NATIVE AMERICANS AND FREE EXERCISE CLAIMS:
A PATTERN OF INCONSISTENT APPLICATION OF FIRST AMENDMENT RIGHTS AND INSUFFICIENT LEGISLATION FOR NATIVES SEEKING FREEDOM IN RELIGIOUS PRACTICE

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ABSTRACT

This article re-addresses the ongoing issue of unfair application of First Amendment Free Exercise rights for Native Americans. Though this topic has been discussed in years past, particularly following the Smith decision, acknowledgement of the Court's current and ongoing pattern of dismissing free exercise cases brought by Natives has yet to bear a working solution that would allow for true free exercise of religion for Natives, as well as others practicing minority religions. This article addresses the Free Exercise Clause under the Constitution, legislation addressing free exercise issues and Natives in particular, and landmark cases that depict the free exercise hurdles felt by Natives. Furthermore, this article proposes that action needs to be taken now to truly address this problem, and education is the first step towards remedying the ongoing misapplication of First Amendment free-exercise jurisprudence.

INTRODUCTION

The Supreme Court has displayed "a strong pattern of cultural bias and religious insensitivity" in its free exercise case opinions involving Native Americans.[1] Over the years, a trend has emerged in which Native free exercise cases are continuously struck down in the courts.[2] This pattern of failing free-exercise cases brought by Native Americans may be linked to a subconscious misunderstanding and underappreciation by Westerners of Native practices that are different from our own. In contrast to the idea of separating church and state, "Native American worship cannot be distinguished from the social, political, and cultural aspects of Indian lifestyle."[3] The ongoing gap between Western American society and Native American societies often stems from a lack of both understanding and empathy towards those who may be

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[1] Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of Smith*, 102 NW. U. L. REV. 1189, 1196 (2008). The Court has applied the traditional standard of review for free exercise cases to several "Western-style religions," while refusing to extend this doctrine to Native American Indians bringing similar claims. Joshua D. Rievman, *Judicial Scrutiny of Native American Free Exercise Rights: Lyng and the Decline of the Yoder Doctrine*, 17 B.C. ENVTL. AFF. L. REV. 169 (1989). *See also,* Appendix, Table 1: Free Exercise Cases of Majority and Minority Religions in Three Circuits, *id.* at 1274.

[2] George Linge, *Ensuring the Full Freedom of Religion on Public Lands: Devils Tower and the Protection of Indian Sacred Sites*, 27 B.C. ENVTL. AFF. L. REV. 307, 314 (2000) (most claims brought by Native Americans under the First Amendment have been evaluated solely on the "strictest, most limiting terms.").

[3] Rievman, *supra* note 1, at 172 (The inextricable link between Native religious, cultural, social, and political realms is often misunderstood because Americans typically strive to separate religion from the political and social realm of society. However, unlike Western American society, Native claimants experiencing free exercise burdens and hurdles to their religious practices "often assert that the loss of spiritual life will result in the destruction of the tribe's very social fabric.").

different.[4] This lack of understanding has led to injustice as the Free Exercise Clause has continued to be applied inconsistently, leading to little or no remedies for Natives raising free exercise claims under the First Amendment.[5]

This article sets out to question the past and current approach the United States takes to free exercise claims brought by Native Americans, and further proposes a working solution to the dilemma of Native Americans' inability to exercise their constitutional religious rights. Part I will discuss a brief history of the relationship between early Christian/Westernized Americans and Natives, and how the diverse mindsets between Christianized Americans and Natives was the beginning of inconsistent application of First Amendment rights. Part II discusses the legal precedent for Native American free exercise claims. Legal precedent is found in both constitutional and statutory grounds, and Part II distinguishes between addressing religious rights under the First Amendment of the Constitution and addressing religious rights under specific statutes that have been enacted to address free exercise issues. Part III examines three important and distinct cases that depict the various constitutional and statutory arguments addressing free exercise issues brought by Native Americans in the Supreme Court. This section also highlights the pattern illustrated by these cases, showing that free exercise claims brought by Native Americans are often destined to fail in Court. Part IV discusses the ways in which statutory free exercise claims have generally failed for Native Americans. This section further scrutinizes some specific pieces of legislation that were enacted to remedy Native American free exercise claims that would otherwise fail under the First Amendment of the Constitution. However, the statutory

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[4] Anastasia P. Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 ARIZ. L. REV. 1291 (1996) (Traditional American "laws and culture implicitly reflect Western values, which in many ways are diametrically opposed to the values held by Native Americans, particularly as they relate to nature and the environment. This clash has led to uninformed and…even hostile attitudes toward Native American religions….").

[5] *See generally*, Luralene D. Tapahe, *After the Religious Freedom Restoration Act: Still No Equal Protection for First American Worshipers*, 24 N.M. L. REV. 331, 338 (1994) (An example of this misunderstanding lies in the way Westerners and Natives view the land; where non-Indians view lands as mostly commodities, Natives believe that the lands are the essence of Native life, religion, and cultural identity). *See generally*, Shawna Lee, *Government Managed Shrines: Protection of Native American Sacred Site Worship*, 35 VAL. U. L. REV. 265, 306 (2000) (native sacred sites and religious practices continue to face threats from tourism and government management of federal lands).

remedies currently in place seem to serve little to no purpose because there is no real enforcement mechanism of these statutes; thus, Natives seem to be left with little to no options for enforcing their rights to free exercise of religion.

The conclusion considers that perhaps "a more significant concern is whether the omission of Indian religious freedom cases as an important topic of discussion…is indicative of a broader indifference, or even hostility, toward Indian religious rights."[6] If so, how might Americans break from the current policies and implement a new policy that works to alleviate discrimination while protecting Native religious rights and needs in the United States. Several theories currently exist for addressing and correcting the public policies that have led to the halt of free exercise rights for Natives in the United States. This note proposes that education is the first realistic step in working to correct widespread ignorance of Native customs and religious beliefs; better education will lead to greater empathy, mindfulness, and understanding of other cultures. Education is a venue that will increase the opportunity for more widespread acceptance of others, thus helping extend religious free exercise rights to those religions that are not mainstream Western religions.

I. DOMINANT, MAJORITARIAN RELIGIONS AND NATIVE AMERICAN RELIGIONS: A BRIEF HISTORY OF THE RELIGIOUS DIFFERENCES BETWEEN EARLY CHRISTIANIZED AMERICANS AND NATIVES

It is important to first consider the historical relationship between the United States and Native Americans in order to better grasp the ideological differences in the Western and Native approaches to religion. The different approaches to and interpretations of religion between Western, Christianized Americans and Native Indians has led to disparity in the First

[6] Allison M. Dussias, *Friend, Foe, Frenemy: The United States and American Indian Religious Freedom*, 90 DENV. U. L. REV. 347, 350 (2012).

Amendment's interpretation. Often, prejudice against those who are different is at the root of political and social behaviors, including lawmaking.[7] The general public's understanding of "religion" is often drawn from subconscious understandings.[8] To form an opinion about Native religions,[9] Westerners often draw parallels from their own beliefs and religions to make sense of the differences.[10] In doing so, "if the equivalency seems unwarranted because of the bizarre nature of the group's theology, [Westerners] might well prove unwilling to accept that the other group is a legitimate 'religion' in the same way as [their] own."[11] This misunderstanding is prevalent in modern U.S. society between Western and Native religions.

Americans have a long history of misunderstanding Native religions because Native religions are different from Western religions.[12] For example, one fundamental difference between Western and Native religions is the difference between their sacred sites.[13] Where Western religions use churches, buildings and structures to define holy sites, whereas Native religions often use the land and nature itself to define holy sites.[14] Native Americans also tend to view religion as synonymous with culture, politics, and social life, and the spiritual is not

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7 JOSEPH F. BYRNES, THE PSYCHOLOGY OF RELIGION 151 (1984). *See also* Winslow, *supra* note 4, at 1307 ("[American] laws implicitly reflect the values of mainstream religions, most notably Christianity.").

