LOST IN TRANSLATION:
A translation that set in motion the loss of Native American spiritual sites

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I. Introduction

There is no word for religion in most Native American languages. The Native American connection to the natural environment is cultural, traditional, and ceremonial. It is, often, linked to sovereignty and tribal governance, but is it a religion as the term is understood from a western viewpoint?

Tribal and individual relationships of Native people to the environment is expressed as religion despite having no equivalence in any Native language. For example, the Ojibway have "no (one) word for religion" but it is part of a traditional lifeway.[2] Colonization reduced this complex indigenous relationship to the environment to one word. This led to stripping of the spiritual significance of Native American natural sites since the beginning of the relationship between the tribal nations and the United States. This was done in the name of protecting the wall between church and state. Sacred sites were lost and desecrated due to this First Amendment framing with the word "religion". The narrow interpretation of the Free Exercise Clause and the broad interpretation of the Establishment Clause of the Constitution ensured the continued injustice through broken treaty promises to allow continuity of tribal self-governance.

The fragility of the protection of Native American sacred sites cannot withstand judicial scrutiny under the First Amendment line of cases controlling this issue because they are part of a "religion", a word selected by colonizers. This makes all the difference in how these sites are considered in the U.S. judicial system. It has become evident that the majority of the public supports protecting Native American sacred sites, demonstrated in one survey by the finding that more than half of the public in the U.S. does not support the Dakota Access Pipeline[3] that threatened to desecrate Lake Oahe, a sacred site for the Lakota Tribes. Ironically, unlike the U.S. Supreme Court and Congress who have overlooked the obvious distinction of the unique status of Tribes under the guardianship of the Federal government, the public senses the injustice done to Native Americans. This is unlike all other religious groups and conflicts that have been before the Court requiring special protection beyond ordinary First Amendment litmus tests.

First, indigenous peoples were deemed pagans[4], or having no religion at all. "They should be easy to Christianize because they have no religion

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[2] Michael McNally, Defend the Sacred. Native Americans Religious Freedom Beyond the First Amendment 5 (Princeton Univ. Press 2019).

[3] Rob Suls, *Public divided over Keystone XL, Dakota pipelines; Democrats turn decisively against Keystone*, Pew Rsch. Ctr. (Feb. 21, 2017) https://www.pewresearch.org/fact-tank/2017/02/21/public-divided-over-keystone-xl-dakota-pipelines-democrats-turn-decisively-against-keystone.

[4] From the first Papal bull in 1436 *Romanus Pontifex*, when the people of the Canary Islands were deemed not to exist because they were not Christian to the declaration that they were pagans in the 1452 papal bull *Dum Diversas* that instructed the Portuguese crown "to invade, capture, vanquish, and subdue all Saracens, pagans, and other enemies of Christ, to put them into perpetual slavery, and to take away all their possessions and property," the concept of religion clearly meant different things to

at all" was the first assessment which came from Christopher Columbus.[5] The U.S. Supreme Court in their foundation cases interpreting the Constitutional government to government relationship with Native Nations, used the word religion to describe their way of life. They based their opinion in part on their finding that Indians were "fierce savages"[6], even referencing their "character and religion" as a basis for taking their land.[7]

Second, the concept of sacred space is very different from the western concept of religion. In describing the Blue Lake case, R.C. Gordon-McCutchan explains the "edifice complex"[8] as an absolute bar to understanding the Native American experience with sacred spaces. Christians think of sacred spaces as buildings that are churches and chapels, whereas Native Americans think of environmental places as sacred spaces.[9] Therefore, using the term "religion" as a term-of-art not only masks the different type of relationship that Native Americans have with the environment but leads to adopting it as synonymous with the meaning of "religion" in Constitutional jurisprudence. Many Native American individuals choose a western religion and make it their own but that does not diminish their strong practice of tribal traditions that contribute to their cultural survival.

Third, the use of the First Amendment[10] is limited by the Establishment Clause which has stopped the government from protecting "religious" sites because of the fatal test of "entanglement" of the government with religion. It is also limited by the Free Exercise Clause where the balancing test proves that no matter what the burden on Tribes' freedom of religion, there has never been a burden too great to outweigh the government's compelling state interest[11] when it comes to sacred sites.

Yet, when it served the political aims of U.S. policy to terminate Tribes and assimilate them away from their culture, traditions, and "religion", the U.S. government entangled itself inextricably with religion when it set forth its "Peace Policy"[12]. In 1869, President Grant established his

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the colonizers and the indigenous people. *See* Vinne Rotendaro, *Disastrous doctrine had papal roots*, Nat'l Catholic Rep. (Sep. 4, 2015) https://www.ncronline.org/news/justice/disastrous-doctrine-had-papal-roots.

5 Christopher Columbus, Report to the Queen, "They ought to be good servants and of good intelligence . . . I believe that they would easily be made Christians because it seemed to me that they had no religion. Our Lord pleasing, I will carry off six of them at my departure to Your Highnesses, in order that they may learn to speak." James Waldram, The Way of the Pipe: Aboriginal Spirituality and Symbolic Canadian Prisons 17 (Peterborough, Ontario: Broadview Press, 1997).
James Youngblood Henderson called them "cultural serial killers."

6 Johnson & Graham's Lessee v. McIntosh, 21 U.S. 543, 590 (1823).

7 *Id.*

8 R.C. Gordon-McCutchan, *The Battle for Blue Lake: A Struggle for Indian Rights*, J. of Church and State 785–97 (1991).

9 Vine Deloria, Jr., God is Red. A Native view of Religion (1994).

10 U.S. Const. amend. I.

11 Barclay, Stephanie H. and Steele, Michalyn, Rethinking Protections for Indigenous Sacred Sites (September 8, 2020). 134 Harvard Law Review 1294 (2021).

