WHY THE RELIGIOUS FREEDOM RESTORATION ACT CANNOT PROTECT SACRED SITES

Timothy Wiseman

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I. INTRODUCTION

The United States is a pluralistic society, supporting an enormous array of different religions and often multiple independent interpretations of those religions. The United States has fallen short of its aspirations to show full tolerance for minority religions,[1] even though it enshrines protections for the vital rights of freedom of religion in its Constitution.[2] However, the way these rights of freedom of religion have been interpreted and protected by the judiciary, particularly under the Free Exercise Clause, has varied throughout the years.

Seminal cases including *Sherbert*[3] and *Yoder*[4] helped establish what came to be known as the substantial burden test. The substantial burden test determines when a government action was at risk of violating the protections of the First Amendment religious rights. Although this test was used numerous times, its applicability was severely narrowed in *Smith*.[5] This narrowing sparked outrage from a variety of religious groups, political groups, and the general public. They felt that, as narrowed, it left far too little protection for their religious freedoms. This is especially significant since some government actions may infringe upon a religious freedom in ways that may not be obvious to the institutions that take the action or promulgate the law. Thus, Congress responded to the outcry and

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[1] The U.S. for a time banned the use of peyote in spite of significance to certain Native American Religions. *See*, Employment Division v. Smith, 494 U.S. 872, 874 (1990); *see also infra* Part II. Although later rectified by the courts, inmates in Ohio have been denied access to items essential for their worship. *See, e.g.*, Cutter v. Wilkinson, 544 U.S. 709 (2005).

[2] U.S. CONST. amend. art. I

[3] Sherbert v. Verner, 374 U.S. 398 (1963).

[4] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[5] Employment Division v. Smith, 494 U.S. 872, 874 (1990).

passed the Religious Freedom Restoration (RFRA) act with the specific intention of restoring the jurisprudence to the state it was in before *Smith*.[6]

While it was valuable in protecting the rights of religious minorities, the substantial burden test was not enough to protect Native American religions and their sacred places, either before or after the RFRA was passed. Many of these sacred places are located on land owned by the federal government and actions by federal agencies may disturb or even desecrate these important sites.[7] Even before the *Smith* decision, the courts frequently failed to protect some of these sacred locations from federal agencies, or even to subject these actions to the full scrutiny of a compelling interest test.[8] In fact, the Supreme Court has been openly critical of restrictions placed on what the government can do with federal land based on religious needs.[9] Some have claimed that the RFRA legislatively expanded the protections beyond the precise test as established by *Sherbert* and *Yoder*, and that this should now provide better protection for the sacred places in America.[10] But the Ninth Circuit has ruled that the RFRA uses the phrase "substantial burden" in a precise way that limits the applicability of the statue.[11] As the Ninth Circuit has interpreted the phrase in *Navajo Nation*,[12] the protections of the RFRA can only be invoked when a government action either denies a benefit or delivers a punishment for following religious precepts.[13]

This paper will explain that the Ninth Circuit established the correct definition for "substantial burden" as that phrase is used in the RFRA, and so the political branches must act to protect locations

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[6] 42 U.S.C. § 2000bb(b)(1) (2012).
[7] *See* Alex Tallchief Skibine, *Toward a Balanced Approach for the Protection of Native American Sacred Sites*, 17 MICH. J. RACE & L. 269, 270 (2012); Marcia Yablon, *Property Rights and Sacred Sites*, 113 YALE L. J. 1623, 1627 (2004).
[8] *See, e.g.*, Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988).
[9] *Id.* at 453 (explaining that whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its rights to use what is, after all, *its* land).
[10] Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 Harv. L. Rev. 1175, 1213 (1996).
[11] Navajo Nation v. U.S. Forest Service, 535 F.3d 1058 (9th Cir. 2008).
[12] The *Navajo Nation* case is also referred to as the "San Francisco Peaks litigation" by some commentators. Skibine, *supra* note 7 at 275 n.40.
[13] *Id.*

sacred to Native American religions. Despite the eloquent dissent and subsequent academic literature criticizing *Navajo Nation*, it was correctly decided. This only shows that other methods must be used to ensure that federal agencies show great deference to the needs of Native Americans when making decisions about federal land. Part II of this paper will look at the history that led to the passage of the RFRA, including the cases which established the substantial burden test, the *Smith* case which vastly narrowed the use of that standard, and the passage of the RFRA itself which largely nullified *Smith*. Part III will explore some significant applications of the substantial burden test to the protection of the Native American religion in general and, in particular, their sacred religious sites. It will then look at the *Navajo Nations* case, which dealt with using recycled water on sacred land. The implications of that decision, which did not protect the Native American interests will be explored. This section will also look at how that case has impacted other cases and how it has been viewed in academic literature. Part IV will explore both the affirmative case for the interpretation of the phrase "substantial burden" used by the Ninth Circuit. Part IV will also explore and respond to the criticisms which have been raised in the dissent and in other papers. The paper will conclude that Native American sacred places need further protection, but that this protection must come through additional actions from the political branches rather than changes in judicial interpretation.

II. SUBSTANTIAL BURDENS, *SMITH*, AND THE RFRA

A. Establishing the Substantial Burden Test in Sherbert and Yoder

The Constitution protects the people's right to religious freedom in the First Amendment, which says "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…".[14] Based on this amendment, the Supreme Court established what came to be called the "substantial burden test."[15]

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[14] U.S. CONST. amend. art. I.

[15] Eloise H. Bouzari, *The Substantial Burden Test's Impact on the Free Exercise of Minority Religions*, 2 TEX. F. ON C.L. & C.R. 123, 124 (1996). This test is also occasionally referred to as the "compelling interest test". *See id.* at n.9.

