Loyola University Chicago Law Journal

Volume 20
Issue 1 *Fall 1988*

Article 7

1988

Lyng v. Northwest Indian Cemetery Protective Association: A Form-Over-Effect Standard for the Free Exercise Clause

Peggy Healy

Lyng v. Northwest Indian Cemetery Protective Association: A Form-Over-Effect Standard for the Free Exercise Clause

I. INTRODUCTION

> Even if we assume that . . . 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.[1]

With that cavalier statement, the Supreme Court in *Lyng v. Northwest Indian Cemetery Protective Association*[2] proceeded to dismiss a claim brought under the free exercise clause of the first amendment.[3] In *Lyng*, various Indian groups sought to prevent the federal government from building a road through a forest area which the Indians considered to be sacred. The lower courts found that the government's need for the road was only arbitrary and speculative.[4] The Supreme Court, however, reversed the lower courts and allowed the construction of the road.[5] The Court's decision, if adhered to in future cases, portends a more restrictive interpretation of the free exercise clause, with profound implications for all religious groups.

Perhaps the most disturbing aspect of the *Lyng* decision is that the Court upheld the government action without any showing of a "compelling" interest. Instead, the Court held that construction of the road did not "prohibit" the free exercise of religion under the first amendment, even though the road would virtually destroy the Indians' ability to practice their religion.[6] Since no prohibition was involved, the Court did not require the government to make any showing of need for the road.

The Court interpreted the word "prohibit" to include only ac-

1. Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S. Ct. 1319, 1326-27 (1988) [hereinafter *Lyng*].

2. *Id.*

3. *See infra* notes 51-60 and accompanying text for an explanation of the free exercise claim.

4. Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 595-96 (N.D. Cal. 1983); Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 695 (9th Cir. 1986). *See Lyng*, 108 S. Ct. at 1339 (Brennan, J., dissenting). *See infra* notes 58 and 84.

5. *Lying*, 108 S. Ct. at 1324.

6. *Id.* at 1326-27.

tions that are coercive.[7] Under this interpretation, the free exercise clause does not restrict government actions which a court deems non-coercive, even if the impact on religion is devastating. Moreover, the government is not required to demonstrate any need or compelling interest for its actions as long as the actions are not, in form, coercive.[8] In essence, the determination of whether an action prohibits the free exercise of religion is governed by the form which the action takes rather than the impact of the action on the religion.

This Note will first consider the trends in free exercise cases prior to *Lyng*. Specifically, this Note will examine the types of government actions which have constituted a burden on the free exercise of religion.[9] The Note will then criticize the reasoning of the *Lyng* case itself for considering only the form of the government's action when determining whether a burden on religion exists.[10] Finally, the impact that this decision will have on future free exercise cases will be examined.[11]

II. BACKGROUND

A. The Supreme Court's Traditional Analysis

The First Amendment of the United States Constitution provides in relevant part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[12] The Supreme Court, in interpreting the free exercise clause, has distinguished between religious beliefs and actions. The former are absolutely protected from any government regulation, whereas the latter may be subject to some restrictions to preserve public safety, peace, or order.[13]

In determining whether an action violates the free exercise clause, the Court has developed a three-part test.[14] First, the claimant must show that the government action results in a burden

7. *Id.* at 1326.

8. *Id.*

9. *See infra* notes 18-41 and accompanying text.

10. *See infra* notes 58-85, 100-71 and accompanying text.

11. *See infra* notes 172-76 and accompanying text.

12. U.S. CONST. amend. I. The free exercise clause was applied to the states through the fourteenth amendment in Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

13. Sherbert v. Verner, 374 U.S. 398, 402-03 (1963). At first, the Court only invoked the free exercise clause to protect beliefs, not actions. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 164 (1878) ("Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."). In time, however, the belief/action distinction faded.

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

on religion.[15] Second, the government must justify that burden by demonstrating that the action serves a compelling interest.[16] Finally, the action must be the least restrictive means available to meet that government interest.[17]

The Court in *Lyng* placed free exercise cases into three general categories.[18] The first category comprises cases in which the burden on religion was indirect. For example, in *Sherbert v. Verner*,[19] the Court addressed the constitutionality of the denial of unemployment benefits to an applicant who refused to accept work requiring her to violate the Sabbath.[20] The Court employed the three-part test and held that the denial of benefits was unconstitutional.[21]

The Court first examined whether the denial imposed a burden on the free exercise of religion. The Court noted that any consequences of the disqualification were merely indirect results of legislation that the state had the power to enact.[22] Nevertheless, the Court found a burden on religion: "If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."[23] By denying the unemployment benefits to the applicant, the government effectively forced her to choose between following her religion and forfeiting benefits, or disregarding her religion and accepting the work.[24] The Court ruled that the government's imposition of such a choice constituted a burden within the scope of the free exercise clause.[25] The Court then proceeded to find that the government had failed to demonstrate any compelling interest sufficient to justify the burden.[26] As a result, the

15. *Id.*
16. *Id.* at 406.
17. *Id.* at 407.
18. The majority in *Lyng* was the first to categorize cases in this manner. *Lyng*, 108 S. Ct. at 1325-26. Numerous factors distinguish the past free exercise cases, and thus different classifications could have been possible. In *Lyng*, however, the Court focused on one specific aspect — the coercive nature of the government action — as a basis for differentiation. That categorization is used here because it will help the reader better understand the *Lyng* Court's reasoning.
19. 374 U.S. 398 (1963).
20. *Id.* at 399-401.
21. *Id.* at 410.
22. *Id.* at 403.
23. *Id.* at 404 (quoting Braunfeld v. Brown, 366 U.S. 599, 607 (1961)).
24. *Id.*
25. *Id.*
26. *Id.* at 407-09.

scheme was held unconstitutional.[27]

The second general category of cases encompasses those in which the government action imposed a direct burden on religion or was directly coercive. Included in this category are cases in which laws directly mandated certain actions by imposing criminal or civil penalties for failure to comply.[28] In *Wisconsin v. Yoder*,[29] for instance, the Court held that the conviction of Amish petitioners for their failure to obey a compulsory school-attendance law violated the petitioners' right to the free exercise of religion.[30]

In determining that the law placed a burden upon the practice of the Amish religion, the Court extensively discussed the Amish religion and its unique attributes. The Court concluded that the Amish faith and lifestyle were inseparable and interdependent.[31] In addition, it determined that the refusal to comply with the school-attendance law did not reflect a personal or philosophical choice, but rather was rooted in religious belief.[32] Because seclusion from the world and its values were central to the Amish faith and would be impaired or destroyed by the school attendance requirement, the Court found that the law did in fact burden the free exercise of the petitioner's religion.[33] The government's interest in preparing the children to be productive members of society was

27. *See also* Thomas v. Review Bd., 450 U.S. 707 (1981). The *Thomas* decision represents a more recent affirmation of the *Sherbert* doctrine. In *Thomas*, the Court examined the denial of unemployment benefits to an applicant who quit because his religion forbade him to fabricate weapons. *Id.* at 709. On reasoning similar to that of *Sherbert*, the Court found that the denial constituted a burden, albeit an indirect one, on the free exercise of religion. *Id.* at 717-18. In reaching that decision, the Court also analyzed whether Thomas's opposition to the production of weapons was a personal philosophical choice or was a religious belief. *Id.* at 714-15.

