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THE CLASH OF STORIES AT CHIMNEY ROCK: A NARRATIVE APPROACH TO CULTURAL CONFLICT OVER NATIVE AMERICAN SACRED SITES ON PUBLIC LAND

Howard J. Vogel*

I. INTRODUCTION: CULTURAL CONFLICT AS A PROBLEM OF LAW

Disputes arising from different views of moral understanding and the source of moral authority have been a prominent feature of political conflict in recent years in the United States. James Davison Hunter refers to this phenomenon as "The Culture Wars." The stakes in these disputes ultimately involve a struggle for cultural domination that involves a struggle for survival of a

* J.D., University of Minnesota; M.A.R.S., United Theological Seminary of the Twin Cities; B.A., University of Minnesota. Professor of Law, Hamline University School of Law. I am grateful to many conversation partners along the way, as this essay has taken shape. Former Dean Raymond E. Krause offered early support and encouragement in this undertaking. Eric Cheyfitz provided helpful and timely criticism. I also profited from comments received on an earlier version of this essay presented at the conference on "Law's Grounds," April 7-8, 2000, at Cleveland-Marshall College of Law, Cleveland State University. My colleagues David Cobin and Earl Schwartz helped me gain a measure of understanding of the Jewish tradition. My colleague Mary Jo Brooks Hunter helped me gain an understanding of some of the distinctive features of Native American spiritual understanding. The limits in the understanding of the Jewish tradition and of the Native American spirituality in this essay are mine alone. I am also indebted to my colleagues Marie Failinger and Patrick Keifert, with whom I have had the pleasure of many years co-teaching seminars in law and religion that stressed the importance of narrative for understanding human experience. Thanks are also in order for research assistance provided by Carole Finneran, Amy Feddema, Teresa Burris, Sally Ackerman, Patina Park, and Karen Gladen.


2. See id. at 52. Hunter's thesis is that two competing views are locked in a struggle to define America around a number of political disputes over issues involving the family, education, media and the arts, law, and electoral politics.
particular way of life.\textsuperscript{3} Rarely is the oldest, and one of the deepest cultural divides in American experience mentioned in the discussion of the culture wars. That is the cultural conflict, which springs from the collision of European culture, in its various expressions, with that of the Native people of the North American continent. Here we find a conflict that involves a deep divide in fundamentally differing views of time and space.\textsuperscript{4} This conflict is most dramatically presented in cases where Native American sacred sites are located on government land. These sacred sites, and rituals associated with those sites, are an especially important expression of Native American spirituality and collective identity. This importance is located deep in the ancient history of these peoples and holds a prominent place in the stories handed down from one generation to another.

Litigation undertaken in the 1980s designed to secure judicial protection of six sacred sites failed dramatically. Instead of providing protection, the judicial decisions in these cases have upheld a variety of intrusions upon sacred sites, thus serving to continue the long history of the subordination

\textit{See id. at 49-51, 176-287.} Beneath the surface of the debate over these political issues is a deep divide between two points of view, which he calls “orthodox” and “progressivist.” The “orthodox” view is grounded in an understanding of moral authority as “external, definable, and transcendent”—“sufficient for all time,” and not dependent on the sentiments of a particular time. The “progressivist” view is grounded in the “spirit of the modern age, a spirit of rationalism and subjectivism”—contingent upon “prevailing contemporary assumptions” to a significant degree for its expression. \textit{See id. at 43-45.}

3. \textit{See id. at 102.}

of Native American spirituality to the interests of the state.  

This essay undertakes a critical reexamination of the Chimney Rock case, *Lyng v. Northwest Indian Cemetery Protective Association*, the only one of the sacred site cases to reach the United States Supreme Court. My thesis is that we need to recognize these disputes as *cultural conflicts* between communities, arising from a *clash between master stories*, which inform the identity and understanding of the peoples who are the parties to these disputes, rather than simply as disputes involving conflict between individual rights and government power. As the discussion of *Lyng* will make clear, in those cases where cultural conflict involves the clash of master stories, conventional individual rights-based approaches are likely to perpetuate the conflict, rather than secure a resolution which can bring about social healing. In such cases I shall argue for the adoption of a *narrative approach* as an alternative. Using such an approach, a court would *start* its analysis of the dispute by looking for the presence of competing collective narratives—the master stories of communities in conflict—within the facts of the dispute, as a way of identifying the stakes to the communities, as well as to the individuals involved in the dispute, rather than simply applying the conventional individual rights-based approach which either ignores or minimizes the community stakes involved in the dispute. The major argument to be advanced here is that a *narrative approach*, sensitive to developing a deep appreciation for the master stories present in these disputes and their adjudication, can open up options for the courts to develop new modes of dealing with these conflicts in a way that embraces a greater appreciation for, and accommodation of, Native American culture, as well as other forms of cultural

