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# CULTURE TALK OR CULTURE WAR IN FEDERAL INDIAN LAW?

Alex Tallchief Skibine\*

## INTRODUCTION

When it comes to conflicts between Native American culture and the cultural norms of the dominant society, is federal law more inclined towards “culture talk,” meaning engaging Indian tribes in a dialogue aiming at finding common grounds, or is it more engaged in “culture war”? The point of this essay is to evaluate how the law of the dominant culture accommodates Native American cultural and religious rights. This essay also examines the costs of such “accommodations” on Native American culture. In other words, these “accommodations” may come at a price. One such price is that through such accommodations, the dominant culture may be exerting a certain amount of control in determining the meaning and extent of Native American culture.

After once asking an older Sioux medicine man about some of the more esoteric aspects of Sioux religious practices, I was told that this could not be revealed because it was, as he put it, “sacred and secret.” Undoubtedly, one of the reasons for this not atypical answer came from the desire to protect and preserve such practices. Eventually, however, most Indians came to understand that, in order for these cultural and religious practices to be respected by the dominant culture and protected by its laws, they would have to be understood by such culture. This meant, in turn, that Native American cultural and religious practices would have to be, to a certain degree, “integrated” into the law of the dominant culture. The danger these days is no longer that, once known and understood, the dominant culture will try to prohibit these practices.<sup>1</sup> The danger now is that through legal regulations of such cultural issues, the dominant culture will try to influence and transform Native American culture and religion in order to make them better “fit” into the dominant culture’s vision about what Indian culture should be. So the question is whether there can be “integration” without “assimilation.” The challenge here is to achieve protection for Native American culture without Native American culture being “assimilated” into the dominant culture, thereby losing what is uniquely “Native American” about it.

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1. For an analysis of laws outlawing Native American religious practices, see Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 *Stan. L. Rev.* 773 (1997).

In the first part of this essay, I talk about the various ways to frame the debate concerning Native American cultural or religious rights. In the next part, I focus on four areas of concern affecting these rights: use of controlled substances, possession of eagle feathers, issues relating to who and what is Native American for the purposes of the Native American Grave Protection Act (NAGPRA),<sup>2</sup> and finally, protection of Native American sacred sites.

## I DEFINING THE TERMS OF THE DEBATE: NOT JUST A MATTER OF SEMANTICS

When talking about tribal cultural rights, an important issue for tribal advocates is to decide what nomenclature to adopt. This is not just a matter of semantics. It could make some meaningful differences in outcomes. How should the debate be framed? Should we speak in terms of cultural or religious rights? Individual, instead of tribal rights? Or perhaps fundamental rights or maybe even political rights?

Although at times, especially when it comes to Native American issues, telling cultural from religious rights is hard to do,<sup>3</sup> there are at least a couple of fundamental differences. First, culture can and does change, religion usually does not. Secondly, culture can be negotiated, religion usually cannot.<sup>4</sup> Viewing a certain issue as a matter of culture instead of a matter of religion has some positive and negative aspects for Indians when it comes to the religion clauses of the First Amendment to the United States Constitution.<sup>5</sup> On the one hand, Indians can invoke the Free Exercise Clause of the First Amendment to claim, for instance, that their religion precludes them from cutting their hair pursuant to government regulations.<sup>6</sup> On the other hand, a government regulation granting an exception or accommodating a traditional Indian cultural practice could be attacked as being in violation of the Establishment Clause of the First Amendment if such a practice was really viewed as a religious practice. Courts have, however, usually used the cultural aspect of the practice in order to justify such accommodations.<sup>7</sup>

Although this essay talks in terms of cultural/religious rights, the subject can also be analyzed in terms of property rights or fundamental rights unrelated to religion. Some may think that treating cultural rights as a type of property right may have negative implications or connotations because it could have a tendency to commodify or

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2. 25 U.S.C. §§ 3001–3013 (2006).

3. Michelle Kay Albert, *Obligations and Opportunities to Protect Native American Sacred Sites Located on Public Lands*, 40 Colum. Hum. Rights L. Rev. 479, 487 (2009) (noting the problem in distinguishing between religion and culture and stating, “[t]his line drawing exercise is inherently more difficult in the context of Native American religious beliefs and practices”); see also Bryan J. Rose, *A Judicial Dilemma: Indian Religion, Indian Land, and the Religion Clauses*, 7 Va. J. Soc. Policy & L. 103, 105 (stating that “[f]irst, Indian religion and culture are functionally inseparable, so that one cannot meaningfully discuss Indian religion apart from Indian life in general” (footnote omitted)).

4. See S. Alan Ray, *Native American Identity and the Challenge of Kennewick Man*, 79 Temp. L. Rev. 89, 118 (2006).

5. The religion clauses of the First Amendment read, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .” U.S. Const. amend. I.

6. See *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005).

7. See *Access Fund v. Dept. of Agric.*, 499 F.3d 1036 (9th Cir. 2007); *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969 (9th Cir. 2004); *Nat. Arch & Bridge Socy. v. Alston*, 209 F. Supp. 2d 1207 (D. Utah 2002); see also Erik B. Bluemel, *Prioritizing Multiple Uses on Public Lands after Bear Lodge*, 32 B.C. Env'tl. Aff. L. Rev. 365, 392 (2005).

commercialize cultural rights. A recent article by professors Carpenter, Katyal, and Riley provides, however, an excellent example of how to include cultural rights as property rights while at the same time avoiding this common pitfall.<sup>8</sup> Instead of trying to fit Native American cultural rights into conventional property rights, the authors redefined what property rights should mean so that Native American cultural rights can be respected. In other words, they did not change Native American cultural rights so they could fit into western concepts of property; they attempted to change the meaning of property so that Native American cultural rights can fit into a property right paradigm. The same type of inquiry can be done with other areas of the law. Professor Rebecca Tsosie, for instance, has suggested that there could be such a thing as a fundamental right to cultural identity.<sup>9</sup>

Another way to think of Native American cultural rights is in terms of tribal sovereignty and the right to self-determination.<sup>10</sup> I once wrote that “[t]alking in terms of sovereignty often invites conflicts because sovereignty is connected with an assertion of power . . . .”<sup>11</sup> Framing the discussion in terms of cultural or religious rights, on the other hand, seems less confrontational and may invite more of a dialogue. Yet, “sovereignty” cannot and should not be easily discarded. In an earlier article, Professor Perry Dane of Yale Law School put forth some arguments on why what he termed “sovereignty talk” was important to Indians and Indian tribes.<sup>12</sup> Professor Dane wrote,

[s]overeignty-talk is a distinct form of argument. It is the demand that one legal system recognize the prerogatives of another. Tribal sovereignty is more than a right of association, or a right to contract . . . . [Sovereignty] is less a grant of freedoms or privileges than the power to define freedoms and privileges.<sup>13</sup>

In the end, however, Native American culture is connected and relevant to tribal sovereignty. As pointed out by some scholars, what sets Indians apart from others within the multicultural movement is that conflicts over Native American culture cannot be disassociated from tribal sovereignty.<sup>14</sup> In a landmark article, Rebecca Tsosie and Wallace Coffey put forth the proposition that instead of defining tribal sovereignty in terms of western political thought, tribes should put forth their own concept of sovereignty according to their own cultures. Tsosie and Coffey termed this “cultural sovereignty.”<sup>15</sup> There are, however, some dangers associated with redefining political

8. Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 Yale L.J. 1022 (2009).

9. Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 Ariz. St. L.J. 299, 332–346 (2002). It should be noted, for instance, that the Columbia Constitution of 1990 recognized the right to cultural identity as a fundamental right.

10. E.g. Robert J. Miller, *Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling*, 25 Am. Indian L. Rev. 165 (2001).

