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Dana Lloyd
Syracuse University

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ABSTRACT

In 1988 the United States Supreme Court declared constitutional the federal government’s development plan in an area (known as the High Country) that was considered central to the religious practice of three local American Indian nations. The Court admitted that “It 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.” Nevertheless, because the disputed area was on public land, the Court thought that the government should be allowed to manage its property in any way it saw fit, regardless of the severe adverse effects on the religious practice of the local Indian nations. A lot has been written about this case, Lyng v. Northwest Indian Cemetery Protective Association (1988), but one thing that scholars have not paid attention to is the declaration of a study that comprised the central evidence in the case, according to which seeing the practice in question as religious is problematic, because it forces an Indian practice into a Western category. This case, therefore, raises questions about the relationship between law and religion in the United States, and specifically in the context of American Indian rights. Why was this case argued as one about religion? If it is not about religion, what is it about? In this dissertation I offer two readings of this case.

In Part One I read this case as it is normally read, as a case about religious freedom. I read the Supreme Court decision, which does not doubt the religiosity of the practice, its sincerity, and the burden imposed on it by the government’s development plan and nevertheless denies it First Amendment protection, against the body of precedent available to the Court as well as the evidence and testimony provided in the original District Court trial. I argue that a broader understanding of religion calls for
constitutional protection of this practice. But I find this reading to be missing something, and it has become less satisfactory to scholars of law and religion who have recently doubted the free exercise route as one that is useful for religious and racial minorities. In Part Two I suggest reading this case as one about Indigenous sovereignty. I read the dissenting opinion in the case against the background of the evidence and testimony in the trial as well as scholarship on sovereignty and on indigeneity. But sovereignty – just like religion – is a Western concept, and applying it to American Indian nations requires some critical adjustments as well. Listening to the voices of American Indian witnesses and scholars, I think about ways to modify the concept to make it useful for Indigenous communities seeking justice in the United States.
FROM RELIGIOUS FREEDOM TO INDIGENOUS SOVEREIGNTY:

THE CASE OF *LYNG V. NORTHWEST INDIAN CEMETERY PROTECTIVE ASSOCIATION* (1988)

by

Dana Lloyd

LL.B Tel Aviv University, Faculty of Law, 2004
LL.M Tel Aviv University, Faculty of Law, 2009
M.A. Tel Aviv University, 2010
M.Phil. Syracuse University, 2016

DISSERTATION

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The project that ended up being my dissertation began shaping in my first semester at Syracuse University, when I read the U.S. Supreme Court decision in *Johnson v. McIntosh* (1823) and was struck by the similarities (and the differences) between American Indian land claims in the U.S. and Palestinian land claims in Israel. For the longest time, I resisted writing about the relationship between law, land and religion, but Phil Arnold’s encouragement and reassurance that this is an important project, and that I am the right person for the job, finally worked, and I discovered I had some things to say about the topic. Phil has become the most supportive advisor I could have asked for, and his commitment both to Indigenous justice and to his students has always been inspiring.

The other members of my dissertation committee have been of tremendous help as well. Winni Sullivan’s work has been my inspiration from the start, and her comments on my writing, as well as our conversations, have pushed me to think better and to write better about law and religion and about my positionality as a non-American writing about America. Jim Watts has shown me that there are many ways to think about the intersection of law and religion and has always pushed me to think more critically about everything I read (and write). Ken Baynes has shown me that philosophy matters for real life, especially for politics, and that politics matters for philosophy. Ann Gold’s ethnographic insight has enabled me to approach the ethnographic materials that have become so central to my dissertation.

The Department of Religion and the Graduate Student Organization at Syracuse University have supported my research with travel grants for archival research and to present my work at various conferences. I am grateful for their support. Jackie Borowve
and Debbie Pratt in the Department of Religion made completing each stage of the program successfully possible, and I am thankful to them both.

During my years in graduate school, I spent time at the Institute for Research in the Humanities at the University of Wisconsin—Madison and in the Department of Religious Studies, as well as the Katz Center for Advanced Judaic Studies at the University of Pennsylvania, which allowed me access to excellent libraries and intellectual communities that contributed significantly to my work. The Department of Theology and Religious Studies at Villanova University – where I have been teaching classes for the past year – has felt like a home to me from the start, and my colleagues and students there have been invaluable conversation partners.

A week I spent at the National Archives at San Francisco has been crucial for completing my dissertation. The staff there, and especially Aaron Seltzer, has made my stay there easy and enjoyable, and it made me love archival work.

I thank Richard Avilas for inviting me to present my work at the Race and Ethnicity Seminar at the University of Wisconsin—Madison and Alda Balthrop-Lewis for inviting me to present my work at the Institute for Religion and Critical Inquiry at the Australian Catholic University. These presentations, and the discussion that followed each of them, have been instrumental in developing my arguments in Chapters Three and Four of this dissertation.

Attorney Stephen Quesenberry and Mark Royman, law clerk at the United States District Court for the District of Northern California, have been particularly helpful in locating materials related to the Lyng case. The staff at the California Indian Legal Services has encouraged me to pursue this project and connected me with people who
have helped me to think about the Lyng case. I owe special thanks to Judge Abby Abinanti, who has been generous and encouraging.

Conversations with several scholars have been helpful in shaping my thinking on this project. I thank Kathleen Birrell, Anna Blume, Marianne Constable, Larry Nesper, Adi Ophir, Tim Powell, Elliot Ratzman, William Robert, and Ludger Viehues-Bailey.

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My mother, Rachel Barnea, my siblings, Liat Ginzburg and Gilad Shneor-Barnea, and my in-laws, Ric and Debbie Lloyd, have always believed in me and encouraged me to keep doing what I’m doing. I love you and thank you for this.

Finally, to Vincent and Anya. Thank you for teaching me what justice means and challenging the ways I see the world in endless conversations every day. You are both the smartest, kindest people I know, and I dedicate this work to you.
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When I teach courses on law and religion, the thing my students find most intriguing is how we get from a human story, rich with detail, with experience and with emotion to a short, dry Supreme Court decision. When I was a law student, we talked about this question quite a bit. But my students are college students, taking a humanities class, and most of them do not have access to such questions and to their answers. Actually, as Duncan Kennedy has written, even law students spend most of their time reading Supreme Court decisions, thus forgetting the stories behind the texts, the people who have experienced something that was so significant that they were willing to fight for it in three different courts, and whose fight was over something so significant that the Supreme Court agreed to hear it. Of course, we also forget all the cases that never reached the Supreme Court.¹ William Felstiner, Richard Abel, and Austin Sarat argue that thinking about legal disputes only through looking at court decisions distorts our understanding of the social reality:

Studying the emergence and transformation of disputes means studying a social process as it occurs. It means studying the conditions under which injuries are perceived or go unnoticed and how people respond to the experience of injustice and conflict. In addition, though the study of crime and litigation rates seems to be derived from and to support the conviction that both are too high – that there is a need for more police and longer prison terms, that the courts are congested with “frivolous” suits – the study of the emergence and transformation of disputes may

lead to the judgment that too little conflict surfaces in our society, that too few wrongs are perceived, pursued, and remedied.²

I am writing my dissertation in a religion department and with the assumption that my readers have a greater interest in the humanities than in law. I therefore believe that my readers would be interested in the human story that turned into the infamous Supreme Court decision in *Lyng v. Northwest Indian Cemetery Protective Association* (1988) that is at the center of my dissertation. Taking seriously the critiques of Kennedy, Felstiner, Abel, and Sarat, I decided to try to tell a more robust story about *Lyng* than the one told in the Supreme Court decision. In order to tell the story behind the case I traveled to San Bruno, California, for archival research that discovered the transcripts of the District Court trial, including the examination of dozens of witnesses – Yurok and Karuk members, expert witnesses, and Forest Service officials – and a lengthy report of a comprehensive study concerning the High Country (the area at the heart of the dispute), an area which is seen by some as sacred, by others as a cultural resource to be conserved, and yet by others as private property whose owners should be able to do whatever they want with it.

This question – about the story behind the case – will hopefully be of interest to my readers. But why is it of interest to me? What do I have to do with some legal case from California in the 1980s? I arrive at the *Lyng* case with a background that is somewhat different than that of most Americans – both those whose training is in law and those with training in religious studies. In order to see beyond the brief description of the facts of the case and the technical analysis of the legal issues that it raises, I wanted to

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know how lay people understood this case. I was interested in the position of lay people whose everyday lives are tied with the fate of this area which is, at once, a place of worship and public land. I thought that if I understood this case better, I would understand America better.

In what follows, I describe the things I found at the San Bruno archive. I wish I could describe all the people involved in the trial – the judge, the lawyers, the witnesses. I would describe what they look like, the sound of their voices, the hesitation of a witness when responding to questions filled with legal jargon, the facial expression of a witness whose storytelling is being interrupted by the judge. I wish I could see Merilyn Miles, the Indian plaintiffs’ litigant, then a lawyer fresh out of law school, who is now a retired California Superior Court judge. Would the reader be interested in her occasional apologies, reminding the judge that she is “obviously new to this”? would the reader be interested in the judge’s reassurance that she is doing well?

Going back to my theology students and religion scholars who are my potential readers, I ask again, what is of interest to them? What will they want to know? Can the transcripts teach me – and can I then teach my readers – anything new about religion? Anything new about religion beyond what the Supreme Court decision in Lyng teaches us? Different people tell different stories about the High Country: these people include Yurok and Karuk members who tell the story from a “traditional” perspective, archeologists and geologists who tell the story from an environmental point of view, and government officials who tell the story from an owner’s point of view. Because the Indian perspective has been neglected, I focus on their story in this dissertation.
A few words about my positionality as a non-Indigenous author are due here. I feel comfortable writing about Common Law, reviewing the colonial history as well as the body of precedent, and critiquing the U.S. Supreme Court and its decision in this case. For this critique I use, among other things, the words of the witnesses in the trial, in which I was not present, and to which I gained access through archival research. During the work on my dissertation I felt strong resistance to “reporting” about the trial in my own words. Part of my aim in this work is to let the witnesses’ voices to be heard, and so rephrasing their testimonies, interpreting them, and editing out large parts of their stories seemed to go against my aim. To mitigate this problem, I added the full testimony of two of the witnesses as appendices to my dissertation. But this addition did not solve the whole problem. Admitting that anything I might write about the trial would require interpretive work and realizing that what I do here is telling a more robust story about Lyng than the one told by the Supreme Court – but that the story is nevertheless incomplete – allowed me to pursue the task at hand. The story told here, therefore, is partial. It contextualizes the Lyng decision legally, historically, politically, and, finally, religiously.
INTRODUCTION

In 1988 the United States Supreme Court declared constitutional the federal government’s development plan in an area (known as the High Country) that was considered central to the religious practice of three local American Indian nations. The Court admitted that “It 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.” Nevertheless, because the disputed area was on public land, the Court thought that the government should be allowed to manage its property in any way it saw fit, regardless of the severe adverse effects on the religious practice of the local Indian nations. A lot has been written about this case, *Lyng v. Northwest Indian Cemetery Protective Association* (1988), but one thing that scholars have not paid attention to is the declaration of a study that comprised the central evidence in the case, according to which seeing the practice in question as religious is problematic:

Because of the particular nature of the Indian perceptual experience, as opposed to the particular nature of the predominant non-Indian, Western perceptual experience, any division into “religious” or “sacred” is in reality an exercise which forces Indian concepts into non-Indian categories, and distorts the original conceptualization in the process. This case raises, therefore, questions about the relationship between law and religion in the United States, and specifically in the context of American Indian rights. Why was this

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4 Theodoratus Cultural Research, *Cultural Resources of the Chimney Rock Section, Gasquet–Orleans Road, Six Rivers National Forest*, Fair Oaks, CA (hereafter “Theodoratus Report”), 44.
case argued as one about religion? If it is not about religion, what is it about? In the following pages I offer two readings of this case.

In Part One I read *Lyng* as it is normally read, as a case about religious freedom. I read the Supreme Court decision – which does not doubt the religiosity of the practice, its sincerity, and the burden imposed on it by the government’s development plan and nevertheless denies it First Amendment protection – against the body of precedent available to the Court as well as the evidence and testimony provided in the original District Court trial. I argue that a broader understanding of religion calls for constitutional protection of this practice. But I find this reading to be missing something, and it has become less satisfactory to scholars of law and religion who have recently doubted the free exercise route as one that is useful for religious and racial minorities. In Part Two I suggest reading *Lyng* as one about Indigenous sovereignty. I read the dissenting opinion in the case against the background of the evidence and testimony in the trial as well as scholarship on sovereignty and on indigeneity.

Reading the case as one about sovereignty requires attention to the fact that sovereignty, just like religion, is a Western concept. Therefore, arguing for Indigenous sovereignty has an effect similar to that of arguing for Indigenous religious freedom: on the one hand, one faces the danger of forceding non-Western phenomena into Western categories, thus misunderstanding the phenomena (or the categories) altogether; on the other hand, such practice has the effect of destabilizing the Western categories as including only Western phenomena. In other words, arguing the *Lyng* case as one about

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religious freedom implies that not only Christianity deserves constitutional protection as “religion.” Arguing against the development of the High Country because of Indigenous sovereignty implies that not only states can be sovereign.

**Law and Religion**

In this work I join an ongoing conversation, one that I find productive, in a field that has been given the title “law and religion.” The academic field of law and religion has gained popularity in the United States in recent years. Several journals and edited collections have been dedicated to the subject. While religious freedom has been a central issue in the field, scholars have attempted to approach other questions through this methodology as well. In the legal field, approaches of “law and x” have been popular for decades. Law and society, law and economics, and law and literature are just a few examples of the approaches taken by legal scholars. Similarly, approaches of “religion and x” have been popular in the academic study of religion, where religion and science, religion and society, and religion and psychoanalysis are just a few examples.

Joining the conversation on law and religion involves acknowledging the reciprocal relationship between the two categories. Law is an important tool through which religion is shaped, but religion is itself a tool through which positive law is constantly examined. Together, the two shape American citizenship. But law and

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religion, as lenses through which we view the world, also share many qualities. In Silvio Ferrari’s words:

This is the profound meaning of the relationship between law and religion:

religion, like law, is an attempt to provide answers to the great questions which lie at the base of the existence of men and things. For this reason philosophers, theologians and legal scholars have pondered for so long on what unites and what distinguishes law from religion.\(^7\)

The study of law and religion has emerged in Germany and Italy in the second half of the nineteenth century, conducted by lawyers interested in the relationship between states and religious communities. Today it is popular worldwide and revolves around three main lines of research: the relation between state and church, the right to religious freedom, and the role of religion in the public sphere. While in the past the focus of the study of law and religion had been solely on the relation between church and state and was of interest mostly to lawyers who specialized in the relation between the state and religious organizations, things changed in the 1980s and 1990s, when critiques of the theory of secularization have become popular, and the field of law and religion has become interesting to the general public. The focus of studies on law and religion shifted to the right to religious liberty, placing this field in contact with scholarship on human rights. My own point of entry to this field through the *Lyng* case, which was decided in the late 1980s, demonstrates this shift at its height.

What does it mean to work on law and religion? How do the two fields intersect? Law and religion are both similar in many ways and interact in many ways. This

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\(^7\) Ferrari and Cristofori, *Law and Religion*, xi.
characteristic makes them into a productive dyad to study. I am especially interested in law and religion as sites where identity is performed or articulated but also produced or constructed. It is important, in this kind of study, to think of each of the two as historical forces that shape each other and our identities while deprivileging both – “to view them as human, historical, interested, and necessarily ideological.”

I am interested in thinking of indigeneity as a kind of identity that is shaped in close relationship with law and with religion. Specifically, in Lyng Indigenous peoples appeal for the protection of the free exercise of their religion, but I argue that the identity that is articulated and produced in the case is Indigenous rather than religious; I also argue that the freedom that they are denied in this case is not only religious freedom but also sovereign freedom. Each of the central concepts in this paragraph – religion, indigeneity, sovereignty – occupies its own chapter in this dissertation.

Law and religion in the context of indigeneity have been studied in several ways. Legal anthropologists have studied jurisprudence in Indigenous communities (Karl N. Llewellyn’s and Max Gluckman’s studies are central examples of this field). Religious studies scholars, such as Robert Michaelsen and Huston Smith, have explored Indigenous

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8 Winnifred Sullivan writes about law as a privileged site in which the public struggle for identity and meaning takes place (Winnifred Fallers Sullivan, Paying the Words Extra: Religious Discourse in the Supreme Court of the United States (Cambridge: Harvard University Press, 1994), 7).


traditions and the ways in which they were affected by contact with Christianity. A third trend in the study of law and religion in the context of indigeneity moves toward critiques of human rights discourses, questions of citizenship and decolonization.

Because law and religion are sites of identity formation, articulation, and production, the problem of authenticity is central to their study. Many scholars have critiqued the ways in which law essentializes indigeneity, requiring the Indigenous subject before the law to perform a certain identity that would be recognized as “authentic” in order to grant her certain rights. I find this critique influential in my own work. When I say that the identity that is articulated by the plaintiffs in *Lyng* is Indigenous rather than religious I am trying to move away from the tendency of the law to expect a proof of authentic identity. I understand Indigenous identity as tightly related to questions of conquest and sovereignty. Nevertheless, I do not want to dismiss religious identity as part of the *Lyng* case altogether. As we will see, the witnesses in the trial use religious language continuously in their testimony. As we will also see, the Western legal framework defines religion in a way that fails to adequately reflect an Indigenous sense of the world. Justice Brennan points in this direction in his dissent, which I read closely in Chapter Three.

Ronald Niezen argues that indigeneity (or “indigenism” in his terminology) is an invented category:

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When we look for things that indigenous people have in common, for what brings them together and reinforces their common identity, we find patterns that emerge from the logic of conquest and colonialism. These patterns apply equally to peoples otherwise very different in terms of history, geography, method of subsistence, social structure, and political organization. They are similarities based largely on the relationships between indigenous peoples and states.\(^\text{13}\)

My reading of *Lyng* as a case about indigeneity follows this understanding (which has been expressed by many other scholars as well).\(^\text{14}\)

Of course, not only indigeneity is constructed, but also religious and legal identities. Susan Staiger Gooding points to this fact when she writes:

One task for contemporary scholars of Native America […] is to take account of legal discourse as an historical force, without taking it as our framework for understanding. Such is certainly the case with Native American religions. In fact, among the Indian scholars I read and the tribal members with whom I work there is a kind of double-voicing with regard to religion. While there is agreement that the struggle for religious rights is among the most important issues in Indian Country today, there is also an insistence that the very concept “religion” is a colonial concept.\(^\text{15}\)

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Gooding writes that the domestication of American Indians (the discontinuation of treaty making and beginning to make policies for – rather than with – Indians, treating them as “wards” of the federal government rather than foreign, sovereign nations), marked the beginning of regulating Indian religiosity. Together with limiting the movement of Indigenous communities and invading every aspect of their domestic life, religion was also an object of regulation. “Policies about religion were at the core of this invasion,” Gooding writes.16 Between 1869 and 1872, all recognized Indian nations were assigned one of the thirteen recognized Christian denominations, and Christian boarding schools were institutionalized on a national scale. But these policies, Gooding argues, were not the result of a concern with Indians’ belief but with their ceremonial practices. In 1883, Courts of Indian Offences were founded on all reservations to enforce the prohibition on traditional practices referred to as “the old heathenish dances, such as the sun-dance, scalp-dance, etc.”17 The practices that were prohibited suggest that the policy aimed to eliminate the social and political communities that were created and maintained through them rather than at any religious belief.18 The Lyng case is about a religious practice that is highly territorial, which suggests that the refusal to grant it protection is concerned not merely with communal ceremonies but with the strong ties it maintains between American Indians and the land. As we can see in the testimonies of religious practitioners in the Lyng trial, they talk about their schooling at BIA schools off-handedly, not in order

16 Gooding, “At the boundaries of Religious Identity,” 160.
17 Ibid., 161.
18 A similar argument can be found in Tisa Wenger, We Have a Religion: The 1920s Pueblo Indian Dance Controversy and American Religious Freedom (Chapel Hill: University of North Carolina Press, 2009).
to speak directly about the continuity of the religious ceremonies in the area. A sensitive reader, however, will notice the connection.  

There is extensive scholarship on each of the concepts that are at the center of my research. Scholars of different disciplines have studied sovereignty, approaching it from different angles: political theorists have taken a comparative approach, looking at what sovereignty means in different parts of the world; historians have searched for the meaning of sovereignty in different historical periods; legal scholars have closely read laws, treaties, and court decisions regarding sovereignty; theologians have sought to recover the theological roots of sovereignty, looking for clues in scripture. Many have questioned the relevance of this concept in an age of globalization, yet the study of sovereignty has persisted.

Similarly, scholars have been interested in the concept of indigeneity both comparatively and historically. Anthropologists studied Indigenous peoples around the world and then were criticized for their Eurocentric approach. The study of indigeneity has prospered, mainly in the context of human rights and political identity. Indigenous history and practice have interested scholars and practitioners of spiritualism, alternative medicine, and environmental studies; they have been the focus of attention of ethnic studies scholars, who read Indigenous literatures, histories, and law with a motivation to decolonize our society in general and academia in particular. I see my work as joining the latter conversation.

The scholarship on free exercise of religion is robust both in the United States and outside it. In the United States, scholars of constitutional law, of political science, and of

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19 The testimony of two of the religious practitioners is brought in full in the appendices to this dissertation, and both of them mention their schooling at the beginning of their testimony.
religious studies have studied it as a fundamental principle of American citizenship and public life alongside disestablishment. There is great popular interest in this concept as it is related to current controversial issues such as marriage equality and contraception. As such, it has been studied in the context of human rights and civil rights.

2018 marks the fiftieth anniversary of the Indian Civil Rights Act (1968), the fortieth anniversary of the American Indian Religious Freedom Act (1978), the thirtieth anniversary of the *Lyng* case, and the twenty-fifth anniversary of the Religious Freedom Restoration Act (1993). The question of American Indian religious freedom is especially relevant today not only because of these multiple anniversaries but also because of the current struggle against the reduction of Bears Ears and Grand Staircase-Escalante National monuments and the recent protest against the construction of the Dakota Access Pipeline. While Indigenous sacred land claims are central to both these cases, neither the Native leaders involved nor the public discourse around them emphasized the issue of religious freedom. Reading *Lyng* closely will help us, I argue, to understand these contemporary cases better.

Neither AIRFA, that declared in 1978 that “it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise [their] traditional religions,” nor RFRA’s declaration in 1993 that “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” provide American Indian

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nations with appropriate mechanisms to aid their efforts to stop the logging, mining, and commercial development that increasingly threaten Indigenous sacred places.\(^{24}\)

The connections between *Lyng* and RFRA is interesting and often overlooked. *Lyng*, a landmark case in constitutional law that denied the right of three American Indian nations to the free exercise of their religion for the sake of protecting property rights of the federal government, is the main precedent used in the more well-known Supreme Court case of *Employment Division, Department of Human Resources of Oregon v. Smith* (1990)\(^{25}\) – the peyote case that directly led to the enactment of RFRA in order to secure the strict scrutiny of generally-applicable legislation that burdens the free exercise of an individual’s (or a group’s) religion.\(^{26}\) As noted above, and as discussed at length in this dissertation, the Court in *Lyng* determined that even though there was no doubt that the religious practice at the center of the dispute was based on a “sincerely held belief,” and there was also no doubt that the government’s development plan at the center of the dispute imposed a “substantial burden” on this religious practice, the development plan was not unconstitutional. The Court has been criticized for its neglect of minority religious communities, and RFRA is a result of this criticism. Nevertheless, RFRA has been ruled unconstitutional as applied to states by the Supreme Court in its *City of Boerne v. Flores*\(^{27}\) decision in 1997, and several individual states have legislated in response their own versions of religious freedom protection laws.\(^{28}\)


\(^{27}\) 521 U.S. 507 (1997).

But, as also noted above and discussed at length in this dissertation, the *Lyng* case is even more complicated. The complication has to do with the doubt that the evidence in the case sheds on the religiosity of the practice in question, because religion is a Western category into which American Indian practice cannot fit. Given this doubt, I raise the question whether arguing cases about American Indian sacred sites as cases about religious freedom is appropriate or effective. Given that no Indian religious freedom case has been won so far, some scholars and litigators have concluded that it is inappropriate to argue them as such.

What route, then, should cases about the protection of American Indian sacred sites take? We have recently seen a significant movement toward arguments about environmental justice in American Indian sacred land cases (such as the Dakota Access Pipeline and Bears Ears), but I worry that this strategy overlooks something that is unique about these cases, something that has to do with American Indian sovereignty. Can the Indian Civil Rights Act of 1968 help us to address these questions better? The Indian Civil Rights Act, that is celebrating its fiftieth anniversary this year, applies the Bill of Rights, including religious freedom, to American Indian nations. But this act is also fundamentally about American Indian jurisdiction, sovereignty, and self-government, and it therefore offers us another way to think about the protection of American Indian sacred sites as an issue of Indigenous sovereignty rather than merely one of religious freedom. This interpretation is explored in Part Two of this dissertation.

The structure of this work is as follows: Part One, “Religious Freedom,” offers a reading of the *Lyng* case as a case about the free exercise of religion and is divided into two chapters. Chapter One, “Law,” offers a close reading of the Supreme Court decision in the case, focusing on Justice Sandra Day O’Connor’s majority opinion. I follow the main legal and religious studies scholars who have criticized O’Connor’s opinion and her limited understanding of religion as fundamentally Protestant. I then contextualize the majority opinion within the body of precedent available to the Supreme Court when deciding the case. While *Lyng* is the first case about American Indian sacred sites to have reached the Supreme Court, there is a substantial body of Supreme Court decisions about free exercise as well as a few lower court decisions about American Indian sacred sites. I review these cases in Chapter One. Chapter Two, “Religion,” follows the testimony and evidence presented in the *Lyng* trial, as far as they are relevant to my reading of the case as one about free exercise. The Theodoratus Report describes the religious practice of the relevant nations at length, and four religious practitioners who testified in the trial describe their religious relation to the area as well as the ways in which the development of the area would burden their religious practice.

Part Two, “Indigenous Sovereignty,” offers a reading of *Lyng* as a case about Indigenous sovereignty. It is divided into two chapters. Chapter Three, “Indigeneity,” reads Justice William Brennan’s dissenting opinion in the case and argues that, despite being celebrated as progressive and promoting American Indian rights, it essentializes and depoliticizes indigeneity. In Chapter Four, “Sovereignty,” I read the history of Federal Indian law, which turned American Indian communities from sovereign nations with whom treaties are negotiated and signed into “domestic dependent nations.” I read
the history of the relationship between Northwest California Indian nations and the United States in relation to this broader legal history, beginning to contextualize Brennan’s dissent in order to politicize indigeneity. I also read the testimonies of Indian witnesses in the *Lyng* trial alongside scholarship on Indigenous sovereignty and propose that not only does indigeneity need to be politicized, but cases about American Indian sacred sites need to be understood as cases about Indigenous sovereignty.

At the closing of this introduction, I would like to address terminology and my positionality as a non-Indigenous scholar. Whenever possible, I refer to specific Indigenous peoples by their specific affiliation. I only use the terms “tribe” or “tribal” – which are considered derogatory nowadays – where they appear in direct quotations. Instead, I use the term “nation(s),” following Indigenous scholars, even though I am aware of the problematics this term brings with it. The terms “Native Americans,” “Indigenous peoples,” and “American Indians” are used here interchangeably, following Indigenous scholarship from recent decades that has appropriated the term “American Indian” as empowering rather than insulting.

The category “Western” is not used here as a marker of modernity or progress. When I write that religion is a Western category I do not mean that it necessarily fits better to describe the practice of American Christian religious practitioners, for example, than it fits to describe the ceremonies of Native Americans. I also do not mean that because religion is a Western category we should not use it at all (I am well aware that the categories “sovereignty” and “nation” are just as Western as the category of “religion” is, and I use them nevertheless). I use the term “Western” (rather than “imperial” or “colonial,” for example) because this is the term used in the trial testimony
and evidence. While scholars of postcolonial theory tend to avoid using the term “Western” today, I am using here the language of the main actors in the Lyng case, which may seem outdated to contemporary readers. What the witnesses and the experts stress is that the case is argued as one about religious freedom because of the existing legal framework, and not because the plaintiffs themselves necessarily see the practice of which they seek protection as religious. This category, they say, was given to them (or forced upon them) following contact; it is not natural or trivial to them. I believe that is what they mean when they refer to religion as a Western category, and my use of the term follows theirs.

Writing this dissertation as a non-Indigenous (and non-American) scholar, I am well-aware of the limitations of my perspective. My point of departure, then, is the U.S. legal discourse on religious freedom. Even though I am very much an outsider to this discourse, I do bring to this project experience in a common-law legal system. Allowing Indigenous voices to be heard, I aim to transcend the religious freedom discourse and move into the realm of Indigenous sovereignty.

Discussions of religious freedom in the United States are often prompted by conflict over school prayer, teaching of evolution, conscientious objection, and prisoners’ devotion. The right to the free exercise of religion is understood as an individual right in the U.S. context because of its framing in the First Amendment. Growing up and studying and practicing law in Israel, a nation defined by its Jewish identity, I have a different perspective on religious freedom. In Israel/Palestine, where the land is considered sacred by many, the freedom of religion and the freedom to possess land are often one and the same. When this is the case, freedom of religion is not an individual
right; it is a collective right. Arriving in the United States, I noticed the starkly contrasting conception of religious freedom. The relationship between religious freedom and land rights that seemed obvious from my Israeli perspective was not at all part of the conversation about religious freedom in the U.S. Given the similarities between Native American land rights claims and Israeli/Palestinian land rights claims, rooted in understandings of land as sacred, but also in a history (and present) of oppression, I believe that to achieve justice, we need not only to expand our understanding of religion to include territorial religions, but also to think of religion in the context of settler colonialism, as tightly related to questions of Indigenous sovereignty. I believe that the *Lyng* case demonstrates this relation, and in what follows, I explore it through a reading of the case.

Reading closely the *Lyng* decision can offer insight into the relationship between land and religious freedom, an insight important to legal scholars and to religious studies scholars alike. But I believe that approaching the case and the conceptual questions it raises from two disciplinary points of view – that of a legal scholar and that of a religious studies scholar – is valuable as well. The two perspectives can enrich each other’s understanding of each of the concepts discussed here and the relationships between them. While religious studies scholars have been serving as experts in courts, in academia the two fields have remained separate. I believe that my background in both fields can offer a complex understanding of the issues at hand, both practically and theoretically. In addition, while the existing literature tends to study sovereignty, indigeneity, and religious freedom from an exclusively American or an exclusively European point of

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For an excellent discussion of decolonization in the context of Palestine see Raef Zreik, “When Does a Settler Become a Native? (With Apologies to Mamdani),” *Constellations* 23, no. 3 (September 2016).
view, I believe that my position as an outsider lends me a unique view of the American landscape that I study.

A reading of the *Lyng* case requires a complex understanding of land as a place of worship as well as an object of legislation; of religion as a cultural practice as well as a constitutional right; of freedom as a liberal (negative) right as well as a positive feature of citizenship. My background as a scholar of both law and religion enables me to offer a rich reading of the case.

My work draws on methods from three different disciplines: religious studies, Indigenous studies, and legal studies. From legal studies, in Chapter One, I take the question how the courts and the parties to the case participate in a continuing game of defining religion. The tools of religious studies help me, in Chapter Two, to expand the understanding of religion to include mythology and experience. Drawing on Indigenous studies, I show in Chapters Three and Four, how the definitional question overshadows other questions that can be woven in, like the question of sovereignty. The interdisciplinary method I employed reflects the nature of the relationship between law and religion, in the sense that in order to decide what religion means legally, courts need to take into account knowledge from different disciplines, such as history and anthropology, in addition to the more obvious bodies of knowledge of jurisprudence and theology. As a religious studies project, my dissertation participates in two sub-fields in religious studies and asks to build a bridge between them – law and religion on the one hand, and Indigenous religions on the other.

I chose *Lyng* because it seemed very central, on the one hand (every constitutional law student reads it in the first year of law school), and on the other hand, it seemed to be
understudied, at least outside of the legal academic world. In comparison with *Oregon v. Smith*, that centers around an individual practice and therefore, to some extent, fits well into familiar categories, in *Lyng* the postcolonial context is hard to ignore, and it is nevertheless absent in the Supreme Court decision.

When I read *Lyng* through the lens of Indigenous sovereignty, I could understand better how an ostensibly-insignificant dispute over a six-mile segment of a road in a national forest became important enough for the Supreme Court to agree to hear it. However, new questions arise when we read the case through the lens of Indigenous sovereignty: first and foremost, how did it come to be that an area that is sacred to three Indian nations had turned into a national forest rather than a part of a reservation of at least one of the Indian nations? The Supreme Court did not address this question.

