COMMENT

Lyng v. Northwest Indian Cemetery Protective Association: Government Property Rights and the Free Exercise Clause

Introduction

The Free Exercise Clause of the First Amendment guarantees that "Congress shall make no law . . . prohibiting the free exercise [of religion]."[1] In the past, the United States Supreme Court has interpreted this clause to mean that religious practices are shielded from governmental interference absent a compelling regulatory interest.[2] In a recent case, *Lyng v. Northwest Indian Cemetery Protective Association*,[3] however, the Supreme Court held that the Free Exercise Clause did not bar the federal government from building a logging road in a national forest despite the fact that this road "could have devastating effects on [nearby] traditional Indian religious practices" by impairing the privacy and solitude of the "high country"[4] needed by the Indians for satisfactory ritual performance.

The Court of Appeals for the Ninth Circuit had upheld the district court's injunction of the planned road.[5] In reversing the lower courts' decisions, Justice O'Connor, writing for the five-to-three majority, ruled that the Free Exercise Clause does not protect against "incidental effects

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1. U.S. CONST. amend. I.

2. *See infra* notes 97-144 and accompanying text.

3. 108 S. Ct. 1319 (1988).

4. *Id.* at 1326. The Court's decision in *Northwest Indian* evoked quick opposition in the press. *See The Road to Perdition*, Los Angeles Times, Apr. 26, 1988, at 4, col. 1; *Religious Rights: A Matter of Property*, Wall St. J., May 20, 1988, at 18, col. 4; *Religion Clauses of First Amendment Divide Court Along Ideological Grounds*, The Recorder, Sept. 6, 1988, at 10, col. 1. Popular concern over the future of the affected tribes' religion prompted musical artists to stage a Hollywood rock concert in September, 1988, the proceeds of which benefited the Native American Rights Fund to lobby on the Indians' behalf. *See No G-O Road Concert to Benefit Native American Rights Fund* (PR Newswire, Sept. 1, 1988) (NEXIS, NEXIS library, Omni file).

5. Northwest Indian Cemetery Protective Ass'n. v. Peterson, 565 F. Supp. 586 (N.D. Cal. 1983), *aff'd*, 795 F.2d 688 (9th Cir. 1986), *rev'd sub nom.* Lyng v. Northwest Indian Cemetery Protective Ass'n., 108 S. Ct. 1319 (1988).

of government programs, which may make it more difficult to practice certain religions."[6] The Court ruled that the government's actions will be subject to strict scrutiny only when the incidental effects of their programs either "coerce individuals into acting contrary to their religious beliefs,"[7] or "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."[8] Since the planned logging road would neither "coerce" nor "penalize" the Indians for their beliefs, the road's effects on their religious practices—however disastrous they would be—were deemed constitutionally irrelevant.[9]

Justice Brennan, joined by Justice Marshall and Justice Blackmun, dissented strongly. " 'Prohibit,' " the dissenters claimed, is "a comprehensive term that in no way suggests that the intended [Free Exercise Clause] protection is aimed only at governmental actions that coerce affirmative conduct."[10] They argued that "prohibit" should be broadly construed to sanction government "laws that frustrate or inhibit religious *practice*"[11] unless the government can show a "compelling justification for its proposed use of federal land."[12]

This Comment examines previous decisions of the Supreme Court in order to discover whether the indirect effects of government programs on the vitality of religious practices have been considered in determining whether government actions impose an unconstitutional burden on the free exercise of religion. Part I of this Comment will present the facts and holding of the *Northwest Indian* majority, and the dissent's argument for a broader interpretation of the Free Exercise Clause. Part II then will trace the origin and development of the Supreme Court's modern, two-part test for an unconstitutional infringement of religious practice by looking at those cases in which the Court has given constitutional significance to the noncoercive, nonpenalizing effects of government programs on religiously motivated conduct. Finally, Part III will assess the constitutional analysis in *Northwest Indian* in light of the standards established by precedent.

This Comment will conclude that the "incidental effects of government programs"[13] often have been of deep concern to the Supreme Court in ruling whether government actions unconstitutionally infringe on the rights of religious practitioners.[14] The modern, two-part test has typi-

6. *Northwest Indian*, 108 S. Ct. at 1326. (Kennedy, J., did not take part in the decision).
7. *Id.*
8. *Id.* at 1325.
9. *See id.* at 1326-27.
10. *Id.* at 1335 (Brennan, J., dissenting).
11. *Id.* (emphasis in original).
12. *Id.* at 1338.
13. *Id.* at 1326.
14. *See infra* notes 97-144 and accompanying text.

cally included an evaluation of the harm government programs would inflict on the vitality of the religions affected.[15] By explicitly rejecting this effects analysis in *Northwest Indian*, the Supreme Court refused to recognize the indirect impact governmental action may have on religious practice.[16] As Justice Brennan trenchantly observed in his *Northwest Indian* dissent, "[The majority's holding produces] the cruelly surreal result [that] governmental action that will virtually destroy a religion is nevertheless deemed not to 'burden' that religion."[17]

I. Background

A. Facts

The Siskiyou mountains rise more than seven thousand feet above the confluence of the Klamath River and Blue Creek in remote northwestern California.[18] The highest group of peaks and rocks, constituting approximately twenty-five square miles,[19] is traditionally a sacred "high country" for nearby Yurok, Karok, and Tolowa Indians.[20] "For at least 200 years and probably much longer,"[21] tribal representatives have followed a network of ancient paths into the high country,[22] where, using "prayer seats," they believe they communicate with primordial creative spirits residing in the mountains and valleys around and below them. Through silent, solitary meditation in the high country, Indian healers and leaders acquire spiritual power or "medicine." Returning from the peaks, they perform the "World Renewal" tribal ceremonies, "which constitute the heart of the *Northwest Indian* religious belief system."[23] So important are the Indians' regular pilgrimages into the high country that "[a]lthough few tribe members actually make medicine at the most powerful sites, the entire tribe's welfare hinges on the success of the individual practitioners."[24] Making medicine is "site-specific." The Indians must silently meditate at specific locations in the high country in order

15. *See infra* notes 110-144 and accompanying text.

16. *See infra* notes 47-52, 87-88 and accompanying text.

17. *Northwest Indian*, 108 S. Ct. at 1337 (Brennan, J., dissenting).

18. P. MATTHIESSEN, INDIAN COUNTRY 165-99 (1984).

19. *Northwest Indian*, 108 S. Ct. at 1330 (Brennan, J., dissenting).

20. P. MATTHIESSEN, *supra* note 18, at 168.

21. *Northwest Indian*, 108 S. Ct. at 1330 (Brennan, J., dissenting).

22. The Yurok call the path-network *thkla-mah*, *i.e.*, the ladder or steps into the sacred "sky-world" of the high country. P. MATTHIESSEN, *supra* note 18, at 169.

23. *Northwest Indian*, 565 F. Supp. at 594. Individual members hike into the high country to acquire "curative powers for the healing of the sick, or personal medicine for particular purposes such as good luck in singing, hunting, or love." *Northwest Indian*, 108 S. Ct at 1331 (Brennan, J., dissenting).

24. *Northwest Indian*, 108 S. Ct. at 1332 (Brennan, J., dissenting). *See Northwest Indian*, 565 F. Supp. at 591-92.

for medicine-making to have religious efficacy.[25]

> The religious power [medicine makers] acquire in the high country lends meaning to . . . tribal ceremonies, thereby enhancing the spiritual welfare of the entire tribal community . . . . For the Yurok, Karok, and Tolowa peoples, the high country constitutes the center of the spiritual world. No other geographic areas or sites hold equivalent religious significance for these tribes.[26]

Thus, the Yurok, Karok, and Tolowa Indians cannot practice their religion outside the high country, and their beliefs and their tribal welfare require that these sacred sites remain undisturbed.[27]

The high country constitutes the northeastern corner[28] of what is today the 76,500-acre Blue Creek Unit of Six Rivers National Forest (the Forest).[29] Chimney Rock is a prominent peak in the high country that the Indians use as a sacred medicine site.[30] In 1982, the United States Forest Service gave final approval to a plan to pave a six-mile segment of an existing dirt road traversing the Chimney Rock area.[31] When paved, the segment would complete the "G-O road," a 75-mile-long roadway to be used by logging trucks and automobiles traveling between the small towns of Gasquet and Orleans, California.[32] At the same time that the Forest Service approved completion of the G-O road through Chimney Rock, the Service adopted a management plan permitting the harvesting of 733 million board feet of timber from the Blue Creek Unit over the next 80 years.[33]

The federal government approved completion of the G-O road and harvesting plans despite a 1979 preliminary Forest Service study recommendation that the road not be completed. That study, based on extensive consultation with affected tribes, urged the government to abandon its plan because Indian religious rituals conducted at Chimney required "privacy, silence, and an undisturbed natural setting," and construction along any possible route "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of belief systems and lifeway of Northwest California Indian peoples."[34]

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25. *Northwest Indian*, 108 S. Ct at 1331 (Brennan, J., dissenting) ("The site-specific nature of Indian religious practice derives from the Native American perception that land is itself a sacred, living being.").