11. Alex Tallchief Skibine, *Tribal Sovereign Interests Beyond the Reservation Borders*, 12 Lewis & Clark L. Rev. 1003, 1019 (2008) (emphasis original).

12. Perry Dane, *The Maps of Sovereignty: A Meditation*, 12 Cardozo L. Rev. 959, 965–973 (2008).

13. *Id.* at 966–967 (footnote omitted).

14. See Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 Cal. L. Rev. 799 (2007); Scott C. Idleman, *Multiculturalism and the Future of Tribal Sovereignty*, 35 Colum. Hum. Rights. L. Rev. 589 (2004).

15. Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 Stan. L. & Policy Rev. 191, 196 (2001) (as the authors put it, “cultural sovereignty: that is, the effort of Indian nations and Indian people to exercise their own norms and values in structuring their collective futures” (emphasis original)).

sovereignty in terms of cultural sovereignty. In an insightful essay, Sam Deloria once made the following comments:

Let me warn you about something about this culture business. In the law of the United States, which is the way decisions are made and power is allocated, that power can put us out of business. Our existence is on a thread . . . . In the law of the United States . . . we are entitled to self-government because we, as societies, preexisted this other government that came along. And that's fine. That is an abstract, theoretical basis for our tribal existence. And there are no conditions on that. If we stake out a position that says that our right to self-government is tied to our dedication, our adherence to culture . . . we are saying for the first time, WE are saying, it's conditional.<sup>16</sup>

Deloria concluded by warning that when talking about cultural sovereignty, we have to "be damned careful that we're not saying to this society, 'In exchange for a continued political existence, we promise to maintain some kind of cultural purity,' because you think it's going to be by our standards. Hell no . . . it's going to be by THEIR standards."<sup>17</sup>

Of course, no one has suggested that there is a static traditional Indian definition of what is Indian culture. As stated by Barsh and Henderson, tribal self-government should not be identical with cultural fossilization: "White self-government does not depend upon the preservation of 'pioneer culture' . . . . Self-government transcends culture; it is the right to choose culture."<sup>18</sup> Acknowledging the adaptability and responsiveness of Native culture, Cherokee scholar Alan Ray has argued that the concept of cultural *hybridity* has played a large role in the evolution of Indian culture, especially Cherokee culture.<sup>19</sup> Ray quoted the words of theorist Benita Perry that cultural hybridities "are those moments 'when the scenario written by colonialism is given a performance by the native that estranges and undermines the colonialist script.'"<sup>20</sup>

Nevertheless, there is some validity to Sam Deloria's cautionary statement concerning the danger of the dominant culture taking the lead in defining or, more accurately, re-defining not only what is Indian culture but also who is an Indian. As stated in this essay's introduction, in order to be better protected under United States law, Native American culture and religion have to be understood and thereby somewhat "integrated" into the dominant culture.<sup>21</sup> Perhaps one of the greatest challenges for Native American communities is to integrate their own culture into the law of the

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16. Sam Deloria, *Commentary on Nation-Building: The Future of Indian Nations*, 34 *Ariz. St. L.J.* 55, 58 (2002).

17. *Id.* at 59.

18. Russell Lawrence Barsh & James Youngblood Henderson, *The Road: Indian Tribes and Political Liberty* 118 (U. of Cal. Press 1980).

19. Ray, *supra* n. 4, at 117–118.

20. *Id.* at 118 (footnote omitted) (quoting Benita Perry, *Problems in Current Theories of Colonial Discourse*, in *The Post-Colonial Studies Reader* 36, 42 (Bill Ashcroft, Gareth Griffiths & Helen Tiffin eds., Routledge 1995)). For a book which proves this sentence's point perfectly, see Phillip Deloria, *Indians in Unexpected Places* (U. Kan. Press 2004).

21. In a similar vein, I have argued elsewhere that in order for their political rights to be more permanently secured, Indian tribes, as sovereign governments, need to be incorporated or integrated into the legal and constitutional structure of the United States under a third sphere of sovereignty. See Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within "Our Federalism": Beyond the Dependency Paradigm*, 38 *Conn. L. Rev.* 667 (2006).

dominant society without their culture being assimilated by that mainstream society. The question is whether there can be *integration* without *assimilation*. While most scholarship seems to associate “integration” with “assimilation,” this does not always have to be the case.<sup>22</sup> For instance, after remarking that “many [b]lack no longer seek integration through assimilation[,]”<sup>23</sup> Judge Harry T. Edwards concluded that “[i]ntegration and assimilation are no longer synonymous.”<sup>24</sup> As ably put by Professor Kenneth Karst:

Integration itself may seem to some Americans of minority race or ethnicity to be a snare and a delusion, . . . a way to ‘make black people white people with black skin’ . . . . Supporting integration does not . . . require the surrender of racial or cultural self-identification . . . . [M]inority cultural forms are not to be ‘assimilated’ out of existence, but [are] themselves to have causative roles in reshaping the national polity and the culture of a nation. Any integration worthy of the name will involve not just elements in which different cultural streams join together . . . but also elements in which streams of culture go their separate ways.<sup>25</sup>

## II. FOUR AREAS OF CULTURAL/RELIGIOUS CONCERNS

In this part, I explore four areas where conflicting claims have been made between Native cultural rights and the dominant society and try to see what the different outcomes tell us about how far the dominant culture is willing to go in accommodating Native American cultures, and whether in doing so, the dominant culture is interposing its own notion of what Indian culture is or should be. I will be speaking here mostly of cultural rights connected to religion and not about other non-religious areas of cultural concerns such as the use of mascots<sup>26</sup> or other issues relating to preservation of native cultural property.<sup>27</sup> The analysis starts with the area that has enjoyed the most favored reception by the dominant culture and works its way down to the more problematic areas.

22. E.g. Patrick Macklem, *Indigenous Recognition in International Law: Theoretical Observations*, 30 Mich. J. Int'l. L. 177, 194 (2008) (observing that the International Labour Organization Convention No. 107 “distinguishes between integration and assimilation . . . . The terms of Convention No. 107 were consistent with a conception of integration as an enlightened process of cultural adjustment designed to foster economic and social development in ways that reinforce the legitimacy and effectiveness of the national institutions of a State.” (footnote omitted)).

23. Harry T. Edwards, *The Journey from Brown v. Board of Education to Grutter v. Bollinger: From Racial Assimilation to Diversity*, 102 Mich. L. Rev. 944, 959 (2004).

24. *Id.* at 960 (emphasis omitted).

25. Kenneth L Karst, *The Revival of Forward-Looking Affirmative Action*, 104 Colum. L. Rev. 60, 72–73 (2004) (footnotes omitted). Similarly, Professor Charles Ogletree once wrote, “The challenge of *Brown* was not only to achieve integration but also to recognize that once integrated, all of us are diverse . . . . Integration does not simply place people side by side in various institutional settings; rather, it remakes America, creating a new community founded on a new form of respect and tolerance.” Charles J. Ogletree Jr., *All Deliberate Speed: Reflections on the First Half Century of Brown v. Board of Education* 295 (W.W. Norton & Co. 2004).

26. Not that such issues are unimportant. See e.g. *Pro Football Inc. v. Harjo*, 565 F.3d 880 (D.C. Cir. 2009) (dismissing a case filed by Native Americans who had wanted the Washington Redskins trademark cancelled on the ground that such name was disparaging to Native Americans).

27. For a thorough analysis on how the development of tribal law can help tribes in this task, see Angela R. Riley, “*Straight Stealing*”: *Towards an Indigenous System of Cultural Property Protection*, 80 Wash. L. Rev. 69 (2005).