Without employing an interdisciplinary approach, I could not have answered all the questions that this case raised. I turn now to explore these questions and their possible answers.
Background

In 1982, the U.S. Forest Service made a plan to harvest timber and construct a paved road through federal land, including the Chimney Rock area of the Six Rivers National Forest. This area, as reported in a study commissioned by the Service, has historically been used by the Yurok, Karuk, and Tolowa Indian nations for rituals that depend upon privacy, silence, and an undisturbed natural setting. Rejecting the study’s recommendation that the road not be completed through the Chimney Rock area because it would irreparably damage the sacred sites, and also rejecting alternative routes outside the National Forest, the Service selected a route through the Chimney Rock area. After exhausting administrative remedies, the Indians filed suit in the federal District Court challenging both the road-building and timber-harvesting decisions. The court issued a permanent injunction that prohibited the government from constructing the Chimney Rock section of the road or putting the timber-harvesting plan into effect, holding, inter alia, that such actions would violate the respondents’ First Amendment right to freely exercise their religion. The Ninth Circuit Court of Appeals affirmed in pertinent part, and the Supreme Court reversed the decision. The government’s plan, according to the Supreme Court, did not violate the Indians’ free exercise right regardless of their effect on the religious practices of the respondents, because it compelled no behavior contrary to their belief. In
other words, the government can do whatever it wants with its land, even if it virtually destroys a religious practice, as long as the destruction of this religious practice is not the explicit target of the government’s actions. As I discuss below, this decision indicates a conception of land as property, something to be owned, which may be seen as contradicting the respondents’ conception of the land as a place of worship.

Justice Sandra Day O’Connor writes in her majority opinion that “The Free Exercise Clause is written in terms of what the Government cannot do to the individual, not in terms of what the individual can exact from the Government,”30 presenting us with an interpretation of the religion clauses of the First Amendment as protecting an individual – rather than collective – right. Justice O’Connor’s interpretation of religious freedom is tightly related to the Court’s understanding of land as private property rather than a place of worship. Justice William J. Brennan Jr., dissenting, points to the absurdity created by focusing on one aspect of this land (as federal property) and ignoring another aspect of it (as a place of worship), which causes the “gravest threat to [respondents’] religious practices.”31 As he puts it, “the Court believes that Native Americans who request that the Government refrain from destroying their religion effectively seek to exact from the Government de facto beneficial ownership of federal property.”32 Justice Brennan in his dissent lays the ground to critiquing U.S. legal conceptions of land and of religious freedom as deeply intertwined. Moreover, according to Justice Brennan’s reading of the case, it is a conception of land as property – rather than an interpretation of

30 Lyng, 451
31 Ibid., 459.
32 Ibid., 458.
religious freedom – that leads to the majority opinion and ultimately to the Court’s decision.

At the background of this discussion there is another issue. Given the Court’s understanding of land as property (an understanding that detaches land both from sovereignty and from indigeneity) and of religious freedom as an individual right, the *Lyng* decision invites us to reflect on what it means for Native Americans to use U.S. law as their tool for demanding justice, when their understanding of fundamental concepts such as sovereignty, religious freedom, and ultimately, social justice, is so different than that of the Court’s. Thinking practically, it seems that a different path might have been more successful – using the Court’s conceptions of land and of religious freedom – as the Court might be unable to accommodate other, non-Western conceptions of the two. On the other hand, resigning one’s own belief system in order to be heard by one’s colonizer’s court does not seem as a potential path to a more just society. Abby Abinanti, a Yurok judge who was involved in the litigation of the *Lyng* case as a law student, expresses something of this sentiment in an open letter to Justice O’Connor:

> My belief in the High Country emanates from what I believe you would call “the soul.” I have never been farther than the former end of the road, yet I know of its importance. But how do I explain that to you? Must I find concepts that are familiar to you? Things you think are important to protect? Is that how we can survive, by somehow showing you how alike we are? The problem is that we are not alike.\(^3\)

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The most fundamental difference in this case is between seeing the land as a sacred, living thing – with its own subjectivity – and seeing it as property, a mere object to be developed. And this clash is so essential, because, as Philip Arnold writes, “Maintaining the vitality of the living presence of the land is a core value of Indigenous communities.”

Brian Brown adds:

Since the unique identity of the different Indian tribes is so often coherent with the land that animates and sustains their religious beliefs and practices, bureaucratic decisions to alter land sites are intrusive invasions of tribal self-understanding; the dissipation of tribal identity is the inherent consequence of land desecration.

What does it mean for Indian nations to appeal to their colonizer to recognize their right to use land the nations had inhabited before the land has been colonized? More generally, what does it mean for Indigenous peoples to use their colonizer’s legal system to protest against their colonization? First and foremost, it means acknowledging the state-sovereignty of the U.S. The Native American case is complicated, since, as Vine Deloria, Jr. explains, on the one hand, the Native American conception of salvation and of protest is tightly related to “a return to the old ways, the old religion and the old political structure,” which means returning to a theology that “demands that the sacred places of the earth be discerned and communities of whole human beings be allowed to live on

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them." On the other hand, they seem to have to accept their colonizer’s conception of sovereignty as closely tied with ownership of land in order to be heard in U.S. courts. This absurdity, I suggest, follows a more general problematic, namely, that law and religion, the tools of the colonizer, are the only tools that the Native American protesters can use in order to protest. Cases where Indian nations have tried avoiding the courts, contesting state sovereignty in other ways, such as purchasing land with casino profits, as happened recently in *City of Sherrill v. Oneida Indian Nation of New York* (2005), have often ended up in court. Paradoxically, contesting U.S. sovereignty has the effect of acknowledging it. Acknowledging U.S. sovereignty by way of arguing a case in its Supreme Court allows the Court to determine the terms of the debate. The Court in *Lyng* understands land as private property and religious freedom as an individual right. The privatization of land and the privatization of religion occurred in early modern Europe at the same time, as part of a more general process of secularization.

Marc DeGirolami points to what he sees as two fundamental clashes in *Lyng*. One is a clash between conceptions of religious liberty. The Court understands its role as protecting individuals from coercion. The Indian nations in *Lyng* emphasized a different value, one that DeGirolami interprets as piety. “The Court takes non-coercion or non-compulsion to be the monistic value of religious liberty protected by the Free Exercise Clause,” he writes. According to the Indians, on the other hand, piety demanded in their case “a solitary, tranquil, and undisturbed holy ground in order to undertake a spiritual

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37 Ibid., 33-4.
journey leading to an apperception of the transcendent – within their overarching concept of what it is to lead a moral life. Religious liberty was valuable to them precisely in order to participate in and live out that moral life.”

What DeGirolami overlooks, to my mind, is that there is a clash here between understanding religious liberty as an individual right and understanding it collectively. What is certain, DeGirolami argues, is that non-coercion (negative freedom of religion) and piety (positive freedom of religion) cannot coexist if either is taken as the monistic value of religious liberty. But can the two be thought of as concurring values of equal importance? If not, the Court’s conception is bound to win.

The second clash in Lyng occurs between the Indians’ religious liberty and the government’s interest in building the road. This conflict turns on the fact that Chimney Rock, after all, “belongs” to the government, according to the Supreme Court. According to DeGirolami, “a theory of religious liberty that divested the government of all rights to use its own land as it saw fit would be wholly inadequate.”

I think he is right in the sense that such a theory would not prove successful in court. But what are the moral implications of a theory that does not doubt the government’s right to the land at all? We need to ask, I argue, about the value that the government wants to promote, and whose interests it wants to support (and it is almost never the Indians’ interest). Furthermore, thinking of the land as belonging to the government while ignoring the context of conquest is problematic. Had the respondents in the case been a majority group (for example, urban Protestants whose church the government wants to destroy in order to construct a road), we might have said that there is a clash here that can be reconciled –

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41 Ibid., 169.
42 Ibid., 170.
perhaps the government’s interest is the respondents’ interest as well, in which case there is a clash among the same group’s different interests (they need a place of worship but they also need the road). The respondents in Lyng might benefit slightly from the government’s development plan (it might create more jobs in the area in the short term), but they are going to lose something more significant in the long term – their traditional practices that keep the community tight. In this case the clash seems irreconcilable. And it is irreconcilable because essentially, the dispute in this case is over land rights – those of the government and those of the Indians.

The Indians find themselves in an absurd situation because they claim the land is sacred, and therefore belongs to everyone, or to no one, but the Court thinks of land as something that is owned, and it rejects the Indians’ claims as if they asked it to acknowledge their ownership of the land, while they were essentially arguing the opposite. In Justice Brennan’s words, the Lyng decision:

represents yet another stress point in a longstanding conflict between two disparate cultures – 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.43

Describing the clash in Lyng as a clash between the Indians’ right to religious liberty and the government’s property rights seems to be based on the understanding of colonial invasion as a discrete event. In the view of the Court, the occupation of the land might be

43 Lyng, 458. A critique of the assumption that Indians have no concept of property can be found in Kristen A. Carpenter, Sonia K. Katyal, and Angela R. Riley, “In Defense of Property,” Yale Law Journal 118, no.6 (April 2009). I expand on it in Chapter Four.
a wrong, but it is one that belongs in the past, rather than an ongoing one.  

The Court does not doubt that the land belongs to the government. Nevertheless, if we see invasion as a structure – a worldview complete with creation myths and value systems – and not as an event, then the clash in *Lyng* is not necessarily between property rights and religious freedom; in a way, protecting the Indians’ freedom to worship on the land must involve admitting that the land was wrongly taken from them. When we read the Court’s decision, we might conclude that it is not the Indians who need the protection of the Court against the violation of their right to worship, but the government’s property rights that need protection against the Indians’ claim to the land. As Brown writes:

> The non-Native notion that religion is separable and essentially discrete from land, reduced to a core of beliefs and behavior that are ultimately distinct from the customary and traditional mores and practices of a particular society, often blunted the courts’ sensitivity to the extent of the spiritual and cultural harm from which the tribes sought protection.  

But the conception of land as property was more harmful than the conception of religion as a set of beliefs rather than a way of life. Even though the Court recognized the detrimental effects of the construction of the road on Indian religion, it nevertheless freed the government of its obligation to prove a compelling state interest of sufficient magnitude that would justify the consequent religious harm. It ultimately determined that whatever rights the Indians may have, those rights do not divest the government of its right to use what it, after all, *its* land. Justice Brennan’s acknowledgement that the land is

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sacred to the Indians is not enough. Acknowledging the sacredness of the land is important because the land as sacred is in dynamic relationship with the land as political, as Joanne Barker writes. Jodi Byrd adds:

For American Indians, who have lived for tens of thousands of years on the lands that became the United States two hundred and thirty years ago, the land both remembers life and its loss and serves itself as a mnemonic device that triggers the ethics of relationality with the sacred geographies that constitute indigenous peoples’ histories.

Amy Bowers and Kristen A. Carpenter, too, propose a political reading of the story of Lyng, one that is told from the perspective of the Indians. It is a story of a community that is forced to defend itself against the assimilationist agenda of the federal government, developing a contemporary political identity in the process.

The road was never constructed, and the timber was never harvested in the High Country. In 1984, while the case was still pending, Congress passed the California Wilderness Act exempting much of the High Country from logging. In 1990, Congress passed the Smith River National Recreation Area Act, exempting the proposed site of the road from such construction. The sacred areas were largely preserved. Lyng is “a story of the inextricable relationship between Indian people and lands, in which the Tribes’ attachment to their sacred sites ultimately triumphed over the Supreme Court’s narrow

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46 Barker, Native Acts, 105.
application of religion and property laws.”51 Retelling the story in this way helps making this connection between the sacred aspect of the land and its political aspect. It recreates the Indian nations as communities rather than individuals. It stays committed to the notion of land as sacred rather than as something that is owned, because it sees the continued worship as a triumph, not acknowledging the Court’s power to decide that the land is government property.

In order to enrich my discussion of religious freedom and of Indigenous sovereignty through a reading of Lyng, I read the Supreme Court decision in the context of historical, theoretical and legal backgrounds, but most importantly, in the context of the trial – including the evidence and the testimonies of Indian religious practitioners, Forest Service officials, and expert witnesses. I do so to avoid privileging abstract legal categories as my point of departure, relying instead on a thick description. Like Benjamin Berger, who refers to his work as a “phenomenological turn in the study of law and religion,” I seek to “privilege experience of the law as the analytic starting point, rather than legal concepts or ideal forms of theory.”52

The plaintiffs in the case included the Northwest Indian Cemetery Protective Association, four Indian religious practitioners (Jimmie James, Sam Jones, Lowana Brantner, and Christopher H. Peters), six environmental organizations (the Sierra Club, Wilderness Society, California Trout, Siskiyou Mountains Resources Council, Redwood Region Audubon Society, and Northcoast Environmental Center), and two individual members of the Sierra Club (Timothy McKay and John Amadio). A second lawsuit, filed by the state of California, acting through the Native American Heritage Commission, was

51 Bowers and Carpenter, “Challenging the Narrative of Conquest,” 492.
52 Berger, Law’s Religion, 36.
consolidated for trial. The defendants were the Secretary of Agriculture John R. Block, Forest Service Chief R. Max Peterson, and Regional Forester Zane H. Smith. (By the time the case reached the Supreme Court, Richard E. Lyng had become Secretary of Agriculture and the case was known forever after as “Lyng.”)

The Indian plaintiffs were represented by Marylin Miles of the California Indian Legal Services, the environmental organizations were represented by attorney Michael Sherwood, and the state of California was represented by Deputy Attorney General Edna Walz. The Forest Service was represented by Rodney Hamblin, Assistant U.S. Attorney.

The plaintiffs brought eight claims, challenging the decisions by the United States Forest Service (1) to complete construction of the last 6.02 miles (Chimney Rock Section) of a paved road from Gasquet, California, to Orleans, California (the “G-O road”), and (2) to adopt a forest management plan providing for the harvesting of timber for the Blue Creek Unit of Six Rivers National Forest. Plaintiffs argued that the Forest Service’s decisions violated (1) the First Amendment of the Constitution of the United States; (2) the American Indian Freedom of Religion Act, (3) the National Environmental Policy Act of 1969 (NEPA)\(^ {53}\) and the Wilderness Act,\(^ {54}\) (4) the Federal Water Pollution Control Act,\(^ {55}\) (5) water and fishing rights reserved to American Indians on the Hoopa Valley Indian Reservation, and defendants’ trust responsibility towards those rights, (6) the Administrative Procedure Act,\(^ {56}\) (7) the Multiple–Use Sustained–Yield Act of 1960,\(^ {57}\) and (8) the National Forest Management Act of 1976.\(^ {58}\)

\(^{56}\) 5 U.S.C. § 706.
\(^{58}\) U.S.C. § 1600.
The case was assigned to Judge Stanley A. Weigel, a Jewish Republican who referred to himself as “agnostic” and was known for his toughness and independence. “It was a fortunate selection for the plaintiffs. A member of the national board of the American Civil Liberties Union at the time President John F. Kennedy appointed him to the bench, Weigel was unafraid to uphold unpopular causes, and had represented professors in a dispute over loyalty oaths with the University of California.”59

The two-week trial began on March 14, 1982. Twenty-three witnesses were examined over those two weeks: the four individual Indian plaintiffs testified alongside two expert witnesses (anthropologists Arnold Pilling and Dorothea Theodoratus) for the Indian plaintiffs. The State of California called and examined William James Pink, the executive secretary of the California Native Heritage Commission. The environmental organizations, together with the State of California, examined eight other expert witnesses.60 The defendants called and examined eight Forest Service employees.61

While the plaintiffs won the case in the district court and in the court of appeals, they lost in the Supreme Court. I turn now to reading the majority opinion of Justice O’Connor, which ignores most of the testimony and evidence that were presented at trial. I return to the trial in Chapter Two.

60 The witnesses were engineering geologists Eugene Kojan and Ralph Graham Scott, professor of environmental geology Robert Curry, fishery biologist Richard Wood, soil scientist Annette Parsons, resources consultant Larry Edwin Moss, consulting forester Greg Blomstrom, and forest policy analyst Kathleen Green
61 The witnesses for the defendants were forest supervisor Joseph Harn, forest cultural resource specialist Kenneth Wilson, forest geologist Richard Farrington, director of building and planning Ernest Wesley Perry, forest engineer Robert Black, forest fishery biologist Jerry Barnes, forest hydrologist Christopher Knopp, and forest soil scientist Brent Roath.
Justice O’Connor’s Majority Opinion

In this section, I read closely O’Connor’s majority opinion in Lyng, before turning, in the next section, to a discussion of her opinion against the background of the body of caselaw and legislation available to her in making her decision. I then turn, in Chapter Two, to the body of evidence and testimony presented in the Lyng trial that is largely missing from O’Connor’s opinion.

O’Connor, joined by Justices Rehnquist, White, Stevens, and Scalia, acknowledged in her opinion that “It 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.” Nevertheless, she disagrees with the respondents that the burden is heavy enough to violate the respondents’ First Amendment free exercise right unless the government can show a compelling interest in completing the road or executing the timber-harvesting plan. Her disagreement relies mostly on the Court’s previous decision in Bowen v. Roy (1986), where it was decided that:

The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. Just as the Government may not insist that [the Roys] engage in any set form of religious observance, so [they] may not demand that the Government join in their chosen religious practices by refraining from using a

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62 The dissenting opinion was filed by Justice Brennan, who was joined by Justices Marshal and Blackmun. Justice Kennedy, who was appointed to the Supreme Court after the hearing of Lyng, took no part in the consideration or decision of the case.
63 Lyng, 447.
64 476 U. S. 693 (1986).
number to identify their daughter […] The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government’s internal procedures.65

According to O’Connor, “The building of a road or the harvesting of timber on publicly owned land cannot meaningfully be distinguished from the use of a Social Security number in Roy.”66 In both cases, she explains, government actions would interfere with a private person’s ability to practice his or her religion. Nevertheless, in neither case does the government coerce any individual to act in violation of his or her religious beliefs. Similarly, in neither case does the government penalize a religious practice or belief. Therefore, in neither case is there a violation of the First Amendment’s free exercise clause.

O’Connor is able to equate the two cases because she understands the burdened practice or belief as personal or private. It seems, therefore, that challenging this understanding of religion as a private matter would be useful in distinguishing the cases. But none of the respondents in the case challenged this conception of religion as private. Instead, respondents focused on other aspects of the two cases. As O’Connor describes:

We are asked to distinguish this case from Roy on the ground that the infringement on religious liberty here is “significantly greater,” or on the ground that the government practice in Roy was “purely mechanical” whereas this case

65 Ibid., 699-700.
66 Lyng, 449.
involves “a case-by-case substantive determination as to how a particular unit of land will be managed.”

I argue that these are not the meaningful differences between Roy and Lyng. While in Roy it is the spiritual development of an individual that is allegedly infringed through the government actions, in Lyng it is a community’s wellbeing that is violated.

The State of California argued that Roy should be distinguished from Lyng because in Roy the government actions took place in a remote location, the Roys did not have any real knowledge about them, and therefore the notion that the government’s actions created a burden on the Roys’ religious practice was merely subjective. In Lyng, on the other hand, the government’s actions “physically destroy the environmental conditions and the privacy without which the [religious] practices cannot be conducted.” O’Connor rejects this reasoning. Any attempt to distinguish between the cases, she explains, would require the Court to determine the truth of the underlying beliefs that led to objections to the government’s actions, and this task is simply impossible to accomplish. Note that it is not the sincerity of the belief that matters according to O’Connor, but the objective truth of the belief. This is an implausible interpretation of the free exercise clause, one that renders all free exercise cases impossible to decide, unless we assume that Supreme Court Justices are theologians with unique access to knowledge about the truth or falsehood of all religious beliefs (and

67 Lyng, 449 (citing Brief for Indian Respondents, 33-4).
68 This may mean that the case is not at all about religious freedom – that what is burdened is not the free exercise of religion but something else. I explore this possibility in Part Two.
69 Lyng, 449.
O’Connor has already told us that this is not the case, that she is unable to determine the truth of religious beliefs of American Indians.\(^\text{70}\)

Because the Court cannot determine the truth of the religious belief underlying the Roys’ objection to the Social Security system, it cannot evaluate the burden resulting from government actions. Nevertheless, O’Connor tells us, “Respondents [in Lyng] insist […] that the courts below properly relied on a factual inquiry into the degree to which the Indians’ spiritual practices would become ineffectual if the G-O road were built.”\(^\text{71}\) O’Connor portrays the free exercise clause as protecting not sincere religious belief or practice, but outcome. Because she cannot know what would happen to the effectivity of the religious practice in question, she cannot offer it protection. But what the religious practitioners are arguing here is that the practice of their religion itself would be burdened, not its effectivity. Indeed, they would be unable to practice their religion if the road is built (rather than arguing that they can continue the practice but it would not be as effective). Separating the practice from its (anticipated) results seems to misunderstand religion altogether.\(^\text{72}\)

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\(^{70}\) Later in her opinion, O’Connor responds to Brennan’s dissent, elaborating further on this issue: “the dissent proposes a legal test under which it would decide which public lands are ‘central’ or ‘indispensable’ to which religions, and by implication which are ‘dispensable’ or ‘peripheral,’ and would then decide which government programs are ‘compelling’ enough to justify ‘infringement of those practices.’ We would accordingly be required to weigh the value of every religious belief and practice that is said to be threatened by any government program. Unless a ‘showing of centrality’ is nothing but an assertion of centrality, the dissent thus offers us the prospect of this Court holding that some sincerely held religious beliefs and practices are not ‘central’ to certain religions, despite protestations to the contrary from the religious objectors who brought the lawsuit. In other words, the dissent’s approach would require us to rule that some religious adherents misunderstand their own religious beliefs.” (Lyng, 457; citations omitted)

\(^{71}\) Ibid., 450.

\(^{72}\) Similarly, Adeil Sherbert argues that she is not allowed to work on Saturdays rather than arguing that if she works on Saturday something would happen to her (Sherbert v. Verner, 374 U.S. 398 (1963)); the Yoders argue that it is against their belief to send their teenage kids to public schools rather than saying that something would happen to them at school (Wisconsin v. Yoder, 406 U.S. 205 (1972)).
O’Connor’s distinction between *Sherbert v. Verner* (1963) and *Lyng* is unconvincing as well. While she agrees that the 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,” she nevertheless determines that this does not mean 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.”

The differentiation relies on an understanding of the word ‘prohibit’: “For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.”

Does O’Connor mean that in *Sherbert* the government’s refusal to pay unemployment to Adeil Sherbert, who lost her job because she refused to work on her Sabbath, amounted to a prohibition of religious practice while the construction of the G-O road did not? In any case, deciding free exercise cases cannot rely on the spiritual development of the religious objector to the government’s actions, according to O’Connor.

We could say that what O’Connor implies here is that free exercise does not equal spiritual development. I could not agree more. But the *Lyng* case is not about “personal spiritual development” either. Reading the testimonies in the trial and the Theodoratus Report in Chapter Two will help me to establish that.

“The Government does not dispute, and we have no reason to doubt, that the logging and road-building projects at issue in this case could have devastating effects on

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73 *Lyng*, 450-1.
74 Ibid., 451.
75 Ibid.
76 Ibid.
traditional Indian religious practices.”\textsuperscript{77} This acknowledgement seems encouraging at first, but O’Connor explains the use of the High Country thus:

Individual practitioners use this area for personal spiritual development; some of their activities are believed to be critically important in advancing the welfare of the tribe, and indeed, of mankind itself. The Indians use this area, as they have used it for a very long time, to conduct a wide variety of specific rituals that aim to accomplish their religious goals. According to their beliefs, the rituals would not be efficacious if conducted at other sites than the ones traditionally used, and too much disturbance of the area’s natural state would clearly render any meaningful continuation of traditional practices impossible.\textsuperscript{78}

This explanation of the practice allows O’Connor to determine that it does not deserve First Amendment protection, despite the acknowledgement of the G-O Road’s adverse effects on it. Firstly, it is individuals rather than communities who use the High Country for personal spiritual development, and O’Connor has already determined that spiritual development does not equal exercise of religion.\textsuperscript{79} Secondly, those practitioners believe that their rituals advance the wellbeing of the community and of the whole world. Unfortunately, the Court cannot determine the truth of the claim that those rituals would not be effective if performed in other places. This focus on efficacy prevents the Court from asking why it is important for the practitioners to practice their religion specifically in the High Country regardless of results. This question, I argue, calls for contextualizing the case more broadly, which in turn allows for an understanding of this case as one that

\textsuperscript{77} Ibid.
\textsuperscript{78} Ibid.
\textsuperscript{79} The High Country is indeed used by individuals for spiritual development, as we will see in Chapter Two. However, it is also used, perhaps primarily, for other, communal purposes.
is about more than free exercise. I pursue this line of thought in Part Two (“Indigenous Sovereignty”).

“Even if we assume that we should accept the Ninth Circuit’s prediction, according to which the G-O road will ‘virtually destroy the Indians’ ability to practice their religion’,” O’Connor continues, the Court cannot decide the case in favor of the respondents, because “government simply could not operate if it were required to satisfy every citizen’s religious needs and desires.” The argument unfolds as a ‘slippery slope’ argument, according to which many people would surely find some government action offensive, and some of these people would base their objection on sincerely held beliefs. Moreover, some people would find the opposite action offensive, and their objection may also rely on sincerely held beliefs. Because the constitution must apply equally to all citizens, no one can be given a veto over a public program that does not prohibit the free exercise of religion. And even though the respondents are not objecting to the current use of the area by tourists and other Indians (they only object to the development plan), “Nothing in the principle for which they contend, […] would distinguish this case from another lawsuit in which they (or similarly situated religious objectors) might seek to exclude all human activity but their own from sacred areas of the public lands.” The task of balancing between different citizens’ demands on the government, even if those demands are based on religious beliefs, if it is possible at all, “is for the legislatures and other institutions.”

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80 Lyng, 451.
81 Ibid., 452.
82 Ibid., 452-3.
83 Ibid., 452. Justice Brennan addresses this statement on sending this case to the legislature. As I mentioned in the Introduction, the legislature indeed took upon itself the task with RFRA, which the Supreme Court then ruled unconstitutional.
O’Connor moves on to briefly describing the religious practice as it is explained in the respondents’ brief, and then reveals what seems to be the real reason behind her ruling: “No disrespect for these practices is implied when one notes that such beliefs could easily require de facto beneficial ownership of some rather spacious tracts of public property.”84 The case turns, at this point, into one about land ownership rather than religion, even if the two issues are mixed together in O’Connor’s words:

The Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred, and a law forbidding the Indian respondents from visiting the Chimney Rock area would raise a different set of constitutional questions. 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. […] Nothing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen. The Government’s rights to the use of its own land, for example, need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents.85

I discuss the treatment of the case as one that is about property in Part Two.86

O’Connor adds that the government has done everything that could be expected from it to minimize the impact that construction of the G-O road would have on the respondents’ religious practice. She counts the commission of the Theodoratus Report,

84 Ibid., 453.
85 Ibid., 453-4.
86 I also address there Brennan’s dissent, according to which we should distinguish Lyng from Roy because in Roy the government was acting “in a purely internal manner,” whereas land-use decisions “are likely to have substantial external effects.” (Lyng, 470)
the steps taken to minimize audible and visual intrusions, and the selection of a route that avoids specific ritual sites (pointing this out suggests a misunderstanding of the sacred nature of the High Country, as I discuss below). These steps, O’Connor adds, are in line with the American Indian Religious Freedom Act, according to which:

> It shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian [...] including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.\(^8^7\)

A second section of AIRFA required an evaluation of federal policies and procedures in consultation with Native religious leaders, of changes necessary to protect and preserve the rights and practices in question. The Theodoratus Report satisfies this requirement. “Nowhere in the law is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights.”\(^8^8\)

O’Connor ends her discussion of AIRFA with a quote from the sponsor of the statute, Representative Udall, who defined it as “a sense of Congress joint resolution,” that in fact “has no teeth in it.”\(^8^9\) O’Connor’s analysis of the local traditions demonstrates a misunderstanding of them, but it may also be critiqued as misinterpreting religious freedom.\(^9^0\) Understanding O’Connor’s majority opinion in *Lyng* requires a review of the caselaw she cites in her decision as well as the caselaw she ignores. In the next section I

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\(^8^7\) *Lyng*, 454.
\(^8^8\) Ibid., 455.
\(^8^9\) Ibid.
\(^9^0\) Brown, for example, calls the *Lyng* decision “a lamentable failure of First Amendment jurisprudence,” and “a serious flaw in Constitutional analysis.” (*Religion, Law, and the Land*, 4)
read the Supreme Court cases about free exercise that were decided before *Lyng*, as well as cases about Indian sacred sites that were decided by the lower courts before *Lyng*. Other authors have provided similar reviews to the one I offer below; while some focus on the free exercise issue, others focus on the sacred lands issue. In the following section I follow Donald Falk, who, in a 1989 Note, focuses on both Supreme Court free exercise precedent and on lower courts’ sacred site jurisprudence as a background for his critique of the *Lyng* decision as “curtail[ing] the ability of American Indians to preserve sacred sites on federally owned public lands.”

*Lyng* is the first Supreme Court case about Native American sacred sites; however, the Supreme Court only ruled on the free exercise issue and not on any statutory issue (“The Government, which petitioned for certiorari on the constitutional issue alone, has informed us that it believes it can cure the statutory defects identified below, intends to do so, and will not challenge the adverse statutory rulings.”) Therefore, I believe that the first step toward understanding and critiquing this decision is to read it against the background of free exercise jurisprudence. Let me turn to this task now.

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92 Falk, “Bulldozing First Amendment Protection.”

93 Ibid., 515. Falk also criticizes the Supreme Court for ignoring the testimony and evidence in the *Lyng* trial. I agree with his critique and in the following chapter read closely both the testimony and the evidence. According to Falk: “The method of the Court in *Northwest Indian* is as disturbing as the result. Under the *Northwest Indian* approach, factual judgments based upon extensive oral testimony and a vast record, already approved by two lower courts, may be reopened according to the discretion of a Court perhaps uncomfortable with the actual implications of its preferred legal result.” (Ibid., 570)

94 *Lyng*, 447.
Defining Religion

As we have seen, O’Connor’s interpretation of Lyng is based almost exclusively on the then-recent Supreme Court decision in Bowen v. Roy. However, reviewing the hundred-year long history of free exercise jurisprudence and the body of precedent available when deciding the case may show us that Lyng could have been decided differently if it were to rely on other cases. A review of free exercise jurisprudence and scholarship follows.

The religion clauses of the First Amendment to the U.S. Constitution declare unconstitutional any prohibition on the free exercise of religion and laws respecting the establishment of religion. The consequence is that whenever a group demands to be recognized as religious and be granted the right to the free exercise of religion, courts must determine whether the religious practice in question is “legally” religious. This situation is problematic, because American law is essentially secular – the American people have chosen to live under the rule of law (as opposed to the rule of God) – and therefore, allowing (or requesting) law to define religion may have grave consequences on the category of religion.

How does the Court go about to define religion? As Eduardo Peñalver points out, the case of religious freedom is unique, because, unlike free speech, where the legal definition of “speech” is clearly different than the colloquial use of the term, in the case of the free exercise of religion the courts tend to use the term “religion” unreflectively, as if the everyday use of the term makes it clear what religion means.95 But, as Winnifred Sullivan points out, religion today is as difficult to define as truth is in Rashomon. In our

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95 Eduardo Peñalver, “Note: The Concept of Religion,” Yale Law Journal 107, no. 3 (December 1997).
everyday use of the term, everything may be recognized as religion and nothing is exclusively defined as religion. This fact renders the courts’ job of securing the right to religious freedom (but also of securing disestablishment) impossible, as Sullivan’s book’s title suggests.96

Legal scholars have suggested different definitions of – or different methods for defining – religion, hoping that courts would rely on their suggestions when deciding cases about religious freedom. Some have sought substantial definitions, relying on classic definitions such as those of scholars of religion like Émile Durkheim97 or Clifford Geertz,98 and some have defined religion in a functional way: John Sexton proposes to understand religion as Paul Tillich did,99 functionally, and to declare anything of “ultimate concern” to a person as deserving constitutional protection.100 Kent Greenawalt rejects the notion of a dictionary-style definition of religion and proposes a method for the court to use when trying to identify religion.101 He proposes to identify religion through analogy, something similar to a Wittgensteinian “family resemblance,” and Peñalver, following Greenawalt, suggests a similar, but more elaborate, method. Peñalver is in favor of creating a method instead of a definition. He supports the Wittgensteinian

96 Sullivan, *The Impossibility of Religious Freedom*.
97 Durkheim defines religion as “a unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden – beliefs and practices which unite into one single moral community called a Church, all those who adhere to them.” (Émile Durkheim, *The Elementary Forms of Religious Life*, trans. Karen E. Fields (New York: Free Press, 1995), 44).
98 According to Geertz, religion is “(1) a system of symbols which acts to (2) establish powerful, pervasive, and long-lasting moods and motivations in men by (3) formulating conceptions of a general order of existence and (4) clothing these conceptions with such an aura of factuality that (5) the moods and motivations seem uniquely realistic.” (Clifford Geertz, “Religion as a Cultural System,” in *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1993), 90).
method, but he also offers three guidelines for the identification of religion by the court, and the method of analogy or family resemblance is only one of them. The first guideline is to seek to define only religion, rather than offering broader definitions that would include conscience as well, as has been done in some cases. The second guideline is to take into account the evolving nature of language, which means that the definition has to be flexible and bear the potential to evolve alongside ordinary language. The third guideline is to compare the phenomenon in front of the court to as many phenomena that already count as religion as possible, in order to avoid bias toward a specifically-Western definition of religion.\footnote{Peñalver, “The Concept of Religion,” 814-21.}

Having surveyed the scholarly debate of the legal definition of religion and before turning to the courts’ opinion(s) on the matter, I would like to explore the political implications of the need for the law to define religion. Political and legal theorists agree that the U.S. is a secular nation that cares deeply about religion. Paul Kahn refers to this feature of the American polity as “cultural pluralism,” and says that it raises a theoretical challenge, but also a practical one (how can we decide which minority practice is tolerable?)\footnote{Paul Kahn, Putting Liberalism in its Place (Princeton: Princeton University Press, 2005).} Bette Novit Evans adds that in a pluralist culture, defining religion becomes more and more difficult, because religious practice has become more diverse. Furthermore, religious organizations have started offering many services beyond the religious service, and at the same time the government is regulating more and more areas of life. Therefore, the conflict between government and religion becomes inevitable.\footnote{Bette Novit Evans, Interpreting the Free Exercise of Religion: The Constitution and American Pluralism (Chapel Hill: University of North Carolina Press, 1997).} I think the main problem that arises has to do with the principle of separation between
church and state, because if separation (or disestablishment) is dependent on the state or
the law defining what counts as religion, then how can we see the two as separate?
Scholars have understood disestablishment as the neutrality of the state between different
religions and between religion and non-religion, but Evans notes the difficulty to provide
a neutral definition that would not offend anyone. If we want a broad definition it will
probably be very superficial, and if we want a deep definition it is doomed to be too
narrow. Evans worries not that politicians and courts would resent religion, but that they
would be ignorant about it; thus, they may be unaware of the importance of land to
Native American worship or of the yarmulke to Orthodox Jewish identity. Sullivan adds
to that worry that religion in the twenty-first century, when diaspora religion is the most
common one, and when most religious people in the West live in secular states, is “lived
religion.” This means that religion changes constantly according to the circumstances,
and therefore any theoretical definition would always be too static to capture the
phenomenon. 105 Elizabeth Shakman Hurd writes that “religion is too unstable a category
to be treated as an isolable entity, whether the projective is to attempt to separate religion
from law and politics or design a political response to ‘it.’” 106 For her, then, the challenge
is “to signal an interest in a category, religion, which is legible to many, while also
arguing for a different understanding of it.” 107

107 Ibid.
Free Exercise Jurisprudence Before *Lyng*

Like legal scholars, the Supreme Court has had to grapple with the question “what is religion?” throughout the years as well. Though it has not been as adventurous as the lower courts, it has allowed the First Amendment to protect a variety of phenomena as religious. In *Reynolds v. U.S.* (1878) the Supreme Court defined religion for the first time, ruling that the First Amendment protects only religious belief and not the actions that it entails.\(^{109}\) The *Reynolds* Court ruled that the Mormon defendant’s belief that practicing polygamy was a religious duty did not exonerate him from criminal conviction.\(^{110}\) According to the Court, criminal statutes against polygamy enforce a social duty and cannot be attacked on free exercise ground, lest religion become the law of the land and every citizen become her own law. This Lockean differentiation between religious belief and religious conduct is problematic, as commentators have argued.\(^{111}\) This differentiation cannot be meaningful because states can only regulate conducts; they cannot regulate belief.\(^{112}\)

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\(^{108}\) 98 U.S. 145 (1878).


