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FROM SUBSTANTIAL BURDEN ON RELIGION TO DIMINISHED SPIRITUAL FULFILLMENT: THE SAN FRANCISCO PEAKS CASE AND THE MISUNDERSTANDING OF NATIVE AMERICAN RELIGION

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ABSTRACT

In *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2763 (2009), the Ninth Circuit seated en banc found that federal approval of a plan by a ski resort to make artificial snow with treated sewage effluent on Arizona's San Francisco Peaks, a mountain massif held sacred by the Navajo, Hopi, and four other claimant tribes, did not violate their religious liberty under the Religious Freedom Restoration Act (RFRA). The court accepted numerous factual findings about sincere religious exercise, but found federal approval of the scheme did not constitute a "substantial burden" on religion; rather, it only "decreased spiritual fulfillment" of tribal members. Despite a spirited dissent, the Ninth Circuit narrowly interpreted RFRA's language of "substantial burden" by making reference to the Supreme Court's 1988 holding in *Lyng v. Northwest Cemetery Protective Association*, 485 U.S. 439 (1988). This article shows how conventional wisdom about individualistic, subjective, and protean "spirituality" and in particular about "Native American spirituality" equips the court to denature highly specific and collective religious claims about the mountain by plaintiff tribes, and in turn to naturalize those claims as merely spiritual. Misrecognition of Native religions as Native spirituality then troubles the substantial burden analysis. While *Navajo Nation* suggests courts may never fully understand Native claims to sacred sites, the Supreme Court's 2014 holding in *Burwell v. Hobby Lobby, Inc.*, 134 S. Ct. 2751, 2759 (2014), opens the door to revisiting the interpretive posture spelled out in *Navajo Nation*, and the Ninth Circuit's interpretive approach to "substantial burden" bears revisiting.

KEYWORDS: Native American, American Indian religion, spirituality, sacred lands, sacred sites, Religious Freedom Restoration Act, San Francisco Peaks, Navajo, Hopi

In *Navajo Nation v. United States Forest Service*, the Ninth Circuit Court of Appeals, sitting en banc, eclipsed a lengthy ruling by a three-judge panel of the same circuit that had gone far, in its brief eighteenth-month life, to advance the legal claims regarding sacred land by Native American communities, and that had drawn something of a line in the sand about whether

Native sacred lands could ever be protected under legal regimes of the freedom of religion.[1] The three judge panel ruling, now reduced to a dissent, pays close attention to the religious freedom claims by the Navajo, Hopi, White Mountain Apache, Yavapai-Apache, Havasupai, and Hualapai nations in their effort to protect the San Francisco Peaks, a mountain sacred to each nation, from a proposal to boost the commercial viability of a ski area on the mountain by making artificial snow with treated sewage effluent from the city of Flagstaff.[2] While First Amendment claims had failed to halt expansion of the ski resort in the first place in the early 1980s,[3] the tribes in this instance challenged the U.S. Forest Service's approval of the sewage-to-artificial snow plan as a violation of the broader statutory protections of the 1993 Religious Freedom Restoration Act (RFRA).[4] The en banc majority ruled that spraying treated sewage as artificial snow on a sacred mountain does not "substantially burden" religious exercise under RFRA and thus does not pass the threshold question that triggers RFRA's strict scrutiny standard of review of the government action in question:

> Where, as here, there is no showing the government has coerced the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, or conditioned a governmental benefit upon conduct that would violate the Plaintiffs' religious beliefs, there is no "substantial burden" on the exercise of their religion.[5]

Instead, the en banc court found, since the ski area comprises only 1 percent of the surface of the mountain, and because there would be no limiting of access or physical destruction of plants or sites on the ski slopes, the "sole effect of the artificial snow" is on the Native Americans' "subjective spiritual experience," amounting merely to "diminished spiritual fulfillment":

> That is, the presence of the artificial snow on the Peaks is offensive to the Plaintiffs' feelings about their religion and will decrease the spiritual fulfillment Plaintiffs get from practicing their religion on the mountain. Nevertheless, a government action that decreases the spirituality, the fervor, or the satisfaction with which a believer practices his religion is not what Congress has labeled a "substantial burden"—a term of art chosen by Congress to be defined by reference to Supreme Court precedent—on the free exercise of religion.[6]

In June of 2009, the Supreme Court declined to hear the case, denying a certiorari petition that had asserted incongruous interpretations by various circuit courts of the meaning of "substantial burden" to religious exercise in RFRA.[7]

As an historian of American religion trained in the field of religious studies, and as a student of Native American claims to religious freedom generally, I am keen here to disclose the rhetorical

1 Navajo Nation v. United States Forest Service, 535 F.3d 1058, 1113 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2763 (2009). The three-judge panel ruling is Navajo Nation v. United States Forest Service, 479 F.3d 1024, 1029 (9th Cir. 2007), *reversed en banc*, 535 F.3d 1058, 1066 (9th Cir. 2008). The en banc judgment was an 8-3 decision.

2 *Navajo Nation*, 479 F.3d at 1029.

3 Wilson v. Block, 708 F.2d 735, 738 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 956 (1983).

4 42 U.S.C. §§ 2000bb–2000bb-4 (2006).

5 *Navajo Nation*, 535 F.3d at 1063.

6 *Id.*

7 Navajo Nation v. U.S. Forest Service, 129 S. Ct. 2763 (2009). In Petition for a Writ of Certiorari at 12–19, 129 S. Ct. 2763 (2009) (No. 08-846), the tribes argued that appellate courts had adopted two broad approaches to interpreting RFRA's "substantial burden" that present alternatives to the Ninth Circuit's approach in this case, and cited a 2008 case involving a successful sacred site claim under RFRA, *Comanche Nation v. United States*, No. CIV-08-849-D, 2008 WL 4426621, at *20 (W.D. Okla., 2008) that post-dated the en banc ruling in *Navajo Nation* but expressly rejected the Ninth Circuit's narrow interpretation in favor of the Tenth Circuit's approach. *See also infra* note 20.

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force of reducing complex and corporate religious practices involving this mountain seen as necessary to the well-being and peoplehood of the six plaintiff Native American nations to the individualistic, interior, and sentimentalized terms of "Native American spirituality" and "spiritual fulfillment." I think *Navajo Nation* not only involves a strained interpretation of Congress's intentions in RFRA (one that is now out of step with the interpretive posture toward ambiguous language in RFRA taken by the Supreme Court in *Burwell v. Hobby Lobby, Inc.*[8]), but it also produces a disturbing result for the specific Native communities involved, one reminiscent of the patterned, often ritualized, desecration by one group of another's sacred sites.[9] The *Navajo Nation* decision further impoverishes the language with which courts understand Native religions generally, and very likely the religious exercise of other communities that Congress intended to protect under RFRA.[10] *Navajo Nation* rests on the court's reduction of six different but equally sophisticated tribe-specific complexes of religious duty, narrative, and ritual practice to a common concern vaguely and inaccurately construed as Native "spirituality."[11] At issue here is something more complex than simply to observe, along with the dissent and other critics of the decision, that all religion is inherently subjective.[12] I therefore examine the alchemy by which the discourse of spirituality first denatures the accepted factual findings about the collective claims of Navajo, Hopi, and the other indigenous religions in such a way as to minimize the appraisal of the burden on their exercise, and then naturalizes this denaturing by appeal to conventional wisdom about Native spirituality. The court's rhetorical move, as I show here, is as weighty as it is subtle, embedded problematically in a discourse of "spiritual, not religious" that has more to do with broader therapeutic and consumerist trends in contemporary American religion than with the accepted factual findings in the Native claims at hand. The substantial burden analysis that follows is troubled as a consequence.

8 134 S. Ct. 2751, 2759 (2014). *See* discussion *infra*.

9 Although beyond the narrower concerns of this article, this would be suitable frame, I think, for understanding the deep irony and felt violence of the San Francisco Peaks case. Roman destruction of the Jerusalem Temple is a prominent example, as is destruction of Shi'ite shrines by Sunni groups, or destruction of mosques by Hindu nationalists in India. This can be especially forceful when a given tradition figures the sacred/profane in terms of purity/impurity. On the latter, see generally MARY DOUGLAS, PURITY AND DANGER: AN ANALYSIS OF THE CONCEPTS OF PURITY AND TABOO (1966); John Copeland Nagle, *The Idea of Pollution*, 43 U.C. DAVIS LAW REVIEW, 1 (2009); Joshua Edwards, note, *Yellow Snow on Sacred Sites: A Failed Application of the Religious Freedom Restoration Act*, 34 AMERICAN INDIAN LAW REVIEW 151 (2010); Thomas F. King, *Commentary: What Burdens Religion? Musing on Two Recent Cases Interpreting the Religious Freedom Restoration Act*, 13 GREAT PLAINS NATURAL RESOURCES JOURNAL 1 (2010).

10 In their gloss on this case, Kristen Carpenter and colleagues have argued compellingly that the cultural property questions of the San Francisco Peaks case evince a narrow, modern Western view of property in terms of wealth and rights of exclusion and alienability rather than in distinctively indigenous terms of relationship. *See* Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE LAW JOURNAL, 1022, 1027 (2010).

11 Two commentators have insightfully addressed the impertinence of conventional distinctions between sacred and secular to Native religions, citing this particular case. *See* Peter Zwick, note, *A Redeemable Loss: Lyng, Lower Courts and American Indian Free Exercise on Public Lands*, 60 CASE WESTERN RESERVE LAW REVIEW, 241, 243 (2009) (This note was the 2009 Note of the Year.); Seth Schermerhorn, *Secularization by the Sacred? Discourse of Religion and the San Francisco Peaks*, ERAS, no. 11, November 2009, at 14, *available at* http://arts-online.monash.edu.au/eras/edition-eleven-december-2009/.

12 *Navajo Nation*, 535 F.3d at 1096 (Fletcher, J., dissenting); King, *supra* note 9, at 8–11; Nagle, *supra* note 9, at 75.

THE SAN FRANCISCO PEAKS AND NAVAJO AND HOPI RELIGIONS

Before I turn to the Ninth Circuit majority's analysis in support of its holding on RFRA, I must review the detailed findings of fact elicited by the trial court regarding the indispensable place of the San Francisco Peaks to the religious systems of the six Native communities. I do not write as a specialist on the languages and sophisticated religious traditions of the Navajo, Hopi, or other nations with religious claims to the Peaks, but my more informed understanding of the religion of Anishinaabe communities of the Great Lakes region helps sensitize me to the sophistication and nuance that attends those religious claims to the San Francisco Peaks, as well as to the immense difficulty of articulating indigenous traditions in the idioms and practices of US law.[13] I am oriented also by a strong literature on the spatial practices and beliefs of Native American religions and the implications for considerations of religious freedom.[14] At any rate, this analysis need not proceed beyond the factual findings that emerged from the testimony of Native spiritual leaders themselves, especially since those factual findings were agreed upon by all parties and accepted in toto by the en banc Ninth Circuit.[15]

For the more than one-quarter million Navajo, the San Francisco Peaks massif is *Do'ok'oos-lííd* ("shining-on-top," in reference to its snowcap), the westernmost of six sacred mountains that define the sacred precincts of Navajoland and that orient disciplines of Navajo prayer and daily life alike.[16] The mountain is understood to be the site of the creation of the Navajo people; is regarded as alive; and is referred to as "Mother," the Navajos' "essence and their home," their "leader," and a source of power for living and healing. Navajos regard the mountain as the place where the deity Changing Woman resided and went through puberty in the first *kinaalda*, or puberty ceremony, which is replicated ceremonially as a rite of passage to Navajo womanhood, that is also a ritual renewal of community and cosmos.[17] The Peaks massif is a location for the ritualized gathering by *hitaali* (singers or medicine men) of specific plants, medicines, and other items necessary for the creation and renewal of medicine bundles, ritual items that anchor healings and other

13 For example, elders and Native spiritual leaders present testimony as mere lay witnesses; whereas interpretation of facts is left to expert witnesses, like the archaeologist Dr. Propper, who averred at trial that no substantial burden to religious exercise was involved. *Navajo Nation*, 408 F. Supp. 2d at 888. For the author's work on Anishinaabe religious history, see generally MICHAEL D. MCNALLY, OJIBWE SINGERS: HYMNS, GRIEF AND A NATIVE CULTURE IN MOTION (2000); MCNALLY, HONORING ELDERS: AGING, AUTHORITY AND OJIBWE RELIGION (2009); see also McNally, *Native American Religious Freedom beyond the First Amendment*, in AFTER PLURALISM: REIMAGINING RELIGIOUS ENGAGEMENT (Courtney Bender & Pamela Klassen eds., 2010).

