

# THE RELIGIOUS FREEDOM RESTORATION ACT AND PROTECTION OF NATIVE AMERICAN RELIGIOUS PRACTICES

By  
Jason Gubi\*

## INTRODUCTION

While there has been debate as to what the religion clauses protect, nearly all observers would agree that the First Amendment prohibits the federal government from establishing a national religion.<sup>1</sup> Yet, from 1882 to 1932, the federal government subsidized the conversion of Native Americans to Christianity, while simultaneously banning Native American spiritual practices.<sup>2</sup>

Moreover, courts have treated Native American religions differently from “mainstream”<sup>3</sup> Judeo-Christian religions for much of this nation’s history. Beginning with *Johnson v. M’Intosh*, the Supreme Court noted that the “character and religion” of the Native Americans stood in stark contrast to the “superior genius of Europe,” helping to justify European control of the land.<sup>4</sup> In exchange, the Europeans gave the Native Americans civilization and Christianity, believing this to be “ample compensation.”<sup>5</sup> *M’Intosh’s* view of the Native American religions as being somehow inferior to those of Western Europe thus informs the Court’s subsequent unbalanced treatment of Native Americans in Free Exercise Clause jurisprudence.

This article will discuss the extent to which the Free Exercise Clause creates rights to freely exercise religion for Native Americans in comparison with adherents of mainstream religions and the effects, if any, the Religious Freedom Restoration Act (“RFRA”) has had on such rights.<sup>6</sup> Section II of this article examines the law governing Native American land use, including the First Amendment, the American Indian Religious Freedom Act (“AIRFA”), and the RFRA. Section III illustrates some key issues arising in Free Exercise Clause jurisprudence cases: (a) how central an asserted right must be for the courts to recognize that the right must be protected from government action; (b) how substantial a burden on religion must be to be protected under RFRA; and (c) what constitutes a compelling government interest. Section IV reviews Free Exercise Clause jurisprudence in general, with an emphasis on Native American Free Exercise Clause jurisprudence, to illustrate the difference in application of the clause to mainstream religions as opposed to Native American religions. Section V analyzes and predicts the manner in which Native American religious freedoms are protected, positing that although the law has historically provided little protection for Native American religions, courts may now be more receptive to securing Native American religious freedoms under RFRA.

## THE LAW GOVERNING RELIGIOUS FREEDOM

The free exercise of religion in the United States is secured first and foremost by the Bill of Rights. The First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...”<sup>7</sup> Taken together, the Establishment and Free Exercise

clauses prohibit the government from establishing a state religion and prevent the government from unduly restricting the exercise of religious freedoms.

Congress has also passed statutes to effectuate the purposes of the First Amendment with regard to religion. The AIRFA protects Native Americans’ rights to “believe, express, and exercise” their traditional religions, “including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.”<sup>8</sup> The AIRFA initially offered only weak protection, however, and Congress had to amend the law in response to a landmark Supreme Court case concerning religious use of peyote.

In *Employment Division v. Smith* the Supreme Court upheld a statute barring the use of peyote even for religious reasons.<sup>9</sup> The Court found that neutral, generally applicable laws could be applied to religious practices even when they substantially burden the free exercise of religion and were not supported by a compelling government interest. In response to *Smith*, Congress amended the AIRFA to allow the use of peyote in religious rituals<sup>10</sup> and passed the RFRA.<sup>11</sup>

The RFRA prohibits the government from substantially burdening the free exercise of religion unless it can show a compelling interest, and accomplish its ends through the least restrictive means possible.<sup>12</sup> Although the RFRA was found unconstitutional as applied to the states,<sup>13</sup> it has been found constitutional as applied to the federal government.<sup>14</sup>

## GOVERNING PRINCIPLES OF JUDICIAL APPLICATION OF THE RFRA

To determine whether the RFRA protects a right the courts consider several key interests such as: (a) the central nature of the asserted right; (b) whether the burden on religion is substantial; and (c) what constitutes a compelling government interest. Courts sometimes analyze the centrality of an infringed practice in determining the constitutionality of the governmental action. RFRA defines exercise of religion as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”<sup>15</sup> Section IV of this article, addresses the extent to which a given religious practice must be central to trigger protection under the Free Exercise Clause or RFRA frameworks.

The RFRA only protects religious practices that are substantially burdened by governmental action.<sup>16</sup> Some of the approaches courts have taken to analyze the substantiality of the burden are: (a) making a case specific determination;<sup>17</sup> (b) requiring coercion of a religious adherent;<sup>18</sup> (c) assuming sufficiency of the asserted burden;<sup>19</sup> and (d) requiring that an individual be prevented from engaging in religious conduct or having a religious experience.<sup>20</sup>

Only compelling governmental interests can infringe the free exercise of religion. The Supreme Court defines compelling interests as interests of “the highest order and not otherwise served.”<sup>21</sup> Maintaining a uniform tax code,<sup>22</sup> preserving

Native American culture,<sup>23</sup> protecting bald and golden eagles,<sup>24</sup> and enforcing participation in the social security system<sup>25</sup> are examples of compelling governmental interests.

## FREE EXERCISE CLAUSE JURISPRUDENCE

This section will compare how courts have analyzed Free Exercise claims in a number of different scenarios, highlighting the differences between the treatment received by adherents of Native American and mainstream religions.