12 Ulysses S. Grant, Inaugural Address Online by Gerhard Peters and John T. Woolley, The American Presidency Project https://www.presidency.ucsb.edu/node/203651

"Peace Policy"[13] that granted Christian missions contracts and federal funding to "civilize" and Christianize the Native American peoples of specific reservations. Today, many Native Americans are members of religious denominations directly linked to the religious organizations that were sent to "Christianize" them.[14]

Fourth, even when the federal government makes a good faith effort to protect Native American sacred sites, it has failed. The actions of Presidents', Congress, and Tribal Nations to protect Native American sacred sites, since 1978, have included Executive Orders,[15] statutes intended to protect sacred sites,[16] statutes intended to protect religious liberty,[17] and litigation. All have failed. The future of the sacred sites in Bears Ears National Monument with its tumultuous judicial ride using the Antiquities Act of 1906 – first to expand it and then to diminish it – still hangs in the balance.

Fifth, to illustrate the problems with the current line of cases, rather than re-state what many scholars have already said about the *Lyng* case,[18] among others, the statutory fixes (AIRPA, RFRA) and the failure of those statutory fixes, other cases will be analyzed for testing a new concept of culture and traditional knowledge rather than "religion." Comparing *Sequoyah v. T.V.A.*[19] and *Tennessee Valley Authority v. Hill20* - one assessing the environmental impact and the other assessing the Native American cultural impact, illustrates how the mistranslation of a word can result in inconsistent jurisprudence and unaccountable injustice from our judiciary.

In the sixth section, I want to make a modest proposal for sacred site protection that avoids the use of the characterizing term "religion" which has repeatedly failed to protect even a single sacred site. Instead, I want to focus on tribal sovereignty, tradition, and culture as critical to survival. I would like to propose that sacred sites are no less important than sacred spaces in western religion but lacking key features like a pathway to salvation as is typical of most western religions makes it incongruous, at best. Despite that, sacred sites and the cultural and traditional practices associated with them are integral to community and tribal survival. Thus, it is more related to sovereignty, the right to self-governance, cultural and

(last visited July 27, 2020).

13 Ulysses S. Grant, Inaugural Address Online by Gerhard Peters and John T. Woolley, The American Presidency Project https://www.presidency.ucsb.edu/node/203651 (last visited July 27, 2020).

14 It is commonly known that many Pueblos are Catholics and many Catawbas are Mormon, each tribe Christianized by these respective religious organizations for example.

15 President William J. Clinton, Executive Order 13007, "Indian Sacred Sites" 26 Fed. Reg. 26771–2 (May 29, 1996).

16 American Indian Religious Freedom Restoration Act, 42 U.S.C. § 1996 (1978).

17 Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4 (November 16, 1993).

18 Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988).

19 Sequyoah v. T.V.A., 620 F. 2d 1159 (1980).

20 437 U.S. 153 (1978).

tribal practices, and the critical link between these which involve sacred sites as opposed to individual pathways to salvation which are on par in western religions. As Vine Deloria said, "There is no salvation in tribal religions apart from the continuance of the tribe itself."[21]

II. Setting in motion the term "religion" in American Indian Jurisprudence: What do the Foundation cases reveal about "religion" and tribal nations?

Looking to the three foundational cases of federal American Indian Law we have more clarity as to how we came to use religion and religious freedom to define the protection of tribal sovereignty and governance through protection of cultural practices. The use of the term "religion" in the three foundational cases can also be read to describe cultural survival and governance objectives.

Justification for taking Indian lands was based on the western notion of religion. Justice Marshall wrote, "On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all, and the *character and religion of its inhabitants* [emphasis added] afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency." The entire theory of Indian title was based on an exchange for Christianity in place of their "religion" which may have been overlooked in precedential interpretations of *Johnson & Graham's Lessee v. M'Intosh*[22] where Justice Marshall established that "that they made ample compensation to the inhabitants of the new by bestowing on them civilization and Christianity in exchange for unlimited independence."[23]

Johnson v. M'Intosh (1823) also uses a word we find reprehensible today in describing American Indians as "savages"[24] who live from the

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[21] Deloria, *supra* note 9, at 200.

[22] "On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all, and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new by bestowing on them civilization and Christianity in exchange for unlimited independence. But as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements and consequent war with each other, to establish a principle which all should acknowledge as the law by which the right of acquisition, which they all asserted should be regulated as between themselves. This principle was that discovery gave title to the government by whose subjects or by whose authority it was made against all other European governments, which title might be consummated by possession." 21 U.S. 543, 572–3 (1823).

[23] *Id.*

[24] "But the tribes of Indians inhabiting this country were fierce savages whose

forest and defend their independence. Bias in who can better manage the land is clear here where the court says simply that to leave these "savages" in control of their land would "leave the country a wilderness".[25] So the very practice of their subsistence from the forest is a threat to the new nation. *Ipse dixit*, they should not have a right to the land.

Further, less than a decade later, in *Cherokee Nation v. Georgia* (1831), the court referred to the use of terms, stopping short of considering how the use of these terms might affect the resolve of Congress regarding treaties but resolved to interpret the treaty as it is written regardless of the terms used. Yet, without the use of western governance terms as analogous, the court seemed unable to recognize the Native governance terms and instead substituted western terms to reach their logical end of the argument. Here, the court explains:

> I will next inquire how the Indians were considered; whether as independent nations or tribes, with whom our intercourse must be regulated by the law of circumstances. In this examination it will be found that different words have been applied to them in treaties and resolutions of congress; nations, tribes, hordes, savages, chiefs, sachems and warriors of the Cherokees for instance, or the Cherokee nation. I shall not stop to inquire into the effect which a name or title can give to a resolve of congress, a treaty or convention with the Indians, but into the substance of the thing done, and the subject matter acted on: believing it requires no reasoning to prove that the omission of the words prince, state, sovereignty or nation, cannot divest a contracting party of these national attributes, which are inherent in sovereign power pre and self existing, or confer them by their use, where all the substantial requisites of sovereignty are wanting.[26]

In the same case, the court refers to the law of nations for authority to make up the law to define Indian nations in the United States. The court finds that international law would not define Indian Tribes as nations. They write: " . . . the law of nations would regard [tribal nations] as nothing more than wandering hordes, held together only by ties of blood and habit, and having neither laws or government, beyond what is required in a savage state."[27] Interestingly, the court does not include any reference to a religion or even culture within Indian Tribes, in its description of Tribes' governance model, failing to see it as part of tribal sovereignty.

