TOWARDS A BALANCED APPROACH FOR THE PROTECTION OF NATIVE AMERICAN SACRED SITES

Alex Tallchief Skibine★

Protection of "sacred sites" is very important to Native American religious practitioners because it is intrinsically tied to the survival of their cultures, and therefore to their survival as distinct peoples. The Supreme Court in Oregon v. Smith *held that rational basis review, and not strict scrutiny, was the appropriate level of judicial review when evaluating the constitutionality of neutral laws of general applicability even when these laws impacted one's ability to practice a religion. Reacting to the decision, Congress enacted the Religious Freedom Restoration Act (RFRA), which reinstated the strict scrutiny test for challenges to neutral laws of general applicability alleged to have substantially burdened free exercise rights. In a controversial 2008 decision, the Ninth Circuit held that a "substantial burden" under RFRA is only imposed when individuals are either coerced to act contrary to their religious beliefs or forced to choose between following the tenets of their religion and receiving a governmental benefit. In all likelihood, such a narrow definition of substantial burden will prevent Native American practitioners from successfully invoking RFRA to protect their sacred sites.*

In this Article, I first explore whether the Ninth Circuit's definition of "substantial burden" is mandated under RFRA. To a large degree, this question comes down to whether a pre-RFRA Supreme Court decision, Lyng v. Northwest Indian Cemetery, *precludes courts from adopting a broader definition of what is a substantial burden under RFRA. Although this Article contends that neither* Lyng *nor RFRA precludes the adoption of a broader definition of "substantial burden," the Article nevertheless acknowledges that many judges may disagree. The Article therefore recommends enactment of a legislative solution.*

The legislation proposed is a compromise between the needs of Indian religious practitioners and those who argue that religious practitioners should not have a veto over how federal lands are used and developed. Therefore, in return for the broadening of what can constitute a substantial burden on free exercise rights, the Article recommends the adoption of an intermediate type of judicial scrutiny. The Article also discusses ways to limit what can be considered sacred sites under the legislation so as to ensure protection of sites vital to Native American culture and religion without unnecessarily burdening federal management of federal lands.

★ S.J. Quinney Professor of Law, University of Utah S.J. Quinney College of Law. I want to thank professors Wayne McCormack and Frank Ravitch for reading and analyzing earlier drafts of this Article. Thanks also to Kristen Carpenter and Rick Collins (and all the participants) for organizing a work-in-progress conference at the University of Colorado School of Law where an earlier draft of this paper could be discussed.

INTRODUCTION

Native American religions are land based. There are certain geographical sites or physical formations that are held to be "sacred" as an integral part of the religion. Religious practitioners therefore hold certain ceremonies, collect plants, or make pilgrimages to such places on recurring bases.[1] These places used to be located within the tribes' ancestral territories, but as a result of conquest, land cessions, and other historical events, many sacred sites are now located on federal land. Though federal managers have at times accommodated Indian religious practitioners' interests in protecting these sites,[2] there have also been times when federal management of those sites has conflicted with Native religions. I have in previous writings joined others in expressing the view that among all the Native American cultural and religious issues, protection of sacred sites is the one area where Native Americans have enjoyed by far the least success.[3] This Article explores what can be done to help Native religious practitioners more successfully assert their interests and rights in these sites. Some scholars have made coherent and persuasive arguments about expanding the law of property to defend Native American sacred sites.[4]

1. *See generally* WALTER ECHO-HAWK, IN THE COURTS OF THE CONQUEROR 325–56 (2010).

2. *See* Bear Lodge Multiple Use Ass'n. v. Babbitt, 2 F. Supp. 2d 1448 (D. Wyo. 1998); Natural Arch & Bridge Soc'y v. Alston, 209 F. Supp. 2d 1207 (D. Utah 2002); *see also* Martin Nie, *The Use of Co-Management and Protected Land-Use Designation to Protect Tribal Cultural and Reserved Treaty Rights on Federal Lands*, 48 NAT. RESOURCES J. 585 (2008), Mary Ann King, *Co-Management or Contracting? Agreements Between Native American Tribes and the U.S. National Park Service Pursuant to the 1994 Tribal Self-Governance Act*, 31 HARV. ENVTL. L. REV. 475, 488–93 (2007).

3. *See* Jessica M. Wiles, *Have American Indians Been Written Out of the Religious Freedom Restoration Act?*, 71 MONT. L. REV. 471, 497–98 (2010); Rayanne J. Griffin, *Sacred Site Protection Against a Backdrop of Religious Intolerance*, 31 TULSA L.J. 395 (1995); John Rhodes, *An American Tradition: The Religious Persecution of Native Americans*, 52 MONT. L. REV. 13, 23 (1991); Alex Tallchief Skibine, *Culture Talk or Culture War in Federal Indian Law*, 45 TULSA L. REV. 89, 100–07 (2009).

4. *See* Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting A Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1065–67 (2005); Kevin J. Worthen, *Protecting the Sacred Sites of Indigenous People in U.S. Courts: Reconciling Native American Religion and the Right to Exclude*, 13 ST. THOMAS L. REV. 239 (2000).

Others have looked to the Executive Branch and some administrative-type remedies.[5] While these new theories are promising—and some have met with substantial success[6]—the purpose of this Article is to evaluate legal protections given to Native American sacred sites under current free exercise jurisprudence and the Religious Freedom Restoration Act (RFRA).[7] RFRA re-imposed the strict scrutiny test as it was used before *Employment Division v. Smith*, a case in which the Supreme Court held that strict scrutiny was no longer applicable when the challenge was to a neutral law of general applicability which only incidentally substantially burdened someone's religion.[8] Under RFRA, the government cannot substantially burden a person's exercise of religion unless it demonstrates that it is protecting a compelling governmental interest by the least restrictive means.[9]

In *Navajo Nation v. United States Forest Service*, Indian tribes were attempting to prevent the Forest Service from authorizing the use of artificial snow made from recycled sewage water at a ski resort located in Arizona within the San Francisco Peaks, an area held sacred by many tribes.[10] The Ninth Circuit, en banc, reversed a panel decision and held that in order to show that their free exercise rights have been substantially burdened under RFRA, religious practitioners attempting to protect sacred sites located on federal land must show that the government has either coerced them to do something against their religion or that the government has denied them a benefit because they opted to practice their religion.[11] As a result, the tribes lost their case. There is now a

5. *See, e.g.*, Michelle Kay Albert, *Obligations and Opportunities to Protect Native American Sacred Sites Located on Public Lands*, 40 COLUM. HUM. RTS. L. REV. 479 (2009); Marren Sanders, *Ecosystem Co-Management Agreements: A Study of Nation Building or a Lesson on Erosion of Tribal Sovereignty*, 15 BUFF. ENVTL. L.J. 97 (2007–08), Marcia Yablon, *Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land*, 113 YALE L.J. 1623 (2004).

6. *See, e.g.*, Access Fund v. U.S. Dept. of Agriculture, 499 F.3d 1036 (9th Cir. 2007); *see also* Zuni Tribe v. Platt, 730 F. Supp 318 (D. Ariz. 1990) (holding that the Zuni tribe had established a prescriptive easement over private lands that had to be crossed in order to reach tribal sacred sites).

7. 42 U.S.C. § 2000bb (2006).

8. Emp't Division v. Smith, 494 U.S. 872, 881 (1990).

9. 42 U.S.C. § 2000bb-1 (2006).

10. 535 F.3d 1058, 1062–63 (9th Cir. 2008).

11. *Id*. at 1069–70. As the Ninth Circuit put it, "a 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)." For a brief but witty criticism of this approach, see Thomas F. King, *Commentary: What Burdens Religion? Musings on Two Recent Cases Interpreting the Religious Freedom Restoration Act (RFRA)*, 13 GREAT PLAINS NAT. RESOURCES J. 1, 1–3 (2010) (observing that under this interpretation of RFRA neither Nebuchadnezzar, who destroyed Solomon's temple before taking the Jews into captivity to Babylon, nor Titus, the Roman emperor who dispersed the Jews

conflict among the federal circuit courts concerning what constitutes a "substantial burden" under RFRA. In addition to the Ninth Circuit, the Fourth and D.C. Circuits also have adopted a narrow definition of substantial burden.[12] However, in *Comanche Nation v. United States*, a federal district court stated that "RFRA does not define 'substantial burden.' "[13] The Tenth Circuit has defined the term by stating that a governmental action that substantially burdens a religious exercise is one that must "significantly inhibit or constrain conduct or expression" or "deny reasonable opportunities to engage in religious activities."[14] The Tenth Circuit's position seems to be followed in the Eighth Circuit.[15] Others, like the Seventh Circuit, also seem to be more in line with this view.[16]

One of the questions examined in this Article is whether the Ninth Circuit's definition of "substantial burden" is mandated under RFRA. More precisely, the question is whether a pre-RFRA decision, *Lyng v. Northwest Indian Cemetery*,[17] precludes courts from adopting a different definition of substantial burden when deciding a case under RFRA.[18] In *Lyng*, Native religious practitioners were attempting to prevent the United States Forest Service from completing a timber logging road, the G-O road, through an area held sacred to the Tolowa, Yurok, and Karuk Indian tribes.[19] As further explained below, even though the government's interest did not seem compelling and even though the Court acknowledged that completion of the road would "virtually destroy the . . . Indians' ability to practice their religion,"[20] the Court rejected the tribes' free exercise claim, stating that "the Constitution simply does not provide a principle that could justify upholding respondents' legal claims."[21] In doing so, the Court seemed to have adopted a very narrow definition of substantial burden, one that would in fact totally preclude Indian tribes from using RFRA to protect sacred sites.

---

throughout the Mediterranean world, could be found guilty of violating the Jews' religious rights).

12. *See* Henderson v. Kennedy, 253 F.3d 12, 15–17 (D.C. Cir. 2001); Goodall v. Stafford County, 60 F.3d 168, 171–73 (4th Cir. 1995).

13. No. CIV-08-849-D, 2008 WL 4426621, at *3 (W.D. Okla. Sept. 23, 2008).

14. *Id.* (citing Thiry v. Carlson, 78 F.3d 1491, 1495 (10th Cir. 1996)).

