Supplementary Material

Chapter 10: The Reagan Era—Individual Rights/Religion/Free Exercise

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Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988)

The Northwest Indian Cemetery Protective Association was an organization of Native Americans in northern California concerned with protecting areas considered sacred to their religious practices. In 1982, the Forest Service of the United States began building a road in the Chimney Rock area of California that a study commissioned by the Forest Service concluded 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." The Northwest Indian Cemetery Protective Association sought to prevent the government from building that road by filing a lawsuit against Robert Lyng, the Secretary of Agriculture. They claimed the road would violate the free exercise of religion protected by the First Amendment as well as religious freedoms protected by the American Indian Religious Freedom Act. A federal district court issued an injunction against the government and that decision was sustained by the Court of Appeals for the Ninth Circuit. Lyng and the United States appealed to the Supreme Court of the United States.

The Supreme Court by a 6–3 vote ruled that the government was authorized to build the road through Native American religious sites. Justice O'Connor's majority opinion declared that the decision to build the road did not coerce Native American belief and that the American Indian Religious Freedom Act was not justiciable. Why did Justice O'Connor believe the decision to build the road was not coercive? Did Justice Brennan reject her analysis of coercion or her belief that coercion was the touchstone of a free exercise violation? Suppose the road had disturbed a site considered sacred by a mainstream Christian sect. Do you think the road would have been built? Does that influence your analysis of the constitutional issues in Lyng*?*

JUSTICE O'CONNOR delivered the opinion of the Court.

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In *Bowen v. Roy* (1986), we considered a challenge to a federal statute that required the States to use Social Security numbers in administering certain welfare programs. Two applicants for benefits under these programs contended that their religious beliefs prevented them from acceding to the use of a Social Security number for their 2-year-old daughter because the use of a numerical identifier would "'rob the spirit' of [their] daughter and prevent her from attaining greater spiritual power. Similarly, in this case, it is said that disruption of the natural environment caused by the G-O road will diminish the sacredness of the area in question and create distractions that will interfere with "training and ongoing religious experience of individuals using [sites within] the area for personal medicine and growth . . . and as integrated parts of a system of religious belief and practice which correlates ascending degrees of personal power with a geographic hierarchy of power." The Court rejected this kind of challenge in *Roy*:

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

The building of a road or the harvesting of timber on publicly owned land cannot meaningfully be distinguished from the use of a Social Security number in *Roy*. In both cases, the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs. In neither case, however, would the affected individuals be coerced by the Government's action into violating their religious beliefs; nor would either governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.

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Even if we assume that we should accept the Ninth Circuit's prediction, according to which the G-O road will "virtually destroy the . . . Indians' ability to practice their religion," the Constitution simply does not provide a principle that could justify upholding respondents' legal claims. However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires. A broad range of government activities—from social welfare programs to foreign aid to conservation projects—will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion. The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion. The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent that it is feasible, is for the legislatures and other institutions.

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The Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred, and a law prohibiting the Indian respondents from visiting the Chimney Rock area would raise a different set of constitutional questions. 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.

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Except for abandoning its project entirely, and thereby leaving the two existing segments of road to dead-end in the middle of a National Forest, it is difficult to see how the Government could have been more solicitous. Such solicitude accords with "the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." American Indian Religious Freedom Act (AIRFA).

Respondents, however, suggest that AIRFA goes further and in effect enacts their interpretation of the First Amendment into statutory law. . . . This argument is without merit. Nowhere in the law is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights.

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The sponsor of the bill that became AIRFA, Representative Udall, called it "a sense of Congress joint resolution," aimed at ensuring that "the basic right of the Indian people to exercise their traditional religious practices is not infringed without a clear decision on the part of the Congress or the administrators that such religious practices must yield to some higher consideration." Representative Udall emphasized that the bill would not "confer special religious rights on Indians," would "not change any existing State or Federal law," and in fact "has no teeth in it."

