"A conflict between two disparate cultures." Indigenous Agency and Legal Narratives in the United States. The Case of *Lyng v. Northwest Indian Cemetery Protective Association*.

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Thesis Submitted for the Degree of
Master of Philosophy in Indigenous Studies
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To Jane, my greatest source of inspiration

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Abstract

In 1988, the United States Supreme Court denied the Yurok, Karuk, and Tolowa tribes constitutional protection of 'High Country,' a sacred area in danger of being destroyed by the government. The dispute, known as *Lyng v. Northwest Indian Cemetery Protective Association*, became infamous for its detrimental effects on legal protection of Native American religious beliefs and practices.

This thesis explores the space of Native American participation in the legal landscape of the U.S by framing it in a postcolonial discourse. The *Lyng* proceedings serve an interesting starting point for an analysis of how Native American litigants must navigate the courtroom and the law by adhering to the rules and customs of an institution based on an Anglo-American, and ultimately, colonial heritage. The language of the Supreme Court reveals a low degree of understanding of, or respect for, Native American worldviews. Prejudices and misconceptions of Native religions are masked by an abstract level of reasoning and a purported concern for the rights of the government. This negates indigenous faiths as equal to Judeo-Christians under the law, because of the first groups' often-unfamiliar appearance and worldviews. Consequently, many tribes have sought rights protection outside of the courtroom. Since 1988, numerous steps haven been made to ensure that the spiritual beliefs and practices of Native Americans are secured against private or governmental interests. New laws, practices, and public awareness are contributing to right past wrongs, away from the shifting support of the U.S. courts. Nevertheless, this form of active agency is important in its impact on the postcolonial landscape of law, as well as on the government and the image of the Native in the United States.

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Chapter 1 - The Lyng Supreme Court decision as a starting point for discussing postcolonial legalities.

> "This case […] represents yet another stress point in the longstanding conflict between two disparate cultures – the dominant Western culture, which views land in terms of ownership and use, and that of Native Americans, in which concepts of private property are not only alien, but contrary to a belief system that holds land sacred."[1]

1.1 Introduction

In April of 1988 the United States Supreme Court handed out its ruling in the case of Lyng v. Northwest Indian Protection Cemetery Association.[2] It rejected constitutional protection to an area of sacred lands in Northern California against a government development plan. Three Native American tribes were denied any support from the judiciary against the probable destruction of High Country, a sacred tribal place on government land and under government control. Tribal members, indigenous rights activists, and legal scholars of the field were shocked. How could the court refute their claims to religious freedom under the highest law of the land when the welfare of the tribal spirituality was at stake?

This question is the impetus for the thesis, which takes the relationship between the Supreme Court and Native American tribes as a starting point for putting a whole array of questions on the relationship between the government and its indigenous people in contemporary USA to the test. The empirical focus of this investigation is the Supreme Court case mentioned above, *Lyng v. Northwest Indian Cemetery Protective Association*. It is an interesting dispute in itself for what it reveals of the inherent positioning of U.S. law. Moreover, it generated some very tangible consequences that shaped, and continue to shape, Native American agency in the legal narrative on religious freedom. The ruling of the Supreme Court set a precedent for the scope of the Constitution in protecting tribal religion that rendered it almost impossible for

[1] Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439, 99 L. Ed. 2nd 534, 108 S. Ct. 1319 (1988), http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&vol=485&invol=439 (accessed 10.08.2011), 473 (Brennan, J., dissenting).
[2] *Lyng v. Northwest Indian CPA*, 485 U.S. 439 (1988), hereinafter *Lyng* in the text.

Natives to seek legal protection for similar instances in the future.[3] The controversy of the decision, and the debate it spurred after, makes this legal case a compelling subject for a study on the role of law and judiciaries in wielding power over Native American rights.

1.2 The context for providing scope of the thesis

The Yurok, Karuk[4], and Tolowa peoples of Northern California brought a suit to court in order to protect the Chimney Rock area of the Six Rivers National Forest against road construction and forest development.[5] It was the tribes' ancestral homeland and they had been coming to this area for centuries. After the Europeans invaded that part of the North American continent, the indigenous tribes continued their travels to this sacred area, where they practiced rituals such as meditations, vision quests, and ceremonies.[6] Fast forward to the 1970's, when the government (acting through the Forest Service) sought to extract timber from the forest, and proposed the construction of a road. The tribes became seriously concerned for the welfare of their ancestral lands and saw the action as an infringement upon their religious rights. They decided to sue the Forest Service for placing a substantial burden on the tribes' ability to freely practice their faith, as would be protected by the Free Exercise Clause of the First Amendment.[7]

The case went through the various levels of the legal system, ending up in the Supreme Court.[8] In 1988, after months of hearings, that court came down with its ruling, which went in favor of the Forest Service. Although the majority of the justices acknowledged that the tribes would be limited in their access to the Chimney Rock area, they nevertheless sided with the government and its right to manage its own property. Moreover, the court reasoned that

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[3] 'Precedent' is a legal concept; a ruling in court by which future decisions must adhere to. *New Oxford American Dictionary*, Mac Version 2.1.3., 2005, Apple Inc.
[4] The tribe is described as 'Karok' in the court documents. However, the tribe itself employs 'Karuk,' which I will therefore honor throughout this thesis. See, http://karuk.us
[5] *Lyng v. Northwest Indian CPA*, 485 U.S. 439 (1988).
[6] Kristin Carpenter and Amy Bowers, "Challenging the Narrative of Conquest: The Story of Lyng v. Northwest Indian Cemetery Protective Association," in *Indian Law Stories*, ed. Carole Goldberg, Kevin K. Washburn, Philip P. Frickey (New York: Foundation Press, 2011), http://ssrn.com/abstract=2020681 (accessed April 15, 2012), 493.
[7] U.S. National Archives and Records Administration, "Bill of Rights Transcript Text," *The Charters of Freedom*, http://www.archives.gov/exhibits/charters/bill_of_rights.html (accessed April 27, 2012).
[8] Carpenter and Bowers (2011), 505-509.

because the road construction did not *actively* punish nor prohibit the Native Americans from practicing their faith, the Free Exercise Clause of the U.S. Constitution could not protect their religious rights.[9] [10]

1.3 The context for providing research questions

By widening the scope we can place the *Lyng* case within the landscape of the American legal system. The Supreme Court relied on a premise that the religious beliefs and practices of the California tribes were vastly different from other religions, and especially Judeo-Christian ones. If we accept this premise of differing worldviews, we should then look at the relations between the two. The court saw fit to make comparisons between the beliefs of the tribes' and that of earlier litigants of other faiths, bringing them all into an abstract level of religion, as interpreted under the Constitution. However, acting on that first premise of cosmological difference, we are impelled to investigate a second one. In the matter of *Lyng*, indigeneity is the focal point and therefore subject to dynamics of authority and legitimacy between the various actors. If we take on a second premise, that these relations play important role in areas of law beyond one simple court case, then we need to investigate the role of Native American issues in an Euro-American-based legal system.

My reasoning for choosing the Supreme Court is both personal and academic, although they are in a manner one and the same. I was lucky enough to spend a semester in the United States, studying in the field of Native American studies, at the Montana State University. One class in particular caught my interest. It was called Federal Indian Policy and Law, and provided me with a whole new area of knowledge on historical-legal issues pertaining to Native American tribes. The role of the Supreme Court stood out to me as we studied some of the most vital cases, from colonial beginnings to present day. It struck me how much power these few justices had over the entire indigenous population in the country, and how much the outcome was dependant upon the cultural, religious, and political views of one small group of people. Although these societal preconceptions exist in the other branches of government, I found it both fascinating and disheartening the role the Supreme Court has played for the past

[9] *Lyng v. Northwest Indian CPA,* 485 U.S. 439 (1988).
[10] The First Amendment to the U.S. Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the **free exercise** thereof (…)" (emphasis added).

200 years in challenging and establishing the laws and principles of minority to majority, indigenous to conqueror, Native to non-Native, relations.

Native American tribes are continuously dependant upon the court, as a legal entity and as real-life actors striving to maintain or regain their rights. The master's program in Indigenous Studies at the University of Tromsø has allowed me to further broaden my horizons, and investigate the contemporary outcomes of historical processes. A critical view of institutionalized authorities and legitimacies taken for granted are important parts of my education, which I strive to bring with me into this project. As an official institution, the Supreme Court of the United States is a well-established and respected body of government. Yet as the pendulum of political moods swings across, so does naturally the composition of justices and their views. Since the U.S. legal system derives from common law, wherein customs and judicial principles outlines much of the policy, decisions made by the courts not only determines the outcome of one case, but set precedents for years, decades, or centuries to come. The Marshall Trilogy of the early 1800s is such an example, as the rulings by the Supreme Court on the rights of tribes to hold and sell land put down some of the most central concepts of the tribal-to-federal relationship, still in place to date.[11] These landmark cases have continued to carry weight throughout decades of shifting political climates. Thereby, they have served as both a detriment and benefit to the tribes, highlighting the power of the Supreme Court.

Lyng v. Northwest Indian Cemetery Protective Association stands out because the Supreme Court came down with a ruling that at the time seemed to go in the opposite direction of other federal policies and interests.[12] It was quite a devastating blow to any future attempts by Natives to find judicial protection of religious rights, establishing its place of infamy in the legal field. As mentioned above, the case has *not* been overturned, and although only twenty-four years old it is already among the most-cited cases in Federal Indian Law. [13]

[11] Getches, Wilkinson, and Williams, Jr. (2005), 63-71.
[12] See, for instance, Brian E. Brown, *Religion, Law, and the Land – Native Americans and the Judicial Interpretation of Sacred Land* (Westport, CT: Greenwood Press, 1999), 119-170.
[13] Matthew L.M. Fletcher, "Top 25 Most-Used and Most Cited Indian Law Supreme Court Cases," *Turtle Talk*, August 9 2011, http://turtletalk.wordpress.com/2011/08/09/top-25-most-used-and-most-cited-indian-law-supreme-court-cases/ (accessed October 17, 2011).

To the public, the field of law is often perceived as a relatively objective arena, where neutrality, facts, and fairness are given considerable weight. In a country as multicultural as the United States it is vital that the courts represent all citizens and do not favor one ethnic group or class above the others. Yet, it is too easy with this perception to reify the court; to look at the law as a 'thing' itself, separated from the people who make it, who interpret it, and who must abide by it. Likewise, it is too easy to separate the law from the historical circumstances that formed this body, and the cultural and societal relations of those in charge of representing it. My aim is therefore to highlight the American court system as an arena that despite serving all the different ethnic, cultural, and religious groups in the United States, still makes comparisons and evaluations which place different worldviews in different, and thus sometimes unequal, positions. Although the nine justices of the Supreme Court are agents of a larger body of law, they are active in seeking out their interpretations of it, necessitating one worldview above another. This becomes especially tangible when presented with cases of Indian Law, and where some of the actors in the courtroom not only differ in religious beliefs, but also in cultural and societal, creating a divide much larger to overcome on both parts.

It has led to a large number of scholarly works produced on *Lyng*. Much has been said of the case as it pertains to other court decisions on religious freedom.[14] One might ask if there is a fresh angle to be found on the topic. At the same time, because *of* its importance there are numerous ways to analyze and further examine how *Lyng* came to be and what came out of it. Here I believe my scholarly background of multidisciplinary foci can help me create a space for writing on the topic which has not yet been covered. Although my main discussion centers on a legal case and the role of law, my experiences in anthropology and history will help me look at the subject from different perspectives and create a larger context for the role of law in Native America. This being a thesis of an interdisciplinary student, my approach will thus combine elements of several academic teachings to provide a broader context of Native American religion in the law. Moreover, this project is an indigenous one, not in its author but both its theoretical background but its empirical focus.

[14] See, for instance, Brown (1999), Susan Staiger Gooding, "At the Boundaries of Religious Identity: Native American Religions and American Legal Culture," in *Numen*, vol. 43, no. 2 (1996).

1.4 Research Questions

Using the Supreme Court decision as my starting point, I am then able to investigate a number of relating issues, yet still tie them together under the umbrella of colonization, the role of law, and indigenous worldviews. My overarching research question is as follows:

> Is there a space for Native American agency and decolonization in the field of law?

In order to answer this question more precisely, I have some subordinated questions as well, which are:

> How does the *Lyng* Supreme Court decision fit into the body of Federal Indian Law?
> How do issues of power and difference play out in the courtroom?
> How did the outcome of *Lyng* affect the narrative indigenous rights in the United States?
> What does *Lyng* say about the postcolonial landscape of American legality?

These questions will hopefully allow me to draw my material together into a succinct analysis of the case and of the larger issues surrounding it. My ultimate goal is to bring the discussion to a conclusion on where Native Americans stand as subjects of U.S. law. The three underlying questions would guide me to such a point. The first, by placing *Lyng* in a larger context, will allow me to show my readers its historical connections and contemporary standing. The second question will bring up a discussion of how Native American issues are argued in a courtroom, and how indigeneity plays a vital role in the outcome of a decision such as *Lyng*. This will lead into a search for the consequences of it, which will be guided by my third question on subsequent events and processes. Here I will attempt at highlighting the road after *Lyng*, taken by both Native activists and the court. This will finally lead me to my last question on the role of postcoloniality in U.S. law, which can be answered by combining all the previous information gathered into an analysis on the relationship between Native Americans and the government, represented in this case by the judiciary, in a contemporary context.

1.5 Highlighting the theoretical tools and concepts

1.5.1 Postcolonial Theory

The overarching theory at play here is that of postcoloniality, of looking at indigenous perspectives in a context that emphasize and critique the colonial heritage.[15] This theory, originally of a literary focus, has spanned to be included in many various disciplines that are concerned with the modern-day experiences of colonized peoples. A core of this theory is the attempt to find new modes of analysis and expression removed from the structures and ideas based in Western academia.[16] It might be a paradox, then, this project's attempt at describing an indigenous issue from an analytical perspective fully founded on scientific methods and theories. Indigenous scholars occupied with postcolonial theory have problematized this aspect as well.[17] Jace Weaver laments that 'the postcolonial moment" has not arrived as long as indigenous peoples are denied their sovereignty, and Elizabeth Cook-Lyn critiques the discipline of Native American studies for failing to escape its colonial structures.[18] On the other hand the last author also emphasizes how important it is to study indigeneity and sovereignty in academia.[19]

There are obvious problems and paradoxes inherent in the theory of postcolonial thinking, and my positioning in this field, as a student of Western academia, needs to be questioned. Yet, there are valuable strains of thinking stemming from this discourse on the aftermath of colonialism. If bearing in mind its pitfalls, it can be useful to employ postcolonial ideas that bring to light just how much knowledge production is influenced by scientific, positivistic ideals born out of a colonial heritage. As such, a postcolonial framing of the Native American rights narrative can provide new aspects on the role of law and legal texts in indigenous lives.

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[15] Anna Green and Kathleen Troup, *The Houses of History: A Critical Reader in Twentieth-Century History and Theory* (Manchester University Press, 1999), chapter 11.
[16] Green and Troup (1999), 283.
[17] Jace Weaver, "Indigenousness and Indigeneity," in *A Companion to Postcolonial Studies*, ed. Henry Schwartz and Sangeeta Ray (Oxford: Blackwell Publishers Ltd, 2000), ch. 10.
[18] Weaver, 233; Elizabeth Cook-Lyn, "Who Stole Native American Studies," in *Wicazo Sa Review*, Vol. 12, No. 1 (1997), 25, http://www4.uwm.edu/letsci/ais/pdf/whostole_cooklynn.pdf (accessed Nov 1, 2011)
[19] Cook-Lyn (1997), 21.

1.5.2 Important concepts

The notion of 'knowledge' is an important one when talking about how different peoples view the world. Coming back to postcolonial thinking, via Orientalism, Stuart Hall details the dichotomies created by European imperialism.[20] His notion of the center versus the periphery is an important tool for exposing 'the other' as a Western construction. Moreover, a postcolonial interpretation of the subject at hand puts much emphasis on the role of knowledge in both upholding and dismantling power. This ties together with this project's tackling of knowledge. I wish to deconstruct the kind of knowledge embedded in Anglo-American legal thinking, as well as how this is in opposition to indigenous presentations and representations of knowledge. In indigenous-to-majority relations this often turns into a question of legitimacy and power: who is vested with the authority to determine valuable information? How is some forms or pieces of knowledge considered legitimate and others not?

I also intend to employ "agency" as a social motive. Sherry B. Ortner writes of practice theory, a strain of anthropological thinking that tries to bridge the structures of society with the actions of the individuals.[21] Semantically speaking, agency embodies the human ability to be in control of one's behavior and intentions and act on them. Although an individual trait, agency is formed by cultural and societal interactions as well. These relations bring with them issues of power and inequality, and these elements play out when social actors carry out their agency.[22] Bringing this back to my case study, agency is important as a concept for examining how Native Americans make use of their active social roles to participate and shape legal discourses. If keeping in mind that when different social actors are brought to a project – such as a legal proceeding –, each individual's role will be determined by some larger societal structures. The level of mastering a discourse is dependant upon knowledge of the formal rules and norms present in the court. The question I wish to find an answer to is what kind of agency Native Americans act out in a legal setting such as the 'Lyng' case, and what kinds of power relations exists between themselves and their (juridical) opponents.

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[20] Stuart Hall, "The West and the Rest: Discourse and Power," in *Modernity: An Introduction to Modern Societies*, eds. S. Hall, D. Held, D. Hubert, and K. Thompson (Malden, MA: Blackwell Publishers Ltd., 1996).
[21] Sherry B. Ortner, *Anthropology and Social Theory: Culture, Power, and the Acting Subject* (London: Duke University Press, 2006).
[22] Ortner, 130-131.

1.5.3 An introduction to basic terms

The Yurok, the Karok, and the Tolowa people of Northern California have distinct names for their tribes. For instance, Yurok means … For non-native people, however, the Yurok are more likely to be called "Native Americans," "American Indians," simply "Indians," or in some unfortunate cases "red Indians." The Yurok identify themselves as 'Olekwo'l,' meaning "Persons." The state of California and the United States government identify them as the Yurok Tribe, a federally recognized American Indian tribe. The general, international public might name them "Indigenous Peoples." How to address members of the Yurok, or other American Indian tribes, is an important question. It has been subject to much debate in the Untied States, as an important part of the general discourse on Native American issues. The most common term, Indian, has its origin in the European arrogance of Christopher Columbus, who believed he had reached India when he met the indigenous people on the American continent. As such, the name and its legacy have come to symbolize the colonial history between Europeans and Native Americans.

"Indian" is much more than a factual description of a people. It carries immense connotations, subject to changes in historical moods and political climates. Most often it has been used derogatory, in signaling the vast difference between, and inferiority to, the European settlers. As such, many feel that the term should be abandoned. On the other hand, many Natives see the benefit of reclaiming the word as a way of taking control of a discourse so heavily created by and for non-Natives. For the past half-century or so, the term "Native American" has been most commonly used. It has its disadvantages as well, since some U.S. citizens feel they ought to be able to call themselves the same, as natives to the country. However, this *is* such a widespread term that I feel confident in employing it without great offense.[23] Using "Indian" leads me to shakier ground, since I am not a native person reclaiming the word. On the other hand, in much of the material discussed throughout this thesis, the term is used widely. Legal matters pertaining to the tribes fall under the umbrella category of Federal Indian Law and therefore the term is often used, always with a capital "I." When discussing a specific people, I find it best to employ the names they have given themselves, or at least are known as officially. Moreover, I will vary between denoting their groupings as "tribes" or "nations."

[23] Walter C. Fleming's *The Complete Idiot's Guide to Native American History* (Indianapolis, IN: Alpha Books, 2003) has a great basic discussion of the various names, in chapter 1; also, Clara Sue Kidwell, Homer Noley, and George E. "Tink" Tinker, *A Native American Theology* (New York: Orbis Books, 2001), xi.

The latter term has risen in popularity lately. It is often associated with politically independent areas and groups, and many tribes feel that it better signals the self-determination they are trying to achieve.

It is also important to mention some of the terms I will use when discussing non-Native people of the United States. In contemporary matters they are simply Americans, or U.S. citizens. However, in the context of this thesis it is important to denote their background when discussing historical issues. Their cultural, social, and political background has their origins too, and it is vital to equalize the differences between, for instance, Yurok and British cultural traditions. While "Euro-American" is one of the most common names, I will often denote legal matters as of "Anglo-American" origin, as much of the U.S. legal system is based on British common law. When addressing religious matters, it is somewhat insufficient to label the majority views as Judeo-Christian; however, it is done here for sake of space. Likewise, Native American religions is a term with many lacking and generalizing attributes, however, this will be discussed more extensively in chapter 3, as it is an important part of the religious rights discourse in the Untied States.

