NO MORE RELIGIOUS PROTECTION: THE IMPACT OF *LYNG V. NORTHWEST INDIAN CEMETERY PROTECTION ASS'N*

I. INTRODUCTION

The free exercise clause of the first amendment protects the right to practice religion.[1] Courts[2] and legislatures[3] recognize that the right to believe in[4] and to worship freely[5] a Supreme Being constitutes a fundamental right.[6] Consequently, an individual has the right to invoke con-

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1. U.S. CONST. amend. I. The amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." *Id.* The free exercise clause applies to the states through the fourteenth amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

2. *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (the right to freely worship is a fundamental right).

3. *See, e.g.*, The American Indian Religious Freedom Act of 1978 (AIRFA), 42 U.S.C. § 1996 (1982). AIRFA protects and preserves "for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indians . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." *Id.*

4. The freedom to believe is absolute. *Cantwell*, 310 U.S. at 303. The Supreme Court originally held that the free exercise clause generally protected one's right to have religious beliefs. This right, however, does have limits. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 166-67 (1878) (permitting a man who engaged in polygamy to exercise his beliefs "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself").

5. The Supreme Court eventually extended free exercise protection to individual acts as well as beliefs in Cantwell v. Connecticut, 310 U.S. 296 (1940). The Court stated that the first amendment "embraces two concepts, freedom to believe and freedom to act." *Id.* at 303. The freedom to act, however, is not absolute but "remains subject to regulation for the protection of society." *Id.* at 304.

6. Marcus, *The Forum of Conscience: Applying Standards under the Free Exercise Clause*, 1973 DUKE L.J. 1217, 1217-18.

stitutional protection when government policy or action restrains his or her ability to worship.[7] Native Americans consider this right of paramount importance when trying to protect their sacred lands.[8] Native American religion revolves around sacred land. Thus, the destruction or alteration of this land destroys the core of Native American religion and other important aspects of Native American life.[9]

Before allowing any burden on an individual's free exercise of religion, courts historically require that the government show its action constitutes the least restrictive means of accomplishing a compelling state objective.[10] In deciding Native American sacred land cases, how-

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7. *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707 (1981); Wisconsin v. Yoder, 402 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963). *See infra* notes 17-51 and accompanying text for a discussion of these cases.

8. Some of the more noteworthy sacred land cases include: Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 956 (1984) (holding that alternative religious sites alleviate the burden on Native American religions); Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980) (holding that the governmental action did not burden a central aspect of Native American religion); Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981) (holding that an important government interest outweighs any burden on the Native American's religion). Cases at the district court level include: Crow v. Gullet, 541 F. Supp. 785 (D.S.D. 1982) (court held that state should not prohibit religious acts nor should it provide the means to carry them out); Inupiat Community of Arctic Slope v. United States, 548 F. Supp. 182 (D. Alaska 1982) (holding that the Native Americans failed to show a burden on their religion).

9. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 459-60 (1988) (Brennan, J., dissenting).

> [F]or most Native Americans, '[t]he area of worship cannot be delineated from social, political, cultural, and other areas of Indian lifestyle.' A pervasive feature of this lifestyle is the individual's relationship with the natural world. . . . While traditional western religions view creation as the work of a deity 'who institutes natural laws which then govern the operation of physical nature,' tribal religions regard creation as an on-going process in which they are morally and religiously obligated to participate. Native Americans fulfill this duty through ceremonies and rituals designed to preserve and stabilize the earth and to protect humankind from disease and other catastrophes. Failure to conduct these ceremonies in the manner and place specified, adherents believe, will result in great harm to the earth and to the people whose welfare depends upon it.

Id. (citations omitted). *See also* A. HULTKRANTZ, BELIEF AND WORSHIP IN NATIVE NORTH AMERICA (1981) (emphasizing that the core of Indian religions is their land).

10. *See, e.g.* Wisconsin v. Yoder, 406 U.S. 205, 235 (1972) (allowing Amish children to be educated at home infringed less upon their first amendment rights than requiring school attendance until age 16). *See infra* notes 43-51 and accompanying text for a discussion of *Yoder*. *See also* Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975) (a prison's interests could be served without requiring an Native American to cut his hair against his religious beliefs).

ever, district and appellate courts have failed to use traditional free exercise analysis and have been inconsistent both in their formulation and application of free exercise analysis.[11] In *Lyng v. Northwest Indian Cemetery Protective Ass'n*,[12] the Supreme Court decided whether a state government's infringement on tribal sacred land violated the Constitution.[13] The Court upheld this infringement because the government did not coerce Native Americans into practicing a different religion or penalize their beliefs.[14] This coercion or penalty requirement, though, may significantly reduce the possibility of bringing a successful suit against the government.[15]

II. TRADITIONAL FREE EXERCISE CLAUSE ANALYSIS

The first amendment's free exercise clause theoretically applies equally to the religious practices and beliefs of all citizens.[16] In a recent opinion, the Supreme Court stated that first amendment protection exists even if a religious belief is unacceptable, illogical, inconsistent, or incomprehensible to others.[17] Historically, however, many religious minorities and groups with unusual views have failed in their pursuit of free exercise claims.[18]

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11. *See infra* notes 54-88 and accompanying text for a discussion of Sequoyah v. Tennessee Valley Auth., 480 F. Supp. 608 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980); Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 956 (1984); Badoni v. Higginson, 455 F. Supp. 641 (D. Utah 1977), *aff'd*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

12. 485 U.S. 439 (1988).

