MAKING SPACE FOR SACRED LANDS: FROM THE HARSH GLARE OF *LYNG* TO *APACHE STRONGHOLD*

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Federal courts have routinely held—under the Free Exercise Clause and Religious Freedom Restoration Act (RFRA)—that government actors operating on government-owned land may desecrate, destroy, modify, or restrict access to landmarks that are sacred to Native American tribes, even if doing so would "virtually destroy" the tribes' ability to practice their religion. Beginning with Lyng v. Northwest Indian Cemetery Protective Association *in 1988, courts have justified these results on the grounds that tribal litigants are asserting a positive right that would permit them to "exact something" from the government. The Free Exercise Clause and RFRA, however, only protect "substantial burdens" on religious practice, or rather, violations of negative rights (i.e., rights to be free from coercion). In its recent decision in* Apache Stronghold*, the Ninth Circuit's 6-5 per curiam decision ostensibly expanded the scope of "substantial burdens" to include "preventing access to religious exercise." A different 6-5 majority opinion in this case, however, retreated to* Lyng*'s analysis and denied the Western Apaches' claims. The Supreme Court has declined to hear the case, over a vociferous dissent from Justice Gorsuch calling the decision to not review the Ninth Circuit's "questionable reasoning" a "grievous mistake" with "consequences that threaten to reverberate for generations." Indeed, the Ninth Circuit's confused reasoning writes the Western Apache and other minority religions, especially those using public land, out of RFRA and the Free Exercise Clause. If federal courts do not revisit this analysis, land-based tribes are powerless to prevent the extinction of their religious and communal traditions.*

This Article argues that the conceptual distinctions on which courts rely in sacred land cases—along with the policy arguments that support them—are simplistic and ahistorical. Holding onto the positive-negative rights distinction in these cases results in the mischaracterization of the harms that tribes have suffered and the attendant rights they seek to protect. In place of this binary distinction, this Article employs resources from social and political philosophy to argue for a more nuanced and historical context-sensitive inquiry, pursuant to which courts ask whether a religious litigant has access to a non-hostile religious atmosphere. After

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Part I presents a brief history of sacred land cases, Part II both makes a philosophical case for the right to a non-hostile atmosphere and argues this is what the Court intended in Wisconsin v. Yoder. *Part III then presents additional resources from First Amendment doctrine and related areas of law, each of which suggest that this principle is already implicit in our doctrinal history.*

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INTRODUCTION

Despite liberal democracies' professed commitment to the free exercise of religion, religious and cultural minorities have not fared well in their legal systems. Legal philosopher Jeremy Waldron offers a gloomy picture of this phenomenon, observing that such groups "wither and die in the harsh glare of modern life, and that the custodians of these dying traditions live out their lives in misery and demoralization."[1] American Indian tribes[2] know this story all too well. After centuries of violent displacement and forced assimilation, tribal worshippers have struggled to maintain access to various sacred sites, long integral to their religious practice and cultural existence, and now located on government-owned land.[3] These struggles have culminated in many tribes challenging governmental land uses—under the Free Exercise Clause or Religious Freedom Restoration Act (RFRA)—that would render their continued religious practices impossible.[4] The sites at issue in these cases are considered by tribal worshippers to be the birthplace of humanity;[5] the home or embodiment of powerful spirits with whom it is vital that the tribe commune;[6] the site of annual rituals of healing or renewal without which sick persons, the tribe, or the whole world is placed in grave danger;[7] or a place of pilgrimage around which the annual calendar and the tribe's religious and social world revolves.[8]

Federal courts have nonetheless ruled against the tribes in these

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1. Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. MICH. J. L. REFORM 751, 761 (1992).

2. Because tribal citizens and scholars differ in their preferred nomenclature, this Article will employ the widely-used terms "Native American" and "American Indian" interchangeably.

3. *See generally* Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 HARV. L. REV. 1294 (2021); Kristen Carpenter, *Limiting Principles and Empowering Practices in American Indian Religious Freedoms*, 45 CONN. L. REV. 387 (2012); Alex Tallchief Skibine, *Towards a Balanced Approach for the Protection of Native American Sacred Sites*, 17 MICH. J. RACE & L. 269 (2012); Michael McNally, *From Substantial Burden on Religion to Diminished Spiritual Fulfillment: The San Francisco Peaks Case and the Misunderstanding of Native American Religion*, 30 J. L. & RELIGION 36 (2015).

4. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Apache Stronghold v. United States, 101 F.4th 1036 (9th Cir. 2024) (en banc), *cert. denied*, 145 S. Ct. 1480 (2025); Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814 (10th Cir. 1999); Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058 (9th Cir. 2008); Snoqualmie Indian Tribe v. Fed. Energy Regul. Comm'n, 545 F.3d 1207 (9th Cir. 2008); Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980); Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981); Slockish v. U.S. Fed. Highway Admin., No. 08-cv-01169, 2018 WL 2875896, at *1 (D. Or. June 11, 2018); Crow v. Gullet, 541 F. Supp. 785 (D.S.D. 1982).

5. *See, e.g.*, *Navajo Nation*, 535 F.3d at 1102 (Fletcher, J., dissenting).

6. *Id.* at 1099-1102; *Lyng*, 485 U.S. at 461 (Brennan, J., dissenting).

7. *Lyng*, 485 U.S. at 461-62 (Brennan J., dissenting).

8. *Navajo Nation*, 535 F.3d at 1099-1102 (Fletcher, J., dissenting).

circumstances, finding governmental actors free to destroy,[9] alter,[10] desecrate,[11] or restrict access to the sacred land,[12] or to permit land uses by third parties that would have these same consequences.[13] In the latest chapter of this story—the Ninth Circuit's en banc decision in *Apache Stronghold v. United States*—the destruction will be total: The land will be turned into a crater two miles wide and a thousand feet deep,[14] rendering the land permanently inaccessible to the Western Apache.[15] The Supreme Court has declined to hear the case, over a vociferous dissent from Justice Gorsuch calling the Court's decision a "grievous mistake" with "consequences that threaten to reverberate for generations."[16]

As Justice Gorsuch's dissent explains, the denial of certiorari leaves unresolved a circuit split on the meaning of "substantial burden" under RFRA and RLUIPA, as well as what, if any, religious liberties exist on public land.[17] Absent some form of intervention from the other branches of government, there appears to be nothing preventing the federal government from ending religious exercise for the Western Apache as they know it.[18] This decision will have outsized consequences even if it is limited to the Ninth Circuit, which "encompasses 74% of all federal land and almost a third of the nation's Native American population"[19] and is home to every sacred land decision over the last several decades.[20] Moreover, even if "tribal members will suffer the most" by this decision, they will "hardly be alone,"[21] as the federal government has already used this decision as a justification for denying other religious land use claims.[22] Given the far-reaching consequences of this decision, and the extent to which the religious liberty terrain has changed in the decades since *Lyng* was decided, it is vital that federal courts find opportunities to revisit this issue. To this end, this Article will analyze and develop a critique of the currently predominant approach to sacred land cases, from *Lyng* to *Apache Stronghold*.

A common basis for federal courts' decisions in sacred land cases lies in the

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9. *Apache Stronghold*, 101 F.4th at 1047-49.

10. *Id.* at 1092-93 (Nelson, J., concurring).

11. *Navajo Nation*, 535 F.3d at 1070.

12. *Apache Stronghold*, 101 F.4th at 1047-48.

13. *See id.* at 1036 (permitting process that would alter and lead to complete destruction of land by third party); *Navajo Nation*, 535 F.3d at 1058 (permitting land use that would desecrate land); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (permitting clearing of forest that tribes argued would destroy purity of sacred sites).

14. *Apache Stronghold*, 101 F.4th at 1131 (Murguia, C.J., dissenting).

15. *Id.* at 1132.

16. Apache Stronghold v. United States, 145 S. Ct. 1480 (Gorsuch, J., dissenting from denial of certiorari) [hereinafter Gorsuch dissent].

17. *Id.* at 15-16.

18. *See id.* at 8, 15.

19. *Id.* at 16.

20. *Id.* at 16-17.

21. *Id.* at 15.

22. *Id.* at 15-16.

distinction between *negative* and *positive* liberties.[23] As this distinction came under considerable scrutiny in political philosophy, courts employed it in doctrinal and policy arguments. In an oft-cited articulation of this distinction, Judge Richard Posner declared in *Jackson v. City of Joliet* that "the Constitution is a charter of negative rather than positive liberties."[24] Justice O'Connor's majority opinion in *Lyng*, the Court's only sacred land decision to date, reinforced this principle as it applies to the Free Exercise Clause generally and sacred land cases specifically.[25] In *Lyng*, the Supreme Court ruled against tribal claimants despite the majority's concession that the government action—clearing forest and building a road at sacred ritual sites—would virtually destroy the tribes' ability to practice their religion.[26] The Court reasoned that the Free Exercise Clause was not designed to protect what religious citizens "can exact from the government" but what the government may *not* do to religious citizens or collectives: The government was free to use "what was, after all, its land."[27] In other words, the putatively *negative* right of free exercise is violated only where government action *coerces* a religious group to violate its religious beliefs; the Free Exercise Clause does not protect *positive* rights that involve *exacting* something from the federal government.

The passage of RFRA—which was meant to counteract the narrow interpretation of Free Exercise in *Employment Division v. Smith*[28]—has done little to alter this analysis.[29] In *Apache Stronghold*, the Ninth Circuit ruled against tribal claimants on the grounds that an actionable "substantial burden" under RFRA occurs only where there is an element of governmental coercion placed on the practitioner to act contrary to her beliefs, such as (1) the denial of a public benefit, or (2) the imposition of a civil or criminal penalty.[30] Even though the *Apache*

23. *See* HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 352 (40th anniv. ed. 2020).

24. Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1983); *see also* DeShaney v. Winnebago Cnty. Dep't. of Soc. Servs., 489 U.S. 189, 204 (1989); Phillip Kannan, *Logic from the Supreme Court that May Recognize Positive Constitutional Rights*, 46 U. MEM. L. REV. 637 (2016); Jorge M. Frinacci-Fernos, *Looking Beyond the Positive-Negative Rights Distinction: Analyzing Constitutional Rights According to their Nature, Effect, and Reach*, 41 HASTINGS INT'L & COMP. L. REV. 31 (2018).

25. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450-51 (1988).

26. *See id.* at 451-52.

27. *Id.* at 451-53.

28. 494 U.S. 872 (1990).

29. *See* Religious Freedom Restoration Act, 42 U.S.C. §2000bb(a) (citing *Smith*'s virtual elimination of governmental obligations to justify restrictions on free exercise as Congressional findings and impetus for RFRA); *see also* Garrett Epps, *To an Unknown God: The Hidden History of* Employment Division v. Smith, 30 ARIZ. ST. L. J. 953, 956-57 (1998) (discussing Congress's unmistakable intent to void *Smith* through RFRA).

30. Importantly, in a brief per curiam opinion, a majority overruled *Navajo Nation* to the extent that it held that denials of public benefits and impositions of civil or criminal penalties are the only substantial burdens under RFRA. *See Apache Stronghold*, 101 F.4th 1036, 1044 (9th Cir. 2024). A *different* majority (which included Judge Bea, the author of the panel opinion), however, upheld much of the rest of *Navajo Nation*'s analysis, including the legacy and rationale of *Lyng*. *See id.* at 1044-45.

Stronghold per curiam opinion partially overruled *Navajo Nation v. U.S. Forest Service*[31]—holding that "preventing access to religious exercise" is also a substantial burden[32]—a different majority opinion in that case reached a very similar result as *Navajo Nation* on similar grounds.[33] Thus, what has mattered to courts in these cases has been the *kind* or *category* of burden, or harm, that government action visits on the tribal claimant, rather than its *magnitude* or *historical origin*. In sum, sacred land cases have found that a substantial burden exists *only* where a definite category of *negative* liberties is violated, and no tribal claims fall in this category.

When articulating these purportedly-objective categories of "substantial burdens," these decisions have not been grudging applications of constitutional precedent or plain, textual language: The authoring judges have defended this circumscription of religious liberty as a sound, or even unavoidable, policy judgment. Beginning with *Lyng* in 1988, courts have characterized tribal claimants as seeking a privileged veto power over public land uses.[34] Recognizing this veto right would supposedly come with untenable and undesirable consequences for governmental action:

> Were it otherwise, any action the federal government were to take, including action on its own land, would be subject to the personalized oversight of millions of citizens. Each citizen would hold an individual veto to prohibit the government action solely because it offends his religious beliefs, sensibilities, or tastes, or fails to satisfy his religious desires. Further, giving one religious sect a veto over the use of public park land would deprive others of the right to use what is, by definition, land that belongs to everyone.[35]

This reasoning was featured prominently in both the *Apache Stronghold* majority's panel decision[36] and recent en banc decision,[37] evidencing ongoing judicial support for a highly restrictive scope of "substantial burdens." Moreover, even though RFRA was passed in response to *Smith*,[38] that decision remains good law under the Free Exercise Clause; and its influence is evident even in post-RFRA cases.[39] In *Smith*, Scalia's majority opinion conceded that the lawmaking process might leave minority religions at a "relative disadvantage," but concluded this result is an "unavoidable consequence of democratic government

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31. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058 (9th Cir. 2008).

32. *Id.* at 1044.

33. The latter majority opinion—written by Judge Collins—featured only one of the six judges (Judge Nelson) who joined the per curiam opinion. *Id.*

34. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 452 (1988); *Navajo Nation*, 535 F.3d at 1063-64; Apache Stronghold v. United States, 38 F.4th 742, 767 (9th Cir. 2022), *amended on denial of reh'g en banc*, 56 F.4th 646 (9th Cir. 2022) (mem.), *aff'd en banc*, 101 F.4th 1036 (9th Cir. 2024).

35. *Navajo Nation*, 535 F.3d at 1063-64.

36. *Apache Stronghold*, 38 F.4th 742.

37. *Apache Stronghold*, 101 F.4th 1036.

38. 494 U.S. 872 (1990).

39. *See* Fulton v. City of Phila., 593 U.S. 522 (2021) (applying *Smith* in interpreting Free Exercise Clause); City of Boerne v. Flores, 521 U.S. 507, 534-36 (1997) (citing arguments from *Smith* in overruling RFRA's application to state laws).

that must be preferred to a system in which each conscience is a law unto itself."[40] Thus, post-RFRA sacred land decisions reflect a effectively identical judicial attitude as the case RFRA was meant to render inapplicable to future religious liberty disputes.

There is much philosophical support for the judicial attitude of *Lyng* and its sacred land progeny, including from Waldron himself.[41] However lamentable cultural losses might be for minority religions, Waldron is not convinced they ought be remedied: "If a particular church is dying out because its members are drifting away, no longer convinced by its theology or attracted by its ceremonies, that is just *the way of the world*."[42] This is commensurate with John Rawls's claim that the loss of such cultures is a "[fact] of commonsense political sociology"[43] given that "[n]o society can include within itself all forms of life."[44] In fact, Rawls offers as an example of *unreasonable* citizens—those whose claims are not constitutionally cognizable—religious citizens who demand that their religious pilgrimages to sacred places be subsidized by the state.[45] This conclusion appears to hold even if this environment became inhospitable due to past oppression, as Rawls never indicates anything to suggest otherwise. As this view shows up in sacred land cases, the unfettered, internal functions of government and public access to public lands are the "way of the world,"[46] too central a part of our

40. Carpenter, *supra* note 3, at 436 (discussing *Smith*); *see also Smith*, 494 U.S. at 890.

41. *See, e.g.*, BRIAN BARRY, *The Strategy of Privatization*, *in* CULTURE & EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM 19 (2001); BARRY, *The Dynamics of Identity: Assimilation, Acculturation and Difference*, *in* CULTURE & EQUALITY, *supra* at 63 (rejecting multiculturalist arguments that democratic states owe minority cultures special protections); JOHN RAWLS, POLITICAL LIBERALISM 194-98 (expanded ed. 2005) (defending theory of justice that does not aim to preserve disadvantaged cultures against loss).

42. Waldron, *supra* note 1, at 762 (emphasis added). To be fair to Waldron, it's not clear he had Native American tribes principally in mind, since their members have not merely "drifted away": oppression initially *forced* them away and the current social and political circumstances make their participation in their traditional lifeways unattractive, difficult, or impracticable. Elsewhere, however, Waldron has defended the view that lands acquired from indigenous populations through historically unjust or violent means do not always come with an obligation on the part of later generations of the dominant group to return control of those lands to the indigenous claimants. *See* Jeremy Waldron, *Superseding Historical Injustice*, 103 ETHICS 4 (1992). As such, the label "Waldronian" is an apt label for this stance and very likely Waldron's own position.

43. RAWLS, *supra* note 41, at 193. As a contemporary Rawlsian, Stephen Macedo has put it regarding a similar issue, it is "inscribed in the value patterns of liberal democratic institutions and practices" that public actions may "diminish the importance of some religious convictions in people's lives," a fact that does not call for "regret, apologies, or adjustment." Stephen Macedo, *Transformative Constitutionalism and the Case of Religion*, 26 POL. THEORY 56, 69 (1998).

44. RAWLS, *supra* note 41, at 197.

45. *See id.* at 329-30. It is worth noting that the later Rawls was much more amenable to the use of religious reasons in public discourse towards the end of his life. Moreover, unlike in Waldron's case, it is less clear what Rawls would make of the ongoing pertinence of Native American tribes' historical displacement. As such, I elect to identify this attitude with Waldron more than Rawls.

46. Waldron, *supra* note 1, at 762 (describing vanishing of minority religions in

sociopolitical climate to permit the expansion of religious liberty that such preservation of sacred sites would entail.[47] Land-focused religions, like those practiced by many tribal litigants, simply have not been not incorporated into the vocabularies and procedures of our judicial system.

This Article argues that the conceptual distinctions on which courts rely in sacred land cases, along with the policy arguments that support them, are overly simplistic and ahistorical. The demarcation between negative and positive rights—especially between coercion and exaction—affords an illusory, formal equality and not the substantive, contextually-sensitive equality at which the Free Exercise Clause, RFRA, and the Religious Land Use and Institutionalized Persons Act (RLUIPA) otherwise aim. This Article therefore shares Jon Witte and Joel Nichols's view of the *Lyng* era as a clear departure from the Court's "earlier solicitude for the equality of a plurality of religious faiths, particularly the needs of religious minorities to be protected from general legislation."[48] Because courts then began eschewing inquiries into the sociohistorical circumstances of religious minorities that characterized earlier decisions like *Wisconsin v. Yoder* and *Sherbert v. Verner*, Witte and Nichols describe this line of cases as reducing "the Court's nuanced interpretations of the freedom of religious expression to a blunt inquiry into simple neutrality."[49]

The purpose of this Article is to: (1) call into question federal courts' overreliance on the *positive-versus-negative-liberty* distinction in sacred land cases, and (2) refocus courts' attention on providing *substantial*, and not merely *formal*, equality for tribal litigants and similarly situated religious minorities. This Article will recommend an approach in the sacred land cases, and possibly in other religious liberty contexts, which is a return to the context-sensitive approach of *Yoder* and *Sherbert*. Such a shift would bring this corner of religious liberty jurisprudence into accord with closely related areas of rights jurisprudence, including RLUIPA caselaw and other First Amendment doctrines.[50]

Before *Apache Stronghold* was decided, several other commentators criticized this judicial attitude and recommended judicial or legislative solutions consistent with this Article's argument.[51] Some of the judicial hesitance to rule

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cosmopolitan climates as "the way of the world"); *see* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 453 (1988) (describing management of its land as clear fulfillment of internal government procedure).

47. *Lyng*, 485 U.S. at 452 (making policy argument that government simply could not operate if approach favorable to tribal litigants were adopted); Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1064 (9th Cir. 2008) (citing government's inability to function as reason against result favorable to tribal claimants).

48. JON WITTE & JOEL NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 146 (Oxford Univ. Press 4th ed. 2016) (2000).

49. *Id.*

50. *See infra* Parts III.A-B (demonstrating that the non-hostile atmosphere principle has roots in developed areas of case law, including RLUIPA land use case law and the First Amendment requirement that time, place, and manner restrictions leave adequate alternative channels available for speech).

51. *See generally* Skibine, *supra* note 3; Barclay & Steele, *supra* note 3.

otherwise likely persists because the type of right which tribal litigants possess in these cases remains too loosely characterized. As such, courts find themselves without the conceptual equipment to replace the stark coercion-exaction distinction with an appropriately nuanced tool. If more justificatory work is not done to substantially characterize the rights of tribal litigants, federal courts will, to paraphrase a Wittgensteinian phrase, remain caught in a picture that holds them captive.[52] Admittedly, part of the reason is that sacred land cases include a feature present in only two other religious liberty circumstances: Only in cases involving inmates and local zoning regulations do government officials exercise so much control over the necessary instruments of religious practice.[53] At the same time, constitutional doctrine *does* seem to be the appropriate source of such a right: without it, tribes' religious liberty guarantees amount to very little and are subject to the vagaries of the political branches. In other words, judges in a constitutional democracy like ours ought to be able to answer the following question: Precisely what is the right that all of us have which is violated in the tribes' cases and which could be violated against us if the circumstances were quite different?