15. *See In re* Young, 82 F.3d 1407, 1418–19 (8th Cir. 1996).

16. *See* Civil Liberties for Urban Believers v. Chicago, 342 F.3d 752, 761 (7th Cir. 2003) (stating that a "regulation that imposes a substantial burden on religious exercise is one that necessarily bears a direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable.").

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

18. See Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989) for a discussion of substantial burdens on free exercise cases.

19. 485 U.S. at 442–44.

20. *Id.* at 451.

21. *Id.* at 452.

Some have argued that the lack of support for protecting sacred sites stems from a lack of understanding Indian religions.[22] While the degree of understanding among judges and justices may vary, one cannot deny a certain Western-centered aspect in the *Lyng* Court's discussion of the burden on Native American practitioners. Such views, which are also reflected in both the district court and the Ninth Circuit en banc decisions in *Navajo Nation v. United States Forest Service*, suggest a lack of understanding about why sacred sites are important to Indian people. Thus, even though the *Lyng* Court claimed that it was willing to assume that the G-O Road would destroy the Indians' ability to practice their religion, the Court also stated, "[w]hatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by the government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's *spiritual development*."[23] The Court added, "[a] broad range of government activities—from social welfare programs to foreign aid to conservation projects—will always be considered essential to the *spiritual well-being* of some citizens."[24] Justice O'Connor also stated that the "government simply could not operate if it were required to satisfy every citizen's religious needs and desires."[25]

Statements such as these seem to equate Indians' religious exercises at sacred sites with Western yoga-like practices. In other words, this view portrays Native religious activities at sacred sites as only about spiritual peace of mind. While such benefits are certainly part of the practice, they do not go to the heart of why these sacred places are important to Indian people or why management practices like cutting down trees and spilling recycled sewage water on sacred land are extremely disturbing to many Indian tribes.[26] The importance of sacred sites to Indian tribes and Native practitioners is less about individual spiritual development and more about the continuing existence of Indians as a tribal people.[27] The preservation of these sites as well as tribal people's ability to practice their religion there is intrinsically related to the survival of tribes as both

22. *See* Sarah B. Gordon, Note, *Indian Religious Freedom and Governmental Development of Public Lands*, 94 YALE L.J. 1447, 1449–53, 1459–64 (1985); John Rhodes, *An American Tradition: The Religious Persecution of Native Americans*, 52 MONT. L. REV. 13, 16–17, (1991); Bryan J. Rose, Note, *A Judicial Dilemma: Indian Religion, Indian Land, and the Religion Clauses*, 7 VA. J. SO. POLICY & L. 103, 104–05 (1999).

23. *Lyng*, 485 U.S. at 451 (emphasis added).

24. *Id*. at 452 (emphasis added).

25. *Id*.

26. On the importance of Sacred Sites to Indian people, see ECHO-HAWK, *supra* note 1, at 237–358.

27. *See* Jessica M. Erickson, *Making Live and Letting Die: The Biopolitical Effect of* Navajo Nation v. U.S. Forest Service, 33 SEATTLE U. L. REV. 463, 471–74 (2010).

cultural[28] and self-governing entities.[29] As stated in a mandated report submitted to Congress by the Department of the Interior,

> [t]he Native peoples of this country believe that certain areas of land are holy. These lands may be sacred, for example, because . . . they contain specific natural products, because they are the dwelling place or embodiment of spiritual beings, because they surround or contain burial grounds or because they are sites conducive to communicating with spiritual beings. There are specific religious beliefs regarding each sacred site which form the basis for religious laws governing the site.[30]

This is not only a matter of individual spiritual development. It is about the potential destruction of a people and their culture. Although the right to cultural identity is not a recognized constitutional right in the United States, there is an emerging consensus in international forums that it should be a norm of international human rights law.[31]

Concluding that *Lyng* may prevent the adoption of a broader definition of "substantial burden," this Article recommends amending the American Indian Religious Freedom Act (AIRFA)[32] to achieve a more balanced approach for the protection of sacred sites. Of course, the free exercise clause remains a viable alternative if the law being challenged is not neutral in that it discriminates against Indian religions[33] or if Indian complainants can somehow invoke the so-called hybrid theory by claiming that protection of sacred sites involves not only a religious right but

28. *See* David Bogen & Leslie F. Goldstein, *Culture, Religion, and Indigenous People*, 69 MD. L. REV. 48, 56–57 (2009).

29. *See* Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN L. & POL'Y REV. 191, 205–06 (2001); Robert J. Miller, *Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling*, 25 AM. INDIAN L. REV. 165 (2000–01).

30. U.S. DEP'T OF INTERIOR, P.L. 95-341, AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT 52 (1979).

31. *See* Siegfried Wiessner, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, 22 EUR. J. INT'L L. 121, 129 (2011) (arguing that the threat to the survival of indigenous peoples' culture is what has motivated most of the international declarations adopted by the United Nations concerning the rights of Indigenous peoples); *see also* Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299, 332–46 (2002) (suggesting that there should be a fundamental right to cultural integrity under United States law).

32. Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified as amended at 42 U.S.C. §§ 1996–1996a (2006)).

33. *See* Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993); Fraternal Order of Police v. City of Newark, 170 F.3d 359 (3rd Cir. 1999); *see also* Kenneth D. Sansom, Note, *Sharing the Burden: Exploring the Space Between Uniform and Specific Applicability in Current Free Exercise Jurisprudence*, 77 TEX. L. REV. 753 (1999) (arguing that since the Court is unlikely to overturn or modify *Oregon v. Smith*, free exercise advocates should focus on finding exceptions to *Smith* as was done in *Church of the Lukumi Babalu*).

another fundamental right as well.[34] Though these are both possible alternatives, they are beyond the scope of this Article.

This Article is divided into three Parts. Part I gives a brief background on *Navajo Nation v. United States Forest Service*[35] and the statutory interpretation issues relating to RFRA faced by the court in that case. Part II debates whether *Lyng* precludes the adoption of a broader view of what is a "substantial burden" when litigating under RFRA. Part III proposes an amendment to the American Indian Religious Freedom Act that would acknowledge that Federal management of sacred sites can impose substantial burdens on Native religions even if those burdens do not involve coercion/denial of governmental benefits. Part III also criticizes the current version of RFRA and argues that rather than imposing strict scrutiny along with a narrow definition of substantial burden, a better solution would adopt a type of intermediate scrutiny with a broader definition of substantial burden.

I. RFRA AND THE SAN FRANCISCO PEAKS LITIGATION

Lyng is the only Supreme Court decision involving Indian sacred sites. Before *Lyng*, Native American religious practitioners and Indian tribes had not met with any success in the lower courts when invoking the free exercise clause to protect their sacred sites from detrimental governmental actions. *Lyng*, of course, further foreclosed any chances of success.[36] In some of these pre-*Lyng* cases, the Indians lost because the court found that the governmental actions at issue did not interfere with a central aspect of Native religions.[37] In other cases, courts held that the burdens on religious practitioners were either insufficient[38] or were outweighed by more compelling governmental interests.[39] Thus, sacred sites advocates thought the enactment of RFRA in 1993 could only bring welcome changes for Indian tribes in their quest to protect sacred sites. The Ninth Circuit en banc decision in the San Francisco Peaks litigation[40]

34. However, some scholars have found this new hybrid theory, apparently first announced in Justice Scalia's opinion in Employment Division v. Smith, 494 U.S. 872, 882 (1990), was flawed and not supported by precedent. *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1121–22 (1990).

35. 535 F.3d 1058 (2008).

36. *See* Havasupai Tribe v. United States, 752 F. Supp. 1471, 1485 (1990); United States v. Means, 858 F.2d 404, 407 (8th Cir. 1988).

37. *See, e.g.*, Sequoyah v. Tenn. Valley Auth., 620 F.2d 1159, 1164 (6th Cir. 1980).

38. *See, e.g.*, Wilson v. Block, 708 F.2d 735, 744–45 (D.C. Cir. 1983).

39. *See, e.g.*, Badoni v. Higginson, 638 F.2d 172, 177 (10th Cir. 1980); Crow v. Gullett, 706 F.2d 856, 858–59 (8th Cir. 1983).

40. The *Navajo Nation v. United States Forest Service* case is commonly referred to as "the San Francisco Peaks litigation;" this Article will use those two terms interchangeably.

was therefore a bitter reminder that the courts have a history of not being helpful to Indian tribes on the issue of sacred sites protection.[41]

Since many articles have already engaged in lengthy analysis and description of *Navajo Nation v. United States Forest Service*,[42] this Article will only summarize the issues in that case, focusing on how the various court decisions determined whether a substantial burden had been imposed on Native religious practitioners. At issue in the litigation was a decision by the United States Forest Service to allow the Snowbowl, a ski resort located within the San Francisco Peaks in Arizona, to make artificial snow using recycled sewage water.[43] The decision allowed up to 1.5 million gallons of the recycled water to be dumped on the Peaks each day.[44] The Peaks are considered sacred by many Indian tribes, the Navajo and the Hopi among them.[45] The tribes claimed that the recycled sewage water would pollute the Peaks and prevent their religious practitioners from performing certain ceremonies within the Peaks since these ceremonies use water and native plants that would now be contaminated.[46]

The federal district court held that the tribes had failed to show that their religious exercises would be substantially burdened under RFRA because they had not shown that the government's action pressured tribal adherents either to commit acts forbidden by the religion or prevented them from engaging in religious conduct that the religion mandated.[47] The district court emphasized that "[p]laintiffs have not identified any plants, springs or natural resources within the . . . area that would be affected by the Snowbowl upgrades. They have identified no shrines or religious ceremonies that would be impacted by the Snowbowl decision."[48] The court also noted that the tribes did not show that any religious ceremonies actually took place within the 777-acre ski resort,[49] and remarked that the ski area consisted of about only 1 percent of the total San Francisco Peaks area.[50] The tribes would still have access to some 74,000 acres within the Peaks for religious purposes.[51]

41. For a retrospective analysis on treatment of Native American religions, see Allison Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773 (1997).

42. For one of the more comprehensive analyses, see Jonathan Knapp, *Making Snow in the Desert: Defining A Substantial Burden under RFRA*, 36 ECOLOGY L.Q. 259 (2009).

43. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1062 (9th Cir. 2008).

44. *Id*. at 1082.

45. *Id*. at 1063, 1099–1102.

46. *Id*. at 1103–06.

47. Navajo Nation v. U.S. Forest Serv., 408 F. Supp.2d 866, 904–05 (D. Ariz. 2006), *rev'd*, 479 F.3d 1024 (9th Cir. 2007).

48. *Id*. at 905.

49. *Id*. at 888.

50. *Id*. at 883.

51. *Id*. at 905.

A panel for the Ninth Circuit reversed.[52] The panel found that the Indians' religion would be burdened in two respects. First, particular ceremonies requiring purity could no longer be done because the local plants and water would be contaminated.[53] Second, the religious exercises "require belief in the mountain's purity or a spiritual connection to the mountain that would be undermined by the contamination."[54] While the district court had discounted this second aspect of the burden and focused on alternative ways for the tribes to continue their religious practices while avoiding the effects of the recycled water, the three-judge panel focused more comprehensively on the Indian religion's view of the Peaks and on the state of mind of the religious practitioners.[55] The judges focused on whether the Indians believed dumping the recycled water on the Peaks violated the tenets of their religion.[56] The panel concluded by stating,

> We uphold the RFRA claim in this case in part because otherwise we cannot see a starting place. If Appellants do not have a valid RFRA claim in this case, we are unable to see how any Native American plaintiff can ever have a successful RFRA claim based on beliefs and practices tied to land they hold sacred.[57]

Having found a substantial burden, the panel held that the governmental interest in public recreation was not one of the highest order.[58] As stated earlier, the Ninth Circuit, in an en banc decision, reversed the panel decision and held that under RFRA, the tribes had not shown that the exercise of their religion was substantially burdened because the religious practitioners were neither coerced into doing something against their religious beliefs nor were they denied a benefit as a consequence of following the tenets of their religion.[59]

RFRA is ambivalent on determining what constitutes a substantial burden. On one hand the Act's purpose is said to be "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*."[60] On the other hand, the Congressional findings announced that "the

52. Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024 (9th Cir. 2007), *aff'd*, 535 F.3d 1058, 1062 (9th Cir. 2008).

53. *Id*. at 1039.

54. *Id*.

55. *Id*. at 1038–42.

56. After stating that "the whole mountain is regarded as a single, living entity," the court gave a detailed analysis of how the presence of sewage effluent on the Peaks would fundamentally undermine all of the tribes' religious practices. *Id*.

57. *Id*. at 1048.

58. *Id*. at 1044–46.

59. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1067 (9th Cir. 2008).

60. 42 U.S.C. § 2000bb(b)(1) (2006) (internal citations omitted).

compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing . . . governmental interests."[61] The problem is that the Supreme Court's understanding of the compelling interest test, and especially what constitutes a substantial burden, has not remained static since *Sherbert v. Verner*[62] and *Wisconsin v. Yoder*.[63] So the statement of RFRA's purpose is not easy to reconcile with RFRA's findings.[64]

Although the Ninth Circuit in its Navajo Nation en banc opinion reconciled RFRA's purpose with its findings by taking the position that, because the statute mentioned *Yoder* and *Sherbert*, a substantial burden under RFRA was limited to the exact type of burdens involved in these two cases (denial of a governmental benefit or coercion of practitioners by imposing a criminal penalty for following the tenets of their religion), this interpretation is surely incorrect. The tribal attorneys in *Navajo Nation* argued that "[t]he important question from the standpoint of religious freedom is simply whether government action significantly interferes with religious practices, not whether it happens to do so by the same mean as a prior Supreme Court case."[65] In fact, neither *Sherbert* nor *Yoder* actually mentioned the words "substantial burden."[66] The Court in *Sherbert* spoke only in terms of "any incidental burden on the free exercise" must be "justified by a compelling interest."[67] Thus, after stating "[w]e turn first to the question whether the disqualification for benefits imposes *any burden* on the free exercise of appellant's religion,"[68] the *Sherbert* Court quoted

61. 42 U.S.C. § 2000bb(a)(5) (2006).

62. 374 U.S. 398 (1963). In *Sherbert*, the plaintiff was a Seventh Day Adventist who had been denied unemployment benefits after she lost her job for refusing to work on Saturdays, which was the Sabbath in her religion. *Id*. at 399. The Court upheld her free exercise claim, stating that the government had imposed a substantial burden on her without a compelling governmental interest protected by the least restrictive means. *Id*. at 406–08.

63. 406 U.S. 205 (1972). In *Yoder* the Court upheld the claim of Amish parents who refused to send their children to school past the eighth grade claiming that it was against the tenets of their religion. *Id*. at 234–35. Under state law, school attendance was compulsory and parents faced potential criminal penalties for failing to comply. *Id*. at 207–08.

64. On the interpretive issues raised by RFRA see generally Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1 (1994); Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209 (1994); Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171 (1995).

65. Petition for Writ of Certiorari at 27 Navajo Nation v. U.S. Forest Serv., 129 S. Ct. 2763 (2009) (No. 08-846), 2009 WL 46999 at *27.

66. *See* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1213–14 (1996) (finding that *Sherbert*'s analysis "provides little guidance for the substantiality inquiry," while *Yoder* was "equally unilluminating").

67. *Sherbert*, 374 U.S. at 403 (internal quotation marks omitted).

68. *Id*. (emphasis added).

from *Braunfeld v. Brown*[69] for the proposition that a law would be unconstitutional even if it only "impede[d]" religious observances through "indirect" burdens.[70] As for the jurisprudence on substantial burden after *Yoder* but before *Employment Division v. Smith*, one scholar described it as "not especially instructive."[71]

II. THE PRECLUSIVE FORCE OF *LYNG*

This Part discusses whether *Lyng* precludes defining "burden" in sacred sites cases beyond coercion and denial of government benefits. As stated in the preceding section, although RFRA imposed a substantial burden requirement before the government could be required to bring forth a compelling interest, the pre-*Smith* law on substantial burden was ill defined.[72] There are two possible interpretations of *Lyng*. First, it can be argued that just like in *Smith*, the Court refused to use the strict scrutiny test in cases involving the government's management of its own internal affairs, including its land management.[73] Under this interpretation *Lyng*, like *Smith*, was overturned by RFRA, and courts are now free to come up with a different definition of substantial burden under RFRA. The other interpretation of *Lyng* is that the Court used the strict scrutiny test, but did not reach the compelling interest part of the test because the plaintiffs did not show a substantial burden.

The strongest argument for the first interpretation is found in the debate between Justices Scalia and O'Connor in *Employment Division v. Smith*. Justice Scalia cited to both *Bowen v. Roy*[74] and *Lyng* to show that he was not breaking new ground in refusing to use the strict scrutiny test.[75] The *Smith* Court interpreted both *Bowen* and *Lyng* as not having used the strict scrutiny test.[76] In *Bowen*, the claimants had alleged that the Government's use of a Social Security number for their daughter, Little Bird of the Snow, would rob her of her spirit and thus was a burden on their

69. 366 U.S. 599 (1961).

70. *Sherbert*, 374 U.S. at 404 (quoting *Braunfeld*, 366 U.S. at 607).

71. Dorf, *supra* note 66, at 1214 (citing two Native American religious freedom cases, Lyng v. Northwest Indian Cemetery, 485 U.S. 439 (1988) and Roy v. Bowen, 476 U.S. 693 (1986), in which the Court did not find substantial burdens even though the governmental actions would imperil the practitioners' spiritual well-being).

72. *See* Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 594–96 (1998) (explaining why RFRA has not been successfully used by religious practitioners and attributing this failure partly to courts adopting a narrow definition of substantial burden).

73. *See, e.g.*, Eric D. Yordy, Commentary, *Fixing Free Exercise: A Compelling Need to Relieve the Current Burdens*, 36 HASTINGS CONST. L. Q. 191, 206–07 (2009).

74. 476 U.S. 693 (1986).

75. Emp't Division v. Smith, 494 U.S. 872, 883 (1990) (stating that in both cases "we declined to apply *Sherbert* analysis").

76. *Id*.

religion.[77] The Court disagreed. Taking the position that the free exercise clause cannot be interpreted to require the Government to conduct its own internal affairs in conformance with the religious beliefs of various citizens, it pointedly remarked that "Roy may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets."[78] In a revealing footnote, Justice Scalia in *Smith* observed that

> Justice O'Connor seeks to distinguish *Lyng* and *Bowen* on the ground that those cases involved the government's conduct of "its own internal affairs" . . . . [I]t is hard to see any reason in principle and practicality why the government should have to tailor its health and safety laws to conform to the diversity of religious belief, but should not have to tailor its management of public lands or its administration of welfare programs.[79]

In her concurrence, Justice O'Connor responded that in both *Bowen* and *Lyng* "we expressly distinguished *Sherbert* on the ground that the First Amendment does not 'require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development.' "[80] Although this statement from Justice O'Connor is not pellucid as far as clarifying whether she thought she had used the strict scrutiny test in *Lyng*, even if it is conceded for the purpose of the argument that she thought she had used the test the majority of the Court in *Smith* plainly disagreed with her. By the time Congress enacted RFRA, it should have been on notice that at least the *Smith* majority thought that both *Bowen* and *Lyng* could not be meaningfully distinguished from *Smith*. If that is the case, it can be argued that if RFRA was meant to overturn *Smith*, it also was meant to overturn at least the reasoning, if not the outcome, of *Lyng*.

Even if Justice O'Connor did not use the strict scrutiny test in *Lyng* and therefore the case does not control future litigation under RFRA, the question would remain whether under the strict scrutiny test as it was devised before *Smith*, substantial burden in sacred site cases should be limited to cases of government coercion/denial of governmental benefits.[81] Apart from *Lyng* as *stare decisis*, is there any reason to limit what is a substantial burden to coercion or conferral of a government benefit? Is there something special about the phrasing of the free exercise clause? Justice

77. *Bowen*, 476 U.S. at 696.

78. *Id*. at 699–700.

79. *Smith*, 494 U.S. at 885–86 n.2 (citations omitted).

80. *Id*. at 900 (O'Connor, J., concurring).