14 For important studies of Native claims and relations to sacred places, see generally VINE DELORIA, JR., GOD IS RED: A NATIVE VIEW OF RELIGION 271–86 (30th anniversary ed., Fulcrum 2003) (1973); PETER NABOKOV, WHERE THE LIGHTNING STRIKES (2006); KEITH BASSO, WISDOM SITS IN PLACES (1996); RICHARD K. NELSON, MAKE PRAYERS TO THE RAVEN: A KOYUKON VIEW OF THE NORTHERN FOREST (1983); LLOYD BURTON, WORSHIP AND WILDERNESS: CULTURE, RELIGION, AND LAW IN THE PUBLIC LANDS MANAGEMENT (2002); THOMAS F. KING, PLACES THAT COUNT: TRADITIONAL CULTURAL PROPERTIES IN CULTURAL RESOURCE MANAGEMENT (2003).

15 *Navajo Nation*, 535 F.3d at 1064 n.80.

16 Testimony about Navajo and other practices and beliefs from the District Court trial transcripts are summarized in Judge Fletcher's dissent. *Navajo Nation*, 535 F.3d at 1100–01 (Fletcher, J., dissenting).

17 The Apache have a cognate ceremonial tradition involving a similar deity, who, some say, is an embodiment of earth. In a ceremonially effected exchange, Changing Woman passes on her wisdom to Navajo girls who become women, and exchange their youth to Changing Woman, who can continue apace. *See* Inés Talamantez, *The Presence of Isanaklesh: The Apache Female Deity and the Path of Pollen*, *in* UNSPOKEN WORLDS: WOMEN'S RELIGIOUS LIVES (Nancy Auer Falk & Rita M. Gross eds., 1989).

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ceremonies of Navajo life.[18] The mountain is not only an ecological niche for the flora necessary to these ritual practices: it is a place whose power is related to the effectiveness of those medicines, a place for ritually regulated practices of gathering on the mountain. As Joe Shirley, Jr., then president of the Navajo Nation put it, one "cannot just voluntarily go upon this mountain at any time. It's—it's the holiest of shrines in our way of life. You have to sacrifice. You have to sing certain songs before you even dwell for a little bit to gather herbs, to do offerings."[19] Such practices, because they are crucial to the generative and healing power that benefits all life, are not pursuits of individuals for their own spiritual edification; they are obligatory facets of ceremonies like the Blessingway, which brings healing, well-being, and cosmic renewal. Indeed the Peaks are prayed to by name in the Blessingway, and because the Blessingway serves as a ritual coda of sorts to other ceremonial complexes, the spiritual presence of the mountain is invoked in virtually every Navajo ceremonializing. In all these respects, it is clear that for Navajo people, the San Francisco Peaks massif is not simply a place for meditation, ritual activity, or a landmark on the horizon; it is a fundamental point of orientation and source of power for a Navajo way of life.

For the Hopi, the Peaks are also among the holiest of places, but for reasons that pertain to entirely different cultural traditions, narratives, codes of duty, and ritual practices. As for the Navajo, the Peaks are a holy focal point orienting and sanctifying all life. The Peaks are the home of the *Katsinam*, or kachinas, spirits that bring rain and blessing on the Hopi and that are the center of much Hopi religiosity and ethics. Hopi sacred narratives specify the Peaks as the place where Hopi ancestors went, after emergence from the underworld, to receive instructions from and establish a covenant with *Ma'Saw*, a key divine figure who teaches the Hopi how to live well on earth. The Hopi people not only maintain numerous shrines and make ritual pilgrimages on the Peaks, but, like the Navajo, they have scores of prayer and ritual practices that reference and revolve around the Peaks and foster the right relations with deities on the Peaks—on which all life depends. It would be hard, I suspect, to find a more religiously specific and necessary sacred place for the Navajo or Hopi, or to adequately describe all aspects of their holiness, meaning, or urgency to Native people, much less to identify an adequate analogy for the shape of their significance to Native lives from monotheistic traditions.[20]

For the Havasupai and Hualapai, the Peaks are the center of the world: a site where a female ancestor alighted following a cataclysmic flood and conceived by the water on the mountain the next generations. Ritual pilgrimages to the Peaks require complex spiritual preparation. Water from the Peaks is ceremonially necessary for healing and purification.[21]

For the White Mountain Apache communities, the San Francisco Peaks massif is also not merely one among numerous sacred mountains but one of the four "holy" mountains and the White Mountain that is the community's namesake. A conscious distinction between the language of the "sacred" and the language of the "holy" emerged in the testimony at the trial court, a distinction suggesting that "sacred" was insufficient to evoke the sacrosanct "presence" of the San Francisco Peaks, apart from the memories or ritual activities associated with it. Apache leader

18 On the larger reach and texture of this practice, see, e.g., NAVAJO BLESSINGWAY SINGER: THE AUTOBIOGRAPHY OF FRANK MITCHELL 1881–1967 (Charlotte J. Frisbie & David P. McAllester eds., 1978).

19 *Navajo Nation*, 535 F.3d at 1101.

20 Testimony about Hopi and Navajo practices and beliefs from the District Court trial transcripts are summarized in Judge Fletcher's dissent. *Id.* at 1099 (Fletcher, J., dissenting).

21 *Id.* at 1101–02.

Vincent Randall said in response to a line of questioning that insinuated all Apache land was sacred, or that the Peaks were sacred like any number of sites in the region:

> That's your term "sacred." That's not my term. . . . There are other places of honor and respect. You're looking at everything as being sacred. . . . [T]here is honor and respect, just as much as the Twin Towers is a place of honor and respect. Gettysburg. Yes, there are places like that in Apache land, but there are four holy mountains. Holy mountains.[22]

Given such consistently rich and detailed testimony in the trial court, it is perhaps unsurprising that the Ninth Circuit, like the trial court, accepted the factual findings about the religious practices associated with the mountain, so what was formally at issue was not whether the Native claims were themselves religious or sincere but whether Native communities were "substantially burdened" in their religious exercise under the statute.

THE LEGAL ISSUE IN *NAVAJO NATION*: "SUBSTANTIAL BURDEN"

The Religious Freedom Restoration Act was passed in 1993 by a nearly unanimous Congress bent on restoring a robust strict scrutiny approach to religious freedom that placed the burden of proof on governments to show they had a "compelling state interest" and had selected the "least restrictive means" in accomplishing government aims that involved a "substantial burden" on religious exercise. But RFRA does not define precisely what would constitute a "substantial burden" to that exercise.[23] Indeed, as Alex Tallchief Skibine points out, RFRA remains "ambivalent" about

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22 *Id.* at 1098 (Fletcher, J., dissenting) (citing trial transcript 722–23). Here, Justice Fletcher draws on this distinction in the trial transcripts between sacred and holy in a manner roughly congruent to the pairing of spirituality and religion. For the White Mountain Apache, the "White Mountain" is one of four sacred peaks and the source of the Crown Dancers, powerful spirits crucial to healing and ceremonialism as a site of the Sunrise Ceremony, a ceremony that conjoins a girl to womanhood rite of passage with an annual world renewal ceremony. *Id.*

23 42 U.S.C. §§ 2000bb–2000bb-4 (2006). The Supreme Court has yet to settle differences among various federal appellate courts in terms of what constitutes a "substantial burden" on religious exercise under RFRA, and thus what threshold triggers RFRA's restored strict scrutiny. The Eighth Circuit has followed the Tenth Circuit's approach in *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995) (holding that government conduct substantially burdens a person's religious exercise when it "significantly inhibit[s] or constrain[s] religious conduct or expression . . . meaningfully curtail[s] a [person's] ability to express adherence to his or her faith; or den[ies] [a person] reasonable opportunities to engage in those activities that are fundamental to [his or her] religion."). *In re* Young, 82 F.3d 1407, 1418 (8th Cir. 1996). More recently the federal court for the Western District of Oklahoma appealed to this Tenth Circuit approach and expressly rejected the government's request to invoke the Ninth Circuit interpretation of substantial burden in *Navajo Nation*. Comanche Nation v. United States, No. CIV-08-849-D, 2008 WL 4426621, at *17 (W.D. Okla. 2008) (finding a RFRA substantial burden where the development of a building at Fort Sill would obstruct a traditional view of Medicine Bluffs, a sacred site to the Comanche, and would significantly inhibit the "spiritual experience" of tribal members).

Other circuits have taken intermediary positions. The Seventh Circuit has held that an imposition of a substantial burden is one that "necessarily bears direct, primary and fundamental responsibility for rendering religious exercise . . . effectively impracticable." Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003), *cert. denied*, 541 U.S. 1096 (2004). The Fifth Circuit has held that government action imposes a substantial burden when it "truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs," Adkins v. Kaspar, 393 F.3d 559, 569 (5th Cir. 2004) (citation omitted), *cert. denied*, 545 U.S. 1104 (2005), but makes "no effort to craft a bright-line rule" and instead "requires a case by case, fact specific inquiry to determine whether the government . . . imposes a substantial burden." Adkins, 393 F.3d at 571. This approach has been broadly adopted by the Third Circuit. Washington v. Klem,

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how to regard such a burden, with a stated purpose that is difficult to reconcile with many of the findings in the congressional record.[24] The Ninth Circuit's en banc holding rejected an approach that would accept the term's plain meaning, or meaning under the Dictionary Act.[25] The court also implicitly rejected the approaches of other circuit courts and its three dissenting judges that RFRA intended a more robust restoration of the reach of the free exercise of religion.[26] The dissent construed "substantial burden" in terms of different precedents to mean "preventing [the plaintiff] from engaging in [religious] conduct or having a religious experience" and would have held that Ninth Circuit precedent on the meaning of "substantial burden" had always been "according to the *effect* of a government action on religious exercise rather than particular mechanisms by which this effect is conceived."[27] The en banc majority insisted instead that "substantial burden" is a term of art developed in the Supreme Court's First Amendment precedents prior to *Employment Division v. Smith*,[28] applying "only when individuals are [1] forced to choose between following the tenets of their religion and receiving a governmental benefit . . . or [2] coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions."[29]

Here the Ninth Circuit majority confines a "substantial burden" to the particular mechanisms of government interference in the two landmark Supreme Court cases of pre-*Smith* free exercise law, *Sherbert v. Verner* (1963) and *Wisconsin v. Yoder* (1972),[30] although the specific construction "substantial burden" appears nowhere in those cases:

> The dissent would have us ignore this Supreme Court precedent and, instead, invent a new definition for "substantial burden" by reference to a dictionary. This we cannot do. Rather, we must presume Congress meant to incorporate into RFRA the definition of "substantial burden" used by the Supreme Court.[31]

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497 F.3d 272, 280 n.7 (3rd Cir. 2007). Finally, the Eleventh Circuit holds that "a substantial burden must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly." Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004), *cert. denied*, 543 U.S. 1146 (2005).

24 Alex Tallchief Skibine, *Toward a Balanced Approach for the Protection of Native American Sacred Sites*, 17 MICHIGAN JOURNAL OF RACE AND LAW 269, 277–78 (2012).

25 *Navajo Nation*, 535 F.3d at 1074.

26 *Id.* at 1074–78; *see also* Petition for a Writ of Certiorari at 12–20, 24–31, *Navajo Nation*, 129 S. Ct. 2763 (No. 08-846) (certiorari denied); *see supra* note 23.

27 *Navajo Nation*, 535 F.3d at 1091, 1093 (Fletcher, J., dissenting) (citing Bryant v. Gomez, 46 F.3d 948 (9th Cir. 1995)).

28 494 U.S. 872 (1990). In *Smith*, the Court narrowed its precedents from *Sherbert* and *Yoder*, *see infra* note 30, permitting laws that burden religion so long as such laws are "neutral" and "generally applicable." *Smith*, 494 U.S. at 881. The *Smith* decision spurred Congress to enact RFRA. *See* 42 U.S.C. § 2000bb(a)(4).

29 *Navajo Nation*, 535 F.3d at 1070.