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5. *See infra* notes 43-48 and accompanying text.
7. "Master Stories," as used in this article, are a form of narrative that has a central place in the collective life and identity of a particular people. They are located within the collective memory of the people, and are passed from generation to generation as part of the cultural heritage of the people. The designation "master" designates these stories as those of central importance within the cultural heritage of a particular people. These stories may be handed down either through an oral tradition, or, through the literary tradition of a people which surrounds a written text that is sacred to the people. For further detail, *see infra* notes 56-58 and accompanying text.
diversity, within contemporary American public life. As I shall argue below, a narrative approach to adjudication offers a different starting point for understanding the facts in a case. A narrative approach offers an angle of vision on those facts that can broaden the range of legal imagination in applying the doctrinal principles gleaned from past cases to cases of cultural conflict in a way that serves the deepest values of American constitutional law, without simply inviting judicial legislation based on policy grounds unmoored from precedent. Thus, I will argue, a narrative approach breaks free from the strictures of conventional analysis, which while sometimes sensitive to the cultural consequences of such cases, is unable to break free of a defining framework for analysis that limits the possibilities for courts to address cultural conflict in a way that may lead to social healing. Conventional analysis, as my narratively informed critique of *Lyng* below will demonstrate, more often than not, replicates the social divisions, which brought the cultural conflict to the court. In doing so, conventional analysis tragically enforces and deepens those divisions; thus, rendering the vision of a more perfect union ever more distant on the horizon of American constitutional law.

In the course of this essay I will take up four tasks: first, I will offer some opening comments on the historical meaning of the American constitutional commitment to religious liberty within the larger context of the experience of the descendants of the European immigrants to the United States as compared to the experience of the Native American peoples. Second, I will briefly describe "narrative method" as an alternative approach to analyzing cases of cultural conflict that can aid us in understanding the deep cultural issues at stake in sacred site cases. Third, I will critically analyze the opinion of the United States Supreme Court in *Lyng*, with special emphasis on the doctrinal and cultural dimensions of the dispute as seen by the Court. The critique of part IV, informed by the narrative method described in part III, will serve to illustrate the power of narrative method to break out of the bounds of conventional analysis to reveal the deep stakes to the communities in cases of cultural conflict. In particular, this critique will demonstrate the power of the Anglo-American view of land as property, subject to title and possession, as an important feature of the American narrative
embraced by most European-Americans, against the meaning of land within Native American narratives. Fourth, I will close with some conclusions about what the clash of master stories at Chimney Rock teaches us about the limits of the conventional American approach to cultural conflict. I will compare this approach to the possibilities offered by narrative stimulating legal imagination for dealing in new ways with such conflict in the midst of a culturally diverse society, while honoring a relational understanding of what it means to become "one nation" that is faithful to the deepest understanding of the American constitutional vision of a "more perfect union." 8

II. BAD NEWS FOR NATIVE AMERICANS IN THE MIDST OF GOOD NEWS FOR THE EUROPEAN IMMIGRANTS: THE HISTORICAL MEANING OF RELIGIOUS LIBERTY IN THE AMERICAN REPUBLIC

For European immigrants the First Amendment has been very good news. But the First Amendment has not been good news for the indigenous people known as American Indians, or Native Americans.9 The good news for the immigrants was the measure of religious tolerance achieved in the young nation, at least among competing Protestant Christian sects.10 But there would be no tolerance of the spiritual traditions of the Native peoples as missionaries, aided and abetted by the state, set out on persistent efforts to convert the native peoples to the dominant religion of the old

9. The use of a general term to refer to the indigenous people of "North America" is unsatisfactory for several reasons. To begin with there are many distinct groups of these people, each with discrete collective identities. Beyond that, the assignment of the inclusion of the term "American Indian" and "Native American" embraces the European conquest of the "North American" continent and depreciates the distinctive cultures of the various indigenous peoples to whom these terms are ascribed. Nevertheless, both "American Indian" and "Native American" are used, somewhat interchangeably, along with "Native people" by leaders and advocates for the various indigenous people in the present day United States. In light of this, both of these terms are employed in this article.
10. Roman Catholic Christians, however, did not experience such tolerance. During the nineteenth century, in particular, American history is marked by considerable hostility toward Roman Catholic Christians. See HUNTER, supra note 1, at 35-37. The same was true for Jews and Mormons. See id. at 37-39.
The American historian, William Lee Miller, argues that the American commitment to religious liberty is distinctive as compared to similar commitments in other constitutional democracies. Indeed, he argues that if there is anything unique in the American political system it is the particular expression of the commitment to religious liberty that we enjoy. Religious liberty, as the "first liberty," is a key foundational element in other forms of liberty within the American system. The American approach to liberty springs out of the historical background of the struggles engaged in by James Madison and Thomas Jefferson to secure religious liberty in the Commonwealth of Virginia.