This Article argues that the tribes, like all peoples, have a right to a non-hostile atmosphere. The recognition of this stick in the "free exercise bundle" refocuses courts' attention to where it belongs: on whether a religious minority is meaningfully or substantially free to practice their religion, given the unique sociopolitical obstacles they face in doing so. Even though a collective's right to a non-hostile atmosphere sometimes resembles *positive* rights, recognition should be warranted absent a showing of coercion.[54] While this Article draws on novel conceptual tools from social and political philosophy to justify recognizing this principle in religious liberty doctrine, it also argues that the principle itself is anything but new, even if it hasn't been articulated in precisely this form. Rather, this principle represents both a return to the Court's reasoning in *Yoder* and a fulfillment of what Congress sought to accomplish through legislation like RFRA, RLUIPA, and the American Indian Religious Freedom Act (AIRFA). Accordingly, this Article's central argument is best understood as a Dworkinian defense, insofar as the right to a non-hostile atmosphere both *fits* and *justifies* our doctrinal history by making it philosophically consistent.[55]

Part I provides a background of the most important judicial developments in sacred land jurisprudence, particularly the distinctions between "coercion-

52. *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, ¶ 4853e ¶ 115 (G.E.M. Anscombe et al. trans., rev. 4th ed. 2009).

53. *See* Apache Stronghold v. United States, 38 F.4th 742, 776 (9th Cir. 2022) (Berzon, J., dissenting); Barclay & Steele, *supra* note 3, at 1301; Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, 2020-2021 CATO SUP. CT. REV., 33, 33, 58-59.

54. *Cf.* SHUE, *supra* note 23 (arguing that positive-negative rights distinctions are arbitrary, even illusory, where the provision of resources is necessary to make negative rights effective).

55. *See generally* RONALD DWORKIN, *Integrity in Law*, *in* LAW'S EMPIRE (1986) (laying out and defending a two-stage approach to judicial interpretation that includes fitness and justification).

exaction" and "positive-negative" rights. Part II introduces resources from social and political philosophy that call these distinctions into question, at least as applied to sacred land cases, given the effects that sociohistorical circumstances have on communities' doxastic options over time. In light of these resources, the focus of sacred land ought to be on whether a minority religion has the ability to operate in a *non-hostile atmosphere*, which, as Part II argues, is precisely what the Court was after in *Yoder*. Finally, Part III presents additional resources from First Amendment doctrine and other related areas of law, each of which suggests this principle is already implicit in our doctrinal history.

As suggested earlier and in Justice Gorsuch's dissent,[56] it is long past time that the Court reconsider *Lyng* and especially its post-RFRA progeny. Whatever their disagreements elsewhere, so-called conservative and liberal justices alike have indicated a distaste for *Smith* and a desire for a more capacious Free Exercise Clause,[57] which would presumably entail a more capacious RFRA. Because *Lyng* was close in time and similar in attitude to *Smith*, this recent attitudinal shift foreseeably extends to sacred land cases. The Court's composition is markedly different than it was in *Smith*, including the addition of Justice Gorsuch, who is an advocate for tribal rights and author of an impassioned concurrence in a recent decision that protected tribal sovereignty.[58]

Second, as the population grows and the political and commercial appropriation of land expands,[59] the space in which indigenous and other non-mainstream communities can exist dwindles. Disputes such as these will invariably multiply. If courts do not revisit the doctrines governing sacred land disputes, these communities will meet the fate of the dying custodians Waldron described. This urgency is compounded by the difficulties tribes face in making headlines or advancing meaningful legislation, given their low political capital and their geographic distance from any halls of power.[60] In his dissent, Gorsuch expressed doubt that the Court would have similarly shuffled this case off its docket had it involved the decision to "demolish a historic cathedral."[61] If true, this is a great indictment of our religious liberty jurisprudence, which can only really demonstrate our commitment to equal liberty in how we go about "protecting unpopular

56. *See supra* text accompanying notes 16-22.

57. *See, e.g.*, Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1876-77 (2021) (declining to revisit *Smith* over sharp disagreement among the justices); *id.* at 1924-25 (Gorsuch, J., concurring in the judgment) (arguing in favor of overruling Smith); *id.* at 1926 (evidencing sharp disagreement about overruling *Smith* among justices, but widespread distaste for it, and citing five cases evidencing intensified calls to reexamine *Smith*).

58. *See* Haaland v. Brackeen, 143 S. Ct. 1609, 1641 (2023) (Gorsuch, J., concurring).

59. *Cf.* Wisconsin v. Yoder, 406 U.S. 205, 217 (1972) (discussing the way in which contemporary society places "hydraulic insistence" on minority faiths to conform to "majoritarian standards").

60. *See* Apache Stronghold, Gorsuch dissent at 17 ("They may live far from Washington, D. C., and their history and religious practices may be unfamiliar to many. But that should make no difference.").

61. *Id.*

religious beliefs."[62]

I. HISTORY OF NATIVE AMERICAN FREE EXERCISE

As anyone with a passing familiarity of American colonization understands, our country's development has devastated American Indian tribes in countless ways. Recent estimates suggest American Indigenous groups have lost up to ninety-nine percent of their historically occupied land, including myriad sacred sites.[63] Much of this land was the site of violent conflict and the subject of coerced transactions or broken treaties.[64] In many infamous instances—such as the Trail of Tears and the Long Walk of the Navajo—tribes were not only divested of their land through a property law regime that was alien to them, but they were also forcibly removed under such harsh conditions that thousands died on the journey.[65] Today, even where some degree of regular access to ancestral land has been restored, many tribes are made to feel like interlopers or, at best, just one among several consumer groups interested in using it.[66] Constitutional law professors Stephanie Barclay and Michalyn Steele observe this phenomenon related to a sacred site called Medicine Lake:

> A coalition of affected tribes has been engaged in a prolonged struggle to protect the sacred lake from the efforts by the Bureau of Land Management (BLM) and the U.S. Forest Service to exploit the area's geothermal properties through leases with energy companies. One report noted that tribal healers, or "[m]edicine men[,] . . . train there, and coming-of-age ceremonies are conducted there. Many Indians immerse themselves in the lake to cleanse the body and soul." Recreators in the area mean "tribe members wait until nightfall to conduct ceremonies at the lake to avoid motor homes and boaters." Tribal Chairman Gene Preston noted in 2002 that tribal practitioners "have to hide in the bushes and wait until everybody is gone and sneak out on the lake . . . . Our land was taken away initially with land claims, and now they are trying to take our culture and religion."[67]

The only necessary instrumentality for many tribes' centuries-old religious practices, the land itself, has been controlled by the U.S. government or its assignees, each frequently using the land in ways that render these practices impossible. As Barclay and Steele elegantly observe, the tribes are starting from a "baseline of coercion" due to the complete control the government has exercised

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62. *Id.*

63. *See* Justin Farrell et al., *Effects of Land Dispossession and Forced Migration on Indigenous Peoples in North America*, SCI., 29 Oct. 2021, at 1578, .

64. *See* Barclay & Steele, *supra* note 3, 1310-16. As Chief Judge Murguia's dissent describes it, the Santa Fe Treaty that led to the Apache losing property interests in Oak Flat was an act of desperation by Apache leadership to curb the increasingly frequent and violent territorial conflicts with American pioneers. *See Apache Stronghold*, 101 F.4th at 1130 (Murguia, C.J., dissenting).

65. *See* Angela R. Riley & Kristin A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 873-77 (2016).

66. Barclay & Steele, *supra* note 3, at 1306.

67. *Id.* (alterations in original).

over "access to worship areas and resources."[68]

Forceful or duplicitous land separations are only part of the government-instantiated uphill battle tribes face in carrying on their religious practices. During early land divestitures and for many decades afterward, government and government-supported actors expressly aimed to eradicate the tribes' cultural and religious practices.[69] Richard Henry Pratt, who founded the Carlisle Indian Industrial School in 1879, stated that his goal was to "[k]ill the Indian . . . and save the man," or rather, to entirely separate American Indian boys from their cultural and religious heritage.[70] Pratt inspired many other boarding schools to follow suit, resulting in myriad abuses of indigenous boys and complete alienation from their cultures for generations.[71] In an even more targeted vein, legislation and executive branch policies expressly outlawed religious practices themselves.[72] Federal and state legislatures outlawed the practices of medicine men and communal rituals like the Sun Dance, authorized the seizure of various religious relics, and criminalized other activities that were central to tribes' religious beliefs and cultural unity, such as collecting eagle feathers for ceremonial purposes.[73] Throughout the nineteenth century and first half of the twentieth century, federal officials directed significant manpower and resources toward enforcing these and other measures.[74] In some circumstances, enforcement came with violent and fatal consequences, most infamously at the Wounded Knee Massacre of 1890.[75]

It was not until the late 1970s that federal lawmakers made any effort to recognize or ameliorate these catastrophic losses. The Indian Child Welfare Act (ICWA), passed in 1978, gave tribes presumptive jurisdiction in child custody proceedings concerning Native children.[76] More pertinent to the present discussion, the American Indian Religious Freedom Act (AIRFA) was passed the same year.[77] AIRFA included a joint resolution to, among other things, "protect and preserve for American Indians their inherent right of freedom to . . . exercise the traditional religions of the American Indian . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship

68. *Id.* at 1301.

69. *See* Carpenter, *supra* note 3, at 408-09; Barclay & Steele, *supra* note 3, at 1307-08.

70. *See* Barclay & Steele, *supra* note 3, at 1308 & n.60 (quoting Richard H. Pratt, The Advantages of Mingling Indians with Whites (1892), *in* AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE "FRIENDS OF THE INDIAN" 1880-1900, at 260, 260 (Francis Paul Prucha ed., 1973)).

71. *See* DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875-1928, at 47-59 (2d ed. 2020); *see also* Riley & Carpenter, *supra* note 65, at 877-78 (describing Wounded Knee massacre as the culmination of prior practices and policies); Barclay & Steele, *supra* note 3, at 1308-09 (same).

72. *See* Carpenter, *supra* note 3, at 408-09; Barclay & Steele, *supra* note 3, at 1307-08.

73. Carpenter, *supra* note 3, at 408-09; Barclay & Steele, *supra* note 3, at 1307-08.

74. *See* Carpenter, *supra* note 3, at 408-10; Barclay & Steele, *supra* note 3, 1307-08.

75. *See* Riley & Carpenter, *supra* note 65, at 878; Carpenter, *supra* note 3, at 408-09.

76. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified as amended in scattered sections of 25 U.S.C.).

77. American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified as amended at 42 U.S.C. §§ 1996-1996a).

through ceremonials and traditional rites."[78] As protective as AIRFA might sound, it includes no enforcement mechanism. In other words, it provides largely aspirational language and doesn't require public officials to do much of anything.[79] In response to *Smith*, however, Congress amended AIRFA to include a provision that protects the use of small amounts of peyote for religious rituals.[80] In short, these relatively recent efforts to correct such total and longstanding destruction of a people were directed at very specific instances of such destruction, largely ignoring the rest, and were only passed after significant irreversible damage.

It is against this historical backdrop that sacred land litigation began making its way through federal courts.[81] Two years before *Lyng*—the first and only Supreme Court decision about sacred lands—the Court decided *Bowen v. Roy*,[82] which would heavily influence *Lyng* and every post-RFRA sacred land case. In *Roy*, Stephen Roy and Karen Miller "applied for and received benefits under the Aid to Families with Dependent Children program and the Food Stamp program" but refused to comply with the requirement they furnish state welfare agencies with the social security numbers of their household members.[83] More specifically, they objected to the government's assignment of a social security number to their two-year-old daughter, Little Bird of the Snow. Roy, a descendant of the Abenaki tribe, claimed the religious belief "that control over one's life is essential to spiritual purity, and indispensable to 'becoming a holy person.'"[84] There was no evidence that other members of his tribe shared this belief.[85] By assigning their daughter a social security number, he claimed, the government robbed her of control over her spirit and harmed her spiritual power.[86] Under this view, the social security number requirement violated Stephen and Karen Roy's rights under the Free Exercise Clause.

The Court ruled against the plaintiffs, using language that would become pivotal in *Lyng* and other sacred land cases to follow: The Free Exercise Clause "does not afford an individual a right to dictate the conduct of the Government's internal procedures," including the creation and use of social security numbers.[87] Reinforcing the distinction between positive and negative rights, the Court found

78. *Id.*

79. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 455 (1988).

80. *See* American Indian Religious Freedom Act Amendments of 1994, Pub. L. No. 103-344, 108 Stat. 3125 (codified at 42 U.S.C. § 1996a) (directing the government to ensure its policies are consistent with the sacramental use of peyote by tribal worshippers).

81. *See, e.g.*, Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *cert. denied sub nom.* Badoni v. Broadbent, 452 U.S. 954 (1981); Sequoyah v. Tenn. Valley Auth., 620 F.2d 1159 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980).

82. 476 U.S. 693 (1986)

83. *Id.* at 695.

84. *Id.* at 696.

85. *See id.* (describing the process by which Stephen Roy developed beliefs about technology and social security numbers).

86. *Id.*

87. *Id.* at 700.

that the Free Exercise Clause "is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government."[88] The Court reasoned that a social security number was no more Roy's concern than the color or size of the government's filing cabinets.[89] Moreover, the Court found that our Free Exercise tradition draws a sharp line between religious belief—which is absolutely protected—and religious conduct—which receives only qualified constitutional protection.[90]

For these reasons, *Roy* was markedly different from two scenarios which *can* involve cognizable Free Exercise claims and which trigger strict scrutiny: cases where the individual is denied a government benefit due to their religious beliefs,[91] and cases where the individual is penalized for their religious beliefs.[92] Where, as here, the government is merely enforcing a "facially neutral and uniformly applicable requirement for the administration of welfare programs reaching many millions of people, the Government is entitled to wide latitude."[93] Since there was no demonstrable animus towards Roy's religion, the government was only required to demonstrate that a neutral and uniform requirement was a "reasonable means of promoting a legitimate public interest."[94]

The unusual facts in *Roy*—that the plaintiff's religious beliefs and claims were not shared by other members of an existing Native American Tribe and that the challenged government action was confined to internal administrative procedures—did not lead to a narrow application of the holding. In *Lyng*, a Free Exercise case, the Court would find no reason to distinguish *Roy*.[95] In *Navajo Nation* and *Apache Stronghold*, both RFRA cases, the Ninth Circuit would rely almost entirely on *Lyng*.[96] Consequently, *Roy* was a pivotal starting point for three related distinctions that spelled doom for tribal litigants over the next several decades: (1) the government's wide latitude to conduct its own internal affairs regardless of incidental effects on religious practice, (2) the restriction of constitutionally cognizable burdens on plaintiffs to an acontextual, limited set of categories, and (3) an understanding of the Free Exercise Clause as only protecting minority religious litigants' *negative* rights (i.e., freedom from coercion). However speculative the counterfactual, it is unfortunate for tribal litigants that the narrow facts and idiosyncratic belief in *Roy* set the stage for the diverse landscape of sacred land cases to follow.

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88. *Id.* (quoting Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)).

89. *Id.*

90. *Id.* at 699, 703.

91. *See e.g.*, *Sherbert*, 374 U.S. 398; Thomas v. Rev. Bd of the Ind. Emp. Sec. Div., 450 U.S. 707 (1981).

92. *See e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972).

93. *Roy*, 476 U.S. at 707.

94. *Id.* at 707-08.

95. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 449 (1988).

96. *See* Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1071-73 (9th Cir. 2008); Apache Stronghold v. United States, 101 F.4th 1036, 1049-55 (9th Cir. 2024) (en banc).

Each of these doctrinal trends suggests that courts post-*Roy* were less concerned with undertaking any sociohistorical inquiry or considering the unique needs of each faith community. Instead, they asked whether the challenged government action was neutral in that it did not (1) target a particular religious group, or (2) penalize religious practice *in a direct and immediate sense*. As Part II argues, this sense of neutrality is decidedly different from a free exercise jurisprudence that prioritizes *substantial* equality among religious groups. The remainder of this Part provides a summary of these trends as they developed in *Lyng*, *Navajo Nation*, and *Apache Stronghold*.

A. Sacred Lands Under the Free Exercise Clause: *Lyng*

At issue in *Lyng* was the U.S. Forest Service's proposal to build a paved road (the "G-O Road") through the Chimney Rock Section of the federally owned and operated Six Rivers National Forest.[97] Much of this land had been occupied and used by various American Indian tribes in centuries past.[98] The G-O Road's purposes included facilitating nearby timber operations and making the Chimney Rock area more accessible for public recreational use.[99] Prior to the road construction, the Chimney Rock area had long—prior to its official occupation by the U.S. government and "probably much longer" before that—been used for religious purposes by the Yurok, Karok, and Tolowa Indians.[100] Specific sites in this area were used in religious rituals, which were "facilitated by certain qualities of the physical environment, the most important of which are privacy, silence, and an undisturbed natural setting."[101] Importantly, these tribes believed that "land, like all other living things, is unique, and specific sites possess different spiritual properties and significance," and *only* these specific sites could be used for these rituals.[102]

As the majority conceded, it was the tribes' longstanding belief that the land at issue was "critically important in advancing the welfare of the Tribe, and indeed, of mankind itself."[103] The tribes believed this was the area to which "prehuman spirits moved with the coming of humans to the Earth."[104] These spirits remained the source of great spiritual power necessary to cure various maladies and keep the world in balance; and to harness these powers, tribe members had to make frequent trips to commune with the spirits through meditative rituals in "privacy, silence, and an undisturbed natural setting."[105] If these conditions were removed and the rituals rendered inefficacious, the tribes would be unable to

97. *Lyng*, 485 U.S. at 442.
98. *Id.* at 459 (Brennan, J., dissenting).
99. *Id.* at 462.
100. *Id.* at 459.
101. *Id.* at 462.
102. *Id.* at 461.
103. *Id.* at 451 (majority opinion).
104. *Id.* at 461 (Brennan, J., dissenting).
105. *Id.* at 462.

obtain medicines necessary for curing the sick.[106] More importantly, the litigants and many tribes shared the belief that creation is an "on-going process in which they are . . . religiously obligated to participate . . . through ceremonies and rituals designed to preserve and stabilize the earth and to protect humankind from disease and other catastrophes."[107] It is difficult to overstate what they believed was at stake if their world renewal efforts in the high country were rendered unsuccessful, or how central these beliefs and practices were to their religious and cultural unity.

Given the importance of the area to the tribes' religious lives and the relatively minor government interests in the land, the report recommended against construction of the G-O Road.[108] The Regional Forester proposed an alternate "route that avoided archeological sites and was removed as far as possible from the sites used by contemporary Indians," but the Forest Service nonetheless proceeded with the G-O Road.[109] The tribes initially sued the Forest Service in the U.S. District Court for the Northern District of California, where they received a favorable ruling on their free exercise claim which was later affirmed by the Ninth Circuit.[110] Both the Northern District and Ninth Circuit decisions focused much of their analysis on the adverse effects the G-O Road would have on the High Country and consequently would impose on the tribes' religions.[111] These approaches bore more semblance to the position Parts II and III of this Article defend.

The litigants' success ran out when *Lyng* reached the Supreme Court. Applying the test from *Roy*, Justice O'Connor's majority opinion found the construction of the G-O Road neither coerced the tribes into violating their beliefs nor penalized them by denying them an equal share in public benefits.[112] For this reason alone, the government's activity did not present the kind of harm necessary to constitute a substantial burden on the tribes' free exercise.[113] Though the majority assumed arguendo that the G-O Road would render the tribes' religious practice impossible, the proposed construction was still not something being

106. *Id.* at 461-62.

107. *Id.* at 460.

108. *Id.* at 442 (majority opinion). As Justice Brennan's dissent noted, the U.S. Forest Service's commissioned report found that the G-O Road would not improve the administration of the Six Rivers National Forest, would not improve access to timber, and would only increase recreational activity marginally, while also damaging the pristine environment that made it attractive to many non-Indian visitors. *Id.* at 463-64 (Brennan, J., dissenting). On the other hand, the same report found that this area was potentially destructive to the very core of the tribes' religion. *Id.* at 463.

109. *Id.* at 443 (majority opinion).

110. *Id.* at 443-45.

111. *See id.*

112. *Id.* at 449.

113. *See id.* Because this was a pre-RFRA case, the Court had not yet adopted the precise phrase "substantial burden" as it appeared in the text of RFRA and in post-RFRA cases, but I use it here for ease of comparison between pre- and post-RFRA cases.

"done" to the tribes in any objective sense.[114] Rather, any harm to the tribes could only be conceived subjectively: Because the road merely affected their ability to pursue "spiritual fulfillment"—language that the Court would further emphasize in *Navajo Nation*[115]—it constituted harm only from the tribes' point of view.[116] While the majority recognized that incidental effects of government action might sometimes give rise to a constitutional violation even absent direct coercion or penalties, they found that "the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development."[117]

The Court found itself unable to conceive the tribes' claim as anything but an attempt to exact something from the federal government, a quintessential positive right that is not within the ambit of the Free Exercise Clause given that the Constitution arguably contains no positive rights at all. In fact, the Court found the G-O Road no less an internal procedure than the assigning and managing of social security numbers at issue in *Roy*.[118] Critics have been surprised at this indistinction since the effects on the tribes here were much more concrete and tangible than in *Roy*.[119] Nonetheless, the Court reasoned that permitting any religious litigant's intrusion into internal decision-making would lead to governmental impotence:

> However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires. A broad range of government activities—from social welfare programs to foreign aid to conservation projects—will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion. The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion.[120]

The Court found this concern particularly relevant here, as there was nothing preventing the tribes from seeking to "exclude all human activity but their own from sacred areas of the public lands,"[121] nor would a contrary holding prevent similarly situated litigants from "*de facto* beneficial ownership of some rather spacious tracts of public property."[122] As the other cases in this Part will demonstrate, this concern about a small minority placing a "veto" or condition of

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114. *See id.* at 451-52.

