# Making Live and Letting Die: The Biopolitical Effect of Navajo Nation v. U.S. Forest Service

## Jessica M. Erickson $^{\dagger}$

The being within, communing with past ages, tells me that once, nor until lately, there was no white man on this continent; that it then all belonged to red men, children of the same parents, placed on it by the Great Spirit that made them, to keep it, to traverse it, to enjoy its productions, and to fill it with the same race, once a happy race, since made miserable by the white people who are never contented but always encroaching.<sup>1</sup>

#### I. INTRODUCTION

The philosophies of Michel Foucault have long been applied to various cultures and social movements in hopes of gaining insight into how power operates within a societal framework.<sup>2</sup> One philosophy, Foucault's conception of "biopolitics," refers to the state's regulatory control over the population as a whole, or its ability to control the life and death of the citizenry.<sup>3</sup> Instead of exercising power at the level of each individual, "biopower"<sup>4</sup> is exercised on the level of the population; it is the power to make live and let die.<sup>5</sup>

<sup>&</sup>lt;sup>†</sup> J.D. Candidate, 2010, Seattle University School of Law; B.A., Philosophy and Religious Studies, B.A., Law and Justice, Central Washington University, 2003. The author would like to thank the members of the *Seattle University Law Review*, especially Gabriella Wagner, James Beebe, Micol Sirkin, and Colin Prince. The author would also like to thank her family for their constant and unending support.

<sup>1.</sup> See JOHN SUGDEN, TECUMSEH: A LIFE 22, 374–75 (1997). Tecumseh (born in March 1768 and died on October 5, 1813) was a famous Native American leader of the Shawnee.

<sup>2.</sup> MICHEL FOUCAULT, "SOCIETY MUST BE DEFENDED": LECTURES AT THE COLLÈGE DE FRANCE 1975–1976, (Mauro Bertani et al. eds., David Macey trans., 2003) [hereinafter FOUCAULT, SMBD].

<sup>3.</sup> MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION 139, 143 (Robert Hurley trans., 1978) [hereinafter FOUCAULT, THE HISTORY OF SEXUALITY]; see also FOUCAULT, SMBD, *supra* note 2, at 243.

<sup>4.</sup> The terms "biopolitics" and "biopower" are used somewhat interchangeably within Foucault's philosophies, but basically, biopolitics is the style of government that regulates populations through biopower—the impact of political power on all aspects of human life.

<sup>5.</sup> FOUCAULT, SMBD, supra note 2, at 241.

Indian<sup>6</sup> nations have been battling for sovereignty—freedom from external control in determining the direction of their life—since the founding of this country.<sup>7</sup> Throughout its relatively short history, the United States has espoused a number of varying policies directed towards Native Americans and tribal culture.<sup>8</sup> These policies, manifested through various congressional acts and case law, have had differing impacts on native culture.

One noteworthy example is the Religious Freedom Restoration Act (RFRA),<sup>9</sup> which despite its noble purpose,<sup>10</sup> has proven to have a negative effect on tribal culture. The Ninth Circuit has erected hurdles that tribes must face in order to establish a valid claim under the RFRA. Beginning with its ruling in *Navajo Nation v. U.S. Forest Service*,<sup>11</sup> the Ninth Circuit has consistently denied tribes' claims under the RFRA because evidence of "damaged spiritual feelings" is insufficient to prove that practice of their religion was substantially burdened.<sup>12</sup>

This Note explores the connection between the philosophy of Michel Foucault and current Ninth Circuit sacred site cases, primarily *Navajo Nation v. U.S. Forest Service.*<sup>13</sup> Part II of this Note discusses Foucault's philosophies on biopower. Part III briefly explores the evolution of federal Indian policy. Part IV provides background on Native American religions and their connection to the land. Part V outlines the Ninth Circuit's legal framework for protecting native religions. Part VI concludes the Note, arguing that the test developed from *Navajo Nation* should be reconsidered because of its biopolitical effect on Native American populations. In its place, a new test should be implemented that takes into consideration the unique character of the link between native religion and the land.

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<sup>6.</sup> This Note uses the terms "Native American," "Indian," and "native" interchangeably as each term is considered to be politically acceptable.

<sup>7.</sup> An indepth analysis of what sovereignty means in the context of federal Indian law is beyond the scope of this Note. It is sufficient to observe that Indian policy and the definition of tribal sovereignty has fluctuated through the years. *See infra*, Part II.

<sup>8.</sup> For an overview of Federal Indian law, *see* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, (Nell Jessup Newton et al. eds., Lexis Nexis 2005) (1953).

<sup>9.</sup> Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, § 2(b), 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb (2006)).

<sup>10.</sup> One declared purpose is to "provide a claim or defense to persons whose religious exercise is substantially burdened by the government." *Id*.

<sup>11.</sup> Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058 (9th Cir. 2008), cert denied, 129 S. Ct. 2763 (2009).

<sup>12.</sup> Id. at 1070 n.12.

<sup>13.</sup> Navajo Nation, 535 F.3d 1058.

#### II. FOUCAULT AND POWER

Just as the history of Indian policy is relevant to understand how tribal sovereignty and land ownership has evolved, background on Foucault's theories of power is necessary to understand how this power is experienced in the Native American context. Because of the strong link between Native American culture and the land, regulations affecting the land inevitably affect the native populations themselves. Foucault's theories provide a framework from which we can criticize regulation<sup>14</sup> affecting Native American sacred sites. Moreover, the nature of Foucauldian power explains how entire populations can be affected, or even eliminated, by certain types of legal or political decisions.

Michel Foucault, noted philosopher, historian, critic, and sociologist, is widely known for his work on power and the relationships between power, knowledge, and discourse. Foucault taught at the Collège de France from January 1971 until his death in June 1984.<sup>15</sup> In a series of lectures delivered at the Collège de France in 1975 and 1976, Foucault addressed the function of racism in the state and the specific techniques of power associated with it. In his concluding lecture, he considered two different powers he had undertaken to study in the course.

The first was the power of the sovereign: from the early modern period, the power embodied by the sovereign was a "right of life and death" over his subjects—the right to "take life or let live."<sup>16</sup> The seventeenth and eighteenth centuries saw the emergence of techniques of power that were centered on the individual body, such as torture and the modern penal system.<sup>17</sup> However, in the second half of the eighteenth century, a new technology of power emerged, which modified the disciplinary power and expanded it beyond the realm of the individual.<sup>18</sup> As Foucault explained, "[u]nlike discipline, which is addressed to bodies, the new nondisciplinary power is applied not to man-as-body but to the living man, to man-as-living-being. . . . [T]o man-as-species."<sup>19</sup> This man-asspecies power did not, like discipline, try to control by ruling a "multiplicity of men to the extent that their multiplicity can and must be dissolved into individual bodies that can be kept under surveillance, trained,

<sup>14.</sup> The term "regulation" is used loosely to describe any legislative act, administrative regulation, or case law.

<sup>15.</sup> With the exception of 1977 (when he was on sabbatical). His chair was in the History of Systems of Thought. FOUCAULT, SMBD, *supra* note 2, at ix.

<sup>16.</sup> Id. at 241.

<sup>17.</sup> *See id.* at 242. This focus on the individual is most closely associated with Foucault's work with disciplinary power and the emergence of modern penitentiaries. *See generally* MICHEL FOUCAULT, DISCIPLINE AND PUNISH (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

<sup>18.</sup> FOUCAULT, SMBD, *supra* note 2, at 242.

<sup>19.</sup> Id.

used, and, if need be, punished.<sup>20</sup> Rather, this new power is established to address a multiplicity of men "not to the extent that they are nothing more than their individual bodies, but to the extent that they form, on the contrary, a global mass that is affected by overall processes characteristic of birth, death, production, illness, and so on.<sup>21</sup> It is this "massifying" and not "individualizing" power which Foucault called the "biopolitics of the human race.<sup>22</sup>

While disciplinary power is applied on an individual level to train and make use of the body, the second kind of power functions on a different scale and is implemented in a very different way.<sup>23</sup> This power, called biopower, is applied to the human species through a biopolitical form of government.<sup>24</sup> According to Foucault, biopower emerged during the eighteenth century as a result of the rapid growth of various disciplines and regulations designed to control burgeoning populations.<sup>25</sup> Such power reduced life into a series of exacting calculations by the state and assigned knowledge as the power to transform human life.<sup>26</sup> The subject of the state's calculations increasingly became the life and death of the population as a whole, as opposed to specific individuals.<sup>27</sup>

It is this slow evolution away from using political power to control the individual, to "take life or let live," and towards the impact of political power on all aspects of human life that Foucault describes as the "right to make live and to let die."<sup>28</sup> Another way to view this is to look at it as the contrast between an epidemic and an endemic. Instead of an epidemic, which suddenly causes more frequent deaths, an endemic has permanent characteristics and factors that often work over time, that is, "illness as phenomena affecting a population."<sup>29</sup>

<sup>20.</sup> Id.