This test arose from the Supreme Court cases of *Sherbert v. Verner* and *Wisconsin v. Yoder* when read together.[16]

In *Sherbert,* an employer terminated a member of the Seventh Day Adventist Church after she refused to work her Church's Sabbath of Saturday.[17] She filed for unemployment compensation, but was denied payment because she refused to accept any employment which would require her to break her Sabbath.[18] She appealed this decision, and eventually came before the Supreme Court. The Supreme Court stated that to be constitutionally acceptable, the law must either place no burden upon the right of free exercise of religion or that the burden must be justified by a compelling and legitimate interest.[19] The Court then found that this law placed a burden on the plaintiff because following her religion would force her give up government benefits.[20] It further found that there was no sufficiently compelling interest to justify this burden, noting that it required more than a mere rational basis to justify such an infringement on free exercise.[21]

Yoder was decided after *Sherbert*, and dealt with members of the Old Order Amish and Conservative Amish Mennonite Churches who refused to send their children to required education beyond the eighth grade for religious reasons.[22] The Court found that when a state action "interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."[23] Although the Court recognized the state's legitimate interest in seeing that the children were educated, it emphasized that "only those interests of the highest order and those not otherwise served can overbalance legitimate

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[16] *Id. See also* Jessica M. Wiles, Note, *Have American Indians Been Written Out of the Religious Freedom Restoration Act,* 71 MONT. L. REV. 471, 474-475 (2010). The exact phrase "substantial burden" does not appear in either *Sherbert* or *Yoder.* Skibine, *supra* note 7 at 278.
[17] Sherbert v. Verner, 374 U.S. 398, 399 (1963).
[18] *Id.* at 400-01.
[19] *Id.* at 403-04.
[20] *Id.*
[21] *Id.* at 406-07.
[22] Wisconsin v. Yoder, 406 U.S. 205, 207-208 (1972).
[23] *Id.* at 214.

claims to the free exercise of religion."[24] The Court found that the state's interest in this case could not balance out the rights of free expression, combined with the interests of parenthood that they had asserted, especially since the court found that the Amish did provide continued education even if it was not of the form the state preferred.[25]

Together, these cases established the substantial burden test.[26] That test requires that the court determine if a government action imposed a substantial burden on the free exercise of religion. If it did, then the court would have to consider a second step and determine if the burden was outweighed by a compelling, legitimate interest.[27] This test was applied a number of times, with some minor variations and interpretations until 1990 when the Supreme Court considered *Employment Division v. Smith.*[28]

B. Changing the Substantial Burden Test with Smith

In *Smith*, the Court significantly reduced the applicability of the substantial burden test, and this decision created intense academic discussion of the matter.[29] Here, Alfred Smith and Galen Black were terminated from their positions with a private company after it was learned that they had used peyote, a controlled substance under the law, in one of their religious activities.[30] The fact that the peyote was used as part of an organized religious ritual and that it was forbidden by their religious organizations for use outside of such

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[24] *Id.* at 215.
[25] *Id.* at 233-35.
[26] Wiles, *supra* note 16 at 475. *See also* Bouzari, *supra* note 15 at 124.
[27] Some academic commentators such as Jessica Wiles have asserted that there was also a requirement that it be done with the least restrictive means. Wiles, *supra* note 15 at 475. However, I was unable to find that language in either *Sherbert* or *Yoder*. Further, the Ninth Circuit in interpreting the RFRA specifically stated that Congress added that language to the RFRA as an addition to the original test in the pre-*Smith* jurisprudence. Navajo Nation v. U.S. Forest Service, 535 F.3d 1058, 1075-76 (9th Cir. 2008).
[28] Bouzari, *supra* note 15 at 124. *See e.g.* Thomas v. Review Board, 450 U.S. 707 (1981).
[29] Bouzari, *supra* note 15 at 124.
[30] Employment Division v. Smith, 494 U.S. 872, 874 (1990).

rituals did not protect them from being terminated.[31] They then requested unemployment compensation from the state, and they were denied since they had been terminated for misconduct which violated state law.[32] They sought judicial intervention. The Oregon Supreme Court, following the reasoning in *Sherbert* found that denying them unemployment benefits under these circumstances would be a violation of their free expression rights. The U.S. Supreme Court then considered the case, but remanded it to the Oregon Supreme Court which again found in favor of Mr. Smith and Mr. Black, and the Supreme Court once again granted certiorari.[33]

The Supreme Court declared that the substantial burden test, as announced in *Sherbert,* was only applicable in the field of unemployment compensation.[34] In particular, they said that the *Sherbert* test was not relevant to a "generally applicable criminal law."[35] Although this case did deal with an unemployment claim, the applicability of the criminal law banning the use of peyote was significant since they were denied unemployment benefits because they were terminated for violating a criminal law. The Court also distinguished this situation from *Yoder.* The Court noted that here the terminated employees claimed only rights under the Free Exercise Clause had been violated while in *Yoder,* and many of the other cases where the substantial burden test was employed, another right was asserted along with the Free Exercise Clause.[36] Those other cases involved hybrid rights where Free Exercise was buttressed by some other significant right. In *Yoder* in particular, the Amish asserted their rights to direct the education of their children along with their religious rights.[37] The court emphasized that the centrality or significance of the religious belief could not play a role in determining what test would be used to determine if the law was constitutional.[38] It would be neither appropriate nor possible for a

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[31] Kristen A. Carpenter, *Limiting Principles and Empowering Practices in American Indian Religious Freedoms,* 45 CONN. L. REV. 387, 394 (2012).
[32] Employment Division v. Smith, 494 U.S. 872, 875 (1990).
[33] *Id.* at 875-76.
[34] *Id.* at 883.
[35] *Id.* at 884.
[36] *Id.* at 881-82.
[37] Wisconsin v. Yoder, 406 U.S. 205, 233-35 (1972). *supra* note Section II.A.
[38] Employment Division v. Smith, 494 U.S. 872, 886-87 (1990).

court to decide what was central to a religion and what was more peripheral.

With this backdrop, the court found that the requirement to show a compelling interest was rarely applicable in the context of religious freedom. It was effectively limited to cases that could allege a violation of a hybrid right.[39] The majority opinion went so far as to call a broad application of this test to religious matters to be "courting anarchy."[40] The majority provided a parade of horribles of matters, in other words, a list of matters that could be challenged on a religious basis that the majority felt it would be undesirable to leave exposed to such challenges.[41] The majority expressed their concerns that health and safety regulations, animal cruelty laws, and even child labor laws could be challenged in this way.[42] It concluded by finding that the prohibition of peyote was constitutional; therefore, the denial of the unemployment benefits was proper.[43] It stated that those burdened were not left without recourse though, since those who felt their religious freedom was being infringed could seek aid from the legislative and executive branches through the political process.[44] The court directly recognized that this may be difficult for minority religions which may have trouble gaining attention from the more political branches of government.[45] Because