\(^{110}\) *Reynolds*, 166-7.

\(^{111}\) John Locke argues in his “Letter Concerning Toleration” that while belief should be tolerated, certain acts can (and must) be outlawed. See John Locke, *A Letter Concerning Toleration and Other Writings* (Indianapolis: Liberty Fund, 2010).

This definition of religion as belief was rejected by the Supreme Court more than half a century after Reynolds, in Cantwell v. Connecticut (1940). In Cantwell, the Court unanimously reversed the conviction of Jehovah’s Witnesses for soliciting money for a religious cause without prior government approval and common law breach of the peace. The Court held that the religion clauses of the First Amendment applied to the states by virtue of the Fourteenth Amendment and interpreted the free exercise clause as protecting against laws prohibiting both belief and “chosen form of religion.” According to Justice Roberts, “the Amendment embraces two concepts – freedom to believe and freedom to act,” even if the freedom to act is not absolute. “Conduct remains subject to regulation for the protection of society,” but deprivation of a religion’s means of survival is considered an impermissible “censorship of religion.” In Cantwell, the Court struck down a law as infringing free exercise rights for the first time, balancing the citizens’ right to exercise their religion freely against the legislature’s prerogative. In Falk’s words, “States could not place the physical means of a religion’s continued existence at the discretion of public officers. Further, general regulations that might infringe on religious practice had to have a permissible motive and could not inhibit free exercise more than was necessary to protect a substantial state interest.”

Cantwell’s protections were sharply but briefly limited in Minersville School District v. Gobitis (1940). Gobitis rejected a free exercise challenge by Jehovah’s Witnesses.

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113 310 U.S. 296 (1940).
114 Ibid., 303.
115 Ibid.
116 Ibid., 304.
117 Ibid., 305.
118 Falk, “Bulldozing First Amendment Protection,” 532; Cantwell, 305-7.
119 310 U.S. 586 (1940). Gobitis was decided two weeks after Cantwell and was overruled by West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).
Witnesses to a statute requiring all schoolchildren to salute the American flag and recite the Pledge of Allegiance daily. The Court exempted any “general law not aimed at the promotion or restriction of religious beliefs” from free exercise scrutiny, and limited free exercise protection to three narrow rights: subjective belief, conversion of others, and assembly in a chosen place of worship. The government thus could justify a broad range of burdens on religion unless the offended parties could show clearly that the government action lacked any rational basis. Sarah Gordon explains that because the flag salute was a nonreligious exercise, the Jehovah’s Witnesses refusing the salute were seen by the public as simply unreasonable: “By importing religion into a nonreligious exercise, they seemed superstitious and disloyal, as well as impolite and aggressive.” According to the District Court judge who heard the Gobitis trial, however, “the decision about what counts as religious should rest with the believer, not school officials.”

Three years later, West Virginia State Board of Education v. Barnette (1943) overruled Gobitis and refined the Cantwell test. Barnette rejected the toothless “rational basis” test for legislation and held that the First Amendment religious rights of the individual limited the scope of state power. The Court ruled such rights could be restricted “only to prevent grave and immediate danger to interests which the state may lawfully protect.”

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120 Gobitis, 594.
122 Ibid., 30.
123 Barnette was decided three years after Gobitis and was based on identical facts. Falk explains the Justices’ change of heart by the appointment of Justice Jackson, who joined the Supreme Court after the Gobitis decision, the wide criticism the Supreme Court faced after Gobitis, as well as by Congress’ endorsement of a voluntary flag salute in 1942. (Falk, “Bulldozing First Amendment Protection,” 533, fn. 164)
124 Barnette, 639.
Three principles established in *Barnette* – which was decided on the grounds of free speech – are relevant to free exercise according to Falk:

First, infringements upon the free exercise of religion could be justified only if the government is safeguarding a legitimate state interest from grave and immediate danger. Second, the Court would not defer to legislative or executive judgment on Bill of Rights issues. Action by other branches of government was always subject to judicial scrutiny when that action conflicted with freedoms guaranteed by the Bill of Rights. Third, the Court found that the government has no inherent power to act contrary to the Bill of Rights; all levels of government must respect the freedoms guaranteed therein.\(^\text{125}\)

In the 1960s, the Court began to consider cases about government actions that indirectly burdened free exercise, and it also broadened its definition of religion. In *Torcaso v. Watkins* (1961)\(^\text{126}\) the Court declared a religious test for public office unconstitutional. In a famous footnote in his majority opinion, Justice Hugo Black wrote that the First Amendment protected not only religions that were based on the belief in the existence of a creator, but also nontheistic faiths, such as Buddhism, Taoism, and secular humanism.\(^\text{127}\) Two days later, in a decision in *Braunfeld v. Brown* (1961),\(^\text{128}\) the Court, considering whether Sunday closing laws infringed the free exercise rights of an Orthodox Jew, established a framework for evaluating laws that had the purpose or the effect of burdening the free exercise of religion, unless the secular purpose cannot be achieved without this burdening. While the plurality opinion did not see economic

\(^{125}\) Falk, “Bulldozing First Amendment Protection,” 533; *Barnette*, 638-40.
\(^{127}\) *Torcaso*, 495, fn.11.
burdens as amounting to the prohibition of religious practice, the dissent (filed by Justice Brennan) focused on the compulsory effect of forcing one to choose between religious belief or practice and economic survival. While the plurality opinion used a rational-basis standard, Brennan argued for using strict scrutiny.

_Sherbert v. Verner_ (1963), two years after _Braunfeld_, sees such forced choice between religious belief or practice and economic benefits as amounting to “the same kind of burden upon the free exercise of religion as would a fine imposed […] for […] Saturday worship.” According to the _Sherbert_ strict scrutiny test, a government action that incidentally burdens religion is justified only by a “compelling state interest in the regulation of a subject within the State’s constitutional power to regulate.” Moreover, where there is such compelling interest, the government also needs to show that “no alternative forms of regulation would combat such abuses without infringing First Amendment rights.”

Under the _Sherbert_ test, as it was clarified in _Wisconsin v. Yoder_ (1972) and in _Thomas v. Review Board of the Indiana Employment Security Division_ (1981), a plaintiff must show that a sincerely-held belief is burdened by a government action. The burden of proof then shifts to the government to show either that the religious practice poses a grave and immediate threat to society (in the case of direct burdens) or a compelling state interest that cannot be achieved in less restrictive means (in the case of indirect burdens). While _Yoder_ expands the strict scrutiny test of _Sherbert_, it narrows the definition of religion that was broadened in _Torcaso_. _Yoder_, which Justice O’Connor

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129 _Sherbert_, 404.
130 Ibid., 403.
131 Ibid., 407.
distinguished from *Lyng* in her majority opinion and Justice Brennan cited as relevant precedent in his dissent, exempted Old Order Amish children from compulsory secondary education because high school attendance is contrary to Amish beliefs. The *Yoder* Court held that a facially neutral statute that advanced substantial state interest is subject to the balancing test because it unduly burdened free exercise rights. But it required the plaintiffs to demonstrate that the practice in question is sincerely rooted in religious belief, thus narrowly understanding religion as belief rather than conduct yet again. Even though compulsory school attendance threatened the Amish way of life, this burden was declared unconstitutional because this way of life was rooted in religious belief (rather than understanding this way of life as religious in itself).

The court in *Thomas* clarified the test applied to state actions that indirectly or incidentally infringed upon a religious practice: such infringement is justified only if it is the least restrictive means to achieve a compelling state interest. Even more important to our reading of *Lyng* is the Court’s holding that the religious belief of a group does not have to be accepted by, or even comprehensible to, nonbelievers. Furthermore, to invoke First Amendment protection, a belief need not be articulated with precision or shared by all members of a religious sect. In *Goldman v. Weinberger* (1986), however, the Court exempted the military from the compelling interest balancing test and excused the Air Force from review of its rational justification. The Court held that “the military’s perceived need for uniformity,” reasonably and evenhandedly applied, legitimized the infringement of Goldman’s religious practice. The dissent in *Goldman* noted that a regulation written from a Christian point of view could not be considered “neutral.”

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133 475 U.S. 503 (1986).
134 Ibid., 510.
In *Bowen v. Roy* (1986), the Court rejected an Abenaki Indian’s suit to prevent the use of a Social Security number to process welfare benefits for his daughter. Roy claimed that use of the number would rob his daughter of her spirit and prevent her from attaining greater spiritual power. The Court held that the free exercise clause “does not afford an individual a right to dictate the conduct of the Government’s internal procedures.” An individual could not use the clause as a sword to make the government “behave in ways that the individual believes will further his or her spiritual development.” The Court was divided on whether the government could require Roy to use his daughter’s Social Security number to receive benefits. Chief Justice Burger distinguished the case from *Sherbert* and claimed that “mere denial of a governmental benefit by a uniformly applicable statute does not constitute infringement of religious liberty.” The opinion lowered the standard of free exercise clause analysis in benefits cases. Government benefits programs would withstand scrutiny as long as the government’s scheme was neutral and uniform in its application and was a “reasonable means of promoting a legitimate public interest.”

Justice O’Connor, joined by Justices Brennan and Marshall, concurred in part and dissented in part. Justice O’Connor found the *Sherbert* balancing test applicable to the question whether Roy had to provide the number despite his beliefs and that the government had available less restrictive means to prevent welfare fraud. Justice O’Connor noted the lack of precedent for the reasonable means test, which would

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135 *Roy*, 696.
136 Ibid., 699. The Court also found that Roy failed to prove that the government’s requirement infringed upon his free exercise rights, which means that the case could have been decided using traditional free exercise analysis, without invoking the “internal procedure” test.
137 *Roy*, 704, 708.
138 Ibid., 707-8.
relegate free exercise claims to “the barest level of minimal scrutiny.”\(^{139}\) She believed such a lax interpretation of the clause would enfeeble the Constitution’s “express limits upon governmental actions limiting the freedoms of […] society’s members.”\(^{140}\)

The last free exercise case decided by the Supreme Court before *Lyng* was *Hobbie v. Unemployment Appeals Commission of Florida* (1987),\(^ {141}\) which reaffirmed the traditional free exercise analysis of incidental burdens on religious practice. The Court expressly rejected Burger’s attempt in *Roy* to apply a reasonable means test to some “incidental neutral restraints on the free exercise of religion.”\(^ {142}\) Thus, prior to *Lyng*, the Court’s free exercise clause doctrine stood as follows: Direct criminalization of religious activity and compulsion to act in a manner contrary to religious belief (direct burdens) were forbidden unless justified by a grave danger to a substantial government interest. Indirect burdens on religious practice had to be justified by a government interest of the highest order that could not be served by less restrictive means.

**American Indian Sacred Land Cases Before *Lyng***

Before *Lyng*, the Supreme Court had never considered whether development of federal land could injure the free exercise rights of American Indians. Lower federal courts, however, had considered several such claims.\(^ {143}\)

\(^{139}\) Ibid., 727.  
\(^{140}\) Ibid., 732.  
\(^{142}\) Ibid., 141.  
\(^{143}\) Brown’s book, *Religion, Law, and the Land*, is dedicated to these cases.
The first appellate opinion on an Indian free exercise challenge to public lands development was *Sequoyah v. Tennessee Valley Authority* (1980). Cherokee Indians challenged the impoundment of the reservoir behind the Tellico Dam in Tennessee, claiming that the dam would flood their sacred homeland along the Little Tennessee River, inundating and destroying sacred sites, medicine gathering sites, holy places, and innumerable ancestral grave sites, and would otherwise “disturb the sacred balance of the land” by stopping up the last free-flowing stretch of the largest and best trout-fishing water east of the Mississippi River. The trial court had rejected the plaintiffs’ free exercise claim because the Cherokees lacked a property interest in the site. However, the Court of Appeals balanced the burden on religion against the government’s interest, following *Sherbert* and *Yoder*. The absence of a property interest was not conclusive in view of the history of Cherokee expulsion from the area at issue and the importance of geographic sites to the Cherokee religion. For sake of such balancing, however, the Sixth Circuit required that the Cherokees prove (again, following *Yoder*), the “centrality or indispensability” of the area to be flooded to their religious practice. Ruling that the plaintiffs failed to show that the sites at issue were “central or indispensable to religious practice,” the court determined that the plaintiff’s affidavits reflected “personal preference,” which is unprotected by the First Amendment.

Six months later, in *Badoni v. Higginson* (1980), the Tenth Circuit Court dismissed the appeal of Navajo Indians similarly confronted with the disappearance of sacred land under invasive waters impounded from yet another government-sponsored...
dam. In opposition with *Yoder*, the court discussed the government’s compelling interest in operating and maintaining the dam before discussing the question whether this operation and maintenance burdens the Navajo religion. Plaintiffs sought to prevent the flooding and desecration of sacred sites in Rainbow Bridge National Monument by enjoining the continued filling of Lake Powell and by forcing the government to institute stricter controls on tourist activities in the area. The court concluded that the government’s interest in the dam was of the highest order and could not be served if Lake Powell was kept at a level low enough to protect plaintiffs’ religious sites. Examining the burden that the dam imposed on the Navajo religion, the court determined that plaintiffs had to show the coercive effect of government action on their religious practice, which they failed to do, because they were not denied access to the sacred areas. But while the court decided in favor of the government, it also subjected federal land management policies to free exercise clause scrutiny.

In *Wilson v. Block* (1983), the District of Columbia Circuit Court rejected Hopi challenges to the expansion of a ski resort in the San Francisco Peaks within the Coconino National Forest. While the plaintiffs established the indispensability of the San Francisco Peaks as a whole, they failed to establish “the indispensability of that small portion of the Peaks encompassed by the Snow Bowl permit area” or the site of the proposed expansion. The court required that the particular land threatened would be “indispensable to some religious practice,” and that “plaintiffs seeking to restrict government land use in the name of religious freedom must, at a minimum, demonstrate

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148 708 F.2d 735 (D.C. Cir. 1983).
149 Ibid., 744.
that the government’s proposed land use would impair a religious practice that could not be performed at any other site.\textsuperscript{150}

While plaintiffs might have \textit{believed} that the sacred quality of the Peaks was impaired by the ski resort development, they had not shown a cognizable burden on religious \textit{practice}. \textit{Wilson} thus focused free exercise inquiry on the link between a particular geographic area and a particular religious practice that could not be performed elsewhere. Though land development might erode religious beliefs, the free exercise clause was not implicated unless the mode of worship was irreparably injured as well.

The \textit{Lyng} lower courts followed this logic, and based on the evidence and testimony in trial, both the District Court and the Ninth Circuit Court\textsuperscript{151} decided that the High Country was indispensable to the local Indians’ religious practice and that the government’s interest in developing the area was not compelling enough to justify the burden it would impose on the Indian religious practice. As we have seen, the Supreme Court reversed this decision. In the following chapter I read the trial evidence and testimony in order to understand the local practice as the practitioners themselves present it.

\textsuperscript{150} \textit{Wilson}, 743-4.

\textsuperscript{151} \textit{Northwest Indian Cemetery Protective Association v. Peterson}, 795 F.2d 688, 692 (9\textsuperscript{th} Cir. 1986).
CHAPTER TWO: RELIGION

Introduction

As we have seen in the previous chapter, according to the Sherbert test, in the case of incidental burdens on religious practice, the court first needs to determine whether the practice of which plaintiffs seek protection is based on a sincerely-held belief, and whether the government’s action poses a substantial burden on plaintiffs’ ability to exercise this religious belief. If these two elements are established, then the government must show that it is acting in furtherance of a compelling government interest and using the least restrictive means to pursue it. In the present chapter I offer a reading of the testimony and evidence presented in the Lyng trial. I organize this reading around the first two elements of the Sherbert test: “sincerely-held belief” and “substantial burden.” After establishing these two elements, I show that they are not enough to grant the sought protection in this case because the Sherbert test is suitable for the protection of an individual exercise of religion and does not allow for the establishment of a close tie between religion and land. Specifically, understanding burden as prohibition or coercion does not fit with territorial religion and therefore basing a decision on such an understanding of burden does not require scrutinizing the government’s interest in the development plan. To show this I follow the descriptions of the High Country as sacred land as they appear in the testimony and in the Theodoratus Report.
The Theodoratus Report is composed of ethnographic, historic, and archeological chapters. It was conducted by Theodoratus Cultural Research for the United States Department of Agriculture, Forest Service, Six Rivers National Forest. Its purpose is:

to identify cultural properties and evaluate their significance to Native Americans in the area of potential environmental effect of the Gasquet-Orleans Road, Chimney Rock Section; to describe the various impacts which may be expected from proposed changes in the area; to discuss mitigation alternatives if adverse effects are found to be involved; and to offer recommendations relative to the management of the cultural properties.152

The geographic study area encompassed in this research is located in Del Norte, Humboldt, and Siskiyou Counties, California. The project area, situated within the study area, is located seventeen miles east of the town of Klamath and twenty-five miles north of the settlement of Weitchpec. Within the project area the proposed Chimney Rock section of the Forest Service road, known popularly as the G-O Road, would constitute the final link in a double lane paved road connecting the towns of Gasquet and Orleans. The existing Chimney Rock section is passable by two-wheel drive, high clearance vehicles from west to east only, and in both directions by four-wheel drive vehicles from June to October each year. The length of the proposed section of the G-O Road varies from 5.7 to 9 miles and covers from 41 to 163 acres, depending on which of nine alternative routes is chosen. The research for the report centered on the Blue Crick area of the Six Rivers National Forest and the adjoining Klamath National Forest, an area conceptually referred to by local Native Americans as the “High Country.”

152 Theodoratus Report, 1.
Journalist Sarah Neustadtl describes the High Country thus:

In the high country, a few unusual but not very imposing landforms punctuate a medium-sized ridge. These are the legendary medicine rocks of the Yurok and Karuk Indians. Chimney Rock (5,727 feet) is a small protuberance of weatherworn red rock. Nearby there is the bare and rusty hilltop known as Turtle Rock. Doctor Rock (4,924 feet) is not far north of them, a small brushy dome from which a monument-sized boulder rises like a podium. In the protected crack of this boulder is a soot-blackened grotto littered with beer cans – a medicine cave. Only in the high country can medicine men and women pray for the rooted steadiness that countervails when the universe in knocked out of balance by human foolishness.¹⁵³

Doctor Rock “is the place where a few select Yurok women can go questing for visions, after which they return to the villages to train with older women as doctors.” At Chimney Rock, “men pray for wisdom and strength, and the medicine men pray for a power they can shoot down to the people on the river like a shaft of light.” The rituals included “the Jump Dance and the White Deerskin Dance of World Renewal – standing in a long line, they stamped their feet on the ground to balance the world.” The medicine men guided the Yurok to pray for law. “When the law was broken, the universe blistered with sickness and storm, insanity and murder,” and they still believe today that “the world is in turmoil because of individual wrongdoing. A lawbreaker is seized by a bad luck that

¹⁵³ Sara Neustadtl, Moving Mountains: Coping with Change in Mountain Communities (Appalachian Mountain Club, 1987), 180. Neustadtl’s account of the Lyng trial is told largely through the observations of traditional religious practitioners Sam and Audrey Jones, Lowanna Brantner, Charlie Thom, Dewey George, Jimmie James, and Chris Peters, and it was published at a time when the Lyng litigation was still ongoing.
shakes him into humility, for when the law is broken, the balance needs to be found again.” Neustadtl concludes that “This Indian religion is no once-a-week genuflection; it is a voice of the universe, with the power to make itself heard.” 154

The Theodoratus Report describes a “bitter disagreement” between different Forest Service employees regarding the impact of the development plan. One of the employees is Arnold Pilling, who will later become an expert witness in the case. 155 The Theodoratus Report was commissioned because of this disagreement and was meant to (1) locate and document all cultural properties within the project area and its immediate environs; (2) determine the religious significance of the High Country to contemporary Northwest California Native Americans; (3) investigate “the presence of an ongoing, shared, religious system in the study area,” and determine whether this contemporary system constitutes “traditional religious behavior or is idiosyncratic in nature”; 156 (4) determine the number of Native Americans who were using the High Country for ritual/religious purposes and the nature and extent of such use at the time the study was conducted; (5) find out whether and how the G-O Road would affect traditional religious beliefs and/or contemporary ritual/religious use of the High Country; (6) investigate other types of culturally significant practices which would be adversely affected by the road. 157

154 Ibid., 180-1.
155 Theodoratus Report, 3.
156 Ibid. This question raises some problems, because it assumes that traditions are static rather than evolving in time and influenced by contact with other cultures. Many scholars have written about this problem. See, e.g., Gregory B. Johnson, Sacred Claims: Repatriation and Living Tradition (Charlottesville: University of Virginia Press, 2007) and Wenger, We Have a Religion; a discussion of what is referred to as an “authenticity discourse” with regards to Native American traditions appears in Chapter Three below. The report itself does acknowledge that “there is a longstanding tradition of intermarriage between individuals from Northwest California tribal groups. Further there is a history of intermarriage with Indians from other Indian groups as well as with non-Indian individuals. To assume ‘purity’ of group and associate this with ‘purity’ of culture is a longstanding Western misconception of Native American behavior which misses the multi-cultural nature of the life experience of many Indian people.” (Theodoratus Report, 9)
157 Archival research was initiated in August 1978 and consulted local, state, and national archives. Field contacts and interviews followed. Most of the research was conducted from August to November 1978. The
The report is divided into three major sections. Part One, the ethnographic component, presents cultural data on Northwest California Indian peoples, relates the data to specific sites within the G-O road project area, summarizes the findings, and presents a brief discussion of conclusions and recommendations. Part Two, the historical component, presents historical materials which supplement and give further context to the ethnographic research. Part Three, the archeological component, presents the research, conclusions, and recommendations resulting from the archeological survey of the G-O road project area. The final section briefly reviews the findings of the study as a whole and presents overall recommendations. In my dissertation I present the ethnographic and historical parts of the study but not the archeological part, because the first two are relevant to my explorations of Lyng as a case about religious freedom and Indigenous sovereignty, while the third is concerned with data that is not central to my own project. I do, however, present the conclusions of the Theodoratus Report, and those are derived from all three parts of the study.

I present and analyze the historical part of the report in Chapter Four, where I use it to support an argument that the Lyng story must be read as one not only about religious freedom but also about Indigenous sovereignty. In the present chapter, I focus on the ethnographic part of the study, and I read it alongside trial testimonies about the practice of which the plaintiffs seek protection, that portray religion as fundamentally territorial (as opposed to the approach of the courts to religion, which favors a Tillichian definition

accumulated data was collated and analyzed through January 1979. The ethnographic field research was conducted from an office on the premises of the Northwest Indian Cemetery Protective Association in McKinleyville, California. (Theodoratus Report, 4) Northwest Indian Cemetery Protective Association will become the principal plaintiff in the Lyng case.
of religion as “ultimate concern,” as discussed above in Chapter One). I do so in order to examine the problematic described in the introduction – the practice in question is described at once as religious and as transcending the category of religion. I argue that if the practice is religious and burdened by the development plan then according to the Sherbert test the government should show a compelling interest in completing the road, as well as that the route chosen is the least harmful means to pursuing this interest. However, I believe that once we know more about the practice in question, we will understand why the compelling-interest test was not invoked by Justice O’Connor.

The ethnographic chapter opens with an explanation of the measures taken in order to avoid problems that are common to relationships between ethnographers and Indians, who are often suspicious of people who attempt to study them. The field research was primarily conducted through open-ended interview questions that can be divided into four categories. The first set concerned the general Blue Creek area, the second set was meant to discover knowledge of specific sites in the area. A third set of questions related to the consultant’s involvement in, or concern for, the local Native

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The report talks about the need to establish credibility: “TRC identified and contacted various influential individuals and groups to discuss project concerns. Every effort was made to establish this study as important, definitive and likely to set a precedent. The credibility of the research was enhanced through the presence on the staff of locally hired and trained Native American researchers. These researchers greatly extended TRC’s range of contact and scope of knowledge, and helped to gain credibility from the community.” (Theodoratus Report, 7-8)

However, the report also states that during the conduction of the study, local people were involved in political activities centering on political and economic issues, particularly the question of fishing rights on the Klamath River. The researchers took great care not to become involved in these issues, in order not to inject politics into the research. I am suspicious of this statement, both because it seems impossible for an ethnographer who is living among the community she studies to remain distanced from the issues that concern that community, and also because the study itself is conducted from the premises of the Northwest Indian Cemetery Protective Association (who ends up being the principal plaintiff in Lyng), which suggests that the Theodoratus Cultural Research staff is not neutral in its relation to the local Indian communities. On the other hand, I do appreciate the need to appear neutral and distanced from local concerns, especially because the study was commissioned by the Forest Service.
American culture, aiming to determine the extent and intensity of local Indian cultural involvement. The fourth and final set of questions involved the potential cultural impact of the proposed road. I identified similar categories of questions in the examination of witnesses in the Lyng trial, which helps in reading the report and testimonies together.

Four thousand adult Indian people are believed to be living in the three counties of Del Norte, Humbolt, and Siskiyou. Out of them, TRC interviewed 166 people. There is no available list of people of Indian descent in the area and their affiliation with specific nations. The total number of Indians in the area is unknown.\textsuperscript{159} Let us turn now to a discussion of the religious practice of the Yurok, Karuk, and Tolowa Indians in the High Country, as it is presented in the Theodoratus Report and by the witnesses in the Lyng trial.

**Sincerely-Held Belief**

The Yurok, Karok and Tolowa Indian tribes live in the northwestern corner of California. These tribes share the use of a very special religious area. That area is located in the southern portion of the Siskiyou mountains, and referred to by the Indian people as the “High Country.” Doctor Rock, Chimney Rock, Pick 8 and Little Medicine Mountain are located within this religious area and are some of the more sacred places within the High Country. They have been used throughout the years by Indian people who go there to pray for special purposes or special

\textsuperscript{159} Thaodoratus Report, 9. See also Dorothea Theodoratus’ testimony in the trial (Reporter’s Transcript, 130), but see estimates of 4500 religious practitioners by witness Christopher Peters (Reporter’s Transcript., 113).
powers, or medicine. The High Country was placed there by the Creator as a place where Indian people could seek religious power.”

Thus begins Christopher Peters (Yurok/Karuk) his testimony in the Lyng trial. I return to this testimony below. The Theodoratus Report prefaces its description of Yurok, Karuk, and Tolowa religious practice with a similar characterization, stating that “Native American uses of the high country articulate closely with an unending search for spiritual power. This search permeates daily life and as such is interrelated with many other aspects of Native American culture.”

Thus, the ethnographic part of the report describes aspects of the communities’ daily life, such as religious ceremonies, social institutions, and technological and material culture. This introductory remark is in line with the general observation made by scholars that:

[...] Native American religions are territorial in conception, [...] they exist in relation to, and dictate conduct within, a geographic place. It is a comprehensive way of life with extensive economic implications that simply cannot be practiced on certain days, inside designated buildings, or through purely intellectual exertions. [...] Native Americans live a life shaped by belief, rather than viewing religion as a transcendent phenomenon to be experienced fully only in the next world.

The territorial aspect of Native religiosity is discussed extensively by the witnesses as well as in the Theodoratus Report, which notes that descriptions that single out specific cultural sites as isolated (e.g., Doctor Rock, Chimney Rock, Peak 8) are distortions of

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160 Ibid., 76.
161 Theodoratus Report, 12.
Indian conceptualizations of these important cultural properties.\textsuperscript{163} The report adds a preliminary remark about the conception of religious sites that is at the center of the investigation (and at the center of AIRFA and other cultural preservation laws). How should we conceptualize a “site”? the report asks. While “in the conventional definitions the concept of ‘site’ is usually tied to a building, a rock formation, or an area of cultural debris,”

local Indian residents have defined a site as more than a limited measurable locality. For instance, a religious site can be a condition – silence. In this report religious site descriptions are given in terms of the perceptions of local Native Americans and therefore may include psychological, visual, and other sensory aspects of a particular area. Another element of perceptual difference, the idea fundamental to local Native Americans, that sacred sites are used qualitatively rather than quantitatively, also defines site locations in a manner which is unconventional to many non-Indian Americans. In order to understand what a site means to Native American residents of this area, a mental shift must be made away from the purely physical aspect of a site to an extended definition which includes various qualitative, psychological and sensory aspects.\textsuperscript{164}

With all this in mind we can start looking into the content of the religious practice of which the Yurok, Karuk, and Tolowa Indians seek protection.

The report describes a relationship between religious and social status. Both are described in terms of height, both in relation to rank and to sacredness of specific places: “the higher a house on the side of the hill, the higher the social rank of the owner. This

\textsuperscript{163} Theodoratus Report, 44.
\textsuperscript{164} Ibid., 10-11.
relationship of height to social rank can be seen as a secular reflection of the sacred world wherein the higher places in the mountains possessed greater sacred power.”¹⁶⁵ The social life of Northwest Indians has been described as organized around individual rights, property, and prestige. The report brings an early account of this by a Yurok woman, Lucy Thompson, who in 1916 talked about the “Talth” or “High Priests” of the Yurok: “Among them were our leaders... These men and women in our language we call Talth, and were the High Priests, and great rulers who ruled our people. Therefore, we were one of the tribes that was never ruled by a single chief, but by our Talth, or High Priests... The Talth were the mediators between man and God...¹⁶⁶ “High Men” are also referred to in 1973 by Harry Roberts, who has lived in close association with the Yurok for over 50 years, and he connected between high men and high places: “Chimney Rock, Turtle (Frog) Rock, and Sawtooth Mountain are places where ‘high’ medicine was made, and it was in these places that many of the great men of the tribes received their final training and confirmation as High Men.”¹⁶⁷

Lucy Thompson also described “men doctors” who mediated with women doctors, served in family disputes, and organized the White Deerskin Dance biannually. The men doctors were wealthy, and they had secrets they had learned from relatives. According to Thompson, before beginning practice, the doctor went “back to the mountains to some distant and secluded place where there is a large rock or high peak, where he can look over the whole surrounding country all alone. There he prays to his God for health, strength and success.”¹⁶⁸ Thompson described the training which sons of

¹⁶⁵ Ibid., 36.
¹⁶⁶ Ibid., 39.
¹⁶⁷ Ibid.
¹⁶⁸ Ibid., 40.
aristocratic Yurok families undertook in order to validate their social position: it included abstaining from food and water, remaining in the secluded area for eight to twelve days, returning home and smoking a pipe. Then the supplicant was ready to become a doctor, use roots, herbs, and minerals for curing disease. Scholars have observed that validation of social position was done through performance of religious duties, including sweating, sexual abstinence, and sweathouse training to become “real men.”

The TRC field research showed a continuing importance of “high men” in contemporary local Native American communities. But while traditionally, prestige and leadership roles were gained through “wealth” (property or rights), today the quest for such wealth is interpreted as an integral part of “a more basic and deeply meaningful search for the sacred, the sanctified, and the spiritual aspects of life.”

