NOTE

FREE EXERCISE CLAIMS OVER INDIGENOUS SACRED SITES: JUSTICE LONG OVERDUE

*Anna Sonju**

This Note argues for a change in the Supreme Court's treatment of free exercise claims over Indigenous sacred sites. First, this Note reasons that, in Lyng v. Northwest Indian Cemetery Protective Ass'n*, the Court set an impossibly high standard for parties bringing sacred site free exercise claims against the government. This insurmountable standard, masking itself as strict scrutiny, implicitly precludes any claimant from prevailing against a government action designated for a sacred site. Further, statutes aimed at protecting religious liberty have resolved little, leaving no choice but to rework the standard.*

Next, this Note delves into three preexisting theories from like-minded critics of Lyng *and analyzes the pros and cons of their proposed approaches to sacred site free exercise claims. Lastly, this Note sets forth a novel test that modifies the framework courts currently use in free exercise jurisprudence. Appreciating the fundamental distinctions between religious land and religious acts, this new test is uniquely tailored to address claims over sacred lands. This proposed test seeks to (1) give religious claimants a realistic opportunity to meet their initial burden in court, (2) put sacred site claims on equal footing with other free exercise claims, and (3) address the Supreme Court's concerns with overexpanding free exercise doctrine.*

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INTRODUCTION

The Supreme Court's treatment of Indigenous sacred sites in the free exercise realm[1] is fatal both in theory and in fact. In its most recent decision in *Lyng v. Northwest Cemetery Protective Ass'n*,[2] the Court authorized the government to proceed with a construction project that would damage a Native American[3] sacred site on federal land.[4] In its opinion, the Court briefly acknowledged that Native American religious practices are "inextricably bound up with the unique features of the . . . area."[5] But in giving the government the green light to bulldoze a sacred site on federal land, the Court failed to meaningfully consider inherent distinctions between Native American religions and their

[1] U.S. Const. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . . .").

[2] 485 U.S. 439 (1988).

[3] I predominantly use the term "Native American" or "Indigenous" throughout the piece to refer to Native Peoples. Many cases referenced use the term "Indian." I consider all these terms interchangeable for purposes of the Note.

[4] *Lyng*, 485 U.S. at 458 (holding that the government may permit timber harvesting and road construction on a Native American sacred site). The applicability of *Lyng*'s holding is limited to sacred sites on "publicly owned land." Id. at 449.

[5] Id. at 451.

Western counterparts. This Note argues that the legal standard established in *Lyng* kills most sacred site claims in the first instance because it fails to account for unique aspects of Native American sacred sites. In response, this Note proposes a modification to the legal standard to correct this problem and put Native Americans' religious claims over sacred sites on equal footing with those of other religious claimants.

When contemplating Native American free exercise issues, it is important to understand that each Native American religion incorporates its own values, beliefs, and traditions into its practice.[6] Yet there are commonalities across these religions, one of which is the importance of sacred sites.[7] Sacred sites are specific locations with unique religious and cultural significance.[8] Their existence is not exclusive to Native American religions, but the term's connotation in such religions is unlike that embraced by most other religious groups.[9] For instance, Jerusalem is considered a sacred site in Christianity largely because of its rich history and centrality to the story of Jesus Christ's death and salvation.[10] In contrast to Christianity and other major religions, the importance of sacred sites to Native American religions centers not around history or traditions, but rather, the individual spirits ever-present in sacred lands.[11] This stems from the notion that Native American religions do not distinguish between the real world and the supernatural—the two

[6] Native American Religions, Dialogue Inst., https://dialogueinstitute.org/native-american-religions [https://perma.cc/TV8G-XZZS] (last visited Nov. 20, 2023).

[7] See Alex Tallchief Skibine, Towards a Balanced Approach for the Protection of Native American Sacred Sites, 17 Mich. J. Race & L. 269, 269 (2012) ("Protection of 'sacred sites' is very important to Native American religious practitioners because it is intrinsically tied to the survival of their cultures, and therefore to their survival as distinct peoples.").

[8] The Protection of Indian Sacred Sites, Advisory Council on Hist. Pres., https://www.achp.gov/indian-tribes-and-native-hawaiians/protection-indian-sacred-sites [https://perma.cc/J5K7-SJV8] (last visited Nov. 20, 2023).

[9] Thomas F. King, "Sacred Sites" Protection: Be Careful What You Ask For, Sacred Land Film Project (May 28, 2002), https://sacredland.org/wp-content/uploads/2017/07/Thomas_King-1.pdf [https://perma.cc/W5GK-SXTL].

[10] What Makes Jerusalem So Holy?, BBC (Oct. 30, 2014), https://www.bbc.com/news/world-middle-east-26934435 [https://perma.cc/CUQ5-7KD2]; The Holy Land, Libr. of Cong. (Nov. 15, 2010), https://www.loc.gov/rr/amed/guide/hs-holyland.html#:~:text=For%20the%20Christian%2C%20the%20Holy,to%20have%20ascended%20to%20heaven [https://perma.cc/X5VG-AZ6N].

[11] King, supra note 9; see also Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 460–61 (1988) (Brennan, J., dissenting) ("Where dogma lies at the heart of Western religions, Native American faith is inextricably bound to the use of land. The site-specific nature of Indian religious practice derives from the Native American perception that land is itself a sacred, living being.").

dimensions are inherently intertwined.[12] Accordingly, each sacred site is markedly different from the next, possessing its own distinct spiritual beings and religious qualities.[13]

Due to their incomparable religious worth, sacred sites are typically reserved for certain religious practices such as ceremonies and pilgrimages,[14] or left undisturbed entirely so as to not "disrupt[] the lives of deities" therein.[15] Altering or destroying an Indigenous sacred site strips it of its spiritual essence,[16] signifying to worshippers that their "prayers will not be heard"[17] or their "ceremonies will be ineffective to prevent evil and disease,"[18] among other potentially devastating impacts. Thus, preservation of sacred sites is essential to Native Americans' ability to practice their respective religions, and irreparably damaging a sacred site can functionally eliminate a Native American religious group's ability to freely exercise their religion.[19]

Despite the potentially catastrophic consequences of destroying sacred sites on religious freedom, free exercise claims seeking the protection of Indigenous sacred sites have seldom succeeded following the Supreme Court's ruling in *Lyng v. Northwest Indian Cemetery Protective Ass'n*.[20] In *Lyng*, Native American tribes brought a claim that the government's construction project on a sacred site located on federally owned land violated their free exercise rights guaranteed by the First Amendment.[21]

[12] Native American Religions, Dialogue Inst., https://dialogueinstitute.org/native-american-religions [https://perma.cc/PC23-PDP8] (last visited Nov. 20, 2023).

[13] See King, supra note 9.

[14] Rosalyn R. LaPier, What Makes a Mountain, Hill or Prairie a 'Sacred' Place for Native Americans, Observer (Feb. 20, 2017, 11:43 AM), https://observer.com/2017/02/what-makes-a-mountain-hill-or-prairie-a-sacred-place-for-native-americans/ [https://perma.cc/WUL5-HRBF].

[15] Id.

[16] See Teisha Cloos, Destruction of Indigenous Sacred Site in the U.S. Heard Before Federal Court, Nat'l Indigenous Times (Nov. 17, 2021), https://nit.com.au/17-11-2021/2532/destruction-of-indigenous-sacred-site-in-the-u-s-heard-before-federal-court [https://perma.cc/BS56-Q93Q] ("[W]ithout our sacred land, our religious traditions will be lost.").

[17] Amber L. McDonald, Note, Secularizing the Sacrosanct: Defining "Sacred" for Native American Sacred Sites Protection Legislation, 33 Hofstra L. Rev. 751, 751 (2004) (quoting Badoni v. Higginson, 638 F.2d 172, 177 (10th Cir. 1980)).

[18] Id.

[19] See Stephanie Hall Barclay & Michalyn Steele, Rethinking Protections for Indigenous Sacred Sites, 134 Harv. L. Rev. 1294, 1305 (2021) ("The practices attached to that specific locale are not portable. They must be performed in those places or the essential rites and the animating beliefs behind the rites are, by compulsion, extinguished.").

[20] 485 U.S. 439 (1988).

[21] Id. at 443.

The majority struck down this challenge, rejecting the claimants' argument that the government imposed a substantial burden on their free exercise rights since they were not "coerced by the Government's action into violating their religious beliefs."[22] Rather, it held that an individual has only been coerced into violating their religious beliefs if the government threatened to impose penalties for noncompliance.[23]

Since *Lyng*, courts have repeatedly struck down free exercise claims involving Native American sacred sites,[24] reaffirming the notion that the government has imposed a substantial burden on a Native American party's free exercise rights concerning a sacred site *only* when the government action amounts to an affirmative act of coercion under threat of sanctions.[25] Although Congress subsequently passed multiple laws aimed at protecting religious freedom,[26] including one directed specifically at Native American religious liberty,[27] these statutes have also failed to create a judicially enforceable cause of action.[28]

This Note argues for a change in the Supreme Court's characterization and treatment of sacred sites in free exercise cases. Part I provides a background of free exercise jurisprudence and legislation pertaining to

[22] Id. at 449.