### GOVERNMENTAL BENEFITS

In *Sherbert v. Verner*, the Supreme Court considered the constitutionality of a South Carolina unemployment benefits scheme which exempted people from benefits if they were able to work but chose not to work.<sup>26</sup> This scheme benefited Sunday worshippers while indirectly burdening the free exercise of religion of non-Sunday Sabbath-worshippers. The Court, therefore, established a burden switching, or compelling burden test.<sup>27</sup> For an action to be constitutional, the government must prove that it has a compelling interest in the regulation or action and that the means of achieving this interest are the least restrictive possible.<sup>28</sup> Under this test, the Court noted that non-Sunday worshippers were forced to choose between taking the unemployment benefits and observing their religion.<sup>29</sup> The Court found such a choice repugnant under the Free Exercise Clause as an undue burden on religious freedom.<sup>30</sup>

In *Bowen v. Roy*, the Court declined to apply the burden switching test that it had used in *Sherbert*.<sup>31</sup> Native American recipients of welfare benefits, on behalf of their minor child, objected to a government policy requiring the parents to submit the child's social security number in order to receive benefits. The child's father believed that the use of an arbitrary number as a means of identification contradicted his religious convictions, as it cut against an individual's uniqueness.<sup>32</sup> Though the Court recognized that the test applied in cases like *Sherbert* would seem to be applicable because an ostensibly neutral governmental policy was creating a burden on the free exercise of religious practice, it declined to do so.

In *Bowen*, the court found a lesser burden upon a religious practice, and a higher governmental interest in enacting the regulation.<sup>33</sup> The Court distinguished government regulations that only "call[] for a choice between securing a governmental benefit and adhering to a religious belief[]...from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons."<sup>34</sup> Moreover, the Court reasoned that the *Sherbert* ruling may be viewed "as a protection against unequal treatment rather than a grant of favored treatment for the members of the religious sect."<sup>35</sup> Therefore, while the *Sherbert* test was appropriate in cases involving unequal treatment,<sup>36</sup> there was no need for a more stringent test in *Bowen*.

*The Court appears to favor Judeo-Christian beliefs in determining whether or not to apply the Sherbert test.*

While the Court distinguished *Bowen* from *Sherbert*, both instances involved a religious adherent who had to choose

between following his religion and receiving a government benefit. The *Bowen* Court did not analyze the centrality of the infringed religious practice. It noted, however, that while the governmental interest was compelling, the religious practice was not substantially infringed. In finding that the burden imposed on the Native American family was minor, the Court thus implicitly regards that choosing to obey a Sabbath is more important than a religious belief in an individual's uniqueness.

### GOVERNMENTAL REGULATIONS THAT THREATEN THE EXISTENCE OF A PARTICULAR RELIGION.

The following cases illustrate the Court's treatment of governmental practices that are neutral on their face, but indirectly threaten the entire existence of religious practices.

In *Wisconsin v. Yoder*, Wisconsin's compulsory schooling law forced Amish parents to send their children to public school after the eighth grade violating core Amish religious beliefs.<sup>37</sup> Although this law was a neutral government regulation, the Court applied the *Sherbert* test to find that Wisconsin's law would debilitate the continuance of the Amish faith and therefore unduly burden the free exercise of religion.<sup>38</sup> The Court found that a regulation that is neutral in application may nonetheless "offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."<sup>39</sup> In *Yoder*, the neutral regulation ran afoul of the Free Exercise Clause because its neutral application would have the effect of debilitating the continuance of the Amish faith. The Court thus expanded the scope of protection of the Free Exercise Clause.

In *Lyng v. Northwest Cemetery Protective Association*, the government proposed the construction of a six-mile road cutting through a National Forest in northwestern California.<sup>40</sup> Though the Forest Service's expert was against building the road because the area was viewed as indispensable<sup>41</sup> to the religious practices of three Native American tribes, the Forest Service rejected that recommendation.<sup>42</sup>

The tribes initially achieved some success in the lower courts.<sup>43</sup> The district court acknowledged the centrality of the infringed right to their religious practice<sup>44</sup> and issued an injunction.<sup>45</sup> On appeal, the Ninth Circuit affirmed the granting of the injunction, holding that the road construction did not further a compelling state interest and violated the tribes' free-exercise rights.<sup>46</sup>

The Supreme Court reversed, distinguishing *Lyng* from other cases where the indirect burden was found unconstitutional in that they involved governmental coercion, while concluding that *Lyng* did not.<sup>47</sup> The Court said the First Amendment does not involve what individuals can extract from the government; rather it involves what the government is prohibited from doing to the individual.<sup>48</sup> Even if the road would destroy the tribes' religion, the Court reasoned that because the governmental action did not "coerce" the tribes into violating their religious tenets, it did not sufficiently burden their religion.<sup>49</sup>

In rejecting the tribes' claim, the Court also stressed that the government has the prerogative to decide what to do with its own land.<sup>50</sup> It feared that recognizing the claim could give rise to religious servitudes on government property, thereby inhibiting the government's ability to advance the public interest.<sup>51</sup>

*The Free Exercise Clause did not protect Native Americans from a governmental action that*