1.6 Methodological points and ethical concerns

As readers have probably discovered by now, this project is largely based on analysis of written documents. During the research process, some interviews were conducted with tribal members from Western Montana. The 'Lyng' case itself was not mentioned, but in all of my interviews we discussed general concerns of the tribes on the protection of knowledge, on religious freedom, and on tribal integrity. These conversations have shaped the process of the thesis, and my thinking process. However, as the nature of the thesis has changed since its initial design, I will not apply the interviews.

My analysis will be purely qualitative and based on written research. Primary sources include the official court documents of Lyng v. Northwest Indian Cemetery Protective Association, and interviews and news articles relaying its information. The secondary sources consist of scholarly and activist books, articles and opinions on the 'Lyng' case itself and on issues relating to the discourse on indigeneity and religious freedom in the United States. In choosing my material I have strived to be selective. First and foremost I am required to rely on a number of sources written by legal institution, such as official court documents.

However, I have tried to supplement these with as many indigenous scholars as possible. I do think it is a highly necessary and valuable determination as a student of Indigenous Studies.

The analysis of a legal case follow a certain pattern, and I have used this outline as a skeleton but fleshed out the analysis by adding information other than the legal text, or other case law, itself. This method, called "briefing" is structured as such:[24]

1. Identification of the case: with its full name and citation.
2. The facts of the case: the origins of the dispute and the arguments of both the plaintiff and the defendant. Here, one can also include any relevant decisions made by a lower court.
3. The issue at hand: the central matter of the dispute, in the form of a question before the court.
4. The decision: whether the court answered this question "yes" or "no."
5. The reasoning: how the court came to its conclusion, and possibly what statutory law or precedents it relied on.

Since my thesis is not strictly a legal brief, or even a legal analysis, I will not follow this to a tee. Yet, such an outline is helpful in singling out the most important facts of a complex issue and structuring them in comprehensible manner.

I have briefly touched upon the issue of integrity in relation to informants, but there are some other ethical concerns that need to be addressed as well. When conducting my interviews with the tribal members, I openly stated my interest in the topic, the reasons why, and my concerns with being a non-indigenous person writing about indigenous topics and peoples. I always try to be aware of my role as an outsider in this context. I have a genuine interest in and passion for the topics I am discussing, and I do wish to present them with the integrity they deserve. Despite this, there is no denying that I am a European; a Westerner; a white person whose upbringing and educational background is grounded in a culture that differs from that of many indigenous experiences. I can advocate for postcolonial thinking and indigenous methodologies, but I cannot write as an indigenous person. My analysis will necessarily be informed by the scientific ideals of Western academia. Yet I hope that by keeping an honest

[24] Getches, Wilkinson, and Williams, Jr. (2005), chapter 1; "How to Brief Cases and Analyze Case Problems," *Cengage Learning* http://academic.cengage.com/resource_uploads/downloads/0324654553_91282.pdf (accessed June 10, 2012).

and open outlook I will still be able to provide a valuable contribution to these issues. My aim is to present these topics fairly, honestly, and concretely. Although I wish to add something to the general discussion of legal cultures and indigeneity, I realize that I have limited time, space, and knowledge to do so.

I am a non-indigenous person. Moreover, I grew up in and got my education in one of the richest welfare-societies in the world. If I were not aware of my privileged background before entering this field of study I certainly am now. As such, this thesis has opened my eyes not only to the world of law and spirituality and of postcolonial discourses. My position as an academic student, from and in a Western, European country is revealed by the manner in which I pose questions, by how I relate to differing worldviews and beliefs, and by how I present and represent those involved in this narrative. My cultural, political and religious points of views will necessarily play a part in the way I situate myself. On the other hand, for all my difference from the indigenous peoples whose story I will relay, there are many similarities as well, and especially one in particular I wish to mention.

I grew up on a farm. I lived there until I was 18, and have since then spent most of my summers, Christmases, and other holidays there. My dad runs it, as his dad did before him, and his dad again before that. In fact, I belong to the nineteenth generation living on this piece of land. I could say property, but that would not cover what this place is or what it means to me. I know that girls like me have walked the same paths as I have one hundred years ago. I know that men like my father have harvested corn on the same acres four hundred years ago. To me, imagining these daily events signifies the connection to my ancestors, my heritage, in a way I know many others cannot experience. However, reading and hearing Native people speak of their forefathers and their land that has always been there under their feet, I see my story and myself. I see my passion for my home place and my connection to the land my family has lived and breathed on for centuries. I find that I can channel some of that passion and spirit into this thesis, and know that although I am far removed from their stories there are still values which we all hold sacred.

It is not my wish nor goal to achieve total objectivity or neutrality, by presenting both sides of the argument and leaving the reader to decide for him or herself which story they believe. My goal is to convince my readers that what I have to say has truth. However, it is *my* truth and no one else's. It is up to the reader to ascertain whether the narrative I present is backed by

facts and arguments which compel them to feel something for the story. Whether that is anger, frustration, sympathy, or apathy is up to you but I hope that what I am about to present will make a contribution.

1.7 A chapter outline

Having thus outlined the scope and purpose of my thesis, I will turn to the thick descriptions of my research material and analyses. The second chapter is devoted to the overarching theories I will employ throughout this text. I will start with a discussion on the origins of postcolonial theory and present some of the criticism raised against it. Then I will include notions of indigeneity as it relates to the postcolonial project and briefly discuss how it can be of purpose when addressing Native American issues. I will also draw some connections to the role of law in such a context. The second half of this chapter concerns itself with Federal Indian Law, both as a theory and historical process. As such, I will spend some time outlining the founding principles, which informs this body of knowledge, and then give a quick overview of the role of law throughout U.S. history, as it pertains to Native Americans.

This should set the stage for the next chapter, in which I will go into the historical and legal contexts more in depth. Chapter 3 will provide the reader with more extensive knowledge of Native Americans as a legal entity within the nation-state. Although there is no room for a full historical analysis, it is vital to the understanding of Federal Indian Law that the reader is aware of some of historical and contemporary conditions for the case study. Therefore this chapter also includes a discussion of the religious views of both Native Americans and a mainstream America. This is an important aspect of the project, and as much detail as necessary yet relevant is outlined, but for the sake of space there has been made some generalizations on both sides. However, the nuances will hopefully remain clear. Finally, the chapter tackles the case study itself – the Supreme Court decision called *Lyng*, and details its initial circumstances as well as the journey through the legal system.

The fourth chapter will dive into an analysis of the *Lyng* case and discuss at length all the aspects of the decision. This includes an evaluation of the logic employed by the court, and the kinds of precedents it relied on. Moreover, it will examine the dissenting opinion and how it creates a contrast to the majority. The chapter will also place much weight on an extensive interpretation of the language used by the court. By looking at themes such as difference, the

role of the sacred, authority, and notions of land, we can place the legal decision within the framework of postcolonial thinking.

After this I will move on to the fifth chapter, which although also providing analysis, will rather consider some longer lines of judicial treatment of religious rights. By employing the material presented in the preceding chapters I will supply some much needed context for *Lyng* so as to place it within the framework of both Federal Indian Law and a legal rights narrative. It will then turn to the relationship between Native Americans and the courts, and look at some of the developments taking place after the 1988 Supreme Court decision. The chapter will conclude with a discussion on the current status of a postcolonial tribal rights narrative.

Finally, I will end the thesis with a short chapter in order to provide the reader with some conclusive remarks. It will provide a space for reflections on the thesis itself and seek to draw the different themes and analysis made throughout this text together. As such, it can provide a complete narrative for the reader.

Chapter 2: A theoretical approach to *Lyng*; overarching theories and histories.

Before I start my analysis of *Lyng v. Northwest Indian Cemetery Protective Association*, it is important to shed some light on the theoretical aspects of the thesis and how they will service this case study. I derive my more abstract material from two academic fields and will seek to combine them in the analysis for the purpose of giving my empirical examples weight and context. The first I will present is Postcolonial Theory, as briefly introduced in the previous chapter. I will discuss some basic foundation blocks as well as problematic points and then give a thicker description of the field as it pertains to indigenous issues. This will hopefully give the reader an understanding of its relevance to my exact topic. In the second half of this chapter I will move onto a discussion on the merits of Federal Indian Law. This body of theories is the umbrella under which a legal case such as *Lyng* falls, and it is important to provide the reader with knowledge of the field's roots, principles, and usage. The demarcation of Federal Indian Law, as well as postcolonial theory, will hopefully provide a sufficient framework for the case study and bring them together in a harmonious contribution to the abstract levels of this thesis.

2.1 Postcolonial Theory

2.1.1 Overview of theoretical field

Postcolonial theory concerns itself with the effects of colonization, to put it shortly. The 'post' does not imply that our contemporary society is freed from the force of it. Rather, because the period of physical European occupation of foreign nations is mostly over, a new paradigm of analysis and critical thought is opening up in "the colonial aftermath."[25] Although political and economic upheaval have dominated this period, postcolonial theory concerns itself mostly with a critique of Western ideas, ideologies, and knowledge, and the ways in which these have claimed a narrative over the subjugated colonies.

[25] Leela Gandhi, *Postcolonial Theory: A Critical Introduction*, (New York: Columbia University Press, 1998), 5.

Such strains of thought can be traced back to the poststructuralist climate of the 1970s. Edward Said's notion of the West and the 'Other' in his publication "Orientalism" in 1978 is often considered a pillar of postcolonial theory.[26] He was joined by philosophers, physiatrists, and other theoretical thinkers in creating new literary works on the experiences of colonization. The development of the new theory followed in the wake of decolonization efforts by populations throughout the world rebelling against their former oppressors. Parts of this surge of literary prose came from authors standing in the middle of these battles.[27] They were able to draw attention to those struggling to free themselves from subjugation. However, it is important to note that postcolonial theory found its institutional footing in the previous imperial states such as Great Britain and the United States.[28] This implicates the focus of the theory as one that strives to free First World nations and discourses of their colonial legacies – an often-problematic endeavor, which I will return to below.

What Said did for the postcolonial project should nevertheless not be diminished. By pointing out the hierarchical structure of knowledge production, he was able to demonstrate the importance of the ideological motive for and support of Western dominance. Power is not only found in military strength or control of resources but in how a society is informed to think of others, and how they are presented, or represented, to the society.[29] In other words, there exists a colonial, or Oriental, discourse; a system of meaning wherein the ruling European class have established the perceptions of themselves and their colonized people, and of the relation between these two, which dominates above others. The charge Said made against this authority thus implicated Western academia and its role in upholding control through theoretical writing. Knowledge becomes embedded with such powers to the point that, according to Said, "European knowledge *is* colonialism."[30]

The postcolonial project is an attempt at deconstructing this knowledge system wherein the voices of colonized peoples are reduced to images of representations formed by Western

[26] Gandhi (1998), 23-25.
[27] Gandhi (1998), 6 (on Albert Memmi).
[28] Jenny Sharpe, "Postcolonial Studies in the House of US Multiculturalism," in *A Companion to Postcolonial Studies*, ed.s Henry Schwartz and Sangeeta Ray (Oxford: Blackwell Publishers, 2000), 113-114.
[29] Gandhi (1998), 64-65, 74.
[30] Henry Schwartz, "Mission Impossible: Introducing Postcolonial Studies in the US Academy," in *A Companion to Postcolonial Studies*, ed.s Henry Schwartz and Sangeeta Ray (Oxford: Blackwell Publishers, 2000), 4.

mindscapes. This deconstruction, however, is a complex task beyond the goal of reversing the hierarchies of power. First of all it is twofold in that it seeks to dismantle the seemingly scientific and positivistic composition of Western knowledge systems, and to lift up those systems often referred to as "subjugated knowledges." [31] Second, there are those who claim that colonialist influences cannot be shed, and that the project of postcolonial theory is to recover from past atrocities through remembrance. Although many might wish for a clean break with colonial traditions and a pure reversal of power, it is necessary for moving forward that the historical impact be given (new) light. One can compare it to that of recovery from a traumatic event, by which those affected need to come to terms with what has happened and how their lives will always be informed by it. That is of course not to say that those affected will be so forever, but rather that it is utopian to believe that a simple refusal to speak of the past again will erase it.

2.1.2 Indigeneity and postcolonial theory

If we look at the experiences of Native Americans, many of the postcolonial goals apply to their histories. Since the arrival of Columbus in 1492, they have been subjugated physically, physiologically, and emotionally to the authority of others. Although indigenous to the land, the long-term military dominance of the European conquerors enabled an inversion, by which the indigenous became the Other. As such, there is a long and excruciating history in the United States of colonial ideas and images of the Indian. "Barbarians," "uncivilized," and "savages" were common descriptors of the population of the Americas in the early days of colonization.[32] These creations have proved difficult to erase and have gone from building knowledge to defining it. Part of the decolonization project for Native Americans lies then in exposing these racist terms for what they are – constructions – and strive to demand the power to define themselves.

Such a task is made the more difficult by the unique structure of the United States as a former colony. As opposed to, for example, India, where the British were eventually forced out, the colonial conquerors of Native Americans never left. That is of course one of the defining characteristics of indigenous peoples: a population or several who continue to live under the rule of a foreign power, despite defining themselves as sovereign before and during such a

[31] Gandhi (1998), 52-53.
[32] Getches, Wilkinson, and Williams, Jr. (2005), 48-51.

reign.[33] This power dynamic is often called "internal colonization," describing the marginalization of a minority by the dominant group. However, in the United States it also denotes the experiences of immigrants, who take up a large portion of the multicultural nation-state. It is important to the integrity of the postcolonial project to account for "uneven historical formations and dispersed geographical locals, " including immigrants and minority groups.[34]

Nevertheless, the extraordinary conditions making up an indigenous group, such as Native Americans, has created unique histories that give them a space in the discourse of their own. Here, the "post" part of postcolonialism becomes vital. For indigenous peoples in settler states, it is difficult to discuss the effects of Western imperialism on their societies as reflections of the past. Those with authority to define and rule still benefit from the colonial past, and they bring this privilege into their contemporary narratives.[35] The U.S. courts provide a telling example. The institutions are based on European customs and rules, established at a point in history when Native Americans were legally defined as "savages." Yet, they continue to make use of language stemming from such a worldview, despite the epoch of origin.

2.1.3 The problematic nature of postcolonial theory

The contemporary situation of settler nations such as the United States reveals itself open to postcolonial discussion. Especially for Native Americans, there is much to be said for the dynamics of settler-indigenous in a country where the ruling elite still benefits from colonialism. Yet, critics of postcolonialism charge that the academic discourse on these issues are still permeated by Western-based ideas and notions. Elizabeth Cook-Lyn offers a critique of the development of Native American studies as a scholarly pursuit, for its failure to revolutionize perceptions of indigenous peoples in the United States.[36] According to her, this

[33] Benjamin J. Richardson, Shin Imai, and Kent McNeil, "Indigenous Peoples and the Law – Historical, Comparative and Contextual Issues," in *Indigenous Peoples and the Law: Comparative and Critical Perspectives*, ed.s Richardson, Imai, and McNeil (Oxford: Hart Publishing, 2009), 13.
[34] Sharpe (2000), 118.
[35] Jace Weaver, "Indigenousness and Indigeneity," in *A Companion to Postcolonial Studies*, ed.s Henry Schwartz and Sangeeta Ray (Oxford: Blackwell Publishers, 2000), 223.
[36] Elizabeth Cook-Lyn, "Who Stole Native American Studies," in *Wicazo Sa Review*, Vol. 12, No. 1 (1997), 25.

stems from a lack of Native scholars in the field, or rather the ability of Native scholars and intellectuals to establish their own discourse.

This assessment is in accordance with much of what has been said of postcolonial theory on a grander scale. Because it concerns itself mostly with a critique of Western knowledge, of Western academia, and of Western intellectual history, it can consequently be viewed as a discipline made for intellectuals, seeking to distance themselves from their predecessors. Therein lies the contradiction of Western academia, which seeks to denounce its imperial history and bring marginalized voices into the field by means of a theory developed *by* and *for* academics. Commentators point out the distance between those writing about topics of postcolonialism and those 'acting' it out. There is, in other words, still a gap between author and subject. Postcolonial theory is born out of Western, academic discourses, which continue to uphold authoritative positions in the world of academia.[37] This place of centrality is often in contrast with the lives led by the objects of the pursuit, signifying that people continue to live on the margins of society, as well as of academic, or intellectual, power.

Such criticism is important to highlight, although it might appear to give the theory a lethal blow. A few point are then important to counter with. First of all, this criticism overlooks all the voices coming from "subjugated" knowledges that have contributed to the creation and development of postcolonial theory. It was Edward Said, a Palestinian-American, who created its catalyst. Other defining figures include Gayatri Spivak, an Indian professor, who coined some of the most important terms and continues to challenge the internal structures of the field.[38] But founding figures aside, numerous of writers and scholars from decolonized nations have contributed to postcolonial theories, signaling that the vitality of the project is dependant upon such diversity. Second, denouncing postcolonial projects as simply Western and therefore of no value to decolonization efforts, is to overlook another aspect of its own beginnings. The project came about precisely to expose academic knowledge production as a construct, and more specifically, the writing of colonial times as a tool of oppression and authority. By doing so, postcolonial discussions are not only producing new forms of knowledge but also new tools for exposing truths and establishments as constructed worldviews, with roots in discriminatory beliefs and ideas.

[37] Gandhi (1998), 55.
[38] Gandhi (1998), 43, 55.

In indigenous circles there are those who wish to forgo all traces of Western-based approaches in creating and communicating knowledge. Dynamics and rules of academia must be discarded for a peoples' own customs and methods. Critics coming from a Native American point of view lament the failure of their own academic field to support the long-term goals of the people, namely sovereignty. True self-determination is impossible as long as the tribes are educated by and for a system with origins in their oppression.[39] On the other hand, the reality of the situation makes it difficult to implement such a radical break. As Native Americans are still fighting for their right to dictate the terms of their status in the U.S. (legal and otherwise), postcolonial theory "represents a response to a genuine need."[40] It can thus be employed by Native activists, intellectuals, and academics, to expose Western worldviews and knowledge hierarchies and find new ways of addressing their own. Beyond this diversity, it seems necessary that in order to keep postcolonial discourses 'in line' it is important that those writing in the field dare to oppose the Western institutions home to colonial narratives. This often becomes a challenge centered on questions of loyalty, integrity, and co-option. Gandhi emphasizes the political involvement of academics in this context and the need for postcolonial intellectuals who dare act against academic institutions and build bridges between those and peoples involved in decolonization efforts.[41]

2.1.4 Postcoloniality and the law

Although not a main goal of postcolonial theory, the law is nonetheless an interesting heir to the colonial heritage and worthy subject of study. The origins of U.S. legal theory will be more thoroughly described underneath, but some context is useful to provide here. The uniqueness of indigenous groups lies with the forms of occupation. Colonies of settlement are defined by a long-term presence of a European, dominant community and the subjugation and removal of the people indigenous to the land. The subversion from majority to minority was an important part of the colonial project in addition to making the settlers "native" to the area so as to legitimize their occupation of land already inhabited. The construction of "terra nullius" was such a myth, created to stimulate the notion that the indigenous did not in fact occupy the land. The "terra," or earth, was empty. The claim was necessary, for neither the Americas nor Australia was invaded by full military force. "Empty land can be settled, but

[39] Weaver (2000), 227-232; Cook-Lyn (1997), 19.
[40] Dirlik, quoted in Weaver (2000), 222.
[41] Gandhi (1998), 58-59, 63.

occupied land can only be invaded."[42] The colonizers claimed the land they settled was uncultivated and without use, thereby justifying the "simple" takeover and displacement of the indigenous peoples.

However, this conflicting status of the colonial project in settler-states meant that the various indigenous groups were neither military invaded or conquered, nor where they accepted or assimilated into the new, European-derived societies. They continued to denote an anomalous legal status as the colonial powers carried out policies of armed conflicts and displacement of land along while simultaneously they signed treaties and respected some inherent rights of the indigenous population. Although their presence became a growing problem against rising immigration, the native peoples were given some prerogatives from the start, such as (narrow) rights to occupy their land. Their inclusion into the legal discourse meant onwards they could not be ignored. However, the law could be used as a tool to suppress narrative that challenges the legitimacy of the American conquest. As such, the judiciary becomes a dangerous space for the indigenous, since the control of lies entirely in the hands of their colonizers.[43]

Moreover, Native Americans have for most of post-contact history been subjected to the definitions of others. As such, the legitimacy of their own beliefs and practices has always been dependant upon recognition by their colonial oppressors. One road to decolonization is therefore the disruption of majority authority. For most indigenous populations in settler-colonies, the physical and intellectual control over land and property has been one of the areas with the most conflict. In many ways, rights to land is inherent in the right to govern oneself, and one that is especially vital for groups still residing on their historical land, but as member of a nation in which the colonizers still reside and control. As opposed to former colonies on the African and Asian continent, resistance and reforms has not been possible for indigenous peoples in settler-colonies. There, decolonization of physical, spiritual, and legal property has to take place in a space still dominated by European, colonial histories, although modernized. The challenge for Native Americans and other indigenous groups alike is therefore to achieve self-determination *and* separate from the colonial traditions of the legal field.