28. An early example of this type of case is Reynolds v. United States, 98 U.S. 145 (1878). In *Reynolds*, a law prohibiting polygamy was upheld when applied against a member of the Mormon Church who believed that it was the duty of male members to practice polygamy when circumstances permitted. *Id.*

29. 406 U.S. 205 (1972).

30. *Id.* at 207. In Pierce v. Society of Sisters, 268 U.S. 510 (1925), the Court already had struck down statutory requirements that children attend *only* public schools. In *Yoder*, however, no formal alternative schooling was to be provided. *Yoder*, 406 U.S. at 210-11.

31. *Id.* at 215-16. Specifically, the Amish respondents:

> [C]onvincingly 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.

Id. at 235.

32. *Id.* at 215-16.

33. *Id.* at 226-27.

adequately met by elementary education and the training later received in the Amish community.[34] Therefore, the law constituted a direct and impermissible burden on the Amish parents' free exercise of religion.[35]

The third category includes cases in which the Court found no burden on religion. In this class of cases, the plaintiffs failed to meet the first prong of the three-part test which requires the showing of a burden on religion caused by the state action. As a result, the Court did not require the government to demonstrate any compelling interest for its actions.

For example, in *Bowen v. Roy*,[36] the petitioner objected to the use of a social security number for his daughter because he believed that it might harm her spirit.[37] The state was required to use the social security number in the administration of the Aid to Families with Dependent Children program ("AFDC").[38] The petitioner objected to that use of the number, according to the Court, not because it restricted what he could believe or do, but because he believed that the use of the number would prevent his daughter from maximizing her spiritual development.[39] The Court declared that the first amendment does not require the government to act in ways designed to enhance the spiritual development of individual believers or to conduct its internal affairs in accordance with the religious beliefs of individual citizens.[40] As a result, eight members of the Court joined in finding such internal government action to be constitutional.[41]

---

34. *Id.*

35. The *Yoder* case dealt only with the burden on the parents' free exercise rights, and did not directly address children's rights. In a dissenting opinion, however, Justice Douglas did address children's rights. *Id.* at 241-49 (Douglas, J., dissenting).

36. 476 U.S. 693 (1986).

37. *Id.* at 695.

38. *Id.* at 699.

39. *Id.* at 696. The petitioner, Roy, believed that control over one's life was essential to spiritual purity. Use of a social security number by the State was seen as destroying his daughter's uniqueness and preventing attainment of greater spiritual power. *Id.*

40. *Id.* at 699. The Court stated:

> Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family. The Free Exercise Clause cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.

Id. (emphasis in original).

41. *Id.* at 701. The second claim addressed in *Roy* was Congress's mandate that the state require each AFDC applicant to furnish a social security number to the agency. *Id.* The requirement compelled certain action by Roy, and thus would fall under the second

B. Application of the Traditional Analysis to Indian Lands

Prior to *Lyng*, numerous lower courts struggled with the constitutional implications of government use of land which was sacred to Indians.[42] The lower courts generally applied the three-part test enunciated by the Supreme Court. For instance, in *Wilson v. Block*,[43] the District of Columbia Circuit examined a law permitting private parties to expand a ski area and recreational facilities on the San Francisco Peaks in Cocino National Forest.[44] The Navajo Indians objected to that use because they believed that the development would impair the healing power of the Peaks.[45] Similarly, the Hopi Indians contested the expansion because of their belief that the use of the Peaks for commercial purposes would constitute a direct affront to the Creator.[46]

In determining whether the government's action burdened religion, the court focused on the effects of the development upon the Indians' beliefs and religious practices.[47] The court concluded that the plaintiffs had not demonstrated that the government land at issue was central or indispensable to a religious practice.[48] As a result, no religious practice was impaired and, therefore, no burden was shown.[49]

In a similar case, *Badoni v. Higginson*,[50] the Tenth Circuit denied relief to Indian plaintiffs by declaring that the government interest in maintaining the water level of a lake[51] outweighed the

---

category of claims illustrated by *Yoder*. Because the statute required affirmative action by Roy that was contrary to his religious beliefs, it constituted a burden cognizable under the first amendment. *Id.* at 706. A divided Court found that the requirement was nonetheless constitutional. *Id.* at 712.

42. Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S. Ct. 1319, 1338 (1988) (Brennan, J., dissenting). The dissent in *Lyng* provides a listing of lower court cases which addressed these issues.

43. 708 F.2d 735 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983).

44. *Id.* at 738.

45. *Id.*

46. *Id.*

47. *Id.* at 740.

48. *Id.* at 743.

49. *Id.* In a similar case, Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980), members of the Cherokee religion brought a class action to halt construction of the Tellico Dam on the Little Tennessee River. The plaintiffs alleged that the dam would flood their sacred homeland and destroy sacred sites. *Id.* at 1160. The Sixth Circuit held that the Indians failed to demonstrate infringement of a constitutionally cognizable interest because they did not prove that the land was central to the practice of their religion. *Id.* at 1164. The court interpreted *Yoder* and lower court cases as requiring such a showing in order to prove a burden on religion. *Id.*

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

51. The lake created by the dam was a necessary part of a multi-state water storage and power generation project. *Id.* at 177.

plaintiff's religious interests.[52] By examining the government interest first, the court avoided discussing whether a burden existed.[53] In a second challenge in *Badoni*, the Indians claimed that the government burdened the practice of their religion by permitting public access and the operation of commercial tour boats at the site.[54] The court held, however, that the government had not prohibited the plaintiffs' religious exercises in the area, and that any interference arose from the actions of the tourists, and not the government.[55] Moreover, the court noted that the plaintiffs were seeking affirmative action by the government to exclude others from the area, which would raise establishment clause implications.[56] As a result, the court did not find a constitutional violation.[57]

III. THE *LYNG* OPINION

A. The Majority

The *Lyng* case presented the Supreme Court with a fact pattern similar to those faced by the lower courts in *Wilson* and *Badoni*. The dispute in *Lyng* arose from the government's decision to build a road through federally-owned land traditionally used by Indian tribes for religious practices.[58] Before deciding where to construct the road, the United States Forest Service prepared an environmental impact statement.[59] In preparing that statement, the Forest Service commissioned a study of the American Indian cultural and

52. The Indians had claimed that the government violated their free exercise rights by constructing a dam and a resultant lake which effectively "drowned some of plaintiffs' gods and denied . . . plaintiffs access to a prayer spot sacred to them." *Id.* at 176.