The distinctive feature of the American commitment to religious liberty is found in the premises underlying the two religious liberty clauses of the First Amendment: "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof." The premises underlying these clauses can be summarized as embracing three key commitments: (1) personal religious liberty; (2)
institutional independence; and (3) the absence of hostility to
the traditional religious beliefs of the colonists of America.
Professor Miller describes the distinctive character of these
key commitments, and the "new idea" on which they are
based, in the following words:

[T]he unique liberty in which the American nation was
"conceived" included more than personal religious liberty,
as it would be understood worldwide; it includes also the
full institutional independence of the federal union from
all churches and of those churches from the national state.

[This institutional independence, as a constitutional
matter] was a new idea, that there did not have to be any
link between religion and the state, between ultimate
convictions and the power of the law. The unity of the
state did not require any unity of religion. A great nation-
state could exist, and hold together, and walk upright
upon its legs among the nations of the world, without the
spinal column of an official religious institution. The
variety of religious belief and nonbeliefs could be
altogether voluntary; in the eyes of the state they could be
equal and free.

The new nation, of, by, and for the people, was, or came
to be, distinctive in yet another regard, to the considerable
puzzlement of the world: That full formal independence of
the state from all religious beliefs and nonbeliefs did not
represent, and did not entail, hostility to the traditional
religious beliefs of Western civilization.15

To see the unique character of the "new idea" one need
only look to the institutional linkage between religion and the
state found in other constitutional democracies committed to
some form of religious liberty. In country after country, some
form of linkage between religion and the state is stated in
more or less explicit constitutional terms.16 In the United
States, the Constitution eschews any linkage between religion
and the state.

These features of the American commitment to religious
liberty have been developed and applied through a set of
doctrinal principles fashioned by the United States Supreme

15. MILLER, supra note 12, at 7-8.
16. See, e.g., Johan van der Vyver, Introduction to RELIGIOUS HUMAN
RIGHTS IN A GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 11 (Johan van der
Vyver & John Witte, Jr. eds., 1996) (cataloging and describing the variety of
approaches to religious liberty found in other countries).
Court during the last fifty years. In the most simple terms these principles may be summarized broadly as a commitment to *neutrality* between religions by prohibiting the state from establishing religion, coupled with a commitment of *tolerance* toward all forms of religious expression. On the face of it, these doctrinal principles embrace all three features of the American commitment to religious liberty, including the absence of hostility to religion. In fact, however, the formulation by the Court of these principles creates problems when one understands the way in which the American Constitution embraces cultural diversity within the framework of political unity. This can be seen very simply on the back of an American dollar bill. There you will find the American national motto *E Pluribus Unum*—From many, One. The motto expresses a commitment to pluralism within union that the Framers sought to accomplish under the Constitution in general and the First Amendment in particular. But, it also sets the stage for what might be called *Lincoln's Dilemma*. Abraham Lincoln as President faced the problem in 1862 when the State of South Carolina seceded from the Union. As Lincoln himself put it: “Must a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence?” or, in other words: How much diversity can the Union stand and still protect the freedom which makes the diversity possible?

Lincoln’s Dilemma regularly appears in court in American constitutional jurisprudence. The free exercise cases are a prominent example. In the face of this dilemma, the American Supreme Court has attempted to steer a safe course by recourse to a broad general conception of neutrality.

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17. These principles have been developed since the landmark decision of the Court in *Everson v. Board of Educ.*, 330 U.S. 1 (1947). Today, however, the Court’s effort to develop doctrinal principles are frequently the subject of both political and scholarly criticism as well as, on occasion, scorn. See, e.g., RONALD F. THIEMANN, RELIGION IN PUBLIC LIFE: A DILEMMA FOR AMERICAN DEMOCRACY (1996).

18. These guarantees are found within the purview of the “establishment” and “free exercise” clauses of the First Amendment which reads as follows: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...” U.S. CONST. amend. I.


and tolerance of diversity. The most eloquent statement of this came from Justice Jackson in his 1943 opinion for the Court in West Virginia State Board of Education v. Barnette. In that case the Court struck down a state order that required all public school teachers and students "to participate in the salute honoring the Nation represented by the Flag" on pain of being cited for insubordination if they refused. Speaking for the Court, in the midst of the Second World War, Justice Jackson said, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

This commitment to neutrality and tolerance of diversity does not, however, solve, let alone avoid, Lincoln's Dilemma. Although neutrality and tolerance have been the backbone of doctrinal developments under the two religious liberty clauses, their articulation in specific cases have been the source of great difficulty in developing an intellectually satisfying body of doctrine. The form which Lincoln's Dilemma takes on in the context of religious liberty cases, is this: How much tolerance is required on the part of the government in religious matters, and what amount of inconvenience may be imposed on religious practices through governmental action without violating the commitment to neutrality? How much burden may be imposed on religious practices, and how much duty is there for the government to accommodate such practices and still remain faithful to the commitments of the First Amendment? This statement of the dilemma reflects what many commentators have noted as the