8 *See* BYRNES, *supra* note 7, at 158 ("[R]eligious sects and denominations frequently represent the characteristic cultural controls which operate in the construct systems of a group of people"); *See also*, Krotoszynski, Jr., *supra* note 1, at 1235 (Even those who may not accept or practice a dominant Western religion in the United States may still be influenced by the traditions of religious Westerners (for example, Christmas) and could "undergo cognitive dissonance from exposure to a minority religion's practice or belief.").

9 Joel Brady, *"Land Is Itself A Sacred, Living Being": Native American Sacred Site Protection on Federal Public Lands Amidst the Shadows of Bear Lodge*, 24 AM. INDIAN L. REV. 153, 157 (2000) (There is no one Native American religion; there are several Tribes in the United States and there is a "wide variance in specific types of Native American religious beliefs.").

10 Krotoszynski, *supra* note 1, at 1235.

11 *Id.*

12 Rievman, *supra* note 1, at 171-72.

13 Tapahe, *supra* note 5, at 338.

14 Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 461 (1988) (Brennan, J., dissenting) ("land is itself a sacred living being."); Rievman, *supra* note 1, at 172 (attitudes towards the environment are drastically different between Natives and say, Christians); Tapahe, *supra* note 5, at 337 (prayers are also directed towards specific natural sites such as mountains, lakes, and valleys; these natural places are viewed as embodying holy spirits and beings); Winslow, *supra* note 4, at 1298 ("Christian teachings discuss the environment as a commodity to be used and controlled, whereas Native Americans see the world as a place of gods, spirits, and living beings." Thus, trees, rocks, mountains, and the like may be considered holy sites to Natives.).

necessarily separated from the secular.[15] Likewise, Native American culture is often community based, whereas Western culture is highly individualized.[16]

American history denotes Native Americans as "wards" of the federal government;[17] thereby affording Native citizens the same constitutional protections as other U.S. citizens.[18] Religious freedom, as embodied in the First Amendment, is a fundamental Constitutional right that is a crucial piece of United States history.[19] Why, then, does it seem that over the course of time Native Americans have not been able to enjoy the rights provided for in the First Amendment?[20] Do the statutes addressing Native religions work to remedy the Court's inconsistent application of the free exercise claims under the Constitution? In order to discuss how Native Americans have been denied inherent religious rights, it is important to understand both the First Amendment, as well as several statutory measures that have been put into place to address Native American free exercise of religion.

II. LEGAL PRECEDENT: CONSTITUTIONAL AND STATUTORY LAWS ADDRESSING NATIVE AMERICAN FREE EXERCISE

A. The First Amendment to the United States Constitution: A Brief Explanation of Fundamental Rights to Religious Freedom

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15 Winslow, *supra* note 4, at 1295-96 (native religions also do not necessarily follow monotheism like Western religions do).

16 *Id.* at 1299.

17 Kathryn C. Wyatt, *The Supreme Court, Lyng, and the Lone Wolf Principle*, 65 CHI.-KENT L. REV. 623, 632 (1989) (The Marshall Trilogy cases "evidence a jurisprudential evolution of the notion that Native Americans possess a special relationship with the federal government, a status likened to that of a ward to a guardian…."). *See generally*, Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975); Wyatt, *supra* note 17, at 632 (Early Supreme Court cases also exemplify the "transformation of the guardian-ward relationship from one based on the duty to protect to a relationship which served in effect as a virtually unlimited source of power over Native Americans."); *Id.* at 654 (Some have suggested that this power imbalance "forms a fundamentally flawed basis for the relationship between Native Americans and the United States government," and that the United States government has no accountability to Native Indians.).

18 Tapahe, *supra* note 5, at 331-32.

19 Lee, *supra* note 5, at 269. European settlers came to the New World to escape religious persecution and worship as they wished. *Id.* at 270. *See generally*, Freedom From Religion Found., Inc. v. Thompson, 920 F. Supp. 969, 972 (W.D. Wis. 1996).

20 Tapahe, *supra* note 5, at 331-32.

The First Amendment to the United States Constitution reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…."[21] This Amendment allows individuals to exercise their right to choose and practice a religion, or none at all.[22] Generally, the First Amendment is often referred to by its two clauses: the Free Exercise Clause, and the Establishment Clause. For purposes of this note, the Free Exercise Clause of the First Amendment will be the only clause discussed here as relating to Natives' ability to freely exercise Native religions in the United States.[23]

1. The Free Exercise Clause of the First Amendment: A Synopsis of the Free Exercise Test Today

The Free Exercise Clause generally prohibits the government from interfering with religious practices.[24] However, "barring a finding that the government affirmatively 'coerced or penalized' one particular religious group because of that group's beliefs, government interference with the free exercise of religion is permissible."[25] Justice Scalia noted that the "'exercise of religion' often involves not only belief and profession but the performance (or abstention from) physical acts," including but not limited to gathering for a worship service, abstaining from food or activities, or participating in missionary or community work.[26]

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21 U.S. CONST. amend. I.

22 Wallace v. Jaffree, 472 U.S. 38, 53 (1985). *See also* Lee, *supra* note 5, at 272; Lydia T. Grimm, *Sacred Lands and the Establishment Clause: Indian Religious Practices on Federal Lands*, 12 NAT. RESOURCES & ENV'T 19, 21 (1997) (The Government may acculturate to religious practices to "prevent the free exercise violation, but it must be something less than the establishment of religion.").

23 The focus of this note is not on the Establishment Clause component of the First Amendment; however, the Establishment Clause is worth generally noting as it plays a significant role in First Amendment religious rights. Generally, government actions do not offend the Establishment Clause if the *Lemon* test is satisfied, where (1) the government action has a secular purpose; (2) the government action does not have the principal effect of advancing or inhibiting religion; and (3) the government action does not foster an excessive entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

24 Grimm, *supra* note 22, at 19. *See also*, Gardner, *supra* note 14, at 164.

25 *See* Grimm, *supra* note 22, at 19. *See also* Ann M. Hooker, *American Indian Sacred Sites on Federal Public Lands: Resolving Conflicts Between Religious Use and Multiple Use at El Malpais National Monument*, 19 AM. INDIAN L. REV. 133, 138 n.42 (1994).

26 Employ't Div. v. Smith, 494 U.S. 872, 876 (1990).

Critics have commented on the current Free Exercise Clause[27] test due to its inconsistency with the Court's past free exercise analysis. Prior to the *Employment Division v. Smith*[28] decision in 1990 the Supreme Court applied a strict scrutiny analysis derived from two significant cases.[29]

The first significant case is *Sherbert v. Verner*,[30] where the Court held that a Seventh-Day Adventist was eligible for unemployment benefits in light of his refusal to work on Saturdays for religious reasons.[31] The Court determined that "[a]lthough a state has a legitimate need and the authority to limit unemployment benefits to those who make themselves available for work, it may not enforce the limitation when it conflicts with sincere religious practices."[32] Under the *Sherbert* test, a claimant must show that (1) his conduct is motivated by a sincere religious belief, and (2) the government has imposed a substantial burden on his religiously motivated conduct.[33] The only way the government prevails under this test is if it can establish that its actions were in furtherance of a compelling government interest, and that those actions represent the least restrictive means of achieving that interest.[34]