53. *Id.* at 177 n.4.

54. *Id.* at 178.

55. *Id.*

56. *Id.*

57. *See also* Crow v. Gullet, 541 F. Supp. 785, 791-92 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir.), *cert. denied*, 464 U.S. 977 (1983) (court rejected Indian plaintiffs' claim that the free exercise clause obligates the government to control the actions of the general public which may interfere with plaintiffs' religious practice). For a more extensive discussion of cases brought by American Indians under the free exercise clause, *see* Comment, *Native Americans' Access to Religious Sites: Underprotected Under the Free Exercise Clause?*, 26 B.C.L. REV. 463, 466 (1985), and Comment, *Northwest Indian Cemetery Protective Association v. Peterson: Indian Religious Sites Prevail Over Public Land Development*, 62 NOTRE DAME L. REV. 125 (1986).

58. Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S. Ct. 1319, 1322 (1988). The road would connect two other road segments. *Id.* at 1321. The district court found, however, that the unconnected road segments had independent utility. *Id.* at 1332-33 (Brennan, J., dissenting). Moreover, the need for the connecting road was questionable. *Id.* at 1339 (Brennan, J., dissenting).

59. *Id.* at 1321-22.

religious sites in the area. The study found that the Yurok, Karok, and Tolowa Indians historically had used the proposed construction area for religious purposes.[60] The study further concluded that construction of a road through the proposed area "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."[61] Although the study recommended against building the road, the Forest Service opted to construct the road.[62] The Forest Service rejected alternative sites because the sites would have required the acquisition of private land, raised soil stability problems, and intruded upon other areas having ritualistic value to American Indians.[63]

After the government decided to build the road, various Indian groups initiated court proceedings.[64] They asserted that construction of the road constituted a violation of their first amendment right to free exercise of religion.[65] The lower courts agreed that the government's construction of the road violated the first amendment.[66] Subsequently, the Supreme Court reversed those decisions.[67]

The Supreme Court characterized the first amendment claim as indistinguishable from the claim advanced in *Bowen v. Roy*.[68] In *Roy*, the petitioner challenged a federal statute which required the states to use social security numbers in administering welfare programs.[69] The Indian respondents in *Lyng* argued that the infringe-

60. *Id.* at 1322.

61. *Id.* (quoting THEODORATUS, RESOURCES OF THE CHIMNEY ROCK SECTION, GASQUET-ORLEANS ROAD, SIX RIVERS NATIONAL FOREST (1979)).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* The Indians made other challenges to the government's actions based upon the Federal Water Pollution Control Act, the National Environmental Policy Act of 1969, several other federal statutes, and governmental trust responsibilities to Indians living on the Hoopa Valley Reservation. *Id.* The lower courts found violations on a number of statutory grounds as well as on the free exercise claim. *Id.* at 1323. Before addressing the free exercise claim, the Supreme Court examined whether the first amendment claim was necessary to the lower court's opinion. *Id.* at 1323-24. The Court determined that the statutory holdings would not have supported all the relief granted, and therefore that it was "reasonably likely" that the first amendment issue was necessary to the decision below. *Id.* at 1324. As a result, the Court proceeded to address the first amendment issue. *Id.*

66. *Id.* at 1322-23. *See* Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586 (N.D. Cal. 1983), *aff'd in part*, 795 F.2d 688 (9th Cir. 1986).

67. 108 S. Ct. at 1330.

68. *Id.* at 1325. For a discussion of *Roy*, *see supra* notes 36-41 and accompanying text.

69. 476 U.S. 693, 699 (1986).

ment on their religious liberty was significantly greater than that in *Roy*.[70] The Court declared that it could not weigh the adverse effects on the petitioner in *Roy* against the impact on the Indians in *Lyng* because of its inability to inquire into the truth of religious beliefs.[71] Therefore, the Court merely acknowledged that in both cases, the challenged governmental action interfered with the individual's ability to pursue spiritual fulfillment.[72] It concluded, however, that the government action neither coerced the individuals into violating their religious beliefs nor penalized religious activity by denying a right, benefit, or privilege.[73] The Court found that coercion was necessary to sustain a free exercise claim.[74]

The *Lyng* Court also characterized its decision as consistent with precedent. The Court acknowledged that in cases such as *Sherbert v. Verner*[75] and *Thomas v. Review Board*,[76] "indirect coercions or penalties, not just outright prohibitions," constituted violations of the first amendment.[77] Nevertheless, the Court declared that:

> This does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions.[78]

This distinction between coercive and non-coercive incidental effects formed the crux of the *Lyng* Court's opinion. The Court emphasized that the "crucial word" in the free exercise clause is "prohibit."[79] Therefore, government actions do not violate the free exercise clause unless they directly or indirectly operate to coerce the individuals to violate their religious beliefs.[80] In other words, the initial analysis focuses on the form of the government's action

---

70. *Lyng*, 108 S. Ct. at 1325.

71. *Id.* (citing Hobbie v. Unemployment Appeals Comm'n, 107 S. Ct. 1046, 1051 n.9 (1987)).

72. *Id.*

73. *Id.*

74. *Id.* at 1326.

75. 374 U.S. 398 (1963). The coercion or penalty in *Sherbert* was that if Sherbert refused to work on the Sabbath as required by his religion, he would be denied unemployment benefits. *See supra* notes 19-27 and accompanying text.

76. 450 U.S. 707 (1981). In *Thomas*, the coercion or penalty was that if Thomas quit because his religion forbade him to fabricate weapons, he would be denied unemployment benefits. *See supra* note 27.

77. *Lyng*, 108 S. Ct. at 1326.

78. *Id.*

79. *Id.*

80. *Id.*

rather than on the effect of that action on the religion.[81]

The Court did not consider the construction of the road through the sacred area to be coercive, even though the construction could virtually destroy the Indians' ability to practice their religion.[82] As a result, the government's action did not fall within the scope of the free exercise clause.[83] The Court never proceeded to examine whether the government had a compelling interest in constructing the road or whether the least restrictive means were used. If the Court had found a burden on religion cognizable under the first amendment, the government would probably have been unable to meet the compelling interest prong. The lower courts had found that the need for the road was minimal.[84] Indeed, both of the lower courts had found a violation of the free exercise clause.[85]

B. The Dissent

The dissent argued that the majority's opinion was inconsistent with precedent.[86] Specifically, the dissent asserted that the *Sherbert* and *Thomas* decisions "lent themselves to the coercion analysis"[87] used by the majority in *Lyng* because the religions proscribed conduct which the unemployment benefits laws effectively compelled.[88] Those decisions, however, "nowhere suggested that such coercive compulsion exhausted the range of religious burdens rec-

---

81. The Court stated that "[w]hatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." *Id.* *See also id.* at 1334 (Brennan, J., dissenting) ("I thus 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.").