13. *See infra* notes 90-111 and accompanying text for a discussion of *Lyng*.

14. 485 U.S. at 449.

15. *See* 485 U.S. at 476, where Brennan suggests that the *Lyng* decision strips the Indian's religious practices of constitutional protection. *Id.* (Brennan, J., dissenting).

16. *But cf.* Kurland, *Expanding Concepts of Religious Freedom, Foreward—Church and State in the United States: A New Era of Bad Feelings*, 1966 WIS. L. REV. 215, 216 (stating that although courts have generally been tolerant toward religious minorities, "the caveat must be added that the minority must not be too small or eccentric.").

17. Thomas v. Review Bd., 450 U.S. 707, 714 (1981). The *Thomas* Court distinguished between religious and philosophical beliefs, noting that religious beliefs are afforded first amendment protection. *Id.* at 713. The Court reversed the Indiana Supreme Court's characterization of Thomas' beliefs as a personal philosophical choice not entitled to first amendment protection. *Id.* at 714-15.

18. United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968) (district court rejected defendant's claim that she was a minister of the Neo-American Church and that marijuana and LSD were true sacramental foods and their use was essential to her religion). *See, e.g.*, Reynolds v. United States, 98 U.S. 145 (1878) (Mormons suffered harsh sentences for practicing polygamy); Davis v. Beason, 133 U.S. 333 (1890) (Mormons

Given the broad spectrum of conflicting religious beliefs and practices in the United States, it is easy to understand why the Court has struggled in formulating a free exercise analysis that protects all citizens. Traditionally, a plaintiff could establish a prima facie case under the first amendment by showing that a governmental action or policy burdened a sincerely held religious belief.[19] If the plaintiff succeeded in establishing a prima facie case, the burden shifts to the government to show that its action or policy was the least restrictive means of accomplishing a compelling state objective.[20]

The development of free exercise analysis changed direction with the 1963 Supreme Court decision in *Sherbert v. Verner*.[21] In *Sherbert*, the Supreme Court upheld a free exercise claim in favor of an individual for the first time.[22] Adell Sherbert was a member of the Seventh-Day Adventist Church, which prohibits Saturday labor.[23] Sherbert's em-

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practicing polygamy lost the right to vote); Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245 (1934) (conscientious objectors could not attend state-run universities); Prince v. Massachusetts, 321 U.S. 158 (1944) (Jehovah's Witnesses can be prohibited from having their children sell or distribute religious literature in public); *In re* Ferguson, 55 Cal. 2d 663, 674, 361 P.2d 417, 423, 12 Cal. Rptr. 753, 759, *cert. denied*, 368 U.S. 864 (1961) (stating that "the Muslim Religious Group is not entitled as of right to be allowed to practice their religious beliefs in prison. . . .");.

19. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 403 (1963), holding that the first question is whether the government action imposes any burden on the challenger's religion. Courts hold that beliefs are burdened if governmental action or policy either penalizes religious beliefs or coerces an individual to stop practicing certain religious beliefs. Courts have found that governmental action penalized religious beliefs when the receipt of certain benefits was contingent on an individual's acting contrary to his religion. In *Sherbert*, the Court held that a state could not deny unemployment compensation to Seventh-day Adventist who refused to work on Saturdays. *Id.*

Coercion exists when the government either outlaws certain religious practices or requires behavior contrary to certain religious beliefs. *See infra* notes 21-51 and accompanying text discussing the requirements for establishing a prima facie case based on the free exercise clause. *See, e.g.*, Reynolds v. United States, 98 U.S. 145 (1878) (law prohibiting Mormons from practicing bigamy upheld); Wisconsin v. Yoder, 406 U.S. 205 (1972) (striking down compulsory school attendance law as it applied to Amish children).

20. A compelling state interest is an "interest of the highest order." *Yoder*, 406 U.S. at 215 (1972). *See infra* notes 21-51 and accompanying text discussing compelling state interests and least restrictive means analysis.

21. 374 U.S. 398 (1963).

22. *See* Marcus, *supra* note 6, at 1220 (*Sherbert* was the first major free exercise claim resolved in favor of an individual).