26. *Northwest Indian*, 565 F. Supp. at 591-92, 594 (citations omitted).

27. *See id.* at 594.

28. *Id.* at 591.

29. *Northwest Indian*, 795 F.2d at 689.

30. *Northwest Indian*, 108 S. Ct at 1322.

31. *Id.*

32. *Id.* at 1321.

33. *Id.* at 1332 (Brennan, J., dissenting).

34. *Id.* at 1322 (quoting D. THEODORATUS, CULTURAL RESOURCES OF THE CHIMNEY ROCK SECTION, GASQUET-ORLEANS ROAD, SIX RIVERS NATIONAL FOREST (1979)).

The final plan prepared by the Regional Forester and accepted by the government selected the route farthest from "sites used by contemporary Indians for specific spiritual activities,"[35] and provided a one-half mile protective zone around "eleven sites with identified historical and ritual use."[36] The final plan rejected as logistically and economically unfeasible alternative routes that would have avoided Chimney Rock altogether.[37]

After exhausting their administrative remedies,[38] Indian organizations, environmental groups, the State of California, and individuals petitioned the United States District Court for the Northern District of California for a permanent injunction against both completing the G-O road and timber harvesting.[39] The plaintiffs based their claim on the Free Exercise Clause of the First Amendment, which states that "Congress shall make no law . . .prohibiting the free exercise [of religion]."[40] After emphasizing the centrality of the Chimney Rock area to the practice of their religion, the Indians argued that the government's proposed half-mile protective zones "would fail significantly to mitigate the adverse visual, aural, and environmental impacts of logging activities on the high country's salient religious characteristics."[41] They claimed that (1) by separating Chimney Rock from contiguous peaks, the G-O road would "damage the pristine visual conditions found in the high country that are essential for its religious use"; (2) noise from road construction and vehicular traffic would have a significant negative impact on religious practices; (3) road construction would result in "environmental degradation," which would "erode the religious significance" of the Chimney Rock area; and (4) "religious use of the area would be impaired by increased recreational use resulting from construction of the Chimney Rock Section."[42] The Indians asserted that the Free Exercise Clause precluded the Forest Service from completing the G-O road and permitting harvesting without first showing a compelling governmental interest that could not be satisfied by means that did not burden the Indians' religious practices.[43]

35. *Northwest Indian*, 108 S. Ct. at 1322.

36. *Northwest Indian*, 795 F.2d at 694. *See Northwest Indian*, 108 S. Ct. at 1322.

37. *Northwest Indian*, 108 S. Ct at 1322. *See Northwest Indian*, 565 F. Supp. at 598-601.

38. *Northwest Indian*, 565 F. Supp. at 590.

39. *Id.* at 606.

40. U.S. CONST. amend. I.

41. *Northwest Indian*, 565 F. Supp. at 592.

42. *Id.*

43. The district court also considered and rejected the Indians' claim that completion of the Chimney Rock section would be in violation of the American Indian Religious Freedom Act (AIRFA), a Congressional resolution stating that the United States endorses a policy "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 cere-

In response, the government "concede[d] that the Indian plaintiffs' use of the high country for religious practices [was] entitled to First Amendment protection."[44] The defendants argued, however, that the government had an overriding interest in completing the G-O road. The government cited several benefits of the proposed project. Completing the road would provide greater access to the Forest for administrators, recreational visitors, and timber harvesters. In addition, development of the area's timber would stimulate employment in the region and generate revenue for the federal government.[45] The government argued that these benefits amounted to a compelling interest that justified the indirect religious infringement that the road would cause.[46]

The Indian plaintiffs, at the outset, faced a discouraging trend in federal court decisions concerning Native American religious rights. Although state courts had upheld these rights over asserted government interests,[47] the federal courts had not been as receptive. Federal appellate courts found for the United States when the government sought to develop a ski area, despite evidence that the increased tourist presence would disturb natural sites held sacred by Hopi and Navaho Indians,[48] and when construction of a government road would result in an increase of tourists next to Lakota and Tsistsistas ceremonial grounds.[49] Federal appellate courts permitted the United States to flood Navajo sacred springs and prayer sites[50] and the Cherokee ancestral town of Chota,[51] all on federal land, to construct dams.[52]

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monials and traditional rites." 42 U.S.C. § 1996 (1982). *See Northwest Indian*, 565 F. Supp. at 597-98 (AIRFA's goals were satisfied when Forest Service agents planning the road took testimony from Indian leaders to minimize harm to sacred sites).

44. *Northwest Indian*, 565 F. Supp. at 594.

45. *Id.* at 595.

46. *See id.* at 595-97.

47. State supreme courts have recognized a substantial burden on Native American religious practices and required the government to show justification for its interference when the practices did not conflict with state land-use management. Thus, the Alaska Supreme Court found that the interest of an Athabascan in providing moose meat for a funeral meal outweighed the State's interest in preventing poaching. Frank v. State, 604 P.2d 1068 (Alaska 1979). The California high court also balanced interests to find that the interest of a member of the Native American Church in performing a peyote ritual outweighed the admittedly important State goal of drug control. People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

48. Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1056 (1984).

49. Crow v. Gullet, 706 F.2d 856 (8th Cir. 1983), *cert. denied*, 464 U.S. 977 (1983).

50. Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

51. Sequoyah v. Tennessee Valley Authority, 620 F.2d 1159 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980).

52. Federal appellate courts have considered and rejected the idea that individuals must own property in order to assert a claim under the Free Exercise Clause. *See Badoni*, 638 F.2d at 172; *Sequoyah*, 620 F.2d at 1164. *See generally*, Note, *Native American Free Exercise Rights to the Use of Public Lands*, 63 B.U.L. REV. 141 (1983); Stambor, *Manifest Destiny and Ameri-*

In *Northwest Indian*, however, the district court rejected the government's assertion that its interests in completing the G-O road were compelling and found for the Indian plaintiffs.[53] The Indians had demonstrated that the pristine and undisturbed environment of the Chimney Rock section was "central and indispensable" to their religious practices and that the proposed governmental action would "burden the free exercise of [their] religion."[54] Balancing the demonstrated burden to the Indians' first amendment rights against the government's asserted interests in developing the Chimney Rock area, the district court found that the government had failed to demonstrate an overriding justification for paving the six-mile section of road. The lower court found that completion of the Chimney Rock section would neither improve access to timber resources nor result in a net increase in regional jobs.[55] Increased recreational access by completing the road "[could] not support infringement of plaintiffs' First Amendment rights."[56] The court concluded that the government's remaining concerns (administrative efficiency, increased revenues) "[fell] far short" of the very weighty interests required to justify an infringement on the Indians' freedom of religion.[57]

While the government's appeal to the Ninth Circuit was pending, Congress enacted the California Wilderness Act of 1984.[58] The Act prohibited all timber harvesting throughout the Forest, exempting from its wilderness designation only the six-mile strip of land required for completing the G-O road, "if the responsible authorities so decide."[59] With the volume of timber subject to harvesting substantially diminished, the government's assertedly compelling interests—already rejected as inadequate by the lower court—failed to impress the appellate court and the Ninth Circuit affirmed the district court's grant of a permanent injunction against the completion of the G-O road.[60] The Indians had shown that their religious practices would be significantly harmed, while the government had failed to demonstrate a "compelling justification" for

can Indian Religious Freedom: Sequoyah, Badoni *and the Drowned Gods*, 10 AM. INDIAN L. REV. 59 (1982).

53. *Northwest Indian*, 565 F. Supp. at 591.

54. *Id.* at 594, 595. *See Sequoyah*, 620 F.2d at 1164 (No claim that ancestral land had "centrality or indispensability" to Cherokee religious observances held dispositive of Indians' free exercise claim against government land development.).

55. *Northwest Indian*, 565 F. Supp. at 595-96.

56. *Id.* at 596.

57. *Id.*

58. California Wilderness Act, Pub. L. No. 98-425, 98 Stat. 1619 (1984).

59. *Northwest Indian*, 108 S. Ct. at 1323.