The second significant case is *Wisconsin v. Yoder*,[35] where the U.S. Supreme Court invalidated a state statute requiring compulsory school education for children until age sixteen.[36] Decided a few years after *Sherbert*, the *Yoder* Court modified the *Sherbert* test to include the

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[27] For a detailed review of the Free Exercise Clause's history in the Supreme Court dating back to 1879, *see generally* Krotoszynski, *supra* note 1, at 1199-207.
[28] *Smith*, 494 U.S. 872.
[29] Tapahe, *supra* note 5, at 333.
[30] 374 U.S. 398, 409–10 (1963).
[31] *Id.* (A member of the Seventh Day Adventist Church was fired for refusing to work Saturdays, which were her Sabbath. She applied for and was denied unemployment benefits under South Carolina's Unemployment Compensation Act.).
[32] Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1411 (1990). *See Sherbert*, 374 U.S. at 409–10.
[33] *Sherbert*, 374 U.S. at 406.
[34] *Id.*
[35] 406 U.S. 205 (1972).
[36] *Id.* (A group of Amish parents brought a free exercise claim challenging the law because their religion required home schooling of children ages fourteen to sixteen).

notion that government actions violate the Free Exercise Clause if those actions infringe on hybrid rights, meaning rights coupled with other constitutional rights.[37] In so doing, the Court found that the values taught in modern compulsory school education conflicted with central Amish values when it held that Amish values offset the state's interest in compulsory school education.[38]

In 1990, the *Sherbert* and *Yoder* tests were overruled and replaced with a new test for free exercise claims: strict scrutiny is only applicable to government actions that directly target a particular religion or religious practice.[39] Rather than requiring the government to establish a compelling interest by use of the least restrictive means of achieving that interest, the Court now requires the government to establish only a rational basis for its actions, which places an incidental burden on individuals' rights to free exercise of religion.[40] Justice Scalia pointed out that pre-*Smith*, the Court had "abstained from applying the *Sherbert* test at all," and further emphasized that the *Sherbert* test "was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct."[41] The Court ultimately concluded that "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'"[42] Today, the *Smith* test is used analyze state and local free exercise claims, including those brought by Native Americans.

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[37] An example of "hybrid rights" would be parental rights. *See* Michael E. Lechliter, *The Free Exercise of Religion and Public Schools: The Implications of Hybrid Rights on the Religious Upbringing of Children*, 103 MICH. L. REV. 2209 (2005).
[38] *See Yoder*, 406 U.S. at 205.
[39] *Smith,* 494 U.S. at 872-73.
[40] *Id.* at 872.
[41] *Id.*
[42] *Id.* at 885 (quoting *Lyng,* 485 U.S. at 451).

2. Legislative Remedies for Native American Free Exercise: A Moral Compensation for Denying Natives a Strict Scrutiny Analysis under the First Amendment

The Free Exercise test established in *Smith* imposed a virtually impossible standard for Native Americans to meet in bringing free exercise claims, because the government easily satisfies the standard for establishing a rational basis for its conduct even if that conduct burdens some individuals' free exercise of religion.[43] However, even prior to the *Smith* decision there was a pattern of denying the free exercise to minority religions, including Native American religious practices.[44] This pattern has significantly impacted the legal treatment of Native American religions.[45] To compensate for past and ongoing actions hindering Native Americans religious freedom, the government has passed a number of statutory remedies addressing the issue.

3. The American Indian Religious Freedom Act (AIRFA)

In an effort to protect Native American religious rights, Congress passed AIRFA on August 11, 1978.[46] The statute provided for the accommodation of sacred sites on federal lands.[47] AIRFA's preamble states clearly that it is designed to (1) recognize the importance of Native religions to the identity of Native Americans, and (2) prevent any religious infringements that could result from insensitivity in enforcing federal policies and regulations.[48] Ultimately, the statute was designed to protect Native American rights to sacred land and sites, while also protecting Natives from insensitive interference with the lands. [49]

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[43] *See generally Smith*, 494 U.S. at 901–02 (O'Connor, J., concurring).

[44] *See Lyng*, 485 U.S. 439; Bowen v. Roy, 476 U.S. 693 (1986). *See also* Krotoszynski, *supra* note 1, app at 1274 (Table 1: Free Exercise Cases of Majority and Minority Religions in Three Circuits); Lee, *supra* note 5, at 278 ("The inability of Native Americans to rely on the First Amendment for Constitutional protection of their religious practices on federal land is documented through the judicial treatment of Native American claims of Free Exercise Clause violations.").

[45] Lee, *supra* note 5, at 278.

[46] 42 USCS § 1996 (West 2014).

[47] *Id. See also* Lee, *supra* note 5, at 286-87.

[48] American Indian Religious Freedom Act of 1978, Pub. L. No. 95-341, 92 Stat. 469 (1978). *See also*, Linge, *supra* note 2, at 320.

[49] *See generally*, Linge, *supra* note 2, at 320.

Despite the intentions behind AIRFA, the statute has been widely criticized as being highly ineffective.[50] The three main issues with AIRFA that have proven problematic are "(1) the Act does not create legal rights of action or allow for substantive relief arising from agency violations; (2) the Act does not prohibit agencies from making choices that could harm sacred sites or religious practices; and (3) the Act is dependent on federal administrative good will to be implemented."[51] No real enforcement mechanism for AIRFA exists, rendering the legislation useless despite its warm intentions.[52] In light of the AIRFA's shortcomings, Congress has since continued to work towards providing sufficient legislation for the protection of Native Americans' free exercise of religion.[53]

4. The Religious Freedom Restoration Act (RFRA)

RFRA[54] was enacted in 1993, after the test for free exercise cases shifted from strict scrutiny to rational basis in *Smith*.[55] The purpose of RFRA was (1) **"**to restore the compelling interest test" of *Sherbert* and *Yoder* and "to guarantee its application in all cases where free exercise of religion is substantially burdened[56], and (2) to provide a claim or defense to persons

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[50] Grimm, *supra* note 22, at 20. *See also*, Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983).

[51] Lee, *supra* note 5, at 287. *See also Lyng*, 485 U.S. 439; Grimm, *supra* note 22, at 20; Michael J. Simpson, *Accommodating Indian Religions: The Proposed 1993 Amendment to the American Indian Religious Freedom Act*, 54 MONT. L. REV. 19, 20 (1993); Wilson, *supra* note 49.

[52] Linge, *supra* note 2, at 320 (since AIRFA has no enforcement mechanism, Native Americans with free exercise issues have continued to resort to bringing their claims under the First Amendment, despite the Court's continued pattern of rejecting these types of cases). *See also*, Hooker, *supra* note 25, at 133.

[53] *See generally, e.g.*, The Religious Freedom Restoration Act (RFRA), 42 U.S.C.A. §§ 2000bb-2000bb-4 (West 2014).

[54] 42 U.S.C.A. §§ 2000bb-2000bb-4 (West 2014).

[55] *See* Morgan F. Johnson, *Heaven Help Us: The Religious Land Use and Institutionalized Persons Act's Prisoners Provisions in the Aftermath of the Supreme Court's Decision in Cutter v. Wilkinson*, 14 AM. U. J. GENDER SOC. POL'Y & L. 585, 590-91 (2006).

[56] The term "substantially burdened" in RFRA remains undefined. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1068 (9th Cir. 2008). However, the rest of the legislation makes it pretty clear that the statute is steering away from the Court in *Smith.* Dussias, *supra* note 6, at 385. *See also*, Whitney M. Morgan, *Navajo Nation v. United States Forest Service: Reading Native Americans Out of RFRAa*, 30 PUB. LAND & RESOURCES L. REV. 57, 60-1 (2009).

