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Reconsidering Religion Policy as Violence: Lyng v. Northwest Indian Cemetery Protection Association.

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RECONSIDERING RELIGION POLICY AS VIOLENCE: *LYNG* V. *NORTHWEST INDIAN CEMETERY PROTECTIVE ASSOCIATION*

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I. Context 374
II. Ruling 376
A. A General Theory of Violence in Indian Policy 378
III. The *Lyng* Decision as Violence 384
IV. The Court and *Lyng* 393
A. Implications and Conclusion: The Lyng Ruling as Legal Contradiction 394
V. Discussion 395

The challenges to American Indian religious practice, and especially the rights of American Indians to exercise religious freedom on public land without interference from the United States government, are generally well-established.[1] In this article we reconsider the impediments to American Indian religious practice by focusing on the United States Su-

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1. *See* Lee Irwin, *Freedom Law and Prophecy: A Brief History of Native American Religious Resistance*, 21 AM. INDIAN Q. 35 (1997) (discussing the legal suppression of American Indian religious practices and the laws that later helped guarantee protection of their religious rights under the First Amendment); *see also* George Linge, *Ensuring the Full Freedom of Religion on Public Lands: Devils Tower and the Protection of Indian Sacred Sites*, 27 B. C. ENVTL. AFF. L. REV. 307 (2000) (referencing a specific instance in which American Indians attempt to protect a sacred site on public lands). Further, Linge discusses religious oppression against Native Americans by focusing the dialogue in terms of examining two competing components of the First Amendment, more specifically, two parts of the religion clauses – "one grounded in formalism, the other built upon an under-

preme Court's ruling in *Lyng v. Northwest Indian Cemetery Protective Association*.[2] Although almost two decades old, the *Lyng* decision remains guiding precedent for Supreme Court decisions regarding Indians and federal Indian policy, specifically as it relates to Indian religious practice. This Court decision also shapes how political institutions within the United States government interact with Indian tribes over religious issues. In examining *Lyng*, we contend that the United States government practices a form of violence in its policies governing Indian religious rights. After defining violence as a breach of reciprocal agreements and established policy, and applying the concept to the *Lyng* decision, we suggest that the implications for *Lyng* extend beyond violence in the area of religion, and fit a larger question of the legal contradiction inherent in federal Indian policy.

I. CONTEXT

In 1977, the United States Forest Service developed a project to link two California towns, Gasquet and Orleans, with a seventy-five mile road, called the G-O road.[3] The Forest Service had already completed two sections of the G-O road, but an unfinished, six-mile portion of road running through the Chimney Rock area of the Six Rivers National Forest separated the two sections.[4] To complete their project, the Forest Service would have to pave this section.[5] Resistance to the completion of the

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standing of 'full and equal' or 'full and free' religious freedom." (citations omitted). *Id.* at 309.

2. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (holding that the Free Exercise Clause of the First Amendment is not violated through the burdening of religious practices). "The Free Exercise Clause of the First Amendment provides that 'Congress shall make no law . . . prohibiting the free exercise [of religion].'" *Id.*

> It is undisputed that the Indian respondents' beliefs are sincere and that the Government's proposed actions will have severe adverse effects on the practice of their religion. Those respondents contend that the burden on their religious practices is heavy enough to violate the Free Exercise Clause unless the Government can demonstrate a compelling need to complete the G-O road or to engage in timber harvesting in the Chimney Rock area. We disagree. *Id.* at 447.

3. *Id.* at 442 (pointing out that the Forest Service proposed such a project).

> "As part of a project to create a paved 75-mile road linking two California towns, Gasquet and Orleans, the United States Forest Service has upgraded 49 miles of previously unpaved roads on federal land. In order to complete this project (the G-O road), the Forest Service must build a 6-mile paved segment through the Chimney Rock section of the Six Rivers National Forest. That section of the forest is situated between two other portions of the road that are already complete. In 1977, the Forest Service issued a draft environmental impact statement that discussed proposals for upgrading an existing unpaved road that runs through the Chimney Rock area." *Id.*

4. *See id.*

5. *See id.*

G-O road came from the Yurok, Karok, and Tolowa Indians of Northern California who hold this land sacred.[6] In response to Indian claims on the land, the Forest Service conducted a survey of American Indian cultural and religious sites in the Chimney Rock area.[7] "The commissioned study, which was completed in 1979, found that the entire area is significant as an integral and indispensable part of Indian religious conceptualization and practice."[8] The tribes' religious rituals depend upon "certain qualities of the physical environment, the most important of which are privacy, silence, and an undisturbed natural setting."[9] The study concluded that building the G-O road "would cause serious and irreparable damage to the sacred sites which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples."[10] The researchers recommended the G-O project be abandoned.[11]

In 1982, ignoring the central recommendations of its own study, the Forest Service finalized project plans for the G-O road.[12] While the final path of the road would avoid archaeological sites, and the route was drawn as far as possible from areas still used for religious purposes and rites by Indian tribes, the government disregarded suggestions to bypass the area altogether.[13] The Forest Service claimed it was impractical to bypass the entire Chimney Rock area because alternate routes involved

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6. *See id.* ("The Hoopa Valley Indian Reservation adjoins the Six Rivers National Forest, and the Chimney Rock area has historically been used for religious purposes by Yurok, Karok, and Tolowa Indians.").

7. *See Lyng,* 485 U.S. at 442 ("In 1977, the Forest Service issued a draft environmental impact statement that discussed proposals for upgrading an existing unpaved road that runs through the Chimney Rock area. In response to comments on the draft statement, the Forest Service commissioned a study of American Indian cultural and religious sites in the area.").

8. *See id.* (citing D. THEODORATUS, CULTURAL RESOURCES OF THE CHIMNEY ROCK SECTION, GASQUET-ORLEANS ROAD, SIX RIVERS NATIONAL FOREST (1979)) (emphasizing the importance of the area that was to be paved).

9. *See id.* (citing D. THEODORATUS, CULTURAL RESOURCES OF THE CHIMNEY ROCK SECTION, GASQUET-ORLEANS ROAD, SIX RIVERS NATIONAL FOREST (1979)) (listing qualities which are essential to the religious rituals of the tribes).

10. *See id.* (citing D. THEODORATUS, CULTURAL RESOURCES OF THE CHIMNEY ROCK SECTION, GASQUET-ORLEANS ROAD, SIX RIVERS NATIONAL FOREST (1979)) (concluding that construction would destroy sacred areas).

11. *See id.* (citing D. THEODORATUS, CULTURAL RESOURCES OF THE CHIMNEY ROCK SECTION, GASQUET-ORLEANS ROAD, SIX RIVERS NATIONAL FOREST (1979)) (recommending that the road construction not be completed). "Accordingly, the report recommended that the G-O road not be completed." *Id.*

12. *See id.* ("In 1982, the Forest Service decided not to adopt this recommendation, and it prepared a final environmental impact statement for construction of the road.").