60. *Northwest Indian*, 795 F.2d 688, 698 (9th Cir. 1986). The California Wilderness Act rendered moot the lower court's requirement that the government prepare environmental impact reports on the wilderness potential of the Blue Creek Unit and the effect of logging on indigenous populations of anadromous fish. Accordingly, the court of appeal vacated those portions of the district court's order.

the road's completion.[61]

The United States Supreme Court granted certiorari to address the merits of plaintiff Indians' first amendment claim.[62] The Supreme Court, ruling that the Free Exercise Clause does not prohibit the government's proposed actions, reversed, and remanded the case to the district court for reconsideration of the lower court's injunction.[63]

B. Majority Holding

The *Northwest Indian* majority recognized that completion of the G-O road would have serious and possibly fatal effects on the religious practices of the Indian plaintiffs.[64] Unlike the two lower courts, however, the Supreme Court refused to balance the harm to the Indians' religious practices against the government's interest in finishing the G-O road. The Court ruled that the Constitution does not protect individuals from indirect, adverse consequences of otherwise lawful government actions. If balancing were required, the Indians could burden the government with a religious servitude on its own land by showing that the adverse effects to their religion outweighed the government's interest in developing its property.[65] In addition, a balancing test would require the judiciary to evaluate religious-truth claims.[66] The Court found that the Free Exercise Clause only prohibits the government from coercively compelling believers to act contrary to the tenets of their faith, or penalizing believers for performing their religious practices. Since the Indian plaintiffs did not allege coercion or penalization, they did not state a claim under the Free Exercise Clause.[67]

The *Northwest Indian* majority conceded that the Indians' religious beliefs were sincere[68] and their religious practices in the high country were long-standing.[69] The Court recognized that these practices were "intimately and inextricably bound up with the unique features of the Chimney Rock area . . . ."[70] The Court recognized what the government did not dispute, namely, that "the logging and road-building projects at issue . . . could have devastating effects on traditional Indian religious practices."[71] The majority agreed that "the threat to the efficacy of at least some religious practices is extremely grave," and accepted for pur-

61. *Id.* at 694-95.
62. *Northwest Indian*, 108 S.Ct. at 1324.
63. *Id.* at 1330.
64. *See infra* notes 68-74 and accompanying text.
65. *See infra* notes 75-77 and accompanying text.
66. *See infra* notes 78-81 and accompanying text.
67. *See infra* notes 82-83 and accompanying text.
68. *Northwest Indian*, 108 S. Ct. at 1324.
69. *Id.* at 1326.
70. *Id.*
71. *Id.*

poses of argument the Ninth Circuit's opinion that the G-O road will " 'virtually destroy the Indians' ability to practice their religion.' "[72]

Nevertheless, the Court ruled that the First Amendment does not require balancing the indirect adverse effects on religion against the government's interests.[73] "Even if we assume . . . the Ninth's Circuit's prediction [that the road] will 'virtually destroy the Indians' ability to practice their religion' . . . the Constitution simply does not provide a principle that could justify upholding respondents' legal claims."[74]

In support of its ruling, the Court gave two reasons why first amendment balancing of effects and interests would be inapplicable in cases like *Northwest Indian*. First, constitutional recognition of indirect adverse effects of government property use on religious practices would permit the Indians to impose a "religious servitude" on Chimney Rock, opening the way for a constitutional objection to the presence of anyone in the area—"recreational visitors, other Indians, or forest rangers."[75] Unless the Court upheld the government's right to use its land, despite the admitedly negative consequences to petitioners' religious practices, accommodating Indian religious convictions "could easily require de facto beneficial ownership of some rather spacious tracts of public property."[76] The result of the majority's analysis is a powerful vindication of the government's right to use its property in any lawful manner it sees fit. Justice O'Connor concluded, "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."[77]

Second, the Court believed that application of a balancing test would necessarily involve the judiciary in an inappropriate assessment of the truth of believers' religious claims. According to the majority, since courts "cannot determine the truth of the underlying [religious] beliefs that [lead] to . . . religious objections [, courts] cannot weigh the adverse effects" of government programs on the spiritual welfare of religious adherents.[78] What is true of any one religious objector's beliefs is true of all: courts have no access to religious truth and therefore have no standard for the comparison of competing religious views. The court concluded that "[w]ithout the ability to make such comparisons, we cannot say that . . . one form of incidental interference with an individual's spiritual activities should be subjected to a different constitutional analysis than [an]other."[79] Again assuming that a constitutional analysis of gov-

72. *Id.* (quoting *Northwest Indian*, 795 F.2d at 693).
73. *See id.* at 1324.
74. *Id.* at 1326-27 (quoting *Northwest Indian*, 795 F.2d at 693).
75. *Id.* at 1327.
76. *Id.*
77. *Id.* (emphasis in the original).
78. *Id.* at 1325 (citations omitted).
79. *Id.*

ernmental effects on religious *practices* requires a judicial determination of unprovable religious *beliefs*, the court emphasized that the "location of the line" between permissible government actions and impermissible prohibitions on the free exercise of religion "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development."[80] Since courts cannot determine which indirect effective burdens on religious practice deserve judicial relief and which do not (because they cannot assess which practices reflect beliefs closer to divine truth), the government need not provide a compelling justification for conduct that "would significantly interfere with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs."[81]

The Court distinguished two forms of government action that would require justification. When religious adherents are coerced by government programs into acting against their religious beliefs, or penalized by being denied government benefits available to other citizens, the First Amendment requires the government to show a compelling justification for its conduct.[82] Because the government's proposed land use in the Chimney Rock area neither coerced nor penalized the Indians, the First Amendment could not protect them from the effective destruction of their religion by the government's programs.

> [The scrutiny applied to] indirect coercions or penalties on the free exercise of religion. . . . does not and cannot imply that the 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.[83]

C. Dissenting Opinion

The Brennan dissent, which Justices Marshall and Blackmun joined, argued that the Free Exercise Clause required the Court to balance the indirect harm to the Indians' religious practices against the government's interests. Justice Brennan criticized the majority for departing from the effects-oriented, "common-sense"[84] reading of the Free Exercise Clause that the Court had adopted in the past. Indirect affirmative coercion of

80. *Id.* at 1326.

81. *Id.* at 1325.

82. *Id.* at 1326 ("[I]ndirect coercion or penalties on the free excercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment."). The Court's analysis relies on Bowen v. Roy, 476 U.S. 693 (1986). *See infra* notes 145-168 and accompanying text.

83. *Northwest Indian*, 108 S. Ct. at 1326.

84. Citing Webster's definition of "prohibit" ("to prevent from doing something") as evidence of the majority's too-narrow interpretation of the free exercise guarantee, Justice Brennan concluded, "Government action that frustrates or inhibits religious practice fits far more comfortably within this definition than does the Court's affirmative compulsion test." WEB-

believers, the dissenters argued, is just one way in which the government has burdened religious practices in previous cases. In deciding those cases, "we nowhere suggested that such coercive compulsion exhausted the range of religious burdens recognized under the Free Exercise Clause."[85]

Regarding the majority's contention that upholding the injunction would permit the Indians to unilaterally resolve future conflicts in their favor by invoking the Free Exercise Clause, Justice Brenann observed that the issue of federal lands under " 'religious servitudes' . . . . is most assuredly not before us today," and would not in any case excuse the Court from making a constitutional analysis of the adverse effects of the government's program on the Indians' religious practices in reaching its decision.[86] By refusing to balance the interests of the parties, "the Court embrace[d] the Government's contention that its prerogative as landowner should always take precedence over a claim that a particular use of federal property infringes religious practices."[87] As a result, the dissenters argued, "the Court has effectively bestowed on one party to this conflict the unilateral authority to resolve all future disputes in its favor . . . ."[88]

Justice Brennan rejected the majority's premise that assessment of adverse effects would entail judicial evaluation of religious-truth claims. Rather, "Native Americans would be the arbiters of which practices are central to their faith, subject only to the normal requirement that their claims be genuine and sincere."[89]

Addressing the majority's contention that any analysis of the effects of government action on religious practices would require "measuring . . . spiritual development,"[90] the dissenting justices observed that the Court had previously "recognized that laws that affect spiritual development by impeding the integration of children into the religious community or by increasing the expense of adherence to religious principles—in

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STER'S NINTH NEW COLLEGIATE DICTIONARY 940 (1983); *Northwest Indian*, 108 S. Ct. at 1335 n.4 (Brennan, J., dissenting).

85. *Id.* at 1334 (Brennan, J. dissenting).

86. *Id.* at 1339 (Brennan, J., dissenting).

87. *Id.* at 1333 (Brennan, J., dissenting). *See* W. CANBY, JR., AMERICAN INDIAN LAW 236 (1988) (Canby, the author of the Ninth Circuit's opinion in *Northwest Indian*, 795 F.2d 688 (9th Cir. 1986), argues that the Supreme Court's disposition of the case "presumably puts an end to free exercise challenges of governmental development projects.").

88. *Northwest Indian*, 108 S. Ct. at 1338 (Brennan, J., dissenting).