23. 374 U.S. at 399. The Seventh-Day Adventists celebrate their Sabbath on Saturday. *Id.*

ployer fired her because she refused to work on Saturdays.[24] Unable to find alternate employment which did not require Saturday work, Sherbert filed a claim for state unemployment compensation benefits.[25] The state declared her ineligible to receive benefits under the state act because Sherbert had refused, without good cause, to accept suitable work offered by the employment office or an employer.[26]

The Court recognized that the state act burdened Sherbert's free exercise of religion because it forced her to choose between receiving benefits and practicing her religion.[27] Consequently, the Court held that the state scheme penalized the free exercise of Sherbert's religion.[28] Once Sherbert had established a prima facie case, the Court considered whether the state had a compelling state interest.[29] Finding that no compelling state interest justified the denial of the unemployment bene-

24. *Id.* Sherbert only worked Monday through Friday when she became a member of the Seventh-Day Adventist Church in 1957. In 1959, however, the work week was changed and every employee had to work on Saturdays. *Id.* at 399 n.1.

25. *Id.* at 399-400.

26. *Id.* at 401. The South Carolina Unemployment Compensation Act, S.C. CODE ANN. § 68-114 (Law. Co-op. 1962) provided that:

> Any insured worker shall be ineligible for benefits: . . .
>
> (3) . . .
>
> (a) If the Commission finds that he has failed, without good cause, (i) either to apply for available suitable work, when so directed by the employment office or the Commission, (ii) to accept available suitable work when offered him by the employment office or the employer or (iii) to return to his customary self-employment (if any) when so directed by the Commission, such ineligibility shall continue for a period of five weeks . . . as determined by the Commission according to the circumstances in each case. . . .

Id.

27. 374 U.S. at 404. The Court analogized the imposition of this choice to a fine imposed against Sherbert for her beliefs and stated that both were equally burdensome. *Id.* Further, the question of whether a sincerely held religious belief was involved was not an issue in the case; therefore, it was established that the religious belief was sincere. *Id.* at 399 n.1.

28. *Id.* at 406. The Court stated that "[t]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Id.* Thus, Sherbert had established a prima facie case of a constitutional violation. *See supra* note 19 for a discussion of burdens on the exercise of free speech.

29. *Id.* at 406. Justice Brennan's threshold inquiry concerning a compelling state interest required a strong showing by the state: "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.' " *Id.* at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

fits,[30] the Court never reached the question of whether less restrictive methods existed for promoting the state purpose.[31] Therefore, the Court mandated the extension of unemployment benefits to Sherbert.[32]

In *Thomas v. Review Bd. Employee Sec. Div.*,[33] the Supreme Court expressly relied on *Sherbert* to strike down a state's denial of unemployment benefits to a Jehovah's Witness who left a job at a steel factory because of his religious beliefs.[34] Thomas quit his job after he was transferred from a non-military production department to a department that produced turrets for military tanks. Thomas claimed that his religious beliefs prevented him from producing war materials.[35] The Review Board found that Thomas quit without good cause, and thus violated the Indiana unemployment compensation statute.[36] The Board therefore denied him unemployment benefits.[37]

Engaging in traditional free exercise analysis, the Court first deter-

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30. *Id.* at 407. The only state interest suggested in *Sherbert* was a mere possibility that the "filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work." *Id.*

31. The Court added, however, that even if a compelling state interest had been shown in this case, the state would still have "to demonstrate that no alternative forms of regulation would combat such abuses without infringing [f]irst [a]mendment rights." 374 U.S. at 407. The Court held that a state "may not constitutionally apply the [unemployment] eligibility provisions so as to constrain a worker to abandon his religious convictions . . . ." *Id.*

32. *Id.* at 410. "[T]he consequences of . . . disqualification [due] to religious principles and practices may be only an indirect result [of the legislation]; it is true that no criminal sanctions directly compel appellant to work a six-day week." *Id.* at 403 (citation omitted).

33. 450 U.S. 707 (1981).

34. *Id.* at 716-20. The *Thomas* Court rejected the state's argument in *Sherbert* that the burden is merely an indirect consequence of legitimate government action. *Id.* at 716-18. The *Thomas* court also relies on *Sherbert* to dismiss the state interest. *Id.* at 718. Finally, as in *Sherbert*, the *Thomas* court warns that it is not promoting the religion with its decision. *Id.* at 719-20.

35. *Id.* at 709. The Court did not challenge the Review Board's finding that Thomas sincerely held his beliefs. *Id.* at 714.

36. *Id.* at 712. IND. CODE ANN. § 22-4-15-1 (Burns 1978) provides:

[A]n individual who has voluntarily left his employment without good cause in connection with the work . . . shall be ineligible for waiting period or benefit rights for the week in which the disqualifying separation occurred and until he had subsequently earned remuneration in employment equal to or exceeding the weekly benefit amount of his claim in each of ten (10) weeks. . . .