13. *Id.* ("The Regional Forester selected a route that avoided archeological sites and was removed as far as possible from the sites used by contemporary Indians for specific spiritual activities.").

the purchasing of private lands and still fell on lands with spiritual and ritualistic value to Native Americans.[14] The final G-O plan also included a provision for the harvesting of timber in the Chimney Rock section of the Six Rivers National Forest.[15] "The management plan provided for one-half mile protective zones around all the religious sites identified in the report that had been commissioned in connection with the G-O road."[16]

Those against the G-O road plan first sought an administrative resolution to the controversy.[17] When none could be achieved, the parties (an Indian organization, individual Indians, nature organizations, and the state of California) challenged this plan as a violation of "the Free Exercise Clause, the Federal Water Pollution Control Act, the National Environmental Policy Act of 1969, several other federal statutes and governmental trust responsibilities to Indians living in the Hoopa Valley Reservation."[18]

II. RULING

The Supreme Court acknowledged that the Forest Service's actions would have an adverse effect on the Indians' practice of their religion.[19] However, the Court held that this was not enough to constitute a violation of the First Amendment and the Free Exercise Clause.[20] The Jus-

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14. *See id.* (citing D. THEODORATUS, CULTURAL RESOURCES OF THE CHIMNEY ROCK SECTION, GASQUET-ORLEANS ROAD, SIX RIVERS NATIONAL FOREST (1979)) (rejecting alternative routes, that avoided the area in dispute, for various reasons). "Alternative routes that would have avoided the Chimney Rock area altogether were rejected because they would have required the acquisition of private land, had serious soil stability problems, and would in any event have traversed areas having ritualistic value to American Indians." *Id.*

15. *See id.* ("At about the same time, the Forest Service adopted a management plan allowing for the harvesting of significant amounts of timber in this area of the forest.").

16. *See id.* (citing D. THEODORATUS, CULTURAL RESOURCES OF THE CHIMNEY ROCK SECTION, GASQUET-ORLEANS ROAD, SIX RIVERS NATIONAL FOREST (1979)).

17. *See Lyng*, 485 U.S. at 443 ("After exhausting their administrative remedies, respondents-an Indian organization, individual Indians, nature organizations and individual members of those organizations, and the State of California-challenged both the road-building and timber-harvesting decisions in the United States District Court for the Northern District of California.").

18. *Id.*

19. *Id.* at 447 ("It is undisputed that the Indian respondents' beliefs are sincere and that the Government's proposed actions will have severe adverse effects on the practice of their religion.").

20. *Id.* ("Those respondents contend that the burden on their religious practices is heavy enough to violate the Free Exercise Clause unless the Government can demonstrate a compelling need to complete the G-O road or to engage in timber harvesting in the Chimney Rock area. We disagree.").

tices based their decision on the precedent established in *Bowen v. Roy*,[21] which denied a claim by two parents that the use of a Social Security number to identify their daughter impinged on their beliefs.[22] In *Roy,* the plaintiffs contended that "numerical identifiers" would "'rob the spirit' of [their] daughter and prevent her from attaining greater spiritual power."[23] The Court ruled that the situation presented in *Lyng* mirrors the *Roy* case.[24] Both involve challenged governmental activity that greatly hinders the practice of religion of an individual and pursuit of spiritual fulfillment.[25] Despite this hindrance, in both cases, the Justices concluded that the actions of the government did not coerce individuals into violating their own religious beliefs.[26] Nor did the action penalize a person for his or her own beliefs by depriving them of "an equal share of the rights, benefits, and privileges enjoyed by other citizens."[27]

Also, in the *Lyng* ruling, the Court held that the Indians' claims of rights to free exercise or rights to ceremonial land use do not outweigh the government's right to use its lands. The Court suggested that the government could have done little else to work favorably toward Indian re-

21. *See id.* at 448; Bowen v. Roy, 476 U.S. 693, 695 (1986) ("The question presented is whether the Free Exercise Clause of the First [A]mendment compels the Government to accommodate a religiously based objection to statutory requirements that a Social Security number be provided by an applicant seeking to receive certain welfare benefits and that the States use these numbers in administering the benefits programs.").

22. *See* Bowen v. Roy, 47 U.S. 693, 699–700 (1986) ("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 appellees engage in any set form of religious observance, so appellees may not demand that the Government join in their chosen religious practices by refraining form using a number to identify their daughter.").

23. *Id.* at 696 ("In order to prepare his daughter for greater spiritual power, therefore, Roy testified to his belief 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 has no control, will serve to 'rob the spirit' of his daughter and prevent her from attaining greater spiritual power.").

24. *Lyng*, 485 U.S. at 449 ("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.*").

25. *Id.* ("In both cases, the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs.").

26. *Id.* ("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.").

27. *Bowen*, 47 U.S. at 728 ("Only an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens.").

ligious claims. The Forest Service had conducted a survey into the effects of the G-O road program on the Chimney Rock region. Even though it ultimately rejected the survey's findings, the Forest Service adopted other "ameliorative measures"-e.g., not disturbing sites where specific rituals were conducted.[28] The Court deemed these actions consistent with the provisions of the American Indian Religious Freedom Act of 1978.[29] The Supreme Court ruled that the First Amendment prohibited neither the completion of the G-O road nor the harvesting of timber in the Chimney Rock area.[30]

We suggest that the Court's findings in *Lyng* constitute a form of violence perpetuated against American Indians and American Indian religion because the Court ruling violates fundamental agreements between the United States government and the tribes in question. We begin by examining a theory of violence as applied to United States relations with American Indians. Then, we draw on the tenets of this theory to better understand the abrogation of treaties, executive orders, statutes and prior court decisions to explain the violence perpetrated against Indian religious rights. By abrogating Indian religious rights, the courts perpetuate a legal contradiction and make the free practice of Indian religion more difficult despite congressional and presidential directives ordering (and promising) the contrary.

A. *A General Theory of Violence in Indian Policy*

In this paper, we adopt a theory of violence first applied to United States relations with American Indians by Peter Jacques, Sharon Ridge-

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28. *Lyng*, 485 U.S. at 454 (pointing out that even though the Forest Service did not follow the recommendations, it did, however, adopt ameliorative measures). "Although the Forest Service did not in the end adopt the report's recommendation that the project be abandoned, many other ameliorative measures were planned. No sites where specific rituals take place were disturbed." *Id.*

29. *See id.* at 454–55 (holding that the actions were consistent with the provisions of the American Indian Religious Freedom Act of 1978).

