
Making Snow in the Desert: Defining a Substantial Burden under RFRA

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In this Note I argue that although the Ninth Circuit ultimately reached the correct conclusion in Navajo Nation v. United States Forest Service—that the Religious Freedom Restoration Act of 1993 (“RFRA”) does not provide any more religious protection for sacred site claims than the Free Exercise Clause of the First Amendment—the case reflects the pressing need for clarification as to how injury or burden should be analyzed under the Act. Despite RFRA’s lofty goal of repairing the damage to religious liberty caused by the United States Supreme Court’s decision in Employment Division v. Smith, as the Act is purposely ambiguous concerning the meaning to be supplied to all of its critical terms, such as what types of governmental action “substantially burden” the free exercise of religion, Congress simply returned a number of intractable issues to the courts. This lack of formal guidance in RFRA has resulted in pervasive confusion over how the term “substantial burden” should be defined and analyzed, conflict between appellate courts, and ultimately, profound limitation of the statute’s success. In advance of possible Supreme Court review of Navajo Nation, this article provides a frame of reference for understanding why interpretation of the term “substantial burden” has generated so much confusion and discord by examining ambiguities in RFRA’s operative provisions and tensions in the Supreme Court’s free exercise decisions over what constitutes a burden on the free exercise of religion.

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INTRODUCTION

Congress enacted the Religious Freedom Restoration Act of 1993¹ (RFRA or “the Act”) to restore the constitutional right of free exercise of religion that existed under the Free Exercise Clause of the First Amendment prior to the United States Supreme Court’s infamous decision in *Employment Division v. Smith*.² For nearly three decades prior to *Smith*, the Supreme Court analyzed challenges under the Free Exercise Clause with a three-part legal framework: if an injury to a claimant’s freedom to practice her religious beliefs was recognized, then the government was required to justify the infringement with a compelling governmental interest, or an interest of the highest order, and show that it had adopted the least restrictive means of advancing that interest.³ However, in *Smith*, the Supreme Court held that this framework did not apply where a religious claimant challenged neutral and otherwise valid laws of general applicability—that is, laws that were not “aimed at the promotion or restriction of religious beliefs.”⁴ As few laws explicitly endorse or target religious beliefs,⁵ the Supreme Court’s decision in *Smith* severely curtailed protection of free exercise rights. RFRA restored application of the compelling interest test to “laws neutral toward religion”⁶ by replacing the Court’s contrary holding in *Smith* with “instructions to return to the future; that is, to reemploy doctrines gleaned from prior law developed in adjudication.”⁷ RFRA provides that government “shall not substantially burden a person’s exercise of religion,” unless it can show that its actions further a compelling governmental interest by using the least restrictive means.⁸ In order to maintain the broad coalition of Senators, Representatives, and organizations that backed the bill, it was politically necessary to enact a general standard that did not provide interpretative guidance which favored or disfavored any constituency.⁹ For instance, RFRA does not define the term “substantial burden.”¹⁰ Although the house and senate reports that accompanied the bill stated the expectation that

1. 42 U.S.C. §§ 2000bb(a)(4)–(5) (2006).

2. *Employment Div. v. Smith*, 494 U.S. 872 (1990); see Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 219 (1994).

3. See *infra* note 57; see, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963), *Wisconsin v. Yoder*, 406 U.S. 205 (1972); The third component of the framework for analyzing free exercise challenges articulated in Supreme Court decisions during this period—the requirement that the least restrictive means be used to advance a compelling governmental interest—was, as the Court noted in *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997), not actually used in these decisions.

4. *Smith*, 494 U.S. at 879.

5. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 580 (1993) (“It is only in the rare case that a state or local legislature will enact a law directly burdening religious practice as such.”).

6. 42 U.S.C. § 2000bb(a)(2).

7. Ira C. Lupu, *Of Time and the RFRA: A Lawyer’s Guide to the Religious Restoration Freedom Act*, 56 MONT. L. REV. 171, 172 (1995).

8. 42 U.S.C. § 2000bb-1.

9. See Laycock, *supra* note 2, at 218–19.

10. 42 U.S.C. § 2000bb-2 (defining other terms but excluding substantial burden).

courts would look to free exercise cases decided prior to *Smith* to determine what types of governmental action satisfy this standard,¹¹ there is no prevailing consensus on how to interpret the pre-*Smith* case law as to what constitutes an injury, or burden, on the free exercise of religion. Thus, despite RFRA's lofty goal of "repair[ing] the damage to religious liberty" caused by *Smith*,¹² as the Act is purposely ambiguous concerning the meaning to be supplied to all of its critical terms, such as what types of governmental action "substantially burden" the free exercise of religion, Congress simply returned a number of intractable issues to the courts.¹³ This lack of formal guidance in RFRA, combined with the problem of interpreting statutory text that overlays, but does not supersede, complex Supreme Court precedent, has resulted in pervasive confusion over how the term "substantial burden" should be defined and analyzed, conflict between appellate courts,¹⁴ and ultimately, profound limitation of the statute's success.¹⁵

In *Navajo Nation v. United States Forest Service*¹⁶ the Ninth Circuit was recently faced with this precise question; the court had to decide what types of governmental action "substantially burden" the free exercise of religion under RFRA. In *Navajo Nation II*, the Ninth Circuit initially rejected a proposal to further develop a commercial ski resort in Coconino National Forest, which featured a plan to make artificial snow from treated wastewater, after concluding that the proposed snowmaking would desecrate a mountain revered as hallowed ground by at least thirteen Indian tribes of the American Southwest.¹⁷ The tribes view the mountain known as the San Francisco Peaks, which is located in northern Arizona, as indispensably connected to their

11. Senate Comm. On the Judiciary, Religious Freedom Restoration Act of 1993, S. REP. NO. 111, 103rd Cong., 1st Sess., at 8–9 (1993) [hereinafter Senate Report]; House Comm. On the Judiciary, Religious Freedom Restoration Act of 1993, H. REP. NO. 88, 103d Cong., 1st Sess. at 6 (1993) [hereinafter House Report].

12. Laycock, *supra* note 2, at 210.

13. See Thomas C. Berg, *What Hath Congress Wrought? An Interpretative Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 3 (1994); Lupu, *supra* note 7, at 173; see also Laycock, *supra* note 2, at 219–21.

14. See Petition for a Writ of Certiorari at 11–12, *Navajo Nation v. U.S. Forest Serv. (Navajo Nation III)*, 535 F.3d 1058 (9th Cir. 2009) (No. 08-846) (describing the "current splintering of authority," and stating that "[t]he question of what constitutes a 'substantial burden' on religious exercise – the gateway to RFRA's compelling interest analysis – has deeply fractured the courts of appeals").

15. Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 594 (1998) (stating that "a stunningly high proportion of all RFRA claims decided on the merits [between RFRA's enactment in 1993 and 1997] involved rejection of claims as presenting insubstantial burdens," and predicting that "judges seeking to limit exemptions will be inclined to rely upon the 'burden' requirement as the primary obstacle to RFRA claimants" (citations omitted)).

16. *Navajo Nation v. U.S. Forest Serv. (Navajo Nation II)*, 479 F.3d 1024 (9th Cir. 2007), *rev'd*, 535 F.3d 1058 (9th Cir. 2008) (en banc), *petition for cert. filed*, (U.S. Jan. 5, 2009) (No. 08-846). The district court opinion, discussed below, is at *Navajo Nation v. U.S. Forest Service (Navajo Nation I)*, 408 F. Supp. 2d 866 (D. Ariz. 2006).

17. See 479 F.3d at 1028–30, 1040–41.

religions in myriad ways.¹⁸ The Ninth Circuit's original opinion, written by Judge William A. Fletcher, was hailed as a precedent that would expand the free exercise rights of Native Americans¹⁹ because it was the first major decision to uphold a RFRA challenge to the government's use of public lands held sacred by Indian beliefs. Judge Fletcher's opinion concluded that RFRA, as amended by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA),²⁰ adopted a more rights-protective standard for evaluating burden in free exercise challenges than the Free Exercise Clause of the First Amendment.²¹ Using this standard, Judge Fletcher's opinion held that the proposed upgrades to the ski resort "substantially burdened" the tribes' free exercise of religion.²²

The victory was short lived, however, as Judge Fletcher's opinion was subsequently reversed by an eleven-judge en banc panel of the Ninth Circuit.²³ The en banc panel, in an opinion written by Judge Carlos T. Bea, acknowledged artificial snowmaking would desecrate the Peaks from the "subjective" viewpoint of the Indian claimants, but held that such "damaged spiritual feelings" are insufficient to "substantially burden" their free exercise rights under RFRA.²⁴ Judge Bea's opinion concluded that under the appropriate legal standard, the tribes' free exercise of religion was not substantially burdened because the proposed snowmaking would neither force the tribes to choose between "following the tenets of their religion and receiving a governmental benefit" nor coerce them "to act contrary to their religion under the threat of civil or criminal sanctions."²⁵

The tribes appealed to the United States Supreme Court; a writ of certiorari is currently pending.²⁶ The tribes argue that the case of *Navajo Nation* is an "ideal vehicle for bringing order to the 'substantial burden' requirement," as it presents the Supreme Court with the opportunity to construe "this central and often determinative provision" of RFRA for the first time.²⁷

Whether the Supreme Court decides to review Judge Bea's opinion, the case of *Navajo Nation* reflects the pressing need for clarification as to how burden should be analyzed under RFRA. This Note provides a frame of reference for understanding why interpretation of the term "substantial burden" has generated so much confusion and discord by examining ambiguities in

18. *Id.* at 1030, 1034–44; see Kristen A. Carpenter, *Real Property and Peoplehood*, 27 STAN. ENVTL. L.J. 313, 337 (June 2008).

19. See Michael Kiefer, *Fake snow out of Snowbowl*, THE ARIZ. REPUBLIC, Mar. 13, 2007.

20. See 42 U.S.C. §§ 2000cc *et seq.* (2006).

21. See *Navajo Nation II*, 479 F.3d at 1032–34; U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof").

22. *Id.* at 1038–43.

23. *Navajo Nation III*, 535 F.3d 1058, 1063 (9th Cir. 2008) (en banc).

24. *Id.* at 1070 n.12.

25. *Id.* at 1070.

26. Petition for a Writ of Certiorari, *Navajo Nation III*, 535 F.3d 1058 (No. 08-846).

27. *Id.* at 11.

RFRA's operative provisions and tensions in the Supreme Court's free exercise decisions as to what constitutes a burden on the free exercise of religion.

More specifically, examination of the Court's free exercise decisions reveals two distinct tests for determining the threshold question of whether the exercise of religion has been burdened in an individual case.²⁸ The nature of the challenged governmental action determines which test applies; the pertinent inquiry is whether the challenged action may properly be classified as an internal government function, such as the government's recordkeeping procedures for a public benefits program,²⁹ or its management of public lands.³⁰ If the government's internal functions are involved then the claimant must show that the challenged action affirmatively compels violation of religious belief or prohibits religious observance.³¹ As this test requires that the challenged governmental action be coercive in nature, it is referred to as the *coercion test*. On the other hand, if no internal government functions are implicated, then the claimant must simply show that the challenged action frustrates or inhibits her free exercise of religion.³² As this test focuses upon the impact of the challenged governmental action, it is referred to as the *substantial impacts test*.

Applying these principles, I argue that contrary to the tribes' contentions in *Navajo Nation*,³³ and Judge Fletcher's opinion, RFRA does not establish a more rights-protective standard for analyzing burden in free exercise challenges than the Free Exercise Clause of the First Amendment. Thus, the Supreme Court's landmark decision involving a free exercise challenge brought by three

28. See Ira C. Lupu, *Where Rights Begin: The Problems of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 961 (1989) (emphasis added) (indicating the "Judges have developed two basic approaches to the burden problem—the *coercion theory* articulated in *Bowen* [*v. Roy*, 476 U.S. 693 (1986).] and *Lyng* [*v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988)], and the *substantial impact theory* developed by Justice Brennan in his *Lyng* dissent"); Laycock, *supra* note 2, at 227 (stating that where a free exercise challenge involves the "internal operation of government programs," *Bowen* and *Lyng* "hold, in effect, that government does not prohibit the free exercise of religion unless it regulates or penalizes a religious practice").

29. See *Bowen*, 476 U.S. at 699–700.

30. See *Lyng*, 485 U.S. at 453–54.

31. See *id.*

32. *Id.* at 469 (Brennan, J., dissenting) (arguing that the Court's free exercise decisions prior to *Lyng* "recognized that laws that affect spiritual development by impeding the integration of children into the religious community or by increasing the expense of adherence to religious principles – in short, laws that frustrate or inhibit religious practice – trigger the protections of the constitutional guarantee" (emphasis added)). See also Lupu, *supra* note 28, at 942 ("In the significant free exercise decisions between 1963 and 1986 [the year *Bowen* was decided] there was no dispute that the challenged policy created a cognizable burden on religion."); cf. *Lyng*, 485 U.S. at 456 (responding to dissenting Justice Brennan's characterization of prior free exercise case law, stating that "[t]he Constitution, however, says no such thing. Rather, it states: 'Congress shall make no law . . . prohibiting the free exercise [of religion]'" (citation omitted)).

33. See Petition for a Writ of Certiorari at 28, *Navajo Nation III*, 535 F.3d 1058 (9th Cir. 2009) (No. 08-846) (distinguishing *Lyng* on the ground that "RFRA . . . sets a softer threshold in cases involving federal governmental action for triggering strict scrutiny" than the Free Exercise Clause of the First Amendment).

Native American tribes to the government's management of public lands, *Lyng v. Northwest Indian Cemetery Protective Association*,³⁴ which applied the coercion test referenced above,³⁵ dictates that the RFRA claim in *Navajo Nation* be rejected. As Judge Bea's opinion properly concluded, the tribes' free exercise of religion was not "substantially burdened" because the challenged governmental actions did not expressly prohibit or penalize the performance of Indian rites on the San Francisco Peaks.³⁶ Contrary to Judge Bea's opinion,³⁷ however, the more restrictive coercion test is not applicable in all free exercise challenges, but only those challenging internal government functions.

Finally, although the objective of this Note is to clarify how burden should be analyzed under RFRA, it also examines the Supreme Court's variable application of the compelling interest test, or strict scrutiny, in free exercise challenges prior to *Smith*.³⁸ As explained above, RFRA restores the Court's three-part framework for analyzing free exercise challenges, and each of these questions—whether a burden on the free exercise of religion exists, and if so, whether a compelling governmental interest justifies the infringement and whether it uses the least restrictive means—are conceptually distinct inquiries. However, both of the Ninth Circuit's opinions in *Navajo Nation*, to varying degrees, conflate two of these separate considerations. More specifically, both opinions improperly rely on one of RFRA's stated purposes that explicitly concerns the compelling interest test³⁹ to define what constitutes a substantial burden.⁴⁰ Thus, it is necessary to explain the relevance of this statutory provision in context, and thereby, dispel an additional source of confusion.

34. 485 U.S. 439, 441–442.

35. *Id.* at 448 (citing *Bowen v. Roy*, 476 U.S. 693, 699–700 (1986)). As discussed in more detail below in Part I(B)(1), *Bowen*, decided two years before *Lyng*, introduced the requirement of direct governmental compulsion or coercion into free exercise challenges involving the government's "internal affairs." 476 U.S. at 699.

36. *Navajo Nation III*, 535 F.3d at 1070 (stating that the tribes were not "fined or penalized in any way for practicing their religion on the Peaks," and emphasizing that the Forest Service has "guaranteed" religious practitioners access to the ski resort and the rest of the Peaks for religious purposes).

37. *Id.*

38. *See, e.g.*, Berg, *supra* note 13, at 9 (stating that throughout the 1980s "the Burger and Rehnquist Courts . . . had been undercutting the 'compelling interest' test while continuing to give it lip service").

39. 42 U.S.C. § 2000bb(b) ("The purposes of this chapter are: (1) 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; and (2) to provide a claim or defense to persons whose religions exercise is substantially burdened by government." (emphasis added)).

40. *See Navajo Nation III*, 535 F.3d at 1069 ("The same cases that set forth the compelling interest test also define what kind or level of burden on the exercise of religion is sufficient to invoke the compelling interest test."); *Navajo Nation II*, 479 F.3d at 1032–33 (citing 42 U.S.C. § 2000bb(b) (2006)) (justifying application of a more rights-protective standard for analyzing burden than the coercion test applied in *Lyng* by arguing, in part, that "RFRA provides broader protection for free exercise because it applies *Sherbert's* compelling interest test 'in all cases' where the free exercise of religion is substantially burdened").

Part I provides a brief summary of the Supreme Court's free exercise decisions that focuses on the development of two distinct tests for analyzing burden in free exercise challenges and the rise and fall of strict scrutiny. Part II examines RFRA and RLUIPA and provides background information on each statute, relevant provisions, analysis of the respective legislative histories, and notable cases illustrating intercircuit conflict and uncertainty over how substantial burden should be defined and analyzed. Part III examines the Ninth Circuit's decisions in *Navajo Nation II* and *III*. It provides background information on the case, and refutes the argument advanced in Judge Fletcher's opinion that RFRA, as amended by RLUIPA, adopts a more rights-protective standard for analyzing burden than the Free Exercise Clause. This section also explains how Judge Bea's opinion misconstrues RFRA's purpose and the Supreme Court's decision in *Wisconsin v. Yoder*,⁴¹ and thereby, obscures the distinction between the two tests for analyzing burden in free exercise challenges. Finally, the Conclusion recommends that in the event the Supreme Court reviews *Navajo Nation*, the coercion test should be abandoned and other alternatives, such as intermediate scrutiny, should be adopted to reconcile the competing interests presented by free exercise challenges to the government's internal functions, such as its management of public lands. Barring abandonment of the coercion test, the Note ends with a call for clarification that there are two distinct tests for analyzing burden in free exercise challenges under RFRA, what each test requires, and when each test applies.

I. THE EVOLUTION OF TWO DISTINCT TESTS FOR ANALYZING BURDEN
AND THE RISE AND FALL OF STRICT SCRUTINY IN FREE EXERCISE DOCTRINE

This Part describes the evolution of two distinct tests for analyzing burden and the Court's variable application of the compelling interest test, or strict scrutiny, in free exercise doctrine. It chronicles the establishment of a framework for evaluating free exercise challenges in *Sherbert v. Verner*,⁴² its subsequent development in *Wisconsin v. Yoder*,⁴³ and ultimate limitation in a particular subset of cases involving the government's internal functions in *Bowen v. Roy*⁴⁴ and *Lyng v. Northwest Indian Cemetery Protective Association*.⁴⁵

41. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

42. 374 U.S. 398 (1963).

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

44. 476 U.S. 693 (1986).

45. 485 U.S. 439 (1988).