81. For a discussion on burdens generally, see Dorf, *supra* note 66. On burdens in free exercise cases specifically, see Lupu, *Where Rights Begin*, *supra* note 18.

O'Connor tried to make the argument that there is by stating that the operative word in the amendment is that the government shall not "prohibit" the free exercise of religion. But is there anything so talismanic about this word? Examining the meaning of the word "prohibiting" in the free exercise clause, Professor Michael McConnell wrote that the distinction between "prohibit" and "abridge," as those words are used in the First Amendment, "is probably overdrawn in the context of the free exercise debate."[82] Professor McConnell concluded that "[d]espite its plausibility as a textual matter, the narrow interpretation of 'prohibiting' should therefore be rejected, and the term should be read as meaning approximately the same as 'infringing' or 'abridging.' "[83]

Ultimately, however, to argue that Justice O'Connor did not use the strict scrutiny test because the free exercise clause simply does not apply to the management of federal lands may prove too much. For instance, no one would argue that other parts of the First Amendment, such as the establishment clause or the free speech clause, are not applicable to the management of federal lands. Thus, in her *Lyng* opinion, Justice O'Connor stated, "respondents contend that the burden on their religious practices is heavy enough to violate the free exercise clause unless the Government can demonstrate a compelling need to complete the G-O road or to engage in timber harvesting in the Chimney Rock area. We disagree."[84]

Therefore, a second possible interpretation of *Lyng* is that when it comes to challenging the way the government manages its internal affairs, including its public lands, religious practitioners have to show either that they are being coerced to do something against their religion or that they are being denied a benefit because they decided to live by the tenets of their religion.[85] Thus the *Lyng* Court found that its facts could not be meaningfully distinguished from *Bowen v. Roy*, and concluded that "[i]n neither case, however, would the affected individuals be coerced by the Government's action into violating their religious belief; nor would either governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."[86] The Court added that although indirect coercion as well as outright prohibitions are subject to strict scrutiny, such a finding could

82. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1486 (1990).

83. *Id*. at 1488; *see also* Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 893 (1994) (arguing that even though each of these terms have their own independent meanings that could control judicial reviews of the laws being challenged, in reality the textual language is almost never dispositive).

84. Lyng v. Nw. Indian Cemetery, 485 U.S. 439, 447 (1988).

85. *See* Knapp, *supra* note 42, at 273–74.

86. *Lyng*, 485 U.S. at 449.

not imply that every incidental effect which does not coerce individuals to act contrary to their religious beliefs requires the government to show a compelling state interest.[87] This is probably the fairest interpretation of *Lyng*. Although some have argued for limiting this aspect of *Lyng* to cases where the Indian practitioners attempt to exclude everyone else from a sacred area, nothing in the text of *Lyng* supports such an interpretation.[88]

Even if *Lyng* did use strict scrutiny and adopted a narrow definition of substantial burden, I believe a strong argument can be made that RFRA allows the court to broaden the definition of burden. This Article does not deny that there should be some meaningful burden on a person's religion before the government can be asked to put forth an important or significant interest allowing for the action.[89] *Lyng*'s interpretation of substantial burden resulted in a striking paradox: the Court acknowledged that prohibiting Indians' access to a sacred site would raise a free exercise claim, but held that completely destroying that same site would not.[90] There must be, therefore, more reasonable alternatives to the concept of "burden" as it was defined in *Lyng*.[91] As stated by the dissent in *Navajo Nation v. United States Forest Service*, "RFRA provides greater protection for religious practices than did the Supreme Court's pre-*Smith* cases . . . . 'RFRA goes beyond the constitutional language that forbids the 'prohibiting' of the free exercise of religion and uses the broader verb 'burden.' "[92] As one scholar noted, although Congress in RFRA did not "purport to change the law" of substantial burden, "the prior law was poorly defined

87. *Id*. at 450–51.

88. *See* Peter Zwick, Note, *A Redeemable Loss:* Lyng*, Lower Courts and American Indian Free Exercise on Public Lands*, 60 CASE W. RES. L. REV. 241, 275 (2009).

89. *See* Brownstein, *How Rights Are Infringed*, *supra* note 83, at 902; Andy G. Olree, *The Continuing Threshold test for Free Exercise Claims*, 17 WM. & MARY BILL RTS. J. 103, 106, 121–25 (2008) (showing how the test for determining what is a substantial burden was devised before *Smith*, has never been repudiated since *Smith* and should remain an important part of the strict scrutiny test).

90. *Lyng*, 485 U.S. at 453 ("The Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred, and a law prohibiting the Indian respondents from visiting the Chimney Rock area would raise a different set of constitutional questions.").

91. *See, e.g.*, Note, *Burdens on the Free Exercise of Religion: A Subjective Alternative*, 102 HARV. L. REV. 1258, 1259 (1989) (arguing that "a free exercise burden should be deemed to exist when a claimant demonstrate a sincere belief that a government activity interferes with the exercise of his religious beliefs or practices.").

92. 535 F.3d 1058, 1084 (9th Cir. 2008) (quoting United States v. Bauer, 84 F.3d 1549, 1558 (9th Cir. 1996)). Many commentators have followed the same position. *See, e.g.*, Wiles, *supra* note 3, at 494 ("[C]ourts should consider whether from the point of view of the practitioner, the government has in fact imposed such a burden that reaches the level of substantiality that RFRA was designed to protect."). It should also be noted that when Congress amended RFRA in RLUIPA in 2000 it provided for an expanded definition of "exercise of religion" to mean "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A) (2006).

and subject to pro-government manipulation."[93] Another scholar, Michael Dorf, remarked, "[n]either the text nor the legislative history of RFRA provides a clear indication of how courts ought to determine whether an incidental burden on religion is in fact substantial."[94] After noting that the legislative report issued by the United States House of Representatives stated that there was an "expectation that the courts will look to free exercise of religion cases decided prior to *Smith* for guidance in determining whether or not religious exercise has been burdened,"[95] Professor Dorf nevertheless concluded that RFRA did not "simply restore the pre-*Smith* law" and that "RFRA would thus seem to endorse a specific version of the pre-*Smith* law, 'the high water mark of free exercise accommodation.' "[96]

Other scholars, however, have a glibber view of RFRA's intent. After remarking that the pre-*Smith* law developed by the Court had only few supporters and had been criticized as being part of the decline, and not the restoration, of religious liberties, Professor Ira Lupu concluded, "[o]nly insensitivity to Native American faiths, which had borne the brunt of the development of the doctrine of 'burdens,' can explain why Congress selected this formulation."[97] Later in his article, Professor Lupu argued that the developing case law on substantial burden "disclosed no consistent theory—indeed very little theory at all—through which the concept can be understood,"[98] and suggested that Congress's seeming adoption of such a definition of burden represents a view which is "notoriously insensitive to religions rooted in customary practices, rather than obligations."[99] In the end Professor Lupu was not optimistic and concluded that in interpreting RFRA, courts will in all likelihood construe the Act to "incorporate a narrow view of substantial burdens, one that requires a strenuous form of coercion and a weighty impact on a matter of religious obligation."[100] In many ways, this should be expected since the lower courts would have to follow the lead of a Supreme Court that has not supported free exercise rights generally and minority religions in particular.[101]

93. Lupu, *The Failure of RFRA*, *supra* note 72, at 594.

94. Dorf, *supra* note 66, at 1213.

95. Dorf, *supra* note 66, at 1213 (quoting H.R. REP. NO. 103–88, at 6–7 (1993).

96. *Id*. at 1213 (quoting Michael S. Paulsen, *A RFRA Runs Through It*, 56 MONT. L. REV. 249, 256 (1995)). Dorf also added that *Lyng* did "not provide any clear basis for a distinction between substantial and insubstantial basis." *Id*. at 1214.

97. *See* Lupu, *Of Time and the RFRA*, *supra* note 64, at 190.

98. *Id*. at 202.

99. *Id*.

100. *Id*. at 220–21.

101. *See* Frank S. Ravitch, *Rights and the Religion Clauses*, 3 DUKE J. CONST. L. & PUB. POL'Y 91, 111–12 (2008) (arguing that the Court has modified its free exercise doctrines to favor dominant/majority religions).

It is true that parts of the legislative history of RFRA indicate that Congress did not intend to overturn cases such as *Lyng* and *Bowen*, which had come up with a very narrow definition of substantial burden.[102] For instance, as stated in the Senate Report,

> Pre-*Smith* case law makes it clear that only governmental actions that place a substantial burden on the exercise of religion must meet the compelling interest test set forth in the Act . . . And, while the committee expresses neither approval nor disapproval of that case law, pre-*Smith* case law makes it clear that strict scrutiny does not apply to government actions involving only management of internal governmental affairs or the use of the Government's own property or resources.[103]

On the other hand, the Senate Report also stated, "[t]he committee wishes to stress that the act does not express approval or disapproval of the result reached in any particular court decision involving the free exercise of religion . . . . This bill is not a codification of the result reached in any prior free exercise decision . . . ."[104] Furthermore, the House Report stated that "in order to violate the statute, government activity need not coerce individuals into violating their religious beliefs nor penalize religious activity."[105] According to the House Report, such governmental activity need only have "a substantial external impact on the practice of religion."[106] Some scholars took the position that such language may have been a specific endorsement of the test adopted by Justice Brennan in his *Lyng* dissent.[107]

A good argument can also be made that the Supreme Court's more recent RFRA opinion in *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*[108] announced at least an inclination to interpret RFRA liberally and more favorably to religious interests. The issue in *O Centro* was whether the government had met its burden of showing a compelling interest to prevent members of a church from ingesting hoasca as part of their religious ceremonies.[109] Regulated under the Controlled Substance

102. *See* Laycock & Thomas, *supra* note 64, at 229 ("Regardless of one's opinion about these cases, the Senate Committee said that RFRA does not affect [*Bowen v. Roy* and *Lyng*].").

103. S. REP. NO. 103-111, at 8 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, at 1898. There was also a colloquy between Senators Grassley and Hatch in which Senator Hatch stated that RFRA would have "no effect" on cases similar to *Bowen* and *Lyng*. 139 CONG. REC. S.14,350, 14,365 (daily ed. Oct. 26, 1993).