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[39] *Id.* at 881. *See also* Wiles, *supra* note 16 at 477 (discussing the hybrid claims).
[40] *Smith*, 494 U.S. at 888-89.
[41] The court does not make clear in its parade of horribles why subjecting these matters to a substantial burden scrutiny is actually horrible. Presumably those of true significance could pass the examination, and the rest perhaps should either not be regulated by law at all or could accommodate religious exemptions. The first example, for instance, is compulsory military service, but America does allow for conscientious objector status so long as the objector meets certain qualifications. As discussed in the next section, Congress appeared to think that the test was workable. *Smith*, 494 U.S. at 888-89.
[42] *Id.*; Some academics agreed with the concerns about some of the items in the parade of horribles. For instance, some religions permit punishments that would be considered domestic violence under secular law, and some academics are concerned that without limitations on religious protections like those established in *Smith* their religion could give the abusers effective protections from those laws. Leslie C. Griffin, *Smith and Women's Equality*, 32 CARDOZO L. REV. 1832, 1833 (2011).
[43] *Smith*, 494 U.S. at 888-89.
[44] *Id.*
[45] *Id.*

of this, Native Americans in practice have limited protections for their religious rights in some cases.

C. Nullifying Smith with RFRA

The decision in *Smith* was subject to vigorous academic discussion and even in the popular press, much of it critical of the ruling and the reasoning used by the majority. [46] Many groups reacted with anger and shock, as they saw this as a direct threat to the protections of the religious freedom.[47] One professor went as far as saying that "the Court had held that every American has a right to believe in a religion, but no right to practice it."[48] Lower courts naturally took their guidance from this ruling, with some academics watching these courts saying that they took the ruling to mean that free expression arguments could have no sway, and that no facially neutral law could be found infirm based solely on a free expression challenge.[49] Not all academics were inclined to see *Smith* as either incorrect or entirely undesirable as a precedent.[50] It could ensure that some could not use religion to escape responsibility for their improper actions.[51] However, the weight of opinion was firmly aligned against the precedent in *Smith,* and a broad consortium of individuals and groups, from a variety of political leanings and a variety of religious beliefs, called for Congressional intervention in the matter.[52] Congress heard them, and answered.

In 1993, Congress passed the Religious Freedom Restoration Act (RFRA).[53] The act had overwhelmingly broad support. It was supported by both Republicans and Democrats, with members of both parties sponsoring the bill.[54] It was swiftly signed into law by

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[46] Bouzari, *supra* note 15 at 124-25.
[47] *See* Wiles, *supra* note 16 at 478.
[48] Douglas Laycock, *The Religious Freedom Restoration Act,* 1993 BYU L. REV. 221, 221 (1993).
[49] Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act,* 73 TEX. L. REV. 209, 214-15 (1994).
[50] *See generally* Griffin, *supra* note 35.
[51] Arguing that it provided protection for some groups, particularly women, from those who may cloak their illicit activities with religion. *Id.*
[52] Laycock & Thomas, *supra* note 49 at 210-11.
[53] *Id.*
[54] *Id.* at 214-15.

President Clinton.[55] The bill had a stated purpose of restoring the compelling interest test and directly cited both *Sherbert* and *Yoder*.[56] The Committee on the Judiciary, in its report for the House of Representatives, said it expected "that the courts will look to the free exercise of religion cases decided prior to *Smith* for guidance".[57] The bill, in its findings, specifically named *Smith* as an impetus for the passage of the bill.[58] The Senate, in its consideration, specifically sought to ensure protection for minority religions, who may not always be able to readily gain the attention of the political branches of the government.[59]

The RFRA created a cause of action to challenge a government action that substantially burdened exercise of religion under the test established in *Sherbert* and *Yoder*.[60] It permitted that substantial burden to stand only if the government could then show it was necessary for a compelling government interest and that it was the least restrictive means of achieving that goal.[61] As scholars promptly noted, the effectiveness of the RFRA depended on the interpretation of the terms "exercise of religion," "substantially burden," and "compelling interest."[62] The application of the RFRA was swiftly challenged in court as it applies to states, and was found unconstitutional in that context based on separation of powers.[63] This means that the states are not bound by the already limited protections for freedom of religion provided by the RFRA. However, it remains in effect as applied to the federal government, and it provides additional protection beyond what is available under the ruling in *Smith*.[64]

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[55] *Id.* at 210.
[56] 42 U.S.C. § 2000bb(b)(1) (2012).
[57] H.R. Rep. No. 103-88 at 6-7 (1993). Some scholars have argued that the bill went beyond merely restoring the pre-*Smith* law. Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 Harv. L. Rev. 1175, 1213 (1996); Skibine, *supra* note 7 at 282.
[58] 42 U.S.C. § 2000bb(a)(4) (2012).
[59] Sen. Rpt. No. 102-111 at 8 (July 27, 1993). *See also* Wiles, *supra* note 16 at 480.
[60] 42 U.S.C. § 2000bb-1 (2012).
[61] *Id.*
[62] Laycock & Thomas, *supra* note 49 at 210-11.
[63] City of Boerne v. Flores, 521 U.S. 507, 536 (1997).
[64] Gonzalez v. O Central Espirita Beneficenta Unaiao do Vegetal, 546 U.S. 418 424 (2006). *See also* Carpenter, *supra* note 31 at 446.

III. NATIVE AMERICANS, NAVAJO NATION, AND ITS AFTERMATH

A. Protecting Native Religions before Navajo Nation

The ability to practice their religion freely is vital to every group of people with an independent identity. For Native Americans in particular, tribal leaders have asserted that the ability to practice their traditional religions is essential to their self-determination.[65] Navajo Nation President, Joe Shirley, has even said that restrictions on their ability to practice their religion free from outside contamination are akin to genocide as well as religious persecution.[66] Because of the significance of their religion, there have been a number of cases of Native Americans and Native American groups seeking protection for their religious activities and for places of religious significance to them.