21. A case frequently cited by the Court for the principle of neutrality is Everson, in which Justice Black, speaking for the Court, said that the government could not "pass laws which aid one religion, aid all religion, or prefer one religion over another." Everson, 330 U.S. at 15.
22. 319 U.S. 624 (1943).
23. Id. at 642.
25. For commentary on the incoherence of doctrine on permissible and impermissible governmental involvement with religion, see Thomas Shaffer, Slippered Feet Aboard the African Queen, 3 J.L. & RELIGION 193 (1985).
In the face of this dilemma the Court has provided some accommodation for some religious practices in some governmental settings. Thus, for example, when faced with a choice between strict neutrality and non-support for clergy serving as military chaplains, and governmental funding of these clergy, in those cases where service on active duty in the armed forces of the United States makes corporate religious ritual practices difficult or impossible without the presence of the clergy, the Court has permitted the government funding of clergy. The Court also permits legislative prayer, and limited government cooperation with religiously identified educational institutions.

Against this historical record of some accommodation for religious observance in some government settings, one might expect that there might be some cases of accommodation of Native American spiritual practice at sacred sites on government land. But that has not been the case. This reveals that the American commitment to avoiding governmental hostility to religion is severely limited in scope. As Professor Miller notes, the absence of hostility to religion is not to all religion, but rather to the traditional religious beliefs of the colonists. And so it has been in American history. Religious liberty has been good news for the European immigrants, but bad news for the Native American peoples. The past was witness to many forms of suppression of Native American spiritual practice, some of which have been alleviated in more recent times. But today the suppression continues as seen in the disastrous history of the recent cases involving Native American sacred sites located on public land.

26. See, e.g., TRIBE, supra note 24, § 14, at 1157.
30. See MILLER, supra note 12, at 8.
32. See id. at 35-40; Steven C. Moore, Sacred Sites and Public Lands, in HANDBOOK OF AMERICAN INDIAN FREEDOM 81 (Christopher Vecsey ed., 1996).
The bad news in the sacred sites cases is especially
dramatic when seen against the good news on religious
liberty that marks the founding of the American Republic.
The seizure of traditional lands on which sites of especially
great spiritual power for the Indian people were located are
among the most dramatic intrusions on Indian spirituality.
The seizure of these lands was formalized in a series of
treaties that included provisions ostensibly providing for
protection of Indian culture and tradition. It is a sad fact of
American history, however, that the treaties have been
honored more in the breach than in the keeping over the
years.

The land seizures stretch back to the early years of
European immigration, but they became especially dramatic
during the nineteenth century with the "Opening of the West." In 1803, when Thomas Jefferson’s government
bought the huge territory in the center of the North American
continent from the French, the land mass of U.S. territory
virtually doubled overnight. A vast area was suddenly
available to settlement. Many new states would be created
within this territory during the space of the next sixty years.

33. See Vine Deloria, Jr. & Clifford Lytle, American Indians,
American Justice (1983); Vine Deloria, Behind the Trail of Broken
Treaties: An American Indian Declaration of Independence (1985)
[hereinafter Deloria, Behind the Trail of Broken Treaties]; Peter
Nabokov, Native American Testimony: A Chronicle of Indian-White
Relations from Prophecy to the Present, 1492-1992 (Viking Penguin 1991)
(1978).

34. See Deloria, Behind the Trail of Broken Treaties, supra note 33.

35. For a compelling survey of this history of displacement of Native
Americans, as a product of European settlers “invading” Native American
homelands, see Paula Mitchell Marks, In a Barren Land: American
Indian Dispossession and Survival (1998).

36. See Stephen Ambrose, Undaunted Courage: Meriwether Lewis,
Thomas Jefferson and the Opening of the American West (1997)
(describing the centrality of the Louisiana Purchase in Thomas Jefferson’s
presidency). This discussion includes details on Jefferson’s successful request
for congressional appropriations to fund the Lewis and Clark Expedition into
this territory, before the territory was sold to the United States. See id.
This action was clearly questionable on constitutional grounds. See id. Perhaps this
is why Jefferson never sought to justify his action on constitutional grounds.

37. In 1819, prior to the Missouri Compromise and the admission of
Missouri as a slave state, there were 22 states in the union, 11 of which were
free and 11 of which were slave states. The Constitution provided no definitive
statement on the question of whether the federal government had police power
to govern the territories in general or with respect to slavery. Thus, the debates
in Congress over how to govern these territories, and which states to admit as
In an effort to induce settlement of this area, the government "opened" the territory to migration by offering free land for settlement provided it was lived on for a certain number of years. This set off a land rush. Fueled by the prospects of cheap land for pasture and agriculture, forest for lumbering, and the discovery of gold in the West, thousands of people headed west to make a new life for themselves on the western frontier.