<sup>21.</sup> Id. at 243.

<sup>22.</sup> *Id.* Biopolitics referred to the state's regulatory control over the population as a whole— "the species body, the body imbued with the mechanics of life and serving as the basis of the biological process." *See* FOUCAULT, THE HISTORY OF SEXUALITY, *supra* note 3, at 139; *see also* FOUCAULT, SMBD, *supra* note 2, at 243, 247 (With "the emergence . . . of this technology of power of 'the' population as such, over men insofar as they are living beings . . . we have the emergence of a power that [Foucault called] the power of regularization.").

<sup>23.</sup> FOUCAULT, SMBD, *supra* note 2, at 242.

<sup>24.</sup> *Id.* Foucault also refers to this type of power as biopower in *The History of Sexuality*. FOUCAULT, THE HISTORY OF SEXUALITY, *supra* note 3, at 143 ("applied not to man-as-body [as disciplinary power is], but to the living man, to man-as-living-being; ultimately . . . to man-asspecies.").

<sup>25.</sup> See Joshua E. Perry, Biopolitics at the Bedside, 28 J. LEGAL MED. 171, 174 (2007).

<sup>26.</sup> FOUCAULT, THE HISTORY OF SEXUALITY, *supra* note 3.

<sup>27.</sup> Id. at 140.

<sup>28.</sup> FOUCAULT, SMBD, supra note 2, at 241.

<sup>29.</sup> Id. at 244.

While biopolitics most obviously concerns population-level health regulation and policy, it also encompasses environmental regulation. Foucault explained that control over the human species is also exercised by control over its environment, the "milieu in which they live."<sup>30</sup> This includes direct effects on geographical, climatic, or hydrographic environment, including "the problem of the environment to the extent that it is not a natural environment."<sup>31</sup> Basically, when you control a population's environment, you control the population.

Foucault's philosophy on biopower has primarily been connected to scholarship in the medical field and the field of health regulation.<sup>32</sup> However, any time a regulation, a court ruling, or even a social norm affects the ability to live, Foucault's ideas apply. The exercise of biopower to "compel conformity and its tendency to oppress and alienate results in political struggles and strategies that manifest in culture wars over one's 'right' to life (and to death), to health, to happiness, to one's body, and 'to rediscovery of what one is and all that one can be."<sup>33</sup> This right to rediscover oneself and determine specific opinions and worldviews includes religion. Therefore, within the Native American context, regulation of the land, manifested through judicial holding, has a biopolitical effect on life because individual and tribal identity are inseparably connected with what is being regulated—the land.

## III. A BRIEF HISTORY OF FEDERAL INDIAN POLICY

Federal Indian policy has a long and varied history in the United States.<sup>34</sup> Occasionally, sentiments focus on tribes as inherent sovereign bodies associated with a particular geographical base protected by the federal government.<sup>35</sup> However, the dominant policy has been to completely disseminate tribes and assimilate their members into non-Indian society.<sup>36</sup> The tension between these disparate views is still felt in current Indian law cases. For this reason, it is unsafe to presume that federal Indian policy has settled in one particular direction.<sup>37</sup>

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<sup>30.</sup> Id. at 245.

<sup>31.</sup> Id.

<sup>32.</sup> See, e.g., Perry, supra note 25.

<sup>33.</sup> Id. at 175 (citing FOUCAULT, THE HISTORY OF SEXUALITY, supra note 3, at 145).

<sup>34.</sup> See generally COHEN, *supra* note 8, for a comprehensive overview of federal Indian policy. 35. See the Marshall Trilogy: Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee

Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

<sup>36.</sup> The aim of the termination policy was, "as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, [and] to end their status as wards of the United States ....." H.R. Con. Res. 108, 83rd Cong., 67 Stat. B132 (1953).

<sup>37.</sup> See, e.g., COHEN, supra note 8, at 10.

During early colonial times, tribes were viewed as sovereign powers.<sup>38</sup> However, as the colonies continued to expand and the American Revolution came and went, tension grew between Indian and non-Indian populations, particularly with regard to the land the tribes occupied.<sup>39</sup> A series of cases, known as the "Marshall Trilogy,"<sup>40</sup> quickly emerged and defined tribal sovereignty in relation to land.

The first of the trilogy, *Johnson v. M'Intosh*,<sup>41</sup> recognized that although the tribes had the right to occupy their land, the federal government could extinguish any title they held. Additionally, the tribes could alienate their land only to the federal government.<sup>42</sup> In effect, the Court determined that the title the Indians held ("Indian title" or "aboriginal title") was held only at the sufferance of the federal government,<sup>43</sup> and that, by purchase or conquest, this title could be taken away.<sup>44</sup>

Following *M'Intosh*, the Court further tailored the concept of tribal sovereignty in *Cherokee Nation v. Georgia.*<sup>45</sup> Chief Justice Marshall determined that the tribes were capable of governing themselves and their own affairs; however, their sovereignty was not comparable to that of a foreign nation.<sup>46</sup> Rather, Marshall said that their status was that of a "domestic dependant nation," which was enclosed entirely within the United States territory.<sup>47</sup> The dependent nation's relationship with the United States is like that of a ward to its guardian.<sup>48</sup> This is the root of the "trust responsibility," a term describing the relationship between the federal and tribal governments.<sup>49</sup>

Even more pivotal than *Cherokee Nation* in affirming tribal sovereignty was *Worcester v. Georgia.*<sup>50</sup> After reviewing treaties made with the Cherokee, congressional acts, and the course of dealing with the Indians, Chief Justice Marshall concluded that the Cherokee nation was a distinct community "occupying its own territory, with boundaries accurately described."<sup>51</sup> Marshall further asserted that the state's law could

<sup>38.</sup> See id. at 10–19. With sovereignty came the right to deal with foreign nations, such as the British Colonies, and the recognition that Indian tribes held some kind of alienable title to the land they occupied. Id.

<sup>39.</sup> It is beyond the scope of this Note to address the detailed history of each period.

<sup>40.</sup> See cases cited supra note 35.

<sup>41.</sup> Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

<sup>42.</sup> See id. at 573.

<sup>43.</sup> See id.; COHEN, supra note 8, at 56.

<sup>44.</sup> M'Intosh, 21 U.S. at 587.

<sup>45.</sup> Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

<sup>46.</sup> Id. at 16.

<sup>47.</sup> Id. at 17.

<sup>48.</sup> Id.

<sup>49.</sup> COHEN, supra note 8, at 122.

<sup>50.</sup> Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

<sup>51.</sup> Id. at 520.

have no force in that territory, reaffirming tribal sovereignty over the tribe's own land.<sup>52</sup> However, as the West continued to expand and change, federal Indian policy was forced to change with it.

The expanding West caused federal Indian policy to evolve—by restricting tribes to specific reservations.<sup>53</sup> As demand for Indian land increased, justification for acquiring non-Indian lands became necessary.<sup>54</sup> The theory of assimilation was used to justify the legislation approving the acquisition of Indian lands and was heralded as benefitting the Indians.<sup>55</sup> Some proponents of assimilation believed that the policy would aid the absorption of Indian tribes into mainstream society and thereby cure "savage" tribes of their culture.<sup>56</sup>

The Indians' move to the reservations<sup>57</sup> was followed shortly by the Allotment Era. During this period, reservations were broken into smaller portions and given to individual Indians.<sup>58,59</sup> The allotment period continued until the beginning of the twentieth century, when policy shifted more towards tolerance and respect for the traditional aspects of Indian culture.<sup>60</sup> However, this period of reorganization<sup>61</sup> was short-lived. The

58. *See generally* Indian General Allotment (Dawes) Act of 1887, ch. 119, 24 Stat. 388 (repealed 1934); COHEN, *supra* note 8, at 75–84. Allotment decreased tribal landholding and surplus land was often sold to non-Indians. *Id.* 

<sup>52.</sup> Id. at 561.