104. S. REP. NO. 103-111, at 9 (1993).

105. H.R. REP. NO. 103-88, at 6 (1993).

106. *Id*.

107. *See* Berg, *supra* note 64, at 54.

108. 546 U.S. 418 (2006).

109. *Id*. at 423.

Act,[110] Hoasca is a hallucinogen derived from ingredients found in the Amazonian jungle.[111] The government in *O Centro* took the position that the Court should follow a "categorical approach" in evaluating its compelling interest.[112] It wanted the Court to evaluate more categorically whether the Controlled Substances Act as a whole advanced an interest that was compelling enough, and whether such an interest would be generally threatened if courts started to grant potentially large numbers of exceptions.[113] The Court disagreed, stating,

> RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the Government's categorical approach. RFRA requires the government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person"—the particular claimant whose sincere exercise of religion is being substantially burdened.[114]

The *O Centro* Court found that since the United States had already exempted hundreds of thousands of Native Americans ingesting Peyote from the law, the government could not show that it had a compelling interest in not allowing an exemption for just the 130 or so members ingesting hoasca as part of their religious ceremonies.[115] Because RFRA had specifically mentioned that Congress was adopting the compelling interest test as applied in *Sherbert* and *Yoder*, the Court noted that "[i]n each of those cases, this Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants."[116]

In *O Centro*, the government had conceded the substantiality of the burden and the only issue was how to evaluate the compelling governmental interest.[117] So while *O Centro* is not exactly on point, it is important to note that just like there were, before *Smith*, two methodologies on how to evaluate the substantiality of burdens, there were also multiple ways to evaluate how compelling a governmental interest was. The *O Centro* Court, faced with the language of RFRA and its reference to *Sherbert* and *Yoder*, opted to follow the approach that was more

110. 21 U.S.C. §§ 801–904 (2006).
111. *O Centro*, 546 U.S. at 425.
112. *Id*. at 430.
113. *Id*.
114. *Id*. at 430–31.
115. *Id*. at 433–34.
116. *Id*. at 431.
117. *Id*. at 426.

beneficial to the religious claimant[118] and adopted a focused rather than a categorical approach.[119] Certainly there are those who believe that it is because RFRA does mandate strict scrutiny that courts will in all likelihood continue to adopt a cramped view of substantial burden so as not to reach the "compelling interest" part of the test as the Court did in *O Centro*.[120] Yet other scholars have taken the position that *O Centro* altered the approach to the benefit of religious practitioners.[121] Still others have noted that since that case, the government's chances of losing its compelling interest argument have increased.[122]

Besides adopting a different approach to evaluate how compelling governmental interests are, *O Centro* may also have announced a general change of mood towards religion. For instance in answering the type of slippery-slope argument that was also present in *Lyng* and is made in most sacred-sites cases, the Court stated,

> The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions to "rules of general applicability." Congress determined that the legislated test "is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.[123]

118. *See* Matthew Nicholson, Note, *Is* O Centro *a Sign of Hope for RFRA Claimants?*, 95 VA. L. REV. 1281, 1289–90 (2009).

119. *Id*. at 1289–93 (describing the difference between the "focused" and "categorical" approaches as being related to the level of generality at which the government is required to frame its compelling interest). The "categorical" approach allows the government to describe broadly what the government's interest is, while the "focused" approach forces the government to explain why the government's interest is compelling in this particular case. *Id*.

120. *Id*. at 1301.

121. *See* Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 472 (2010) ("[T]he Supreme Court gave RFRA the sort of expansive interpretation it deserved. And in some ways, it left us to wonder whether religious liberty was even better off under *Gonzales* than it had been before *Smith*."); *see also* Amit Shah, *The Impact of* Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S 418 (2006), 10 RUTGERS J.L. & RELIGION 4, 26 (2008) ("[B]y requiring the government to show more than just generalized assertions of policy or Congressional findings to prove a compelling interest, minority religious practices are more likely to succeed in RFRA litigation.").

122. *See* Ari B. Fontecchio, *Compelling the Courts to Question* Gonzales v. O Centro*: A Public Harms Approach to Free Exercise Analysis*, 14 RICH. J.L. & PUB. INT. 227, 228 (2010) ("The raw data suggests that the government had a 17.4% chance of losing its compelling interest argument before *O Centro* and a 35.7% chance of losing after *O Centro*.").

123. Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal, 546 U.S. 418, 436 (2006).

Finally, the interpretation of RFRA should be at least influenced by the United Nations' adoption in 2007 of its Declaration on the Rights of Indigenous Peoples.[124] Although not "binding" as such on the United States, the Declaration is now part of the evolving norms of international law.[125] Relevant to the topic of this Article, the Declaration contains three articles directly related to sacred sites. Article 11 concerns the right of indigenous peoples to practice their cultural traditions, and specifically "includes the right to maintain, protect, and develop the past, present and future manifestations of their culture, such as archeological and historical sites."[126] Similarly, Article 12, concerning the general right of indigenous peoples to practice their religious traditions and ceremonies, also mentions their special "right to maintain, protect and have access in privacy to their religious and cultural sites."[127] Finally, Article 25 states, "[i]ndigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas."[128] It is too early to assess the impact the Declaration will have on the right of indigenous people to self-government and self-determination globally, although the scholarly debate has already begun.[129]

---

124. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement. On December 16, 2010, President Obama declared that the United States would reverse the position taken during the Bush Administration and become the last country to drop its opposition to the U.N. Declaration on the Rights of Indigenous Peoples. Valerie Richardson, *Obama Adopts U.N. Manifesto on Rights of Indigenous Peoples*, WASH. TIMES (Dec. 16, 2010), http://www.washingtontimes.com/news/2010/dec/16/obama-adopts-un-manifesto-on-rights-of-indigenous-/.

125. *See* Siegfried Wiessner, *The Cultural Rights of Indigenous People: Achievements and Continuous Challenges*, *supra* note 31, at 130 ("United Nations declarations, like almost any other resolution by the General Assembly, are of a mere hortatory nature: they are characterized as 'recommendations' without legally binding character. . . . To the extent that the Declaration reflects pre-existing customary international law or engenders future such law, it is binding on states which do not qualify as persistent objectors.").

126. United Nations Declaration on the Rights of Indigenous Peoples, art. 11(1), G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement.

127. *Id*. at art. 12(1).

128. *Id*. at art. 25.

129. *See, e.g.*, Karen Engle, *On Fragile Architecture: The U.N. Declaration on the Rights of Indigenous People in the Context of Human Rights*, 22 EUR. J. INT'L L. 141 (2001) (arguing that the Declaration privileges an individual human rights paradigm at the expense of a strong form of indigenous self-determination); Jo M. Pasqualucci, *International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples*, 27 WIS. INT'L L.J. 51 (2009) (examining the impact and inter-relationship between the U.N. Declaration and the decisions of the Inter-American Court of Human Rights); Sarah Stevenson, Comment, *Indigenous Land Rights and the Declaration on the Rights of Indigenous Peoples:*

In conclusion, while there are very strong arguments that, especially after *O Centro*, *Lyng* did not and should not foreclose courts from adopting a different definition of substantial burden when considering claims made under RFRA, there is still a likelihood that most judges, reluctant to force the government to come up with a compelling interest protected by the least restrictive means, will take refuge in Lyng's substantial burden definition and dismiss tribal sacred site cases. Thus, in the next Part, this Article proposes a legislative solution that strikes a fair balance between religious and secular interests. It attempts to do so with full awareness of the *Smith* Court's statement that "[i]t may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in,"[130] but also taking into account Justice Scalia's suggestion that this "unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself."[131]

III. A PROPOSED LEGISLATIVE SOLUTION

The legislative solution this Article proposes would amend the American Indian Religious Freedom Act (AIRFA)[132] so as to give a specific cause of action to federally recognized Indian tribes attempting to protect sites located on federal land as long such sites have been held sacred according to traditional Native American religions. There are three essential features of the proposed amendment: first, the adoption of an intermediate type of scrutiny instead of the traditional strict scrutiny usually applied to free exercise cases; second, a broadening of the threshold element of burden beyond the coercion/denial of benefit test; and finally, a more precise delimitation for the definition of sacred sites. The amendment I propose is modeled after the 1994 amendments to AIRFA inasmuch as it is only applicable to Indians and Indian tribes. The 1994 AIRFA Amendments prevented the United States or states from prosecuting Native Americans for using Peyote "for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion."[133]

Implications for Maori Land Claims in New Zealand, 32 FORDHAM INT'L L.J. 298 (2008) (examining the potential impacts of the U.N. Declaration on the rights of the Maoris); Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the Declaration on the Rights of Indigenous Peoples,* 41 VAND. J. TRANSNAT'L L. 1141, 1166 (2008) (recognizing that while the amount of self-government guaranteed in the Declaration is indeterminate, this may be a good thing given the diversity of aspirations among indigenous peoples).

130. Emp't Division v. Smith, 494 U.S. 872, 890 (1990).

131. *Id*.

132. 42 U.S.C. §§ 1996–1996a (2006).

133. *Id*. § 1996a(b)(1).

The proposed amendment should be immune from constitutional attacks arguing that it discriminates in favor of a suspect class. Under *Morton v. Mancari*,[134] federal laws treating members of Indian tribes differently are not viewed as involving a suspect racial classification for the purpose of evaluating the constitutionality of such laws under the equal protection clause. Instead, the classification of Indian is viewed as a political classification; an Indian tribe is a political organization with a government-to-government or trust relationship with the United States.[135] As such, federal laws treating members of Indian tribes differently are not evaluated under strict scrutiny and will not be disturbed "as long as [they] can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians."[136] Such legislation should also be immune from attacks asserting that it is in violation of the establishment clause, since it represents precisely the kind of remedy the Court in *Smith* suggested religious practitioners should be seeking.[137] Besides, the legislation does not in and of itself create an exemption for Indian tribes attempting to protect sacred sites. It just provides a different opportunity than the one already contained in RFRA for protecting Native American sacred sites.