### A. PEYOTE AND OTHER CONTROLLED SUBSTANCES

In *Employment Division v. Smith*,<sup>28</sup> the Supreme Court held that the strict scrutiny test was not applicable to test the validity of a criminal statute of general applicability which only incidentally burdened someone's religion. Therefore, a general criminal law prohibiting the use or possession of peyote was held not to interfere with the free exercise rights of Native American religious practitioners using peyote in religious ceremonies. In response to this decision, Congress in 1990 enacted the Religious Freedom Restoration Act (RFRA).<sup>29</sup> The Act essentially reinstated the strict scrutiny test to gauge the validity of criminal laws of general applicability which incidentally impose a substantial burden on the free exercise of religion. Under RFRA, the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."<sup>30</sup>

Congress, in 1994, also amended the 1978 American Indian Religious Freedom Act (AIRFA), to specifically prevent states from punishing Native Americans using peyote in religious ceremonies.<sup>31</sup> After the *City of Boerne* case came down in 1997<sup>32</sup> holding RFRA unconstitutional as applied to states, I am still a little surprised that no one has challenged the AIRFA amendments as unconstitutional on federalism grounds using the opaque *congruent and proportional* test enunciated in *City of Boerne*. Perhaps this reflects an implicit acknowledgment by the mainstream culture that making such discrete and specific exceptions to drug laws based on religious grounds is legitimate. Certainly, there was some evidence of this in the recent *Centro Espirita* case,<sup>33</sup> where the Court upheld the right of a Christian Spiritist sect based in Brazil with some 130 practitioners in the United States to use hallucinogenic tea brewed from plants only found in the Amazon region as part of their religious ceremonies.

In holding that the government had not shown a compelling interest protected by the least restrictive means, the Court specifically mentioned the exemption given to Native Americans for peyote. After stating that since Congress had granted an exception "for hundreds of thousands of Native Americans practicing their faith, it is difficult to see how those same [congressional] findings alone can preclude any consideration of a similar exception for the 130 or so American members of the [sect] who want to practice theirs[.]"<sup>34</sup> the Court added that "[t]he well-established peyote exception also fatally undermines the Government's broader contention that the Controlled Substances Act establishes a closed regulatory system that admits of no exceptions . . . ."<sup>35</sup> As further explained in the next section, this kind of rationalization may be potentially troublesome for Native American interests. Thus, the same kind of reasoning was recently used by a

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28. 494 U.S. 872 (1990).

29. 42 U.S.C. §§ 2000bb-4 (2006).

30. *Id.* at § 2000bb-1(a)-(b).

31. *Id.* at § 1996a(a)-(b).

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

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

34. *Id.* at 433.

35. *Id.* at 434.

federal district court in Utah to allow non-Indians to possess eagle feathers for religious purposes, a decision which could potentially result in less eagle feathers being available for Native American practitioners.<sup>36</sup>

#### B. POSSESSION OF EAGLE FEATHERS

In this area, the government has made some efforts to accommodate the religious needs of Native American practitioners. Although possession of eagle feathers is generally prohibited, Native American religious practitioners who are also tribal members have been allowed to apply for permits entitling them to possess eagle feathers for religious purposes.<sup>37</sup> The courts have refused, however, to uphold the rights of Native American practitioners outside the narrow perimeters set out in the permit system. This reflects a judicial willingness to strongly defer to the executive and legislative branches in this area. In most of the cases, the courts have held that the permit system is the least restrictive means of protecting two compelling federal interests: the protection of the eagle population and Native American culture.<sup>38</sup> Perhaps this is yet another example of what some scholars have noted is the Court's hands off approach in free exercise cases.<sup>39</sup>

The same hands off approach has not been adopted by some lower courts in cases involving non-Indians or non-members practicing traditional Native American religions and possessing eagle feathers. In one long running case, two non-Indians, Wilgus and Hardman, were being prosecuted for possession of eagle feathers.<sup>40</sup> As non-tribal members, they were not eligible to apply for permits to possess eagle feathers. In ruling that such federal prosecution violated the free exercise rights of these non-Indians under the RFRA, the Utah federal district court seemed to have been disturbed by the unequal treatment between Native American and non-Native American practitioners. Thus, the Judge noted that when the case went up to the Tenth Circuit, that Court of Appeals noted:

The question at the heart of this case is why an individual who is not a member of a federally recognized tribe is foreclosed from applying for a permit that may be used as a defense to criminal prosecution for possession of eagle feathers, while an *identically situated* individual may apply for a permit if she is a member of a federally recognized tribe.<sup>41</sup>

The district court had revealed its own discomfort with the unequal treatment given to Native American and non-Native American practitioners at the outset of its opinion,

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36. *U.S. v. Wilgus*, 606 F. Supp. 2d 1308 (D. Utah 2009).

37. 50 C.F.R. § 22.22 (2008). Although possession of eagle feathers is prohibited under the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668 (2006), the Act authorizes the Secretary of the Interior to make exceptions under the Act. *Id.* at § 668a.

38. See *U.S. v. Friday*, 525 F.3d 938 (10th Cir. 2008); *U.S. v. Vasquez-Ramos*, 531 F.3d 987 (10th Cir. 2008); *U.S. v. Tawahongva*, 456 F. Supp. 2d 1120 (D. Ariz. 2006).

39. See generally Samuel J. Levine, *The Supreme Court's Hands-Off Approach to Religious Doctrine: An Introduction*, 84 Notre Dame L. Rev. 793 (2009).

40. *Wilgus*, 606 F. Supp. 2d 1308; see also *U.S. v. Hardman*, 622 F. Supp. 2d 1129 (D. Utah 2009). These decisions were issued on remand from the Tenth Circuit in *U.S. v. Hardman*, 297 F.3d 1116 (10th Cir. 2002) (en banc).

41. *Wilgus*, 606 F. Supp. 2d at 1314 (emphasis original) (quoting *Hardman*, 297 F.3d at 1135).



remarking that “[e]xceptions for some groups or interests to a government scheme that substantially burdens religious practice make it difficult for the government to show that its restrictions on religious practice are the least restrictive means of pursuing its goals.”<sup>42</sup> After acknowledging that it was imposing on the government the “formidable task . . . to set its compelling interests in equipoise so as to protect Native American culture and eagles in the manner least restrictive of the RFRA right to free exercise of the defendants,”<sup>43</sup> the court, not surprisingly, found that the government had not met its burden of showing that its two compelling but conflicting interests were being fulfilled using the least restrictive means.

Although it has to be noted that at least one other circuit, the Ninth, has taken a different position in cases involving non-members possessing eagle feathers in the course of practicing Indian religions,<sup>44</sup> two issues raised by cases such as *Hardman* and *Wilgus* should be of concern to all Native American communities. The first issue is whether there can or should be a unified position within the Native American religious communities concerning whether non-tribal members should be given the same rights as Indians in practicing Native American religions. In *Hardman*, the district court noted that the Native American religious communities were divided on this issue, and this split seemed to have played an important role in the court’s discussion on whether the restriction on non-members possessing eagle feathers was necessary to protect tribal cultures.<sup>45</sup> This issue is especially important since, as mentioned earlier, there seems to be a difference of methodology in dealing with this issue between the Ninth and Tenth Circuits. Therefore, this issue may eventually reach the United States Supreme Court.

The second issue is: what should such a tribal position be? While the scholarly literature has generally been supportive of the current scheme,<sup>46</sup> can it legitimately be argued that non-member Indians or non-Indians, such as spouses of members or people who have been adopted by Native religious communities as legitimate practitioners, should be criminally prosecuted when other members within their religious community or family who happened to be enrolled tribal members of federally recognized tribes enjoy an immunity from such prosecutions?

The United States Supreme Court once told the tribes that although they could adopt non-Indians and make them tribal citizens, these non-Indians would still not be recognized as tribal Indians for the purposes of federal criminal law.<sup>47</sup> The legal foundation of this 1845 case has been seriously criticized.<sup>48</sup> Are Native Americans today

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42. *Id.* at 1310.