Having explored the relationship between social life and religious status, the report turns to discuss specific religious beliefs and practices, declaring this discussion to be the most important aspect of the study. As indicated in the introduction to this dissertation, the researchers are aware of the problematic nature of classifying the beliefs and practices they have observed as “religious.” First of all, all aspects of Native lives are interconnected and cannot be separated into religious and secular ones. Secondly, the category of religion is a Western category, and it is not adequate to analyzing Indigenous practices. A statement made by a Hupa woman testifying in 1954 before a committee of the United States Senate gives partial insight into the Indian concepts:

[…] To most people, hunting and fishing is a sport. To the American Indian it is a part of a religious custom. The American Indians are a very pious – I do not like

169 Ibid.
170 Ibid., 41.
the insinuations of ‘pious’ – but they are a very religious people. We did not believe in a church just one day; we believed in a church every day of the week and in every act that we did. And we have continued with that belief. Therefore, even the taking of food was a religious sacrament in a way, particularly in regard to the hunting of the deer. We had a set custom that we followed in the conserving of it and the way we used the meat and our sharing it with others and so forth.171

In trial, witness Christopher Peters expresses a similar sentiment: “It is difficult to talk about traditional types of things in translating it into the English language. I think the court will find […] converting Indian concepts into European language loses something in the translation.”172 In order to avoid distortion of Indian concepts by forcing them into Western categories, the authors of the Theodoratus Report focus on delineating events and features of local Indian life as they relate to the High Country. In many cases, they discover that seemingly unrelated elements are, in fact, closely interrelated. They declare an awareness of such interrelationship to be important to the examination of the religious life of the peoples concerned, and of the relationships of religious beliefs and practices to certain locations within the project area.173

The report than turns to discussing the major ceremonial events and of the philosophical precepts upon which they are based. Many of these events stress the quest of rejuvenation of the world, the community, and the individual. Special attention is given to the training of “medicine people,” as we can see below. Northwest California

171 Ibid., 44.
172 Reporter’s Transcript, 70.
173 While the authors of the Theodoratus Report try to focus on describing specific rituals and their relation to specific locales and communities, they fail to avoid using the term “religion” altogether. I identify a similar tendency in the witnesses’ testimonies, where they compare the High Country to a church several times, even when they assert that their own traditions and relation to the High Country are fundamentally different than the Whites’ relations to their churches.
Indian religious practice is focused on world renewal, aiming to stabilize and preserve the earth from catastrophe and mankind from disease. In trial, Peters explains that “world renewal” has both physical and spiritual aspects:

[…] they are world renewal ceremonies, and most of the time when people think of world renewal, the general understanding, the image or the concept is making the physical world over again. The ceremonies do do that deed, but also they make a spiritual world over again, a spiritual bond that holds tribal people together.

The religious practitioners believe that world renewal ceremonies were initiated by pre-human spirits who inhabited the world and brought all living things and culture to humankind. The Karuk call these spirits *ixkareya* and see them as guides for human behavior; the Yurok call them *woge* and believe that they are afraid of contamination by mortals. Ceremonies of world renewal include reciting of origin myths such as the following:

The Yurok myths … belong to a time period when the earth was inhabited by a race of beings called woge … small humanoid beings who reluctantly yielded the earth to mankind. There is an eerie sense of nostalgic sadness and loss whenever the woge are mentioned … the woge withdrew into the mountains or across the sea or turned into landmarks, birds, or animals in order to escape close contact

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174 Theodoratus Report, 45.
175 Reporter's Transcript, 112.
176 Theodoratus Report, 45.
with newly created man. Yet the woge are still present in some sense, and they are depicted as being glad to be called upon (in ritual formulas and the like).\(^{177}\)

The medicine people (whom I describe at length below) who go to the High Country to communicate with the spirits recite set narratives at specific places in a fixed order. A complicated process of purification is required before attending the High Country – abstaining from water, sex, and profane activity, fasting, isolation in the sweathouse, and using tobacco and a specific medicine made at a specific site in the High Country.\(^{178}\)

Medicine women must not be menstruating at the time of the ceremony, and neither can any other of the female participants (e.g., the mother of a sick child for whom the ceremony is being conducted). About twenty girls and boys participate in the Brush dance, the girls prohibited from dancing once they get married or have a child.\(^{179}\)

Elements of the traditional ceremonies (hereditary rights, importance in loaning of regalia, reciprocal assistance across tribal lines, responsibility to feed visitors, and payment to mourners) continue to be an integral part of Northwest Indian present-day ceremonies.\(^{180}\)

Ceremonial dances are performed at the sites where the pre-human figures are said to have first brought certain gifts to man. The dances are considered to be the reaffirmation of the gifts and to have the power to remove evil from the world and to restore balance with the earth. While ethnographers have argued in the past that the Yurok dance regalia is merely a marker of status and wealth, the Yurok interviewed in

\(^{177}\) Ibid., 46. It is interesting to think about this myth as a metaphor for Indian-White contact, one that resulted in withdrawal of the Indians, who nevertheless remain present in the White-dominated world, though of course not as gods or kin. The contact between local Indians and Whites and its consequences are considered in Chapter Four below.

\(^{178}\) Theodoratus Report, 46.

\(^{179}\) Reporter’s Transcript, 237-8.

\(^{180}\) Theodoratus Report, 47, 70; Reporter’s Transcript, 237.
the Theodoratus Report disagree, seeing the regalia as symbolic and sacred. According to those consultants, the regalia is regarded as living spirits and sacred objects. They say that the ethnographers’ focus on material wealth has led to misinterpretation of their culture. One of the consultants said that “Dances are our religion,” while another specified that “when ceremonies are held, the people pray about everything, for the salmon to come, for the acorns to grow, for the presence of all kinds of game, and for children to grow up to be good.”

The Theodoratus Report turns to discuss “people with power,” i.e. doctors and medicine men. The category of doctors includes people who are capable of curing ill patients. The other category includes those who have acquired “medicine” for any purpose other than curing illness. Today such individuals are often called “doctors” too. Both doctors and medicine people are trained in the High Country, and only those who train in the mountains are said to achieve great power. The word “doctor” is a locally accepted term for any of the esoteric practitioners who have had High Country training. The Theodoratus Report uses the term “doctor” to refer to a spiritual specialist who achieves “power” through trance from an order other than the “natural” world. For the Yurok these doctors were women. The report uses the term “medicine man” to refer to male formalists or priests who are ceremonial practitioners. The report (and the witnesses in trial) discuss another category – of people who sought particular expressions of power, such as that for “good,” “long life” or “strong.” The people in the latter category are referred to as “medicine makers” in the Theodoratus Report, which defines medicine making thus:

182 Ibid., 51.
[a] homogenous constellation of physical, mental, and vocal actions, and experiential events, undertaken or sought in a religious manner and frame of mind, the purpose of which is to maximize the practitioner’s potential […] to act in a desired direction, or to live in a desired way. It invariably involves … the practitioner’s experiencing contact with supernatural forces, either generalized or specific. While medicine making may incorporate given ascetic acts, and prescribed rituals, prayers, or ordeals, it is, in the purest sense, an inwardly experienced moment of intense awareness and, in the more lofty (or “High”) medicines, of transcendent understanding. A man or woman might, then, carry out all of the prescribed actions, and yet not “make medicine”; that is, not experience the requisite inner state.183

The report discusses a “universal energy” (which it refers to as “power,” “spirit,” and “fire” interchangeably, and explains that it is part of the “creator”). Such power can be obtained in several ways. Every Yurok child is born with it, and s/he also has a “soul,” which is a more individuated spiritual element, as well as a body and a mind-element. While some people get an extra portion of this “power” at birth, others acquire it after birth. The Yurok believe that the “soul” enters the body ten days after birth, at which point the child is recognized as a human being. At this point a doctor can “shoot” the child with power, giving the child an added increment of spirit and, hence, added potential for power. A person may also inherit potential power: the ability to train for doctoring. The report refers to this potential power as “calling.”184

183 Ibid., 51-2.
184 Ibid., 52.
Although doctors, usually women, often come from families of doctors, each individual must seek the realization of this power on her own. While doctoring is a path to wealth, the training it requires is too strict for many people. One TCR Yurok consultant said:

I had to fight against being a doctor. I drank water so I couldn’t be a doctor. I had foresight to see future events. I foresaw an automobile accident. It was terrible. I woke up in the night singing doctor songs. That’s why I drank water, to keep from being a doctor.\(^{185}\)

Those who seek to be curing doctors must first experience a “vision” in a trance or dream state. A person or an animal appears and guides the novice, who is undergoing a “pain” – an animate object introduced into the novice’s body during the vision. This vision is followed by training in which the novice learns to control the pain in order to use it while curing patients. The doctor usually possesses pairs of “pains” which are used to draw illness out of the bodies of others. The concept of calling is invoked again: no one volunteers or is appointed to become a doctor; “One is called.”

The training for power acquisition includes performing a Kick Dance in a sweathouse for ten days under the guidance of an older doctor. During the dance, the trainee is considered ill; she learns to control her “pain,” and when she can do so, she is considered to be cured. This is called “cooking the pains” to make them amenable to her control. In the summer following this dance, the novice goes to the mountains to dance overnight, usually accompanied by another doctor or assistant who watches over her. Another Kick Dance follows her return from the mountains, and then she is ready to enter

\(^{185}\) Ibid., 53.
the profession of a doctor. Specific accounts of doctors who trained in the High Country appear in the report\textsuperscript{186} and in Bowers and Carpenter.\textsuperscript{187} The mountains are the focal source of curative powers because this is where the \textit{woge}-spirits went when humans came to the earth, according to the myth described above, and in death, the doctors’ souls follow the path of the \textit{woge}-spirits to the mountains.

In the past, disease was thought to be caused in several interrelated ways, including sin or breach of taboo. Modern disease theory, while accepted, has not changed basic curing patterns. The doctor diagnoses the precise cause of an illness before beginning treatment. The patient is placed by a living-room fire with assembled family and friends gathered to sing and watch the cure. The doctor smokes tobacco in her pipe and dances until reaching a state where she can divine the cause of the illness. Breaking of a taboo has to be publicly confessed. (in the consultants’ stories, it sounds like recurring deaths in the family is considered a disease). After public confession of breaches of taboos (those pertaining to death or sex, usually), the doctor would affect the cure. She removed the “pain” from the affected part of the patient’s body with her mouth. The pain would then enter the doctor’s body, and she would vomit it into her hand or into a basket, exhibit it to the people, and then dance until it disappeared.\textsuperscript{188}

A variety of personal non-curing medicines might be sought in order to influence a number of aspects of daily life. The Report mentions medicine for alleviating personal bereavement, women’s menstrual mountain medicine, medicine for success in stick games, singing, dancing, hunting, gambling, love, good life, long life, philosophy, and

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\item \textsuperscript{186} Ibid., 54-5.
\item \textsuperscript{187} Bowers and Carpenter, “Challenging the Narrative of Conquest,” 495-96.
\item \textsuperscript{188} Theodoratus Report, 56.
\end{itemize}
spiritual enlightenment. One might seek supernatural help through proper ritual behavior at certain spots that have specific types of power. Again, fasting and abstinence from sex and water were part of this search. The ritual of gathering sweathouse wood in the hills is one example. All Indians in the study area observe this practice, and the higher the location, the more desirable the wood. The gathering of sweathouse wood is regarded as a religious act which is meant to bring the gatherer good fortune or money. It was believed that sweathouse wood gathered from the high country gave greater power to the sweating for which it was used.

As noted above, medicine makers (those who use the High County to gather non-curing medicine) are usually men. Their training is described in the report and by some of the witnesses. The process is described as difficult and lonely. The training is a period when pollution is particularly contagious, and therefore you must cook for yourself and eat alone, to avoid association with menstruating women or with people who engage in sexual relations. You could have a post-menopausal woman cook for you, because she would be considered to have lost interest in sex and is, in fact, sociologically classified as a male. A trip to the High Country must be preceded by a ten-day purification period of fasting and praying, confessing sins and ridding oneself of bad feelings. It is traditionally done in the sweathouse, under the instruction of a trainer. The purification procedure is aimed to allow the individual sufficient power to enter the High Country. During the purification period, the individual waits for acknowledgement of the spirits that his quest is sincere and sanctified. The acknowledgement can come in the form of a dream, a sign,

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189 Ibid., 60.
190 Ibid., 58.
or a vision. The training itself, in the High Country, is a long-term endeavor involving a
great deal of preparation, both on the part of the initiate and of the trainer.

The preparation for training involves what is seen as a “community support
system.” Because the medicine maker is considered to achieve knowledge or a skill
which is of benefit to the community, and because any achievement of medicine is
viewed by the remainder of the community as adding to the total store of medicine/power
within that community, communal interest is very important. While only very few people
ever make medicine on Chimney Rock for instance, the entire community has a vested
interest in the success of those few individuals, whether they be doctors making medicine
at Doctor Rock or Chimney Rock, or men making “high medicine.” In either case, the
community will benefit, and thus is supportive of the person seeking power when his or
her quest is not secret.

One enters the High Country to make medicine walking or running. The trainer
sometimes follows the medicine-maker at a distance. The trainer’s presence in the
individual’s first medicine trip is important because the trainer might have to save the
student from gaining the wrong power, from making mistakes, from dying or having a
psychological crisis. The trainer might also “shoot” his power into the student while the
student is making medicine. Vehicles may not be used. Often the trip itself is full of
difficulties and tests the individual’s endurance. The person is tested by dangers along the
trail, such as bears or tempting food. It is also important that the seeker take the
appropriate trail, which depends upon the type of medicine sought as well as the seeker’s
abilities. It is also important that the seeker not look into the eyes of passersby along the
trail, in order to maintain his purity, to protect innocent people from the medicine, and to
maintain secrecy. Such contact might put the innocent passerby in grave danger, and it also interferes with the person seeking power. On the way out of the prayer seat or medicine area, in order to maintain his concentration, the medicine maker must avoid conversations or eye contact with anyone along the trail, as those would spoil the effort by bringing the person too quickly into a world in which he does not yet care to be.

Generally, privacy is emphasized in the High Country. One means of insuring this is through building rock piles. The rocks psychically warn the medicine-maker if anyone is coming, since if someone who is not pure is met inadvertently, the entire effort is spoiled.

When in the high country the medicine-maker uses a number of techniques to induce trance states. One of these is the use of “Rhythm Sticks” made of wood and beaten in constant rhythm to get the person into the mental framework which allows him to be receptive to the spirit from whom he is seeking inspiration.191

The report dedicates a short chapter to contemporary religions in the area. It stresses that even those Indians who adhere to recently-introduced religions, such as Christianity, have simultaneously maintained traditional Native American religious beliefs. Indian participation in traditional practices has continued despite vast social changes, even if not regularly. According to one TCR consultant, religious traditions are still alive and religious power is maintained through the way people live and think. “One of our religious beliefs is that we don’t expose our sacred practices. It is a personal thing.”192 Another consultant stated that she believed that White people have cut off religion at one point but that Native American beliefs go beyond that point. “Now the Indians are reviving the old ways to the point that they have the power to enable them to

191 Ibid., 63.
192 Ibid., 70.
fly, to send their souls elsewhere beyond their bodies and many other things too.”

Many other consultants referred to the concept of soul travel as an enduring feature of the belief system.

People seeking power continue to go to the High Country to achieve personal medicine and curing medicine. Older men go there, sometimes alone and sometimes in pairs, “to recharge their batteries.” Some Karuk members who use the Blue Creek area were originally trained somewhere else, but their sites were desecrated so they have switched to this new area. There are present-day practitioners who could be classified as “inactive users” since they do not now walk to the area because of age or health reasons. Several consultants spoke of the ability (both past and present-day) to turn to the High Country from a distance and derive a regeneration of power. In trial, witness Chris Peters estimates that about forty people physically or actively use the area at the time, qualifying this estimation with a remark that there is a training aspect involved (which suggests that more people are learning to actively use the area). But he continues:

The other response is a multiple use, and that’s in terms of understanding what Indian religions are. You need to understand a process of mental telepathy, if you will – it is an awkward translation, again, a spiritual visitation that is through the mind and through the power you get from there, so people can return to the area spiritually and engage in a religious expression through a spiritual movement, not requiring a physical presence in that area.

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193 Ibid.
194 Ibid.
195 Ibid., 69. A similar explanation to the use of the High Country has been given in trial by witness Lowanna Brantner (Reporter’s Transcript, 231-33), and by witness Chris Peters (Reporter’s Transcript, 120-1).
196 Reporter’s Transcript, 85.
At the time of the *Lyng* trial, several Indian doctors in the area practiced various forms of curing. Training of doctors was not openly discussed since this is a personal seeking of medicine, and part of the belief system regarding doctoring requires that Indians avoid indiscriminate discussions about this sacred training.\(^{197}\) However, guarded references made by consultants regarding the continued training of novice doctors (reportedly six during fall 1978) gives strong evidence that this religion is a viable one in Northwest California, the report concludes.\(^{198}\) In a letter to Judge Weigel, attorney Marylin Miles explains that the number of people directly using the High Country is unknown – and probably very small – thus:

\[\ldots\] only a limited number of people are called or chosen by the Creator or Spirits to be such persons. Thus, only certain people can go to the Doctor Rock area on behalf of the rest of the community, and only then for a proper purpose and at a proper time. But this is not unlike other religions; not all members of a particular faith are permitted on the alter, for the alter is reserved for the priest or spiritual leader.\(^{199}\)

Miles explains that the few people who are allowed in the High Country use the powers that they get there in ceremonies that benefit the entire community, adding a photo to illustrate her point.

\(^{197}\) Theodoratus Report, 70.
\(^{198}\) Ibid., 71.
\(^{199}\) Letter from Marylin Miles to Judge Weigel, December 7, 1982 (San Francisco National Archives), 1.
Miles describes the photo as follows:

Enclosed for the Court’s assistance is a photograph from a recent ceremony in Weitchpec. The medicine woman in the center of the photograph was required to go to the sacred high country for guidance and power to pray for the Indian child held by her mother and for others in the community, and all those in attendance are dependent upon the powers and Spirits of the area, and thereby “use” the sacred region.200

I find this use of the photo interesting and illustrative of another point. While the Indian religious practitioners consistently argue that secrecy with regard to their ceremonies is required, they realize that seeking protection of their free exercise right from the court requires them to reveal their secrets, thus violating the sacred nature of the ceremonies and the area, at least partly. This is another aspect of the absurdity of arguing an Indian religious freedom case in U.S. courts, discussed in the introduction to this dissertation.

Miles concludes her letter to the Judge Weigel:

This is the best, and perhaps the only answer Indian plaintiffs can give the Court. The number of persons who physically go to the high country is not known, although Indian plaintiffs recognize that the numbers may not be large. As explained above, however, it is wrong to measure the religious values of this sacred area and the associated practices in terms of the number who set foot there.201

When asked about their religion the Indian plaintiff-witnesses describe a religious system that begins with community and its relation to the natural world, rather than with the

200 Ibid., 2.
201 Ibid.
individual and her relationship with God. Jimmie James tells the court that “[t]he most important thing was to have an understanding of nature. Love your people, and always remember to follow out the command of the Great Spirit, the Great Creator, and this up-to-date, I have tried to be obedient to those commands.”202 The most important religious virtue is an understanding of nature, because nature, or specific natural settings, is considered to be sacred. Sacred places are those in which communication with the Creator, or the Great Spirit, can be conducted. As Peters explains, “[t]he High Country – Doctor Rock, Chimney Rock – is essential to our religious beliefs, and serves as the very core of our cultural identity.”203 Therefore, “[t]his area is our church: cannot be moved or disturbed in any way.”204

The witnesses often compare the High Country to a church, and I think it is because they assume (probably justifiably) that it would be easier for the court to understand the importance or centrality of the area to their religion through this analogy: the High Country is to Yurok and Karuk religion what a church is to a Christian congregation. But this analogy is misleading, because, as Marc DeGirolami points out, a church could easily be moved while the High Country cannot. And so, while moving a church structure to the other side of a street in order to accommodate a development plan is not unheard of, the picks in the Six Rivers National Forest cannot be moved; moreover, one cannot simply declare another part of the forest a new place of worship (thus allowing for the Chimney Rock area to be developed). The witnesses explain that the specific site is central to their religious practice because it was given to them by the

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202 Reporter’s Transcript, 57.
203 Ibid., 77.
204 Ibid.
Creator. “This is where we meet with the Great Spirit, that area, and that’s why we all get a call to go there.” In addition, the sacredness of this area has been intensified following the development and consequent desecration of many other sacred mountains by White settlers. This last point will be elaborated in Chapter Four.

Questions about the specific ways in which the area is being used by religious communities and individuals are being addressed through specific stories. Beyond Peters’ general explanation that the area has “been used throughout the years by Indian people who go there to pray for special purposes or special powers, or medicine,” and that “the High Country is used by Indian people who have dedicated years for special training and preparation,” James tells about his grandmother, who “lived to be about 110 years old, […] and has fought the spirits of the devil for our people, she’s well known.”

And then she goes back to Elk Valley and stays there quite a number of days to give thanks, and you might say give praise to the Creator. Then, from there, she is all going to different areas wherever she is called, wherever she is called, she goes, regardless of what kind of weather. She charges nothing, and whatever they give her, she smiled.

James has also used the area himself:

I had a beautiful experience there. I went up there because I felt that my family had a friction against me, and I went up there and I come out of there with a pleased answer, and it was not long when one of my boys was in a car wreck in

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205 Reporter’s Transcript, 64.
206 Ibid., 230-31.
207 Ibid., 76.
208 Ibid., 77.
209 Ibid., 59.
the canyon, 300 feet down the mountain, in the car. There was nothing left to it. And his head was split, his shoulder was busted up, two fractures in his back, a chunk of his arm was taken off, and when the doctor saw him, he said he would live only three days. I finally took him to another doctor. He said, that is all, he would live three days. But we talked with the Great Spirit about it, and that has been in ’68, and he is still alive. I wish I brought him with me today. That area means a lot to me.210

When asked why the area is important to his communication with the Spirit, Mr. James says: “It was given to us. this is where we meet with the Great Spirit, that area, and that’s why we all get a call to go there.”211

Chapter Two of the Theodoratus Report, “Ethnogeography,” is dedicated to specific sites in the project area. The chapter begins with a description of the possible site attributes. A site can possess, according to the report: (1) a visual, aesthetic perspective; (2) a set of physical conditions; (3) a set of sensory conditions; (4) a specific human construction; (5) or a combination of all of these. The medicine that is found in a specific locale is only a part (even if a central part) of what makes it into “a site.” Standing on a “site” is not the total experience for those who seek the medicine. Rather, the quality of silence, the aesthetic perspective, and the physical attributes, are an extension of the sacredness of that particular site. For example, while Doctor Rock is an important source of medicine in the project area, several locations near or on the mountain are very salient aspects of the sacred site, since all these locations are identified with the mountain. The report notes that sites in the project area increase in sacredness as one travels from lower

210 Ibid., 59-60.
211 Ibid., 64.
to higher elevations above the Klamath River (this observation is in line with the discussion above of the connection between height and social status as a secular reflection of the sacred nature of high locales). Nevertheless, lower sites are still crucial to the overall use of the area, since training doctors must progress through a sequential regimen that encompasses a spiritual journey toward power paralleled by the physical journey to the High Country.

Reading the trial transcript, it is interesting to note the different ways different witnesses describe the High Country. James says he is familiar with the area “because [his] grandmother was a Pomo Indian Doctor, and she went through very much before she could get the power from the Great Creator.”

Here is Doctor Rock, and this is where they start out their dancing, and Elk Valley is where they come first to meditate, to clean themselves, clean their hearts, so that they can thank the Great Spirit, the Great Spirit will be pleased before they can even talk to him. […] Then they go down to the Doctor Rock and do their dancing, and they don’t get involved with other voices but the Great Spirit, and from there, they are told what to do before they begin or are granted the power.212

Peters provides two descriptions of the area – a physical one and a spiritual one:

First, let me describe it physically. The area has had many intrusions already. There has been a jeep road, there has been trails put there by the U.S. Forest Service. That intrusion has been limited when compared to the proposed harvesting plan and G-O road development. The area still maintains significant acres of quality roadless, pristine environment. Significant strands of old growth

212 Ibid., 58.
still exist there. There is animal life there that is not found in other places, and in an abundant form. It is a wilderness area as closely defined in terms of wilderness areas set aside in other areas throughout the country. It’s as close to a natural setting as exists in today’s society.  

The witness also provided a spiritual description of the area:

The area, in terms of my conversations with older generations, the area has spiritual qualities. It is a sacred area. The area is a place where people can engage in an emotional interaction with a spiritual world. A translation to that in the English language may be likened to a prayer, but a lot more significant than a prayer. It is said that that area is not even a part of this world that we live in here. That that place up there, the High Country, belongs to the Spirit and it exists in another world apart from us.

Since the environment as a whole has religious significance, local Indians believe that any changes to the area would destroy the cleanliness and purity that are attached to the High Country. Therefore, the government’s argument according to which other sites in the area – which are supposedly not affected by the development plan – are just as sacred as those in Blue Crick, is irrelevant. The government attorney, Mr. Hamblin, says in his opening statement in the trial:

Your honor has indicated earlier and had asked me the question about overriding public interest. If this was a sacred area, and to that extent we will show that while this area up in the Chimney Rock—Doctor Rock and Pick 8, that they are held by at least the plaintiffs in this case and other local Yurok Indians, Tolowa and

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213 Ibid., 73-74.
214 Ibid., 74.
Karok, to have a special spiritual significance to them, we will show that the same tribe – when I use the word “tribe,” the same three Tolowa, Yurok and Karok, hold other areas to be equally spiritual. This is not the one and only place. […] there are some twenty-five other areas throughout the entire Six Rivers National Forest held by other local Indians to equally be of spiritual significance in those areas […]215

This argument represents a misunderstanding of the relationship between the local Indians and the High Country. There is a physical-psychological interaction that takes place between those who go to get medicine and the sacred place which furnishes this medicine. If one feature of this interaction is disturbed, the flow of power is blocked. The notion of desecration of the sacred High Country is highlighted by the following analogy: “Empty beer cans and used condoms are about as appropriate on Doctor Rock as they would be on the altar of a cathedral; traditional Indian religion places great emphasis on abstinence from physical pleasures while seeking spiritual energy.”216 TRC consultants are concerned that with increased access to the High Country, there is increased possibility that the area will by improperly used. This concern for the future is reflected in a statement by a TRC Yurok consultant who expressed concern that her children or grandchildren might be called to be doctors and that there might not be a place for them to go when they are ready to receive power. In the words of a Karuk consultant:

These areas need to be there when a new Indian person gets the “calling” to become a medicine person. Suppose the “calling” is received and the person arrives to find an army of tourists to take pictures and make tape recordings of a

215 Ibid., 1201-2.
216 Theodoratus Report, 186.
real live medicine person in the process of training. Also the trees are gone, the whole area logged off. The solitude and atmosphere for meditation is totally lost. How will that person train properly? … The culture has been torn apart by progress and now people are asking for the pieces to be torn in smaller places.\textsuperscript{217}

**Substantial Burden**

The Theodoratus Report dedicates a short chapter to “contemporary attitudes toward non-Indian incursions.”\textsuperscript{218} It discusses the impact of the G-O Road on the High Country and the rituals that are conducted there by the Yurok, Karuk and Tolowa. This discussion, following the consultants’ answers to interview questions about the impact of the road, is presented within a more general context of Indian-White contact, which suggests that the problem is larger than the immediate impact of the construction of the road on the ability to perform specific rituals in specific locales. I therefore propose, in Part Two of this dissertation, to think about the *Lyng* case as one that is (also) about Indigenous sovereignty, and I refer there to the longer history of Indian-White relationships in the area and in the U.S. more generally at length.

According to the Theodoratus report, the Indian consultants’ view of the impact of the road on their religious practice could be referred to as an “environmental viewpoint.” This means that they view the environment as a whole:

\begin{quote}
[...] the mountains, rivers, wildlife, and ocean are viewed as a whole in which each part is related to each other part. Thus, a discussion of the religious use of
\end{quote}

\begin{itemize}
\item \textsuperscript{217} Ibid., 75.
\item \textsuperscript{218} Ibid., 96-103.
\end{itemize}
the high country around Doctor Rock leads to consideration of the effect that a road there might have on the visual and aural properties of the area, then to the effects of logging on the environment, especially natural plant growth, then to the effects on the streams, silting of the river and finally to salmon fishing.\textsuperscript{219}

This approach to the environment teaches us something about religion as well. “The religious aspect is not a thing apart, it is part of the whole [...]”\textsuperscript{220} The report explains that this wholistic view of the environment is itself a part of “traditional Indian religion/culture,” and that even though this worldview coincides with the view of contemporary environmentalists it originated from a different root.\textsuperscript{221} Some consultants are concerned with the overuse of resources that would destruct the forest. They say that their people had been using the resources that they need to live (not only for religious needs) for centuries and had taken measures to conserve those resources. Therefore, many consultants, while not objecting to logging altogether, believe that much more care for the environment should be taken during and after the logging activities, that long-term consequences – beyond immediate economic benefits – should be taken into account, and that logging should always be done in the least expensive manner, regardless of the consequences for the land. However, the consultants knew many places along the Klamath River where there were slides into the rivers, severely eroded hillsides, and the silted-up mouths of creeks, all of which were results of poor logging, according to consultants.\textsuperscript{222}

\textsuperscript{219} Ibid., 96.
\textsuperscript{220} Ibid., 96-7.
\textsuperscript{221} Ibid., 97, footnote.
\textsuperscript{222} These effects (and similar ones caused by the existing Blue Creek Road) are discussed at length by expert witnesses – and not by religious practitioners – during the trial (see especially the testimony of engineering geologist Eugene Kojan, Reporter’s Transcript, 346-506). The State of California, in its opening statement in the trial, argues that the Blue Creek area is one of the most highly unstable landslide-
Consultants have felt that the Forest Service had declared a systematic war on sacred sites. In their description of the impact of the development plan they explain that they believe that the road would lead to logging regardless of the specific route chosen, and that because of the religious characteristics of the area it must be treated as a whole rather than as consisting of distinguished individual sites:

Many consultants stated that because of the religious characteristics of this area, nothing should be removed. It is believed that living things, especially trees and other plants, should not be removed from the high country unless it is done following the specified procedures of Indian culture. To do so is considered irreligious. It is also believed, and reinforced by tradition, that “improper” removal is likely to bring extremely bad luck or disease to the offender (whether he/she be a believer or a non-believer).223

I would like to highlight two important points in this passage: one is that the logging itself is considered to be a burden on the local Indians’ religious belief and practice, because the trees themselves are considered living beings whose removal would be irreligious. The other is that the cause of such irreligious behavior would be “extremely bad luck.” This understanding of “substantial burden” – but also of “sincerely held belief” seems to be different than the ones we saw in the precedent, and it does not seem compatible with O’Connor’s understanding of burden as prohibition. Because the logging itself is considered irreligious, there is no distinction between the government action and its consequences. The practitioners in this case cannot – as they could in Yoder or in

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223 Ibid., 100.
Sherbert – disobey and avoid “extremely bad luck” in the cost of a fine, imprisonment, or loss of unemployment benefits. It is interesting to note – and we see this in the testimony in trial as well – that for the practitioners there is no distinction between the government action and the burden, or between the burden and the results. Logging leads directly to bad luck. In other descriptions we can read a story that seems more in line with the prohibition interpretation: the construction of the road would result in heavier traffic, which would have an adverse effect on the audiovisual conditions of the area (which, as we have seen at the beginning of this chapter, are themselves considered to be a “sacred site”), which in turn means that the religious ceremonies that take place in the area would not be effective, which would lead to more adverse effects. When this is the story, one might say that the government plan does not prohibit the Indians from using the High Country for their rituals (even though there is some adverse impact on the rituals). But the interpretation according to which logging itself is desecration of the sacred area does not lend itself to the interpretation of burden as prohibition or coercion.