82. *Id.* at 1326.

83. *Id.* at 1326-27.

84. *Id.* at 1332 (Brennan, J., dissenting). Justice Brennan recognized that:

> In particular, the [lower] court found that the road would not improve access to timber resources in the Blue Creek Unit and indeed was unnecessary to the harvesting of that timber; that it would not significantly improve the administration of the Six Rivers National Forest; and that it would increase recreational access only marginally, and at the expense of the very pristine environment that makes the area suitable for primitive recreational use in the first place.

Id. (Brennan, J., dissenting).

85. *See* Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586 (N.D. Cal. 1983), *aff'd in part*, 795 F.2d 688 (9th Cir. 1986).

86. *Lyng*, 108 S. Ct. at 1330 (Brennan, J., dissenting) ("The constitutional guarantee we interpret today, however, draws no such fine distinctions between types of restraints on religious exercises, but rather is directed against any form of governmental action that frustrates or inhibits religious practice.").

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

88. *Id.* (Brennan, J., dissenting).

ognized under the Free Exercise Clause."[89] Moreover, the dissent characterized the Court's decision in *Wisconsin v. Yoder*[90] as based upon the impact of the law on the religious practice itself, not upon the source of that impact.[91] As a result, the dissent rejected "the Court's premise that the form of the Government's restraint on religious practice, rather than its effect, controls our constitutional analysis."[92] Finally, the dissent maintained that *Bowen v.Roy*[93] was distinguishable from the situation in *Lyng* because *Roy* involved government actions of a purely internal nature, whereas "[f]ederal land-use decisions are likely to have substantial external effects."[94] Because of that difference, the dissent asserted that land use decisions are subject to greater public scrutiny than internal decisions.[95]

The dissent then set forth an alternative interpretation of the free exercise clause which the majority had explicitly rejected. The dissent based its test upon the analysis employed by a number of lower courts in reviewing similar cases.[96] First, religious "adherents challenging a proposed use of federal land [w]ould be required to show that the [government action] poses a substantial and realistic threat of frustrating their religious practices."[97] Such a showing would suffice to demonstrate a burden under the traditional three-part test.[98] After this showing is made, the government would be obliged to identify a compelling state interest sufficient to justify the infringement on the religious practice.[99]

IV. ANALYSIS

As the dissent noted, the majority's opinion in *Lyng* was not mandated by precedent. In fact, the opinion represents a significant departure from the focus of the cases upon which it relies. In

89. *Id.* (Brennan, J., dissenting).
90. 406 U.S. 205 (1972).
91. *Lyng*, 108 S. Ct. at 1334 (Brennan, J., dissenting).
92. *Id.* (Brennan, J., dissenting).
93. 476 U.S. 693 (1986).
94. *Lyng*, 108 S. Ct. at 1336 (Brennan, J., dissenting).
95. *Id.* at 1336-37. In support of that distinction, the dissent noted that the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996 (1982), expressly indicates that land use decisions are not merely internal, and that they may have a substantial effect on the religious practices of Indian groups. *Id.* at 1337 (Brennan, J., dissenting).
96. *Lyng*, 108 S. Ct. at 1338 (Brennan, J., dissenting).
97. *Id.* at 1339 (Brennan, J., dissenting).
98. *Id.* (Brennan, J., dissenting).
99. *Id.* (Brennan, J., dissenting). The majority in *Lyng* rejected that proposal as placing courts "in the untenable position of deciding what practices and beliefs are 'central' to a given faith." *Id.* (Brennan, J., dissenting).

addition, the reasoning of the majority in *Lyng* is logically inconsistent. Finally, the *Lyng* decision cannot be justified as a result-oriented opinion because the result is not practically desirable.

A. Conformity with Precedent

The Court in *Lyng* based its decision primarily on *Bowen v. Roy*,[100] but also characterized its opinion as consistent with *Sherbert v. Verner*,[101] *Thomas v. Review Board*,[102] and *Wisconsin v. Yoder*.[103] Those decisions, however, do not mandate the result reached in *Lyng*, and should have led to a contrary result.

The primary contention of the Court was that *Lyng* is indistinguishable from *Roy*.[104] Despite the Court's assertion, the *Lyng* case is not in accord with *Roy*. The *Lyng* Court's discussion of *Roy* is incomplete, and ignores certain aspects of the decision that distinguish it from the facts of *Lyng*. For example, in *Lyng*, the Court quoted from *Roy* as follows:

> 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 [the Roys] may not demand that the Government join in their chosen religious practices by refraining from using a number to identify their daughter . . . . The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures.[105]

The sentence immediately preceding the quoted paragraph from *Roy*, however, clarifies the distinction that the *Roy* Court was making. The *Roy* Court noted that the petitioner objected to the statutory requirement not because it placed any restriction on what he could believe or do, but because he believed that the use of the number could harm his daughter's spirit.[106] Thus, the distinction was made between government action that affirmatively impairs the ability of an individual to practice his religion, and government action that simply does not aid the individual in furthering his spiritual development. In that context, the *Roy* Court proceeded to

100. 476 U.S. 693 (1986).
101. 374 U.S. 398 (1963).
102. 450 U.S. 707 (1981).
103. 406 U.S. 205 (1972).
104. *Lyng*, 108 S. Ct. at 1325.
105. *Id.* (quoting *Roy*, 476 U.S. at 699-700).
106. *Roy*, 476 U.S. at 699.

state, in the portion quoted above, that the free exercise clause does not require the government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.[107]

Under this interpretation, the facts of *Lyng* are distinguishable from *Roy*, in that the government action in *Roy* did not infringe on the individual's ability to practice his religion. Instead, the internal government action merely failed to maximize his spiritual development. Thus, the government's own use of the social security number in no way prohibited the free exercise of religion by Roy. In *Lyng*, on the other hand, the government action does impair the ability of the Indians to practice their religion, and in fact virtually destroys their ability to do so.[108] An individual cannot expect constitutional protection from government action which in no way impairs her own ability to practice her religion, in spite of her belief that the action will hinder her spiritual growth. On the other hand, an individual should be able to expect protection from government action which destroys her ability to carry on the religious ceremonies that are a central part of her religion. Thus, *Roy* and *Lyng* addressed fundamentally different issues, and are not indistinguishable as the *Lyng* Court maintained.[109]

The Court in *Roy* also implied that a situation such as *Lyng* could violate the Constitution. The Court discussed the American Indian Religious Freedom Act,[110] which states that:

> [I]t shall be the policy of the United States to protect and pre-

107. *Id.* at 699-700.

108. *Lyng*, 108 S. Ct. at 1326-27.