The story of my home state of Minnesota is typical of what happened in these years. In 1832 the "European discovery" of the source of the Mississippi River took place in what would become the Minnesota Territory in 1849. Nine years later, in 1858, Minnesota became a state. In the decade lying roughly between these two events, 1850-1860, dramatic changes in population and human activity took place. Just as the land rush of the 1850's was about to start, there were about 6,000 Europeans settled in Minnesota. By 1860, a mere ten years later, there would be 180,000, or thirty times more than in 1850.

With the coming of the settlers and the establishment of U.S. governmental control over traditional Indian lands, the religious beliefs, rituals, and sites of the Native Americans came under severe pressure. Some rituals, such as the Ghost Dance in the Northern Plains, were suppressed at the end of the nineteenth century. Others were made difficult through free or slave states, became a central feature of American politics. From 1820 to 1850 nine states were added to the Union making a total of 31. Three others were added by 1861 to bring the total number of states to 34 at the outbreak of the Civil War, 19 of which were free, and 15 of which were slave states.

38. The source of the Mississippi had, of course, been long known to the Native Americans who had resided in the area for centuries. This is now acknowledged at the Headwaters of the Mississippi by a descriptive plaque that describes how a Native American man O-Z-Ki-Ya, led Henry Schoolcraft to the source of the River.


40. The Ghost Dance was a world renewal ritual created by the Paiute prophet Wovoka, who for some was revered as a messianic figure. The dance combined elements of Christian messianic hope with native spirituality and spread rapidly among the Lakota in the face of the starvation and hopelessness they experienced in the winter of 1889-90. The dance added to the defiance of the Lakota, and stirred fear among government agents. Things came to a bloody conclusion on the frozen ground near Wounded Knee Creek in South Dakota on December 28, 1890, when 150 of the 350 men, women, and children that had followed old Chief Big Foot toward the Pine Ridge Agency were killed after the U.S. Seventh Cavalry caught up to them, surrounded them, and
the establishment of a permit system requiring application to observe the ritual. While the suppression of the rituals was relaxed over time, intrusion upon Indian religious practices continued if for no other reason than the simple fact of the enormous displacement of Indian people from traditional lands that had occurred during the period of rapid westward expansion. In addition, the immigrants had little understanding and even less sympathy for the Native American spirituality, which differed so markedly from their own religious traditions rooted deep in Western Christianity.

Today the picture is not radically different. Even though courts dealing with conflict over governmental action at Native American sacred sites often now proceed with full knowledge of the history of governmental sanctioned suppression of Indian religious practices, and on occasion express some sympathy for the extraordinary burden this has opened fire on them. See Marks, supra note 35, at 216-24. For historical treatments of the experience of the Lakota, Dakota, and Nakota people of the Northern Plains, see Roy W. Meyer, History of the Santee Sioux: United States Indian Policy on Trial (rev. ed. 1993) (1968); Edward Lazarus, Black Hills/White Justice: The Sioux Nation Versus the United States, 1775 to the Present (1991); Dee A. Brown, Bury My Heart at Wounded Knee: An Indian History of the American West (1970); Nick Coleman & John Camp, The Great Dakota Conflict, St. Paul Pioneer Press Dispatch, April 26, 1988, at 3 (originally published as a five-part series in the Saint Paul Pioneer Press, and later reissued as a 48 page educational supplement for use in classrooms); The Dakota Conflict & Exile (KTCATV broadcast 1993); Carol Chomsky, The United States-Dakota War Trials: A Study in Military Injustice, 43 Stan. L. Rev. 13 (1990); The Dakota Exile (Minn. Public Television 1996); Proclamation of Rudy Perpich, Governor of Minnesota (Dec. 19, 1986) (designating 1987, the 125th Anniversary of the Dakota Conflict, as the Year of Reconciliation) (on file with author).

41. For a Pueblo account of the Pueblo peoples’ history, see Joe Sando, Pueblo Nations: Eight Centuries of Pueblo Indian History (1992).

42. Thus, for example, pilgrimages to sacred sites of special power like Mount Harney in the Black Hills of South Dakota were intruded upon because of the presence of the new immigrant settlements that sprung up rapidly with the discovery of gold. See Lazarus, supra note 40. In other aspects of Native American spiritual practice, not focused on sacred sites, the record is also dismal. Consider the following categories of activity: Rituals of Native Americans—People v. Woody, 61 Cal. 2d 716 (1964) (sacramental use of Peyote); U.S. v. Top Sky, 547 F.2d 483 (9th Cir. 1976) (taking Bald Eagle feather); Frank v. Alaska, 604 P.2d 1068 (Alaska 1979) (killing moose for funeral feast of Potlatch); Employment Div. of Or. v. Smith, 494 U.S. 872 (1990) (sacramental use of Peyote); Other Religiously Based Conduct of Native Americans—New Rider v. Board of Educ., 480 F.2d 693 (10th Cir. 1973), cert. denied, 414 U.S. 1097 (1973) (hair length of student in school); Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975) (hair length of prison inmate); Bowen v. Roy, 476 U.S. 693 (1986) (Native American religious objection to issuance of Social Security Number).
placed on the integrity of Indian culture, the decisions rendered in these cases have served to extend and entrench the cultural domination of the European immigrants and made it difficult for those Native American people who today are trying to revive traditional spiritual practices as a way to restore their culture.\textsuperscript{43}