<sup>53.</sup> COHEN, *supra* note 8, at 45, 65. Policy shifted from removing the tribes to concentrating them on fixed reservations. *Id.* The policy of "concentrating the Indians on small reservations of land, and of sustaining them there for a limiting period, until they can be induced to make necessary exertions to support themselves" was first implemented in 1853. *Id.*; CHARLES E. MIX, ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS, S. EXEC. DOC. NO. 35-1, at 357 (1858).

<sup>54.</sup> COHEN, supra note 8, at 45.

<sup>55.</sup> Id. at 77.

<sup>56.</sup> See id.; Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

<sup>57.</sup> The federal government reserved distinct portions of land on which they would provide "only sufficient land for their actual occupancy... divid[ed] among them in severalty... and in lieu of money annuities ... stock animals, agricultural implements, mechanic shops, tools and materials, and manual labor schools for the industrial and mental education of their youth." COHEN, *supra* note 8, at 65 (quoting S. EXEC. DOC. NO. 35-1, at 357). Reservations were, in effect, "schools for civilization" provided to further the goal of assimilation. COHEN, *supra* note 8, at 65.

<sup>59.</sup> It should be noted that allotment did not always have its intended effect. Indians were not "transformed into farmers" and the complex scheme of issuing fee patents enabled some Indians to sell their land but left many Indians landless. COHEN, *supra* note 8, at 78.

<sup>60.</sup> COHEN, *supra* note 8, at 84. The primary catalyst for change was the well-known Meriam Report. *Id.*; INST. FOR GOV'T RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (Lewis Meriam ed., 1928). This two-year non-governmental study brought public attention to the deplorable living conditions of tribal peoples. COHEN, *supra* note 8, at 84. Although the Report reflected some assimilationist attitudes, it gave greater credence to Indian culture and aimed to develop that which is good in Indian culture "rather than to crush out all that is Indian." *Id.*; *see also* COMMITTEE OF ONE HUNDRED, THE INDIAN PROBLEM, H.R. MISC. DOC. NO. 68-149 (1924).

<sup>61.</sup> *See generally* Indian Reorganization (Wheeler-Howard) Act, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479 (2006)).

United States soon found itself in the middle of the Great Depression, followed closely by World War II.<sup>62</sup>

Shortly after World War II, federal Indian policy made a dramatic shift towards "termination." This affected the tribes in two ways.<sup>63</sup> First, termination functioned as an experiment imposed on a small number of tribes and ended the special relationship<sup>64</sup> between those tribes and the federal government.<sup>65</sup> Second, tribes that were not directly terminated suffered as large amounts of acreage were passed out of Indian hands, and the Bureau of Indian Affairs was stripped of many of its responsibilities.<sup>66</sup>

Beginning in 1958, federal Indian policy shifted once again, this time to promote self-determination and tribal self-governance.<sup>67</sup> The effect of self-determination can be seen in the passage of the Indian Civil Rights Act of 1968,<sup>68</sup> which extends federal constitutional protections to tribal governments.<sup>69</sup> Further, the theme of protecting and extending tribal life can be clearly seen in the vast array of policies, programs, and legislation that have recently taken shape.<sup>70</sup> Encapsulating the spirit of affirming tribal culture, President Clinton pledged that "our first principle must be to respect your right to remain who you are and to live the way you wish."<sup>71</sup>

One important component of federal Indian law, as opposed to policy, is the emergence of specific canons of construction.<sup>72</sup> The canons' main requirement is that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians, with any ambiguity resolved in their favor.<sup>73</sup> These canons are grounded in the values of structural sovereignty, not "judicial solicitude for powerless minorities."<sup>74</sup> Because these canons help mediate problems that are presented by the nonconsensual inclusion of Indian nations into the United States,

<sup>62.</sup> See COHEN, supra note 8, at 89.

<sup>63.</sup> Id. at 89-97.

<sup>64.</sup> This special relationship refers to the federal trust responsibility. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (recognizing the existence of the federal trust responsibility).

<sup>65.</sup> COHEN, supra note 8, at 91.

<sup>66.</sup> Id.

<sup>67.</sup> Id. at 97-113.

<sup>68.</sup> Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–1303 (2006).

<sup>69.</sup> Prior to the passage of the Indian Civil Rights Act, constitutional restrictions, including the Bill of Rights, did not apply to tribes. *See* Talton v. Mayes, 163 U.S. 376 (1896).

<sup>70.</sup> COHEN, supra note 8, at 104-05.

<sup>71.</sup> Id. at 105.

<sup>72.</sup> Id. at 119.

<sup>73.</sup> *Id.; see also* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999); City of Roseville v. Norton, 348 F.3d 1020 (D.C. Cir. 2003).

<sup>74.</sup> COHEN, supra note 8, at 123; Worcester v. Georgia, 31 U.S. 515 (1832).

they are helpful in preserving distinct Native American cultures as well as the tribes' inherent sovereignty.

## IV. RELIGION AND PEOPLEHOOD

The unique character of Native American culture is inextricably linked to religion.<sup>75</sup> As Vine Deloria said, "There is no salvation in tribal religions apart from the continuance of the tribe itself."<sup>76</sup> The continuance of the tribe depends not only on legal recognition of a tribe's sovereign status,<sup>77</sup> but also on continuing access to sites deemed sacred by the native communities for spiritual activities.<sup>78</sup> This Part establishes the direct link between Native Americans, religion, and the land. It describes how a law or regulation disturbing the use of sacred land can have the effect of destroying the religion, the culture, and ultimately the people who use the land for religious purposes.

The survival of a population often depends on religious and cultural unity within that population. One way of describing such unity of a tribal population is to look at it as "peoplehood," a concept recently advanced by Kristen Carpenter.<sup>79</sup> As Carpenter explains, peoplehood is "an inclusionary and involuntary group identity with a putatively shared history and distinct way of life."<sup>80</sup> In addition, "[p]eoplehood is a shared consciousness and commitment to a group characterized by 'common descent—a shared genealogy or geography' as well as 'contemporary commonality, such as language, religion, culture, or consciousness."<sup>81</sup> Peoplehood has less to do with being generally Indian; rather, it is tribal-specific, relating to particular locations and customs.<sup>82</sup> This is contrary to how most people think about Native Americans; people often fail to

<sup>75.</sup> See, e.g., Kristen A. Carpenter, Real Property and Peoplehood, 27 STAN. ENVTL. L.J. 313, 352 (2008).

<sup>76.</sup> VINE DELORIA, JR., GOD IS RED: A NATIVE VIEW OF RELIGION 194 (1992).

<sup>77.</sup> Tribal sovereignty is a complex question of Indian law. *See generally* COHEN, *supra* note 8. However, for the purposes of this Note, I recognize that biopolitical effect on a tribal group is not dependent on legal recognition of that tribe.

<sup>78.</sup> DELORIA, *supra* note 76.

The Hopi believe that pleasing the Katsinam on the [San Francisco] Peaks is crucial to their livelihood. Appearing in the form of clouds, the Katsinam are responsible for bringing rain to the Hopi villages from the Peaks. The Katsinam must be treated with respect, lest they refuse to bring the rains from the Peaks to nourish the corn crop.

Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1034 (9th Cir. 2007), *rev'd en banc*, 535 F.3d 1058 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2763 (2009).

<sup>79.</sup> Carpenter, supra note 75.

<sup>80.</sup> Id. at 348.

<sup>81.</sup> Id.

<sup>82.</sup> Id.

differentiate between the spiritual experiences and belief systems of individual tribal groups.<sup>83</sup>

Carpenter explains that each tribe often maintains its own religion, culture, and language, even though similarities may be found with other tribes.<sup>84</sup> Although these traits change over time, tribes can often trace current religious and cultural practices back to pre-contact times.<sup>85</sup> As an illustration of how historically rich Indian identity is, as well as its deep connection with the land base, S. James Anaya offers the following specialized definition of "indigenous peoples":<sup>86</sup>

They are indigenous because their ancestral roots are embedded in the lands in which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity. Furthermore, they are peoples to the extent they comprise distinct communities with a continuity of existence and identity that links them to the communities, tribes, or nations of their ancestral past.<sup>87</sup>

According to American Indian Studies scholar Tom Holm, there are four attributes of peoplehood that have helped to ensure the survival of Indian tribes throughout the devastating eras of conquest, colonization and forced assimilation.<sup>88</sup> They are: (1) maintaining language; (2) understanding place; (3) keeping particular religious ceremonies alive; and (4) perpetuating a sacred history.<sup>89</sup> These categories are interrelated; they reinforce the idea that sacred sites and American Indian peoplehood are strongly connected.<sup>90</sup> For example, because keeping particular religious ceremonies alive often means performing them in a particular place, native culture and identity is reinforced when sacred places and observance of religion meet.