A. *The Birth of the Substantial Impacts Test and the Rise of Strict Scrutiny*

1. *Sherbert v. Verner: Establishment of the Burden Requirement and Strict Scrutiny in Free Exercise Doctrine*

Sherbert v. Verner,⁴⁶ decided by the Supreme Court in 1963, announced a three-part rights-protective framework for courts to use in analyzing free exercise challenges. First, the decision established that governmental action that impedes religious observance by exerting indirect pressure to modify behavior constitutes a cognizable injury, or burden on free exercise rights.⁴⁷ *Sherbert's* consideration of indirect effects of governmental action expanded constitutional protection of free exercise rights beyond the Court's prior, limited focus on direct restraint of religious conduct, such as punishment imposed on religious speech or assembly.⁴⁸ Writing for the Court in *Sherbert*, Justice Brennan found that where a Seventh Day Adventist was faced with the choice of either violating her religious faith by working on Saturday, her Sabbath, or foregoing unemployment benefits to which she was statutorily entitled, her free exercise rights were effectively penalized.⁴⁹ The opinion compared the burden on the claimant's free exercise rights to a fine imposed on Sabbath worship, and concluded that conditioning receipt of benefits upon violation of religious observance resulted in an equally "coercive effect."⁵⁰ Although *Sherbert* established the concept of indirect burden on free exercise rights, the decision did not include any express guidance for future courts to use in resolving the threshold question of whether a burden exists.⁵¹

Second, by borrowing the "discourse of strict scrutiny" established in equal protection cases to create a new standard for evaluating free exercise challenges, *Sherbert* signaled that free exercise rights would be vigorously protected.⁵² Justice Brennan announced that no government could enforce a

46. 374 U.S. 398 (1963).

47. See *id.* at 404 (quoting *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (stating that "[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect"). Although in *Braunfeld* the Court first recognized that indirect burdens on free exercise could constitute a cognizable injury, *Sherbert* was the first decision in which the Court sustained a free exercise challenge on such grounds.

48. See *Sherbert*, 374 U.S. at 404 n.5 (quoting *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 402 (1950)).

49. *Id.*

50. *Id.* at 405 n.5.

51. See Lupu, *supra* note 28, at 942.

52. See Edward McGlynn Gaffney, Jr., *Curious Chiasma: Rising and Falling Protection of Religious Freedom and Gender Equality*, 4 U. PA. J. CONST. L. 394, 404 (2002) (citation omitted) (noting *Sherbert* was decided "less than a decade after the Court had begun its bold move to confront the brutality of Jim Crow" in *Brown v. Board of Education*, 347 U.S. 483 (1954) (holding de jure racial segregation in schools unconstitutional). Professor Gaffney explains that during this period, "[t]he message to Attorneys General was they must have solid reasons—the Court called them 'compelling state interests'—to justify the racial classifications in statutes or practices they were defending as

law of general applicability in a manner that burdened an individual's free exercise rights unless it was justified by a compelling governmental interest.⁵³ The compelling interest test required the government to show that an asserted justification for a challenged action "was not merely an ordinary interest, but one of the highest order":⁵⁴ "in this highly sensitive constitutional area, [o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation."⁵⁵ In *Sherbert*, the Court found that no compelling state interest justified the government's eligibility requirements for unemployment benefits.⁵⁶

Third, *Sherbert* imposed a least restrictive alternative requirement that was intended to discourage government from exaggerating justifications for state action.⁵⁷ Years later, discussing provisions of RFRA, which appear largely derived from the *Sherbert* framework, the Court indicated that "[r]equiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law."⁵⁸ As the *Sherbert* Court concluded that no compelling state interest justified the government's denial of unemployment benefits, it had no occasion to reach the least restrictive means requirement.⁵⁹

consistent with the Equal Protection Clause of the Fourteenth Amendment. One way of describing this form of analysis is that the judiciary was performing its task of scrutinizing reasons for policies carefully. . . . The Court was becoming more skeptical. Phony reasons for racism that abounded throughout the Jim Crow era would not cut it any more." The Court referred to this heightened level of judicial review as "strict scrutiny."

53. *Sherbert*, 374 U.S. at 403 (citing *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

54. Gaffney, *supra* note 52, at 404.

55. *Sherbert*, 374 U.S. at 406 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

56. *Id.* at 406–07. The *Sherbert* appellant was discharged from her employer for refusing to work on Saturday, her Sabbath, and then was denied unemployment benefits for refusing "without good cause . . . to accept available suitable work when offered." *Id.* at 399.

57. *Id.* at 406 (considering "whether some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right"); *id.* at 407 (requiring the government to "demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights"); see also Gaffney, *supra* note 52, at 406 ("Another component of the *Sherbert* analysis, the "least restrictive alternative" standard, was meant to curb the tendency of government attorneys to exaggerate the interest they are protecting."); cf. Lupu, *supra* note 7, at 194 (stating that "[a]lthough both *Sherbert* and *Yoder* contain some language concerning alternative means, neither decision required anything like a showing that government's choice of means was "least" restrictive compared to all possible alternatives," the standard adopted by RFRA (citations omitted)). Both commentators are correct insofar as *Sherbert* announced a similar requirement, but the term "least restrictive means" first appeared in the Court's free exercise case law in *Thomas v. Review Board*, 450 U.S. 707, 718 (1981). In any event, despite articulation of the least restrictive means requirement in free exercise decisions during this period, the requirement was not actually applied because the Court never reached the third prong of the test in any of its decisions after *Thomas* and before RFRA was enacted. See *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997) ("the least restrictive means requirement was not used in the pre-*Smith* jurisprudence RFRA purported to codify").

58. *City of Boerne*, 521 U.S. at 534.

59. See *Sherbert*, 374 U.S. at 406–407.

Following *Sherbert*, the Court affirmed its precedential value in a series of decisions that also involved the government withholding unemployment benefits from persons who refused work due to their religious beliefs.⁶⁰

2. *Wisconsin v. Yoder: Introduction of Substantial Impacts Analysis, the Centrality Requirement, and Affirmation of Strict Scrutiny*

In *Wisconsin v. Yoder*,⁶¹ decided in 1972, the Court built upon *Sherbert*'s recognition that governmental action could improperly burden free exercise rights through indirect effects by introducing a substantial impacts test into free exercise doctrine.⁶² Trimming back on the potential reach of *Sherbert*, however, the *Yoder* Court also articulated a threshold centrality requirement to restrain unlimited extension of the burden concept.⁶³

In *Yoder*, the Court held that Amish parents who refused to send their children to public school past the eighth grade were exempted from a law that required compulsory school attendance.⁶⁴ Although the attendance law was compulsory, it did not compel violation of any particular religious belief; the Amish religion does not expressly proscribe secondary public school education⁶⁵ as, for example, Judaism or Islam prohibits the consumption of pork. Nevertheless, in departure from *Sherbert* and its progeny, the Court granted the exemption in recognition of the feared *impact* that compulsory high school attendance would have on Amish communities, namely, by corrupting Amish children through exposure to worldly influences "at the crucial adolescent stage of development."⁶⁶

The second important development in *Yoder* for the law of free exercise was consideration of the centrality of a religious adherent's faith as a means of limiting the scope of free exercise protections. To determine whether particular religious practices or beliefs are sufficiently important to warrant constitutional

60. See *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Frazee v. Ill. Dep't of Employment Sec.*, 489 U.S. 829 (1989).

61. 406 U.S. 205 (1972).

62. *Id.* at 217-19.

63. See *id.* at 215.

64. *Id.* at 234-36.

65. See *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 466-67 (1988) (Brennan, J., dissenting); see Lupu, *supra* note 7, at 203 ("Although the Old Order Amish parents did assert that salvation required a life apart from worldly influence, they were not strictly obliged by their faith doctrines to withdraw their children from school at the teenage years. They did so only because the experience of high school attendance threatened the imposition of values inconsistent with Amish ways.").

66. *Yoder*, 406 U.S. at 218; see S. Alan Ray, Comment, *Lyng v. Northwest Indian Cemetery Protective Association: Government Property Rights and the Free Exercise Clause*, 16 HASTINGS CONST. L.Q. 483, 500 (1989) ("Significantly, the Court [in *Yoder*] did not base its [substantial burden analysis] on a finding that the Wisconsin law coercively compelled the Amish to choose between public schools and criminal sanctions. Instead, the Court made an analysis of the indirect adverse effects of public schooling on the future of Amish religion, values, and culture, if respondents complied with the law.").

protections, the Court identified several threshold factors for assessing the “quality of the claims,” or the existence of a cognizable injury, including whether a particular religious practice or belief is “central” to an adherent’s faith.⁶⁷ This centrality requirement was subsequently interpreted by several courts of appeals as barring sacred site claims where Indian tribes could not establish that the federal property at issue was indispensable to their religious practices.⁶⁸ Significantly, as explained in more detail below in Part II(B)(2) RFRA, as amended by RLUIPA, appears to expressly reject the *Yoder* Court’s centrality requirement.⁶⁹

Apart from identifying these threshold factors, however, the *Yoder* Court failed to provide any other express guidance for lower courts to use in assessing whether particular impacts on free exercise rights constitute cognizable injuries in the first instance.

Finally, Justice Burger’s majority opinion in *Yoder* affirmed the strict level of review required under *Sherbert*’s compelling interest test: “only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”⁷⁰

B. *The Emergence of the Coercion Test and the Withdrawal of Strict Scrutiny*

1. *Bowen v. Roy: Introduction of the Coercion Test and the Withdrawal of Strict Scrutiny*

Then in 1986, the Court’s decision in *Bowen v. Roy* marked a departure from the rights-protective standard introduced in *Sherbert* and expanded upon in *Yoder* for analyzing burden, and indicated an emerging reluctance to apply *Sherbert*’s compelling interest test to all free exercise challenges.⁷¹ *Bowen* concerned a free exercise objection by Stephen Roy, an Abenaki Indian, to a requirement that was imposed by Aid to Families with Dependent Children (AFDC) as a condition of receiving public benefits.⁷² Mr. Roy objected to the requirement that he provide social security numbers for each member of his household, as he believed that use of a social security number to identify his two-year-old daughter would “rob [her of her] spirit.”⁷³

67. *Yoder*, 406 U.S. at 210, 215–19.

68. Samuel D. Brooks, *Native American Indians’ Fruitless Search for First Amendment Protection of Their Sacred Religious Sites*, 24 VAL. U. L. REV. 521, 542–44 (1990) (stating that by “misusing the centrality inquiry” several appellate courts “have forced American Indians to demonstrate that the sacred site is indispensable to their religious practice”); see also Luralene D. Tapahe, *After the Religious Freedom Restoration Act: Still No Equal Protection for First American Worshipers*, 24 N.M. L. REV. 331, 336–37 (1994).

69. See 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A) (2006).

70. *Yoder*, 406 U.S. at 215.

71. See *Bowen v. Roy*, 476 U.S. 693, 699 (1986).

72. *Id.* at 695–96.

73. *Id.*

Bowen announced the coercion test by expressly requiring that free exercise claimants demonstrate governmental action compels violation of religious belief in order for the Court to recognize a cognizable injury.⁷⁴ The decision indicated, however, that this more restrictive test only applies to cases involving the government's "internal affairs," such as its recordkeeping procedures for a public benefits program.⁷⁵ To emphasize the "internal" nature of the administrative recordkeeping at issue, the Court explained that Roy could "no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets."⁷⁶ As in *Sherbert*, Roy faced the choice of either receiving welfare benefits for his daughter or remaining faithful to his religious beliefs.⁷⁷ However, Chief Justice Burger, writing for the Court, rejected the comparison, holding that the Free Exercise Clause does not require the government to conduct its own internal affairs or functions in ways that conform to the religious beliefs of particular citizens, but instead, only affords protection against certain types of "governmental compulsion."⁷⁸

Chief Justice Burger went further in a section of the opinion in which only Justices Powell and Rehnquist joined, opining that another component of the *Sherbert* framework, the compelling interest test, should never apply in cases involving the government's internal functions.⁷⁹ Instead, Chief Justice Burger indicated that absent proof of discriminatory intent, in a free exercise challenge to a requirement for governmental benefits (such as the claim in *Bowen*) the government need only demonstrate that a general law of uniform applicability is "a reasonable means of promoting a legitimate public interest."⁸⁰ Chief Justice Burger thereby suggested that free exercise protection in cases involving the government's internal functions be relegated to the "barest level of minimal scrutiny,"⁸¹ which would have marked a drastic departure from his majority opinion in *Yoder* fourteen years earlier.

74. *Id.* at 700 ("The Free Exercise Clause affords an individual protection against certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures.").

75. *Id.* at 699-700.

76. *Id.* at 700.

77. *See id.* at 708. In Part III of the opinion in which Justice Burger could only persuade Justices Powell and Rehnquist to join, he distinguished *Sherbert* by asserting that the statutory scheme for unemployment benefits, unlike that for the AFDC program, included a mechanism for individualized exemptions by providing compensation where an employee quit work or refused available work with "good cause." *Id.* In the absence of such an exemption scheme, Justice Burger reasoned that the government's policy decision to avoid "case-by-case inquiries" was entitled to substantial deference. *Id.* at 707.

78. *Id.* at 699-701.

79. *See id.* at 707-08.

80. *Id.* at 708 (emphasis added).

81. *Id.* at 727 (O'Connor, J., dissenting).

Following *Bowen*, the Court began to withdraw application of *Sherbert's* compelling interest test from various categories of cases, such as free exercise challenges involving military personnel⁸² and claims of discriminatory treatment of prisoners.⁸³ Moreover, in cases where the Court applied the compelling interest test, the application was often half-hearted; the Court found it “satisfied without a searching inquiry of the asserted need to regulate the particular religious conduct.”⁸⁴ Thus, although the Court continued to give “lip service” to the compelling interest test after its decision in *Yoder*, “the Court never again upheld a free exercise claim on the merits against a general law” outside of the context of unemployment benefit cases similar to *Sherbert*.⁸⁵

2. *Lyng v. Northwest Indian Cemetery Protective Association: Establishment of the Coercion Test in Free Exercise Challenges to the Government's Management of Public Lands and Continued Withdrawal of Strict Scrutiny*

Lyng built upon *Bowen* in holding that free exercise challenges to government land use decisions require application of the coercion test, and thus, must either affirmatively coerce violations of religious belief or penalize religious practices in order to cognizably burden the free exercise of religion.⁸⁶ *Lyng* thereby expanded the “internal affairs” distinction drawn in *Bowen* to encompass the government's management of public lands.⁸⁷

In *Lyng*, the Court approved logging and construction of a six-mile road segment that would transect the Chimney Rock section of the Six Rivers National Forest, an area traditionally used for religious practices by the Yurok, Karok, and Tolowa Indian tribes.⁸⁸ The tribes' rituals were dependent upon privacy, silence and the site's undisturbed natural condition.⁸⁹ Writing for the majority, Justice O'Connor acknowledged that by eliminating the minimal

82. *Goldman v. Weinberger*, 475 U.S. 503, 510 (1986) (rejecting application of *Sherbert's* compelling interest test and acknowledging that a burden on religious exercise resulted from an Air Force regulation that restricted an Orthodox Rabbi from wearing a yarmulke, yet holding that the regulation was *reasonable* in light of the “military's perceived need for uniformity”).

83. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349, 353 (1987) (rejecting application of *Sherbert's* compelling interest test in holding that a prison may enforce regulations that interfere with religious practices provided they are “*reasonably* related to legitimate penological objectives” (emphasis added) (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987))).

84. *Berg*, *supra* note 13, at 53–54, 10 (citing *United States v. Lee*, 455 U.S. 252 (1982); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983)).

85. *Id.* at 9.

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

87. *See Lupu*, *supra* note 28, at 945–46. *See also Lyng*, 485 U.S. at 470–71 (Brennan, J., dissenting) (disputing the extension of *Bowen* to the facts of *Lyng* and emphasizing that federal land use decisions, unlike government recordkeeping, are “subject to public scrutiny and public challenge in a host of ways.” Justice Brennan argues that this distinction indicates that federal land use decisions are not “internal” government functions, and thus, should be subject to constitutional challenge.).

88. *Lyng*, 485 U.S. at 441–42.

89. *Id.* at 452–53.

conditions required for the tribes' rituals the logging and road construction could have "devastating effects" on Indian religious practices.⁹⁰ However, she concluded these governmental actions were indistinguishable from the government's use of a social security number in *Bowen*, as they both involved the government's internal affairs or functions.⁹¹ Therefore, because the affected individuals were neither affirmatively coerced into violating their religious beliefs (as they would have been, according to the majority, if they were completely barred access to the site), nor penalized for their religious practices, the Court refused to recognize the existence of a cognizable injury under the coercion test introduced in *Bowen*.⁹²

In addition to its reliance on *Bowen*, Justice O'Connor's majority opinion justified the Court's refusal to apply *Sherbert* and its progeny to the facts in *Lyng* by advancing a narrow reading of the Free Exercise Clause.⁹³ The Court held that the crucial word in the constitutional text is "prohibit," emphasizing that the Free Exercise Clause prescribes what the government cannot do to the individual, namely, "coerce individuals into acting contrary to their religious beliefs," not what the individual can exact from the government.⁹⁴

Based on this reading, the Court held that the government's prerogative as a landowner takes precedence over claims involving particular uses of federal property that infringe upon religious practices.⁹⁵ The *Lyng* majority concluded that whatever rights the tribes have to use the Chimney Rock area for religious practices "do not divest the Government of its right to use what is, after all, *its* land."⁹⁶ The Court offered two justifications for this conclusion: that extension of the principle underlying the tribes' free exercise claims would likely result in "religious servitudes" over vast tracts of public property; and, in this particular case the diminution of the government's property rights would be substantial in that affirming the tribes' free exercise challenge would result in restrictions on more than 17,000 acres of public land.⁹⁷ Thus, instead of formulating a legal doctrine that balances the competing interests of the site-specific nature of Indian belief, on the one hand, and government property rights and duties of

90. *Id.* at 451.

91. *Id.* at 449.

92. *Id.* at 449–52; *id.* at 449 (explaining that the Court could not recognize a cognizable burden on free exercise rights in *Bowen* or *Lyng* because "[i]n neither case . . . would the affected individuals be coerced by the Government's action into violating their religious beliefs; nor would either government action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens").

93. *Id.* at 450–451.

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

95. *See id.* at 453 ("Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land." (emphasis added)); *see also* Note, *Religious Land Use in the Federal Courts Under RLUIPA*, 120 HARV. L. REV. 2178, 2193 n.100 (2007) (indicating that in *Lyng*, 485 U.S. at 448–49, the Court "rested its holding on the government's prerogative with regard to its own land").

96. *Lyng*, 485 U.S. at 453 (emphasis added).

97. *Id.*

public management, on the other,⁹⁸ in *Lyng* the Supreme Court established a restrictive burden requirement that effectively bars sacred site claims.⁹⁹

Moreover, by establishing use of the coercion test in free exercise challenges to the government's management of public land, as a practical matter, the decision also withdrew application of *Sherbert's* compelling interest test from sacred site claims.¹⁰⁰ Significantly, however, and in contrast to prior decisions by the Court involving military personnel and discriminatory treatment of prisoners where the compelling interest test was expressly rejected, *Lyng* leaves open at least the possibility of a successful sacred site claim under the coercion test.¹⁰¹ For instance, if the challenged governmental action prohibited Indian religious practices on public lands then the compelling interest test might still apply.¹⁰²

Justice Brennan's dissent, which was joined by Justices Marshall and Blackmun, disputed the *Lyng* majority's narrow interpretations of *Sherbert* and *Yoder*¹⁰³ and argued that the Supreme Court's free exercise precedents reflected a more rights-protective standard.¹⁰⁴ In the major free exercise decisions between 1963 and 1986, the year *Bowen* was decided, there was no dispute that the challenged governmental action created a cognizable burden on the free exercise of religion.¹⁰⁵ During this period the concept of burden analysis "remained in the background, unclarified and inchoate."¹⁰⁶ Therefore,

98. See MICHAEL FOBES BROWN, WHO OWNS NATIVE CULTURE? 167 (2004); see also *Lyng*, 485 U.S. at 473 (Brennan, J., dissenting) (noting that sacred site cases also reflect a vast cultural divide between the "dominant Western culture, which views land in terms of ownership and use, and that of Native Americans, in which concepts of private property are not only alien, but contrary to a belief system that holds land sacred").