Worcester v. Georgia tells us that "The charters [of the Colony of Georgia, et. al.] contain passages showing one of their objects to be the civilization of the Indians, and their conversion to Christianity—objects

occupation was war and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country was to leave the country a wilderness; to govern them as a distinct people was impossible because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence." *Id.* at 590.

[25] *Id.*

[26] Cherokee Nation v. Georgia, 30 U.S. 1, 86 (1831).

[27] *Id.* at 62.

to be accomplished by conciliatory conduct and good example, not by extermination."[28]

Looking to the Webster's dictionary of 1828, it is not until the fourth definition of the word "religion" that we find one close to the use of the word during this period. This defines religion as "any system of faith and worship" and includes worship of "pagans and Mohammedans, as well as christians [sic]" which requires some conformity to a western idea of religion. The next sentence includes "any religion consisting in the belief of a superior power or powers governing the world, and in the worship of such power or powers." Here is the full fourth definition:

> 4. Any system of faith and worship. In this sense, religion comprehends the belief and worship of pagans and Mohammedans, as well as of christians; any religion consisting in the belief of a superior power or powers governing the world, and in the worship of such power or powers. Thus we speak of the religion of the Turks, of the Hindoos, of the Indians, etc. as well as of the christian [sic] religion We speak of false religion as well as of true religion.[29]

Checking whether the word "culture" might have been a better fit for the governance of tribal nations, the meaning in 1828 in its first definition means the tilling of the soil. The second definition however, means "The application of labor or other means to improve good qualities in, or growth; as the culture of the mind; the culture of virtue."[30] This definition may come closer to how Tribes view their culture of sacred sites and ceremonies that are part of tribal governance and tribal law.

It is clear that courts relied on cases steeped in racial bias and labels of "paganism" to use the term "religion" to thread precedent to the present. Yet, the evidence that it is cultural survival and tradition tied to tribal governance was never considered. The courts also sought to translate tribal governance practices and naming systems into an "equivalent" western framework leading to broad generalities that failed to capture the role of cultural practices.

Further, Native Americans demonstrably show that they consider religion and traditional cultural practices to be different and distinct experiences. Individual tribal members can choose their own religion and are free to do so; and they can also be found to have remained members of religions that were brought to them by religious organizations who came to "Christianize" them, like Catholicism[31] and Mormonism,[32] for example.

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[28] 31 U.S. 515, 546 (1832).

[29] Religion, Webster's Dictionary 1828, http://webstersdictionary1828.com/Dictionary/religion (last visited Nov. 8, 2021)

[30] Culture, Websters Dictionary 1828, http://www.webstersdictionary1828.com/Dictionary/culture (last visited Nov. 8, 2021).

[31] Pueblo people were "Christianized" by Catholic missions who came to the Southwestern United States for that purpose.

[32] Catawba people were "Christianized" by the Church of the Latter-day Saints, and many today are still Mormons.

III. Concept of sacred sites is very different from the concept of western religion

The courts have used the label of "sacred site" to describe sacred spaces of cultural practice and tradition. One of the first to seek to understand the concept of sacred space was Eliade,[33] who describes sacred space as a "'primitive' ontological conception: an object or an act [that] becomes real only insofar as it imitates or repeats an archetype."[34] Eliade explains the archetype reference to mean "the primeval action accomplished at the beginning of time by a divine being . . . ."[35] Some have compared Eliade's archetypes to Jung's archetypes of the collective unconscious. I am reminded of the testimony of the Apache Medicine Man who saw the rise of the elders over the mountain in Cibecue before the infamous massacre there. That Mountain became a place of visitation by Apaches to make a connection with these leaders and elders.

While sacred, it is not religious.

The "edifice complex"[36] ties western religion to a building, and R.C. Gordon-McCutchan claims this is an absolute bar to understanding the Native American experience with sacred spaces from a western perspective. Even citing examples of indigenous religious structures, such as hogans, sweat lodges and stone altar-like structures, these are still intimately located in relation to the land and direction of their siting.

Lyng used the term "sacred" seven times to modify "areas" in the majority opinion, once in reference to the non-distinction they were making with other religions not based in "physical sites."[37] Further evidence of the *Lyng* Court's struggle to justify their logic, they spend an incredible part of the dissent explaining how the concept of religion is different in western thought than for Native Americans!

The court wrote:

> As the Forest Service's commissioned study, the Theodoratus Report, explains, for Native Americans religion is not a discrete sphere of activity separate from all others, and any attempt to isolate the religious aspects of Indian life "is in reality an exercise which forces Indian concepts into non-Indian categories." Thus, for most Native Americans, "[t]he area of worship cannot be delineated from social, political, cultur[al], and other areas o[f] Indian lifestyle." A pervasive feature of this lifestyle is the individual's relationship with the natural world; this relationship, which can accurately though somewhat incompletely be characterized as one of stewardship, forms the core of what might be called, for want of a better nomenclature, the

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[33] Mircea Eliade, The sacred and the profane: The nature of religion (Willard R. Trask trans., Harcourt Brace Jovanovich, ed., 1968).

[34] Mircea Eliade, Cosmos and History: The Myth of the Eternal Return 34 (Willard R. Trask trans. 1959).

[35] Donald H. Mills, *"Sacred Space" in Vergil's Aeneid*, 29 Vergilius 34, 34 (1983).