One prominent example in the appellate courts is *Sequoyah v. TVA*, which was decided in 1980.[67] *Sequoyah* was brought by practitioners of the traditional Cherokee religion to prevent the Tennessee Valley Authority from building a dam.[68] This dam would have flooded regions that the Cherokee considered sacred as well as areas once used as Cherokee cemeteries. Since it was decided in 1980, this case came after the substantial burden test is established in *Sherbert and Yoder* but before the effects of *Smith* and the RFRA. The court thus applied the substantial burden test and found that there was no substantial burden that needed to be balanced.[69] Although they acknowledged that graves may be disturbed or that significant places may be flooded, the court found that represented personal preference rather than strongly held convictions.[70] In comparing it with previous cases, the court found that there was

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[65] Carpenter, *supra* note 31 at 397.
[66] Cyndy Cole, *Snowmaking Opponents Now Targeting City Council*, ARIZ DAILY SUN, (Jan 13, 2006), *available at* http://azdailysun.com/snowmaking-opponents-now-targeting-city-council/article_3cff71dc-acbf-59f9-8461-63548e54cfb5.html.
[67] Sequoyah v. Tenn. Valley Auth., 620 F.2d 1159 (6th Cir. 1980).
[68] *Id.* at 1160-61.
[69] *Id.* at 1163-65.
[70] *Id.*

nothing which was inseparable from their way of life, or that was central to their religion that would be destroyed by the flooding.[71] The court also noted, while saying that it was not dispositive by itself, that the Cherokee has no legally recognized property interest in the land in question. The court thus declined to protect this significant place.

Another prominent example arose in *Wilson v. Block* in 1983.[72] In *Wilson*, groups representing both the Hopi and Navajo tribes sued to prevent the further development of an area of the Coconino National Forest, including the San Francisco Peaks.[73] The San Francisco Peaks were of great religious significance to both the Hopis and the Navajo.[74] The Navajo believed that the Peaks were the home to certain spiritual beings and were significant for healing. The Hopi also believed that a group of spiritual beings, called Kachinas, occasionally dwelt on those peaks.[75] The Hopis asserted in this case that use of this area for commercial purposes would be an insult to the Creator and the Kachinas. Nevertheless, a portion of the peaks had been used for recreational skiing since 1937. This suit was launched because the forest service authorized the company managing the ski facilities to clear additional land and upgrade the facilities. The Native Americans asserted a claim under the Free Exercise Clause.[76] The court highlighted the need for the plaintiff to bear the initial burden of proof in a free exercise challenge to show that the there was a burden upon religion.[77] Citing to *Sherbert*, the court noted that this burden may be indirect.[78] But, while the burden may be indirect, it must still come in the form of penalizing faith in

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[71] *Id.*
[72] Wilson v. Block, 708 F. 2d 735 (D.C. Cir. 1983).
[73] *Id.* at 738-39.
[74] *Id.*
[75] *Id.* Marcia Glowacka, et al., *Navutakya'ovi, San Francisco Peaks,* 50 CURRENT ANTHROPOLOGY 547, 553-54 (2009) (using the transliteration "Katsinam").
[76] They also asserted claims under the American Indian Religious Freedom Act, the Endangered Species Act, and several other statutes. These other claims are not relevant to this paper. The trial court found for the defendants on all but one claim under the National Historic Preservation Act. The defendants brought themselves into compliance with that act. Wilson v. Block, 708 F. 2d 735, 739 (D.C. Cir. 1983).
[77] *Wilson*, 708 F. 2d at 740-42.
[78] *Id.*

some way. Government actions that merely offend believers or even cast doubt upon the veracity of the belief, without in some way penalizing that faith, will not place a burden upon the faith as that term is used in *Sherbert*.[79] Thus, the court held that the tribes would need to show that, at a minimum, the government's plan would have impaired some religious function that could not be performed elsewhere for the land use to place a substantial burden on their religion.[80]

The tribes argued that they could meet that standard. The court agreed that their affidavits showed that the use of the Peaks were vital to their religions, both for ceremonies and for the gathering of items which were significant to their ceremonies.[81] However, the Forest Service had allowed the tribes free access to the Peaks for religious purposes and planned to continue doing so. They could not demonstrate to the court's satisfaction any activity that they would be unable to continue to perform after the expansion and modernization.[82] The court, much like the court in *Sequoyah*, thus declined to protect the Native American Religions under the Free Exercise Clause. Much like *Sequoyah*, this case was decided before *Smith* and overtly and conscientiously applied the standard set forth in *Sherbert*.

B. The Navajo Nation Decision

Navajo Nation proved to be both a significant and highly controversial decision from the Ninth Circuit, dealing with the RFRA and the rights of Native Americans in particular. Much like *Wilson*, the significant *Navajo Nation* decision revolves around the San Francisco Peaks in the Coconino National Forest.[83] In 2002, the operators of the ski facilities on the Peaks asked for permission to use recycled wastewater to create artificial snow.[84] This would

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[79] *Id.*
[80] *Id.* at 744-45.
[81] *Id.*
[82] *Id.* at 745.
[83] Navajo Nation v. U.S. Forest Service, 535 F.3d 1058, 1064-65 (9th Cir. 2008) (noting that the ski facilities had been previously challenged in *Wilson*).
[84] *Id.* at 1065.

allow them to expand the season during which skiers could visit and make use of the facility and improve the quality of the snow. However, recycled wastewater can contain human waste even after it has been processed.[85] In 2005, after investigations and consultations with Native American groups, the Forest Service approved the request by the operators to use recycled waste water.[86] Native American groups found this to be an affront to their spirituality and began taking steps to prevent the use of the wastewater. They began with an appeal to an administrative board, and then sued in the district court.[87] Both the administrative appeal board and the district court found that the use of the wastewater was permissible. So, the Native American groups appealed to the Ninth Circuit. A three judge panel initially found that this plan violated the RFRA, but the Ninth Circuit then took the case *en banc*.[88]

The Ninth Circuit, sitting *en banc*, considered the case in light of the RFRA.[89] The court stated that, similar to the *Sherbert* test examined in Wilson,[90] the initial burden of proof was on the Native Americans to establish that this government action placed a substantial burden on their exercise of religion.[91] Only if they crossed this hurdle would the burden shift to the government to show that its action supported a compelling government interest and that it did so in the least restrictive way. Both sides agreed that the Native Americans held sincere religious beliefs and were engaged in the exercise of religion on the Peaks.[92] The Court focused on the meaning of the phrase "substantial burden" in the context of the RFRA.