*threatened a religious practice because of the government's interest in managing its land.*

The *Lyng* Court seemed to be holding that ostensibly neutral laws that eliminate Native American religious practices are constitutional so long as they are not an outright ban on the practicing of a religion. Both *Yoder* and *Lyng* involve government policies that risked the destruction of a religion, yet only in *Lyng* was the government action found to be constitutional.<sup>52</sup> The difference in the outcome of these cases resulted from the fact that the proposed action in *Lyng* involved government land.<sup>53</sup> Therefore, the *Lyng* case can be interpreted to mean that the First Amendment cannot be invoked to challenge the government's use of real property.<sup>54</sup>

Indeed, this interpretation of *Lyng* was expressed when the RFRA was passed in November 1993.<sup>55</sup>

RFRA calls for the application of Free Exercise analysis from before *Smith*, including cases such as *Lyng*, which refuse to extend judicial protection when government action on federal land is at issue.<sup>56</sup> Congress was thus not attempting to change the way the courts interpret cases that deal with governmental land management. Yet, an express aim of RFRA was to create a right of action for individuals suffering infringement of their right to freely exercise their religious beliefs as a result of indirect, ostensibly neutral, government action.<sup>57</sup> Therefore, RFRA creates a right of action for individuals privately owning land, but not when the federal government is managing federal land. Moreover, since Native American religious practice often occurs on federal land, such practices will be subject to greater infringement than those who practice their religion on their own property.<sup>58</sup>

In *Yoder*, a government policy that risked the destruction of a religion was found unconstitutional,<sup>59</sup> yet in *Lyng*, a government action that posed an even greater risk of this same result was found constitutional.<sup>60</sup> In *Lyng*, the centrality of the religious practice at issue was recognized by the district court and the substantiality of the burden was clear because experts believed the proposed action would damage an area viewed as indispensable to the religious practice of three Native American tribes.<sup>61</sup> However, because the proposed action was to occur on governmental land, it was allowed.<sup>62</sup>

#### **RELIGIOUS OBJECTS AND OBSERVANCES**

Case law has been inconsistent in its treatment of government regulations affecting the use of objects that are used for religious observances, but whose use is also regulated by a federal regulatory scheme. This inconsistency continues even after passage of the RFRA.

In *Employment Div. v. Smith*, the Supreme Court held that neutral statutes are not unconstitutional by virtue of impos-

ing an undue burden on the free exercise of religion so long as the law is otherwise valid and within the government's prerogative to regulate.<sup>63</sup> The *Smith* Court viewed accommodation of religious minorities as preferring one religion over another. This accommodation would create a constitutional right to ignore neutral laws of general applicability.<sup>64</sup> Therefore, the Court decided not to apply the compelling interest test that it had applied in cases such as *Sherbert* and *Yoder*.<sup>65</sup> Rather, a rational basis for the regulation was sufficient to pass constitutional muster.

In *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, a small religious sect sought a preliminary injunction to prevent the federal government from enforcing a ban against using a hallucinogen regulated under the Controlled Substances Act.<sup>66</sup> The district court granted the injunction, and the Court of Appeals affirmed.<sup>67</sup>

The court applied the *Sherbert* test because the federal government was seeking to impose restrictions that burden religious practice.<sup>68</sup> Under this test, the Government failed to show that it had a compelling interest in not allowing an exception to the Controlled Substances Act. Neither the evidence related to diversion of the drug away from its religious use, nor the evidence as to its adverse health effects was strong.<sup>69</sup> The Supreme Court affirmed noting that RFRA expressly requires an individualized inquiry.<sup>70</sup> The Court also noted that the Controlled Substances Act does make an exception to hallucinogens such as peyote.<sup>71</sup>

The Tenth Circuit Court of Appeals in *U.S. v. Hardman* found that a governmental scheme aimed at restricting access to eagles' feathers violates individuals' Free Exercise rights because the regulatory scheme was not the least restrictive means possible to accomplish the government's compelling interest.<sup>72</sup> The regulatory scheme required a permit from the federal government to collect eagles' feathers.<sup>73</sup> Only members of federally-recognized tribes could apply for this permit.<sup>74</sup>

As a preliminary matter, the circuit court found that because an eagle's feather is sacred in many Native American religions, any scheme limiting access to feathers substantially burdened the free exercise of a religious belief.<sup>75</sup> In addition, the court also found that there was a compelling governmental interest to combat spurious claims for eagles' feathers and to protect Native American culture.<sup>76</sup> However, the government never showed the nexus between preservation of this culture and selectively allowing application for permits based on membership in federally-recognized tribes.<sup>77</sup> The court found that testimony in support of the notion that the prohibition would help to preserve Native American culture was equally indicative of a tendency to cause its destruction since the ineligibility of adherents to apply for a permit could just as easily lead to poaching as too long a waitlist.<sup>78</sup> As a result, the court found that the regulation was not the least restrictive way to preserve Native American Culture.<sup>79</sup>

In *United States v. Tawahongva*, the United States District Court for the District of Arizona found that a Native American's freedom to exercise his religion was not substantially burdened by the government's requirement that an individual seeking to acquire an eagle's feather apply for a permit.<sup>80</sup> The court admitted that the permit requirement substantially burdened the free exercise of Native American religion in other cases. However, rather than making a particularized inquiry as to whether the means of achieving the asserted governmental interest was

the least restrictive possible, the *Tawahongva* court merely inquired as to whether the defendant's burden was particularly burdensome.<sup>81</sup> The defendant only objected to the requirement to apply for a permit from the Hopi tribal government, and did not object to the need to apply for a permit in general. The court concluded that the burden was not substantial for him.<sup>82</sup> Even if the burden was substantial, the court nevertheless determined that the government has a compelling interest in regulating access to eagles' feathers and the means used to accomplish it were the least restrictive possible.