> 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. *Id.*

See also American Indian Religious Freedom Act, Pub. L. No. 95–341, 92 Stat. 469 (1978) (protecting American Indian's religious freedoms under the First Amendment) (codified in part at 42 U.S.C.A. § 1996).

30. *Lyng*, 485 U.S. at 458.

way and Richard Witmer.[31] Here, the authors defined violence as "a breach of the reciprocal relationship established between Indian tribes and the federal government through treaties."[32] This essay provides some valuable insights into the theory of violence, especially regarding Native Americans and their sacred sites, and adds the important role that native religions play in refining the violent relationship evident in the *Lyng* decision.[33]

Like Jacques *et al.*,[34] we find that a problem with popular conceptions of violence lies in the dependence on the perspective of the actor perpetuating the violent act.[35] This is troublesome because violence may not be perceived as violence by the perpetrator, or the actor may not want to admit that the acts are violent. For example, the federal government is not likely to label its allotment and termination policies as violent acts.[36] The government might even suggest that these acts, or their harmful effects, were unintentional and surely not violent. Moreover, the government has no incentive to claim its acts are anything but in the public interest. By avoiding alternative descriptions, it can make its actions appear justified and legitimate. Similarly, the policies concerning the use of Indian (sacred) lands are unlikely to be recognized by the United States

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31. *See* Peter Jacques, Sharon Ridgeway & Richard Witmer, *Federal Indian Law and Environmental Policy: A Social Continuity of Violence*, 18 J. ENVTL. L. & LITIG. 223 (2003). "The premise of this Article is that the environmental policy of the United States government, because it exerts control over Indian nations' natural resources in violation of specific treaties, is inherently violent." *Id. at* 224.

32. *Id.* at 224 (defining violence as a breach of the reciprocal, treaty-based, relationship between the Unites States federal government and Indian tribes).

33. *See generally id.* at 223 (examining the environmental policy of the United States and positing that the federal government's actions in this area exemplify the definition of violence through the United States government's regulation of natural resources of several Indian nations, which contradicts specific treaty agreements explicitly forbidding such government control).

34. *See generally id.*

35. *See id.* at 227 ("While the definition of violence has been subject to minimal debate or analysis as a concept, it has an assumed meaning in social science that generally includes physical injury with malicious intent. In this definition of violence, the focus is on the intent of the agent to cause harm. Attempting to define actions as violent from the agent's perspective . . . becomes very difficult.").

36. *See id.*

> "One reason for this is that the same agent (the United States federal government) in the form of the Supreme Court and Congress has been allowed to rule in its own interest and then sanction that ruling . . . . In other words, in relying on the agent of violence to define legitimate fiduciary responsibility for the tribes, the Court and Congress are empowered to promote their own interest. In this case, the separation of powers is irrelevant because the interest of the federal government as a whole is uniformly found in the control of tribal land wealth." *Id.*

government as violent because that recognition would depend upon the perspective of the perpetrator.

This model of violence also draws insight into the breach of expectations in a relationship through the works of Plato and St. Augustine. Pertinent to our discussion of the problem of perspective is Augustine's reliance upon the agent model, the principal standard used in conflict studies.[37] Here the interpretation of violence is tied to the "intention of the individual decision maker."[38] In other words, whether the actor meant to do good or bad by his violent action determines whether that act is good or bad. The ultimate result in such a system is that the actor decides whether his own acts are violent or not—since society is left to rely on the actor's own interpretation of his intent in committing the act. Therefore, when the United States government commits violence toward the Indians by taking their lands or undermining their ability to practice their religion freely, such an act is not perceived as violent because the government refuses to admit that its intentions were malicious or that its actions were violent. Again, the interpretation of an act as violent depends upon the perspective of the actor.[39]

This reliance upon intent becomes particularly problematic when the proposed perpetrator of the violent act is the government. If the state is defined as a "monopoly of legitimate use of force within a given territory," then, state actions, by definition, are legitimate, not violent.[40] Even when state acts are seen as violent, they can be defended as a neces-

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37. *See generally* Sharon Ridgeway & Peter Jacques, *Population-Conflict Models: Blaming the Poor for Poverty*, 39 SOC. SCI. J. 599 (2002) (demonstrating how a limited focus on population growth *per se* disguises the violence that is inherent within the unequal distribution of social resources). "We contend that part of understanding whether an action is seen as violence, or not, is recognizing the expectations inherent within a relationship." *Id.* at 600.

38. *Id.* at 603.

> "We see this focus on the intention of the individual decision maker in the dominant model of conflict studies, the agent model. Whether the agent is an objective utility maximizer calculating the expected utility of each outcome in a model of pure deductive rationality or has their formal rationality constrained by cognitive rationality (which allows for more non-rational complexities in decision making), the focus in the agent model is still limited to the though processes of the individual. As such[,] any understanding of violence is limited to an analysis of the intentions of the agent to cause harm." *Id.*

39. Peter Jacques, Sharon Ridgeway & Richard Witmer, *Federal Indian Law and Environmental Policy: A Social Continuity of Violence*, 18 J. ENVTL. L. & LITIG. 223, 227 (2003).

40. KUSIK & KNUTTILA, STATE THEORIES: CLASSICAL, GLOBAL, AND FEMINIST PERSPECTIVES 50 (1987).

sary means for progress or protection of the social contract.[41] These ideas allow the government to manipulate conceptions of violence and claim intentions of progress and maintenance of the social contract to defend questionable actions regarding treaty observance and land disputes. In the *Lyng* case, progress was a road that was necessary for the advancement of the larger society, despite evidence of the negative impact it would have on local Indian communities.[42]

Society may also interpret a violent act depending upon the "rationality of the act." There is a cultural difference in the perception of violence based on the motive behind the action. As a result, popular interpretations of violence often fail to recognize government acts in the name of progress or rationality as violent.[43] The dominant groups of society interpret the actions of government as less violent, or not violent at all, because the intent of the government is to pursue progress and its approach is rational.[44] Based on this understanding of violence, such proposed purposes make the acts acceptable, not inherently violent—at least from the perspective of the majority of society.

The rationality and violence of an action of government is also viewed in its relationship to the social contract. Clearly, "[o]ne purpose of the social contract [is] to keep violence at a minimum so that people [can] be free to live their lives . . . ."[45] Moreover, once entering the social contract, a party gains "civil liberty and the proprietorship of all he possesses."[46] The association of government with the prevention of violence is important. Under this interpretation of a social contract, the state becomes a protector from violence. The state is expected to keep people safe and ensure daily tranquility. Thus, it is incongruous for the state to commit violent acts against its own citizens because the state's main goal

41. Peter Jacques, Sharon Ridgeway & Richard Witmer, *Federal Indian Law and Environmental Policy: A Social Continuity of Violence*, 18 J. ENVTL. L. & LITIG. 223, 226 (2003) ("Since the state is the source of legitimacy[,] its actions are not recognized as violent. Or, if they are seen as violent, the violence is not seen as problematic as it furthers the goals of a social contract and modern progress.").