[36] R.C. Gordon-McCutchan, *The Battle for Blue Lake: A Struggle for Indian Rights*, 33 J. Church and St. 785, 790 (1991).

[37] 485 U.S. 439, 453 (1980).

> Indian religious experience. 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 ongoing 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.
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> In marked contrast to traditional Western religions, the belief systems of Native Americans do not rely on doctrines, creeds, or dogmas. Established or universal truths—the mainstay of Western religions—play no part in Indian faith. Ceremonies are communal efforts undertaken for specific purposes in accordance with instructions handed down from generation to generation. Commentaries on or interpretations of the rituals themselves are deemed absolute violations of the ceremonies, whose value lies not in their ability to explain the natural world or to enlighten individual believers, but in their efficacy as protectors and enhancers of tribal existence. 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. Rituals are performed in prescribed locations not merely as a matter of traditional orthodoxy, but because land, like all other living things, is unique, and specific sites possess different spiritual properties and significance.[38]

Why did the court spend two pages of dicta comparing "western religion" to Native American religion as if struggling with the concept under the First Amendment? Their narrative seems more an effort to demonstrate a connection with tribal tradition and governance rather than any individual right. The court stopped short of seeing this than anything other than a "religion" case under the First Amendment.

McNally quotes historian Joel Martin who wrote,

> If you pull on the thread of 'Native American religion, you end up pulling yourself into the study of Native American culture, art, history, economics, music, dance, dress, politics, and almost everything else. Talk about Hopi religion and you must talk about blue corn. One thing always leads to another and another when land, religion and life 'are one.'[39]

Further, it is not unusual to find Native Americans who also strongly profess to be adherents to western religions, such as Catholicism[40] or

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[38] *Id.* at 459–61. (citations omitted)

[39] Michael D. McNally, Defend the Sacred 5 (2020), quoting Joel W. Martin, Land Looks After Us: A History of Native American Religion, Preface, page x (2001).

[40] Pueblos were Christianized by Catholic missions to the southeast as early as the 1500s.

Mormonism[41], for example, depending upon which religious organization was sent to convert them. This also shows that "religion" is demonstrably separate from tribal traditions and cultural survival tied to sovereignty.

IV. First Amendment

Infamously, *Lyng v. Northwest Indian Cemetery Protective Association42* set out the controlling logic for how the First Amendment would never be used to protect Native American sacred sites because it does not burden American Indians by preventing them from practicing their "religion". It is another *ipse dixit* leap of logic, the *deus ex machina* of the legal stage to leap from the facts that a complete destruction of sacred sites does not amount to a burden on Free Exercise of religion! Then they also had to distinguish *Wisconsin v. Jonas Yoder*,[43] requiring another *ipse dixit* to conclude that making Amish parents send their children to school past the 8th grade was a burden on their freedom of religion that outweighed the state's compelling interest; whereas building a forest road (that should not be in a wilderness in the first place), was a compelling state interest that outweighed the burden on the freedom of the Tribes to practice their religion, destroying the very means for them to do it for eternity. The only way to distinguish these two cases is to agree that there is in operation a principle of racism and bias. Even for a twentieth century court, the legacy of racial bias from the Foundation cases still carries through to the present. To do that, it must be light on logic and heavy on Kabuki theater to mask this racism, and thus, the need for the *ipse dixit* conclusions.

A. *Free Exercise Clause*

The use of the word "religion" will trigger the First Amendment inquiry, and that is the legal theory that was taken to the 9th Circuit in the *Lyng* case using the statutory authority of the American Indian Religious Freedom Act (AIRFA)[44] to apply the First Amendment. *Lyng* should have been a foundation case in how sacred sites are protected by the First Amendment using the American Indian Religious Freedom Act,[45] but it was just the opposite.

Lyng was decided on an analysis of the Free Exercise Clause of the Constitution, which states: "Congress shall make no law . . . prohibiting the free exercise [of religion]."[46] The court focused on the word "prohibiting" but never questioned whether the cultural practices essential to the sovereignty and existence of the tribal government was a "religion". Yet,

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41 Catawbas were Christianized by the Church of Latter-day Saints, and today there are still many Mormons among tribal members.

42 485 U.S. 439 (1988).

43 406 U.S. 205 (1972).

44 Public Law No. 95–341, 92 Stat. 469 (Aug. 11, 1978) (commonly abbreviated to AIRFA), codified at 42 U.S.C. § 1996 (1978).

45 42 U.S.C. § 1996 (1978).

46 U.S..CONST .,amend..I.

their distinctions to *Yoder* and *Sherbet47* cases suggest they see western religion as distinct from Native American "religion" because of race, bias, or failing to see that it is a cultural survival element of tribal sovereignty held by a tribe and not necessarily an individual.

1. Does the U.S. judiciary see Europeans who came to American for "freedom of religion" distinct from indigenous "religions" and therefore do not warrant the same protection?

At one point, the court in dicta pondered that some government actions that might protect religion might also be deemed offensive to others.[48] This clearly smacks of racism and anti-freedom of religion sentiment that does not comport with the First Amendment unless you can distinguish religions originating with the colonists from all those "religions" that pre-existed colonialism. Where precedent is strictly adhered to in our common law system, how could the jurists not be influenced by reading the condemnations of savagery and paganism from the Foundational cases?

While the *Lyng* court professed that the test for a burden on religion should not be different,[49] they failed to protect the individuals of Native religions in contrast to all western religions.

B. *The First Amendment, the Establishment Clause*

The use of the First Amendment,[50] Free Exercise of Religion Clause is limited by the Establishment Clause. The Establishment Clause prevents the government from protecting "religious" sites because of the fatal test of "entanglement" of the government with religion. The courts use Thomas Jefferson's "wall"[51] that separates Church and State as an ever-present tool for breaking treaty promises to allow Tribal nations to continue collective traditions. It is also limited by the Free Exercise Clause where the balancing test proves that no matter what the burden on Tribe's freedom of religion, there has never been a burden too great (or not narrowly tailored enough) to outweigh the government's compelling state interest.