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[42] Anna Johnston and Alan Lawson, "Settler Colonies," in *A Companion to Postcolonial Studies*, ed.s Henry Schwartz and Sangeeta Ray (Oxford: Blackwell Publishers, 2000), 364.
[43] Robert A. Williams, Jr., "Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law," in *Arizona Law Review*, vol. 31 (1989), http://heinonline.org (Accessed March 9, 2012), 261.

2.2 Federal Indian Law

The anomalous status of indigenous peoples has, as briefly described above, led to a special development of legal texts and practices, unique to each settler-nation with a colonized, indigenous population. In the United States this vast historical and thematical collection is called Federal Indian Law. It provides the theoretical basis for discussing any aspect of Native Americans and their participation in the courtroom or in other judicial spaces. In order to understand the complex circumstances of *Lyng v. Northwest Indian Cemetery Protective Association*, this part of the chapter will provide the reader with some basic knowledge of the legal field in which Native Americans are placed and in which they must operate. Federal Indian Law is at its core a body of legal documents and cases that all make up the legal rights of Native tribes in the United States.

2.2.1 Where does Federal Indian Law come from?

Although some of the legal justification for the colonization of the New World has been discussed above, I would like to add a few details to broaden the specific context of the United States. Much of the Federal Indian Law body is based on common law, which in turn is derived from customs and judicial precedents. The origins of U.S. common law as it pertains to Native Americans can be traced as far back the Middle Ages. The legal status of non-European peoples had occupied the minds of European intellectuals since the Crusades. The debate concerned what kinds of justifications existed for European nations to invade and subjugate other nations. Most found their reasoning in the "natural law," which deemed Christianity a rightful cause for conquest of heathens.[44] The argument of civilization and subjugation of non-Christian peoples carried on into the era of discovery in the fifteenth century. Moreover, it gave way to legal principles amongst the European nations as well, the Law of Nations.[45] This law dictated the right of the discovering nation against others as absolute, derived from nature, i.e. the natural conditions under the Christian God.

The colonial period in what was to become the United States (and Canada) presents an interesting contradiction. On the one hand, British settlers had to justify taking land already occupied and inhabited by Native American tribes. Many employed the Christianity argument as reasoning for settling the continent. In addition, the puritans failed to recognize any

[44] Getches, Wilkinson, and Williams, Jr. (2005), 42-46.
[45] Getches, Wilkinson, and Williams, Jr. (2005), 48.

societal structures among the tribes, especially since the natural state of the lands they lived on was seen as a pre-modern form of living.[46] On the other hand, throughout the first wave of British settlement, many of the Eastern tribes were numerous and military strong. Through centuries of habitation, they held immense knowledge of the land and resources and therefore made valuable trading partners. Despite European notions of their inferiority, the tribes became involved in both trades and disputes with some sort of established conduct and protocol. By entering into treaties with the British, the tribes built a government-to-government relationship with the colonial powers that laid the foundation for their legal status. According to the tribes, their right to independence and governance was inherent from time immemorial. From the colonizers point of view, on the other hand, these rights could easily have been ignored all together. However, through the process of treaty making and trade, the European settlers put in place a relationship that could not be ignored later on.

After Independence in 1776, the British colonies became free from their Old World motherland and established themselves firmly on American soil. They moreover grounded their sovereign right as a nation over the landmass, despite the presence of an indigenous population already living on much of the land. How to deal with the legal status of Native American tribes was a problem exemplified even in the American Constitution. The tribes were only mentioned three places in the founding text, which means that from the onset, much of the legal principles for dealing with Native American matters had to be derived from common law – from customs and legal decisions as opposed to statutory law. Besides being mentioned in relation to taxation and the executive's power of treaty making, the only clause legally governing relations between the tribes and the government was the Commerce Clause. In article 1, section 8, clause 3, of the Constitution Congress is given the power to regulate commerce with the tribes.[47] What "commerce" entails has been subject to one of the great debates in Federal Indian Law, and still poses questions as to what kinds of powers the tribes possess inherently, and what kinds of powers Congress have been charged with by the Constitution.

Because the founding document was rather vague on the legal status of the native population, much of their rights have been outlined in the courtroom (in addition to statutes and acts). The

[46] Getches, Wilkinson, and Williams (2005), 57-58.
[47] William C. Canby, Jr., *American Indian Law*, 4th ed. (St.Paul, MN: Thomson West, 2004), 12.

Supreme Court has in particular played a vital role in establishing the scope of Federal Indian Law and continues to do so today. However, that governmental institution is not a static or neutral body as politics plays an important role in setting the legislative *and* judicial agenda. By setting up a chronological line of events, one sees how the pendulum has swung from forces of assimilation to separatism. Moreover, the fate of the tribes is prone to pressure from various opposing interests, which contribute to create "uniquely formidable obstacles to the development of consistent and unitary legal doctrine."[48]

2.2.2 The historical periods of Federal Indian Law and policy

The colonial period up until the 1820s is also considered the first era dictating Federal Indian law and policy, and it was dominated by treaty-making and the Trade and Intercourse Acts of 1790. These pieces of legislation were meant to separate the tribes from non-Indians by establishing boundaries and giving the federal government control of land purchases. The second era is often called the removal era and was dominated by conflicting interests between and within the three governmental branches on how to deal with "the Indian problem."[49] A trio of Supreme Court decisions handed down by Chief Justice John Marshall became precedents for some of the most important and well-established principles of Federal Indian Law (and will be discussed in detail in chapter 3).[50] With meager judicial support for tribal rights, President Jackson launched the removal of five Southeastern tribes, now famously known as the Trail of Tears.

The removal of tribes further west, into what was then considered unknown and unoccupied territory by the newcomers, led to a period of establishing reservations (known historically as the reservation era). Through treaties, various tribes ceded some of their land in exchange for developments of schools, housing, and protection of the reservation. They had little left to bargain with, as their strength diminished and that of the European immigrants grew.[51] Tribe after tribe signed treaties giving up their ancestral land in favor of areas further west, where they supposedly would be alone from white settlement. The American government also hoped

[48] Charles F. Wilkinson, "American Indians, Time and the Law," in *Cases and Materials on Federal Indian Law*, 5th ed. (2005), 30-33.
[49] Kristin Ruppel, "Federal Indian Law and Policy: A Historical Overview," (lecture, Montana State University, Bozeman, MT, February 13, 2008).
[50] Richard Warren Perry, "Remapping the Legal Landscape of Native North America: Layered Identities in Comparative Perspectives," in *PoLAR*, vol. 25, no. 1 (2002), 136-137.
[51] Getches, Wilkinson, and Williams, Jr. (2005), 128.

these bounded areas would create farmers out of the Native Americans, thereby civilizing the tribes and assimilating them successfully into the majority society. These reservations became known as "Indian territories." Because of the extraordinary status of the Indian tribes as legal entities, the territories out West developed into areas of (limited) tribal jurisdiction. The tribes who moved onto these bounded areas retained some of their governmental powers, and were able to assert authority over these lands, which eventually became known as Indian Country – a legal description denoting tribal jurisdiction that still operates today.[52]

The 1870's and 80's saw further defeats for tribes, especially in the Northwest, as skirmishes, battles, and outright massacres diminished them in number. Military defeats gave way to further settlement of the West, which was becoming increasingly attractive due to gold mining and the building of transcontinental railways. Moreover, the Congress sought to limit the rights of Indians living on reservations and overturned a Supreme Court decision in order to seize criminal jurisdiction in Indian Country from the tribal courts. In 1887, Congress enacted the General Allotment Act, which individualized ownership of land on the reservations. Each piece of land was held in trust by the federal government, and the acres "left" after the distribution to all eligible Indians were then opened to the general public for purchase.[53] This piece of legislation is considered one of the most damaging for Native American land rights and the communal way of life. It permeated land policies throughout the coming century, creating so-called "checkerboard reservations."[54]

The Indian policy era of allotment lasted well into the twentieth century. During this period over 90 million acres of Indian territory was lost to non-Indians, and over 65 percent of land previously owned by the tribes was taken from them through forced or "surplus" sales.[55] However, terrible conditions for Natives all over the U.S., and on Hawaii, in the early 1900's led to a shift in policy. The period known as Reorganization got its name from the Indian Reorganization Act of 1934, or the "Indian New Deal." It sought to stop the allotment of Indian lands, bring them back into Native control, and empower the tribes to manage their

[52] Getches, Wilkinson, and Williams, Jr. (2005), chapter 6.
[53] Benjamin J. Richardson, "The Dyadic Character of US Indian Law," in *Indigenous Peoples and the Law: Comparative and Critical Perspectives*, ed. Benjamin J. Ricardson, Shin Imai, and Kent McNeil (Oxford: Hart Publishing, 2009), 63-64.
[54] Getches, Wilkinson, and Williams, Jr. (2005), 172.
[55] Kristin Ruppel (lecture, February 13, 2008); Richardson (2009), 64.

affairs and developments themselves.[56] The goal was to create and sustain self-governance through political organization of the tribes, which would simultaneously diminish the powers of administration by the federal government, such as the Interior Department and the Office of Indian Affairs.[57] Despite this positive shift, many have criticized the act for its Westernized outlook. The tribal councils and constitutions to be implemented by the tribes were based on Anglo-American forms of government, and not on the specific governance of the tribes themselves. The imposition of these institutions from the outside led to much protest within the communities as well.[58]

The historical timeline of Federal Indian Law sways much like a pendulum. As the political climate of the USA shifted after the Second World War, so did policies in regards to the native population. From the 1950's to the end of the 1960's, federal laws and policies were aimed at terminating the extraordinary legislative and judicial status held by the tribes. In 1953, the House of Representatives adopted a policy of termination, which would eliminate the shaky yet important government-to-government relationship between the tribes and the federal U.S. powers. One of the consequences of this policy was the termination of around one hundred tribes, which entailed that their official status as a tribe (with all the rights connected to this) was terminated. Moreover, Congress sought to move Natives off the reservations while extending civil and criminal jurisdiction of states to Indian Country, which previously had been mostly subject to its own, tribal authority.[59]

However, legislators did not foresee how their actions awakened a fighting spirit among the tribes, and organizations sprung up in order to protest the federal acts. Consensus soon grew on the termination policies inefficiencies and by the 1960s it had largely been abandoned. A new shift was on the rise, born out of the civil rights movement. The era of self-determination is the current one to mark federal laws and policies towards the tribes, although there have been several shifts within this time period. Nonetheless, the 60's and 70's were represented by positive developments from both the legislative and executive branches. In 1970, President Nixon put self-determination on the agenda with a statement to Congress, for which the

[56] Richardson (2009), 65.
[57] Getches, Wilkinson, and Williams, Jr. (2005) 190-191.
[58] Richardson (2009), 65.
[59] Getches, Wilkinson, and Williams, Jr. (2005), 205; Canby (2004), 27.

Native community praised him.[60] Further into the decade, Congress passed a number of acts seeking to improve and develop economic and social conditions on the reservations. The 1990's also saw a number of laws in which protection of culture and language was the goal.[61]

Other initiatives sought to increase self-governance for the tribes, by strengthening their tribal constitutions and councils as well as their tribal courts. Moreover, laws such as the 1988 amendment of the Indian Self-Determination Act would help tribes take increasing charge over programs previously overseen and administered by non-Indian agencies, for example in regards to health services.[62] The judicial branch of the government, on the other hand, has overall been less then willing to expand or even preserve the self-determination rights of the tribes. The Supreme Court led by Chief Justice Rehnquist between 1986 and 2005, known as the Rehnquist Court, has gained criticism for curtailing tribal sovereignty and limiting or denying cultural protections.[63] Whereas the last thirty years have proven positive in legislative developments, the courts remain an unstable judge of Indian policy and law. For "even as tribes have gained greater political influence, their ability to rely on the Court to insist on clear expressions of congressional intent to alter or diminish their rights is being cast into doubt."[64] The developments in the judicial branch begs the question for future historians of when the era of self-determination will give way to another, and of what kind.

2.2.3 Self-determination

Throughout the history of the tribal-government relationship, self-determination has been the most important goal for Natives to achieve and the government to curtail. Questions of sovereignty have permeated the history of Federal Indian Law since there was no definite answer to be found in the Constitution. Is the right to self-determination for the tribes inherent? Or does Congress, who holds plenary power over the Native Americans, give it to them? Despite being subjected to two hundred years of judicial review, these questions are still not finitely answered. Consequently, self-determination as a realistic goal for Natives is often dependant upon the pendulum of policies and decisions of the courts. In his third trilogy

[60] Getches, Wilkinson, and Williams, Jr. (2005), 218.
[61] Richardson (2009), 70.
[62] Getches, Wilkinson, and Williams, Jr. (2005), 222.
[63] Getches, Wilkinson, and Williams, Jr. (2005), 253. For case examples, see Richardson (2009), 73-74.
[64] Getches, Wilkinson, and Williams, Jr. (2005), 255.

case, Marshall laid the groundwork for this debate by acknowledging the "natural rights" of the Indians "as undisputed possessors of the soil, *from time immemorial*."[65]

However, there is a competing view that the powers of Congress over the tribes are plenary in the sense that they are all compassing, instead of retaining only those granted by law. The difference lies in the distinction between a hierarchy of governmental powers and an absolute right of power. The latter interpretation has led to some of the most devastating policies and legal opinions for the tribes. It has afforded the Congress with justification for terminating treaties with tribes, as well as even denying tribes their status *as* tribes by eliminating all the rights such a status gives the tribes, as well as individual members of them. I will provide some examples of these debates in the following chapter but for now it is vital to emphasize how the dependency of the self-determination project lies with the federal government, and thus is continuously subject to the political climate of legislators and judiciaries.

2.3 Conclusion

The federal government has a large hold over the rights of Native Americans. A historical overview as the one detailed above, displays the authoritative position of the legislature and (especially) the Supreme Court in setting the rights agenda for the country's indigenous population. As the political climate of the nation has shifted back and forth between liberal and conservative outlooks, so has the legal standing of the tribes been subject to such review. The body of knowledge known as Federal Indian Law holds the information necessary to both examine the history of tribal status but also get a feel of the role of the Indian in the legal discourse. It allows us to provide context to the other theory discussed in this chapter – postcoloniality. The project of deconstructing the ideas and narratives of Western intellectual superiority opens up a discourse on contemporary indigeneity. Despite some concerns with how the theory originated, postcolonial ideas are of value to Native American decolonization efforts. Moreover, they provide a framework for discussing notions of power and knowledge in a hierarchical, Western-based system such as United States law.

[65] Worcester v. Georgia 31 U.S. (6 Pet.) 515, 8 L.Ed. 483, partially reprinted in Getches, Wilkinson, and Williams, Jr. (2005), 112 (emphasis added).

Chapter 3 – The American courtroom as a meeting point for Federal Indian Law policies and religious rights.

Following the last chapter's framing of this thesis theoretical focus, I will now present the case study fully. First of all this chapter will provide the reader with an in-depth discussion on both the legal and historical circumstances for the Supreme Court decision. I will place the *Lyng* case both within the landscape of Federal Indian Law and the historical context of Native American rights. Thereafter, I will go into the court proceedings themselves and trace the history of the dispute throughout the legal system. Finally, I will present the opinion as given by the majority vote, and end with an overview of the dissenting opinion. An analysis of these legal texts will be saved for the 4th chapter.

3.1 The history of Federal Indian Law in the United States

3.1.1 Historical turning points for Native Americans in U.S. law

Before delving into the actual *Lyng* case, it is necessary to briefly discuss some of the historical and legal circumstances leading up to this event. The Supreme Court decision needs to be viewed in light of a larger discourse of Federal Indian Law, and of the roots and traditions embedded in the American legality. As outline in the previous chapter, the Supreme Court plays a vital part in determining the scope of law as it pertains to the tribes. Native Americans have historically a very complex relationship with the governing powers of the United States. As the colonial legacy of the nation-state continues to influence its society, the colonial foundation of the American legal system continues to mark its subjects.

Much of the Federal Indian Law body has been created through common law, since Native Americans hold this extraordinary position in U.S. law. Therefore, the ability of the Indian tribes to fight for their rights over the past centuries has been dependant upon judicial decisions, legislative acts, and executive actions. It comes as no surprise then, that majority views of the native population have influenced the scope and content of the latter group's rights. As mentioned in chapter 2, there is little written about the tribes in the U.S. Constitution. In fact, they are only referred to three places, and two by name. However, by singling them out as an authority beside a state or foreign nation, the Founding Fathers laid a

course for the branches of government to follow up on, but without much to guide them in the text itself.[66]

The United States became independent in 1776, but there was still much of the territory to "conquer." As such, colonial ideas of discovery and settling new lands were carried through to the nineteenth century. These soon became visible in the judicial and legislative texts of the day. The Trade and Intercourse Acts of 1790 were enacted in order to separate the Indian from the settler. Although respecting of the right of the tribes to negotiate treaties, the purpose of the acts was to stop private sales so that the U.S. government could control the landmass.[67] On of the other, and if not the most, legendary texts in Federal Indian Law, and U.S. Law itself, where actually a trio, handed down by the Supreme Court in the 1820's and 30's.

The Marshall Trilogy became infamous for establishing most of the guiding principles of Federal Indian Law. None of the tree cases deal with matters of a religious nature. Yet, their relevance span the entire field and are most telling in both the defense of Native American rights in general and the discriminatory, colonial influences of the court. In *Johnson v. McIntosh* the Supreme Court asked whether a title to land was rightfully obtained from the Illinois and Piankeshaw tribes.[68] The answer could have been an easy no, since the purchase happened after the government forbid private speculation of Indian lands. However, Chief Justice Marshall went far beyond the original question and into an elaborate discussion on the rights of Indian tribes to own and sell land. The Indian tribes were "the rightful occupants of the soil," but they had lost their complete sovereignty over it when the British asserted their "right of discovery" against other nations. The trade relations with the tribes make it evident that the North American continent was neither "discovered" nor "conquered." Still, the court needed to legitimize the U.S. government as landowners. It therefore sought a legal principle somewhere in between discovery and conquest, which, although was an "extravagant pretension" could not be questioned if both asserted and sustained. This claim was given further weight by pointing to the condition of the Indians. Their "savage" nature made them impossible to live in peaceful coexistence with, yet unfit to cultivate the soil on their own.[69]

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[66] William C. Canby, Jr., *American Indian Law*, 4th ed. (St. Paul, MN: Thomson West, 2004), 12.
[67] Getches, Wilkinson, and Williams (2005), 90.
[68] *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 5 L.Ed. 681 (1823); partially reprinted in Getches, Wilkinson, and Williams (2005), 63-68.
[69] Getches, Wilkinson, and Williams (2005), 65-66.

In reality, the Supreme Court could not deny that the tribes had been dealt with as a legal entity with rights to transfer land holdings. However, it could make sure that plenary power over them was vested with federal authorities – the Congress – and thereby guarantee that the government had a final say in tribal matters. Moreover, the court could reduce the legal status of Natives and their land in order to legitimize further conquest of land. In *Johnson v. McIntosh* the Supreme Court granted the tribes "aboriginal title" to their land, which embodied the right to occupy and make use of but not sell it.[70] *Cherokee Nation v. Georgia* in 1831 and *Worcester v. Georgia* a year later established principles denoting the legal status of Native Americans. The tribes were deemed "domestic dependant nations," which signified that although their territories were not equal to the power bestowed on the states or foreign nations, they were distinct communities with their own authority. Yet, the tribes were under federal power in a relationship Marshall called "[resembling] that of a ward to his guardian."[71]

In a contemporary context it might seem unreasonable that the Marshall Trilogy should carry much weight. Chief Justice Marshall's view of the tribes as fierce savages who needed to be protected and civilized, does not fit well into the liberal, multicultural society the U.S. claims to be today. However, the common law traditions of the country denotes that important cases, such as the Marshall Trilogy, become precedents when courts carry them on through employment and citations.[72] The discriminatory view of the Indian tribes, upheld by the Marshall court and those who followed, have been for the most part a detriment to indigenous rights in the U.S. For instance, in 1955, the ruling of *Tee-Hit-Ton Indians v. United States* denied Alaskan tribes redress for the harvesting of timbers on lands held with aboriginal title. The rationale relied on the plenary power of Congress to abrogate rights of the Natives not explicitly stated. The court cited *Johnson v. McIntosh* as the source of this rule, and in general portrayed the tribes as "savage" and "conquered" by "force."[73]

The Rehnquist Court, who ruled on the outcome of *Lyng*, did not use such derogatory language. However, as I will demonstrate in the next chapter, in the majority opinion there are

[70] Canby (2004), 15.
[71] *Cherokee Nation v. Georgia* 30 U.S. (5 Pet.) 1, 1832, quoted in Canby, 16.
[72] Canby (2004), 72.
[73] *Tee-Hit-Ton Indians v. United States* 348 U.S., 272 (1955), partially reprinted in Getches and Wilkinson (1986), 179.

some interesting phrases and arguments that carry certain connotations to the "savage" Indian of the nineteenth century. Although *Lyng* deals with religious freedom more than sovereign rights or land title, these latter two issues are too important to be completely missing from any legal matter concerning Native American rights in general. Moreover, *Lyng* presents a telling example of the role and power of the U.S. Supreme Court in shaping self-determination for the Native American tribes.