30 Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972). The *Yoder* case gives some pause for my consideration here beyond how the Ninth Circuit majority has used it. The Ninth Circuit opinion observes that "indeed, the Supreme Court in *Yoder* drew the same distinction between objective and subjective effect on religious exercise that the dissent criticizes us for drawing today: 'Nor is the impact of the compulsory attendance law confined to grave interference with important Amish religious tenets from a *subjective* point of view. It carries with it precisely the kind of *objective* danger to the free exercise of religion that the First Amendment was designed to prevent.'" *Navajo Nation*, 553 F.3d at 1070 n.12 (quoting *Yoder*, 406 U.S. at 218 n.12). Contrary to the dissent's assertions, in *Yoder* it was not the effect of the high school's secular education on the children's subjective religious sensibilities that constituted the undue burden on the free exercise of religion. Rather, the undue burden was the penalty of criminal sanctions on the parents for refusing to enroll their children in such school. *See* Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439, 457 (1988).

31 *Navajo Nation*, 535 F.3d. at 1075 (citing dissent at 1086–87).

But crucial to my purposes here, the en banc majority bolsters that construal with broad appeals to Supreme Court decisions involving Native American religious freedom in *Lyng v. Northwest Indian Cemetery Protective Association* and *Bowen v. Roy*, as well as the 1983 D.C. Circuit decision in *Wilson v. Block*.[32] While each was decided prior to *Smith*, and thus considered by the Ninth Circuit majority to be proper places for delimiting "substantial burden," they are hardly *Sherbert* or *Yoder* era decisions; indeed, *Lyng* and *Roy* were instrumental to *Smith*'s undoing of the strict scrutiny approach to the Free Exercise clause framed by *Sherbert* and *Yoder*.[33] *Lyng* and *Roy* served this purpose by articulating a presumed "slippery slope" that some on the court reasoned had set in under *Sherbert* and *Yoder*, and who concluded that granting any religious freedom claim by any particular Native individual invites a potential judicial chaos where there is "no stopping place."[34]

The question of the relevance of the Supreme Court's precedent in *Lyng* is at the heart of the reasoning in *Navajo Nation*. In *Lyng*, the Supreme Court reversed a Ninth Circuit holding that had been favorable to the Yurok, Karok, and Tolowa tribes, and ruled that a logging road through high country precincts sacred to those nations did not sufficiently "prohibit" the tribal member's free exercise under the First Amendment to trigger the strict scrutiny protections of *Sherbert*.[35] Much has been written about *Lyng*, and I do not fully treat it here;[36] suffice it to say that *Navajo Nation* is effectively framed in terms of *Lyng* as a Native sacred land case, and that this asserted comparison mutes the contrast between resolving such claims under RFRA rather than under the First Amendment. I agree with Alex Tallchief Skibine that this contrast is a glaring one. Although *Lyng* admits of two different interpretations that, in turn, lead to two different views as to whether RFRA overturns *Lyng*, RFRA does not simply override *Smith* in favor of *anything* before *Smith*; rather, RFRA also must be considered in light of *Smith* era decisions that raised the threshold and shrunk the reach of protected religious exercise.[37] For example, pre-*Smith* First Amendment cases had narrowed the scope of "substantial burden" analysis by requiring that the burdened religious exercise have a certain level of centrality to a religious system, and RFRA, as amended in 2000, undid this standard of centrality by explicitly extending the definition of exercise

32 *Lyng*, 485 U.S. at 456–59; Bowen v. Roy, 476 U.S. 693, 712 (1986); Wilson v. Block, 708 F.2d 735, 738 (D.C. Cir. 1983).

33 *See* Michael Dorf, *Incidental Burdens on Fundamental Rights*, 109 Harvard Law Review 1175, 1214 n.176 (1996).

34 The Ninth Circuit, following *Lyng* and *Roy*, conjures up a scenario where government actions on public lands would be subject to "the personalized oversight of millions of citizens," each holding "an individual veto to prohibit the government action solely because it offends his religious beliefs, sensibilities, or tastes, or fails to satisfy his religious desires." *Navajo Nation*, 535 F.3d at 1063. Other commentators have similarly criticized the Ninth Circuit's narrow interpretation of RFRA on this point. *See* Jessica M. Wiles, note, *Have American Indians Been Written Out of the Religious Freedom Restoration Act?* 71 Montana Law Review 471, 493–97 (2010).

35 Though curiously the *Lyng* decision proceeds to blur what ought merely to be consideration of that threshold issue with ample discussion of the subsequent balancing tests under *Sherbert* and effectively roughing out a framework with which the *Smith* decision could finish the job. *Lyng*, 485 U.S. at 441–42.

36 *See*, *e.g.*, Ira Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 Harvard Law Review 933, 961 (1989); Alan Ray, comment, *Lyng v. Northwest Indian Cemetery Protective Association: Government Property Rights and the Free Exercise Clause*, 16 Hastings Constitutional Law Quarterly 483, 490 (1989); Howard Vogel, *The Clash of Stories at Chimney Rock: A Narrative Approach to Cultural Conflict over Native American Sacred Sites on Public Land* 41 Santa Clara Law Review 757, 760 (2001); Kristen Carpenter, *A Property Rights Approach to Sacred Sites: Asserting a Place for Indians as Non-Owners*, 52 UCLA Law Review 1061, 1077 (2005).

37 Skibine, *supra* note 24, at 279–80.

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of religion to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[38]

A BRIEF INTERLUDE IN LIGHT OF *BURWELL V. HOBBY LOBBY*

Citing such arguments, the Supreme Court in *Burwell v. Hobby Lobby, Inc.* has indeed taken this overarching view of RFRA—that Congress intended in RFRA not simply to restore, but to extend beyond, the First Amendment free exercise jurisprudence prior to *Smith*.[39] Because there had been no Supreme Court First Amendment case where a for-profit corporation had been recognized as having free exercise rights, the particular intention of Congress in RFRA with respect to that body of pre-*Smith* jurisprudence was key to a novel holding that closely-held for-profit corporations were "persons" capable of protected "religious exercise" under RFRA.[40]

In *Hobby Lobby*, the Court responded to the government's claim that RFRA did "no more than codify this Court's pre-Smith Free Exercise Clause precedents," (a claim that prevailed in *Navajo Nation*) and "because none of those cases squarely held that a for profit corporation has free exercise rights, RFRA does not confer such protection."[41] To this view, and based on its overall appraisal of RFRA as a "very broad" statute, the *Hobby Lobby* majority asserted that "nothing in the text of RFRA as originally enacted suggested that the statutory phrase 'exercise of religion under the First Amendment'" was meant to be tied to the Court's pre-*Smith* interpretation of that Amendment.[42] The Supreme Court went on to espouse a view that had prevailed in the Ninth Circuit's three-judge panel ruling in *Navajo Nation*[43] but that was dismissed by the ultimate en banc ruling. The *Hobby Lobby* majority wrote:

> [I]f the original text of RFRA was not clear enough on this point—and we think it was—the amendment of RFRA through RLUIPA [Religious Land Use and Institutionalized Persons Act] surely dispels any doubt. That amendment deleted the prior reference to the First Amendment and neither HHS nor the principal dissent can explain why Congress did this if it wanted to tie RFRA coverage tightly to the specific holdings of our pre-Smith free exercise cases. Moreover, as discussed, the amendment went further, providing that the

38 42 U.S.C. § 2000bb-2 (2006).

39 The *Hobby Lobby* Court also drew support for the claim that RFRA extends beyond the pre-*Smith* jurisprudence from its decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997). Even though the Supreme Court in *City of Boerne* had taken pains to delimit the reach of RFRA by declaring it unconstitutional as applied to the states, *Id.* at 529–36, the *Hobby Lobby* majority argued, perhaps ironically, that its holding in *City of Boerne* was actually an acknowledgment of the fuller reach of RFRA as intended by Congress: "In *City of Boerne* . . . we held that Congress had overstepped its Section 5 authority because 'the stringent test RFRA demands' 'far exceeded any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*." Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2761 (2014) (citing City of Boerne v. Flores, 521 U.S. 507, 533–34 (1997).

40 The *Hobby Lobby* majority found, with what the dissent identified as weak support, "the one pre-*Smith* case involving the free exercise rights of a for-profit corporation suggests if anything that for profit corporations possess such rights. *Hobby Lobby*, 134 S. Ct. at 2772 (citing Gallagher v. Crown Kosher Super Market, Inc., 366 U.S. 617 (1961)).

41 *Id.*

42 *Id.* Though issued too recently to be given a full treatment in this article, the Court's recent decision in *Holt v. Hobbs* continues the line of reasoning on the scope of RFRA protection begun in *Hobby Lobby*. *See* Holt v. Hobbs, 135 S. Ct. 853, 859–60 (2015).

43 See Navajo Nation v. United States Forest Service, 479 F.3d 1024, 1029 (9th Cir. 2007), *reversed en banc*, 535 F.3d 1058, 1066 (9th Cir. 2008).

exercise of religion "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."[44]

"It is simply not possible," the *Hobby Lobby* majority held, "to read these provisions as restricting the concept of the 'exercise of religion' to those practices specifically addressed in our pre-Smith decisions."[45]

Justice Ginsburg's spirited dissent in *Hobby Lobby* gained wide acclaim for its defense of women's access to health care, but it turned legally on her disagreement with the majority's view that Congress, in RFRA, intended much more than what the Supreme Court had held under the First Amendment prior to *Smith*: "Persuaded that Congress enacted RFRA to serve a far less radical purposes, and mindful of the havoc the Court's judgment can introduce, I dissent."[46]

The *Hobby Lobby* decision reopens a number of questions for the concerns of this article, among them the stature of what might be termed collective or group religious freedom rights, and those questions will in time be taken up by this author elsewhere.[47] But more directly relevant to the concerns of this article, the *Hobby Lobby* decision clearly opens the door for rethinking the Ninth Circuit's interpretive posture in *Navajo Nation*: that Congress in RFRA narrowly meant to restore pre-*Smith* First Amendment jurisprudence, and thus that *Lyng* is a reliable controlling decision for the substantial burden analysis in the case.

NO "SUBSTANTIAL BURDEN" ON NATIVE AMERICAN SPIRITUAL FULFILLMENT

But whatever should befall the substantial burden analysis modeled in *Lyng* and elaborated under RFRA in *Navajo Nation* in terms of what interpretive criteria to apply to the ambiguities of RFRA in light of *Hobby Lobby*, a still deeper question is begged by the Ninth Circuit's en banc decision: how courts construe the *religiousness* of Native American sacred site claims. For a court's determination of what burdens are "substantial" and what are merely minor or incidental, are not determinations solely of burden, but determinations of the reach and extent of religious exercise.[48]

Part of whether spraying treated sewage as artificial snow on a sacred mountain rises to the level of a "substantial burden" on religious exercise involves how the court chooses to gauge the "religiousness" of the Native American exercise in question. A proper analysis of this case cannot narrowly be about which theory of statutory interpretation should prevail or simply a threshold question about where a "substantial burden" begins but also a question of where protected *religious exercise* ends.[49] Thus, there is a substantive question about how the courts regard the distinctive shape of indigenous religions, whose profound orientation to land and irreducibly collective nature requires intellectual precision, dexterity, and rigor that the conceptual field of "spirituality" does not elicit. I turn now to the cultural history of that conceptual field of

44 Hobby Lobby, 134 S. Ct. at 2772 (citations omitted).

45 *Id.*

46 *Id.* at 2787 (Ginsburg, J., dissenting).

47 Michael D. McNally, The Group Rights of Native American Religious Freedom (May 2011) (unpublished manuscript) (on file with author).

48 Indeed Justice Ginsburg's dissent in *Hobby Lobby* pointed out that the Court's determination that Congress intended RFRA's language of "person" to include closely held for-profit corporations was not merely an isolated exercise in interpreting the term "person" but one that implicated questions of what Congress meant by "religious exercise." *Hobby Lobby*, 134 S. Ct. 2793–96 (Ginsburg, J., dissenting).

49 *See* Lupu, *supra* note 36, at 948.