*Judicial interpretation of RFRA with regard to the use of religious objects and religious observances in the face of governmental regulatory schemes remains inconsistent.*

In *Smith*, the Court rejected using the balancing test from *Sherbert* and *Yoder* even though the regulation indirectly burdened religion. The Court questioned neither the centrality of the practice, nor the substantiality of the burden. Had the Court undertaken the *Sherbert* and *Yoder* analysis, it likely would have struck the government regulation for not being the least restrictive means of accomplishing a compelling interest.

Mainstream religions had for decades been protected from governmental infringement of religious practice via *Sherbert* and *Yoder's* analytical framework. Yet, the Court in *Smith* eschewed that analysis in consideration of a burden imposed upon a non-mainstream religion. After passage of the RFRA, the *O Centro* Court overturned the governmental action in a case factually similar to *Smith*. Thus, the RFRA can be understood to convey greater protection for the free exercise of religion than the Free Exercise Clause.

While the *Hardman* and *Tawahongva* courts both assumed that the infringed right was central enough to trigger an analysis under the Free Exercise clause, the two courts differed as to the substantiality of the burden imposed. This difference is likely due to the *Tawahongva* court's subjective inquiry on the substantiality of the burden for the defendant. Therefore, the *Tawahongva* court rejected the defendant's claim even while recognizing that the statute as generally applied substantially burdens the free exercise of religion.<sup>83</sup> This subjective RFRA inquiry involved greater scrutiny of the defendant's asserted injury than courts ordinarily undertake in Free Exercise cases.

The RFRA protected non-mainstream religions use of controlled substances for religious purposes. However, as in *Tawahongva*, Native American tribes are still unable to freely practice their religion as mainstream religions are.

#### **CONFLICTS BETWEEN GOVERNMENTAL MANAGEMENT OF FEDERAL LAND AND RELIGIOUS PRACTICES.**

Cases involving land use have traditionally been decided in favor of the government, and thus against the free exercise of religion by Native Americans.<sup>84</sup> Though the RFRA did not appear to change this analysis, case law may be evaluating Native American Free Exercise land use claims similarly to mainstream religions.

In *Sequoyah v. Tennessee Valley Authority* upheld the proposed governmental construction of the Tellico Dam on the Little Tennessee River.<sup>85</sup> Cherokee Indians claimed the dam

would flood their sacred homeland.<sup>86</sup> The court found that, although the complaint asserted an irreversible loss of Cherokee culture and history, these were not interests protected by the Free Exercise Clause of the First Amendment.<sup>87</sup>

The Cherokee Indians failed to demonstrate that worship at Little Tennessee Valley was (1) inseparable from their way of life; (2) the cornerstone of their religious observance; (3) or that it played a central role in their religious ceremonies and practices.<sup>88</sup> The land at issue was, therefore, not the theological heart of their religion and thus the Free Exercise clause did not apply.

In *Badoni v. Higginson*, the Navajo sought to order the government to lower a reservoir that partially flooded the Rainbow Bridge National Monument, a sacred site.<sup>89</sup> The tribe also tried to compel the government to issue regulations controlling tourist behavior at the monument; and to temporarily close the monument to the public, on notice, for religious ceremonies.<sup>90</sup>

The court first noted that the government had a compelling interest in maintaining the level of the reservoir because it supplied both water and electricity for the region.<sup>91</sup> The court next stated that a governmental action must be coercive in order to potentially violate the Free Exercise Clause.<sup>92</sup> Here, the government was not forcing the Native American groups to do anything that was against their religion, nor depriving anyone of a governmental benefit for failure to take an action that was abhorrent to their religion. Finally, because the plaintiffs were seeking to compel the government to prevent the public from accessing areas of religious significance, the court reasoned that taking such action would violate the Establishment Clause.<sup>93</sup>

In *Wilson v. Block*, the Navajo and Hopi Indians sought to enjoin the clearing of fifty acres of forest to expand the Snowbowl ski resort in the Coconino National Forest in Northern Arizona.<sup>94</sup> However, they failed to show a substantial burden upon their religious practices.<sup>95</sup> To show a substantial burden, unlike in *Sequoyah*, this court did not require that the religious practice be central to the religion. Nonetheless, it required that the affected religious practice could not be performed elsewhere.<sup>96</sup>

The *Wilson* Court then considered whether the AIRFA protected the tribes from the proposed expansion.<sup>97</sup> Based on the legislative record, the court found that AIRFA did not create any additional rights. Rather, it merely required federal agencies to consider the impact of proposed regulations and actions upon Native Americans.<sup>98</sup>