42. *See generally Lyng*, 485 U.S. at 439.

43. *See* Peter Jacques, Sharon Ridgeway & Richard Witmer, *Federal Indian Law and Environmental Policy: A Social Continuity of Violence*, 18 J. ENVTL. L. & LITIG. 223, 226 (2003).

44. *See id.* ("[V]iolence within modernity is usually conceived of as the erratic behavior of criminals and has not typically been conceived of as a social continuity perpetrated by rational and civil modernity itself."). By definition, the state becomes a protector from violence, not the perpetrator of violence; and, violence that the state does commit is veiled in legitimacy." *Id.*

45. *Id.* at 225 (citing C.B. MACPHERSON, INTRODUCTION TO THOMAS HOBBES, LEVIATHAN 9, 39–40 (C.B. Machpherson ed., Penguin Books 1985) (1651)).

46. *Id.* (quoting JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT 49–67 (H.J. Tozer trans., Wordsworth Editions Ltd. 1998) (1762)).

is violence prevention. Therefore, government acts are instead attributed to the pursuit of progress and rationality, like building roads for transportation purposes.

American Indians were denied the protections against violence afforded to those within the social contract, and as outsiders, they lacked the "proprietorship" of all their belongings, specifically their lands.[47] Thus, the government faced little resistance when taking Indian lands. After all, outside of the social contract, no one can claim a right to own or use real property.[48] Taking or using the property of those outside the social contract elicits little concern and is not violent according to the state.

Environmental research also decries an understanding of violence as acceptable when committed against outsiders. Environmental activists argue that "social groups associated with the state of nature are tied to a state versus society justification of domination."[49] The outsider is viewed as inhuman or foreign enough to be justifiably subjected to violence.[50] These groups are outside of society, so violence committed toward them is fundamentally different than violence toward others in society; the rationality of the act is different.[51]

The identification of others outside of the social contract highlights the violence that replaces basic assumptions in any association. Here, parties involved generally assume a minimal expectation of reciprocity where no one group of people will view themselves or be viewed "as justifiably inferior to the other, regardless of relative capabilities."[52] Nor will their

47. *See id.* at 225–26 ("'What man [sic] loses by the social contract is his natural liberty and an unlimited right to everything he tries to get and succeeds in getting; what he gains is civil liberty and the proprietorship of all he possesses.'" (citing JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT 65 (H.J. Tozer, trans., Wordsworth Editions Ltd. 1998) (1762)).

48. Peter Jacques, Sharon Ridgeway & Richard Witmer, *Federal Indian Law and Environmental Policy: A Social Continuity of Violence*, 18 J. ENVTL. L. & LITIG. 223, 226 (2003) ("Outside the social contract there is no such thing as 'private property' to social contract theorists, merely the ability to temporarily use a resource.").

49. *Id.* at 228 (highlighting the ecofeminist observation that groups linked with the natural state are bound to a justification of domination defined by the state versus society).

50. Sharon Ridgeway & Peter Jacques, *Population-Conflict Models: Blaming the Poor for Poverty*, 39 SOC. SCI. J. 599, 602 (2002) ("Any entity not seen to have a respectable soul/mind is seen as an 'other' and is easily violenced like slave, foreigners, women . . . and, of course, the earth and non-human nature.").

51. *See id.*

52. *See* Peter Jacques, Sharon Ridgeway & Richard Witmer, *Federal Indian Law and Environmental Policy: A Social Continuity of Violence*, 18 J. ENVTL. L. & LITIG. 223, 230 (2003) ("When groups of people interact with each other, we assume that no group of people will view themselves as justifiably inferior to the other, regardless of relative capabilities.").

cultural practices be viewed as inferior to those of the dominant society. This assumption is lacking from most federal-tribal interactions, in which the United States has often assumed that it is the stronger of the two parties. When this happens, and a party in a relationship unilaterally assumes a superior position, this constitutes a harm.[53] It is an act of violence that breaches expectations inherent in a relationship.[54]

The characterization of violence as dependent on the understanding of the relationships involved is an important distinction from previous theories and is important for our understanding of *Lyng* as an act of violence. This view marks a transition from a subjective definition of violence that relies upon the intent of the actor and the interpretation of the act by the very perpetrator of said act. This new definition of violence eliminates the problem of perspective by examining the relationship between the parties involved in the dispute over religious rights. This allows for a relatively unbiased decision about violence that examines the act's effect on a relationship.[55]

One additional insight for the discussion on violence, and one that is especially relevant to the investigation of federal Indian land policy, must also be examined. There are actually two acts of violence when the United States government breaks an agreement reserving land for Indian religious use. The first act of violence is the broken relationship between the tribes and the United States. The second is the breaking of the human-nature relationship between Indian tribes and the land itself. Many tribes acknowledge the great power of the earth and form reciprocal affiliation with the earth itself. The peoples become tied to the land, and federal policies discarding treaty rights and the right to hold an area sacred sever these ties. Violence in *Lyng* is the destruction of the connectedness of place, religion, and culture in Indian society. And, violence

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53. *See id.*

> [N]on-coercive and non-retributive consent is a minimum requirement to change the expectations of a reciprocal relationship between equals. If consent is not obtained, the unilateral action by one side without consent of the other destroys the equality and replaces circularity with hierarchy within the relationship. This hierarchy results in harm, which then constitutes violence. *Id.*

54. *See id.* at 229 ("Violence is, first and foremost, a breach of expectations inherent in a relationship.").

55. *Id.*

> "The focus has now shifted from the subjective intent of the agent and all of its associated problems to the relationship established between the involved parties. Understanding what constitutes violent action is recognizing the expectations inherent in that relationship. Breaching these expectations is the core of understanding whether harm has occurred." *Id.*

See also Sharon Ridgeway & Peter Jacques, *Population-Conflict Models: Blaming the Poor for Poverty*, 4 SOC. SCI. J. 599, 600 (2002)).

is the means by which modern governments compromise the universal kinship inherent in the relationship that exists between the tribes and their sacred sites in the name of progress.[56]

Therefore, the United States government's forced control of Indian lands constitutes two distinct acts of violence, one between the state and tribes, the other between tribes and a sacred site. These insights into the understanding of violence provide an important context within which we examine the federal government's policy toward Indian sacred sites utilizing the *Lyng* case.

While the Supreme Court's ruling in the *Lyng* case was detrimental to American Indian religious exercise and culture, to achieve our definition of violence requires more than an unfavorable policy or decision. For an act to constitute violence, it must breach terms of the reciprocal relationship outlined by agreements between Indians and the United States government.