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spirituality, its misguided apotheosis in the concept of "Native American spirituality," as well as a legal history of the term's usage pertaining to Native religious freedom. Thus equipped, we will be better positioned to examine how the Ninth Circuit, following the Supreme Court in *Lyng*, does not merely turn to the discourse of spirituality for aid in coming to terms with difficult to understand spatial practices of Native American religions, but draws on that seemingly natural semantic shift to distinguish the merely spiritual from the properly religious, and in the doing filters out the sharper edges, not to mention what Kristen Carpenter has called the internal "limiting principles," of the religious exercise claims at hand.[50]

CULTURAL HISTORY OF NATIVE AMERICAN "SPIRITUALITY" AS A CONCEPT

It may seem to many like the words roll off the tongue today, but the usage "Native American spirituality" is anything but a natural construction, and consideration of its emergence through legal and cultural history can offer crucial insight into the workings of its usage in *Navajo Nation*. What passes as a seemingly natural and neutral way to describe those aspects of Native religious traditions that lay outside the typical semantic range of the concept "religion" is deeply rooted in rhetorical strategies and valuations that pervert a proper understanding of the religious exercise at stake in *Navajo Nation*.

The cultural history of "spirituality" as a concept is a broad one, part of a narrative arc that includes the Enlightenment, Pietism, and romanticism; the Western encounter with colonized others; devotionalism; and sixties counterculture—nor can it be exhaustively treated in these pages.[51] Here, I want simply to establish that the "spiritual fulfillment" that the Ninth Circuit regards as "diminished" in *Navajo Nation* ensconces by reference to *spirituality* a broadly American, rather than specifically Native American (much less Navajo, Hopi, etc.) understanding of religion. Furthermore, this rhetorical move blurs the very boundaries that Congress, in RFRA, sought to maintain against the grain of the Supreme Court's First Amendment jurisprudence. The move from "religion" to "spirituality" asserts a distinction, if not opposition, that many Americans of the baby boomer and subsequent generations insist upon in the oft heard claim: "I'm spiritual, not religious." This opposition privileges the former in such dualities as inner/outer, authentic/organized, experience/doctrine, felt/rote even as it reduces "real" religion to a private, subjective sphere of the self that makes relatively few demands on the public square.[52]

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50 Kristen A. Carpenter, *Limiting Principles and Empowering Practices in American Indian Religious Freedoms*, 45 CONNECTICUT LAW REVIEW 387, 401 (2012). Carpenter's article appeared after I had originally drafted and publicly presented versions of this article at the American Academy of Religion in 2009, and her analysis has dramatically extended and sharpened my thinking.

51 *See generally* LEIGH ERIC SCHMIDT, RESTLESS SOULS: THE MAKING OF AMERICAN SPIRITUALITY FROM EMERSON TO OPRAH (2005) (placing the contemporary phenomenon in the longer historical frame). Sociologists have examined the diversity, commitments, and finer grain of those professing to be "spiritual, not religious." *See, e.g.*, COURTNEY BENDER, THE NEW METAPHYSICALS: SPIRITUALITY AND THE AMERICAN RELIGIOUS IMAGINATION (2010); NANCY AMMERMAN, SACRED STORIES, SPIRITUAL TRIBES: FINDING RELIGION IN EVERYDAY LIFE (2014).

52 *See, e.g.*, ROBERT C. FULLER, SPIRITUAL, BUT NOT RELIGIOUS: UNDERSTANDING UNCHURCHED AMERICA (2001); CHARLES JOHN SOMMERVILLE, RELIGION IN THE NATIONAL AGENDA: WHAT WE MEAN BY RELIGIOUS, SPIRITUAL, SECULAR (2009); Brian Zinnbauer & Kenneth Pargement, *Religion and Spirituality: Unfuzzying the Fuzzy*, 36 JOURNAL FOR THE SCIENTIFIC STUDY OF RELIGION 549 (1997). Ammerman argues in *Sacred Stories, Spiritual Tribes: Finding Religion in Everyday Life*, *supra* note 51, that the asserted opposition between spirituality and religion obscures the broad overlap between members of religious communities and those professing spirituality outside them.

In the most insightful analysis of the phenomenon, sociologist Robert Wuthnow has framed the phenomenon in terms of a tectonic shift in the second half of the twentieth century from an American religiosity of "dwelling" to one of "seeking." Fueled by rapid changes in mobility, technology, and globalization, American religion has gone from being typified by members of stable, enduring local religious communities in which they dwell to being typified by seekers, whose eclectic spirituality traverses geographical, cultural, and historical boundaries on a quest for fleeting "sacred moments" and new "spiritual vistas."[53] Wuthnow does not let the distinction between religion and spirituality stand, but interrogates it to find two highly contrasting types of spirituality, contrasting in ways that disclose deep differences in social theory on religion between Émile Durkheim and Max Weber:

> With Durkheim, a spirituality of dwelling pays considerable attention to ways of distinguishing sacred habitats from the profane world and to rituals that dramatize these differentiations. With Weber, a spirituality of seeking pays virtually no attention to the contrast between sacred and profane, or to the use of spatial metaphors, but concentrates on that mixture of spiritual and rational, ethical and soteriological, individual and collective activities whereby the person in modern societies seeks meaning in life and tries to be of service to others.[54]

A legitimate quarrel with the binary nature of the contrast suggested here between Weber and Durkheim need not deter a consideration of the implications that a shift toward a spirituality of seeking has for a sense of the sacred and in particular to sacred places. "A spirituality of dwelling requires sharp symbolic boundaries to protect sacred space from its surroundings; a spirituality of seeking draws fewer distinctions of such magnitude," writes Wuthnow, who goes on to cite Max Lerner:

> One might agree with Durkheim that 'the contrast between sacred and profane is the widest and deepest the human mind can make.' Yet for myself I find all sorts of things . . . to be sacred. Rather than being in a place that is by definition spiritual, the sacred is found momentarily in experiences as different as mowing the lawn or viewing a full moon.[55]

In another major study of the conscious turn toward "spirituality" in the remaking of American religion, sociologist Wade Clark Roof found "talk about spirituality was often rambling and far-ranging," but among the themes which emerged as patterns were the self-authored search, looking inward, and journeying in search of growth.[56] For many, "journey involved extended mental trips, voyages into other traditions, imaginary movement across time and space in search of spiritual resources available to the self."[57]

Wade Clark Roof and others have called attention to an economic model of American religion as a "spiritual marketplace," to the consumptive patterns of American religiosity through spirituality bought and collected, and to the therapeutic turn in the history of American religion from

53 Robert Wuthnow, After Heaven: Spirituality in America since 1950 3–4 (1998).

54 *Id.* at 4–5.

55 *Id.* at 5 (citing Max Lerner, Wrestling with the Angel 191 (1990)).

56 Wade Clark Roof, The Spiritual Marketplace: Baby Boomers and the Remaking of American Religion 82 (1999).

57 *Id.*

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communal norms of self-discipline to individual possibilities of self-fulfillment.[58] Wuthnow describes the transformation of American religion in terms of a shift from "spiritual production to spiritual consumption." Religious Americans, he writes, "used to produce offspring for their churches and synagogues, send out missionaries . . . to convert others, and spend their time working for religious committees and guilds; they now let professional experts—writers, artists, therapists, spiritual guides—be the producers while they consume what they need in order to enrich themselves spiritually."[59]

Market analogies may have their drawbacks, but they draw useful connections between the semantic range of *spirituality* as it is used in contemporary parlance and a concern for a piety whose authenticity relies on the self's ability to range freely across religious and cultural boundaries to find its fulfillment. This state of affairs urges the deregulation of a spiritual marketplace and the maximization of choices, even as it offers incentives for aggressive marketing and branding of a spirituality industry, in no small part through a thriving book trade where, it would seem, the term spirituality far outsells the term religion. Word searches on "Native American religion" produce books whose authors are typically familiar to this scholar of religion: a search of books under the rubric of "Native American spirituality" produces books largely authored by non-Native, non-scholarly writers, including authors with names like "Cinnamon Moon."[60] Scholarship on what has come to be called the "plastic shaman" phenomenon has documented how the marketplace and consumption metaphors for spirituality have been particularly apt for understanding how a spirituality industry has trained a hunger for spirituality on representations of Native American religiosity.[61]

NATIVE/NATURE "SPIRITUALITY"

The cravings of the "spiritual, not religious" appetite for Native American goods stem from deep in American culture and history. Philip Deloria has shown just how enduring is Americans' penchant for "playing Indian." From the Boston Tea Party to the Grateful Dead concerts, it is a penchant tied to deep ambivalence about American identity.[62] But a hunger for romanticized images of an emotional, aesthetic Native American view that "everything is sacred" is also related to Wuthnow's observation of a shift to seeker spirituality. Seekers' desire to connect, to collect fleeting "sacred

58 *Id.*; *see also*, ROBERT ELLWOOD, THE FIFTIES SPIRITUAL MARKETPLACE: AMERICAN RELIGION IN A DECADE OF CONFLICT (1997); ROGER FINKE & RODNEY STARK, THE CHURCHING OF AMERICA: WINNERS AND LOSERS IN OUR RELIGIOUS ECONOMY, 1776–1990 (1992); Roger Finke & Laurence R. Iannaccone, *Supply Side Explanations for Religious Change*, ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, May 1993, at 27.

59 Wuthnow, *supra* note 53, at 7–8. Roof found that self-identified spiritual seekers were inclined to "evaluate their personal growth or inner development in terms of how well they were able to achieve the desired benefits; phrases like 'it helps you,' 'you discover things about yourself you never knew,' and 'it works,' were not uncommon," and all this in contrast to those who identify as belonging to religious traditions. Roof, *supra* note 56, at 83.

60 *See, e.g.*, CINNAMON MOON, A MEDICINE WOMAN SPEAKS (2001).

61 *See, e.g.*, Laura Donaldson, *On Medicine Women and White Shame-ans: New Age Native Americanism and Commodity Fetishism as Pop Culture Feminism*, 24 SIGNS 677 (1999); Lisa Aldred, *Plastic Shamans and Astroturf Sun Dances: New Age Commercialization of Native American Spirituality*, 24 AMERICAN INDIAN QUARTERLY 329 (2000); PHILIP JENKINS, DREAM CATCHERS: HOW MAINSTREAM AMERICA DISCOVERED NATIVE SPIRITUALITY (2004); Andrea Smith, *For Those Who Were Indian in a Past Life*, *in* ECOFEMINISM AND THE SACRED 168–71 (Carol J. Adams, ed., 1993); GRANT MCCRACKEN, CULTURE AND CONSUMPTION: NEW APPROACHES TO THE SYMBOLIC CHARACTER OF CONSUMER GOODS AND ACTIVITIES (1988).

62 *See generally* PHILIP JOSEPH DELORIA, PLAYING INDIAN (1998).

moments," and to take in new "spiritual vistas" has led many Americans to a nature spirituality of which Native American "spirituality" is seen as the apotheosis. Just as Nature spirituality seeks to find a subjective home absent a stable objective one, in emotive experiences of "Nature," "Nature" itself, or its corollary "wilderness," emerges as an abstraction increasingly unmoored from necessary connections to particular places. The history of American nature religion has often seen deep ecologists, neo-pagans, wiccans, and other activists seeking not only political alliances but also spiritual direction from Native people; and, to be sure, many Native communities have been more than willing to find common ground.[63]

But to view Native American religions as the apotheosis of nature spirituality is to de-nature those traditions. Native religious traditions are highly diverse, involving many hundreds of distinct communities speaking more than 200 distinct indigenous languages, and profoundly local—that is, profoundly tied to particular, specific places in complicated and sophisticated ways that are as obscured as they are clarified by the relatively wooden term *sacred*. Some places are so sacrosanct that traditions forbid anyone to go there; others are sacred but also open to other uses, such as for economic livelihood; still others are sacred in terms of certain times of year.[64] These relationships to place, as heartfelt and emotive as they can be at a subjective level for individual members of a Native community, are not best understood through approaches to "religion" as individual conscience or subjective emotion. Even Judge Fletcher's otherwise able dissent turns on a criticism that the en banc majority had misunderstood religion's centrally subjective nature. Citing William James's definition of religion as "the feelings acts and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine," Fletcher asserts that "religious exercise sometimes involves physical things, but the physical or scientific character of these things is secondary to their spiritual and religious meaning. The centerpiece of religious belief and exercise is the 'subjective' and the 'spiritual.'"[65] Fletcher's view surely pertains to many contemporary religious phenomena, but religious studies scholars are wary of any purported "essence" or essential trait of religion.[66]

Scholars of indigenous religions in particular have long struggled with the ill fit between "religion" as an analytical category emerging in the modern West and the practices and beliefs that characterize the local, oral traditions of Native communities. But the term "spirituality," which clearly some intend as a better suited analytic category, is not synonymous with religion; it only exacerbates the difficulties of "religion" as an analytical category.[67] In the shift from the analytical

63 *See* Cathy Albanese, Nature Religion in America: From the Algonkian Indians to the New Age 154–55 (1990).