Lyng was the first case before the U.S. Supreme Court that established the legal test for the First Amendment protection of sacred sites, requiring another *ipse dixit* to distinguish the rights at issue from *Yoder.* Not to downplay the importance of *Yoder* to the Amish and their protected right to not send their children to high school (even though educating

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47 Sherbert v. Verner, 374 U.S. 398 (1963).

48 *Lyng*,485 U.S. 439 at 452 (1980).

49 *Id.*at 453.

50 U.S. CONST. amend. I.

51 James Hutson, '*A Wall of Separation*',Library of Congress, https://www.loc.gov/loc/lcib/9806/danbury.html (accessed Apr. 19, 2021). Thomas Jefferson's reply on Jan. 1, 1802, to an address from the Danbury (Conn.) Baptist Association which has come to be considered Jefferson's analysis of the Establishment Clause.

its population is a compelling state interest), protecting the center foundation of a traditional sacred ceremonial site of a sovereign nation of residents of the United States somehow seemed much less important to the "Supremes".[52] This first test of the American Indian Religious Freedom Act, stripped it of the power of the First Amendment protection afforded other residents of the United States.

Even something as simple as prohibiting climbing on a sacred site for limited times during the year for prayer was found to be unconstitutional. The *Mato Tipila* (Bear Lodge), also known as *He Hota Paha* (Grey Horn Butte) in Lakota, found on maps as Devil's Tower, the derisive western name, is a sacred site with origin stories of several Tribal Nations that pre-date colonial settlement. There are periods during the year when the National Park Service was asked to protect the site from climbers so the Tribes could engage in prayer and ceremony, undisturbed, as an essential part of the prayer period.

When the federal government sought to instate a voluntary ban for climbing of the butte during a sacred time (the month of June) for the Native American Nations of the region, it was challenged as an unconstitutional violation of the First Amendment's Establishment Clause.[53] The voluntary ban was held to be constitutional and did not fail the entanglement test. But the court warned that if they proceeded with their threatened action to "converting the June closure to mandatory [one]" it likely would constitute sufficient evidence of coercion to violate the establishment Clause of the Constitution, opining, "[W]hile a more direct threat of a mandatory ban in the wake of a failed voluntary ban could evidence coercion, the remote and speculative possibility of a mandatory ban found in this case is insufficient to transform the Government's action into a coercive measure."[54] Prohibiting the climbing of "Devil's Tower" during the short seasonal period required for tribal ceremonial observances would likely have been found to be a government entanglement with religion. (On appeal to the 10th Circuit, the court found the plaintiffs had a lack of standing, opining that a speculative injury for fear of instating the permanent ban was not enough to meet the threshold requirement for an injury in fact, and the Constitutional question was never reached.)

In this case, the district court applied the *Lemon55* test, a three-part test for distinguishing between constitutional and unconstitutional action. The test provides where the Establishment Clause is not offended by asking whether: (1) it has a secular purpose; (2) does not have the principal or primary effect of advancing or inhibiting religion; and

[52] The "Supremes" is a nickname for the Associate Justices and Chief Justice of the U.S. Supreme Court. The term is used here to illustrate the power differential between the U.S. Supreme Court as a party to treaties and the Tribal Nations.

[53] Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814 (10th Cir. 1998), *aff'g* 2 F.Supp. 2d 1448 (D. Wyo. 1998).

[54] Bear Lodge Multiple Use Association, et. al, v. Babbitt, 2 F. Supp. 2d 1448 (1998).

[55] *Lemon v. Kurtzman,* 403 U.S. 602, 612–13 (1971).

(3) does not foster an excessive entanglement with religion.[56] Additionally, the court required O'Connor's endorsement test.[57] The court decided that the question should be framed to "look beyond the plain language establishing the climbing ban and examine its purpose and effects in order to determine if it is appropriate accommodation or if it breaches the necessary gap between state and religion fusing the two into one."[58] The District Court of Wyoming found that it did not violate the Establishment Clause, finding that what the federal government did was a "type of custodial function [that] does not implicate the dangerously close relationship between state and religion which offends the excessive entanglement prong of the *Lemon* test."[59]

Using the First Amendment, there is no conceivable action the government can take to protect sacred sites that will pass the Lemon test for "entanglement" test. The horrors expressed by Justice Scalia in the use of the Lemon test when it is useful, and ignoring when it is not, could not have been expressed better with his opinion

> As to the Court's invocation of the *Lemon* test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again[60]

With this line of failed First Amendment cases, Congress and the Executive Branch used its powers to try to provide a legislative or executive solution for this injustice, and the destruction of sacred sites with no protection by the federal government. This started during the environmental social movement of the 1970s.

V. Even when the federal government makes a good faith effort to protect Native American sacred sites, it has failed.

In 1978, during the environmental social movement, the recognition that Native American sacred sites were unprotected gave rise to the American Indian Religious Freedom Act.[61] *Lyng* was the first case to use this statute and eviscerated the Act finding its effect to be unconstitutional.

In 1993, Congress tried to correct this injustice with the Religious Freedom Restoration Act[62] and sought to restore Congressional intent to protect Native American sacred sites.

The Executive Branch tried to use its authority as well, but it is limited to the authority to organize and direct the functioning of the Executive Branch and cannot legislate through Executive Orders. So, the use of

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56 *Id.*
57 Lynch v. Donnelly, 465 U.S. 668 (1984).
58 Bear Lodge Multiple Use Ass'n v. Babbitt, 2 F.Supp. 2d 1448, 1454 (D. Wyo. 1998)
59 *Id.* at 1456.
60 Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).
61 American Indian Religious Freedom Act, *supra* note 42.
62 Religious Freedom Restoration Act of 1993, *supra* note 17.