More recently, in a similar dispute the Ninth Circuit in *Navajo Nation v. U.S. Forest Service* overruled the Arizona District Court's finding that the proposed expansion of the Snowbowl ski resort was constitutional under the First Amendment.<sup>99</sup> Contrary to the district court, the circuit court held that the proposed action constituted a substantial burden on the free exercise of religion. Moreover, it also held that the government did not have a compelling interest in the expansion of the Snowbowl ski resort.<sup>100</sup>

The owners of the ski resort and the government were seeking to expand the size of the resort and introduce artificial snow-making.<sup>101</sup> Although artificial snow-making expanded the ski season, it also entailed the use of treated sewage effluent.<sup>102</sup> The circuit court found that the proposed use of sewage effluent would be a burden of the highest order upon the tribes' right to freely exercise their religion.<sup>103</sup> The court noted that a burden must prevent the plaintiff from "engaging in religious conduct or having a religious experience" in order to trigger RFRA analysis.<sup>104</sup> Here, the proposed expansion would severely burden the

religious exercise of the Hopi and Navajo because it polluted the most sacred place of those tribes. Since their religious practices require pure natural resources, use of the treated sewage effluent would prevent the Navajo from conducting some ceremonies and would undermine the Hopi's entire system of belief.<sup>105</sup>

The circuit court agreed with the district court in that the government in general has a compelling interest in managing public recreational land. However, it argued that *O Centro* requires a more particularized compelling interest analysis than the lower court employed. Under that analysis, expanding the size and operating season of a ski resort that is located in the desert is not a compelling governmental interest.

The government also argued that it had a compelling interest in developing snow-play areas for non-skiers. Without these areas, non-skiers were having accidents by playing close to the road.<sup>106</sup> The circuit court rejected this argument because nothing in the trial record indicated that these safety concerns had any relationship to expansion of the resort.<sup>107</sup> The circuit court found that even if creation of a snow-play park was a compelling interest, introducing artificial snow-making and expanding the resort were not the least restrictive means of furthering such an interest.<sup>108</sup>

The owners of the resort also argued that complying with the Establishment Clause was a compelling governmental interest.<sup>109</sup> Therefore, in furtherance of this interest, the government should not accommodate Native American religious practices.<sup>110</sup> However, the circuit court noted that the Supreme Court has repeatedly held that the Constitution requires accommodation, rather than mere tolerance, of all religions.<sup>111</sup> The circuit court viewed refusal to allow the proposed expansion as a "permitted accommodation to avoid callous indifference."<sup>112</sup>

*The post-RFRA Navajo Nation decision interprets burdens upon the free exercise of religion more broadly than the pre-RFRA case-law.*

These land use cases hinged on the definition of what was a substantial burden on the free exercise of religion. For example, the *Sequoyah* Court did not view destruction of the Cherokee's ancestral lands as a substantial interest protected by the First Amendment.<sup>113</sup> Rather, to find a substantial burden it examined whether the infringed practice was (1) inseparable from a way of life; (2) the cornerstone of a religious observance; or (3) central to religious ceremonies and practices.<sup>114</sup> Since the destruction of the Cherokee's ancestral lands did not fall under any of these categories, the governmental action did not violate the Free Exercise Clause. The *Badoni* Court analyzed the substantiality of an imposed burden via whether or not the act or regulation is coercive.<sup>115</sup> Since the governmental act was not coercive, the Court did not find it in violation of the free exercise of religion. Also, the *Wilson* Court analyzed substantiality by asking whether a given religious practice could not be done

elsewhere.<sup>116</sup> Since the religious activity could be conducted elsewhere, the infringement did not violate the free exercise of religion.

The *Navajo Nation* Court, however, defined a substantial burden upon the free exercise of religion as actions preventing an individual from "engaging in religious conduct or having a religious experience."<sup>117</sup> This definition is broader than the definitions provided by the *Sequoyah*, *Badoni*, and *Wilson* courts. A potential explanation for this more inclusive definition is that the *Navajo Nation* case occurred after passage of the RFRA.

The *Navajo Nation* Court noted that the term 'exercise of religion' is defined more broadly under RFRA in distinguishing cases that allowed governmental activities that gravely impacted Native American religious practices.<sup>118</sup> Before, the Free Exercise Clause analysis examined whether an action prohibited the free exercise of religion. Under the RFRA analysis actions merely burdening the free exercise of religion may violate Free Exercise rights.<sup>119</sup>

The circuit court differentiated the *Lyng* and *Wilson* decisions because of this greater protection provided by the RFRA and also on factual differences.<sup>120</sup> These land use cases hinged on the definition of what was a substantial burden on the free exercise of religion. Therefore, while RFRA does not change the method of determining when a substantial right is infringed, its interpretation in *Navajo Nation* marks a post-RFRA land use case that protected Native American religious practices.

## ANALYSIS AND PREDICTIONS

This section will review federal court interpretation of when religious practices are protected from government actions or regulations; when governmental action substantially infringes such a right; and what constitutes a compelling governmental interest. Finally, it will predict the direction of federal court jurisprudence in light of the *Navajo Nation* decision.