When the witnesses in trial are asked whether (and why) the High Country should remain undeveloped, they give several different answers. Witness James explains: “Let me put it this way: if we took a bulldozer and run it through the White man’s church, it is like if they went in there and felled the trees, it would be like pulling the lumber and everything off of the walls, and then destroy their bible – it is the same as that.”224 Peters adds that the pristine nature of the area is its main religious characteristic, and this would be destroyed with development.225 In reference to the difference between the existing jeep road and the new proposed section of the road, he explains:

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224 Reporter’s Transcript, 64.
225 Ibid., 80.
The road is a dirt road, and it connects, it goes through the area. The use of the area disturbs the quiet and the solitude of the area, though the road itself, as discussed earlier in previous hearings, may not have a direct adverse effect. The use of the road has a significant and destructive impact on the ability to engage or maintain engagement with the spiritual world. […] The new road would provide significantly greater numbers of people using the area. It is also the basis of whether further development will occur. […] You know, in Indian customs generally, a decision of this magnitude is not only made for the current generation but is made for six or seven generations to come. The management plan may produce some immediate jobs and stimulate some economics today, but it will have a destructing effect on generations to come, […] cultures are not dying, they are coming back stronger.”^226

Peters’ story is much more in line with O’Connor’s interpretation; according to this story the road in and of itself does not burden the religious practice. It is the use of the road that would disrupt communication with the spiritual world. When asked directly how the 6.02-mile proposed section of the road would burden the religious practice he has just described, Peters explains:

The whole area, the High Country, as I’ve indicated, the belief was that it’s there for Indian people to prepare themselves and then go up into and communicate with a spiritual world. What we’re talking about here is what I refer to as spiritual trespass, that is when people on the far extreme of manifest destiny can say they can manage something better than the Creator, and this is the Creator’s land, and

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^226 Ibid., 81.
to build a road to intrude directly through that spiritual land is spiritual trespass, and that is what the Forest Service has perpetrated.\footnote{Ibid., 90.}

This is an unexpected response to the question about burden, which demonstrates how different the witness’s view of the conflict is than that of the court. For the witness, the construction of the road is unacceptable because it interferes with the Creator’s plan for the area and its use. The judge does not accept such an answer, and even though he is generally very sympathetic to the witness, here he tells him that his answer has not been responsive. The witness, who probably knows well that this is not an answer that the court can accept, immediately agrees and returns to the question of burden:

The road development in the area, once it is completed, would bring with it a lot of damage and more destruction. The road itself represents something down here in this world, asphalt for one, signs for another, and that intrusion in the area is significant. The dirt road intrusion has not been as significant as to what it would bring with it in terms of the new road, which is the asphalt.\footnote{Ibid., 91.}

Again, the judge does not understand what the problem is with asphalt. The witness illustrates this point with a story: “Last night a woman […] prayed for us, and to do that effectively, she had to take off everything that was a white man’s stuff, jewelry and things like that, to engage the powers that she has. In the same respect here, you are bringing into a spiritual area something that is foreign to that area, and it is an intrusion.”\footnote{Ibid.}
PART TWO: INDIGENOUS SOVEREIGNTY

In Part One I argued that the Indian respondents have lost their case in the Supreme Court because of the Court’s limited understanding of the concept of religion in general and particularly of Indigenous religiosity. Reading scholarship on religious freedom and the body of precedent available to the Supreme Court while deciding the case, as well as taking seriously the story told in the trial through testimonies and evidence about Northwest Indian religiosity, I showed that the case could have been won by the Indians just as it was won in the lower courts. But I also argued that categorizing the Northwest Indians’ way of life as described by the witnesses and in the Theodoratus Report as religious forces a Western category on a non-Western set of practices. Arguing the case as one about religious freedom might have been necessary given the legal framework available to the plaintiffs; insisting that non-Western practices should be recognized as religious may be seen as usefully destabilizing the Western category of religion. Nevertheless, adopting the category of religion to describe the Northwest Indians’ relation to the High Country is limited and problematic, and arguing their case as one about religious freedom ultimately failed. As we will see in Part Two, Justice Brennan’s view of the religiosity of the Northwest Indians is more robust and sympathetic than Justice O’Connor’s, and according to Brennan’s dissent, the set of practices described in the case should be granted First Amendment protection. But Brennan’s dissent is also problematic in its view of indigeneity, that is at the background of his description of the Yurok, Karuk and Tolowa Indian religion.
Part Two focuses on Indigenous sovereignty and offers a reading of Justice Brennan’s dissent in *Lyng* against the background of recent scholarship on sovereignty and on indigeneity, as well as the history of U.S.-Indian relationship as it is described or alluded to in the Theodoratus Report and by the Indian witnesses in the *Lyng* trial. While I acknowledge the positive aspects of Brennan’s view of the Indians’ deep religious relation to the land, I also criticize it as essentializing and depoliticizing indigeneity, because it ignores the question of Indigenous sovereignty.

Before moving on to a reading of the dissent I would like to consider briefly one more aspect of the case – the fact that originally it was argued as a case not only about religious freedom but also about environmental protection. As we have seen, while the Indians were preparing to sue the Forest Service, claiming the violation of their right to the free exercise of religion under the First Amendment and AIRFA, a few environmental organizations were also preparing to sue over the G-O road, focusing on environmental protection statutes such as the National Environmental Policy Act. One may think the opportunity for the nations to create an alliance with many environmentalists fortunate, but Bowers and Carpenter tell a different story:

Some lawyers involved in the case remember the period leading up to the litigation as one of constant negotiation and translation. The environmental groups and Indians shared a common goal – preventing construction of the road – but they lacked a shared worldview or vocabulary. Abby Abinanti recalls: “There was a strategy of cooperation with environmental [parties] which was strained. It was like we did not speak the same language. [We] saw something happening and
knew it was wrong … but we were never comfortable with each other, nor did we have a common language/feeling, or so it seemed to me."^230

Not speaking the same language and not sharing a worldview may seem as a small problem, not enough to deem the collaboration between the Indians and environmentalists unsuccessful. But the fundamental difference in approach to the issue has a real consequence. As we have seen, while the case had been on appeal to the Ninth Circuit, Congress passed the California Wilderness Act, “render[ing] moot many of the issues that led to the intervention of the State of California and the six environmental groups that lent collateral support to the Indians’ claims.”^231 And so by the time the case reached the Supreme Court, the Indians were left on their own, and the case seemed much less significant than it had seemed before the enactment of the California Wilderness Act. That the case has been decided as one about free exercise with no environmental consequences might have led to the decision in the case. While the environmentalists have gotten what they wanted through the legislature, the Indians were left unprotected by the Court. The failure of both the religious freedom framework and the environmental framework to protect the Northwest Indians’ relation to the High Country has led me to explore the possibility to read Lyng as a case about Indigenous sovereignty.

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CHAPTER THREE: INDIGENEITY

Introduction

Robert Miller points out that the Yurok, Karuk, and Tolowa Indians have used the Chimney Rock area to perform rituals and to prepare for religious and medicinal ceremonies since at least the early nineteenth century. According to the Theodoratus Report, “Intrusions on the sanctity of the Blue Creek high country are therefore potentially destructive of the very core of Northwest religious beliefs and practices,” and “the spiritual nature of the region involved and the demonstrated importance of that region to the concerned Native American individuals and communities prohibit the construction of Chimney Rock section of the G-0 road.”

Nevertheless, according to the Supreme Court, the government’s plan did not violate the Indians’ right to religious freedom regardless of their effect on the religious practices of the respondents because it compels no behavior contrary to their belief. In other words, the Government can do whatever it wants with its land (understood merely as property), even if it virtually destroys a religious practice, as long as the destruction of this religious practice is not the explicit target of the Government’s action. Justice O’Connor writes in her majority opinion that “The Free Exercise Clause is written in terms of what the Government cannot do to the individual, not in terms of what the individual can exact from the Government,” presenting us with an interpretation of the

232 Miller, “Correcting Supreme Court ‘Errors’,” 1050.
233 Theodoratus Report, 420.
234 Lyng, 451.
First Amendment free exercise clause as protecting an individual right. O’Connor’s interpretation of religious freedom is tightly related with the Court’s understanding of land as private property, rather than a place of worship. Howard Vogel strongly criticized *Lyng*, arguing that “the Anglo-American understanding of land, expressed through a conventional understanding of doctrinal principles of property law, shapes the Court’s reading of the facts and adds to the difficulty of seeking a resolution that might heal the conflict.”

Justice Brennan, dissenting, points to the absurdity created by focusing on one aspect of this land (as federal property) and ignoring another aspect of it (as a place of Indigenous worship), which causes the “gravest threat to their religious practices.” As he puts it, “the Court believes that Native Americans who request that the Government refrain from destroying their religion effectively seek to exact from the Government de facto beneficial ownership of federal property.” Justice Brennan in his dissent lays the ground to critiquing U.S. legal conceptions of land and of religious freedom as deeply intertwined. Moreover, he raises the possibility that it is a conception of land as property – rather than an interpretation of religious freedom – that motivates the Court’s decision. The relationship between conceptions of state sovereignty and of land as property is explored below.

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235 Howard J. Vogel, “The Clash of Stories at Chimney Rock: A Narrative Approach to Cultural Conflict over Native American Sacred Sites on Public Land,” *Santa Clara Law Review* 41 (2001): 783. Marcia Yablon responds that “rather than revealing a problem with judicial sacred sites decisions, this concern about the Anglo-American values that underlay the *Lyng* decision actually supports the proposition that sacred sites determinations should be made by land management agencies: The *Lyng* Court’s Anglocentric reasoning is merely one in a number of striking illustrations of how agencies are better able to accommodate Indian values and beliefs than the courts or Congress.” (Yablon, “Property Rights and Sacred Sites,” 1634). I further discuss the conception of land as property in Chapter Four.

236 *Lyng*, 459.

237 Ibid., 458.
Justice Brennan’s Dissent

Justice Brennan dissents “because the Court today refuses even to acknowledge the constitutional injury respondents will suffer, and because this refusal essentially leaves Native Americans with absolutely no constitutional protection against perhaps the gravest threat to their religious practices.” Brennan acknowledges that “for Native Americans religion is not a discrete sphere of activity separate from all others.” He quotes from the Theodoratus report, saying that “any attempt to isolate the religious aspects of Indian life ‘is in reality an exercise which forces Indian concepts into non-Indian categories’.” This acknowledgement of Western intellectual imperialism seems very progressive and welcome in a Supreme Court decision, even if only as part of a dissenting opinion. In Part One we took this logic a step further and suggested that religious freedom is an unsuitable category for the pursuit of justice by American Indians altogether. As Tisa Wenger points out, the conflict over Native American religious freedom always involves the question whether the practice in question is “authentically” religious. Religion as a set of beliefs, practices, and institutions that can be separated from other spheres of life is a uniquely European colonial concept, and American Indians started to use it only after contact, to refer to Catholicism, while referring to their traditional ceremonies as “custom.” Adopting the concept of religion for pragmatic reasons in cases such as Lyng is a strategy that tends to fail. “Separated and abstracted from other spheres of life,

238 Ibid., 459.
239 Ibid. Is the religious sphere “separate from all others” in any other societies? If we think of Weber’s secularization thesis – religion has become a separate sphere in the modern secularized world. Weber’s secularization thesis has been vastly criticized and modified. I discuss this thesis and its critiques more thoroughly below.
240 Lyng, 459.
241 Wenger, We Have a Religion, 5.
‘religion’ becomes the picturesque repository of tradition and sentiment, made irrelevant to what appear to be the more real-world concerns of land and government.” Whether or not we agree that framing the case as one about religious freedom is problematic, as it leads to a (depoliticized) debate over the religious nature of the relationship between Indigenous peoples and land, making land central to the debate is useful, as it allows the debate to take indigeneity into consideration. This is what Justice Brennan does when he explains Indigenous religiosity as deeply related to specific locales.

Justice Brennan mentions stewardship – “the individual’s relationship to the natural world” – as a “pervasive feature” of Native American lifestyle, calling this relationship “the Indian religious experience.” He explains Native American religion at length, but for the purpose of this chapter, the following sentence is key: “Where dogma lies at the heart of Western religions, Native American faith is inextricably bound to the use of land. […] land is itself a sacred, living being.” Brennan later compares Lyng to the situation in Wisconsin v. Yoder:

Here the threat posed by the desecration of sacred lands that are indisputably essential to respondents’ religious practices is both more direct and more substantial than that raised by a compulsory school law that simply exposed Amish children to an alien value system. And of course respondents here do not even have the option, however unattractive it might be, of migrating to more hospitable locales; the site-specific nature of their belief system renders it nontransportable.

242 Ibid., 7.
243 Lyng, 460.
244 Ibid., 460-1.
245 Ibid., 467-8.
Acknowledging the strong locality of Indigenous lives is undoubtedly important, as we have seen in Part One. On the other hand, while this strategy failed in the Supreme Court (presenting the relation to the High Country did not lead to a First Amendment protection), here it does the work of producing indigeneity as fundamentally unique, or different not only form the majority culture but also from other minorities. What I argue in Part Two is that while presenting the relationship to the High Country is essential to the case, it is the political relation to the land that needs to be at the foreground of the debate, not instead of, but in addition to, the religious relation to the land.

Brennan’s strongest words appear in the final section of his dissent. This case, he writes, “represents yet another stress point in the longstanding conflict between two disparate cultures – 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.” The Court, he continues, avoids addressing these “potentially irreconcilable interests,” turning the task to the legislature. In his view, “Native Americans deserve – and the Constitution demands – more than this.”

While Justice Brennan worries about turning this task to the legislature, legal scholar Marcia Yablon sees Congress (as well as government agencies) as suitable to address this task. As we have seen, it was indeed Congress who eventually protected the area from development. Given this conclusion to the story, one could raise doubts about the ability of the courts to promote social change, doubts that were convincingly raised in

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246 Lyng, 473.
Gerald Rosenberg’s well-known work *The Hollow Hope*. Rosenberg’s theory raises, in turn, doubts about the usefulness of litigation in constitutional matters, and specifically, in our case, in the postcolonial context, when neither precedent nor public opinion support social reform. Deciding this case with attention to indigeneity (which takes us away or beyond the constitutional free exercise dispute), therefore, seems important to me. But I would like to ask what his opinion teaches us about indigeneity, especially given the following quote:

> Because of their perceptions of and relationship with the natural world, Native Americans consider all land sacred. [...] respondents here deemed certain lands more powerful and more directly related to their religious practices than others. [...] adherents challenging a proposed use of federal land should be required to show that the decision poses a substantial and realistic threat of frustrating their religious practices.  

Here, I believe, the problem in Brennan’s enthusiastic embrace of the Theodoratus Report becomes apparent. Brennan’s dissent becomes an exploration of indigeneity – Native Americans consider all land sacred – rather than a discussion of a specific area, that for reasons that neither the majority opinion nor the dissent mention ended up not being a part of any of the relevant nations’ reservations. The relationship between the Northwest Indians and the High Country has a complex history, one that should not be confined to

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247 Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991). Rosenberg reads cases such as *Brown v. Board* and *Roe v. Wade* – cases that are usually celebrated as ones in which the Supreme Court was “dynamic” and capable of bringing about social change. Rosenberg, however, sees the Court as “constrained.” The Court cannot promote significant social reform without sufficient precedent; it is not sufficiently independent from the legislative and the administrative branches; and it controls neither the sword nor the purse (it cannot enforce its own decisions).

248 *Lyng*, 475.
the boundaries of the category of religious freedom. Thinking about this history through the category of Indigenous sovereignty helps to complicate the story. One of the dimensions of the relationship of the Indians to the High Country is undoubtedly religious, but the relationship is also cultural, social, and political. Focusing on the sacredness of land to American Indians is problematic because it does not distinguish between the three nations involved in the case and other Indigenous peoples. Even though it does acknowledge that “certain lands” are “more powerful and more directly related to their religious practices” than other lands, this qualification is only secondary; it is not as important as the sweeping characterization of Native Americans as people who consider the land (or nature) sacred. Brennan, thus, essentializes indigeneity. The tendency of courts to essentialize indigeneity is discussed and critiqued by scholars of law and of ethnic studies.249 I survey their scholarship in the next section. One of the characteristics of Indigenous difference as it is produced in legal discourse is the connection between Indigenous peoples and the past, making Indigenous identity static, ignoring its fluidity and evolvement with the time, especially through its encounter with and survival of colonial encounters. Here is how Brennan does it in his final words about Lyng:

[…] today’s ruling sacrifices a religion at least as old as the Nation itself, along with the spiritual well-being of its approximately 5,000 adherents, so that the Forest Service can build a 6-mile segment of road that two lower courts found had only the most marginal and speculative utility, both to the Government itself and to the private lumber interests that might conceivably use it.250

249 The critique of the legal “authenticity” discourse is discussed at length in the next section. Similar critiques have been addressed at anthropologists. See footnote 158 above.

250 Lyng, 476.
Before addressing the authenticity discourse that is on display in this last paragraph, I would like to return to Brennan’s point that “for Native Americans religion is not a discrete sphere of activity separate from all others.”

This seems to be a secular approach that sees Indigenous epistemologies or ways of life as fundamentally religious. This raises the question what happens to religion when it is examined by secular law. On the one hand, we might expect the secular method of examination to secularize the examined phenomenon – and we have seen it happening when we reviewed the history of religious freedom jurisprudence; nevertheless, in Brennan’s dissent, Northwest Indian epistemology, in which “religion is not a discrete sphere of activity separate from all others,” becomes religious, even though Brennan himself acknowledge that religion is a Western category, inadequate to describe Indigenous ways of life.

What happens to religion as an object of study when the method of examining it is secularized? Different thinkers have offered different answers to this question, and here I address only a few – Talal Asad, José Casanova and Charles Taylor – whose conversation I find productive. The identification of secularity with modernity, which presents secularity as a necessary product of the progress of history, occurs in the nineteenth century, and it is largely associated with Max Weber and his secularization thesis.

All three thinkers with whom I am concerned here can be read as responses to Weber. Weber’s thesis is represented in different ways by its different critics, all of whom offer modifications and problematizations of it rather than alternative theories.

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251 Ibid., 459.
Take for example Casanova’s interpretation of the secularization thesis.\textsuperscript{253} According to Casanova, secularization can be understood as having three aspects: (1) a decline in the power of religion (or the number of adherers); (2) religion is less present in public debate; (3) the differentiation of spheres (if in the past religion was the organizing principle of all spheres of life, in modernity each sphere – politics, economics, aesthetics, etc. – is organized around its own logic, and religion becomes only one of these spheres of life). In the 1980s we witness a renewed rise of religion in different parts of the world – Islam in the Middle East, fundamental Christianity in the U.S. – and this rise casts doubts with regards to Weber’s thesis. Casanova, in response to these doubts, offers that while the first two aspects of secularization do not describe our contemporary world, the third and most essential aspect of secularization – the differentiation of spheres – does. Religion has become one sphere of life among many different ones, and as such it is, in and of itself, a secular phenomenon. According to this interpretation, we moderns cannot but see religion as a secular phenomenon. Understanding religion as one among many ways to organize reality is fundamentally secular (as opposed to understanding art, ethics, and, the economy to serve a religious purpose).

Taylor’s question in \textit{A Secular Age} is a bit different than Casanova’s.\textsuperscript{254} Taylor takes the secular as a given and asks about the conditions of its possibility, as opposed to whether or not our modern world is secular. Taylor asks, in other words, why it is impossible to be secular in the year 1500 but possible in the year 2000. Taylor’s account focuses on a different aspect of Weber’s thesis (though he never refers to Weber by name). In premodernity there were two aspects of religiosities: one is the belief in a

\textsuperscript{254} Charles Taylor, \textit{A Secular Age} (Cambridge, MA: Harvard University Press, 2007).
transcendent realm beyond our own, and the second is the distinction between the sacred and the profane within our own world. Accordingly, there are two stages of secularization: disenchantment (no more transcendence) and the disappearance of the sacred from this world. What Taylor takes as a given is disenchantment. The purpose of his book is to search for the possibility of “fullness” within immanence. His question is about lived experience rather than on ideas, as he declares, but his account mixes together intellectual and material history. One could argue that Taylor uses this mixed method intentionally, because what he is really searching for is the possibility of a religious existence in a secular world. His method does not seem “secular” to me, perhaps because it is not systematic (the social imaginary and its effects in the world are accounted for together, not even analytically separated), and (perhaps as a result) nothing happens to the category of religion throughout his work. If in Casanova’s analysis we could see that religion is secularized in modernity, in Taylor’s account religion remains the same and is struggling to find its place in this secular age.

Asad sees religion in modernity as a new, secularized phenomenon. An example would be the waqf – sacred land – that has no metaphysical implication whatsoever; it is sacred in the sense that it belongs to religious authorities. Asad sees secularization not as a necessary development but as a contingent one; it occurred in Europe and was exported elsewhere. He examines Egyptian law and politics that in modernity are organized around a secular principle. The most important contribution of his work to our current exploration is, I believe, the distinction between secularity and

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256 This is, of course, in contrast to the Northwest Indians’ relation to the High Country.
secularism. While secularity is an epistemology, secularism is an ideology. Secularity as an epistemology is so total that it includes religion in it; secularism is the way in which we attribute value to the secular. As a result, secular(ist) law is unable to understand religion religiously – as a phenomenon that is not separate from all other spheres of life. Brennan’s observation, therefore, suggests that we should think of the phenomenon in front of us as Indigenous rather than religious. Let us see if that might work.

Why is Indigeneity Important?

The legal philosopher Jeremy Waldron offers a conceptual analysis of indigeneity (“a term of art in the politics and philosophy of cultural rights of First Peoples”) in his essay “Why is Indigeneity Important?” The question motivating Waldron’s analysis is: “what does it add to our understanding of the predicaments and choices facing the people and government of New Zealand, to describe Maori (the Ngai Tahu people of New Zealand’s South Island, e.g.) as the indigenous people of that country?” The desire to find an answer to this question has motivated my exploration in this chapter and the next one. The question can be narrowed as follows:

In the process of trying to come to terms with historic injustice perpetrated by white settlers and by colonial and postcolonial authorities in Australia, New Zealand, Canada, the United States, and other countries over the past 300 years, how important is it to bear in mind that some of these injustices were perpetrated

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258 Ibid., 24 (emphasis in the original).
against the indigenous inhabitants of those countries? No doubt people and
governments acted oppressively to many groups; no doubts they still do. But it is
widely believed that injustices perpetrated against Maori, or Aborigines or Native
Americans are more egregious – or at least different in kind – than injustices
against immigrant groups, or religious minorities, or slaves and their descendants.
It is thought that injustice against Australian Aborigine, or Native Americans or
Maori is specially salient, not only on account of its extent and its human
consequences, but just because it was perpetrated against the original people of
the land.\textsuperscript{259}

This question implies an understanding of colonialism as a discrete event – “a historic
injustice.” To begin answering this question, I argue, following Patrick Wolfe, we need,
instead, to see colonialism as a structure, and injustice as an inherent characteristic of this
structure, which is, as such, ongoing rather than historic.\textsuperscript{260} This notion is explored
below.

Against the concept of indigeneity, Waldron invokes the legal concept known as
“principle of first occupancy,” explaining that “[t]his principle holds that the first person,
or the first people, to take possession of a piece of land acquire special rights over it, so
far as property and sovereignty are concerned.”\textsuperscript{261} Waldron explains:

If the resources of our society are wrongly distributed – if land, wealth, income,
and power are wrongly distributed – then distributive justice demands a
readjustment. Such redistribution has happened on a large scale and small scale in

\textsuperscript{259} Ibid. (emphasis in the original).
\textsuperscript{260} “Invasion is a structure, not an event” (Patrick Wolfe, “Settler Colonialism and the Elimination of the
Native,” 388).
\textsuperscript{261} Waldron, “Why is Indigeneity Important?” 24.
the past. Maybe it should happen again. But that is not enough – say some writers
and politicians – if the issue is indigeneity. Indigeneity calls for a more radical
approach: not just remedial measures to address maldistribution, but a *restoration*
to the descendants of indigenous peoples of some or all of the rights – rights of
sovereignty, rights of property – that were once held by their ancestors.262

In other words, indigenous peoples’ claims are different from other minority groups’
claims (African Americans might demand reparations, immigrants might have a claim
against prejudice and discrimination, but Indigenous peoples claim something radically
different). A theory of indigeneity must take this difference seriously.

Indigeneity can be defined in two different ways, Waldron tells us. One definition
refers to the “descendants of the earliest populations living in the area.” The other refers
to the “descendants of peoples who lived in the territory before the entrance of a
colonizing population.”263 While in some places (such as Australia) the concepts are
coextensive, in others (such as India) they are not. And even if we concentrate on the first
definition, Waldron says, there is still considerable indeterminacy.

The fact is that humans have been migratory animals since our emergence in
Africa more than a hundred thousand years ago, and it is plain that the application
of the term indigenous to human populations is always going to be somewhat
different from its application to plants, for example. Humans are not indigenous in
the way that plants are. We have not sprung from the earth or evolved within the
territories with respect to which we claim to be indigenous.264

262 Ibid., 25 (emphasis in the original).
263 Ibid., 26.
264 Ibid., 27. I find Philip P. Arnold’s discussion of “religion as habitation” helpful in responding to this
argument: “religion as habitation is universal to all religious orientations. All religions have a homeland: a
Waldron cites James Anaya’s definition of indigeneity, according to which peoples are “indigenous because their ancestral roots are embedded in the lands in which they live [...] much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity,” but he is not satisfied with this definition.

Waldron tells us that the second definition (“descendants of people who lived in the territory before the entrance of a colonizing population”) often suggests not only temporal priority but also a great disparity between the few generations that have passed since colonization and the millennia in which the Indigenous populations have occupied the territory. But this is not always the case. Waldron is aware of scholars who argue against the desire to define this term – either because it is impossible to define or because the task needs to be left for Indigenous peoples themselves. “Those who believe that indigeneity is important,” he continues, “believe that its importance consists in the challenge it poses to current patterns of sovereignty and property rights.” Some argue that it is also important because of cultural rights and language issues.

place that is regarded more highly than other places – a sacred place. For specific reasons, however, religious communities are forced into diaspora. This limits access to the homeland, the site of the founding hierophany. This fundamentally changes the nature of a human relationship with the sacred and the land. Up until the fact of displacement all religions were indigenous. Since the Age of Discovery, however, there has been a religious elevation in the value of displacement.” (Arnold, The Urgency of Indigenous Values, 124-5). Waldron, according to this argument, thinks about indigeneity from a post-discovery point of view, while Indigenous peoples think of their relation to the land in a very different way.


The logic is quite simple. Indigenous peoples were not just waiting to be colonized in the eighteenth and nineteenth centuries. They were living and thriving with their own systems of polity, law, and economy. Those systems were there first; and they have a continuing moral status that is grounded in that priority. Colonization disrupted that, often brutally. Such disruption establishes the current regime of property and sovereignty as presumptively illegitimate. Now, in some cases where a present regime is judged illegitimate, the appropriate response is to look forward to arrangements that might be more just or appropriate. But with this sort of illegitimacy – the illegitimate disruption of an indigenous regime – the remedy involves looking back to pre-existing arrangements, and finding a structure now that is more respectful of those arrangements than the colonial and settler regimes have been to date.  

While the claims of immigrants or the descendants of slaves are utopian (they look for justice where it has not yet existed), the claims of Indigenous peoples are more grounded in preexisting reality. The point is that peoples who have been sovereign in the past, remain sovereign in the face of illegitimate occupation or even annexation. “The sovereignty of the dispossessed peoples continues, awaiting reversion, despite the loss of territory and even total illegal annexation … [W]here people have been forcibly subjugated, their sovereign title continues in abeyance and can later be restored.”

Most people do not call for complete reversion of the status quo, but any claim for justice for Indigenous peoples relies to some extent on an idea of Indigenous entitlement.

269 Ibid., 29.
Waldron seems to be moving toward a definition of indigeneity that would tie it together with sovereignty, but he returns quickly to the analytic distinction between indigeneity as first occupancy and indigeneity as prior occupancy, both of which are problematic, each for its own reasons.\textsuperscript{271} The first definition correlates with a principle of first occupancy, which is based on Locke’s theory of property in Chapter Five of \textit{Two Treaties}, II, and the second definition correlates with a pragmatic conservative principle of respecting existing arrangements (Waldron calls it a “principle of established order”).\textsuperscript{272} Waldron explains the problem he finds with the established order principle as a basis for Indigenous claims for justice with an example:

If the basis of M’s complaint of injustice is that M held resources in a stable pattern of established occupancy and P disturbed that pattern, then whether reversion is an appropriate remedy will depend in part on whether P has now established a stable pattern of occupancy, which is entitled to respect on exactly the same principle as M’s was.\textsuperscript{273}

The principle of first occupancy is problematic as well, according to Waldron:

The Principle accords moral privilege to an occupant, in virtue of that occupant’s not having dispossessed anyone else. The title of such occupant is supposed to have absolute priority over anyone whose occupancy was affected by war or violence. But in relation to territory and resources, violently dispossessing another person or another people is not the be-all and end-all of injustice, and it is not the only basis on which we might raise a moral question mark over an entitlement.

\textsuperscript{271} Both definitions are anthropocentric, disregarding the notion of land as a living being and an intersubjective relationship between Indigenous peoples and the land they inhabit.
\textsuperscript{272} Waldron, “Why is Indigeneity Important?” 30.
\textsuperscript{273} Ibid., 33.
Refusing to share resources with others is also a form of injustice; refusing to modify a holding based on First Occupancy in response to demographic or other changes in circumstances is an injustice. Taking more than you need, or occupying so much that subsequent arrivals have nothing to occupy, is an injustice.\textsuperscript{274}

Waldron is aware of critiques that can be addressed at his analysis – his discussion is too analytic, to Western, too liberal. But I see the first definition as problematic for another reason: basing a definition of indigeneity on Locke’s theory of property is problematic, because it understands land as a commodity, it is grounded in a Christian worldview, and for these two reasons it is not fitting to describe Indigenous relationships with the land.

But indigeneity, Waldron insists, cannot be \textit{sui generis} as James Tully suggests, generating a set of claims that “do not derive from any universal principles, such as the freedom or equality of peoples, the sovereignty of long-standing, self-governing nations, or [even] the jurisdiction of a people over land they have occupied to the exclusion and recognition of other peoples since time immemorial.”\textsuperscript{275}

Waldron does not offer us any answers, but he does open up a question that we should address, because he pinpoints exactly the notion of the Supreme Court in \textit{Lyng} that worries about the possibility of the Indian nations demanding \textit{de facto} ownership of public lands. To answer the question of indigeneity, we will need to either find a universal principle that justifies the struggle for Indigenous justice, or to convincingly

\begin{itemize}
\item \textsuperscript{274} Ibid., 35-6.
\end{itemize}
argue that indigeneity is unique. I turn now to scholarship on Indigenous sovereignty, in search for an explanation.

Indigenous Sovereignty

The question of indigeneity in the U.S. context (as in other postcolonial contexts) is a political question. While the *Lyng* decision, including Brennan’s dissent, depoliticizes it by analyzing the relationship between the nations and the land in question only as religious, recent scholarship on indigeneity emphasizes the political implications of the concept by closely examining it in relation to the question of sovereignty. Karena Shaw, for example, thinks of the ways in which indigeneity as a form of difference challenges the discourse of sovereignty:

> [...] contemporary politics are framed by discourses of sovereignty. These discourses are neither natural nor neutral. They reproduce a space for politics that is enabled by and rests upon the production, naturalization, and marginalization of certain forms of ‘difference.’ Indigenous politics illustrate and challenge this in three ways: first, Indigenous peoples are among those both implicitly and explicitly produced and marked as ‘different’ in and through sovereignty discourse, and this is one of the enabling conditions of sovereignty discourse; second, even as these discourses enable Indigenous peoples’ political claims, they also continue to be marginalized by and through these same discourses; and, third,

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276 I am not arguing that religion is not a political – it certainly is, in the U.S. and elsewhere. What I argue is that the legal discussion of the Northwest Indians’ relation to the High Country as religious has been conducted in a way that depoliticized it.
through their (necessary) engagement with this paradox, these movements are encountering, challenging, and reshaping the ‘limits’ of contemporary politics. Thus, even as Indigenous politics are framed by these discourses and practices, they also, in part because of their centrality to them, expose, denaturalize, and reformulate them.277

When indigeneity is understood (or produced) as Indigenous difference it “takes on an almost sacred character and becomes a compelling idiom for articulating rights, values, and identities.”278 The rights discourse that goes hand in hand with the discourse of difference, interpellates political questions into legal ones.279 This has become, Jennifer Hamilton argues, the main tool for Indigenous peoples to make political claims, especially in Anglo settler states. Hamilton talks about “a double blind in the cultural production of indigeneity in which the very conditions that enable indigenous peoples to make compelling legal claims based on difference can simultaneously lead those claims to failure.”280 She demonstrates how “the deployment of such culturalist discourse in law creates a specific context in which broader political assertions, especially those concerning sovereignty and land rights, are potentially undermined.”281

Kevin Bruyneel asks where American Indians fit in relation to the American political system – “inside, outside, or somewhere in between?”282 This is a question about Indian sovereignty – if they are sovereign peoples then they are considered “outside”;

278 Ibid., Indigeneity in the Courtroom, 3.
279 Ibid., 2.
280 Ibid., 8.
281 Ibid.
accordingly, if they are inside then they are not sovereign (only the U.S. is sovereign).

Bruyneel seeks to open up a “third space” – an in-between space – for Indian sovereignty, one that will allow Indigenous peoples to be at once inside and outside the U.S. political realm. For Bruyneel, this is their position in reality, and his goal is to allow for a theory of sovereignty that would fit this reality. Bruyneel’s analytical suggestion is refreshing and promising: he calls it “concurrent sovereignty” (a legal situation that exists in a few states and Bruyneel wants to adopt theoretically). Bruyneel points to the binary nature of sovereignty and looks for a way to break through this binary, a binary that makes sovereignty into self-sufficiency.  

Thinking about sovereignty in the context of *Lyng* invites us to think of it in a non-binary way, as bringing together law, religion, and land. Here I am recounting some of sovereignty’s features, in order to clarify its relationship with indigeneity. Sovereignty is an ambiguous concept, classically defined as supreme legal authority, one that has both legal and theological bases – a legal authority based on divine right. The vast literature on Indigenous sovereignty focuses either on the theological dimension or on the legal aspects of it. Neither, I believe, captures the complexity of the concept of sovereignty. In law, sovereignty is practiced through jurisdiction, as Lisa Ford points out, and so

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sovereignty is legalized and depoliticized. In theology, we usually think of God as sovereign, and of political sovereignty as a feature of divine will, so politics is tied together with theology, not with positive law. Lyng remains a case about law and religion, leaving aside the political, and neglecting the question of Indigenous sovereignty altogether.