109. The contention that the *Roy* and *Lyng* decisions are indistinguishable as involving "internal" government decisions is unconvincing. First, the basis for the decision in *Roy* was that the government action did not affect Roy's ability to practice his religion. *Id.* at 699. The government action did not preclude Roy from engaging in any religious practice at all; instead, the action simply did not accord with Roy's religious beliefs. *Id.* To that extent, the government actions were merely "internal." In *Lyng*, on the other hand, the government action could destroy the Indians' ability to practice their religion. Therefore, the action at issue in *Lyng* is not "internal" as that term was understood by the *Roy* Court. Second, based on any definition of internal, the government action in *Lyng* should be considered external. Land use decisions inevitably have a direct external effect. In fact, the American Indian Religious Freedom Act represents an "express congressional determination" that federal land use decisions are likely to burden religious practices. *Lyng*, 108 S. Ct. at 1337 (Brennan, J., dissenting). Finally, the determination of whether actions are inherently internal or external simply adds another level of ambiguity to an already nebulous area of law. Such a focus produces an artificial distinction between free exercise claims, which in no way is mandated by the language or precedent of the first amendment. The relevant focus should be on whether or not the government action effectively prohibits the free exercise of religion.

110. 42 U.S.C. § 1996 (1982).

> serve 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 . . . and freedom to worship through ceremonials and traditional rites.[111]

The Court in *Roy* declared that the Act "with its emphasis on protecting the freedom to believe, express, and exercise a religion — accurately identifies the mission of the Free Exercise Clause itself."[112] Because the use of the social security number did not impair Roy's freedom to believe, express, or exercise his religion, the Court found no burden on religion.[113] In *Lyng*, however, the construction of the road on the sacred land did impair the Indians' ability to practice their religion, a point which the Court did not dispute.[114] Thus, the very case upon which the *Lyng* Court relied as dispositive indicated that a different result should be reached.

In addition, the *Roy* Court's discussion of the Act further indicated that the free exercise clause is concerned with the impairment on the religion, not the form of the action. In fact, the *Roy* Court concluded that the protection of religion called for in the Act accurately identified the mission of that clause.[115] The *Lyng* Court, which made abundant use of the *Roy* opinion throughout the rest of the its analysis, failed to mention this aspect of *Roy* in its discussion of the Act. Instead, the Court merely declared that the Act created no cause of action or any judicially enforceable individual rights.[116] Thus, the *Lyng* decision certainly was not mandated by *Roy*, and, in fact, conflicts with the *Roy* Court's understanding of the free exercise clause.

The majority in *Lyng* also attempted to characterize its decision as consistent with past cases such as *Sherbert*, *Thomas*, and *Yoder*. An examination of those cases, however, belies that assertion by the Court. According to the *Lyng* Court, past free exercise cases demonstrate that two types of government action could unconstitutionally burden religion: a) actions which coerce the adherents into violating their religious beliefs; or b) actions which penalize religious activity by denying adherents an equal share of rights and benefits enjoyed by other citizens.[117]

---

111. *Id.*
112. *Roy*, 476 U.S. at 700.
113. *Id.* at 700-01.
114. *Lyng*, 108 S. Ct. at 1326.
115. *Roy*, 476 U.S. at 700.
116. *Lyng*, 108 S. Ct. at 1328. Even the dissent in *Lyng* agreed that the Act did not create any judicially enforceable rights. *Id.* at 1337 (Brennan, J., dissenting).
117. *Id.* at 1325.

As an example of the former type of government action, the Court in *Lyng* cited the *Yoder* decision. In *Yoder*, the Court previously found that a compulsory school attendance law violated the free exercise clause because it placed an undue burden upon the practice of the Amish religion.[118] The Court in *Lyng* stated that "there is nothing whatsoever in the *Yoder* opinion to support the proposition that the 'impact' on the Amish religion would have been constitutionally problematic if the statute at issue had not been coercive in nature."[119] Therefore, the Court narrowly read *Yoder* to set up the dual requirement that only a statute that is both coercive and that has an impact can be unconstitutional.

This dual requirement, although not inconsistent with the literal language of *Yoder*, represents a very strained reading of that case. The impact in *Yoder* arose directly because the statute was coercive. If attendance had not been mandatory, the Amish could have kept their children home, and no impact or burden on the religion would have resulted. Therefore, the *Yoder* Court did not specifically address the question of whether a *non-coercive* government action which has an impact on free exercise is unconstitutional. Instead, the language of the *Yoder* opinion indicates that the Court was more concerned with the impact on religion than with the form of the government's action.

In *Yoder*, the Court discussed at great length the negative impact of the law on religion.[120] That decision included consideration of the Amish lifestyle, the sincerity of the belief, and the role that belief and daily conduct play in the continuation of the Amish religion.[121] At no time did the Court discuss the coercive nature of the statute independently from the consideration of its impact. Moreover, in finding a burden on religion, the Court noted that the law "carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent."[122] That objective danger was the threat of undermining the Amish community and their religious practice, and forcing them either to abandon their belief or to migrate to a more tolerant region.[123]

The *Yoder* Court thus did not emphasize the government's action, but rather stressed the effect of the law on the religion. More-

118. Wisconsin v. Yoder, 406 U.S. 205 (1972).
119. *Lyng*, 108 S. Ct. at 1329.
120. *Yoder*, 406 U.S. at 208-11, 215-19, 235.
121. *Id.*
122. *Id.* at 218.
123. *Id.* at 235.

over, in examining the kind of objective danger that the free exercise clause is designed to prevent, the Court did not discuss the danger of prohibitive government actions, or the need to guard against certain forms of government action. Instead, the focus was on the impact of the law on the religion and the danger posed to its survival.

The "objective danger" noted by the Court in *Yoder* is equally applicable to the situation in *Lyng*. In *Lyng*, the Court assumed that the road would virtually destroy the ability of the Indians to practice their religion.[124] Thus, the road certainly carries with it the threat of undermining the Indian community and religious practice. Moreover, the road impacts on the Indians even more severely because they do not have the option of migrating to some other region. The land-specific nature of their religion means that no other land can substitute for the land upon which the road is being built.[125] Thus, to the extent that the *Yoder* opinion emphasized the impact on the religion, the *Lyng* Court failed to follow that case. The Court in *Lyng* instead interpreted the *Yoder* decision as being based on the coercive nature of the statute.[126] Although the *Yoder* Court could have based its decision on the coercive nature of the statute, nothing in the language of that case indicates that it actually did so.[127]

Like *Yoder*, the *Sherbert* Court also indicated that the relevant focus is on the impact of the government action.[128] In fact, the *Sherbert* decision specifically states that "[i]f the purpose *or effect* of a law is to impede the observance of one or all religions . . . that

124. *Lyng*, 108 S. Ct. at 1326.

125. For a discussion of the "site-specific" nature of Indian religions, in contrast to traditional western religions, see *id.* at 1330-32 (Brennan, J., dissenting).

126. *Id.* at 1329.