The Religious Freedom Restoration act was explicitly intended to restore the test established in *Sherbert* and *Yoder*, so the court

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[85] *Id.* at 1063.
[86] *Id.* at 1066-67.
[87] *Id.*
[88] *Id.* at 1067
[89] Other matters were also before the court including the National Environmental Policy Act and the national Historic Preservation Act. The Ninth Circuit found in favor of the Forest Service on those issues as well, but those details are not relevant here. *Id.* at 1063.
[90] *See supra* Section III.A.
[91] *Navajo Nation*, 535 F.3d at 1068.
[92] *Id.*

examined the meaning of the phrase in those cases.[93] The Ninth Circuit held that a "substantial burden" exists "only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)."[94] They then went even further to say that even if a government action could "virtually destroy" the ability of a group to practice their religion it could not constitute a "substantial burden" under the RFRA unless it did so through a conditional benefit or coercion that compelled them to act contrary to their faith.[95] As a matter of policy, the Court was concerned that a broader reading of the meaning of those words could cause almost any governmental action to be "subject to the personalized oversight of millions of citizens" with a vast diversity of religious beliefs and sensibilities.[96]

The court found that there was no substantial burden, within the meaning of the RFRA, placed upon the Native American's religion.[97] While acknowledging that there may be a serious diminishment of the spiritual fulfillment of Native Americans who practice their religion on this peak and that it was offensive to their religious sensibilities, the use of the wastewater neither denied them a benefit nor attempted to coerce action from them.[98] It thus, under this definition, did not place a cognizable substantial burden upon them and there was no need to evaluate if there was a compelling government interest or whether the least restrictive means to achieve it were being used. Attempts by the Native American groups to appeal to the Supreme Court were rejected.[99]

C. Criticisms of the Navajo Nation Decision

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[93] *Id.* at 1069-70. 42 U.S.C. 2000bb(b)
[94] *Navajo Nation,* 535 F.3d at 1070.
[95] *Id.* at 1072.
[96] *Id.* at 1063-64.
[97] *Id.* at 1078.
[98] *Id.* at 1063.
[99] Navajo Nation v. United States Forest Service, 129 S. Ct. 2763 (2009) (*cert. denied*).

Since the release of the *Navajo Nation* opinion, there has been extensive scholarship on its meaning and its impact. Much of that scholarship agreed with the dissent and criticizing the majority decision.[100] Ms. Wiles, for instance, has argued that the Ninth Circuit has unduly narrowed the interpretation of the phrase "substantial burden," and has turned the RFRA from a restriction on effect to one that merely restricts the form of government action.[101] She argues that giving the phrase its plain meaning would not create the individual veto that the Ninth Circuit was concerned about but would rather allow a more flexible protection for religious beliefs.[102] She highlights studies which have shown that government actions satisfy the compelling interest test 72% of the time when it is fully applied in the context of religious activity.[103] She also highlights actions which she believe Congress specifically intended to prohibit with the RFRA that she believes would not satisfy the Ninth Circuit's interpretation.[104] Specifically, she believes that autopsies would not qualify as a substantial burden as the Ninth Circuit has phrased the test despite being banned by certain faiths.[105]

Professor Carpenter also expressed concerns with the results of the case.[106] She asserts that the RFRA as interpreted by the Ninth Circuit will provide no protection for Native American sacred sites or their religious freedom at those sites.[107] In fact, she believes that under that interpretation, the courts will be unable to provide their vital role of protecting minority rights from the political process which is driven by the majority.[108] She asserts that this ruling will leave the protection of tribal religions and their sacred sites at the mercy of agency discretion.[109]

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[100] *See, e.g.*, Bouzari, *supra* note 15; Wiles, *supra* note 16.
[101] At the time of her writing, Ms. Wiles was a student commentator with the Lewis and Clark Law School. Wiles, *supra* note 16 at 494-95.
[102] *Id.*
[103] *Id.*
[104] *Id.* at 497.
[105] *Id.*
[106] At the time her paper was published, Professor Carpenter was the Associate Professor of Law, and Director of the American Indian Law Program at University of Colorado Law School. Carpenter, *supra* note 31 at 459.
[107] *Id.*
[108] *Id.* at 480.
[109] *Id.* at 456.

Ms. Erickson looks at *Navajo Nation* though a biopolitical lens provided by Foucault.[110] Biopolitics is the ability of a government to control its citizens as populations, and "the power to make live and let die."[111] She highlights the strong link to the land itself in Native American religions to show that there is no way to impact the land they identify as sacred without affecting the populations and their religion.[112] In Native American religions, unlike most sects of Judeo-Christian tradition, particular places may be of great significance to a religious experience and to religious belief.[113] Maintaining their religion, continuing religious ceremonies, and perpetuating their religious history are vital for their survival as tribes. They also all require ties to particular places and respect both for land in general and for particular pieces of land which hold religious significance for them. In this light, actions such as using reclaimed wastewater on sacred land could be viewed as an existential threat to the affected Native American tribes by damaging their ability to practice their religions and traditions in a way that the Native Americans will view as valid and pure.[114] She argues that under the standard established by the Ninth Circuit it would be unlikely that any Native American religious concerns about how land sacred to them, but owned by the federal government, would receive any protection.[115] Because of the seriousness of the damage to the Native Americans both in this case itself and in cases that come after it, Ms. Erickson urges a reconsideration of the standard for "substantial burden" that the Ninth Circuit has adopted.

D. The Aftermath of the Navajo Nation Decision

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[110] Ms. Erickson was, at the time of her paper, a student commentator with Seattle University School of Law. She holds a B.A. in Philosophy and Religious Studies. Jessica M. Erickson, *Making Live and Letting Die: The Biopolitical Effect of Navajo Nation v. U.S. Forest Service,* 33 Seattle Univ. L. Rev. 463 (2010).
[111] *Id.* at 463.
[112] *Id.* at 465.
[113] *Id.* at 472-73.
[114] *Id.* at 487; Glowacka, *supra* note 75 at 554.
[115] As discussed more in Section IV.B., she may well be right. This standard would be hard to meet when it came to any proposed land use. Erickson, *supra* note 110 at 497.

The concerns that some critics have raised that the effects of the Ninth Circuit's ruling might have on other cases affecting Native American religions are not academic. The case has been cited numerous times. The effects of the case were felt almost immediately since the pending *Snoqualmie Indian Tribe* case had been held in abeyance while waiting for the *en banc* rehearing of *Navajo Nation*.[116] In that case, the Federal Energy Regulatory Commission (FERC) had authorized the continuation of a hydroelectric project that affected the Snoqualmie River and the Snoqualmie Falls into which the river flowed. The hydroelectric project affected the tribe's access to the falls, which they used for religious experiences.[117] It eliminated a mist that frequently formed at the base of falls which was significant for their religious practices.[118] This project altered the land itself, which the tribe considered to be sacred. The Ninth Circuit applied the standard it announced in *Navajo Nation* to determine that there was no substantial burden placed upon the tribal religion.[119] Although this project impacted the tribes, it did not place them in a situation where exercise of their religion would either deprive them of government benefits or subject them to sanctions. The Ninth Circuit thus again declined to protect sites sacred to a Native American Tribe.[120] This immediate aftermath of the *Navajo Nation* case showed the importance of that decision, and how the courts cannot, under the current laws, provide proper protection for sacred religious spaces.