99. See, e.g., Kristen A. Carpenter, *In the Absence of Title: Responding to Federal Ownership in Sacred Sites Cases*, 37 NEW ENG. L. REV. 619, 625 (2003) (indicating general consensus that *Lyng* effectively bars Indian free exercise claims involving sacred sites located on federal property).

100. Cf. Gaffney, *supra* note 52, at 411–412 (stating that the Court's decision in *Lyng* categorically removed sacred site claims "from the protection of *Sherbert*").

101. *Lyng*, 485 U.S. at 453 ("The Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred, and a law prohibiting the Indian respondents from visiting the Chimney Rock area would raise a different set of constitutional questions."); cf. Berg, *supra* note 13, at 61–62 nn.268–269 (contending that *Bowen* and *Lyng* establish a bright line rule "that there can be no cognizable 'burden' on religion from a government action that is merely an 'internal' operation, such as the keeping of administrative records or the management of government lands" (citations omitted)). Professor Berg cites Justice Burger's plurality opinion in *Bowen* and Justice O'Connor's majority opinion in *Lyng*, explaining that "[t]his was an alternative holding to the erroneous holding that there was no 'burden' because no coercion against a specific Native American religious tenet existed." *Id.* Cf. Senate Report, *supra* note 11, at 8–9 (referencing *Bowen* and *Lyng* for the proposition that "strict scrutiny does not apply to government actions involving only management of internal Government affairs or the use of the Government's own property or resources").

102. *Lyng*, 485 U.S. at 453.

103. *Lyng*, 485 U.S. at 466–68 (Brennan, J., dissenting).

104. *Id.* at 459.

105. Lupu, *supra* note 28, at 942–43 (citations omitted). Notably, in describing the major free exercise decisions during this period Professor Lupu does not discuss the use of the *Yoder* centrality requirement by several courts of appeals to bar sacred site claims at the threshold throughout the 1980s.

106. *Id.*

although in *Sherbert* and *Yoder* the Court recognized cognizable injuries to free exercise rights from indirect governmental action, these decisions failed to provide workable standards for lower courts to apply. Instead, it was left to Justice Brennan in his *Lyng* dissent to articulate a substantial impacts test derived from the Court's prior treatment of burden analysis.¹⁰⁷

Justice Brennan's *Lyng* dissent correctly challenged the majority's interpretation of *Sherbert* and the other free exercise challenges involving unemployment claims decided in its wake.¹⁰⁸ The *Lyng* majority interpreted *Sherbert* and its progeny as requiring that governmental action be coercive in nature to constitute a burden on the free exercise of religion because the decision analogized to a fine imposed on religious observance.¹⁰⁹ As Justice Brennan observed in his *Lyng* dissent, however, *Sherbert* and these other free exercise challenges nowhere *required* that governmental action coerce violation of religious belief, but instead, merely identified coercive effect as one type of religious burden that was recognized by the Court.¹¹⁰ Moreover, the *Lyng* majority's interpretation appears to be further undermined by the fact that *Sherbert* did not include any express guidance for how to analyze burden in free exercise challenges, let alone prescribe specific requirements.¹¹¹

Similarly, Justice Brennan's dissent also disputed the majority's interpretation of the Court's decision in *Yoder*.¹¹² Justice O'Connor's majority opinion concluded that the Court's decision in *Yoder* hinged upon the coercive nature of the compulsory attendance law, not its impact on the Amish community.¹¹³ In *Yoder*, the Court concluded that secondary schooling, in essence, "contravenes the basic religious tenets and practice of the Amish faith,"¹¹⁴ which would support the *Lyng* majority's interpretation that the law compelled violation of such beliefs and religious practice. However, as Justice

107. *Lyng*, 485 U.S. at 474–476 (Brennan, J., dissenting); see Lupu, *supra* note 28, at 961 (citations omitted) ("Judges have developed two basic approaches to the burden problem—the coercion theory articulated in *Bowen* and *Lyng*, and the substantial impact theory developed by Justice Brennan in his *Lyng* dissent.").

108. *Lyng*, 485 U.S. at 466 (Brennan, J., dissenting).

109. See *id.* at 450–451 (emphasis added) ("It is true that this Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment. Thus, for example, ineligibility for unemployment benefits, based solely on a refusal to violate the Sabbath, has been analogized to a fine imposed on Sabbath worship. This does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions *but which have no tendency to coerce individuals into acting contrary to their religious beliefs*, require government to bring forward a compelling justification for its otherwise lawful actions." (citing *Sherbert v. Verner*, 374 U.S. 389, 404 (1963)); see also Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1434, 1455–56 (1989) (arguing that Justice Brennan's majority opinion in *Sherbert* helped launched the "coercion analysis" later applied, over his strong dissent, in *Lyng*).

110. *Lyng*, 485 U.S. at 466 (Brennan, J., dissenting).

111. See Lupu, *supra* note 28, at 942.

112. *Lyng*, 485 U.S. at 466–67 (Brennan, J., dissenting).

113. *Id.* at 456–57.

114. *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972).

Brennan argued in his dissent, the attendance law did not compel violation of any particular religious beliefs or practices because the Amish religion does not expressly proscribe secondary public school education.¹¹⁵ Instead, it appears the rationale for granting the exemption was the broader “impact” the law would have on religious exercise, not the coercive nature of the law itself.¹¹⁶ The *Yoder* Court’s pronounced emphasis on the broad threat posed to the Amish way of life¹¹⁷ undermines the *Lyng* majority’s conclusion that this impact would have been constitutionally insignificant if the law had not been coercive in nature.¹¹⁸

Rejecting the *Lyng* majority’s coercion test, and imposing *Yoder*’s centrality requirement, along with a requirement that the challenged governmental action have “substantial external effects,” Justice Brennan indicated the proper test for analyzing burden under the Free Exercise Clause is whether governmental action “poses a substantial and realistic threat of undermining or frustrating . . . religious practices” that are central to a claimant’s religion, a test that he found satisfied by the record in *Lyng*.¹¹⁹

3. Employment Division v. Smith: *The Abandonment of Strict Scrutiny*

In *Employment Division v. Smith*,¹²⁰ decided in 1990, the Supreme Court severely limited the reach of the compelling interest test required by *Sherbert*. In *Smith*, the Court held that two members of the Native American Church who ingested peyote during a religious ceremony were not exempt from an Oregon criminal statute that denied them unemployment benefits as a result of their drug use.¹²¹ Writing for the Court, Justice Scalia announced that *Sherbert* did not apply to neutral and otherwise valid laws of general applicability—that is, laws that were not “aimed at the promotion or restriction of religious beliefs.”¹²²

115. *Lyng*, 485 U.S. at 466–67 (Brennan, J., dissenting) (citing *Yoder*, 406 U.S. at 209); see Lupu, *supra* note 7.

116. *Lyng*, 485 U.S. at 466 (Brennan, J., dissenting) (citing *Yoder*, 406 U.S. at 209); see Ray, *supra* note 66, at 508–09.

117. *Yoder*, 406 U.S. at 218 (“As the record shows, compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some more tolerant region.”).

118. *Lyng*, 485 U.S. at 456–57 (“The dissent’s out-of-context quotations notwithstanding, there is nothing whatsoever in the *Yoder* opinion to support the proposition that the ‘impact’ on the Amish religion would have been constitutionally problematic if the statute at issue had not been coercive in nature.”).

119. *Id.* at 470, 474–476 (Brennan, J., dissenting).

120. 494 U.S. 872 (1990).

121. *Id.* at 874, 884–85.

122. *Id.* at 879. The Court’s decision in *Smith* has been widely criticized on the ground that it does not provide enough protection for religious liberty. See, e.g., Jesse H. Choper, *The Rise and Decline of the Constitutional Protection of Religious Liberty*, 70 NEB. L. REV. 651, 670–680 (1991) (providing a comprehensive evaluation of the *Smith* decision).

Significantly, Justice Scalia's majority opinion distinguished *Sherbert* and its progeny as involving only statutory entitlements to unemployment benefits, a context that facilitated "individualized governmental assessment[s]."¹²³ As explained in more detail below in Part II(B)(1), Congress relied on this distinction years later when it enacted RLUIPA.¹²⁴

II. RFRA AND RLUIPA: CONFLICT AND CONFUSION ABOUND,
DESPITE STATUTORY ATTEMPT TO PRESERVE TWO DISTINCT TESTS
FOR ANALYZING BURDEN IN FREE EXERCISE CHALLENGES

A. *The Birth of RFRA: Congressional Backlash against Smith*

Newspapers, academics, members of Congress, and religious interest groups condemned the *Smith* decision.¹²⁵ Congressman Stephen J. Solarz, a strident critic of *Smith*, and the chief sponsor of RFRA, proclaimed that "with the stroke of a pen, the Supreme Court has virtually removed religious freedom from the Bill of Rights."¹²⁶ In response to this widespread backlash, three years after *Smith* was decided Congress took the "extraordinary measure" of reversing a Supreme Court decision through legislation by passing RFRA with overwhelming margins.¹²⁷ However, due to the size and breadth of the coalition behind RFRA, which included such improbable allies as the American Civil Liberties Union and the Traditional Values Coalition, "RFRA's proponents were largely forced to avoid dealing explicitly with more difficult and controversial questions such as: how to specify the precise level of protection for religious conduct . . . and how to address all of the pre-*Smith* cases that had likewise contributed to the downfall of free exercise rights."¹²⁸

123. *Id.* at 884.

124. *See Note, supra* note 95, at 2181.

125. *See, e.g.,* James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407 (1992).

126. *Id.* at 1409–10 (quoting *Religious Freedom Restoration Act of 1990: Hearings on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 18 (1990) (statement of Congressman Stephen J. Solarz)).

127. William J. Clinton, Remarks by the President at Signing Ceremony for the Religious Freedom Restoration Act (Nov. 16, 1993), *available at* 1993 WL 479632. In the Presidential Signing Statement for the bill President Clinton indicated that a broad coalition of citizens came together across ideological and religious lines to advocate for the legislation and that RFRA was passed with a 97-to-3 vote in the Senate and adopted by a voice vote in the House. *Id. See also* Gaffney, *supra* note 52, at 412–15 (describing chronology that resulted in enactment of RFRA).

128. Berg, *supra* note 13, at 13–14. *But cf.* Laycock, *supra* note 2, at 219 (arguing that in addition to these political considerations, the statute's generality also reflected: "an act of high principle. The Act is only a statute, not a constitutional amendment, but it is a statute designed to perform a constitutional function. It is designed to restore the rights that previously existed under the Free Exercise Clause, rights that Congress believes should exist if the Constitution were properly interpreted. . . . The only way to draft such a protection was in the manner of the Free Exercise Clause itself—as a general principle of universal application.").

1. *Relevant Statutory Provisions*

RFRA begins by stating congressional findings and declarations of the statute's purpose. The findings indicate that contrary to the Supreme Court's holding in *Smith*, neutral laws of general applicability may burden religious exercise as surely as laws intended to promote or restrict religious beliefs, and that "the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."¹²⁹ The purpose of the Act is described as restoration of "the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened."¹³⁰

The heart of RFRA states that government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless it can show that its actions are the least restrictive means of furthering a compelling governmental interest.¹³¹ Thus, RFRA restored the second and third components of the three-part *Sherbert* framework for analyzing free exercise challenges, the compelling interest test and the least restrictive means requirement.

Significantly, RFRA failed to address the first part of the *Sherbert* framework by not including a definition of "substantial burden."¹³² Instead, as explained in more detail below in Part II(A)(2)(b), the house and senate reports that accompanied the bill stated the Judiciary Committee's expectation that courts would look to "free exercise cases decided prior to *Smith* for guidance in determining whether the exercise of religion has been substantially burdened."¹³³ However, as explained above, there is no prevailing consensus over how to interpret the pre-*Smith* case law as to what constitutes a burden on the free exercise of religion.

The statute does, however, provide a definition of "exercise of religion."¹³⁴ As enacted in 1993, RFRA defined exercise of religion as "exercise of religion under the First Amendment."¹³⁵ The First Amendment provides that "Congress shall make no law . . . *prohibiting* the free exercise [of religion]."¹³⁶ As explained in more detail below in Part II(B)(2), Congress

129. 42 U.S.C. §§ 2000bb(a)(2), 2000bb(a)(4)–(5) (2006).

130. *Id.* §§ 2000bb(b)(1)–(2) (citations omitted) (indicating the two purposes of the Act are "(1) to restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder* . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government").

131. *Id.* § 2000bb-1.

132. *Id.* § 2000bb-2 (defining other terms but excluding substantial burden).

133. Senate Report, *supra* note 11, at 8–9; *see also* House Report, *supra* note 11, at 6.

134. 42 U.S.C. § 2000bb-2(4).

135. 107 Stat. 1488, 1489 (1993) (codified at 42 U.S.C. § 2000bb-2(4) (1994) (repealed)).

136. U.S. CONST. amend. I (emphasis added).

replaced RFRA's original definition of "exercise of religion" when it enacted RLUIPA.¹³⁷

2. *Legislative Intent: RFRA Preserves Two Distinct Tests for Analyzing Burden in Free Exercise Challenges*

This part analyzes ambiguities in RFRA's operative provisions in light of the Act's legislative history and standard principles of statutory construction. These sources of legislative intent reveal that in enacting RFRA, Congress intended to preserve the two tests for conducting burden analysis that were used in free exercise decisions prior to *Smith*. In addition, this part also seeks to clarify the meaning of one of RFRA's stated purposes that explicitly and exclusively concerns the compelling interest test in order to dispel an additional source of confusion that muddled the Ninth Circuit's analysis in both of its opinions in *Navajo Nation*.

a. *The Ambiguities of RFRA*

Despite the apparent simplicity of RFRA's statutory language, interpretation of its operative provisions "can be deceptive"¹³⁸ because it fails to clarify how courts should address pre-*Smith* cases other than *Yoder* and *Sherbert* in relation to three fundamental issues in free exercise doctrine.

First, RFRA's use of the term "substantial burden" presents interpretative challenges. At first blush the term appears broad on its face. However, the words "substantial" and "burden" each appear frequently in free exercise doctrine stretching as far back the Court's decision in *Sherbert*,¹³⁹ and, before *Smith*, the Court often interpreted each of these words narrowly to avoid applying the compelling interest test altogether.¹⁴⁰

137. See 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A).

138. Berg, *supra* note 13, at 19–20.

139. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 407 (1963) (using "substantial" throughout the decision to modify descriptions of injury to free exercise rights, e.g., "substantial infringement of religious liberties." Similarly, "burden" is repeatedly used to describe a cognizable injury, e.g., "incidental burden on the free exercise of appellant's religion."); *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 698–99 (1989) ("The free exercise inquiry asks whether government has placed a *substantial burden* on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." (emphasis added)); *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 384–85 (1990) (quoting formulation of substantial burden requirement in *Hernandez*).

140. See, e.g., *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 447 (1988) (stating that: "[i]t is undisputed that the Indian respondents' beliefs are sincere and that the Government's proposed actions will have severe adverse effects on the practice of their religion. Those respondents contend that the *burden* on their religious practices is heavy enough to violate the Free Exercise Clause unless the Government can demonstrate a compelling need to complete the G-O road or to engage in timber harvesting in the Chimney Rock area. We disagree." (emphasis added)); *Lee*, 455 U.S. at 261 ("Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the *burdens* incident to exercising every aspect of the right to practice religious beliefs Granting an exemption from social security taxes to an employer operates

Second, RFRA's statements of findings and purposes reflect internal inconsistency as to whether courts should emulate the compelling interest test as specifically set forth in *Yoder* and *Sherbert*, or, rather, more generally look to all pre-*Smith* case law for guidance. Until late in the legislative process, RFRA's findings and purposes were internally consistent; both sections of the statute indicated that courts should emulate the compelling interest test as set forth in *Sherbert* and *Yoder*.¹⁴¹ However, prior to enactment the findings were rewritten to replace the reference to *Sherbert* and *Yoder*, with a reference to unspecified "prior Federal court rulings," that ostensibly provide "a workable test for striking sensible balances between religious liberty and competing prior governmental interests."¹⁴² Thus, in the final version of RFRA, the findings point to all pre-*Smith* case law as guidance for application of the compelling interest test,¹⁴³ not just *Sherbert* and *Yoder*.

A third source of ambiguity revolves around the underlying question of what is meant by "exercise of religion."¹⁴⁴ RFRA initially defined "exercise of religion" as "the exercise of religion under the First Amendment."¹⁴⁵ This statement provided little interpretative guidance given that prior constitutional cases "provide no single or comprehensive definition" of what type of conduct is covered by the term "exercise of religion."¹⁴⁶ As explained in more detail below in Parts II(B)(2) and (3), RLUIPA's amendment to RFRA's definition of "exercise of religion" explicitly states what type of religious conduct is covered by the Act,¹⁴⁷ and thus, directly addresses this issue.

b. RFRA's Legislative History Indicates the Statute Preserves Two Distinct Tests for Analyzing Burden in Free Exercise Challenges

Although there is ambiguity in RFRA's legislative history regarding interpretation of the term "substantial burden," on balance it appears that Congress intended to preserve *both* tests for analyzing burden in free exercise challenges. As explained above in Part I, prior to *Smith* the Court's free exercise decisions applied two distinct tests for analyzing burden. These decisions instruct that the substantial impacts test should generally be applied in free exercise challenges,¹⁴⁸ and the coercion test should only be used to analyze burden in a discrete category of cases involving the government's

to impose the employer's religious faith on the employees. Congress drew a line . . . exempting the self-employed Amish but not all persons working for an Amish employer. The tax imposed on employers to support the social security system must be uniformly applicable to all, except as Congress provides explicitly otherwise." (emphasis added).

141. Lupu, *supra* note 7, at 196–97 (citing 42 U.S.C. § 2000bb(a)(5) (Supp. V 1993)).

142. *Id.* at 196 (citing 42 U.S.C. § 2000bb(a)(5)).

143. 42 U.S.C. § 2000bb(a)(5).

144. See Laycock, *supra* note 2, at 230–36.

145. 107 Stat. 1488, 1489 (1993) (codified at 42 U.S.C. § 2000bb-2(4) (1994) (repealed)).

146. Laycock, *supra* note 2, at 230.

147. 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A).