### INTERPRETATION OF KEY ISSUES

In Native American Free Exercise jurisprudence, courts have required a higher showing that a practice was substantially burdened than in cases involving mainstream religions. In Free Exercise cases regarding mainstream religions, courts ordinarily decline any ability to measure the centrality of a religious practice.<sup>121</sup> In many Native American Free Exercise cases, however, courts have required the Native American group to prove the centrality of the religious practice. For example, for mainstream religions, it has sometimes been sufficient that a religious practice be in any way affected by a governmental act.<sup>122</sup> Conversely, in *Tawahongva*, the court subjectively examined the claimant's burden even when, in general, the act substantially burdened the free exercise of religion.<sup>123</sup> Other courts have required that a given practice could not be done elsewhere. Only when these high substantial burden requirements were satisfied would the courts be willing to apply the compelling interest test

analysis.<sup>124</sup>

However, even when this test is applied, courts are quicker to find both a compelling interest and that the government engaged in the least restrictive means of accomplishing this interest in cases involving the government's management of federal land.<sup>125</sup> Such an approach negatively impacts Native American religious practice because Native American sacred sites are often located upon federal land.

### FREE EXERCISE AND THE RFRA GOING FORWARD

Post-RFRA cases only addressing what the First Amendment prohibits the federal government from doing miss the point. The RFRA increases the prohibitions on what the federal government can do through the requirement that the government pursue its aim by the least restrictive means possible.<sup>126</sup> Cases that fail to recognize that the RFRA protects a broader range of conduct are also misguided because RFRA's expansive definition of 'exercise of religion' includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."<sup>127</sup>

The RFRA was amended in 2000 upon passage of the Religious Land Use and Institutionalized Persons Act ("RLUIPA") of 2000 to change the understanding of the term 'exercise of religion.'<sup>128</sup> While the RFRA previously relied on the Court's understanding of the term as required by the First Amendment, RLUIPA expanded its meaning.<sup>129</sup>

Finally, based on *Navajo Nation's* different interpreta-

tion of the RFRA, courts may in the future analyze Native American Free Exercise cases in the same manner as the Free Exercise cases of mainstream religions. Such an interpretation of the RFRA would provide greater protection of Native Americans' rights to freely practice their religion. RFRA restored the method of analysis from before *Smith*<sup>130</sup> when mainstream religions received more protection than Native American religions.<sup>131</sup> Therefore, the RFRA alone would not seem to increase protection for the free exercise of Native American religious practices in the land use context.<sup>132</sup>

However, *Navajo Nation* used the RFRA framework with the RLUIPA definition of 'free exercise of religion' to protect the rights of Native Americans. The *Navajo Nation* court seriously questioned the government's asserted interest in expanding a ski resort and protected sacred Native American land from destruction. Also, contrary to previous cases, *Navajo Nation* did not examine the individual's ability to have this experience elsewhere or the coercive nature of the governmental action.<sup>133</sup> Rather, it analyzed whether the government had prevented an individual from "engaging in religious conduct or having a religious experience." Therefore, if *Navajo Nation* indicates a change in the way courts will evaluate governmental burdens on Native American religious practices, then Native American religious practices may receive the same level of accommodation as mainstream religious practices in the future.

## ENDNOTES

\*Jason Gubi is an alumnus of the College of New Jersey. After working for the National Security Agency, the author graduated from Fordham University School of Law in New York City in 2008. The author would first like to thank his brother Aaron Gubi and his friend Chait Desai, for their patience as he finished his first draft of the article while vacationing with them nearly a year ago. The author would also like to thank his friends Catherine LaRose and Yavar Bathaee, for reading over drafts of the article and encouraging him to pursue its publication. Finally, he would also like to thank Andrew Lim and the rest of The Modern American's editorial board. What mistakes remain, whether in substance or style, are the author's.

See U.S. CONST. amend. I (preventing Congress from making any law respecting an establishment of religion or from prohibiting the free exercise of religion).

<sup>2</sup> See generally, Lee Irwin, *Freedom, Law, and Prophecy: A Brief History of Native American Religious Resistance*, 21 *American Indian Quarterly* (Special Issue) Winter, 1997, at 35-55 (discussing oppressive federal government policies including the banning and criminalization of religious and spiritual practices and the subsidized conversion to Christianity of Native American children, often after being taken away from their parents); see also Crusade Watch, [http://www.crusadewatch.org/index.php?option=com\\_content&task=view&id=746&Itemid=128](http://www.crusadewatch.org/index.php?option=com_content&task=view&id=746&Itemid=128) (last visited Oct. 27, 2008).

<sup>3</sup> "Mainstream" in the context of this paper shall be understood to mean non-Native American religions in general, but more specifically, Judeo-Christian religions.

<sup>4</sup> See *Johnson v. M'Intosh* 21 U.S. 543, 573 (1823).

<sup>5</sup> See *id.*

<sup>6</sup> See Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb – 2000bb-4(1993).

<sup>7</sup> U.S. CONST. amend. I, § 1.

<sup>8</sup> American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996 (1978).

<sup>9</sup> *Employment Div. v. Smith*, 494 U.S. 872, 874 (1990).

<sup>10</sup> See 42 U.S.C. § 1996.

<sup>11</sup> See 42 U.S.C. §§ 2000bb – 2000bb-4.

<sup>12</sup> *Id.* at § 2000bb-1.

<sup>13</sup> *City of Boerne v. Flores*, 521 U.S. 507, 534-35 (1997).