IV. THE CASE FOR A NARROW READING OF "SUBSTANTIAL BURDEN"

A. The Affirmative Case for a Narrow Reading of Substantial Burden

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[116] Snoqualmie Indian Tribe v. FERC, 545 F.3d 1207, 1210-11 (9th Cir. 2008).
[117] *Id.* at 1213.
[118] *Id.*
[119] *Id.* at 1214-15.
[120] The tribe also asserted other rights including the National Historic Preservation Act (NHPA), but those claims were also denied by the appellate court and the details are not relevant here. *Id.* at 1219-20.

The majority's decision in *Navajo Nation* and in particular its narrow interpretation of "substantial burden" was subjected to a vigorous and eloquent dissent as well as well reasoned academic criticism. Nontheless, the majority's decision used the correct interpretation of those words under both standards of statutory interpretation and of policy. As the majority points out, a narrow reading focusing on either a denial of benefits or punishment for following a religious dictate is the natural interpretation of the statute.[121] The RFRA used the term "substantial burden" without providing a definition. When a statute uses a term of art which is already well in use within the field the statute is referring to, it is both natural and supported by precedent to assume, absent contrary evidence, to give that term the meaning it has held as a term of art rather than referring to a more conventional dictionary definition.[122] Moreover, in this particular case, the statute expressly refers to two cases that helped originally define that term of art. This shows that it is correct to give this term of art its meaning in case law and to give particular attention to those two cases when evaluating the term.

In those cases, as the majority correctly points out, a substantial burden was found when a government benefit was conditioned on violating a religious precept or when sanctions were threatened unless a religious precept was violated.[123] Cases that came after *Sherbert* and *Yoder* in the Supreme Court, but before the RFRA, do not provide evidence that the Supreme Court intended for a broader meaning. The majority opinion expressly declares that there are no cases in which the Supreme Court has found a substantial burden on free exercise when it did not fall into one of those two categories.[124] In fact, other pre-*Smith* decisions would seem to emphasize the narrowness of the use of this term. *Lyng*, which the majority opinion discusses at length, is worthy of particular attention.[125]

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[121] Navajo Nation v. U.S. Forest Service, 535 F.3d 1058, 1068-71 (9th Cir. 2008), *cert denied* 129 S. Ct. 2763 (2009).
[122] *Id.* at 1074.
[123] *Id.* at 1069-70.
[124] *Id.* at 1075.
[125] *Id.* at 1072.; Ms. Erickson asserts that *Lyng* limited the applicability of the RFRA. This may be correct in a sense, but the Supreme Court decided *Lyng* in 1988, which puts it before the RFRA was passed in 1993 and even before *Smith*

In *Lyng*, Native American groups challenged a Forest Service decision to build a road through the Chimney Rock area of the Six Rivers National Forest as well as harvest of timber from that area.[126] This road would help link two California towns.[127] It would also disrupt the environmental conditions that are necessary for the practice of certain rituals and religious practices of the Native Americans.[128] The Supreme Court noted specifically that the Native Americans were not being coerced into acting against their beliefs nor would they be denied a benefit for acting according to their beliefs.[129] Although the court never directly uses a phrase like "substantial burden test," it does cite to *Sherbert* and *Yoder* and it declines to find a heavy enough burden upon free exercise to force the government to show a compelling interest in the road.[130] This pre-*Smith* case decided by the Supreme Court supports, at least indirectly, the interpretation given by the Ninth Circuit to the phrase "substantial burden."[131]

The Ninth Circuit is also correct as a matter of policy. It asserted that a broader reading would permit every person to "hold and individual veto to prohibit the government action solely because it offends his religious beliefs, sensibilities, or tastes, or fails to satisfy his religious desires."[132] As some critics have pointed out, the majority may go too far in its language. A broad reading of substantial burden would not grant the ability to outright forbid such government actions, but it could make it much easier to force the

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which was decided in 1990. This makes it a pre-*Smith* case which interpreted the pre-*Smith* standard rather than an explicit limit or interpretation of the RFRA. Erickson, *supra* note 110 at 477.

[126] Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 442-443 (1988).

[127] *Id.*

[128] *Id.* at 448-49.

[129] *Id.*at 449.

[130] *Id.* at 447

[131] In *Navajo Nation*, the plaintiffs tried to distance this situation from *Lyng* by saying the *Lyng* did not apply the *Sherbert* test. Because there is some merit to that, the support provided by *Lyng* is best characterized as indirect. However, the majority disagreed with the plaintiffs on the applicability of *Lyng*. Even granting the plaintiff's assertions that *Lyng* should not be controlling, it is certainly consistent with the decision reached by the majority. Navajo Nation v. U.S. Forest Service, 535 F.3d 1058, 1072-73 (9th Cir. 2008).

[132] Navajo Nation v. U.S. Forest Service, 535 F.3d 1058, 1063 (9th Cir. 2008).

government to demonstrate a compelling interest before taking action. There are numerous religions, often with numerous sects and subdivisions which have different beliefs; it could be quite easy to offend the religious sensibilities of some sect with a government action. Outside of coercion of some form, the legislature is better equipped to evaluate the affects governmental actions on various religions in this diverse society and to balance their needs than the courts could be.[133]

B. Responding to the Critics

Those who disagree with the majority have an array of meritorious arguments for a broader reading. Perhaps the most compelling is highlighting the great weight of spiritual disquiet this particular decision and those that follow its example bring. Members of the Navajo Nation have publicly compared the use of the reclaimed wastewater, which may have some remnants of human waste, on land they hold sacred to genocide.[134] Ms. Erickson came close to that by saying it was a challenge to their ability to survive as a unified tribe over time.[135] The dissent in *Navajo Nation* eloquently lays out some details of the various religions of the several Native American groups involved in the suit and shows the significance of the Snowbowl area to them.[136] While the Native Americans considered many areas sacred, the San Francisco Peaks are more sacred than most others, and one of the Native American leaders compared it to the Tabernacle.[137] The dissent highlighted the statements of Navajo medicine men that the use of reclaimed water, which may have come from mortuaries and hospitals, would destroy his ability to practice as a medicine man and prevent him from performing the Belssingway ceremony.[138] Similarly, the Hualapi could be prevented from using the waters from the peaks in