148. *Lyng*, 485 U.S. at 469 (Brennan, J., dissenting).

internal functions, such as its recordkeeping procedures for a public benefits program as in *Bowen* or its management of public lands as in *Lyng*.¹⁴⁹

There are several indicia that Congress intended to preserve both tests for analyzing burden found in the Court's pre-*Smith* free exercise decisions when it enacted RFRA. To put it another way, it is evident that Congress did not intend to create a new "softer" standard for triggering strict scrutiny¹⁵⁰ by limiting application of the coercion test, as established in *Bowen* and *Lyng*. As explained above, the words "substantial" and "burden" each appear frequently in free exercise doctrine stretching as far back the Court's decision in *Sherbert*.¹⁵¹ A recognized canon of statutory construction prescribes that when Congress codifies a term of art, courts should interpret it "consistent with its established meaning."¹⁵² Thus, incorporation of the terms "substantial" and "burden" in RFRA strongly, albeit implicitly, suggests that Congress intended for courts to interpret those terms as they had been used in prior free exercise jurisprudence. Moreover, the senate and house reports that accompanied the bill explicitly directed courts to pre-*Smith* case law for guidance in defining a substantial burden under RFRA.¹⁵³ Further, the senate report states that RFRA does not affect the Court's decisions in *Bowen* and *Lyng*.¹⁵⁴ It is worth noting that so long as courts interpret the term substantial burden by reference to pre-*Smith* case law and the Court's foundational free exercise decisions—*Sherbert*, *Yoder*, *Bowen* and *Lyng*—are unaffected by RFRA,¹⁵⁵ then the status quo that existed prior to *Smith* is necessarily restored by the statute.

On the other hand, language in the house report appears to reject the coercion test, and thereby, establish use of the substantial impacts test in all free exercise challenges, including those involving the government's internal functions.¹⁵⁶ This would, in effect, establish a softer standard for triggering strict scrutiny than found in pre-*Smith* free exercise decisions. When read in the

149. *Lyng*, 485 U.S. at 448–52 (indicating that under *Bowen* and *Lyng* the coercion test applies to free exercise challenges involving the government's internal functions).

150. See Petition for Writ of Certiorari at 28–29, *Navajo Nation III*, 535 F.3d 1058 (9th Cir. 2009) (No. 08-846) (arguing that "RFRA . . . sets a softer threshold in cases involving federal governmental action for triggering strict scrutiny" than the Free Exercise Clause of the First Amendment).

151. See *supra* note 139.

152. Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 515 n.59 (2005) (citing *Morrisette v. United States*, 342 U.S. 246, 263; *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991)).

153. House Report, *supra* note 11, at 6–7; Senate Report, *supra* note 11, at 9.

154. Senate Report, *supra* note 11, at 13–14 n.19; see also 139 CONG. REC. S14350, S14365 (daily ed. Oct. 26, 1993) (statement of Sen. Orrin G. Hatch) (introducing RFRA with Senator Edward M. Kennedy and stating that RFRA was not intended to effect the Court's decisions in *Bowen* and *Lyng*); 139 CONG. REC. S14461, S14470 (daily ed. Oct. 27, 1993) (colloquy of Sens. Hatch and Grassley) (making the same point).

155. See 42 U.S.C. § 2000bb(b)(1) (2006). Although RFRA's stated purpose, to restore the compelling interest test as set forth in *Sherbert* and *Yoder*, does not provide guidance for how burden should be analyzed in free exercise challenges under RFRA, it does minimally show that Congress did not intend to displace either of these decisions by enacting the statute. See *infra* Part III(B)(2)(b)(i).

156. House Report, *supra* note 11, at 6–7 (emphasis added).

context of the committee hearings, however, these statements can be reconciled with the premise that RFRA was not intended to affect the Court's decisions in *Bowen* and *Lyng*.

The house report states "in order to violate the statute, government activity need not coerce individuals into violating their religious beliefs nor penalize religious activity," but need only "have a substantial external impact on the practice of religion."¹⁵⁷ Commentators argue that this language rejects the coercion test by categorically adopting the substantial impacts test, as articulated by Justice Brennan in his dissent in *Lyng*.¹⁵⁸ However, others contend that this statement and similar language in the house report was apparently designed to provide coverage for an unusual set of cases that played a prominent role in the committee hearings: "cases of autopsies performed on decedents who held, or whose families hold, religious objections to mutilation of the body of the deceased."¹⁵⁹ In the autopsy cases there is no actual governmental coercion, however the government does act in a tangible way that creates a "substantial external impact" on the body of a religious adherent, or "on a body to which believing next of kin [are] entitled."¹⁶⁰ Therefore, it is asserted, these cases can be distinguished from *Lyng*, where "the government physically changed its own property," and *Bowen*, "where the feared effect was spiritual and supernatural."¹⁶¹

On balance, the later interpretation of the house report, preserving the coercion test, at least in the contexts in which *Bowen* and *Lyng* were decided, appears more persuasive in consideration of the other legislative history discussed above. In addition to the instructions contained in the house and senate reports directing courts to pre-*Smith* free exercise decisions for guidance in defining a substantial burden, a body of case law that inescapably includes *Bowen* and *Lyng*, and the senate Report's explicit preservation of these decisions, there is no statement anywhere in RFRA's legislative history expressly displacing either *Bowen* or *Lyng*.

Thus, in sum, the Act's legislative history indicates that RFRA's codification of the substantial burden requirement was merely intended to

157. *Id.*

158. Berg, *supra* note 13, at 54 (arguing that the house report expressly rejects use of the coercion analysis for assessing burden in free exercise challenges and tellingly, takes the phrase "substantial external impact" from Justice Brennan's dissent in *Lyng*, "which condemned the majority's limitation of 'burdens' to cases involving 'commands and prohibitions'").

159. Laycock, *supra* note 2, at 229 (citing *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong., 2d Sess. 1 (1992) (statement of William Yang)) (additional citations omitted); see GARRETT EPPS, *TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL* 226-227 (2001) (explaining that William Yang, a representative from the Hmong community, testified before the judiciary committee about how autopsies had been performed by state medical examiners on Hmong, in violation of their religion).

160. *Id.* at 229-230 (citing House Report, *supra* note 11, at 6).

161. *Id.* at 230.

restore the Court's treatment of burden analysis and "did not purport to change the law" as it stood prior to *Smith*.¹⁶²

c. *Findings v. Purposes*

Turning to another source of ambiguity in RFRA, it appears that the inconsistency between the Act's findings and purposes should be resolved by fixing the compelling interest "at its point of greatest vigor" in the pre-*Smith* case law, as it was applied in *Sherbert* and *Yoder*.¹⁶³ The difference between RFRA's findings, which states courts should emulate the compelling interest as it was applied in pre-*Smith* case law,¹⁶⁴ and one of its express purposes, which states courts should emulate the compelling interest test as set forth in *Yoder* and *Sherbert*,¹⁶⁵ is significant. The findings provide, "the compelling interest test as set forth in *prior Federal court* rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."¹⁶⁶ However, after *Yoder*, the Court failed to uniformly apply the compelling interest test, and thus, it is difficult to discern any workable standard derived from the pre-*Smith* case law overall.¹⁶⁷ Further, prior to *Smith*, the Court had become more deferential to the government,¹⁶⁸ and had carved out exceptions for prisons and the military, holding that the compelling interest test did not apply in these contexts.¹⁶⁹ By contrast, RFRA's statement of purpose incorporates a highly protective standard for application of the compelling interest test; *Yoder* subordinates religious freedom only to "interests of the highest order," and *Sherbert* only to avoid "the gravest abuses, endangering paramount interests."¹⁷⁰

Given the gross disparity between the referenced standards, the existence of ambiguity in the Act as to which standard applies is troubling and requires resolution.¹⁷¹ The United States Supreme Court interprets RFRA as having "expressly adopted" the compelling interest test as set forth in *Sherbert* and

162. Lupu, *supra* note 15, at 594.

163. Berg, *supra* note 13, at 26.

164. 42 U.S.C. § 2000bb(a)(5) (2006).

165. *Id.* § 2000bb(b)(1).

166. *Id.* § 2000bb(a)(5); see Berg, *supra* note 13, at 27 (noting that the committee reports indicate at various points that RFRA is only intended to overturn *Smith*, and that "the compelling interest test generally should not be construed more stringently or leniently than it was prior to *Smith*" (citing Senate Report, *supra* note 11, at 9, 12; accord House Report, *supra* note 11, at 7)). Thus, similar to RFRA's findings, these statements in the committee reports also directly contradict RFRA's stated purpose to restore the compelling interest test as specifically set forth in *Sherbert* and *Yoder*.

167. See Berg, *supra* note 13, at 26.

168. See *id.*

169. See *infra* notes 82–85, and accompanying text.

170. Laycock, *supra* note 2, at 224 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963)).

171. See *supra* note 166.

Yoder.¹⁷² Moreover, standard principles of statutory construction suggest that this disparity should be resolved by fixing the compelling interest test “at its point of greatest vigor” in the pre-*Smith* case law, as the compelling interest test was applied in *Sherbert* and *Yoder*.¹⁷³ First, “purposes” generally trump “findings” as more probative of congressional intent.¹⁷⁴ Second, the Act’s statement of purpose is more specific than its general statement of findings.¹⁷⁵ Finally, and, most importantly, if Congress intended to overrule the Court’s decision in *Smith*, which severely limited application of the compelling interest test in free exercise challenges, merely “restoring the body of prior federal court rulings would force into the Act all of the pre-*Smith* damage to free exercise values,” namely, the gradual withdrawal of strict scrutiny, and thus, significantly “under-restore” religious liberty.¹⁷⁶

Significantly, as explained in more detail below in Part III(B)(2)(b)(i), RFRA’s statement of purpose to restore the compelling interest test as set forth in *Sherbert* and *Yoder* does not “also control the substantial burden inquiry.”¹⁷⁷

3. *Conflict and Confusion following RFRA’s Enactment*

a. *Mack v. O’Leary: Identification of an Early Intercircuit Split in How Substantial Burden is Defined*

In the three years after RFRA was enacted, conflict emerged, albeit largely unrecognized, between the circuits concerning how to determine the threshold question of what constitutes a substantial burden.¹⁷⁸ In *Mack v. O’Leary*, a RFRA case decided by the Seventh Circuit in 1996, Chief Judge Posner, writing for the court, identified what he described as an unacknowledged intercircuit split in how substantial burden was defined under RFRA.¹⁷⁹ Chief Judge Posner found that the Fourth, Ninth and Eleventh Circuits had espoused

172. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) (citing § 2000bb(b)(1)) (discussing the compelling interest test as applied in *Sherbert* and *Yoder*, and stating, “[i]n each of those cases, this Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants” (emphasis added)). Notably, the *Gonzales* Court did not address the disparity between RFRA’s purposes and findings.

173. Berg, *supra* note 13, at 26.

174. See Lupu, *supra* note 7, at 196–97 (indicating that Congressional findings are “assessments of pre-enactment conditions,” while purposes “are statements of legislative objectives”).

175. Laycock, *supra* note 2, at 224 (noting same); see also Berg, *supra* note 13, at 27 (arguing that passages in RFRA’s legislative history indicating that the statute is “only intended to overturn *Smith*,” and not impose a more stringent or lenient application of the compelling interest test than that which generally existed in pre-*Smith* free exercise decisions, should not override RFRA’s explicit statement of purpose (citation omitted)).

176. Lupu, *supra* note 7, at 196–97 (internal citations omitted) (emphasis added).

177. *Contra Navajo Nation III*, 535 F.3d 1058, 1069 (9th Cir. 2009).

178. *Mack v. O’Leary*, 80 F.3d 1175, 1178–79 (7th Cir. 1996) (discussing the intercircuit split).

179. *Id.*

a definition of substantial burden that only accorded free exercise protection to practices required by an adherent's religion.¹⁸⁰ By contrast, the Eighth and Tenth Circuits considered all "religiously motivated conduct," not simply obligatory religious practices, protected by the Free Exercise Clause.¹⁸¹ Chief Judge Posner arrived at his own formulation by fusing together the standards articulated by the Eighth and Tenth Circuits, reasoning that the broader approach espoused by these courts was more faithful to free exercise doctrine before *Smith* and intended by RFRA's legislative history.¹⁸²

Mack demonstrates that following RFRA's enactment courts continued to conflict over how to define a substantial burden on the free exercise of religion and reveals a source of confusion in free exercise doctrine that appears to have influenced Judge Fletcher's opinion and dissent in *Navajo Nation*.¹⁸³ In *Mack*, the Seventh Circuit focused on the kinds of religious observance protected under RFRA—and not the nature of the governmental action itself—in framing the distinction between the conflicting standards it identified for analyzing burden under the statute.¹⁸⁴ It thereby adopted a formulation of the appropriate legal standard that encompassed "religiously motivated conduct" not required by an adherent's religion, but also fused together elements of both the coercion test and substantial impacts test:

We hold, therefore, that substantial burden on the free exercise of religion, within the meaning of the [RFRA], is one that *forces* adherents of a religion to refrain from religiously motivated conduct, *inhibits or constrains* conduct or expression that manifests a central tenet of a person's religious beliefs, or *compels* conduct or expression that is contrary to those beliefs.¹⁸⁵

Essentially, the Seventh Circuit correctly identified one source of conflict in how these various circuits had articulated the scope of religious conduct protected under RFRA—whether the statute only recognizes free exercise

180. *Id.* at 1178 (indicating these circuits defined substantial burden "as one that either compels the religious adherent to engage in *conduct that his religion forbids* (such as eating pork, for a Muslim or Jew) or forbids him to engage in *conduct that his religion requires* (such as prayer)" (internal quotation omitted) (emphasis added) (citing *Goodal v. Stafford County Sch. Bd.*, 60 F.3d 168, 172–73 (4th Cir. 1995); *Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir. 1995); *Bryant v. Gomez*, 46 F.3d 948 (9th Cir. 1995))). These standards appear to be derived from the *Yoder* Court's centrality requirement, as explained above in Part I(A)(2), that essentially asks whether particular forms of religious observance or belief are "central to [an adherent's] faith." *Wisconsin v. Yoder*, 406 U.S. 205, 210 (1972).

181. *Mack*, 80 F.3d at 1178 (citing *Brown-El v. Harris*, 26 F.3d 68, 70 (8th Cir. 1994); *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995)).

182. *Id.* at 1179 (citing Senate Report, *supra* note 11, at 5–9; House Report, *supra* note 11, at 2–7; U.S. Code Cong. & Admin. News 1993 pp. 1892, 1894–1899).

183. See *Navajo Nation II*, 479 F.3d 1024, 1033 (9th Cir. 2007); *Navajo Nation III*, 535 F.3d 1058, 1085 (9th Cir. 2009) (Fletcher, J., dissenting).

184. *Mack*, 80 F.3d at 1179 (indicating that "the decisive argument" supporting the generous definition of substantial burden "is the undesirability of making judges arbiters of religious law" as required under the alternative approach that requires courts to determine what practices the plaintiff's religion obligates him to follow).

185. *Id.* at 1179 (citations omitted) (internal quotation omitted) (emphasis added).

burdens on religious observance that a faith requires or also protects “religiously motivated conduct” that is not obligatory¹⁸⁶—but failed to discern a second, conceptually distinct source of inconsistency. Chief Judge Posner’s decision in *Mack* did not recognize that the Fourth, Eighth, Ninth and Eleventh Circuits had all adopted a standard that required the challenged governmental action be coercive in nature,¹⁸⁷ where, by contrast, the Tenth Circuit had espoused a substantial impacts test for assessing burden under RFRA.¹⁸⁸ In formulating the Seventh Circuit’s standard, Posner incorporated elements of both the coercion and substantial impacts test without clearly distinguishing between them.

This failure is perhaps not surprising given that the Seventh Circuit’s opinion does not discuss the Supreme Court’s justification for using the coercion analysis to assess burden in a discrete category of free exercise challenges, such as the claims in *Bowen* and *Lyng*.¹⁸⁹ This omission not only reflects widespread ignorance and confusion about the existence of two distinct tests for analyzing burden and an understanding of when those tests should be applied, but also reveals that the concept of *burden* on free exercise is multifaceted; it requires consideration of the type of religious observance at issue and the nature of the challenged governmental action.

b. Thiry v. Carlson: Example of Confusion Distinguishing between the Two Tests for Analyzing Burden

The emerging problem of defining a substantial burden under RFRA, recognized in *Mack*, was also illustrated in 1996 in *Thiry v. Carlson*,¹⁹⁰ in which the Tenth Circuit opined that the coercion test appeared applicable in a case involving a government land use decision that the court found “strikingly similar” to *Lyng*.¹⁹¹ In *Mack*, Chief Judge Posner identified two conflicting formulations of “substantial burden,” one that limited protection under RFRA to obligatory religious practices and another that expanded the scope to include

186. *Id.* at 1178–81 (citations omitted).

187. *See id.* at 1178 (quoting *Goodal v. Stafford County School Board*, 60 F.3d 168, 172–73 (4th Cir. 1995); *Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir. 1995); *Bryant v. Gomez*, 46 F.3d 948 (9th Cir. 1995)) (indicating these circuits defined substantial burden “as one that either *compels* the religious adherent to engage in conduct that his religion forbids (such as eating pork, for a Muslim or Jew) or *forbids* him to engage in conduct that his religion requires (such as prayer)” (emphasis added)); *id.* (quoting *Brown-El v. Harris*, 26 F.3d 68, 70 (8th Cir. 1994) (defining substantial burden as one “that *forces* religious adherents ‘to refrain from religiously motivated conduct’” (emphasis added)).

188. *See id.* (defining substantial burden as one that “significantly *inhibits* or *constrains* conduct or expression that manifests some central tenet of a [person’s] individual beliefs” (quoting *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995) (emphasis added))).

189. *See Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 449–52 (1988) (indicating that under *Bowen* and *Lyng* the coercion test applies to cases involving the government’s internal functions).

190. 78 F.3d 1491 (10th Cir. 1996).

191. *Id.* at 1495.

all “religiously motivated conduct,”¹⁹² yet failed to recognize that under Supreme Court precedent there are two distinct standards for conducting burden analysis in free exercise doctrine, the coercion test and substantial impacts test. *Thiry* demonstrates a different, but related, problem: judicial awareness of the two tests, but failure to accurately distinguish between them.¹⁹³

In *Thiry*, a couple objected on religious grounds to government expansion of a highway that necessitated condemnation of a section of their property where their daughter was buried.¹⁹⁴ The Thirys asserted that the disturbance caused by relocation and loss of the original gravesite would burden their religious beliefs, which involved tenets of American Indian spirituality, Quakerism and Christianity.¹⁹⁵ Although the Tenth Circuit had preceded the Seventh Circuit in applying the broader substantial impacts test in a prior case involving a prisoner’s free exercise rights,¹⁹⁶ it declined to do so in *Thiry*. By contrast, in *Thiry*, the court analogized to *Lyng* in holding that the coercion test applies to cases involving “traditional Indian religious practices.”¹⁹⁷ In fact, the Tenth Circuit concluded that the Supreme Court’s decision had not rested on the government’s property rights, so the fact that *Thiry* involved private property was immaterial.¹⁹⁸ Leaving the Tenth Circuit’s untenable interpretation of *Lyng* aside,¹⁹⁹ the most significant aspect of the decision for present purposes is that the court refused, and was apparently unable, to harmonize its earlier application of the substantial impacts test with *Lyng*.²⁰⁰ Instead, the court indicated that under either the substantial impacts test or the

192. *Mack*, 80 F.3d at 1178–81 (citations omitted).

193. *See Lyng*, 485 U.S. at 449–52.

194. *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996).

195. *Id.* at 1493, 1495 (Diane De Fries Thiry, the mother, was one-thirty-second Delaware Indian).

196. *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995) (citations omitted).

197. *Thiry*, 78 F.3d at 1495.