III. THE *LYNG* DECISION AS VIOLENCE

In viewing the *Lyng* case as violence, we move beyond earlier work that focuses on the violation of written treaties and explore the contradictions in the Court's *Lyng* ruling that circumvent established federal-Indian relations. This is necessary as much of the evidence of how *Lyng* constitutes violence lies in more recent documents and principles pertinent to sacred lands and sites developed post-1871, when treaty-making ended. Thus, this examination of violence goes beyond treaties to include relevant statutes, past Supreme Court decisions, executive orders, and other government information including a Department of Justice memorandum on the accommodation of sacred sites.

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56. *See, e.g.*, Martin Ball, *People Speaking Silently to Themselves*, 26 AM. INDIAN Q. 460, 463 (2002) ("For Native cultures, place becomes the primary referent for all formulations of meaning and value within the culture. To fail to understand this primacy of place and what happens or has happened at specific places is to fundamentally misunderstand Native traditions."); *see generally* Russel Barsh, *The Nature and Spirit of North American Political Systems*, 10 AM. INDIAN Q. 181, 193–94 (1986).

> "Kinship is not maintained by laws and cannot be sustained through coercion. . . . Kinship is a living system, constantly changing. . . . Relationships must periodically be remembered and renewed to restore order. . . . Diplomatic relations among North America's original nations were established according to the norms of kinship, with each nation assuming the role of kinsman within a confederation. . . . The real work of foreign affairs took place at annual ceremonies of renewal at which confederated nations identified and reconciled their grievances, confessed their sins, paid their debts, enlisted one another's aid, and reaffirmed their kinship. Each year ended a cycle and restored the original relationship." *Id.*

We begin with the act of Congress that extended citizenship to all American Indians, the Indian Citizenship Act of 1924,[57] which officially declared all Native Americans citizens of the United States.[58] Along with the rights they had as members of their tribes, Indians were entitled to the rights of all other American citizens, including those listed in the Bill of Rights, and to the rights of citizens of the state in which they reside. Among these protections-and pertinent to this case-is the First Amendment provision for free exercise of religion.[59] For Indians, this protection includes access to sacred sites where religious rituals and rites are held. Under First Amendment sanction, the government is prevented from infringing upon the free practice of religion in most cases. While individual rights assuredly are not absolute, the government must have a significant reason or interest for encroaching upon those rights, according to the standard set forth by the Supreme Court.[60]

At a very basic level, by ignoring the findings of a government report authorized to review the impact of the G-O road on tribal religion and religious practices (which advised against the road's construction on religious grounds), the Court in *Lyng* approved action contrary to the widely accepted standards for the protection of basic rights of religious practice.[61] Importantly this is noted in the dissenting opinion of *Lyng*.[62] While the Court's majority opinion against religious practice is troubling, it may not meet the standard of violence we have asserted exists in *Lyng*. Yet, the right of American Indians to practice their religion is not limited to the First Amendment rights established in the Constitution. Indeed,

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57. Indian Citizenship Act of 1924, 68 Pub. L. No. 175, 43 Stat. 253 (1924) ("An Act to authorize the Secretary of the Interior to issue certificates of citizenship to Indians.").

58. *Id.*

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all noncitizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: *Provided*, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property. *Id.*

59. *See generally* U.S. CONST. amend. I.

60. Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) ("[I]t must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.").

61. *See generally Lyng*, 485 U.S. at 439.

62. *See id.* at 458 (Brennan, J., dissenting) (emphasizing that the Court approved actions which were against the acceptable standards of protecting basic religious practice). "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." *Id.*

clarification and extension of Indian rights is evident in prior Court rulings, presidential orders and acts of Congress.

Central to this discussion of the *Lyng* decision as violence, and foundational to federal Indian policy in general, is the Supreme Court's ruling in *Winters v. United States*.[63] The case centered on an agreement between several Indian tribes and the federal government reserving land for those tribes to equip the Indians with a means of farming.[64] From the government's perspective, this agreement provided a method for civilizing the Indians, while tribal members appreciated the land and other considerations from the government. An unfortunate consequence of the agreement's provisions was a conflict between the Indian inhabitants of the reserved lands and non-Indian settlers who began diverting and using streams and water sources tied to those lands. The federal government filed suit on behalf of the Indians, claiming that the land rights established by the governmental agreement implied rights to enough water to irrigate the lands and make them fertile.[65] The Court sided with the government and affirmed the Indians' implied right to water sources.[66]

Important for the discussion of *Lyng* as violence is the Court's reasoning in the *Winters* case and the precedent that it set.[67] The justices sided with the tribes by noting that it is unreasonable to assume that the Indians would form an agreement for the right to settle a tract of land without the inclusion of enough water necessary to make that land useful.[68] The Court's holding established the precedent of interpreting the terms of treaties and other agreements as the Indians would understand them. The *Lyng* decision clearly does not follow the doctrine outlined in *Win-*

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63. Winters v. United States, 207 U.S. 564 (1908) (enjoining defendants from constructing dams on the Milk River, a part of the Fort Belknap Indian reservation).

64. *Id.* at 565–66 (describing the attributes of the Milk River and the importance of how the Indians utilize its flow).

> [T]he Indians residing on the reservation diverted from the river for the purpose of irrigation a flow . . . of water . . . and raised upon said lands crops of grain, grass, and vegetables. . . . and the United States "has been enabled by means thereof to train, encourage, and accustom large numbers of Indians residing upon the said reservation to habits of industry and to promote their civilization and improvement." *Id.* at 566–67.

65. *Id.* at 568 (explaining that on May 1, 1888, the United States, established the territory to be a reservation for Indian tribes in Montana).

66. *See generally id.* at 564.

67. *See generally id.*

68. *Winters*, 207 U.S. at 576 ("The government is asserting the rights of the Indians. . . . By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians."). Further, the Court suggests that the Indians can claim protection under a special relationship with the government, and under this relationship, even certain omission within agreements on the part of Indians may be overlooked. *Id.* at 577.

ters. In fact, the Court disregards Indian understanding of religion and sacred sites, an understanding that is very different from the views of most Western religions.

The Court in *Lyng* further abandoned precedent established in previous cases regarding a conflict between secular goals and Native American religious exercise. Previous cases had challenged dam erection and parking lot construction on or near sacred Indian sites.[69] In each case, the tribes argued the developments would compromise the sacred nature of the site and prevent them from practicing their religion.[70] Each time the Court's response was that the government had a compelling state interest in its construction projects that trumped the Indians' claims to free exercise of religion.[71] The *Lyng* decision breaks from this precedent.[72] In the Court's majority opinion, Justice O'Connor denied the government's need for a compelling interest to outweigh Indian religious claims.[73] Thus, by contradicting the cases leading up to *Lyng*, the Court further abandons and ignores the terms of the relationship between the tribes and the federal government. This breach is an act of violence.