3.1.2 The relationship between Indian Country and the U.S. judicial system in a contemporary context

The judiciary branch of the federal government has had a shifting role for Federal Indian Law since the beginning. Based on the examples provided in this chapter, the Supreme Court presents itself as the villain in this narrative. Although some of its decisions have had devastating consequences for tribal rights, others have benefited the tribes in their pursuit of self-determination. In some areas, the court have been an important adversary in curtailing state power over the reservations, or in preventing Congress from stretching its plenary power to its fullest, possible limits.[74] Protection of religious rights, on the other hand, is an area in which Native Americans have received little to no protection or support from the courts, neither the Supreme Court nor the lower ones. Since the 1950's only *one* out of ten federal court cases dealing with issues of religious freedom have been ruled in favor of the Native litigants.[75] Both the general public and the American government have been skeptical to Native spiritual beliefs. Christian missionaries were early employed in the civilizing mission of the Indian. In the 1880's, the federal government banned spiritual ceremonies, dances and the practices of medicine men on reservations, because of the tribes' failure to "engage in civilized pursuits or employments."[76] In popular culture, Native Americans have long been portrayed as contrasts to mainstream Americans – they are a "foil for modernity."[77] Though

[74] For example, in holding the federal government liable to its trust responsibilities and demanding just compensation for the tribes when treaties have been abrogated. See, *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980); for more examples, Getches, Wilkinson, and Williams (2005), ch. 5, section 2.
[75] David Wilkins, "Who's in Charge of U.S. Indian Policy? Congress and the Supreme Court at Loggerheads over American Indian Religious Freedom," in *Wicazo Sa Review*, vol. 8, no. 1, spring, 1992, http://jstorg.org/stable/1409363 (Accessed May 9, 2012).
[76] Staiger Gooding (1996), 161.
[77] Jo Carillo, "Getting to Survivance: An Essay about the Role of Mythologies in Law," in *PoLAR*, vol. 25, no. 1 (2002), 39.

they might be noble and beautiful, the strange and exotic worldviews of tribal cultures make it easy to label them as exotic.

The typical Indian of 1950's Western movies or popular novels is an outdated stereotype, yet it is an exaggeration to claim that tolerance for Native religions has heightened to the point of equal acceptance. The ban on ceremonial practices has long been lifted, and Christian boarding schools are no longer operating. Parallel to the growing momentum of the self-determination era, tribes across the country have revitalized traditions and customs by bringing back old ceremonies and educating younger generations. Despite these positive developments, many of the tribal religions are fragile after decades of being forced dormant or into almost-extinction. As noted above, the tribes have received little to no support from the courts. The American Indian Religious Freedom Act of 1978 was created in order to provide protection for tribal religions. The uphill battle of religious revitalization and the further erosion of Native-owned lands made it clear that neither the Constitution nor individual rights as American citizens, sufficed to safeguard tribal spirituality.

The act would create initiatives to ensure a new policy, and "protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians."[78] *Policy* is the key word, however, as the act created no obligations that could be legally enforced. It was merely a statement of intent and a recommendation for a new policy. Many federal agencies followed up on the purpose of the act. Moreover, tribes were encouraged to now seek protection of sacred places and spiritual practices and thus secure the future vitality of their religions. Such was the case in Northern California, where tribes began a revitalization of tribal dances and ceremonies in the sacred High Country. In addition, the 1970's saw a real growing political involvement. The Yurok tribe fought, and won, rights to fishing on the reservation, feeding the positive outlook on tribal self-determination.[79]

However, the tribes still faced enormous challenges of recognition. Revitalization of religions was hindered by the lack of legal protection and the threat of destruction of sacred lands. The passing of the American Indian Religious Freedom Act was thought to combat these problems

[78] AIFRA (1978), 42 U.S.C.A § 1996, reprinted in Getches, Wilkins, and Williams, Jr. (2005), 748.
[79] Carpenter and Bowers (2011), 503-504.

and help change the discourse on indigenous spirituality but by mid-century there were still all too few ways for the tribes to seek government protection against infringements on their religious and cultural worlds. Therefore, with the passing of the act, and the growing momentum of indigenous rights, it seemed the time had come for challenging the dismal statistics of Supreme Court decisions on religious rights.

3.2 A short overview of Native American Religions

3.2.1 North American spiritualities

The North American continent is home to a vast spiritual world, which despite its immensity and variation, often falls under the common denominator of religion. For Americans of European decent and background, it is the beliefs and practices of Christian faiths that mostly correspond to their view of religion. Many of their ancestors came to the New World to escape religious persecution and establish an equal society free of a state religion. The Founding Fathers ensured this through the First Amendment to the Constitution, which separated the powers of church and state and made it unlawful to either favor one religion over another or discriminate against any.[80] However, like any other society with a diverse population, a certain hierarchy arose, in which the Christian denominations prevailed on top.

Native American cultures are filled with rich and varied spiritual beliefs, but despite their diversity and intricacy, the cosmological worlds of the Native tribes was from the colonial era labeled as simply "savage." The Indians were heathens because the European immigrants could not recognize visible signs of Christian beliefs in their encounters. The language was foreign, likewise the rituals, ceremonies, and deities. They became "the other" in the minds of European and this provided justification for removal and reform. Since the middle of the twentieth century a slow recognition of Native spirituality grew in the minds of scholars, politicians, and the general public alike. However, a mere acknowledgement that the Indian tribes have their own religions is not enough. Although they deserve equal protection and promotion, Native American religions are not the same as Judeo-Christian religions (as the most dominating world religions in the Western world). Even the term religion is rather inapt

[80] Bryan J. Rose, "A Judicial Dilemma: Indian Religion, Indian Land, and the Religion Clauses," in *Virginia Journal of Social Policy and the Law*, vol. 7 (1999), http://heinonline.org (accessed Feb 18, 2012), 122.

at describing the spiritual world of 562 different tribes, as its application is mostly for a European-American discourse on spirituality, in which certain dogmas, doctrines, and deities hold authority.[81]

Of course, such a generalization goes both ways, and I do not mean to imply that Christian and Judaic faiths are all the same, at all times. There is great diversity within all faiths, but on the outside the beliefs and practices of world religions, and in the West especially, Christian denominations and Judaism are at the center of a discourse of religion. Moreover, the concepts employed in such a space are often used to describe Native experiences solely for the purpose of comparing the spiritual lives of indigenous peoples to those of Westerners. By doing so, the Native American as "the other" is given further life. Among European and American cultures there is a great need for categorizing and compartmentalizing, which extends to the spiritual world.[82] The seemingly foreign and arbitrary beliefs and practices of different Native peoples must therefore be sorted out to find some kind of system or inner logic. Moreover, they must be categorized in order to make them translatable and comparable to Euro-American religious faiths. This conundrum is even pointed out by the dissenting judges in *Lyng*. Justice Brennan writes, "Any attempt to isolate the religious aspects of Indian life "is in reality an exercise which forces Indian concepts into non-Indian categories [quoting the Theodoratus Report]."" [83]

In many ways it is wrong to employ the categories and concepts of a religious discourse when speaking of the various indigenous spiritual worlds. Yet, in this instance it is necessary. Firstly, in a legal context it is required that the tribal beliefs be presented in such a way that makes them recognizable to the court. It enables an inclusion in the discourse by singling out knowledge deemed legitimate and comparable. Secondly, it is necessary here to point out the differences between Native and non-Native worldviews since the core of this project rests upon the inherent problem in relating one to the other, seeing as one of them is deemed the norm and the other an outsider. For instance, the traditional spiritual beliefs of many Natives are part of a cosmology that does not easily separate between the 'secular' and 'religious' spheres of life, in contrast to mainstream American views on Christianity, as represented by the First Amendment. One aspect of this holistic view is the connection shared by all living

[81] Kidwell, Noley, and Tinker (2001), 12.
[82] Kidwell, Noley, and Tinker (2001), 54.
[83] *Lyng v. Northwest Indian CPA* 485 U.S. 439, 459 (1988).

creatures, humans, animals, and plants. It signifies the need for bringing all parts of life together, and to ensure their future well being through ceremonies.[84]

3.2.2 The spiritual world of the Yurok, Karuk, and Tolowa tribes

The holism often found in many Native American religions has its parallel in the value placed on the community. Although the individual experience of spiritual power is important, a person's identity is more interconnected with the family and community than one finds in other parts of the American society. Kin relations form the foundation for individual behavior and responsibilities, and the extended family often determines one's place in a community.[85] For the Yurok, Karuk, and Tolowa tribes, the High Country (the area of dispute in *Lyng*) is a physical and spiritual place for individual quests as well as communal gatherings. The ceremonies and rituals performed there are at least 200 years, and archeologists have found traces of human existence in this area dating more than 2 000 years back.[86]

Today, the High Country falls within the boundaries of the Six Rivers National Park in northwest California. It is part of a larger geographical area of mountain ranges, forests, and rivers, which tribes have lived on and off from since time immemorial. When California became a state in 1850, settlers flooded the area, and the tribes were forced into a newly created reservation, today called the Hoopa Valley Reservation.[87] This was followed by a period of harsh assimilation and allotment policies in the late 1800's, but the tribes in the area were able to trek into the forests to the sacred areas of High Country. These travels have continued to today, and despite that Chimney Rock is federal property, the tribes still consider it their traditional land.[88]

The High Country provides the most important source for communicating with the Creator. It is home to pre-human spirits who helped the first humans survive and a resting place for

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[84] Vine Deloria, Jr., "Sacred Lands and Religious Freedom," from *Sacred Land Film Project,* http://www.sacredland.org/PDFs/SacredLandReligiousFreedom.pdf (accessed Aug 8, 2011), 5.
[85] Kidwell, Noley, and Tinker (2001), 15.
[86] Brian Edward Brown, *Religion, Law, and the Land – Native Americans and the Judicial Interpretation of Sacred Land* (Westport, CT: Greenwood Press, 1999), 120.
[87] Carpenter and Bowers (2011), 500.
[88] Brown (1999), 120-122; Carpenter and Bowers (2011), 500-501.

ancestral medicine men and women.[89] These qualities make the area an important source of spiritual power but that is not all. According to traditional beliefs, the Yurok, Karuk, and Tolowa were parts of the natural order of life. In order to uphold the balance between all living things, the tribes had take care of the earth, perform ceremonies and pray for it. If done according to the Creator, this would ensure a prosperous future. From these beliefs stem the rituals and ceremonies meant to replenish the earth, such as the White Deerskin Dance.[90] People also travel to High Country to gather "medicine" for ceremonies, for personal treks or pilgrimages, to receive religious initiation, and finally as a spiritual act in itself. The journeys require days of preparation and cleansing and specific trails will lead the person to the medicine or the spiritual qualities required for the purpose of the visit. The most sacred places are the ones located highest up. The rock outcroppings of Chimney Rock, Doctor Rock, and Peak 8 are the most powerful of them all.[91] However, the area in itself is a sacred place, and to describe 'sites' as merely physical locations undermines the cosmological whole, in which the psychological and sensory aspects are equally important.[92] The wellbeing of the tribes is dependant upon the wellbeing of the entire High Country.

For many Native Americans, spirituality is intrinsically tied to the earth, which encompasses all human and animal life as well as the land and sky and everything in between. Although tribes such as the Yurok, Karuk, and Tolowa believe in a Creator, they do not perform rituals or have ceremonies for the sake of worship. The celebration and praise of the Christian God is difficult to find among Native religious traditions. It is important to be thankful of the Creator, however, the ceremonies most importantly bind the community together with the spirits in an ongoing relationship always in flux.[93] Whereas churches and synagogues are considered holy places for Christians and Jews, many Native Americans find their "holiness" in nature. For the tribes in northern California, the Chimney Rock area is such a holy place. Moreover, it is a physical place, and an area of earth and forests and sky that has specific spiritual qualities. This means that the tribes who travel here for their rituals cannot take their religious activities and perform them elsewhere.[94] The mobility of other religions, where worship and ceremonies can be practiced anywhere there is a sacred building or an officiator,

[89] Carpenter and Bowers (2011), 497.
[90] Brown (1999), 122.
[91] Brown (1999), 123; *Lyng v. Northwest Indian CPA* 485 U.S. 439, 461 (1988).
[92] Brown (1999), 126.
[93] Kidwell, Noley, and Tinker (2001), 56.
[94] Kidwell, Noley, and Tinker (2001), 127.

stand in stark contrast to most Native American religions, including that of the Yurok, Karuk, and Tolowa.

Another point of difference can be found in the manner in which religious knowledge is transmitted in a society. For many tribes the land is not only spiritual but also sacred and therefore not to be shared with outsiders. Vision quests and secret ceremonies in isolated, uninterrupted places have been important parts of traditional religions among many groups, such as the Tolowa.[95] Today they are threatened by modern infrastructure and developments. Moreover, as many of these ancestral lands are not under Indian ownership, the tribes have little to no power over their use. It was precisely this challenge that faced the Native Americans in northern California, and which brought them to the courts.

3.3 Lyng v. Northwest Indian Cemetery Protective Association: through the U.S. court system

3.3.1 The beginning of the dispute

In 1973 the Forest Service in California began planning a project of commercial timber logging. They proposed to build a road through the Chimney Rock area so as to easily extract the lumber from the Six Rivers National Forest. Tribes soon protested this action as the road would cut right through the sacred High Country.[96] Moreover, several studies showed that these projects would lead to substantial erosion, which would again impact the wildlife habitat in the Klamath River.[97] In 1977, the Forest Service issued a draft statement on the environmental impact of the road, which was six miles away from being completed. Following the result of this, and in combination with the enactment of the American Indian Religious Freedom Act of 1978, the Forest Service commissioned an independent study to investigate their "policies and procedures in order to […] protect and preserve Native American religious cultural rights and practices."[98] The Theodoratus Report concluded that the road should not be built since the entire area is sacred to the Yurok, Karok, and Tolowa Indians. Moreover, it was "an integral and indispensable part of Indian religious

[95] Kidwell, Noley, and Tinker (2001), 128.
[96] Carpenter and Bowers (2011), 505.
[97] Brown (1999), 124.
[98] *The American Indian Religious Freedom Act (1978), Section 2*, printed in part, in Getches, Wilkinson, and Williams, Jr. (2005), 749.

conceptualization and practice."[99] The report warned against accommodating the indigenous groups by *only* isolating some specific places, as the identification of these was inadequate to describe the totality of Native religious beliefs and practices. Overall, the report condemned the Forest Service for failing to understand tribal religions on their own terms. It pointed to the many aspects of sacred qualities in High Country, and not only those that are easily discernible to the (non-Indian) eye.[100]

Nevertheless, in 1982 the Forest Service decided to move on with its planned construction, but with a path that attempted at circumventing the most important sacred places, including Chimney Rock. Having exhausted their administrative appeals, the tribes took the dispute to court. Representatives for the Yurok, Karok, and Tolowa tribes sued the chief of the Forest Service and the secretary of the U.S. Department of Agriculture for violation of (among others) the First Amendment, the National Environmental Policy Act, the Wilderness Act, the American Indian Religious Freedom Act, and government trust responsibilities. The suit was filed with the United States District Court for the Northern District of California in 1982.[101]

3.3.2 The High Country dispute in the lower courts

Numerous other plaintiffs joined the tribes in their suit: the state of California, various environmental organizations, and the Northwest Indian Cemetery Protective Association (a non-profit organization consisting of the Northwest California tribes).[102] Many tribal members testified on the importance of High Country and devastation the construction would create. Yurok medicine woman Lowana Brantner told the court how "we have lost everything, and now we are standing on the last peak."[103] The District Court relied on this evidence showing the sacred nature of the Chimney Rock area. It found that both the timber harvesting and the road construction would violate the tribes' rights under the Free Exercise Clause of the First Amendment because the proposed government actions would cause irreparable damage to the tribal religious activities and therefore the wellbeing of the entire people.[104] Additionally, the court emphasized the importance of the entire area, not just the

[99] *Lyng v. Northwest Indian CPA* 485 U.S. 439, 442 (1988).
[100] Brown (1999), 126-127.
[101] Brown (1999), 131-132; *Lyng v. Northwest Indian CPA* 485 US 439, 443 (1988)
[102] Brown (1999), 132.
[103] Carpenter and Bowers (2011), 511.
[104] DeLashment (1989), 81.

specific sites identified. It observed the necessity for the High Country being kept peaceful, isolated and pristine, and that these conditions were vital not only for the success of the medicine men and women traveling there, but for the entire tribe as well as others connected to those.[105]

The District Court relied on a test created by the precedence of several cases regarding violations of free exercise. The first part of the test orders the offended party to show proof that a limitation by the government is burdensome to their religious practice. If this is met, the second part of the test offers the government a chance to override such a burden, if they can show a compelling interest in the matter (which outweighs the rights of citizens).[106] The District Court built on the Theodoratus Report and found evidence there to support the tribes' claims. The sacred High Country was a "central and indispensable" part of Yurok, Karuk, and Tolowa religious life, and its spiritual qualities made it difficult if not impossible to separate one sacred site from another. The disruption of the area constituted a severe burden to the tribes' constitutional rights. The District Court then denied the Forest Service any compelling interest in the case, as it could not find any solid justifications for the planned developments. Evidence suggested that the road would not increase net jobs, improve access to timber, broaden public access, nor enhance administration.[107]

As a result of its findings, the District Court issued a permanent injunction prohibiting the Forest Service from harvesting timber and constructing the remaining section of the road. The government appealed the decision on behalf of the Forest Service.[108] However, while the ruling of the Appeals Court was pending, Congress enacted the California Wilderness Act of 1984. Under this statute, most of the disputed area was designated a wilderness, which meant that, as a possible environmental disruptive activity, logging would no longer be permissible. Thus, half of the suit was no longer up for judicial debate. However, Congress exempted a narrow strip from this ban, implying that the remaining section of the road could be built, but only if the authorities decided to do so.[109]

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[105] Brown (1999), 132; DeLashment (1989), 81.
[106] Nancy Akins, "New Direction in Sacred Lands Claims: Lyng v. Northwest Indian Cemetery Protective Association," in *Natural Resources Journal*, Vol. 29, Spring, 1989, 596-597, http://heinonline.org (accessed Mar 23, 2012); Staiger Gooding (1996), 167.
[107] Brown (1999), 133-135; DeLashment (1989), 82.
[108] *Lyng v. Northwest Indian CPA* 485 U.S. 439, 443-444 (1988).
[109] DeLashment (1989), 82; *Lyng v. Northwest Indian CPA* 485 U.S. 439, 444 (1988).

The U.S. Court of Appeals for the Ninth Circuit affirmed much of the District Court's holdings. It relied on the findings of the lower court in ruling that the Native tribes had displayed the central and indispensable nature of the High Country to their religion. Likewise, the appellate court found that the federal government had failed to show a compelling interest in the road construction. However, the court did note that the manner in which the religion of the tribes would be burdened was more indirect than in previous instances. Still, it maintained that the burden was significant enough to violate the Free Exercise Clause of the Constitution.[110]

3.3.3 The ruling of the Supreme Court

The federal government was not at all satisfied with the Appeals Court's decision. Although it believed the Forest Service would be able to comply with the various governmental statutes, such as the Environmental Policy Act, it wished to reverse the constitutional findings.[111] The government put in a formal appeal by petitioning for a writ of certiorari. If granted, it means the Supreme Court will review the decision of the lower court and whether the merits (rights and wrongs) rests on existing law.[112] Such an appeal was granted, and oral arguments in *Lyng v. Northwest Indian Cemetery Protective Association* began in November 1987, with the final decision handed down five months later. The Supreme Court reversed the ruling of the two lower courts, with a five-to-three majority vote (and one abstaining). It sided with the federal government in not finding any form of burden on the constitutional religious rights of the Yurok, Karok, or Tolowa.[113]

The question in front of the court was as follows: does the Free Exercise Clause of the First Amendment prohibit the Government from harvesting timber or constructing a road through the Chimney Rock area? The court concluded that it did not.[114] Writing the opinion for the majority, Supreme Court Justice Sandra Day O'Connor divided the rationale of the ruling into three sections. Firstly, the court found that the burden placed on the Yurok, Karuk, and

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[110] DeLashmet (1989), 83; *Lyng v. Northwest Indian CPA* 485 U.S. 439, 445 (1988).
[111] *Lyng v Northwest Indian CPA* 485 U.S. 439, oral argument for petitioner (1988).
[112] *U.S. Legal, Inc.,* s.v. "Writ of Certiorari," http://definitions.uslegal.com/w/writ-of-certiorari/ (accessed May 3, 2012).
[113] *Lyng v. Northwest Indian CPA* 485 U.S. 439, 440-441 (1988).
[114] *Lyng v. Northwest Indian CPA* 485 U.S. 439, 441 (1988).