64 *See* King, *supra* note 14, at 9.

65 *Navajo Nation*, 535 F.3d. at 1096 (Fletcher, J., dissenting) (quoting William James, The Varieties of Religious Experience: A Study in Human Nature 31–32 (1929)).

66 *See*, *e.g.*, Tomoko Masuzawa, The Invention of World Religions: Or, How European Universalism Was Preserved in the Language of Pluralism (2005); Talal Asad, Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam (1993); Saba Mahmood, The Politics of Piety: The Islamic Revival and the Feminist Subject (2005). For an overview of such definitional questions as they pertain to questions of cultural resources, *see* Michael D. McNally, *Religious Practice and Belief, in* A Companion to Cultural Resource Management (Thomas F. King, ed., 2011).

67 This presenting problem is one that faces scholarly students of Native American religious traditions. Religious studies scholar Lee Irwin, for example, chooses the term "spirituality" over religion because the latter problematically rests on a distinction between sacred and profane that does not obtain in Native communities:

> My own experience of the interactive spheres of Native communal life is that they have a relatedness through personal relationships that finds common expression in mutual everyday concerns. Ceremonial activity or prayer or simply carrying out daily activities, driving a friend to work, or struggling for political rights,

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frame of "religion" to that of "spirituality," indigenous traditions, which often cannot be divorced from visible and outward signs of peoplehood, community, norms, duties, and disciplines, are transmuted into a universal piety of nature religion, transportable to virtually any setting, and viewing everything as sacred.[68]

I must insist on an important distinction between tribe-specific religious traditions and a universal piety of nature that is blurred in the concept of spirituality as it has been used. Traditional Native American religions are profoundly local, tied to particular places not simply through deep feeling and aesthetic appreciation, or through religious practices that often take place on them, but also through a whole range of narratives, ritual disciplines, and sophisticated moral codes related to particular places. As I elaborate above, the San Francisco Peaks are, for the Navajo, not just a pristine and beautiful natural place for meditation and spiritual edification; the Peaks orient all aspects of Navajo life as the westernmost of the four mountains designating Navajo space. The peaks are the object of daily prayer disciplines and the sustaining source of healing power through the medicine bundles that empower Navajo ceremonial life. For the Hopi, contamination of the Peaks not only encumbers Hopi spiritual experience on the Peaks but violates "spiritual covenant that the Hopi clans entered into with the Caretaker . . . Ma'saw and the other deities . . . and the Katsina that reside in the Peaks."[69] Desecration of the mountain would cause the Katsinam dance ceremonies that punctuate the Hopi year to lose their religious value, reducing them from effective "religious efforts" to "performances for performance sake."[70]

Similarly, for the Hualapai to bury a portion of the placenta of a child on the Peaks after a difficult labor is not to seek spiritual fulfillment but to obey spiritual direction for the furtherance of the

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> may engage individuals in aspects of "religious" concern. It is that connectedness to core values and deep beliefs that I mean by "spirituality"—a pervasive quality of life that develops out of an authentic participation in values and real life practices meant to connect members of a community with the deepest foundations of personal affirmation and identity. In this sense, spirituality is inseparable from any sphere of activity as long as it really connects with affirmative values and sources of authentic commitment and genuineness of concern.
>
> Lee Irwin, *Introduction: Themes in Native American Spirituality*, 20 AMERICAN INDIAN QUARTERLY 311 (SPECIAL ISSUE) 309, 311 (1996).

68 Conversely, efforts to scrupulously avoid the language of religion (or spirituality for that matter) to understand practices and beliefs of Native American traditions appear unavailing. In *Jock v. Ransom*, 05-CV-1108, 2007 U.S. Dist. LEXIS 47027 (N.D.N.Y June 28, 2007), *affirmed*, 07-CV-3162, 2009 U.S. App. LEXIS 6048 (2d Cir. Mar. 20, 2009), a federal judge for New York's Northern District ruled against the parents of Mohawk school children who attended a public school. The plaintiffs asserted an equal protection claim against the Salmon River Central School Board when the Board prohibited, after two years, using the public address system for recitations of an abridged Mohawk language version of the Thanksgiving Address, an address that "is recited at the opening and closing of all Mohawk gatherings as an acknowledgment of Mohawk existence, culture, and way of life." *Id.* at *12 n.6 (citing Plaintiffs' Statement of Material Facts in Support of Partial Summary Judgment at 1, 3). The School Board decision was driven by a non-Indian parent who viewed the address as a "prayer," and thus an unconstitutional establishment of religion, and the expert testimony on behalf of the Mohawk plaintiffs turned on demonstrating that the address was not a prayer, and that the prohibition on the Thanksgiving Address was discriminatory, given the continued support for the daily recitation of the Pledge of Allegiance, and the encouragement that Mohawk students recognize Christmas, Thanksgiving, and other school holidays. *See Id.* at *9. The district court held that its ruling turned only on finding no discriminatory intent in the school board decision and thus required no judgment as to whether or not the Thanksgiving Address was prayer, *Id.*, and the Second Circuit affirmed.

69 *Navajo Nation*, 535 F.3d at 1104 (Fletcher, J., dissenting) (citing the testimony of Leigh Kuwanwisiwma in the district court opinion).

70 *Id.* at 1105 (Fletcher, J., dissenting) (citing the testimony of Emory Sekaquaptewa in the district court opinion).

health of the child and mother.[71] Such traditions are not only specific to the respective tribes and keyed to specific religious narratives and beliefs; they are counted as duties more than as fulfillment. Such local religions, demanding disciplines of this specificity, are not generalizable into a universal spirituality of nature seeking to re-enchant a disenchanted world.

LEGAL HISTORY OF NATIVE SPIRITUALITY

The specific legal history of the usage "Native spirituality" curiously draws on the universalizing of Native religions in the term's larger cultural history. A search of federal courts in Lexis produced no fewer than forty cases meaningfully joining the terms "Native American" and "spirituality." While of course such a search does not reveal any causative line leading to the holding in *Navajo Nation*, the pattern of correlation does illuminate how the discourse of spirituality shapes judicial approaches to Native cases before them. In several cases pertaining to hair length in prison and employment law, "spirituality" was utilized by Native litigants as a term with a broader semantic range than religion.[72] But in the vast majority of the cases, "spirituality" is no mere synonym for Native American religion, religions, or religious exercise; it is invoked as a term to distinguish "spirituality" from particular tribal "religions." With only one minor exception, cases involving the term do not concern tribe specific claims to sacred sites or religious practices, but rather deal with generalized claims to religious freedom in prisons and, in particular, to those claims by *non-Native practitioners*.

A generative precedent for many of these prison cases is *Morrison v. Garraghty*, a 2001 case in which the Fourth Circuit affirmed a successful equal protection challenge by a non-Native practitioner for what he chose to call his "Native spirituality" from a Virginia prison's policy requiring substantiation of Native American heritage for religious accommodations.[73] Even though the inmate had professed a sincere belief in "the creator, mother earth, the sacredness of all living things, that everything has a spirit and is connected," authorities forced him to yield a number of spiritual objects and herbs, including sage and kinnickinnic. Importantly, the Fourth Circuit affirmed the lower court's holding that his Native American spirituality was not a "religion" for First Amendment purposes (since he could make no showing of any particular ceremony obstructed), but it was sufficient for purposes of the equal protection claim.[74] As is clear from a host of cases that have followed, "Native American spirituality" is a common usage in prison environments for ritual traditions like the sweat lodge and attendant paraphernalia that are associated with Native American traditions but are not tribe-specific and must be open, on equal protection grounds, to participation by non-Native inmates. "Native American spirituality" has also become something of a term of art in the parlance of departments of corrections in states like Arizona and Missouri, as well as the federal Bureau of Prisons, which have used this designation in published guidelines for accommodating minority religious traditions.

71 *See Id.* at 1102 (Fletcher, J., dissenting).

72 There is also one significant reference in a case involving sacred lands. In United States v. Means, 627 F. Supp. 247 (D.S.D 1985), *reversed*, 858 F.2d 404 (1988), a 1981 encampment on federal lands in the Black Hills had been unsuccessful in getting a special use permit, which the court ascertained had a "dominant purpose" "to provide a site for the pursuit of the traditional Lakota spirituality, culture and community life within the sacred environment of the Black Hills." *Id.* at 251.

73 239 F.3d. 648, 658 (4th Cir. 2001). Substantiation could include tribal enrollment, Bureau of Indian Affairs card, or blood relative who is an American Indian. *Id.* at 652.

74 *Id.* at 649.

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As a term of art in corrections administration that signals inclusiveness, its usage also admits of skepticism, suggesting, it seems to me, the added "hassle factor" prison officials associate with inmates claiming need for access to what they view as any number of objects, medicines, and practices associated with Native Americans,[75] and with enough play in its semantic range to account for possible imposture. In this respect, "Native spirituality" can be linked to claims of identified prison groups like the "Mexican Mafia" using the moniker for nefarious purposes, the regulation of which is permissible under the Religious Land Use and Institutionalized Persons Act and the courts' "legitimate penological interests" standard.[76]

THE DISCOURSE OF SPIRITUALITY AND THE LEGAL ISSUE OF SUBSTANTIAL BURDEN

If Native American spirituality has become regularized recently in the legal context of prisons, its specific usage in the *Lyng* and *Roy* decisions mark not only the more important moments of the concept's legal history, but also its rhetorical place in a judicial containment strategy concerning the reach of potentially protean Native religious freedom claims to sacred lands that drives, I would argue, the Ninth Circuit conclusion that spraying treated sewage on a sacred mountain for recreational skiing does not "substantially burden" religion under RFRA.[77]

The en banc majority of the Ninth Circuit affirmed the district court's recognition that the asserted beliefs of the Navajo, Hopi, and others are sincere. But it concluded that "no plants would be destroyed or stunted; no springs polluted; no places of worship made inaccessible, or liturgy modified" by the proposed snowmaking with sewage:

> Thus, the sole effect of the artificial snow is on the Plaintiffs' subjective spiritual experience. That is, the presence of the artificial snow on the Peaks is offensive to the Plaintiffs' feelings about their religion and will decrease the spiritual fulfillment Plaintiffs get from practicing their religion on the mountain.[78]

The en banc majority goes on to distinguish "decreased spiritual fulfillment" from religious exercise that could be "substantially burdened" by the conduct in question:

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75 My basis for this observation are two consultations with a group of state chaplaincy administrators, many of whom I understood to be quite sympathetic to such claims but keenly aware of the relatively costly nature of accommodations of Native traditions. The consultation was on both occasions organized by the American Academy of Religion's government relations and public affairs unit at its Annual Meeting.

76 Longoria v. Dretke, 507 F.3d 898, 904 (5th Cir. 2007). A similar strategy was applied by the District of New Mexico in O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 282 F. Supp. 2d 1271, 1275 (D.N.M. 2002), *vacated*, 389 F.3d 973 (10th Cir. 2004), where the federal trust relationship with Indians was invoked to undermine claims by a South American immigrant group whose worship involved hoasca tea, and who sought equal protection consideration with an eye toward congressional protection of American Indian practitioners of the Native American Church, *see* American Indian Religious Freedom Act, 42 U.S.C. §§ 1996, 1996a (2008). Here the district court distinguished the shared practice of a Native American spirituality from the political status of American Indian members of federally recognized American Indian tribes under the federal trust responsibility doctrine. *O Centro Espirita*, 282 F. Supp 2d at 1280–81.

77 Although it consistently arises in the contexts of Native American religious claims, the dynamic is not specific to Native American claims. *See* Lupu, *supra* note 36, at 947 (observing that courts use substantial burden analysis to contain a proliferation of free exercise claims) ("Behind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe.").

78 *Navajo Nation*, 535 F.3d at 1063 (emphasis added).