Barsh outlines several significant characteristics pertinent to our understanding of native religious and cultural views that clarify the ramifications of the *Lyng* decision and its place in the theory of violence.[74] Importantly, his discussion of cultural characteristics demonstrates the connectedness of Indian religion, culture and the environment.[75] Where *Winters*, in effect, called for the inclusion of these ideas to understand the perspective of Indians affected by a prior agreement, *Lyng* ignored these connections and insisted that progress and development were the most relevant and important issues to consider.

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69. *See, e.g.*, Sequoyah v. Tenn. Auth., 620 F.2d 1159 (6th Cir. 1980) (holding that the plaintiff Cherokee Indians failed to show a violation of their First Amendment rights by the reservoir causing flooding of their sacred lands); Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980) (holding that a lack of property rights was not determinative, but only a factor to be considered in weighing Indian plaintiffs' Free Exercise claim against management of a monument by federal officials).

70. *Sequoyah*, 620 F.2d at 1159; *Badoni*, 638 F.2d at 172.

71. *Sequoyah*, 620 F.2d at 1159; *Badoni*, 638 F.2d at 172.

72. *See generally Lyng*, 485 U.S. at 450–51 (breaking from the notion that the government needs a compelling interest to trump the free exercise of religion).

73. *See id.* ("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.").

74. *See* Russel Barsh, *The Nature and Spirit of North American Political Systems*, 10 AM. INDIAN Q. 181, 181–96 (1986). ("It proceeds from three concepts that recur throughout the theology and cosmology of aboriginal Americans: individual conscience, universal kinship, and the endless creative power of the world.").

75. *See generally id.*

Also a central religious/cultural/environmental concept identified by Barsh is "universal kinship."[76] This approach views the universe as interconnected: all life, all things in the universe are tied together, and each has a role to fulfill.[77] This understanding includes a bond between people and other people, animals, and the land.[78] Humans have a connection with the land, a relationship almost on a familial basis; humans and the land are kin.[79] In much the same way that water rights were assumed to exist given the expectations of the Indians, the right to maintain connections to sacred sites and, indeed, important religious areas without their destruction is part of the ties that exist in native cultures. Overlooking this connection not only violates previous rulings, it also violates the religious rights of native communities. The Court, then, acts violently when it discounts the relationship between tribes and sacred sites like Chimney Rock.

Martin Ball gives further reasons and evidence for Native Americans' connection to the land.[80] Ball points out that Native culture is place-oriented, unlike Western traditions that emphasize a temporal approach to history and significant events.[81] Westerners link events to dates on which they occurred. Indians are more concerned with places where the events occurred. Thus, over time, cultures and groups become closely linked with their local environments. Their cultural identity depends on the environment where all of their historically significant events happened. Without a link to their surroundings, Indians lose their connections with their histories, their traditions. A crucial part of who these groups are becomes blurred and loses importance.

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76. *Id.* at 187–88 ("[T]he tribal system rests on universal kinship—kinship that is continuous in time, space, and across species . . . and uniquely defines each individual in relation to every other. Like woven fabric, kinship draws its strength from crosscutting strands.").

77. *See id.*

> Continuity in time connects ancestors with the unborn. Each that has come this way, and each that is yet to come, has a name. . . . Continuity in space connects family with family. Every family, and thus to varying degrees every human being, is related. . . . Continuity across species connects human beings with all life. Just as human families were joined by marriage and birth at a time before memory, so too were human and animal families. *Id.*

78. *See id.*

79. *See* Russel Barsh, *The Nature and Spirit of North American Political Systems*, 10 AM. INDIAN Q. 181, 187–88 (1986).

80. *See* Martin Ball, *People Speaking Silently to Themselves*, 26 AM. INDIAN Q. 460, 463 (2002) ("To understand the significance of sacred landscapes in Apache tradition, one must first consider the significance of 'place,' sacred geographies, and places in religions and cultures in general and more specifically, in Native American oral traditions.").

81. *See id.* at 464 (It is from where the event took place that context and meaning is derived, not precisely when, in a linear sequence of time, the event took place.").

Ball also stresses the native understanding of lands as continuous.[82] Native boundaries are not distinct, not as clearly delineated as in the Western understanding of land. For the Indian tribes of Northern California, the Chimney Rock area is not outlined with discernible beginning or end points. Therefore, the government's use of buffer zones to preserve the lands is irrelevant to the tribes. The entire continuous Chimney Rock area is sacred to the Indians; no "important" parts can be outlined and protected to allow for uncontested government use of the rest. The Chimney Rock lands must be avoided completely; otherwise, under the Indian view of universal kinship and place-orientation, the lands and their sacredness are compromised.

The Supreme Court's ruling in *Lyng* ignores these native cultural concepts of land. Adding these ideas to the controversy and looking at the lands from this perspective makes the Court's reasoning seem even more flawed. These ideas further strengthen the tribal claims against building the G-O road and harvesting timber in the area. Understanding the government's actions from the perspective of the affected Northern California tribes makes the government's interest seem even less compelling. (The completion of a road does not bear much weight against the corruption of sacred lands integral to tribal culture and to the tribes' very identity.)

This examination of the tribal views of land and their impact upon the government's claim to a compelling interest assumes that the Indians have claims to the free exercise of religion similar to those of all other American citizens. The various government documents and decisions outlining American Indian rights must be analyzed to determine if this is the case.

The American Indian Religious Freedom Act of 1978 headlines this collection of documents.[83] The Act states that it will be United States policy to protect and preserve American Indians' intrinsic right of free

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82. *See id.* at 471.

> For Indigenous peoples, interaction with the land is always defined by conceptions of the sacred, the spiritual, and the power of the land and the beings that live within and on it. The land is not a passive and inert object upon which consciousness and human cultures inscribe meanings purely of their own making. The land is alive and able to interact with humans in profound ways, as is seen with the Mescalero Mountain Spirit tradition. The larger "American" cultures' misunderstanding of Native American conceptions of sacred places has real consequences for issues of land use; protection of Native American religious freedoms, cultural integrity, and sacred places; ecological practices; and intellectual and philosophical thought. *Id.*

83. American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978).

exercise, belief, and expression of traditional American Indian religion.[84] This right includes access to sacred sites, use of sacred objects, and the free practice of ceremonial and traditional rituals.[85] One of the reasons this act is so important is that it was issued by Congress, whose plenary power over Indian affairs is well recognized and documented.[86] The other branches of government have little leverage with which to question congressional approaches to Indian affairs because the U.S. Constitution did not invest any other government branch with powers to deal with Indians.[87] Congress's power to regulate commerce "with foreign Nations. . .and with the Indian tribes"[88] and its treaty-making power confer on Congress an exclusive right to deal with the Indians.[89] Thus, a congressional statute enacted to protect Native American religious freedom and to orient all branches of government in favor of this protection carries great weight.