Six sacred site cases were decided by the federal courts between 1982 and 1988. In each case Native Americans sought to protect traditional sacred sites from government land use plans that would severely intrude on the spiritual significance and practices associated with these sites. All of the cases involved public land. All of the cases involved a challenge to governmental action that intruded upon the spiritual practices at sites sacred to Native American peoples. In all of the cases the Indian claims for accommodation of their spiritual practices were rejected, and the challenged governmental activity was permitted to go forward. In one case the court permitted oil exploration to go forward.\textsuperscript{44} In the second and third cases the courts permitted sacred river valleys to be flooded for hydroelectric dam projects.\textsuperscript{45} In a fourth case the court permitted a state to operate a tourist recreation site on a sacred site where pilgrimages and vigils were carried out.\textsuperscript{46} In a fifth case the court permitted the expansion of a ski resort on a sacred mountain.\textsuperscript{47} In each of

\textsuperscript{43} One notable example of such restoration efforts may be found in the work of The Honorable Robert Yazzie, Chief Justice of the Navaho Nation. See Robert Yazzie, "Life Comes from It:" Navajo Justice Concepts, 24 N.M. L. REV. 175 (1994).

\textsuperscript{44} See Inupiat Community of the Arctic Slope v. United States, 548 F. Supp. 182 (D. Alaska 1982), aff'd, 746 F.2d 570 (9th Cir. 1984), cert. denied, 474 U.S. 820 (1985) (permitting a proposal for governmentally sanctioned oil exploration in the Beaufort and Chukchi Seas off the coast of Alaska to go forward).

\textsuperscript{45} See Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981) (permitting a governmental plan to flood the Glen Canyon of the Colorado river in southern Utah for hydroelectric and tourist recreational purposes to go forward as planned); see also Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159 (6th Cir. 1980), cert. denied, 449 U.S. 953 (1980) (permitting completion of the Tellico dam and planned flooding of the Little Tennessee River Valley in the state of Tennessee by a federal governmental agency for hydroelectric and tourist recreational purposes to go forward).

\textsuperscript{46} See Fools Crow v. Gullet, 706 F.2d 856 (8th Cir. 1983), cert. denied, 464 U.S. 977 (1983) (permitting state governmental plan to develop and regulate a tourist recreational park located on the geological formation known as Bear Butte on the eastern edge of the Black Hills in the state of South Dakota).

\textsuperscript{47} See Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), cert. denied, 464 U.S.
these cases appeals were filed from the lower court decisions, but the Supreme Court denied certiorari. Finally in 1988, the Supreme Court took the Chimney Rock case. In its decision, the Court refused to prohibit construction of a road for logging operations in the forest in the sacred “high country” of northwestern California surrounding a series of rock outcroppings, including one known as “Chimney Rock,” used for religious purposes by the people of three Indian tribes. Subsequently, ten years after the Court’s failure in *Lyng* to find a constitutionally grounded requirement for the federal government to accommodate spiritual practices at Chimney Rock, the U.S. Department of the Interior undertook to voluntarily accommodate spiritual practices at the unique geologic formation in eastern Wyoming known to the Tsitsi people as *Mato Tipi* (Bear Lodge), which was set aside as Devil’s Tower National Monument by President Theodore Roosevelt in 1906. The government management plan for the site included a voluntary “ban” on rock climbing during the month of June, the height of spiritual practices at the site. This plan, challenged by non-Indian plaintiffs with a commercial interest in rock climbing at the site, was upheld as a permissible exercise of governmental discretion rather than one that was constitutionally mandated. This result is consistent with the principles in *Lyng*, which upheld the federal government’s power to exercise its discretion to manage public land in a manner that might be inimical to Native American spiritual practices associated with such land.

956 (1983) (permitting a plan to expand and develop the Snow Bowl Ski Resort owned by the federal government on the San Francisco Peaks in the Coconino National Forest north of Flagstaff, Arizona to go forward).

48. See *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988) (permitting a federal government plan for timber harvesting and road construction in the Six Rivers National Forest through the “High Country” of the Chimney Rock area to go forward). Eight years after the decision in the last of these six cases, a seventh was filed in the District of Wyoming involving the Devil’s Tower. In granting a preliminary injunction, the court declared a government plan to accommodate Native American spiritual practice at this sacred site an unconstitutional establishment of religion.