Although the belief systems of individual tribal groups may differ, Native American belief systems as a whole are clearly distinct from the

<sup>83.</sup> Martin C. Loesch, *The First Americans and the "Free" Exercise of Religion, in* NATIVE AMERICANS AND THE LAW: NATIVE AMERICAN CULTURAL AND RELIGIOUS FREEDOMS 19, 65 (John R. Wunder ed., 1996). Because Native Americans are seen as distinct from Europeans, they are often grouped together in one unit. However, native religions are as complex and diverse as the "multiplicity of their cultures suggest." This plurality is one hurdle that Native Americans face in the court system.

<sup>84.</sup> Id. at 56.

<sup>85.</sup> Id.

<sup>86.</sup> *Id*.

<sup>87.</sup> Id.

<sup>88.</sup> Carpenter, *supra* note 75, at 350.

<sup>89.</sup> *Id.* (quoting TOM HOLM, THE GREAT CONFUSION IN INDIAN AFFAIRS: NATIVE AMERICANS & WHITES IN THE PROGRESSIVE ERA, at xiv, xvii (2005)).

<sup>90.</sup> Carpenter, supra note 75, at 351.

Western-based religions that permeate American culture.<sup>91</sup> One of the primary differences between the Judeo-Christian tradition and native religions is that Native American spiritual traditions tend to be more spatially oriented, while Judeo-Christian religions are more time-oriented.<sup>92</sup> This is not to say that there are no sacred sites within Judeo-Christian traditions, but rather that there is a stronger focus on specific events in the course of linear history than on a particular connection to place. For Native Americans, however, the religious experience is often inseparable from a particular location.<sup>93</sup>

This sacredness of place captures the true character of Native American life.<sup>94</sup> As some Indians have described the connections to sacred sites: "[O]ur ancestors arose from the earth here; . . . we make pilgrimages and vision quests here; our gods dwell here; our religion requires that we have privacy here; . . . hence, this sacred site must remain undisturbed, or we must have unlimited access to this place."<sup>95</sup> In short, for Native Americans, sacred places are "essential for human survival."<sup>96</sup>

Because these sites are essential for human survival, regulations damaging sites or prohibiting entry seriously affect the lives of both individual Indians and entire tribes. This effect is biopolitical because the regulation essentially "lets die" the population affected—the native population.

The importance of place is readily apparent when one dismisses any preconceived notion that may come from a Western religious mindset and develops a correct understanding of Native American religions. Unlike Western-based religious identities that may be formed by attending a variety of places of worship in different locations, Native-based religions cannot survive apart from the specific places to which they are con-

<sup>91.</sup> Although there are many religions observed in the United States, I will focus on the Judeo-Christian influence and its contrast with native religion.

<sup>92.</sup> See Loesch, supra note 83, at 67; see also DELORIA, supra note 76, at 76. Another major difference between Judeo-Christian religions and native religions is language. "Because the dominant society has not accepted native spirituality on its own terms, all Indian traditions and beliefs must be translated, in order for their petition to be heard in the American judicial system." Loesch, supra note 83, at 66. Other differences include the lack of uniformity among native religions (as opposed to the sense of orthodoxy in many Western religions) and the mystery surrounding many native spiritual practices because they are generally conducted privately in remote places. *Id.* at 67.

<sup>93.</sup> DELORIA, *supra* note 76, at 80 ("[r]evelation [is] a particular experience at a particular place, [with] no universal truth emerging").

<sup>94.</sup> Loesch, *supra* note 83, at 70. For a summary of core features of traditional Native American spirituality, see Deward E. Walker, Jr., *Protection of American Indian Sacred Geography, in* THE HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM 102 (Christopher T. Vescey ed., 1991) [hereinafter AIRF HANDBOOK].

<sup>95.</sup> Loesch, *supra* note 83, at 70 (quoting Christopher T. Vescey, *Prologue, in* AIRF HANDBOOK, *supra* note 94, at 12).

<sup>96.</sup> Loesch, supra note 83, at 70 (quoting AIRF HANDBOOK, supra note 94, at 25).

nected. Because faith is always a part of identity, faith inextricably connected with a particular location means that location is also part of one's identity. Thus, laws and regulations affecting that location also affect one's identity, even to the point of extinguishing identity completely.

## V. LEGAL FRAMEWORK

The case law dealing with religious freedoms is incredibly varied and highly complex. Tensions between constitutional principles, such as the freedom of religion and the Establishment Clause,<sup>97</sup> are strong, and conflicts are not easily resolved. Recently, how Indian religious freedoms are viewed and protected under the Constitution has begun to change. Specifically, courts have struggled with defining what conduct constitutes a "substantial burden" on religion and determining the point at which qualifying conduct must be stopped. The precedent that has emerged thus far has had a biopolitical effect on Native American populations. By allowing sacred sites to be polluted, the native religious experience is tainted, if not altogether halted. And, because native identity is inextricably connected with religious experience, damage to the native religious experience is harmful to collective native identity. Therefore, new precedent should be developed that takes into account the unique character of native identity and its link to religion and the land.

This Part first lays the foundation of general federal case law, both prior to and following the enactment of the RFRA. It then explores the development of Ninth Circuit precedent, culminating in the creation of the *Navajo Nation* test.

#### A. General Federal Precedent

## 1. The Pre-RFRA Era

Prior to 1990, the U.S. Supreme Court established that the First Amendment prevents infringement on the exercise of religious beliefs unless such infringement is justified by a compelling interest that cannot be achieved through less restrictive means.<sup>98</sup> In a 1963 decision, *Sherbert v. Verner*, the Court first applied a strict scrutiny test, requiring the government to demonstrate a compelling interest in Free Exercise Clause cases.<sup>99</sup> Appellant Adell Sherbert, a member of the Seventh-Day Adventist Church, was fired from her job for refusing to work on Satur-

<sup>97.</sup> It is beyond the scope of this Note to discuss either First Amendment or Establishment Clause issues.

<sup>98.</sup> See, e.g., Sherbert v. Verner, 374 U.S. 398 (1963). 99. Id.

<sup>99.</sup> Id.

days.<sup>100</sup> Sherbert subsequently applied for unemployment benefits, but her request was denied.<sup>101</sup> Sherbert brought an action against her employer under the Free Exercise Clause of the First Amendment.<sup>102</sup> In finding for the plaintiff, the Court held that "South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest."<sup>103</sup>

*Sherbert*'s strict scrutiny test uses four criteria to determine whether an individual's right to free exercise of religion has been violated. A court must first determine whether the claim involves a sincere religious belief.<sup>104</sup> Next, a court must determine whether the government action imposes a substantial burden on the free exercise of the individual's religion.<sup>105</sup> If the claimant shows a sincere religious belief upon which a government action imposes a substantial burden, the burden of proof shifts to the government.<sup>106</sup> The government must then prove that it is acting in furtherance of a compelling government interest, and that it has pursued that interest in the manner least restrictive to religion.<sup>107</sup>

The Court reaffirmed the *Sherbert* test in the 1972 case *Wisconsin* v. *Yoder*.<sup>108</sup> In *Yoder*, three Amish families challenged a law requiring compulsory school attendance until the age of sixteen.<sup>109</sup> Appellants argued that the law violated their religious belief that formal education should not be required past the eighth grade.<sup>110</sup> By applying the *Sherbert* 

<sup>100.</sup> *Id.* at 399. Seventh-Day Adventists believe "[t]he fourth commandment of God's unchangeable law requires the observance of this seventh-day Sabbath as the day of rest, worship, and ministry . . . ." Seventh-Day Adventist Church, Fundamental Beliefs, http://www.adventist.org /beliefs/fundamental/index.html (last visited Nov. 5, 2008). For Seventh-Day Adventists, Saturdays are observed as the Sabbath.

<sup>101.</sup> Sherbert, 374 U.S. at 401.

<sup>102.</sup> Id.

<sup>103.</sup> Id. at 410.

<sup>104.</sup> In *Sherbert*, the sincerity of appellant's religious beliefs was not in dispute. *Id.* at 399 n.1. 105. There was clearly a burden imposed in *Sherbert*. The appellant was

force[d]... to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Id. at 404.