115. Navajo Nation v. United States Forest Serv., 535 F.3d 1058, 1072 (9th Cir. 2008) (applying *Lyng*'s exclusion of diminished "spiritual fulfillment" from harms protected by the Free Exercise Clause).

116. *Lyng*, 485 U.S. at 452.

117. *Id.* at 451-52.

118. *Id.* at 448-49.

119. *See, e.g.*, LAYCOCK & BERG, *supra* note 53, at 58.

120. *Lyng*, 485 U.S. at 452.

121. *Id.* at 452-53.

122. *Id.* at 453.

"religious servitude" would go on to play a substantial role in future sacred land cases.[123]

Justice Brennan's dissent in *Lyng* offers both a scathing criticism of the majority's ahistorical approach and a view of constitutional doctrine that could have obviated many of the constitutional and legislative changes the subsequent thirty-five years would produce.[124] The most fundamental problem with the majority's approach, according to Brennan, was that it refused "even to acknowledge the constitutional injury" the tribes had suffered, leaving them "with absolutely no constitutional protection against perhaps the gravest threat to their religious practices."[125] As noted, the majority thought this result lamentable yet unavoidable, given the doctrinal history of "coercion" versus "exaction" and the untenable policy implications of discarding this distinction.[126] Yet, as Brennan explained, such a neat distinction can only be maintained through willful inattention to the social circumstances and theological differences between most mainstream religions and the claimants in *Lyng*.[127] In its most apt and succinct moment, Brennan's dissent accused the majority's approach of attempting to force "Indian concepts into non-Indian categories."[128]

B. Sacred Lands Under RFRA: *Navajo Nation*

This doctrinal shift in *Lyng*, spurred by the unique circumstances of *Roy*,[129] reached the height of its unpopularity with *Smith*.[130] In *Smith*, two members of the Native American Church were denied unemployment benefits after being fired from their jobs for ingesting peyote in connection with a religious ritual.[131] The Court rejected the plaintiffs' free exercise claim on the grounds that the law prohibiting peyote use was neutral and generally applicable, i.e., it did not target peyote use for religious reasons.[132] Thus, while the right at issue in *Smith* was negative, the Court concluded it was like *Lyng* in that the tribal claimants were interfering with an essential government function—land management in *Lyng* and criminal prosecution in *Smith*.[133] The majority's attitude was thoroughly Waldronian: It acknowledged the dim prospects for the litigants' church but prioritized the "way of the world" and noted the untenability of disrupting that

123. *See* Apache Stronghold v. United States, 101 F.4th 1036, 1051 (9th Cir. 2024) (en banc) ("religious servitude") (citing *Lyng*, 485 U.S. at 449); Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1063-64 (9th Cir. 2008) ("veto").

124. *See Lyng*, 485 U.S. at 458-77 (Brennan, J., dissenting).

125. *Id.* at 459.

126. *Id.* at 450-51 (majority opinion).

127. *Id.* at 459-61 (Brennan, J., dissenting).

128. *Id.* at 459.

129. *Id.* at 448-49.

130. *See* THOMAS C. BERG, RELIGIOUS LIBERTY IN A POLARIZED AGE 66-67 (2023).

131. Emp. Div. v. Smith, 494 U.S. 872, 874 (1990).

132. *See id.* at 879-82.

133. *Id.* at 885; *Lyng*, 485 U.S. at 452-53.

world.[134] The governmental function of passing and enforcing generally applicable laws would be rendered impotent if interrupted in any circumstances other than the most constitutionally exigent. As such, the majority developed a hybrid rights explanation of prior cases like *Yoder* and *Sherbert*: Only in circumstances where *two* fundamental rights are implicated at once could a religious minority's complaints against a generally applicable law trigger strict scrutiny.[135]

The *Smith* decision was so unpopular that just three years later a nearly unanimous Congress responded by effectively overruling *Smith* with the passage of RFRA.[136] RFRA's stated purpose was to "restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened."[137] One of the findings informing this purpose—pertinent to the argument in Parts II and III for the right to a non-hostile atmosphere—is that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended for interfere with religious exercise."[138] As such, RFRA provided that the government may only "substantially burden a person's exercise of religion if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling government interest, and (2) is the least restrictive means of furthering that compelling interest."[139]

The relationship between RFRA sections 2000bb and 2000bb-1became the subject of much confusion, as commentators and courts alike found it unclear what the Act was supposed to reinstate.[140] While the prefatory language in 2000bb specifically endorses *Yoder* and *Sherbert*, the test set out in 2000bb-1 uses more general language, setting out the compelling interest test and using a term of art ("substantial burden") that only shows up occasionally in pre-RFRA

134. *See* Waldron, *supra* note 1, at 762; Emp. Div. v. Smith, 494 U.S. at 888-90 (leaving accommodation of minority religions to political process, rather than Constitution, an "unavoidable consequence of democratic government" and ruling to contrary would be "courting anarchy").

135. *Smith*, 494 U.S. at 881-83 (first discussing Sherbert v. Verner, 374 U.S. 398 (1963), then discussing Wisconsin v. Yoder, 406 U.S. 205 (1972)).

136. *See* John Witte, Jr. & Joel A. Nichols, *Come Now Let Us Reason Together: Restoring Religious Freedom in America and Abroad*, 92 NOTRE DAME L. REV. 427, 427 (2016).

137. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(b)(1).

138. *Id.* § 2000bb(a)(2).

139. *Id.* § 2000bb-1(b).

140. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 746-50 (2014) (Ginsburg, J., dissenting) (arguing that § 2000bb and § 2000bb-1 codify pre-*Smith* case law as instances of substantial burdens, against the majority's contention that § 2000bb-1 anticipates a broader scope of substantial burdens not recognized in pre-*Smith* cases); Michael Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 1771 (2016) (summarizing various disagreements between commentators about formulations of substantial burdens); Sherif Girgis, *Defining "Substantial Burdens" On Religion and Other Liberties*, 108 VA. L. REV. 1759, 1768-77 (summarizing gaps in understanding of substantial burdens and differing formulations of courts and commentators); 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION 202-04 (2006) (describing different formulations that courts developed due to uncertainty about meaning of substantial burden).

cases.[141] As a result, there were disputes about precisely *how* "substantial burden" ought to be defined: whether it was limited to the *precise* kinds of burdens established pre-RFRA, and whether it was meant to incorporate *all* decisions after *Sherbert* and *Yoder* until *Smith* (including *Lyng*).[142] This interpretive issue was particularly vexing given that, as noted earlier in this Part, *Lyng* and other cases which were decided close in time to *Smith* exemplify the very judicial approach RFRA was meant to reform.[143] Moreover, RFRA section 2000bb-1(b) requires that the *application* of the substantial burden to *that person* meet the compelling interest test.[144] This accords with Berg and Layock's claim that the compelling interest test requires the government to show a compelling interest *as applied* to the religious litigant's marginal claim for an exemption or special access right.[145] On this reading, a case like *Lyng* would not be enough for the government to rely on its general interest in land management to satisfy its burden: It would need to demonstrate a compelling interest that would be harmed by the halting of the G-O Road—or, at the very least, land management decisions *like* the G-O Road.[146] Given the clear intent of Congress to create a more capacious religious liberty doctrine and both because and in spite of these uncertainties in RFRA, tribal litigants were probably hopeful the fortunes of sacred land plaintiffs might change.,.

This hope was supported by an additional legislative development which took place after *Lyng* and before the next significant sacred land case. After RFRA's application to the states was ruled unconstitutional in 1997,[147] further bipartisan commitment to robust religious liberty emerged with the passage of the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2000. Under RLUIPA, Congress once again required both state and federal

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141. *See* Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1088-80 (9th Cir. 2008) (Fletcher, J., dissenting) (discussing limited use of phrase "substantial burden" prior to passage of RFRA and collecting cases).

142. *See* Joel West Williams & Emily deLisle, *An "Unfulfilled, Hollow Promise":* Lyng*,* Navajo Nation*, and the Substantial Burden on Native American Religious Practice*, 48 ECOLOGY L. Q. 809, 833-37 (2021) (arguing that various courts' reliance on several principles from *Lyng* is misunderstanding of RFRA, contrary to its purpose, and constitutes near resurrection of *Smith*); *see also* Michael Stokes Paulson, *A RFRA Runs Through It: Religious Freedom and the* U.S. Code, 56 MONT. L. REV. 249, 271 n.69 (1995).

143. *See* § 2000bb (detailing Congressional findings and purpose, including that *Smith* "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion" and that cases prior to *Smith* provide better balance of governmental interests and religious liberty); Williams & deLisle, *supra* note 142, at 809; Frederick Mark Gedicks, *RFRA and the Possibility of Justice*, 56 MONT. L. REV. 95, 95 (1995) (including *Lyng* in list of exemplars of "low point" in religious liberty jurisprudence, alongside *Smith*, during which religious exemptions were repeatedly denied for unimportant reasons); WITTE & NICHOLS, *supra* note 48, at 146 (describing general line of cases leading to *Smith*, including *Lyng*).

144. § 2000bb-1(b).

145. LAYCOCK & BERG, *supra* note 53, at 51-52.

146. *See* Lyng v. Nw Indian Cemetery Protective Ass'n, 485 U.S. 439, 442 (1988) (discussing G-O road).

147. *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

governments to demonstrate a compelling interest for any substantial burdens on religion.[148] This time, however, the law only covered a narrow set of issues: disputes related to (1) land use regulations and (2) the treatment of institutionalized persons.[149] While it was far from apparent that actions like the government's in *Lyng* would constitute a "land use," RLUIPA was promising for sacred lands cases for at least two reasons: (1) the statutory rules for construing RLUIPA provided for the broadest protection of religious exercise allowable under the Constitution,[150] and (2) courts subsequently held that the meanings of "substantial burden" under RLUIPA and RFRA were the same.[151] Even if sacred site destruction by the U.S. Forest Service did not constitute a land use regulation falling within RLUIPA's ambit, it was foreseeable that language from RLUIPA cases would tilt judicial understandings of substantial burdens further in their favor.

The hopes of religious litigants would be dashed in the post-RFRA/RLUIPA sacred land case *Navajo Nation*, which relied on *Lyng* and produced similar results. The land use at issue in *Navajo Nation* was the Snowbowl ski area (the "Snowbowl") located on Humphrey's Peak, the highest of the San Francisco Peaks (the "Peaks").[152]As with the land at issue in *Lyng*, the Peaks serve as a focal point of the tribes' religious life and communal practices, with Humphrey's Peak being the most sacred.[153] While the precise narrative regarding Humphrey's Peak varies among the tribes, the Navajo, Hopi, Hualapai, and Havasupai each regard it as the site of creation and a place of great spiritual power; and they directed prayers, songs, and other rituals to it accordingly.[154] Each tribe's religious and cultural life is entirely centered on the Peaks, especially Humphrey's Peak, and failure to perform efficacious rituals there comes with consequences for the tribe and, according to some practitioners, humankind.[155] Additionally, many rituals involve gathering plants , drinking water, and otherwise ingesting products of the Peaks for the purposes of healing, rites of passage, or communion with the spirits who resided there.[156]

Due to variable snowfall at the Snowbowl, government contractors devised a plan to keep the ski lodge commercially viable: the use of artificial snow made from treated wastewater.[157] The tribes were opposed to this plan, as they believed—for various reasons among them—that the use of recycled wastewater would render these centrally important rituals ineffective and their whole way of

148. *See* 42 U.S.C § 2000cc-3.

149. *See* § 2000cc (land use); § 2000cc-1 (institutionalized persons).

150. 42 U.S.C § 2000cc-3(g).

151. *See* Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 436 (2006).

152. *See* Navajo Nation v. U.S Forest Serv., 535 F.3d 1058, 1064 (9th Cir. 2008).

153. *Id.* at 1081-82; Lyng v. Nw Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)

154. *Navajo Nation*, 535 F.3d at 1099-1102.

155. *See id.* at 1064, 1099-1102; *see also Lyng*, 485 U.S. at 451 (1988) (describing similar view among tribal worshippers in this case).

156. *Navajo Nation*, 535 F.3d at 1064.

157. *Id.* at 1082.

life impracticable.[158] Each of the tribes believed the wastewater would damage the physical and spiritual purity of the Peaks, irreparably damaging the spirits there or their connection with them.[159] Additionally, pursuant to longstanding Hualapai religious law, mixing of the living and the dead causes a serious condition known as "the ghost sickness," which use of the wastewater would constantly risk, particularly when sourced from hospitals or mortuaries.[160] To underscore how seriously some tribal practitioners took this issue, they believed that their failed world renewal efforts at the Peaks had, due to its desecration, already "caused many disasters, including the September 11, 2001 terrorist attacks, the Columbia Space Shuttle accident, and increases in natural disasters."[161]

The majority opinion in the Ninth Circuit's ruling against the tribal claimants relied heavily on *Lyng* and *Roy*, which it found controlling notwithstanding the passage of RFRA.[162] Because the Snowbowl proposal constituted neither a coercive penalty nor the withholding of a government benefit, it was not a "substantial burden" within the court's interpretation of RFRA.[163] In defense of its narrow reading, the court reasoned Congress had chosen "substantial burden" as a "term of art" and, in so doing, "restored a body of Supreme Court case law that defines what constitutes a substantial burden on the exercise of religion."[164] Thus, in determining the meaning of substantial burden, the court found it had "decades of Supreme Court precedent" for guidance, evidently including those cases immediately preceding *Smith*.[165] Outside of those specific kinds of burdens recognized in the body of pre-*Smith* precedent—coercion and withholding government benefits—the court found it lacked the requisite evidence of what Congress intended to include under the "substantial burden" heading.[166]

Despite the majority's narrow reading of "substantial burden," the Court took care to note various indicia of harm that would have been empirically observable, or perhaps objectively intelligible across worldviews, had the area not been visited by the tribes:

> [T]here are no plants, springs, natural resources, shrines with religious significance, or religious ceremonies that would be physically affected by the use of such artificial snow. No plants would be destroyed or stunted; no springs polluted; no places of worship made inaccessible, or liturgy modified. The Plaintiffs continue to have virtually unlimited access to the mountain, including the ski area, for religious and cultural purposes.[167]

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158. *Id.* at 1102-6.

159. *Id.* at 1103.

160. *Id.*

161. *Id.* at 1064.

162. *Id.* at 1071-73.

163. *Id.* at 1063.

164. *Id.* at 1074.

165. *Id.* at 1068, 1074.

166. *See id.* at 1075 (collecting cases comprising the "*Sherbert/Yoder* framework"); Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Review Bd. of Ind. Emp. Sec. Div., 450 U.S. 707 (1981) (applying *Sherbert*).

167. *Navajo Nation*, 535 F.3d at 1063.

The implication is that the plaintiffs would have had a stronger RFRA case had these effects been present. It appears that in the majority's worldview, destroyed shrines or natural resources would be measurable, empirical, or objective effects,[168] while the effects at issue here are only a matter of "feelings," "fervor," or "decrease[ment] [of] spiritual fulfillment."[169] Given the absence of these objective harms, the Ninth Circuit's characterization of the harm the tribal claimants might suffer was much less sympathetic than the majority's in *Lyng*:[170]

> The only effect of the proposed upgrades is on the Plaintiffs' *subjective, emotional religious experience*. That is, the presence of recycled wastewater on the Peaks is *offensive to the Plaintiffs' religious sensibilities*. To plaintiffs, it will spiritually desecrate a sacred mountain and will *decrease the spiritual fulfillment* they get from practicing their religion on the mountain.[171]

This characterization of the tribal interests is an instance of what Judge Brennan accused the majority of in *Lyng*: misapprehending the land-based religious life of the tribal litigants, forcing "Indian concepts into non-Indian categories."[172] The court in *Navajo Nation* found it adequate to inquire into the harms that would be intelligible from a materialist perspective or from that of a largely doxastic religion, like many variants of the Abrahamic faiths: There was no physical harm to a sacred site, no coerced liturgical modification, and no civil or criminal penalty; and they could still perform rituals at and visit the land at issue. But these affordances, as was the case for the *Lyng* plaintiffs, were either irrelevant or of secondary importance from the tribe's perspective. From their worldview, something measurable *had* been done to them. The tribes could no longer perform the rituals at issue since the conditions for their performance had been eliminated. This was as true here as it was for the *Lyng* plaintiffs, and to the same extent as the religious prisoners covered by RLUIPA and discussed in Part III.

If these "subjective" harms were actionable, the court claimed there would be nothing preventing government actions and public initiatives from being completely immobilized by RFRA claims:

> Were it otherwise, any action the federal government were to take, including action on its own land, would be subject to the personalized oversight of millions of citizens. Each citizen would hold an individual veto to prohibit the government action solely because it offends his religious beliefs, sensibilities, or tastes, or fails to satisfy his religious desires. Further, giving one religious sect a veto over the use of public park land would deprive others of the right to use what is, by definition, land that belongs to everyone.[173]

While such a circumstance is theoretically possible, there are several reasons why such a slippery slope is inapposite in this case. First, insofar as the Court

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168. *Id.*

169. *Id.*

170. Lyng v. Nw. Indian Cemetery Protective Assn'n, 485 U.S. at 454, 456 (1988) (encouraging government to use land in ways accommodating to Native American practices and expressing sympathy toward plaintiffs' plight).

171. *Navajo Nation*, 535 F.3d at 1070 (emphasis added).

172. *Lyng*, 485 U.S. at 459 (Brennan, J., dissenting).

173. *Navajo Nation*, 535 F.3d at 1063-64.

took itself to be constrained by precedent in defining a "substantial burden," the Supreme Court has held that the definition of a "substantial burden" should not be determined by the sort of slippery slope arguments that *Navajo Nation* and *Apache Stronghold* employed.[174] Such reasoning would be more appropriate in determining the extent of the government's interest, which takes place after a substantial burden is found and is independent of that inquiry. Second, the government needs to prove its interest *with respect to the claimant's request* rather than through their assertion of a broad interest.[175] In each of these cases, the claimants were looking for something akin to an easement rather than control of the land, and the government's interest was only marginal. Third, insofar as this policy argument is material to this stage of the inquiry—about which more will follow the discussion of *Apache Stronghold*—tribal claimants here are unique. They belong to federally recognized tribes and the land use at issue has been historically entrenched for centuries. Thus, we have nothing like the idiosyncratic claimants of *Roy* nor the *ad hoc* interests of an upstart religion. Admittedly, we need a principled way of distinguishing this case from *Roy*, which Parts II and III provide.

C. Recent Developments: *Apache Stronghold* and *Slockish*

The most significant decisions since *Navajo Nation* have, at the time of this writing, cemented the legacy of *Lyng*. Both of them—*Apache Stronghold* and *Slockish v. U.S. Federal Highway Administration*—were factually more like *Lyng* insofar as they involved the physical destruction of land forming a section of a sacred site.[176] In *Apache Stronghold*, the government intended to transfer sacred ceremonial land to a private mining company, whose mining practices would permanently destroy the landscape and render any ceremonial practices impossible.[177] In *Slockish*, the U.S. Federal Highway Administration destroyed tribal ancestral burial grounds and a sacred stone altar in order to expand U.S. Highway 26.[178] Both cases produced rulings against the tribes.[179] This Subpart focuses on *Apache Stronghold*, as *Slockish* was dismissed on mootness grounds

174. Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 435-36 (2006) (rejecting similar slippery slope arguments as "the classic rejoinder of bureaucrats throughout history").

175. LAYCOCK & BERG, *supra* note 53, at 51-52.

176. Apache Stronghold v. United States, 101 F.4th 1036, 1047-48, 1128-29 (9th Cir. 2024) (en banc); Slockish v. U.S. Fed. Highway Admin., 682 F. Supp. 2d 1178, 1184 (D. Or. 2010), *vacated as moot sub nom.* Slockish v. U.S. Dep't of Transportation, No. 21-35220, 2021 WL 5507413 (9th Cir. Nov. 24, 2021).

177. *See Apache Stronghold*, 101 F.4th at 1132 (Murguia, C.J., dissenting); *see also id.* at 1047-48 (majority opinion) (including government recognition that the land owner will eventually restrict access to the mine and surrounding area).

178. Slockish v. U.S. Fed. Highway Admin., No. 08-CV-01169, 2018 WL 4523135, at *2 & n.1 (D. Or. Mar. 2, 2018), *findings and recommendation adopted*, No. 08-CV 01169, 2018 WL 2875896 (D. Or. June 11, 2018); *see also Case Detail:* Slockish v. U.S. Dep't of Transp., BECKET, https://perma.cc/HG4U-MQC4 (last visited May 27, 2025).