[23] Id. at 440.

[24] See, e.g., Apache Stronghold v. United States, No. 21-15295, slip op. at 27 (9th Cir. Mar. 1, 2024) (en banc), *aff'g* 38 F.4th 742 (9th Cir. 2022) (rejecting a claim seeking to prohibit construction of a copper mine on sacred ground); Badoni v. Higginson, 638 F.2d 172, 177–79 (10th Cir. 1980) (rejecting a claim that the government's management and allowance of public access to a sacred monument and nearby lake has desecrated its sacredness); Slockish v. U.S. Fed. Highway Admin., No. 08-cv-01169, 2018 WL 2875896, at *1–2 (D. Or. June 11, 2018) (denying relief for plaintiffs seeking to enjoin a highway construction project on a sacred site).

[25] *Apache Stronghold*, slip op. at 27 (holding that the Tribe's claim fails under *Lyng* because it does not coerce them to act contrary to their beliefs under threat of sanctions).

[26] See Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4 ("Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability"); Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc–2000cc-5 ("No government shall impose or implement a land use regulation in a manner that imposes a substantial burden 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 government interest; and (B) is the least restrictive means of furthering that compelling governmental interest.").

[27] See American Indian Religious Freedom Act, 42 U.S.C. § 1996.

[28] See *Lyng*, 485 U.S. at 455 ("[The American Indian Religious Freedom Act ("AIRFA") does] not 'confer special religious rights on Indians,' [does] 'not change any existing State or Federal law,' and in fact 'has no teeth in it.'" (quoting 124 Cong. Rec. 21444–45 (1978))); see also Wilson v. Block, 708 F.2d 735, 747 (D.C. Cir. 1983) ("AIRFA requires federal agencies to consider, but not necessarily to defer to, Indian religious values.").

Native American sacred sites. It presents an overview of the substantial burden test established originally in *Sherbert v. Verner*[29] and *Wisconsin v. Yoder*[30] and adopted in *Lyng* and its progeny, followed by an analysis of failed statutory attempts to protect Native American religious liberty. Part I also highlights why *Lyng*'s failure to protect free exercise rights calls for a reformulation of sacred site claims within the contours of the *Sherbert*/*Yoder* test. Part II provides a synopsis of existing proposed alternatives to the *Lyng* majority's substantial burden test for sacred site free exercise claims. It analyzes and critiques theories posited by Justice Brennan in the *Lyng* dissent, Professor Alex Tallchief Skibine, and Professors Stephanie Barclay and Michalyn Steele. Part III synthesizes the benefits and drawbacks of the approaches laid out in Part II. Building off this analysis, it offers a new test which broadens the definition of "coercion" for land-based claims within the substantial burden framework. This test will put Native American sacred site claims on equal footing with other religious claims but remains sufficiently narrowly tailored to address concerns of overexpanding free exercise rights generally.

I. THE ROAD FROM *SHERBERT*/*YODER* TO NOW

Part I argues for modification of the substantial burden test with respect to sacred sites. Section I.A provides background on free exercise jurisprudence leading up to and including the Supreme Court's *Lyng* decision. Section I.B overviews Congress's codification of free exercise rights and explains why these statutes have failed to effectively protect Native American religions in practice. Section I.C concludes by urging the Court to modify its standard of review for sacred site free exercise claims by broadening its preexisting framework.

A. Strict Scrutiny Under Sherbert/Yoder/Lyng *and Its Implications for Sacred Sites*

The Supreme Court's decision in *Lyng* arrived amid a line of cases epitomizing the Court's unwillingness to seriously entertain most free exercise claims. First, in *Sherbert v. Verner*, the Court established a strict scrutiny test for free exercise claims.[31] This requires plaintiffs alleging a

[29] 374 U.S. 398 (1963).
[30] 406 U.S. 205 (1972).
[31] *Sherbert*, 374 U.S. at 403.

free exercise violation to demonstrate that the government has imposed a "burden on the free exercise of [their] religion."[32] Upon such a showing, the government must prove that its infringement of a plaintiff's free exercise rights is "justified by a 'compelling state interest,'" otherwise the free exercise challenge would prevail.[33] In *Wisconsin v. Yoder*, the Court fine-tuned its definition of "burden," clarifying that the government action at issue must "*unduly* burden[] the free exercise of religion."[34] The Court applied this standard stringently in subsequent cases: with the exception of *Yoder*, the Court upheld only those free exercise challenges with facts closely reminiscent of *Sherbert*.[35]

A few years after *Yoder*, the Court handed down *Lyng*. *Lyng* involved a challenge to a federal timber and road construction project set to occur on sacred lands which were federally owned but historically used for three Native American tribes' religious rituals.[36] In the midst of the project, the Forest Service conducted a study of the lands which revealed that they were "significant as an integral and indispensible [sic] part of Indian religious conceptualization and practice,"[37] and that "privacy, silence, and an undisturbed natural setting"[38] were necessary for successful religious practice at these sites. The government altered its route to try to avoid archaeological sites and other sacred sites used by the religious groups but nonetheless decided to proceed with the project.[39] The plaintiffs sued the government, alleging that the decision to undertake the construction

[32] Id.

[33] Id. (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

[34] *Yoder*, 406 U.S. at 220 (emphasis added).

[35] James E. Ryan, Note, *Smith* and the Religious Freedom Restoration Act: An Iconoclastic Assessment, 78 Va. L. Rev. 1407, 1414 (1992) ("[S]ince establishing the test in *Sherbert v. Verner* in 1963, the Court rejected thirteen of the seventeen free exercise claims it heard. Moreover, three of the four victories involved unemployment compensation and thus were governed by the explicit precedent of *Sherbert*. . . . [E]ven the holding in *Yoder*, exempting Amish children from compulsory school attendance laws, seems limited to the facts of that case and the adherents of the Amish order."). To view the three cases where religious claimants successfully argued that denial of unemployment benefits violated the Free Exercise Clause, see Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829, 835 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 139 (1987); Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 719–20 (1981).

[36] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 439, 442 (1988).

[37] Id. at 442.

[38] Id.

[39] Id. at 443.

project on sacred lands violated the Free Exercise Clause of the First Amendment.[40]

Justice O'Connor, writing for the majority, rejected the plaintiffs' claim that their free exercise rights had been violated by the government's decision to pursue the construction project.[41] In so doing, the majority concluded that the government has only unduly burdened one's religion if it "coerce[s] individuals into acting contrary to their religious beliefs" or "penalize[s] the exercise of religious rights by denying religious adherents an equal share of the rights, benefits, and privileges enjoyed by other citizens."[42] According to the Court, the plaintiffs in *Lyng* failed to satisfy this test because (1) a government action is not coercive if it merely interferes incidentally with a claimant's religious practices without a threat of penalties, and (2) the plaintiffs were not denied rights, benefits, and privileges enjoyed by other citizens.[43]

The majority did not dispute that the government project at issue in *Lyng* could have potentially "devastating effects on traditional Indian religious practices."[44] Nevertheless, the Court maintained that even if the government action would "virtually destroy"[45] the tribes' ability to practice their religions, the action is not coercive unless the government action actively *prohibits* free exercise of religion with a threat of penalties.[46] To hold otherwise would entitle citizens to "a veto over public programs,"[47] where the government would be forced to "satisfy every citizen's religious needs and desires."[48] The majority thus took a very constrained approach to applying the *Sherbert*/*Yoder* test to claims over federally owned sacred lands.[49] This formulation of the test created an impossible hurdle for future Native American claimants: it gave the

[40] Id.

[41] Id. at 439.

[42] Id. at 440.

[43] Id. The second substantial burden factor is irrelevant to this Note because it applies only when a plaintiff has been denied explicit benefits conferred by the government, such as unemployment benefits. See, e.g., Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707 (1981) (involving denial of unemployment benefits to a religious applicant); Sherbert v. Verner, 374 U.S. 398 (1963) (concerning denial of unemployment benefits to a religious claimant who refused to work during the Sabbath).

[44] *Lyng*, 485 U.S. at 451.

[45] Id.

[46] Id. at 453 ("[A] law prohibiting the Indian respondents from visiting the Chimney Rock area would raise a different set of constitutional questions.").

[47] Id. at 452.

[48] Id.

[49] Id.

government free rein to pursue practically any project on a sacred site without being considered coercive under the Free Exercise Clause, as long as the government did not explicitly ban a religious group's access to those sites. Such a narrow conception of burden implicitly prevented any sacred site free exercise claim thereafter from succeeding.