127. In fact, numerous lower court cases have interpreted *Yoder* and *Sherbert* as mandating consideration of impact. For instance, the court in EEOC v. Pacific Press Publishing Association, 676 F.2d 1272, 1279 (9th Cir. 1982), interpreted those cases as meaning that a free exercise challenge to a neutrally-based statute involves weighing, first of all, the magnitude of the statute's *impact* upon the exercise of the religious belief. In general, the lower courts have assumed that a burden on religion is established by demonstrating an impact. *See* EEOC v. Mississippi College, 626 F.2d 477, 488 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981); Walsh v. Louisiana High School Athletic Ass'n, 616 F.2d 152, 157-58 (5th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981) ("To pass constitutional muster, the application of such a regulation . . . must not interfere with, burden, or deny the free exercise of a legitimate religious belief."); United States v. Means, 627 F. Supp. 247, 258 (D.S.D. 1985) (court declared that it must look at the facts and "decide whether there exists a real negative impact upon the exercise of the religion that is significant enough to be labeled a burden").

128. For lower court cases which interpreted *Sherbert* as mandating consideration of impact, see *supra* note 127 and accompanying text.

law is constitutionally invalid."[129] Despite this statement, the *Lyng* Court effectively eliminated the relevance of the "effect" in evaluating actions that are deemed to be non-coercive.[130] Thus, the *Lyng* decision certainly was not mandated by precedent, and, in fact, represented a departure from at least the spirit, and often the language, of past free exercise cases.[131]

B. Logical Consistency

In addition to its disregard for precedent, the *Lyng* Court's emphasis on the form of government action rather than its effect is logically indefensible. First, a pure emphasis on form over effect would logically require the overruling of cases involving penalties, such as *Sherbert v. Verner* and *Thomas v. Review Board*. Second, the Court failed to explain the crucial step upon which the word "prohibit" in the free exercise clause became synonymous with "coerce." Finally, the cases relied on to support the *Lyng* decision never claimed to define the outer reaches of the free exercise clause, although they are treated by the Court as doing so.

---

129. Sherbert v. Verner, 374 U.S. 398, 404 (1963) (quoting Braunfeld v. Brown, 366 U.S. 599, 607 (1961)) (emphasis added). *See also* Comment, *Native Americans' Access to Religious Sites: Underprotected Under the Free Exercise Clause?*, 26 B.C.L. REV. 463, 466 (1985) ("Government action may burden religion when it inhibits or prohibits activity important to the practice of a particular religion.").

130. Other commentators also had interpreted the prior Supreme Court cases as mandating consideration of effect or impact. *See, e.g.*, J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 1068 (3d ed. 1986) ("In earlier cases the Court mentioned the need to show that the state regulation amounted to 'coercion.' Today any regulation which substantially impairs the practice of a religion will be sufficiently 'coercive' to merit further review under the balancing test.").

131. In addition, the decision, to some extent, conflicts with the purpose of the free exercise clause as explicated by the Supreme Court. Discussions by the Court regarding the values underlying the first amendment indicate a predominant concern with preserving individual liberty. The focus is on protecting that liberty from infringement by the government, and no justification emerges for distinguishing between types of government action. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 53-54 n.38 (1985), wherein the court quoted James Madison's "Memorial and Remonstrance Against Religious Assessments" (1785) as follows:

> The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right . . . . We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society.

Id. *See also* Abington School Dist. v. Schempp, 374 U.S. 203, 226 (1963) (the Court declared that "the place of religion in our society is an exalted one" and that the government could not invade that area "whether its purpose or effect be to aid or oppose"); Engel v. Vitale, 370 U.S. 421 (1962); Everson v. Board of Educ., 330 U.S. 1 (1947); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (characterized the first amendment as "safeguarding" the free exercise of religion).

The Court recognized two general categories of government action as potentially burdening religion.[132] The first category includes coercive action, of which *Yoder* is an example.[133] The second category involves action which penalizes religious activity by denying participants an equal share of benefits enjoyed by other citizens.[134] Examples of this latter type of action can be found in the unemployment benefit cases such as *Thomas v. Review Board*,[135] *Sherbert v. Verner*,[136] and *Hobbie v. Unemployment Appeals Commission*.[137]

Contrary to the *Lyng* Court's assertion, those cases did not involve government action that constituted, in form, a penalty. For example, a law could mandate that anyone engaging in certain religious activities pay a certain amount of money. Such a law clearly would be a penalty. The unemployment compensation statutes, however, were facially-neutral statutes which did not set up any penalty for certain actions — religious or otherwise. Such a statute, however, may have the impact of a penalty on certain religions.[138] Thus, before characterizing a statute as a penalty, the Court must examine the impact of the law on the religion or its followers. If the effect of the law is to penalize the practice of religion, then the facially-neutral law would fall under one of the categories of government actions which may burden religion.

The Court in *Lyng* declined to examine the effect of the government's action, stating that "[w]hatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development."[139] Despite the Court's objections to line-drawing based on effect, in cases such as *Sherbert*, *Thomas*, and *Hobbie*, the effect will determine that line. A statute may burden the free exercise of

132. *Lyng*, 108 S. Ct. at 1326.
133. *Id.*
134. *Id.*
135. 450 U.S. 707 (1981).
136. 374 U.S. 398 (1963).
137. 107 S. Ct. 1046 (1987).
138. For instance, the applicant in *Sherbert* had been fired by her employer because she would not work on Saturday, the Sabbath. She could not find another job because of her refusal to work on Saturday. She was declared ineligible for benefits under the statute because she failed, without good cause, to accept available suitable work when offered to her. That provision of the statute clearly serves the necessary purpose of eliminating payment to claimants who are unwilling to work. As applied in *Sherbert*, however, the statute had the effect of penalizing the applicant for the exercise of her religion.
139. *Lyng*, 108 S. Ct. at 1326.

religion unconstitutionally if it has the effect of a penalty. On the other hand, if the effect of government action is to prevent the religious practice altogether as in *Lyng*, the action will not raise free exercise concerns. Thus, the *Lyng* Court, while purporting to rely solely on the form of government action in determining a burden on religion, actually preserved an analysis of effect or impact for an entire category of cases.