179. *See Slockish*, 682 F. Supp. 2d at 1186-87; *Apache Stronghold*, 95 F.4th at 614.

by the Ninth Circuit[180] and the case was settled before the Supreme Court responded to the tribal litigants' appeal. It is worth noting, however, that the latter case's dismissal on mootness grounds might well embolden government actors to wantonly destroy sacred sites and discourage tribes from challenging such actions.

The government-owned land at issue in *Apache Stronghold* is Oak Flat—known to the Apache as "Chí'chil Biłdagoteel"—a 6.7-square-mile plot of plains, oak groves, and rocky cliffs located in Tonto National Forest in Arizona.[181] Oak Flat occupies a similarly central place in Apache cosmology and religious practice as the lands at issue in *Lyng* and *Navajo Nation*.[182] It is the place the Ga'an—their "creators, saints, saviors, [and] holy spirits" —reside and the Apache can communicate with them.[183] In 2014, Congress included a provision in the National Defense Authorization Act (NDAA) requiring the Department of Agriculture to convey 2,422 acres of land, including Oak Flat, upon request by Resolution Copper, a private mining company that owned adjacent land to Oak Flat,.[184] The NDAA required the Secretary of Agriculture, to (1) engage in consultation with the affected Indian American tribes regarding the land exchange, and (2) work with Resolution Copper to mitigate adverse effects on the tribes.[185] Once Resolution Copper owned the land containing Oak Flat, they nonetheless intended to use a mining technique that would alter the landscape of Oak Flat, permanently destroy the majority of the area, and render non-existent Oak Flat as we knew it.[186] The Apache sought a preliminary injunction to prevent any such activities, relying on claims including both the Free Exercise Clause and RFRA.[187]

The Ninth Circuit majority's panel opinion, delivered by Judge Bea, affirmed the district court's ruling against the Apache, largely relying on *Navajo Nation*'s reading of RFRA:[188]

> [T]he government imposes a substantial burden on religion in two—and only two—circumstances: when the government force[s individuals] to choose between following the tenets of their religion and receiving a government benefit and when the government coerce[s individuals] to act contrary to their religious

180. Slockish v. U.S. Dep't of Transp., No. 21-35220, 2021 WL 5507413 (9th Cir. Nov. 24, 2021).

181. *Apache Stronghold*, 101 F.4th at 1129-30 (Murguia, C.J., dissenting).

182. *See id.* at 1044-45; Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 459-60 (1988) (Brennan, J., dissenting); Navajo Nation v. U.S Forest Serv., 535 F.3d 1058, 1098 (9th Cir. 2008) (Fletcher, J., dissenting).

183. *Apache Stronghold*, 101 F.4th at 1129-30 (Murguia, C.J., dissenting).

184. *Id.* at 1045-47 (majority opinion); *see also* 16 U.S.C. §§ 539p(b)(2), 539p(c)(1).

185. *See* 16 U.S.C. § 539p(c)(3). Like in AIRFA, however, there was relatively little to hold the government accountable for such good faith consultation.

186. *See Apache Stronghold*, 101 F.4th at 1047-48.

187. *Id.* at 1044.

188. *See* Apache Stronghold v. United States, 38 F.4th 742, 756-57 (9th Cir. 2022), *aff'g* 519 F. Supp. 3d 591 (D. Ariz. 2021).

beliefs by threat of civil or criminal sanctions.[189]

Though this particular interpretation was overruled by a brief per curiam opinion on rehearing en banc, three noteworthy features of Judge Bea's opinion were either affirmed or not contradicted by the en banc majority.[190] First, the so-called "*Yoder/Sherbert* framework" evidently left undisturbed decisions made close in time and similar in attitude to *Smith*, particularly *Lyng*.[191] Second, it was immaterial to the panel's decision that the physical destruction of the religiously significant land in *Apache Stronghold* was more total and permanent than the developments at issue in *Navajo Nation* or *Lyng*.[192] The *Navajo Nation* majority's implication that physical destruction of a religious shrine might be a material difference was foreclosed in this case.[193] Judge Bea's majority also conceded that the government took less care here than in *Lyng* and *Navajo Nation* to minimize the impact on tribal interests.[194] Third, the panel opinion expanded the Ninth Circuit's policy arguments in *Navajo Nation*, suggesting that even RFRA's narrow application to sacred lands would be untenable.[195] After all, "[e]very new hiking path, ranger station, or 'Keep Off the Grass' sign in every National Park could deny access to land or physically destroy the environmental conditions and the privacy necessary to some religious practices."[196]

Though the per curiam opinion briefly defined an expanded scope of "substantial burdens" under RFRA,[197] the Ninth Circuit's en banc majority opinion reached the same sort of result as the panel decision and relied on the same distinctions as *Lyng* and *Navajo Nation*.[198] Just as in *Lyng*, the court held that the transfer and subsequent use of Oak Flat neither had a "tendency to coerce" the Apache nor did it "discriminate" against, "penalize" them, or "deny them 'an equal share of the rights, benefits, and privileges enjoyed by other citizens.'"[199] Each of these categories are distinct from circumstances in which the government's actions merely have the "practical consequence of 'preventing' a religious exercise."[200] In other words, the majority, rejected the Apache's attempt

189. *Id.* (citations omitted).

190. For his part, Judge Bea joined the en banc majority and wrote a separate, concurring opinion that echoed many of his sentiments from his panel opinion. For ease of reference, I will refer to the "per curiam" opinion and the "majority" opinion.

191. There was considerable ambiguity as to what set of cases, circumstances, or elements comprised the "*Yoder/Sherbert* framework."

192. *See* Apache Stronghold v. United States, 101 F.4th at 1052, 1055 (finding presence of physical destruction immaterial to RFRA analysis).

193. *See* Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1063 (9th Cir. 2008).

194. *Apache Stronghold*, 38 F.4th at 760-62, 767 (recognizing that government actors in *Lyng* took greater care to avoid disturbing sacred site and that dicta in *Lyng* and *Navajo Nation* were careful to note the lack of physical damage to sacred land in those cases).

195. *Id.* at 767.

196. *Id.* (citations omitted).

197. *Apache Stronghold*, 101 F.4th at 1043-44.

198. *See id.* at 1049-52, 1059-63.

199. *Id.* at 1051-52 (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 449-50, 453 (1988)).

200. *Id.* at 1053.

to blur the line between coercion and exaction, or between internal governmental affairs and actionable harms.[201] This was just as much an internal governmental issue as that involved in *Roy*.[202] Similarly, because RFRA incorporated *Lyng*, this did not constitute a "substantial burden" under RFRA.[203] Though RFRA effectively hollowed out *Smith*, the majority held that RFRA cemented O'Connor's concurrence in *Smith*, especially her analysis of substantial burdens.[204] Due to her authorship of both the *Lyng* majority and the *Smith* concurrence, the Ninth Circuit concluded that RFRA's codification of her *Smith* concurrence also constituted an incorporation of *Lyng* into RFRA.[205] Finally, the majority's recognition of RLUIPA and RFRA as providing the "same standard" amounted to little: Because RLUIPA only applied to land use regulations and prison inmates, that case precedent had no bearing on the outcome here.[206] Once again, ostensibly-promising developments ended in a yet more emphatically closed door for sacred land claims.

In summary, there is a clear trend that is observable from *Lyng* to *Navajo Nation* to *Apache Stronghold*. Each decision not only upholds the coercion-exaction distinction regardless of the source of law—the Free Exercise Clause or RFRA—but further circumscribes the scope of religious liberty. While *Lyng* left open the door for *some* incidental harms to religious practices to be constitutionally cognizable and RFRA seemed to open the door for a more expansive conception of tribal free exercise, *Navajo Nation* closed these doors. It also reaffirmed that harms cognizable from minority worldviews amount to "diminishment of spiritual fulfillment," rather than harms that can give rise to a RFRA claim.[207] Dicta in *Navajo Nation* still made possible other categories of harms constituting "substantial burdens" under RFRA, but *Apache Stronghold* closed this door as well. Moreover, governmental actors in each case have taken progressively less care to consult or accommodate the tribes prior to taking permanent and destructive actions—despite the existence of AIRFA and the requirements of the Land Transfer Act in *Apache Stronghold*. The purpose of Part II is to articulate precisely what the tribes are losing as a result of these decisions, something the Court recognized in *Yoder,* and Part III shows that other areas of law would find this trend intolerable.

II. SOCIETAL CULTURES AND HOSTILE ATMOSPHERES

This Part provides conceptual equipment absent from current sacred land caselaw but operative in *Yoder* and elsewhere in First Amendment doctrine,

201. *Id.*

202. *Id.* at 1053-54.

203. *Id.* at 1059-63.

204. *Id.* at 1059.

205. *Id.* at 1061-63.

206. *Id.* (applying *Lyng* to RFRA and making no mention of RLUIPA); *see also id.* at 1043 (per curiam holding that RLUIPA and RFRA are interpreted uniformly).

207. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1070 (9th Cir. 2008).

namely the notion of a "hostile atmosphere*."* Fleshing out this concept underscores the arbitrariness in distinguishing between coercive and putatively non-coercive adverse effects on the tribal litigants. The goal is not to question the positive-negative liberty distinction per se, but merely its application to sacred land cases. As Judge Fletcher argued in his *Navajo Nation* dissent, the majority's mistake lay in its mischaracterization of the "sticks" which the *Yoder* and *Sherbert* decisions included in the Free Exercise bundle, which in turn created a line of precedent under the Free Exercise Clause and RFRA that leaves land-based minority religions all but hopeless.[208] Courts following the current predominant approach seem caught in a picture that holds them captive, from which they have lost the capacity to imagine any alternative.[209] Thus, this Article's strategy is to introduce, or rather to revitalize, imagery that might demonstrate to the Supreme Court that it is not so categorically constrained in finding a substantial burden as the *Lyng-Navajo Nation-Apache Stronghold* line would suggest.

Rawls famously argues that any liberal democracy ought to provide its citizens with a fully adequate scheme of rights and liberties that protects their capacity to develop and live in accordance with a conception of the good.[210] On Rawl's account, chief among these liberties are those contained in the First Amendment.[211] Whatever disputes might exist about the purposes of the Free Exercise Clause, it should be uncontroversial to suggest the Founders similarly regarded this capacity as fundamentally important. In many respects, protecting this capacity constitutes the *sine qua non* of democratic citizenship, since it is difficult to even speak of autonomous citizens without it. At the same time, this does not mean each citizen will have equal success in attaining what they regard as final ends. It might, as the Court in *Smith* and *Lyng* emphasized, be far more difficult for some citizens to attain their final ends than others.[212] Moreover, as the sacred lands cases in Part I emphasized, certain exercises of this capacity might risk a diminishment of other citizens' capacities. Nonetheless, a citizen's deprivation of the means of forming and pursuing their conception of the good is a grave matter that would seem to warrant serious consideration, mitigation measures, or avoidance, whenever feasible.[213]

One of the necessary conditions for citizens exercising this capacity is their access to what political philosopher and liberal multiculturalist Will Kymlicka

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208. *Id.* at 1113-14 (Fletcher, J., dissenting) (finding that the majority's approach will effectively read tribes out of RFRA).

209. As Charles Taylor summarizes Wittgenstein's conception of picture, it refers to a "background to our thinking, within whose terms it is carried on, but which is often largely unformulated, and to which we can frequently, just for this reason, imagine no alternative." CHARLES TAYLOR, A SECULAR AGE 549 (2007).

210. *See* RAWLS, *supra* note 41, at 334-40.

211. *See id.* at 291, 340-48.

212. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451-52 (1988) (conceding that proposed government action might virtually destroy tribes' ability to worship); Emp. Div. v. Smith, 494 U.S. 872, 890 (1990).

213. Though they contain no teeth, both the entirety of AIRFA and the mitigation requirement of the Land Transfer Act seemed to precisely be recognitions of this.

calls "societal cultures," or cultures that provide members "with meaningful ways of life across the full range of human activities . . . encompassing both public and private spheres."[214] Whether one is conscious of it or not, each of us develops our conception of the good and a life plan—as well as the capacity to choose between conceptions and plans—within a social context. A societal culture provides us with a "shared vocabulary of tradition and convention," including not just a language and associated constellation of concepts, but also a knowledge of shared public and private social practices, historical narratives that explain these practices, and the institutions in which various social practices take place.[215] The elements of a societal culture allow us to fully understand the purpose and value of certain courses of action in the lives of those who undertake them, and they provide a lens through which *we* decide which courses of action to undertake.

Insofar as societal cultures provide a framework for valuing and choosing in this way, they are also tied to their members' identity and dignity. Thus, members of a societal culture leave it infrequently and only with great pains, which is why Rawls suggests we should assume that each citizen will occupy the same culture throughout his or her life.[216] It is also the case, Raz and Margalit have argued, that a loss of social esteem for a societal culture often translates into a loss of dignity for many of its members.[217]

Kymlicka argues that we place paramount importance in protecting our societal culture from debasement or decay due to the ubiquity of one's societal culture and its role in autonomous choice and self-understanding, let alone in the development of a worldview,.[218] In doing so, our society faces a significant obstacle because modern industrialized countries bring significant pressure for the development of a singular, national societal culture.[219] Thus, cultures that do not belong to the majority tend to face enormous pressure to conform to the majority and to experience "ever-decreasing marginalization" due to this pressure,[220] much like Waldron observed.[221] The foregoing implies that minority societal cultures—including American Indian tribes—risk losing the means through which they exercise their moral powers in a Rawlsian sense, let alone the ground of their identity. In short, the loss of a tribe's societal culture may well be tantamount to the loss of any meaningful sense of autonomy.

An obvious rejoinder to the association between access to one's native societal culture and one's autonomy is the possibility of simply "joining" another

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214. WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 76 (1996).

215. *Id.*

216. RAWLS, *supra* note 41, at 277.

217. *See* Avishai Margalit & Joseph Raz, *National Self-Determination*, 87 J. OF PHIL. 439 (1990).

218. KYMLICKA, *supra* note 214, at 83.

219. *Id*. at 80.

220. KYMLICKA, *supra* note 214, at 80.

221. *See* Waldron, *supra* note 1, at 761.

societal culture, particularly the dominant one. This happens in the modern world all the time, and someone who makes this sort of jump has the context of choice, identity, and dignity that societal cultures provide. Indeed, Waldron endorses this view through his "cosmopolitan alternative," where, for example, an Irish-American eats Chinese food, practices Buddhist meditation techniques, and reads her child *Grimms' Fairy-Tales.*[222] However, as Kymlicka observes, this both exaggerates the ease with which people move between cultures and misunderstands what it is to move between societal cultures.[223] Waldron's cosmopolitan person is not *moving between* societal cultures, but rather is *joining* the diverse societal culture that exists in metropolitan areas in the United States.[224] Partaking in something produced by persons of another nationality or ethnicity is quite different than living within, and identifying with, an entire societal culture.

Moreover, as Kymlicka argues, many members are vehemently opposed to leaving their societal culture and would have a particularly difficult time doing so.[225] Rawls considered the bonds of shared "society and culture" so integral to the person that many citizens expect to occupy a singular culture throughout the course of their lives.[226] The lifeways, conventions, and institutional strictures of a majority culture might well be an awkward or even incommensurable fit with the beliefs and patterns of conduct of a minority culture and the minds of the individuals raised within them. As a result, members of these cultures spend their lives in a liminal state that falls short of the Rawlsian standard for equal social bases of self-respect:

> What matters . . . is that people have access to a societal culture which provides them with meaningful options encompassing the range of human activities. Throughout the world, many minority groups are denied this access. They are caught in a contradictory position, unable either to fully participate in the mainstream of society or to sustain their own distinct societal culture . . . . Failure to recognize these rights will create new tragic cases of groups which are denied the sort of cultural context of choice that supports individual autonomy.[227]

Given the unique situation of many tribes, it should be noted that many of them "belong" to one societal culture over another: that of their tribal community versus the mainstream United States. Thus, the extent to which this rootlessness Kymlicka describes applies to a tribe or its members is a case-by-case inquiry.

As social & political philosopher Charles Taylor and philosopher & psychologist William James each have argued, our sociocultural milieu also plays a significant role in framing our metaphysical and epistemological commitments.[228] By the Jamesian account, each of us has a finite set of "live options"

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222. *See* Waldron, *supra* note 1, at 754.
223. KYMLICKA, *supra* note 214, at 85.
224. *Id.*
225. *Id.* at 86-87.
226. *Id.* at 87.
227. *Id.* at 101.
228. *See* TAYLOR, *supra* note 209, at 539-94 (arguing that various social and cultural

available to us to believe, shaped by our sociohistorical circumstances and psychological dispositions.[229] Given the cultural milieu and widely accepted beliefs about the world and the cosmos at the time of James's writing, the "live options" for the twentieth-century American included Christianity and agnosticism.[230] Belief in and worship of the Norse pantheon of deities, however, was and is a "dead" option.[231] Within any given milieu, there are various options which are living or dead, and their death or vitality might well be traceable to a particular feature of the atmosphere.[232] That feature of one's milieu will sometimes be traceable to past, current, or ongoing government action; and in other circumstances it may not be so traceable and might constitute the "way of the world" in a Waldronian sense.[233]

Building on James's insight, Taylor's *A Secular Age* exhaustively details the various social and historical changes that account for the change in conditions of belief in a transcendent God.[234] This belief was accepted uncritically and could only be resisted with great difficulty in Latin Christendom, so one could not help but orient one's life and identity religiously.[235] The way people encountered objects, understood maladies or natural phenomena, and discussed such things with their neighbors was saturated with the language of an enchanted world, so much so that enchanted objects, spirits, demons, possession, and the like were experienced as "immediate reality, like stones, rivers and mountains."[236] Moreover, the political and social organization of one's community was so formed around a single narrative:

> [T]he functioning mode of local government was the parish, and the parish was still primarily a community of prayer . . . . [T]he only modes in which the society in all its components could display itself to itself were religious feasts, like, for instance, the Corpus Christi procession. In these societies, you couldn't engage in any kind of public activity without "encountering God."[237]

It is no wonder that it was rare for someone in the Latin Christendom of the Middle Ages to wrest themselves from these overwhelming influences and

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changes from Middle Ages to present were responsible for sort of secular worldviews that presently exist); WILLIAM JAMES, THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY, 14-15, 21 (The Floating Press 2010).

229. JAMES, *supra* note 228, at 21-23.

230. *See id.* at 15.

231. *See id.* (invoking belief in Mahdi as "dead" option to his audience).

232. *See id.* at 21-23.

233. *See* Waldron, *supra* note 1, at 762.

234. *See* TAYLOR, *supra* note 209, at 549 (crediting James with insights central to work as a whole).

235. *See id.* at 1-2.

236. *Id.* at 12; *see also id.* at 11 ("Those nightmare scenarios of possession, of evil spirits, of captivation in monstrous animal forms; we can imagine that these were not 'theories' in any sense in the lived experience of many people in that age. They were objects of real fear, of such compelling fear, that it wasn't possible to entertain seriously the idea that they might be unreal. You or people you knew had experienced them. And perhaps no one in your milieu ever got around even to suggesting their unreality.").

237. *Id.* at 2.

question the beliefs of their milieu.

Christopher Eberle similarly describes a hypothetical society called Christendom in which citizens are almost universally Christian, Christian buildings adorn the countryside and proclaim Christianity's truth, school curricula include the studying of Christian doctrine, and Christian symbols are ubiquitous in official state institutions.[238] Eberle asks us to imagine the conditions under which an ordinary person of average cognitive competence and inquisitiveness, Thomas, could come to disbelief in such a setting:

> In what way should we expect Thomas's immersion in a society so saturated with Christianity to affect his perception of Christianity? We can be reasonably confident that Thomas can resist deference to Christianity only with difficulty – if Thomas can muster the strength and independence of thought to reject Christianity, he'll succeed only with effort and determination. Most likely, however, the massive social confirmation of Christian creeds will have its counterpart in Thomas's subjectivity: Christian tenets will enjoy the maximum plausibility that naturally attends realities that one is fortunate enough to be able to take for granted. As a ubiquitous and firmly entrenched feature of his social environment, Christianity appears to Thomas as a massive reality that imposes itself on his consciousness as ineluctably as do similarly massive features of his natural environment.[239]

Eberle hypothesizes that one can slowly alter the features of Thomas environment so that endorsing Christianity becomes progressively more difficult.[240] Taylor argues this is precisely what happened throughout Western history.[241] Centuries of social and philosophical developments—which included different conceptions of time, the self, and the relationship between ecclesiastical and civil authority—helped create the modern construal of the world, which Taylor calls the "immanent frame."[242] In this construal, belief in a transcendent God is one option among many.[243] In some settings, believing in and living in accordance with such a God is an option that can be accepted only with great difficulty and against the currents of one's colleagues or neighbors.[244]

As a final articulation of this phenomenon, Herbert Marcuse's *One-Dimensional Man* argues twentieth-century American life had become so saturated with the values of its technocratic capitalist system, across institutions and even in the academy, that its citizens had lost the ability to posit genuine desires of their own or imagine any possibilities of life being substantively different from the daily grind.[245] Where Marx's time was one in which the factory worker's private self

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238. CHRISTOPHER J. EBERLE, RELIGIOUS CONVICTION IN LIBERAL POLITICS 29-30 (2002).

239. *Id.* at 30.

240. *Id.* at 30-31.

241. TAYLOR, *supra* note 209, at 534-39.

242. *Id.* at 548.