> Under RFRA, a 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*). Any burden imposed on the exercise of religion short of that described by *Sherbert* and *Yoder* is not a 'substantial burden' within the meaning of RFRA, and does not require the application of the compelling interest test set forth in those two cases. Navajo Nation, 535 F.3d at 1069-70.

whose religious exercise is substantially burdened by government."[57] RFRA was the product of Congressional reaction to backlash received after the change in the traditional free exercise analysis in *Smith*. [58]RFRA was the first attempt at reverting back to a higher standard of strict scrutiny review for religious free exercise claims.[59] To bring a claim under RFRA, the claimant must use the prior *Sherbert* standard to establish that (1) his or her conduct is motivated by a sincere religious belief, and (2) that the government has imposed a substantial burden on his or her religiously motivated conduct.[60] The only way the government may prevail in a claim invoking RFRA is if the government can establish their actions were in furtherance of a compelling government interest that represents the least restrictive means of achieving that interest.[61]

Though *Boerne v. Flores* overruled the RFRA[62] just a few years after its inception, the *Boerne* ruling did not invalidate RFRA's applicability to federal law. [63]However, like the AIRFA, the RFRA has also been widely criticized as an ineffective recourse for Native Americans bringing free exercise claims. [64]The most noted failure of RFRA is its inability to protect Native land and sacred sites.[65] Many scholars and authors have noted the numerous problems that arise in applying RFRA to Native free exercise claims regarding land use, and one author has noted that,

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[57] 42 U.S.C.A. § 2000bb (West).

[58] *See generally*, Johnson, *supra* note 53, at 590-91.

[59] *See* Johnson, *supra* note 53, at 590-91. *See also* Zackeree S. Kelin & Kimberly Younce Schooley, *Dramatically Narrowing RFRA's Definition of "Substantial Burden" in the Ninth Circuit—the Vestiges of Lyng v. Northwest Indian Cemetery Protective Association in Navajo Nation et al. v. United States Forest Service et al*, 55 S.D. L. REV. 426, 428 (2010); *Morgan*, *supra* note 54, at 61-2.

[60] *Sherbert*, 374 U.S. at 406.

[61] *Id.*

[62] Boerne,521 U.S. 507 (1997) (RFRA was overruled as applied to states when the Court found that Congress stepped beyond its enforcement powers). *See also* Lee, *supra* note 5, at 291.

[63] *See* Lee, *supra* note 5, at 291.

[64] *See generally*, *e.g.*, Lee, *supra* note 5.

[65] *Id.*

> "[t]he destruction of land cannot be challenged under RFRA based on the reasoning that such actions do not burden the free exercise of religion. The inapplicability of RFRA to Native American sacred site religions is further solidified by Senate Report 111, that assured Congress that RFRA would not create a cause of action for Native Americans seeking to protect sacred sites. As such, Congress passed RFRA with knowledge that it did not provide protection against government imposed burdens on sacred site worship."[66]

The broad conclusion made by many that RFRA fails to protect Native American free exercise claims that relate to the land and sacred sites have helped develop several theories regarding government insensitivity to Native religion and Native religions' connections to land and the environment.[67]

5. The Religious Land and Institutionalized Persons Act of 2000 (RLUIPA)

In yet another effort to accommodate free exercise of Native religions and other religions that require land and sacred site use, President Clinton passed RLUIPA in 2000 as another stepping-stone in accommodating free exercise of minority religions. [68]RLUIPA is the most significant piece of recent legislation regarding religious free exercise in the United States.[69] It was implemented as a Congressional response to the holding in *Boerne v. Flores* that invalidated RFRA's enforceability at the state and local government levels.[70] RLUIPA was instituted to preserve religious autonomy in protecting religion from government hostility.[71] Piggy-backing off of the purpose and intentions of RFRA, RLUIPA imposes the general rule that,

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66 Lee, *supra* note 5, at 291; James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1439 (1992) (Despite Congress's positive intentions behind implementing RFRA, in reality the passage of this legislation was "…little more than a symbolic victory for religious liberty."); *Id.* (RFRA has proven to be "ineffectual and perhaps even detrimental to the protection of free exercise rights" for Native Americans.).

67 *See* Dussias, *supra* note 6, at 392 ("In light of the history of government policy toward Indian religions and contemporary government commitments to the protection of Indian religion and sacred sites…[the government's arguments that either no burden was imposed on free exercise or that burdens are not substantial] smacks of arrogance and continuing paternalism when made to counter Indian RFRA claims."). *See also* Winslow, *supra* note 4, at 1315.

68 42 USCS § 2000cc.

69 Shawn P. Bailey, *The Establishment Clause and the Religious Land Use and Institutionalized Persons Act of 2000*, 16 REGENT U. L. REV. 53, 54 (2004).

70 Kelin & Schooley, *supra* note 56, at 429.

71 Bailey, *supra* note 63 at 53-4.

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden[72] on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--
> (A) is in furtherance of a compelling governmental interest; and
> (B) is the least restrictive means of furthering that compelling governmental interest.[73]

RLUIPA also addresses discrimination and government land use regulations, and discourages any form of discrimination or exclusion on the basis of religion.[74]

To bring a claim under RLUIPA, the claimant must make a showing of their religious faith.[75] However, the "bar is low and largely restricted in its scope of investigation."[76] RLUIPA does not allow claimants to bring claims in an effort to do "whatever they want, wherever they want. The interest that is being protected must simply be a part of a system of beliefs, whether or not it is central to the religion."[77] Given the history prior to RLUIPA and subsequent cases brought under this statute, it seems that Congress holds a "…desire to increase the protections granted religious exercise, and reject a narrow reading of substantial burden."[78]

III. CASE EXAMPLES: PATTERNS IN NATIVE AMERICAN RECOURSE FOR FREE EXERCISE CLAIMS

Though there would seem to be some sort of legal recourse for Native Americans bringing free exercise claims today, there remains a distinct pattern of cutting off free exercise claims brought by Natives regardless of whether those claims are brought under the Constitution

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72 Like RFRA, RLUIPA never explicitly defines "substantial burden;" case law settles that for the purposes of RLUIPA, "a substantial burden exists where: (1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available…versus abandoning one of the precepts of his religion in order to receive a benefit; OR (2) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs." Kelin & Schooley, *supra* note 56, at 458.

73 42 U.S.C.A. § 2000cc(a)(1) (West 2014).

74 42 U.S.C.A. § 2000cc(b) (West 2014).

75 Kevin M. Powers, *The Sword and the Shield: Rluipa and the New Battle Ground of Religious Freedom*, 22 BUFF. PUB. INT. L.J. 145, 159 (2004).

76 *Id.*

77 *Id.* at 162.

78 Morgan, *supra* note 54, at 68.

or under legislation such as AIRFA, RFRA, or RLUIPA.[79] As previously mentioned, Native Americans view religion as synonymous with culture, politics, and social life; the spiritual is not necessarily separated from the secular. [80]This is particularly important to keep in mind when "analyzing the legal system's impact on Native American cultures."[81] Three relatively recent cases are worth discussing because the outcomes of these cases exemplify how Native American free exercise cases are doomed to fail before they are ever brought to court: *Lyng v. Northwest Indian Cemetery Protective Association;*[82] *Employment Division, Department of Human Resources of Oregon v. Smith;*[83] and *Navajo Nation v. U.S. Forest Service.*[84]

A. Lyng v. Northwest Indian Cemetery Protective Association

Lyng is a significant modern case regarding Native religion and free exercise with regards to land and sacred sites. This case considered whether the government was prohibited under the First Amendment from constructing a road through a national forest that had been traditionally used by local Indian tribes for religious purposes.[85] Ultimately the Court concluded that the government was not forbidden from constructing this road through Native sacred land.[86] In constructing plans to build this road through the Chimney Rock section of the Six Rivers National Forest, the Forest Service commissioned a study, which concluded that "constructing a road along any of the available routes 'would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest

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79 Krotoszynski, *supra* note 1, at 1198 ("[E]mpirical data show conclusively that minority religionists brought more cases pre-Smith, and lost a much higher percentage of them, than did majority religious groups…"). *See also id.* at 1234; Rievman, *supra* note 1, at 174 (In addressing specifically claims brought by Native Americans, "[t]he Supreme Court and the lower federal courts…have consistently failed to uphold the first amendment rights of Native American Indians when asserted in opposition to the federal government's use of federally owned land."). *See e.g.,* Lyng, 485 U.S. 439; Sherbert, 374 U.S. 398; Wilson, 708 F.2d 735.