43. *Id.* at 1326.

44. See *U.S. v. Antoine*, 318 F.3d 919, 923–924 (9th Cir. 2003) (holding that the government had met its burden of showing a compelling interest protected by the least restrictive means and signaling its disagreement with the Tenth Circuit’s approach as set forth in *Hardman*) (stating that, “[w]e do not believe RFRA requires the government to make the showing the Tenth Circuit demands of it.”); see also *U.S. v. Winddancer*, 435 F. Supp. 2d 687 (M.D. Tenn. 2006) (following the Ninth Circuit’s approach).

45. *Hardman*, 622 F. Supp. 2d at 1136–1138.

46. See e.g. Kevin J. Worthen, *Eagle Feathers and Equality: Lessons on Religious Exceptions From the Native American Experience*, 76 U. Colo. L. Rev. 989 (2005); see also James R. Dalton, Student Author, *There is Nothing Light About Feathers: Finding Form in the Jurisprudence of Native American Religious Exemptions*, 2005 BYU L. Rev. 1575 (2005).

47. See *U.S. v. Rogers*, 45 U.S. 567 (1845).

48. See generally Bethany R. Berger, “Power Over this Unfortunate Race”: *Race, Politics and Indian Law*

willing to support the reasoning of this case when it comes to religious rights?<sup>49</sup> While it is true that granting such rights to non-members may somewhat diminish the amount of feathers available to tribal members,<sup>50</sup> are such federal prosecutions an indirect attack on the legitimacy and authority of Native American religious leaders in cases where the feathers were acquired by the non-members from such native religious leaders?<sup>51</sup>

### C. NAGPRA AND THE BONNICHSEN CASE

There is no question that the enactment of the NAGPRA<sup>52</sup> in 1990 represented a major victory for the religious and cultural interests of Native Americans and Indian tribes.<sup>53</sup> Yet, Native American cultural interests suffered a setback in the litigation involving tribal attempts to repatriate the 9,000 year old remains of a man found on the banks of the Columbia River near the town of Kennewick. Five local Indian tribes had claimed cultural affiliation with the remains and wanted them properly re-buried as was their right under NAGPRA. On the other side, a group of scientists wanted to conduct scientific studies on the remains. In *Bonnichsen v. U.S.*,<sup>54</sup> the Ninth Circuit held that NAGPRA was not applicable to the remains of this 9,000-year-old man because such remains could not possibly be considered “Native American” as that term is defined in NAGPRA. The court came to this conclusion by focusing on a section of NAGPRA which defines “Native American” as “of, or relating to, a tribe, people, or culture that is indigenous to the United States.”<sup>55</sup> According to the court, the use of the present tense as reflected by the word “is” showed that Congress intended the human remains subjected to the Act to “bear some relationship to a presently existing tribe . . . to be considered Native American.”<sup>56</sup> The Ninth Circuit further found that the age of the remains alone made it impossible for any currently existing Indian tribe to prove any relationship with such remains.<sup>57</sup>

There are many controversial aspects to this decision, not the least of which is the refusal of the Court to grant deference under the *Chevron* doctrine to the statutory

in *United States v. Rogers*, 45 Wm. & Mary L. Rev. 1957 (2004).

49. For an essay questioning the current system of defining who is politically or racially an Indian and arguing for a liberalization of such concept, see Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 Cal. L. Rev. 801 (2008).

50. For an eloquent argument that granting preferential treatment to Native Americans in such cases is consistent with American constitutional norms, see Worthen, *supra* n. 46.

51. For a thoughtful analysis and an alternative way to fulfill the federal government’s compelling interests, see Stephen Rosecan, Student Author, *A Meaningful Presentation: Proposing a Less Restrictive Way of Distribute Eagle Feathers*, 42 New Eng. L. Rev. 891 (2008) (arguing that non-members who are active participants in Native American religions should be able to be issued permits to possess feathers if such permit is endorsed by a legitimate Native American religious practitioner).

52. 25 U.S.C. §§ 3001–3013.

53. On NAGPRA generally, see Debora L. Threedy, *Claiming the Shields: Law, Anthropology, and the Role of Storytelling in NAGPRA Repatriation Case Study*, 29 J. Land, Resources, & Envtl. L. 91 (2009). See also Angela R. Riley, *Indian Remains, Human Rights: Reconsidering Entitlement Under the Native American Graves Protection and Repatriation Act*, 34 Colum. Hum. Rights L. Rev. 49 (2002).

54. 367 F.3d 864 (2004).

55. 25 U.S.C. § 3001(9).

56. *Bonnichsen*, 367 F.3d at 875 (emphasis omitted).

57. *Id.* at 879 (stating that “[t]he age of Kennewick Man’s remains, given the limited studies to date, makes it almost impossible to establish any relationship between the remains and presently existing American Indians” (emphasis omitted)).

interpretation adopted by the Secretary of the Interior on the grounds that the statutory section in question could not possibly be ambiguous.<sup>58</sup>

Another controversial aspect of the decision was that the court seemed to collapse the inquiry of whether the remains were Native American with the inquiry of whether they were culturally affiliated with a specific Indian tribe. The Ninth Circuit rejected this accusation,<sup>59</sup> although the analysis it used to determine whether the remains had any “relationship” with any present day Indian tribes has some very strong similarities with an analysis determining cultural affiliation with a specific Indian tribe. The Ninth Circuit was judicious in making a distinction between the two inquiries because under NAGPRA section 3002(a)(C)(1), if the cultural affiliation of the remains “cannot be reasonably ascertained,” but are found on federal land that was once recognized as within the aboriginal territory of some Indian tribe, that tribe has a right to such remains. In other words, as long as the remains qualified as “Native American” under the Act, a tribe could acquire possession without positively or conclusively showing cultural affiliation. This was the reason the *Bonnichsen* court could not talk in terms of cultural affiliation but had to rest its case on a finding that the remains were not Native American to start with.

One question that comes to mind about the court’s analysis, however, is this: if not then, when? If people who walked this continent 9,000 years ago cannot be considered Native Americans, when did this “Native American” business start? The court never answered that question. Basically it just stated that no present-day tribe could possibly establish “that [the] Kennewick Man’s remains are connected by some special or significant genetic or cultural relationship to any presently existing” Indian tribes.<sup>60</sup> There are many other important aspects to this dispute and much has been written about the Ninth Circuit’s decision.<sup>61</sup> I will focus here on only three points.

First, the case has to do with “cultural continuity” and with respecting Indian tribes’ understanding of their own cultural history.<sup>62</sup> This desire to establish cultural

58. *Id.* at 877. The Secretary determined that under NAGPRA, any remains dated before 1492 were *de facto* “Native American.” *Id.* at 876. Under the *Chevron* doctrine, an interpretation of an ambiguous term the federal agency in charge of implementing the legislation has to be given deference and should be upheld as long as such interpretation is reasonable or permissible. See *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

59. *Bonnichsen*, 367 F.3d at 877. This accusation was made against the District Court’s opinion but the methodology adopted by the Court of Appeals is the same.

60. *Id.* at 880.

61. See Rebecca Tsosie, *The New Challenge to Native Identity: An Essay on “Indigeneity” and “Whiteness”*, 18 Wash. U. J.L. & Policy 55, 77–84 (2005); Allison Dussias, *Kennewick Man, Kinship, and the “Dying Race”*: *The Ninth Circuit’s Assimilationist Assault on the Native American Graves Protection and Repatriation Act*, 84 Neb. L. Rev. 55 (2005); Ray, *supra* n. 4. Most of the scholarship has been critical, although not entirely. Compare Ashley Young, Student Author, *Continuing An American Legacy of Racial and Cultural Injustice: A Critical Look at Bonnichsen v. United States*, 17 DePaul-LCA J. Art & Ent. L. & Policy 1 (2006) with Robert Van Horn, Student Author, *The Native American Graves Protection and Repatriation Act at the Margin: Does NAGPRA Govern the Disposition of Ancient, Culturally Unidentifiable Human Remains?* 15 Wash. & Lee J. Civ. Rights & Soc. Just. 227 (2008).