243. *Id.* at 3.

244. *See id.* at 566, 591-92.

245. *See* HERBERT MARCUSE, ONE-DIMENSIONAL MAN: STUDIES IN THE IDEOLOGY OF ADVANCED INDUSTRIAL SOCIETY (2d ed. Routledge 2002)

was alienated from his working self, resulting in an unhappily divided but two-dimensional person, Marcuse's was one of a more "progressive stage of alienation" in which the authentic, autonomous self had been swallowed by an imposed, public self whose "false consciousness" became one's true consciousness.[246] Germane to the present discussion is Marcuse's suggestion nature itself has largely lost its status as a place of respite from the totalizing narrative of mainstream public life:

> [T]he physical transformation of the world entails the mental transformation of its symbols, images, and ideas. Obviously, when cities and highways and National Parks replace the villages, valleys, and forests; when motorboats race over the lakes and planes cut through the skies—then these areas lose their character as a qualitatively different reality, as areas of contradiction.[247]

Another feature of modern life—the saturation of our consciousness with advertisements—similarly suggests this is so at home too, even when we are do not directly encounter mainstream culture.[248] We don't have to endorse the entirety of Marcuse's critique to recognize these vignettes as apt descriptors of modern life.

In sum, our sociocultural milieu or atmosphere provides context for developing and pursuing a conception of the good, a basis for our identity and self-respect, and a way of framing our beliefs and perceptual experiences. As Taylor and Eberle each argue, members of societal cultures encounter various cultural elements as just as real as massive features of their natural environment (though the category of "natural environment" is itself a product of a particular paradigm).[249] As Kymlicka observes, it's not as if any of us can operate in an unfiltered, neutral atmosphere—Western secular cosmopolitan society provides a frame of its own.[250] Marcuse and Kymlicka each make explicit arguments about how elements of a mainstream culture can operate simultaneously to crowd out other options or even limit the capacity to autonomously exercise the moral powers Rawls considers so central to democratic citizenship.[251] Thus, even prior to thinking about direct coercion concerning beliefs or practices, one must investigate the extent to which citizens have access to an atmosphere in which they can develop the frameworks that sustain these beliefs and practices.

Turning to the social and historical context of the sacred land cases, there are myriad ways in which the American settlers' and many of the tribes' respective atmospheres were incommensurable. Kent Greenawalt offers the following illustration of this clash, drawing substantially from Sydney Ahlstrom:

> With regard to the Indian's religion, the modern American imagination

246. *Id.* at 13.

247. *Id.* at 69.

248. *See id.* at 95.

249. *See* EBERLE, *supra* note 238, at 30; TAYLOR, *supra* note 209, at 11.

250. *See* KYMLICKA, *supra* note 214, at 85.

251. *See generally id.*; MARCUSE, *Negative Thinking: The Defeated Logic of Protest*, *in* ONE-DIMENSIONAL MAN: STUDIES IN THE IDEOLOGY OF ADVANCED INDUSTRIAL SOCIETY, *supra* note 245, at 127.

> falters . . . . [G]eneralizations about *all* of the tribes [given their immense diversity] must be of the simplest sort . . . . One can perhaps say that the American Indian, like other peoples, stood in awe and relative helplessness in the face of the mysteries of nature and life . . . . His beliefs were animistic—the world of multifarious forces and things was animated or controlled by a hierarchy of spirits whose acts and intentions could in some degree be interpreted or conditioned through shamans and by appropriate ceremonies and rituals . . . . Most tribes tended to read the earth and its powers with greater veneration and respect than the Europeans who would cut down the trees and plough up the prairies . . .[and their] way of life contrasted sharply with the Puritan view of work and individual advancement . . . . If Christians believed Jesus was crucified in South Dakota rather than Jerusalem, on land now owned by the government, Christians would be shocked if the government proposed to build a gambling casino on the site. But even this extreme hypothetical does not capture the claim of the Native Americans, because Christians do not believe particular geographical locations are sacred in the way that Native Americans do.[252]

The irreconcilable facets of each atmosphere were interdependent: conventions of land development, religious and metaphysical beliefs, and legal categories in property law and free exercise jurisprudence. Against this backdrop, it is no small wonder the *Lyng* Court would later feel compelled to place "Indian concepts in non-Indian categories."[253] Doctrines that shaped free exercise jurisprudence were developed primarily with doxastic variants of Protestantism in mind and by those familiar with those denominations, all while firm categories of property ownership within the English common law tradition became more firmly entrenched. Thus, this was a circumstance in which a majoritarian culture and its institutions each developed without input from these cultural minorities while expanding the jurisdiction of these institutions. Had the relationship between these cultures been otherwise, there might well have been forms of property ownership—such as particular kinds of easements—that accommodated Native conceptions of land access, or a Free Exercise approach that accounted for these different concepts. Eventually, once this majoritarian culture's reach became sufficiently pervasive, the atmosphere would become one in which non-majoritarian cultures could survive only with great difficulty.

One might object that this Part has offered nothing with which the *Lyng* line of cases would disagree: A societal culture might be formative in various ways and important for free exercises purposes, and minority cultures have trouble keeping theirs alive. In the case of the tribes, it might be argued—if the land conquests discussed in Part I are assumed away—that the separate development of these cultures was desired by both parties, as the tribes wanted to maintain their own institutions. Thus, if it turned out the Anglo-American traditions became the more pervasive and influential culture, then the tribal decline would, in Rawlsian terms, constitute a commonsense fact of political ecology. Even if a

252. 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS, 193 (Princeton Univ. Press 2006).

253. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 459 (1988) (Brennan, J., dissenting).

societal culture is deeply meaningful in the way that Kymlicka or Taylor argue it is, that doesn't necessarily indicate there must be unfettered access to all the resources necessary to maintain one's societal culture.

This sort of objection is the very point of the *Lyng* line of cases, Waldron, and even Rawls: Not every instance of a lamentable loss—like the loss of one's societal culture—is the violation of a right, particularly when the complainant is seeking a *positive* right as a remedy. Many other social goods are centrally important to the lives of citizens that are *not* the subject of federal constitutional rights, such as access to education or healthcare.[254] Losses for which the governmental actor at issue is culpable in a particular sense—such as where their action contains an element of coercion—give rise to such a right. In other words, the pervasiveness of the majority societal culture, and the inhospitable atmosphere it creates for minority cultures, is not coercive in the ways anticipated by the Free Exercise Clause and RFRA. And even if some facets of this pervasiveness are traceable to historical injustices, it cannot be the province of the Constitution to remedy all such harms. According to this sort of objection, the sacred land cases either constitute an instance in which historical injustice has been superseded by present social concerns or one that is better left to the legislature. To fall within the ambit of the Free Exercise Clause or RFRA, there must be an element of coercion in a more immediate sense—and hence, the violation of a *negative* right.

The picture changes with a thorough description of what it is tribal claimants are losing across the sociohistorical backdrop, or rather the sort of harm that the challenged government action brings to fruition. The government in each case *had* done something affirmative to the tribes, and the destruction of the sacred site was the culmination of a long process of removing access to their societal culture.[255] In other words, destruction of the sacred site fully transformed the atmosphere into one utterly hostile to continued tribal belief and practice. Even if we style this right as a positive one, it is only positive in the way other, recognized First Amendment liberties are. The requirement that content-neutral regulations on speech leave speakers with a suitable channel for their message, or the RLUIPA requirement that suitable land be made available to a religious organization's needs, are construable as positive rights in the same way. Part III will pursue these comparisons in greater detail.

The difficulty and folly of placing tribal claims (or harms) in either box, as the Introduction mentioned, is that the historical circumstances, legal status, and religious practices of the tribes at issue are quite unique. However we style their claims, the fact remains that the challenged governmental land use renders the atmosphere entirely hostile to the truth and practice of the tribal beliefs. One can graft Eberle's character Thomas[256] onto any of the sacred sites at issue in these

254. *See generally* U.S. Const.

255. *See supra* Part I (summarizing historical persecution of tribes in the century leading up to sacred land cases); *supra* Part II (detailing the concept of a "societal culture" and its value to marginalized religions).

256. *See supra* notes 239-40 and accompanying text.

cases: Before that site's destruction, the serenity of the environment permitted him to believe he was communing with the spirits who resided there, even with the history of coerced land transfer surrounding that land. After its demolition or subsequent use for commercial purposes, Thomas finds no such spirits—only the dead and abandoned or commercialized land. He loses the ceremonial glue of his cultural and religious community and has a difficult time imagining what it would mean to pass such traditions down to his children.

What tribal claimants are losing access to is not merely the ability to visit a site, but the societal culture around which that site revolves and all that comes with access to one's societal culture. This is a much different scenario than one in which (a) one culture simply fails to attract members, or (b) the loss of one's societal culture is traceable to long-past historical persecution. In denying responsibility for the loss of the tribe's societal culture, or rather the relegation of it to historical actions, courts countenance the government's "perverse incentive to destroy the societal culture of national minorities, and then cite that destruction as a justification" for later making that destruction more total.[257] The denial of a constitutionally cognizable claim permits the government to set up a system where it benefits from committing injustices.

This approach might sound like appropriate reasoning for the moral philosopher, but it is too theoretical for the construction of constitutional doctrine. As the rest of this Part argues, the right to a non-hostile atmosphere is precisely what the Court intended in *Yoder*.[258] While the Anabaptist plaintiffs in *Yoder* have some important distinctions from the tribal claimants, their religious beliefs and practices similarly involved a communal life separate from mainstream society as well as the maintenance of a particular sort of atmosphere.[259] *Yoder* involved a Wisconsin state law that would make public or private education compulsory until the age of sixteen.[260] The named plaintiff, Jonas Yoder, declined to send his children, ages fourteen and fifteen, to public school after they completed the eighth grade.[261] Following a complaint by the school district's administrator, Yoder was convicted under the compulsory education law and fined the mandated fee of five dollars.[262] Yoder, a member of an Old Order Amish community, contended that the enforcement of this law violated his Free Exercise rights.[263]

When *Yoder* reached the Supreme Court, Justice Berger's majority opinion outlined several features of the Amish faith and the unique burdens its practitioners face that are comparable to—but arguably less significant—than those of the tribal litigants in *Lyng*, *Navajo Nation*, and *Apache Stronghold*. The nature of the harm the court found significant in *Yoder* is precisely the sort this Part describes

257. KYMLICKA, *supra* note 214, at 100.
258. *See* Wisconsin v. Yoder, 406 U.S. 205, 218-19 (1972).
259. *Id.* at 217.
260. *Id.* at 207.
261. *Id.*
262. *Id.* at 208.
263. *Id* at 208-09.

in the other cases: a deprivation of access to a societal culture due to its members being subjected to an atmosphere hostile to that culture.[264] As with American Indian religions, both seclusion and a lack of disturbance from the outside world are central Amish sacred practices:

> As a result of their common heritage, Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. This concept of life aloof from the world and its value is central to their faith.[265]

Like the tribes, their religious life was both land-based and not neatly separable from the rest of their communal existence:

> A related feature of Old Order Amish communities is their devotion to a life in harmony with nature and the soil . . . . Amish beliefs require members of the community to make their living by farming or closely related activities. Broadly speaking, the Old Order Amish religion pervades and determines the entire mode of life of its adherents.[266]

Given these beliefs and practices, the Amish found high school education spiritually corrupting and harmful. The values taught in the high schools that qualified with the compulsory education law were "in marked variance with Amish values and the Amish way of life"[267]:

> [The Amish] view secondary school education as an impermissible exposure of their children to a "worldly" influence . . . . The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students . . . . [It] is contrary to Amish beliefs, not only because *it places Amish children in an environment hostile to Amish beliefs* with increasing emphasis on competition in class work and sports and pressure to conform to the styles, manners, and ways of the peer group, but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life . . . . [A]t this time of life, the Amish child must also grow in his faith and his relationship to the Amish community if he is to be prepared to accept the heavy obligations imposed by adult baptism. In short, high school attendance with teachers who are not of the Amish faith—and may even be hostile to it—interposes a serious barrier to the integration of the Amish child into the Amish religious community.[268]

This fundamental incompatibility came about in part because Amish religious practices remained static for several centuries as society around them changed and became more ubiquitous:

> As the society around the Amish has become more populous, urban, industrialized, and complex, particularly in this century, government regulation of human affairs has correspondingly become more detailed and pervasive. The Amish mode of life has thus come into conflict increasingly with requirements of contemporary society exerting a hydraulic insistence on conformity to majoritarian

264. *See id.* at 217-19.
265. *Id.* at 210.
266. *Id.*
267. *Id.* at 211.
268. *Id.* at 211-12 (emphasis added).

standards.[269]

This "hydraulic" pull became especially potent with the addition of the compulsory education law, as education in rural areas increasingly took place in a "consolidated school, often remote from the student's home and alien to his daily home life."[270]

Given the pressures that contemporary, cosmopolitan life already exert on the Amish, the Court found the compulsory education law "carries with it a very real threat of undermining the Amish community and religious practice as they exist today" and that this was "precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent."[271] The threat of criminal sanctions meant the Amish would either need to "abandon belief and be assimilated into society at large" or be "forced to migrate to some other and more tolerant region."[272] Because the evidence showed that the law would "gravely endanger if not destroy" their beliefs, the Court held that it violated their Free Exercise rights.[273]

What is noteworthy about *Yoder* is the Court's focus on the Amish's sociohistorical context, their longstanding and constant religious practices—which long predated the challenged government action, and the degree of adversity the challenged government action would visit on their religion.[274] While the threat of criminal sanction was the precipitating event for the lawsuit, it was only the contingent means by which the government would "gravely endanger" if not "destroy" the Amish religion.[275] Indeed, the Court barely discussed the fine.[276] That there was some government conduct traceable to the harm—as there was with the tribal litigants—was clearly important; but the *degree* of harm, considered in its sociohistorical context, comprised the bulk of the Court's discussion.[277]

The senses of harm discussed by the *Yoder* majority are also noteworthy for their relevance to sacred land litigants. First, the pressure on Amish schoolchildren to conform to a ubiquitous, mainstream culture was clearly relevant to the *Yoder* Court's analysis.[278] They thought Yoder himself had an interest in the atmosphere to which his children were exposed, particularly the extent to which the physical and psychological spaces they inhabited would render the Amish way of life a dead or faintly living option.[279] That Amish children would be exposed to a hostile atmosphere and pulled away from their faith by the "hydraulic insistence" of mainstream culture played a significant role in their Court's

269. *Id.* at 217.
270. *Id.*
271. *Id.* at 218.
272. *Id.*
273. *Id.* at 219.
274. *See id.* at 216-18.
275. *Id.* at 219.
276. *See id.* at 208-13.
277. *Id.* at 215-19.
278. *Id.* at 218.
279. *See id.* at 211-12, 214-19.

decision.[280] It is similarly difficult to imagine how Apache with strong traditional faiths can pass their beliefs and practices—which themselves serve as a focal point of communal cohesion—to subsequent generations when the sacred area is no longer there.[281]

Second, the Court treated the *subjective* effects on the Amish—the threat to their salvation—as much more relevant to their analysis than courts did in the aforementioned sacred land cases. The *Yoder* Court could have reasoned as the majority did in *Navajo Nation* and *Lyng*, suggesting that the compulsory education law did *not* objectively harm the interests of the Amish but only decreased their "spiritual fulfillment" or "subjective spiritual experience."[282] Recall that the *Navajo Nation* majority treated as persuasive the fact that tribal worshippers weren't themselves forbidden from doing anything: None of their liturgical practices had been modified and they could still visit any shrine they wished.[283] Similarly, while Yoder was required to do something, his community's practices were still intact: The Amish were not being asked to modify their liturgical practices and their adolescent children could still learn Amish values and prepare for their future roles within the community.[284] An additional two years in school would perhaps make the practice of their religion more difficult—as the Court conceded in *Lyng*, *Navajo Nation,* and *Apache Stronghold*[285]—or decrease the spiritual fulfillment Yoder would receive by keeping his children home earlier in their adolescence, but it would not prohibit Amish practices.[286] Further, the fine at issue was minimal, so the option was available for Yoder to retain those two years of spiritual development by paying the fine. Moreover, the Court might have accepted as persuasive the sort of slippery slope argument that appeared in *Lyng* and *Navajo Nation*—that the government's interest in educating its future citizens could be imperiled by a litany of religious objectors just as much as its interest in land management.[287] That the *Yoder* Court was not moved by these sorts of considerations reinforces the effects-focused reading of the case.

Third, the *Yoder* Court devoted significant space to the fact that the Amish practices at issue were longstanding, pre-dating the sociopolitical pressures now creating an especially hostile atmosphere to their continued vitality.[288] Not only have the values and priorities of public schools changed in the several centuries

280. *Id.* at 217.

281. Apache Stronghold v. United States, 101 F.4th 1036, 1045 (9th Cir. 2024) (en banc) (describing centrally important rituals, including rites of passage for young women, that take place at Oak Flat).

282. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1063 (2008).

283. *Id.*

284. *Yoder*, 406 U.S. at 211-12.

285. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450-51 (1988); *Apache Stronghold*, 101 F.4th at 1052-53; *Navajo Nation*, 535 F.3d at 1063.

286. *Yoder*, 406 U.S. at 217-18. In this decision, however, the Court rejected the idea that these were merely "subjective" harms. *See id.* at 218.

287. *See Lyng*, 485 U.S. at 448-49, 453; *Navajo Nation*, 535 F.3d at 1072.

288. *Yoder*, 406 U.S. at 216-17.

since the nation's founding,[289] but the Court took care to note that schools themselves have become more consolidated and less tied to many students' communities.[290] Many of the Court's observations were even more apt in the decades that followed. Political philosopher and commentator on multiculturalism Jeff Spinner-Halev, for instance, offered the following description in 2005 of the pressures mainstream culture exerts on schoolchildren, including those belonging to insular religious communities like the Amish:

> [The Rawlsian liberal] fails to recognize that in the consumer, materialist societies of the West, the lure of exit [from insular religious communities] is always present. It is partly because our societies are so materialist, including our public schools in many ways, that some people retreat to religion. Some people complain about the hold that certain groups have over their children, but the hold that popular culture has over many people is not exactly uplifting . . . . In the USA today *public* schools routinely make marketing deals with Pepsi or Coca Cola; where other private companies are allowed to buy advertising within the schools; where private television networks are shown for free in schools in return for the ability to show advertising to the children; where peer pressure is often intense and sometimes harmful. Are these the sorts of schools that produce autonomous adults? Then, of course, there are the private media that children in mainstream culture often find themselves immersed in . . . . [S]uffice to say that autonomy is not what much of popular culture is after . . . . Children immersed in a culture defined by advertising, entertainment media, and peer pressure are often dominated by influences they neither understand nor resist.[291]

There are social and governmental pressures, such as the consolidation of schools and the capitalist displays within them, which evolved after the well-documented instantiation of these Amish communities and form part of an atmosphere hostile to them. An additional government action, here a compulsory education law, renders that atmosphere *even more* hostile, removing what the Amish regard as necessary conditions for their vitality. Similarly, in the sacred land cases, past government persecution of the tribes made maintaining their culture much more difficult; but the challenged government action in each case renders the atmosphere so hostile that it seals their fate.

In *Yoder* and the sacred land cases discussed in Part I, the causal role of the government was to either institute or more fully render a religiously hostile atmosphere. In the case of the tribal litigants, however, the governmental contribution to that hostility began more intentionally, happened earlier in time, and was much more total in its adverse effects on their religious practices. Although the precise, precipitating events in the two sets of cases—a criminal sanction versus a new land use decision—seem to involve more direct coercion of the

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289. For an excellent history of the development of the public school system and its evolving relationship with religious citizens, see STEPHEN MACEDO, DIVERSITY AND DISTRUST (2003).

290. *Yoder*, 406 U.S. at 217.

291. Jeff Spinner-Halev, *Autonomy, Association, and Pluralism*, *in* MINORITIES WITHIN MINORITIES 157, 162 (Avigail Eisenberg and Jeff Spinner-Halev eds., 2004) (internal citations omitted).

Amish than the tribes, the broader timeline of their events do not. In Barclay and Steele's terms, tribal litigants live from a "baseline of coercion."[292] Whereas mainstream values were alien to many tribal faiths at the onset of our constitutional system,[293] various Anabaptist sects initially were not always so distant from mainstream religious life.[294] While the Amish and the various tribes were not part of the respective constituencies that determined how physical space would be occupied or what kinds of property or religious interests would be represented in our body of law, tribal interests were considerably less represented in mainstream politics and culture.

The *Yoder* majority considered it important that the Amish way of life depended on a degree of physical and psychological independence from the outside world, an atmosphere permeated with sanctity rather than the profanity of mainstream life.[295] This condition was even more exacting for tribes, as their sanctified atmosphere required access to a *specific* tract of land they had used for centuries.[296] In part for this reason, the tribes had even less religious freedom than the Amish would have under the compulsory education law: They didn't have the option of paying a fine as "punishment" for their continued way of life.[297] Instead, many tribal litigants' way of life was rendered impossible, not merely more costly or more psychologically difficult.[298] They weren't given the option to maintain their societal culture or pay a modest fine: The singular option was to cease beliefs and practices at the heart of their societal culture. In other words, they were given the Hobson's choice of conforming their beliefs and practices more closely to mainstream societal cultures or entirely leaving their societal culture.