<sup>106.</sup> Id. at 406–09; Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1067 (9th Cir. 2008), cert. denied, 129 S. Ct. 2763 (2009).

<sup>107.</sup> South Carolina did not meet its burden, and the Court declared the action unconstitutional. *Sherbert*, 374 U.S. at 406–10.

<sup>108.</sup> Wisconsin v. Yoder, 406 U.S. 205 (1972).

<sup>109.</sup> Id. at 207.

<sup>110.</sup> The Court explained that

<sup>[</sup>the petitioners] object to the high school, and higher education generally, because the values they teach are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a

test, the Court determined that the Wisconsin law violated the Free Exercise Clause of the First Amendment because the State did not meet its burden of showing with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish.<sup>111</sup>

The *Sherbert* test was sharply curtailed in *Employment Division v. Smith*, when the Court held that the Free Exercise Clause of the First Amendment does not prohibit burdens on religious practices if they are imposed by laws of general applicability.<sup>112</sup> The Court sidestepped *Sherbert* and *Yoder* by characterizing such cases as "hybrid" decisions invoking multiple constitutional interests and held that facially neutral laws would no longer be subject to strict scrutiny under the First Amendment.<sup>113</sup>

In direct response to *Smith*, Congress quickly enacted the RFRA.<sup>114</sup> Congress opined that the *Smith* decision "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion," and that "the compelling interest test as set forth in prior federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."<sup>115</sup> Congress declared the purposes of the RFRA are to "provide a claim or defense to persons whose religious exercise is substantially burdened by the government" and to "restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*."<sup>116</sup> The RFRA was quickly passed unanimously in the House of Representatives and gained all but three votes in the Senate.<sup>117</sup>

'worldly' influence in conflict with their beliefs. The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learningthrough-doing; a life of 'goodness,' rather than a life of intellect; wisdom, rather than technical knowledge, community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.

114. Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 437 (1994).

115. Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, § 2(b), 107 Stat. 1488, 1488 (1993) (codified at 42 U.S.C. § 2000bb(a) (2006)).

Yoder, 406 U.S. at 210-11.

<sup>111.</sup> Id. at 234–36.

<sup>112.</sup> Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990). The respondents in *Smith* were members of the Native American Church and were fired for using peyote during a religious ceremony, which was prohibited under Oregon law. The respondents were subsequently disqualified from receiving unemployment benefits. *Id.* 

<sup>113.</sup> Id. at 881-82.

<sup>116.</sup> Id. § 2(b), 107 Stat. at 1488 (codified at 42 U.S.C. § 2000bb(b)).

<sup>117.</sup> Eisgruber, supra note 114, at 438.

As it currently stands, the RFRA prohibits the federal government<sup>118</sup> from substantially burdening "a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)."<sup>119</sup> Subsection (b) states: "[the] Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest."<sup>120</sup> However, as with most congressional acts, determining the language of the Act is only the beginning. The years following the enactment of RFRA saw much dispute over what it means to substantially burden a person's exercise of religion.

#### 2. The Post-RFRA Era

By enacting the RFRA, Congress restored the compelling interest standard and pre-Smith case law. However, the force of the standard was soon limited by restraints on its applicability. In Lyng v. Northwest Indian Cemetery Protective Association,<sup>121</sup> a case concerning a Native American sacred site, the Court determined that only governmental action that placed a substantial burden on religious exercise had to meet the compelling interest standard.<sup>122</sup> Lyng concerned a proposal by the United States Forest Service to build a six-mile stretch of paved road through the Chimney Rock section of the Six Rivers National Forest.<sup>123</sup> In preparation for an environmental impact statement, the Forest Service commissioned a study, which determined that the area had historically been used by certain American Indians for religious rituals that rely upon privacy, silence, and an undisturbed natural setting.<sup>124</sup> The commissioned study also determined that "the entire area is significant as an integral and indispensible part of Indian religious conceptualization and practice."<sup>125</sup> The study recommended that the road not be completed because

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<sup>118.</sup> In the 1997 case *City of Boerne v. Flores*, the Supreme Court held RFRA unconstitutional as applied to state and local governments because it exceeded Congress's authority under Section 5 of the Fourteenth Amendment. 521 U.S. 507, 529, 534–35 (1997) (finding that RFRA basically changes the substantive meaning of the Establishment Clause and holding that Section 5 grants remedial powers only). However, the Court did not invalidate RFRA as applied to the federal government. *See* Guam v. Guerrero, 290 F.3d 1210, 1220–21 (9th Cir. 2002). For purposes of this Note, it is pertinent only that RFRA applies to federal causes of action.

<sup>119. 42</sup> U.S.C. § 2000bb-1(a) (2006).

<sup>120.</sup> Id. § 2000bb-1(b).

<sup>121.</sup> Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

<sup>122.</sup> Id.

<sup>123.</sup> See id. at 442–52.

<sup>124.</sup> Id.

<sup>125.</sup> Id. (internal quotations omitted).

constructing a road along any of the available routes "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples."<sup>126</sup> However, the Forest Service declined to adopt the recommendation.<sup>127</sup> Instead, it selected a route that avoided archeological sites and was far removed from the sites used by contemporary Indians for spiritual activities, but that still traversed land having ritualistic value.<sup>128</sup>

After exhausting their administrative remedies, several individual Native Americans, various organizations, and the State of California challenged both the road-building and timber-harvesting decisions in the U.S. District Court for the Northern District of California, claiming that the Forest Service's decision violated, inter alia, the Free Exercise Clause.<sup>129</sup> In response, the district court issued a permanent injunction prohibiting the government from constructing the Chimney Rock road or putting the timber-harvesting management plan into effect.<sup>130</sup> On appeal, the Ninth Circuit affirmed in part, concluding that the government had failed to demonstrate a compelling interest in the construction of the road.<sup>131</sup> The Supreme Court subsequently reversed.<sup>132</sup> Although the Court acknowledged that the Native Americans' beliefs were sincere and that the government's proposed actions would have severe adverse effects on the practice of their religion, the Court disagreed that the burden on their religious practices was "heavy enough" to violate the Free Exercise Clause.<sup>133</sup> The Court stated that precedent has not held "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."<sup>134</sup>

The Court also opined that regardless of the nature of the rights afforded to the Indians, it shall "not divest the Government of its right to use what is, after all, *its* land."<sup>135</sup> Although the Court emphasized that

<sup>126.</sup> Id. (internal quotations omitted).

<sup>127.</sup> Id. at 443.

<sup>128.</sup> Id.

<sup>129.</sup> Id.

<sup>130.</sup> Id.; see also Nw. Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586 (1983).

<sup>131.</sup> Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 445 (1988).

<sup>132.</sup> Id. at 458.

<sup>133.</sup> Id. at 447.

<sup>134.</sup> Id. at 450-51.

<sup>135.</sup> *Id.* at 453. Limiting the federal government's use of its own land to avoid disrupting religious ceremonies might violate the Establishment Clause by imposing a "religious servitude" on the property and subsidizing the religion in question. *Id.* 

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nothing in the opinion should be read to encourage governmental insensitivity to the religious needs of any citizen, it went on to state, "[h]owever much we might wish it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires."<sup>136</sup> Here, the Court's inability to recognize the difference between cultural identity and personal autonomy is problematic and highlights the need for a correct understanding of collective tribal identity.

#### B. Ninth Circuit Precedent

As discussed in Part IV, Native American religions are inextricably connected with the land, unlike many Western religions. The San Francisco Peaks, located in Arizona's Coconino National Forest, are considered one of the most revered mountains by the Hopi and Navajo religious cultures.<sup>137</sup> To the Hopi, "the Peaks are the home of the Kachinas, spiritual beings who assist the Creator as his emissaries to humanity."<sup>138</sup> The Peaks are an essential element of many religious ceremonies, including annual pilgrimages by Hopi elders and other tribal members.<sup>139</sup> The Kachina Peaks are the most sacred place for the Hopi, serving as both a destination for major pilgrimages and the residence of Hopi gods.<sup>140</sup>

To the Navajos, the Peaks are one of four mountains marking the boundaries of the Dinetah, the sacred Navajo homeland.<sup>141</sup> The Navajo people have always had "a spiritual obligation to stay within their ho-

Id.

<sup>136.</sup> *Id.* at 452–53. The Court emphasized that the First Amendment must apply to all citizens alike, stating "it can give to none of them a veto over public programs that do not prohibit the free exercise of religion." *Id.* at 452.