Any legislation aimed at protecting sacred sites will confront the following political and legal arguments: First, even though the sites were originally within tribal territories, they are today located on federal land. As such, powerful interests currently leasing or using such lands will object to Indians obtaining a veto power over federal management decisions. Second, because Indian religions are perceived as mysterious and because the location of sacred sites can be at times ill-defined, once claims to sacred sites are recognized, the floodgates may open, leaving nothing to stop Indians from claiming vast areas as sacred, thus freezing economic activities over numerous tracts of federal land. In order to counter or appease such arguments, my proposal contains the following three compromises: first, a lowering of the level of scrutiny; second, maintaining some kind of burden requirement; and third, the delimitation of what can be considered a sacred site.

A. *Towards Intermediate Scrutiny*

On many fronts, RFRA was not well thought out.[138] It re-imposed a test that was only "strict" in name. The Court had been moving away

134. 417 U.S. 535 (1974).

135. *Id*. at 553–54.

136. *Id*. at 555.

137. Emp't Division v. Smith, 494 U.S. 872, 890 (1990); *see also* Bogen & Goldstein, *supra* note 28, at 60–65.

138. *See generally* Lupu, *The Failure of RFRA*, *supra* note 72. Professor Lupu also took the position that the Judiciary Committee staff may have been somewhat over its head when it came to understanding the fine points of the religion clauses. Lupu, *Of Time and*

from the high water mark of strict scrutiny cases such as *Sherbert* and *Yoder* by either allowing the government to claim as compelling interests that really were not, or by adopting a narrow interpretation of substantial burden. At least one commentator took the position that the test being used before *Smith* was really a form of intermediate scrutiny.[139] The problem with the real strict scrutiny test in free exercise cases was that courts in the pre-*Smith* era seemed to have thought that it was too demanding a test on the government.[140] No doubt this uneasiness with strict scrutiny contributed to its abandonment in *Smith*. Therefore, while cognizant of the potential pitfalls,[141] this Article contends that a legislative solution is one option worth exploring even though there have been previous unsuccessful efforts at enacting legislation on this issue.[142]

The solution this Article advocates is a compromise: While it adopts a broader definition of substantial burden, it also suggests the use of a mid-level type of scrutiny in reviewing governmental management of public lands involving sacred sites alleged to interfere with free exercise rights of Indian tribes. Intermediate scrutiny is most closely associated with gender discrimination. In a foundational gender discrimination case, the Court in *Craig v. Boren* stated, "[t]o withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to those objectives."[143] The intermediate scrutiny test this Article envisions, however, is modeled after the test adopted in *United States v. O'Brien*,[144] which uses free speech methodology to challenge content-neutral laws that affect symbolic conduct such as burning one's draft card. The *O'Brien* Court held,

the RFRA, *supra* note 64, at 190. Thus he accused the Senate Report of misapprehending the Act's operation in several ways and remarked that "[t]he Senate Report's illustration, which runs together without a missed beat RFRA's rule and the exception to it, does not inspire confidence that its authors knew or cared about the difference between them." *Id.*

139. Nicholas Nugent, Note, *Toward a RFRA that Works*, 61 VAND. L. REV. 1027, 1028 (2008) (arguing that courts should use intermediate scrutiny when applying RFRA).

140. Tania Saison, Note, *Restoring Obscurity: The Shortcomings of the Religious Freedom Restoration Act*, 28 COLUM. J.L. & SOC. PROBS. 653, 655 (1995) (arguing that the compelling interest test's standard was too high to meet and that RFRA should not have adopted it).

141. *See generally* Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565 (1999).

142. The most recent effort was a bill introduced by Congressman Nick Rahall on June 11, 2003, the Native American Sacred Lands Act. H.R. 2419, 108th Cong. (2003). The Bill would have allowed Tribes to intervene in administrative proceedings to have sacred sites declared unsuitable for certain federal activities. *Id.* § 3(b)(1). The Bill also provided for consultation with the appropriate Indian tribes concerning activities having significant impacts on sacred sites. *Id.* § 8(a).

143. 429 U.S. 190, 197 (1976).

144. 391 U.S. 367 (1968).

> [A] governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[145]

Under my proposed test, once a claimant shows a burden upon his exercise of religion, the government would have to come forth with an important or substantial interest. That governmental interest would have to be unrelated to the suppression of religion, and the burdens posed on religious freedom could be no greater than those essential to protect that governmental interest.[146]

Although most Native American religious practitioners may at first be reluctant to support such a position, it is important to clarify here that the legislation does not discriminate against Native Americans. In other words, it does not impose a more stringent test on Native Americans by asking the government to only meet intermediate scrutiny requirements while imposing strict scrutiny on claims brought by non-Indians. Native Americans attempting to protect sacred sites can still litigate under RFRA. This legislation just gives them an alternate remedy. Although Native Americans may be hesitant to abandon strict scrutiny in exchange for intermediate scrutiny with a relaxation of the burden requirement, for the following reasons, this exchange is worth considering.

First, as demonstrated in Part I, it seems that many scholars and judges would interpret *Lyng* as imposing a restrictive view of substantial burden, one that would foreclose protection of sacred sites under RFRA. Additionally, there are some reasons to believe that RFRA was not meant to overturn *Lyng*; at least some of the legislative history shows this to be the case.[147]

Second, scholars have shown that the rate of success in free exercise cases was not very good before *Smith*.[148] This indicates that strict scrutiny was not really applied.[149] Instead, courts used a type of intermediate

145. *Id*. at 377.

146. For a discussion on the rise and application of intermediate scrutiny in First Amendment cases, see Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783 (2007).

147. *See supra* notes 98–99 and accompanying text.

148. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 796–97 (2006) (finding that in 60 percent of free exercise cases, the government won even though courts purported to use strict scrutiny).

149. *See* Eugene Volokh, *A Common-Law Model For Religious Exemptions*, 46 UCLA L. REV. 1465, 1494–98 (1999).

scrutiny when the law being challenged was a neutral law of general applicability.

Third, some influential scholars have advocated that, should the Court modify or overrule *Smith*, an intermediate scrutiny test should be used for all free exercise challenges.[150] Others have even argued that courts should apply intermediate scrutiny in RFRA cases notwithstanding the statutory language directing the use of strict scrutiny because that was in fact the type of scrutiny used in free exercise cases before *Smith*.[151]

Finally, as noted by some scholars, even though they are both fundamental rights, the Court has been more respectful of freedom of speech than freedom of religion.[152] Other scholars have argued that the difference in level of scrutiny used in speech and religion cases could perhaps explain this disparity.[153] Thus, they argue that using intermediate scrutiny with respect to neutral laws of general applicability would bring free exercise jurisprudence more in line with the methodology used in freedom of speech and other First Amendment cases.[154] In free speech cases, the level of scrutiny varies with the context. Thus, strict scrutiny is only used when the law challenged is not viewpoint or content neutral.[155]

Within free speech jurisprudence, a good analogy can be found between regulations affecting sacred sites and the limitations existing on government regulations of speech in the public forum.[156] The concept of the public forum was developed to evaluate regulation of speech in areas owned by the government but generally opened to the public, such as streets and sidewalks.[157] Most of the sacred sites we are concerned with here are also located on government-owned land that is generally open to

150. *See generally* Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RES. L. REV. 55 (2006); Frederick Mark Geddicks, *Towards a Defensible Free Exercise Doctrine*, 68 GEO. WASH. L. REV. 925 (2000); Rodney A. Smolla, *The Free Exercise of Religion After the Fall: The Case for Intermediate Scrutiny*, 39 WM. & MARY L. REV. 925 (1998).

151. *See* Nugent, *supra* note 139, at 1034–40 (arguing that the text of RFRA refers to strict scrutiny as applied in *Sherbert* and *Yoder*, but showing that the state interests in those cases were not really compelling and that the scrutiny used was more like intermediate scrutiny). Nugent also points out that if RFRA's scrutiny was really meant to be the type of strict scrutiny used in equal protection and free speech cases, many of the pre–*Smith* Free Exercise cases, such as *Sherbert*, would come up differently under RFRA. *Id*. at 1039. Yet this does not appear to have been what Congress intended. *Id*.

152. Stephen M. Feldman, *The Theory and Politics of First Amendment Protections: Why Does the Supreme Court Favor Free Expression Over Religious Freedom*, 8 U. PA. J. CONST. L. 431, 431 (2006); Patrick M. Garry, *Inequality Among Equals: Disparities in the Judicial Treatment of Free Speech and Religious Exercise Claims*, 39 WAKE FOREST L. REV. 361, 363 (2004).

153. *See, e.g.*, Geddicks, *supra* note 150, at 935–38.

154. *Id*.

155. *See* Turner Broad. Sys. v. Fed. Commc'n Comm'n, 512 U.S. 622, 642–43 (1994).

156. *See* Gordon, *supra* note 22, at 1466–69.

157. For a discussion on speech in the public forum generally, see Robert Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987).

the public. Neutral time, place, and manner restrictions on speech in the public forum are evaluated under intermediate scrutiny.[158] Generally speaking, the government can regulate speech in the public forum as long as the regulations are content neutral; involve reasonable time, place, and manner restrictions; serve an important governmental interest; are narrowly tailored to protect that interest; and leave "ample alternative means of communications."[159] The Court in *Ward v. Rock Against Racism* added, "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative."[160] The *Ward* Court also noted that this test was essentially the same as the intermediate scrutiny test used in *O'Brien* to determine the validity of government restrictions on symbolic speech.[161] Even though the Court has identified many types of intermediate scrutiny in free speech cases depending on the context, lower courts have tended to merge all these various brands into one generic test under which "laws will be upheld so long as they serve some sort of a significant/substantial/important governmental interest and are *reasonably* well tailored to that purpose (i.e. not unreasonably overbroad)."[162] Following the analogy, the *Ward/O'Brien* intermediate scrutiny test should be applicable to challenge governmental actions affecting religious exercises conducted at sacred sites located on federal lands in areas generally open to the public.

Different levels of scrutiny are also used in ballot access cases, although these are more appropriately considered voting rights cases than First Amendment cases. The analogy to these cases is especially interesting because just as sacred sites issues involve the federal government's interest in managing its own lands, state governments also have the constitutional right to regulate the time, place, and manner of elections.[163] The analogy is also appropriate here because in these cases, the level of scrutiny varies with the substantiality of the burden.[164] In the ballot access cases, the court first determines how severe the burden is and then, depending on

158. *See* Ward v. Rock Against Racism, 491 U.S. 781, 800 (1989).