89. *Id.* at 1339 (Brennan, J., dissenting). The centrality test is discussed and criticized in Note, *American Indian Sacred Religious Sites and Government Development: A Conventional Analysis in an Unconventional Setting*, 85 MICH. L. REV. 771, 783 (1987) ("In all [sacred site] cases . . . American Indian plaintiffs readily demonstrated that they followed an actual religion in which they sincerely believed."). *See also* Note, *Indian Religious Freedom and Government Development of Public Lands*, 94 YALE L.J. 1447 (1985).

90. *Northwest Indian*, 108 S. Ct. at 1326.

short, laws that frustrate or inhibit religious *practice*—trigger the protections of the [Free Exercise Clause]."[91] In brief, prior decisions by the Supreme Court required no judicial evaluation of spiritual development to assess the effect of government action on religious practices.

Justice Brennan offered a balancing test that suggests that once religious "adherents challenging a proposed use of federal land" vouch for the centrality of an affected practice, they bear the burden of showing "that the [use] poses a substantial and realistic threat of frustrating their religious practices. Once such a showing is made, the burden should shift to the Government to come forward with a compelling state interest sufficient to justify the infringement of those practices."[92]

The dissenters believed that the majority's interpretation of the Free Exercise Clause was unjustifiably narrow. Justice Brennan stated, " '[P]rohibit' [is] a comprehensive term that in no way suggests that the intended protection is aimed only at governmental actions that coerce affirmative conduct."[93] Instead, protection under the First Amendment should extend to governmental acts that effectively "prevent conduct consistent with religious belief."[94]

According to the dissent, failure to reaffirm its own precedents led the Court to the inequitable result that "a federal land-use decision that promises to destroy an entire religion does not burden the practice of that faith in a manner recognized by the Free Exercise Clause."[95] Because the majority unjustifiably narrowed the scope of free exercise clause protection, the dissent concluded, the Court's decision "fails utterly to accord with the dictates of the First Amendment."[96]

II. Free Exercise Clause Precedents to *Northwest Indian*

A. *Cantwell*'s "Shield"

The history of the Supreme Court's analysis of the Free Exercise Clause supports the *Northwest Indian* dissent. The early history of free exercise cases established the government's role as active protector of religious diversity.[97] The Supreme Court then provided a two-part test for determining when government action unconstitutionally intruded upon religious practice.[98] Only recently has the manner of this intrusion weighed in the balancing of these interests.[99] Indeed, the modern history

91. *Id.* at 1335 (Brennan, J., dissenting) (emphasis in the original).
92. *Id.* at 1339 (Brennan, J., dissenting).
93. *Id.* at 1335 (Brennan, J., dissenting).
94. *Id.*
95. *Id.* at 1339 (Brennan, J., dissenting).
96. *Id.* at 1340 (Brennan, J., dissenting).
97. *See infra* notes 101-109 and accompanying text.
98. *See infra* notes 110-144 and accompanying text.
99. *See infra* notes 145-168 and accompanying text.

of free exercise clause analysis supports the contention of the *Northwest Indian* dissent that the "effect" and not the "form" of government constraints on religious practice determine their constitutionality under the First Amendment.[100]

The Framers, by incorporating the Free Exercise Clause into the First Amendment, intended "at the very least . . . to guarantee freedom of conscience by preventing any degree of compulsion in matters of belief."[101] Early in its discussion of the Free Exercise Clause, the Supreme Court made a distinction between freedom to believe, which is absolutely protected, and freedom to act on those beliefs, which the government may regulate in the public interest.[102] The Court first recognized that the Free Exercise Clause protects religious practices in certain circumstances in 1940 in *Cantwell v. Connecticut*.[103] In *Cantwell*, a Jehovah's Witness was arrested for playing an anti-Catholic record to interested members of the public without receiving city certification as a member of a religious or philanthropic cause.[104] The Court ruled that the state law requiring such certification violated his right to the free exercise of religion, and noted that while the government may regulate religious activity, "[i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom [to act]."[105]

Significantly, the Court emphasized that the purpose of first amendment liberties is to foster, not merely tolerate, religious and political diversity.[106] Religious and political "liberties are, in the long view,

100. *Northwest Indian*, 108 S. Ct. at 1334 (Brennan, J., dissenting).

101. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1160 (2d ed. 1988).

102. *See* Reynolds v. United States, 98 U.S. 145 (1878) (polygamy statute upheld against Mormon who claimed polygamy was religious belief); Prince v. Massachusetts, 321 U.S. 158 (1943) (statute prohibiting public sale of magazines by minors upheld against parents' claim that sale was mandated by their beliefs as Jehovah's Witnesses).

103. 310 U.S. 296 (1940). One year earlier, in Schneider v. New Jersey, 308 U.S. 147, 164 (1939), the Court had ruled that the government must use the least restrictive means of achieving its lawful ends when "freedom of speech and press" are impaired by requiring permits to distribute religious pamphlets. The Court did not mention the Free Exercise Clause.

104. *Cantwell*, 310 U.S. at 301-02.

105. *Id.* at 304.

106. *See* Lynch v. Donnelly, 465 U.S. 668, 673 (1984) "[T]he Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. . . . Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause." *Id.* (citing Zorach v. Clauson, 343 U.S. 306, 314, 315 (1952)) (citation omitted). *See also* Walz v. Tax Comm'n, 397 U.S. 664 (1970) (tax exemptions to religious organizations do not violate Establishment Clause when regulation would result in government entanglement with religion). *But cf.* School Dist. of Abingdon Township v. Schempp, 374 U.S. 203 (1963) (majority cannot use government resources to require religious practices without violating Establishment Clause).

The deference that the Free Exercise Clause requires the government to show toward religious conduct is based on the Founders' perception of the nonrational nature of religion itself:

essential to enlightened opinion and right conduct on the part of the citizens of a democracy."[107] Justice Roberts, writing for a unanimous court, concluded, "The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds."[108] Only when religiously-based conduct rises to the level of "a clear and present danger to a substantial interest of the State" by, for example, inciting violence or breach of the peace, can a "narrowly drawn" statute regulate religious practices.[109]

B. Modern Free Exercise Clause Analysis

1. Sherbert v. Verner

Although *Cantwell* established a "shield" of first amendment protection for religious activity, the Court had addressed only direct government regulation of that activity. In 1963, the Supreme Court in *Sherbert v. Verner*[110] considered the indirect effect that neutral government regulations can have upon religious practice and constructed a test for evaluating the validity of these regulations. In *Sherbert*, a Sabbatarian was

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> The religion clauses were designed to carve out the largest possible sphere where individuals would be free to behave in accordance with the divine impulse and to prevent the impulse from becoming an operative force in secular affairs. What differentiates the religion clauses from the secular aspects of the First Amendment is the founders' understanding that when human beings behave in response to the religious impulse, they cannot be expected to maintain the levels of "reasonable" cost/benefit behavior that can be demanded in the political sphere.
>
> That perception underlies our extremely generous "pure effects-strict scrutiny" free-exercise doctrine that, prior to *Lyng* always had forced government to justify any behavior that had the effect of stifling worship.

Newborne, *Religion Clauses of the First Amendment Divide Court Along Ideological Grounds*, The Recorder, Sept. 6, 1988, at 11, col. 4. On the recent history of the accommodation principle, see generally *Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1606, 1705-15 (1987); *The Supreme Court, 1987 Term—Leading Cases*, 102 HARV. L. REV. 143, 232-42 (1988) (criticizing *Northwest Indian* for an insensitivity to nonmainstream religious claims).

107. *Cantwell*, 310 U.S. at 310.

108. *Id.*

109. *Id.* at 311. The Court, in Murdock v. Pennsylvania, 319 U.S. 105 (1943), invalidated the application of a law requiring solicitors to purchase permits as against itinerant distributors of religious pamphlets. The Court looked explicitly to the effect the law would have on "an age-old type of evangelism," concluding that if the law were enforced, "[t]he spread of religious ideas through personal visitations by the literature ministry of numerous religious groups would be stopped." *Id.* at 115. Laurence Tribe argues that taken together, *Schneider*, *Cantwell*, and *Murdoch* "established the principle that even 'a regulation's unintended adverse impact upon persons of a particular faith can invalidate it' as applied to them." L. TRIBE, *supra* note 101, at 1254 n.23 (quoting Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1319 (1970)).