<sup>137.</sup> BRIAN EDWARD BROWN, RELIGION, LAW, AND THE LAND: NATIVE AMERICANS AND THE JUDICIAL INTERPRETATION OF SACRED LAND 61 (1999). The Peaks are not only held sacred by the Hopi and the Navajo, but also the Havasupai Tribe, the Yavapai-Apache Nation, the Hualapai Tribe, and others. *See also* Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2763 (2009).

<sup>138.</sup> BROWN, supra note 137, at 61.

<sup>139.</sup> Id. at 61-62.

<sup>140.</sup> Id. Brown states:

For some six months of the year, the Kachinas travel to the Hopi villages and participate with the tribe in the various religious ceremonies and rituals referred to as the Kachina cycle. Then, beginning in late July or early August and extending through mid-winter, the Kachinas return to the Peaks for the next six months and take up residence. The Hopi people believe that the Kachinas' activities on the peaks give rise to the rain and snow storms that nurture the villages with life-sustaining water and food and thus, their happiness, health and well-being. No other place is more sacred than the Kachina Peaks, which is the object of annual pilgrimages by Hopi elders and other ritual objects at innumerable sites.

<sup>141.</sup> Id. at 62. See also Carpenter, supra note 75.

meland, care for it, and revere their sacred mountains."<sup>142</sup> The Peaks are especially "revered as the physical embodiment of one of the Holy Ones or Navajo gods, with various parts forming the head, shoulders, and knees of a body reclining and facing to the east, and the trees, plants, rocks, and earth making up the skin."<sup>143</sup> "The Navajos pray to the peaks as a living, sacred being to whom they are intimately related."<sup>144</sup> The Peaks connect Navajos to their origins as a people and "reflect sacred histories, both ancient and modern."<sup>145</sup>

As a result of the Peaks' importance, many claims have been brought over the years alleging interference with religious freedom. The first of these decisions, *Wilson v. Block*,<sup>146</sup> set the stage for what would become decades of litigation over use of the Peaks, ultimately culminating in *Navajo Nation v. United States Forest Service*.

#### 1. Wilson v. Block

In 1937, a 777-acre portion of the San Francisco Peaks, designated the Arizona Snowbowl, was set aside for recreational skiing and the construction of a ski lodge.<sup>147</sup> The original lodge was destroyed by fire in 1952 and in 1956 a new lodge was constructed.<sup>148</sup> In 1958, a Poma lift was installed, as was a chairlift in 1962.<sup>149</sup> The following fifteen years saw very little change in the facilities.<sup>150</sup>

In April 1977, the U.S. Forest Service transferred the permit to operate the Snowbowl skiing facility from Summit Properties, Inc., to the Northland Recreation Company.<sup>151</sup> In July 1977, Northland submitted to the Forest Service a "master plan" for the future development of the Snowbowl, which included the construction of additional parking, new

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<sup>142.</sup> Carpenter, supra note 75, at 352.

<sup>143.</sup> BROWN, supra note 137, at 62.

<sup>144.</sup> Id.

<sup>145.</sup> Carpenter, *supra* note 75, at 353. For example, according to the Navajo creation story, the Peaks were the home of the first woman, Changing Woman. Changing Woman, the mother of twins who are the ancestors of the Navajo people, experienced her kinaalda coming-of-age ceremony on the Peaks, and young Navajo women continue to celebrate their own kinaalda ceremonies today. *Id., see also* Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1035 (9th Cir. 2007), *rev'd en banc*, 535 F.3d 1058 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2763 (2009). An example of a modern societal history is the "Long Walk," the federal government's forceful relocation of the Navajos from their homeland to a prison camp at Bosque Redondo. Carpenter, *supra* note 75, at 353. This period, from 1864 to 1868, was a defining time in Navajo history; it signified a desire and longing to return to the homeland, marked by the San Francisco Peaks. *Id.* 

<sup>146.</sup> Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983).

<sup>147.</sup> Id. at 738.

<sup>148.</sup> Id.

<sup>149.</sup> Navajo Nation, 479 F.3d at 1030.

<sup>150.</sup> Wilson, 708 F.2d at 738.

<sup>151.</sup> Id.

lodges, expanded ski slopes, and more ski lifts.<sup>152</sup> Pursuant to the National Environmental Policy Act, the Forest Service identified six feasible plans that represented the spectrum of public opinion.<sup>153</sup> Between June 23 and September 30, 1978, the Forest Service solicited public opinion on a draft Environmental Impact Statement based on the six plans and made special efforts to solicit views from the Hopis and the Navajos.<sup>154</sup> On February 27, 1979, the Forest Service issued a decision to permit moderate development of the Snowbowl.<sup>155</sup>

Due to the sacredness and the prominence of the Peaks, the Navajo Medicinemen's Association, the Hopi tribe, and nearby ranch owners filed several claims, including one under the Free Exercise Clause of the First Amendment in 1981.<sup>156</sup> The plaintiffs sought to "halt . . . further development of the [Snowbowl] and the removal of existing ski facilities."<sup>157</sup> The Navajo and the Hopi felt "that development of the Peaks would be a profane act and an affront to the deities, and as a result, the Peaks would lose their healing power and otherwise cease to benefit the tribes."<sup>158</sup>

The Court of Appeals for the D.C. Circuit affirmed the district court and concluded that the government had not unconstitutionally burdened the tribes' religious practices or beliefs.<sup>159</sup> The court also held that "plaintiffs seeking to restrict government land use in the name of religious freedom must, at a minimum, demonstrate that the government's proposed land use would impair a religious practice that could not be performed at any other site."<sup>160</sup> Although the plaintiffs established the general indispensability of the Peaks to the practice of their religion, they

<sup>152.</sup> Id.

<sup>153.</sup> *Id.* These alternatives ranged from complete elimination of artificial structures in the Snowbowl to full development as proposed by Northland. *Id.* 

<sup>154.</sup> Id.

<sup>155.</sup> *Id.* at 739. The plan selected was not one of the six alternatives previously presented. The plan allowed the clearing of 50 acres of forest for new ski runs, instead of the 120 acres requested by Northland. The plan also authorized construction of a new day lodge, improvement of restroom facilities, reconstruction of existing chair lifts, construction of three new lifts, and the paving and widening of the Snowbowl road. *Id.* 

<sup>156.</sup> *Id.* Other claims were brought under the American Indian Religious Freedom Act, the Establishment Clause, the Endangered Species Act, the Wilderness Act, the National Historic Preservation Act, and 16 U.S.C. §§ 497, 551. The district court granted the defendant's summary judgment on all claims except the claim brought under the National Historic Preservation Act.

<sup>157.</sup> Wilson, 708 F.2d at 739.

<sup>158.</sup> *Id.* at 740. "As relief, the Navajos and Hopis sought a phased removal of all artificial structures on the Peaks, or, at the least, an injunction against further development of the Snow Bowl." *Id.* 

<sup>159.</sup> Id.

<sup>160.</sup> *Id.* at 744. The court clarified that such proof would not necessarily establish a burden of free exercise, but that the First Amendment, at a minimum, required such proof. *Id.* at 744 n.5.

failed to show the particular indispensability of the Snowbowl area.<sup>161</sup> Further, the Forest Service did not deny the plaintiffs access to the Peaks, but rather permitted free entry onto the Peaks and did not interfere with their ceremonies or the collection of ceremonial objects.<sup>162</sup> Therefore, the court determined that the plaintiffs had not proven that expansion of the ski area would prevent them from performing ceremonies or obtaining ceremonial objects unique to the Snowbowl area.<sup>163</sup>

#### 2. Navajo Nation v. United States Forest Service

In the years following the *Wilson* decision, many of the improvements authorized by the Forest Service were implemented.<sup>164</sup> In 2002, the current owners of the Snowbowl, Arizona Snowbowl Resort Limited Partnership, submitted a proposal to implement snowmaking at the facility using "A+ reclaimed water," which is treated sewage effluent.<sup>165</sup> In February 2005, the Forest Supervisor issued a Final Environmental Impact Statement and Record of Decision.<sup>166</sup> Shortly thereafter, the plaintiffs commenced litigation alleging that the Forest Service had failed to comply with the requirements of the RFRA.<sup>167</sup>

Noting that the ski area constituted only about one percent of the Peaks' 74,000 acres of public land and that the area proposed for snow-making was only approximately one quarter of one percent of the Peaks, the district court found that the Snowbowl upgrades did not interfere with or inhibit any of the plaintiffs' religious practices.<sup>168</sup> Although the court found that the Peaks were sacred to the plaintiff tribes, and crucial to their way of life, it found that the evidence "adduced at trial demon-

167. *Id.* The plaintiffs also brought claims under NEPA, NHPA, ESA, the Grand Canyon National Park Enlargement Act, the National Forest Management Act, and trust law (that the Forest Service failed to comply with its responsibilities to the tribes). *Id.* 

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<sup>161.</sup> Wilson, 708 F.2d at 744.