49. See *Bear Lodge Multiple Use Assoc. v. Babbitt*, 175 F.3d 814 (10th Cir. 1999), cert. denied, 529 U.S. 1037 (2000). The original plan called for a mandatory ban. When this was struck down by the federal district court on a motion for a preliminary injunction as a violation of the establishment clause of the First Amendment, the Interior Department revised its management plan for the site to make the climbing ban voluntary. Subsequently the District Court
What makes these cases especially troubling is the fact that in 1978 the United States Congress took note of the continued difficulties experienced by Native Americans who sought religious freedom on par with all other Americans. In response Congress adopted the American Indian Religious Freedom Act of 1978 (AIRFA). This Act expressly declared that American Indians are guaranteed the same religious freedom available to all Americans under the First Amendment. It specifically mentioned the importance of religious liberty at sacred sites. This legislative sensitivity towards, and recognition of, the importance of Native American spirituality occurred while conversion activity by Christian churches among Native Americans declined. In this setting, the Act set the stage for, and inspired the Indian plaintiffs to bring, the six cases of the 1980s in which they sought the protection of religious liberty for their distinctive spiritual traditions. These promising developments make it

held the plan to be constitutional as not infringing the liberty guaranteed by the establishment clause, and an appeal was then taken to the 10th Circuit Court of Appeals, which upheld the lower court on establishment clause grounds. Several Native American advocacy groups and individuals, plus others, filed amicus curiae briefs with the Tenth Circuit supporting the government management plan. While this case represents a welcome governmental effort to accommodate Native American spiritual practices associated with sacred sites on public land, the fact that it was accomplished through the exercise of governmental discretion does not disturb the principle of Lyng. See infra Part IV.

52. The first major sign of federal governmental sensitivity to Native American culture and the need to accommodate that culture came with President Franklin D. Roosevelt's appointment of John Collier as Commissioner of Indian Affairs. See Christopher Vecsey, Prologue to HANDBOOK, supra note 4, at 16. The last half of the 20th Century saw increasing recognition of the need to accommodate Native American culture so that it might continue to survive in contrast to the suppression of many forms of Native American spirituality by government and Christian religious organizations during the 19th and early 20th centuries. See generally O'Brien, supra note 31.
53. For documentation and commentary on the way the American Indian Religious Freedom Act of 1978 has failed to provide a source of protection for a variety of aspects of Native American spirituality, see HANDBOOK, supra note 4. See also American Indian Religious Freedom: Hearings on Senate Joint
especially difficult to read about the string of failures in the courts, which soon followed. Where tolerance, and even accommodation of Indian spirituality, had begun to emerge in a variety of settings, in the sacred site cases the courts have failed to offer any protection under the First Amendment for one of the core features of the spiritual practices of many different Native Americans.

What went wrong? What can we learn from these American cases concerning how we might deal with the problem of cultural diversity in a constitutional democracy? Is there any hope for responding to these conflicts through law? These questions are especially important today for two reasons: First, the gathering movement among Native American communities to recover their spiritual traditions and thus, the integrity of their way of life has been slowed, and even jeopardized by these cases. Second, with the close of the twentieth century, Americans find themselves living in an increasingly diverse society both religiously and ethnically, much of it the result of an influx of people from other lands with religious commitments not found in significant numbers until now, such as Buddhism, Hinduism, and Islam. Already this is leading to new conflicts. If we address the first conflict—that with Native Americans—we may be able to address the new ones now forming in our midst. A close examination of the failure of the Chimney Rock case to provide protection for Native American spiritual practice on sacred ground may point us toward new options for dealing with cultural conflict more successfully in the future. One way to critically assess what went wrong in Lyng as well as to imagine a more hopeful way of dealing with cultural conflict

Resolution 102 Before the Senate Selection Comm. on Indian Affairs, 95th Cong. (1978); Indian Religious Freedom Issues: Hearings on Senate Joint Resolution 102, 97th Cong. (1982).

54. See supra notes 49, 52 and accompanying text.

55. See THIEMANN, supra note 17, at 2-3 (noting that there has been a great increase in religious diversity in the latter part of the 20th century). Most notable is the increase in Islam. In Minnesota, for example, some estimates now place the number of Muslims as greater than the number of Jews in the state.

56. See id.

57. A good source for on-going current instances of such conflict between Islam in the United States and the dominant religion in the American culture is available on the Internet at the website of the Committee on American Islamic Relations (CAIR) (last modified Apr. 23, 2001) <http://www.cair-net.org>.
at sacred sites in the future is to employ a narrative approach in describing and adjudicating these conflicts when they reach the courts. We turn now, in part III, to a description of this approach before applying it critically to the *Lyng* case in parts IV and V below.

III. A NARRATIVE APPROACH TO DEALING WITH CULTURAL CONFLICT IN THE COURT OF LAW

Cases involving efforts to exempt religiously grounded conduct from the reach of the law of the state as a matter of religious liberty protected by the First Amendment to the U.S. Constitution are typically framed as individual rights cases. Consequently, courts frequently neglect or give less than full consideration to the deep cultural significance of these cases to the communities from which the parties to the dispute come to the court. What courts overlooked in the process is that these are conflicts between communities that arise from clashes of culture between those communities. They are not simply conflicts between individual rights and government power. The source of the conflict is rooted deeply in the master stories of the communities involved where individual conscience and identity is formed and informed by those stories.  