80 *See*, Introduction of this article.

81 Brady, *supra* note 9, at 157.

82 Lyng, 485 U.S. 439.

83 Smith, 494 U.S. 872.

84 Navajo Nation, 535 F.3d 1058.

85 Lyng, 485 U.S. at 440.

86 *Id.*

California Indian peoples.'"[87] Despite a recommendation to not go through with the road construction, the Forest Service prepared to continue building the road.[88] The majority opinion concluded that the government action to follow through with construction of the road did not violate the First Amendment because (1) the affected Natives were not being coerced by the government's action to violate their beliefs; and (2) the governmental action did not penalize religious activity by denying anyone an equal share of the rights, benefits, and privileges enjoyed by others.[89]

Lyng exemplified the continued challenges for Native Americans in fighting for free exercise rights against federal land management policies.[90] Many sacred sites for Natives are located on federal lands.[91] However, the pattern perpetuated by the Court in *Lyng* has been one of governmental ignorance and possibly discrimination when it comes to addressing Native free exercise claims.[92] The government's land use which results in the desecration and destruction of sacred lands often causes the death of spiritual and cultural activities that have been entrenched in Native religion and culture for generations.[93] Despite the marked devastation experienced by Natives who lose First Amendment or RFRA claims against government actions on sacred lands, the government continues to display an aura of ignorance and a lack of respect for those Native religions that are "different."[94] Governmental actions and the Court's ultimate findings in Native

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87 *Id.* at 442-443.

88 *Id.* at 442.

89 *Id.* at 456- 457.

90 Rievman, *supra* note 1, at 169 (this case also exhibited Supreme Court denials of protection to Indian sacred sites, as previously evidenced in cases including *Sequoyah, Badoni*, and *Wilson)*; Linge, *supra* note 2, at 329.

91 Lee, *supra* note 5, at 268; Grimm, *supra* note 22, at 19 ("Sacred lands are found within areas now designated as national parks and monuments, national forests, and on other public lands managed by federal agencies. Unfortunately, agency decisions authorizing the use or development of public lands can harm, or even destroy the attributes that make such lands sacred.…").

92 Lee, *supra* note 5, at 268.

93 *Id*. (Government actions such as "logging trees, altering the terrain, building new roads, and the presence of tourists and vandals" are seen as actions that damage and negatively impact Natives using those sites for religious and cultural practices.).

94 *Cf*. Winslow, *supra* note 4, at 1319 (An alternative theory for the outward denial of these types of free exercise claims is that perhaps the Court is afraid that if sacred-site protection is granted, "too many people would assert free exercise claims for the purpose of laying stake to government property, thus crippling the government.").

free exercise cases may be characteristic of the subconscious differences between Western culture and Native culture. Because Western religions often view their holy places as buildings,[95] it should come as no surprise that Westerners "tend to not view the land on which places of worship are located as being itself imbued with sacredness."[96] Thus, if Western religious buildings are moved, torn down, or damaged in any way, "religious practices can be relocated without losing their significance and efficacy."[97] This Western misunderstanding of the significance and sacredness of the land and environment itself to Native Americans has lead to the current disregard of Indians' religious, cultural, and social needs.[98]

B. Employment Division, Department of Human Resources of Oregon v. Smith

The *Smith* decision in 1990 is undoubtedly the most controversial and contested free exercise case to date, because it departed from prior free exercise precedent and implemented a new standard that was virtually impossible to meet.[99] In *Smith*, respondents Alfred Smith and Galen Black were fired from their jobs with a drug rehabilitation center after ingesting peyote[100] for sacramental purposes as part of a religious ceremony of the Native American Church.[101] Upon being terminated, the gentlemen sought unemployment benefits and were denied the opportunity to receive those benefits because they were terminated for work-related

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[95] Dussias, *supra* note 6, at 352 (such as temples, churches, synagogues, and mosques).

[96] *Id.*

[97] *Id.* ("A new site for worship can be consecrated as the old one is deconsecrated—a practice that is usually not possible with Indian religious practices related to specific sacred sites."); *See also*, Jane Hubert, *Sacred Beliefs and Beliefs of Sacredness*, *in* SACRED SITES, SACRED PLACES 9, 13-14 (David L. Carmichael et al. eds.,1994).

[98] *See*, Dussias, *supra* note 6, at 350.

[99] *See* Krotoszynski, *supra* note 1, at 1190 (lowering the standard from strict scrutiny to rational basis "ensures that most free exercise claims will fail." Among many legal scholars and religious rights activists, *Smith* "produced widespread disbelief and outrage.") *See also* Tapahe, *supra* note 5, at 343.

[100] *See also* Robert N. Anderson, *Just Say Not to Judicial Review: The Impact of Oregon v. Smith on the Free Exercise Clause*, 76 IOWA L. REV. 805, 805 n.4 (1991) (peyote is a cactus whose ingestion produces a number of effects including visual hallucinations or color visions, as well as alterations in the perception of movements, smells, and sounds. No after-effects are known and peyote is not habit forming); Smith, 494 U.S. at 903 ("Peyote is a sacrament of the Native American Church and is regarded as vital to respondents' ability to practice their religion. As we noted in *Smith I,* the Oregon Supreme Court concluded that 'the Native American Church is a recognized religion, that peyote is a sacrament of that church, and that respondent's beliefs were sincerely held.'").

[101] Smith, 494 U.S. at 874.

"misconduct."[102] The Court was asked to consider whether the Free Exercise Clause of the First Amendment permitted the state of Oregon to deny unemployment benefits to Smith and Black because they were discharged from their jobs due to the ingestion of a Schedule I hallucinogenic drug prohibited by Oregon law.[103] The Court found that "[b]ecause respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug."[104]

The Court reasoned that it had "never held an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[105] The Court further reasoned that having religious beliefs that conflict with "relevant concerns of political society" should not allow citizens to act in contradiction to the law.[106] The Court then implemented the rational basis test for free exercise claims as opposed to the previously applied strict scrutiny analysis.

Some Native American religions have "a history of responsible peyote use documented back to the year 1560."[107] Peyote is not only central to some religions, but it embodies those religions, and peyote use outside of a religious ceremony is often deemed sinful.[108] The "history of internally regulated peyote use is empirical proof that use by Native Americans does not 'court anarchy.'"[109] Furthermore, contrary to Justice O'Connor's assertion that peyote use has detrimental health effects, "peyote may actually have positive health effects. Peyote historically

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[102] *Id.*

[103] *Id.*

[104] *Id.* at 890.

[105] *Id.* at 895.

[106] *Id.* at 879

[107] Anderson, *supra* note 94, at 822.