<sup>14</sup> *Guam v. Guerrero*, 290 F.3d 1210, 1220-21 (9th Cir. 2002) (holding RFRA constitutional as applied to the federal government).

<sup>15</sup> 42 USC § 2000bb-2(4); see also *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1033 (9th Cir. 2007).

<sup>16</sup> See 42 USC §§ 2000bb-1(a), 2000bb(b).

<sup>17</sup> See, e.g., *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (recognizing a substantial burden upon religion when a state requires all parents to send their children to public school until age sixteen).

<sup>18</sup> See, e.g., *Lyng v. Nw. Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988) (requiring actual coercion before finding a substantial burden upon the free exercise of religion).

<sup>19</sup> See, e.g., *United States v. Hardman*, 297 F.3d 1116, 1126-27 (10th Cir. 2002) (noting that an eagle's feather is universally recognized as sacred for Native American religious practice).

<sup>20</sup> See, e.g., *Navajo Nation*, 479 F.3d at 1031-32 (finding a substantial burden on religion when the contamination of the Hopi's most sacred site would undermine the tribe's entire system of belief while simultaneously preventing the Navajo from engaging in particular ceremonies).

<sup>21</sup> See *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

<sup>22</sup> See *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989).

<sup>23</sup> See *Hardman*, 297 F.3d 1116 at 1128.

<sup>24</sup> See *United States v. Tawahongva*, 456 F. Supp. 2d 1120, 1133 (D. Ariz. 2006).

<sup>25</sup> See *United States v. Lee* 455 U.S. 252, 258-59 (1982).

<sup>26</sup> *Sherbert v. Verner*, 374 U.S. 398, 399-01 (1963).

<sup>27</sup> *Id.* at 399-406.

<sup>28</sup> See Jack S. Vaitayanonta, *In State Legislatures We Trust?: The "Compelling Interest" Presumption and Religious Free Exercise Challenges to State Civil Rights Laws*, 101 COLUM. L. REV. 886, 891-92, (2001).

<sup>29</sup> *Sherbert*, 374 U.S. at 404.

<sup>30</sup> *Id.* at 407.