159. *Id*. at 791. The Court also stated, "a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interest but . . . it need not be the least restrictive or least intrusive means of doing so." *Id*. at 798.

160. *Id*. at 800.

161. *Id*. at 797–98. *United States v. O'Brien*, 391 U.S. 367 (1968), however, does not contain the requirement that there be ample alternative means of communications. *See supra* text accompanying note 145.

162. Bhagwat, *supra* note 146, at 801.

163. Article I, Section 4 of the United States Constitution provides, "[t]he Times, Places and Manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof." U.S. CONST. art. I, § 4, cl. 1.

164. *See* Brownstein, *How Rights are Infringed*, *supra* note 83, at 914–19.

the answer, uses a strict or a more relaxed level of review.[165] Thus the Court in *Crawford v. Marion County Election Board*, in evaluating the constitutionality of a law requiring voters to present a government issued identification card before being allowed to vote, first determined that the burden on the voters was not that severe,[166] before sidestepping strict scrutiny in favor of the balancing approach devised in *Anderson v. Celebrezze*.[167]

It should be noted, however, that the Justices do not seem to be in total agreement on the methodology to be followed in such cases. Most of the differences of opinion center on how to evaluate the severity of the burden not on whether a lesser degree of scrutiny is applicable once it is determined that the burden is not that severe.[168] However, the Justices do not seem to agree on what this lower level of scrutiny encompasses; some favor an open-ended balancing approach, while others, like Justice Scalia, advocate for a much more deferential test resembling rational basis review.[169] In *Crawford*, for instance, Justice Scalia thought that the balancing test developed in *Celebrezze*[170] had been somewhat modified in *Burdick v. Takushi*,[171] where the Court had adopted a much more deferential approach to state regulations.[172]

In the cases of sacred sites protection, I am willing to concede for the purpose of argument that since the burden does not involve coercion or the denial of benefits, it may not be the most severe kind of burden. Thus, following the example of the ballot access cases, intermediate scrutiny would seem justifiable. While there are some who may argue that an intermediate type of scrutiny may be too easy on the government,[173] scholars who have compared the Court's free exercise jurisprudence with what the Court has done in the free speech area have found that the Court has been much more receptive to free speech claims than claims

165. *See* Burdick v. Takushi, 504 U.S. 428, 434 (1992); Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

166. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 197–200 (2008).

167. *Id*. at 202–04 (citing Anderson v. Celebrezze, 460 U.S. 780 (1983)).

168. *See* Christopher S. Elmendorf & Edward B. Foley, *Gatekeeping v. Balancing in the Constitutional Law of Elections: Methodological Uncertainty on the High Court*, 17 WM. & MARY BILL RTS. J. 507 (2008) (showing that ambiguities as to the correct methodology persist, and describing the various approaches).

169. *Id*. at 523–24.

170. 460 U.S. 780 (1983).

171. 504 U.S. 428 (1992).

172. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 205–05 (2008) (Scalia, J., concurring joined by Justices Thomas and Alito).

173. *See* Dorf, *supra* note 66, at 1203–08 ("Given that the *O'Brien* test asks so little in principle, it should not be surprising that it means so little in practice."); *see also* Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 160–61 (2002); Lupu, *The Failure of RFRA*, *supra* note 72, at 592–93;Volokh, *supra* note 149, at 1512.

based on free exercise.[174] This would tend to indicate that intermediate scrutiny may give adequate protection to sacred sites.

B. *Redefining Substantial Burden*

Adopting an intermediate level of scrutiny borrowed from free speech jurisprudence and abandoning the coercion/denial of benefits test to determine what a substantial burden is does not answer the question of what test should be adopted for defining substantial burden. While the free speech cases do not generally speak in terms of a substantial burden prerequisite as such, the time, place, and manner restrictions in public forum cases mention that in addition to the requirements of intermediate scrutiny listed above, governmental restrictions will only be sustained if they leave "ample alternative channels for communications."[175] Professor Dorf noted that this was the equivalent of a substantial burden requirement,[176] and Professor Geddicks remarked that transposing this requirement into free exercise cases would require courts to evaluate whether there are alternative means of exercising one's religion.[177] Although he conceded that this inquiry may involve courts in the interpretation of religious doctrine and beliefs, a practice that was criticized in *Smith*,[178] Professor Geddicks concluded that this problem was not "insuperable," and that in many free exercise cases, the issue would not arise anyway.[179] In order to avoid this problem entirely, my proposed test would not substitute the "burden" inquiry found in free exercise cases with the "alternative means of communication" analysis found in free speech cases. Instead, my proposed solution involves a burden inquiry, but one that is different than the one used by the Court in *Lyng*.

In searching for ways to conceptualize substantial burdens to be more understanding or receptive to Indian religions, a good place to start is to look generally at the purposes and reasons behind the enactment of RFRA. As one scholar put it,

> The relevant principles underlying the statute are the protection of religious minorities, the maintenance of "substantive" neutrality toward religion, and the concern with "cumulative exemptions" undermining the statutory scheme. The category of cognizable "burdens" should be drawn so as to remove

174. *See, e.g.*, Feldman, *supra* note 152; *see also* Garry, *supra* note 152, at 368–72 (showing that as a result of this disparity, litigators are using free speech arguments in trying to win free exercise cases).

175. Heffron v. Int'l Soc'y of Krishna Consciousness, 452 U.S. 640, 648 (1981).

176. Dorf, *supra* note 66, at 1208–10.

177. Geddicks, *supra* note 150, at 947.

178. *Id*. at 947–48.

179. *Id*. at 948.

> government interference with religious practices, without encouraging an unmanageable number of claims or creating substantial incentives for others to engage in religious practices so as to gain the relative benefits of exemption.[180]

Justice Brennan, in his *Lyng* dissent, proposed his own version of the substantial impact test.[181] After remarking that simply alleging that the land is sacred is not enough to make a valid free exercise claim, Justice Brennan took the position that religious practitioners would also have to allege that the federal action posed "a substantial and realistic threat of undermining or frustrating their religious practices."[182] To distinguish cases like *Roy v. Bowen*, Justice Brennan would also impose a requirement that the federal decisions being challenged be shown to have "substantial external effects."[183]

In an influential pre-*Smith* article, Professor Lupu criticized both Justice O'Connor's definition of substantial burden in *Lyng* and Justice Brennan's suggested test in the dissent.[184] He advocated instead the use of a common law type of test. Under this test, "[w]henever religious activity is met by intentional government action analogous to that which, if committed by a private party, would be actionable under general principles of law, a legally cognizable burden on religion is present."[185] Professor Lupu admitted that the requirement of adversity of possession may be an impediment to the Indians' argument in situations similar to the one in *Lyng*, but believed that there was enough judicial flexibility built into the common law approach to resolve these difficulties in a satisfactory manner.[186] He specifically referred to *Lyng* and the sacred sites issue, concluding that "[t]he doctrine of easement by prescription, designed to 'stabiliz[e] long continued property uses,' seems especially well tailored to the problem in *Lyng*, and indeed to the general problem of Indians' use of land for religious purposes."[187]

---

180. Berg, *supra* note 64, at 57.

181. Lyng v. Northwest Indian Cemetery, 485 U.S. 439, 475 (1988) (Brennan, J., dissenting).

182. *Id*. While Justice Brennan did say that "I believe it appropriate . . . to require some showing of 'centrality,' " *id*. at 474, he also warned that centrality should not be determined by the courts. *Id*. at 475. Instead, "Native Americans would be the arbiters of which practices are central to their faith." *Id*.

183. *Id*. at 470–71.

184. *See* Lupu, *Where Rights Begin*, *supra* note 18, at 961–65 ("Even if limited by a test of substantiality, however, an impact-based approach would be difficult to maintain in a coherent fashion . . . judging burdensomeness by impact-focused theories, even if limited by tests of 'substantiality' is unlikely to produce any more defensible results than employing coercion-based theories.").

185. *Id*. at 966.

186. *Id*. at 974–75.

187. *Id*. at 973 (internal citation omitted).

In determining what a substantial burden under RFRA should be, Professor Dorf acknowledged, "[t]he very concept of a substantiality test implies a subjective weighing process. Judicial inquiry under a substantiality test must therefore be subjective if courts are to be sensitive to different contexts."[188] However, he would reduce the degree of subjectivity by applying a notion of "neutrality," albeit with "greater sensitivity than the *Smith* Court."[189] Thus he concluded that "[b]y asking whether the burden imposed by a particular law on an adherent of a minority faith greatly exceeds the law's effect on the majority . . . we can give the substantiality test some concrete substance."[190] Using this analysis, absent the preclusive force of *Lyng* as *stare decisis*, Native American practitioners should have no problems showing that certain federal management decisions destructive of sacred sites would have a disproportionate impact on their religion and would therefore create a constitutionally significant burden on the exercise of their religious practices.

Finally, in a relatively recent opinion, *Comanche Nation v. United States*,[191] the Western District of Oklahoma wrote that "[t]he Tenth Circuit has defined the term [substantial burden] by stating that a government action which substantially burdens a religious exercise is one which must 'significantly inhibit or constrain conduct or expression' or 'deny reasonable opportunities to engage in religious activities.' "[192] Similarly, Judge Fletcher in his *Navajo Nation v. United States Forest Service* en banc dissent adopted a definition of substantial burden from previous cases according to which, "[a] governmental [action] burdens the adherent's practice of his or her religion . . . by preventing him or her from engaging in [religious] conduct or having a religious experience . . . . This interference must be more than an inconvenience; the burden must be substantial."[193]

In conclusion, it seems that there are better alternatives to the coercion/denial of benefit test adopted by Justice O'Connor in *Lyng*. A threshold test based on religious claimants showing a significant impact and disproportionate burdens (as compared to burdens suffered by other religious faiths) on their ability to conduct meaningful religious exercises should be the starting point. Any concern that this may be too easy to meet will be tempered by the fact that the government only has to satisfy an intermediate standard of review and, as explained in the next section, by imposing some limits on what can be considered a sacred site.