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[133] Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 452 (1988).
[134] Cole, *supra* note 66.
[135] *See supra* Section III C.
[136] Navajo Nation v. U.S. Forest Service, 535 F.3d 1058, 1099-1103 (9th Cir. 2008)
[137] *Id.*at 1099.
[138] *Id.* at 1104-05.

healing ceremonies in ways they would recognize as effective after it was contaminated with wastewater.[139] Anthropologists researching the matter have stated that use of the reclaimed water, and thus polluting the sacred space, may "threaten the very core of Hopi spiritual practice."[140]

These arguments are compelling: they show the true seriousness of the government's actions on these sacred lands. They are persuasive arguments that the treated sewage at issue in *Navajo Nation* should not be used on land sacred to the Native Americans and that the Forest Service reached the wrong conclusion in deciding to permit it. However, even if the Forest Service was wrong, that does not mean that the courts are the proper venue to prevent these actions from occurring. As the Supreme Court in *Lyng* stated, such decisions, when they do not cross the line of coercion, are more suited to the political branches of the government.[141]

There are problems with entrusting such matters entirely to the political branches. The courts have often been relied on to protect minorities from majoritarian politics.[142] Yet, the political process often does protect minority religions. Although it required lobbying, federal regulations now protect the religious use of peyote in spite of rulings in federal court that such protection was not mandated by the First Amendment.[143] In the past, the executive branch has also taken steps to help ensure protection of Native American interests, and it can and should continue to do so whenever reasonable.[144] While expecting Congress to intervene swiftly or on a regular basis is likely to be problematic, Congress could be petitioned to strengthen the provisions of laws that require consultation with and consideration of Native American needs such as the American

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[139] *Id.*
[140] Glowacka, *supra* note 75 at 554.
[141] Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 452 (1988). Additionally, while arguing strenuously that the judiciary should reconsider the decision in *Navajo Nation*, Ms. Wiles also advocated for both the legislative and executive branches to intervene and seems to think they can do so effectively. Wiles, *supra* note 16 at 500.
[142] Carpenter, *supra* note 31 at 480.
[143] *Id.* at 399-400.
[144] *Id.* at 445 (discussing executive orders meant to protect Native American interests).

Indian Religious Freedom Act (AIRFA).[145] Since the AIRFA was insufficient to obtain results favorable to the Native American religious followers in *Lyng* and did prevent the issues that arose in *Navajo Nation*, it is clearly inadequate to provide protections that would satisfy the current criticisms. But similar laws have already helped reach accommodations between the government and Native American groups on several issues, and it could readily be strengthened to provide more favorable treatment for Native American religious concerns.[146] The law as it stands is inadequate to provide the needed protections to Native American religious groups, but the political branches have taken some steps in that direction and they should further improve the way they handle religious sensibilities.

Even if it were assumed, *arguendo*, that courts should provide greater review for the actions of federal agencies and their land use, the RFRA is not the proper statute to bring such redress. The RFRA was explicitly intended to restore the pre-*Smith* jurisprudence. But *Lyng* was a pre-*Smith* case,[147] and so was *Wilson*.[148] In both of those cases, the courts declined to protect the Native American interest against the government's actions on federally owned land. If a currently existing statute is to be interpreted more broadly to provide better protection for sacred sites, then there are other candidates such as the American Indian Religious Freedom Act (AIRFA).[149] The court in *Lyng* read the AIRFA narrowly, but future courts could be read it more broadly to provide greater protections for established Native American groups without distorting the interpretation of the RFRA.[150] Using a law like the AIRFA, which is specifically limited to protecting established Native American religions, would also avoid the concerns of subjecting every government action to religious scrutiny by every possible religious interpretation. Using the AIRFA more broadly would have a narrower impact than would using the RFRA more broadly. Although the arguments that the

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[145] 42 U.S.C. § 1996 *et seq*. *See also* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 455 (1988).
[146] Carpenter, *supra* note 31 at 400.
[147] *See supra* Section IV.A.
[148] *See supra* Section III.A.
[149] 42 U.S.C. § 1996 *et seq*. (2012).
[150] *See Lyng*, 485 U.S. at 455.

forest service made the wrong decision are compelling, there are better ways of redressing it than the courts. There are more appropriate statutes, which are designed specifically to provide protections to Native Americans, to do it than the RFRA if it must be redressed by the courts.

The critics, including the dissent, used a number of hypothetical examples to attempt to show that the meaning of substantial burden should encompass the use of reclaimed water on sacred land. The dissent, with later agreement from a number of commentators, subtly accuses the majority of being ethnocentric and tries to use these hypotheticals to show something that would be comparable in the Judeo-Christian framework.[151] For instance, the dissent asserted that the majority would likely find a substantial burden if there was a law that required the use of treated wastewater for baptisms. The courts would likely strike down such a law, but with an equal protection argument since it would target Christians on its face. However, a law or government action of general applicability that came close to that in effect most likely would be acceptable under the RFRA. For instance, several cities now add treated sewage directly back to their general water source.[152] Clearly, this is not the same as requiring the use of reclaimed wastewater for baptisms, but it does mean that any member of the clergy wishing to avoid that would have to take extra steps and added expense to avoid doing so in those cities. Should a city decide to take the matter further and reserve bottled water in the city only for use in hospitals, making it yet more difficult to do baptisms without using treated wastewater, courts would likely uphold it as an act of general applicability which merely burdened religious feelings.

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[151] Navajo Nation v. U.S. Forest Service, 535 F.3d 1058, 1097 (9th Cir. 2008) (Fletcher, J., dissenting). Some of the commentators were not so subtle in accusing the majority of being ethnocentric. Bouzari, *supra* note 15 at 135.

[152] *See e.g.* Mike Lee, *Parched Texas Town Turns to Treated Sewage as Emergency Drinking Water Source*, SCIENTIFIC AMERICAN (July 11, 2014) *available at* http://www.scientificamerican.com/article/parched-texas-town-turns-to-treated-sewage-as-emergency-drinking-water-source/; *San Diego Agrees to Turns Recycled Wastewater into Drinking Water*, FOXNEWS, Nov. 19, 2014 *available at* http://www.foxnews.com/us/2014/11/19/san-diego-agrees-to-turn-wastewater-into-drinking-water/.