[108] *Id.*

[109] *Id.* at 822–823.

has been used medicinally, and . . . has been utilized in the treatment of alcoholism.[110] Peyote ceremonies vary amongst different tribes, but are usually held in a teepee.[111] The ceremony usually has four distinct factors: prayer, singing, eating the sacramental peyote, and contemplation.[112] "Visions are produced by the ingestion of peyote and are used in guiding the worshiper's life."[113] Given the religious significance of peyote use for Native religions, including the Native American Church referenced in *Smith*, the Court's holding in *Smith* posed a real threat to Native free exercise practices involving the use of ceremonial peyote, as well as all other religious practices that may go against a neutral law of general applicability.[114]

The *Smith* standard outraged many on the religious front.[115] Justice Blackman noted in the opinion's dissent that the majority's decision "effectuates a wholesale overturning of settled law concerning Religious Clauses of our Constitution."[116] Not only did the Court deviate from free exercise precedent, but the Court seemed to exemplify a blatant disregard for those Native religions that engage in religious peyote use. The *Smith* case has received much negative treatment, and in light of the immense backlash that resulted from the Supreme Court's

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110 *Id.* at 830.

111 *Id.* at 805, n.5.

112 *Id.*

113 *Id.*

114 It is worth noting that the discussion in the Supreme Court opinion in *Smith* regarding peyote use is minimal, and does not discuss the importance or significance behind Native religious peyote use and peyote ceremonies. Purposefully leaving important information regarding religious peyote use out of the majority opinion implies a willful ignorance of the Court understanding the religious practices of the Native American Church and other minority religions. This misunderstanding of religious peyote use combined with the pattern of denying free exercise claims brought by Native Indians further exemplifies how fundamental rights of religious freedom for Natives are really unavailable.

115 Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RES. L. REV. 55, 56 (2006) (Professor Alan Brownstein even went so far as to state that "[b]y limiting judicial review to only those situations in which the government discriminates against religious beliefs or practices, and refusing to protect religious activities against substantial burdens imposed by neutral and general laws, the Court was not taking religious liberty seriously."). *See* Ryan, *supra* note 61, at 1455. *See also* Tapahe, *supra* note 5, at 344 (there are also theories that the *Smith* decision threatened Native American religions and practitioners in particular).

116 Smith, 494 U.S. at 908.

decision[117], the Religious Freedom Restoration Act was implemented in 1993 as a congressional moral compensation.[118]

C. Navajo Nation v. U.S. Forest Service

Navajo Nation is a more recent example of a Court decisions that seem to lead Native free exercise nowhere.[119] Like *Lyng*, *Navajo Nation* deals with free exercise and sacred land. The San Francisco Peaks in northern Arizona are at the core of the beliefs, values, religious practices, and communal events for several surrounding Indian tribes.[120] The Peaks are owned by the federal government and maintained by the United States Forest Service.[121] In addition to being a central place for Native practices, the Peaks are also used for many secular activities, such as camping, biking, hiking, skiing, and more.[122] In 2005, an expansion of the resort on the Peaks was approved to increase the skiable area and implement a new way for the resort to share yearlong snow coverage.[123] Six Native American Tribes brought suit against the United States Forest Service to challenge the Forest Service's approval of a plan to use treated sewage effluent in an artificial snowmaking operation.[124] The issue was whether or not the Forest Service's

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117 Brownstein, *supra* note 109, at 55 (The backlash came from those who concluded that after the *Smith* decision the Free Exercise Clause of the First Amendment provided little to no protection for religious free exercise against neutral laws of general applicability).

118 *See generally*, Tapahe, *supra* note 5, at 344.

119 Morgan, *supra* note 54, at 59 (It has been noted that the Court's decision "tracks a long judicial trend of denying relief to plaintiffs in free exercise challenges.").

120 Kelin & Schooley, *supra* note 56, at 429–30 (This piece of land is considered the "center of creation . . . the home to deities and ancestral beings, and a source of natural resources needed to perform ceremonies that are an indispensable part of the religious traditions and everyday lives of the tribes that hold the mountain sacred.").

121 *Id.*; Navajo Nation, 535 F3d. at 1064 (the resort known as the Snowbowl is located on Humphrey's Peak, the highest mountain of the San Francisco Peaks).

122 Kelin & Schooley, *supra* note 56, at 429-30 (the peaks are a part of the Coconino National Forest, and meet the criteria for inclusion on the National Register of Historic Places as a Traditional Cultural Property).

123 *Id.* at 431; *id.* at 427 (The plan's approval meant that the resort would be the first of its kind to depend entirely on "sewage effluent to make artificial snow."); Navajo Nation, 535 F.3d at 1065 (The recycled wastewater to be used in the operation was classified as "A+" by the Arizona Department of Environmental Quality, which means that the wastewater is the "highest quality of recycled wastewater recognized by Arizona law and may be safely and beneficially used for many purposes, including irrigating school ground landscapes and food crops.").

124 Morgan, *supra* note 54, at 57-8.

approval of the use of artificial snow on federally owned park lands violates RFRA, and the Court held that the Forest Service's approval of the plan did not violate RFRA.[125]

The concerns raised by Natives of the use of recycled wastewater to generate more snow focused more on "spiritual and cultural issues, not the [actual] biological purity of the water itself (i.e., to the tribes, it is irrelevant that reclaimed water meets EPA and ADEQ standards)."[126] The Tribes involved in the case noted that the use of sewage water on the land they considered sacred would have "devastating effects on tribal and individual spirituality."[127] To the Tribes, the Peaks are a living entity, and the Tribes also use the plants, water, and other natural materials of the Peaks for certain religious ceremonies.[128] Justice W. Fletcher also notes in his dissent that the Tribes view the Peaks as, "home to the deities and other spiritual beings; . . . tribal members can communicate with higher powers through prayers and songs focused on the Peaks; and . . . the tribes have a duty to protect the Peaks."[129] The majority opinion did not delve too much into the details of the issue of using recycled wastewater on the Peaks; because the wastewater was passed off as of "high quality," the Court did not seem to ask questions about whether or not the water might still be harmful to the natural resources of the Peaks, let alone harmful to the religious practices and beliefs of Natives living nearby.[130] Justice W. Fletcher notes in his dissent the facts and background of the recycled wastewater process; using treated sewage effluent as a resource for generating more snow that humans will ski on and play in is quite sordid;

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125 Navajo Nation, 535 F.3d at 1063 (the Supreme Court affirmed the district court's denial of relief on all grounds).

126 Kelin & Schooley, *supra* note 56, at 432.

127 Morgan, *supra* note 54, at 58; Navajo Nation, 535 F.3d at 1063 (The use of recycled wastewater to generate artificial snow on the Snowbowl would "spiritually contaminate the entire mountain and devalue [Natives'] religious exercises."); *Id*. at 1064 (Furthermore, "[c]ertain Indian religious practitioners believe the desecration of the Peaks has caused many disasters, including the September 11, 2001 terrorist attacks, the Columbia Space Shuttle accident, and increases in natural disasters.").

128 Navajo Nation, 535 F.3d at 1064

129 *Id.* at 1081 (Fletcher, J., dissenting).

130 Navajo Nation, 535 F.3d 1058

furthermore, most resort patrons may even have second thoughts about skiing in the resort's "snow" if they knew the true nature of the reclaimed wastewater.[131]

The *Navajo Nation*, *Smith*, and *Lyng* cases are all demonstrative of the struggles Natives face in bringing free exercise claims in Court, as well as the continued lack of understanding between Western society and Native society when it comes to religion and religious practices. As previously mentioned, Congress has reacted to these Native free exercise claims by invoking statutory remedies (such as AIRFA, RFRA, and RLUIPA) that appear to solve the problem of Native access to free exercise protection; however, these statutory remedies frequently fall short of a truly just solution for protection of Native American free exercise rights.