The U.S. Supreme Court has struggled with the limits of Indian sovereignty since early nineteenth-century. In 1823, in *Johnson v. McIntosh*, the Supreme Court adopted for the United States the “right of occupancy” version of colonial sovereignty. This remains the basic legal position of federal Indian law, despite the fact that divine right is not accepted elsewhere in United States law. The *Johnson* decision may be seen as secularizing sovereignty as it applies the doctrine of Christian discovery in the secular state. A recent example that shows the discovery doctrine’s long-lasting effect on courts’ decisions in cases regarding Native American sovereignty is the 2005 case of *City of Sherrill v. Oneida Indian Nation of New York*, which cites the doctrine of discovery in a footnote.

The secularization of sovereignty by the Marshall Court involved transforming Indians from “pagans” to “savages” and from Indigenous peoples to a racial minority. The secularization of the terms of the dispute is significant because it led to the shifting of the focus of postcolonial critique from questions of collective rights to land and to self-determination to individual rights, based on racial or ethnic identity. According to Patrick Wolfe, “[o]n the passing of the frontier, US Indian Policy sought to incorporate Indians...”

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286 21 U.S. 543 (1823). I discuss this case in more depth in the next chapter.
into settler society not as so many separate tribes but generically, individually, and as a whole – which is to say, as a race." While some scholars frame the problem as racism, others believe that focusing on race and ethnicity conceals the real object of the dispute, namely, land. As Byrd puts it,

The conflation of racialization into colonization and indigeneity into racial categories [...] masks the territoriality of conquest by assigning colonization to the racialized body, which is then policed in its degrees from whiteness. Under this paradigm, American Indian national assertions of sovereignty, self-determination, and land rights disappear into U.S. territoriality as indigenous identity becomes a racial identity and citizens of colonized indigenous nations become internal ethnic minorities within the colonizing nation-state.

When race and ethnicity become the focus of our critique, we are distracted from the real questions we need to ask and from the possibility of resisting U.S. colonialism more effectively. Wolfe reminds us that what he calls “the logic of elimination” that is tied with U.S. colonialism used race as its main tool. “Indigenous North Americans were not killed, driven away, romanticized, assimilated, fenced in, bred White, and otherwise

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289 See, for example, Williams, *Like A Loaded Weapon*.
290 Byrd, *The Transit of Empire*, xxiii. There is another issue that Byrd does not mention: the profits that recognized Indian nations make from casinos. The focus of the non-Indian media on those profits takes part in masking the territorial issue at hand. The focus on those profits is not unrelated to the racialization of American Indians. See Renée Ann Cramer, *Cash, Color, and Colonialism: The Politics of Tribal Acknowledgement* (Norman: University of Oklahoma Press, 2005), xvi.
291 Circe Dawn Sturm reminds us that racial blending leads to what might be the most acute “danger [that] is posed to Native-American sovereignty and even continuity if the federal government continues to identify Native Americans on a racial instead of a cultural or more explicitly political basis.” See Circe Dawn Sturm, *Blood Politics: Race, Culture and Identity in the Cherokee Nation of Oklahoma* (Berkeley: University of California Press, 2002) 3. American Indian culture is treated as something that is either dying or belongs in the past, and therefore is repressed in favor of blood quantum or documentation, as the two main criteria for determining Indian Identity.
eliminated as the original owners of the land but as Indians,” he writes. A postcolonial critique, then, should go back to a recognition of American Indians as Indigenous peoples rather than a racial or ethnic minority. Moreover, as Mark Rifkin notes, both discourses of racial difference and equality and discourses of cultural recognition are deployed by the U.S. in ways that reaffirm its authority to determine the issues that would count as part of its political system. These discourses mask, according to Rifkin, “the structuring violence performed by the figure of sovereignty.” Native peoples are simply defined as those who are not sovereign. Thus, they help to define the state as sovereign.

The U.S. grants certain rights to Native Americans who reside in its territory based on their racial status: how much Indian blood they have in them. Barker writes that the racialization of Native legal status by blood is a process that allows the state to individualize Native legal rights and so to defer attention from the collective rights to sovereignty and self-determination Native peoples possess under international and constitutional law. One effect of this racialization and individualization is ignoring the common good that defines Native peoples as communities, namely, their aboriginal relation to the land. It transforms them from communities of citizens with shared interests to a collection of individual citizens bearing liberal-universal rights. George E. Tinker criticizes this individualization using a slightly different terminology:

[…] the political and economic bias in the international discourse is to recognize only states as the fundamental actors in international political discourse. As such, the natural national entities that make up indigenous peoples’ communities are

293 Rifkin, “Indigenizing Agamben,” 91.
294 Barker, Native Acts, 40.
seen today as merely ethnic minorities within state structures, who may have individual rights but who do not have any distinct set of community or cultural rights as an independent people. Hence, the sovereignty or autonomy of indigenous nations is a priory bracketed from consideration in any state discourse.295

The racialization and individualization of Native Americans by the U.S. has the effect of requiring one to prove that she is an “authentic” Indian in order to be granted individual rights. This is the concern (and object of critique) of many scholars of indigeneity, including Eva Garroutte, Tisa Wenger, Kathleen Birrell, and Jennifer Hamilton.296 The notion of authenticity has been vastly criticized. One of the problems with this notion is that representing “authenticity” successfully would mean that U.S. colonialism did not do any harm to native identity. Barker writes:

The United States escapes the consequences of its own historical sins by having real Indians situated in a far distant past before colonialism and imperialism mattered and embodying those cultures and identities today as though colonialism and imperialism have had no substantive or significant long-term consequences. Native peoples are confronted with the impossible task of representing that authenticity in order to secure their recognition and rights as sovereigns.297

This call for authenticity has devastating cultural implications, Barker continues. “Being authentic” often means in the eyes of the West that one has to adhere to “traditional”

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295 Tinker, Spirit and Resistance, 7 (emphasis in the original).
296 Eva Marie Garroutte, Real Indians: Identity and the Survival of Native America (Berkeley: University of California Press, 2003); Wenger, We Have a Religion; Birrell, Indigeneity: Before and Beyond the Law; Hamilton, Indigeneity in the Courtroom.
297 Barker, Native Acts, 35.
values, in a way that can create an identity crisis for Native Americans who are expected
to be homophobic and misogynistic, among other traits that the West considers to be
“pre-modern.” Ayelet Shachar adds that there may be “disproportionate costs imposed
upon traditionally less powerful group members.”²⁹⁸ In many cases, accommodation of
the different traditions and practices of minority groups depends on demonstration of
“authentic” characteristics, and results in risking the weaker group member’s citizenship
rights.²⁹⁹ James Clifford writes about the relation between poverty and authenticity in the
American Indian context:

Economic success […] can bring significant increases in wealth. But it also
encourages new hierarchies, communal divisions, and dependency on external
markets and capital resources. Whatever material progress has been made over the
past few decades is unevenly distributed. Indigenous populations in most
contemporary nation-states remain poor, lacking adequate health and education, at
the mercy of predatory national and transnational agents of ‘development.’ The
modest, but real, gains in control over land and resources achieved by native
groups in recent years are fragile, always susceptible to reversal by
overwhelmingly more powerful majority populations. Intractable double blinds –
for example, an assumed contradiction between material wealth and cultural
authenticity – are imposed on tribal people aspiring to something more than bare
survival in settler-colonial states.³⁰⁰

²⁹⁸ Shachar, Multicultural Jurisdictions, 11.
²⁹⁹ An example for the conflict that may be the result of accommodation can be found in Wegner, We Have
a Religion.
University Press, 2013), 17 (citations omitted).
Hamilton asks when and how indigeneity matters in the legal sense. In her work, she seeks to understand how indigeneity is legally produced and to apprehend its broader political and economic implications. By ‘indigeneity’ Hamilton refers not to “the specific ontologies and epistemologies of peoples living throughout Native North America,” but to “the political, economic and legal articulations of indigenous difference,” and “the discursive and material effects of these articulations.” She examines the deployment of Indigenous difference within a particular spatial and temporal scope (the Native Northwest coast in the late twentieth and early twenty-first centuries). Hamilton emphasizes the context of multiculturalism as the background against which we need to understand indigeneity. “[…] indigeneity refers to the idea that the content and meaning of indigenous difference is produced in particular contexts, in response to a variety of social, political, and economic forces,” writes Hamilton. In other words, for Hamilton, cultural difference in general, and Indigenous difference in particular, is not essential, inherent, or natural. Therefore, it would be wrong to talk about indigeneity in terms of authenticity. Indigenous difference is produced, and law is one of the spheres where it is produced.

Birrell thinks of indigeneity in the context of law and literature. According to Birrell, “The narratives of law and literature both create and legislate meaning,” and in her work she focuses on “their mutual creation and legislation of indigeneity.” Birrell argues that “legal narratives conceive of indigeneity in terms of a putative ‘authenticity,’” and suggests that “the aesthetic of Indigenous literature disrupts and deconstructs the

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302 Ibid., 4.
Birrell follows Wolfe in arguing that law embraces a notion of “the ‘authentic’ or whole indigenous subject, framed and referenced by mythic time and complex kinship rather than by the impacts of colonialism.” Birrell moves away from the discourse on authenticity and argues, following Michel Foucault and Judith Butler, that “In the context of native title, the colonial schema in which the common law conception of indigeneity operates compels a particular performance from the indigenous subject, in order to appear before the law at all.” This is a crucial point in my reading of the decision in *Lyng*.

When we conceive of indigeneity in terms of authenticity we do not only ignore the role that law plays in producing the indigenous, we also treat it as a fixed identity. Birrell, following James Clifford, argues that literature dissolves this fixity, even of momentarily. I believe that thinking of indigeneity in the context of sovereignty and religious freedom has a similar effect. As Chris Peters explains during the *Lyng* trial:

> Many people who are not familiar with our religious ways think that Indian people and Indian religions only existed in years gone by. However, our elders continue to maintain and preserve our religious beliefs and spiritual ways. Indian religions continue to exist today; increasing members of our young people are taking a more active role in the traditions and ceremonies of our people. These traditions are passed down from generation to generation. With these religious beliefs and traditional customs, we look proudly into the future.

Jean Bethke Elshtain writes that “theological understandings had migrated into early modern political sovereignty.” She thinks of the ways medieval ideas about God as

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304 Ibid.
305 Ibid.
306 Ibid.
307 Reporter’s Transcript, 77-8.
sovereign have influenced early modern (“post-medieval,” in her words) conceptions of
the sovereign state and their relation to modern notions of self-sovereignty. In terms of
methodology, Elshtain warns us from over-abstracting our concepts, especially when it
comes to political concepts such as sovereignty: “Without concrete history, political
thought becomes a gnostic enterprise – all words, no flesh; all spirit, no body. Then,
disastrously, that disembodied enterprise invites schemes and ideologies that are imposed
over the living, incarnate tissue of human life.”\(^{309}\) One of my aims in this work is to
avoid the over-abstraction that Elshtain warns us against. According to Elshtain, who
follows Hendrik Spruyt,\(^{310}\) the present system of sovereign states that many take for
granted is a modern development that is not inevitable.\(^{311}\) Sovereignty has not always
been tied to territory,\(^{312}\) and the idea of divine right monarchy is also an early modern
invention.\(^{313}\) For Joan Cocks sovereign power (or “sovereignal freedom”) is not only a
modern invention, but it is also a delusion, and one that poses political dangers as well,
especially when it is democratized.\(^{314}\) Cocks casts doubt with regards to the aspiration to
Indian sovereignty, asking about “the tendency of those oppressed by sovereign power to
make counter-sovereignty bids to save themselves”\(^{315}\):

> Human rights advocates and other progressives condemn the sovereign power of
xenophobic majorities and defend the aspirations to sovereign power of

\(^{309}\) Ibid., xvi.


\(^{311}\) Elshtain, *Sovereignty*, 92.

\(^{312}\) Ibid., 2.

\(^{313}\) Ibid., 95.

\(^{314}\) Sovereign freedom, Cocks writes, is “quintessentially modern, along with the idea of the sovereign individual, ethnonational sovereignty, popular sovereignty, and the dream that the human race might rule the earth and eventually even the universe.” Joan Cocks, *On Sovereignty and Other Political Delusions* (New York: Bloomsbury, 2014), 4.

\(^{315}\) Ibid., 9.
vulnerable peoples, but what exactly makes the exclusivism of privileged citizenship a minus in the ledger of democracy, and the exclusivism of penetrated indigeniety a plus?¹³¹⁶

This doubt is in line with Taiaiake Alfred’s assertion that sovereignty is not an appropriate political objective for Indigenous peoples, as the concept itself is essentially Western, and has served as a tool in colonizing Indigenous peoples.³¹⁷ I take this critique of the quest for Indian sovereignty seriously in my work, and I try to answer it because even though I see the problematic it points to, I see a great theoretical potential in this concept.

Bruyneel might have an answer to this serious doubt, and it is one that I favor. The concept of state sovereignty presents us with what Bruyneel calls “a false choice.”³¹⁸ Advocates of sovereignty for Indigenous nations often present us with a false choice between two possibilities only: (1) acknowledging aboriginal sovereignty with the consequence of destructing the sovereignty of the occupying state; and (2) continuing to deny aboriginal sovereignty. This is a false choice because both options accept the same (secular) conception of sovereignty. Shachar presents us with another problematic aspect of this binary: granting full jurisdictional power to the state, she argues, might be suitable to protect the individual rights of the less powerful members of minority groups, but it does so at the expense of relegating their cultural identity to the private sphere, in a way that fails to acknowledge their cultural identities; granting full jurisdictional power to the group, on the other hand, would be suitable to protect cultural diversity, but at the cost of

³¹⁶ Ibid., 24.
³¹⁸ Bruyneel, The Third Space of Sovereignty, 217.
enabling the systematic maltreatment of specific members by their accommodated group. However, there is a third option. According to Bruyneel,

[…] it is possible for both entities to enjoy concurrent sovereignty. The false choice here is that either indigenous tribes and nations must become sovereign states, thereby destroying the settler-states within which they reside, or their citizens must accept unambiguous inclusion in the settler polity, thereby denying their collective claim to sovereignty.\(^\text{319}\)

Shachar proposes a model that avoids this false choice: the joint governance approach. According to this model, some people will jointly belong to more than one community and will accordingly bear rights and obligations that will derive from more than one source of legal authority. These proposals are ones that I take seriously, and I believe that they carry both practical and theoretical potential that is missing from the essentializing discourse on Indigenous religious freedom that appears in *Lyng*.

**Conclusion**

One could tell the story of *Lyng* in many different ways. This case is remembered as a decision that interpreted religious freedom too narrowly and property rights too broadly; as a case that demonstrates the advantage of the political process of legislation over the legal route of litigation; as a story about the attachment of Indigenous peoples to sacred lands despite colonization (the tribal-centric story is “a story of a community forced to defend itself against the assimilationist agenda of the federal government – and

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\(^{319}\) Ibid., 218.
developing a contemporary political identity in the process,” according to Bowers and Carpenter). While Justice O’Connor’s majority opinion is infamous for sacrificing Native American religion for the sake of protecting the government’s property rights, Justice Brennan’s dissent may be celebrated as sensitive to cultural difference, acknowledging the differences between Western religion and Native American religion, and the unique relation between Native Americans and the land they inhabit. However, while “courts have become increasingly fluent in ‘culture talk,’” this discourse has been critiqued “as simplistic, essentializing, and incomplete.” In this chapter, I tried to show how – albeit all the obvious advantages of Brennan’s dissent over O’Connor’s majority opinion – Brennan’s “culture talk” participates in depoliticizing Indigenous identity.

Miller writes that “If an Indian religious case was ever going to win in the Supreme Court, it was *Northwest Indian.*” Yet, the Indians lost the case. “Given the fact that […] no Jewish, Muslim, or Native American plaintiff has ever prevailed on a free exercise claim before the Supreme Court,” there may be a reason to doubt the effectiveness of the constitutional route for minority groups in general, and for Indigenous peoples in postcolonial contexts in particular.

In the next chapter I explore the historical context that I think we need to take into account if we want to read the *Lyng* case as one about sovereignty. This historical context is described in the evidence and in the testimony in the *Lyng* trial. When we read these texts we can see that the parties to the case do see the historical context as essential to deciding the case. Nevertheless, the courts have ignored it in their decisions.

320 Bowers and Carpenter, “Challenging the Narrative of Conquest,” 492.
322 Miller, “Correcting Supreme Court ‘Errors’,” 1062.
CHAPTER FOUR: SOVEREIGNTY

Introduction

What happens when we place the *Lyng* decision in its historical context? As I have discussed in Part One, there is disagreement between scholars whether the practice for which protection is sought in *Lyng* is religious or not. Deloria writes that thinking of this practice in historical context proves it religious:

Traditional [Indian] religions are under attack not because they are Indian but because they are fundamentally religious and are perhaps the only consistent religious groups in American society over the long term. If kidnapping children for boarding schools, prohibiting religious ceremonies, destroying the family through allotments, and bestowing American citizenship did not destroy the basic community of Indian people, what could possibly do so? The attack on religion today is the secular attack on any group that advocates and practices devotion to a value higher than the state. That is why the balancing test has been discarded and laws and ordinances are allowed primacy over religious obligations.\textsuperscript{324}

My argument in Part Two opposes Deloria’s. I argue that reading the *Lyng* decision within the historical context that Deloria refers to allows us to shift our attention from religious freedom and read the case as one that is about Indigenous sovereignty. In what follows, I read the local history as it is described in the Theodoratus Report and alluded to by some of the witnesses in the *Lyng* trial, a historical account that explains how it

\textsuperscript{324} Deloria, *For This Land*, 228.
came to be that the High Country never became a part of any of the local nations’ reservations. I then place this local history within a survey of the broader history of U.S.-Indian relations, although with a legal focus. I end this chapter with a discussion of the theoretical concerns that arise from the historical accounts.

**Local History**

The “History” chapter of the Theodoratus Report contextualizes the proposed government development plan within “the larger milieu of Indian-White relations.”

The purpose of the archival research was to conduct “analysis of the time depth of the religious tradition of the area.” While I find this objective problematic, because it assumes that religious traditions are immutable, the survey did end up showing “past impacts on the ritual tradition of the study area [...] of various non-Native American incursion into the project/study area,” which helps to support the argument of this dissertation, that the *Lyng* story is not only about religious freedom but about Indigenous sovereignty as well.

In what follows, I read this part of the report – which focuses on the history of Indian-White relations in Northwest California – as part of a broader history of the relations between Indians and Whites in the U.S. in the same period, with special attention given to the legal aspects of this relationship. I also read some of the testimonies in the *Lyng* trial, focusing on the parts of the testimony that place the local story (even if

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325 Theodoratus Report, 108.
326 Ibid., 7.
327 Ibid., 7.
only implicitly or indirectly) within the context of this broader history of contact, conquest, and intergenerational trauma. Read within this context, the development plan is revealed as one that cannot be understood as a mere decision by the government about how to manage its lands; the plan is revealed as one that has the power to erase a culture that is in the midst of its revival against grave threats to its vitality.

The purpose of the historical part of the Theodoratus Report is to discover possible effects of the history of local Indian-White relations on contemporary Indian use of the High Country. This context, the report tells us, will help us to better understand present concerns in the area, because it will show us the general course of events which have shaped the lives of the people who live in Northwest California. In addition, this context is useful in the assessment of past impact on religious/ritual tradition.

The historical survey reveals a complex relationship between local Indians and Whites, as opposed to the overwhelming emphasis of violence in most existing accounts. These accounts’ focus on warfare between Indians and Whites in the Klamath River in the 1850s and 1860s has overshadowed other aspects of the relationship, such as the integration of Indian people into the labor force (“a fact which accounts in part for the survival of Indian people even though in the initial stages coercion was the method of integration”\textsuperscript{328}), the Federal Government’s attempts to convert Indians to Christianity, and intermarriage between Indians and Whites. The report shows a wide range of interactions, arguing that concentrating on any one type of relationship in the historic process in isolation from the others is misleading. As we will see later in this chapter, Indigenous scholars such as Alfred argue that focusing on only one type of historic

\textsuperscript{328} Ibid., 108.
relationship – especially on conquest – supports the “myth of state sovereignty,” or the belief that only the U.S. – and not Indian nations – can be (and has always been) sovereign.

The history of Indian-White relations in Northern California began with European exploring expeditions sailing northward to scout the western coast of North America. These expeditions were carried on primarily under the Spanish Crown, began shortly after the conquest of Mexico, and continued for over two hundred years until the Spanish made a permanent settlement in Alta California. The local Indigenous peoples learned from these expedition parties about the existence of European peoples, the usefulness of trade goods created by a mercantile economy, and the effects of exotic diseases introduced by those parties.

In 1769, the Spanish Crown established a Franciscan Mission system in Alta California because of concerns about the Russian Empire’s possible expansion into America from the north. The Friars and the Spanish government intended the mission system to convert Indians into Spanish-speaking Catholics, and to teach them European trades and farming techniques. Then Indians were supposed to be integrated into the Spanish social order, and the missions were supposed to be secularized (which meant that the lands held by the missions were supposed to be returned to the Indians). For reasons discussed below, this did not occur. The mission establishment in California had destructive impacts on Native life and culture, and we see demographic decline that began with the founding of the first mission in 1769 and continued until the Mexican government began to secularize the mission in 1834. The California Indian population in

1769 was estimated at about 310,000. In the period between 1834-1846 the estimated population was between 150,000-175,000. Some Indians resisted this intrusion and conflicts between Indian groups and rancheros occurred, and the presence of soldiers became regular in California by 1820. This background is important to us because it has affected policies regarding American Indians during the Mexican and American periods, but Northwest Indians remained isolated and removed from this relationship for a while.

In 1828, representatives of the fur trading industry entered the country of the Yurok, Karuk, and Hupa peoples. The first recorded encounter between an expedition and a group of Indian people was on May 25, 1828 near the junction of the Trinity and Klamath Rivers. The American expedition wanted to trade with the Indians for fur. A few encounters with Yurok people are described in detail by the expedition’s secretary and quoted in the Theodoratus Report. Although the expedition remained in Yurok territory for only a brief time, their reports suggest that the Native people seemed willing to trade, especially for blankets and metal tools. The secretary consistently remarked that the Indians appeared friendly. The meeting between the American fur traders and the Yurok signaled the end of the isolation of Northwest Indians, now that a practical overland between Oregon and California had been established. In 1843 the fur trade was deemed unprofitable and discontinued. It is interesting to note that local Indians were isolated throughout the period of nation-to-nation relations between the U.S. and American

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330 Theodoratus Report, 111. Indian groups living in closest proximity to the missions tended to die off faster than those farther removed. That meant that the Friars had to look farther away for new converts. The missions formed the basis of the California economy, and the converts performed all the labor at the missions, and therefore a steady supply of Indians was necessary to keep California’s fragile economy from faltering.
331 Theodoratus Repot, 111-12.
332 Ibid., 113.
Indians. The 1831 U.S. Supreme Court case of *Cherokee Nation v. State of Georgia* marks the beginning of the period of domestication, when Indian nations were considered “domestic dependent nations.” I elaborate on this period and its significance in the next section.

During the Mexican War in 1846, United States military commanders became responsible for managing Indian affairs in California, but their main purpose was to mollify California’s non-Indian population. In establishing a code of Indian-White relations in the newly conquered Mexican province, the military governors relied on the advice of landholders, whose main concerns were with the Indian livestock raiding and the need for a stable supply of Indian laborers. Because of California’s isolation from the rest of the United States, makers of Indian policy in Washington, D.C. were willing to allow the local population to shape Indian policy in the newly acquired territory. But the discovery of gold in 1848, and the Gold Rush to California that followed it, marked a radical change in the patterns of Indian-White relations. For the first time, California Indians were outnumbered by non-Native gold seekers who had little respect for Native land or life. While the landholders had an interest in protecting Indian people for the sake of using their labor, the gold seekers had no such interest. The California Indian Wars (a series of murderous expeditions against Indian people) are described as resulting from the view of Indians by gold miners as an obstacle in the path to quick wealth.

Meanwhile, in 1850, California enacted a statute entitled “A Law for the Government and Protection of the Indians,” which was an integral part of the domestication policy mentioned above and discussed more thoroughly below. The law

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333 30 U.S. 1 (1831).
334 Theodoratus Report, 114.
provided that any Indian who was not in the employ of a White man could be sentenced to labor on a farm for four months. It also allowed the indenture of Indian children until they reached adulthood, with the consent of their parents or if the parents were dead. This harsh law was open to grave abuse, and professional Indian hunters travelled around California, killing Indian parents, capturing their children, and selling them to White ranchers.

The Theodoratus Report stresses that Indian-White relations were not confined to these situations. Many Indians worked for wages in mines in various areas of California in the early days of the Gold Rush. The report describes trade relationships suggesting that the White traders tried to take advantage of the Indians’ ignorance of White trading practices, that the Indians knew they were being cheated and tried to avoid it in various ways, and that they did not always succeed in avoiding it. But The Klamath River was rich in gold, the mining towns around it grew quickly, and the rapid growth of the non-Indian population in California created a crisis in local Indian affairs. In response, the federal government appointed Indian commissioners to make treaties with California Indians. The north coast of California fell under the jurisdiction of Redick McKee, chairman of the commission. In order to visit the Indians of the Klamath River region and negotiate treaties, he requested fifty troops, for he believed the Indians were “a bold, independent, warlike race, with but little, if any, knowledge of our government, or its resources and consider the immigration of our people … as an invasion, entitling them, if not to revenge, at least to pecuniary compensations.”

335 Ibid., 115.
336 McKee to the Tenth Military Department, June 17, 1851 (quoted in the Theodoratus Report, 116).
McKee was provided thirty-six troops under the command of Major Henry W. Wessells, who wrote about the area of the junction of the Klamath and Trinity Rivers that if it were not for the search for gold, it “would scarcely have been trotted by the foot of white man,” noting that this spot occupied “a central and commanding position with regard to numerous tribes on both sides of the river, and on the Klamath itself below the junction.” Wessells describes the Yurok and Hupa people as follows: “with few exceptions, [they] came freely into our camp, bringing their women and children, and exhibiting an appearance of open, cheerful frankness entirely different from that of any tribes heretofore met with.”

On October 6, 1851, representatives of Yurok, Karuk and Hupa communities signed a treaty with the U.S. in which they agreed to “relinquish, cede, and forever quit claim to the United States, all their rights, title, claim or interest of any kind which they or either of them have to lands or soil in California.” In return, the United States agreed to set aside a reservation “forever guaranteed” to the Indian signatories. The land reserved for the Indians measured approximately twelve miles in width and twenty miles in length. The United States reserved the right to farmland on the reservation, the right of way over the land, and the right to establish military posts, erect buildings, and make improvements to accommodate their officers. The Indians were forbidden to sell any part of their lands to anyone except the United States, and Whites could lease reservation lands only with the consent of the Indian agent. The Indians agreed to remove to the reservation within three years, and the U.S. agreed to provide farmers, mechanics, and school-teachers to instruct them in the language, arts, and agriculture of the Whites. This

337 Theodoratus Report, 117.
338 Ibid., 118.
treaty was similar to others made with California Indians, the Theodoratus Report explains. The treaties established U.S. sovereignty, acquired from the Indians legal title to their Native land, set aside lands reserved for the Indians, provided teachers of European trades for the Indians, and required the government to give Indian people sufficient livestock, seed, implements and other items necessary to carry on a self-sufficient livestock grazing and farming operations on the reservation. The U.S. was bound to protect Indian people on their reservations, to see to it that White offenders against Indians were prosecuted in state courts, and to give Indians some provisions with which to live.

Some segments of California society were working against the treaties. Many non-Indians believed that the treaties reserved too much valuable agricultural and mineral land for California Indians. Consequently, in 1852 the Senate resolved to refuse to ratify all eighteen California Indian treaties. The refusal to ratify the treaties led to changes in Indian-White relations. Local Whites together with the state government had a greater role in shaping these relations in the lack of federal control. A miners’ code was established to regulate Indian-White relations, according to which Indians would be punished if they were suspected of crimes against Whites. While the code’s purpose is described as protecting Indians from maltreatment and preserving the peace with them, the punishments counted in the code are harsh and without due process. The Theodoratus Report describes several events following this code, including some burned Indian villages. These events led eventually to the establishment in 1855 of the Klamath River Indian Reservation, but the establishment of the reservation did not calm the situation
down, and warfare between Indians and Whites in the region is described at length in the Report.\textsuperscript{339}

The Report describes Yurok life on the lower Klamath River reservation between 1855-1862 as better than that of other Indians on the north coast. This is because they were allowed to live in their traditional territory. The Klamath River reservation was considered “the only one in California worthy of praise.”\textsuperscript{340} The geography helped the Yurok and other local Indians remain fairly isolated and protected from Indian-hunting expeditions and other strangers. By 1859, one observer noted that there were over 220 acres of land under cultivation on the reservation. However, in 1862, after a hard winter, a flood swept down the Klamath and ruined the reservation, leaving its 2000 Indians in a state of starvation.

Superintendent Hanson searched the north coast for a suitable refuge for the displaced Yuroks, and decided to settle them on the Smith River, where Whites had established some twenty farms. He negotiated with the farmers for the purchase and improvement of their land and arranged to rent it in the meantime. He sent a group of 400 or 500 Indians from Humboldt County to the land he rented to establish a reservation. They walked there barefoot through snow, rain, and mud, and started building houses right when they got there. The federal government, however, did not approve the purchase, which meant that the Indians spent the next few years tilling land that belonged to Whites, including a former Klamath River Indian Agent. But government documents show that the Yuroks did not stay on the Smith River, and by 1864, most of them returned to their homeland. The report describes hard labor conditions on the Smith River

\textsuperscript{339} Theodoratus Report, 131-55.
\textsuperscript{340} Ibid., 156.
reservation, including severe punishments by White supervisors, as one possible reason why the Yuroks left.\textsuperscript{341} The reservation was closed in 1869, and the Indians who resided there were removed once again, this time to Hoopa.

According to the report, 2000 Yuroks were living on the Klamath River again at this point, and the government, while not concerned by it, did not want to establish a new reservation there. The California superintendent at the time recommended that the government do nothing since the Yuroks were living at “their old homes subsisting themselves without any expense to the government.”\textsuperscript{342} Until 1891, those 2000 Yuroks lived on the Klamath River outside of government control, even though the federal government still owned that land. The Hoopa Valley reservation was the only reservation in Northwest California at the time. The report describes difficult conditions on the Hoopa reservation, including violence and injustice, while life on the Klamath River is described as peaceful. Several attempts were made to convince the Yuroks to move to the Hoopa reservation for their protection, but most of them consistently refused. The Local Agent observed in 1871 that “the love of the Indian for the home of his fathers is so strong that he will seldom leave it for any prospect of good that may be held out to him” and recommended to make the old Klamath reservation a dependency of the Hoopa reservation.\textsuperscript{343}

This agent was replaced by a Methodist minister after only one year as the Hoopa agent, in accordance with President Grant’s policy, which gave various church groups authority to nominate Indian agents. The purpose was to hasten the process of converting

\textsuperscript{341} Ibid., 158-60.
\textsuperscript{342} Maltby to Cooley, May 24, 1866 (quoted in Theodoratus Report 160).
\textsuperscript{343} Whipple to Ely S. Parker, March 20, 1871 (quoted in Theodoratus Report, 162-163).
the Indians to Christianity and making them into useful citizens, as described in more
detail in the next section. Some of the Christian employees were interested not only in
conversion but in gold, and mining activity by Whites on the Hoopa reservation
increased. In 1874, the local agent reported that the mining intruded upon graves and
sacred places, and that this intrusion bothered the Indians. The agent ordered the miners
to leave but had no support from the commander, who did not evict the miners.\textsuperscript{344} Whites
also expressed interest in the timber on the Klamath River, but local agents consistently
recommended protecting the area by either letting the Yuroks control it or extending the
Hoopa reservation boundaries to include it.\textsuperscript{345}

During the early 1880s there was a growing movement toward allotment, which I
describe in more detail in the next section. Allotment meant breaking up reservations into
farm-sized units, distributing the parcels among Indian families, and returning the
remainder to the public domain for further disposition. The Theodoratus Report explains
that while most reservations were established by treaties and therefore could not be
closed without legislative action, the California reservations were established by
executive orders and could be altered or abandoned by administrative decision.\textsuperscript{346} In
1883, the Indians on the lower Klamath (which was still technically a reservation, even
though the Indians were largely left to run their own lives there) were told that the
reservation could be allotted to family heads. The Yuroks, realizing their precarious
situation, petitioned for allotment because they preferred to be able to maintain some of

\textsuperscript{344} Theodoratus Report, 164.
\textsuperscript{345} The report explains that many agents believed that the Indians are a vanishing race and that they would
be gone by the time the timber would be needed. (Theodoratus Report, 165)
\textsuperscript{346} Theodoratus Report, 170.
their homeland to the alternative option, that their reservation would simply be terminated.

“In spite of the intent of the legislation,” the report tells us, “it was not the Indians who were the principal beneficiaries of Indian allotments on the Klamath River”:

Of the 25,000 acres in the original reservation, only 10,000 were allotted to Indians. In 1918 the Hoopa Superintendent noted that “for some reason the land that was sold [to Whites, from the excess that was returned to the public domain] contained practically all of the valuable timber and the land that was allotted to the Indians was what was left over.” The Superintendent knew “nothing about the circumstances under which these allotments were made but each time that I make a trip to the territory I have it more forceably impressed upon my mind that somehow the Indians did not get a fair portion of the land.”