198. *See id.* at 1495 n.2 (“The Court’s analysis in *Lyng* did not rest on property ownership. Rather, it focused on the nature and extent of the intrusion on religious beliefs and practices as such.” (citations omitted)).

199. This interpretation disregards the Court’s express justification for its application of the coercion test in *Lyng*, namely, that the case involved a free exercise challenge to the government’s management of public lands. *See Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 453 (1988) (“Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land.”); *id.* at 459 (Brennan, J., dissenting) (characterizing the majority as holding “that federal land-use decisions that render the practice of a given religion impossible do not burden that religion in a manner cognizable under the Free Exercise Clause, because such decisions neither coerce conduct inconsistent with religious belief nor penalize religious activity”); *see also supra* notes 95–97 and accompanying text.

200. *Thiry*, 78 F.3d at 1495 (“*Werner* is a prisoner case, which may explain why we failed entirely to address the Court’s ‘substantial burden’ standard in *Lyng*. The reasoning of *Werner*, however, is too broad to permit a prisoner/nonprisoner distinction. Regardless, in this case it is unnecessary for us to attempt to harmonize *Werner*’s language with *Lyng*, or to explore its ramifications, since as the district court found, the Thirys did not carry their burden of proof under any plausible reading of the statute.”).

coercion test the Thirys failed to demonstrate a cognizable injury due to their own paradoxical testimony.²⁰¹

B. *RLUIPA*

1. *Background*

Four years after RFRA was enacted, the Supreme Court held the statute unconstitutional as applied to state and local governments, after finding it exceeded Congress' power to enforce the Free Exercise Clause under section 5 of the Fourteenth Amendment.²⁰² The Court, however, upheld the constitutionality of RFRA as applied to the federal government.²⁰³ Determined to apply *Sherbert's* compelling interest test to state and local governmental action, Congress seized on the dictum in *Smith* that suggested a loophole for "individualized governmental assessments."²⁰⁴ In 2000, Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA) that required *Sherbert's* balancing test be applied to state and local governments in two areas where such "individualized" assessments were common: land use decisions and regulations governing institutionalized persons.²⁰⁵

2. *Relevant Statutory Provisions*

RLUIPA applied RFRA's strict scrutiny language in the context of land use²⁰⁶ and cases involving institutionalized persons.²⁰⁷ The land use provision provides that "use, building, or conversion of real property [for religious purposes constitutes] religious exercise."²⁰⁸ RLUIPA avoided the fate of RFRA by specifying that its land use provision only applies to cases that implicate

201. *Id.* While the Thirys testified that they would be distressed and inconvenienced by the relocation of their daughter's gravesite, they also indicated that their Christian and American Indian spiritual beliefs would not be violated by the proposed move.

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

203. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (noting that "[a]s originally enacted, RFRA applied to States as well as the Federal Government," but that the Court's decision in *City of Boerne v. Flores*, 521 U.S. 507, "held the application to States to be beyond Congress' legislative authority" under section 5 of the 14th Amendment). In *Gonzalez*, the Court applied RFRA to a federal statute, the Controlled Substances Act, 28 U.S.C. 801 *et seq.* (2006). *Id.* at 439.

204. Note, *supra* note 95, at 2181 (2007) (quoting *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990)).

205. *See id.*; 42 U.S.C. § 2000cc *et seq.* (2006).

206. 42 U.S.C. § 2000cc(a)(1) ("No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden . . . is the least restrictive means of furthering [a] compelling governmental interest.").

207. *Id.* § 2000cc-1.

208. *Id.* § 2000cc-(7)(B).

Congress's spending or commerce power, or where the regulating government has authority to make individualized assessments of proposed uses of land.²⁰⁹

RLUIPA only partially addressed the interpretative problems created by the ambiguity of RFRA's operative provisions. Significantly, RLUIPA replaced RFRA's original definition of exercise of religion with language that expressly covers a broader range of religious conduct, thereby encompassing "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."²¹⁰ However, like RFRA, RLUIPA fails to define "substantial burden,"²¹¹ and its legislative history also directs courts to reference the Supreme Court's definition for guidance.²¹²

3. *Legislative History*

RLUIPA's legislative history explains the rationale for broadening the definition of exercise of religion in RFRA and for omitting a statutory definition of substantial burden.²¹³ The house report that accompanied the bill indicated that the definition of exercise of religion was broadened in order to "clarify[] issues that had generated litigation under RFRA."²¹⁴ The problematic "issues" that prompted the amendment were not identified in the house report. Nevertheless, it appears reasonable to conclude the amendment was intended to address conflicting interpretations over the range of religious observance protected under RFRA that gave rise to the intercircuit split described in *Mack*.²¹⁵

The joint statement of RLUIPA's co-sponsors expressly addressed why the term substantial burden was not defined: "[t]he Act does not include a definition of the term 'substantial burden' because it is not the intent of this Act to create a new standard."²¹⁶ Instead, the Joint Statement directs courts to reference the "Supreme Court's articulation of the concept of substantial burden" for guidance.²¹⁷

209. See Note, *supra* note 95, at 2181 (citing 42 U.S.C. § 2000cc(a)(2)).

210. 42 U.S.C. § 2000cc-5(7)(A).

211. See *id.* § 2000cc-5(7) (defining other terms but excluding substantial burden).

212. See 146 CONG. REC. S7776-01 (joint statement of Sens. Hatch & Kennedy).

213. See H. REP. NO. 106-219 (1999); 146 CONG. REC. S7776-01 (joint statement of Sens. Hatch & Kennedy).

214. H. REP. NO. 106-219 (1999).

215. See *supra* notes 178–181 and accompanying text.

216. 146 CONG. REC. S7776-01 (joint statement of Sens. Hatch & Kennedy).

217. *Id.*

4. *Uncertainty Remains following RLUIPA's Enactment*

a. *Henderson v. Kennedy: Confusion and Conflict Remain following Amendment of RFRA by RLUIPA*

In practice, RLUIPA has not resolved the confusion surrounding substantial burden analysis. In *Henderson v. Kennedy*, the United States Court of Appeals for the District of Columbia expressly rejected the standard articulated in *Mack* by the Seventh Circuit, minimized the significance of the statute's amended definition of exercise of religion, and joined the Fourth, Ninth and Eleventh Circuits in adopting a definition of substantial burden under RFRA that only affords free exercise protection to practices required by an adherent's religion.²¹⁸ *Henderson* involved a RFRA challenge to a government regulation prohibiting the sale of t-shirts on the National Mall, which, the court concluded, did not violate the free exercise rights of a group of evangelical Christians.²¹⁹ *Henderson* was decided prior to the enactment of the RLUIPA, but subsequently affirmed following the statute's passage, in part, to clarify that the amended definition of exercise of religion did not alter how the D.C. Circuit analyzes substantial burden under RFRA.²²⁰

Henderson demonstrates that following RLUIPA's enactment and the amendment of RFRA, uncertainty remained—courts continued to apply conflicting approaches for analyzing burden under RFRA and continued to provide confusing rationales for the standards they articulated. In *Henderson*, the D.C. Circuit adopted the following legal standard for analyzing burden under RFRA: “[P]laintiffs cannot claim that the regulation *forces* them to engage in conduct that their religion forbids or that it *prevents* them from engaging in conduct their religion requires.”²²¹ Similar to the Seventh Circuit's decision in *Mack*, in *Henderson* the D.C. Circuit failed to recognize the existence of two distinct tests for analyzing burden in free exercise challenges under RFRA, the coercion test and substantial impacts test and adopted a standard that uses the coercion analysis without referencing *Bowen* or *Lyng*.²²²

The D.C. Circuit's decision in *Henderson* is important to this discussion apart from further illustrating the pervasive ignorance and confusion about the existence and proper application of two distinct tests for analyzing burden under RFRA. *Henderson* also demonstrates the inherent difficulty of

218. *Henderson v. Kennedy (Henderson I)*, 253 F.3d 12, 16 (D.C. Cir. 2001) (citing *Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 172–73 (4th Cir. 1995); *Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir. 1995); *Bryant v. Gomez*, 46 F.3d 948 (9th Cir. 1995)), *rehearing denied*, *Henderson v. Kennedy (Henderson II)*, 265 F.3d 1072 (D.C. Cir. 2001) (affirming prior holding following RFRA's amendment by RLUIPA in 2000).

219. *Id.*

220. *Henderson II*, 265 F.3d 1072 (D.C. Cir. 2001).

221. *Henderson I*, 253 F.3d at 16 (emphasis added).

222. *See id.*

interpreting statutory directives that overlay, but do not supersede, complex Supreme Court precedent. RFRA's amended definition of exercise of religion expressly broadens protection afforded by the statute to encompass more kinds of religious observance: specifically, "any exercise of religion, whether or not compelled by, or *central* to, a system of religious belief."²²³ In formulating its legal standard, however, the D.C. Circuit improperly relied upon a pre-*Smith* Supreme Court decision, *Jimmy Swaggart Ministries v. Board of Equalization*, which expressly limits the free exercise inquiry to whether "the government has placed a substantial burden on the observation of a *central* religious belief or practice."²²⁴ Although these two sources of legal authority are contradictory, the D.C. Circuit apparently prioritized the Supreme Court precedent, as it affirmed its prior holding following RLUIPA's enactment, and amendment of RFRA.²²⁵

b. San Jose Christian College v. City of Morgan Hill: Example of Ninth Circuit's Plain Meaning Approach for Defining Substantial Burden under RLUIPA

In contrast to *Henderson's* prioritizing Supreme Court precedent over statutory text, in *San Jose Christian College v. City of Morgan Hill*, a RLUIPA case decided in 2004, the Ninth Circuit constructed a definition of "substantial burden" by resorting to the dictionary to determine the plain meaning of the statutory language.²²⁶ In *San Jose Christian College*, the Ninth Circuit rejected a RLUIPA challenge to the denial of a rezoning application that prevented a college from expanding its campus to land originally dedicated for use as a hospital after concluding it had failed to comply with the city's procedural requirements.²²⁷ The Ninth Circuit did not refer to RLUIPA's legislative history or Supreme Court free exercise precedents in its decision, but instead used a dictionary to define the terms *substantial* ("considerable in quantity" or "significantly great") and *burden* ("something that is oppressive").²²⁸ After determining the plain meaning of the statutory text, the court incorporated RLUIPA's amended definition of exercise of religion into its formulation of the appropriate legal standard: "The government is prohibited from imposing or implementing a land use regulation in a manner than imposes a *significantly great restriction or onus* on any exercise of religion, whether or not compelled

223. 42 U.S.C. § 2000cc-5(7)(A) (2006) (emphasis added).

224. *Henderson I*, 253 F.3d at 17 ((quoting *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 384–85 (1990)).

225. *Henderson II*, 265 F.3d at 1073 (D.C. Cir. 2001) (quoting 42 U.S.C. § 2000bb-1(a) ("The amendments did not alter RFRA's basic prohibition that the 'government shall not substantially burden a person's exercise of religion.'").

226. *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004).

227. *Id.* at 1027, 1035–36.

228. *Id.* at 1034.

by, or central to, a system of religious belief.”²²⁹ As discussed below, in *Navajo Nation II*, Appellants argued that the district court failed to apply the appropriate legal standard for conducting burden analysis under RFRA, and instead, should have relied upon the articulation in *San Jose Christian College*.²³⁰

San Jose Christian College is important to this analysis for several reasons. By demonstrating the other end of a wide spectrum of conflicting approaches for defining “substantial burden,” the decision illustrates the confusing state of free exercise doctrine following the enactment of RFRA and RLUIPA and prior to *Navajo Nation*. Moreover, *San Jose Christian College*, like *Henderson*, demonstrates the inherent difficulty of interpreting statutory directives that overlay, but do not supersede, complex Supreme Court precedent. However, it also reveals the other side of the coin—the absurdity of supplanting forty-five years of complex and hard-fought Supreme Court precedent with a sparingly-worded statute. Finally, although Judge Fletcher’s opinion in *Navajo Nation II* did not adopt the plain meaning approach of *San Jose Christian College*, the court’s decision appears to have been influenced by it, as it concludes that the word “burden” in RFRA’s statutory text provides broader protection of free exercise rights than the Free Exercise Clause.²³¹

III. *NAVAJO NATION*: A PRIME EXAMPLE OF HOW THE DISTINCTION BETWEEN THE TWO TESTS FOR ANALYZING BURDEN HAS BEEN OBSCURED

Judge Fletcher’s opinion in *Navajo Nation II* was seen as an important victory for the free exercise rights of American Indians²³² and as a precedent of great consequence because it was the first major decision to apply RFRA, as amended by RLUIPA, to a free exercise challenge involving public lands, and specifically, a sacred site.²³³ However, as discussed above, the victory was short lived because Judge Fletcher’s opinion was subsequently reversed by an en banc panel of the Ninth Circuit, in an opinion by Judge Bea.²³⁴ In his dissent from the en banc decision, Judge Fletcher reiterates a range of positions from his original opinion in *Navajo Nation II* that illustrate the widespread confusion

229. *Id.* at 1034–35 (citations omitted) (internal quotations omitted) (emphasis added).

230. Plaintiffs’/Appellants’ Opening Brief at 30, *Navajo Nation II*, 479 F.3d 1024 (9th Cir. 2007) (Nos. 06-15371, 06-15436, 06-15455), 2006 WL 2429667 (citing *San Jose Christian College*, 360 F.3d at 1034–1035); see also Joint Opening Brief of Appellants Hualapai Tribe, Norris Nez and Bill Bucky Preston at 27, *Navajo Nation II*, 479 F.3d 1024 (Nos. 06-15371, 06-15455), 2006 WL 2429668 (arguing that the appropriate legal standard for analyzing burden under RFRA is articulated in *Warsoldier v. Woodford*, 418 F.3d 989, 995 (9th Cir. 2005), which in turn, relies upon the articulation in *San Jose Christian College*, 360 F.3d at 1034–35: “in order for a government land use decision to place a ‘substantial burden’ upon religious exercise, it must ‘impose a significantly great restriction or onus upon such exercise’”).

231. See *Navajo Nation II*, 479 F.3d at 1032 (citing *United States v. Bauer*, 84 F.3d 1549, 1558 (9th Cir. 1996)); *id.* at 1032–33, 1047–48.

232. See, e.g., Kiefer, *supra* note 19.

233. See *Navajo Nation II*, 479 F.3d at 1048.

234. See *Navajo Nation III*, 535 F.3d 1058, 1063 (9th Cir. 2008) (en banc).

amongst lower courts concerning how to define a substantial burden under RFRA.²³⁵ Although the burden analysis presented in Judge Bea's opinion more closely adheres to a proper interpretation of RFRA, both of the Ninth Circuit's decisions in *Navajo Nation* obscure the distinction between the two tests for analyzing burden under the statute. Considered in the context of the "current splintering of authority" amongst appellate courts on this question, these opinions emphasize the need for the Supreme Court to revisit, or at least clarify, the appropriate legal standard.²³⁶

A. Background

First, this Part presents background information on the religious interests generally involved in sacred site claims, and the specific religious beliefs and practices at issue in *Navajo Nation*. Second, it chronicles the events that gave rise to the litigation, and describes the decisions of the district court and the Ninth Circuit, focusing upon the respective courts' interpretations of what constitutes a "substantial burden" under RFRA.

1. Religious Interests

a. Religious Interests in Sacred Site Claims

In American Indian cultures, tribal origin stories, societal values, cultural norms and religious practices are inextricably tied to the tribes' relationship with the land.²³⁷ Indian religions conceive of "gods, people and nature as an integral whole."²³⁸ In this conception of the universe "spiritual and physical reality converge in certain natural phenomena or locations."²³⁹ Therefore rituals must be performed in prescribed places because all land is unique and particular locations possess different spiritual significance,²⁴⁰ such as inseparable connections to certain tribal deities or spiritual beings.²⁴¹ Additionally, Indian rituals often require the use of animals, plants and minerals collected from sacred sites.²⁴² Therefore, destruction or desecration of a sacred site is considered a "cataclysmic event," because it may impair the

235. *Id.* at 1080–81 (Fletcher, J., dissenting) (Judge Fletcher's dissent was joined by Judge Harry Pregerson and Judge Raymond C. Fisher).

236. Petition for a Writ of Certiorari at 11, *Navajo Nation III*, 535 F.3d 1058 (No. 08-846).

237. Carpenter, *supra* note 18, at 327–328.

238. See Sarah B. Gordon, *Indian Religious Freedom and Governmental Development of Public Lands*, 94 YALE L.J. 1447, 1448 (1985).

239. *Id.* at 1449.

240. See, e.g., *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 461 (1988) (Brennan, J., dissenting).

241. See Gordon, *supra* note 238, at 1448.

242. See Brooks, *supra* note 68, at 525.

ability to communicate with tribal deities or other spiritual beings, or diminish the purity of natural resources essential for Indian rituals.²⁴³

b. Religious Interests in Navajo Nation

The area at issue in *Navajo Nation* is a mountain comprised of four peaks, commonly referred to as the San Francisco Peaks. The Peaks are located in Coconino National Forest in northern Arizona.²⁴⁴ The Peaks are considered sacred by at least thirteen Indian tribes of the American Southwest.²⁴⁵ For the six tribes that are parties to the RFRA action, including the Navajo and the Hopi, the Peaks are viewed as indispensably connected to their religions, the site of tribal origin stories, daily prayers, rituals, medicine gathering, and the primary home of tribal deities and other spiritual beings.²⁴⁶ The Ninth Circuit's decision primarily relied upon evidence in the record concerning the religious beliefs and practices of the Navajo and Hopi.²⁴⁷

For the Navajo the Peaks are known as *Do'ok'oos-liid* ("shining on top")²⁴⁸ and they are considered "the holiest of shrines in the Navajo way of life."²⁴⁹ The Navajo creation story is centered on the Peaks.²⁵⁰ The mother of humanity, called the Changing Woman, lived on the Peaks and went through puberty there.²⁵¹ The people rejoiced as this represented the gift of new life.²⁵² Following the celebration, known as the *kinaalda*, the Changing Woman gave birth to twins, the Navajo's ancestors.²⁵³ Young women today celebrate their own *kinaalda*, and the ceremony often involves water "especially collected from the Peaks."²⁵⁴

The purity of the Peaks plays a central role in Navajo beliefs; medicine bundles "composed of stones, herbs, shells, and soil from each of [the] four sacred mountains" are found in nearly every Navajo household.²⁵⁵ Medicine bundles play a critical role in the "fundamental Blessingway ceremony" and the natural resources they contain are used to make medicine.²⁵⁶

For the Hopi people the Peaks are known as *Nuvatukyaovi*, or "high place of snow," and they are also the central focus of the tribe's religion.²⁵⁷ The Hopi

243. Gordon, *supra* note 238, at 1448–1449.

244. *Navajo Nation II*, 479 F.3d 1024, 1029 (9th Cir. 2007).

245. *See id.* at 1028–30, 1040–41.

246. *Id.* at 1030, 1034–44; *see* Carpenter, *supra* note 18, at 337.

247. *Navajo Nation II*, 479 F.3d at 1034.

248. *Id.* at 1036.

249. *Navajo Nation I*, 408 F. Supp. 2d 866, 889 (D. Ariz. 2006).

250. *Navajo Nation II*, 479 F.3d at 1035.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* at 1035.

256. *Id.* at 1040.

