AIRFA. Indeed AIRFA, which the *Lying* court found to lack the legal teeth of a formal "cause of action" to bring suit, is one such congressional clarification that could draw on the persuasive power of religious freedom discourse as well as the clarification of the UNDRIP to level the playing field of competing claims, especially on federal lands, and to deliver on protection for Native sacred sites. In 2014, the National Congress of American Indians passed a resolution endorsing some suggested language for such an AIRFA cause of action related to sacred sites.³¹⁹ After the November 2016 elections, one strains to imagine signed legislation in the short term; but perhaps as the idea builds, the statutory language can make even more explicit what AIRFA makes implicit – that Native American religious freedom not only requires considerations beyond the conventional understandings of religion in a majority Christian country to include such things as sacred sites but that Native

318. AIRFA, 42 U.S.C. § 1996(1).

319. NCAI Res. ATL-14-032 (Ann. Sess. 2014) (The National Congress of American Indians titled the Resolution as "Calling for Protection of Native Peoples' Sacred Places, Sacred Objects and Ancestors under United States, Native Nations and International Law, Policy and Practice."), <http://www.ncai.org/resources/resolutions/calling-for-protection-of-native-peoples-sacred-places-sacred-objects-and-ancestors-under-united-states-native-nations-and-international-law-policy-and-practice>.

American religious traditions may have far less to do with the spiritual fulfillment of Native American individuals meditating in pristine natural places, than with the collective obligations, and rights, of Native nations.

Federal administrations have considerable room to bring various agency policies to standards in keeping with the government-to-government relationship and federal trust responsibility and in aspiring to conform those policies to the provisions of UNDRIP. Although this Article has left unexplored this administrative terrain and what fuller accommodations for collective rights of Native American religious freedom would look like, it is clear that due diligence under current standards of government-to-government consultation and in the federal review obligations under environmental and historic preservation law (much less incorporation of UNDRIP's standard of indigenous peoples' free, prior, and informed consent on policies and developments that impact them) would go far to negotiate reasonable accommodations for Native communities' sacred claims in advance of costly litigation or costlier controversy in courts of public opinion. As the U.S. Army Corps of Engineers, Energy Transfer Partners, and the state of North Dakota learned the hard way in terms of millions of dollars of lost revenue and lost clout, it can make good fiscal sense—not just moral and legal sense—to engage Native nations early and often to navigate impacts on what they hold sacred, collectively.