Tolowa Nations by the planned Forest Service projects did *not* violate the Free Exercise Clause of the First Amendment.[115] This was further substantiated with a reliance on an earlier Supreme Court case on a possible religious burden by the government, *Bowen v. Roy*.[116] O'Connor compared the challenge here to the preceding one and found that they were both unfounded as the government in neither would force those involved into violating their religious rights. Nor would the action in question deny neither party equal benefits. Moreover, the Court found in *Lyng* that despite the possibility that some actions might affect the practice of religious beliefs, the "incidental effects of government programs" do not give the plaintiffs any rightful claims under the Free Exercise Clause, nor do they require the government to "bring forward a compelling justification for its otherwise lawful actions."[117] According to the court there are a number of governmental programs or actions which will offend the spiritual beliefs of one citizen or another. The authorities cannot alter or restrain their activities in order to comply with every "citizen's religious needs and desires."[118]

In the second part of the ruling, Justice O'Connor denied the validity of the plaintiff's claim that the American Indian Religious Freedom Act of 1978 gave authorization to an injunction against the road. She rebutted the law as having any enforceable rights that would hold up in court, but noted that the Forest Service had complied with the general policy of the act by operating as "solicitous" as possible. Additionally, O'Connor emphasized that the Forest Service had commissioned an impact study. Although they did not comply with the recommendations of the report, the least invasive path was chosen when planning the road construction (the one farthest removed from the sites).[119]

The last part of the ruling was focused on refuting the claims of the judges who voted against the ruling. O'Connor found the dissent to rely on an analysis "incompatible with the text of the Constitution [and] with the precedents of [the] Court."[120] Further, she claimed they misread the legal precedents they based their analysis on. There is a difference between outright coercion of a law and the potential impact a law might have which leads to coercion,

[115] *Lyng v. Northwest Indian CPA* 485 U.S. 439, 447 (1988).
[116] *Bowen v. Roy* 476 U.S. 693 (1986), quoted in *Lyng v. Northwest Indian CPA* 485 U.S. 439, 448-449.
[117] *Lyng v. Northwest CPA* 485 U.S. 439, 450-451 (1988).
[118] *Lyng v. Northwest CPA* 485 U.S. 439, 452 (1988).
[119] *Lyng v. Northwest CPA* 485 U.S. 439, 454-455 (1988).
[120] *Lyng v. Northwest CPA* 485 U.S. 439, 456 (1988).

but merely as an indirect outcome.[121] Lastly, the majority overruled a proposal by the dissent of a legal test by which the central values of a religion must be examined.

3.3.4 The dissenting opinion of the Supreme Court

The dissenting opinion, written by Justice Brennan, focused on the practical implications of the actions. He, along with his fellow dissenting judges (Justices Marshall and Blackmun), found it astounding that the majority did not see any infringement of constitutional rights, despite the claim by the Native American tribes that the construction would virtually destroy their religious practice. The majority only relied on the 'coercion' and 'penalty' wording of the constitutional clause, and not on the impact the clause is meant to cover, according to judicial review.[122]

The dissent used precedents that addressed constitutional rights to free exercise, wherein laws denied citizens from enjoying their religious practices, or coerced them into abandoning them. Justice Brennan stated that "coercive compulsion [did not] exhaust […] the range of religious burdens recognized under the Free Exercise Clause," and relied on those previous cases to show that impact, not merely coercion, gives way to these rights.[123] Moreover, he emphasized that these precedents observed the impact of a certain law or action, but the majority court in *Lyng* failed to comply with the effect rather than form (of a government's action). Another such distinction was one between decisions that "*compel* affirmative conduct inconsistent with religious belief, and those […] that *prevent* conduct consistent with religious belief."[124]

A further problematic point for the dissent was the comparison between *Lyng* and the other Supreme Court decision, *Roy*. According to Justice Brennan, these cases should be differentiated because the complaint in *Roy* was against the internal procedures of the government, whereas the Forest Service actions in *Lyng* would likely cause "substantial external effects."[125] Moreover, in *Lyng* the plaintiffs' freedom of *exercising* their religion

[121] *Wisconsin v. Yoder* 406 U.S. 205 (1972), referenced in *Lyng*, in which a law was found in violation of Free Exercise rights of Amish parents not to send their children to a public school contrary to Amish beliefs and way of life.
[122] *Lyng v. Northwest Indian CPA* 485 U.S. 439, 459 (1988) (Brennan, J., dissenting).
[123] *Lyng v. Northwest Indian CPA* 485 U.S. 439, 466 (1988) (Brennan, J., dissenting).
[124] *Lyng v, Northwest Indian CPA* 485 U.S. 439, 468 (1988) (Brennan, J., dissenting) (emphasis added).
[125] *Lyng v. Northwest Indian CPA* 485 U.S. 439, 470 (1988) (Brennan, J., dissenting).

would be impaired if the road was constructed, as opposed to *Roy*. The American Indian Religious Freedom Act is significant here because it, although not creating any judicially enforceable rights, emphasizes the desire of Congress to protect Native American religions from impairment.[126]

Finally the dissent then proposed a test for accurately ruling on claims of free exercise breaches; the first being on the part of religious adherents and the second the government. Claimants would have to demonstrate that the interest in question is central to their religion and that a decision by the government would pose "a substantial and realistic threat of frustrating their religious practices." If such can be shown, the government would on its hand have to demonstrate an interest in the matter compelling enough to warrant a possible infringement.[127]

3.4 Conclusion

In his dissenting opinion, Justice Brennan noted the problematic nature of the Supreme Court's decision, in that by strictly relying on the wording of the Free Exercise Clause, they in reality threatened to destroy a religious practice. The lower courts had agreed with him but for the majority of the Supreme Court the main argument in *Lyng* was that the government was well in its right to do as it saw fit on its property, as long as it did not actively force the tribes to stop practicing their religion (for example by denying access to the Chimney Rock area. Such a reading of the law is quite narrow, and the first part of this chapter should provide enough context to frame *Lyng* in a larger picture. The United States court system is seeped in a history of colonial relations, and has since the birth of the nation had immense power over the legal status of tribes. One legal case can reverberate for centuries to come, by creating precedents which extend beyond a legal context into the social imagination. Native American tribes have had to fight two fights; one against the legal erosion of their rights and another against the public's image of them and their worldviews. There are inherent differences between Native and world religions, such as the value placed on the land as a spiritual entity against the separation of deity into its own metaphysical sphere. In contemporary United States there should be room for a multitude of religious views, yet as the next chapter will discuss, the courts leave a very small space open for tribal religions.

[126] *Lyng v. Northwest Indian CPA* 485 U.S. 439, 471-472 (1988) (Brennan, J., dissenting).
[127] *Lyng v. Northwest Indian CPA* 485 U.S. 439, 475 (1988) (Brennan, J., dissenting).

Chapter 4 – The judicial treatment of Native American spirituality in *Lyng v. Northwest Indian Cemetery Protective Association*.

The preceding chapter should provide the reader with the historical and legal context necessary to examine the case further. The time has now come to turn to an analysis of the opinion of the court, as written by Justice O'Connor on behalf of the majority. Such a thorough analysis of the ruling is imperative in order to emphasize the importance of *Lyng*. This chapter will therefore shed light on the Supreme Court as a legal arena, in which constructions of indigeneity, language, difference and sacredness play vital parts. Such an analysis will open up for the placement of *Lyng* in a larger Federal Indian Law context, as well in within the framework of a postcolonial understanding of contemporary legal culture.

4.1 The meeting of the indigenous and the law

4.1.1. Native Americans in a postcolonial United States

Native Americans are all citizens of the United States. As such, they take part in the same society and are expected to abide by its laws. When appearing in a courtroom, actors enter with certain expectations and rules in mind. The legal language and procedures are firmly established in the American system, built up over two hundred years of practice. Although the United States is no longer a colonial power, the foundations of its law came into being during a period of time dominated by colonial ideas and beliefs. As such, it is difficult to speak of a U.S. society of postcoloniality, as if the multicultural norm of today is eroding away any influences of the past.[128] Moreover, some groups in the country will find themselves benefiting from the country's heritage while others will see that their past legal selves still influence the system today. In a settler state such as the United States it is possible to discuss postcoloniality from own experiences when discussing the former U.S. colonies overseas. However, there lies a greater challenge in calling the nation postcolonial domestically, since Native Americans continue to live under the rule of their conquerors. For *them* there has been no break from colonial dominance towards self-determination. Native Americans have not

[128] Schwartz (2000), 9.

been able to form their own government. Although federally recognized tribes have jurisdiction on their own territories, these are not fully independent from U.S. authority, and are as such not comparable to that of sovereign nations.[129]

This complex contemporary situation provides us with some difficult questions on indigeneity and law in a postcolonial world. The term postcolonial does not denote an easy division between before and after colonial powers were present in a country. For Native Americans, who have been subject to a form of internal colonialism, the concept is even murkier. Navigating a new form of legality, hopefully independent of a European supremacy, has been challenging enough for former colonies without *any* foreign power elite ruling the nation.[130] The internal nature of colonialism in a settler nation enables non-indigenous authority by upholding the source of it as integral to the survival of the nation-state. It stands in contrast to the decolonization efforts of, for instance, India, where the legal system has been subject to changes, away from British customs.[131] The indigenous status of Native Americans in a settler nation provides a different reality. Any amendments to the judiciary system must be fought for within the framework of an Anglo-American legal culture that has never gone through a "post" phase. Laws have been added, definitions widened, and procedures expanded, but Native Americans (and other indigenous peoples) are continuously forced into the legal space of the colonial oppressor. *Lyng*, although a crucial indigenous issue, was fought over in a non-indigenous courtroom.

It would be necessary to point out that being indigenous is not the sole relevant factor in court proceedings. Although the content matter in *Lyng* addresses experiences of three Native American tribes, claims of constitutional breaches are of importance to all U.S. citizens. The Rehnquist Court relied on principles and previous cases that reached beyond the scope of Native American religious practices to education and federal services.[132] It issued a ruling that set a precedent not only pertaining to Indian Law. Scholar and activist Vine Deloria, Jr. has claimed that the consequences of *Lyng* are such as to render any American subject to its interpretation of the law. One governmental service or another can put limits on citizens who

[129] Getches, Wilkinson, and Williams, Jr. (2005), 6.
[130] Upendra Baxi, "Postcolonial Legality," in *A Companion to Postcolonial Studies*, ed.s Henry Schwartz and Sangeeta Ray (Oxford: Blackwell Publishers, 2000), 541.
[131] Baxi, 2000, 549.
[132] *Lyng v. Northwest Indian CPA* 485 U.S. 439, 450 (1988).

practices a faith, if the religious adherents cannot show that the government is explicitly trying to prohibit their activities.[133]

Nevertheless, to claim that *Lyng* is not of *particular* indigenous importance would be a disservice to the Yurok, Karuk, and Tolowa tribes. For these peoples the issue is not only a principle of constitutional rights but also a fight for the survival of their spiritual world. As such, the Supreme Court case and proceedings become highly relevant for anyone interested in indigenous law. Moreover, it is most constructive to examine the case of *Lyng* through a lens that focuses on the role of the indigenous actor in the courtroom, and the role of the courtroom within a postcolonial frame.[134] The larger part of the legal document issued by the Supreme Court in this instance is centered on dissecting and analyzing the religious views of three Native American tribes in California. Both the majority and dissenting opinions entail evaluations of how the spiritual world is made up and what is of importance in these tribal religions. Moreover, the Supreme Court justices attempt to articulate an understanding and differentiation between Native and Western religions in order to provide logic to their respective judicial opinions. These interpretations place the Native actors in a space wherein the validity of their knowledge of their own religion is dependant upon the analysis of it by nine judges who have all been educated, both academically and socially, in a society resting on colonial foundations.[135] To move beyond colonial structures to a "post" era then becomes a difficult task of presentation and representation, mediated in an Anglo-American court of law.

4.1.2 The Supreme Court's handling of religious rights under the Constitution

The lawyers for the tribes presented their arguments in court with the purpose of relaying the spiritual importance of the Chimney Rock area. That became a more difficult task as the case was brought upwards in the judiciary, from the Federal District Court, via the Ninth Circuit Court of Appeals before it ended up in front of the Supreme Court. For each step in the hierarchy the narrative of the case changed in its scope. The first court spent much time listening to the testimonials of religious practitioners and other witnesses, enabling the telling

[133] Deloria, Jr., quoted in Gooding, 1996, 169.
[134] See, for instance, Jennifer A. Hamilton, *Indigeneity in the Courtroom – Law, Culture, and the Production of Difference in North American Courts* (New York: Routledge, 2009).
[135] Of course, most Native Americans are active part of the larger U.S. society, yet their place in it is more precarious when their indigenous cultural worlds clash with the views of America.

of a story of the spiritual world, as it existed for the tribes. When the case was brought further up in the system, this specific narrative became less important in favor of a hypothetical discussion on religious rights in general.[136] This was evidenced by the oral argument hearings, where the tribes' lawyer had to spend most of her time answering questions by the Supreme Court justices on any possible activity which might occur in the future and thus disrupt the sacred area.[137] Moreover, the court shifted its focus from the claims of the tribes to infringement, to a defense of the government.

It is also worth noting the procedures involved when ruling on a case based on a writ of certiorari. As Brown points out, "it is a well-settled rule of federal procedure that the Court would not disturb findings of facts agreed upon by both the District Court and the Court of Appeals unless those findings were clearly erroneous."[138] The case had been brought on the account of the merits, as in whether the ruling was right or wrong. Consequently, the factual findings by the lower courts should have prevailed, and the argument that the government could not show a compelling interest for the road construction should have stood its ground. As it were, they were not taken into consideration at all. O'Connor wrote that the government was vested with the power to use their own land as they see fit.[139] Moreover, she employed language that hinted at her disbelief in the grave nature of the burden placed before the court. "Even if we assume that we should accept the Ninth Circuit's prediction […]." Such a statement reveals a doubt of the validity of the evidence, which as stated above, and by the dissent as well, goes against the rules of court procedure.[140]

The main argument of the Supreme Court majority was that there exists no constitutional protection for religious activities in which the adherents are neither penalized for their exercise nor prohibited or coerced from it.[141] According to the court, the Constitution only protects a person's religious activity on two accounts. The first being if he or she is affirmatively coerced into acting contrary to his or her religious beliefs. In *Wisconsin v. Yoder*, the Supreme Court struck down a compulsory law on that account. There, Amish

[136] Carpenter and Bowers, 2011, 516.
[137] "Oral Argument Transcript," available from *The Oyez Project*, Lyng v. Northwest Indian CPA 485 U.S. 439 (1988), http://www.oyez.org/cases/1980-1989/1987/1987_86_1013/argument (accessed March 21, 2012).
[138] Brown, 1999, 152.
[139] *Lyng v. Northwest Indian CPA* 485 U.S. 439, 453 (1988).
[140] *Lyng v. Northwest Indian CPA* 485 U.S. 439, 451, Footnote 3 (1988).
[141] *Lyng v. Northwest Indian CPA* 485 U.S. 439, 450 (1988).

parents were forced to send their children to a school contrary to their religious beliefs of not exposing children beyond a certain age to values not consistent with the Amish.[142] The second form of constitutional protection is accorded to individuals who are penalized if they choose to follow their faith. As precedent for this principle, the court pointed to their decision in *Sherbert v. Verner*, where a person was denied unemployment benefits because she refused to work on the Sabbath.[143]

In *Lyng,* on the other hand, the proposed road construction would not actively prohibit the tribal members from traveling into their sacred High Country and perform their rites there, nor would they be denied any benefits if they were to continue their practices. Therefore, the First Amendment did not apply as it had done in the previous cases mentioned above, and others in the opinion by the court.[144] Upon reflection, by following these principles the court seemed to be perfectly aligned with its own precedents. However, numerous commentaries suggest that the opinion is a disruption in the legal development of religious rights cases and moreover shows a total lack of understanding indigenous spiritualities and beliefs.[145]

4.1.3 Providing context to a legal decision: the anomalous yet significant status of *Lyng* in the American legal narrative

From a law perspective, *Lyng* came about as a result of two lines of previous cases merging their contents together. Claims of infringement upon religious freedom had been brought up to the Supreme Court before (as in the instances above). However, Native Americans had per 1987 never won a Supreme Court case in which a religious practice or sacred site was in danger of destruction.[146] The various lower courts hearing these cases found that none could establish a sufficient burden on their religious activities, nor that the activity in question was central to the continuance of the religion itself. However, with the district court predecessor to *Lyng* the Yurok, Karuk, and Tolowa (and their joining litigants) were able to demonstrate to a federal court that the road construction in the Chimney Rock area would place a too heavy burden on their religion. The District Court of California put the compelling interest standard

[142] DeLashmet (1989), 84.
[143] *Lyng v. Northwest Indian CPA* 485 U.S. 439, 450 (1988).
[144] See list of cases mentioned at *Lyng*, 450.
[145] See, for instance: Getches, Wilkinson, and Williams, Jr. (2005), 748-756; Deloria, Jr. (2011), 2-8; Wilkins (1992), 56-57.
[146] DeLashmet (1989), 85 (see footnote 64 for list of cases).

to the test but could not either see that the government had interests in the matter which outweighed those of the tribes.[147]

It appeared that there finally was a standard in place for measuring protection of religious rights in court. Five years after this entered the legal system, however, the Supreme Court went against their previous rulings in a move lambasted by critics from several disciplines. Religious scholar Brian Edward Brown stated in his book on Native religions in the legal field: "the Supreme Court's departure form the standard it should have applied to the case is egregious." Moreover, he claimed that the court behaved irresponsibly and decided the case on a "shameful absurdity."[148] Legal scholar Kent Greenawalt noted that the compelling interest test had been the norm up until the late 1980's but that the Supreme Court then went on to abandon its own standards by extensively narrowing the reading of the Free Exercise Clause.[149] Native activist and scholar Vine Deloria Jr. claimed the decision had created "a major crisis in Indian Country."[150]

One the one hand, there is nothing new or shocking about a decision from the judiciary that creates controversy. Such is the nature of the common law system in the United States, as an always-developing force. On the other hand, the history of Federal Indian Law uncovers the inherent power in a legal precedent. As discussed in the previous chapter, the Marshall Trilogy of cases in the early nineteenth century is still employed by U.S. courts today.[151] Although Chief Justice Marshall sought avoid language and logic that could be used for extreme measures, his decisions have been used as impetus for denying Native Americans legal rights over their lands.[152] These founding cases highlight the power of the written language in a legal narrative. Marshall's phrase "ward to a guardian" on describing the relationship between the tribes and the government has become one of the pillars of Indian law.

Lyng is of relatively young age. Nevertheless, the logic employed by the Supreme Court in this instance holds immense potential. From the court's perspective, the issue of the sacred

[147] DeLashmet (1989), 81-82.
[148] Brown (1999), 151-152.
[149] Greenawalt (2004)146.
[150] Deloria, Jr. (2011), 8.
[151] Perry (2002), 136.
[152] Getches, Wilkinson, and Williams, Jr., 2005, 110.

High Country is not about religious survival or indigenous struggles but about the First Amendment of the Constitution and the rights of the government. These might be two sides of the same coin but the context is quite different from one to another. As a judicial decision, *Lyng* carries its own logic. From a purely legal standpoint it offers a distinct reading of the law. However, if one provides context on the role of a legal decision in law in general, and Federal Indian Law in particular, it opens up the narrative to reveal a court with a distinct position. Thus it becomes important to ask why the case is constructed the way it is and bring in the discussion raised above on the relevance of indigeneity in a courtroom. By doing so, some neutral truths become exposed for the culturally situated opinions that they are, seeped in colonial knowledge production and authoritative placement.