Executive Orders to ensure the federal agencies were protecting Native American sacred sites was a step taken by the Clinton Administration.

President Clinton recognized the futility of protecting Native American sacred sites with the Constitution, and so, within the scope of authority of his Article II powers, he signed an Executive Order on May 24, 1996 that would require federal agencies to "accommodate" sacred sites,[63] similar to the accommodation doctrine in energy law, which allows two uses on the same property to co-exist.[64] President Clinton designated the Grand Staircase-Escalante in 1996 using the Antiquities Act[65] as granted by Congress to Presidents to set aside "objects of historic or scientific interest" in a way that is the "smallest area compatible" with the objective.

That is exactly what the Obama Administration did, in a creative use again of the Antiquities Act of 1906[66], by setting aside a sweeping area in Utah that has long lacked protection from destructive tourism. Among many sacred sites in this area, Bears Ears is the site by which the case has come to be identified.

In 2017, the Trump Administration promptly rolled back the scope of the designated land by an Executive Order based on the Antiquities Act of 1906 and it was immediately appealed as an act outside the authority granted to the President in the statute. A President could set aside protected land with an Executive Order, the Tribes argued. However, a President could not "undo" or reverse setting aside protected land using the same Act as an authority for the rollback.[67] That the Obama Administration exceeded their authority under the Act by not keeping the protected area limited to just the areas for protection was the Trump Administration's response to the complaint.[68]

The concept of individual rights does not fit the collective nature of tribal nations' connection with environmental sites. The First Amendment protects individual rights, not collective ones. A showing of constitutional standing requires one case of an injured party, making it all the more a misfit for the ceremonies and life traditions that are entwined in these sites of spiritual significance forming collective interests. In a disappointing turn, during the last days of his Administration, President Obama allowed the Corps of Engineers to proceed under NEPA with the building of the Dakota Access Pipeline, removing the last barrier to the destruction of the Lakota Lake Ohae.

President Trump proved the fragility of Executive Orders and even the discretion of the Executive Branch to reverse these monument designations made by previous Presidents where only the action of the

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63 President William J. Clinton, Executive Order 13007, *supra* note 15.

64 Getty Oil Co. v. Jones, 470 S.W.2d 618 (Tex. 1971).

65 16 U.S.C. §§ 431–433.

66 54 U.S.C. § 320301 (2021).

67 Memorandum in Support of Cross-Motion for Partial Summary Judgment, Hopi Tribe, et. al. v. Trump, U.S. D.D.C. (2019) (No. 17-cv-2590).

68 *Id.*

Executive Branch is required. (It was not the first time the reduction of National Monuments had been done through this Act.)

The Trump Administration's reduction of the Bears Ears National Monument by 85% in 2017 demonstrated that fragility. The complete and utter failure to protect the Lakota's sacred Lake with the National Environmental Policy Act was another broken tool in the legal toolbox. In the shadow of the "black snake" warning from the Lakota's oral tradition, more than half of the public stand opposed to building the Dakota Access Pipeline.[69] Yet, our own legal framework has worked against the public's interests as well as Native interests. Sensing injustice, the majority opposed destroying the sanctity of a sacred site (and putting it at risk for pipeline leaks). And yet again, the federal government has still failed to uphold its own treaty agreements with Tribes.

VI. Not just Congressional Policy Choices: Endangered Species Act compared to protections for cultural survival of Native Nations

Two cases that focused on the same geographic area, the same federal project decided by the same U.S. Circuit court, came to assert their claims based on Congressional statutes that provided for specific protections of their respective objectives. One was intended to preserve and protect endangered species (the Endangered Species Act of 1973) and the other was intended to preserve and protect American Indian religious freedom (the American Indian Religious Freedom Act of 1978). Endangered species and Native American matters are both administered by the Department of Interior where the protection of endangered species and their survival is far more effective than any protection of Native Americans against destruction and dissemination of their cultural survival. This is largely due to Congressional priorities and the judiciary's interpretation of those laws. The comparison of these two cases shows a serious failing in protecting the cultural survival of Native Americans.

In *Sequoyah v. T.V.A.*[70], the recently enacted AIRFA that was designed and written by Congress as evidenced by the Senate Report, was applied to overcome the outright prohibitions of Native American cultural practices.[71] In the opening paragraphs of the opinion, astonishingly, the court almost chastises the plaintiffs for objecting to the dam as early as 1965 (15 years earlier) because they based their claim on cultural heritage:

> The record in the present case discloses that some of the plaintiffs objected to the dam and sought to prevent its construction as early as 1965. However, the documents in the record indicate that the Cherokee objections to the Tellico Dam were based primarily on

[69] Rob Sols, *Public Divided over Keystone XL, Dakota Pipelines*, *supra* note 3.

[70] Sequyoah v. T.V.A., 620 F. 2d 1159 (6th Cir. 1980).

[71] Jimmy Carter, American Indian Religious Freedom Statement on Signing S.J. Res. 102 Into Law (August 12, 1978), https://www.presidency.ucsb.edu/node/248389.

> a fear that their cultural heritage, rather than their religious rights, would be affected by flooding the Little Tennessee Valley.[72]

Yet, the court's Free Exercise Clause analysis reached only the "quality of the claims" side and determined the balancing test and "compelling interest" analysis need not be done, because the "quality of the claims" analysis failed. This analysis began with *Yoder* and the court opined:

> In *Wisconsin v. Yoder*, *supra*, the Supreme Court found that the religious faith and the mode of life of the Amish are "inseparable and interdependent," and that "the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living."[73]

The Court finds there is "no such claim of centrality or indispensability of the Little Tennessee Valley to Cherokee religious observances."[74]

Further, the court tries to characterize the religion of the "individual plaintiffs" as one where they "sincerely adhere to a religion which honors ancestors and draws its spiritual strength from feelings of kinship with nature . . . "[75] The court finds this fails the test that requires "demonstrating that worship at the particular geographic location in question is inseparable from the way of life (*Yoder*)."[76] The court further uses two criminal convictions for traditional Native American practices as Free Exercise Clause tests, finding against the Cherokee plaintiff's claims because they failed to demonstrate that the geographical area was "the cornerstone of their religious observance (*Frank*), or plays the central role in their religious ceremonies and practices (*Woody*)." Both of these cases involved reversing criminal convictions, not recognition of their religious practices, and should not have been considered analogous.