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JUSTICE KENNEDY took no part in the consideration or decision of this case.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

"'[T]he Free Exercise Clause,'" the Court explains today, "'is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.'" Pledging fidelity to this unremarkable constitutional principle, the Court nevertheless concludes that even where the Government uses federal land in a manner that threatens the very existence of a Native American religion, the Government is simply not "doing" anything to the practitioners of that faith. Instead, the Court believes that Native Americans who request that the Government refrain from destroying their religion effectively seek to exact from the Government de facto beneficial ownership of federal property. These two astonishing conclusions follow naturally from the Court's determination that federal land-use decisions that render the practice of a given religion impossible do not burden that religion in a manner cognizable under the Free Exercise Clause, because such decisions neither coerce conduct inconsistent with religious belief nor penalize religious activity. The constitutional guarantee we interpret today, however, draws no such fine distinctions between types of restraints on religious exercise, but rather is directed against any form of governmental action that frustrates or inhibits religious practice. Because the Court today refuses even to acknowledge the constitutional injury respondents will suffer, and because this refusal essentially leaves Native Americans with absolutely no constitutional protection against perhaps the gravest threat to their religious practices, I dissent.

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The Court does not for a moment suggest that the interests served by the G-O road are in any way compelling, or that they outweigh the destructive effect construction of the road will have on respondents' religious practices. Instead, the Court embraces 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. Attempting to justify this rule, the Court argues that the First Amendment bars only outright prohibitions, indirect coercion, and penalties on the free exercise of religion. . . . Since our recognition nearly half a century ago that restraints on religious conduct implicate the concerns of the Free Exercise Clause, we have never suggested that the protections of the guarantee are limited to so narrow a range of governmental burdens. The land-use decision challenged here will restrain respondents from practicing their religion as surely and as completely as any of the governmental actions we have struck down in the past, and the Court's efforts simply to define away respondents' injury as nonconstitutional are both unjustified and ultimately unpersuasive.

I cannot accept the Court's premise that the form of the government's restraint on religious practice, rather than its effect, controls our constitutional analysis. Respondents here have demonstrated that construction of the G-O road will completely frustrate the practice of their religion, for as the lower courts found, the proposed logging and construction activities will virtually destroy respondents' religion, and will therefore necessarily force them into abandoning those practices altogether. Indeed, the Government's proposed activities will restrain religious practice to a far greater degree here than in any of the cases cited by the Court today. . . .

Ultimately, the Court's coercion test turns on a distinction between governmental actions that compel affirmative conduct inconsistent with religious belief, and those governmental actions that prevent conduct consistent with religious belief. In my view, such a distinction is without constitutional significance. The crucial word in the constitutional text, as the Court itself acknowledges, is "prohibit," a comprehensive term that in no way suggests that the intended protection is aimed only at governmental actions that coerce affirmative conduct. Nor does the Court's distinction comport with the principles animating the constitutional guarantee: religious freedom is threatened no less by governmental action that makes the practice of one's chosen faith impossible than by governmental programs that pressure one to engage in conduct inconsistent with religious beliefs. . . .

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In *Bowen v. Roy* (1986), we repeatedly stressed the "internal" nature of the Government practice at issue: noting that Roy objected to "the widespread use of the social security number by the federal or state governments in their computer systems," we likened the use of such recordkeeping numbers to decisions concerning the purchase of office equipment. . . .

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, and they are correspondingly subject to public scrutiny and public challenge in a host of ways that office equipment purchases are not. Indeed, in the American Indian Religious Freedom Act, Congress expressly recognized the adverse impact land-use decisions and other governmental actions frequently have on the site-specific religious practices of Native Americans, and the Act accordingly directs agencies to consult with Native American religious leaders before taking actions that might impair those practices. Although I agree that the Act does not create any judicially enforceable rights, the absence of any private right of action in no way undermines the statute's significance 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. That such decisions should be subject to constitutional challenge, and potential constitutional limitations, should hardly come as a surprise.

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Today, the Court holds 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. Having thus stripped respondents and all other Native Americans of any constitutional protection against perhaps the most serious threat to their age-old religious practices, and indeed to their entire way of life, the Court assures us that nothing in its decision "should be read to encourage governmental insensitivity to the religious needs of any citizen." I find it difficult, however, to imagine conduct more insensitive to religious needs than the Government's determination to build a marginally useful road in the face of uncontradicted evidence that the road will render the practice of respondents' religion impossible. Nor do I believe that respondents will derive any solace from the knowledge that although the practice of their religion will become "more difficult" as a result of the Government's actions, they remain free to maintain their religious beliefs. Given today's ruling, that freedom amounts to nothing more than the right to believe that their religion will be destroyed. The safeguarding of such a hollow freedom not only makes a mockery of the "'policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the[ir] traditional religions,'" (quoting AIRFA), it fails utterly to accord with the dictates of the First Amendment.