IV. STATUTORY REMEDIES TO FREE EXERCISE ISSUES OF NATIVE AMERICANS: THE USE OF AIRFA, RFRA, AND RLUIPA

Native American free exercise claims are often at the heart of the implementation of statutory schemes meant to enable religious free exercise.[132] Since the 1970s, the government has worked to disavow past polices exhibiting "explicit suppression of Indian religions."[133] AIRFA was passed in 1978 in response to grievances voiced by Native religious practitioners regarding the blatant governmental disregard of their constitutional rights to religious free exercise.[134] The intentions of AIRFA were to make the government more aware of general ignorance to Native religions and activities, and to encourage governmental departments and agencies to view their

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131 In Justice W. Fletcher's notes the following in his dissent:

> Before treatment, raw sewage consists of waste discharged into Flagstaff's sewers by households, businesses, hospitals, and industries . . . . The effluent that emerges after treatment by Flagstaff satisfies the requirements of Arizona law for 'reclaimed water.' However . . . the treatment does not produce pure water: Fecal coliform bacteria, which are used as an indicator of microbial pathogens, are typically found at concentrations ranging from 105 to 107 colony-forming units per 100 milliliters (CFU/100 ml) in untreated wastewater. Advanced wastewater treatment may remove as much as 99.9999+ percent of the fecal coliform bacteria; *however*, the resulting effluent has detectable levels of enteric bacteria, viruses, and protozoa, including Cryptosporidium and Giardia. Under Arizona law, the treated sewage effluent must be free of 'detectable fecal coliform organisms' in only 'four of the last seven daily reclaimed water samples.'"

Id. at 1082-83 (Fletcher, J., dissenting)(emphasis added).

132 *See generally* Dussias, *supra* note 6, at 421.

133 Dussias, *supra* note 6, at 354.

134 *Id.*

policies and procedures through a lens that would protect and preserve Native American religious rights.[135]

Though enacted with seemingly positive objectives, AIRFA did not really do much to preserve Indian religious rights.[136] This inadequacy was most emphasized in the outcome of the *Lyng* case.[137] The Court emphasized that AIRFA really had no teeth to it since the AIRFA actually did not establish a cause of action for Native free exercise claims.[138] Why, then, was AIRFA implemented? It seems as though AIRFA was implemented to merely serve as an attempt to show what Native free exercise should look like. In other words, AIRFA was established to "look good," and make it seem that Native issues with free exercise were in fact being addressed, when behind the scenes they remained ignored.

Though AIRFA was enacted with the best of intentions, there was no real effort to remedy the threat to religious practice until the enactment of RFRA.[139] Congress enacted RFRA in reaction to the decision of the *Smith* case.[140] The Congressional intention in responding to *Smith* with RFRA was to "restore legal protection for religious exercise by requiring all free exercise claims to be examined under strict scrutiny."[141] This effectively reinstated the *Sherbert*/*Yoder* test.[142] RFRA was intended to really limit the government's ability to impose any substantial burden on any person's free exercise rights, unless the burden is (1) in furtherance of

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135 Dussias, *supra* note 6, at 356.

136 *Id.* ("…as evidenced by a series of defeats for Indian free exercise claims in federal district court and courts of appeals.").

137 Lyng, *supra* note 14, at 440 (Where the Court held that the Free Exercise Clause did not prohibit the United States Forest Service from building a road on a site sacred to Natives, even assuming that the road would "virtually destroy the Indians' ability to practice their religion."). *See also* Dussias, *supra* note 6, at 356.

138 *See* Lyng, *supra* note 14, at 440.

139 Powers, *supra* note 69, at 151.

140 Bailey, *supra* note 63, at 56. *See also* Powers, *supra* note 69, at 151; Dussias, *supra* note 6, at 421 (before the enactment of RFRA, Congress put forth an amendment to AIRFA in order to protect the sacramental use of peyote by members of federally recognized tribes as against federal and state prohibitions of such use); *Id.* (In congressional hearings discussing the possible enactment of RFRA, the focus of the arguments for and against RFRA came mostly from the testimony of "representatives of mainstream religions. RFRA itself was thus largely shaped by the majority, rather than minority, voices and concerns.").

141 Powers, *supra* note 69, at 154.

142 Bailey, *supra* note 63, at 56.

a compelling governmental interest, and (2) achieved by the least restrictive means possible in furthering that interest.[143]

Like AIRFA, RFRA was broad in nature, and thus was used by many different people and different groups as an avenue in protecting religious free exercise rights.144 Unfortunately, because the RFRA's application to the states was struck down in *Boerne v. Flores145*, the law "lost most of its teeth as a result of this ruling."146 This piece of legislation has been named "dubious,"147 and "[s]ome leaders. . . have recognized that Indian religions will not be adequately protected under the RFRA."148 One argument as to why Native Americans remain unprotected despite the existence of RFRA is that ". . . there is nothing [for RFRA] to 'restore' since Native Americans did not enjoy the full judicial protection of their religious freedom even before *Smith*."149 Since the Court continues to use ambiguous language, such as "substantially burden," in its test for free exercise claims, many argue that the current approach to free exercise claims raised under RFRA will give way to the continued judicial insensitivity150 of Native religions because Natives will be virtually unable to prevail under a test that is nearly impossible to meet.151 Given the track-record of the Court siding with the government more often than not

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143 Powers, *supra* note 69, at 154.

144 *Id.*

145 Boerne, 521 U.S. 507.

146 Powers, *supra* note 69, at 155; *Id.* at 154 (Though RFRA may still be enforced at a federal level, the law was seen as over-broad as applied to states, and the Court held that "while Congress has the power to enforce the Constitution legislatively, Congress can only act to remedy past violations, not to prohibit speculative harms that have yet to be demonstrated.").

147 Tapahe, *supra* note 5, at 332.

148 *Id.* at 332 n. 7. *See generally* Tapahe, *supra* note 5, at 345; Id. at 332 n. 7 (Those leaders emphasizing RFRA's shortcomings have "lobbied for the introduction of a bill, the new American Indian Religious Freedom Act, which specifically addresses Indian religious freedom concerns."); Dussias, *supra* note 6, at 421 (However, it should be noted that many do view RFRA as a positive piece of legislation because it was the first real example of an attempt by the government "to recognize the needs of practitioners of Native religions and other minority religions for protection against substantial burdens on their religious exercise.").

149 Tapahe, *supra* note 5, at 345 (Furthermore, "RFRA is not meant to address the ingrained judicial misconceptions of Indian religions. There is nothing in RFRA that changes pre-Smith misconceptions about Native American sacred sites and religions.").

150 Tapahe, *supra* note 5, at 346 (Many believe that currently there is much room for judicial insensitivity and cultural bias in determining the outcome of a free exercise claim).

151 *See id.* at 345; *Id.* at 346 (Author Luralene D. Tapahe has argued that courts will also "fail to find legally cognizable burdens upon religion because RFRA only requires the government to show its means further a compelling interest, rather than prove its means are essential to that interest."); *Id.* at 347 (The free exercise test under RFRA remains difficult to meet because government action need only further a goal, while

in cases raising free exercise claims,[152] the question remains if the government is lying to itself about its seemingly just relationship with Indian tribes?

The issue with RLUIPA, enacted in 2000, is the statute's vague wording and Congress's failure to define specific terms within the statute. For example, like RFRA, the term "substantial burden" is hardly defined in RLUIPA.[153] In failing to more clearly define "substantial burden,"[154] the drafters of the statute created a loophole for enforcement. Judicial insensitivity towards Native claims raised under AIRFA and RFRA exhibit the Western view of religion and the widespread misunderstanding of Native religions. This "Western viewpoint" of Native free exercise claims leaves little room for the Court to exercise understanding in why and how certain governmental actions do, in fact, "substantially burden" Native religions, since both cultures view different governmental actions as "substantially burdensome" on religions. Generally, the RLUIPA statute seems ripe with opportunities for the Court to have the government meet its burden of having a compelling interest, given the ambiguity, lack of clarity, and inconsistent application of the statute.