The logic of the Court is also questionable insofar as it excludes a crucial step in its reasoning. The Court throughout the opinion asserted that the government action did not fall under the protection of the free exercise clause because the action was not coercive.[140] The Court then noted that the crucial word in the clause is "prohibit."[141] The Court failed to explain, however, why the term "prohibit" is necessarily synonymous with "coerce" instead of an alternative word such as "impair," which also appears abundantly in free exercise cases. Moreover, the Court quoted past cases under the free exercise clause which involved coercive government action.[142] Admittedly, those cases clearly support the proposition that coercive government action is subject to first amendment scrutiny. The Court relied on those cases to conclude that *only* coercive actions fall under the free exercise clause, and therefore that the Indians could not prevail in their claim. Despite that contention, the Court could cite no language from those cases which defined the outer reaches of the free exercise clause. Thus, the Court erred in treating those cases as excluding non-coercive action, when in fact they simply did not address that issue at all.[143]

Finally, the determination that certain actions constitute "coercion" while others do not is essentially one of semantics. The *Lyng* case may be characterized as a situation in which government action forced three Indian tribes to abandon the practice of their religion. On the other hand, the situation may be described as one in which government action destroyed the ability of those tribes to practice their religion. The former description uses terms which would indicate coercion, whereas the latter summation used by the

140. *See, e.g., id.* at 1325-26, 1329.

141. *Id.* at 1326.

142. *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

143. While the issue was not directly addressed, the focus of the analysis regarding the coercive actions can provide some guidance. The language of those opinions indicates that the impact on religion was the predominant concern, and therefore that non-coercive government action should be subject to first amendment scrutiny if the action's effect is to impair the practice of religion.

Court does not necessarily raise the specter of compulsion. Of course, even the latter description implies coercive effect, but the Court disregarded the effect. Thus, reliance on the coercive nature of the government's action may not be a useful standard because it is inherently subjective and susceptible to attack.

C. Practical Desirability

In addition to the logical inconsistencies, the *Lyng* decision is not necessarily desirable from a practical standpoint, and thus cannot be justified as a "result-oriented" decision. In fact, the three fears articulated by the Court were unfounded. First, in analyzing the Indians' claim, the *Lyng* Court was concerned that a decision for the Indians would severely curtail the ability of the government to utilize its land.[144] Furthermore, the Court was concerned that application of the dissent's test would involve the Court in the unconstitutional task of determining the scope and merit of religious belief.[145] Finally, the *Lyng* Court expressed apprehension that a contrary decision could lead to claims for Indian possession of federal land to the exclusion of other groups.[146]

The *Lyng* Court's fear that a decision in favor of the Indians would unduly restrict the government's use of federal land was unwarranted. The lower courts have handled numerous cases which are factually identical to the present one.[147] In those cases, the courts examined the *impact* on religion to determine whether a burden existed.[148] Even with that focus on impact, however, the vast majority of religious groups failed to demonstrate a constitutional violation under the traditional three-part test.[149] Thus, the Court could have included noncoercive action within the protection of the free exercise clause without wreaking havoc on the ability of government to use its land.

The analysis employed by those lower courts is substantially similar to that advocated by the dissent in *Lyng*. Like past free exercise cases, the dissent would retain a balancing test, and would not consider the form of the government's action as definitive of whether a burden on religion existed.[150] In order to demonstrate a

144. *Lyng*, 108 S. Ct. at 1327.
145. *Id.* at 1329-30.
146. *Id.* at 1327.
147. *See supra* notes 42-57 and accompanying text.
148. *Id.*
149. *Id.*; *see also* Comment, *Native Americans' Access To Religious Sites: Underprotected Under the Free Exercise Clause?*, 26 B.C.L. REV. 463 (1985).
150. *Lyng*, 108 S. Ct. at 1334 (Brennan, J., dissenting).

burden in a dispute involving land use, the dissent would require the religious group to demonstrate that the land was "central" or "indispensable" for a religious practice or belief.[151] The Court mischaracterized the dissent's approach as requiring a judicial determination of which religious practices or beliefs are "central" to a religion.[152] Based on that interpretation, the Court then declared that the Constitution will not allow inquiry into whether a sincerely-held belief is central; therefore, the test could not be used unless a mere "assertion of centrality" is all that would be required.[153] The Court instead preferred not to protect the religion at all.

Despite the Court's mischaracterization, the test proposed by the dissent would not present the Court with a constitutional dilemma. The Indians would be required to show only that the specific land in question was central or indispensable for a certain religious *belief* or *practice*. Such a showing would not require the Court to inquire into the religion in any greater depth than would be normally required. In effect, the test merely restates the initial requirement that an individual demonstrate an impairment or burden on that individual's religious practice.[154] If the land is not central to a religious practice, no actual impairment on free exercise would exist, and the first amendment claim could not succeed. Once a claimant demonstrates a burden by proving the indispensable nature of the land, however, the government would have to demonstrate a compelling interest and show that the least restrictive means was employed to address that interest.

That test mirrors the Court's analysis in past cases.[155] For instance, in *Yoder*, the Court examined the sincerity of the religious beliefs, and the interrelationship between belief and lifestyle.[156] The *Yoder* Court found a burden on the Amish religion only after it first determined that isolation from the ways of the secular world was central to the practice of that religion. Moreover, in *Thomas*, the Court inquired into whether a belief was based on Thomas' religion or was merely a philosophical choice.[157] Thus, the precedent cited by the *Lyng* majority provided ample support for an examination into whether the land had religious significance and

151. *Id.* at 1338-39 (Brennan, J., dissenting).
152. *Id.* at 1329-30.
153. *Id.* at 1329.
154. *See supra* notes 14-17 and accompanying text.
155. *See supra* notes 12-41 and accompanying text.
156. Wisconsin v. Yoder, 406 U.S. 205, 235 (1972).
157. Thomas v. Review Bd., 450 U.S. 707, 713 (1981).

was necessary for a religious practice.[158]

Finally, lower courts addressing claims similar to *Lyng* have used the test advocated by the dissent. For example, in *Wilson v. Block*,[159] Hopi and Navajo Indians unsuccessfully challenged a government decision allowing private expansion of a ski area in the San Francisco Peaks in Cocino National Forest.[160] In analyzing whether a burden on religion existed, the court required the plaintiffs to demonstrate that the government land was indispensable to some religious practice, whether or not it was central to their religion.[161] Thus, the plaintiffs in *Wilson* had to demonstrate that the government land use would impair a religious practice that could not be performed at an alternative site.[162] Because the Indian groups were unable to show such an impairment, no burden was found.[163] The *Wilson* court, therefore, recognized the distinction between centrality to a practice and centrality to a religion. The dissent in *Lyng* advocated the former, but the Court addressed only the latter.

If the *Lyng* Court had utilized the dissent's approach, the Indians clearly would have been able to demonstrate a burden on religion. In fact, the Court repeatedly acknowledged that the road would impair the Indians' ability to practice their religion.[164] To the extent that the Court's form-over-effect standard resulted from an alleged inability to balance the interests adequately any other way,[165] the dissent's test destroys the justification for that standard. The proposed test is consistent with precedent, and would not unconstitutionally make the Court an arbiter of religious truth or centrality. The Court's failure to address adequately the viability of that test undermines its continual protestations[166] that no other

158. In fact, the *Yoder* decision could even support analysis into the centrality of the practice itself to the religion. For instance, in *Yoder* the Court declared that "[t]his concept of life aloof from the world and its values is central to their [the Amish] faith." *Yoder*, 406 U.S. at 210. In that case, however, the Court was not concerned with the effect of the education requirement on any specific religious practice, but rather with its effect on the entire Amish lifestyle and faith.