4.2 Indigeneity and the court

4.2.1 Representations of difference in a legal space

One of the main points of contention in *Lyng* is the simple fact that the tribes sought to find legal protection for a religion that is not only different from other cases reviewed by the court, or the religious beliefs of the judiciaries themselves, but also new to the Supreme Court itself. These complex preconditions required the tribes, and their lawyers, to fashion an understanding to the court of what religion "is" to the Yurok, Karuk, and Tolowa. They spent much time emphasizing the spiritual qualities of High Country both as a sacred place itself and as a physical location for sacred happenings. As described in the previous chapter, this area in the mountains always has been, and continues to be, attended by medicine women, tribal elders, individuals seeking prayer, and communities as a whole when they gather there for ceremonies.[153] In testimonies when the *Lyng* was still at the district level,[154] tribal members told stories from and of that land to the court. Although they spoke of the religious nature of their travels there, they emphasized how crucial the place was to the survival of the community as a whole.[155]

Even though story upon story, or rather page upon page, could be told or written in an attempt at making outsiders understand some of these tribal beliefs, it is an almost impossible task to

[153] Carpenter and Bowers (2011), 502.
[154] Which were brought to the Supreme Court as part of the evidence.
[155] Carpenter and Bowers (2011), 510-511.

create a full picture of complexity and nuances for legal purposes. Contemporary Native experiences in U.S. law hold a great paradox. In order to regain some of the rights they lost during the colonial era, the tribes have to fight for these in a space where they are forced to convert worldviews to fit into an Anglo-American body of knowledge in order to be understood by their colonial masters. Although the "subjugated knowledges" of the Yurok, Karuk, and Tolowa were given a space in the legal discourse, they had to be told on terms dictated by the court. Not only did they have to follow judicial procedures, but also successfully express their spiritual beliefs in a manner that can correspond to a dominant, Judeo-Christian understanding of religion.

In his essay on litigation in cases of religious freedom for Native Americans, Robert Michaelsen points out the difficulties of presenting one's case in court as well as trying to relate the issue at hand in a manner Western-educated jurors will respond and relate to.[156] He refers to a tribal member who testified in front of the District Court on the qualities of the Chimney Rock area (in the lower court proceedings of *Lyng*). The witness compared its religious importance to that of a church, as a sacred place containing spiritual powers. However, Michaelsen notes how even that analogy fails to account for much of the meaning and value of High Country. Although some churches are built on places of spiritual importance, most can be erected anywhere and become sacred because of what they are supposed to contain, whereas most Native sacred sites are holy grounds on their own.[157] The Yurok, Karuk, and Tolowa cannot move the rock formations, plants, or birds there to a more convenient or secluded place.

Such analogies relating one religion to another may be applicable in certain legal cases. However, with sacred lands litigation the divide between cultural understandings of spirituality and religion is greater than a simple metaphor will solve. It is not enough to communicate the worldview of a tribe in terms relatable to that of mainstream America, at least not from a postcolonial perspective. It negates the possibility of achieving one of the project's two cornerstones. While bringing to the table the stories of the colonized, and giving them legitimacy, the masters of the legal space does not allow for their own inherent

[156] Robert S. Michaelsen, " American Indian Religious Freedom Litigation: Promise and Perils," in *Journal of Law and Religion*, no. 47, vol. 3, 1985, http://heinonline.org (accessed Aug 8, 2011).
[157] Michaelsen (1985), 67.

understandings of the world to be deconstructed. It would be presumptuous and fruitless in a U.S. court of law to put forth an argument that the Free Exercise Clause of the Constitution is inherently colonial and biased against tribes. Yet, for Native Americans, a main goal of decolonization is to achieve self-determination.[158] In order to reach this state, the tribes need to regain control over ancestral lands and given the Anglo-American definition of land as property, this needs to be obtained in court. Even a contemporary survey of legal precedents reveals, however, the lack of progressive, decolonized narratives available to aid the tribes.[159] Securing the right to practice ones religion on ancestral land would appear a logical step towards achieving more self-determination, but as discussed throughout this paper, it has proven almost impossible.

U.S. courts are increasingly coming to understand and respect Native cultures and expand the conventions of the court by bringing in oral stories as a form of evidence, for instance.[160] However, a tribe's understanding of the law seem only to go as far as to an interpretation of their own religion, yet not the one established through both common and statutory law. In other words, U.S. law is the product of a colonial heritage and as such, its interpretation of religious rights is influenced by this history. Moreover, it is firmly entrenched in a body of knowledge that has been produced and transmitted for the purpose of upholding the religious hierarchy in the United States, which validates certain faiths and denominations above others.[161] Such a differentiation is part of a long-standing tradition in the country: "the Court's unquestioned reliance on a strategy of difference can be most readily understood in the context of a thousand year legacy of European-derived racist-imperial discourse."[162] This postcolonial reading of American religious constructs reveal the unequal position between the indigenous litigant and the Westernized body of knowledge, as purported by U.S. law. Nevertheless, it is expected of an indigenous actor to appear in this space ready to relate his or her worldview without being able to equally deconstruct the worldview of the court – by extension the interpreters of the law.

[158] Weaver (2000), 223.
[159] Wilkins (1992), 57-58.
[160] See Miller (1998); Carpenter and Bowers (2011).
[161] Gandhi (1998), 44.
[162] Williams, Jr. (1989), 265.

4.2.2 Sacred places and secret sites

The courtroom operates as a space where evidence is of utmost importance. As such, it is the task of the actors to bring as much valuable information to the table in order that a jury or a court can interpret those to their advantage. However, it is highly subjective which facts are brought into this space, and as has already been discussed, how they are presented. For indigenous actors, a courtroom often becomes another challenge between the integrity of their culture and customary claims to legitimacy and full disclosure. Most of the dogmas and doctrines of Christianity, Islam or Judaism, are bodies of knowledge produced for and communicated to a large audience. They pride themselves on their availabilities and consequently abilities to convert non-believers.

For many Native American groups, the religious world is a sacred one, which often also implies a secret one. It can mean that places, ceremonies, artifacts, or stories, must be kept from outsiders and in many cases also members of their own societies (for instance, where the sacred knowledge is held only by a few spiritual practitioners). Moreover, many fear that by revealing information about their religion, a tribe will loose control over this knowledge, and subject it to the interpretation and possible contortion of non-Natives.[163] When members of the Yurok, Karuk, and Tolowa began contemplating bringing the dispute with the Forest Service to court, they were faced with this dilemma. Many of the elders in the tribal communities did not wish to defend the sites in court, as it would mean revealing much of the spiritual attributes of that sacred place. The practitioners had for centuries treated the place with the utmost respect and privacy. The High Country had such value that much of it was only to be spoken of in matters of spirituality.[164] Although Native claimants have brought sacred knowledge into the legal arena many times before, the Yurok, Karok, and Tolowa tribal members knew that they would have to present *their* unique worldview in terms relatable to the lawyers and judges educated in a Western legal discourse.

The testimonial of tribal members as well as the Theodoratus Report pointed to the interconnectedness of Native spirituality and daily life.[165] The rituals of the Yurok, Karok, and Tolowa were performed, although only by a few, to secure the wellbeing of not only the tribe for their own sake but as stewards of the earth. Nevertheless, some of the language used

[163] Kidwell, Noley, and Tinker (2001), 128.
[164] Carpenter and Bowers (2011), 497, 508.
[165] Brown (1999), 129.

by the court hint at a conceptual framework in which Native traditions were merely equated with Judeo-Christian ones, as if they could be easily converted. For example, Justice O'Connor claims that one cannot decide on whether the free exercise right has been violated based on "measuring the effects of a governmental action on a religious objector's spiritual development." Further down she writes that some of the government's actions will possibly be "incompatible with their own search for spiritual fulfillment."[166] These two quotes seem to suggest that the tribes (or tribal members) are suing the government due to some personal preference which does not extend beyond their own, individual development. Although it is a true statement that medicine women and leaders venture into the High Country on their own, the knowledge, wisdom, and medicine they bring back benefits the community. Their calling is not for *personal* proficiency and welfare but for that of the entire tribe (and in extension Mother Earth).[167]

Witnesses and lawyers made an active choice to talk about the sacred qualities of the Chimney Rock area, and along with the Theodoratus Report gave the court a chance to gather as much knowledge of their worldview as possible. Although making an impact on the lower court, these stories were not enough to convince the Supreme Court. Justice O'Connor wrote a majority opinion that reduced the complex sacredness of the High Country down to a matter of individual fulfillment or choice, in order to make it comparable to *Bowen v. Roy*, the other (and for the most part, only) Supreme Court case, where claims of infringement on religious rights were denied. This reduction is a failure on court's part to realize the constraints of their cultural knowledge, wherein the sacred has little emphasis beyond the confines of religious buildings or artifacts.

> "Efforts to construct a notion of sacredness in court as a means of creating legal space appears to be akin to a cultural defense in criminal litigation in that the court must accept premises which are neither shared by the judges' own cultures or the legal sub-culture and thereby stand outside of their values and experiences."[168]

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[166] *Lyng v. Northwest Indian CPA* 485 U.S. 439, 451-452 (1988).
[167] Brown (1999), 122-123.
[168] Bruce G. Miller, "Culture as Cultural Defense: An American Indian Sacred Site in Court," in *American Indian Quarterly*, vol. 22, no. ½ (1998), http://www.jstor.org/stable/1185109 (Accessed Feb 18, 2012), 83.

Of course on can argue that there are physical places in the non-Native world, which are considered holy, such as the River Jordan in Egypt or the city of Mecca. According to Vine Deloria, Jr., they share some sacred qualities with Native places, if we are to make them comparable in any way.[169] However, their sacredness is far removed from what makes the Chimney Rock area sacred to the Northern California tribes. For them, and for other Natives, land is sacred in itself as a living, breathing creature. The High Country is kept sacred by the joint efforts of the community in an ongoing relationship with nature itself. Although there is sacredness in specific geographical locations, "daily life, ritual practice, […] and ideas of origin and World Renewal [incorporate into] a conceptualization of sacredness."[170]

Such a body of knowledge is difficult to make legitimate in a legal space. As the judges must step out of their cultural worldview, they have to understand how something can be sacred but not tangible. Although some places in the Chimney Rock area could be pointed out, many had to be experienced, as only could be done by being a part of the culture. Tribes such as those in *Lyng* (but also all over North America) are forced to place a hierarchy on the sacredness of a place, with geographical markers at the top. Connecting sacred qualities to sounds or aesthetics must be subordinated in favor of markers that are recognizable to a Western worldview.[171] The Forest Service relied on this construct by planning to build a road removed from the "most" sacred places. The Supreme Court accepted this claim as a valid accommodation of the tribes, and lauded the agency for circumventing those areas where specific rites were preformed, thus negating the full picture of what constitutes a sacred place to Native Americans.[172]

4.3 The arguments of the Supreme Court majority

After the Supreme Court case was decided, a Yurok tribal leader said that the justices "must not have understood, because if they did how could they have allowed an ancient religion to be completely destroyed just to permit the construction of a road?"[173] Justice Brennan, who dissented, other tribal activists, legal scholars and academics from other disciplines, all shared

[169] Deloria, Jr. (2011), 4.
[170] Theodoratus Report, cited in Brown (1999), 157.
[171] Miller (1998), 84-85.
[172] *Lyng v. Northwest Indian CPA* 485 U.S. 439, 454 (1988).
[173] Carpenter and Bowers (2011), 526.

this view. To them, it appeared that the court had failed to interpret the law within a framework where Native religious beliefs are equal and valid to those of themselves and the majority population. It is difficult to see how the amounting evidence from both indigenous and non-indigenous alike portraying Chimney Rock and the surrounding area as most central to religious activity and vitality failed to convince the court. According to the majority of the justices, however, differing worldviews and forms of knowledge had little to do with the outcome. They saw the tribes' claim as a possible abuse of the Constitution and of what it protects U.S. citizens from.

In the written opinion, the Supreme Court called the effects of the road construction on tribal religions "incidental," and further stated that it was not the intention of the Forest Service to penalize the tribes because the government was only using its own property as it sees fit. But what the majority call a side effect, others have called biased and discriminatory.[174] In *Wisconsin v. Yoder* it was established that a public law on school attendance interfered with Amish religion and therefore their way of life. In that decision it appears the court was able to comprehend that for the Amish, religion is not separated from other spheres of life, such as education.[175] A similar understanding of Native religions was not presented in *Lyng*.

4.3.1 Internal versus external

This emphasis on a "private person's ability to pursue spiritual fulfillment according to their own religious beliefs" is given weight by the Supreme Court through their decision in *Bowen v. Roy*. The issue at hand in that suit was whether the governmental policy of Social Security numbers interfered with free exercise rights of a girl, whose father claimed the registering of her robbed her of her spirit.[176] The majority and dissent in *Lyng* disagreed on whether these two cases could be meaningfully differentiated from each other, with the former claiming them to be similar on the account of the action interfering with "internal affairs" of the government. Moreover, O'Connor wrote that it was not possible for the court to evaluate the effects of either against the other. On the other hand, it is difficult to argue that construction

[174] Deloria, Jr. (2011), 8; Wilkins (1989), 56.
[175] Richard M. Carson, "The Free Exercise of Native American Religions on Public Lands: The Development of and Outlook for Protection under the Free Exercise Clause of the First Amendment," in *Public Land Law Review*, vol. 11, 1990, http://heinonline.org (accessed April 15, 2012).
[176] *Bowen v. Roy* 476 U.S. 693 (1986), referenced in *Lyng v. Northwest Indian CPA* 485 U.S. 439, 449 (1988).

of a road through traditional lands of at least three tribes, whose religious activities are dependent upon that area, can be labeled an "internal affair" of the government. One only has to point to the proceedings prior to the case entering the judicial system. The Forest Service went through numerous steps to voice public opinion about the project and how it would affect the area. As DeLashment mentions, this shows the very *external* nature of the project.[177]

According to the Supreme Court, the Forest Service in fact showed great "solicitude" in calling for the environmental impact study, and upon choosing not to adhere to its recommendation at least picked the route least invasive to the tribes. This effort, along with sufficient adherence to the principles laid out by the American Indian Religious Freedom Act, was enough to warrant commendation by the court.[178] Of course, the act does not have any statutory force, but the court makes almost an outright mockery of its intent. It is difficult to see how the tribes' "inherent right of freedom to believe, express, and exercise the traditional religions" were accorded with, which brings us back to another point of difference between *Roy* and *Lyng*.

4.3.2 The individual versus the group

The claimant in *Roy* would not loose his ability to practice or express his (and his daughter's) religion, rather damage the spiritual development of the child. Although the court in *Lyng* employed language categorizing the infringement as one on an individual's *personal development*, the burden this road would place on the women and men of the three tribes stretches much further than the personal spiritual development of the practitioners. The spirituality of the daughter in *Roy* was not crucial to the survival of the Abenaki Tribe, of which the father was descendent from.[179] The distinction here between the religious rights of the individual versus the group seems thus to have been overlooked, as the comparison between the two cases dismisses the importance of the group as a religious entity among indigenous communities.

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[177] DeLashment (1989), 92.
[178] *Lyng v. Northwest Indian CPA* 485 U.S. 439, 454 (1988).
[179] Carpenter and Bowers points out that the tribal affinity of the plaintiff in *Roy* was murky, and that among the Abenaki there was little to suggest they were actually against the use of Social Security numbers (2011, 518).

Much of the language from *Roy* was used in the court opinion to give weight to their argument, but the reliance on individual claims does not cover the extent of religious complexity of the Yurok, Karok, and Tolowa. Although the tribes value the individual contributions of medicine men and women, these are made within the context of a community.[180] As such, the language of the court exposes the Judeo-Christian constructs of religion in which the individual's relationship with a deity is crucial, yet shaped by dogma and written words that are easy to cite evidence from. In the case of *Roy*, the court seemed to fear that if they ruled in favor of the plaintiff, there was no limit to the kinds of personal religious preferences the government would have to adhere to in future suits. Moreover, in their brief for *Lyng,* the government acted as if the spiritual importance, and long history, of the High Country could be equated with the father in *Roy*'s "sudden" awakening to his daughter's spiritual danger.[181]

4.3.3 Language of the court as a source of power

The affirmations of AIFRA to promote Native religions fell short in front of the court's discourse of power and property. Through the eyes of the Rehnquist court, the protection of this sacred site was a dangerous move. Firstly, it would open up the legal process for countless religious claims in the future from groups seeking to "exclude all human activity but their own from sacred areas of the public lands." Secondly, it would divest the government "of its right to use what is, after all, its land."[182] Both these claims place the affront on the indigenous litigants, and turns around their effort to protect themselves *from* infringement to an effort to infringe *upon* the government as well as others who might have an interest in the area. By portraying the American Indians as greedy or demanding, in "requiring de facto beneficial ownership" it becomes easier for the court to base its reasoning on a public interest, as if that really were the case.

However, numerous non-indigenous groups joined the Indian plaintiffs in the suit, as well as the state of California, comprising a diverse collection of interests all united for the protection of the area *from* development. Moreover, the collective nature of the suit negates the majority's claim that the road was an affront to the personal development of a few

[180] Staiger Gooding (1996), 173.
[181] Carpenter and Bowers (2011), 519.
[182] *Lyng v. Northwest Indian CPA* 485 U.S. 439, 453 (1988).

individuals. The public interest claim is more a theoretical aspect than an empiric one, as evidenced by the oral arguments. The representative for the Northwest Indian Cemetery Protective Association had to spend most of her testimony answering hypothetical questions from the Supreme Court justices. She defended that the tribes sought protection against the road construction specifically, and not against all foreseeable or unforeseeable future disruptions. Still, the justices asked numerous questions about a variety of activities, which theoretically could impair the religious activities of the tribes. Moreover, they seemed intent on equating this form of protection as a "set-aside" as if the issue at hand was whether all activities in the area should be banned (probably violating the Establishment Clause).[183]

4.3.4 Land as property, land as culture

As mentioned elsewhere, the majority put much emphasis on the ownership claim. Some scholars, such as Vine Deloria, Jr., have argued that this reasoning moves *Lyng* beyond the legal discourse of indigenous rights and into a more general American discussion of property. To some extent that is true, in that by denying citizens religious protections of public lands, the court signaled the authority of the government against the public.[184] Nevertheless, it is difficult to discuss property and indigenous rights without connecting the two. As pointed out previously, the religious beliefs of Native Americans are often tied to place, and place as a physical, empiric reality. There are few places in the Judeo-Christian religions that are considered sacred or holy. But these can be easily separated from the non-sacred.[185] Generally speaking, the world religion put more emphasis on the abstract, metaphysical composition of their spirituality.

To speak in generalized terms, the religious connection of tribes to place is in contrast with the Euro-American separation of church and state, of the religious and secular spheres, and of property and culture. The First Amendment of the Constitution should ensure that these differences are not the cause of unequal treatment, yet as the historical recounting of Native American spirituality showed, this has not been the case. However, for the *Lyng* majority it seemed enough to circumvent this inherent disadvantage by clinging to the property card. As such, the court could hide behind the rules of law in order to distance themselves from the

[183] "Oral Argument Transcript," *Lyng v. Northwest Indian CPA* 485 U.S. 439 (1988).
[184] Deloria, Jr., quoted in Gooding (1996), 168-169.
[185] Deloria, Jr. (2011), 4-5.

reality in front of them. Carson notes how proper management of federal lands is crucial to the economic welfare of the United States and as such gives the federal government a mandate in ensuring this.[186] However, to use this as an argument in the particular instance of *Lyng* falls flat, since the Federal District Court had already ruled that the Forest Service had failed to demonstrate a compelling interest in the area which would surmount to ensuring this aspect of the federal responsibility.[187]

Empirically speaking, the Yurok, Karuk, and Tolowa have a different relationship with the High Country than the government does. The attorney for the tribes also points out in her oral argument that the tribes have performed their rituals in the High Country "long before the Federal Government even came into existence," a statement that was promptly ignored by the justices.[188] The Chimney Rock area is legally speaking government land, and therefore subject to its authority. However, historically and culturally, it has been and continues to be permeated by indigenous presence and activity. Such is the case with traditional lands all over the country. It seems impossible to engage in a discourse on indigenous rights and accept the authority of European-derived property rights as the only rightful ones. The U.S. government's land ownership is based on the subjugation of its indigenous peoples, and it is therefore not surprising to see the Supreme Court almost ignore this historical relationship in favor of defending its property rights.

It does not take much deconstruction to see that such a attitude reveals the colonial heritage of the courts' authority. Moreover, it points to the denial of it by those charged with upholding this narrative as (if not the only one) the main one. But to affirm and entrench the colonial foundation of the legal system is to deny the history of Native American subjugation. Justice O'Connor claims to take into consideration "the sympathy we must all feel for the plight of the Indian respondents," yet with this statement makes the situation appear as something of the past, to be pitied, not rectified.[189] She is addressing indigenous concerns as if they are past the point of contention. Yet in settler nations such as the U.S. it is difficult to label any contemporary reality with a "post" mark.[190] One can surely trace changes in government attitudes towards Native American concerns but as outlined in chapter two, these tend to

[186] Carson (1990), 193.
[187] Brown (1999), 133-135.
[188] Oral Argument Transcript.
[189] *Lyng v. Northwest Indian CPA* 485 U.S. 439, 456 (1988).
[190] Johnston and Lawson (2000), 366-367.

swing from one end of the political spectra to another. There has been no clean break with colonialism and a refusal to admit this then continues to subjugate the worldviews of the indigenous population.