The Supreme Court case of *Morton v. Mancari*[90] provides further insight into the preferred status of American Indians. This case dealt with Bureau of Indian Affairs' (BIA) hiring preferences, and the preferences' validity in light of the Equal Protection Clause.[91] The Supreme Court ruled that partiality for federally recognized Indian tribes is not a "racial" preference but rather an employment criterion designed to help only Indians.[92] The preference is a law that is one of many derived from historical relationships that takes a "paternalistic approach" with the Indian

84. *Id.* ("it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian").

85. *Id.* ("[I]ncluding but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.").

86. U.S. CONST. art. I, § 8, cl. 3.

87. *Id.*

88. *Id.*

89. *See* Morton v. Mancari, 417 U.S. 535, 551 (1974) ("The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, § 8, cl. 3, provides Congress with the power to 'regulate Commerce . . . with the Indian Tribes,' and thus . . . singles Indians out . . . for separate legislation."); *see also* Missouri v. Holland, 252 U.S. 416, 433 (1920) ("Acts of Congress are the supreme law of the land . . . when made in pursuance of the Constitution . . . [and] treaties are declared to be so when made under the authority of the United States.").

90. *Morton*, 417 U.S. at 535 (holding that "the employment preference for Indians in the Bureau of Indian Affairs was not impliedly repealed by the Equal Employment Opportunities Act of 1972, and that the preference did not constitute invidious racial discrimination but was reasonable and rationally designed to further Indian self-government.").

91. *See id.* (analyzing whether the employment preference for qualified Indians deprived non-Indians of property rights without due process of law).

92. *Id.* at 554 ("The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.").

tribes: a "wardship" under the "guardianship" of the federal government.[93] As long as these preferences can be reasonably tied to facilitating the government's responsibilities in this relationship, such congressional biases are allowed.[94] The *Mancari* case set a precedent within the court system for preferring Indian tribes in a variety of areas, including religion. This decision helps outline the government's approach to tribal religion and individual Indian religious practice. The *Lyng* Court breaks from the precedent established by this approach, and that departure is part of the reason the *Lyng* decision is an act of violence.

The legislative and judicial acknowledgments of the special status of Indian religions and Indians' right to free exercise are joined by a similar declaration from the executive branch. President Clinton issued Executive Order No. 13007,[95] which deals with Indian ceremonial use of sacred sites. The order applied to all agencies of the executive branch that manage federal lands and stated that they should "accommodate access to and ceremonial use of Indian sacred sites" and "avoid adversely affecting the physical integrity of such sacred sites."[96] This deference to Indian religions implies that it will not require illegal behavior of the involved executive agencies and that it will not obviously contradict "essential agency functions."[97] (Is the completion of the G-O road or the harvesting of lumber in the Chimney Rock area an essential function of the Forest Service?) President Clinton went on to expand the accommodation to include the provision of reasonable notification of proposed actions or policies affecting Indian land use.[98] Executive orders are not legally enforceable—a fact Clinton expressly states in the final section of the order—especially in light of Congress' exclusive right to regulate Indian affairs.[99]

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93. *See id.* at 551–53 (asserting that the constitutional validity of an Indian preference must be determined in its historical and legal context).

94. *See id.* at 555 (holding that the preference for Indians given by the BIA in hiring and promotion practices was "reasonable and rationally designed to further Indian self-government" and, therefore, does not violate due process).

95. Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996) (defining "Indian tribe" as a member of an "Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to Public Law No. 103-454, 108 Stat. 4791, and "Indian" refers to a member of such an Indian tribe.").

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* ("This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity, by any party against the United States, its agencies, officers, or any person.").

Following President Clinton's executive order, the secretary of the Interior asked the Department of Justice for a memorandum on the order's declarations and their relation to the Establishment Clause of the First Amendment.[100] The assistant attorney general's memorandum cited the previously mentioned *Mancari* case to highlight the preferential relationship between the national government and federally recognized Indian tribes.[101] Based on this ruling, the memorandum declared that accommodations of tribal religious practices and sacred sites are political preferences, not religious concessions.[102] They are based on government action toward a quasi-sovereign entity meant to aid the federal government in the exercise of its trust responsibility and its obligation to foster tribal self-determination. As religion is not a factor in this consideration, the government has relatively broad—although still somewhat limited—leeway in administering these duties. The Department of Justice concluded its memorandum by warning government agencies to minimize the risk of governmental entanglement in Indian religions.[103]

The assistant attorney general's interpretation of legal precedents and past statutes in the memorandum provides even more support for the preferred status of Indian religions. This memorandum, issued shortly after President Clinton's executive order, gives additional legal weight to his instructions.

As previously stated, these statutes, rulings, and orders define the relationship over sacred sites and religion between the federal government and Native Americans. With the lack of a treaty-making process, these become the authoritative documents on Indian religion and use of sacred sites. Because of the Indian Citizenship Act of 1924, Native Americans are entitled to the same right of free exercise as all other citizens.[104] However, these more recent government actions and documents suggest Indians have a special position in certain areas, including religion, because of their history with the United States government. Indians are entitled to special considerations and preferences in matters such as relig-

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100. Memorandum from the U.S. Dep't of Justice Office of Legal Counsel to the Sec'y of the Interior, "Permissible Accommodation of Sacred Sites," para. 2 (Sept. 18, 1996), *available at* www.usdoj.gov/olc/sacredsites.htm (finding there is no bar on either the Executive Order or the National Park Service regulation in question by the Establishment Clause of the First Amendment).

101. *Id.* (referring to federally recognized Indian Tribes as "quasi-sovereign" or "political groups").

102. *Id.* at para. 19.

103. *Id.* at para. 24 ("[W]here feasible, agencies [should] adopt regulations that are facially neutral with respect to religion—i.e., that do not on their face give priority to any religious use of the sites.").

104. Indian Citizenship Act of 1924, 68 Pub. L. No. 175, 43 Stat. 253 (1924) (protecting the tribal or other property of those Indians receiving citizenship).

ion, and all three branches of the national government have affirmed and reaffirmed this entitlement.