110. 374 U.S. 398 (1963). On the history of the pure effects-strict scrutiny doctrine, see L. TRIBE, *supra* note 101, at 1251-75.

fired from her job after refusing to work on Saturdays.[111] The Court ruled that a South Carolina statute, denying unemployment compensation benefits to anyone refusing to accept suitable work, violated her rights under the Free Exercise Clause.[112] Justice Brennan, writing for the majority, constructed a two-part test for unconstitutional governmental interference with the free exercise of religion, first inquiring whether the government regulation interfered with the claimant's religious practices and then weighing whether the government's interest justified this interference.[113]

First, the Court asked "whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion."[114] Justice Brennan stated, as a general rule, that " '[i]f the purpose *or effect* of a law is to impede the observance of one or all religions . . ., that law is constitutionally invalid even though the burden may be characterized as being *only indirect*.' "[115]

The *Sherbert* Court found the South Carolina law indirectly burdened the appellant's religious practices by forcing her "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."[116] The Court found that choice analogous to "a fine imposed against appellant for her Saturday worship."[117] Thus, because the South Carolina law "condition[ed] the availability of benefits upon [the Sabbatarian's] willingness to violate a cardinal principle of her religious faith," the law substantially burdened her freedom of religion.[118]

The Court therefore focused on the state's actions under the second prong of the test, inquiring "whether some compelling state interest . . . justifies the [government's] infringement of appellant's First Amendment

111. *Sherbert*, 374 U.S. at 410.

112. S.C. CODE ANN. § 68-114(3)(a)(ii) (Law. Co-op. 1962), providing in relevant part that a claimant is ineligible for benefits, "[i]f . . . [she] has failed, without good cause . . . to accept available suitable work when offered [her] by the employment office or the employer."

113. *See infra* notes 114-123 and accompanying text.

114. *Sherbert*, 374 U.S. at 403.

115. *Id.* at 404 (quoting Braunfeld v. Brown, 366 U.S. 599, 607 (1961)) (emphasis added). In *Braunfeld*, the Supreme Court, per Warren, C.J., rejected a claim by Orthodox Jewish merchants that a Pennsylvania law requiring storekeepers to close on Sundays violated their free exercise rights by depriving them of customers if they followed their religious precepts and closed on Saturdays as well. The Court held that the Constitution did not prohibit an "indirect economic burden" on religious practices that merely made it more expensive to follow religious tenets. *Braunfeld*, 366 U.S. at 606. The Court noted, however, that the Orthodox merchants were "not faced with as serious a choice as forsaking their religious practices . . . ." *Id.* at 605.

116. *Sherbert*, 374 U.S. at 404.

117. *Id.*

118. *Id.* at 406.

right."[119] Even if the state showed a compelling interest, the Court would require the government to "demonstrate that no alternative forms of regulation would combat [unemployment compensation fraud] without infringing First Amendment rights."[120] The Court noted that when courts had found such compelling interests in the past, "[t]he conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order."[121] In *Sherbert*, the government failed to show a compelling state interest because it failed to prove that awarding benefits to Sabbatarians who refused to work on their Sabbath would dilute the compensation fund or disrupt employee scheduling.[122] Consequently, the Court did not proceed to ask whether less restrictive means for achieving the state's purposes were available.[123]

The particular adverse effect of the law at issue in *Sherbert* was the government's indirect coercive compulsion of the Sabbatarian to her religious beliefs. The Supreme Court applied the *Sherbert* two-part test in subsequent free exercise clause cases to establish the rule that the government cannot unjustifiably condition receipt of benefits on an employee's compliance with the law if compliance forces the employee to choose between adhering to his or her religious beliefs and forfeiting unemployment benefits.[124] The government cannot coerce a citizen to act in violation of his or her religious beliefs without a compelling justification, and may only burden religious practices when the government shows that

119. *Id.*

120. *Id.* at 407. *Accord Braunfeld*, 366 U.S. 599, 607 (1961) (statute advancing compelling state interest is valid "unless the State may accomplish its purpose by means which do not impose such a burden [on religious practice]" (citing *Cantwell*, 310 U.S. 296, 304-05 (1940)); *see Sherbert*, 374 U.S. at 408-09 (distinguishing *Braunfeld*'s conclusion that Sunday closing law expressed compelling state interest in uniform day of rest for workers).

121. *Sherbert*, 374 U.S. at 403 (citing Reynolds v. United States, 98 U.S. 145 (1878)); *see also Cantwell*, 310 U.S. at 304, 310-11.

The Supreme Court has not applied strict scrutiny to the armed forces' interference with the religious practices of its troops; the Court has required only a rational relation between the military's constraints and its goals. *See* Goldman v. Weinberger, 475 U.S. 503 (1986) (Air Force's perceived need for uniformity among troops sufficent to prevent Orthodox Jewish rabbi, an officer, from wearing yarmulke); Chappell v. Wallace, 462 U.S. 296, 305 (1983) ("courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have"); Parker v. Levy, 417 U.S. 733, 743 (1974) ("the military is, by necessity, a specialized society separate from civilian society"). Compare the military's goal of maintaining a uniform appearance with the government's need to regulate its internal affairs in a uniform manner. *See infra* notes 150-153 and accompanying text.

122. *Sherbert*, 374 U.S. at 407.

123. *Id.* at 407-09.

124. *See* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (state cannot deny unemployment benefits to Seventh Day Adventist-convert who refused to work on Saturday, her Sabbath); Thomas v. Review Board of the Ind. Employment Sec. Div., 450 U.S. 707 (1981) (state cannot deny unemployment benefits to pacifist Jehovah's Witness who quit rather than work in munitions factory).

there are no less restrictive means of satisfying its interests.[125] The Supreme Court refined and applied the *Sherbert* test, protecting religious practices from all effective burdens that the government cannot justify, nine years later in *Wisconsin v. Yoder*.[126]

2. Wisconsin v. Yoder

Sherbert held that forcing citizens to choose between observing their religion and receiving government benefits can indirectly and impermissibly burden the free exercise of their religion.[127] In *Wisconsin v. Yoder*,[128] the Court applied the *Sherbert* test to decide whether the government can require citizens to do something that will effectively undermine both their religion and their religiously-based community. The State of Wisconsin convicted members of the Old Order Amish under a compulsory school attendance law[129] after they refused to send their children to a private school or enroll them in public school after the eighth grade.[130] The State Supreme Court reversed and Wisconsin appealed.[131] A majority of the United States Supreme Court, led by Chief Justice Burger, held that, despite the considerable interest of the state in educating its citizens, the statute was unconstitutional as applied to the respondents because their compliance would undermine the Amish community and its religious practices.[132]

In applying the first prong of the *Sherbert* test, the *Yoder* Court looked to the the effect and not the form of government action in determining whether a burden on religion existed. The Court observed that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."[133] The Court therefore looked closely at the relation between Amish faith, religious practice, and community to decide whether compliance with the Wisconsin statute would pose a serious threat to the survival of their religion. As determined by the trial court, and accepted by the Supreme Court, "Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the

125. *See infra* notes 126-144 and accompanying text.

126. 406 U.S. 205 (1972).

127. *Sherbert*, 374 U.S. at 404.

128. 406 U.S. 205 (1972).

129. WIS. STAT. § 118.15 (1969), providing in relevant part, "(1)(a) [A]ny person having under his control a child . . . between the ages of 7 and 16 years shall cause such a child to attend school . . . until the end of the school term . . . in which [the child] becomes 16 years of age . . . . (5) Whoever violates this section . . . may be fined not less than $5 nor more than $50 or imprisoned not more than 3 months or both."

130. *Yoder*, 406 U.S. at 207-08.

131. *Id.* at 207.

132. *Id.* at 218.

133. *Id.* at 220. *See Northwest Indian*, 108 S. Ct. at 1334 (Brennan, J., dissenting).

world and worldly influence . . . [and by] their devotion to a life in harmony with nature and the soil."[134] Consequently, requiring Amish teenagers to attend modern American public schools, which stress "technical knowledge[,] . . . competition[,] . . . [and] integration with[ ] contemporary worldly society . . . . interposes a serious barrier to the integration of the Amish child into the Amish religious community"[135] and would "ultimately result in the destruction of the Old Order Amish church community as it exists in the United States today."[136]

Significantly, the Court did not base its first-prong conclusion on a finding that the Wisconsin law coercively compelled the Amish to choose between public schools and criminal sanctions. Instead, the Court made an analysis of the indirect adverse effects of public schooling on the future of Amish religion, values, and culture, if respondents complied with the law.

> Aided by a history of three centuries as an identifiable religious sect . . ., the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others.[137]

Having found that application of the attendance law would burden the respondents' free religious exercise, the Court applied the second prong of the *Sherbert* test and balanced the government's interests against the likely harm to the Amish. The Court emphasized at the outset the significance of valid free exercise claims when it stated, "only those [state] interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[138] The Court first defined the allegedly compelling interests the state sought to advance by its compulsory school attendance law: preparation for responsible citizenship and self-sufficiency in society,[139] and noted that

134. *Yoder*, 406 U.S. at 210.

135. *Id.* at 211-12.