The Court's impossibly high standard also minimized the government's responsibility to mitigate the detrimental effects of its projects on sacred sites in two principal ways.[50] First, the *Lyng* majority interpreted the American Indian Religious Freedom Act[51]—a statute enacted to protect and preserve Native Americans' religious freedoms and access to sacred sites—as creating no judicially enforceable right.[52] So, this once-promising statute became little more than a policy aspiration, imposing no legal responsibility on the government to prioritize Native American religious rights. Second, since the substantial burden standard is exceptionally demanding of plaintiffs, the onus rarely shifts to the government to demonstrate its compelling interest and use of the least restrictive means in pursuing that interest.[53] Therefore, in practice the government rarely, if ever, needs to put forth a compelling interest to prevail under *Lyng*.[54] It can instead assume that the claim will terminate before the government ever carries the evidentiary burden. After *Lyng*,

[50] Justice O'Connor did mention all the mitigation steps the government took in the construction project at issue in *Lyng*. Id. at 454 ("It is worth emphasizing, therefore, that the Government has taken numerous steps in this very case to minimize the impact that construction of the G-O road will have on the Indians' religious activities."). However, nothing in this portion of the opinion confers legal responsibility on the government since the Court never reached the government interest prong of the substantial burden test.

[51] AIRFA asserts that:

> [I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

American Indian Religious Freedom Act, 42 U.S.C. § 1996.

[52] *Lyng*, 485 U.S. at 455 (explaining that the Act's legislative history suggests that it does not give Native Americans special religious rights).

[53] Ryan, supra note 35, at 1416 ("[Prior to *Smith*], to show a burden was often to present simultaneously the government's compelling interest. Conversely, if the government's involvement or interference was not strong, i.e., its interest was not compelling, it was unlikely that a burden could be demonstrated.").

[54] See *Lyng*, 485 U.S. at 473 (Brennan, J., dissenting) ("[T]he Court has effectively bestowed on one party to this conflict the unilateral authority to resolve all future disputes in its favor.").

we are accordingly left with scant legal protection of sacred sites and few incentives for the government to avoid them.

B. Rational Basis Under Smith *and Statutory Responses*

Just two years after *Lyng*, the Supreme Court handed down *Employment Division v. Smith.*[55] In *Smith*, the Supreme Court abandoned the substantial burden test entirely and opted for rational basis review.[56] Under this new standard, one could not claim a religious exemption to avoid compliance with neutral and generally applicable laws.[57] This drastic swerve in doctrine was met by the public with "condemnation and despair,"[58] which swiftly led to a legislative resolution: the Religious Freedom Restoration Act of 1990 ("RFRA").[59] RFRA essentially reinstated the strict scrutiny language devised in *Sherbert* and *Yoder*, formally establishing the "substantial burden" test for free exercise claims. Then, in *City of Boerne v. Flores*,[60] the Court held that portions of RFRA that applied to state and local government actions were unconstitutional.[61] Congress, however, responded by enacting the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA")[62] as an extension of RFRA, which applied heightened judicial review to state and local government actions restricting religious exercise in the land use and prison contexts.

[55] 494 U.S. 872 (1990).

[56] Id. at 885 ("We conclude today that the sounder approach [to free exercise challenges], and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The 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.'" (quoting *Lyng*, 485 U.S. at 451)).

[57] Id. at 878 ("[I]f prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.").

[58] Ryan, supra note 35, at 1409.

[59] Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4.

[60] 521 U.S. 507 (1997).

[61] Id. at 532, 536 (holding that Congress "exceeded its authority under the Constitution" in that it "displac[es] laws and prohibit[s] official actions of almost every description and regardless of subject matter").

[62] Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc–2000cc-5.

While there are competing theories on the relevance of pre-*Smith* free exercise cases as authority after RFRA's enactment,[63] the Court has since generally interpreted RFRA as providing a "very broad protection for religious liberty."[64] It has not, however, specifically addressed the persuasiveness of *Lyng* in sacred site claims after RFRA. Nevertheless, neither RFRA nor RLUIPA has offered any extra protection for Native American sacred sites in lower courts. Even after RFRA's enactment and the Supreme Court's broad interpretation of the text, lower courts have consistently relied on *Lyng* as binding authority in evaluating Native American sacred site claims.[65] Most recently, in *Apache Stronghold v. United States*, the U.S. Court of Appeals for the Ninth Circuit, sitting en banc, rejected a challenge to the federal government's decision to allow a company to construct a copper mine on a sacred site.[66] In its reasoning, the majority interpreted RFRA as "subsuming, rather than abrogating, the holding of *Lyng*."[67] RLUIPA's protection of land has also proven entirely futile in the sacred site context—appellate courts have only applied RLUIPA to government land use regulations like zoning.[68]

C. The Need for Change in Free Exercise Doctrine

The Court's struggle to strike an appropriate balance in the sacred site realm of free exercise claims has highlighted the need for a fundamental change in the analysis. The test set forth in *Lyng* is functionally rational

[63] See Micah J. Schwartzman, What Did RFRA Restore?, Religious Freedom Inst. (June 30, 2016), https://religiousfreedominstitute.org/2016-6-30-what-did-rfra-restore/ [https://perma.cc/UT53-SG2X].

[64] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 685 (2014); see also Holt v. Hobbs, 574 U.S. 352, 356 (2015) (citing *Burwell*, 573 U.S. at 693); Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2383 (2020) (same).

[65] See, e.g., Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 239 F. Supp. 3d 77, 93 (D.D.C. 2017) ("That *Lyng* was a Free Exercise, rather than a RFRA, case does not change its applicability here. . . . In enacting RFRA, Congress restored the compelling-interest test set forth in pre-*Smith* cases."); Real Alts., Inc. v. Sec'y Dep't of Health & Hum. Servs., 867 F.3d 338, 363 (3d Cir. 2017) ("[I]n passing RFRA, Congress bolstered *Lyng*'s reading of the Free Exercise Clause with RFRA's text and legislative history.").

[66] Apache Stronghold v. United States, No. 21-15295, slip op. at 12, 27 (9th Cir. Mar. 1, 2024).

[67] Id. at 51.

[68] Id. at 47 ("RLUIPA expressly applies only to 'substantial burdens' in two specific contexts—namely, 'impos[ing] or implement[ing] a land use regulation,' and restrictions on 'a person residing in or confined to an institution' affiliated with a government." (alterations in original) (citations omitted)).

basis wearing a strict scrutiny disguise,[69] and it is fatal in fact for sacred site claims. Despite the indispensability of sacred sites for the meaningful practice of Native American religions, the Court has erroneously focused not on maintaining the existence of the sites themselves but rather *access* to them. It cares not about the government's destruction of sacred sites, but whether it has prohibited religious claimants from physically accessing them.[70] As far as sacred sites are concerned, this perspective is utterly flawed. Access to a sacred site does not protect free exercise rights if the site's religious value has been decimated. Sacred sites are a physical manifestation of spirituality. In order to protect Native American religions, they must be acknowledged as such.

Moreover, a change in doctrine is necessary because *Lyng* and its progeny fail to capture the spirit of the Free Exercise Clause generally.[71] James Madison, in his pursuit of religious liberty, emphasized that people deserve "*equal* right[s] . . . to the free exercise of [their] [r]eligion according to the dictates of conscience."[72] *Lyng* plainly fails to fulfill this purpose. Placing the onus on Native American claimants to demonstrate a substantial burden does not itself deprive them of equal rights to free exercise. Indeed, the standard of scrutiny is high for all religious claimants, and the Court has denied most claims for religious exemptions since *Sherbert*, regardless of their religion.[73] However, the Court has only willingly granted exemptions to individuals coerced into specific *acts*

[69] See Ryan, supra note 35, at 1416 ("*Smith* in one sense achieved wholesale what the Court had already been doing retail.").

[70] Interestingly, lower courts have embraced the broader notion that *preventing* (as opposed to prohibiting) access to religious practice could qualify as a substantial burden for cases governed by RFRA and RLUIPA. See, e.g., Abdulhaseeb v. Calbone, 600 F.3d 1301, 1315 (10th Cir. 2010); *Apache Stronghold*, slip op. at 180 (Murguia, C.J., dissenting). However, courts have not applied this broader understanding of RFRA to the sacred site context, instead using the narrow test in *Lyng* as authority. Id. at 50–51.

[71] See, e.g., Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 477 (1988) (Brennan, J., dissenting) ("The safeguarding of such a hollow freedom not only makes a mockery of the 'policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise [their] traditional religions,' . . . it fails utterly to accord with the dictates of the First Amendment." (quoting AIRFA, 42 U.S.C. § 1996)).

[72] James Madison, Memorial and Remonstrance Against Religious Assessments (1785), *in* 2 The Writings of James Madison 183, 190 (Gaillard Hunt ed., 1901) (emphasis added).

[73] See Ryan, supra note 35, at 1414 ("[T]he Court rejected thirteen of the seventeen free exercise claims it heard.").

contrary to their religious principles.[74] On the other hand, the Court's treatment of *land* has proven to demand a completely different level of scrutiny, as evidenced by *Lyng*. That is, unless the government explicitly bans access to a sacred site, which it will almost never do, it is simply impossible for Native American claimants to meet their evidentiary burden. So, the Court's unique hostility to sacred site claims does not grant Native Americans equal rights to free exercise.