257. *Id.* at 1034.

believe that their ancestors journeyed to the Peaks and entered into a covenant with a spiritual presence, *Ma'saw*, to take care of the land.²⁵⁸ The Hopi re-enact this story annually, maintain shrines on the Peaks, and direct their prayers and thoughts to this “point in the physical world that defines the Hopi universe.”²⁵⁹

The Peaks are also the primary home of the *Katsinam*, the spirits of Hopi ancestors “who bring water, snow and life to the Hopi people.”²⁶⁰ Traditional songs pass on the Hopi belief that when they die their spirits will join the *Katsinam* on the Peaks.²⁶¹ Once a year, the *Katsinam* visit the Hopi villages in order to convey the tribe’s prayers to the higher powers.²⁶² These visits are marked by celebrations in which the *Katsinam* appear in costume and perform for sixteen days.²⁶³ The Hopi believe it is crucial to please the *Katsinam* as they bring rain from the Peaks to “nourish the corn crop.”²⁶⁴ In preparation for these visits and to show respect for their spiritual ancestors, Hopi members make pilgrimages to the Peaks to gather water for use in ceremonies and Douglas fir worn by the *Katsinam* during their nightly dances.²⁶⁵

2. Navajo Nation: *The Controversy and the Resulting Decisions*

a. *The Controversy: Making Snow in the Desert*

Navajo Nation arose when the Forest Service approved the Arizona Snowbowl’s proposal to make artificial snow from treated wastewater and upgrade facilities at the ski resort that it operates on the San Francisco Peaks.²⁶⁶ At the time of approval, the Forest Service was well aware of the Peaks’ religious and cultural significance. In fact, the agency had designated the Peaks as a traditional cultural property in recognition of the mountain’s importance to the tribes’ identities.²⁶⁷ Further, approval was granted despite the agency’s acknowledgment that covering the Peaks with millions of gallons of “reclaimed water” each ski season would have “irretrievable impacts” on tribal belief systems and traditional religious practices.²⁶⁸

Notably, in a predecessor case, *Wilson v. Block*, several tribes objected to the Forest Service’s approval of a prior proposal to expand the ski resort.²⁶⁹

258. *Id.*

259. *Id.* (quoting *Navajo Nation I*, 408 F. Supp. 2d 866, 894 (D. Ariz. 2006)).

260. *Id.* (quoting *Navajo Nation I*, 408 F. Supp. 2d at 894).

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.* at 1035.

266. *Id.* at 1029.

267. *Id.*

268. *Id.* at 1039.

269. *Wilson v. Block*, 708 F.2d 735, 738 (D.C. Cir. 1983).

Although organized skiing has existed on the Peaks since 1938, in 1979 the Snowbowl proposed to significantly expand skiable terrain and facilities.²⁷⁰ The tribes argued that further development would be a profane act that would desecrate the Peaks, and thereby, cause the mountain to lose its spiritual power.²⁷¹ In addition, the tribes contended that the proposed expansion would severely impair religious practices inextricably tied to the Peaks.²⁷² Nonetheless, in *Wilson*, the District of Columbia Court of Appeals allowed the Snowbowl to move forward with its upgrades.²⁷³

b. The District Court's Decision

In *Navajo Nation I*, six tribes and two environmental organizations²⁷⁴ challenged the Forest Service's approval of the Snowbowl's proposal under RFRA, the National Historic Preservation Act (NHPA),²⁷⁵ and the National Environmental Protection Act (NEPA).²⁷⁶ The district court disposed of nearly all their claims at summary judgment.²⁷⁷ In analyzing the RFRA claim, which was ultimately dismissed, the district court relied heavily on *Wilson* and *Lyng*.²⁷⁸ Interestingly, *Wilson*, although decided five years before *Lyng*, also used a coercion analysis to assess burden on the free exercise of religion.²⁷⁹

The district court began its burden analysis under RFRA by referencing the senate report that directs courts to pre-*Smith* case law for guidance.²⁸⁰ The court applied the coercion test as suggested in *Wilson* and articulated in *Lyng*, after reasoning that both of these cases also involved the government's management of public lands.²⁸¹ Not surprisingly, the district court found that the Snowbowl proposal neither coerced the tribes into acting contrary to their religious beliefs, nor penalized their religious practices.²⁸² Similar to *Lyng*, the

270. *Id.* at 739.

271. *Id.* at 738.

272. *Id.*

273. *Id.* at 760.

274. *Navajo Nation I*, 408 F. Supp. 2d 866, 869–70 (D. Ariz. 2006) (Plaintiffs were the Navajo Nation, the Hopi Tribe, the Havasupai Tribe, the Hualapai Tribe, the Yavapai-Apache Nation, the White Mountain Apache Nation, individual named plaintiffs of the Hopi, Navajo Nation, and Havasupai tribes, the Sierra Club and the Center for Biological Diversity, and the Flagstaff Activist Network).

275. 16 U.S.C. §§ 470 *et seq.* (2006).

276. 42 U.S.C. §§ 4321 *et seq.* (2006).

277. *See Navajo Nation I*, 408 F. Supp. 2d at 908.

278. *See id.* at 903–07.

279. *See Wilson v. Block*, 708 F.2d 735, 741 (D.C. Cir. 1983) (“Many government actions may offend religious believers, and may cast doubt upon the veracity of religious beliefs, but unless such actions *penalize* faith, they do not burden religion.” (emphasis added)); Brooks, *supra* note 68, at 544–45 (citations omitted) (noting that prior to the Supreme Court's decision in *Lyng*, several federal appellate courts denied sacred site claims “by focusing on the nature of the governmental action rather than on the affect of the action,” and thus only considered whether the “governmental actions were by their nature coercive”).

280. *Navajo Nation I*, 408 F. Supp. 2d at 903.

281. *Id.*

282. *Id.* at 905.

court presented the Forest Service's guarantee to provide religious practitioners access to the Peaks as proof of the absence of governmental compulsion.²⁸³ Moreover, again mimicking *Lyng*, the court justified its refusal to recognize a cognizable injury by emphasizing the importance of the government's unfettered management of public lands and the unworkable precedent that would be created by accepting a "subjective definition of substantial burden."²⁸⁴

In addition, the district court distinguished between what it characterized as "objective" elements of religious practice, such as plants, springs, other natural resources, shrines or specific religious ceremonies that would be affected by the Snowbowl proposal, and the tribes' "subjective" beliefs of "perceived religious impact."²⁸⁵ The district court concluded that the tribes failed to present any evidence of objective impediments to religious practice posed by the proposal and discounted the tribes' subjective beliefs as insufficient to constitute a burden under RFRA.²⁸⁶

c. *The Ninth Circuit's Original Decision, Judge Fletcher's Opinion*

A three-judge panel of the Ninth Circuit reversed the district court in part, holding that the Forest Service's approval of the use of recycled wastewater for artificial snowmaking on the Peaks violates RFRA and that the agency failed to adequately consider the risks posed by human ingestion of artificial snow under NEPA.²⁸⁷ In a unanimous opinion written by Judge Fletcher, the panel also affirmed the grant of summary judgment to the Defendants on four of Plaintiffs' five NEPA claims and their NHPA claim.²⁸⁸

In articulating a test for analyzing burden under RFRA, Judge Fletcher's opinion neither referenced the statute's legislative history, nor any Supreme Court free exercise jurisprudence.²⁸⁹ In fact, the only Supreme Court decision relevant to burden analysis that the court discussed was *Lyng*, which it attempted to distinguish.²⁹⁰ Instead, the court solely relied upon Ninth Circuit precedent interpreting RFRA along with its own analysis of how the statute afforded broader protection than the Free Exercise Clause of the First Amendment based on four different aspects of the statutory language.²⁹¹ Ultimately, Judge Fletcher's opinion adopted the following test: "RFRA

283. *See id.*

284. *Id.* at 904 (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452–53 (1988)).

285. *Id.* at 905.

286. *Id.*

287. *Navajo Nation II*, 479 F.3d 1024, 1029 (9th Cir. 2007) (the case was heard by Circuit Judges William A. Fletcher and Johnnie B. Rawlinson, and Senior District Judge Thelton E. Henderson of the Northern District of California, sitting by designation).

288. *Id.*

289. *See id.* at 1031–34, 1042–43.

290. *Id.* at 1046–48.

291. *Id.* at 1031–34.

plaintiffs must prove that the burden on their religious exercise is substantial. The burden must be more than an inconvenience, and *must prevent* the plaintiff from engaging in religious conduct or having a religious experience.²⁹² As explained below, the court's test uses the coercion analysis by stating that governmental action must affirmatively prevent or prohibit a claimant from engaging in religious observance in order to constitute a cognizable injury.²⁹³

The court identified two cognizable burdens: artificial snowmaking would contaminate the natural resources needed for tribal rituals, thereby preventing performance of certain religious ceremonies; and, it would also undermine the tribes' "religious faith, practices, and way of life by desecrating the Peaks' purity."²⁹⁴ Judge Fletcher's opinion rejected the distinction drawn by the district court between objective and subjective evidence, and thus, accepted testimony by Indian religious practitioners as sufficient to demonstrate a burden on free exercise rights.²⁹⁵ The court recognized the testimony of Navajo practitioners that covering the Peaks with millions of gallons of treated wastewater would prevent them from making medicines, medicine bundles, and from performing the Blessingway ceremony.²⁹⁶ Similarly, the court relied upon the testimony of Hopi practitioners that the proposed contamination would undermine their entire system of belief and their religious practices that are dependant on the purity of the Peaks as the primary home of the *Katsinam*, the spirits of Hopi ancestors.²⁹⁷

Having recognized a cognizable injury, the court proceeded to reject the compelling governmental interests advanced by the Forest Service.²⁹⁸ The court held that National Forest Management Act's multiple-use mandate was a broadly formulated interest that could not justify governmental action under RFRA.²⁹⁹ The court also rejected the more particularized interest of providing a reliable ski season as a governmental priority of the highest order.³⁰⁰ Moreover, the Ninth Circuit concluded that evidence produced at trial did not support the district court's finding that snowmaking was needed to maintain the economic viability of the Snowbowl, particularly as the ski resort had solely relied on natural snowfall since 1938.³⁰¹ The court also found the proposed action failed to advance the Forest Service's interest in ensuring public safety and that refusing to allow a ski resort in a national forest to place treated

292. *Id.* at 1033 (citations and internal quotation marks omitted) (emphasis added).

293. *See id.*; *see also infra* Part III(B)(2).

294. *Navajo Nation II*, 479 F.3d at 1040–41.

295. *See id.* at 1039–43.

296. *Id.* at 1039–40.

297. *Id.* at 1041–42.

298. *Id.* at 1043–46.

299. *Id.* (citing *Gonzales v. O Centro Espirita Beneficente*, 546 U.S. 418, 431 (2006)).

300. *Id.* at 1044.

301. *Id.*

wastewater on a sacred mountain is an accommodation that “falls far short of an Establishment Clause violation.”³⁰²

Finally, as explained in more detail below, Judge Fletcher’s opinion distinguished *Lyng* on two grounds: by indicating that RFRA affords broader protection than the Free Exercise Clause of the First Amendment and asserting that the facts in *Lyng* were “materially different” from those in *Navajo Nation*.³⁰³

d. The Decision of the En Banc Panel, Judge Bea’s Opinion

The eleven-judge en banc panel held that Plaintiffs had failed to establish a RFRA violation.³⁰⁴ The en banc panel affirmed Judge Fletcher’s opinion as to Plaintiffs’ NHPA claim, four of Plaintiffs’ five NEPA claims, and held that Plaintiffs’ fifth NEPA claim—that the Forest Service allegedly failed to adequately consider the risks posed by human ingestion of artificial snow—was waived on appeal.³⁰⁵ Thus, Judge Bea, writing for the majority, “affirm[ed] the district court’s denial of relief on all grounds.”³⁰⁶

The Ninth Circuit explained that it took the case en banc “to revisit the [three-judge] panel’s decision and to clarify our circuit’s interpretation of ‘substantial burden’ under RFRA.”³⁰⁷ In contrast to Judge Fletcher’s opinion, the en banc panel relied upon Supreme Court precedent to determine what constitutes a “substantial burden” under RFRA.³⁰⁸ More specifically, the en banc panel reasoned that RFRA’s statements of findings and purposes not only indicate how the compelling interest should be applied under the Act, but also dictate how burden should be analyzed.³⁰⁹ Thus, the court determined that the “same cases that set forth the compelling interest test also define what kind or level of burden on the exercise of religion is sufficient to invoke the compelling interest test.”³¹⁰ As the court did not find any inconsistency between RFRA’s findings and purposes, it simply combined the statements, and thus, concluded “the cases that RFRA expressly adopted and restored—*Sherbert*, *Yoder*, and federal court rulings prior to *Smith*—also control the ‘substantial burden’ inquiry.”³¹¹

Applying this reasoning, the en banc panel adopted the following definition of substantial burden under RFRA:

302. *Id.* at 1046.

303. *Id.* at 1047.

304. *Navajo Nation III*, 535 F.3d 1058, 1063 (9th Cir. 2008) (en banc).

305. *Id.* at 1079–1080.

306. *Id.* at 1063.

307. *Id.* at 1067.

308. *See id.* at 1068 (“Fortunately, we are not required to interpret the term [substantial burden] by our own lights. Rather, we are guided by the express language of RFRA and decades of Supreme Court precedent.”).

309. *Id.* at 1069.

310. *Id.*

311. *Id.*

Under RFRA, a “substantial burden” is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*). Any burden imposed on the exercise of religion short of that described in *Sherbert* and *Yoder* is not a “substantial burden” within the meaning of RFRA, and does not require the application of the compelling interest test set forth in those two cases.³¹²

Notably, the Ninth Circuit adopted a narrow interpretation of *Yoder* drawn from Justice O’Connor’s majority opinion in *Lyng*.³¹³

Applying this test, the court concluded that although artificial snowmaking would desecrate the Peaks from the “subjective” viewpoint of the Indian claimants, such “damaged spiritual feelings” are insufficient to “substantially burden” their free exercise rights under RFRA.³¹⁴ The Ninth Circuit held that the use of recycled wastewater on the Peaks did not impose an unconstitutional condition on government benefits, as in *Sherbert*, or “coerce the Plaintiffs to act contrary to their religion under the threat of civil or criminal sanctions, as in *Yoder*.”³¹⁵ In similar fashion to the district court, the opinion by the en banc panel emphasized that the Plaintiffs continue to have guaranteed access to the Snowbowl and the rest of the Peaks for religious purposes.³¹⁶ Moreover, the en banc panel adopted the district court’s distinction between objective and subjective effect on religious exercise,³¹⁷ and found support for that distinction in *Yoder*³¹⁸ and *Lyng*, which it found factually analogous to *Navajo Nation*.³¹⁹

Finally, to reinforce its conclusion that no substantial burden was presented, and thus, the compelling interest test was not triggered, the Ninth Circuit’s opinion repeatedly emphasized the most ethnocentric language from *Lyng*: “Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land.”³²⁰

312. *Id.* at 1069–70.

313. *See id.*

314. *Id.* at 1070 n.12.

315. *Id.* at 1070.

316. *Id.*

317. *See id.* at 1063.

318. *Id.* at 1070 n.12 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (emphasis added)) (“Nor is the impact of the compulsory-attendance law confined to grave interference with important Amish religious tenets from a *subjective* point of view. It carries with it precisely the kind of *objective* danger to the free exercise of religion that the First Amendment was designed to prevent.”).

319. *Id.* at 1072 (“Like the Indians in *Lyng*, the Plaintiffs here challenge a government-sanctioned project, conducted on the government’s own land, on the basis that the project will diminish their spiritual fulfillment . . . [T]here is nothing to distinguish the road-building project in *Lyng* from the use of recycled wastewater on the Peaks.”).

320. *Id.* at 1072–73 (quoting *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 451–53 (1988)) (emphasis added). *See id.* at 1063–64 (wherein Judge Bea articulates the same sentiment, but in a more inclusive manner, “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”).

Judge Fletcher's dissent criticizes Judge Bea's majority opinion for effectively "read[ing] American Indians out of RFRA,"³²¹ and discounting the Indians' claims as merely arising from a "subjective spiritual experience," and, pointedly, not a "genuine religious belief and practice."³²² Judge Fletcher also objected to what he perceived as the "tragic irony" underlying the majority's justification for its holding that the Coconino National Forest, in which the Peaks are found, is "public park land" that "belongs to everyone".³²³

The United States government took this land from the Indians by force. The majority now uses that forcible deprivation as a justification for spraying treated sewage effluent on the holiest of the Indians' holy mountains, and for refusing to recognize that this action constitutes a substantial burden on the Indians' exercise of their religion.³²⁴

Apart from these statements, Judge Fletcher contended that RFRA provides a more rights protective standard than the Free Exercise Clause, based on the same analysis presented in the Ninth Circuit's original opinion, as noted above.³²⁵ Moreover, the dissent argued, "the majority is wrong in looking to *Sherbert* and *Yoder* for an exhaustive definition of what constitutes a 'substantial burden,'"³²⁶ and asserted that RFRA restored application of the compelling interest test to cases such as *Lyng*.³²⁷

321. *Id.* at 1113–14 (Fletcher, J., dissenting) ("RFRA was passed to protect the exercise of all religions, including the religions of American Indians. If Indians' land-based exercise of religion is not protected by RFRA in this case, I cannot imagine a case in which it will be. I am truly sorry that the majority has effectively read American Indians out of RFRA."). *Cf.* Laycock, *supra* note 2, at 229 (citing S. 1021, 103rd Cong. (1993)) (indicating that at the time of RFRA's enactment Native Americans recognized that the statute would not affect the Court's decisions in *Bowen* and *Lyng* and therefore "included an explicit provision about land use and sacred sites in the proposed Native American Free Exercise of Religion Act").

322. *Navajo Nation III*, 535 F.3d at 1096 (Fletcher, J., dissenting).

323. *Id.* at 1113 (Fletcher, J., dissenting).

324. *Id.*

325. *Id.* at 1084–85 (Fletcher, J., dissenting).

326. *Id.* at 1086 (Fletcher, J., dissenting).

327. *Id.* at 1085, 1088 (Fletcher, J., dissenting) (arguing that with the passage of RFRA, "Congress restored the application of strict scrutiny, as applied in *Sherbert* and *Yoder*, to all government actions substantially burdening religion, and rejected the restrictive approach to free exercise claims taken" in *Lyng*, among other cases); *id.* at 1090 ("The majority's attempt to read *Lyng* into RFRA is not just flawed. It is perverse.").