<sup>162.</sup> Id.

<sup>163.</sup> Id.

<sup>164.</sup> Navajo Nation v. U.S. Forest Serv., 408 F. Supp. 2d 866, 870 (D. Ariz. 2006), *rev'd*, 479 F.3d 1024 (9th Cir. 2007), *rev'd en banc*, 535 F.3d 1058 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2763 (2009).

<sup>165.</sup> *Id.* A+ reclaimed water "is the highest grade of reclaimed water recognized under Arizona statutes and regulations. Class A+ reclaimed water has been approved for use in snowmaking by the Arizona Department of Environmental Quality." *Id.* at 887.

<sup>166.</sup> The Record of Decision approved, in part: (a) approximately 205 acres of snowmaking coverage throughout the area, utilizing reclaimed water; (b) a 10 million-gallon reclaimed water reservoir near the top terminal of the existing chairlift and catchments pond below Hart Prairie Lodge; (c) construction of a reclaimed water pipeline between Flagstaff and the Snowbowl with booster stations and pump houses; (d) construction of a 3,000 to 4,000 square foot snowmaking control building; (e) construction of a new 10,000 square foot guest services facility; (f) an increase in skiable acreage from 139 to 205 acres—an approximate 47% increase; and (g) approximately 47 acres of thinning and 87 acres of grading, stumping, and smoothing. *Id.* at 871.

<sup>168.</sup> Id. at 883, 886, 889.

strates that snowmaking is needed to maintain the viability of the Snowbowl as a public recreational resource."<sup>169</sup> Further, the area proposed for snowmaking was a marginal percentage of the Peaks and the tribes had already been using reclaimed water for various purposes.<sup>170</sup>

In assessing whether a substantial burden was imposed on the Native American exercise of religion, the court found that the plaintiffs had "failed to present any objective evidence that their exercise of religion [would] be impacted by the Snowbowl upgrades."<sup>171</sup> Instead of looking at the effect on the land as a whole, the court focused on whether specific areas or ceremonies would be impacted.<sup>172</sup> The court further found that the plaintiffs had neither met the "coercion" requirement of pre-*Smith* case law, nor had they demonstrated that their religious activity had been penalized.<sup>173</sup> Therefore, as a matter of law, the district court held that the Forest Service's authorization of upgrades to the ski area was not a violation of the RFRA.<sup>174</sup> The plaintiffs appealed.

On appeal, a three-judge panel of the Ninth Circuit reversed the district court in part, holding that the use of recycled wastewater on the Snowbowl violates the RFRA.<sup>175</sup> The court found two substantial burdens for the Navajo and the Hopi plaintiffs.<sup>176</sup> The first burden was "the inability to perform a particular religious ceremony, because the ceremony requires collecting natural resources from the Peaks that would be too contaminated—physically, spiritually, or both—for sacramental use."<sup>177</sup>

<sup>169.</sup> *Id.* at 907. This finding affirms the Forest Service's determination that improvements to Snowbowl would enable the ski area to provide a safe, reliable, and consistent operating season. *Id.* The court recognized that both the protection of public safety and management of public land for recreational uses are compelling governmental interests. *Id.* at 906.

<sup>170.</sup> *Id.* at 898. Reclaimed water was used by many of the plaintiff tribes for irrigation, dust control, and soil compacting. *Id.* In addition, waste from reservation medical clinics was disposed of on what was considered Navajo sacred land. *Id.* 

<sup>171.</sup> *Id.* at 905 (finding that "[t]he subjective views and beliefs presented at trial, although sincerely held, are not sufficient for the proposed project to constitute a substantial burden under RFRA on the practice of religion by any Plaintiff or any members of any Plaintiff tribe or nation."). *Id.* 

<sup>172.</sup> The court explained that the plaintiffs did not identify any plants, springs, or natural resources, or any shrines or religious ceremonies that would be affected by the Snowbowl upgrades. *Id.* 

<sup>173.</sup> *Id.* at 905. "The Legislature intended for courts to look to pre-*Smith* cases when applying RFRA and thus the court's finding of no coercion was tantamount to its holding that there was no substantial burden here." S. REP. NO. 103-111 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1989; *see also* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450–51 (1988); Wisconsin v. Yoder, 406 U.S. 205 (1972).

<sup>174</sup> Navajo Nation v. U.S. Forest Serv., 408 F. Supp. 2d 866, 870 (D. Ariz. 2006).

<sup>175.</sup> Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1029 (9th Cir. 2007), *rev'd en banc*, 535 F.3d 1058 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2763 (2009).

<sup>176.</sup> *Id.* at 1043. The court did not need to decide whether there was a substantial burden on the other tribes because it found one for the Navajo and the Hopi. *Id.* at 1034.

<sup>177.</sup> Id. at 1039.

The second burden was "the inability to maintain daily and annual religious practices comprising an entire way of life, because the practices required belief in the mountain's purity or a spiritual connection to the mountain that would be undermined by the contamination."<sup>178</sup>

Unlike the district court, which held that the tribes had not presented any objective evidence of a substantial burden, the Ninth Circuit went into great detail to describe the religious practices of the involved tribes, emphasizing the plaintiffs' religious beliefs.<sup>179</sup> In particular, the court highlighted the belief that the mountains are a living being, and contamination of one portion would contaminate the whole.<sup>180</sup>

Finding a substantial burden, the court proceeded to the remaining steps of the RFRA's compelling interest test.<sup>181</sup> The court rejected the argument that the Snowbowl upgrades were in furtherance of a compelling governmental interest achieved by the least restrictive means because it was unwilling to hold that "authorizing the use of artificial snow at an already functioning commercial ski area in order to expand and improve its facilities . . . is a governmental interest 'of the highest order."<sup>182</sup> The tribes' interest in sustaining their religious identity had been validated. The victory, however, was short-lived.

In 2008, the Ninth Circuit took the case en banc to revisit the panel's decision and to clarify the court's interpretation of substantial burden under the RFRA.<sup>183</sup> The court reversed the panel's decision and affirmed the district court's denial of relief.<sup>184</sup> Emphasizing the preeminence of pre-*Smith* decisions, the court held that under the RFRA, a substantial burden is imposed only where individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (e.g., *Sherbert*) or are coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (e.g., *Yoder*)."<sup>185</sup> If a burden imposed falls short of the situations described in *Sherbert* and *Yoder*, it is not a substantial burden and therefore does not require application of the compelling interest test.<sup>186</sup> Because neither situation applies in *Navajo* 

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<sup>178.</sup> Id.

<sup>179.</sup> Id. at 1039-42.

<sup>180.</sup> *Id.* at 1034–38. It is important to note that the panel did not address the lower court's finding that waste water was already being disposed of on the Navajo reservation. *See supra* text accompanying note 170.

<sup>181.</sup> See Navajo Nation, 479 F.3d at 1033-34.

<sup>182.</sup> Id. at 1044.

<sup>183.</sup> Id. at 1067.

<sup>184.</sup> Id. at 1063.

<sup>185.</sup> Id. at 1070.