When one considers the tribes' sociohistorical circumstances, the ongoing pressure mainstream society visits on their way of life, and the effect of the challenged government action on their faith—all significant atmospheric conditions in the *Yoder* decision—the atmosphere was even more hostile to their religious practice than was the atmosphere to the Amish. It is misleading to focus solely on a precise form of a precipitating government action at a fixed moment in time if, prior to that action, the atmosphere was already hostile *because of* past or ongoing government action. Robert Nozick is generally critical of such "time-slice principles" of justice and suggests that one consider not just the present

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292. Barclay & Steele, *supra* note 3, at 1301.

293. *See supra* notes 29-30.

294. *See Yoder*, 406 U.S. at 217.

295. *Yoder*, 406 U.S. at 216-17.

296. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 459 (1988); (Brennan, J., dissenting); *Apache Stronghold*, 101 F.4th at 1130-31 (Murguia, C.J., dissenting);

Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1106 (2008) (Fletcher, J., dissenting).

297. Michael A. Helfand, *Identifying Substantial Burdens*, 4 U. Ill. L. Rev. 1771, 1805 (2016); *see also Lyng*, 485 U.S. at 467-68 (Brennan, J., dissenting) (arguing that tribal litigants had less religious freedom and faced greater burden than Amish plaintiffs in *Yoder*).

298. *See Lyng*, 485 U.S. at 451-52; *Apache Stronghold*, 101 F.4th at 1145 (Murguia, C.J., dissenting).

distribution of different persons rights and liberties, but how such distributions came about.[299] Ultimately, when reading *Yoder* alongside the sacred land cases, one notices the animating concerns of the *Yoder* majority don't show up as considerations for the majorities in the sacred land cases. This point of discontinuity becomes especially problematic when considered alongside the cases discussed in Part III.

One might wonder what is included in a right to a religiously *non-hostile atmosphere* or *non-hostile environment*. While the Free Exercise Clause and RFRA are not protective of access to a societal culture *per se*, Part II has argued that access to a societal culture is a necessary condition for any meaningful sense of citizen autonomy, including our capacities to form a religious and moral framework. Understanding the connection between these concepts is necessary to articulate the extent and nature of the burden various governmental actions visit on minority faiths, especially the causal nexus between a government action at a fixed point in time against a broader, oppressive trend.

As held by the majority in *Apache Stronghold*, substantial burdens only exist where the government action has a tendency to coerce, discriminate against, penalize, or deny an "equal share of the rights [or] privileges enjoyed by other citizens."[300] In the sacred land cases[301]—notwithstanding a serious uphill battle occasioned by two centuries of persecution of their societal culture—the tribal litigants continued their religious observances, beliefs, and attendant communal life. In these cases, it was the challenged government actions which finally made these observances, beliefs, and communal lives impracticable; and as the *Yoder* majority recognized, such an atmosphere was hostile to the tribes' survival.[302] If the opportunity to live within their societal culture is part of the "equal share" of rights under the Free Exercise Clause, it is difficult to imagine how the tribes could be understood to enjoy any *substantial* equality in this area, rather than the *formal* equality that the *Lyng* approach envisions.

Even so, what is it precisely that makes the atmosphere hostile under the principle this Part reads into *Yoder*? Is it because the destruction of the Oak Flat makes it impossible to believe the metaphysical claims) the Apache made about the place, rendering their beliefs dead options? Or is the issue with the individual litigant's inability to impart that belief to subsequent generations? Under either of these interpretations, one might argue the concerns about *positive* rights laid out by the sacred land cases are vindicated: It's implied that governmental actors need to construct the landscape such that it supports a religious litigant's beliefs, or at least does not create tension with them. This interpretation comes close to a principle that Stephen Macedo calls (and criticizes) freedom of the "formation"

299. ROBERT NOZICK, ANARCHY, STATE & UTOPIA 155 (Reprint ed., Basic Books 2013).

300. *Apache Stronghold*, 101 F.4th at 1051.

301. *Lyng*, 485 U.S. at 458-61 (Brennan, J., dissenting); *Apache Stronghold*, 101 F.4th at 1129 (Murguia, C.J., dissenting).

302. Wisconsin v. Yoder, 406 U.S. 205, 219 (1972).

of "beliefs and opinions."[303] Or, if it is purely about the *practice* of the Sunrise Ceremony—one of the important Apache rituals taking place at Oak Flat—then the tribes suffered no harm in any of the sacred land cases.[304] What the tribal claimants argued and this Article defends is a conjunction of these interpretations: the right to practice the Sun Ceremony at Oak Flat under such conditions that it would perform the religious and cultural function it had for centuries.

To the extent that the object of the right to a non-hostile atmosphere—whether it pertains to practices, possibilities of belief, or both—remains ambiguous, its resolution isn't necessary in this Article. The *Yoder* majority was content to observe that several of these factors were present at once: The case was about Jonas Yoder's interests in practicing *Ordnung* and his children's ability to form the beliefs and virtues necessary to their spiritual, communal lives in the Amish community.[305] The majority's focus was on the *totality of the effect* of a government action on Amish societal culture, constitutive of their religious lives.[306] The Amish people's continued religious practice, tenability of their pertinent beliefs, and ability to pass these beliefs and practices down to subsequent generations are all affected by compulsory secondary school attendance. Each of these factors are present to an even greater degree in *Apache Stronghold*, and so the "hostile atmosphere" principle this Part has read in *Yoder* is even more applicable in the tribal sacred land cases.

III. FITNESS AND THE NON-HOSTILE ATMOSPHERE

Part II outlined some of the philosophical justifications for the right to a non-hostile atmosphere and a reading of *Yoder* that embraces this principle. But the consistency of this principle with *Yoder* may not, on its own, be adequate grounds for a court to apply it in an ostensibly novel way, such as to sacred land cases. The difficulty recognizing this principle stems from the unique facts and socio-historical circumstances surrounding the sacred land cases and tribal litigants. As this Part argues, however, many other areas of constitutional doctrine are harder to reconcile with the absence of this principle than with its recognition.

Recognizing the right to a non-hostile atmosphere is not just supported by *Yoder*; but it serves three, interrelated desiderata of constitutional jurisprudence: (1) what Dworkin calls the "integrity of law," whereby we hope to find a set of consistent principles in constitutional doctrine,[307] (2) the desire to decide similar cases similarly, and (3) the importance of providing differently situated citizens with rights and liberties of equal value.[308] The adoption of the right to a non-

303. MACEDO, *supra* note 289, at 58-59.

304. *See Apache Stronghold*, 101 F.4th at 1044-45.

305. *See* NOZICK, *supra* note 299.

306. *Yoder*, 406 U.S. at 219.

307. *See* RONALD DWORKIN, *Integrity in Law*, *in* LAW'S EMPIRE 225, 227-28 (1986).

308. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it,

hostile atmosphere serves these goals, while the denial of it detracts from them. This Part comprises four areas that provide this sort of support for the right to a non-hostile atmosphere: Subpart A discusses RLUIPA case law , Subpart B outlines doctrines arising under the Free Speech Clause, Subpart C covers the Free Exercise rule against targeting religions, and Subpart D covers the trust doctrine.

Before turning to these Subparts, it is important to more precisely define what a non-hostile atmosphere is and what it means if the court finds there to be one. The following is a provisional four-part test to determine the existence of a hostile atmosphere under the Free Exercise Clause (and RFRA, to the extent it can be incorporated):

(a) There is no available space in which believing in and fulfilling the dictates of the plaintiff's faith is practicable;

(b) There once was adequate space for doing so and the plaintiff did so routinely;

(c) The plaintiff had a reasonable expectation of continued access to such space; and

(d) The unavailability or inadequacy of this space was proximately caused by government action.

The elements of this test are informed by the general sense of a hostile atmosphere described in Part II and parallel approaches that have been adopted in Free Speech cases and RLUIPA doctrine.[309] Part (b) of this test suggests this principle is only or primarily protective of preestablished religious entities, or those with a demonstrable history of belief and practice. This circumscription admittedly will not cover certain religious minorities, especially those whose beliefs are not clearly substantiated by regular, outward conduct. However, as anthropologist and cultural property expert Michael Brown has argued, an existing pattern of conduct is practically necessary to guard against the worries that *Lyng* and its progeny raise about religious groups making ad hoc claims on expansive tracts of public property .[310] It is also meant to differentiate situations in which,

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is a right which must be made available to all on equal terms."); *see also* JOHN RAWLS, *Priority of Right and Ideas of Good*, *in* POLITICAL LIBERALISM 173, 189 (1993).

309. *See, e.g.*, Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter, 456 F.3d 978, 992 (9th Cir. 2006) (basing a "substantial burden" determination under RLUIPA on whether the county would approve a building permit in suitable space for temple construction); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 654-55 (1981) (upholding a law restricting solicitation on state fairgrounds under the Free Speech Clause because religious practitioners still had an adequate, alternative channel for speech and fairgrounds weren't a necessary location for their message); Bery v. City of New York, 97 F.3d 689, 698 (2d Cir. 1996) (striking down a restriction on sidewalk art sales because the site-specific nature of the artists' message would leave no adequate alternative channels of expression); Weinberg v. City of Chicago, 310 F.3d 1029, 1041-42 (7th Cir. 2002) (striking down a law prohibiting street peddling near stadiums since the appellant had no adequate alternative channel to communicate his message critical of Chicago Blackhawks leadership).

310. *See* MICHAEL F. BROWN, *At the Edge of the Indigenous*, *in* WHO OWNS NATIVE CULTURE? 173, 190-98 (2003) (discussing several legal disputes over sacred sites and concluding that fairness requires evidence of past and ongoing ritual conduct). As Berg and Laycock have argued, however, concerns that strict scrutiny will lead to anarchy or governmental

as Waldron aptly suggests, nothing untoward has happened other than the "way of the world": A religion has simply failed to attract followers, its practices have become prohibitively costly in the modern world, and so on.[311] Finally, part (d) of the test may require modification to only reach particular types of government actions, such as those which are "coercive" or "restrictive." The addition of such a modifier might also risk collapsing this test into the one this Article criticizes. As argued above, narrowly defined coercion and penalties should not be the *only* circumstances in which courts find substantial burdens on religion.

This test might initially sound overinclusive because it would put the government on the hook where claimants assert a positive right whose recognition would subject the government—and hence, the public—to costly or unmanageable forms of redress. There are circumstances in which this would also open the door to Establishment Clause concerns, insofar as an idiosyncratic minority faith could demand a disproportionate share of limited public resources. In this respect, the concerns of the *Lyng* majority would be vindicated. Beyond the four-part test laid out above, however, there are additional reasons why the non-hostile atmosphere doctrine need not lead to an unmanageable flood of litigation.

These feasibility concerns are best remedied through the kind of balancing tests that are ubiquitous in constitutional law, as the Court has held in the RFRA context.[312] Neither this Article nor the dissenting opinions in sacred land cases have argued that any cognizable rights to sacred sites are indefeasible.[313] Rather, this Article's complaint is that they are not even recognized as constitutionally or statutorily cognizable. If a court were to find that a hostile atmosphere constitutes a substantial burden, it would then turn to the question of whether the government can demonstrate a sufficient interest to justify that burden. This could manifest in several ways in sacred land cases. First, Berg and Laycock have proposed that such positive and conduct-based "free exercise" claims as those in sacred land cases be subject to "serious intermediate scrutiny,"[314] which is both more solicitous to the unique needs of religious minorities and more responsive

impotence are greatly exaggerated. *See* Laycock & Berg, *supra* note 53, at 44-45 (citing empirical studies on free-exercise claims); *see also* Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, 546 U.S. 418, 435-36 (2006) (rejecting the government's slippery slope argument on the ground that RFRA's balancing test is meant to appropriately manage claims and protect government interests). Thus, the "pattern of conduct" standard need not be particularly exacting to state a prima facie case.

311. Waldron, *supra* note 1, at 762.

312. *See Gonzales*, 546 U.S. at 435-36.

313. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 471-74 (1988) (Brennan, J., dissenting) (recommending a showing of the religious practice's importance before the burden shifts to government to demonstrate compelling interest); Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1106-07 (9th Cir. 2008) (Fletcher, J., dissenting) (recognizing that the government could have but failed to demonstrate that sacred land desecration was the least restrictive means of satisfying compelling government interest); Apache Stronghold v. United States, 101 F.4th 1036, 1129 (9th Cir. 2024) (en banc) (Murguia, C.J., dissenting) (arguing that the case should have been remanded to the district court so the government could demonstrate compelling interest).

314. Laycock & Berg, *supra* note 53, at 58-59.

to the concerns about judicial economy than strict scrutiny.[315] This is the balance courts have struck in analogous free speech contexts, one of which this Subpart will briefly discuss. One might object that Berg and Laycock's proposal would create asymmetric standards of review: intermediate scrutiny for Free Exercise Clause claims and strict scrutiny for RFRA claims. While perhaps uncomfortable, this distinction would pass constitutional muster, as federal courts may employ a more exacting standard of review for federal governmental actions under RFRA than in Free Exercise cases.[316]

Second, if courts continue to apply strict scrutiny, a more robust set of compelling government interests ought to be developed in cases where recognizing a sacred land claim would create unmanageable precedent. Government action would be immobilized if, for instance, Stephen Roy had prevailed in *Roy*: Subjecting the government to oversight in such a thoroughly internal and ubiquitous program as social security would be unmanageable. Productive and publicly beneficial federal projects might also fail if, as each of the sacred land decisions cautioned,[317] *all* potential government land uses were subject to public veto. But the record suggests these risks did not exist in the sacred land decisions, as the proposed uses had only marginal economic benefits. Regardless, such an inquiry was never reached. Moreover, as Part II mentioned, there is empirical data indicating these slippery slope concerns are poorly substantiated in the first place.

Third, it might be the case that the best and most realistic solution is one proposed by Alex Tallchief Skibine: a legislatively-rooted intermediate scrutiny.[318] Skibine argues this would not only avoid what might be an intractable disagreement among federal judges—particularly given the deep-rooted coercion-exaction distinction described in Part I—but would allow courts to strike a more appropriately nuanced balance between tribal and governmental interests.[319] Skibine's proposed solution is compelling and elegant, and it is not without precedent: As noted earlier, Congress amended AIRFA once before to permit sacramental peyote use.[320] And Judge VanDyke's concurrence in *Apache Stronghold*—which was the deciding vote against the tribal claimants—would be more amenable to a legislative solution.[321] While a separate legislative solution, would still leave the tribes' religious liberties essentially non-cognizable

315. *Id.*

316. *See* City of Boerne v. Flores, 521 U.S. 507, 534-36 (1997) (striking down RFRA as applied to state law because it required states to provide more protection than the Free Exercise Clause required); *Gonzales*, 546 U.S. at 432-34 (upholding RFRA as applied to federal government action).

317. *See supra* notes 25-28 and accompanying text.

318. Alex Tallchief Skibine, *Towards a Balanced Approach for the Protection of Native American Sacred Sites*, 17 MICH. J. RACE & L. 269, 288-301 (2012).

319. *See id.*

320. *See* American Indian Religious Freedom Act Amendments of 1994, Pub. L. No. 103-344, 108 Stat. 3125 (amending 42 U.S.C. § 1996).

321. *See* Apache Stronghold v. United States, 101 F.4th 1036, 1125-28 (9th Cir. 2024) (en banc) (VanDyke, J., concurring) (criticizing litigants' position as "reparations theory" and arguing that this is the province of Congress).

under the Constitution, RFRA, and RLUIPA; Skibine's solution would be preferable to the currently predominant judicial approach. The cases in this Part will provide support for whichever mechanism is optimal for the result that justice requires, be it the judicial solution defended in this Article or the legislative solution Skibine proposes. Most importantly, these cases will support the presence of the hostile atmosphere principle throughout our body of positive law.

Since this Article largely agrees with and draws from several lines of case law from Barclay and Steele, it is worth reiterating a central, albeit intramural, point of difference between accounts. Barclay and Steele are correct that courts have an unjustifiably narrow conception of coercion, although they may still be understating the severity. They describe the courts' conception as "Nozickean,"[322] but not even Nozick would embrace an entitlement theory incapable of cognizing a redress of past injustices like those suffered by the tribes in these cases.[323] In fact, no general theory of justice comes to mind which warrants a complete bracketing of such historical considerations, at least on moral grounds. Nonetheless, it is equally important to acknowledge the extent of the ostensible, though ultimately inconsequential, difference between the form of coercion present in RLUIPA cases and the sacred land cases. So far, this Article has aimed to provide additional conceptual equipment to account for courts' dogged insistence on the *Roy*-derived distinction between coercion and exaction. Ultimately, what this Article calls a "right to a non-hostile atmosphere" aims to describe a right whose substance thoroughly transcends these distinctions.

A. RLUIPA: A Religious Right to Adequate Space

As Part I detailed, Congress enacted RLUIPA to retain certain religious liberty protections that were abrogated when *City of Boerne v. Flores* overruled RFRA as it applied to the states.[324] Though RLUIPA only covers two areas—land use regulations and policies pertaining to prison inmates—the Supreme Court has held that RFRA and RLUIPA impose the "same standard."[325] Moreover, RLUIPA and RFRA cases are informed by the same pre-*Smith* precedents in their interpretation of what constitutes a substantial burden; and the Supreme Court has cited RFRA cases in support of RLUIPA decisions, and vice versa.[326] The per curiam majority in *Apache Stronghold* overruled *Navajo Nation* to the extent that it limited "substantial burdens" under RFRA to a narrower set of

322. Barclay & Steele, *supra* note 3 at 1323-24.

323. NOZICK, *supra* note 299 at 152-53 (discussing rectification principles that apply where the chain of transfers of property and other holdings is poisoned by historical injustices).

324. *See* Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc to 2000cc-5); Cutter v. Wilkinson, 544 U.S. 709, 714-15 (2005) (describing RLUIPA as a congressional response to City of Boerne v. Flores, 521 U.S. 507 (1997)).

325. Holt v. Hobbs, 574 U.S. 352, 358 (2015).

326. *See, e.g.*, *Holt*, 574 U.S. at 356-57; Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 695, 729 n.37 (2014).

circumstances than RLUIPA.[327] Thus, even if the extension of RLUIPA is different in terms of the specific kinds of government actions, plaintiffs, and federalism concerns it addresses, the form of substantial burdens and the considerations that inform them are the same.

The per curiam opinion in *Apache Stronghold* held that preventing access to religious exercise is an instance of a substantial burden.[328] As Chief Judge Murguia's dissent noted, it is strange for the same case to reach a decision adverse to the tribes while it embraces "preventing access" and denying "equal . . . rights, benefits, and privileges" as instances of substantial burdens.[329] In his concurrence, Judge Nelson—the only signatory to both the per curiam opinion and Judge Collins's en banc majority opinion—offered some explanation of his rationale:[330] He embraced the *result* of *Navajo Nation* but not its *framework*, interpreting the more expansive categories of substantial burdens in the per curiam opinion as still constrained by *Lyng*'s analysis and consequently by the positive-negative, coercion-exaction distinction.[331]

Parts I and II argued that a precise, good-faith articulation of how the tribes are being harmed in sacred land cases requires the incorporation of their history into that description: what land and cultural cohesion was historically taken from them, what sorts of ongoing burdens they faced since that initial period of persecution, and what opportunities remained in modern times for them, up until the complained-of government action. In RLUIPA land use cases in several circuits, the unavailability of land suitable for religious worship has been found to constitute a substantial burden even without the unique sociohistorical circumstances that attend tribal litigants.[332] The Seventh Circuit's RLUIPA formulation bears a striking resemblance to the non-hostile atmosphere principle: A substantial burden exists where the government action bears a "direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable."[333] Although the Seventh Circuit has been inconsistent in its application of this test, it has found a substantial burden where religious collectives were denied permission to construct worship spaces suitable for their religious practices and missions.[334] In *Saints Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*, Judge Posner emphasized that the hurdle to worship

327. Apache Stronghold v. United States, 101 F.4th 1036, 1043 (9th Cir. 2024) (en banc) (per curiam).

328. *Id.*

329. *Id.* at 1043-44; *id.* at 1146 (Murguia, C.J., dissenting).

330. *Id.* at 1091-92 (Nelson, J., concurring).

331. *See id.*

332. *See* Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter, 456 F.3d 978, 992 (9th Cir. 2006); World Outreach Conf. Ctr. v. City of Chicago, 591 F.3d 531, 538-39 (7th Cir. 2009).

333. C.L. for Urb. Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003). The Seventh Circuit has applied this test in the prison inmate context. Koger v. Bryan, 523 F.3d 789, 799 (7th Cir. 2008).

334. *See* Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 901 (7th Cir. 2005); *World Outreach Conf. Ctr.*, 591 F.3d at 537-38.

need not be "insuperable" to be "substantial": Even if there were another parcel of land on which the church could build an adequate space, it is sufficient to be "substantial" that it would bear considerable delay, uncertainty, and expense in doing so.[335] Circuits adopting this principle have, importantly, relied on *Sherbert*, which is a common root of RFRA and RLUIPA.