The study reports that in the late nineteenth century and early twentieth century, there is evidence that Indians in the Klamath River region continued to rely on places in the High Country for medicine, power, and protection, despite the disruptions of the previous decades. The report also cites evidence of Karuk ceremonies, including the Deerskin dance, performed in the area. The latest testimony brought in the report is from 1928, which is significant because it means that the ceremonies were still carried at a time they could be transmitted to people alive at the time the study was conducted. Finn Jacobs, a Karuk man, wrote a letter describing the use of the High Country in some detail and complaining that the Whites did not follow the strict religious rules that the Karuk

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applied to the sacred land. He explained that “All Pick-ya-wish ground should be kept holy,” like “school and cemetery” are to White people: “no one should go around it until it is necessary.” He describes ceremonies that are carried over a period of several days “every year, during August, [in] the dark of the moon.” To conduct the ceremonies properly, the proper person should climb two mountains in the Pick-ya-wish grounds, but Whites had constructed fences that obstructed the path and this “spoils it.”

The Six Rivers National Forest was created after World War Two, and the report describes the debate over its name (the name “Yurok” had been proposed, but the Forester opposed giving it an Indian name). Significant parts of the High Country have been under Forest Service control since then, and the use of areas such as Doctor Rock by the Service in the 1950s is described, suggesting no knowledge of the significance of the area to Northwest Indians. However, in 1965, Forest Service awareness of the spiritual significance of the area is documented, when a forest supervisor describes Doctor Rock as one of the important sites in the area and the Indians who use it:

The Karok Indian Medicine Men (doctors) climbed the twenty miles of trail from Orleans on the Klamath River each summer to this point to meditate with the spirits. They remained for several weeks fasting and cleansing their souls in their church under the skies.

The historical part of the Theodoratus Report contextualizes the Lyng case and shows how it came to be that the High Country is under the control of the Forest Service and not

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of the Northwest Indians. This is a significant context, that I believe should have been taken into account when the case was decided. Apparently, the Theodoratus team thought that this context should be taken into account by the Service when deciding whether to carry out the disputed development plan. However, both the Service and the Court ignored this context when making their respective decisions, and I believe that it is the legal frameworks of free exercise and of environmental justice that allowed them to ignore it. This chapter asks what it means to take this context seriously, and to answer this question I am now turning to a broader historical survey, to show how the local history described in the Theodoratus Report fits into the legal and political developments in the U.S. at the time.

**Legal and Political History**

The first encounter of Northwest Indians with White Americans in the late 1820s coincided with the transition from a treaty-making period, when Indian communities were considered sovereign nations, the relationship with whom is regulated by international law, to the domestic period – when Indian communities were considered “domestic dependent nations.” The transition is marked by the case of *Cherokee Nation v. State of Georgia* (1831). The Cherokee brought an action before the U.S. Supreme Court against Georgia, who had been continuously attempting to dispossess them from their lands, as a foreign nation. Chief Justice John Marshall found himself in a difficult situation. If the Supreme Court accepted jurisdiction of this case between a foreign government and a state and ruled against Georgia’s aggression, as the international legal
standards required, the authority of the Court would be jeopardized. The hostile chief executive, Andrew Jackson, would likely seek to undermine or render impotent any ruling against Georgia’s aggression. Rather than face the potential of a decision that might be ignored by the federal executive, Marshall described the Cherokee nation as a “domestic dependent nation,” thus denying the Court jurisdiction as the action was not between a foreign nation and a state.351

Chief Justice Marshall, while denying Indian nations status as foreign nations, established the unenforced right under United States law of Indian nations to occupy, as domestic dependent nations, the land Indians believed was theirs. The aggression of the State of Georgia and the executive branch could not be checked by the limited legal rights of land occupation Marshall had tried to establish for the Indigenous populations, and this period was marked by forced removal and relocation of Indians, including the Cherokee “Trail of Tears.”352 Jill Norgren reads this case alongside the other famous Cherokee case, *Worcester v. Georgia* (1832),353 arguing that Marshall had to twist history in order to define Indian nations as domestic dependent nations and ultimate title as resting with the federal government. She also argues that while Marshall intended to protect Indian sovereignty, he ultimately failed.354

Taken together with *Johnson v. McIntosh*, an 1823 land title precedent the later cases relied upon, *Cherokee Nation v. Georgia* and *Worcester v. Georgia* created the theoretical foundations for situating Indigenous peoples in the legal system of the United

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353 31 U.S. 515 (1832).
States, and they are known as the Marshall Trilogy. Operating under a modified form of the Doctrine of Christian Discovery, *Johnson* established the legal notion that simply discovering Indigenous peoples established ownership by the discovering Christian European power of the underlying title to the lands Indian peoples lived on. This gave the discovering power the exclusive right to purchase the lands the Indigenous peoples continued to have the legal right to occupy. As Indian nations did not own the lands they occupied and could only sell their lands to the discovering power or their successor in law (as the United States was to Great Britain after Independence and to France after the Louisiana Purchase), Indian nations were not fully sovereign foreign nations, but domestic dependent nations, with the United States standing as their guardian (in theory, but rarely in practice), as Marshall determined in *Cherokee Nation*. In *Worcester*, Marshall affirmed the supremacy of the United States government over Indian relations and the powerlessness of the states over Indians and the internal affairs of sovereign Indian nations. This was the established legal theory, even if historical practice did not necessarily conform to the theory.\(^{355}\)

The era of domestic dependent nations involved a long period of transition and for the initial decades of this period the Indians of the southwest were not under any claim of

United States jurisdiction. The treaty making process remained in place until 1871.\textsuperscript{356} Over this period the U.S. government pressured Indian nations to remove from the east, cede land, and used negotiation or force to reduce Indigenous land holdings to smaller and smaller reservations. Attempting to limit the Indigenous population to reserves in less violent ways, the federal government moved the Indian Office from the Department of War to the Department of the Interior in 1849.\textsuperscript{357} Initially intended by many of the non-Indian population as places for the Indigenous peoples to retain self-government, by the late nineteenth century, Indian reservations had begun to be seen and used as tools for the destruction of Indian self-governance and the forced adoption of Christian faiths and the cultural ways of the dominant non-Indian population.\textsuperscript{358}

The assault against Indigenous culture and sovereignty began one of its more aggressive phases with allotment. In 1887 the U.S. Congress passed the Dawes Act, which called for breaking up reservations into individual allotments privately owned by individuals. Each head of an Indigenous household was to receive 160 acres of land and expected to become a farmer.\textsuperscript{359} The “surplus” land was to be made available for use by the settler population. In the period of allotment, land held by the Indigenous population shrunk from 138 million acres to 48 million, with 20 million acres of that land being semi-arid or desert.\textsuperscript{360} During the era of allotment, Indian reservations were ruled by Indian Agents of the Federal government.\textsuperscript{361} As part of the policy of the destruction of Indigenous religion and culture, the federal government provided for Christian

\textsuperscript{357} Fixico, “Federal and State Policies,” 383.
\textsuperscript{358} Vinzant, \textit{The Supreme Court's Role}, 48-9.
\textsuperscript{359} Fixico, “Federal and State Policies,” 384.
\textsuperscript{360} Vinzant, \textit{The Supreme Court's Role}, 53.
\textsuperscript{361} Fixico, “Federal and State Policies,” 385.
missionary boarding schools that were intended to prevent the transmission of Indigenous religion and culture to the next generation. It was during this period that resistance, both Indigenous and non-Indian, grew to these repressive policies. Non-Indians who hoped to secure constitutional protections for Indian religious freedom worked to get the 1924 Citizenship Act passed. This act conferred upon American Indians United States citizenship, whether they wanted it or not. Though initiated by those seeking to promote Indian religious freedom, the 1924 act providing U.S. citizenship to the Indigenous population has been viewed by many as another avenue with which to force the Indigenous population to abandon their culture in favor of that of the European immigrant population.\(^\text{362}\)

1934 marked the next major shift in federal Indian policy with the passage of the Indian Reorganization Act (IRA), or Indian New Deal. Championed by John Collier, a cultural pluralist who became Commissioner for Indian Affairs, the IRA was an attempt to reverse the policy of governmental, religious, and cultural destruction of Indigenous communities. The IRA promoted the adoption of Indian governments modeled on Euro-American political forms. Collier ended the Bureau of Indian Affairs policies that criminalized Indigenous cultural practices and instituted a revolving development fund to promote economic growth on reservations. Allotment, while already largely abandoned due to Indigenous resistance, was repudiated as a policy.\(^\text{363}\)

Indian reactions to the IRA process of creating European-style governments was as varied as the conditions of Indian peoples. Many Indigenous groups who were on the brink of social destruction were able to restructure and revive under IRA governments,

\(^{362}\) Ibid.; Wenger, *We Have a Religion*, 184.

like the Washoe. Other Indian nations with surviving traditional governments, such as the Hopi, found the IRA government to be in direct competition with their traditional forms of organization, and adoption of IRA governments caused new political divisions within Indian communities.

After the Second World War, federal policy changed yet again with a renewed assault on Indigenous sovereignty, and the termination era began. The federal government sought to terminate federal services that provided economic support to Indigenous peoples and eliminate their governments. In 1946 the United States government started the Indian Claims Commission (ICC) to provide financial redress for lands illegally appropriated from Indigenous peoples by the federal government. The ICC was a special administrative court designed to examine historical claims against the United State government for the illegal or unconscionable dispossession of Indigenous peoples from their lands in the lower forty-eight states. It was not empowered to return lands under any circumstances. Highly conservative in its approach, the ICC was intended to last only a decade but was not concluded until the late 1970s.

The ICC was intended to lay to rest outstanding claims; the supporters of termination felt that, by addressing these outstanding grievances, the path would be cleared to end the separate political and cultural identity of Indian communities. To further this end, Indigenous people were offered financial incentives to move to urban areas and leave reservations. Additionally, Public Law 280 provided states with the power to take full criminal jurisdiction over Indian lands. In 1953, Congress passed legislation allowing for the removal of federal recognition and services to Indian nations,
and the federal government terminated the political and legal existence of 109 Indian groups between 1954 and the early 1970s.\footnote{Fixico, “Federal and State Policies,” 386-87.}

The termination process revived Indigenous efforts to preserve their religions, cultures, and political sovereignty. The 1960s saw the rise of Red Power and Indian militancy. In 1968 the American Indian Movement (AIM) was founded. In 1969, Indian activists seized Alcatraz Island, justifying their actions on treaty provisions that stated unused federal installations were to be returned to local Indians. In 1972, AIM and other Indian organizations participated in the larger cross-country caravan known as the Trail of Broken Treaties. This event ended with an unplanned occupation of the Department of Interior building where the Bureau of Indian Affairs was headquartered in the District of Columbia. The occupation ended peacefully through negotiations. Among other concessions, the U.S. Government agreed to pay the fairs of the occupiers to return home. In 1973, AIM occupied the church at Wounded Knee in what has come to be known as Second Wounded Knee.\footnote{Ibid., 388.}

Among the less deadly actions of his administration, President Nixon renounced termination and ushered in what is known among scholars as the era of renewed Indian sovereignty or the era of government to government relations. The Nixon administration undertook reforms that promoted government to government relations between Indian governments and the United States. Both Indians and official governmental policy supported this new era of self-determination. The federal government ceded control of
more and more functions to Indian governments. The policy gained formal standing as law in 1975 with the passage of the Indian Self-Determination and Education Act.\textsuperscript{366}

1978 saw the passage of two landmark pieces of legislation that addressed Indian rights. The U.S. Congress passed the Indian Child Welfare Act in 1978 in part to address the widespread abuses by state children services agencies taking Indian children and placing them in non-Indian homes, for both foster care and adoption.\textsuperscript{367} That same year saw the United States Congress pass the American Indian Religious Freedom Act. This law changed the official stated policy to one of preserving and protecting the religions of the Indigenous peoples of the land it now occupied. The American Indian Religious Freedom Act provides for consultation with Indian leaders when governmental actions might impact Indian sacred sites, but it provides no substantive protections. It is at this point that the \textit{Lyng} lawsuit begins.

\textbf{From Domesticity to Dignity}

“Dignity,” a 50-foot-tall statue in Chamberlain, South Dakota, was designed in 2016 to honor the cultures of the Lakota and Dakota people. The face of Dignity was modeled after three Native American women, ages 14, 29, and 55. “Dignity represents the courage, perseverance and wisdom of the Lakota and Dakota culture in South Dakota,” says sculptor Dale Lamphere. “My hope is that the sculpture might serve as a symbol of respect and promise for the future.” The statue’s description online includes the words

\textsuperscript{366} Ibid., 389.
\textsuperscript{367} Ibid.
“grace,” “beauty,” “peace,” and “tolerance.”

Thus, it invites us to reflect on the relationship between dignity, indigeneity, and virtue. It also invites us to think about the gendered aspects of this relationship: why is Dignity a woman? Why is she modelled after three different women of different ages? Rhetoric of dignity and virtue has been deployed to domesticate women, and this point is important to my argument.

My goal in this section is to bring together two important concepts in human rights law that are extremely difficult to define and that have been vastly criticized for their elusive nature, because I believe that thinking of the two together will help to broaden or to complicate our understanding of both. I came to this project assuming that indigeneity will help me to make dignity a more relevant concept for the advancement of justice, beyond the discourse on human rights that has continuously failed marginalized groups, such as women and racialized minorities. My intuition was that the human rights discourse that is controlled by the concept of dignity is problematic because of two of its prominent features: it simultaneously individualizes and universalizes. Indigeneity, on the other hand, shifts our attention from persons to peoples, allowing us to think of rights as collective or communal, taking us beyond the liberal philosophy that has justified so many of the West’s wrongs. I still think that this argument can be made, and that it is worth pursuing, but I also discovered that dignity can help to complicate our understanding of indigeneity in unexpected ways. I was inspired by the work of Bernadette Atuahene, who ties dignity with property in a novel and persuasive way, and I discuss her work and its application to my dissertation in this section.

369 Bernadette Atuahene, We Want What’s Ours: Learning from South Africa’s Land Restitution Program (Oxford: Oxford University Press, 2014). An application of Atuahene’s conception of dignity to the case of
Is human dignity a useful political concept for us today? Is it reducible to respect or to autonomy? Some think it is useful because it can mean whatever one wants it to mean; others think it is useless for that same reason. For example, Reva Segal has shown how both pro-life activists and pro-choice activists have used dignity to support their opposing positions. It is certainly productive, I think, to acknowledge dignity’s elusiveness. Perhaps we can only understand fully what dignity means at instances when society fails to protect the dignity of its members. Perhaps we only know dignity in the face of indignation. In Ranjana Khanna’s words, “It may often be very clear what it means to be treated without dignity, but it is less clear what dignity is except at times when the term itself is instrumentalized.”

Erin Daly writes that in Israel (and this is true for many constitutional democracies as well), dignity “has been described as ‘the source of all human rights […] Indeed, it is human dignity that makes a person worthy of rights’.” Though it is agreed that dignity must be protected, it is not clear who possesses it, what exactly it is, and what the normative implications are of recognizing it in those who possess it.

Nevertheless, Atuahene uses dignity as the central concept in her theory. She does so because:

it resonates across cultural, geographic, and religious divides. Although moral philosophers such as Kant have been important for how Western thinkers understand dignity, it is a concept that also can be located within cultural and

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religious belief systems found in regions such as Africa, Asia, the Middle East, and Latin America.\textsuperscript{373}

Her definition of dignity is based on two central elements: equal human worth and autonomy. She defines dignity as “the notion that people have equal worth, which gives them the right to live as autonomous beings not under the authority of another. Consequently, individuals and communities are deprived of dignity when subject to dehumanization, infantilization, or community destruction.”\textsuperscript{374}

Atuahene writes about what she calls “dignity takings” and “dignity restoration” in South Africa, but I find her theory useful in linking dignity and indigeneity, which is my task in this section. According to Atuahene, the term “dignity takings” applies “when a state directly or indirectly destroys or confiscates property rights from owners or occupiers whom it deems to be sub persons without paying just compensation or without a legitimate public purpose.”\textsuperscript{375} She argues that a comprehensive remedy for dignity takings entails what she calls “dignity restoration,” which she understands as compensation that addresses both the economic harms and the dignity deprivations involved.

The definition of dignity takings that ties together the expropriation of land with dehumanization of its occupants helps me to respond to Waldron’s question, discussed in Chapter Threex, why indigeneity is important. I start with the Doctrine of Discovery. Two Papal Bulls, from 1455 and 1492, had declared the legitimacy of Christian


\textsuperscript{374} Atuahene, \textit{We Want What’s Ours}, 45.

\textsuperscript{375} Ibid., 21.
domination over “pagans,” sanctifying enslavement and expropriation of property, specifically in the lands discovered by Christopher Columbus. What was termed “the Doctrine of Christian Discovery” saw American Indians as sub-human because they were not Christian, and Chief Justice John Marshall used the language of these Papal Bulls to justify state dominion over Indigenous peoples in a series of Supreme Court decisions early in the nineteenth century, replacing the terms “Christian” and “pagans” with “European” and “savages” – a term that also dehumanizes Indians, even if this dehumanization was secularized.

Based on the notion that Indigenous peoples could not possess title to land, Indian title was a colonial fiction, created by Marshall in order to grant Native peoples some property rights while allowing the U.S. to maintain control over land, especially its sale and distribution. Marshall ruled that Indian nations had only “the right of occupancy.” They can do whatever they want with the land while they occupy it, but they cannot sell it to anyone but the sovereign. According to Marshall, discovery of a given territory granted the European discoverer the right, against other European nations, to acquire Indian land (by purchase or conquest) and then grant that land to non-Indians. On the one hand, the Court created a new property right for Indians, one that all parties, including the state, were bound to respect. At the same time, the Court took away absolute control of Indian land by Indians. The Court said that Indians possessed an occupancy right that only the discovering sovereign could extinguish. Thus, discovery did not vest title in the discoverer; it gave the discovering nation the right to extinguish Indian title via purchase or conquest. The rights of the discoverer were against those of other nations staking a claim to Indian land; they were not necessarily rights over Indians. The Court now said
that Indians could convey their land to the discovering sovereign and to no one else. So the sovereign’s rights derived from discovery, and the Indian’s rights came from occupancy. Residence in a given area conferred Indian title upon an Indian nation.

We can ask how come such a revolutionary property expropriation did not do anything to the institution of property, and one possible answer would be that the people whose property was expropriated were already considered nonmembers of the community and therefore not worthy of property rights. In the Native American case, they were also considered too nomadic to own land and too unwilling to make significant improvements that would clarify their claim and give them moral weight. And so the answer to Waldron’s question about the importance of indigeneity would be that taking their lands required their continuing dehumanization and the denial of their sovereignty and autonomy, which Atuahene sees as the violation of their dignity.

As we have already seen, the nineteenth-century Marshall Court – along with creating Native title – also domesticated Indian nations, referring to them as “domestic dependent nations.” When I talk about this domestication I mean three things: (1) the discourse of domesticating or civilizing the savage Indian (“kill the Indian and save the man”), which calls for the implementation of policies that albeit the rhetoric of humanization that accompanied them definitely violated the dignity of American Indians, infantilized them, and destructed their communities; (2) The attack on Indian sovereignty through the domestic sphere (including the practice of out-adoption, the forced removal of Indigenous children from their families to attend government-funded boarding schools and the allotment of reservation land in severalty); (3) The legal definition of Native Americans as “domestic dependent nations” in the Supreme Court in the nineteenth
century. In *Cherokee Nation v. Georgia*, the U.S. Supreme Court recognized that the nationhood of Indian communities was limited primarily by U.S. military conquest. It defined the Indian political organization as “domestic dependent nations” and their members as “wards of the nation,” existing in “a state of pupilage.” According to the Supreme Court: “Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.”

Beth Piatote writes that “Assimilation-era policies […] were driven by the notion that the tribal-national polity, as a competing national sovereignty, must be destroyed. And the way to break up the tribe was to break up the Indian family and to cultivate children’s allegiance to the United States rather than to the tribe.”

A telling example can be found in a speech by Indian Rights Association activist Merrill Gates in 1885:

> The question whether [Indian] parents have a right to educate their children to regard the tribal organization as supreme, brings us at once to the consideration of the family. And here I find the key to the Indian problem. More than any other idea, this consideration of the family and its proper sphere in the civilizing of the races and in the development of the individual, serves to unlock the difficulties which surround legislation for the Indian.

Linking the fate of the Indian home with that of the Indian nation, Gates continues:

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376 *Cherokee Nation v. Georgia*, 2.
We must as rapidly as possible break up the tribal organization and give them law, with the family and land in severalty as the central idea. We must not only give them law, we must force law upon them. We must not only offer them education, we must force education upon them.

Bowers and Carpenter think about domestication in the context of Lyng. As part of the assimilation policy of the early twentieth century, Indian religion was outlawed and referred to as “the devil’s religion.” As a result, many Indian peoples stopped performing certain rituals or were forced to go underground. In the face of racism and discrimination, many Indians tried hard to conceal their Indianness, undergoing a kind of identity crisis. The worst identity crisis was experienced by the generation of Indians who were sent to Indian boarding schools – the worst manifestation of the assimilation policy. Indian children from the Lower Klamath River were sent to residential schools in Northern Oregon. According to Bowers and Carpenter,

These children left the Reservation speaking tribal languages, believing in their cultural covenants, and practicing the religion – only to be beaten and punished for exactly these traditional practices by boarding school teachers and administrators. These students became the first generation of Indian people from the Klamath River not to live in their aboriginal territory or participate in annual tribal religious ceremonies.

When they returned from boarding schools to the reservation, they found extreme poverty, no job opportunities, and felt alienated from their traditional ways of life. “Yet, even at this low point,” observe Bowers and Carpenter,

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379 Ibid., 6-7.
Hope was on the horizon – the civil rights era of the 1960s was headed to the Klamath River. The generation raised pre-contact was still alive. Although they were weary to “be Indian,” they still knew their traditions. Children born in the 1940s and later were not sent away to boarding schools and in fact, they had been exposed to a better education in local public schools. Some of them had made it to college, graduated, and headed home.\footnote{Ibid., 502-3.}

Their experiences at the university had politicized them, having been exposed to Indian activism in Alcatraz and Wounded Knee. They were eager to reassert their Indian identity and to engage their elders in a political movement. Nonprofit organizations in Northwest California, funded by the U.S. as part of the government’s “war on poverty” campaign, were involved in organizing local Indians, “Remarkably,” write Bowers and Carpenter, “within a few years the people began to dance again.”\footnote{Ibid., 503.} Medicine women returned to the High Country. “These events were significant to revitalizing the tribal religion and many of the participants would later become plaintiffs in the Lyng litigation.”\footnote{Ibid.} In the Lyng trial, when witness Peters is asked by the judge about the impact that the development plan might have on the revitalization of local Indian nations, he explains that the High Country is “where we get personal power that reaffirms our Indianness and our way of life. To disrupt it and to destroy it, as the Forest Service is proposing to do, would definitely have an impact on the regeneration of Indian people. Currently it would totally destroy any hope of our grandchildren from knowing what that area has for them.”\footnote{Reporter’s Transcript, 83.}
Domestication is, of course, the way in which patriarchal societies oppress women as well.\textsuperscript{385} The domesticity regime that created a private-public divide and confined women to the private sphere, can be thought of as violating women’s dignity even if the same regime uses the idea of dignity to justify itself. This brings me back to the South Dakota statue. Is building this statue – a 50-foot tall Indian woman in the public square – a practice that can begin to restore dignity (both women’s and Indian’s)? This is definitely the stated goal of the White donors and sculptor, who worked closely with local Native advisors to make sure his creation would be culturally appropriate. Local Lakota teenage girls testify that having such a model – finally a Lakota woman to literally look up to – makes a real difference for them. While this statue does not address the economic harm that was done to these people, it might be starting to address the violation of their dignity. At the closing of this section, I would like to return to the words of sculptor Dale Lamphere, who sounds as if he himself has read Atuahene: “The thing that I’m trying to do is to create a real presence in this sculpture. You know, I have at some point to let go of my own pre-conceived notions and let her have her own life […] and that’s a subtle process.”\textsuperscript{386}

\textbf{From Sovereignty to Freedom}

Deloria notes that “Equality under the law […] was a secularized and generalized interpretation of the Christian brotherhood of men – the universal appeal of individuals

\textsuperscript{385} For excellent accounts on the intersection of gender and indigeneity in the context of domesticity see Amy Kaplan, “Manifest Domesticity,” \textit{American Literature} 70 no. 3 (1998) and Cheryl Suzack, \textit{Indigenous Women Writing and the Cultural Study of Law} (Toronto: University of Toronto Press, 2017).

\textsuperscript{386} http://lampherestudio.com/dignity/ (accessed on June 6, 2018).
standing equally before God now seen as people standing equally before the law and secular institutions.”387 But isn’t sovereignty a secularized Christian concept? Taiaike Alfred responds to this worry, writing that when we think about sovereignty in relation to Indigenous peoples, rather than understanding it as supreme political authority, we must frame the discussion within an intellectual framework of internal colonization, which he understands as “the historical process and political reality defined in the structures and techniques of government that consolidate the domination of indigenous peoples by a foreign yet sovereign settler state.”388 And while internal colonization is the political reality of most Indigenous peoples, Alfred reminds us that the idea of state sovereignty has been contested – both practically and theoretically – since its imposition. The discourse on Indigenous sovereignty is therefore an interplay between notions of dominion (the Western conception of sovereignty) and notions of freedom, respect and autonomy (the Indigenous account of political relations).

According to Alfred, history is written in a way that supports the myth of state sovereignty and with it the colonial project: while in reality, encounters between Indigenous and non-Indigenous peoples were as rich and diverse as any other cultural encounter – “war, peace, cooperation, antagonism and shifting dominance and subservience”389 – this history has been erased in favor of a fiction of a single sovereignty. “Controlling, universalizing and assimilating, these fictions have been imposed in the form of law on weakened but resistant and remembering peoples.”390

387 Deloria, God is Red, 47-8.
389 Ibid.
390 Ibid.
Alfred refers to original treaties between European sovereign states and Indigenous peoples in North America, documents that always recognized Indigenous peoples as the original occupiers of the land, and referred explicitly to their separate political existence and territorial independence. While the written history of North America tells a story of sovereignty that is binary (to use Bruyneel’s language), Alfred says that this story is limited factually (European settlement was negotiated rather than absolute), as well as theoretically:

[…] the discourse of sovereignty upon which the current post facto justification rests is an exclusively European discourse. That is, European assertions in both a legal and political sense were made strictly vis-à-vis other European powers, and did not impinge upon or necessarily even affect in law or politics the rights and status of indigenous nations. It is only from our distant historical vantage point, and standing upon a counterfactual rock, that we are able to see European usurpation of indigenous sovereignty as justified. 391

Albeit the fictional nature of the concept of sovereignty, it has nevertheless limited the way we think, Alfred admits. The conceptual and definitional problematic scholars tend to address is that of the accommodation of Indigenous peoples within a legitimate framework of settler state governance. “When we step outside this discourse, we confront a different problematic, that of the state’s ‘sovereignty’ itself, and its actual meaning in contrast to the facts and the potential that exists for a nation-to-nation relationship.” 392

Indigenous scholars have explored this problematic, though. Alfred reads Russel Barsh and James Henderson’s The Road: Indian Tribes and Political Liberty, a landmark

391 Ibid., 461.
392 Ibid.
work that critiques the notion of sovereignty from within the historic and legal framework of state sovereignty. Alfred reads their work as “profound,” emphasizing the potential for “tribal liberty” and state sovereignty to coexist according to their theory. “In this sense,” writes Alfred, “The Road follows the trajectory – native sovereignty within and in relation to state sovereignty – first set forth in the 1830s in the Cherokee decisions, which suggested that tribes were ‘domestic dependent nations’.”

But sovereignty is practiced through institutions beyond legal doctrines – Alfred points to political, economic, and intellectual strategies that the state uses in order “to impose and maintain its dominance.” Alfred reads Vine Deloria and Clifford Lytle’s work as showing how the legal doctrine is mirrored in governmental structures:

In considering the question of the “sovereignty” of indigenous peoples within its territorial borders, the state takes various positions: the classic strategies include outright denial of indigenous rights; a theoretical acceptance of indigenous rights combined with an assertion that these have been extinguished historically; and legal doctrines that transform indigenous rights from their autonomous nature to contingent rights, existing only within the framework of colonial law.

We see these strategies in the various policies described below, of domestication, termination, and assimilation. With these policies, Alfred writes, “the potential for recognition of indigenous nationhood has gone unrealized.” It is therefore within a

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395 Ibid.
398 Ibid.
framework of domestication – and the intellectual and political environment that the
domestication project created – that Indigenous peoples had to struggle for freedom and
power.

Once Indigenous peoples started to regain the capacity to govern themselves,
Alfred writes, Indigenous scholars have started to doubt the viability of working within
the system. They stopped considering themselves “the nations within” – a status that saw
Indigenous peoples as sovereign but always saw their sovereignty as inferior to that of the
state. An intellectual trend that criticized the authority that the U.S. and Canada claimed
to have over Indigenous peoples emerged, a trend that Alfred refers to as “the project of
deconstructing the architecture of colonial domination.”\(^\text{399}\)

This movement asserted, on
the one hand, a prior and coexisting sovereignty and, on the other, a right of self-
determination for Indigenous peoples in international law. Alfred reads Robert Williams’
critique of what he calls “the discourse of conquest,” according to which law has been the
most significant tool of European colonial genocide.\(^\text{400}\) After Williams’ critique, writes
Alfred, “any history of the concept of sovereignty in North America must trace the
manipulation of the concept as it evolved to justify the elimination of indigenous
peoples.”\(^\text{401}\)

Alfred also reads David Wilkins’ work, pointing to the U.S. Supreme Court’s role
in simultaneously protecting Indigenous sovereignty and limiting it, as is especially
apparent in the creation of the status of “domestic dependent nations.”\(^\text{402}\) All this has led

\(^{399}\) Ibid., 463.
\(^{400}\) Robert Williams, *The American Indian in Western Legal Thought* (New York: Oxford University Press,
1990).
\(^{401}\) Alfred, “Sovereignty,” 463.
\(^{402}\) David E. Wilkins, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice*
(Austin: University of Texas Press, 1997).
to a sentiment within Native communities, according to which “sovereignty” is inappropriate as a political objective for Indigenous peoples, a sentiment that Alfred expresses throughout his scholarship. What does it mean to completely reject the existing intellectual and political structures for the relationship between Indigenous peoples and the state? What does it mean to reject the idea of sovereignty altogether? Alfred reminds us that Indigenous peoples had their own systems of government before contact; he reminds us of the complications in adopting a European notion of (colonial) power into a post-colonial system of Indigenous communities.

Using the sovereignty paradigm, indigenous people have made significant legal and political gains toward reconstructing the autonomous aspects of their individual, collective and social identities. The positive effect of the sovereignty movement in terms of mental, physical, and emotional health cannot be denied or understated. Yet this does not seem to be enough: the seriousness of the social ills, which do continue, suggests that an externally focused assertion of sovereign power vis-à-vis the state is neither complete nor in and of itself a solution.

Indigenous leaders engaging themselves and their communities in arguments framed within a liberal paradigm have not been able to protect the integrity of their nations. “Aboriginal rights” and “tribal sovereignty” are in fact the benefits accrued by indigenous peoples who have agreed to abandon autonomy to enter the state’s legal and political framework.⁴⁰³

A movement for Indigenous self-determination, Alfred writes, has nevertheless found success in re-instituting systems that promote Indigenous values. This success required

rejecting of the legitimacy of the state and recovering traditional Indigenous ways, first by activists and then by intellectuals. In Canada, Alfred writes, the Indigenous struggle is to restore the original relationships with the state, thus transcending colonial structures of domination. Alfred sees a great potential in this struggle. But he also recognizes the problems integral to this struggle. “The core problem for both activists and scholars revolves around the fact that the colonial system itself has become embedded within indigenous societies.” While there is a revival of traditional culture, the political structure is still dictated by Western paradigms, which causes alienation within Indigenous communities.

A perspective that does not see the ongoing crisis fueled by continuing efforts to keep indigenous people focused on a quest for power within a paradigm bounded by the vocabulary, logic and institutions of “sovereignty” will be blind to the reality of a persistent intent to maintain the colonial oppression of indigenous nations. The next phase of scholarship and activism, then, will need to transcend the mentality that supports the colonization of indigenous nations, beginning with the rejection of the term and notion of indigenous “sovereignty.”

What will an Indigenous government be like after self-government is achieved? Alfred asks. Indigenous self-government will not be a replica of pre-colonial systems of government; it will adapt to modern administrative techniques. But he hopes that the new system will embody the underlying values of Indigenous communities. His fear is that new systems will resemble non-Indigenous systems, thus inflicting self-oppression. To avoid this, the discourse of sovereignty needs to be constantly criticized. “Traditional”

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404 Ibid., 466.
405 Ibid.
Indigenous nationhood, Alfred explains, are non-hierarchical – “there is no absolute authority, no coercive enforcement of decisions […] and no separate ruling entity.”

Alfred mentions Deloria again, and specifically the distinction the latter drew between Indigenous conceptions of nationhood and notions of state sovereignty or self-government. While self-determination is appropriate for nations, self-government, delegated by sovereign states, is inappropriate. According to Deloria, delegated forms do not address the spiritual basis of Indigenous societies.

Self-government is not an Indian idea. It originates in the minds of non-Indians who have reduced the traditional ways to dust, or believe they have, and now wish to give, as a gift, a limited measure of local control and responsibility. Self-government is an exceedingly useful concept for Indians to use when dealing with the larger government because it provides a context within which negotiations can take place. Since it will never supplant the intangible, spiritual, and emotional aspirations of American Indians, it cannot be regarded as the final solution to Indian problems.