136. *Id.* at 212. The Court found that Amish "religious faith and . . . mode of life" were "inseparable and interdependent," and that the infringed actions were "rooted in religious belief." *Id.* at 215. In addition, the Court found that public schooling "by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community . . . contravenes the basic religious tenets and practice of the Amish faith . . . ." *Id.* at 218. The Court concluded that compulsory attendance "carries with it a very real threat of undermining the Amish community and religious practice as they exist today" and "would gravely endanger if not destroy the free exercise of respondents' religious beliefs." *Id.* at 218, 219.

137. *Id.* at 235.

138. *Id.* at 215.

139. *Id.* at 221.

"[p]roviding public schools ranks at the very apex of the function of a State."[140]

The Court ruled, however, that the quality of the Amish at-home educational system rendered the state's regulatory interest less than compelling. The Court found that the Amish system adequately prepared the respondents' child for life in "the separated agrarian community that is the keystone of the Amish faith,"[141] and that it also prepared children to fulfill "the social and political responsibilities of citizenship . . . ."[142] Consequently, "Wisconsin's interest in compelling the school attendance of Amish children to age 16 emerges as somewhat less substantial than requiring such attendance for children generally."[143] Balancing the harm to Amish religious practices against the injury to the state of Wisconsin, the Court found the religious interests of the respondents superior, and exempted them from compliance with the statute.[144]

Cantwell, *Sherbert*, and *Yoder* exemplify the Supreme Court's tradition of shielding diverse religious practices from direct and indirect adverse effects of government programs, when, on balance, the government has not shown a compelling state interest that could not be satisfied by less restrictive means. In 1986, the Court limited this protection in *Bowen v. Roy*.[145]

3. Bowen v. Roy

In *Roy*, the Supreme Court determined that some governmental regulations are not subject to strict scrutiny under *Sherbert*'s second prong. The State of Pennsylvania refused to provide two Native American parents with benefits under Aid to Families with Dependent Children (AFDC) and Food Stamp programs when they failed to comply with federal regulations[146] requiring that their minor daughter receive a Social Security number.[147] The Roys sued the government, contending that obtaining and using a numerical identifier would violate their daughter's rights under the Free Exercise Clause.[148]

The Supreme Court found that Mr. Roy, a Native American of Abenaki descent, sincerely believed that obtaining a Social Security number for his daughter (named Little Bird of the Snow), and the government's subsequent use of that number, would violate his religious precepts and harm his child's spirit.

140. *Id.* at 213.
141. *Id.* at 222.
142. *Id.* at 225.
143. *Id.* at 228-29.
144. *Id.* at 235-36.
145. 476 U.S. 693 (1986).
146. *See* 42 U.S.C. § 602(a)(25) (1976), 7 U.S.C. § 2025(e) (1976).
147. *Roy*, 476 U.S. at 695.
148. *Id.* at 696.

> In order to prepare his daughter for greater spiritual power [Roy believed that] he must keep her person and spirit unique and that the uniqueness of the Social Security number as an identifier, coupled with the other uses of the number over which she [had] no control, [would] 'rob the spirit' of his daughter and prevent her from obtaining greater spiritual power."[149]

The government advanced an interest in "preventing fraud in . . . benefits programs,"[150] which, because of their "staggering magnitude" and "tremendous administrative problems,"[151] could best be satisfied through assigning and using Social Security numbers. Congress left no latitude to the states to permit individual exemptions to the contested statutes in administering welfare funds, and affirmatively required potential recipients to provide the state with their Social Security numbers and that of each household member.[152]

The Court did not employ *Sherbert* balancing to decide the case. In rejecting the Roys' claim, Chief Justice Burger emphasized that the government enjoyed wide latitude in the regulation of its "internal affairs":

> 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. . . .
>
> . . . Roy may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets.[153]

After determining that indirect burdens on religion caused by the government's management of its internal affairs do not implicate the Free Exercise Clause, Chief Justice Burger went on to specify a narrow range of government burdens that would raise the constitutional question. In a separate part of his opinion, joined by Justices Powell and Rehnquist,[154] Chief Justice Burger concluded that only affirmative compulsion and criminal penalization are inappropriate means of gaining the compliance of religious objectors. The Chief Justice stated, "[G]overnment regulation that indirectly and incidentally calls for a choice between securing a

149. *Id.*

150. *Id.* at 709.

151. *Id.* at 710. The Court noted that "[e]ach year roughly 3.8 million families receive $7.8 billion through federally funded AFDC programs and 20 million persons receive $11 billion in food stamps." *Id.*

152. *See id.* at 708-09.

153. *Id.* at 699-700. *See* United States v. Lee, 455 U.S. 252 (1982) (on *Sherbert* balancing, government interest in uniform application of Social Security system outweighed Amish employer's religious burden of complying with withholding requirement).

154. *See Roy*, 476 U.S. at 701-12 (Part III) (Blackmun, J., concurring in Parts I and II; O'Connor, J., concurring in Parts I and II and dissenting in part, joined by Brennan and Marshall, JJ.; Stevens, J., concurring in Parts I and II and concurring in the judgment; White, J., dissenting).

governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons."[155]

Conversely, a statute "wholly neutral in religious terms and uniformly applicable" that does not affirmatively coerce or penalize religious practices will not be constitutionally problematic, even though a law "may indeed confront some applicants for benefits with choices."[156] Although Chief Justice Burger believed some "government compulsion [was] involved"[157] in conditioning the Roys' receipt of benefits on their compliance with the statutes, the compulsion did not rise to the level of constitutional significance because the laws in question were facially neutral, and therefore "of a wholly different, less intrusive nature than affirmative compulsion or prohibition, by threat of penal sanctions."[158]

The Chief Justice, in the minority section of his opinion, next developed a standard for review of government regulation that burdens the free exercise of religion. The Burger opinion departed from the Court's precedents by announcing that "the nature of the burden is relevant to the standard the government must meet to justify the burden."[159] Chief Justice Burger explicitly rejected the application of the stringent *Sherbert* test, as refined by *Yoder*, to the case, in favor of a lower, "legitimate interest/rational means test."[160] He went on to state, "The test applied in cases like [*Yoder*] is not appropriate in this setting. In the enforcement of a facially neutral and uniformly applicable requirement for . . . welfare programs . . . reaching many millions of people, the Government is entitled to wide latitude."[161] When the government sets a requirement for financial benefits, "neutral and uniform in its application," it is dispositive of the issue if the government shows it has selected "a reasonable means of promoting a legitimate public interest."[162] Accordingly, the Court held that "the Government [need not] justify enforcement of the use of Social Security number requirement as the least restrictive means of accomplishing a compelling state interest."[163] Chief Justice Burger declared that when the burden is not caused by inescapable coercion or penalization, the *Sherbert* test is inappropriate, and the government need only show a legitimate goal and a rational means to justify its

155. *Id.* at 706.
156. *Id.* at 703.
157. *Id.* at 704.
158. *Id.*
159. *Id.* at 707.
160. *Id.* at 729 (O'Connor, J., dissenting in part).
161. *Id.* at 707.
162. *Id.* at 708.
163. *Id.* at 707.

program.[164]

One year after *Roy*, on facts virtually identical to those of *Sherbert*,[165] the Supreme Court explicitly rejected the second half of Chief Justice Burger's analysis and reaffirmed strict scrutiny as the standard of review for all government actions that burden religious practice.[166] In *Northwest Indian*, however, Justice O'Connor embraced the first half of Chief Justice Burger's innovation and accepted *Roy*'s attenuation of free exercise clause prohibitions to coercive compulsion and penalization, thereby continuing her predecessor's misunderstanding of the Court's tradition of accommodation of religious practices.[167] Consequently, the Court restored strict scrutiny, but the range of prohibited conduct still excluded noncoercive effective burdens such as those threatening the *Northwest Indian* plaintiffs. *Roy* therefore stands for the narrow proposition that a facially neutral law that indirectly burdens the free exercise of religion should not be subjected to strict scrutiny if the law pertains to the government's regulation of its internal affairs and does not affirmatively compel religious objectors to violate their beliefs.[168]

III. Criticism of *Northwest Indian*'s Constitutional Analysis

Early and modern analyses of the Free Exercise Clause from *Cantwell* to *Yoder* shared the conviction that the First Amendment forbids any unjustified government actions that effectively burden the free exercise of religion.[169] Breaking with precedent without explanation, *Roy* attenuated free exercise clause prohibitions to those governmental acts that coerce compliance by threatening economic or criminal penalties.[170] *Roy*'s innovation subsequently yielded the harsh result in *Northwest Indian*.[171] Properly interpreted, however, *Roy*'s restrictions apply only to situations in which a religion is not at stake and the government is seeking to manage its internal affairs in an efficient and fraud-resistant manner.[172] Instead of applying *Roy*'s narrow rule, the *Northwest Indian*

164. *Id.* at 707-08.

165. Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (Brennan, J., joined by White, Marshall, Blackmun, O'Connor, and Scalia, JJ.; Powell and Stevens, concurring in the judgment; Rehnquist, C.J., dissenting); *see supra* note 124.