While other circuits addressing this issue under RLUIPA have ostensibly adopted a coercion-oriented test,[336] they have frequently reached similar results on similar grounds as the aforementioned Seventh Circuit decisions. Most notably, Judge Bea's[337] opinion in *Guru Nanak Sikh Society of Yuba City v. County of Sutter* held that a substantial burden existed where a county government denied a permit to a Sikh nonprofit seeking to build a temple.[338] Though the court found it unnecessary to decide whether "failing to provide a religious institution with a land use entitlement"[339] constituted a substantial burden—a quintessential characterization of a positive right[340]—it found that there was a substantial burden because of the unlikelihood that any of the nonprofit's future permits would be successful.[341] In other words, it was unlikely that the county would make any parcel of land available on which they could construct the temple.

Other circuits have similarly found that a substantial burden exists where it is uncertain or unlikely that a religious group would be able to build or modify structures adequate for its religious observances or its religious mission.[342] Even in a case with an adverse result for the religious group, the Ninth Circuit acknowledged that "a place of worship . . . consistent with . . . theological requirements [is] at the very core of the free exercise of religion."[343]At least one

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335. 396 F.3d at 901.

336. *See, e.g.*, *Midrash Sephardi*, 366 F.3d at 1227; Bethel World Outreach Ministries v. Montgomery Cnty. Council, 706 F.3d 548, 556 (4th Cir. 2013) (collecting cases following the coercion approach).

337. Judge Carlos Bea was the author of the majority opinion in *Navajo Nation* and a partial concurrence and partial dissent in *Apache Stronghold*, each of which was adverse to the tribal claimants. *See* Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058 (2008); Apache Stronghold v. United States, 101 F.4th 1036, 1065 (2024) (Bea, J., dissenting in part and concurring in part).

338. Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter, 456 F.3d 978, 981 (9th Cir. 2006).

339. *Id.* at 989.

340. *See, e.g.*, Jackson v. City of Joliet, 715 F.2d 1200, 1203-04 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1983); (characterizing a positive right as one asking for services and help from the government); Jorge M. Farinacci-Fernós, 41 HASTINGS INT'L & COMP. L. REV. 31, 43-46 (describing a common account of positive rights as those that "compel action" for sake of right-holder).

341. *Guru Nanak*, 456 F.3d at 991-92.

342. *See* Westchester Day School v. Village of Mamaroneck, 504 F.3d 338, 349 (2d Cir. 2007); Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 901 (7th Cir. 2005); *World Outreach Conf. Ctr.*, 591 F.3d at 537-38; *see also* Thai Meditation Ass'n of Ala. Inc. v. City of Mobile, 980 F.3d 821, 828-33 (11th Cir. 2020) (reversing the dismissal and remanding for consideration of whether the city's denial of a Buddhist organization's zoning permit applications created a substantial burden).

343. Int'l Church of the Foursquare Gospel v. City of San Leandro, 673 F.3d 1059, 1069-

RLUIPA land use decision has addressed the awkward fit between the language of coercion and the land use context:

> When a municipality denies a religious institution the right to expand its facilities, it is more difficult to speak of substantial pressure to change religious behavior, because in light of the denial the renovation simply cannot proceed. Accordingly, when there has been a denial of a religious institution's [zoning] application, courts appropriately speak of government action that directly *coerces* the religious institution to change its behavior.[344]

The Tenth Circuit has similarly held coercion to be the appropriate label when the religious plaintiff is left with no choice in the matter: when they do not even have a choice to incur a fine or other cost in pursuing religiously mandated conduct).[345] One can also recognize this principle in the Eleventh Circuit's oft-cited substantial burden test, which directs a court to consider various factors in its inquiry as to whether a plaintiff has experienced "significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly."[346] This "significant pressure" might require a plaintiff to "forego religious precepts."[347] Among the factors of this inquiry, cited by other circuits, are: (1) whether the plaintiffs have demonstrated a genuine need for new or more space, (2) the extent to which a governmental decision "effectively deprives the plaintiffs of any viable means . . . to engage in protected religious exercise," and (3) whether the "alleged burden is properly attributable to the government . . . or whether the burden is instead self-imposed."[348]

While the government actions in sacred land cases are certainly not land uses covered by RLUIPA, the substantial burden inquiry applied to RLUIPA claims is instructive for several reasons. First, courts applying RLUIPA seem to be willing to recognize a right that is arguably positive in character—a right of access to suitable land. If RFRA and RLUIPA apply the same standard, as the Supreme Court has held,[349] then it is difficult to see the hesitance to recognize positive rights in the RFRA context as anything other than blind obedience to *Lyng*. The difference between the "substantial burden" provisions under RFRA and

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70 (9th Cir. 2011) (quoting Viet. Buddhism Study Temple in Am. v. City of Garden Grove, 460 F. Supp. 2d 1165, 1171 (C.D. Cal. 2006)).

344. *Westchester Day School*, 504 F.3d at 349.

345. Yellowbear v. Lampert, 741 F.3d 48, 56 (10th Cir. 2014).

346. *See Thai Meditation*, 980 F.3d at 829-30 (quoting Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004)).

347. *Id.* at 830 (quoting *Midrash*, 366 F.3d at 1227).

348. *See id.* at 831-32 (providing the factors the district court must consider in determining whether zoning regulations substantially burdened an organization proposing a Buddhist meditation and retreat center); Vision Warriors Church, Inc. v. Cherokee Cnty. Bd. of Comm'rs, No. 22-10773, 2024 WL 125969, at *1, 7-8 (11th Cir. Jan. 11, 2024) (applying the factors from *Thai Meditation* to a religious organization operating a substance abuse rehabilitation center); Lovelace v. Lee, 472 F.3d 174, 187 (3d Cir. 2006); Livingston Christian Schs. v. Genoa Charter Tp., 858 F.3d 996, 1003-04 (6th Cir. 2017).

349. Holt v. Hobbs, 574 U.S. 352, 357-58 (2015); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 695-96 (2014); *see also Apache Stronghold*, 101 F.4th at 1100 (Nelson, J., concurring).

RLUIPA is one of extension and not meaning—the latter extends to state and federal governments in specific contexts, the former to all other instances of religious exercise. Second, RLUIPA decisions recognize one of the central claims defended in Part II: There are preconditions to religious liberty, including having access to the space necessary to fulfill one's religious dictates, and the government-caused unavailability of that space precludes meaningful religious liberty. Third, as the prison inmate cases discussed below make clear, it is precisely the worshipper's "subjective" spiritual fulfillment—what they take to be religious precepts—that is protected, contrary to the currently predominant judicial attitude in sacred land cases. Fourth, RLUIPA decisions have protected the construction and expansion of not just houses of worship, but schools,[350] rehabilitation centers,[351] recreational and living facilities,[352] and an outdoor prayer trail,[353] all as components of the religious activity and mission of religious entities. "Souls," Judge Posner quipped in *World Outreach Conference Center v. City of Chicago*, "aren't saved just in church buildings."[354] Though sacred land cases involve neither land use regulations nor the tribes' own property, the juxtaposition of Posner's statement and Subchief Uqualla's in *Navajo Nation* is striking: "The San Francisco Peaks would be like our tabernacle, our altar to the west."[355]

The blurring—and perhaps obliteration—of the positive-negative rights distinction is even clearer in RLUIPA cases involving inmates, as Barclay and Steele demonstrate.[356] Federal courts have regularly found substantial burdens where a prisoner was denied access to suitable spaces, instrumentalities, or other necessary conditions for religious observances. In *Yellowbear v. Lampert*, the Tenth Circuit held, in an opinion from then-Judge Gorsuch, that lack of access to a sweat lodge at the prison was "easily" a substantial burden.[357]

> As Mr. Yellowbear understands his faith, it requires at least *some* access to a sweat lodge. The prison refuses *any* access. This isn't a situation where the claimant is left with some degree of choice in the matter and we have to inquire into the degree of the government's coercive influence on that choice. The prison's policy here falls easily within *Abdulhaseeb*'s second category—flatly prohibiting Mr. Yellowbear from participating in an activity motivated by a sincerely held religious belief.[358]

Other RLUIPA cases, including the above-referenced

350. Westchester Day School v. Village of Mamaroneck, 504 F.3d 338, 352-53 (2d Cir. 2007).

351. *Vision Warriors*, 2024 WL 125969, at *7-8.

352. *World Outreach Conf. Ctr.*, 591 F.3d 531, 537-38 (7th Cir. 2009).

353. Catholic Healthcare Int'l, Inc. v. Genoa Charter Twp., 82 F.4th 442, 451 (6th Cir. 2023).

354. 591 F.3d 531, 535 (7th Cir. 2009).

355. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1098 (2008)

356. Barclay & Steele, *supra* note 3, at 1333-35.

357. *Yellowbear*, 741 F.3d 48, 56 (10th Cir. 2014).

358. *Id.*; *cf.* Abdulhaseeb v. Calbone, 600 F.3d 1301, 1315 (10th Cir. 2010) ("We conclude that a religious exercise is substantially burdened under [RLUIPA] when a government . . . (2) prevents participation in conduct motivated by a sincerely held religious belief").

Abdulhaseeb v.Calbone, have held that failures to provide various other instrumentalities of worship constitute substantial burdens, including religious diets,[359] scented oils,[360] religious leaders,[361] texts,[362] and clothing or facial hair.[363] Cutter v. Wilkinson[364] clarifies that this applies to a wide variety of non-mainstream and unusual faiths that don't fall within the theological framework of the Abrahamic faiths.[365] As Barclay and Steele rightly observe, this line of cases defends the idea that the greater burden—making a religious exercise impossible—is included in the lesser burden—of discouraging that exercise or making it more difficult.[366]

B. Free Speech: The Availability of Ample Alternate Channels

It is difficult to imagine any meaningful sense of citizen autonomy without a Free Exercise Clause *and* a Free Speech Clause, particularly one that enables citizens to exercise the "two moral powers" Rawls emphasizes.[367] Though there are good reasons for the different principles each clause has developed and the doctrinal avenues each clause has traveled, there is also an important sense that they stem from a common root. Thus, although the Free Speech Clause is another order of magnitude distinct from RFRA and the Free Exercise Clause as compared to RLUIPA, the form and substance of the rights included in its bundle is instructive here. As constitutional law professor Sherif Girgis notes, at least one federal circuit has recognized the fruitfulness of using free speech doctrine in this way.[368] More than anything, free speech caselaw evidences a recognition of three principles applicable in sacred land cases: (1) A purely negative right of free speech is meaningless, at least in some contexts, without a positive right of access to an adequate forum; (2) concerns about the proliferation of ad hoc claims are best left to a balancing test, rather than making claims of that form entirely non-cognizable; and (3) an inclusive First Amendment ought to be responsive to a diverse set of speakers whose expressions take diverse forms. Regarding the first of these principles, courts have been very willing to focus on the *nature of the harm* to the speakers in such cases and not merely the *form of the burden*. More specifically, they have treated as cognizable a speaker's lack of access to an adequate forum for their purposes. Perhaps most tellingly for present

359. *See* Koger v. Bryan, 523 F.3d 789, 798 (7th Cir. 2008)*;* Baranowski v. Hart, 486 F.3d 112, 125 (5th Cir. 2007); *Abdulhaseeb*, 600 F.3d at 1319-20; Jehovah v. Clarke, 798 F.3d 169, 177 (4th Cir. 2015).

360. Nance v. Miser, 700 F. App'x 629, 631-32 (9th Cir. 2017).

361. *See* Barclay & Steele, *supra* note 3, at 1334 & n.213 (collecting cases).

362. Washington v. Klem, 497 F.3d 272, 286 (3d Cir. 2007).

363. *Holt*, 574 U.S.at 369.

364. 544 U.S. 709 (2005).

365. *See id.* at 723-24.

366. *See* Barclay & Steele, *supra* note 3, at 1335.

367. JOHN RAWLS, POLITICAL LIBERALISM 19 (1993).

368. Girgis, *supra* note 140, at 1759, 1762 n.9 (citing Mahoney v. Doe, 642 F.3d 1112, 1117, 1121 (D.C. Cir. 2011)).

purposes, the Supreme Court has considered the historical marginalization of the group at issue in determining if the forum is adequate.[369]

This comparison is a necessary complement to the Subpart A because the government is preventing the tribes from doing something in a slightly different sense than in cases involving prisoners or zoning regulations. In each of those scenarios, claimants' bodies are restrained from doing something: Were it not for their physical confinement, prisoners could set up the sweat lodge, purchase scented oils, or prepare their own halal and kosher food; and property owners could construct a church or temple with whatever specifications they wished. The substantial burdens in these cases originate from government actors preventing the worshippers from moving their bodies in certain ways.[370] In the sacred land cases, this is not the case—perhaps with the exception of *Apache Stronghold*.

Though Barclay and Steele's idea of a "baseline of coercion" is largely apt,[371] the sacred land cases involve either a different species of coercion or a slightly distinct sort of harm. Yet, they are just as violative of religious liberty, as ultimately, it is a distinction without difference. Whether government action is labeled as coercive or non-coercive, the central argument of this Article is that this distinction is immaterial: The crux of the issue is whether the claimants are being deprived of something to which they ought to have access.

This line of reasoning is evident in doctrine surrounding content-neutral regulations in public forums which, as in sacred land cases, are located on government-owned or operated land. In such cases, content-neutral regulations on speech pass constitutional muster only when they (1) can be justified without reference to the content of the regulated speech, (2) are narrowly tailored to serve a significant government interest, and (3) leave ample alternative channels for communication of information.[372] The "ample alternative channels" requirement—like the right to a non-hostile atmosphere—transcends the positive-negative distinction.[373] It is true that the government's duty includes one of non-interference—not preventing speakers from speaking on private property—but it also includes a substantial positive component—providing the space and conditions for the relevant sort of expression.[374]

As courts have recognized in assessing the adequacy of alternate channels, a meaningful free speech right does not permit the government to simply substitute one form of speech for another.[375] Some circuits have been explicit that the

369. *See* NAACP v. Button, 371 U.S. 415, 429-31 (1963).

370. *See* Nance v. Miser, 700 F. App'x 629, 631-32 (9th Cir. 2017); Koger v. Bryan, 523 F.3d 789, 799 (7th Cir. 2008)*;* Baranowski v. Hart, 486 F.3d 112, 125 (5th Cir. 2007); Abdulhaseeb v. Calbone, 600 F.3d 1301, 1319-20 (10th Cir. 2010); Jehovah v. Clarke, 798 F.3d 169, 177 (4th Cir. 2015); *Yellowbear*, 741 F.3d 48, 56 (10th Cir. 2014).

371. Barclay & Steele, *supra* note 3, at 1301.

372. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

373. *See* Girgis, *supra* note 140, at 1785.

374. *Id.*

375. *See* City of Ladue v. Gilleo, 512 U.S. 43, 56 (1994); Project Veritas v. Schmidt, 72

adequacy of the alternate channel must be assessed from the speaker's point of view, as the First Amendment requires courts to "presume that speakers, not the government, know best both what they want to say and how to say it."[376] In justifying the restriction on one form of speech, it is inadequate to suggest the speaker could have delivered their message in another form, as they get to choose the means of delivery.[377] The Ninth Circuit, for instance, struck down a law prohibiting unannounced video recordings of conversations.[378] They rejected arguments that "after-the-fact reporting of an undercover interview" or engaging in other forms of investigative journalism were adequate alternatives, as these alternate forms of speech would not be effective means of achieving the speaker's purpose.[379] In that case and other federal decisions, it is constitutionally problematic to leave alternatives that are less effective means for the speaker's purpose, from their perspective. This is incongruous with the courts' flippant attitude in sacred land cases that tribal worshippers could still visit the general area of a sacred site that had been desecrated or destroyed.

More relevantly, it has long been held insufficient to relegate speech to a specific zone if doing so would deprive the speakers of the opportunity to reach a specific audience. Thus, the government must make accessible the sort of space that is suitable for the speaker's message and purpose. In *Bery v. City of New York*,, the Second Circuit struck down a law that prevented artists from displaying and selling their artwork on sidewalks, rejecting the government's contention that there were other adequate channels available for their speech, such as art museums, restaurants, or street fairs.[380] In *Bery*, the court found displaying and selling artwork on the street a "different form of communication . . . not possible in the enclosed, separated spaces of galleries and museums" because it reaches unique audiences, including those who (1) may have never thought of purchasing art before encountering the artist, or (2) feel alienated by other venues where art

F.4th 1043, 1065 (9th Cir. 2023).

376. Weinberg v. City of Chicago, 310 F.3d 1029, 1041 (7th Cir. 2002) (quoting Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 790-91 (1988)).

377. *See* City of Ladue v. Gilleo, 512 U.S. 43, 56 (1994) (holding that display of sign in one's residence carries a message "quite distinct" from conveying the same text or picture by other means); United Bhd. of Carpenters Local 586 v. NLRB, 540 F.3d 957, 969 (9th Cir. 2008) (holding that union members specifically had right to display signage within mall as an extension of their right to choose their means of expression to reach their intended audience); Courthouse News Serv. v. Planet, 947 F.3d 581, 594 (9th Cir. 2020) (finding that right of access to obtaining public records for reporting the news implies a right to contemporaneous news); McCraw v. City of Oklahoma City, 973 F.3d 1057, 1078-79 (10th Cir. 2020) (striking down restriction on expressive activity on road medians, as relegating speech to sidewalks or roadsides would impermissibly restrict plaintiffs' chosen means of speech and intended target audience).

378. Project Veritas v. Schmidt, 72 F.4th at 1064-65 (finding announced recordings an inadequate alternative to unannounced, unfiltered recordings, as former would considerably change speaker's message).

379. *Id.* at 1065-66.

380. Bery v. City of New York, 97 F.3d 689, 696-98 (2d Cir. 1996).

is displayed.[381]

Where a speaker's message and purpose *necessarily* involve a particular location and audience, federal courts have held there to be no substitute for that location, and the area necessary to reach that audience must be made available to the speaker.[382] In *Bay Area Peace Navy v. United States*, the plaintiff was an anti-war non-profit that had historically engaged in counter-war demonstrations during "Fleet Week."[383] Their demonstrations involved amassing their own "fleet" of boats in the water near both the military boats and communicating their messages to the audience assembled for Fleet Week using various means, including a children's choir, signs, and banners.[384] Here, the Ninth Circuit struck down the Coast Guard's 75-yard "security zone" around the pier on the day of the Navy parade, as this made it difficult or impossible for the Peace Navy's intended audience—the Fleet Week attendees—to hear or read their water-borne messages.[385] That is to say, given the unique nature of its audience and the purpose of its messages, there were no alternate channels of communication. Analogously, in *Weinberg v. City of Chicago*, the Seventh Circuit struck down a law prohibiting street peddling in certain areas of the city, including the United Center where the Chicago Blackhawks played.[386] The court held that Mark Weinberg—who was selling copies of a book critical of Blackhawks owner Bill Wirtz—had no adequate, alternative channels of communication: His intended audience, after all, was Blackhawks fans.[387] In these and other federal decisions, a speaker with a message tied to a specific place and audience is entitled to access to that space .[388] The judicial focus is not on the *form* of the deprivation of access, but merely the *fact* of it; and as argued in Part II, this was also the case in *Yoder* and ought to be the case in sacred land decisions.[389]

Where governmental actors have successfully made arguments for the public interest by citing concerns about captive audiences, inability to maintain public safety, or disturbances of the peace, they have done so after the plaintiff has made

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381. *Id.* at 698.

382. *See* Bay Area Peace Navy v. United States, 914 F.2d 1224, 1229 (9th Cir. 1990); Weinberg v. City of Chicago, 310 F.3d 1029, 1042 (7th Cir. 2002).

383. Bay Area Peace Navy v. United States, 914 F.2d 1224, 1225-26 (9th Cir. 1990). During "Fleet Week," the United States Navy puts on a parade and demonstration that includes the display of Naval ships and a Blue Angels air show. *See id.* at 1225. There are over 3,000 invited guests and 500,000 in-person observers. *Id.*

384. *Id.* at 1225-26.

385. *Id.* at 1227-30.

386. Weinberg v. City of Chicago, 310 F.3d 1029, 1033, 1036 (7th Cir. 2002).

387. *Id.* at 1041-42.

388. *See, e.g.*, McCullen v. Coakley, 573 U.S. 464, 486-89 (2014) (rejecting argument, in striking down law banning abortion protestors from public sidewalks, that protestors could engage in other forms of expressions); Students Against Apartheid Coal. v. O'Neil, 660 F. Supp. 333, 339-40 (W.D. Va. 1987) (university regulation prohibiting erection of protest shanties on lawn of building where Board of Visitors meets is not rendered valid by permission to erect shanties elsewhere on campus, in place not visible to members of Board, the intended audience), *aff'd*, 838 F.2d 735 (4th Cir. 1988).