The Court in *Lyng* justifiably expressed concern that veering from the substantial burden test would open the floodgates to endless litigation, tasking courts with "reconcil[ing] the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours."[75] This objection would certainly be reasonable if the Court was asked to lower the plaintiff's burden generally for *all* government actions, as Justice O'Connor implied would happen if the Court strayed from the *Sherbert*/*Yoder* test.[76] However, if the Court narrowly modifies the substantial burden inquiry for claims *only* rooted in the niche context of sacred sites or analogous types of land, citizens will not be granted a broad veto on an array of government actions.

In sum, *Lyng* destroyed the viability of essentially all sacred site free exercise claims by establishing a hurdle that Native American claimants can almost never overcome. The legislature's attempts to secure broad free exercise rights have also failed to successfully address this problem because lower courts still routinely apply *Lyng*'s narrow test. As it stands, the Court's treatment of sacred sites in the free exercise realm reflects either an inability or unwillingness to account for the unique nature of Native American religious practices at sacred sites, as compared to other religions. This effectively denies Native American religious groups equal title to the free exercise of religion. If courts are to ever ensure equal free exercise rights to all religious claimants, the Supreme Court must expand

[74] See, e.g., Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 688–90, 692 (2014) (granting exemptions for corporations that were coerced into providing contraception insurance coverage to employees); Holt v. Hobbs, 574 U.S. 352, 352 (2015) (holding unlawful a prison grooming policy which prevents inmates from growing beards in accordance with their religion); Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 720 (1981) (holding unlawful the denial of employment benefits to an individual who quit his work due to religious beliefs).

[75] *Lyng*, 485 U.S. at 452.

[76] Id. (expressing concern that challenges will be brought to "[a] broad range of government activities—from social welfare programs to foreign aid to conservation projects").

its conception of a "substantial burden" to level the playing field for sacred site claims.

II. ALTERNATIVE THEORIES OF SACRED SITE FREE EXERCISE CLAIMS

Part II provides a synopsis and analysis of existing alternative legal theories for free exercise claims involving Native American sacred sites. Sections II.A–C discuss and critique three such academic theories. The first alternative arises directly from Justice Brennan's *Lyng* dissent. The two latter proposals come from Professor Alex Tallchief Skibine and Professors Stephanie Barclay and Michalyn Steele, scholars in Native American law and religious liberty.

A. Justice Brennan's Lyng *Dissent*

In his strongly worded dissent in *Lyng*, Justice Brennan criticized the majority for failing to adequately address the tension between "Western culture, which views land in terms of ownership and use, and that of Native Americans, in which concepts of private property are not only alien, but contrary to a belief system that holds land sacred."[77] Instead, Justice Brennan argued that the site-specific nature of Native American land claims requires more than the Court's half-hearted effort to reconcile competing interests.[78] He further noted the majority's ironic move of tolerating destruction of an entire religion in a free exercise challenge, pointing out that it "stripped respondents and all other Native Americans of any constitutional protection against perhaps the most serious threat to their age-old religious practices,"[79] leaving them with a "freedom [which] amounts to nothing more than the right to believe that their religion will be destroyed."[80] Lastly, he critiqued the majority's refusal to analyze the government's compelling interest, opting instead to "embrace[] the Government's contention that its prerogative as landowner should always take precedence over a claim that a particular use of federal property infringes religious practices."[81]

In rejecting the Court's formulation of Native American religious liberty, Justice Brennan called instead for a different standard for sacred

[77] Id. at 473 (Brennan, J., dissenting).
[78] Id.
[79] Id. at 476.
[80] Id. at 477.
[81] Id. at 465.

site free exercise claims, drawing inspiration from lower court precedent.[82] He argued that the Court should focus not on the *form* of the government restraint, but on the *effect* on the religious practice at issue.[83] He further criticized the Court for drawing an arbitrary line between government action which compels conduct inconsistent with religious belief (which the Court does consider a constitutional violation) and that which prevents conduct consistent with religious belief (which the Court does not consider a constitutional violation).[84] To resolve these issues, Justice Brennan proposed a different test: a showing that (1) the government action "poses a substantial and realistic threat of frustrating their religious practices,"[85] alongside (2) a centrality inquiry, which asks whether the land is central or indispensable to one's religious practices.[86]

The majority's opinion responded directly to Justice Brennan's test, declining to adopt a framework that inquires into the centrality of a practice to a claimant's religion.[87] It expressed concern that such a test would improperly give courts a role in deciding the importance of various religious beliefs—a task best left out of the judiciary.[88] Justice Brennan countered this claim, arguing that a centrality requirement does not ask courts to weigh the *importance* of religious beliefs, but only whether claims are genuine and sincere.[89]

Justice Brennan rightly criticized the Court's hypocrisy in analyzing free exercise claims based on form, rather than impact, of the government action. It is arbitrary for courts to focus only on form. A government action that abridges or destroys a religious practice is a prohibition of the free exercise of religion, regardless of whether it was done incidentally or purposefully. Distinguishing between explicit and implicit prohibitions benefits only the government, lowering its burden to mitigate its damage to sacred sites.[90] The appropriate question to ask at the substantial burden stage must be broader: it should assess the *impact* of the government action on the religious practice at issue, as Justice Brennan suggests.

[82] See id. at 473–74.
[83] Id. at 467.
[84] Id. at 468.
[85] Id. at 475.
[86] Id. at 474.
[87] Id. at 457–58 (majority opinion).
[88] Id.
[89] Id. at 475 (Brennan, J., dissenting).
[90] See supra Section I.A (explaining why the Court's current standard fails to incentivize the government to mitigate harm).

Nevertheless, Justice Brennan's burden inquiry is overly broad—the vagueness of his "substantial threat" language kicks the door wide open for all free exercise claims. This could plausibly lead to the realization of the majority's concern of giving citizens a veto on government programs. Instead, the Court should embrace a narrow extension which merely puts sacred site claims on equal footing with other religious claims.

Justice Brennan was also misguided in claiming that a centrality inquiry would not force courts to adjudicate the importance of religious beliefs. His "genuine and sincere" language was simply a wolf in sheep's clothing, leaving the majority rightfully concerned that courts would be left "rul[ing] that some religious adherents misunderstand their own religious beliefs."[91]

Of course, Congress already explicitly rejected a centrality inquiry in RFRA.[92] But imagine if courts *did* find an exception to assess centrality in the unique context of Native American sacred sites. Indeed, courts have assessed the centrality of Native American religious practices at sacred sites in the past.[93] Perhaps it makes sense to reconsider this since the present substantial burden question appears ill-fitted to sacred site claims. But even if assessing centrality might be favorable for Native American claimants, centrality is nevertheless an inherently flawed inquiry to begin with—courts tend to end up assessing centrality based on how widespread and frequent the religious practices in question are.[94] For infrequent or niche religious ceremonies or acts, the centrality question has forced courts to analyze a religious practice they did not understand. In *Badoni v. Higginson*,[95] for example, the district court held that a sacred site was not deeply significant to Native American plaintiffs because they had only "attended a combined total of nine religious ceremonies" at the site, and the site was not "intimately related to the daily living of any group or individual."[96] The Tenth Circuit disagreed, noting that the centrality

[91] *Lyng*, 485 U.S. at 457–58.

[92] Religious Freedom Restoration Act, 42 U.S.C. § 2000cc-5(7)(A); see also Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 696, 748 (2014) (clarifying that RFRA bars a centrality inquiry).

[93] See Kristen A. Carpenter, Limiting Principles and Empowering Practices in American Indian Religious Freedoms, 45 Conn. L. Rev. 387, 394–95 (2012) (discussing the centrality test as used by courts prior to *Lyng*).

[94] See, e.g., People v. Woody, 394 P.2d 813, 817 (Cal. 1964) (finding that peyote was central to a Native American religious practice and was "more than a sacrament").

[95] 455 F. Supp. 641 (D. Utah 1977).

[96] Id. at 646.

question was satisfied because Native Americans had been partaking in important ceremonies and prayers at the site for hundreds of years.[97]

Regardless of the result of a centrality test, the methodology poses an unavoidable problem: it incentivizes courts to quantify the frequency of visits to the sacred site at issue or the extensiveness of the ritual or ceremony's history.[98] But numbers are not accurate proxies for religious significance, so quantifying the value of sacred sites leads to arbitrary rulings.[99] Therefore, though Justice Brennan's proposed framework was well-intentioned, any modification of the substantial burden requirement should avoid asking whether the practice or land is central to one's religion.

B. Skibine's Intermediate Scrutiny Proposal

Professor Alex Tallchief Skibine sought to address the problems with Justice Brennan's test in his own approach to sacred site claims. In a law review article, Skibine argued for a legislative solution for Native American free exercise claims involving sacred sites.[100] First, Skibine recommended that the *Lyng* test should be abandoned entirely.[101] Instead, he suggested that the legislature enact a law imposing a relaxed burden requirement which asks whether religious claimants can show a "significant impact and disproportionate burdens . . . on their ability to conduct meaningful religious exercises."[102]

In order to combat the *Lyng* majority's concerns that this would ease up too much on the showing of a burden, Skibine also sought to relax the

[97] Badoni v. Higginson, 638 F.2d 172, 177 (10th Cir. 1980).