37. 450 U.S. at 709.

mined whether the statute burdened Thomas.[38] The Court concluded that the statute in *Thomas* was analogous to the statute in *Sherbert* because it conditioned unemployment benefits on Thomas' willingness to violate his religious beliefs.[39] The statute forced Thomas to choose either his religious beliefs or his work, thus creating a coercive impact on his religion and bringing his claim within the first amendment.[40] The Court next considered whether the statute was the least restrictive means of achieving a compelling state purpose.[41] Concluding that the state failed to advance a compelling state interest, the Court mandated payment of the benefits.[42]

The Supreme Court again utilized traditional free exercise analysis in *Wisconsin v. Yoder*[43] to strike down a compulsory school attendance statute as it applied to the Amish.[44] In accordance with their religion, Amish parents refused to permit their children to attend school beyond the eighth grade.[45] Their actions violated a compulsory school attend-

38. *Id.* at 716-18.

39. *Id.* at 717-18.

40. *Id.* at 717. The Court stated:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Id. at 717-18.

41. *Id.* at 718. The state advanced two interests in support of the disqualifying provision of the Indiana statute: "(1) to avoid the widespread unemployment and the consequent burden on the fund resulting if people were permitted to leave jobs for 'personal' reasons; and (2) to avoid a detailed probing by employers into job applicants' religious beliefs." *Id.* at 718-19 (footnote omitted).

42. *Id.* at 719. In 1987, the Supreme Court affirmed the precedent set out in *Sherbert* and *Thomas* in Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136 (1987). In *Hobbie,* the plaintiff worked for two and a half years before being baptized into the Seventh-Day Adventist Church. Hobbie informed her supervisor that she was unable to work on Saturdays due to religious beliefs. The general manager subsequently fired Hobbie for refusing to work her scheduled shifts. The *Hobbie* Court analogized the case to the situations in *Sherbert* and *Thomas* and found that the statute penalized the plaintiff by forcing her to choose between work and religion. Thus, Hobbie met the prima facie standards required for first amendment protection. *Id.* at 141-42. The Court also stressed that this type of infringement "must be subjected to strict scrutiny and could be justified only by proof of a compelling interest." *Id.* at 141.

43. 406 U.S. 205 (1972).

44. *Id.* at 234.

45. *Id.* at 207. The Amish objection to education beyond the eighth grade is central to their religion. *Id.* at 210-12. One expert testified that:

ance statute requiring parents to send their children to school until age 16.[46]

The *Yoder* Court concluded that the compulsory attendance law burdened the Amish by coercing them to perform acts contrary to their fundamental religious beliefs.[47] The Court further held that the belief at stake was a sincerely held religious belief.[48] Consequently, the Amish established a prima facie case under traditional free exercise analysis, and the burden therefore shifted to the state to prove that mandatory school attendance was a compelling state interest.[49] Although the Court recognized that education of citizens was a compelling state interest,[50] the Court reasoned that this interest could be achieved through a less restrictive burden on the Amish.[51]

III. Free Exercise Analysis in Native American Sacred Land Cases

Formulation of a comprehensive free exercise analysis in Native American sacred land cases has been a constant struggle for courts.[52] Rather than following traditional free exercise analysis, lower courts have altered the existing framework and have failed to formulate a single test.[53]

> [C]ompulsory high school attendance could not only result in great psychological harm to Amish children, because of the conflicts it would produce, but would also, in his opinion, ultimately result in the destruction of the Old Order Amish church community as it exists in the United States today.

Id. at 212.

46. *Id.* at 207. WIS. STAT. § 118.15 (1969) authorizes the state to impose fines or imprisonment on a parent who does not cause his child to attend school until the child is 16.

47. *Id.* at 218. The Amish, to conform with their faith, would practice under threat of criminal sanctions.

48. *Id.* at 235.

49. *Id.* at 221. The state argued that its interest in compulsory education outweighed even the Amish established practices, but the Court did not accept this "sweeping" claim. *Id.*

50. *Id.* The state gave two reasons for compulsory education; to prepare citizens to participate in the political process and to be self-sufficient members of society. *Id.*

51. *Id.* at 235. The Court reasoned that the Amish demonstrated that their alternative method of educating their children at home satisfied precisely the overall interests that the state had in educating its citizens. *Id.*

52. *See infra* notes 54-88 and accompanying text for a discussion of district and appellate court dispositions of sacred land cases.