IV. THE COURT AND *LYNG*

The Supreme Court's ruling in *Lyng* ignores the privileged status established by these government acts and Court decisions, thereby perpetrating an act of violence. The Court follows the same reasoning it would use for any other American citizen who claimed to suffer a violation of the right to free exercise of religion. The justices ignore the findings of the Forest Service's commissioned study. They disregard the precedent established by *Winters v. United States* about interpreting agreement and treaty terms as the Indians would understand them. In this case, the terms to be interpreted are established by the extension of citizenship to the Indians and, thus, their protection under the Bill of Rights. The First Amendment does not specify which religious exercises are protected; the clause applies to all religions. Thus, Indian religious practitioners are protected against burdens from the national government except when the government has an extremely compelling interest (enough to outweigh the preferred religious status of Indians).

It is debatable whether the completion of an ill-conceived road and the practice of timber-harvesting are compelling enough in light of their detrimental effects on the sanctity of a sacred area and the exercise of tribal religion—especially in light of the government's own investigative report on the road. The Court seems to abandon its own precedent in ruling to uphold the government's program in the *Lyng* case. This abandonment of precedent by the Court contributes to the understanding of the Court's decision in *Lyng* as violence. *Winters* is yet another government mandate outlining the relationship between the tribes and the federal government that the Court's ruling violates.

Based on this view, the First Amendment and Free Exercise Clause are the minimum protections that Indians should be afforded. The Court should defer to Indian religious activity and understanding as a political policy, according to the government-to-government relation of the Indian tribes and the United States. Indian religious practice should enjoy the broadest protection from government intrusion based on the American Indian Religious Freedom Act and the pertinent Supreme Court rulings. However, the Supreme Court ignores this understanding of the government's trust responsibility toward the quasi-sovereign tribes, and the justices hold the *Lyng* case subject to interpretations of the First Amendment.

This body of government statutes, policies, and rulings (issued by each of the three branches of the national government) combines to create a preferred status for Indians and their religious practice. The Supreme

Court ignores this status, though, abrogating and contradicting each of the documents and agreements (expressed or implied) that define this relationship between Indians and the federal government concerning religion. Through its violation of this relationship, the United States Supreme Court perpetrates an act of violence in the case of *Lyng v. Northwest Indian Cemetery Protective Association.*

A. *Implications and Conclusion: The Lyng Ruling as Legal Contradiction*

Underscoring this collection of contradictions and violations is an inherent and theoretical contradiction that applies to all systems of law. A system of law cannot work properly or effectively if the people to whom it applies do not know what to expect. There must be uniformity and consistency among the laws; otherwise, there is no reason to have a system of laws.

In fact, many legal thinkers consider uniformity and consistency essential to the very definition of law.[105] If laws are rules, then uniformity and consistency are what make a rule a rule. Lon Fuller, one of the forefathers of contemporary legal theory and a proponent of natural law, viewed the law from a procedural approach that demonstrated this need for uniformity. According to Fuller, the

> "principles of legality" may be regarded simply as means for achieving a certain kind of order, provided this admission is qualified in two ways: (1) that we realize that we are talking, not about control or power over people generally, but about a particular kind of control or power, that obtained through subjecting people's conduct to the guidance of general rules by which they may themselves orient their behavior; (2) that once such a system is attained, it commands a moral force in the lives of men that is subject to abuse.[106]

In order for law to achieve this purpose, its rules must be publicized, expressed in understandable terms, stable (not changing daily or hourly), and free of contradictions.[107] These criteria (and some others), Fuller argued, were necessary in order for legal systems to function properly, in order for the laws to influence behavior.[108]

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105. *See* Lon L. Fuller, *A Reply to Professors Cohen and Dworkin*, 10 VILL. L. REV. 655, 665 (1965).

106. *Id.* at 657.

107. *Id.* at 662–63 (citing LON L. FULLER, THE MORALITY OF LAW 157–58 (1964)).

108. *Id.* at 665–66.

> [I]n law and morals, we cannot project our views upon others without giving them some opportunity to understand those views—we cannot condemn them for violating rules that are left unpublished or could not be known to them, nor punish them for

This conception is almost an inherent agreement of any legitimate legal system. People agree to a form of government and a body of laws because they assume they will know what the laws are and how the laws will affect them.[109] Democratic systems rely on this understanding, and democracy would cease to exist if the legal system abandoned this consistency and stability.

However, the body of rulings and documents affecting sacred Indian sites and the *Lyng* case seem to exhibit inconsistency. From the Indian perspective, these laws would seem to be almost incomprehensible-a law passed declaring the protection of Indian access to and ceremonial use of sacred sites followed by a Court ruling that such sites can be effectively destroyed by government road and timber harvesting projects. Thus, there is the surface contradiction between the Supreme Court's ruling in *Lyng* and the body of documents defining the religious relationship of the tribes to the federal government. There is also the underlying contradiction of the inherent legal relationship between subjects and government, which demands consistency and clarity, and the actual relations of Indians to the federal government, which lacks such demands. Both of these violations make the Supreme Court's decision in the *Lyng* case a form of violence. The Court "breach[es] [the] reciprocal relationship established between Indian tribes and the federal government" through the agreements and government acts that take the place of treaties.[110]

V. DISCUSSION

The United States government exercises power and control, so it defines how the two parties will interact. This interaction has often been marked with inconsistencies, as the government has changed the policies and terms of the relationship to accomplish its goals. By altering without Indian input and redefining prior treaties, agreements, and government decisions, the government is committing violence toward American Indians. It is violating the terms of the relationship, and this violation has occurred specifically in the *Lyng* decision.

The Supreme Court's decision in *Lyng* is an important example of the federal government's reneging and contradicting prior policy commit-

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occurrences that came about without their fault or intent. . . . I believe that order, coherence, and clarity have an affinity with goodness and moral behavior. *Id.*

109. *Id.* at 660 ("[S]pecial [legal] morality attaches to the office of law-giver and law-applier, that keeps the occupant of that office, not from murdering people, but from undermining the integrity of the law itself.").

110. *See* Peter Jacques, Sharon Ridgeway & Richard Witmer, *Federal Indian Law and Environmental Policy: A Social Continuity of Violence*, 18 J. ENVTL. L. & LITIG. 223, 224 (2003) (defining violence "as a breach of the reciprocal relationship between Indian tribes and the federal government through treaties").

ments to fit changing goals. As a result, it violated prior agreements and ignored past government decisions, rulings, and statutes in order to meet these new policy goals. The Supreme Court also contradicted the terms of the tribal-federal relationship regarding religion in order to allow the Forest Service to complete the G-O road and harvest timber in the surrounding area. We contend this constitutes violence.

The government's actions surrounding the *Lyng* case strike at a central aspect of Indian culture and identity. Indian religion and its connection to the land are essential to Indian culture. The very identity of the tribe is tied to the land. By compromising this fundamental aspect of Indian culture and identity, the Supreme Court's ruling in the *Lyng* case clearly amounts to an act of violence.