[98] See Carpenter, supra note 93, at 420 ("[T]he *Badoni* court was left to count up Navajo medicine men who had visited Rainbow Bridge as a measure of the depth and significance of the religious practice. Similarly, by counting visits to Rainbow Bridge, the court could not seem to understand that the ceremonies in question were never held periodically (such as once a month or year), but rather as the needs of an individual or family arose. Missing was an assessment of how these practices and beliefs stemmed from the Navajo creation story, perpetuated Navajo culture and lifeways, and were critical to helping individuals and the community maintain the state of *hozho* that defined the right way of living for Navajos.").

[99] See id. at 413–20 (discussing several cases where the court's centrality inquiry went beyond its institutional capacity). Scholars have similarly criticized the practice of assessing the sincerity of one's religious beliefs to arbitrarily deny plaintiffs relief in other contexts. See, e.g., Micah Schwartzman & Richard Schragger, Religious Freedom and Abortion, 108 Iowa L. Rev. 2299, 2334–35 (2023) (criticizing the "sincerity" approach to free exercise claims in the abortion context).

[100] Skibine, supra note 7, at 288.

[101] Id. at 280.

[102] Id. at 297.

burden on the government."[103] Rather than requiring a compelling interest, he proposed an intermediate scrutiny standard for actions involving sacred sites.[104] This standard, modeled from the free speech realm,[105] would find a government action justified if it "furthers an important or substantial government interest."[106] Under this standard, the government's interest must be "unrelated to the suppression of religion, and the burdens posed on religious freedom could be no greater than those essential to protect that governmental interest."[107] In advocating for such a change, Skibine suggested that pre-*Employment Division v. Smith* strict scrutiny analysis was hardly strict at all—it resembled intermediate scrutiny already.[108] Hence, explicitly changing the standard of review to intermediate scrutiny would not be fatal for religious claimants.

Lastly, Skibine's legislative solution would adopt a narrower definition of "sacred site" in an attempt to appease critics concerned that allowing Native American claimants to prevail would cause future claimants to assert that "the whole earth is sacred," so "there [would] be no end to claims of sacredness."[109] Though he did not offer his own explicit definition, Skibine proposed that Congress adopt a definition that would incorporate preexisting definitions of "sacred site" used by the legislative and executive branches.[110] He argued that these definitions would provide a good baseline for a manageable, narrow conception of the term "sacred site," which would prevent the floodgates of litigation from opening.[111]

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[103] Id. at 290.

[104] Id.

[105] See generally United States v. O'Brien, 391 U.S. 367 (1968). Skibine's basis for suggesting a test analogous to free speech is that:

> [T]he Court has been more respectful of freedom of speech than freedom of religion. Other scholars have argued that the difference in level of scrutiny used in speech and religion cases could perhaps explain this disparity. Thus, they argue that using intermediate scrutiny with respect to neutral laws of general applicability would bring free exercise jurisprudence more in line with the methodology used in freedom of speech and other First Amendment cases.

Skibine, supra note 7, at 292 (footnotes omitted).

[106] Skibine, supra note 7, at 291 (quoting *O'Brien*, 391 U.S. at 377).

[107] Id.

[108] Id. at 291–92 ("[S]cholars have shown that the rate of success in free exercise cases was not very good before *Smith*. This indicates that strict scrutiny was not really applied. Instead, courts used a type of intermediate scrutiny when the law being challenged was a neutral law of general applicability.").

[109] Id. at 298, 300–01.

[110] Id at 299–300.

[111] Id. at 298. Skibine endorsed the definitions in Executive Order 13,007, Bulletin 38 of the National Park Service, and Rahall's Native American Sacred Lands Act as "all fairly similar

Skibine was fair in condemning the Court's conception of the coercion / denial-of-benefit test in *Lyng* and endorsing a broader test through which plaintiffs could more easily meet their onus in the first instance. However, Skibine's modified substantial burden test is overinclusive because its broad language kicks the substantial burden door open for religious claims generally, similar to Justice Brennan's proposal. As a consequence, the Court's concern with excessively expanding free exercise claims could plausibly be realized. Nor is this problem cured by narrowing the definition of a sacred site. While a narrow definition of sacred site would rein in claims alleging government interference with sacred land, it does nothing to rein in other religious claims. So, another religious claimant would still have a disproportionately easier time showing that a government action like mandating social security numbers[112] or excluding churches from government aid programs[113] has imposed a significant impact and disproportionate burden on their religious exercise. Such a test would open the floodgates in other areas of free exercise and fail to put Native American claimants on a level playing field. The optimal way to broaden the substantial burden test without opening the floodgates is thus to merely modify the preexisting coercion framework, rather than expand free exercise entirely.

Skibine's proposal to lower the burden on the government to intermediate scrutiny presents two further problems. First, courts already view the government's interest extremely favorably even under a strict scrutiny analysis. In the free exercise realm generally, courts overwhelmingly side with the government even in the face of powerful claims.[114] So if courts lowered the government's onus to intermediate

and . . . provide an excellent starting point for discussion." Id. at 299–300 (first citing Exec. Order No. 13,007, 61 Fed. Reg. 26771 (May 24, 1996); then citing Patricia L. Parker & Thomas F. King, Dep't of the Interior Nat'l Park Serv., National Register Bulletin: Guidelines for Evaluating and Documenting Cultural Properties 1 (1990); and then citing H.R. 5155, 107th Cong. § 1(b)(4) (2002)).

[112] See Bowen v. Roy, 476 U.S. 693, 693 (1986) (holding that there is no religious exemption to receiving a social security number for welfare benefits).

[113] See Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 450 (2017) (holding that excluding churches from a neutral government funding program violated the Free Exercise Clause).

[114] Ryan, supra note 35, at 1412 ("A survey of the decisions in the United States courts of appeals over the ten years preceding *Smith* reveals that, despite the apparent protection afforded claimants by the language of the compelling interest test, courts overwhelmingly sided with the government when applying that test.").

scrutiny, the government would have almost no trouble demonstrating its substantial interest, and Native American claims would still fail most of the time. Second, if there is one lesson to learn from *Smith* and its aftermath, it is that explicitly lowering the level of scrutiny will be met with public hostility, even if in reality it changes little.[115] This is especially likely because the standard of review would change only for Native American sacred site claims, thereby treating various religious groups differently.

One could argue that it is speculative to assume that the government would still prevail in most instances under intermediate scrutiny. There is, after all, minimal case law reaching the compelling interest analysis stage for any Native American sacred site free exercise claim, since courts usually find that the plaintiffs never met their burden in the first instance.[116] Indeed, for this precise reason, the *Lyng* Court itself did not engage in any compelling interest analysis, although the lower court found that the government had not demonstrated a compelling interest.[117] Nevertheless, since this holding was overruled in *Lyng*, we are left with no guidance as to what government action would fail a compelling interest test for a sacred site free exercise claim.

But even without guidance, one can extrapolate what the effects might be. If the purpose of intermediate scrutiny is to relax the already low burden on the government, even without case law to verify, it is difficult to imagine a scenario where the government would lose. Most, if not all, federal land projects necessarily advance some sort of substantial interest,[118] and the government is under no statutory obligation to defer to

[115] See supra Section I.B, discussing the public's reaction to *Smith*.

[116] See, e.g., Sequoyah v. Tenn. Valley Auth., 620 F.2d 1159, 1160, 1165 (6th Cir. 1980) (holding that plaintiffs seeking to prevent flooding of a sacred river "have not alleged infringement of a constitutionally cognizable First Amendment right"); Wilson v. Block, 708 F.2d 735, 738, 743–44 (D.C. Cir. 1983) (ruling against plaintiffs seeking to prevent development of a ski area on sacred lands).

[117] Nw. Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 695 (9th Cir. 1986), *rev'd sub nom.* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) ("There was evidence that forest management functions would be made easier by the road. There was evidence that the road would also provide greater recreational access to the area, but the projected use was not large. In our view, the government has fallen short of demonstrating the compelling interest required to justify its proposed interference with the Indian plaintiffs' free exercise rights.").

[118] Ryan, supra note 35, at 1416 ("[S]uch extensive involvement or interference would almost always signify that the government had a compelling interest in the law or practice in question, particularly considering what constituted 'compelling' in the Court's eyes.").

Native American religious values in pursuing these actions.[119] Moreover, the Court could give considerable weight to the government's status as an owner of the lands where the sacred sites are, as it did in *Lyng*, to rationalize siding with the government. So, regardless of the potentially detrimental effect on plaintiffs' religious practices, Skibine's test would still lead courts to side with the government since (1) it owns the land at issue, and (2) any minor steps the government takes to mitigate the impacts of its actions will corroborate its substantial interest under intermediate scrutiny. Therefore, one should be skeptical that Skibine's approach would be more beneficial for Native Americans in practice.