53. *See infra* notes 89-112 and accompanying text for a discussion of the Supreme

In *Sequoyah v. Tennessee Valley Authority*,[54] Cherokees sued to prevent the construction and operation of the Tellico Dam on the Little Tennessee River.[55] The Cherokees claimed that the waters would flood numerous sites sacred to their religion and would thus substantially burden the free exercise of their religion.[56] The district court denied plaintiff's motion for injunction and granted defendant's motion to dismiss.[57] The district court assumed that the land[58] was sacred land and of some necessity to the Native Americans' religion, but held that the only coercive effect on their religion would be to prevent access to government owned land.[59] Finding that the Native Americans had no property right, and therefore no right to access, the court concluded that the government imposed no burden on the religion in rendering access to the land impossible.[60]

The Sixth Circuit affirmed the district court decision on a different theory.[61] The circuit court purported to follow traditional free exercise analysis.[62] The court, however, changed the first prong of traditional analysis by requiring the plaintiffs to show that the government act or

Court's analysis of Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S. Ct. 1319 (1988), which may provide a uniform analysis.

54. 480 F. Supp. 608 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980).

55. 480 F. Supp. at 610. The alleged purposes of the Tennessee Valley Authority in creating the lake were: 1) energy generation, 2) creation of flatwater recreation, 3) flood control and 4) enhancement of the local economy. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 157 (1978). The appellate court eluded the issue of whether these reasons sufficiently justified infringement upon the Cherokee's religion. Instead, the court added a centrality/indispensability criteria. 620 F.2d at 1164. *See infra* notes 62-74 and accompanying text discussing the addition of the centrality/indispensability requirement.

56. 620 F.2d at 1160. The Indians claimed that: "[P]laintiffs will suffer injury by the infringement of their right to worship the religion of their choice in the manner of their choosing by the destruction of sites which they hold in reverence and in denial of access to such sites by the Defendant." *Id.*

57. 480 F. Supp. at 612.

58. *Id.* at 611.

59. *Id.* at 612.

60. *Id.*

61. 620 F.2d 1159 (6th Cir. 1980). The circuit court noted that the plaintiff's lack of a property interest in the property was not dispositive. *Id.* at 1164.

62. *Id.* at 1163 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972), and Sherbert v. Verner, 374 U.S. 398 (1963)). The court recognized that the first prong of this test required a determination of "whether the governmental action does in fact create a burden on the exercise of the plaintiff's religion." Secondly, the court must balance the burden against a compelling government interest, if any. *Id.*

policy burdened a *central or indispensable* belief.[63] The court held that the government did not burden a central or indispensable religious belief and,[64] therefore, refused to reach the second prong of the analysis.[65]

The court in *Wilson v. Block*[66] utilized the *Sequoyah* central or indispensable test in addressing a sacred lands case.[67] In *Wilson*, members of the Navajo and Hopi tribes attempted to enjoin the expansion of a ski resort into their sacred land.[68] Both tribes contended that further development would seriously impair their ability to pray, conduct ceremonies and gather necessary religious objects.[69]

The *Wilson* court engaged in traditional free exercise analysis and determined that the Native Americans sincerely held their beliefs.[70] The court deviated from traditional analysis, however, by examining whether access to the ski area was indispensable to their religious practice.[71] The court scrutinized the Native American's use of the area and required them to show, as evidence of indispensability, that their religious practice could not be performed at an alternative site.[72] Accord-

63. *Id.* at 1164.

64. *Id.* The court stated that the Indians' claims demonstrated " 'personal preference' rather than convictions 'shared by an organized group.' " *Id.* (quoting Wisconsin v. Yoder, 406 U.S. 205, 216). Further, "[i]t is damage to tribal and family folklore and traditions, more than particular religious observances, which appears to be at stake . . . [and] [t]hough cultural history and tradition are vitally important to any group of people, these are not interests protected by the Free Exercise Clause of the First Amendment." *Id.* at 1164-65. *See* Frank v. Alaska, 604 P.2d 1068 (Alaska 1979) (despite state laws to the contrary, Indians could hunt moose because moose was the centerpiece of a religious ceremony).

65. 620 F.2d at 1165.

66. 708 F.2d 735 (D.C. Cir. 1983).

67. *Id.* at 739-45. The *Wilson* court chose to rely on *Sequoyah*, rather than accept the *Sherbert* and *Thomas* holdings, as the plaintiffs desired. The court limited the latter cases to situations where the failure to receive government benefits penalized religious beliefs. *Id.* at 741.

68. 708 F.2d at 739.

69. *Id.* at 740.

70. *Id.* at 741-45.

71. *Id.* at 743. The court stated: "If the plaintiffs cannot demonstrate that the government land at issue is indispensable to some religious practice, whether or not central to their religion, they have not justified a First Amendment claim." *Id.* The court first held that the ski resort expansion did not burden the Indian's religious beliefs because it merely caused the Indians spiritual disquiet, but did not penalize them for their faith. *Id.* at 741-42.