62. As stated by Angela Riley,

[N]o cultural practice is more fundamental to group identity and survival than treatment of the dead . . . . This is particularly true for indigenous peoples, who are forever linked to their dead, as they define themselves through their history and place as connected to ancestors, the environment, and the earth. . . . [H]uman remains are valued . . . because human remains connect living Indians to their past and to their future.

continuity is not unique to Indian tribes. In France for instance, where I was brought up, every history school book used to start with a chapter titled “Our Ancestors, the Gauls.” But in effect, under the *Bonnichsen*’s court methodology, this assertion would be highly debatable. It is true that no one in France seems to identify himself primarily as a Gaul anymore and there are some good reasons for this. Gauls were described as barbaric tribes of Gaelic and Celtic origins that could not quite get united to fight off the Roman legions of Julius Caesar when he conquered Gaul in 52 BC. Eventually France was invaded by an eastern Germanic tribe, the Franks, who gave their name to France and the French. Yet, today, all of the Gauls’ cultural heritage is claimed by the French. Could today’s French people successfully show a significant relationship, let alone a cultural affiliation, with yesterday’s Gauls so that the Gauls could be considered related to the French people under NAGPRA using the *Bonnichsen* court’s methodology? The same thing can be said of today’s Egyptians. Could they really show that they are significantly related with the people who built the pyramids? Yet few would seriously argue that the Gauls are not affiliated with today’s French people or that the pyramid builders are not related with the people currently living in Egypt. So when it comes to the claims of Indian tribes, why not err on the side of cultural continuity?

The refusal by the *Bonnichsen* court to uphold the tribes’ claim is also an attack on the legitimacy of the statement from Sam Deloria quoted earlier in this paper: the tribes’ have special rights to self-government because they were here first.<sup>63</sup> Underlying the *Bonnichsen* Court’s decision is the position that, in reality, Native Americans were not here first. That, in fact, this continent was settled by people who had no cultural connection with present day American Indians. In effect, the *Bonnichsen* judge is taking the position that the *Kennewick* Man is more “American” than he is Indian.

Second, the decision is an attack on the legitimacy of tribal religions. For many Native Americans, their religion tells them that their tribe was the first to occupy a given area and in many cases, tribal people believe the Creator told their tribe to take care of that specific area. Yet, in some ways, the tribal religions’ attitude about the land is not that different than what the God of the Old Testament is said to have told the Israelites when he entered into a covenant with them giving them Palestine. Western people seem to have no problem with a religion making such an assertion. So why the disconnect when it comes to Indian religions and their claim about the land?

One scholar took the position, however, that the debate is not as much about Indian versus western religions as it is between religion and science. Thus, professor Steven Goldberg has argued that both sides of the issue care deeply about this because this has to do with where we came from, it is about *origins*.<sup>64</sup> Professor Goldberg sees a similarity between the *Bonnichsen* controversy and the evolution v. creationism debate.

Third and finally, although only binding in one circuit, this decision brings into focus the desire of some within the dominant culture to control the definition of who is an Indian and what is culturally “Indian.” The holding of the case may tend to prove Sam

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Riley, *supra* n. 53, at 58–59 (footnote omitted).

63. See Deloria, *supra* n. 16.

64. Steven Goldberg, *Kennewick Man and the Meaning of Life*, 2006 U. Chi. Leg. Forum 275, 280–281 (2006).

Deloria right when he warned us that decisions related to Native American culture were going to be made under a white man's standards.<sup>65</sup> It is true that it is the dominant society that first racial-ized Indian tribes.<sup>66</sup> These blood quantum-based tribal rolls were initially a BIA idea born out of the Allotment Era.<sup>67</sup> Yet the *Bonnichsen* judge made somewhat of a big deal of the fact that the human remains involved in the case seemed not to be "genetically" related to today's Indians. The court stated that

[a]n examination of the record demonstrates the absence of evidence that Kennewick Man and modern tribes share significant genetic or cultural features . . . . When [the] Kennewick Man's remains were discovered, local coroners initially believed the remains were those of a European, not a Native American, because of their appearance. Later testing by scientists demonstrated that the . . . features . . . most closely resemble those of Polynesians and southern Asians . . . .<sup>68</sup>

#### D. PROTECTION OF SACRED SITES: A NEW KIND OF EXCEPTIONALISM?

##### 1. The Free Exercise Cases

In this area, Native Americans have had much more success with the Executive Branch<sup>69</sup> and the United States Congress than with the courts.<sup>70</sup> In numerous cases before the 1988 landmark Supreme Court decision in *Lyng v. Northwest Indian Cemetery*,<sup>71</sup> lower courts had held that the government's actions on public lands did not amount to a violation of Native American religious practitioners' free exercise rights because such governmental action did not interfere with a central aspect of their religions.<sup>72</sup> In *Lyng*, the Court held that the Native religious practitioners could not force the government to stop construction of a logging road going through their sacred site even if the completion of that road would "virtually destroy the . . . Indians' ability to practice their religion[.]"<sup>73</sup> As the Court succinctly put it:

The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens . . . . The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct

65. See Deloria, *supra* n. 16.

66. See Berger, *supra* n. 48; see also Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. Rev. 591 (2009).

67. See Ray, *supra* n. 4, at 117 (citing the work of Circe Sturm, *Blood Politics: Race, Culture, and Identity in the Cherokee Nation of Oklahoma* (U. Cal. Press 2002)).

68. *Bonnichsen*, 357 F.3d at 977-978.

69. For instance, President Clinton in 1996 signed Executive Order No. 13007 which required the appropriate federal agencies to accommodate access to sacred sites to native religious practitioners and avoid taking actions which would adversely affect the physical integrity of such sites. See 61 Fed. Reg. 26,771 (May 24, 1996).

70. See generally Kristen A. Carpenter, *Old Ground and New Directions at Sacred Sites on the Western Landscape*, 83 Denv. U. L. Rev. 981 (2006).

71. 485 U.S. 439 (1988).

72. See e.g. *Sequoyah v. Tenn. Valley Auth.*, 480 F. Supp. 608 (E.D. Tenn. 1979); *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983); *Crow v. Gullett*, 541 F. Supp. 785 (D.S.D. 1982); *Badoni v. Higginson*, 455 F. Supp. 641 (D. Utah 1977).

73. *Lyng*, 485 U.S. at 451 (citation omitted).

of the Government's internal procedures.<sup>74</sup>

Of course, things only got worse for Native American religious practitioners after *Lyng*.<sup>75</sup> Yet, in 1990, many believed that Native American religious practitioners would be able to use the then recently enacted RFRA<sup>76</sup> to secure more protections for Native American sacred sites located on federal lands. RFRA was enacted as a response to *Employment Division v. Smith*,<sup>77</sup> where the Court held that the strict scrutiny test was not applicable when the free exercise rights of religious practitioners were being substantially burdened by a law of general applicability that was otherwise neutral towards religion. Under strict scrutiny, the government cannot substantially burden a religious practitioner's exercise of religion unless the government has put forth a compelling interest and has demonstrated that it is protecting such compelling interest by a mean that is the least restrictive on the free exercise rights of religious practitioners. RFRA re-imposed the application of the strict scrutiny test in cases where the free exercise rights of religious practitioners were being substantially burdened by an otherwise neutral law of general applicability.<sup>78</sup>

Recently, however, Native American religious practitioners were disappointed when, reversing a panel decision, the Ninth Circuit issued its *en banc* decision in the San Francisco Peaks litigation.<sup>79</sup> In that litigation, Indian tribes were challenging the U.S. Forest Service's decision to authorize the expansion of a privately owned ski resort where artificial snow would be made from recycled sewage water. The resort was located in an area considered sacred by many tribes, including the Navajo Nation, and the Hopi tribe. These tribes claimed that the use of the recycled sewage water would pollute the area in such a way as to impose a substantial burden on the exercise of their religion. Therefore, they argued that according to RFRA, the government could only authorize such expansion of the ski resort if it could show that it had a compelling interest that was being protected by the least restrictive means. That, according to the tribes, the government had failed to do.