In conclusion, Native American sacred site claims should not be inspected under a broad "substantial threat" standard followed by intermediate scrutiny. Instead, the preexisting strict scrutiny framework should merely be modified. This is the most realistic way Native American plaintiffs can prevail without singling out one group's religious claims as deserving less scrutiny on the part of the government than everyone else. Such an approach would be broad enough to open the door to more religious claimants generally, but not so lenient as to open the floodgates to all litigation. Furthermore, keeping strict scrutiny would be met more favorably by the public, avoiding another post-*Smith* reaction.

C. Barclay and Steele's Substantial Interference Argument

In a recent law review article, Professors Stephanie Barclay and Michalyn Steele proposed a modified substantial burden test within the strict scrutiny framework which would redefine the meaning of coercion for Native American sacred sites.[120] First, they posited that a substantial burden analysis should begin with a presumption of government interference with Native American religious practices because Native Americans are "at the mercy of government permission to access sacred sites,"[121] and "affirmative accommodation is required to remove the interference"[122] since the government is the landowner. This interference, Barclay and Steele asserted, is identical to the already accepted legal conception of government interference utilized in the prison, military, and zoning contexts.[123] Barclay and Steele contended that, due to this baseline

[119] *Wilson*, 708 F.2d at 747.
[120] Barclay & Steele, supra note 19, at 1302–03.
[121] Id. at 1301.
[122] Id. at 1302.
[123] Id. at 1333.

of constant government interference with Native American religious practices, Native Americans' religious practices are not voluntary unless affirmative accommodations are taken to remove the interference.[124]

Barclay and Steele next pointed out the judiciary's hypocrisy in finding affirmative acts preventing religious exercise coercive in cases involving Western religions but not for equivalent Native American religions. To correct this double standard, they suggested that courts should legally recognize that Native American religious practices are burdened *more* than voluntary religious practices because of the baseline level of passive government interference.[125] This correction would in turn make it easier for Native American religious claimants to make out a prima facie case of coercion.[126]

Barclay and Steele were correct to assert that courts view government actions which prevent access to sacred sites less favorably than other religious practices. However, their idea of coercion is distorted. A presumption of baseline government coercion does not necessarily follow because the federal government owns the property at issue. While the government is the legal owner of public lands designated as sacred sites, and thus dictates who may use that land, its ownership does not automatically result in the level of interference present in prison or military contexts. In prisons, for example, government officials control details of prisoners' lives like "when and what they eat . . . what they wear and where they sleep."[127] Similarly, in the military, the government controls "regulations about [service members'] hairstyles, use of phones while walking, types of beverages and food that may be consumed, and even appropriate times for using pockets."[128]

The government does not exert an analogous level of control over Native worshippers at sacred sites. It does not disallow Native Americans from accessing sites at certain times, nor does it regulate what or how they

[124] Id. at 1301 ("[T]ribal members seeking access to federally owned sacred sites are not exercising their religion under a baseline of voluntary choice. Instead, because of the history of government divestiture and appropriation of Native lands, American Indians are at the mercy of government permission to access sacred sites. As such, they are subjected to a baseline of omnipresent government interference with the use of many of their most sacred sites. This baseline of coercion, so lightly dismissed as a legal insignificance in *Lyng*, is simply overlooked for Indigenous peoples.").

[125] Id. at 1302.

[126] Id.

[127] Id. at 1333–34.

[128] Id. at 1336.

are able to worship. The furthest its power extends is imposing fees and penalties to those who unlawfully use or damage such land.[129] But this type of interference is irrelevant to Native American religious groups who are lawfully present and have no desire to damage their own sacred sites. The fact that the government *can* impose more regulations—which very well could meaningfully interfere with religious worship—does not automatically mean that it *is* doing so. And it would be a slippery slope to religious discrimination for courts to give only Native Americans special status as being constantly interfered with by the government.[130]

Barclay and Steele's property-based approach of a baseline level of coercion thus goes too far in defining government interference: it equates interference to ownership. While this formulation would surely prove beneficial for Native American claimants in court, it would come at a high cost. Specifically, it could lead non-Native American claimants who worship on federally owned land to argue that the government is interfering with their religious practices because they depend on the government for access and resources, such as Catholics who worship in a church on federal land.[131] If the goal is to put sacred site claims on equal footing, this is an overreach in expanding free exercise.

Barclay and Steele further argued that a new formulation of coercion was necessary to bring the substantial burden requirement for Native American religious claims in line with that for voluntary religious practices.[132] Under their test, the government has exerted coercion if it has, either directly or indirectly, "substantially interfered with a religious individual's ability to voluntarily act on his or her theological commitments."[133] This burden test is flawed because it reaches far beyond protecting Native Americans. Barclay and Steele state that broadening the substantial burden test would put Native Americans on equal footing with other religions since they would start with a baseline of government

[129] Id. at 1340.

[130] See Apache Stronghold v. United States, No. 21-15295, slip op. at 175 (9th Cir. Mar. 1, 2024) (VanDyke, J., concurring) (critiquing Barclay and Steele's theory for protecting "Native Americans, and Native Americans alone").

[131] Id. at 1341 ("Native American sacred sites are not the only ones located on government property. One source estimates there are around seventy churches within the national parks, including an active Catholic church in Grand Canyon Village. Of these churches, over half are government owned." (footnotes omitted)).

[132] Id. at 1344.

[133] Id.

interference.[134] However, by formulating the test vaguely around one's theological requirements,[135] the authors would greatly expand the scope of free exercise to all religious claimants who assert that a government action is inconsistent with their religion. One can easily envision how other claimants may take advantage of this to advance litigation against the government in a variety of contexts.

Thus, while Barclay and Steele had the right idea of seeking to put Native Americans on equal footing by adopting a new meaning of coercion, their baseline level of coercion theory is misapplied to this context. The scope of their theory additionally broadens the scope of free exercise too generally. Their article again reiterates the point that, in order to prevent opening the floodgates of endless free exercise litigation, the meaning of coercion in free exercise should be expanded only narrowly.

III. A REFORMULATION OF THE MEANING OF "COERCION"

Part III argues for a new theory of coercion within the strict scrutiny framework. Section III.A zeroes in on the distinction between land, at issue in sacred site claims, and acts, at issue in most other religious free exercise claims. It argues that this distinction should serve as a foundation for a new test in the sacred site context. Section III.B proposes a new meaning of coercion in the substantial burden framework, which incorporates the benefits of the theories discussed in Part II but eliminates the problems. Lastly, Section III.C offers justifications for the strengths of this approach.

A. Recognizing a Distinction Between Religious Land and Religious Acts

The Court is understandably reluctant to stray from the *Lyng* approach to sacred site-related claims. Though I argue that its current strict scrutiny analysis is certainly unsatisfactory, a solution for Native American religious rights need not involve a drastic change to the level of scrutiny[136] or an expansive relaxation of the substantial burden requirement.[137]

[134] Id. at 1300–03.

[135] Id. at 1346.

[136] See supra Section II.B (debating the benefits and downsides of a potential modification to intermediate scrutiny).

[137] See supra Part II (analyzing theories which promote a general expansion of the substantial burden inquiry).

Rather, this Note advocates for a practical solution that affords claims involving sacred sites a realistic opportunity to prevail, without treating Native Americans differently than other religious groups or expanding the scope of religious liberty rights too broadly.

The fundamental issue courts have had trouble grappling with is the essential tie between Native American religious practices and the land on which they worship—something courts using an Anglo-American perspective of religion cannot completely do justice.[138] Courts have acknowledged the importance of sacred sites to Native American religions, but time and time again, have failed to meaningfully address their importance in analyzing free exercise rights. For example, in *Lyng*, the Court repeatedly mentioned the potentially detrimental impact of the government project[139] and noted the importance of the Chimney Rock sacred site to the Native American plaintiffs.[140] Nevertheless, the Court's legal analysis took none of these considerations into account. The opinion inquired not into whether the plaintiffs' free exercise was burdened, but rather, whether the plaintiffs were prohibited by threat of a penalty from accessing the sacred site at which they worshipped.[141]

The precise problem lies in the Court's overemphasis on prohibition of certain acts or practices. In *Lyng*, the Court focused on whether the government prohibited the act of *accessing* the site. Yet, accessing the site is not the real threat to Native Americans' free exercise of religion. Native Americans' free exercise rights would not be vindicated by the ability to physically access a sacred site that has been obliterated. It is the land *itself* that holds sacred importance to the religion. As Justice Brennan noted in his *Lyng* dissent, for Native Americans "land is itself a sacred, living being."[142]

[138] See supra Introduction for further discussion of this; see also Allison M. Dussias, Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases, 49 Stan. L. Rev. 773, 806 (1997) ("Native American plaintiffs attempting to vindicate their free exercise rights in federal court must first confront a fundamental problem. The First Amendment refers to the free exercise of *religion*, as if religion were wholly separable from other aspects of individuals' lives. Although this isolation of religion from other aspects of life may accurately reflect the Anglo-American perspective of the First Amendment's drafters, it is foreign to the Native American world view.").

[139] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988).