The dissent also asserted that "a court would surely hold that the government had imposed a 'substantial burden' on the exercise of religion if it purchased by eminent domain every Catholic Church in the country." Such a sweeping action targeted at a single religious institution would be struck down on equal protection. But a less extreme version of that has previously survived judicial scrutiny.

The Pillar of Fire, a religious organization, sued to prevent the condemnation of one of their church buildings under imminent domain.[153] They claimed that the church had a "unique religious significance", although the court was skeptical of that claim.[154] They made occasional use of this church for active religious worship along with other church business and the building held historical value to the Pillar of Fire since it served as their headquarters for a time.[155] The condemnation was part of an urban renewal project that contemplated the complete redevelopment of the church's region, and was done as a generally applicable action which did not specifically target a religious activity.[156] Since this was a matter before the state court and the decision was rendered in 1976, they did not specifically consider the substantial burden test as it was later developed. Nonetheless, the court found that "the contemplated condemnation of the property would not interfere with the free exercise and enjoyment of religious worship by the Pillar of Fire Church."[157] It was found Constitutional, and the reasoning would have remained applicable under the substantial burden test had it been developed at that time. The situation in *Navajo Nation* cannot even be meaningfully distinguished by asserting that the Snowbowl is a unique location. While the court in *Pillar of Fire* specifically rejected the church's claim that the location was "*sui generis*", it went on to say that even if it assumed that the property were *sui generis*, that would not have changed the ruling.[158]

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[153] Denver Urban Renewal Authority v. Pillar of Fire, 552 P.2d 23 (Colo. Sup. Ct. 1976).
[154] *Id.* at 24-25.
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] Denver Urban Renewal Authority v. Pillar of Fire, 552 P.2d 23, 25 (Colo. Sup. Ct. 1976).

In addition to those hypotheticals, the dissent in *Navajo Nation* brings up two prior cases that it asserts show that the situation in *Navajo Nation* should fall within the meaning of substantial burden. In *Shakur*, a Muslim prisoner was denied kosher meals and the regular meals were forbidden by his religion.[159] He was offered vegetarian meals, which were acceptable to his religion, but allegedly caused health issues due to medical conditions.[160] The court stated that this could constitute a substantial burden and remanded for additional factual findings.[161] But in *Shakur*, the government brought enormous pressure upon him to change his behavior, distinguishing it from the matter in *Navajo Nation.* The government essentially offered the inmate the choice of eating food which violated his religion or forgoing the benefit of proper meals provided by the prison.[162] The vegetarian option, if his assertions were true, was no option because it created medical issues for him. Indeed, the court in *Shakur* notes that it had previously denied a similarly situated Muslim inmate's request for kosher meals because that inmate had no medical condition that would be exacerbated by the vegetarian meal.[163] The inmate thus, while partially because of his medical condition, was being punished for following his religion, which is absent in the *Navajo Nations* case.

Mockaitis, the other case mentioned by the dissent, is similar in that the inmates were being presented with a coercive choice.[164] There, a district attorney had recorded the confession of an inmate to a priest.[165] The Ninth Circuit found that this constituted a substantial burden on the religious practice of the Catholic priests.[166] However, in that case the Ninth Circuit did not attempt to precisely define the term substantial burden nor did it perform the type of analysis that would have shown what definition they were applying to reach that conclusion.[167] Despite the dissent's assertions that the

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[159] Shakur v. Schriro, 514 F.3d 879, 888-89 (9th Cir. 2008).
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id.* (citing Sefeldeen Alameida, No. 238 Fed. Appx. 204 (9th Cir. 2007)).
[164] Mockaitis v. Harcleroad, 104 F.3d 1522 (9th Cir. 1997).
[165] *Id.* at 1524-26.
[166] *Id.*
[167] Navajo Nation v. U.S. Forest Service, 535 F.3d 1058, 1074 n. 15 (9th Cir. 2008). *See generally Mockaitis*, 104 F.3d.

Mockaitis decision conflicts with the majority opinion, this situation most likely would be a substantial burden under the definition provided by the majority. Once inmates and prisoners knew that the prosecution could record confessions, a suspect would be placed in the forbidden choice of abandoning a significant sacrament or else suffering the punishment of being forced to deliver evidence to the prosecution. That would be a powerful coercive force. In *Navajo Nation*, the Native Americans face no such coercive choice. The Native Americans may no longer find value in the rites performed on the mountain after it has been tainted by the recycled water, but they are not punished for performing the ceremony. The inmate in *Mockaitis* is punished directly for performing his sacrament by handing information to the prosecution.

While the use of the wastewater may be repugnant to the Native Americans, none of the examples provided by the dissent and embraced by academic critics demonstrates why it should be considered a substantial burden under the RFRA. Courts would likely not find the hypotheticals to be a substantial burden if reduced to any form that would be a generally applicable law. While the examples from prior cases they employ clearly were declared a substantial burden, those cases are readily distinguished from the situation in *Navajo Nation* and most likely would be found to be substantial burdens. This of course does not imply that the Forest Service made the right decision, but it does help show that the Ninth Circuit did in its limited review.

V. CONCLUSION

The law has on multiple occasions failed to protect locations that are sacred Native Americans. This has a direct and unfortunate impact on their religious experiences and their perception of their spirituality. There is a strong and compelling moral argument that this situation should be changed to provide Native Americans with greater protections and to ensure that their sacred locations are treated with proper respect, counterbalanced only with truly vital governmental interests.

While the interests of Native American religious groups should be protected, the reasoning employed by the majority in *Navajo*

Nation shows that the RFRA is not the proper tool with which to do that. It is not the proper tool based upon statutory analysis since that indicates the narrow reading that the majority does employ, and that is consistent with other Supreme Court cases. The statute, on its face, was meant to restore a specific body of case law, but that case law had generally failed to provide proper protections for Native American sacred sites even before it was overturned. The RFRA is not the proper tool based on policy, for reading the phrase "substantial burden" broadly enough to bring the Native American land issues under the ambit of the RFRA would subject government actions to enormous scrutiny from a wide array of actors. Rather, the political branches should act and direct governmental agencies to show yet more deference to Native American needs, and particularly to their sacred sites in their administrative decision making process.