The debate between the parties focused on the applicability and precedential value of *Lyng* to the present dispute. Since everyone agreed that RFRA re-imposed a version of the strict scrutiny test as it existed before the Court's decision in *Smith*, the main area of disagreement among the parties concerned the exact nature of that test. More precisely, the issue was how to define what constituted a "substantial burden" under RFRA. On this issue, the tribal attorneys made two major arguments. First, they argued that the original

74. *Id.* at 448 (citation omitted).

75. See e.g. *U.S. v. Means*, 858 F.2d 404 (8th Cir. 1988); *Manybeads v. U.S.*, 730 F. Supp. 1515 (D. Ariz. 1989); *Havasupai Tribe v. U.S.*, 752 F. Supp. 1471 (D. Ariz. 1990).

76. 42 U.S.C. 2000bb-1(a)-(b).

77. 494 U.S. 872; see *supra* nn. 28–30 and accompanying text.

78. RFRA in Section (1)(a) and (b) states that the

government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except . . . [g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. 2000bb-1(a)-(b).

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

RFRA was amended in 2000 by the Religious Land and Institutionalized Person Act (RUILPA)<sup>80</sup> which re-defined the term “exercise of religion” to include any exercise of religion, “whether or not compelled by, or central to a system of belief.”<sup>81</sup> Therefore, according to the tribes, RUILPA aimed at protecting a broader range of conduct than the Free Exercise Clause did as interpreted in *Lyng*. The *en banc* majority, however, answered that RUILPA only modified what is an “exercise of religion,” and not what constituted a “substantial burden.”

The tribal attorneys also took the position that *Lyng* was not an applicable precedent to define the meaning of “substantial burden” under RFRA because Justice O’Connor in her *Lyng* majority opinion had not used the strict scrutiny test while RFRA made the use of that test mandatory.<sup>82</sup> This line of argument was consistent with the Supreme Court’s position in *Smith* where Justice Scalia asserted that Justice O’Connor in *Lyng* had not used the strict scrutiny test.<sup>83</sup> The Forest Service took the position that RFRA did not affect the precedential impact of *Lyng* and therefore *Lyng* controlled the outcome of this litigation. The Ninth Circuit disagreed with the tribal position, stating: “[t]his contention is unpersuasive.”<sup>84</sup> The *en banc* majority further stated that “[a]lthough *Lyng* did not use the precise phrase ‘substantial burden,’ it squarely held the government plan did not impose a ‘burden . . . heavy enough’ on religious exercise to trigger the compelling interest test . . . .”<sup>85</sup>

The use of the term “compelling interest test” in this context can be confusing. In some ways, the tribal attorneys were right in arguing that the *Lyng* Court did not reach the compelling interest test. However, this did not mean that the Court did not use the strict scrutiny test. Thus the Ninth Circuit *en banc* majority took the position that in *Lyng*, the Supreme Court did not reach the compelling interest part of the strict scrutiny test because the Court found that the government had not imposed a substantial burden on the Native American religious practitioners. In holding that the government had not violated RFRA when it authorized the use of recycled sewer water for artificial snow, the Ninth Circuit applied *Lyng* and defined the words “substantial burden” very narrowly so as to limit the term to challenges involving instances where individuals are either “forced to choose between following the tenets of their religion and receiving a governmental benefit . . . or [are] coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions . . . .”<sup>86</sup>

To back up its interpretation that *Lyng* did apply the strict scrutiny test, the Ninth Circuit only referred to the following language from the Court’s decision: “Those

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80. 42 U.S.C. 2000cc.

81. *Id.* at 2000bb-2(4), 2000cc-5(7)(A).

82. *Navajo Nation*, 535 F.3d at 1072 (stating that “[a]ccording to the Plaintiffs, *Lyng* is not controlling in this RFRA case because the *Lyng* Court refused to apply the *Sherbert* test that was expressly adopted in RFRA”).

83. *Id.* at 1073 (stating that in *Lyng* the Court “declined to apply the compelling interest test from *Sherbert*”). Scalia’s position has been endorsed by some scholars. See David Bogen and Leslie F. Goldstein, *Culture, Religion, and Indigenous People*, 69 Maryland L. Rev. 48, 53 (2009)(Stating that in both *Bowen* and *Lyng* “Scalia’s claim that the majority failed to apply the *Sherbert* test is correct.”)

84. *Id.* at 1072.

85. *Id.* at 1071 n. 14.

86. *Id.* at 1070.

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.”<sup>87</sup> The question here is what did the Supreme Court exactly disagree with? Was it that the burden was not substantial enough as the *en banc* decision asserted? Or was it that the Free Exercise Clause as a whole could not be implicated by the actions taken by the Government?

A closer look at O’Connor’s *Lyng* opinion reveals that Justice O’Connor’s opinion is less than pellucid on this point. Paradoxically, Justice O’Connor started her own analysis by proclaiming “[w]e begin by noting that the courts below did not articulate the bases of their decisions with perfect clarity.”<sup>88</sup> Certainly, one could be forgiven for thinking that her own opinion did not add much clarification.<sup>89</sup> In holding against the Indian religious practitioners, the *Lyng* Court first relied on *Bowen v. Roy*,<sup>90</sup> a case where applicants for social security benefits challenged the agency’s practice of assigning social security numbers, claiming that assigning such a number to their daughter would “rob her spirit.” The Court in *Roy* had stated,

The Free Exercise Clause simply cannot be understood to require the government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens . . . . The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government’s internal procedures.<sup>91</sup>

After remarking that there were cases where the strict scrutiny test was applied to government actions involving indirect coercion or penalties but not outright prohibitions, the *Lyng* Court nevertheless stated that

[t]his does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require[s] government to bring forward a compelling justification for its otherwise lawful actions.<sup>92</sup>

Having made that statement, the *Lyng* Court proceeded to an extended discussion as to why, from a policy perspective, the government could not operate if such free exercise challenges were allowed. It was not until the last three pages of the opinion, in Part C, that Justice O’Connor returned to the issue of whether the strict scrutiny test was applicable. In that part of the opinion, she took issue with the dissent’s assertion that the “constitutional guarantee we interpret today . . . is directed against *any* form of government action that frustrates or inhibits religious practice[.]”<sup>93</sup> and asserted instead that “[t]he Constitution, however, says no such thing. Rather, it states: Congress shall

87. *Navajo Nation*, 535 F.3d at 1071 n. 14 (quoting *Lyng*, 485 U.S. at 447).

88. *Lyng*, 485 U.S. at 445.

89. Even as late as 2009, a commentator asserted that in *Lyng*, “[t]he Court concluded that the Free Exercise Clause was not invoked because the location of the road did not coerce practitioners to violate their religious beliefs or penalize their religious activities.” Albert, *supra* n. 3, at 491.

90. 476 U.S. 693 (1986).

91. *Id.* at 699–700.

92. *Lyng*, 485 U.S. at 450–451.