> Nevertheless, a government action that decreases the spirituality, the fervor, or the satisfaction with which a believer practices his religion is not what Congress has labeled a "substantial burden."[79]

"Under Supreme Court precedent," the Ninth Circuit majority concludes, government action that results in "the diminishment of spiritual fulfillment—serious though it may be—is not a 'substantial burden' on the free exercise of religion."[80] This apparently clear distinction between diminished spirituality and burdened religion draws extensively—decisively—from the determination in *Lyng* that the threshold for First Amendment religious free exercise protection was not reached in a matter of interference with a "private person's ability to pursue spiritual fulfillment."[81] The en banc majority closes its logical circle in *Navajo Nation* by paraphrasing the Supreme Court's carefully worded conclusion in *Lyng*:

> No matter how much we might wish the government to conform its conduct to our religious preferences, act in ways that do not offend our religious sensibilities, and take no action that decreases our spiritual fulfillment, no government—let alone a government that presides over a nation with as many religions as the United States of America—could function were it required to do so.[82]

Indeed, though the en banc majority speaks of *Lyng* merely as "on point," *Lyng* functions as the controlling analogy in *Navajo Nation* for determining the threshold of what will constitute burdened religion beyond mere diminished spiritual fulfillment.[83]

Below I revisit the Ninth Circuit's insistence on *Lyng*'s relevance despite the intervening passage of RFRA, and its subsequent amendment in 2000. At this point, however, I want to make reference to our consideration of the cultural history of spirituality and Native American spirituality in order to address the crucial rhetorical turn to language of spirituality and its decreased fulfillment in the logical steps in *Navajo Nation*. Again, at issue is not merely the assertion that all religion is inherently subjective, and that, therefore, burdens on Native religious exercise centered on the San Francisco Peaks are no less "substantially burdened" for being subjective in nature. I must query just how it comes to pass that agreed upon factual findings about the complex ways that desecration of the San Francisco Peaks impairs the exercise of multiple, highly sophisticated, complex Native religious traditions, most of which are not meaningfully confined to the subjective sphere of religious experience, become summarized in terms of "spirituality" or "spiritual fulfillment." I am arguing that this rhetorical shift from religion to spirituality is not merely semantic; it is no mere heuristic technique to understand beliefs and spatial practices associated with a sacred mountain. The shift to spirituality serves to undermine the force of the factual findings about the collective claims of Navajo, Hopi, and other religions by figuring those claims in terms of an individual search for spiritual fulfillment that supposedly take place on the mountain itself, thereby evoking claims that are potentially protean and limitless in nature. And the support for this view is not an explicit treatment of the beliefs and practices themselves, but an implicit appeal to a romanticized view that Native Americans, particularly when it comes to sacred land, are spiritual, not religious.[84]

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79 *Id.*

80 *Id.* at 1070.

81 *Id.* at 1063 (citing *Lyng*, 485 U.S. at 449).

82 *Id.* at 1064.

83 *See* Skibine, *supra* note 24, at 269.

84 *See generally* Carpenter, *supra* note 50, at 396–97 (exploring the difficulties of the collective nature of Native American religions).

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The *Navajo Nation* majority believes, following the logic of *Lyng*, which it cites on this point, that it is granting the sincerity of the Native religious claims and cognizant of the full reach of the harm. In a crucial exchange of footnotes with the dissent on the question of the subjective nature of religion, the Ninth Circuit majority voices its agreement that "spiritual fulfillment is a central part of religious exercise," adding that "the Indians' conception of their lives as intertwined with particular mountains, rivers, and trees, which are divine parts of their being, is very well explained in the dissent."[85] The exchange continues to mangle the factual findings of sincere religious exercise with further spirituality-speak:

> For all the rich complexity that describes the profound integration of man and mountain into one, the burden of the recycled wastewater can only be expressed by the Plaintiffs as damaged spiritual feelings. Under Supreme Court precedent, government action that diminishes subjective spiritual fulfillment does not substantially burden religion.[86]

The "profound integration of man and mountain into one"? Where does such a construction come from if not straight out of some bookstore's New Age Spirituality shelf? To call San Francisco Peaks the "Mother" or "Leader" of the Navajo Nation; to "pray to the peaks and visit them spiritually daily" as part of the discipline of being a good Havasupai; or to regard the desecration of the mountain as related to social and cosmic ills is not to be in a mystical union of man and mountain, but rather to discipline one's thinking and behavior to conform ritually and ethically and doctrinally to the narratives, ethical teachings, and ritual duties of discrete religious traditions. This is true of many religious traditions, not simply indigenous traditions. Devout Muslims pray in the direction of Mecca not to be profoundly integrated or one with Mecca but because God commands such conduct.[87] What counts is the fulfillment of the duty, not the height of the spiritual fulfillment. Consider the place of San Francisco Peaks in the Navajo Tribal Code, amended in 2002 to place the edifice of the code atop traditional foundations of Diné (Navajo) law:

> Diné Natural Law declares and teaches that . . . the six sacred mountains [including "Dook'o'ooslííd," the San Francisco Peaks] must be respected, honored and protected for they, as leaders, are the foundation of the Navajo Nation. . . . The Diné have the sacred obligation and duty to respect, preserve, and protect all that was provided for we were designated as the steward for these relatives through our use of the sacred gifts of language and thinking.[88]

Curiously, neither the Ninth Circuit majority nor the dissent made reference to this formulation of a Navajo natural law obligation to the Peaks.[89]

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85 *Navajo Nation*, 535 F.3d at 1070.

86 *Id.*

87 Such analogous spatial practices, even if they do not have the intensity or necessity of duties to place that such local religion as those of the Navajo and Hopi have toward the Peaks, do share a stark contrast with, say, the pilgrimages to Christian holy sites in Israel, which can be so spiritually fulfilling for so many evangelical Protestants or Roman Catholics, but which are nevertheless hardly compelled by a traditional Christian requirement or duty.

88 NAVAJO NATION CODE ANN. tit. I, § 205(b), § 205(d) (2003).

89 Referring to these foundational obligations, the Navajo Nation Human Rights Commission passed a resolution toward a formal complaint to the Inter-American Commission on Human Rights, stating that "the Navajos have a responsibility to remain on and care for the land where the Holy People placed the Navajo people." Resolution of the Navajo Nation Human Rights Commission Approving and Recommending that the Navajo Nation Register a Complaint of Navajo Human Rights Violation with the Organization of American States Inter-American Commission on Human Rights, NNHRCMAR-27-13 (March 2013).

I do not mean to suggest there is no subjective dimension or inner spirituality to Navajo engagement with the mountain, or that of the other Native nations involved; my point is that the conceptual filter through which the Ninth Circuit has supposedly granted the sincerity of those claims—"spiritual fulfillment"—has obliterated the complexities and details of more than ninety factual findings concerning these discrete traditions that assert any number of distinctions in their practices and beliefs related to the Peaks, and reduced those religions to a singular emotional subjective spirituality of "man and mountain into one." If that is all that is really on the line, then of course, all that results is "damaged spiritual feelings" and one can go find another beautiful mountain to be one with. But that is not how these Native religions work. For all the diversity of specific ways that specific indigenous religions relate to specific places, a common thread through all is that specificity.[90]

A brief consideration of two recent cases involving Navajo religion in federal district courts can help illustrate the inaccuracy of the Ninth Circuit's construal of the factual findings about Navajo religion and the Peaks as merely subjective in nature, or matters of individual spirituality. First, a 1996 case in the District of New Mexico clarified that the medicine bundles—whose power is tied to and renewed by the ritualized gathering of medicines on San Francisco Peaks by authorized Navajo *hitaali*, or singers—are properly understood as cultural patrimony belonging to Navajo clans or the larger collective, and thus not alienable by a Navajo individual.[91] The case upheld the constitutionality of the criminalization of trafficking in such cultural property under the Native American Graves Protection and Repatriation Act and convicted Richard Nelson Corrow, a non-Native enthusiast of Navajo religion, who paid $10,000 for a number of medicine bundles from the widow of a *hitaali* he had come to know and even study with, only to flip them (after making inquiries of their worth on the private collector market) for $50,000 to a law enforcement officer posing as a collector.[92]

Such medicine bundles, or *jiish*, are crucial to Navajo healing, blessing, and ceremonial traditions, and are regarded as alive. That is, they are not simply "keepsakes" from Navajo Singers' meditative experiences on San Francisco Peaks and elsewhere but draw on the power of the place to bring healing to the collective. *Hitaali* Harry Walters testified that "there is no such thing as ownership of medicine bundles," adding the "*jiish* belongs to the Navajo people because they are the only people that can get full benefit from that."[93] Admitting that some Navajos would say a singer's widow would own a bundle, Walters explained that "it would be sacrilegious to sell the [medicine bundle] to an individual who intended to remove [it] from the four corners of the Navajo Nation," making reference again to the sacred space delimited on the West by San Francisco Peaks.[94] *United States v. Corrow* illustrates how the practices associated with ceremonial gathering on the Peaks are not just about activities which happen on the Peaks, thus challenging the argument of the ski resort owners in *Navajo Nation*, that such practices could continue apace even with the snowmaking scheme.

A second District Court decision, this one from 1990, clarifies in no uncertain terms the distinctively collective nature of traditional Navajo religion with respect to sacred places.[95] In *Attakai*

90 For scholarly treatments of the particularity, one might say specific necessity, of certain sacred places in indigenous religions, see generally McNally, *supra* note 13.

91 United States v. Corrow, 941 F. Supp. 1553 (D.N.M. 1996).

92 *Id.* at 1555–56.

93 *Id.* at 1560.

94 *Id.* at 1561.

95 Attakai v. United States, 746 F. Supp. 1395 (D. Ariz. 1990).

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v. United States a group of individual Navajo brought a Free Exercise Clause challenge to a US-funded, Hopi-approved fence project for range restoration in the "Joint Use Area" of the Hopi Reservation, which is occupied by both Navajo and Hopi people. The District Court for Arizona found individual Navajos had standing to bring claims about compromised access to sites of religious significance to their individual piety, but they did not have standing to bring a First Amendment claim about the compromised access to "Star Mountain," the principal site in question, because it is a shrine of "tribal interest."[96] The First Amendment analysis did not compel this distinction; it was admittedly idiosyncratic to Congress's purposes of the Navajo-Hopi Land Settlement Act, which allows only the tribes, and not individuals, to litigate to help minimize the contentiousness of that long-standing dispute.[97] But the court nonetheless readily found reason to recognize and articulate an important and useful distinction between religious claims of collectives/tribes and the personal claims of individual religious practitioners:

> In these proceedings the parties have drawn a distinction between "tribal" religious sites, those which are generally identified and more widely known and which have significance to the tribe, (i.e. Star Mountain), "regional" local sites, those which are known and have significance to persons residing in a particular area, (i.e. a special ceremonial site), and "individual" sites, those which are known and therefore have significance only to individual members of the tribe (i.e. a burial site of an ancestor).[98]

Because Congress recognized the significance of certain religious shrines to each tribe, and intended that these tribal interests be considered in the context of the inter-tribal land dispute, the court held that "individual members of the respective tribes do not have standing to bring actions involving denial of access or interference with Tribal religious shrines.[99]

Neither *United States v. Corrow* nor *Attakai v. United States* finds its way into the arguments put forward in *Navajo Nation*, in part because the distinctions asserted in the two cases admittedly emerge in the context of statutes other than RFRA. Yet the distinctions made sense in those contexts because they make sense in terms of Navajo religion. Notwithstanding the subjective, emotional, experiential aspects of Navajo religion, the religious significance of the San Francisco Peaks is not principally an individual matter of interior states, but a collective matter of duties, ceremonies, peoplehood. This would extend, by analogy, to the findings of fact concerning Hopi, Havasupai, White Mountain Apache, and other plaintiff tribes' religiosity. As I argue further in my conclusion, I think justice for Native American religious freedom requires that there be room for courts to make reasonable distinctions of the sort the District Courts of Arizona and New Mexico did in these cases. These are not distinctions whereby courts establish the centrality or sincerity of a given religious exercise; they are instead reasonable distinctions among registers in which religious exercise can be found.

As Kristen Carpenter has argued, there are sources in existing First Amendment scholarship that embolden the making of such distinctions and the recognition of group rights to Native American religious freedom.[100] Despite the assumed liberal basis of First Amendment free exercise rights as an individual right of conscience, some scholars argue for group rights to free exercise of

96 *Id.* at 1404.