<sup>186.</sup> Id. The dissent emphasized, however, that Congress intended courts to apply the compelling interest test to all RFRA cases. Instead of seeing *Sherbert* and *Yoder* as definitive examples of

*Nation*, the court determined that the compelling interest test was erroneously applied.<sup>187</sup>

The court found that the "only effect of the proposed upgrades is on the [p]laintiffs' subjective, emotional religious experience. . . . [I]t will spiritually desecrate a sacred mountain and will decrease the spiritual fulfillment they get from practicing their religion on that mountain."<sup>188</sup> The court further noted that "for all the rich complexity that describes the profound integration of man and mountain into one, the burden of the recycled wastewater can only be expressed by the [p]laintiffs as damaged spiritual feelings. Under Supreme Court precedent, government action that diminishes subjective spiritual fulfillment does not 'substantially burden' religion."<sup>189</sup> As the en banc court noted, the undue burden in Yoder was not the effect of secular education on children's subjective religious sensibilities, but rather the penalty of criminal sanctions for parents refusing to enroll their children in secular school.<sup>190</sup> Further, the court emphasized that in Sherbert, the protected interest was the receipt of unemployment benefits and not the right to take a religious rest on Saturday.<sup>191</sup> However, the dissent fervently objected to the majority's interpretation of substantial burden, listing multiple reasons why the majority was wrong in considering Sherbert and Yoder.<sup>192</sup>

First, the dissent criticized the majority's approach as inconsistent with the plain language meaning of substantial burden.<sup>193</sup> Second, the dissent stated that the RFRA does not incorporate any pre-RFRA definition of substantial burden.<sup>194</sup> Even if it did, the dissent argued, the cases on which the majority relies "did not state that interferences with the exercise of religion constituted a 'substantial burden' *only* when imposed

when the compelling interest applies, the dissent views them as illustrative examples. *Id.* at 1089 (Fletcher, J., dissenting).

<sup>187.</sup> Id. at 1070.

<sup>188.</sup> Id.

<sup>189.</sup> Id. at 1070 n.12.

<sup>190.</sup> *Id.*; Wisconsin v. Yoder, 406 U.S. 205, 218 (1972) ("The impact of the compulsoryattendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under the threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs.").

<sup>191.</sup> Navajo Nation, 535 F.3d at 1070 n.12; Sherbert v. Verner, 374 U.S. 398, 410 (1963) ("This holding . . . reaffirms a principle that . . . no State may exclude . . . the members of any . . . faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." (citations and internal quotation marks omitted)).

<sup>192.</sup> Navajo Nation, 535 F.3d at 1086 (Fletcher, J., dissenting).

<sup>193.</sup> *Id.* According to the dissent, substantial burden has a plain and ordinary meaning that "does not depend on the presence of a penalty or deprivation of benefit." *Id.* 

<sup>194.</sup> Id.

through the two mechanisms used in *Sherbert* and *Yoder*.<sup>"195</sup> Further, the RFRA was designed to expand rather than contract protection for religious exercise; it creates a legally protected interest in the exercise of religion.<sup>196,197</sup>

Debate lingers regarding exactly what substantial burden means. Nevertheless, the Ninth Circuit has already applied the precedent it set in *Navajo Nation*.

#### 3. Snoqualmie Indian Tribe v. Federal Energy Regulatory Commission

Just a few months after the Ninth Circuit's final opinion in *Navajo Nation*, the court's narrow reading of the substantial burden test affected another sacred site case. In *Snoqualmie Indian Tribe v. Federal Energy Regulatory Commission*, the Ninth Circuit again applied the requirements of *Sherbert* and *Yoder* and held that the Snoqualmie tribe had failed to demonstrate a substantial burden that would meet the *Navajo Nation* standard.<sup>198</sup>

The subject of the case was the Snoqualmie Falls, a site sacred to the Snoqualmie tribe. The Falls play a central role in the tribe's creation story and are an important location for its religious practices.<sup>199</sup> The tribe performs religious ceremonies at the Falls, including vision quests—"multi-day events in which individual tribal members seek spiritual contact through meditation, fasting, and bathing in the water below the Falls."<sup>200</sup>

The dispute arose after Puget Sound Energy, Inc. (PSE) was granted a license to continue operation of the Snoqualmie Falls Hydroe-

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<sup>195.</sup> *Id.* (emphasis added) (highlighting that the RFRA does not state a particular mechanism by which religion cannot be burdened, but rather a prohibition on government action that has a particular effect on religious exercise).

<sup>196.</sup> *Id.* at 1090. The dissent also emphasized that the majority's approach overrules fourteen years of contrary circuit precedent and that it is inconsistent with cases applying the RLUIPA. *Id.* at 1086.

<sup>197.</sup> On January 5, 2009, the Navajo, the Hopi, and other tribes petitioned the U.S. Supreme Court for a writ of certiorari. Petition for Writ of Certiorari, *Navajo Nation*, 129 S. Ct. 2763 (No. 08-846), 2009 WL 46999. A handful of amici filed briefs in support of the petition. *See, e.g.*, Brief of Amici Curiae National Congress of American Indians et al. in Support of the Petitioners, *Navajo Nation*, 129 S. Ct. 2763 (No. 08-846), 2009 WL 355746; Brief of Amici Curiae Religious Liberty Law Scholars in Support of Petition for a Writ of Certriorari, *Navajo Nation*, 129 S. Ct. 2763 (No. 08-846), 2009 WL 355748. Only time will tell if the conservative Ninth Circuit test will be applied nationwide.

<sup>198.</sup> Snoqualmie Indian Tribe v. Fed. Energy Regulatory Comm'n, 545 F.3d 1207 (9th Cir. 2008).

<sup>199.</sup> *Id.* at 1211. The tribe believes that the mist generated by the Falls connects the earth to the heavens and that a power water spirit lives in the plunge pool below the Falls. *Id.* 

<sup>200.</sup> Id.

lectric Project, which began in 1975.<sup>201</sup> The project consists of "a lowlevel diversion dam located upstream from the Falls, an underground power plant, and an above-ground power plant downstream from the Falls."<sup>202</sup> The tribe argued that the continued operation of the hydroelectric project prevented it from having necessary religious experiences in three ways: the project's operation deprived the tribe of access to the Falls for vision quests and other religious experiences, it eliminated the mist necessary for the tribe's religious experiences, and it altered the ancient sacred cycle of water flowing over the Falls."<sup>203</sup> However, the argument failed when the court applied the Navajo Nation test. Because the tribal members would not lose a government benefit or face criminal or civil sanctions for practicing their religion, the governmental activity did not impose a substantial burden on the tribal members' ability to exercise religion.<sup>204</sup> Thus, due to the overly restrictive compelling interest test from Navajo Nation, another Native American tribe has lost full enjoyment of its traditional religion, endangering the tribe's general wellbeing and peoplehood.

#### VI. THE BIOPOLITICAL EFFECT OF THE NAVAJO NATION TEST

The overly restrictive compelling interest test from *Navajo Nation* should be reconsidered because of the biopolitical effect it has on Native American populations. Although biopolitics can, at times, lead to a literal taking of life, it can have a more insidious effect on native culture. Because native identity, both collectively and individually, is so closely related to land itself, decisions affecting the maintenance and control of the land affect the survival of the tribes themselves. From the native perspective, pollution of religious sites will inevitably wipe out the tribes. Because the *Navajo Nation* decision allows Native American sacred sites to be polluted, if it continues to stand it may destroy the very existence of the tribes.

Although the en banc court of appeals did not doubt the sincerity of the tribes' deeply held religious beliefs,<sup>205</sup> it failed to understand that "damaged spiritual feelings"<sup>206</sup> are more than just a subjective religious experience in the Native American context; damage to spirituality literally threatens the existence of a tribe. In failing to understand that connec-

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<sup>201.</sup> Id. at 1210.

<sup>202.</sup> Id.

<sup>203.</sup> Id. at 1213.

<sup>204.</sup> Id. at 1214.

<sup>205.</sup> Cf. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1070 (9th Cir. 2008), cert. denied, 129 S. Ct. 2763 (2009) (discussing at length the plaintiffs' "subjective, emotional religious experience").

<sup>206.</sup> Id.

tion, the court declined to assign it the proper weight. Greater weight should be assigned because the character of native religion is inherently different from the Western-based religions on which the RFRA precedent is founded.<sup>207</sup> Because of crucial differences between Western and Native American religions, specifically the importance of place, this precedent is insufficient for an adequate RFRA sacred site test.

Difficult legal and regulatory decisions must inevitably be made, and one group or another will mostly likely be displeased with the result. Foucault's philosophies are helpful because they provide a novel way of seeing how such decisions affect a population. His concept of biopower is applicable in the Native American context because, as Kristen Carpenter's research shows,<sup>208</sup> Indian peoplehood is affected by adverse decisions in sacred site cases. Here, by "making live" the expansion of the Snowbowl resort and the corresponding recreation, the en banc court of appeals in *Navajo Nation* is essentially "letting die" the affected tribal populations.

The test developed from *Navajo Nation* should be reconsidered because of this biopolitical effect on Native American populations and a new test that takes into consideration the unique character of the link between native religion and land should be implemented.

<sup>207.</sup> Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972). 208. See Carpenter, supra note 75.