72. *Id.* at 744. The court stated: "We thus hold that plaintiffs seeking to restrict government land use in the name of religious freedom must, at a minimum, demonstrate

ing to the court, evidence of alternative sites existed, and consequently the ski resort expansion did not burden the Native Americans religious practices.[73] Therefore, the court again failed to reach the second prong of the analysis.[74]

Badoni v. Higginson,[75] like *Sequoyah*, represents another challenge to governmental action involving interference by a major federal water project onto sacred land. The completion of Glen Canyon Dam on the Colorado River created a reservoir.[76] By 1974, when suit was filed, the reservoir waters had covered certain portions of land sacred to the Navajos.[77] Plaintiffs made two free exercise claims: 1) that the impoundment of water under the bridge drowned their gods, and 2) the water denied them access to their religious sites.[78]

The District Court for the District of Utah ruled against plaintiffs on two grounds.[79] The court, like the *Sequoyah* district court, first found the plaintiffs' lack of property interest determinative.[80] The court next found that the Native Americans' interests were neither central nor indispensable.[81] Although the Tenth Circuit Court dismissed the district court's finding of lack of property interest,[82] it failed to address

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that the government's proposed land use would impair a religious practice that could not be performed at any other site." *Id.* (footnote omitted). This requirement increases the elements necessary to establish a prima facie case and significantly narrows the possibility of successfully exercising a free exercise challenge when sacred lands are involved.

73. *Id.* at 744-45. The *Wilson* court noted that establishing the lack of an alternative site is not sufficient to show a burden on the free exercise of religion; rather it is a minimum requirement without which the court need not proceed. *Id.* at 744-45 n.5.

74. *Id.* at 745.

75. 455 F. Supp. 641 (D. Utah 1977), *aff'd*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

76. 638 F.2d at 175.

77. *Id.* Rainbow Bridge, a nearby spring, a prayer spot and a cave were all adversely affected by the reservoir. The springs and the prayer spot were under water and tourists desecrated the cave and bridge with noise, litter and other defacement. *Id.* at 177.

78. *Id.* at 176. The plaintiffs in *Badoni* sought rather modest relief, such as: closing the bridge area to the public on rare occasions to allow for private religious ceremonies, restricting the use of alcoholic beverages in the vicinity, and move a floating marina to another canyon. *Id.* at 178.

79. 455 F. Supp. at 645-47.

80. *Id.* at 645.

81. *Id.* at 646.

82. 638 F.2d at 176 ("The government must manage its property in a manner that does not offend the Constitution.").

the second contention.[83] Rather, the *Badoni* court found a compelling state interest that outweighed any alleged infringements, and a lack of a less restrictive means of achieving such interest.[84]

The *Badoni* court, similar to the *Sequoyah* court, purported to follow traditional free exercise analysis.[85] The court failed, however, to consider the first prong of the analysis[86] and instead proceeded directly to the second prong—consideration of a compelling governmental interest.[87] The implications of this approach have a potentially devastating effect on the outcome of sacred land cases. The decision precludes inquiry into the burdens on free exercise if the government can demonstrate a significant government interest.[88] The *Badoni* court essentially changed the whole nature of free exercise analysis by allowing the government to justify its actions first, rendering the degree of infringement analysis unnecessary. The *Badoni* decision did, though, clearly illustrate the lack of any uniform free exercise analysis in Native American cases prior to the Supreme Court's decision in *Lyng*.

IV. The Impact of *Lyng v. Northwest Indian Cemetary Protective Ass'n*[89] on Free Exercise Analysis

A. *Facts*

The Yurok, Karok, and Tolowa tribes consider the northeastern corner of the Blue Creek Unit in Six Rivers National Forest, California, sacred land.[90] Ceremonial use of the area by the tribes dates back to

83. *Id.* at 177 n.4. The court held the government interest in the water level was so compelling that it need not address whether the action infringed plaintiffs' rights. *Id.*

84. *Id.* at 177. Contrary to the dam in *Sequoyah*, the Glen Canyon Dam had been constructed and was in operation at the time of plaintiffs' complaint. Further, the court considered the dam a genuinely important edifice, an essential element in the management of the Colorado River and a key to water access in the vast areas of Colorado, New Mexico, Utah and Wyoming. *Id. See* Friends of the Earth v. Armstrong, 485 F.2d 1 (10th Cir. 1973), *cert. denied.*, 414 U.S. 1171 (1974) (found the Glen Canyon Dam to be of crucial importance).

85. 638 F.2d at 176-77.

86. The first prong in traditional analysis considers whether a government action burdens a sincerely held religious belief. *See supra* note 19 and accompanying text for a discussion of the first prong of traditional analysis.

87. 638 F.2d at 177. The court found that the magnitude of the government's interest justified the alleged infringements. *Id.*

88. *Id.* Referring to alleged infringements on free exercise, the court said it need not address the issue because it had found the government's interest compelling.

89. 485 U.S. 439 (1988).

90. Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 591

the early nineteenth century and is critical to certain religious practices of the tribes.[91]

In 1974 and 1975, the Forest Service issued drafts of environmental impact statements proposing various land use management plans and the completion of road construction in the Blue Creek Unit.[92] In response to comments on the 1975 draft statement, the Forest Service commissioned a study of the cultural and religious sites in the area.[93] Declaring the area a significant and indispensable part of the Native American religion, the report recommended that the Forest Service abandon its plans for road development.[94] The Forest Service, however, chose to proceed with construction and issued a final environmental impact statement indicating its intent to do so.[95]

After exhausting all administrative remedies, four Native Americans, the State of California and various individuals and nature organizations filed suit to enjoin the logging and road construction activities.[96]

B. *District and Appellate Court Disposition*

Engaging in traditional free exercise analysis, both the district and appellate courts found that the government interfered with the Native Americans' first amendment free exercise rights.[97] The government

(N.D. Cal. 1984), *aff'd in part and vacated in part*, 764 F.2d 581 (1985) (*Northwest I*), *aff'd in relevant part*, 795 F.2d 688 (9th Cir. 1986) (*Northwest II*), *rev'd sub nom.* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

A total of 31,000 of the 67,500 total acres encompassed by the Blue Creek Unit are roadless areas. Northwest Indian Cemetery Protective Ass'n v. Peterson, 764 F.2d 581, 583 n.1 (9th Cir. 1985) (*Northwest I*).

91. *Northwest*, 565 F. Supp. at 591-92. Individuals utilize the area for prayer seats and seek religious guidance in the area. Key participants in tribal ceremonies utilize the area to purify themselves, and medicine women travel to the area to obtain power and to gather medicine. *Id.*

92. *Northwest I*, 764 F.2d at 584.

93. *Lyng*, 485 U.S. at 442.

94. *Id.* at 442.

95. *Id.* at 443. Although nine different routes were considered, they were ultimately rejected because they would have required the acquisition of private land, had soil stability problems and would have nonetheless affected the sacred lands. *Id.*

96. *Id.* at 443.

97. *Northwest*, 505 F. Supp. at 592-93; *Northwest I*, 764 F.2d at 585-86. The appellate court rejected the argument that the free exercise clause is not violated unless it penalizes religious beliefs or practices. Indirect burdens could suffice. *Northwest I*, 764 F.2d at 586.

did not challenge the sincerity of the Native Americans' beliefs in either proceeding.[98] Further, because the area constituted the center of the Native Americans' spiritual world and no alternative site was adequate, the appellate court affirmed the district court's finding of "centrality-indispensability."[99]

Holding that the Native Americans met the first part of free exercise analysis, the lower courts then turned to the issue of whether the government's interests in logging and road construction were compelling under the second prong of the test.[100] Concluding that the interests claimed by the Forest Service were not sufficient to override the Native Americans' interests,[101] both courts issued permanent injunctions preventing road construction and timber harvesting in the Blue Creek Unit area.[102]

C. *Supreme Court Disposition*

In *Lyng v. Northwest Indian Cemetery Protective Ass'n*,[103] the Supreme Court reversed the lower court decisions and remanded to decide the statutory issues in the case.[104] The Court then addressed *Lyng's* constitutional issues, and upheld the government's right to build a road and harvest timber on land considered sacred by the Native Americans.[105] In reaching the latter holding, the Court relied on a 1986 Supreme Court case, *Bowen v. Roy*.[106] The *Bowen* Court con-

98. *Northwest*, 565 F. Supp. at 594; *Northwest I*, 764 F.2d at 586.

99. *Northwest I*, 764 F.2d at 585-86. The Forest Service's own study suggested that the development could potentially destroy the core of the Indian religious beliefs and practices. *See* D. THEODORATUS, CULTURAL RESOURCES OF THE CHIMNEY ROCK SECTION, GASQUET-ORLEANS ROAD, SIX RIVERS NATIONAL FOREST 420 (1979).

100. *Northwest*, 565 F. Supp. at 595-96; *Northwest I*, 764 F.2d at 586-87.

101. *Northwest*, 565 F. Supp. at 595-96; *Northwest I*, 764 F.2d at 587.

102. *Northwest*, 565 F. Supp. at 606; *Northwest I*, 764 F.2d at 589. The Ninth Circuit later affirmed the circuit court's constitutional ruling, finding that the construction of the road would have significant adverse effects on Native American religious practices. *Northwest II*, 795 F.2d at 693. The government failed to demonstrate a compelling interest in the completion of the road, and consequently could have abandoned completion of the road and thus avoided burdening the tribes. *Northwest II*, 795 F.2d at 695.

103. 485 U.S. 439 (1988).

104. *Id.* at 445-47. The Court held that lower courts should avoid constitutional questions if possible, and that the *Northwest* courts failed to ascertain whether statutory claims gave the Native Americans sufficient relief. *Id.*

105. *Id.* at 458.