188. Dorf, *supra* note 66, at 1216.

189. *Id*. at 1217.

190. *Id*.

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

192. *Id*. at *3 (citing Thiry v. Carlson, 78 F.3d 1491, 1495 (10th Cir. 1996)).

193. 535 F.3d 1058, 1091 (9th Cir. 2008) (Fletcher, J., dissenting) (emphasis removed) (quoting Bryan v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995)).

C. *Limiting What is a Sacred Site*

In adopting intermediate scrutiny to review governmental actions jeopardizing sacred sites, I hope to appease some critics who will argue that Native Americans should not be allowed to use religion to reclaim control over an unlimited amount of land that was taken from them throughout history. This is another version of the argument made by some that to the Indians, the whole earth is sacred and if we allow one claim, the floodgates will be open and there will be no end to claims of sacredness.[194] As one prominent scholar aptly put it, "[b]ehind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe."[195] Similar concerns were certainly evident in Justice O'Connor's *Lyng* opinion when she stated the following even after remarking that the Indian practitioners did not at the time object to the area being used by others:

> [n]othing in the principle for which they contend, however, would distinguish this case from another lawsuit in which they (or similarly situated religious objectors) might seek to exclude all human activity but their own from sacred areas of the public lands. . . . No disrespect for these practices is implied when one notes that such beliefs could easily require *de facto* beneficial ownership of some rather spacious tracts of public property.[196]

The same issue arose in *Navajo Nation v. United States Forest Service* where the en banc majority stated, "[i]n the Cococino National Forest alone, there are approximately a dozen mountains recognized as sacred by American Indian tribes. . . . New sacred areas are continuously being recognized by the Plaintiffs."[197] In other words, once you acknowledge that disturbance of sacred sites can impose a substantial burden on Native religious practitioners there is no stopping place, because virtually everything is sacred. To this argument, Judge Fletcher in his dissenting opinion argued that to the Indians, there were degrees of sacredness.[198] Thus, he attempted to distinguish "sacred" places from truly sacred or "holy" places.[199]

194. *See, e.g.*, Yablon, *supra* note 5, at 1630–33.

195. Lupu, *Where Rights Begin*, *supra* note 18, at 947.

196. Lyng v. Northwest Indian Cemetery, 485 U.S. 439, 452–53 (1988).

197. 535 F.3d 1058, 1066 n.7 (9th Cir. 2008).

198. *Id*. at 1097–98 (Fletcher, J., dissenting).

199. *Id*. at 1098 ("But while there are many mountains within [the tribes'] historic territory, only a few of these mountains are 'holy' or particularly 'sacred.' ").

Although appeasing this fear is important, most Native American religious practitioners seem reluctant to precisely define sacred sites.[200] Yet definitions of "sacred" have surfaced in other legislation and official governmental documents. The Native American Graves Protection and Repatriation Act,[201] for instance, defined "sacred objects" as "specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents."[202] In Executive Order 13007, "sacred site" is defined to mean "any specific, discrete, narrowly delineated location on federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion."[203]

Defining what a sacred site is can also be informed by evaluating the implementation of the National Historic Preservation Act (NHPA),[204] which was amended in 1992 to allow inclusion of "Traditional Cultural Properties" (TCPs) on the National Register of Historic Places. TCPs are defined in the Act as "properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian Organization."[205] The National Park Service has issued guidelines further defining TCPs as property associated "with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community."[206] Under the Act, federal agencies considering a federal "undertaking" must first identify tribes with potentially impacted TCPs,[207] consult with such affected Indian tribes,[208] and develop alternatives aimed at minimizing

200. *See, e.g.*, Havasupai Tribe v. United States, 752 F. Supp. 1471, 1496, 1499 (D. Ariz. 1990); *see also* Ethan Plaut, Comment, *Tribal-Agency Confidentiality: A Catch-22 for Sacred Site Management?*, 36 ECOLOGY L.Q. 137, 138, 143–46 (2009).

201. 25 U.S.C. §§ 3001–3013 (2006).

202. *Id.* § 3001(3)(C).

203. Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996). The Order, signed by President Clinton on May 24, 1996, aimed to facilitate access to sacred sites by Indian religious practitioners. *Id.*

204. Pub. L. No. 89-665, 80 Stat. 915 (codified as amended at 16 U.S.C. §§ 470 to 470x-6 (2006)).

205. 16 U.S.C. § 470a(d)(6)(A) (2006); 36 C.F.R. § 800.16(1)(1) (2004).

206. PATRICIA L. PARKER & THOMAS F. KING, DEPARTMENT OF THE INTERIOR NATIONAL PARK SERVICE, NATIONAL REGISTER BULLETIN: GUIDELINES FOR EVALUATING AND DOCUMENTING CULTURAL PROPERTIES 1 (1990).

207. *See* Pueblo of Sandia v. United States, 50 F.3d 856, 861–62 (10th Cir. 1995) (finding that the Forest Service had not conducted a reasonable investigation to identify TCPs).

208. *See* Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768, 787 (9th Cir. 2006) (finding that the federal agency had not adequately consulted with the tribe).

potential adverse effects on TCPs.[209] For the purpose of this Article it is important to note, however, that the NHPA is only a consultation statute and that federal agencies can still proceed with federal undertakings after such tribal consultations even if they result in adverse effects on the TCPs.[210]

A previous attempt at a legislative solution, the Native American Sacred Lands Act, introduced by Congressman Rahall in 2002, defined "sacred lands" to mean:

> any geophysical or geographical area or feature which is sacred by virtue of its traditional culture or religious significance or ceremonial use, or by virtue of a ceremonial or cultural requirement, including a religious requirement that a natural substance or product for use in Indian tribal or Native Hawaiian organization ceremonies be gathered from that particular location.[211]

For potential legislation to have any chance of passing, some relatively manageable definition of sacred sites should be included in the proposal.[212] Although some commentators have argued for a very general definition,[213] it will ultimately be hard not to narrow down sacred sites to those areas that are truly important or holy to Native practitioners as was suggested by Judge Fletcher in his *Navajo Nation v. United States Forest Service* dissenting opinion. This Article does not argue that only those sacred sites that are "central" to a religion should be protected. The concept of centrality has been criticized,[214] and was discarded by Justice Scalia in his *Smith* majority opinion. However, the definitions contained in Executive Order 13007, Bulletin 38 of the National Park Service relative to TCPs, and Rahall's Native American Sacred Lands Act, are all fairly similar and together provide an excellent starting point for discussion. Assembling the

209. *See* 36 C.F.R. §§ 800.4(b)(1), 800.6(a)-(b) (2011); *see also* Muckleshoot v. U.S. Forest Serv., 177 F.3d 800, 805–07 (9th Cir. 1999) (finding that although the Forest Service had made a good faith effort to identify TCPs, it failed in its obligation to minimize the detrimental effects on TCPs).

210. *See* San Carlos Apache Tribe v. United States, 417 F.3d 1091, 1094–95 (9th Cir. 2005); *see also*, Charles Rennick, Comment, *The National Historic Preservation Act:* San Carlos Apache v. United States *and the Administrative Roadblock to Preserving Native American Culture*, 41 NEW ENG. L. REV. 67, 80 (2006).

211. H.R. 5155, 107th Cong. § 1(b)(4) (2002).

212. For a good discussion of "What is a Holy Place" along with a list of the most important Native American Sacred Sites, see ECHO-HAWK, *supra* note 1, at 329–33.

213. *E.g.*, Amber L. McDonald, *Secularizing the Sacrosanct: Defining "Sacred" for Native American Sacred Sites Protection Legislation*, 33 HOFSTRA L. REV. 751, 783 (2004) ("A sacred site is one which is sacred to those practicing traditional native religions or is otherwise of significance according to native tradition and includes any land that, under a law of the United States is declared to be sacred to Native Americans.").

214. *Id*. at 762, 780.

various concepts contained in these definitions, it is possible to narrow down the essence of sacred sites as comprising three principle elements. First, they have to be specific and delineated geographical areas located on federal lands. Second, they have to be tied to ongoing traditional religious practices or ceremonies. And third, these religious ceremonies have to be important to the Indian religious community.

While it is true that Indian religions may have a somewhat different emphasis on sacred sites, Walter Echo-Hawk remarked that the concept of certain places as being holy is universal:

> Across the world, there is a common human theme of seeking direct spiritual contact at sacred geographical points. The holy places form a rich tapestry where humans can experience direct communication from God, divine beings, or spirits.[215]

Hopefully, the universality of this concept will help create a consensus for defining sacred sites.

CONCLUSION

Sacred sites are vitally important to Native religious practitioners and to the continuation of traditional Native culture. Unfortunately, the reasons for which they are important have been poorly understood by some courts, including the United States Supreme Court. Fearing endless challenges to federal land management decisions, the Court in *Lyng* opted for a definition of substantial burden that seemed to preclude First Amendment protections for Native American religious practitioners. Congress eventually enacted RFRA, which seems to allow courts to adopt a different definition of substantial burden. Some courts, like the Ninth Circuit, still take the position that *Lyng* precludes such a move. Although good arguments can be made against this position, this Article has shown that RFRA is full of ambiguities and that the adoption of strict scrutiny in RFRA may have been a mistake. The Article therefore recommends the adoption of a new test for protection of sacred sites. The essential elements of the new test are: First, the adoption of an intermediate type of scrutiny modeled along the lines of tests the Court has formulated in some free speech cases. Second, the broadening of the threshold element of burden beyond the coercion/denial of benefit test and towards a substantial impact or disparate impact test that combines the test suggested by Justice Brennan in his *Lyng* dissent and currently in use in the Tenth Circuit with the test proposed by Professor Dorf. And third, the adoption of a manageable definition of sacred sites. There is no question that sites sacred to Native American religious practitioners need

215. ECHO-HAWK, *supra* note 1, at 329.

some protection. All of these sites used to be on lands owned by the tribes. Although this is no longer the case, these sites are essential not only to the practice of Native religions but also to the continuing vitality of tribal cultures. Not only are they essential to establishing a connection to what Walter Echo-Hawk has aptly called the spirit world, they are also in many ways what connects one generation of Native Americans to another.[216]

216. *See id.* at 325–56.