389. *See* Wisconsin v. Yoder, 406 U.S. 205, 219-20 (1972).

a *prima facie* case and the burden has shifted to the government to justify the restriction on speech. In cases with results adverse to the claimants, the would-be speakers, courts have found (1) there are adequate alternative channels, and (2) the government has made an adequate showing that its interest is sufficient to justify the restriction.[390] Concerns about a flood of litigation or frustration of a government purpose did not take place prior to the government's justification of its interests. In *Ward v. Rock Against Racism*, for instance, the Court held there to be an adequate, alternate channel for an organization challenging a noise ordinance on the grounds that it prevented them from using their own sound equipment and technicians for a concert.[391] Because the city provided its own equipment and technicians, there was a channel available that communicated a substantially similar message in a similar form and to the same sort of audience.[392] In *Heffron v. International Society for Krishna Consciousness*, the Court upheld a state fair rule that prohibited Hare Krishna from distributing literature and soliciting funds on state fairgrounds.[393] The Court's justification was that (a) the claimants could engage the same audience outside the fairground, including distributing literature and soliciting funds, (b) the claimants remained free to engage in various other forms of speech within the fairground, and (c) the restriction was justified by the interest that the state had in maintaining order and safety within the fairgrounds.[394] Thus, access to a specific location for a particular form of expressive conduct may not be guaranteed where (1) achieving the speaker's purpose is not dependent on utilizing a particular location, and (2) the government narrowly tailors the speech restriction based on how the conduct at issue would frustrate its purpose.[395] In *Lyng* and its progeny, by comparison, the court did not consider factor (1) and did not require the government to make a showing like factor (2).

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390. *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 725-30 (2000) (finding statute creating buffer zone around persons near hospitals to be reasonable, both due to state's demonstrated interest in maintaining order & privacy for persons near hospital and its leaving ample channels open for speakers outside hospitals); Heffron v. Int'l Soc. for Krishna Consciousness, Inc., 452 US 640, 650-51, 654-55 (1981) (finding the state fair's prohibition of soliciting funds and distributing literature on fairgrounds as reasonable, as speakers could still do so outside fairgrounds and the state had demonstrated an interest in limiting congestion and maintaining safety within the fair).

391. Ward v. Rock Against Racism, 491 U.S. 781, 784, 802 (1989).

392. *Id.* at 800-02.

393. *Heffron*, 452 US at 640, 654-55.

394. *Id.* at 651, 654-55.

395. *See, e.g.*, *Ward*, 491 U.S. at 801-02; *Heffron*, 452 U.S. at 654-55; United States v. Kokinda, 497 U.S. 720, 738 (Kennedy, J., concurring in the judgment) ("[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" (quoting *Ward*, 491 U.S. at 791); *cf. Kokinda*, 497 U.S. at 735-36 (affirming that the government need only "adopt reasonable regulations, not 'the most reasonable or the only reasonable' regulation possible" (quoting Cornelius v. NAACP Leg. Def. & Educ. Fund, Inc., 473 U.S. 788, 808 (1985))).

C. Free Exercise: The Rule Against Targeting Religious Groups

Much of this Article has argued that the judiciary's Waldronian attitude—that further tribal losses are simply the way of the world—is often adopted in bad faith.[396] This approach ignores the social and historical context of the tribes; focuses on an isolated government act; and then concludes that it has exercised neutrality, which Kymlicka has criticized as "benign neglect."[397] Judicial endorsement of this attitude permits the government to benefit from its own past wrongdoing: It causes the precipitous decline of a culture through coerced treaties, intentional cultural destruction, and land displacement, essentially citing that wrongdoing as justification for rendering that culture's destruction more complete. Courts should not permit the government to do gradually what they have said the government may *not* do to religious minorities in a sweeping manner. The non-recognition of the hostile atmosphere principle permits the government to do just that: Greater destruction of Indian cultures has licensed the government to take increasingly *less* care when it comes to managing sacred sites, as *Slockish* indicates.[398]

It is well-established that a government action violates a cultural minority's Free Exercise rights when it targets that religious minority, or when its object or purpose is the suppression of religion or religious conduct.[399] In *Church of Lukumi Babalu Aye v. Hialeh*,, the president of a Santeria church announced plans to open a house of worship, museum, and cultural center in Hialeh, Florida for purposes including bringing the church's previously-secretive animal sacrifice practices into the open.[400] Shortly after learning of the planned church, the Hialeh City Council held an emergency public meeting and subsequently passed several ordinances forbidding the possession of animals for sacrifice or slaughter.[401] Though the ordinances cited ostensibly secular concerns, like cruelty to animals or public health and welfare, it included various exemptions for other, non-religious animal slaughter.[402]

In finding the laws violated the church's free exercise rights, the Supreme Court looked not just to the text of the law, which tellingly used the word

396. *See* Waldron, *supra* note 1, at 762.

397. KYMLICKA, *supra* note 214, at 108.

398. *See* Slockish v. U.S. Dept. of Transp., No. 21-35220, 2021 WL 5507413 (9th Cir. Nov. 24, 2021) (dismissing case as moot because, among other reasons, project was already complete and site had already been destroyed); *see also* Slockish v. U.S. Fed. Highway Admin., 682 F. Supp. 2d 1178, 1197 (D. Or. 2010) (detailing limited extent to which federal agencies made any effort at consultation with tribes).

399. *See* Masterpiece Cakeshop v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1731 (2018); Trinity Lutheran Church of Columbia v. Comer, 582 U.S. 449, 458 (2017).

400. Church of Lukumi Babalu Aye, Inc. v. Hialeh, 508 U.S. 520, 525-26 (1993). Santeria involves the use of ritualistic animal sacrifice in many instances, including at birth, marriage, death rites, healing rituals for the sick, the initiation of clergy, and annual celebrations. *Id.* at 525.

401. *Id*. at 526-27.

402. *Id.* at 534-37; *see also id.* app. (appendix including full text of ordinances at issue).

"sacrifice," but the various contextual indicators that the church was the sole and intended target.[403] The resolution documented citizens' concerns about "certain religions" engaging in animal sacrifice and was passed immediately after the Santeria church's announcement.[404] The Court further noted that the legislation's practical operation was an indicator of a religious motivation, as it seemed to only impact Santeria practices.[405] Finally, and most relevant here, the Court turned to Equal Protection Clause cases for guidance on how to determine whether a government action is neutral in purpose.[406] In those cases, circumstantial evidence of a discriminatory intent—or here, a desire to suppress religious conduct—included "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history."[407] What the Court found most significant as circumstantial evidence were statements from various council members and the audience demonstrating animus against the Church.[408] The Court has more recently reinforced this principle that contemporaneous statements made by public officials associated with the challenged legislation can be indicators of religious targeting.[409]

While the targeted, precipitating governmental acts in *Church of Lukumi* were much closer in time to the relevant harm than in any of the sacred land cases, they were no more causally related than the government actions that sought to eradicate tribal culture.: Explicit governmental directives in the nineteenth and twentieth centuries had the express goal of suppressing tribal religions. The circumstances that led to the possession and management of tribal lands by federal agencies were suspect, coercive, and/or downright forcible, as the executive branch and its agents contemporaneously engaged in intentional and organized efforts to suppress tribal religious practices and tribal cultures. Today, many of these offices and their assignees still enjoy the fruits of these suppressive efforts and their continued effects of "virtually destroy[ing]" native tribes' abilities to practice their religions.[410] While there were no public statements of animus behind the transfer of Oak Flat, there statements of animus behind the official acts in the nineteenth and twentieth centuries that made this transfer possible. The relevant historical background may have been protracted,

403. *Id.* at 534-40.

404. *Id.* at 526, 535 (quoting City of Hialeah, Fla., Resolution No. 87-66 (June 9, 1987), *reprinted in Hialeh*, 508 U.S. app. at 548).

405. *Hialeh*, 508 U.S. at 535.

406. *Id.* at 540, 542.

407. *Id.* at 540 (citing Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267-68 (1977)).

408. *Id.* at 541-42.

409. *See* Masterpiece Cakeshop v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1729-30 (2018); *see also* New Hope Family Servs., Inc. v. Poole, 966 F.3d 145, 165-69 (2d Cir. 2020) (applying the *Church of Lukumi* factors in finding contextual evidence of government animosity toward religion).

410. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451-52 (1988) (quoting Nw. Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 692 (1986)).

but it had a direct bearing on the destruction of Oak Flat in *Apache Stronghold* and the High Country in *Lyng*.[411]

Permitting the government to accomplish this slowly where it cannot do so immediately provides the sort of "perverse incentive" described in Part II, whereby the government benefits from committing prior injustices.[412] It is not that the targeting rule *itself* is sufficient when applied to the sacred land cases, but that it would be *incongruous* for courts to both recognize it and permit it as the final act in a chain of actions that have religious suppression as their explicit purpose. The relevance of this observation depends on two important details in each sacred land case: (1) the historical circumstances of the tribe at issue, particularly its relations with the U.S. government, and (2) the extent to which this conduct can be traced to the present destruction or desecration of sacred land. Each of these findings would then have a bearing on (d), the proximate causation element of the non-hostile atmosphere test, or the degree of government causation.

D. The Trust Responsibility: Using Land for the Tribe's "Happiness and Prosperity"

There is one, final area worth considering, which the Apache's counsel asserted as relevant: the government's trust responsibility to American Indian tribes and other, related sources of law recognizing the unique history of the tribes.[413] Recall Kymlicka's argument that being deprived of one's societal culture is tantamount to the loss of one's autonomy.[414] Considering this argument alongside *Yoder* and the cases discussed in this Part, it is clear that (a) different societal cultures face unique obstacles to exercising their moral powers, and (b) governmental actors must be cognizant of these obstacles, even if they aren't dispositive, to avoid running afoul of cultural minorities' First Amendment rights. There are doctrines essentially codifying recognition of these obstacles as applied to the tribes and the loss of opportunity for meaningful civil liberties that come with those obstacles. As such, these doctrines ought to further inform judicial understanding of tribal religious liberty in some way.

Kymlicka argues that where a history of governmental injustices is responsible for an atmosphere that is particularly hostile to a societal culture, some cultural minorities are entitled to group-differentiated rights, or rights that vest in an individual by virtue of their group membership.[415] It is uncontested that many tribes already enjoy *certain* group-differentiated rights that are grounded in treaties with certain tribes or statutes covering specific areas of tribal and

411. *See* 101 F.4th 1036, 1046 (9th Cir. 2024) (en banc); 485 U.S. 439, 448-49 (1988).

412. *See supra* note 253 and accompanying text.

413. Opening Brief for Plaintiff, Apache Stronghold v. United States, 38 F.4th 742 (9th Cir. 2022) (No. 21-15295).

414. *See* KYMLICKA, *supra* note 214, at 80-93.

415. *See* KYMLICKA, *Justice and Minority Rights*, *in* MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS, *supra* note 214, at 107.

governmental activities.[416] While the federal government trust has been interpreted unevenly and remains the subject of considerable controversy, it creates some obligations to act in the tribes' best interests when it comes to matters like land and resource management.[417]

The purpose of this Subpart is not to suggest relevant sources of law ground specific, religiously-oriented, group-differentiated rights. As Barclay and Steele note, the direct applicability of the trust doctrine to individual rights remains an open and unclear question. On the contrary, the "stick" to which the tribes are entitled is one we all possess, but which we take for granted due to the ease with which we exercise it. Instead, these sources of law support something more modest: another thumb on the scale when considered in tandem with the reading of *Yoder* in Part II and the other areas of law discussed in this Part.[418] Parts II and III argued the tribes exist in an atmosphere which the government (a) intentionally made hostile to them in the past, and (b) remains hostile to their survival due to current government actions that render the atmosphere even more hostile by furthering the impact of the past governmental actions. This Part argues that courts have recognized rights analogous to those the sacred land plaintiffs seek, even among speakers and worshippers to whom there is no such historically-grounded special duty. At a minimum, it stands to reason that claimants who are owed such special duties would at least enjoy analogous liberties, if not a rule of construction that would regard these liberties more favorably to account for the courts' trust responsibility.

The earliest conceptions of the trust responsibility arise from Chief Justice John Marshall in the 1830s, where he found a "protector" or "ward to . . . guardian" relationship arising out of treaties with individual tribes and the government's assumption of this role through other sources of law (including the Indian Commerce Clause).[419] Though the government purportedly holds tribal lands in trust for the "benefit" for the tribes, subsequent decisions to Marshall's gave Congress wide latitude and a nearly non-justiciable presumption of "good faith"

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416. *See* 42 U.S.C. § 1996a (AIRFA peyote amendment); 25 U.S.C. §§ 3001-3013 (Native American Graves Protection and Repatriation Act); *id.* §§ 1901-1963 (Indian Child Welfare Act); Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting & Fishing Rights*, 30 ENVTL. L. 279 (2000) (summarizing history of fishing and hunting rights).

417. *Compare* Arizona v. Navajo Nation, 143 S. Ct. 1804, 1813-14 (2023) (restricting substance of trust responsibility to particular treaty language), *with* United States v. Mitchell, 463 U.S. 206, 222, 228 (1983) (permitting loosely related sources of substantive law to jointly form substance of trust relationship). *See also* Arizona v. Navajo Nation, 599 U.S. 143 S. Ct. 1804, 1829-32 (2023) (Gorsuch, J., dissenting) (explaining the majority's misapprehension of Indian trust doctrine); Haaland v. Brackeen, 143 S. Ct. 1609, 1641-1662 (2023) (Gorsuch, J., concurring) (detailing the Court's misapprehension of Congressional plenary power in governing Indian affairs and its trust responsibility).

418. *Cf.* Choctaw Nation v. Oklahoma, 397 U.S. 620, 630-31 (1970).

419. Worcester v. Georgia, 31 U.S. 515, 555 (1832); Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831); *see* Monte Mills, *Beyond a Zero-Sum Federal Trust Responsibility: Lessons from Federal Indian Energy Policy*, 6 AM. INDIAN L.J. 36, 44-45 (2017); Logan Cooper, Comment, *Rising Tides, Rising Obligations: Enforcing Tribal Trust Responsibility for Climate Change Litigation*, 9 ARIZ. J. ENV'T L. & POL'Y 62, 67-68 (2019).

regarding actions it took in managing tribal land, including abrogation of prior treaties.[420] The Court has since given trust responsibility some substance, as Congress no longer enjoys this presumption of good faith once care falls below a floor of guardianship duty.[421] Most notably, Congress cannot take actions tantamount to "spoliation" of tribal land or other resources constituting the *corpus* of the trust[422] and still consider it "good faith" management.[423] While courts have been inconsistent about the extent to which the trust responsibility limits government action, several notable decisions have regarded it as a serious moral responsibility involving the "highest responsibility and trust."[424] At a bare minimum, the language "highest responsibility and trust" implies something much weightier than the duties owed to an arms-length contractual partner.[425]

While more recent decisions leave the precise scope of the trust responsibility in question—as the Court has held that the fiduciary analogy cannot be carried "too far"[426]—the Court has held it applies where there is an existing statutory framework.[427] In *Apache Stronghold*, like other sacred land cases, the presence of both the United States treaty with the Apache and AIRFA provide this sort of foundation.[428] AIRFA declares that the policy of the United States is to "preserve for American Indians their inherent right [to] exercise the[ir] 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."[429] Pursuant to the Apache Treaty of 1852, the government agreed to act in ways conducive to the "prosperity and happiness" of the Apache.[430] If this promise is to be construed in the way the tribe would have understood it at the time,[431] as the Court has recently held treaties must, then the destruction of Oak Flat

420. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 594 (1977) (permitting abrogation of treaty); South Dakota v. Bourland, 508 U.S. 679, 687 (1993).

421. Cooper, *supra* note 409, at 72-74.

422. Seminole Nation v. United States, 316 U.S. 286, 296 (1942).

423. Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 111 (1919); Shoshone Tribe of Indians of Wind River Reservation in Wyo. v. United States, 299 U.S. 476, 497 (1937).

424. *Seminole Nation*, 316 U.S. at 296-97; *see also* Haaland v. Brackeen, 143 S. Ct. 1609 (2023); Arizona v. Navajo Nation, 143 S. Ct. 1804, 1817 (2023).

425. *See Seminole Nation*, 316 U.S. at 296 (finding that trust doctrine implies relationship different than "mere contracting party").

426. United States v. Jicarilla Apache Nation, 564 U.S. 162, 165 (2011).

427. *See* United States v. Navajo Nation, 537 U.S. 488, 506 (2003); *see also* Arizona v. Navajo Nation, 143 S. Ct. at 1831-32 (collecting cases in support of finding broad trust relationship from patchwork of statutes and regulations).

428. *See* Apache Stronghold v. United States, 101 F.4th 1036, 1063-65 (9th Cir. 2024) (discussing relevance of the treaty, but only with brief discussion of trust responsibility).

429. 42 U.S.C. § 1996a.

430. Treaty with the Apaches, Apache Nation-U.S., art. 11, July 1, 1852, 10 Stat. 979.

431. *Cf.* NLRB v. Noel Canning, 573 U.S. 513 (2014) (construing "the recess" in Recess Appointments Clause based on how that term would have been understood at founding and how it would have conformed to historical practices).

couldn't be more contrary to the terms of this treaty.[432]

Ultimately, the takeaway is not that trust responsibility alone must ground the kind of relief tribal claimants are seeking in sacred land cases. Rather, where a governmental action has a bearing on both its trust responsibility and the other sources of law discussed in this Part, it is difficult to imagine what would remain of a trust responsibility that was silent on this issue.

CONCLUSION

The various doctrinal threads from Part III coalesce around the notion of a non-hostile atmosphere. The following propositions, which mirror those defended through the reading of *Yoder* in Part II, arise from the areas of law discussed Part III:

(1) The liberties outlined in the First Amendment and associated statutes protect citizens with a diverse set of expressive needs;

(2) There are necessary, non-fungible instruments and conditions for the meaningful enjoyment of these liberties, including access to a certain kind of space or environment;

(3) The government sometimes takes actions that remove or render inaccessible these necessary conditions, which just as surely renders the right as valueless as actions that are directed at it;

(4) In such cases, equal enjoyment of these liberties requires access to such conditions, whether or not the provision of such access requires more of the government than non-interference; and

(5) The foregoing is particularly true where the actions in proposition (3) were motivated—when viewed in their proper historical context—by a desire to permanently suppress the exercise of the pertinent liberties.

Even in the absence of proposition (5), the Supreme Court recognized Jonas Yoder's right to preserve the atmosphere necessary to maintain Amish communal practices and a realistic chance of passing them on to his children.[433] As Subparts A and B make clear, courts already recognize—pursuant to RLUIPA, which has the "same standard" as RFRA,[434] and the Free Speech Clause—that worshippers must have access to conditions suitable to their expressive purposes as they understand them. This is especially true where, as Part II argues, the religious practices at issue are also constitutive of a societal culture. In sacred land cases, proposition (5) does apply, the instruments of religious practice are unique tracts of land, and a trust responsibility not present in other religious liberty cases, such as *Yoder*, is present here. Thus, the absence of even a cognizable claim in sacred land cases is difficult to square with these doctrinal threads in isolation, and especially difficult when they are considered together.

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432. Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1011 (2019) (collecting cases supporting this rule of construction).

433. *See* Wisconsin v. Yoder, 406 U.S. 205, 217-18, 232-33 (1972).

434. Holt v. Hobbs, 574 U.S. 352, 358 (2015).

It is worth considering, however imperfectly, the experience of the modern-day tribal litigant who had previously been observant of his tribe's traditional religious practices and embedded in its societal culture. At one point in their tribe's history, the sacred site at issue was easily accessible and undisturbed, without the noise or visible presence of modern development or people. Thus, satisfying the conditions necessary for efficacious worship and ritual came naturally. One could easily imagine it being the place of a transcendent spiritual experience or even of spiritual beings. While recreating a similarly quiet, undisturbed, and spiritual setting may have been much more difficult for the tribal worshippers at the time of the sacred land cases, it was still possible.

But the worshipper's possibilities change once government actions like those at issue in the sacred land decisions takes place: All observable characteristics and conditions surrounding it now creating a hostile atmosphere to their way of life, in both phenomenological and logistical ways. Where there was once silence save the sounds of nature, there are now sounds of heavy mining equipment or vehicles on a highway. What once an untouched forest, mountain, or great plain with an uninterrupted horizon was visible, there is now a giant crater or the encroachment of mainstream, industrialized life. In these cases, it is nearly impracticable to experience any of these atmospheres as a center of one's religious community or a place one might commune with the spiritual world. And it is even harder to pass that experience or those beliefs on to subsequent generations, who will never see the High Country, San Francisco Peaks, or Oak Flat in the form their ancestors did. In other words, the post-development scene is an empirical rejection of Native peoples' entire cosmology and religious metaphysic.

More importantly for free exercise purposes, Native peoples simply cannot perform the rituals that stand at the heart of their communal lives. In some sacred land cases, including *Apache Stronghold*, this is because the relevant space no longer exists; in the remainder, like *Navajo Nation*, it is physically possible but spiritually fruitless. In the face of such a hostile atmosphere, the only way for the tribe's culture to survive is to transform itself into something other than what it has long been or be forced to join the societal culture of the institutions that ended theirs. The central contention of this Article is that the government actions giving rise to the sacred land disputes visit grievous harms on tribal worshippers, since these worshippers encounter an atmosphere hostile to their religious life, perhaps to an even greater extent than those who are being coerced in a narrow and immediate sense. However we categorize this harm, the conceptions of autonomous citizenship and freedom of conscience that run throughout our First Amendment jurisprudence should permit tribes to, at the very least, state a cognizable claim. Even for Rawls, who was otherwise willing to accept the losses of various ways of life, it remains important that all "forms of life have a fair opportunity to maintain themselves and to gain adherents over generations."[435] This is precisely the opportunity that has been denied to tribal litigants in sacred land cases.

435. RAWLS, *supra* note 41, at 198.