The court concludes the claims are nothing more than "personal preference" rather than convictions "shared by an organized group."[77]

The federal courts also criticize the fact that only two plaintiffs show they have traveled to the Valley area, as if the prudential rules of standing now must have not a plaintiff but in cases of Native Americans standing must include the entire tribe with injuries:

> There is no showing that any Cherokees other than Ammoneta Sequoyah and Richard Crowe ever went to the area for religious purposes during that time. At most, plaintiffs showed that a few Cherokees had made expeditions to the area, prompted for the most part by an understandable desire to learn more about their cultural heritage."[78]

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[72] *Sequoyah*, 620 F.2d at 1162.
[73] *Id.* at 1164–65 (quoting *Yoder*, *supra* note 43 at 215–16).
[74] *Id.* at 1164.
[75] *Id.* at 1165–65.
[76] *Id.*
[77] *Id.* at 1164–65 (quoting *Yoder*, *supra* note 43 at 216).
[78] *Id.* 620 F.2d at 1163.

The finding of the court that the plaintiffs have no religious claim, so the balancing test against compelling state interests is never reached, contradicts the opening paragraphs of the opinion where the court chastised the plaintiffs for not bringing a Free Exercise Clause claim where the court wrote, "Only with the filing of the complaint in this action, on October 12, 1979 less than a month before impoundment was scheduled to begin did any Cherokee make an explicit claim based on the Free Exercise Clause."[79] There was nothing in the court's analysis that suggested an earlier claim would have made any difference in the court's analysis.[80]

The lone dissenting judge in this three-judge panel, Justice Merritt, wrote that the Cherokees should be given a chance to prove a centrality claim by remanding the case to the District court, given the lack of clarity in the test, at the time of filing the complaint.[81] Although Congress had prohibited any statute from blocking the building of the Tellico Dam, the case ended. A constitutional violation would be beyond Congress's authority.

In stark contrast in *Tennessee Valley Authority v. Hill*, the court found unequivocal protection of the entire habitat of the snail darter, a fish protected by the Endangered Species Act. The fact that this landmark opinion began its discussion of the facts in the first paragraph with a narrative of the loss of this historical and culturally importance region to the Cherokee[82] holds its own unique irony. Awkwardly, the opinion trails into the legal analysis of the ESA and never returned to this opening narrative which suggested it was part of the injury brought before the court for resolution.

The holding in *TVA v. Hill* when juxtaposed against *Sequoyah v. TVA* is a horrific satire of racism and indicates that the Courts care more about the continued existence of the snail darter than that of the Cherokee Nation. The court held in *TVA v. Hill*:

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[79] *Id.* at 1162.

[80] *Id.* at 1164–65.

[81] "I agree with the centrality standard and the general reasoning of the Court's opinion, but I believe the case should be remanded to the District Court to permit plaintiffs to offer proof concerning the centrality of their ancestral burial grounds to their religion. This is a confusing and essentially uncharted area of law under the free exercise clause. At the time the complaint and various affidavits were filed, the centrality standard had not been clearly articulated. It may have been unclear to the Cherokees precisely what they had to allege and prove in order to make a constitutional claim. Indeed, the District Court simply held that the Indians have no free exercise claim because the Government now owns the land on which the burial sites are located . . . " *Id.* (Merritt, J., dissenting).

[82] 437 U.S. 153 (1978). "Considerable historical importance attaches to the areas immediately adjacent to this portion of the Little Tennessee's banks. To the south of the river's edge lies Fort Loudon, established in 1756 as England's southwestern outpost in the French and Indian War. Nearby are also the ancient sites of several native American villages, the archaeological stores of which are, to a large extent, unexplored. These include the Cherokee towns of Echota and Tennase, the former being the sacred capital of the Cherokee Nation as early as the 16th century and the latter providing the linguistic basis from which the State of Tennessee derives its name."

> 1. The Endangered Species Act prohibits impoundment of the Little Tennessee River by the Tellico Dam.
>
> (a) The language of § 7 is plain, and makes no exception such as that urged by petitioner whereby the Act would not apply to a project like Tellico that was well under way when Congress passed the Act.
>
> (b) It is clear from the Act's legislative history that Congress intended to halt and reverse the trend toward species extinction—whatever the cost. The pointed omission of the type of qualified language previously included in endangered species legislation reveals a conscious congressional design to give endangered species priority over the "primary missions" of federal agencies. Congress, moreover, foresaw that § 7 would, on occasion, require agencies to alter ongoing projects in order to fulfill the Act's goals.[83]

The U.S. Supreme Court upheld this sweeping statutory language to protect an endangered species and its habitat, but they were merely interpreting the statutory language of Congress.

Congress responded to the *TVA v. Hill* case by passing special legislation to override the Endangered Species Act in this special case. The *Sequoyah* case was, therefore, focused only on any constitutional violation. In response to the outcome of that case, Congress totally ignored addressing the claims of the Cherokee Tribe.

Even if the Cherokee plaintiffs had been able to establish the centrality of their need for the sacred site, why should they have to disclose every detail of a traditional practice that is essential to the continuity of the tribal government? Why should the Tribe have to justify a cultural practice of collecting plants with no "edifice" to persuade someone of a western religious background who may never be able to overcome the "edifice complex"? Traditions and sacred sites are those of a sovereign nation and there is no compulsory disclosure to the federal government any more than a state would be required to disclose the number of church members it has in its borders to the federal government. Why are Tribal Nations forced to disclose exact locations and exact practices in these futile cases?