97 *Id.* at 1400 ("Congress intended to foreclose participation by individual in the inter-tribal land dispute, in order to prevent duplicative and protracted litigation and to provide a more expeditious and fair resolution of the dispute.").

98 *Id.* at 1400–01.

99 *Id.* at 1402.

100 Carpenter, *supra* note 50, at 437–39.

congregations, sects, and other collectives. Such rights are not merely derivative of the sum of individual rights involved but are matters of congregational autonomy or of rights to association, or what Ronald Garet termed the "groupness" of religious groups existing importantly between the state and the individual.[101] Carpenter rightly observes that there are considerable "pragmatic, conceptual, and doctrinal differences that distinguish American Indians from other theories of groups or institutional rights, and other instances of deference to church autonomy," especially in the context of federal Indian law's recognition of the distinctive political, rather than religious or ethnic, status of Indian tribes.[102] Nevertheless, there are suggestive respects in which the literature on group rights to religious freedom makes potential judicial distinctions such as the kind seen in *Attakai* and *Corrow*, or in a variety of administrative accommodations for collective tribal religions, seem consistent not only with federal Indian law but also with religious freedom law.

But neither the Ninth Circuit majority nor dissent engaged the religious claims of the tribal plaintiffs in *Navajo Nation* as collective claims, in part, no doubt, because the principal Supreme Court First Amendment cases involving Native American religious traditions did not engage them as collective claims. I turn now to those pre-*Smith* cases.

SPIRITUAL FULFILLMENT AND SPIRITUAL DEVELOPMENT IN *LYNG* AND *BOWEN V. ROY*

Lyng, and, by extension, *Bowen v. Roy* are key to the Ninth Circuit rhetorical move from the register of religion to the register of spirituality. The 5-3-1 decision in *Lyng* reversed lower court rulings and permitted construction of a logging road through high country sacred to the Yurok, Karok, and Tolowa nations, finding no constitutional prohibition on the free exercise of their "religion." "Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs," Justice O'Connor wrote, "the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development."[103]

This line of reasoning by the *Lyng* majority drew on *Bowen v. Roy* as its controlling precedent. In *Roy*, decided two years previous, the Supreme Court found unpersuasive the claims of an Abenaki Indian (the Abenaki are not a federally recognized tribe) that the government's use of a social security number assigned to his daughter in its administration of public assistance benefits

101 Ronald R. Garet, *Communality and Existence: The Rights of Groups*, 56 Southern California Law Review 1001 (1983); *see also* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Columbia Law Review 1373 (1981); Frederick Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1 Wisconsin Law Review 99 (1989); Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?* 22 St. John's Journal of Legal Comment 515 (2007); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 Harvard Civil Rights-Civil Liberties Law Review 79 (2009); Horwitz, First Amendment Institutions (Cambridge, MA: Harvard University Press, 2013). I am grateful to one of the anonymous reviewers of this manuscript for these suggestions.

102 Carpenter, *supra* note 50, at 440. Carpenter proceeds (at 460–76) to explore this in the context of the administrative accommodations to the Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668–668d, for members of federally recognized tribes, in the context of the 1990 Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013, and in terms of the 1994 Peyote Amendment to the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1978), together with the courts' endorsement of such accommodations.

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

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violated his First Amendment free exercise rights.[104] Relevant to our discussion, the distinction between the facts of *Lyng* and those of *Roy* suggest something along the lines of a distinction between religion and spirituality; a distinction collapsed first by the High Court's First Amendment analysis in *Lyng* and then by the Ninth Circuit's RFRA analysis in *Navajo Nation*. The Supreme Court in *Roy* did not overtly question the sincerity of Roy's belief that his daughter's soul would be damaged by use of the assigned social security number, but it did determine that the religious exercise at issue was the furtherance of an individual's "spiritual development," a hindrance to "prevent her from attaining greater spiritual power."[105] In *Roy*, the Court held:

> Never to our knowledge has the Court interpreted the First Amendment to require the Government itself to behave in ways that the individual believes will further his or her spiritual development or that of his or her family. 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.[106]

It is revealing of the courts' propensity to draw from broader popular cultural ideas about Native Americans that the Supreme Court could find *Roy* a compelling precedent to rule on the facts of *Lyng*.[107] No ethnohistorians or anthropologists were brought in, much less testimony from Native spiritual leaders, to determine the depth or breadth of Roy's individual and rather idiosyncratic belief about social security numbers and soul robbing. Thus, the Supreme Court justices could read the lower court's summary of Roy's claim as follows:

> [H]e asserts a religious belief that control over one's life is essential to spiritual purity and indispensable to "becoming a holy person." Based on recent conversations with an Abenaki chief, Roy believes that technology is "robbing the spirit of man." In order to prepare his daughter for greater spiritual power, therefore, Roy testified to his belief that he must keep her person and spirit unique and that the uniqueness of the Social Security number as an identifier, coupled with the other uses of the number over which she has no control, will serve to "rob the spirit" of his daughter and prevent her from attaining greater spiritual power.[108]

Operating under the implicit assumption that both *Roy* and *Lyng* are "Native American" cases, Justice O'Connor's majority opinion extends the holding in *Roy* to the facts in *Lyng*: Government action in both would "interfere significantly with private person's ability to pursue spiritual fulfillment according to their own religious beliefs."[109] "However much we might wish that it were otherwise," O'Connor's writes, "government simply could not operate if it were required to satisfy every citizen's religious needs and desires."[110] The Court interprets "spiritual fulfillment" as a

104 Bowen v. Roy, 476 U.S. 693 (1986) (Brennan, J., concurring). That Justice Brennan joined the majority in *Roy* perhaps gives more heft to the distinction he asserted in dissent on *Lyng*.

105 *Id.* at 696. This same language is quoted by the Court in *Lyng*, 485 U.S. at 448.

106 *Roy*, 476 U.S. at 699.

107 Prevailing scholarship has noted how the history of representation of Native peoples of North America shows a consistent tendency to lump all differences among more than five hundred nations into a controlling image of "the Indian." *See, e.g.*, ROBERT BERKHOFER, THE WHITE MAN'S INDIAN (1978).

108 *Roy*, 476 U.S. at 698.

109 *Lyng*, 485 U.S. at 449. Justice Brennan argued in dissent that the majority had fundamentally misunderstood the idioms of Native religions. He doubted that the Native people would "derive any solace from the knowledge that although the practice of their religion will become 'more difficult' as a result of the Government's actions, they remain free to maintain their religious beliefs." "Given today's ruling," Brennan penned, "that freedom amounts to nothing more than the right to believe that their religion will be destroyed." *Id.* at 477 (Brennan, J., dissenting).

110 *Id.* at 452.

species of religious exercise that can be hindered without violating the constitution because to recognize such a violation would imply no "stopping place."

In *Lyng*, O'Connor shoehorns voluminous accepted factual findings of sincere and nonnegotiable Native religious claims into the "spiritual fulfillment" or spiritual development of a "religious objector." This categorization abstracts the time-honored practices necessary to these three Native nations into the hypothetical claims of several individuals seeking pristine meditative experiences of nature religion. It identifies the Native plaintiffs as "objectors" to government action, and in ruling against the "objectors," O'Connor reverses the *Sherbert*- and *Yoder*-era position requiring government actions that effectively "object to" a religious exercise to show a compelling interest and use of the least restrictive means for fulfilling that interest.

O'Connor's opinion bears a skeptical undertone that can be seen in her analogy of entire Native nations with the relatively ungrounded claims of *Roy* about social security numbers, which uproots the meaningful, grounded, and fairly restrained and reasonable claims of practitioners of local religions into the hypothetical space of a protean Native spirituality. This move, allows O'Connor to post a slippery slope: Native religious freedom claims to sacred lands, were they to succeed anywhere in the courts, would open the floodgates to any individual claiming a sincere belief to "veto" any government action on public lands.[111] The heft of the rhetorical move is belied by O'Connor's clarity that the Court was challenging neither the sincerity of the Native religious claims, nor the adverse effects on their practice. But as Justice Brennan's strongly worded dissent avers, the framing of the facts in terms of *Roy* is sufficient to disregard the reach of the religious claims without disregarding their sincerity.[112]

Returning now to the legal issue in *Navajo Nation*: the Ninth Circuit majority saw *Lyng* as "on point," both by a parallel set of facts—Native claims to sacred sites on public lands admitting of multiple uses—and by what it asserted to be a congruent legal issue, the question of what triggers an unlawful burden on religious exercise given those facts. But it seems to me that the rule by which *Lyng*'s analogous facts are assimilated derived from a very problematic precedent in *Roy*. The controlling analogy that these are both Native American cases trumps what common sense would find patently obvious: that the claims of one Native American man that a social security number will rob his daughter of her spirit—and apparently the only Native person to have come forward with this issue—carries the same force as concerns of three entire Native communities about the destruction of a sacred precinct where the cosmos is ritually renewed, where visions are sought, and where medicines are gathered, in order to construct a "marginally useful" road.[113] Applying the precedent of *Roy* to *Lyng* leads to what Justice Brennan called the "cruelly surreal result" that "governmental action that will virtually destroy a religion is nevertheless deemed not to 'burden' that religion."[114]

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111 Importantly, the slippery slope argument fails to account for the fact that a case that passes the threshold of a "substantial burden" under RFRA (or for that matter under pre-*Smith* First Amendment jurisprudence) is also subject to the balancing tests of governmental compelling interest and least restrictive means. As the dissent points out, there is no irrational slippery slope here to worry about. *Roy*, 476 U.S. at 724 (Brennan, J., dissenting).

112 *Lyng*, 485 U.S. at 447 (Brennan, J., dissenting).

113 *Id.* at 469–70 (Brennan, J., dissenting) (disagreeing that an "internal" governmental practice at issue in *Roy* was comparable to land use decisions, with "substantial external effects," but stopping short of differentiating *Roy* in these starker terms).

114 *Id.* at 476. One commentator contends that the *Lyng* decision not only unfairly burdens Native religious traditions, but it also establishes a jurisprudence that "discriminates against American Indian religious practitioners." Because its precedent focuses "on the form of impact the challenged government action creates, rather than the impairment of religious exercise," *Lyng* effectively means that "American Indians are not protected from

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WILSON V. BLOCK, 708 F.2D 735 (D.C. CIR. 1983)

"Cruelly surreal" aptly describes the result in *Navajo Nation*, where findings of fact establish the pivotal place of San Francisco Peaks for so many practitioners of so many tribes and nonetheless approve of spraying treated sewage on the mountain to facilitate recreational skiing for arguably fewer individuals. This result can work, we learn in *Navajo Nation*, in no small part because of the history of litigation, and in particular the 1983 rejection by the D.C. Circuit, in *Wilson v. Block*, of the tribes' challenge to an expansion of the ski area on First Amendment grounds:

> Although the court noted that the proposed upgrades would cause the Indians "spiritual disquiet," the upgrades did not impose a sufficient burden on the exercise of their religion: "Many government actions may offend religious believers, and may cast doubt upon the veracity of religious beliefs, but unless such actions penalize faith, they do not burden religion."[115]

In referencing this earlier case, the Ninth Circuit hastens to affirm the District Court's finding in *Navajo Nation* that the "tribes have continued to conduct religious activities on the Peaks ever since" the loss in this earlier litigation.[116]

The cited terminology of "spiritual disquiet" is not coincidental to the Ninth Circuit majority's reasoning in *Navajo Nation*. It attempts to contain the damage implied by desecration of the mountain to the diminishment of personal spiritual fulfillment on the mountain, and suggests that Native American peoples' protean "spirituality" simply cannot be fully accommodated on public lands in a pluralistic nation.[117] The shaping force of reducing facts delineating complex contours of religious exercise by six distinct Native peoples to a watered down form of nature religion known as Native spirituality appears as well in a parenthetical observation in the decision that is hardly peripheral to its reasoning.