## ENDNOTES CONTINUED

- <sup>31</sup> *Bowen v. Roy*, 476 U.S. 693, 707-08 (1986).
- <sup>32</sup> *Id.* at 696 (The defendant asserted a religious belief that control over one's life is essential to spiritual purity and indispensable to "becoming a holy person." The uniqueness of the Social Security number as an identifier would "rob the spirit" of his daughter and prevent her from attaining greater spiritual power.).
- <sup>33</sup> *Id.* at 707-08.
- <sup>34</sup> *Id.* at 706.
- <sup>35</sup> *Id.* at 708.
- <sup>36</sup> *Cf. Bowen*, 476 U.S. at 708.
- <sup>37</sup> *Yoder*, 406 U.S. at 209-14 (1972) (noting that formal education "beyond the eighth grade is contrary to Amish beliefs, not only because it places Amish children in an environment hostile to Amish beliefs ... but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life").
- <sup>38</sup> *Id.* at 236.
- <sup>39</sup> *Id.* at 220.
- <sup>40</sup> *Lyng v. Nw. Cemetery Protective Ass'n*, 485 U.S. 439, 441-43 (1988).
- <sup>41</sup> *Id.* at 442 (noting that successful completion of certain religious ceremonies by several Native American groups required that the area remain pristine).
- <sup>42</sup> *Id.* at 443.
- <sup>43</sup> *See id.* at 444-45.
- <sup>44</sup> *Id.* at 473-75.
- <sup>45</sup> *Id.* at 444.
- <sup>46</sup> *Lyng*, 485 U.S. at 445.
- <sup>47</sup> *Id.* at 450.
- <sup>48</sup> *Id.* at 448.
- <sup>49</sup> *Id.* at 450.
- <sup>50</sup> *Id.* at 453.
- <sup>51</sup> *Id.* at 452.
- <sup>52</sup> *Lyng*, 485 U.S. at 453.
- <sup>53</sup> *Id.* at 453.
- <sup>54</sup> *Cf. id.*
- <sup>55</sup> *See id.* (indicating that *Sherbert* and *Yoder* did not require application of the compelling interest test in a case involving governmental management of its own property); *see* 42 USC § 2000bb(b)(1) (noting that the purpose of RFRA is to restore the compelling interest test as set forth in *Sherbert* and *Yoder*).
- <sup>56</sup> *See id.* at 452 (indicating that *Sherbert* and *Yoder* did not require application of the compelling interest test in a case involving governmental management of its own property); *see* RFRA § 2000bb(b) (noting that the purpose of RFRA is to restore the compelling interest test as set forth in *Sherbert* and *Yoder*).
- <sup>57</sup> *See* RFRA § 2000bb.
- <sup>58</sup> *See, e.g., Lyng*, 485 U.S. at 439.
- <sup>59</sup> *Yoder*, 406 U.S. at 209-14.
- <sup>60</sup> *Lyng*, 485 U.S. at 453.
- <sup>61</sup> *Id.* at 441-45.
- <sup>62</sup> *Id.* at 453.
- <sup>63</sup> *Smith*, 494 U.S. at 879.
- <sup>64</sup> *See id.* at 886.
- <sup>65</sup> *Cf. id.* at 888 (noting that the compelling interest test would require constitutionally required religious exemptions from civic obligations).
- <sup>66</sup> *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 423 (2006).
- <sup>67</sup> *Id.* at 426-27.
- <sup>68</sup> *Id.*
- <sup>69</sup> *Id.* at 426.
- <sup>70</sup> *Id.* at 430-32.
- <sup>71</sup> *Id.* at 433.
- <sup>72</sup> *Hardman*, 297 F.3d at 1132-35.
- <sup>73</sup> *Id.* at 1132.
- <sup>74</sup> *Id.*
- <sup>75</sup> *Id.* at 1126-27.
- <sup>76</sup> *Id.* at 1127-29.
- <sup>77</sup> *Id.* at 1132-35.
- <sup>78</sup> *Hardman*, 297 F.3d at 1132.
- <sup>79</sup> *Id.* at 1132-35.
- <sup>80</sup> *Tawahongva*, 456 F. Supp. 2d at 1131-32.
- <sup>81</sup> *Id.*
- <sup>82</sup> *Id.*
- <sup>83</sup> *See id.* at 1132.
- <sup>84</sup> *Lyng*, 485 U.S. at 439, can also be considered a land use case.
- <sup>85</sup> *Sequoyah v. Tennessee Valley Authority*, 620 F.2d 1159, 1165 (6th Cir. 1980).
- <sup>86</sup> *Id.* at 1160.
- <sup>87</sup> *Id.* at 1164-65.
- <sup>88</sup> *Id.* at 1164.
- <sup>89</sup> *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980).
- <sup>90</sup> *Id.* at 176.
- <sup>91</sup> *Id.* at 177.
- <sup>92</sup> *Id.* at 176-77.
- <sup>93</sup> *Id.* at 179.
- <sup>94</sup> *Wilson v. Block*, 708 F.2d 735, 737-38 (C.A.D.C. 1983).
- <sup>95</sup> *Id.* at 740.
- <sup>96</sup> *Id.* at 742-43.
- <sup>97</sup> *Id.* at 745-47.
- <sup>98</sup> *Id.* at 746.
- <sup>99</sup> *Navajo Nation*, 479 F.3d at 1046.
- <sup>100</sup> *Id.*
- <sup>101</sup> *Id.* at 1029.
- <sup>102</sup> *Id.*
- <sup>103</sup> *Id.* at 1043.
- <sup>104</sup> *Id.*
- <sup>105</sup> *Navajo Nation*, 479 F.3d at 1043.
- <sup>106</sup> *Id.* at 1044.
- <sup>107</sup> *Id.* at 1045.
- <sup>108</sup> *Id.*
- <sup>109</sup> *Id.*
- <sup>110</sup> *Id.*
- <sup>111</sup> *Navajo Nation*, 479 F.3d at 1046.
- <sup>112</sup> *Id.* (Because the circuit court found that the government did not have a compelling interest in expanding the ski resort, it did not need to address whether the means of accomplishing this interest was the least restrictive possible).
- <sup>113</sup> *Sequoyah*, 620 F.2d at 1164.
- <sup>114</sup> *See id.*
- <sup>115</sup> *See Badoni*, 638 F.2d at 176.
- <sup>116</sup> *See Wilson*, 708 F.2d at 742-43.
- <sup>117</sup> *Id.*
- <sup>118</sup> *Navajo Nation*, 479 F.3d at 1032-34.
- <sup>119</sup> *See id.* at 1032-33.
- <sup>120</sup> *Id.* at 1046-47.
- <sup>121</sup> Luralene D. Tapahe, *After the Religious Freedom Restoration Act: Still No Equal Protection for First American Worshipers*, 24 N.M.L. REV. 331, 336-338 (1994) (noting that in most free exercise cases, the Supreme Court does not analyze the centrality of an activity to a religious adherent; its importance is usually accepted as fact).
- <sup>122</sup> *See* Tapahe, 24 N.M.L. REV. at 338 (noting that government officials can not determine what orthodoxy in religion is, thus indicating that it is the individual who will ordinarily make this determination).
- <sup>123</sup> *Tawahongva*, 456 F. Supp. 2d at 1131-32.
- <sup>124</sup> *See, e.g., Sequoyah*, 620 F.2d at 1160-65; *see e.g., Wilson*, 708 F.2d at 737-46.
- <sup>125</sup> *See, e.g., Sequoyah*, 620 F.2d at 1160-6; *see e.g., Wilson*, 708 F.2d at 737-46; *see, e.g., Lyng*, 485 U.S. at 441-53.
- <sup>126</sup> *See Navajo Nation*, 479 F.3d at 1043-46.
- <sup>127</sup> *See* Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-5(7)(A).
- <sup>128</sup> *See Navajo Nation*, 479 F.3d at 1032.
- <sup>129</sup> *See id.* at 1031-34.
- <sup>130</sup> *See* 42 USC § 2000bb(b)(1).
- <sup>131</sup> *See generally*, Tapahe, *supra* note 122.
- <sup>132</sup> *See id.* at 345-47.
- <sup>133</sup> *See Navajo Nation*, 479 F.3d at 1032.