93. *Id.* at 456 (emphasis original) (quoting from Justice Brennan’s dissent, 485 U.S. at 459).



make no law . . . prohibiting the free exercise [of religion].”<sup>94</sup> In *Navajo Nation*, the tribes had argued that this part of the *Lyng* decision was no longer controlling because RFRA went beyond the constitutional language only restricting the government from “prohibiting” the free exercise of religion, and instead provided that the government could not “substantially burden a person’s exercise of religion.” The Ninth Circuit majority, however, answered that “[t]his contention ignores the Supreme Court’s repeated practice of concluding a government action ‘prohibits’ the free exercise of religion by determining whether the action places a ‘burden’ on the exercise of religion.”<sup>95</sup>

A recent law review note attempts to explain away the confusion by pointing out that the source of the problem was that in enacting RFRA, Congress may have assumed that there was a consensus concerning what constituted a “substantial burden” under the Free Exercise Clause when in fact, no such consensus existed.<sup>96</sup> Thus the author points out that RFRA contained two conflicting statements. In the “Purpose” section of RFRA, Congress asserted that the purpose of the Act was to “restore the compelling interest test as set forth in [*Sherbert v. Verner*] and [*Wisconsin v. Yoder*] . . . .”<sup>97</sup> However, in the “Findings” part of the Act it is stated that “the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.”<sup>98</sup> After correctly pointing out that RFRA nowhere defined a “substantial burden,” the commentator convincingly demonstrates that what constitutes a “substantial burden” under *Sherbert* and *Yoder* is different than how “substantial burden” is conceptualized in more recent cases, such as *Lyng* and *Roy*.<sup>99</sup>

The Note further argues that under the two older cases, a substantial burden was found as long as there was a substantial *impact* on one’s religious practices, while under the newer cases, the Court has required more. It has required either that the government somehow “coerced” the religious practitioners into doing something against their religious beliefs or denied them a federal benefits because they followed the tenets of their religion. The Note concludes, however, that Supreme Court jurisprudence in this area could be reconciled by classifying cases such as *Lyng* and *Bowen* as cases where the religious practitioners were attempting to influence or modify an internal governmental function.<sup>100</sup> Since *Navajo* more readily fits into the *Lyng/Bowen* category, the Note concludes that the *en banc* majority in *Navajo* was correct in requiring tribal plaintiffs to show that they were either coerced or denied benefits before they could be said to have

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94. *Id.* (emphasis added by the Court) (citation omitted).

95. *Navajo Nation*, 535 F.3d at 1076 (footnote omitted).

96. Jonathan Knapp, Student Author, *Making Snow in the Desert: Defining a Substantial Burden Under RFRA*, 36 *Ecol. L.Q.* 259 (2009).

97. 42 U.S.C. 2000bb(b)(1).

98. *Id.* at 2000bb(a)(5).

99. See Knapp, *supra* n. 96. As had been noted by another commentator writing shortly after *Lyng* came down, that decision changed the Court’s Free Exercise Clause jurisprudence and its traditional understanding of what constituted a “substantial burden.” See Robert J. Miller, *Correcting Supreme Court’s “Errors”: American Indian Response to Lyng v. Northwest Cemetery Protective Association*, 20 *Envtl. L.* 1037 (1990).

100. As the author states, “[i]f the government’s internal functions are involved then the claimant must show that the challenged action affirmatively compels violation of religious belief or prohibits religious observance.” Knapp, *supra* n. 95, at 265.

suffered a substantial burden under RFRA.

Although the Note's analysis in attempting to explain past Supreme Court precedents is thorough and persuasive, its conclusion that the *en banc* decision in *Navajo* was sounder than Judge Fletcher's dissenting opinion did not completely convince me.<sup>101</sup> The Note seems to treat cases involving internal governmental functions as an exception to prevailing doctrine and thus requiring coercion or denial of benefits before a substantial burden could be acknowledged. But, perhaps, Justice Scalia's position in *Smith* is more accurate and it is cases like *Sherbert* and *Yoder* that are the exceptions. Under that view, it is only in cases involving denial of unemployment benefits, such as *Sherbert*, and cases such as *Yoder* involving "the Free Exercise Clause in conjunction with other constitutional protections, such as . . . the right of parents . . . to direct the education of their children,"<sup>102</sup> that the Court has upheld free exercise challenges.<sup>103</sup>

If that view is correct, since *Smith* did not purport to overturn *Sherbert* and *Yoder*, one could argue that when Congress decided to overturn *Smith* and reinstate the strict scrutiny test in RFRA, it obviously meant to apply it to other situations than the ones involved in these two cases. Yet, RFRA obviously reinstated the strict scrutiny test to cases beyond the facts involved in *Smith*; that is, beyond cases where the religious activity itself was being *criminalized*, albeit incidentally, by a law of general applicability. Otherwise, Congress would have just said so.

Interestingly enough, in her *Smith* concurrence, Justice O'Connor did not mention *Lyng* when she listed all the cases where the strict scrutiny test had been applied.<sup>104</sup> When she did mention *Lyng*, it was only for the purpose to state that there the Court

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 . . . . The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."<sup>105</sup>

To which Justice Scalia responded, "[i]t is hard to see any reason in principle or 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 . . . ."<sup>106</sup>

Justice Scalia also saw no real distinction between *Smith* and *Lyng* and went out of his way to specifically disagree with Justice O'Connor for attempting to distinguish *Lyng* and *Bowen* from *Smith* "on the ground that those cases involved the government's conduct of 'its own internal affairs.'"<sup>107</sup> If Justice Scalia, speaking for the Court in *Smith*, was correct and *Lyng* cannot be meaningfully distinguished from *Smith*, it should

101. For a recent critique of the *en banc* opinion, see Carpenter et al., *supra* n. 8, at 1118–1124.

102. *Smith*, 494 U.S. at 881.

103. See Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 1254 (Aspen Publ. 2006) ("Other than the employment compensation cases and *Yoder*, the Court during this period never found another law to violate the free exercise clause.")

104. See *Smith*, 494 U.S. at 895 (listing ten cases, including *Bowen v. Roy*).

105. *Id.* at 900 (quoting *Roy*, 476 U.S. at 699).

106. *Id.* at 885 n.2 (citations omitted).

107. *Id.* (citation omitted).

follow that since Congress in RFRA definitely attempted to overturn *Smith*, it also modified the approach taken in *Lyng*. Perhaps this is why not all circuits have followed the Ninth Circuit's narrow interpretation as to what constitutes a substantial burden under RFRA. As stated in a recent case, "[t]he Tenth Circuit has defined the term by stating that a governmental 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."<sup>108</sup>

Even if there is an ambiguity in RFRA when it comes to defining what qualifies as a "substantial burden," that ambiguity should be resolved in the Indian religious practitioners' favor pursuant to the Indian canon of statutory construction. According to this canon, ambiguities in statutes enacted for the benefit of Indians are to be resolved in the Indians' favor.<sup>109</sup> Admittedly, RFRA was enacted for the benefit of all religious practitioners and not only Native American ones. Yet, I think that what constitutes a "substantial burden" could be given a broader interpretation when the conflict is over federal management of sites considered "sacred" by Native American religions. Some have argued that the lack of tribal success in free exercise cases involving sacred sites can be attributed to deep rooted and fundamental theological tensions between Native American religions and the religious views of those who drafted the religion clauses of the First Amendment to the United States Constitution.<sup>110</sup> While I do not doubt that this can explain, at least partly, some of the cases, what is disturbing here is that courts may be developing legal principles which seem to apply generally to everyone but which, in their specific applications, are much more detrimental to Native American religious interests than they are to other religions. Thus, the dissent in the San Francisco Peaks litigation accused the majority of "effectively read[ing] American Indians out of RFRA."<sup>111</sup>

Professor Philip Frickey once wrote an article where he described how the Rehnquist Court had abandoned the Native American "exceptionalism" of the John Marshall Court and was in the process of main-streaming Indian law into the rest of public law.<sup>112</sup> That indeed would be bad enough. But there is a worse scenario. That would be for the current Supreme Court to invent its own virulent brand of "exceptionalism" in Federal Indian law where "general" principles are developed and adopted under the guise that they follow general theories of public law applicable to

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108. *Comanche Nation v. U.S.*, 2008 WL 4426621, \*3 (W. D. Okla.). It should be noted that following its *en banc* decision in the San Francisco Peaks litigation, the Ninth Circuit issued an equally bad decision, from the Native Americans' perspective, in *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207 (9th Cir. 2008).

109. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985); see also Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381 (1993).

110. See Rose, *supra* n. 3. This commentator nevertheless argues that there was some room for a broader constitutional interpretation of the Free Exercise Clause, one that would protect Native American religions. Thus he stated that "[i]n delineating the breadth of the protections he envisioned for the First Amendment, Jefferson indicated a desire for religious freedom of almost unlimited scope, extending to all Christians, whether Catholic or Protestant, but also to Jews, 'Mahamedans,' 'Pagans,' and atheists." *Id.* at 135 (citation omitted).

111. *Navajo Nation*, 535 F.3d at 1114.

112. See Phillip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 Harv. L. Rev. 431 (2005).

anyone when, in reality, they can only adversely affect Native American interests.<sup>113</sup> Thus, while it may be coincidental, I cannot help but notice that all the Supreme Court cases relied on in the Note mentioned above to establish the “coercion” branch of the substantial burden test were “Indian” cases. What is undeniably true is that restricting the meaning of substantial burden to cases of coercion or denial of benefits will have a disparate impact on practitioners of Native American religions. Interpreting RFRA as broadening what is a substantial burden in cases involving Native American sacred sites would go a long way in tempering such disparate impact. Perhaps it is time for Congress to proceed with a “*Lyng* fix” and amend the RFRA to carve out a narrow exception allowing Native American practitioners to challenge federal actions which can literally destroy their sacred sites while still not amounting to either coercion or denial of a federal benefit as defined by the 9th Circuit en banc decision in *Navajo*.<sup>114</sup> As the next section of this article shows, there is a very good chance that such an exception would not be in violation of the First Amendment’s Establishment Clause.

## 2. The Establishment Clause Cases

Governmental protection of sites—located on public land, but considered sacred by Native American religions—has also generated controversies when it comes to the rights of non-Indians. Non-Indians have brought constitutional challenges based on the Establishment Clause.<sup>115</sup> Most Establishment Clause cases in this area have involved non-Indians arguing that governmental regulations preventing them from using or being at a sacred site located on public land amounted to an unconstitutional endorsement of Native American religions.<sup>116</sup> For instance, in one case, non-Indians were challenging a Park Service regulation asking (but not ordering) visitors to respect traditional Indian religions by not walking under Natural Arch Bridge.<sup>117</sup> In another, people were being ordered not to climb a rock formation known as Cave Rock, adjacent to Lake Tahoe.<sup>118</sup> In yet another case, mountain climbers were being requested (but not ordered) to not climb Devil’s Tower National Monument during the month of June.<sup>119</sup> Generally speaking, non-Indian interests have not been successful in these Establishment Clause

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113. Some scholars have argued that this has already happened in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005). See Kathryn E. Fort, *The New Laches: Creating Title Where None Existed*, 16 Geo. Mason L. Rev. 357 (2009); see also Joseph William Singer, *Nine Tenths of the Law, Title, Possession, and Sacred Obligations*, 38 Conn. L. Rev. 605 (2006). Another example of this was how the Supreme Court managed to find a way not to apply the *Ex Parte Young* doctrine in *Seminole Tribe v. Fla.*, 517 U.S. 44 (1996).

114. A legislative solution has been recommended by others. See e.g. Ruth Stoner Muzzin, Student Note, *Seeing the Free Exercise Forest for the Trees: NEPA, RFRA, and Navajo Nation*, 16 Hastings W.-N.W. J. Envtl. L. & Policy 277, 301 (2010) (noting that the Native American Sacred Lands Act, which had the endorsement of the National Congress of American Indians, was introduced in Congress but stalled in committee)

115. Under the First Amendment to the United States Constitution, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .” U.S. Const. amend. I.

116. For an analysis of the Establishment Clause as it relates to Native American sacred sites, see Anastasia P. Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 Ariz. L. Rev. 1291 (1996).

117. See *Alston*, 209 F. Supp. 2d 1207; *Bear Lodge Multiple Use Assn. v. Babbitt*, 2 F. Supp. 2d 1448 (D. Wyo. 1998).

118. See *Access Fund*, 499 F.3d 1036.

119. See *Bear Lodge*, 2 F. Supp. 2d 1448.

challenges.<sup>120</sup> Although there are no Supreme Court cases involving Establishment Clause challenges relating to the protection of Indian sacred sites, lower courts have used the three-prong *Lemon* test<sup>121</sup> to find that: first, the predominant *purpose* behind the government's regulations was not the advancement of religion but the secular goal of protecting Indian cultural or historical sites; second, the primary *effect* was not to endorse an Indian religion but to accommodate religious practices. Finally, courts have generally held that these governmental actions did not run afoul of the *entanglement* prong of the test because Indian tribes are not religious organizations but political ones.<sup>122</sup>

The fact that the federal government and the tribes have been successful in fighting back these challenges generates two observations. First, this could be yet another indication of the Supreme Court's hands off approach in cases involving the religion clauses of the First Amendment, and deference to the Executive Branch.<sup>123</sup> Thus, the same judicial attitude that works against tribal religious interests in the free exercise area is favoring tribal interests when the federal government acts for their benefit. Secondly, in rejecting these Establishment Clause challenges, the lower courts have emphasized that the federal government was protecting Native American culture rather than religion *per se*. Also important was the fact that the government was not getting "entangled" with religious entities but was accommodating the interests of Indian tribes which are political and not religious entities.

### CONCLUSION

To answer the question posed in the title of this essay, one could say that there is both "culture talk" and "culture war" in federal Indian law, meaning that there are both negotiations and battles being conducted when it comes to Native American cultural rights. Native American cultural interests have made substantial gains in Congress through the enactment of legislation such as NAGPRA, RFRA, and the 1994 amendments to AIRFA. In addition, the Executive Branch has been at times supportive of tribal cultural interests as reflected in President Clinton's Executive Order No. 13007 and the various regulations attempting to accommodate Native concerns about sacred sites located on public lands. Generally speaking, however, courts have not been supportive of Native American religious or cultural interests unless the tribes first managed to get the backing of the Executive Branch or Congress. And even then, some decisions, such as the one involving the San Francisco Peaks or repatriation of the *Kennewick* man by the tribes, still reflect some old fashion antagonism from earlier times.<sup>124</sup> Congress should, therefore, enact new legislation amending RFRA which

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120. For a good overview and analysis of the issues involved, see Michele Kay Albert, Student Author, *Obligations and Opportunities to Protect Native American Sacred Sites Located on Public Lands*, 40 Colum. Hum. Rights L. Rev. 479 (2009).

121. See *Lemon v. Kurtzman*, 411 U.S. 192 (1971). Although most cases use the three-prong *Lemon* test, the Supreme Court more recently seemed to have used a two-prong purpose and effect test, resolving all the issues into asking just one question: can the government action be considered as having "endorsed" a religion?

122. See *Cholla Ready Mix v. Civish*, 382 F.3d 969 (9th Cir. 2004).

123. See Levine, *supra* n. 39.

124. For an historical analysis of such earlier times, see Dussias, *supra* n. 1.

would give added protection to Native American Sacred Sites.