159. 708 F.2d 735 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983).

160. *Id.* at 737-38.

161. *Id.* at 743.

162. *Id.* at 744.

163. *Id.* at 744-45.

164. *See, e.g.*, *Lyng*, 108 S. Ct. at 1322, 1324-26.

165. *Id.* at 1327-28.

166. For example, in *Lyng*, the Court stated that "[h]owever much we might wish it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Id.* at 1327. It also stated that "[n]otwithstanding the sympathy that we all must feel for the plight of the Indian respondents, it is plain that the approach taken by the dissent cannot withstand analysis." *Id.* at 1329.

result was possible.

In an alternative objection, the Court maintained that if the Indians' position was upheld, the Indians could then seek to exclude all human activity except their own on similar grounds.[167] This fear is unfounded, and cannot withstand scrutiny for several reasons. First, the Court is not free to reject the requirements of the Constitution when conformity with those requirements proves burdensome. If construction of the road truly imposes a burden upon the free exercise of religion, and no compelling government interest is shown, then the Court must find a violation of the Constitution.

Moreover, a contrary decision in this case would not have meant success in any subsequent action which challenged access to the site by others. In *Lyng*, the government was acting affirmatively in a manner which destroyed the ability of the Indians to practice their religion. In the type of challenge envisioned by the Court, however, the Indians would be asking the government to act in a way which would restrict the access of the general public to the site. Such a request would raise establishment clause implications. Even if the government could constitutionally restrict public access, the free exercise clause would not require such action. That clause declares that the government cannot act in a way to prohibit the free exercise of religion. It does not, however, mandate that the government protect that religion from unrelated forces in society. In other words, the Court could uphold the claim in *Lyng* without setting up the government as a shield to protect religions from all threats or nuisances.

Some lower courts have in fact addressed the type of claim posited by the Court, and have rejected it on constitutional grounds. For instance, in *Badoni v. Higginson*,[168] the plaintiffs objected to the presence of tourists at the Rainbow Bridge National Monument because the tourists prevented the Indians from holding ceremonies near the Bridge. The plaintiffs argued that the government burdened the free exercise of religion by permitting access to the area by the public and commercial tour boats.[169] The court concluded that the government did not violate the Constitution because the government action did not prohibit religious exercises in the area.[170] The plaintiffs had equal access to the site, and the complaint arose from the actions of tourists, not the government.

167. *Id.* at 1326-27.
168. 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).
169. *Id.* at 178.
170. *Id.*

Moreover, the court noted that the plaintiffs sought affirmative action by the government, which implicated the establishment clause of the first amendment.[171] Thus, the *Lyng* Court's concern with the "snowball effect" of a decision for the Indians was unfounded and should not have affected its decision.

V. IMPACT

As a result of the *Lyng* decision, the free exercise clause protects individuals or religions only from government action that the court deems to be "coercive." Any non-coercive action by the government will be upheld without inquiry, even if it destroys the claimants' ability to practice their religion. Indians will undoubtedly feel the most significant impact because of the land-specific nature of their religions. The impact will be intensified because the unfortunate history of this country's relationship with Indian tribes has resulted in government ownership of much land which the Indians traditionally have considered to be sacred. The Court has now given the government free rein to utilize that land in any manner it sees fit, as long as the government action does not constitute compulsion or a penalty.

Under the *Lyng* approach, the government can act in ways which are detrimental to religions without being subject to any real scrutiny by the courts. This reality could result in government harassment of certain "unpopular" religions or cults because the government will not be required to demonstrate the necessity for its action. Moreover, the likely targets of such harassment typically lack the political power to effect change through the executive or legislative branches.

The government's ability to act in a manner that is detrimental to religions, however, may be limited in a number of ways. First of all, those government actions are limited to purely non-coercive measures. The susceptibility of other religions to harassment tactics has yet to be seen, but the possibility that the government could at least inconvenience other religions certainly exists. Second, the government must act in conformity with the decree of *McCullogh v. Maryland*.[172] In *McCullogh*, the Court stated that the government may not, "under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government."[173] Thus, if the government action was designed

171. *Id.* at 178-79.
172. 17 U.S. (4 Wheat.) 316 (1819).
173. *Id.* at 423.

to restrict the free exercise of religion, the non-coercive nature of the action would not save it from constitutional scrutiny.

Finally, lower courts could narrow the applicability of the *Lyng* case, thereby limiting its repercussions. For instance, lower courts could avoid applying *Lyng* to fact situations not involving government land use. The language of the *Lyng* opinion, however, does not easily lend itself to such a constricted application.

On the other hand, courts may be able to accept the reasoning of the *Lyng* Court and still rely on the free exercise clause to limit government action in cases that are factually similar to *Lyng*. For example, the Supreme Court has held that "[t]he First Amendment is . . . broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights."[174] This penumbra theory was enunciated in the free speech context, but was not explicitly limited to that area. Moreover, the Court has indicated that the various clauses of the first amendment operate to protect the same fundamental values.[175] Thus, any clause of the first amendment theoretically should be read as encompassing those rights necessary for its proper enjoyment. In other words, no clear reason exists for excluding the free exercise clause from the reach of a penumbra theory.

By applying a penumbra theory, courts could hold some non-coercive government actions to be unconstitutional while still conforming to the *Lyng* decision. In *Lyng*, the Court held that non-coercive government actions are not included in the wording of the free exercise clause.[176] A penumbra theory, however, allows for protection of rights that are *not* explicitly included in the first amendment. Lower courts then could hold that protection from non-coercive government action is necessary to the enjoyment of the free exercise right. Thus, courts could conclude that the right to exercise freely one's religion, to be meaningful, must include protection from government actions which virtually destroy one's ability to practice that religion. Under a penumbra theory, a court could then find a violation of the free exercise clause in a fact situation similar to *Lyng*.

174. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982) (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 579-80 (1980)).

175. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

176. *Lyng*, 108 S. Ct. at 1326.

VI. CONCLUSION

The *Lyng* decision substantially narrows the scope of the free exercise clause. To demonstrate a burden under that clause, petitioners are now required to show that the government's action is coercive in form. Absent a showing of coercion, a free exercise claim will fail regardless of the extent to which the government action impairs the religious practice. Even if petitioners do establish a burden on religion, the government action may be constitutional if justified by a compelling government interest. A guaranty of freedom to exercise one's religion, however, is meaningless if the conditions under which that freedom may be exercised can be shattered. Allowing the free exercise of religion while destroying the individual's ability to exercise that freedom is akin to granting the freedom to vote but banning elections. The freedom technically exists, but it is a right without any substance.

PEGGY HEALY