166. *Hobbie*, 480 U.S. at 141-42 ("[The legitimate interest/rational means] test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already provides."(quoting *Roy*, 476 U.S. at 727 (O'Connor, J., dissenting in part)).

167. *See supra* notes 82-83, 97-144 and accompanying text.

168. *See Hobbie*, 480 U.S. at 141-42 (rejecting reasonable-means standard for neutral, governmental benefits laws); *Northwest Indian*, 108 S. Ct. at 1336-37 (Brennan, J., dissenting) (limiting *Roy*'s holding to federal management of internal affairs).

169. *See supra* notes 97-144 and accompanying text.

170. *See supra* notes 145-168, and *infra* notes 175-182 and accompanying text.

171. *See infra* notes 183-184 and accompanying text.

172. *See infra* notes 185-195 and accompanying text.

majority should have adopted *Yoder*'s effects analysis. If it had, the Court would have addressed the complex issues of religious truth and religious servitudes in a more satisfactory way than it did.[173] Finally, if the Court had applied the traditional effects analysis, as modified by Justice Brennan, the Court probably would have decided *Northwest Indian* in favor of the Native American plaintiffs.[174]

A. *Roy*'s Holding Misconstrued

The *Northwest Indian* majority relied heavily on *Roy* to establish that the Free Exercise Clause forbids only outright prohibitions of religion and the government's coercive compulsion or penalization of believers.[175] The Supreme Court's analysis in *Roy*, and its application of *Roy* to the facts of *Northwest Indian*, however, are subject to criticism.

First, *Roy* itself was wrongly decided. The Burger majority departed from established precedent that suggested that the range of impermissible government burdens on religion was not limited to coercive compulsion and penalization.[176] Chief Justice Burger's analysis limited the scope of governmental conduct imposing an unconstitutional burden on religious practice to the two forms of affirmative ("inescapabl[e]")[177] compulsion to violate religious precepts, and criminal penalties for religiously-motivated unlawful conduct. As Justice Brennan pointed out in his *Northwest Indian* dissent, however, the Court in *Sherbert* and subsequent cases "nowhere suggested that such coercive compulsion exhausted the range of religious burdens recognized under the Free Exercise Clause."[178] The standard that the *Sherbert* Court adopted required that if a government program impeded religious practices in any way, including but not limited to the impediments of coercion or penalization, that program was subject to constitutional analysis; indeed, "[i]f the . . . effect of a law is to impede the observance of one or all religions . . ., that law is constitutionally invalid even though the burden [is] indirect."[179] By protecting religious practices from both direct and indirect adverse effects of government actions, the Court in *Sherbert* adhered to *Cantwell*'s concept of first amendment liberties as a "shield" beneath which "many types of life, character, opinion and belief can develop unmolested and unobstructed."[180] *Sherbert* and *Yoder*, like *Roy*, both analyzed facially neutral laws with universal application (unemployment compensation and school attendance laws), but recognized explicitly that "any burden" on reli-

173. *See infra* notes 196-210 and accompanying text.
174. *See infra* notes 211-214 and accompanying text.
175. *See Northwest Indian*, 108 S. Ct. at 1326.
176. *See supra* notes 97-144 and accompanying text.
177. *Roy*, 476 U.S. at 706.
178. *Northwest Indian*, 108 S. Ct. at 1334 (Brennan, J., dissenting).
179. *Braunfeld*, 366 U.S. at 607.
180. *Cantwell*, 310 U.S. at 310.

gious activity,[181] or "mode of life" sustained by that activity,[182] was subject to scrutiny under the Free Exercise Clause. By adopting Chief Justice Burger's analysis, the majority in *Roy* restricted without justification the scope of governmental burdens traditionally recognized by the Supreme Court in its analysis of claims under the Free Exercise Clause.

The result of this unprecedented attenuation is the absurd result in *Northwest Indian*. The *Northwest Indian* majority's lopsided balancing test would strictly scrutinize an unemployment compensation law if one Sabbatarian were refused benefits, but would sacrifice an entire religion for a marginally useful road merely on the state's showing of the road's reasonable relation to a legitimate purpose. As Justice Brennan observed in his dissent, such a result is "cruelly surreal,"[183] and "fails utterly to accord with the dictates of the First Amendment"[184] as it has been interpreted in this century.

Second, *Roy*'s narrow holding was misapplied in *Northwest Indian*.[185] The religious objectors in *Roy* did not claim that the future of their religion hinged upon the lower court's decision. Rather, they asserted that, after conversation with their religious leader, they had come to believe that use of a Social Security number would "prevent [their daughter] from attaining greater spiritual power."[186] The Supreme Court has never ruled on a case in which nonreceipt of government benefits would effectively destroy a religion.[187] If *Roy*'s application is meant to be restricted to financial benefits cases where a religion is *not* endangered by government action, the *Northwest Indian* Court wrongly extended *Roy*'s holding in denying the injunction of the G-O road. Abenaki religious faith and practices would not be ended by the Roys' nonreceipt of benefits, but the completion of the G-O road would, by the *Northwest Indian* majority's own admission, probably result in the destruction of the Tolowa, Yurok, and Karok Indians' religion.[188]

Moreover, the *Roy* Court stressed that its holding addressed the religious objectors' attempts to influence "the conduct of the Govern-

181. *Sherbert*, 374 U.S. at 403.

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

183. *Northwest Indian*, 108 S. Ct. at 1337 (Brennan, J., dissenting).

184. *Id.* at 1340 (Brennan, J., dissenting).

185. *See infra* notes 186-195 and accompanying text.

186. *Roy*, 476 U.S. at 696.

187. Justice Burger, in support of his minority opinion in *Roy*, quoted the Court's observation in Bob Jones University v. United States, 461 U.S. 574, 603-04 (1983) (rejecting private school's free exercise clause claim of tax exempt status), that "[d]enial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, *but will not prevent those schools from observing their religious tenets.*" *Roy*, 476 U.S. at 706 (emphasis added). Hence, if deprivation of aid threatened to stop the schools' religious practices altogether, even Justice Burger might have conceded that the government's action implicated the concerns of the Free Exercise Clause.

188. *See supra* notes 68-72 and accompanying text.

ment's internal procedures."[189] As Justice Brennan argued in his *Northwest Indian* dissent, however, "Federal land-use decisions, by contrast, are likely to have substantial external effects that government decisions concerning office furniture and information storage obviously will not."[190] He stated, "[F]ederal land-use decisions are fundamentally different from government decisions concerning information management, and . . ., under *Roy*, this difference in external effects is of constitutional magnitude."[191] It was precisely the external effects of government land-management programs (namely, aural and visual alterations of the Chimney Rock environment caused by the G-O road) that brought the *Northwest Indian* plaintiffs into court. The Court wrongly applied *Roy*'s deference to the government in the conduct of its internal affairs to the facts of *Northwest Indian*. Instead, the government's interests should have been subject to the two-part test enunciated in *Sherbert* and adopted in *Yoder*.[192]

Finally, the Supreme Court based *Roy*'s explicit exception to its traditional balancing test on the government's need for "wide latitude" in the "administration of welfare programs"[193] to counter possible fraud in the nationwide system of public assistance.[194] In *Northwest Indian*, the underlying policy goal of preventing fraud was absent. In addition, the government faced none of the "staggering[,] . . . . tremendous administrative problems"[195] associated with providing benefits to millions of citizens. Absent the government's need for unusually broad latitude in preventing fraud among millions of aid recipients, the Court in *Northwest Indian* had no reason not to follow stare decisis and apply the judiciary's traditional balancing test of affected interests.

B. *Yoder*'s Effects Analysis Ignored

Supreme Court precedents before *Roy* established the longstanding application of a two-part test for the government's unconstitutional interference with religious practices. *Yoder* should have provided the touchstone for the Court's application of this test in *Northwest Indian* because the legal issues and facts of the two cases were similar in several repects.

189. *Roy*, 476 U.S. at 700.

190. *Northwest Indian*, 108 S. Ct. at 1336 (Brennan, J., dissenting). Brennan viewed AIRFA as "an express congressional determination that federal land management decisions are not 'internal' government 'procedures,' but are instead governmental actions that can and indeed are likely to burden Native American religious practices." *Id.* at 1337 (Brennan, J., dissenting).

191. *Id.* at 1337 n.5 (Brennan, J., dissenting).

192. *See supra* notes 110-144 and accompanying text.

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

194. *Id.* at 709.

195. *Id.* at 710.