[140] Id. ("[S]ome of their activities are believed to be critically important in advancing the welfare of the Tribe, and indeed, of mankind itself.").

[141] Id. at 450–53.

[142] Id. at 461 (Brennan, J., dissenting).

Until now, the severe misapplication of the substantial burden test to sacred sites has caused courts to disfavor land-based free exercise claims compared to act-based claims. This is true even as applied to Native American religious claimants. For example, courts have ruled in favor of Native American claimants in free exercise cases involving ingestion of peyote[143] or choice of hair length in prison.[144] However, land-based claims have seen scant success after *Lyng* at the substantial burden stage,[145] because the question of "coercion" is generally lethal to the claim.[146] Thus, unless the judiciary adopts a new meaning of coercion, sacred sites will never be afforded any meaningful protection under the First Amendment. Of course, this does not mean that a new test would allow all land to be considered sacred, and the government would be unable to operate on much of its land, as scholars have warned.[147] Rather, courts can still approach sacred site claims with a skeptical eye. But focusing on the land itself, rather than access to it, provides a valuable bedrock for analysis of sacred site claims. If the substantial burden requirement is narrowly expanded to accommodate such claims, courts can realistically provide Native American claimants an opportunity to meet their initial burden, without being overly liberal in granting exemptions.

[143] See, e.g., People v. Woody, 394 P.2d 813, 821 (Cal. 1964) (holding that ingesting peyote in accordance with one's religion is constitutionally protected); State v. Whittingham, 504 P.2d 950, 954 (Ariz. Ct. App. 1973), *cert. denied*, 417 U.S. 946 (1974) (same).

[144] Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975).

[145] See, e.g., Apache Stronghold v. United States, No. 21-15295, slip op. at 50–51 (9th Cir. Mar. 1, 2024).

[146] See, e.g., id. at 11 (per curiam) (summarizing the majority's holdings) ("[A] disposition of government real property does not impose a substantial burden on religious exercise when it has 'no tendency to coerce individuals into acting contrary to their religious beliefs,' does not 'discriminate' against religious adherents, does not 'penalize' them, and does not deny them 'an equal share of the rights, benefits, and privileges enjoyed by other citizens. . . .' Apache Stronghold's claims under the Free Exercise Clause and RFRA fail under these *Lyng*-based standards . . . ." (quoting *Lyng*, 485 U.S. at 449–50, 453)).

[147] See, e.g., Ira C. Lupu, Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion, 102 Harv. L. Rev. 933, 947 (1989) ("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."); Marcia Yablon, Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land, 113 Yale L.J. 1623, 1630–33 (2004) ("By ruling against the Tribes, the Court [in *Lyng*] avoided a situation in which tribes could guarantee the nonuse of significant portions of government land.").

B. Formulating a New Test for Land-Based Free Exercise Claims

The issue of how to apply the substantial burden standard to sacred site claims is ripe for review at the Supreme Court following the Ninth Circuit's recent en banc decision in *Apache Stronghold v. United States*. That case led to a stark split among the eleven-judge panel on several issues, including (1) whether the narrow test in *Lyng* or RFRA's more broadly applied substantial burden test should govern sacred site claims,[148] and (2) whether the meaning of substantial burden should encompass situations where the government "prevents a person from engaging in sincere religious exercise."[149] The sharp disagreements over how to interpret *Lyng* and RFRA in these lengthy, complicated opinions indicate that the answers to these questions are anything but clear-cut. At a minimum, *Apache Stronghold* shows that lower courts lack the necessary guidance on how to properly apply *Lyng* to sacred site claims following the enactment of RFRA. To resolve this confusion, the Supreme Court must provide clarity on whether *Lyng* should still be guiding authority on sacred site claims, or whether it should be expanded or abandoned entirely in favor of RFRA. Whether or not *Apache Stronghold* makes its way up to the Court, it seems inevitable that the Court will eventually have to face the music. When it does, how should it respond?

This Note seeks to resolve that question. First, the Court is likely uninterested in deviating far from the test it set forth in *Lyng*, which required plaintiffs to demonstrate that they were "coerced by the Government's action into violating their religious beliefs."[150] However, the Court has been increasingly receptive to free exercise claims in recent years, siding with religious claimants in almost every case that has come before it.[151] And in *Apache Stronghold*, five judges would have held that "preventing a person from engaging in religious exercise by denying them access to a sacred site is a substantial burden."[152] Therefore, there is

[148] *Apache Stronghold*, slip op. at 47–48.

[149] Id. at 206 (Murguia, C.J., dissenting).

[150] *Lyng*, 485 U.S. at 449.

[151] See, e.g., Ramirez v. Collier, 595 U.S. 411, 433 (2022); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1868 (2021); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 69 (2020); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2246 (2020); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1720 (2018); Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 450 (2017).

[152] *Apache Stronghold*, slip op. at 228 (Murguia, C.J., dissenting).

openness to expansion in the doctrine. The Court has also become more sympathetic to claims concerning Indigenous rights generally in the past few years,[153] in large part due to Justice Gorsuch's consistent support for Native Americans in every case brought before the Court during his tenure.[154] Thus, the Court would likely be receptive to expanding religious freedoms for Native American claimants, so long as any expansion is not sweeping.

Accordingly, this proposal seeks only to expand free exercise doctrine narrowly, remaining consistent with RFRA and the Court's concerns expressed in *Lyng*. The proposal endorses a broader conception of coercion but declines to go so far as to relax the scrutiny to the tests discussed in Part II. In declining to adopt a heavily revised or otherwise completely different standard of review for sacred site claims, this Note proposes a formulation of coercion which works within the preexisting *Lyng* framework, and places sacred site claims on equal footing with act-based free exercise claims. This theory also seeks to resolve the *Lyng* Court's fears of (1) opening the floodgates to litigation and (2) calculating the centrality of religious beliefs.

Currently, courts view sacred sites in terms of whether plaintiffs can legally *access* them, regardless of whether they are physically destroyed.[155] If Native Americans are not explicitly prohibited from accessing the religious sites, their free exercise rights are not legally violated.[156] In reformulating the substantial burden framework, courts should abandon this approach and instead view destruction of the land *itself* as analogous to coercion of a religious act or practice. Native American plaintiffs are concerned not with access, but with the fact that the state of their sacred site has been so altered by government interference that religious acts can no longer be effectively performed there.[157] In other words, the preservation of sacred land itself is a

[153] See, e.g., Haaland v. Brackeen, 599 U.S. 255, 256 (2023); McGirt v. Oklahoma, 140 S. Ct. 2452, 2453 (2020).

[154] Stephen L. Carter, The Mystery of Gorsuch's Passionate Support for Tribes, Bloomberg (June 25, 2023, 8:00 AM), https://www.bloomberg.com/opinion/articles/2023-06-25/gorsuch-is-the-supreme-court-s-strongest-defender-of-native-american-rights [https://perma.cc/UY4H-U92M].

[155] See supra Section III.A.

[156] Id.

[157] In making this distinction, this Note draws influence from Justice Brennan's form versus effect distinction. See supra Section I.A for a discussion of this distinction as detailed by Justice Brennan.

necessary precursor to Native Americans' ability to freely exercise their religion. So, while land is not in itself a religious act, it should be treated in a parallel manner for purposes of free exercise analysis, because its preservation is indispensable to the religious practices that the Free Exercise Clause *does* protect. Land-based claims thus deserve their own test within the strict scrutiny analysis.

This Note proposes that the Supreme Court adopt a new meaning of coercion that would be applicable only to land-based claims. Under this test, a plaintiff can only demonstrate coercion if the government either explicitly *or implicitly* prohibits meaningful use of sacred land. This incorporates *Lyng*'s requirement of a showing of an explicit ban from accessing the sacred site. However, it expands *Lyng* by allowing plaintiffs to demonstrate an implicit prohibition. Under this approach, an implicit prohibition has occurred if the government action prohibits a religious practice *by means of* irreparably damaging the sacred land.[158]

The first question to ask in applying the test is: How can a court determine if the government has irreparably damaged sacred land? To answer this, courts should consider whether (1) the government has permanently altered the landscape, and (2) partaking in religious practices would be impossible at this location due to the government's alteration to the land. If a religious claimant relies on the unique natural features of a sacred site for prayer, the government's destruction of this land would render prayer impossible at this location. This would amount to irreparable damage of a sacred site.

Yet impossibility of religious practice at just the one sacred site is not enough. If a court does find that the government has irreparably damaged sacred land, the next inquiry is whether this amounts to an implicit prohibition of a religious practice. Courts should find that an implicit prohibition has occurred *only* if that religious practice can no longer occur at all. In order to decide this, courts should look at whether the religious practice that has allegedly been eliminated is unique to that specific site, or whether it can occur at other locations with similar functions or purposes. As an example, a claim that one's prayers generally will not be heard at a sacred site that has been irreparably damaged will not suffice if the claimant cannot show that the prayer is impossible elsewhere. However, if the natural features of the land are necessary for a specific

[158] The "irreparable damage" language was inspired by the facts of *Lyng*, in which the Forest Service conducted a study finding that the government project at issue would irreparably damage sacred land. *Lyng*, 485 U.S. at 442.

medicinal prayer, for example, then the specific religious practice itself has been prohibited. If all the above elements are satisfied, the plaintiffs have met their substantial burden. Then, the court can continue with a strict scrutiny analysis of the government's compelling interest.