106. 476 U.S. 693 (1986). In *Bowen*, Indians refused to apply for a Social Security

cluded that governments must be able to conduct their activities without conforming to the religious beliefs of particular citizens.[107] The *Lyng* Court continued by following traditional free exercise analysis[108] and, like *Bowen*, confirmed the addition of a coercion or penalty requirement in free exercise analysis.[109]

Consequently, to establish a prima facie case, a plaintiff must prove that the government action either coerces him to act contrary to his beliefs or penalizes the free exercise of his religion.[110] The Court nar-

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number because they believed that Social Security and other programs hindered the achievement of spiritual purity. Pennsylvania's welfare programs, however, required a Social Security number as a prerequisite to receive benefits. The plaintiffs sued to recover benefits, claiming the state violated their first amendment rights. *Id.* at 695-96.

The Supreme Court held that not all burdens on religion were unconstitutional. *Id.* at 702. The *Bowen* statutes did not compel the Indians to change their religion or punish them for practicing it. *Id.* at 703. The Court stated that the statute intruded much less on religious beliefs than on affirmative compulsion or prohibition statute. The Pennsylvania statute merely applies uniformly to deny government benefits. *Id.* at 704. The Court distinguished Wisconsin v. Yoder, 406 U.S. 205 (1972), which involved a compulsory attendance law with criminal sanctions. *Id.* at 705 n.15.

The Court reviewed *Bowen* with a tougher standard than *Yoder* because *Bowen* involves an indirect burden rather than a compelling burden or punishment. *Id.* at 707. The Court also distinguished *Sherbert* and *Thomas*. *Id.* at 708.

107. *Id.* at 699-700. The appellate court in *Northwest II* distinguished *Bowen*. 795 F.2d at 693. The Ninth Circuit noted that the government action in *Northwest* virtually destroyed the Indian's ability to practice their religion. In *Bowen*, the Supreme Court stated that the government's use of a Social Security number did not impair the plaintiff's ability to practice his religion. *Id.* (citing *Bowen*, 476 U.S. at 700-01).

The Ninth Circuit also rejected the *Bowen* holding that only statutes which penalize religious beliefs violate the first amendment. Government action which indirectly burdens first amendment rights may also be invalid. 795 F.2d at 693 (citing Sherbert v. Verner, 374 U.S. 398, 404 (1972)).

The Supreme Court in *Lyng* explained that the attempts to distinguish *Bowen* are unavailing. 485 U.S. at 449. The Court refused to analyze the degree of the burden upon an individual's beliefs. *Id.* at 450.

108. 485 U.S. at 450.

109. 485 U.S. at 450-51. The *Lyng* court recognized that "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment." *Id.* at 450. The majority stated, however, that "incidental effects of government programs, which may make it more difficult to practice certain religions but which [do not] coerce individuals into acting contrary to their religious beliefs, [do not] require [the] government to bring forward a compelling justification for its otherwise lawful actions." *Id.* at 450-51.

110. *Id.* at 450-51. The *Lyng* court emphasized that the Constitution condemns laws which *prohibit* the free exercise of religion, not laws which merely frustrate or impede religious practices or beliefs. *Id.* at 451. The Court recognized that the line between unconstitutional prohibitions and unlawful government conduct is not definite. *Id.* The Court appeared reluctant, however, to inquire into the effects of government

rowly construed the government's action in *Lyng* as neither coercing the Native Americans to act in a fashion contrary to their beliefs nor penalizing them.[111] By narrowly construing the penalty/coercion requirement, the Court effectively precluded future suits against the government by Native Americans attempting to enjoin destruction or alteration of their sacred lands.

V. CONCLUSION

In *Lyng*, the Supreme Court held that a federal land use decision which promised to destroy an entire religion did not constitute a penalty or coercion.[112] Through this narrow construction of the penalty/coercion requirement, the Court has divested the respondents and other Native Americans of first amendment protection against a serious threat to their religious practices and entire way of life. The Court abandoned nearly all references to traditional free exercise analysis, neglecting to balance the burden on the Native American's religion with the government interest. Although *Lyng* finally established an analytical framework for examining sacred land free exercise claims, its utility will be fruitless if the Court continues to read the coercion/penalty requirement so narrowly.

*Camala Collins**

action on various religions and insisted that government could not exist if it had to reconcile the competing demands of various religions beliefs. *Id.* at 451-52.

111. *Id.* at 449. The Court recognized that the logging and road-building projects at issue could have a devastating effect on traditional Indian religious practices that are "intimately and inextricably bound up with the unique features of the Chimney Rock area." *Id.* at 451. In spite of this recognition, however, the Court avoided utilizing a compelling governmental interest balancing test by holding that the government was not coercing or penalizing the Indians' religious practices and beliefs.

112. *See supra* notes 104-111 and accompanying text for a discussion of the *Lyng* holding.

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