The differentiation between different forms of knowledge is further revealed in the *Lyng* text. As many commentators have pointed out, the majority seemed unwilling to understand tribal religious activities on their own terms.[191] The decision only briefly dwells on the distinctiveness and complexity of the tribal religion but devotes a few lines to general outlines of the activities going on in the forest.[192] In his dissent, Justice Brennan notes that it is problematic how little time the majority spends on discussing the nature of the tribal religions. Moreover he emphasizes how important it is to understand them in order to create an accurate analysis.[193] This lack of comprehension, and of willingness to looking into other worldviews without having to resort to general and imprecise analogies, becomes the manifestation of the court's continuous subjugation of the knowledges of the Other. *Lyng* provides us with some compelling empirical evidence of the court's bias against non-Western religions, which importance for deconstructing and decolonizing the American legal landscape will be discussed more in the next chapter.

4.3.5 The Supreme Court's failure to protect a tribal religion from destruction

Per the *Lyng* majority opinion, the court's reading of the Constitution and thus applied in this instance was well within the boundaries of this legal interpretation. Yet, most opponents of the ruling claim the case as a departure from previous principles by choosing an incredibly narrow and formalistic reading of the founding document. The majority relied on distinguishing *Lyng* from its predecessors via a separation "between governmental actions that compel affirmative conduct inconsistent with religious belief, and those governmental actions that prevent conduct consistent with religious belief."[194] According to the text of the majority, the road in question would *interfere* with the tribes' ability to practice their religion. However, the tribes presented evidence to demonstrate that the future vitality of their religious world would be destroyed should this road be built and the High Country interfered with. These findings were claimed to be sufficient burdens of proof by the District Court and the

[191] Deloria, Jr. (2011); Carpenter and Bowers (2011); Brown (1999).
[192] *Lyng v. Northwest Indian CPA* 485 U.S. 439, 448 (1988).
[193] *Lyng v. Northwest Indian CPA* 485 U.S. 439, 459 (1988) (Brennan, J., dissenting).
[194] *Lyng v. Northwest Indian CPA* 485 U.S. 439, 468 (1988) (Brennan, J., dissenting).

Circuit Court of Appeals, yet the majority of the Supreme Court found that "the Constitution simply does not provide a principle that could justify upholding respondents' legal claims."[195]

The court claims to abandon any test of centrality as a means to evaluate whether the spiritual practices of the tribes are in sufficient dangers. According to Justice O'Connor it would bestow upon the court the task of possibly deciding that the religious practitioners have misunderstood their own religion and which aspects of it are most vital.[196] More so, the oft differences between the worldviews of Native Americans religions and Judeo-Christian makes it even harder for the court to evaluate such claims.[197] Despite this seemingly noble statement it is hard to believe that in its deliberation the court did not make any judgment on the importance of the Chimney Rock area to the Yurok, Karuk, and Tolowa. Abandoning the centrality test appears in reality more as an effort to draw attention to the point, which, according to their reasoning, is prevailing in this matter – that the tribes were not forced or prohibited from exercising their religious faith. Yet, as Justice Brennan writes in his dissent, the court has never contended that the range of religious protection falls to such a narrow category.[198]

4.4 Conclusion

This narrow and heavily biased reading of the Constitution, the Free Exercise Clause, and the property values of the legal discourse, however, stood its ground. *Lyng* as a singular Supreme Court case is an interesting piece of law in itself. This chapter has focused on the many aspects of the decision in which the majority justices failed to comprehend the complexity and uniqueness of tribal knowledge as a narrative on its own. The tribes subjugated themselves to a space in which they have historically been at a great disadvantage in the hopes of moving the indigenous rights discourse forward. However, the court's reliance on difference (but unequal), property rights, and imprecise readings of legal precedents, reveals both the authority their worldview holds and the colonial advantages the U.S. legal system still benefits from. From focusing on the structures within *Lyng* as one example, we will now turn to a discussion of the longer lines in Federal Indian Law. Moreover, the next chapter will

[195] *Lyng v. Northwest Indian CPA* 485 U.S. 439, 452 (1988).
[196] *Lyng v. Northwest Indian CPA* 485 U.S. 439, 457 (1988).
[197] Greenawalt, 1990, 193.
[198] *Lyng v. Northwest Indian CPA* 485 U.S. 439, 465 (1988) (Brennan, J., dissenting).

analyze the aftermath of the decision and what it implies for the future of Native North America.

Chapter 5 – Religious rights after *Lyng*; Native American agency in a postcolonial United States.

This last chapter of analysis will bring the 1988 Supreme Court decision into the last decades. Despite being over 25 years old it is still a topic of discussion among scholars and Native American activists. It is interesting to look at how the *Lyng* decision continues to shape the landscape of religious rights for the indigenous peoples of the Untied States. However, there have been many developments in other areas, and most of them instigated by the peoples themselves. This chapter will therefore focus on the kinds of active participation and agency the *Lyng* decision spurred. At the same time it is vital that the context of this case is brought to light so as to examine the contemporary narrative of Federal Indian Law against its colonial history. Finally, the role of a postcolonial narrative in law will be highlighted in an effort to analyze whether the move away from courtroom landscapes is beneficiary for the Indian Nations in the end.

5.1 The aftermath of Lyng v. Northwest Indian CPA

Reflecting on the Supreme Court case, Abby Abinanti, the Chief Judge of the Yurok Tribe, said, "*Lyng* was a complete moral and legal disregard of religious freedom. The decision was wrong then and it continues to be wrong."[199] Standing Rock Sioux historian Vine Deloria claimed, "today a major crisis exists in Indian country because of the Lyng decision."[200] These Native activists and scholars were joined by numerous others in crying out their outrage of the Supreme Court, but there was more to follow.

5.1.1. The defeat of Congressional protection of Native rights

The Yurok, Karuk, and Tolowa, along with many other tribes and Native activists had hoped that *Lyng* would become a bench mark standard for protection of Native spirituality and sacred sites. Instead, the Supreme Court relied on Judeo-Christian notions of religion and wrote a majority opinion that firmly entrenched the issue in Western ideas on the relationship

[199] Abinanti, quoted in Carpenter and Bowers, 2011, 532.
[200] Deloria Jr., 2011, 8.

between the individual, the government, and the sacred realm. Although indigenous religions have been a part of the American legal discourse since the birth of the nation, governmental protection of their rights is of very recent origin. Up until the twentieth century, tribal religions were seen as a danger to the civilizing mission of the Indian.[201] Official citizenship was not even extended to all Native Americans until 1924. As mentioned in previous chapter, it was not until the Natives' own rights movement in the 1960's and 70's that something started to happen on the federal level. The American Indian Religious Freedom Act of 1978 signaled the government's willingness to accept, accommodate and protect tribal religions. Many tribes hoped that *Lyng* could provide the judicial equivalent of an affirmation so desperately needed. Instead, it turned the developments upside down and brought the legislative branch with it.

The Supreme Court denounced the act as having any legal force. From the outset, this was not the intention of the act yet there was still an outcry when the *Lyng* decision came out. Justice Brennan wrote in his dissent that: "[in the act] Congress expressly recognized the adverse impact land use decisions and other governmental actions frequently have on the site-specific religious practices of Native Americans." Moreover, the act was created to protect "the freedom to believe, express, and exercise a religion."[202] Suzan Shown Harjo, a Muscogee-Cheyenne writer, was heavily involved with both protests and Native American activism and lobbying in the 1970's.[203] She sat in when the House of Representatives voted on AIFRA. After hard negotiations, the act became a "policy statement. It would be a context for and would set in motion a procedure for subsequent substantive law."[204] In Indian Country there was hope that sacred sites and ceremonies would gain notice and protection with this Congressional measure. The Supreme Court's decision in *Lyng* crushed any wish of that, and even led to federal agencies abandoning the policies set out by the act. Harjo remembers how people thought there might be something substantial about AIFRA after all, but "the Supreme

[201] Wilkins (1992), 49.
[202] *Lyng v. Northwest Indian CPA* 485 U.S. 439, 471-472 (1988) (quoting AIFRA, 42 U.S.C. § 1996) (Brennan, J., dissenting).
[203] Suzan Shown Harjo, "Keynote Address: The American Religious Freedom Act: Looking Back and Looking Forward," in *Wicazo Sa Review*, vol. 19, no. 2, Autumn 2004, http://jstor.org/stable/1409504 (Accessed May 9, 2012).
[204] Harjo (2004), 148.

Court gave the Forest Service exactly what they wanted and exactly what they had set up, and that was our defeat in the *Lyng* case."[205]

5.1.2 Another judicial rejection of religious freedom

More than crushing the American Indian Religious Freedom Act, the Supreme Court in *Lyng* set a barrier for constitutional protection of sacred sites that was almost impossible to surmount. It dealt a further blow to religious freedom for Native Americans two years later, when the court voted against two Native respondents in *Employment Division, Department of Human Resources of Oregon v. Smith* (hereafter *Smith*).[206] The two men had been fired from their jobs for ingesting peyote during ceremonies in the Native American Church, as part of a sacrament. However, the Employment Division of Oregon denied them unemployment, because of their "misconduct" at work (a private drug rehabilitation center), which violated the criminal code of the state. The Native respondents sought an exemption from this code and claimed that the law violated their First Amendment rights to free exercise of religion. The case was brought up through the system and reached the Supreme Court, which sided with the state of Oregon.[207]

The decision stands out for "dramatically [departing] from well-settled First Amendment jurisprudence," according to O'Connor (the Supreme Court justice who handed down the *Lyng* decision).[208] The majority disregarded finding any persuasive interest for the state to deny the two practitioners unemployment rights and moreover found it unsound to use this compelling interest test at all. If a law is valid, there is no need for any exemptions based on religious freedom. Thus, Justice Scalia, writing the majority opinion, abandoned much of the free exercise doctrine previously used by the court and rather claimed that minorities seeking protection of their religious practices should take make their claims political rather than judicial.[209] As the majority claimed similarly in *Lyng* two years before, the unlawfulness of

[205] Harjo (2004), 149-150.
[206] Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876.
[207] Rebekah J. French, "Free Exercise of Religion on the Public Lands," in *Public Land Law Review*, vol. 11, 1990, http://heinonline.org (Accessed April 15, 2012), 208.
[208] *Smith* 495 U.S. 872, 891 (1990).
[209] *Smith* 495 U.S. 872, 890 (1990).

peyote use, and its resulting events in this case, were merely incidental effects not covered by the First Amendment.[210]

Although the majority in *Smith* claimed to distinguish this matter from others of a religious nature that *would* afford Free Exercise protection, Greenawalt makes an interesting analogy in his article on the Rehnquist Court.[211] He states that the *Smith* decisions fails to protect any central form of worship, regardless of faith, but that the outcome would be different if the faith in question was a majority one. If a law prohibits drinking of alcoholic beverages in general, it would also include wine at a Catholic Mass and still be considered lawful. However, as Greenawalt points out, this is merely a hypothetical, for as soon as such a law would have been enacted, the state legislature would have overridden it in order to protect the Catholic faith. A smaller faith, on the other hand, does not have the same support in the government, and is therefore more vulnerable to laws that *seem* neutral but only affects them (as in the use of peyote).[212]

Smith dealt a devastating blow to indigenous communities, to religious freedom, and to belief in the justice system. Yet, the political mood of the country was such in the early 1990s as to combat these judicial developments. In 1993, Congress passed the Religious Freedom Restoration Act. It specifically reversed the *Smith* decision and reinstated the compelling interest test, for all levels of government.[213] However, the Supreme Court struck down on the act in another (non-Indian) case and denied state and local governments to reinstate the test. Then again, Congress passed amendments to the American Indian Religious Freedom Act in 1994, which prohibited states from penalizing Native Americans who use peyote for religious ceremonies.[214] The push-and-pull between judicial and legislative power thus continues.

For the Native communities, these major upsets forced them to seek rights protection outside of the court. Those among the Yurok, Karuk, and Tolowa tribes who had been involved in the legal process of *Lyng* turned their resources towards educating tribal members (their own as well as from other nations) about the case and the consequences its ruling had for religious

[210] *Smith* 495 U.S. 872, 878 (1990).
[211] Greenawalt (2004).
[212] Greenawalt (2004), 154.
[213] 42 U.S.C. §§ 2000bb to 2000bb-4, quoted in Getches, Wilkinson, and Williams, Jr. (2005), 762.
[214] Getches, Wilkinson, and Williams, Jr. (2005), 763.

freedom and site protection. Two years after the decision, the High Country and surrounding areas became part of the Siskiyou Wilderness Area, which prohibited any form of development. The road was left unfinished.[215]

5.2 Are Native American religions protected by the Constitution?

The decision of the Supreme Court in *Lyng*, and the further defeat in *Smith*, made it almost impossible for Native Americans to seek judicial protection of their religious sites. Despite positive developments in the executive and legislative branches of government, the judicial branch seemed determined to curtail or even diminish the rights of Indian tribes. The Rehnquist Court has been devastating to Indian rights, and in particular to those pertaining to religion.

5.2.1. Historical disadvantages

The *Lyng* decision left the tribes with few clues as to how their religious beliefs were protected by law. According to the Rehnquist Court the government had to create outright obstacles in order for a religious practitioner to claim a breach of their constitutional rights. Such a reading of the First Amendment is quite narrow and according to some, outright discriminatory towards Native religions. By distinguishing between direct and indirect actions, the Supreme Court drew a line wherein Judeo-Christian faiths are protected and tribal ones are not.[216]

United States law is meant to offer equal protection to all citizens yet as has been highlighted by several examples, there is an inherent bias in the courts' readings of statutory and common law (the Constitution and legal precedents). This goes of course beyond *Lyng* as a singular dispute, and if we contextualize the hereditary structures of these beliefs we see how the 1988 Supreme Court brought with it colonial ideas into the contemporary legal space. The bias against tribal religions can be traced back to the Founding Fathers.[217] As discussed elsewhere, colonial beliefs of the Indian have always permeated society and consequently influenced the legal discourse. Native Americans were hardly mentioned in the founding documents. But the

[215] Carpenter and Bowers (2011), 526-527.
[216] Getches, Wilkinson, and Williams, Jr. (2005), 748.
[217] Williams, Jr. (1989), 248-250.

question of religious freedom *was* important in the creation of rules of law in the new American nations, since many of the settlers came to the continent to escape religious persecution. The role of religion in the new society, although separated from other spheres of life, got a central role in the legal construction of rights and principles.

The *Lyng* majority diminished the importance of the tribal religions by presenting them as merely an accumulation of the beliefs of individual practitioners. Such a bias has a long standing in American history, where individualism is a core ideology. The communal strength of Native societies has throughout the country's history been considered a danger to civilization. The Allotment Act of 1887 in its core was an attempt to make individual landowners and cultivators of the Indian.[218] Today we see how that project largely failed and instead created checkerboard reservations, where non-Natives held title to pieces of land in-between. Many tribes are today in the process of buying back all the land lost to non-Natives and thus regain ownership of their ancestral lands.[219] This development is a testament to the agency of Native Americans, acting without little aid from the government. The Rehnquist court displayed their bias against the value of community as owners and practitioners of land and religion. It seems that the only way tribes will gain legal recognition of their communal rights, is if they can aptly be translated into Western ideas of individual ownership over land, and reduced to the mere summation of individual rights.[220]

5.2.2 Conflicting views on the agency of the Rehnquist Court

According to legal scholar Bryan Rose, the theology of the drafters of the founding documents is to blame for the inherent discrimination of Native beliefs.[221] The Constitution was written in such a language as to make it impossible for the courts to interpret it in line with tribal religions. First of all, it emphasized religion as a sphere separate from others, especially in public services. Second, the First Amendment should protect the rights of the individual. A citizen should have freedom of religious belief and opinion. A belief in the communal aspects of spirituality, on the other hand, did not go into the theological discussion,

[218] Getches, Wilkinson, and Williams, Jr. (2005), 141-144.
[219] Getches, Wilkinson, and Williams, Jr. (2005), 187.
[220] Richard Hertz, "Legal Protection for Indigenous Cultures: Sacred Sites and Communal Rights," in *Virginia Law Review*, vol. 79, no. 3 (1993), http://www.jstor.org/stable/1073451 (accessed Feb 18, 2012), 704.
[221] Rose (1999), 104.

nor did it include a worldview where space was not only a metaphysical concept but also a geographical location.[222] As such, the Constitutional amendment does not protect tribal religions because they are completely different from that of the founding fathers, and therefore outside the grasp of the law. According to Rose, this lessens the burden of the Rehnquist court, since "the courts continue to apply doctrines that, because they are derived from the Religion Clauses' traditional Western notions of religious freedom, are inadequate to protect the religious life of Indians."[223]

Such a claim might offer a mediating viewpoint of the Rehnquist Court. It places the agency of the judicial body so entrenched in the institutional structures as to leave little room for oppositional narratives.[224] Their judicial reviews have naturally been influenced by the Constitution and as such are reflections of that original intent. On the other hand, the judiciary is as influenced by social and political structures as any other. The Marshall Trilogy stands out as an example of not only how the law can support a body of knowledge but also determine it. The "savage" Indian of the 1800's was an image conjured up in the public's mind, aided and formed by governmental policies and legal texts. Therefore, U.S. courts are heavily loaded weapons that use the written word as their ammunition. Noted Indian Law scholar, Robert Williams, Jr., claims the legitimate status the written law enjoys in Western societies has given the dominant groups the authority to suppress alternate narratives, including those of Native Americans.[225]

Moreover, the authority of the law has enabled the U.S. government to hold back decolonization efforts by determining the narrative on self-determination for the tribes. Williams makes a comparison between the rights discourse of contemporary Natives and the federal policies of the 1830's, when all the tribes in the East were forcibly removed westwards. Although Chief Justice Marshall had provided some legal texts that validated the legal rights of tribes to govern their land, these were ignored in favor of other documents that supported Removal policies based on their narrative of the uncivilized Indian. This historical

[222] Rose (1999), 129-130.
[223] Rose (1999), 132.
[224] Ortner (2006), 131.
[225] Williams, Jr. (1989), 260.

legacy of opposition to Native American self-determination, or tribalism, continues to permeate law and policy today, according to Williams.[226]

His interpretation of the law as a tool for creating a narrative, places a heavier burden on the Rehnquist Court than Rose would argue. Instead of being directed *by* the Constitution, and its original intent, modern-day courts are using the legal text in order to legitimize their colonial heritage and advantage. A postcolonial reading of this space reveals how the dominant society continuously benefits from the discriminatory principles inherent in the U.S. Constitution. Moreover, by putting this theory to work it opens up the narrative to expose these structures for what they are, culturally constructed bodies of knowledge that negates the legitimacy of colonized people.

5.2.3 The construction of land as property

The Supreme Court's reliance on the property aspect of the Chimney Rock area revealed how *Lyng* was decided on the basis of a culturally situated understanding of land. As is the case in many industrialized nations, land holds value as individual property. The American constructions of land are seeped in a history of colonialism and oppression. Since the Crusades, European thinkers have been gathering texts and ideas to support a worldview in which subjugation of non-Christians is a legitimate pursuit.[227] Conquering the land and converting the heathens went hand in hand during the European takeover of the Americas. The Puritan work-ethic and strict sense of moral informed many of the British colonies, and the foreign (to them) cultures of the North American tribes stood in stark contrast to this paradigm. A battle of culture versus nature entered the Euro-American mindscape, wherein "the wild savage" must be defeated as an obstacle to civilization. Moreover, as discussed above, the "savage" nature of the indigenous population gave the founding fathers reason for excluding them from the legal narrative of the U.S. Constitution.

In the early 1800's, immigrants came to the new nation en masse and spilled over the original boundaries, guided by Manifest Destiny.[228] This slogan became an embodiment of the American obsession with pursuit of territory and conquest. It relayed the important task

[226] Williams, Jr. (1989), 247.
[227] Getches, Wilkinson, and Williams, Jr. (2005), 42.
[228] Getches, Wilkinson, and Williams, Jr. (2005), 93-95.

supposedly given by God, to settle the land, cultivate it, and thus create a divine civilization. It is not a coincidence that this venture happened at the same time as the tribes in the east were forcibly removed from their lands. Nor was it by chance that the Frontier was declared closed in 1890. To most Americans, this event marked the complete settling of the continent, and a narrative of struggle and territorial pursuit came full circle. The West, which permeated the mind of many a settler in the late nineteenth century, was finally "won." This end of the full reach of civilization share its anniversary with the last, yet possibly, most terrible massacre in Native American history. The Wounded Knee Massacre in December of 1890 became a cruel symbol of the end of Indian resistance.[229]

A contemporary narrative of the American land conquest embodies the view of these historical events as steps towards modernization. Although Wounded Knee is taught in history books, its loneliness symbolized the negation of a Native narrative. Such a story reveals that the conquest of America was not a simple matter of military might and the spread of civilization but rather that the official government drove a campaign to eliminate the tribes from their own land and alongside gained legitimacy for their story through the backing of law and official policies.