The appropriate cause of action must be based on the unique sovereign government status of Tribes and the concomitant guardianship of the federal government derived from its constitutional plenary power.

VII. Courts have upheld "cultural survival" for Indian Tribes—the federal Guardianship doctrine

Comparing the cases of *Sequoyah v. TVA* and *TVA v. Hill* contrast the astonishing public policy preferences between endangered species and Native American Tribes held by Congress. The lack of existing constitutional law protections for Native Nations and legislative-fixes to

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[83] *Id.* at 154.

protect Native Nations religious freedom and cultural survival have all failed to protect sacred sites of Native Americans.

It is clear that Congress has the unique plenary power authority over the affairs of Native Nations to protect sacred sites that are critical to cultural survival for the Tribal government. These cases are not First Amendment cases, which are all focused on individual wrongs and burdens on freedom that are not outweighed by a compelling government interest. The unique status of Tribes as domestic-dependent nations established in the Foundation cases, also established a guardian to ward relationship, or a trustee relationship with Tribal Nations. Treaties are the law of the land and are not subject to constitutional scrutiny.

The guardianship role finds authority in the Constitution with the plenary power granted to Congress over "Indian tribes",[84] not individuals. From this power, the Marshall court established the guardian relationship over Tribes which has been interpreted as a trust and trustee relationship.[85] For example, land is held "in trust" by the federal government for Tribes. There is no distinction between land and land with sacred sites held in trust by the federal government.

In *Dry Creek Lodge, Inc. v. United States86* the court examined questions of tribal control over property under the lens of the new Indian Civil Rights Act[87] which was created to protect individual members against any of their tribal governments' discriminatory actions or legislation. The court held that the ICRA would have no meaning if tribal sovereign immunity was not waived for individual rights challenges.

When the court wants to uphold tribal sovereignty and the right to a Tribal Nation's traditions, cultural survival, and continuing governance, it is clear that it can do so. In *Santa Clara Pueblo v. Martinez88*, decided in 1978, the case challenged tribal governance based on a patrilineal tradition of property ownership and membership. But the court found tribal sovereignty outweighed the interest of the individual where the traditions tied with self-governance outweighed an individual's interest:

> [T]he equal protection guarantee of the Indian Civil Rights Act should not be construed in a manner which would require or authorize this Court to determine which traditional values will promote cultural survival and should therefore be preserved . . . . Such a determination should be made by the people of Santa Clara, not only because they can best decide what values are important, but also because they must live with the decision every day[89]

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[84] U.S. Const., art, I, § 8, "Congress shall have the power . . . to regulate Commerce with foreign nations and among the several states, and with the Indian tribes . . . "

[85] Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

[86] Dry Creek Lodge, Inc. v. United States, 515 F.2d 926 (10th Cir. 1975).

[87] Indian Civil Rights Act of 1968, P.L. No. 90–284, 82 Stat. 77, 25 U.S.C. §§ 1301–1303 (2020).

[88] Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

[89] Ib*id.* at 54.

If the disruption of the patrilineal system of land inheritance should be the choice of the tribe, then so should the traditions of sacred sites and ceremony which are integral to "cultural survival", and it is based on the federal trust responsibility to Tribal Nations and their continued "cultural survival".

VIII. Conclusion

Commentators and scholars alike, have observed the failure of the First Amendment to protect sacred sites. Scholars continue to try to parse the rules, to find the distinguishing features of sacred sites and the burden test, from *Yoder* and burdens under the Free Exercise Clause analysis.[90]

The U.S. Supreme Court has frequently narrowed distasteful past opinions without overruling them,[91] but this takes time and the "right" case to present. For the sake of justice our public sensibilities are clearly on the side or protecting sacred sites. Why should we not demand the burden test of the Free Exercise Clause analysis be changed to ask if the Tribe's cultural survival is being burdened? So far, courts have been unwavering in their opposition to protecting property that has sacred sites for the purpose of freedom of religion.

The Executive Branch has also used its Article II authority in setting aside land but this is just as easily undone by the next Presidential Administration without further Congressional affirmation through legislation. Despite its delegation of power to the President to set aside national monuments, further Congressional action is required to make it permanent.

However, if these cases could be styled as obligations of the federal government to fulfill its fiduciary responsibility to Tribes, by not only fulfilling treaty obligations but the trust responsibility for Tribes continued existence and cultural survival apart from specific words of a treaty, then sacred sites might be saved.

While we wait for the "right case" to come along, and find a court willing to take a convoluted pathway through a line of unfortunate failed First Amendment cases on sacred site protection, with each passing year, more sacred sites are destroyed.[92]

The pragmatic approach is to seek a pathway to protecting sacred sites in any legal context that can be strategized. We will always find distasteful the failure of the First Amendment to protect individual Native Americans and it will cast yet another long shadow on the broken promises to Native Nations if this is not corrected. The burden analysis of the Free Exercise Clause test could be revised when Native Nations are the plaintiffs to include a question of whether the cultural survival of the Native Nation is threatened by the action. The O'Connor test

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[90] Stephanie Hall Barclay & Michalyn Steel, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294 (2021).

[91] *E.g.*, Korematsu v. United States, 323 U.S. 214 (1944).

[92] *E.g.*, Rio Tinto destruction of the San Carlos Apache sacred site in Arizona.

of whether a religion is promoted by the action should not apply since that is irrelevant to the protection of a sovereign Native Nation's cultural survival. This recognizes the fiduciary duty of the federal government to regard the sovereignty of Indian Tribes and it satisfies the Free Exercise Clause tests.

Congress could create such a standard or courts could reshape the Constitutional tests when Native Nations are the parties bringing the action.

Our national integrity depends upon it.