The law at issue in *Northwest Indian* permitting harvesting and road building was, like Wisconsin's compulsory school attendance law, facially neutral. In both cases, events outside the contemplation of the legislature—the effectiveness of the Amish at-home educational system in preparing Amish youth for productive citizenship,[196] and the California Wilderness Act of 1984 (removing most area timber from harvesting) subsequent to adoption of the 1982 Forest Service study (approving completion of the Chimney Rock section of the G-O road)—diminished the government's interest in applying otherwise valid laws.[197] Moreover, like those of the Amish, the three Indian tribes' centuries-old religious practices would be undermined if the government put its plan into effect. Like the Amish, the affected group in *Northwest Indian* was a small, well-defined segment of the general population whose mode of life was intimately related to its religious practices.

The majority in *Northwest Indian* asserted that "if the statute at issue [in *Yoder*] had not been coercive in nature,"[198] its effect on the Amish would not have been constitutionally problematic. In *Northwest Indian*, however, the majority failed to address the *Yoder* Court's extensive inquiry into "the interrelationship [between Amish beliefs and] their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others."[199] The *Yoder* Court examined the harmful consequences of Wisconsin's compulsory school attendance law on Amish society and religious practice because, in the tradition of *Cantwell*, the majority believed that the scope of free exercise clause prohibitions exceeded coercion and extended to government programs having a negative "impact" on the livelihood of religious practices.[200] Moreover, *Yoder* made clear that the Free Exercise Clause protects not only specific religious practices from unwarranted interference, but "modes of life" that are "inseparable" from those practices as well.[201] *Yoder* confirms that *Cantwell*'s "shield" of the First Amendment oper-

196. *See Yoder*, 406 U.S. at 224 (Wisconsin "mistaken[ly] assum[es] . . . the Amish do not provide any education . . .beyond the eighth grade, but allow them to grow in 'ignorance.' ").

197. *See Northwest Indian*, 795 F.2d at 692-93 ("Because most of the high country has now been designated by Congress as a wilderness area, the issue of logging becomes less significant, although it does not disappear.").

198. *Northwest Indian*, 108 S. Ct. at 1329 ("[T]here is nothing whatsoever in the *Yoder* opinion to support the proposition that the 'impact' on the Amish religion would have been constitutionally problematic if the statute at issue had not been coercive in nature.").

199. *Yoder*, 406 U.S. at 235.

200. *Id.* at 209. "Admittedly, this threat [to the Amish community and religious practice] arose from the compulsory nature of the law at issue, but it was the 'impact' on the religious practice itself, not the source of that impact, that led us to invalidate the law." *Northwest Indian*, 108 S. Ct at 1334 (Brennan, J., dissenting).

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

ates in two directions: *against* a broad range of unjustified governmental interference (including coercive compulsion) and *for* the benefit of diverse religious belief systems and their inseparable modes of life (including specific religious practices).[202]

The *Northwest Indian* Court refused to recognize effective burdens on religious practices, in part because it feared judicial adjudication of religious-truth claims.[203] *Yoder*'s analysis of the affected religious interests should have shown the *Northwest Indian* Court that its fears were unfounded. Faced with a similar challenge, the *Yoder* Court rightly focused on whether application of the law would make Amish practices more difficult, not whether Amish theology was true. Testimony at trial by expert witnesses established connections between Amish beliefs and practices, and drew credible inferences as to the probable effect of the government's action on the respondents' religious practices and mode of life if they complied with the law.[204] Whether or to what degree the views of the Amish coincided with divine truth was never an issue in determining if application of the state's school attendance law would burden their religious practices.

Justice Brennan in *Northwest Indian* offered a standard for evaluating the impact of government actions on religion that was consistent with the Court's analysis in *Yoder*.[205] He urged the Court to permit the Indians, first, to decide which of their practices were central to their religious beliefs and, second, to show "that [a] federal land-use decision poses a substantial and realistic threat of undermining or frustrating their religious practices."[206] The Brennan dissent avoided judicial assessment of the truth of religious claims, while providing a sound method by which the adverse impact of government programs on religious practices may be determined.

The *Northwest Indian* Court also hesitated to adopt *Yoder*'s effects analysis because it feared that a ruling in favor of the Indian plaintiffs would result in a "religious servitude" on government property.[207] Although the Court did not define its terms, a servitude is generally defined as "a charge or burden resting upon one estate for the benefit or advantage of another."[208] Tagging the Indians' interest in Chimney Rock a "religious servitude," however, only restated the Indians' asserted free exercise interest in the use of land owned by another (in this case, the government). Having marked the Indians' claims as an attempted "religious servitude," the Court decided without argument that

202. *See supra* notes 97-144 and accompanying text.
203. *See supra* notes 78-81 and accompanying text.
204. *See Yoder*, 406 U.S. at 209-13.
205. *See Northwest Indian*, 108 S. Ct. at 1338-39 (Brennan, J., dissenting).
206. *Id.* at 1339 (Brennan, J., dissenting).
207. *Id.* at 1327.
208. BLACK'S LAW DICTIONARY 1229 (5th ed. 1979).

the government's interests as landowner must take precedence over the Indians' claims under the First Amendment.[209] Although a nuanced evaluation of the Indians' claims would certainly consider the origin and constitutional limits of religiously-motivated interests in the use of government land, the *Northwest Indian* majority failed to provide an analysis in reaching its uncritical result in favor of the government's right to develop the Chimney Rock section.[210] The answer to the Court's fear of limitless claims by site-specific religious objectors is not the rejection of *Yoder*'s effects analysis. On the contrary, the solution is precisely the careful, case-by-case balancing of alleged harm to religious practices against the weight of governmental interests performed by the Supreme Court in free exercise cases prior to *Roy*.

If the Court had applied Justice Brennan's version of the *Yoder* effects analysis[211] to the facts of *Northwest Indian*, it would have concluded that the permanent injunction of the government's proposed road should be upheld. Justice Brennan's test reveals the following: (1) the Forest Service's own study found that the Indians' sincerely believed that the Chimney Rock section was central to their religious practices, thus satisfying Justice Brennan's preliminary "centrality" requirement;[212] (2) "uncontradicted evidence" established that the proposed government action "render the practice of respondents' religion impossible," thereby obviously creating a risk of substantial harm to central religious practices and burdening respondents' free religious exercise;[213] (3) the government's interest was weak because the G-O road "had only the most marginal and speculative utility"[214] for serving the now-reduced lumber and tourist traffic in the Forest area. Balancing the interests, the government presents a reasonable plan for facilitating regional industry and vehicular traffic, but not a compelling justification for effectively destroying the Indians' religion. Since on balance the Indians' interests are weightier than those of the government, the Court would not need to consider whether less restrictive alternatives to the G-O road existed. Thus, Justice Brennan's test leads to the conclusion that the permanent injunction granted by the district court should have stopped the G-O road.

Conclusion

In *Lyng v. Northwest Indian Cemetery Protective Association*, the Supreme Court held that the Free Exercise Clause does not protect religious practices against the adverse effects of government programs that

209. *See Northwest Indian*, 108 S. Ct. at 1327.
210. *See supra* notes 75-77 and accompanying text.
211. *See supra* note 92 and accompanying text.
212. *Northwest Indian*, 108 S. Ct. at 1338-39 (Brennan, J., dissenting).
213. *Id.* at 1339 (Brennan, J., dissenting).
214. *Id.*

do not penalize or coerce believers to act contrary to their faith, even though the probable result of the government's actions would be the destruction of the believers' religion.

This Comment has shown, however, that the *Northwest Indian* majority failed to address or distinguish key Supreme Court decisions supporting a flexible and expansive interpretation of the Free Exercise Clause. These decisions consider noncoercive, nonpunitive effects of government actions on religious practices in determining whether the government must justify its interference with religion. The particular effects of coercive compulsion and penalization are nonexhaustive examples of the ways in which the First Amendment forbids unjustified government infringement of sincerely held religious beliefs and practices.

The *Northwest Indian* majority applied the Court's holding in *Bowen v. Roy*, namely, that free exercise prohibitions are limited to government criminalization of religion or coercive compulsion of believers in order to gain their compliance with the law. The *Northwest Indian* majority misapplied *Roy* to permit construction of a road across government land when the probable consequence would be the destruction of a Native American religion.

By refusing to balance the adverse effects of government land use on religious practices against the strength of the government's asserted interests, *Northwest Indian* effectively made government land ownership an absolute defense to future claims of infringement on freedom of religious practice. By limiting the kind of government actions that could constitute a burden on the free exercise of religion to coercive compulsion and penalization, the Supreme Court in *Northwest Indian* departed from established precedent and wrongly constricted the scope of first amendment protection of religiously-motivated conduct.

*By S. Alan Ray**

* Ph.D. (Study of Religion), Harvard Graduate School of Arts and Sciences, 1986; Member, Second Year Class. The author dedicates this Comment to the Cherokee Nation of Oklahoma, commemorating in 1988-1989 the sesquicentennial of the Trail of Tears.