B. *Analysis: Both of the Ninth Circuit's Decisions in Navajo Nation Misconstrue the Substantial Burden Requirement under RFRA*

1. *The Ninth Circuit's Original Decision, Judge Fletcher's Opinion*

a. *Contrary to the Judge Fletcher's Interpretation, Lyng and Navajo Nation are Factually Analogous*

Lyng and *Navajo Nation* both involved situations in which the government's management of public lands threatened to eliminate the minimal conditions required for the claimants' religious observance.³²⁸ In both cases, Indian claimants opposed government land use decisions that would disrupt or desecrate sacred sites because they feared the impact of such governmental action would undermine their belief systems, in large part, by diminishing the purity of natural resources essential for religious rituals.³²⁹ Significantly, neither case involved outright prohibitions restricting access to the sites, an example of the affirmative coercion required under *Lyng* to constitute a cognizable injury in such cases.³³⁰ Commentators have criticized *Lyng* by pointing out that in other areas of constitutional law the Court recognizes governmental action can burden fundamental rights by "eliminating the minimal preconditions for its exercise,"³³¹ and by stating the decision reflects ethnocentric bias that prioritizes "Anglo concepts of religion and property," and thereby, fails to accord equal protection to sacred site claims.³³² Nevertheless, the decision remains Supreme Court precedent. Considering the unavoidable similarity between the two cases Judge Fletcher's attempt to distinguish *Lyng* on its facts in the Ninth Circuit's original opinion appears to be an ex-post rationalization for an opinion that heavily relied upon the perceived strength of the underlying conclusion that RFRA provides a more rights-protective standard than the Free Exercise Clause.³³³ Accordingly, as the en banc panel

328. See *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988); *Navajo Nation II*, 479 F.3d 1024, 1042–43 (9th Cir. 2007).

329. See *Lyng*, 485 U.S. at 442, 452; *Navajo Nation II*, 479 F.3d at 1042–43.

330. See *Lyng*, 485 U.S. at 453 ("[A] law forbidding the Indian respondents from visiting the Chimney Rock area would raise a different set of questions."); *Navajo Nation I*, 408 F. Supp. 2d 866, 905 (D. Ariz. 2006).

331. Sullivan, *supra* note 109, at 1454–56 ("[G]overnment action that inhibits freedom but falls short of 'coercion' has long been held in numerous contexts to infringe constitutional rights. . . . The view that only coercion unconstitutionally burdens rights such as speech and free exercise of religion follows from a mistaken conception of government neutrality toward such rights."). Former Stanford Law School Dean Sullivan goes on to argue that *Lyng* was wrongly decided because the Court failed to recognize that the government's withdrawal of the "preconditions" for the claimants' worship on public lands burdened their free exercise rights. *Id.*

332. Tapae, *supra* note 68, at 340–42.

333. See *Navajo Nation II*, 479 F.3d at 1047–48.

concluded, Judge Fletcher's reliance on perceived factual differences that distinguish *Navajo Nation* from *Lyng* is unconvincing.³³⁴

b. Judge Fletcher's Opinion Articulated a Coercion Test yet Applied a Substantial Impacts Analysis

Judge Fletcher's definition of "substantial burden" under RFRA uses a coercion analysis by stating that governmental action must affirmatively "prevent" a claimant from engaging in religious observance in order to constitute a cognizable injury.³³⁵ This formulation reflects the coercion test established in *Lyng*, which requires, in cases involving the government's internal functions, that the challenged governmental action be coercive—either affirmatively compelling individuals "into acting contrary to their religious belief," or penalizing their religious practices.³³⁶ Justice O'Connor's majority opinion in *Lyng* emphasized that the use of the word "prohibit" in the text of the Free Exercise Clause prescribes what the government cannot do to the individual, namely, engage in certain forms of direct governmental compulsion.³³⁷ "Prohibit" is synonymous with "prevent."³³⁸ Therefore, it appears that by expressly requiring that governmental action must "prevent" or prohibit religious observance in order to constitute a substantial burden on religious exercise under RFRA, Judge Fletcher's formulation, as a formal matter, adopts the coercion test.³³⁹

Despite the standard articulated by Judge Fletcher's opinion, the test actually applied appears to correspond more closely to a substantial impacts analysis, because both *Navajo Nation* and *Lyng* involved similar burdens on religious exercise, the elimination of preconditions of religious observance.³⁴⁰ As applied in the pre-*Smith* case law, the substantial impacts test does not

334. See *Navajo Nation III*, 535 F.3d 1058, 1072 (9th Cir. 2008) (en banc) ("Like the Indians in *Lyng*, the Plaintiffs here challenge a government-sanctioned project, conducted on the government's own land, on the basis that the project will diminish their spiritual fulfillment.").

335. See *Navajo Nation II*, 479 F.3d at 1033; see also *Navajo Nation III*, 535 F.3d at 1097 (Fletcher, J., dissenting) (internal quotation marks omitted) (The formulation presented in Judge Fletcher's dissent is, in substance, the same as that presented in the Ninth Circuit's original opinion: "Under our prior case law, a substantial burden on the exercise of religion exists where government action prevents an individual from engaging in [religious] conduct or having a religious experience and the interference is more than an inconvenience.").

336. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 465 (1988).

337. *Id.* at 451 (quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J. concurring)).

338. *Id.* at 469 n.4 (Brennan, J., dissenting) (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 940 (1983)) ("Webster's includes, as one of the two accepted definitions of 'prohibit,' 'to prevent from doing something.'").

339. Cf. *id.* at 468–69 (Brennan, J., dissenting) (turning to Webster's Dictionary in order to illustrate that the verb "prohibit," employed in the Free Exercise Clause and relied upon by the majority as justification for the Court's coercion test, is essentially synonymous with the verbs "prevent," "inhibit" and "frustrate," and thus arguing that there is no textual support for the distinction drawn by the majority between "governmental actions that compel affirmative conduct inconsistent with religious belief, and those governmental actions that prevent conduct consistent with religious belief").

340. See *supra* notes 328–334 and accompanying text.

require an affirmative showing of direct governmental compulsion, but instead asks whether the governmental action frustrates or inhibits religious practice.³⁴¹ By contrast, in cases involving the government's internal functions the coercion test requires free exercise claimants to demonstrate that governmental action compels violation of religious belief or prohibits religious observance in order for the Court to recognize a cognizable injury.³⁴² Therefore, the difference between the two approaches boils down to whether a free exercise claimant is required to show that the challenged governmental action affirmatively compels violation of religious belief or prohibits religious observance, rather than simply frustrating or inhibiting it.

Judge Fletcher's opinion facially applied the "must prevent" formulation to the two cognizable burdens that it identified—contamination of the natural resources needed for tribal rituals and desecration of the Peak's purity³⁴³—but considered broader, indirect effects of the challenged governmental action than are permitted under *Lyng*. For example, as evidence that artificial snowmaking would prevent the performance of certain rituals, a Navajo medicine man testified that if treated wastewater were used on the Peaks he would no longer be able to undertake the pilgrimages required to "rejuvenate the medicine bundles" that are part of every healing ceremony.³⁴⁴ Judge Fletcher's opinion framed this *impact* on religious exercise as preventing the performance of religious rites.³⁴⁵ However, in *Lyng* the Court rejected the similar impact that road construction and logging would have on traditional religious practices because it held that such governmental action did *not* outright prohibit, or prevent religious exercise.³⁴⁶ Therefore, in the absence of an outright prohibition, such as preventing access to the Peaks, or the imposition of a penalty on religious practices, such as a fine for collecting essential natural resources used to create medicine bundles, whatever burden contamination from artificial snowmaking might pose does not satisfy the standard required under *Lyng*. Similarly, Judge Fletcher's analysis of the second identified burden—the desecration of the Peaks—also concerns the indirect *impact* of governmental action. As evidence of this second burden, the court cited testimony of a Hopi religious practitioner who stated desecration of the mountain would cause *Katsinam* dance ceremonies, in which the tribe honors the spirits of their ancestors,³⁴⁷ to lose their religious value.³⁴⁸ Yet there is no governmental coercion as defined by *Lyng*. Nonetheless, Judge Fletcher's

341. *Lyng*, 485 U.S. at 469 (Brennan, J., dissenting).

342. *Id.* at 448-452.

343. *See Navajo Nation II*, 479 F.3d 1024, 1040-41 (9th Cir. 2007).

344. *Id.* at 1040.

345. *See id.*

346. 485 U.S. at 451-52.

347. *Navajo Nation II*, 479 F.3d at 1034; *Navajo Nation I*, 408 F. Supp. 2d 866, 894 (D. Ariz. 2006).

348. *Navajo Nation II*, 479 F.3d at 1041.

opinion recognized cognizable injuries in both of these examples, reflecting the court's application of a more rights-protective standard than the coercion test. Thus, Judge Fletcher's opinion, in essence, announced a new standard for analyzing burden in RFRA claims involving government land use decisions that closely corresponds to the substantial impacts test.

2. *The Decision of the En Banc Panel, Judge Bea's Opinion*

a. *As the En Banc Panel Properly Concluded, Judge Fletcher's Adoption of a Broader Standard is Unjustified*

Although, Judge Fletcher's opinion appears to have inadvertently used coercion as the standard for assessing burden under RFRA, the court's actual analysis more closely corresponds to a substantial impacts test. Which, given the precedent established in *Lyng* concerning free exercise challenges to government land use decisions, raises the question: why did the Ninth Circuit believe that it had the authority to apply a more rights-protective standard in *Navajo Nation*?

Judge Fletcher's opinion mainly justified its express, if muddled, rejection of the coercion test with four legal arguments for why RFRA requires a broader, more rights-protective standard for analyzing burden than the Free Exercise Clause of the First Amendment,³⁴⁹ all of which are reiterated in his dissent to Judge Bea's majority opinion.³⁵⁰ First, RFRA's amended definition of exercise of religion reflects statutory expansion of free exercise rights beyond the Supreme Court's interpretation of exercise of religion under the First Amendment.³⁵¹ Second, the plain meaning of the verb "burden" in RFRA's statutory text affords broader protection to free exercise rights than the Free Exercise Clause, which uses the verb "prohibit."³⁵² Third, RFRA provides more protection because it applies the compelling interest test set out in *Sherbert* "in all cases' where free exercise of religion is substantially burdened," including various categories of claims that had previously been exempted.³⁵³ Fourth, RFRA provides greater protection of free exercise rights than the Free Exercise Clause because it imposes a least restrictive means requirement that was not used in pre-*Smith* case law.³⁵⁴

349. *Id.* at 1032–33, 1047–48.

350. *Navajo Nation III*, 535 F.3d 1058, 1084–85 (9th Cir. 2008) (en banc) (Fletcher, J., dissenting).

351. *Navajo Nation II*, 479 F.3d at 1033, 1047; *Navajo Nation III*, 535 F.3d at 1085 (Fletcher, J., dissenting).

352. *Navajo Nation II*, 479 F.3d at 1032 (quoting *United States v. Bauer*, 84 F.3d 1549, 1558 (9th Cir. 1996), ("government may burden religion only on the terms set out by the new statute")); *see also id.* at 1047; *Navajo Nation III*, 535 F.3d at 1084.

353. *Navajo Nation II*, 479 F.3d at 1033 (quoting 42 U.S.C. § 2000bb(b) (2006)); *see Navajo Nation III*, 535 F.3d at 1085.

354. *Navajo Nation II*, 479 F.3d at 1033 (citing *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997)); *Navajo Nation III*, 535 F.3d at 1084–85.

Turning to the first argument, it is true that RFRA's amended definition of exercise of religion broadens the range of religious observance protected by the statute. However, as the en banc panel recognized,³⁵⁵ the conclusion reached in Judge Fletcher's opinion³⁵⁶ and reiterated in his dissent—that RFRA's amended definition reduces “the difficulty of showing a substantial burden,”³⁵⁷—reflects a conceptual misunderstanding of the burden concept. As Judge Bea's opinion explained, this argument “conflates two distinct questions under RFRA: (1) what constitutes an ‘exercise of religion’ and (2) what amounts to a ‘substantial burden’ on the exercise of that religion.”³⁵⁸ Once a court determines that a claimant's religious observance is properly considered an “exercise of religion,” then it must determine whether the exercise of that religion has been substantially burdened by the challenged governmental action. What kind of religious practices are eligible for consideration in the first instance—whether practices must be central or required by a religion or simply “religiously motivated”—is a conceptually distinct inquiry from any analysis of how much interference with those religious practices will be tolerated under RFRA. As Judge Bea's opinion stated, in *Navajo Nation* it was undisputed that the “Plaintiffs' activities are an ‘exercise of religion.’”³⁵⁹ That determination, however, has no bearing on the substantial burden inquiry, other than to merely trigger it.

Moreover, a brief review of the amendment's history reveals that it was solely intended to resolve a specific point of ambiguity in the Act—to clarify that “religiously motivated” conduct was covered under RFRA. In *Yoder* the Supreme Court introduced a threshold centrality requirement that prescribed in order to demonstrate a cognizable injury a claimant must show particular religious practices or beliefs are “central” to his faith.³⁶⁰ In *Mack*, Chief Judge Posner found that the Fourth, Ninth and Eleventh circuits had espoused a definition of substantial burden that only accorded free exercise protection to practices *required* by an adherent's religion,³⁶¹ a standard that was apparently derived from *Yoder's* centrality requirement. RLUIPA amended RFRA's definition of exercise of religion to encompass: “any exercise of religion, whether or not *compelled* by, or *central* to, a system of religious belief.”³⁶² The

355. *Navajo Nation III*, 535 F.3d at 1076–77 (“RFRA's amended definition of ‘exercise of religion’ merely expands the scope of what may not be substantially burdened from ‘central tenets’ of a religion to ‘any exercise of religion.’ It does not change what level or kind of interference constitutes a ‘substantial burden’ upon such religious exercise.”).

356. *See Navajo Nation II*, 479 F.3d at 1047.

357. *Navajo Nation III*, 535 F.3d at 1085 (Fletcher, J., dissenting).

358. *Id.* at 1076.

359. *Id.* at 1076–77.

360. *Wisconsin v. Yoder*, 406 U.S. 205, 210, 215–17 (1972).

361. *Mack v. O'Leary*, 80 F.3d 1175, 1178 (7th Cir. 1996) (citing *Goodal v. Stafford County School Board*, 60 F.3d 168, 172–73 (4th Cir. 1995); *Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir. 1995); *Bryant v. Gomez*, 46 F.3d 948 (9th Cir. 1995)). *See supra* Part II(A)(2).

362. 42 U.S.C. § 2000cc-5(7)(A) (2006) (emphasis added); *see also* 42 U.S.C. § 2000bb-2(4).

amendment appears to expressly reject *Yoder's* centrality requirement, and further, the legislative history indicates the statute's definition of free exercise was amended to "clarify[] issues that had generated litigation under RFRA."³⁶³ Additionally, cognizant that the burden concept is multifaceted and that the amendment simply addressed one discrete aspect of it, the legislative history expressly stated the amendment was not intended to define a new standard for substantial burden, but instead, deferred to the "Supreme Court's articulation of the concept of substantial burden."³⁶⁴ Therefore, the amendment appears to simply address conflicting interpretations over the range of religious observance protected under RFRA that gave rise to the intercourt split described in *Mack*.³⁶⁵

Accordingly, as the expansive interpretation of the amendment's scope in Judge Fletcher's opinion and dissent misconstrues the burden concept and contravenes RLUIPA's legislative history, it provides no support for the court's adoption of a more rights-protective standard for analyzing burden under RFRA in *Navajo Nation*.

Judge Fletcher's second argument—that the plain meaning of the verb "burden" in RFRA's statutory text affords broader protection to free exercise rights than the Free Exercise Clause that uses the verb "prohibit"³⁶⁶—may be tenable depending on how one views the use of legislative intent in statutory construction, but in the free exercise context it almost seems absurd. The Appellants in *Navajo Nation* argued that the appropriate legal standard for conducting burden analysis under RFRA was announced in *San Jose Christian College*.³⁶⁷ In *Navajo Nation*, Judge Fletcher's opinion cited a RLUIPA case for the proposition that use of the statutory term "burden" in RFRA affords broader protection to free exercise rights than the Free Exercise Clause, which in turn, relied upon the plain meaning standard announced in *San Jose Christian College*.³⁶⁸ Judge Fletcher's dissent defined the term "burden" by reference to two dictionaries, and ultimately concluded, "RFRA prohibits

363. H. REP. NO. 106-219 (1999).

364. H. REP. NO. 106-219.

365. *Mack*, 80 F.3d at 1178.

366. *Navajo Nation II*, 479 F.3d 1024, 1032 (9th Cir. 2007); *Navajo Nation III*, 535 F.3d 1058, 1085 (9th Cir. 2008) (en banc) (Fletcher, J., dissenting).

367. Plaintiffs'/Appellants' Opening Brief, *supra* note 230, at 30 (citing *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034–1035 (9th Cir. 2004) ("The government is prohibited from imposing or implementing a land use regulation in a manner that imposes a 'significantly great' restriction or onus on 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief' of a person.")); *see supra* Part II(B)(4)(b).

368. *Navajo Nation II*, 479 F.3d at 1033 (citing *Guru Nanak Sikh Soc'y v. County of Sutter*, 456 F.3d 978 (9th Cir. 2006)). In a confusing section of the *Guru Nanak Sikh Society* opinion, the Ninth Circuit recognized that the "Supreme Court's free exercise jurisprudence is instructive in defining a substantial burden under RLUIPA," yet adopted the formulation announced in *San Jose Christian College* that solely relied upon the plain meaning of the statutory text. 456 F.3d at 988–89. *See also Navajo Nation III*, 535 F.3d at 1084 (Fletcher, J., dissenting) (citing another Ninth Circuit decision for the same proposition, *United States v. Bauer*, 84 F.3d 1549, 1558 (9th Cir. 1996)).

government action that ‘hinders or oppresses’ the exercise of religion ‘to a considerable degree.’”³⁶⁹ Notably, however, neither Judge Fletcher’s opinion nor his dissent applied a legal standard that followed the plain meaning approach, but, rather, simply presented this argument as an additional justification for the standard ultimately adopted.

The plain meaning approach of *San Jose Christian College* is problematic in the free exercise context for two reasons. First, it directly contravenes an undeniable point of consensus in the legislative histories of both RFRA and RLUIPA: the instruction that courts look to pre-*Smith* case law for guidance in determining what constitutes a substantial burden.³⁷⁰ Second, as the en banc panel indicated, the words “substantial” and “burden” appear frequently in free exercise doctrine and a recognized canon of statutory construction prescribes that when Congress codifies a term of art, courts should interpret it consistent with its established meaning.³⁷¹ In *San Jose Christian College* the Ninth Circuit formulated its legal standard with dictionary definitions of the words “substantial” and “burden.”³⁷² However, the words “substantial” and “burden” are terms of art in free exercise doctrine with discernible meanings. It seems untenable and almost absurd to supplant over four decades of complex and hard-fought Supreme Court precedent with a dictionary interpretation of a sparingly-worded statute.

Third, Judge Fletcher argues that RFRA’s restoration of the compelling interest, “in all cases where free exercise of religion is substantially burdened,”³⁷³ “restored the application of strict scrutiny . . . to all government actions substantively burdening religion, and rejected the restrictive approach to free exercise claims” that had been taken in several cases decided prior to *Smith*, including *Lyng* and *Bowen*.³⁷⁴ The argument that RFRA requires a more rights-protective standard for analyzing burden than the Free Exercise Clause because the Act’s purpose directs courts to emulate the compelling interest test as set forth in *Sherbert* and *Yoder*³⁷⁵ also conflates two distinct inquiries under RFRA: (1) whether a claimant’s exercise of religion has been substantially burdened by governmental action, and (2) whether a compelling government interest justifies such a burden. In *Sherbert* the Court brought these two distinct inquiries together when it established a conjunctive legal standard for evaluating free exercise challenges: if a burden on free exercise is recognized, then the compelling interest test and the least restrictive means requirement

369. *Navajo Nation III*, 535 F.3d at 1086 (Fletcher, J., dissenting).