CONCLUSION: NATIVES CURRENTLY HAVE NO AVENUE TO ENFORCE ALL OF THEIR CONSTITUTIONAL FREE EXERCISE RIGHTS

The issue of failed Native American free exercise claims has been thoroughly addressed throughout the years, most notably after the outcome of the *Smith* case. Now is the time to revisit this issue, as the lack of protection for Native religious rights has yet to be solved. Statutes such as AIRFA, RFRA, and RLUIPA seem to favor the protection of Native American sacred sites

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Indian religious activity will continue to be misunderstood and held to a requirement of essentiality or indispensability. This burden upon Indian religions has proven impossible to meet in the eyes of courts who possess a theology completely at odds with native religion.").

152 Justice Brennan mentions in his dissent that "the Court embraces the [g]overnment's contention that its prerogative as landowner should always take precedence over a claim that a particular use of federal property infringes religious practices." Lyng, *supra* note 14, at 465. This statement makes it very clear that this pattern of the Court siding with the government is almost historical, and a pattern that finds itself at the foundation of Native free[-]exercise cases in the United States.

153 *See* 42 U.S.C.S. § 2000cc.

154 "Substantial burden" is but one term among other ill-defined terms[] including[,] but not limited to, "equal terms," "discriminates," "excludes," "unreasonably limits," and "jurisdiction." *See* Religious Land Use and Institutionalized Persons Act of 2000 § 2, 42 U.S.C. § 2000cc(a)-(b) (2012). How can this statute be applied justly without further clarification of what these terms and others actually mean?

and religious practices, but do not appear to have a mechanism of enforcing those perceived rights. Likewise, the Supreme Court has repeatedly shut off constitutional claims and isolated Native American claims relating to sacred land and religious practices under the Free Exercise Clause.[155] Thus, Native Americans are left with nothing—no protection at all.[156]

Several theories have been proposed over the years to better enforce free exercise rights of Native Americans. For instance, one theory is that the Court should adopt a stricter standard of review than *Smith*, like "rationality with bite."[157] Another theory is that the Fourteenth Amendment would serve as a better avenue for challenging religious rights of Natives because its equal protection would be a better remedy for the underlying issues with subconscious discrimination that may be playing a role in the poor outcomes of free exercise cases brought by Natives.[158] Still others have proposed that a new act addressing Native American sacred sites and religious activities with a more concrete method of enforcement of Native religious rights would "decrease current discrimination against and burdens on Native American …worship."[159] Considering the many theories that have been proposed as solutions to the deprivation of free exercise rights to Natives, and considering the more recent efforts to "evaluate and update policies and procedures for addressing Indian religious exercise needs" in the United States, it seems as if very little effort[160] has been made to address the lingering issue of Natives's rights to

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155 Tapahe, *supra* note 5, at 348 (claims brought under the First Amendment Free Exercise Clause have "consistently failed to protect Indian worshippers" because the courts have failed to apply a strict-scrutiny analysis).

156 *See* Lee, *supra* note 5, at 295-96.

157 Krotoszynski, *supra* note 1, at 1197 (under a "rationality with bite" standard of review, "the government bears the burden of establishing the actual reason for the law that would be advanced by applying the law on the facts presented at bar . . . . [S]hifting the burden of proof to the government significantly improves the odds of success for plaintiffs, as does the requirement that the government establish the actual reason for the enactment."). *See also id.* at 1199.

158 Tapahe, *supra* note 5, at 348; *Id.* at 362 (the Fourteenth Amendment "offers an alternative framework for courts to dispense with unfair tests and to challenge Congress's failure to include Indian religions within the strict-scrutiny protection of RFRA.").

159 Lee, *supra* note 5, at 308.

160 "Today" meaning in the past five years, from 2008 to 2013.

free exercise.[161] Now is the time to revisit this ongoing issue with Native access to First Amendment free-exercise rights, and now is the time to implement a more serious change to remedy the past and current hurdles Native Americans have traditionally faced and continue to face when it comes to issues of free exercise.[162]

Statutest trying to preserve Native free exercise rights must be amended with enforcement mechanisms that will stop governments and individuals from interfering with these rights. If statutes remain in their current state, and are not amended, then the Supreme Court should consider whether free exercise rights can be enforced under the Free Exercise Clause with the recognition that the current statutes essentially do nothing to protect or preserve those constitutional rights of free-exercise of religion that are guaranteed to Natives.[163]

Another possible solution to this pattern of shutting down Native American free exercise claims could be found in improved education of Native cultures. Our current American educational system should better address Native history in elementary, parochial, and higher-education settings. Topics should cover Native history, including culture, religions, tribal government, and tribal involvement with federal lands.[164] Education should go beyond simple history of our relations to Natives when the colonists arrived from England to colonize the future

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161 Dussias, *supra* note 6, at 430-31. *See* Brady, *supra* note 9, at 170 (this may be because of the "Catch-22" issue that the government faces in accommodating Native religious practices while not violating the Establishment Clause. This Catch-22 lies in "the need for a general sacred lands statute because of the Supreme Court's lack of direct precedent concerning the Establishment Clause and sacred sites, yet the need seems fated to remain unsatisfied because of the mandates of the Establishment Clause[,] which cause such proposed bills to fail.").

162 Smith, 494 U.S. at 920 (Justice Brennan, in his dissent in the *Smith* case, noted that the current "freedom" held by Natives with regards to free exercise "amounts to nothing more than the right to believe that their religion will be destroyed." Furthermore, Brennan notes that the *Smith* decision made a mockery of United States's public policy "to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise their traditional religions." (quoting AIRFA)).

163 *See* Krotoszynski, *supra* note 1, at 1220 (the nature of the Free Exercise Clause as existing to advance equality of persons, should allow for persons of all religions, or no religion at all, to be treated equally if they seek to ever invoke their constitutional rights under the clause. No one free exercise claim is any less significant than another simply because one practices a religion that does not fit within the majority-accepted religions in the United States.).

164 Brady, *supra* note 9, at 153 (education is probably the most effective method for the federal government, and broader American society, to have the opportunity to grasp the idea that "Native-American land is part of a rich tapestry that binds tribal members together, as well as an actual, living being in the minds of Native Americans." The relief sought by Natives bringing free-exercise claims might finally be realized if our society becomes more aware of Native-American culture and practices. Society should begin to view those practices as being not foreign, but rather unique and valuable to Americans, despite the differences found between Native culture and Western-American culture.); *Id.* at 185 (American citizens must be "cognizant of the fundamentally conflicting belief and value systems which underscore the Native[-]American and Anglo-American ways of life . . . . In doing so, [Americans] can begin to accord Native-American faiths the respect and dignity they deserve . . . .").

United States and, instead, really delve into the culture, community, and people that make up the Native community. Better education of Native culture, society, government, and religion may break down the current "us versus them" dichotomy, and allow our government representatives and entire American society to exercise empathy, understanding, and mindfulness as to why Natives bring free-exercise claims.[165] A policy that implements better Native-American education than what is currently available in our American schools would allow and stress the "respect and preservation of our entire nation's precious land" and diverse practices.[166]

[165] The Court has stated that nothing in its opinions from Native free-exercise cases "should be read to encourage governmental insensitivity to the religious needs of any citizen." Lyng, *supra* note 14, at 453. However, the pattern of the Court's handling of various Native free exercise cases does ring of insensitivity towards Native religions, particularly with Natives's connections to the land.

[166] Brady, *supra* note 9, at 185.