Similarly, Alfred (following Deloria) critiques notions of aboriginal rights or land rights, that are usually viewed as progressive, as ones that still operate within a colonial legal framework, and therefore even achieving them actually amounts to very limited progress. Indigenous peoples “must conform to state-derived criteria and represent ascribed or negotiated identities in order to access these legal rights.”

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406 Ibid., 467.
408 Ibid., 468-9. Alfred elaborates: “Not throwing indigenous people in jail for fishing is certainly a mark of progress, given Canada’s shameful history. But to what extent does that state-regulated ‘right’ to fish represent justice when you consider that indigenous people have been fishing on their rivers and seas since time began?” (Ibid., 469).
chapter, the conception of indigeneity as fixed and tied to the past serves the purpose of maintaining the myth of conquest that Alfred has described above, and with it, state legitimacy. But this story is anti-historical, according to Alfred. The legitimacy of the state was not achieved through the rule of law but through illegitimate means, such as the spread of diseases and massive immigration. Only recently have Indigenous communities been able to manipulate state institutions, and they have gained support from other marginalized groups. The state, realizing that it can no longer ignore the Indigenous voice, has responded by attempting to draw Indigenous peoples closer to the state, securing certain rights that in reality only helps maintaining the image of the “authentic Indian” and with it the myth of state legitimacy.

“Is there a Native philosophical alternative?” Alfred asks. “In most traditional indigenous conceptions, nature and the natural order are the basic referents when thinking of power, justice, and social relations.” In these views, the relationship between human beings and the earth is one of partnership. Because the land was created by a higher power, human beings have no right to possess it or dispose of it. The partnership with the earth gives human beings special responsibilities within the areas they occupy, “linking them in a natural and sacred way to their territories.” This notion is opposed to the current U.S. notion of economic development that makes the natural world into resources and commodities (especially on Indigenous lands), Alfred writes. Many Indigenous traditions strive for a balanced relationship with the environment; they aim for the sustainability of the earth and the well-being of the people.

409 Ibid., 470.
410 Ibid.
Unlike the earth, political and social institutions were created by men and women, and they have the power and responsibility to change them. “Governance structures and social institutions are designed to empower individuals and reinforce tradition to maintain the balance found in nature.”  

Sovereignty is, of course, a political rather than a natural structure. “For people committed to transcending the imperialism of state sovereignty, the challenge is to de-think the concept of sovereignty and replace it with a notion of power that has at its root a more appropriate premise.”

For Alfred, following Tully, postcolonial justice will abandon the idea of European superiority or any demand for a single language or epistemology. It will move beyond the imperial, totalizing, or assimilative impulse and toward a respect of the diversity of voices that take part in political relationships. “It is no longer possible to maintain the legitimacy of the premise that there is only one right way to see and do things.” Moreover, Alfred calls for a coexistence of individuals, communities, and all elements of creation – a coexistence in which human beings have no priority in “deciding the justice of a situation.”

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411 Ibid., 471.
412 Ibid.
413 Ibid.
414 Ibid., 472.
CONCLUSION

2018 marks the thirtieth anniversary of the *Lyng* decision. Why return to it now? In her letter to Justice O’Connor, Judge Abinanti portrays the precarious relationship between religious freedom and environmental justice when she writes:

I hope heaven has no harvestable timber; or, if it does, I hope your people never have the ingenuity to find heaven and sail there. (I know how important that place is to many of you.) Because if you can get there, and if there is any economic benefit to be had, heaven will surely be harvested, mined, developed, parceled out or otherwise required to yield a profit. Abinanti’s imaginary harvested heaven demonstrates that neither religious freedom nor environmental justice is significant enough a right to trump the interest in profit in the U.S. In other words, property is always more important than the sacred. I find this illustration helpful in the closing of this project. The *Lyng* story, which started as one that was both about religious freedom and about environmentalism, at its end created the two as separate routes, because the California Wilderness Act ostensibly resolved the conflict around the G-O road and the Supreme Court decided the case as an exclusively free exercise case. In hindsight we can say that both routes are unsuccessful, which I believe is because they conceal the real issue underlying the *Lyng* case, and similar cases: Indigenous sovereignty.

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416 The original case rested on First Amendment and AIRFA grounds as well as on environmental legislation.
While religious freedom has been at the center of public attention in recent years, it seems to have gravitated toward questions of gender and sexuality and away from ethnic, racial, and colonial issues.\footnote{See, for example, \textit{Burwell v. Hobby Lobby} (2014) and \textit{Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission} (2018).} The \textit{Smith} case that was decided by the Supreme Court two years after \textit{Lyng} has become the most well-known American Indian religious freedom case, and it has directly led to battles between Congress and the Supreme Court regarding the interpretation of this right, but \textit{Smith} would not have been decided as it was if it were not for \textit{Lyng}. In \textit{Smith}, the Court denied unemployment benefits to two practitioners of “Peyote religion” who lost their jobs after using peyote in a Native American Church service. Justice Antonin Scalia, writing for the majority, interprets the free exercise of religion protected in the First Amendment, as “the right to believe and profess whatever religious doctrine one desires.”\footnote{\textit{Smith}, 877.} Therefore, the First Amendment prohibits any “governmental regulation of religious beliefs as such.”\footnote{Ibid. (Italics in the original).} Scalia summarizes the precedent: “The government may not compel affirmation of religious belief, punish the expression of religious doctrine it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.”\footnote{Ibid., citations omitted.} But Scalia also acknowledges that “exercise of religion” involves not only belief but action, such as “assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation.”\footnote{Ibid.}
O’Connor, concurring, states that:

The Court today extracts from our long history of free exercise precedents the single categorical rule that ‘if prohibiting the exercise of religion … is … merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.’ Indeed, the Court holds that where the law is a generally applicable criminal prohibition, our usual free exercise jurisprudence does not even apply.\(^{422}\)

O’Connor critiques this majority opinion, arguing that “To reach this sweeping result, however, the Court must not only give a strained reading of the First Amendment but must also disregard our consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct.”\(^{423}\) Is O’Connor’s opinion in *Smith* in line with her opinion in *Lyng*? Juxtaposing the two opinions highlights an important difference between the cases. While *Smith* is probably the most famous Indian religious freedom case in the U.S., the conflict at its center is fundamentally different from the conflict at the center of *Lyng*. *Smith* remains a case about religion as an individual practice rather than communal identity. It seeks the accommodation of otherwise-illegal action, whereas *Lyng* seeks protection of Indigenous peoples’ relation to the land they inhabit.

While the Indians lost in *Smith*, the decision attracted strong reactions from other religious communities and from Congress, who passed in 1993 the Religious Freedom Restoration Act in response to *Smith*. RFRA aims to enact the *Sherbert* test, discussed in Part One of this dissertation, into law. It declares that “Government shall not substantially

\(^{422}\) Ibid., 892.

\(^{423}\) Ibid., 893.
burden a person’s exercise of religion even if the burden results from a rule of general applicability,” unless the government action furthers a compelling government interest and it is the least restrictive means of furthering that interest. The Court in response ruled RFRA unconstitutional as it applies to the states in its 1997 decision in City of Boerne v. Flores. In response to this ruling, several states passed their own RFRAs, and Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA), which defines religious exercise as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”

Albeit Congress’ strong reaction to Smith, cases about American Indian sacred sites have not been argued as cases about religious freedom since Lyng. Could Lyng have been argued as a case about Indigenous sovereignty? It probably could not have, because if we had seen the Indian nations involved in the case as sovereign, the Supreme Court would not have had jurisdiction over them or over the area. This is due to the courts’ binary understanding of sovereignty that I discussed in Chapter Four. As we have seen in recent cases such as the Dakota Access Pipeline, sacred sites cases are argued as ones about environmental justice. This worries me, because it, too, neglects the perspective of the people involved and depoliticizes the conflict. Moreover, according to a recent New York Times article, “the Trump administration has sought to reverse more than 60 environmental rules,” demonstrating the current precariousness of environmental protection. If what we want to protect is Indigenous sovereignty, we need to talk about Indigenous sovereignty. Resolving the case as one about either religious freedom or

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424 See footnote 28 above.  
environmental justice will not do. But in order to have a productive conversation about Indigenous sovereignty in the context of sacred sites cases, we need to transcend the binary conception of sovereignty, according to which only states can be sovereign. What might a non-binary conception of sovereignty look like?

In *Basic Call to Consciousness*, John Mohawk ties together “The meaning of sovereignty. The respect for Mother Earth. The search for integrity, the circle of life. Oppression, conquest, colonialism, exploitation. Genocide.”

I am positive that we will not achieve justice if we think about these things as disconnected. Moreover, as long as we think about Indigenous *issues*, rather than about Indigenous *peoples*, as Oren Lyons notes is the case of the United Nations Permanent Forum on Indigenous Issues, we will not achieve justice.

Lloyd Burton describes the problem similarly:

[…] when a court analyzes a sacred site case by viewing it only through the lens of First Amendment analysis or only through the lens of trust responsibility doctrine analysis, it is looking at only half the picture and doing only half its historical homework. Using either perspective alone is like viewing the situation through a spyglass, while to use both is like looking through binoculars. The latter provides both a wider angle view and a greater depth of field.

Following this analysis, we might say that what is missing from the *Lyng* decision (including the dissenting opinion) is an acknowledgement that, “once having evicted tribes from their traditional homelands and having taken measures throughout the late nineteenth and early twentieth centuries to destroy tribal religions and cultures, the U.S.

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427 Akwesanse Notes (ed.), *Basic Call to Consciousness* (Summertown: Native Voices, 2005), 69.
428 Ibid., 23.
government bears some responsibility for at least allowing them to maintain affiliation with their holiest sites and traditional religious practices." This notion helps me to envision what it means to think about sovereignty in a non-binary way. What I am striving for is the kind of protection that would recognize both the Indian nations’ power to decide how to use the holiest of their sites and the responsibility of the U.S. to promote the wellbeing of these nations. As we learn from theories of transitional justice and from other postcolonial situations, it would be naïve to think that there is any possible solution that does not require the U.S. to take responsibility for the wrongs it has done its Indigenous populations. As I see it, there are three possible routes toward a restoration of justice in our case. One is through the court system, another is through a political process, and the final one would be led by social movements. Let us examine these possible routes.

The legal route, as we learn from Lyng, would involve one of two possible arguments: either providing the courts with a better framework to understand religion more robustly, or arguing sacred sites cases as ones about Indigenous sovereignty. From a legal realist point of view, both these arguments would fail. Legal realism is based on the distinction between “law in the books” and “law in action,” and it argues, against theories of legal formalism, that court decisions are driven by material motivations rather by following legal precedents. Therefore, if the courts in cases such as Lyng are motivated by the desire to maintain U.S. sovereignty over Indian sacred sites, it does not matter how well the Indians would argue the case – they are doomed to lose. This goes back to the question of defining religion. What I showed in Part One of this dissertation is

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430 Ibid., 292.
that a more robust understanding of religion would not save the Indians from losing in the Lyng case. This is because of the unexamined underlying issue of Indigenous sovereignty. Thinking of the Lyng case as one that is (also) about sovereignty helps to think about religion in relation to land on the one hand, and in relation to oppression on the other hand. But, as I argued in Part Two of the dissertation, the existing legal framework does not allow for arguing the Lyng case as one about Indigenous sovereignty because the Indian nations in the case do not have a treaty on which to base a sovereignty legal claim. Indigenous sovereignty, therefore, is useful to me only theoretically, as a framework that opens up the possibility to think about Lyng within its historical colonial context.

One may argue that it is still beneficial to bring cases such as Lyng to court because the cases receive public attention and courts would eventually follow public opinion, because they are dependent on the public’s trust. But given the limited financial resources of Indigenous communities, is litigation really the best way to spend their money, if they are likely to lose in courts? The political route may seem more promising.

When we look at the history that is recounted in Chapter Four of this dissertation, we see that the relationship between the federal government and American Indians has changed over the years and has not been limited to violence. There have been attempts by the government and by congress to promote Indian sovereignty, and therefore it might be possible to envision similar relationships in the future. Moreover, specifically in the Lyng case, it was congress who eventually protected the High Country from development. Does this mean that the political route is more promising than the legal route? Scholars have shown that government agencies such as the Forest Service have been more willing
than the Supreme Court to protect Indian sacred sites. They therefore argue that the *Lyng* decision, that leaves the protection of the High Country in the hands of congress and the Forest Service, was correct and appropriate. But as we have seen time and again, the Forest Service has failed to protect Indigenous sacred sites in the High Country and in other cases since *Lyng*. Environmental protection by congress has also been unstable. AIRFA’s consultation requirements may have been a step in the right direction toward something along the lines of co-management of sacred sites on public lands, but even after the act’s amendments in 1994 it has been considered to be “without teeth.”

The biggest problem with the legal and the political routes is the power that they give the U.S. in deciding the fate of Indigenous peoples. Both routes recognize the sovereignty of the U.S. and they also allow the U.S. to determine the terms of the debate. If we want to move in the direction of concurrent sovereignty or co-management, an alternative route should be considered. I see hope in the third proposed path, that of social movements. As we have seen in Chapter Four of this dissertation, the relationships between Indians and Whites in northwest California were not limited to warfare and violence. A range of relationships, including intermarriage and employment, were recounted in the Theodoratus Report. In the *Lyng* case itself, unexpected alliances between the local Indigenous communities and environmentalists were formed. Recently, we have seen an overwhelming support by White Americas of the Standing Rock protesters against the Dakota Access Pipeline. Beyond the American Indian case, we see movements such as BDS in South Africa and in Israel/Palestine, and the Movement for Black Lives in the United States, bringing about hope for real social change, as did
historical movements in the United States, such as the American Indian Movement, the Civil Rights Movement, and the Black Panthers.

Social movements can open themselves to a range of practices, including ones that are inspired by transitional justice, such as truth commissions, reparations, apologies, and prosecutions, to respond to the structural injustices that exist in states that have not undergone regime transition in their relation to Indigenous peoples. Those movements can open themselves to Indigenous worldviews and jurisprudences rather than simply continuing to privilege the legal mechanisms of the state. As I have argued throughout this dissertation, the voices of the Indigenous witnesses in the *Lyng* case need to be heard and the courts have been ignoring them. Alternative legal mechanisms that are not limited by the adversary procedure that rules the common-law system can provide a platform for marginalized voices to be heard and to more robust stories – about religion, about injustice – to be told. While colonial law and legislation limit Indigenous peoples’ political, cultural, and social authority, alternative modes of conflict resolution can establish Indigenous identities and cultural knowledge as foundational to social reform.

One advantage of such alternative mechanisms is that they can be flexible in their relation to the state – they can work side by side with formal legal mechanisms, enjoy government support, or subvert state power altogether. They can transcend the rights discourse that is promoted by legal texts such as the *Lyng* decision and focus on expanding the social collective imaginary, allowing Indigenous voices to be heard. There are examples of such collaborations between Indians and Whites in the U.S, such as the voluntary ban on climbing Mato Tipila / Devils Tower during the month of June, or the attempts by Christian activists to convince their individual churches to formally repudiate
the Doctrine of Christian Discovery. The U.S. Supreme Court is unlikely to overturn *Johnson v. McIntosh*; it is unlikely to overturn *Lyng v. Northwest Indian Cemetery Protective Association*. It is the courts’ function to translate human stories into legal language, to convert communities into rights-bearing individuals. Scholars and activists are not limited to existing legal frameworks. If the religious freedom at the center of *Lyng* is “hollow,” as Justice Brennan declares, we need to strive for an alternative, more substantial freedom: we need to strive for sovereign freedom.
APPENDIX A

Tuesday, March 15, 1983                      1:45 pm O’clock

The Court: Very well, you may proceed.

Ms. Miles: Call Lowanna Brantner, who is at the stand, now.

Lowanna Brantner

Called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The clerk: Please state your full name for the record.

The witness: Lowanna Bratner.

The clerk: Your occupation?

The witness: Was a housewife.

The clerk: Thank you.

The court: You may proceed.

Direct Examination

By Ms. Miles:

Q. Mrs. Brantner, can you tell us your tribe?

A. Yurok.

Q. When were you born?

A. 1908, 22nd of February.

Q. And where were you born?

A. Mettah on the Klamath River.

Q. Where is Mettah located? Is it in the reservation?

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431 Reporter’s Transcript, 226-235.
A. Yes.
Q. Where do you live now?
A. At Mettah.
Q. How were you raised?
A. I was raised as a full-blooded Indian baby should be raised and grewed [sic] up as one.
Q. Who were you raised by?
A. My grandparents. I was raised by my grandparents, so I was taught by the elders about our tradition, about our church, about our people.

I was fortunate. Today I’ll say “fortunate.” Many times I thought it was not fortunate that I was born to four of the biggest houses in the Yurok strip where the famous dances had come up, the White Deerskin Dance, the Jump Dance and the Brush Dance and many other games, and how the Indians had to use the High Country to go and pray so that when they come back to the lowlands, we can share with one another.

My place has been that I have a lot of those relics that I share with my neighbors, the Hoopas, the Karok’s [sic] and my own people to uphold and to see that our religion go [sic] on as it has for thousands of years past.
Q. When you say you share these items, what do you mean you are “sharing them”?
A. Well, down through the years, due to the fact that there were soldiers and people who came through and destroyed, burned, killed, a lot of the relics were burned or taken.

So now, a few of us are left in the three tribes and we take and share. So and so’s got a Brush Dance. Their time come, [sic] their time to dance, we give them so many piece relics they need and the other people do the same so that the dance can be performed the true way as it has been for thousands of years.
Q. Do you hold a position within your people?
A. Yes.

Q. That’s different from others?
A. Yes, I was taught -- I'm not an Indian doctor, but I was taught how the Indian doctors do, because three of my grandmothers, one from Buff Creek, one from Saa’ and one of them from Orick was as Indian doctor.

But then Indian doctors that train, they are just like it is of the medical doctor today. They fill so many different categories. Some is for brains and some is for bones and some of them for other ailments.

Years ago, we use our herbs from the High Country where god had left a piece of land dedicated to be the use of the tribes, to go there and pray like they say Mecca, or different places through the world where the people go by the thousands.

We were only allowed to take those that have passed the test and proven, for they come back to the lowlands and then we pray for our people, asking for help and these dances were not performed for the beauty; they were performed asking that we’ll have plenty to eat, we would have plenty of game, for conservation was the mainstay of our livelihood and through these canyons -- and we always wanted to protect the top of the mountain, because anyone that knows the Klamath, for the first two miles, it’s just rock, stray bluffs and cliffs.

So beyond that, god left us a strip about ten miles wide where the Karoks can come and gather their grain, their seeds and things and once I heard they say, “do you hunt at Doctor Rock?”
No, Ma’am, we do not hunt at Doctor Rock. It’s a sacred place. Nothing is killed at Doctor Rock and Chimney Rock. Chimney Rock is a man’s place to go have -- to prove that they can stand anything that comes along and be brave, to face the world.

So the people can have the knowledge and carry on and we, older people watch the younger boys -- they are raise by the old men and taught. The young girls are separated and they are taught and that was a thing was left to me by these great houses and these great rulers.

We had no chief. We had head men and we all got together and anything that come up, we would come together and talk it over and if there was anything that needed help, then we would see that they all got help, whether that was something that had happened, why they didn’t have any food or whether there was sickness. These doctors would go there -- not everybody -- and it’s the same way, speaking of how we had lived.

Your Honor, may I proceed?

The court: Sure.

The witness: How we had lived, we the people from Bluff Creek, which is no more now -- that's where we had our Boat Dance or our White Deerskin Dance.

Unbeknownst, unknown to me and my people, we didn’t know that the BIA, even though we had a treaty which we didn’t know later that it was not ratified -- we gave all we had promised, way beyond the mountains for them and for the land that we were to have in there, to keep our homes.

In that way we lost everything and now we are standing on the last peak, Doctor Rock, Chimney Rock. My neighbors have lost a lot of their ceremonial grounds due to
mismanagement of the people, not because they were cruel, but because they didn’t understand.

The court: Not because they were what?

The witness: They are not cruel.

The court: Cruel?

The witness: Or unkind. They just did not understand.

The court: Who was it that didn’t understand?

The witness: The new people that came into the Indian country.

The court: By the “new people,” who do you mean?

The witness: The White people.

The court: The White people? Well, you are generous in saying they aren’t cruel.

All right, go ahead.

The witness: So, today I am here, the last place we have. I’m looking back. The Tolewah Tribe, which is a great nation at one time, their villages was [sic] in the town or the city of Crescent City, Smith River and all through there. They have nothing of their ceremonial grounds, but many of them go to the High Country where they have for thousands of years and prayed where they were told to go, Summit Valley.

The Karoks, they come over the mountains. There is [sic] trails there today and we could show it to you, where those trails are. They are secret to everybody else. There are just a few who know where they are, which lead to the High Country, Doctor Rock, Chimney Rock, which is a sacred place.

Only a few people that are left in these great tribes that was [sic]. All we need now is to have the understanding and my understanding was always and I was so happy
that we had the Six Rivers National Forest next to our big reservation. Of course, I was --
my understanding and reading that they were there to protect these lands, so that
everything was cared for for the use of all people and their rights, and where they could
go, some of them to have a home even.

Now, it’s not speaking unkind, but when the Six Rivers National Forest destroyed
my village and then allowed them to go in there and mine, part of that Bluff Creek, my
people, their bones floated down the Klamath River and it’s the same now. On the mouth
of the River where we used to have the White Deerskin Dance ending, there is a station
up there that the soldiers put in.

I understand that everything was dumped into the ocean, all the debris from their
bathhouses and all through there run into the ocean and contaminated it so we have
nowhere to gather our seaweed or mussels. It’s not fit to eat and up on through the
Klamath River, if you were to go through there, it would make you sick. One of the most
beautiful rivers in the world. I wrote an article on it once, I was so proud of it. Now, I am
heartsick about it.

The mountains have all caved in. some of the most beautiful streams, we have
only concrete left.

Blue Creek, and that -- that goes to the steps that leads [sic] up to the Doctor Rock
and the High Country. We need that because they have the best spawning grounds. I
understand they say there is also falls in there and --

The court: Ma’am, I’m very sorry to interrupt you and I am very sympathetic to
everything you say, but I think we are a little off the track of what you’ve been called for
and I will ask the attorney to ask you some questions.
The witness: Thank you for giving me the time you gave me.

The court: No, I am very interested, but I think it’s a little bit off track of the particular thing we are talking about now. Some of it, not all of it.

The witness: Okay.

The court: Thank you. You see, the one thing that I got from your testimony very clearly is that as a -- and I’m not trying to put words in your mouth, but I want you to know that I think I understood what you are saying, is that due to the deprivations occasioned by the Whites, such as the pollution of the streams and the like, and the taking over of more and more land, that the preservation of this particular piece of sacred land has become all the more important.

That’s in part what you are communicating to me; is that right?

The witness: Yes.

The court: All right, go ahead.

Ms. Miles: Actually, she covered everything in her answer, it was so lengthy.

The court: Yes, even the fish.

Ms. Miles: I have no further questions, your honor.

The court: All right. Do you have any questions?

Mr. Sherwood: No, your honor.

Ms. Walz: I have no questions.

The court: You may cross-examine her.

Cross-Examination,

By Mr. Hamblin:
Q. Only one question. Miss Brantner, you mentioned that at times you and others would go up into the High Country to gather herbs for medicine?

A. Yes.

Q. If I understand, do you still -- do you still do that or people that you know still do that?

A. Yes. Yes, I know because I give the relics to my people to perform their dances about three to four times a year.

Q. And they still go up?

A. That is the only place they can go, because that was a site that was set aside and things are planted there that I don’t know the words. I’m not an educated woman, but they don’t grow nowhere else and they are beautiful and they are there.

I am proud they are there, but I would be happy to say that we don’t need no roads to lead in there to destroy the things that are so tiny and growing and there is nowhere these animals can go that are living there, because there is nothing left toward the river.

Q. You are speaking of the Blue Creek area, now?

A. Yes.

Mr. Hamblin: Fine, no further questions.

The court: Thank you for your testimony. There is a very bad step there, so please be careful.

Mrs. Brantner, I think -- I think I want to say something to you. I don’t know where the ball is going to finally bounce. I haven’t heard all the evidence, but I think you should go knowing that what you’ve said has been very helpful.
The witness: Thank you, your honor.

The court: All right.
APPENDIX B

Sam Llewelyn Jones, Jr.,

Called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The clerk: Please state your full name.

The witness: Sam Llewelyn Jones, Jr.

The clerk: Spell your last name, please.

The witness: J-O-N-E-S.

The clerk: Your occupation?

The witness: I am retired.

Direct Examination,

By Ms. Miles:

Q. Mr. Jones, where do you live?

A. I live at the Martins Ferry on the Klamath River, Hoopa River Indian Reservation.

Q. And what tribe are you?

A. I am a Yurok, full-blooded Yurok.

Q. Were you born on the reservation?

A. Yes, I was born March 10th, 1913.

Q. Can you tell me about your schooling?

A. I went to school in Martins Ferry Elementary, California. I went to high school in Riverside, Sherman Institute, Riverside, California.

432 Reporter’s Transcript, 236-41.
Q. Is that a Bureau of Indian Affairs school?

A. Bureau of Indian Affairs school.

Q. Do you participate in traditional ceremonies?

A. Yes, I am a dance maker for the Brush Dance. I’ve been giving Brush Dance for the last ten years. You have to collect your ceremonial things. You go to different -- like Lowanna Brantner here, she has regalia. I go to her and tell her I’m giving a dance, Hoopas, Karoks, and they all come to the Brush Dance.

I have to settle up with all the debts. You have to pay the people that died. That’s in our medicine that we give the Brush Dance.

We have a child that’s sick, that we doctor him to grow better in life. We have to have a medicine lady that fasts for ten days and she makes the medicine and she has to have a medicine girl that I have to get to the Brush Dance.

She has to pledge that she has no sex or can’t have her period. The mother that brings her child has to be the same thing. Can’t have no sex or have any period or anything in that line.

Then you have feed [sic] the people, you have to gather your singers. Not everybody is gifted to sing and some of our people is [sic] gifted to sing, so they dance and you’ve got to get them to dance in your Brush Dance.

You’ve got to get your singers lined up, your regalia and all that and when they dancing [sic] in the hall where you’re doctoring this baby, the people that singing [sic], it’s kind of like a prayer to the spiritual world. They bring in the good spirits in.

The people that’s [sic] dancing with them, they have a -- about twenty in a pit, girls and boys. A girl can’t participate in it if she’s married or have a child. No more
dancing for her and the stomping on the ground and jumping in the middle is driving all the bad spirits away and the guys that singing is [sic] praying to the spiritual world to bring the good spirits in to help the baby that you are doctoring.

Q. Mr. Jones, can you explain how what you’ve just been discussing, what is the Brush Dance -- is that correct? Were you just speaking about the Brush Dance?

A. Yes.

Q. How does that relate to the High Country that we’ve all been listening about?

A. The medicine lady goes to the High Country for her spiritual power where she makes her -- does her fasting and stuff to help a child that’s -- we are doctoring there.

Q. So the ceremony you are talking about, that was where? Where does that take place? On the river?

A. They have one -- the one I take care of is in Weitchpec and they have one at Pecwan and one at Requa and one in the Karok country in Somes Bar.

Q. So the dance takes place --

A. For the Brush Dance.

Q. And someone has to go up to the High Country to --

A. Call a spirit from the High Country.

Q. Will constructing the road that the Forest Service has planned affect your ability to carry on this ceremony you have just described?

A. Yes, it will. the High Country is like our church. In building a road through our church would be really destructive in my frame of mind. I don’t know about anybody else, but that’s what my belief is. That’s our belief, our Indian belief.

Q. Do you use --
The court: Mr. Jones, why would it be destructive?

The witness: They have to pray. When the medicine lady goes out there to pray, they stand on these rocks. They call them Doctor Rock and Chimney Rock and they meditate. I mean the forest is there looking out. They talk to the trees and rocks, whatever is out there.

Our people talk in their language to them and if it’s all logged off and all bald there, they can’t meditate at all. They have nothing to talk to and after they get through praying, their answer comes from the mountain. The medicine lady that goes there or man will see a light or a phantom or whatever they see and then their prayers are answered.

Ms. Miles: Q. Do you use in another way, these people to cure you?

A. Yes.

Q. If you can share with us?

A. Yes, this High Country isn’t just made for doctoring somebody. You go out there to be a lot of other things. A good boat maker, good hunter, good fisherman, good stick player, good gambler. You do all that. In 1942 when I went to the service --

The court: Pardon me? Hold your thought about 1942 and you went to service. What’s a good stick player?

The witness: A stick player is a team that we got three players in a game, but you can have five or six substitute for each time, and we had a team in Weitchpec.

The court: It’s an athletic game?

The witness: It’s an athletic game.
The court: And when you speak of a good gambler, does that mean just what it says, somebody who plays poker?

The witness: No, Indians have their own gambling game. They have sticks and one stick has a black thing around it, a black fern.

The court: It’s a game of chance?

The witness: Yes, you have eleven sticks from that one side, you win the game.

The court: You answered my question and you were talking about 1942. What were you saying?

The witness: In 1942 when I went to war, they went to the High Country, Doctor Rock, Chimney Rock, to pray for me to be -- to come home.

My grandmother made an Indian plate for me to come back to eat in and when we got up to the Ruhr River, we were spearheading the German army and they knocked the bridge out. They zeroed in the 88th and they knocked everybody out and I was still sitting there.

In all belief, that’s our Indian powers working there, our Indian beliefs.

Ms. Miles: I have no other questions, your honor.

The court: Do you have any questions?

Mr. Sherwood: I have no questions.

Ms. Walz: I have no questions, your honor.

The court: All right. Mr. Jones, thank you for your testimony. You may step down. Watch your step.

The witness: Thank you for listening.
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Dana Lloyd  
Curriculum Vita

2018-present  Postdoctoral Research Associate, Washington University in Saint Louis, John C. Danforth Center on Religion and Politics

Education
2018  Ph.D., Department of Religion, Syracuse University  
2010  MA in Philosophy, Tel Aviv University, *summa cum laude*  
2009  LL.M., Tel Aviv University, Faculty of Law, *magna cum laude*  
2004  LL.B., Tel Aviv University, Faculty of Law

Professional Experience
2017-2018  Instructor, Villanova University, Theology and Religious Studies  
2010-2011  Research Fellowship, Minerva Humanities Center, Tel Aviv University  
2007-2008  Research Fellowship, Institute for Social Research, Tel Aviv University  
2004-2005  Law Clerk, Justice Judith Shevah, Magistrate’s Court, Israel  
2001-2003  Internship, Goldberg & Saidoff Law Firm

Publications
Peer-Reviewed Articles
- “Paradoxes of Dignity in Israel/Palestine,” *Law, Culture, and the Humanities*, forthcoming, 2018  
- “Heidegger in Hebrew: An Unknown Chapter in the Formation of a Local Philosophy,” *Theory and Critique* (Summer 2012), 40:35 (with Hagi Kenaan and Shmuel Rottem) [in Hebrew]

Book Chapters

Edited Journal Special Section
Book Reviews

Other Publications

Teaching Experience
2018  *Instructor*, Native American Religions (Spring), Villanova University
*Instructor*, Ethics of Marginalization (online course, Summer), Villanova University
*Instructor*, Religion, Meaning, and Knowledge (online course, Spring), Syracuse University
2017-2018  *Instructor*, Religion and Sports (online course), Syracuse University
2017  *Instructor*, God in the Courtroom, Villanova University
2014  *Co-Instructor*, Race and the Limits of Law in America, Telluride Association, summer program for gifted high school students, Cornell
*Teaching Assistant*, Ecstasy, Transgression, Religion, Syracuse University
2013  *Section Leader*: What is Belief?, Syracuse University
2012  *Teaching Assistant*, Medieval Christianities, Syracuse University
2011  *Teaching Assistant*, Introduction to Religion, Syracuse University
2010-2011  *Co-Instructor*, Theories of Citizenship, Tel Aviv University
2009  *Teaching Assistant*, Discrimination Law, Tel Aviv Law School
2008-2009  *Section Leader*: Philosophy of Religion, Tel Aviv University
2007  *Section Leader*: Guided Reading in Descartes’ *Meditations*, Tel Aviv University
2006  *Teaching Assistant*, Introduction to Moral and Political Theory, Tel Aviv Law School
Invited Guest Lectures

- Religion, Race, and Environmental Ethics, Brown University, 2017
- Do Black Lives Matter to God?, Villanova University, 2017
- What Counts as Evidence in the Humanities?, Institute for Research in the Humanities, University of Wisconsin—Madison, 2016

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- “American Indian Religious Freedom,” at the American Academy of Religion Annual Conference, Denver, 2018
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- The True Political Philosophy – Arendt on Kant, Tel Aviv University, 2010

Professional Affiliations

- American Academy of Religion
- American Comparative Literature Association
- American Philosophical Association
- Association for the Study of Law, Culture and the Humanities
- Critical Ethnic Studies Association
- Law, Literature and the Humanities Association of Australia
- National Women’s Studies Association

Other activities

2015-16 Co-producer / co-host of Her Turn – News by and about Women on WORT FM
2010 Worker’s Hotline (Kav La’ovod), research and consultation on Israeli labor law
2003-2004 The War on Poverty Movement (Ha’tnua Le’milhama Ba’oni), legal assistance on foreclosure cases

Languages

Hebrew (native); English (excellent); German, French, Arabic, Aramaic (basic knowledge)

Bar Admissions

Israeli Bar Association