370. See Senate Report, *supra* note 11, at 8–9; House Report, *supra* note 11, at 6; 146 CONG. REC. S7776-01 (joint statement of Sens. Hatch & Kennedy).

371. *Navajo Nation III*, 535 F.3d at 1074–75. See *supra* note 152 and accompanying text.

372. 360 F.3d at 1034.

373. 42 U.S.C. § 2000bb(b)(1) (2006).

374. *Navajo Nation III*, 535 F.3d at 1088 (Fletcher, J., dissenting).

375. See *id.* at 1085 (Fletcher, J., dissenting); see also *Navajo Nation II*, 479 F.3d 1024, 1033 (9th Cir. 2007).

apply.³⁷⁶ Under the *Sherbert* framework, where a court finds that governmental action substantially burdens a claimant's free exercise rights, the compelling interest test is triggered.³⁷⁷ Increasing or reducing the level of judicial scrutiny that is applied on the second part of this framework cannot logically determine the outcome of the first part which involves whether a substantial burden on free exercise rights exists.

Moreover, the dissent's argument appears based on the mistaken premise that the free exercise challenges in *Lyng* and *Bowen* were rejected on the ground that the compelling interest test categorically does not apply to cases involving the government's internal functions, such as its management of public lands, or its record keeping procedures for a public benefit program.³⁷⁸ While this is an accepted interpretation of *Lyng* and *Bowen*,³⁷⁹ the better way to understand these cases is that they both involved circumstances in which the Court refused to recognize the existence of a cognizable injury because the challenged governmental actions were not coercive in nature,³⁸⁰ and therefore it had no occasion to reach the compelling interest test.³⁸¹ *Lyng* and *Bowen* are thus distinguishable from opinions in which the Court expressly reduced the level of scrutiny required to justify governmental action prior to *Smith*, such as in free exercise challenges involving military personnel and discrimination against prisoners, where the Court replaced the compelling interest test with a reasonableness standard.³⁸² Moreover, as indicated above, RFRA's legislative history indicates that the Court's opinions in *Lyng* and *Bowen* were unaffected by the Act.³⁸³

Finally, Judge Fletcher argues that RFRA provides greater protection of free exercise rights than the Free Exercise Clause because it imposes a least

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

377. *Id.* at 406–407.

378. *See Navajo Nation III*, 535 F.3d at 1085 (Fletcher, J., dissenting) (indicating that throughout the 1980s the Court refused to apply the compelling interest test to various categories of cases, including the claims presented in *Lyng* and *Bowen*). *See supra* notes 82–85 and accompanying text.

379. *See supra* note 102.

380. *See Lyng*, 485 U.S. at 449 (1988) (explaining that the Court could not recognize a cognizable burden on free exercise rights in *Bowen* or *Lyng* because “[i]n neither case . . . would the affected individuals be coerced by the Government’s action into violating their religious beliefs; nor would either government action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens”).

381. *See Laycock, supra* note 2, at 227 (indicating that *Bowen* and *Lyng* “hold, in effect, that government does not prohibit the free exercise of religion unless it regulates or penalizes a religious practice. This rule, which goes to the definition of burden rather than compelling interest, is generally unaffected by RFRA.”).

382. *See supra* notes 82–85 and accompanying text; *see, e.g., Goldman v. Weinberger*, 475 U.S. 503, 510 (1986); *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987); *see also Gaffney, supra* note 52, at 410–11.

383. *See supra* notes 150–155 and accompanying text.

restrictive means requirement that was not used in pre-*Smith* case law.³⁸⁴ However, in the words of the en banc panel, this argument “puts the cart before the horse.”³⁸⁵ This additional statutory requirement to use the least restrictive means is only triggered *after* a substantial burden and a compelling governmental interest have been found. Thus, as the en banc panel concluded, RFRA’s imposition of a least restrictive means requirement has no bearing on the substantial burden inquiry.³⁸⁶

b. Judge Bea’s Opinion Misinterpreted RFRA’s Purpose and the Supreme Court’s Decision in Wisconsin v. Yoder

i. Judge Bea’s Opinion Misinterpreted RFRA’s Purpose

Further illustrating that RFRA is, in fact, “redolent” with ambiguity,³⁸⁷ the majority also misconstrued RFRA’s statement of purposes in two ways, by erroneously combining RFRA’s statements of purposes and findings and by only looking to *Sherbert* and *Yoder* to define what constitutes a substantial burden.³⁸⁸

First, instead of reconciling the internal inconsistency between RFRA’s statements of purposes and findings as to whether courts should emulate the compelling interest test as specifically set forth in *Yoder* and *Sherbert*, or, rather, generally look to pre-*Smith* case law for guidance,³⁸⁹ the majority simply ignored the ambiguity. Instead, the majority combined the statements and determined, “the cases RFRA expressly adopted and restored—*Sherbert*, *Yoder*, and federal court rulings prior to *Smith*—also control the substantial burden inquiry.”³⁹⁰ Thus, the majority reasoned, courts should emulate both the compelling interest test and substantial burden inquiry as set forth in *Sherbert*, *Yoder*, and unspecified pre-*Smith* case law.³⁹¹

This interpretation is problematic in the context of the Court’s prior treatment of the compelling interest test in free exercise case law because “it is impossible to find a uniform standard in the pre-*Smith* cases, given the differing degrees of review applied before *Smith* under the moniker of ‘compelling interest’ analysis.”³⁹² Moreover, “restoring the body of prior federal court

384. See *Navajo Nation II*, 479 F.3d 1024, 1032 (9th Cir. 2007) (citing *City of Boerne v. Flores*, 521 U.S. 507, 535 (1993)); *Navajo Nation III*, 535 F.3d 1058, 1084–85 (9th Cir. 2008) (en banc) (Fletcher, J., dissenting) (citing *Boerne*, 521 U.S. at 535); see also *supra* note 57.

385. *Navajo Nation III*, 535 F.3d at 1076.

386. *Id.*

387. Lupu, *supra* note 7, at 173.

388. *Navajo Nation III*, 535 F.3d at 1086 (Fletcher, J., dissenting) (“[T]he majority is wrong in looking to *Sherbert* and *Yoder* for an exhaustive definition of what constitutes a ‘substantial burden.’”).

389. See *supra* notes 141–143 and accompanying text.

390. *Navajo Nation III*, 535 F.3d at 1069.

391. *Id.*

392. Berg, *supra* note 13, at 27 (emphasis added). See *supra* notes 167–169 and accompanying text.

rulings would force into the Act all of the pre-*Smith* damage to free exercise values,” namely, the gradual withdrawal of strict scrutiny, and thus, significantly “under-restore” religious liberty.³⁹³ By contrast, RFRA’s statement of purpose incorporates a highly protective standard; *Yoder* subordinates religious freedom only to “interests of the highest order,” and *Sherbert* only to avoid “the gravest abuses, endangering paramount interests.”³⁹⁴

The majority’s interpretation also contravenes a plain reading of RFRA’s explicit statutory purpose—“to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*,”³⁹⁵ As noted above, this interpretation of RFRA has been adopted by the United States Supreme Court.³⁹⁶ Moreover, RFRA’s statement of purpose is more specific than its general statement of findings,³⁹⁷ and, “purposes” generally trump “findings” as more probative of congressional intent.³⁹⁸

Second, contrary to the majority’s conclusion, RFRA’s express purpose to restore the compelling interest as set forth in *Sherbert* and *Yoder* does not “also control the substantial burden inquiry”³⁹⁹ such that courts should solely rely upon those opinions in formulating a definition of “substantial burden” under RFRA.⁴⁰⁰ The majority justified its liberal interpretation on the ground that limiting RFRA’s statement of purpose to mere restoration of the compelling interest test as set forth in *Sherbert* and *Yoder* would be “redundant and superfluous” because both opinions apply the “same compelling interest test.”⁴⁰¹ However, as discussed above, prior to *Smith* differing degrees of review were applied “under the moniker of ‘compelling interest’ analysis,”⁴⁰² and “[t]he Court had carved out exceptions for prisons and the military, holding the compelling interest test did not apply to such restrictive environments.”⁴⁰³ Thus, by explicitly restoring the compelling interest test as set forth in *Sherbert*

393. Lupu, *supra* note 7, at 196–97 (internal quotations omitted) (emphasis added).

394. Laycock, *supra* note 2, at 224 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963)).

395. 42 U.S.C.A. § 2000bb(b)(1) (2006) (emphasis added).

396. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006); *supra* note 172.

397. See Laycock, *supra* note 2, at 224 (noting same).

398. Lupu, *supra* note 7, at 196–97 (indicating that Congressional findings are “assessments of pre-enactment conditions,” while purposes “are statements of legislative objectives”).

399. *Navajo Nation III*, 535 F.3d 1058, 1069 (9th Cir. 2008) (en banc).

400. *Id.* at 1069–70 (internal quotations omitted) (although the en banc panel indicated that *Sherbert*, *Yoder* and other pre-*Smith* case law “control the substantial burden inquiry,” the majority only referenced *Sherbert* and *Yoder* in the definition of “substantial burden” it articulated and applied); see *supra* note 312 and accompanying text.

401. *Navajo Nation III*, 535 F.3d at 1075 n.16.

402. Berg, *supra* note 13, at 27. See *supra* note 167 and accompanying text.

403. Laycock, *supra* note 2, at 227 (citations omitted). See *supra* notes 82–85 and accompanying text.

and *Yoder*, RFRA's purpose stated that the test should be applied with the stringency that it was in those opinions.⁴⁰⁴

Moreover, *Sherbert* and *Yoder* provide a frame of reference against which lower courts can compare purported compelling governmental interests. The stringency of the compelling interest test can best be seen in *Yoder*, where the Court held that although education of children in the first two years of high school is important—this interest was “not sufficiently compelling to justify the substantial burden on the Yoders’ religious exercise.”⁴⁰⁵ In *Yoder*, the Court rejected the government’s fear that Amish children who later choose to leave the Amish would be “‘ill-equipped for life’ without a high school education,” as “speculative” because there was no such evidence in the record.⁴⁰⁶ Similarly, in *Sherbert*, the Court found the government’s “speculative” fear—that “unscrupulous claimants feigning religious objections to Saturday work” would “dilute the unemployment compensation fund” and “hinder the scheduling . . . of necessary Saturday work”—was not compelling enough to justify refusing unemployment benefits to those whose religious faith disqualifies them from working on Saturday.⁴⁰⁷

These cases instruct that the government must show an interest more compelling than saving money or educating children.⁴⁰⁸ When this standard is faithfully applied, “most governmental interests are not compelling.”⁴⁰⁹ Accordingly, RFRA’s explicit statutory purpose is neither “redundant” nor “superfluous,” and thus, should not be liberally interpreted to control the “substantial burden inquiry.”⁴¹⁰

ii. Judge Bea’s Opinion Misinterpreted *Wisconsin v. Yoder*

The en banc panel’s opinion also misinterprets *Yoder* by concluding that the Supreme Court’s holding rested on the nature of the challenged governmental action—the compulsory high school attendance law—and not the “impact” the law “could have on the continued survival of Amish communities.”⁴¹¹ According to the en banc panel, under the Court’s opinion in *Yoder*, only governmental action that coerces individuals to act contrary to their religious beliefs by the threat of civil or criminal sanctions cognizably burdens

404. See Laycock, *supra* note 2, at 225–26.

405. *Id.* at 225 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 219–29 (1972)).

406. *Id.* at 225–26 (citing *Yoder*, 406 U.S. at 224–25).

407. *Sherbert v. Verner*, 374 U.S. 398, 407 (1963).

408. See Laycock, *supra* note 2, at 226.

409. *Id.* (noting that the compelling interest of *Sherbert* and *Yoder* is the standard to be applied under RFRA).

410. *Navajo Nation III*, 535 F.3d 1058, 1069, 1075 n.16 (9th Cir. 2008) (en banc).

411. *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 466–67 (1988) (Brennan, J., dissenting); see Ray, *supra* note 66, at 499 (“In applying the first prong of the *Sherbert* test, the *Yoder* Court looked to the effect and not the form of government action in determining whether a burden on religion existed.”).

religious exercise.⁴¹² As discussed above, the attendance law at issue in *Yoder* did not compel violation of any particular religious beliefs or practices because the Amish religion does not expressly proscribe secondary public school education.⁴¹³ In departure from the Court's previous free exercise decisions, the *Yoder* Court granted the exemption in recognition of the feared *impact* that compulsory high school attendance would have on Amish communities—corruption of Amish children through exposure to worldly influences “at the crucial adolescent stage of development.”⁴¹⁴ Contrary to the en banc panel's narrow reading of *Yoder*, which follows the interpretation advanced by Justice O'Connor's majority opinion in *Lyng*, the *Yoder* Court's explicit emphasis on the broad threat posed to the Amish way of life undermines the notion that this impact would have been constitutionally insignificant if the attendance law had not been coercive in nature.⁴¹⁵

Moreover, as indicated by Judge Fletcher's dissent, neither *Sherbert* nor *Yoder* suggested that religious exercise can be burdened *only* by the circumstances presented in those cases.⁴¹⁶ In the Court's major free exercise opinions prior to *Bowen* and *Lyng*, there was no dispute that the challenged policies created a cognizable burden on religion.⁴¹⁷ Until the Court's opinions in *Bowen* and *Lyng* made burden analysis “prominent” in free exercise doctrine, “the concept of burden” was undefined and “inchoate.”⁴¹⁸ Significantly, the legal standard that the en banc panel discerned from *Yoder*'s treatment of burden analysis was, in fact, first announced by the Court fourteen years later in *Bowen*⁴¹⁹ and subsequently applied by *Lyng*.⁴²⁰ All this is to say that the Court's opinions in *Bowen* and *Lyng*, not *Yoder*, represent the point at which the burden concept emerged in free exercise doctrine.⁴²¹ Although Justice O'Connor's majority opinion in *Lyng* sought to justify the Court's application

412. See *Navajo Nation III*, 535 F.3d at 1069–70.

413. See *Lyng*, 485 U.S. at 466–67 (Brennan, J., dissenting) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 209 (1972)); Lupu, *supra* note 7.

414. *Yoder*, 406 U.S. at 218; see also Ray, *supra* note 66, at 508–09.

415. See *supra* notes 116–118.

416. See *Navajo Nation III*, 535 F.3d at 1089 (Fletcher, J., dissenting); see also *Lyng*, 485 U.S. at 466 (Brennan, J., dissenting) (indicating that in sustaining the challenges to unemployment benefits laws that exerted a coercive effect on religious adherents to violate their beliefs in *Sherbert*, *Thomas v. Review Board*, 450 U.S. 707 (1981), and *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987), the Court “nowhere suggested that such coercive compulsion exhausted the range of religious burdens recognized under the *Free Exercise Clause*”); Lupu, *supra* note 28, at 942 (indicating *Sherbert* teaches that indirect burdens “may suffice to cross the threshold,” but the opinion does not provide guidance “on how to determine where indirect burdens begin”).

417. See Lupu, *supra* note 28, at 943.

418. *Id.* at 943–44.

419. *Bowen v. Roy*, 476 U.S. 693, 700 (1986) (announcing the coercion test by expressly requiring that free exercise claimants demonstrate governmental action compels violation of religious belief in order for the Court to recognize a cognizable injury). See *supra* notes 74–78 and accompanying text.

420. See *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988). See *supra* notes 380–381 and accompanying text.

421. See Lupu, *supra* note 28, at 942–46.

of the coercion test based on its prior free exercise opinions, *Yoder* cannot “withstand a view so pinched.”⁴²²

CONCLUSION

Judge Fletcher’s opinion in *Navajo Nation* reflected a determined effort to reconcile the statutory provisions of RFRA with the Supreme Court’s ethnocentric decision in *Lyng*. Unfortunately, as the en banc panel concluded, RFRA was not intended to remedy the disparate treatment of sacred site claims in free exercise doctrine and thus, it does not provide any more protection for these claims than the Free Exercise Clause. Both of the Ninth Circuit’s decisions, however, may ultimately lead to a more equitable framework for analyzing free exercise challenges.

The “battle over the San Francisco Peaks” will likely continue because the case is probably destined for the Supreme Court.⁴²³ Supreme Court review would present the opportunity to revisit the precedents established in *Bowen* and *Lyng* by announcing a constitutional standard that fairly balances fundamental free exercise rights and other important societal interests, such as the government’s effective management of public lands.⁴²⁴ For instance, commentators have suggested alternative standards for assessing burden⁴²⁵ and the use of intermediate scrutiny for striking “an appropriate balance between the government’s interest in the uniform adherence to laws of general applicability and the interest of individuals in receiving modest accommodations for the free exercise of religious beliefs.”⁴²⁶ If the compelling

422. Lupu, *supra* note 7, at 203.

423. See Jeffrey Merchant, *Religion and Public Lands Management: Will Snowbowl Snowball?*, 22 FALL NAT. RESOURCES & ENV’T 54 (2007).

424. See Save the Peaks Coalition, *Tribes & Environmental Groups Petition Supreme Court in Appeal to Protect Religious Freedom & Environmental Integrity of Sacred Mountain*, Jan. 6, 2009, http://www.savethepeaks.org/STPrelease_supremecourt.html (quoting Howard Shanker, attorney for the Navajo Nation, Havasupai Tribe, White Mountain Apache Nation, Yavapai-Apache Nation, Sierra Club, Center for Biological Diversity, and the Flagstaff Activist Network) (“This case represents the last, best chance for Native Americans to have some substantive protection of sites that they hold sacred through application of existing law In a country that supposedly values the free exercise and accommodation of all religion, it is unconscionable that Native American religious and cultural beliefs have essentially been relegated to second-class status by the federal government. The Supreme Court now has an opportunity to right this wrong.”).

425. See, e.g., Lupu, *supra* note 28 (proposing a test of loss of entitlement or government action analogous to that which would be actionable at common law if done by a private citizen).

426. See, e.g., Rodney A. Smolla, *The Free Exercise of Religion After the Fall: The Case for Intermediate Scrutiny*, 39 WM. & MARY L. REV. 925, 937–38 (1998) (stating that “[i]ntermediate scrutiny has proven to be a useful doctrinal vehicle in other areas of constitutional law, and in the religion area it would strike an appropriate balance”); Nicholas Nugent, *Toward a RFRA That Works*, 61 VAND. L. REV. 1027, 1065 (2008) (suggesting that RFRA could accomplish its purpose “by stating that all state laws incidentally burdening the free exercise of religion should be subject to intermediate scrutiny in which the state’s regulatory interest is to be weighed against the burden on the citizen’s religious practice, accounting for possible alternative avenues on both sides”); Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RES. L. REV. 55, 104 (2006) (suggesting a wide variety of “adjudicatory alternatives” to imposing strict scrutiny in all free exercise challenges).

interest test were not imposed in all RFRA challenges, then courts would be less inclined to rely upon threshold burden requirements, such as the coercion test, for disposing of cases involving indisputable injuries to free exercise rights, but that may or may not be justified by legitimate governmental purposes.

If the Supreme Court, however, were to remain committed to its analysis in *Bowen* and *Lyng*, then minimally, one would hope it would clarify the existence of two distinct tests for analyzing burden under RFRA, how each test should be formulated, and under what circumstances each test should apply. As indicated by this Note, and in particular, through analysis of the Ninth Circuit's decisions in *Navajo Nation*, such clarification is necessary to reduce conflict amongst appellate courts and pervasive confusion over the appropriate legal standard.