To inform its contention that Native claims to "spiritual fulfillment" would have no stopping place, the Ninth Circuit majority noted that the Coconino National Forest in question involves "approximately a dozen" mountains sacred to various tribes, as well as other landscapes "such as canyons and canyon systems, rivers and river drainages, lakes, discrete mesas and buttes, rock formations, shrines, gathering areas, pilgrimage routes and prehistoric sites" and that "new sacred areas are continuously being recognized by the Plaintiffs."[118] The District Court judge had observed that the White Mountain Apaches, one of the plaintiff tribes, had made snow at Sunrise, a ski area they operate on a mountain on their reservation, with water from a lake that includes discharged treated wastewater.[119] He noted that Apaches held this portion of the White Mountain reservation to be sacred. The judge further found that Sunrise and the Snowbowl were the two largest of Arizona's ski areas, that the Apaches were expanding their own snowmaking operations at Sunrise, and that the Apache plaintiffs "would prefer complete removal" of the

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government actions that essentially destroy entire religious traditions." Scott Hardt, Comment, *The Sacred Public Lands: Improper Line Drawing in the Supreme Court's Free Exercise Analysis*, 60 UNIVERSITY OF COLORADO LAW REVIEW 601, 657 (1989), *cited in* DAVID GETCHES, CHARLES WILKINSON & ROBERT WILLIAMS, JR, CASES AND MATERIALS ON FEDERAL INDIAN LAW 748 (5th ed. 2005).

115 *Navajo Nation*, 535 F.3d at 1065 (quoting *Wilson v. Block*, 708 F.2d at 741–42).

116 *Id.* The result in *Wilson* guided the processes of environmental and historic preservation review that may have foreclosed more robust consultations with the tribes at earlier stages in the process and which produced the findings of fact, but that provides the "back story" so important to the outcome of the case.

117 *Navajo Nation*, 535 F.3d at 1063–64.

118 *Id.* at 1066 n.7 (citing *Navajo Nation*, 408 F. Supp. 2d at 897–98).

119 *Navajo Nation*, 408 F. Supp. 2d at 890.

Snowbowl.[120] Thus conflating all mountains as sacred to the White Mountain Apaches, and suggesting that some claims could be opportunistic or disingenuous, the District Court could dispute the reach of religious exercise burdened by the Forest Service's action on the San Francisco Peaks.

This observation, especially combined with the explicit recognition that Native religious practices on the mountain survived the fallout from the failed challenge in *Wilson v. Block*, served to frame the religious freedom concerns about the snowmaking with treated sewage effluent in *Navajo Nation* as exaggerated.

CONCLUSION

The tribes filed a certiorari petition for Supreme Court review of the case, citing the discrepancy between the Ninth Circuit's approach to the interpretation of "substantial burden" and that of the Tenth Circuit, which was invoked by a federal District Court in Oklahoma to affirm RFRA protections for a Comanche sacred land claim.[121] But the Supreme Court denied the petition and has yet to weigh in on this discrepancy.[122] I have argued that the Ninth Circuit interpretation of "substantial burden" is centrally equipped, not just informed, by its transmutation of accepted factual findings about distinctive religious exercise involving the San Francisco Peaks by the six plaintiff tribes into matters of diminished—which is to say diminishable—"spiritual fulfillment." "Under Supreme Court precedent," the decision reads, making particular reference to *Lyng*, "government action that diminishes subjective spiritual fulfillment does not substantially burden religion."[123]

The Ninth Circuit's narrow interpretation of "substantial burden" is equipped by this shift from "religion" to "spirituality" in two respects and in each of these respects, the court errs. First, spirituality is used ostensibly as a synonym for religion, even a "natural" synonym to encompass everything about Native American religions that does not easily fit the category of religion. I have shown, however, that spirituality is no neutral synonym for religion: it emerges in plain late twentieth century parlance as a conscious departure from "religion." Nor is "Native spirituality" a natural construction; it is made in relation to the development of spirituality and a spirituality industry and deeply informed by an American cultural history of romanticizing the inherent spirituality of the noble savage.

Second, the court not only uses spirituality as a lens for viewing the facts of Native religions that are difficult to understand in conventional religious terms; it draws on that lens because the authoritative text by which the court chooses to assimilate the facts pertaining to the San Francisco Peaks, *Lyng v. Northwest Cemetery Protective Association*, describes the bundle of claimed religious obligations in terms of "spiritual fulfillment," to finesse the suturing of *Bowen v. Roy* in a *Smith*-era effort by the Supreme Court's conservative majority to shrink the reach of religious free exercise protection where it conflicts with government and market interests. Recall that the *Lyng* claimants were charged with trying to effect the imposition of a "religious servitude" on public lands, a claim that hardly reflected the reasonable position of the Native claimants there, or in *Navajo Nation*.

The procedural logic of American law thus ensconces as substantive, and controlling, interpretations of Native religions that are cooked up under very different legal issues than the ones in play

120 *Id.*

121 Comanche Nation v. United States, CIV-08-849-D, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008). *See supra* note 23 (discussing the alternative interpretations of substantial burden).

122 Navajo Nation v. United States Forest Service, 129 S. Ct. 2763 (2009).

123 *Navajo Nation*, 535 F.3d at 1070.

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under RFRA. In *Navajo Nation*, however, we also see just how authoritative the category of spirituality has become as a frame for the courts' analysis of Native American religious freedom; so much so, that it authorizes the spraying of treated sewage on a sacred mountain to make artificial snow for recreational skiing. Equipped by broader trends of American religion from the religiosity of "dwelling" to the religiosity of "seeking," and informed by a romanticized discourse of pure, "everything is sacred," Native American spirituality, the Ninth Circuit could believe its own conflation of the highly specific, highly particular religious claims of Navajo, Hopi, White Mountain Apache, Yavapai Apache, Havasupai, and Hualapai into a shared ethos of nature spirituality. Along the way, this construal of Native American religions handily contains the implications of those claims on public lands by so interiorizing, privatizing, and aestheticizing them into spiritual fulfillment that is diminishable without being protected under the freedom of "religion."

One could argue, as has Winnifred Fallers Sullivan, that there is a basic "impossibility of religious freedom" that afflicts constitutional and statutory protections of "religious freedom" qua religion, and that applies as consistently to the RFRA interpretation of the Ninth Circuit in *Navajo Nation* as it would to jurisprudence on either the establishment or free exercise ends.[124] No doubt the decision in *Navajo Nation* is caught up in these larger discourse issues. Still, as a scholar of Native American religions, I am quite confident that there are indeed distinctive contours of indigenous religions, both substantively, in terms of their basis in sacred lands, and legally, in terms of the distinctive political status of federally recognized tribes such as the six litigants in *Navajo Nation*. As much as I agree in general with Sullivan's appraisal of the problems accompanying minority religious communities' claims to justice under the discourse of religious freedom, the particularities of Native American religious claims such as those brought forward regarding the San Francisco Peaks embolden me to think that courts can make reasonable distinctions between claims of individual belief and interior piety and the claims to collective duties and practices pertaining to Native American tribes as collectivities. As I discussed above, lower courts had made such reasonable distinctions in *United States v. Corrow*, and *Attakai v. United States*,[125] and certainly the history of First Amendment jurisprudence, despite Justice Scalia's declaiming the practice of courts making such distinctions as an "excessive entanglement" in violation of the Establishment Clause, is rife with examples of courts making reasonable distinctions of the sort. Indeed, if religious freedoms, constitutional or statutory, are to apply equally to Native American communities, courts must engage in such distinctions, or we will continue to have results that discriminate against Native American religious freedom claims.

In light of the Supreme Court's denial of certiorari in *Navajo Nation*, a number of other efforts have been brought forward by the Native communities. The Hopi brought a suit against the City of Flagstaff on a public-nuisance claim,[126] but there has been little as yet gained thereby. Tribes have registered formal complaints in a variety of international law forums.[127] Indeed the 2007 United

124 WINNIFRED FALLERS SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM (2005); *see also* Sullivan, *Religion Naturalized: The New Establishment*, *in* AFTER PLURALISM: REIMAGINING RELIGIOUS ENGAGEMENT (2009).

125 *See supra* note 92 and accompanying text.

126 Hopi Tribe v. City of Flagstaff, 1 CA-CV 12-0370, 2013 WL 1789859 (Ariz. Ct. App. Apr. 25, 2013), review denied (Jan. 7, 2014).

127 The Navajo Nation registered concerns about the Forest Service's approval of snowmaking on San Francisco Peaks in the 2010 Universal Periodic Review Process. In 2011, the Navajo Human Rights Commission sought urgent action against the U.S. Forest Service under the Committee on the Elimination of Racial Discrimination. Also in 2011, a report by the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, James Anaya, registered Navajo, Hopi, and other tribal complaints and noted that the United States did not respond to his concerns. *Report by the Special Rapporteur*

Nations Declaration of the Rights of Indigenous Peoples, which the United States endorsed with certain reservations in 2010, has breathed new life into sacred site claims insofar as it recognizes indigenous peoples' rights to culture, religion, and sites associated with religion and culture.[128]

Despite these efforts to garner international law attention, the Snowbowl ski resort has proceeded to make artificial snow with treated wastewater from Flagstaff, and as of July 24, 2014, was seeking a long term contract with the City of Flagstaff.[129] Absent some specific administrative or legislative fix in response,[130] the final headline in the San Francisco Peaks case, in my view, proclaims not only the full force of the discourse of spirituality but, more ominously, its implication: the erosion of any meaningful American commitment to religious freedom to Native peoples. Judge Fletcher drew a line in the sand with the Ninth Circuit's three-judge panel ruling:

> The Court in *Lyng* denied the Free Exercise claim in part because it could not see a stopping place. We uphold the RFRA claim in this case in part because otherwise we cannot see a starting place. If Appellants do not have a valid RFRA claim in this case, we are unable to see how any Native American plaintiff can ever have a successful RFRA claim based on beliefs and practices tied to land that they hold sacred.[131]

As we have seen, after rehearing en banc, the Ninth Circuit overruled that three-judge panel ruling, and Judge Fletcher's line-in-the-sand remark disappeared from the dissent. Although this particular case is resolved, an ember of possibility for RFRA protection of Native American sacred sites has begun to glow again, oxygenated by the Supreme Court's recent holding in *Burwell v. Hobby Lobby, Inc.* that RFRA in no uncertain terms extends beyond the limits of First Amendment free exercise jurisprudence prior to *Smith*,[132] and that, as Judge Fletcher's dissent averred in *Navajo Nation*, the holding in *Lyng* need not control substantial burden analyses in future cases.[133] In any event, following *Hobby Lobby* judicial considerations of sacred land claims under RFRA ought to remember that while many contemporary Americans profess, with apparent pride, that

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on the Rights of Indigenous Peoples, Report of Human Rights Council, 18th Sess., Aug. 22, 2011, U.N. Doc. A/HRC/18/35/Add.1; UN GAOR, 65th Sess., (Sept. 14, 2011). In 2013, The Navajo Nation registered a complaint with the Organization of American States' Inter-American Commission on Human Rights. Resolution of the Navajo Nation Human Rights Commission Approving and Recommending that the Navajo Nation Register a Complaint of Navajo Human Rights Violation with the Organization of American States Inter-American Commission on Human Rights, NNHRCMAR-27-13 (March 2013).

128 Article 11 recognizes indigenous peoples' rights "to practise and revitalize their cultural traditions and customs." Article 12 recognizes their rights "to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites." Article 25 recognizes indigenous peoples "right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands . . . and to uphold their responsibilities to future generations in this regard." *Declaration of the Rights of Indigenous Peoples*, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007). For an overview of the broader field of indigenous rights in international law, see S. James Anaya, Indigenous Peoples in International Law (2d ed. 2004).

129 Suzanne Adams-Ockrassa, *Snowbowl Seeking 20 Year Contract with Flagstaff*, Arizona Daily Sun, July 24, 2014.

130 Efforts towards a specific legislative fix have as yet come to no avail, although proposals to amend the American Indian Religious Freedom Act to create a cause of action for sacred sites are discussed. *See, e.g.*, Alex Tallchief Skibine, *Towards a Balanced Approach for the Protection of Native American Sacred Sites*, 17 Michigan Journal Race & Law 269, 288 (2012).

131 *Navajo Nation*, 479 F.3d at 1048 (panel decision).

132 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2756 (2014); *see also* Holt v. Hobbs, 135 S. Ct. 853, 859–60 (2015).

133 *Navajo Nation*, 535 F.3d at 1088–90 (Fletcher, J., dissenting).

they are "spiritual, not religious," most such sacred land claims, at least those made by Native nations, are better understood as "religious, not spiritual."

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