C. Justifications for the Proposed "Implicit Prohibition" Test

The test for implicit prohibitions is, of course, extremely narrow. It requires, in essence, complete elimination of one's religious practices via irreparable alteration of sacred land. However, because of the Court's reluctance to broaden free exercise doctrine too much, a limited expansion is necessary to crack open the door to sacred site claims while addressing the flaws in the tests in Part II. This test addresses those problems.

First, this approach benefits only sacred land claims, which provides a necessary limiting principle to the substantial burden inquiry in two ways. In one sense, the test declines to arbitrarily treat all religious land on federal property as special. This solves a shortcoming of Barclay and Steele's analysis. Similar to their test, the irreparable damage prong of my proposal considers whether the government action allows the sacred site to function consistent with Native American religious commitments, incorporating some components from their proposed substantial burden framework.[159] However, unlike Barclay and Steele, the second prong of the test limits its scope to religious practices that would become completely impossible due to the government action. The impossibility requirement would prevent the substantial burden framework from being expanded to all religious practices on federal land. For instance, a dispute over a church on federal land would not prevail unless destruction of the church would prohibit an individual's worship.[160] Even if the government affected a specific piece of unique sacred land, the analysis also terminates if the religious worship at issue can occur elsewhere. So, courts need not be concerned that this test would "favor[] religions that happen to require land . . . [and] discriminate against other religions."[161] This test does not treat land differently simply because land is inherently special,

[159] Barclay & Steele, supra note 19, at 1346.

[160] If a religious claimant could partake in the same worship at a different church elsewhere, they would not meet their burden. See supra Section II.C (explaining why this test hesitates to expand free exercise doctrine generally to any religious sites on federal land).

[161] Apache Stronghold v. United States, No. 21-15295, slip op. at 172 (9th Cir. Mar. 1, 2024) (VanDyke, J., concurring) (critiquing this distinction with respect to Barclay and Steele's article).

nor does it arbitrarily favor religions that happen to be on government property. Rather, it simply appreciates that there are some unique circumstances in which specific sites are so sacred to a religion that religious practices depend entirely on the preservation of such land.

More broadly, the implicit prohibition test provides a limiting principle in that it declines to expand free exercise doctrine universally, unlike the theories discussed in Part II. By declining to widen the entire substantial burden framework, this test prevents the floodgates of litigation from opening, especially from other non-sacred site religious claimants. Specifically, it is restrictive enough to prevent challenges to all other internal government procedures, as Justice O'Connor was concerned about in *Lyng*,[162] because it applies only to government procedures affecting federally owned sacred lands. By applying this analysis to just land-based claims and eliminating the problematic emphasis on the religious act itself, the test ensures that sacred site claims can actually reach the compelling interest stage. This framework, if narrow, merely puts sacred sites on equal footing with claims involving other acts or practices. It goes no further.

Second, this test is also advantageous because it strikes the appropriate balance between treating Native American religions fairly and opting not to single them out or change the standard of scrutiny their claims receive. Unlike Barclay and Steele's passive interference theory, this test would not give Native Americans (or other groups practicing their religion on federal land) special status in free exercise jurisprudence. It declines to put different religious groups at different baselines at the substantial burden stage, which could appear discriminatory. Instead, this proposal simply brings courts' view of religious land in line with how they already view religious acts, within the preexisting framework.

And unlike Skibine's intermediate scrutiny standard, the government would not receive special scrutiny in sacred site claims.[163] The strict scrutiny standard would remain since the functional purpose of lowering the plaintiff's onus for sacred site claims is merely to equalize the playing field for all religious claimants at the substantial burden stage. This implicit prohibition proposal thus renders lowering the government interest analysis unnecessary. And given the Court's already favorable view of the government's strong interest in federal land projects, and the

[162] *Lyng*, 485 U.S. at 448–49.

[163] See supra Section II.B (discussing Skibine's proposal to lower the burden on the government).

fact that the government has a very strong interest in most of its federal land projects to begin with, the strict scrutiny standard will not be fatal for the government. Indeed, the government would likely often still prevail. But by creating an actual threat of litigation of the government's compelling interest, this test merely seeks to actually hold the government accountable for making a concerted effort to protect sacred sites and use the least restrictive means in pursuing its projects.

Third, this formulation of coercion does not unnecessarily inquire into a religious belief's centrality.[164] Courts need not ask whether the prohibition on use of the sacred site would undermine the faith, or whether the land in question is central to the faith. The question is restricted only to whether the land at issue—regardless of how important the land is to a religion—is damaged such that a religious act has been wholly prohibited. It asks not how essential the land is to the religion's faith, but simply, whether destroying the land prohibits a religious practice at all.

Critics of this test may rightfully be concerned that this test is still too broad because it allows claimants to bring virtually any sacred site-related claim, no matter how minor, as long as land has been damaged. It is a reasonable concern that a religious claimant could prevail by arguing that a very minor but unique religious practice can no longer occur, and that courts would equate more physical impact with more protection for that religion. This is certainly a weakness of the implicit prohibition test that could lead to frivolous claims. Even if this concern cannot be resolved entirely, it is largely checked by the narrow scope of the test: that the land must be *irreparably* damaged, such that religious practices will cease to occur *entirely* because of the government's alteration. This is a high bar to meet, and not just any government project's interference or corresponding religious act will suffice. Not even irreparable damage alone will suffice, without impossibility of the religious act entirely.

Critics might also assert that it is discriminatory to analyze burdens based on the physical consequences of a government action because it disfavors religions lacking tangible, material items.[165] If courts emphasize the physical consequences of a government action, the argument goes that "[r]eligions that experience a substantial burden to their exercise due to government action that also has a substantial physical manifestation would be treated favorably. Inversely, religions affected by government

[164] See supra Section II.A (discussing why a centrality inquiry is flawed).
[165] *Apache Stronghold*, slip op. at 171 (VanDyke, J., concurring).

actions with less physical impact would be sent to the back of the bus."[166] In essence, this could functionally just result in treating Native Americans specially in free exercise jurisprudence and discriminating against other religions, even if the test does not explicitly do so.

In response, I confess that the primary beneficiaries of my implicit prohibition test would be Native American religious groups, even if the test does not single them out explicitly. However, it would be a mistake to assume that this test would then give Native Americans special treatment in free exercise jurisprudence. This critique misunderstands how free exercise doctrine currently treats different religious claims. As this Note has argued, all claims do not sit at the front of the bus. Rather, under RFRA, act-based claims get to sit in the front, while land-based claims are sent to the back. This is not done explicitly either—it is simply a product of RFRA and the Supreme Court's case law. A minor expansion to afford more leeway to plaintiffs in sacred site claims would not suddenly turn the tables. Instead, it would just mean that every religious claim, including those over sacred sites, are put on an equal playing field.

To summarize, this test addresses the primary concerns with the approaches outlined in Part II in overexpanding free exercise doctrine or prioritizing Native American religious claims over other religious claims. Instead, this novel approach is both a meaningful expansion that gives Native American sacred site claims a fighting chance, but a narrow limitation that avoids clogging courts with endless sacred site litigation or treating different religious groups differently.

CONCLUSION

The Free Exercise Clause of the First Amendment must apply equally to individuals of all religions, yet as of now it does not. Under the Court's narrow interpretation of coercion in sacred site free exercise lawsuits, adopted in *Lyng* and implemented ever since, Native Americans' land-based religions are not afforded the same free exercise rights as individuals of other religions. In order to succeed in a sacred site free exercise claim, the Court demands of claimants an impossible task: to prove that the government has outright banned their access to sacred sites. Courts have since refused to depart from the "coercion" requirement in *Lyng*. So, if sacred site claims are to ever succeed, the Supreme Court must seriously revisit its meaning of coercion.

[166] Id. at 170–71.

To meaningfully protect Native American religious liberty, the Court must modify its substantial burden framework. This Note analyzed and critiqued three potential approaches to this: the substantial threat and centrality approach adopted by Justice Brennan, the intermediate scrutiny proposition by Professor Alex Tallchief Skibine, and the baseline coercion and substantial interference test offered by Professors Stephanie Barclay and Michalyn Steele. This Note then opted for a novel approach to the meaning of coercion in sacred site claims, which incorporates some positive aspects of former theories, and additionally provides new insight into free exercise doctrine. This Note argued that the implicit prohibition inquiry, narrowly tailored to sacred lands, resolves many of the problems with the former suggested theories. The test addresses the floodgates and centrality concerns expressed by the *Lyng* majority with broadening the substantial burden framework. And while it is uniquely fitted to address the concerns of Native American claimants, the test benefits all religious claimants making sacred land claims. Most importantly, it places Native American sacred site claims on equal footing with other religious claims—something that is not timely, but rather, long overdue.