As such, *Lyng* becomes a modern reincarnation of old narratives. By reducing the complex relationship between the tribes and the land, the Supreme Court was able to single out the two parts of the narrative suited to their logic. First, religion is an individual affair separated from the socializing constructs of a community. Second, the most important quality of a piece of land it's the rights entitled to its owner (in the Western, legal sense of the word). As long as the government is not doing anything to actively punish an individual's religious affairs, it can rely on its title as legal owner of the property to justify any action.[230] Some commentators of *Lyng* argue that the court's reliance on property law was inevitable because it could not escape the number of precedents relying on Anglo-American understandings of land.[231] That may be true but the logic only holds up if you remove all social and cultural contexts from the interpretation of law. As much as a history of colonialism has contributed to a legal narrative,

[229] Richardson (2009), 62.
[230] *Lyng v. Northwest Indian CPA* 485 U.S. 439, 450-451 (1988).
[231] Marcia Yablon, "Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land," in *The Yale Law Journal*, vol. 113, no. 7 (2004), http://jstor.org/stable/4135775 (accessed Oct 12, 2011), 1635.

a contemporary view should be able to stretch in order to accommodate other worldviews, if the integrity of USA as a multicultural nation is to be kept intact.

5.3 Changing the narrative on legal treatment of indigenous religions

5.3.1 Legislative and executive measures to combat the effects of *Lyng*

The Rehnquist Court's interpretation of land and of religious infringement left Native American activists with little hope that the judiciary would abandon their colonial discourse. Both the *Lyng* and *Smith* decisions narrowed the Free Exercise Clause of the First Amendment to such an extent as to render it almost impossible to win any other cases where tribal religions were involved. It has caused many commentators of law to ask about the motives of the judiciary in presiding over Federal Indian Law cases. The Supreme Court has taken on quite a number of them while displaying less than favorable attitudes towards the content matter. Some believe the court has an agenda in securing the rights on non-Natives against tribal sovereignty, which can be seen as a treat towards the nation-state.[232]

Nonetheless, the fight carried on elsewhere. Both individuals and tribal government quickly started gathering activists in order to create legislation to curtail the effects of the court decisions.[233] In 1992, Congress amended the National Historic Preservation Act to include "properties of traditional religious and cultural importance to an Indian tribe" as possible inclusions in the National Register of Historic Places. Furthermore, federal agencies would have to consult with the tribes if they wished to undertake any actions that might interrupt those sacred properties.[234] The Forest Service has also adapted its proceedings following these legislative amendments, even though it was not explicitly directed to do so by the new additions. Regulations have since 2000 been changed to include a special mention of Native Americans, which instructs the Forest Service to identify and consider tribal rights in any planning process.[235]

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[232] David H. Getches, "Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice, and Mainstream Values," in *Minnesota Law Review*, vol. 86 (2001), http://heinonline.org (accessed Feb 29, 2012), 291-297.
[233] Wilkins (1992), 59.
[234] National Historic Preservation Act Amendments of 1992, 16 U.S.C. § 470a (d)(6)(A), quoted in Getches, Wilkins, and Williams, Jr. (2005), 752.
[235] Yablon (2004), 1640-1641.

Such efforts by the agencies *directly* involved with tribal matters and tribal sites signal a departure from the rights frame laid out by the Supreme Court. Moreover, the executive branch of government adopted the same changes towards tribal religions. President Bill Clinton signed an executive order in 1996, which required managers of federally owned land to accommodate tribal religious activities and avoid disrupting the spiritual integrity.[236] Such emphasis by the federal government has led to a closer cooperation between tribes and agencies. The National Park Service, for instance, agreed to close of Devil's Tower in Wyoming from climbers, as they disturb the spiritual qualities and ceremonies held there by several different tribes.[237] Quite recently the Yurok Tribe has partnered with the Western Rivers Conservancy to protect the Lower Klamath River, and restore the wildlife habitat after damages from irrigation and development project. The initiative is an interesting example both of Native activism and local cooperation, and the efforts taken by tribes to restore the ecological sustainability and thus spiritual vitality of their homelands. [238]

5.3.2 The road to self-determination

Much of what is happening between tribes and federal (or state) agencies rely on a voluntarily cooperation. Although the government is taking steps to accommodate the tribes, and thus include their worldview in their discourse, most of the federal legislation only requires that the tribes be consulted on issues pertaining to them. In other words, Native Americans are given the ability to negotiate the scope of the narrative but they are not given the power to establish their own terms. And, since they do not have any legal precedents to support their claims, they are still dependant upon the authority of the government. It might seem that despite the recent changes, "the boundaries of sovereignty for Native peoples remain defines and controlled by the power of the U.S. state."[239]

For many tribes across the country, protection of religious sites continues to confirm old stereotypes and create new enemies. There *are* numerous examples of cooperation between a tribe and government agency, but for every one of those there is another site in danger of

[236] Carpenter and Bowers (2011), 529.
[237] Getches, Wilkins, and Williams, Jr. (2005), 752.
[238] "Blue Creek Salmon Sanctuary and Yurok Tribal Preserve." From *Western Rivers Conservancy*, http://www.westernrivers.org/pages/blueCreek.html (accessed June 8, 2012).
[239] Elizabeth Loeb, "As "Every Schoolboy Knows:" Gender, Land, and Native Title in the United States," in *N.Y.U. Review of Law & Social Change*, vol. 32 (2008), 258.

being destroyed, overrun by tourists or built into a ski-resort.[240] Legislative initiatives and agency cooperation falls flat when the interests of the government or the public seem "compelling" enough to override the religious sanctity of tribal traditions. These issues permeate the narrative on contemporary Native American rights, and echo the Rehnquist court's treatment of tribal spiritualities as less important than other claims. The fight is however vital to both securing and restoring tribal unity and vitality, and as such, is one many Native Americans are willing to take.

5.4 Native American agency and legal theory; reclaiming rights while creating new discourses

5.4.1 Tribal justice system as counterweight

For many tribes the core focus of decolonization should lie with the revitalization of tribal governments and courts. Since the Reorganization Act of 1934, the federal government has supported tribal jurisdiction on the reservation by facilitating and revitalizing traditional forms of government.[241] Native Americans have had their own justice systems since time immemorial, with moral codes, customs, and rules which inform and shape their communities. However, the colonial settling of the continent destroyed many of these practices throughout the nineteenth century. Tribalism was considered a great threat to the Manifest Destiny legacy of the United States, and thought to stand in the way of modernization.[242] Some were outlawed and suppressed, others lost with the annihilation of the tribe. When President Roosevelt initiated his "Indian New Deal" he sought to revitalize those traditions still alive and create new ones for those whom they had been irretrievable.

Despite this resurgence of self-governance, the act has received criticism for adhering to a Westernized model of government, with, for instance, written constitutions. Although it allowed for local variations, the uniform provisions of the outline have critics charging that it was a mere attempt to integrate Native Americans into the mainstream political society.[243] Tribal courts, on the other hand, have been freer in their development or revitalization of traditional forms of justice. As such, they provide some of the most real-live manifestations of

[240] Carpenter and Bowers (2011), 530.
[241] Getches, Wilkinson, and Williams, Jr. (2004), 187-188.
[242] Williams, Jr. (1989), 242-244.
[243] Getches, Wilkinson, and Williams, Jr. (2004), 194-195.

decolonized forms of government.[244]Of course, they must keep their legal structures within the confines of U.S. law but are still able to incorporate many traditional values, such as alternative forms of punishment. Not only are these courts upholding the law, they are also informing new policies entrenched in a tribal worldview, allowing for indigenous knowledge to enter the stage as a relevant and even dominating narrative. Moreover, they are distinct to the specific needs and traditions of a people, such as the Navajo Nations courts, which holds jurisdiction over the entire Navajo Nation, curtailed to the beliefs and practices of its own people.[245]

5.4.2 Should tribes abandon the courts?

Wilkins proposes that the Rehnquist court has acted as an imperial body in relation to Native American issues, by dictating policies as well as upholding them.[246] Although the political climate has changed several times since *Lyng* was decided, there is still reason for Natives to be cautious about which claims they try to settle in court. Certainly, for U.S. tribes the colonial history of Federal Indian Law has made many reluctant to give into the judiciary as an authority on their rights. The failure of the courts to accept the tribal worldviews when hearing religious rights cases such as *Lyng* and *Smith* is destructive to the quest for self-determination. By continuing to rely on a narrow interpretation of land as property, the courts are perpetuating a monolithic view of culture as one "thing" and not a multitude of different beliefs, as should be the norm in a settler nation turned into a multicultural state.

Moreover, the Supreme Court under Rehnquist created legal language that not only denied the tribes religious rights but also excluded them all together. Writing the majority opinion in *Smith*, Justice Scalia suggested that the tribes were better of taking their claims to the political arena.[247] The majority in *Lyng* refused to address the different notions of land ownership and use, and instead clung to property rights as the only valid purpose of the Chimney Rock area. By doing so, Justice Brennan claims the courts denies any responsibility for competing claims and instead choosing to define such a question outside the boundaries of the judiciary.

> "Such an abdication is more than merely indefensible as an institutional matter: by defining respondents' injury as "nonconstitutional," the Court has effectively bestowed on one party to

[244] Getches, Wilkinson, and Williams, Jr. (2004), 414.
[245] Getches, Wilkinson, and Williams, Jr. (2004), 421.
[246] Wilkins (1992), 55-56.
[247] *Smith* 495 U.S. 872, 890 (1990).

> this conflict the unilateral authority to resolve all future disputes in its favor, subject only to the Court's toothless exhortation to be "sensitive" to affected religions." [248]

The other side of the coin is, as some claim, that the move away from the courts is beneficiary for the tribes, since there are branches and agencies of government better equipped at protecting Native American rights, such as sacred sites.[249] The Devils Tower climbing ban case is a well-known example of such a success. However, it does not deny the fact that there are few legally enforceable tools in place for the tribes to use. In Congress there have been made several attempts the past decade to introduce legislation directly aimed at protecting sacred sites, but none have prevailed.[250]

Cooperation is regardless of its perils a valid alternative to judicial protection. Moreover, without undermining the positive developments of tribal courts, it must be pointed out that tribal jurisdiction only goes so far. The plenary power of Congress over the tribes entails a number of areas in which the federal government has authority over relevant issues. As such, the tribes are forced to enter into the federal legal system in cases such as *Lyng*, where federal property is involved. It implies that ultimate authority over the tribes rest not with themselves but the federal government. Consequently, the tribes own quest for self-determination will always be dependant upon the power of their colonizers. One can even go as far as to claim that, "through law and courts, the very granting of "sovereignty" becomes an act of conquest."[251]

As such, Native Americans continue to seek out strategies to avoid more losses. The political climate of the nation will unavoidably inform where they take their claims. A possible strategy is to stay out of the federal courts all together, unless the political will is such as to ensure a positive outcome for tribal claims. According to Oneida Nation member and legal scholar Steven McSloy, tribes should at all costs avoid being "the miner's canary." In other words, they should not subjugate themselves to the court system without the knowledge that

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[248] *Lyng v. Northwest Indian CPA* 485 U.S. 439, 473 (1988) (Brennan, J. dissenting).
[249] Yablon (2004), 1638.
[250] "U.S. Laws and Court Cases Involving Sacred Lands," from *Sacred Land Film Project*, Earth Island Institute, http://www.sacredland.org/home/resources/tools-for-action/ (accessed June 8, 2012).
[251] Loeb (2008), 269.

the government is on their side.[252] They should take learning from *Lyng* and not submit themselves to a Supreme Court (or coal mine, if you will) bent on defending the wording of the Constitution over their religious survival.

As already mentioned, the Yurok, Karuk, and Tolowa religious world is very much a live today. The road was never built and High Country remains a secluded and sacred area, as it has done since time immemorial. To those communities, the outcome of *Lyng* had some positive effects as well. The awakened agency it mustered up among the tribal members extended beyond its conclusion. In 1988, the Yurok formed their own government and included much of their spiritual beliefs and traditions into the constitution. Additionally, it helped revitalize the traditional practices of the three tribal communities and bring back dances and ceremonies to create stronger connections to the land. As such, "the process made the Indian people stronger. Even the highest court in the land could not stop them."[253]

5.5 Conclusion

This final chapter has served the purpose of tying together the events of *Lyng* with further-reaching processes in Federal Indian Law and the development of new policies. It has detailed how it extended backwards by stating that the American Indian Religious Freedom Act had no force in a court of law. It reached beyond by shaping the outcome of *Smith*, another Supreme Court decision denying Native Americans protection to practice their faith. Moreover, *Lyng* regenerated historical processes by which the tribes have been subjugated and oppressed. As such, this one court decision provides a chilling example of the extent of culturally situated knowledge. It also raises the question of whether the Constitution can protect religious freedom for the tribes, or if the interpretation of that by the Rehnquist Court is to blame. Finally, this chapter has focused on some of the most recent developments in indigenous rights in the U.S. today and of their relevance for the agency of tribal activists, as well as the role of decolonization throughout these processes.

[252] Steven Paul McSloy, "The Miner's Canary: A Bird's Eye View of American Indian Law and Its Future," in *New England Law Review*, vol. 37, no. 3, 2003.
[253] Carpenter and Bowers (2011), 527-528.

Chapter 6 - Conclusive remarks and afterthoughts

6.1 The Supreme Court's treatment of Native religions

A case study such as this has its limits. It is merely *one* example in a large and complex field, and as such has its limitation in what it can provide us with in terms of answers. Nevertheless, a legal decision such as this has shown to hold immense authority over an entire narrative. Moreover, it can provide us with valuable information on a much larger scale than the case itself. *Lyng v. Northwest Indian Cemetery Protective Association* is a puzzling case in itself. Without adding any context to the legal issues, the decision by the Supreme Court majority is still noteworthy for its lack of understanding of Native worldviews. Although the Constitution is meant to protect freedom of religion for every citizen, the Rehnquist court had a rather narrow view of the extent of this protection. Justice O'Connor even wrote in the majority opinion that as long as the government did not intend to punish or outlaw a religion, the Constitution could not protect any religious activity.[254]

The court thus found its reasoning, but it is not the form of a threat that makes a government action unlawful, it is the threat itself.[255] The tribes described the threat simple enough. If the Forest Service were to construct a road through the Chimney Rock area, it would destroy the spiritual harmony for the Yurok, Karuk, and Tolowa. Yet the court was able to reject this claim because it was merely an incidental effect of government action on government property. However, this argument revealed much more than its logic. To the tribes, the tribal lawyers, legal scholars, and the dissenting justice, it was clear that most members of the Supreme Court were either unwilling or unable to comprehend the religious complexity of these tribes.

The majority spent some time outlining the facts of the religious traditions connected to the sacred place but focused mostly on the role of the individual practitioner. They neglected to include the communal aspect of Native American religions into their consideration and instead reduced the religious life to individual pursuit. This also enabled them to compare this case to *Bowen v. Roy*, and thus find a precedent to add weight to their argument. On the other

[254] *Lyng v. Northwest Indian CPA* 485 U.S. 439, 450 (1988).
[255] Akins (1989), 603.

hand they stepped away from previous cases that had created tests for deciding on such matters of competing interests, most likely because the lower court had done a too god job of spelling out the strong interest of the tribes and the complete lack of a compelling one of the government. As it were, the Supreme Court placed the sole burden on the tribes and denied them any right to outweigh government interests on government land.

6.2 The colonial structures of indigenous participation in a legal narrative

The argumentation of the court not only revealed a narrow view of the Constitution and an incomplete understanding of tribal religions. Moreover, it exposed the court as an institution, which perpetuates ideas of a colonial origin. The relationship between the indigenous and the conqueror was already visible before the court yet the majority chose to ignore the inherent inequalities present when Native Americans enter the legal discourse. The tribes were forced to subjugate themselves to the authority of a legal body that has had such a longstanding and painful impact on them, both in a legal and social sphere. As such they were again subjecting themselves to the power of the courts to decide the outcome. Moreover, the court would determine whether the knowledge presented by the tribes and their lawyers was legitimate.

The *Lyng* textual information reveals that this was not the case. Although the tribal lawyers and witnesses (from the District Court, which was presented as evidence) attempted to present the religious world of the Yurok, Karuk, and Tolowa with all its complexities yet still make it relatable to the justices, the court seemed uninterested in meeting them halfway. Instead the majority used the tribes' difference as an excuse to "other" them, or make them irrelevant in their exotic behavior. All the different aspects of High Country were lost on the court. The sounds, smells, wildlife, rock formation, paths and trees, the atmosphere, the stories, the revelations, the spirits that inhabited this place were out of the court's grasp of understanding.

This lack of comprehension, whether unwilling or not, still affirms the notion that the Supreme Court was not interested in including the information given to them into their body of knowledge on religion. It is highly likely that had the claim come from Christian or Jewish practitioners the outcome would have changed. The judges and actors would have shared an understanding of what religion means to them, and they would not have to take into consideration that there are different yet as equal ways of interpreting the would around us. This is of course to put things very bluntly, and as far as the individual justices go, we can

know little of their personal preferences beyond the joint opinion written by the majority, via Justice O'Connor. Nevertheless, the court's text did reveal some of the inherent structures embedded in U.S legal narratives.

Moreover, the decision stood out at the time because the political mood of the country was going in quite the opposite direction in regards to Native American rights. The momentum created by the civil right movements in the 1970's and the passing of the American Indian Religious Freedom Act in 1978 were only a few of the markers signaling a positive development for tribal rights. As it were, the *Lyng* decision reminded more of its colonial heritage and its postcolonial future. The tribes saw this opportunity as a chance to finally establish a legal force for protecting Native religions after centuries of oppression. But the court was reluctant to disentangle itself from the subjugating history of indigenous religion.

6.3 The search for Native American agency through postcolonial USA

The destructive force of the *Lyng* decision forces us to ask whether there is a chance of decolonizing the American court system. The field of law is not too often a subject of such studies, at least not by those outside the field of Federal Indian Law or indigenous rights. Nevertheless, or precisely because of this, it becomes important to tackle this problem. To speak of a postcolonial legal narrative in the United States is difficult per se. First of all the country is a settler state and consequently will always exist on a subjugated-subjugator foundation, at least in the foreseeable future. Second, to decolonize an academic discipline or an institutionalized form of knowledge is a difficult task in itself. It becomes almost impossible when those wishing to deconstruct must conform to it in order to be a part of it. In other words, since tribal jurisdiction only extends so far, many Native Americans pursuing legal claims *must* take their case to a federal court and thus subordinate themselves to the rules and authority of the very institution they wish to dismantle.

Events succeeding *Lyng* hint at this paradox. Another attempt was made to establish some form of legal protection of tribal religions a few years after, but *Smith* proved almost equally disheartening. Although the tribes have had a difficult and contentious relationship with the legislative branch of government, and with local authorities, these institutions have for the past decade or two been much more responsive both the political climate and the rising voice of decolonization and indigenous rights. It enabled the tribes to demand and receive

legislation meant at both repairing past wrongs and securing the denial of new ones. From these recent development one can also discern the rising authority of Native agency. It was the Yurok, Karuk, and Tolowa who began protesting the Forest Service, and they remained involved throughout the entire legal process. It was Natives who started lobbying Congress to rectify the wrongs created by the Rehnquist Court. And it is the tribal members, who continue to travel to High Country, dance their renewal dances, fight for the integrity of their ancestral lands, and continue to resist the forces of oppression.

Where does it leave us? Is there room for Native American agency and decolonization in the legal field? Some scholars suggest any decolonization project in the U.S. need to include a reform of the court.[256] It seems that the contemporary federal institution today are reluctant to accept the position Federal Indian Law actually has within a national narrative. The courts cannot simply deny that the United States legal discourse *must* include tribal beliefs, histories and worldviews. But it seems it is up to Native Americans themselves to continue to fight against this system of oppression, and be agents of their own narratives. The continued fight for religious rights, tribal courts, and sacred sites suggests that now more than ever, this indigenous people is trying to break through the colonial structures, originally designed for their destruction, and construct new spaces wherein they, and they alone, are able to create and distribute stories, and consequently shape knowledges entirely of their own authority.

[256] Getches (2001), 358.

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