One way of speaking about the high importance of particular narratives for particular people is to speak of them as “Master Stories.” Master stories often include myths of origin as well as features of individual and community identity. The norms of the community are undergirded by these stories, which give them, and the community, shape, meaning, and identity. Master stories are narratives rooted in the historical experience of these people and have

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normative content for them in terms of understanding themselves and the world they encounter, as well as providing guidance for how they live their lives. Out of these stories come the distinctive features of individual and collective identity shared by those who are members of a community within a particular culture. The stories give rise to the norms of the community and provide a resource for their application in forming and sustaining the community. These stories are told and retold down through the ages as a central vehicle for cultural transmission and identity.

Thus, for example, the Exodus story is the master story of the Jews. For them it conveys both the meaning of life and what it is they understand that they are called upon to do. The central elements of liberation from bondage, the giving of the law, and the covenant at Sinai are focal points of the story. The Passover Haggadah (literally "the telling") which is read aloud at the Passover Seder each year, retells the story and perpetuates it in the memory of the people. In the case of Jewish identity, for example, the relationship of the master story of the Exodus to individual identity and action may be stated as follows: The individual bears an identity formed in large part by the community and the norms (Halakha) of that community which are in turn shaped by and float upon the sea of aggadah (the stories of the community) rooted in the master story of the Exodus. The master story provides a tap root for the stories, norms, and community identity as well as their interpretation over time. In this dynamic way the master stories are foundational as well as life giving within the tradition that holds them dear.59

Other examples can be found elsewhere. Christians, Muslims, Native Americans, and others, all have *particular narratives*, which serve a similar purpose. Where any of these people come into conflict with the state, it is often because their particular master story, and the tradition which surrounds it, calls them, as individuals, to pursue a course of action which the state is not willing to permit.

Prominent within many of these master stories are sacred sites, and rituals, which embody the story and serve as vehicles for its passage across the generations. Many of the sites and rituals have become the focal point of conflict and warfare. The continuing conflict over the sacred sites of Jews, Christians, and Muslims in the Old City of Jerusalem, and the ongoing conflict over sacred sites of indigenous people in North America are striking contemporary examples of how cultural conflict over master stories takes form.

Master stories are not neutral. They embrace and express a particular understanding of reality and are value laden. This means that they can be either "hegemonic tales" or "subversive stories."  

One of the major problems associated with conventional rights-based approaches to dealing with cultural conflict, and especially that involving ethnic or religious groups, is the potential for imposing one particular master story on an entire people in the name of the state; thus, extinguishing the cultural heritage of those who find their identity in the

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Narrative can contribute to hegemony by functioning as a means of social control instructing about what is expected and warning about the consequences of nonconformity. Narrative can also contribute to hegemony by colonizing consciousness with well-plotted but implicit accounts of social causality. Finally, and most importantly, . . . to the degree that stories depict understandings about particular persons and events while simultaneously effacing the connections between the particular persons and the social organization of their experience, they hide the grounds of their own plausibility and thus, help reproduce the taken-for-granted hegemony. However, narratives can also be subversive. To the degree that stories make visible and explicit the connections between particular lives and social organization, they may be liberatory. Subversive stories are narratives that employ the connection between the particular and the general by locating persons and events within the encompassing web of social organization. *Id.* at 222-23.
extinguished master story. The master stories of the other are often obliterated when they come into conflict with the “imperial story” of the dominant culture. Indeed, this is one way that the other is erased by the dominant culture. Thus, when ethnic and religious conflicts come to the American courts, the master stories of people in conflict with the state, which lie at the heart of these conflicts, are likely to be given short shrift or ignored altogether.

The threat of suppressing or extinguishing a master story is especially serious in cases involving efforts to exempt religiously grounded conduct from the reach of the law of the state as a matter of religious liberty protected by the First Amendment to the U.S. Constitution. Such cases are typically characterized by the courts as involving conflicts between individual believers and the state. That view, however, frequently neglects the deep cultural significance of these cases to the communities from which the parties to the dispute come to the court. Consequently, courts frequently neglect or give less than full consideration to the deep cultural significance of these cases to the communities from which the parties to the dispute come to the court. What is overlooked in the process is that these are conflicts between communities that arise from clashes of culture between those communities. They are not simply conflicts between individual rights and government power. The source of the conflict is rooted deeply in the master stories of the communities involved where individual conscience and identity is formed and informed by those stories. Beyond these observations, it bears mention that to the extent that individual rights are a core feature of the dominant American master story, the Court’s use of individual rights principles in adjudication of sacred site cases endorses and imposes the American story upon, and thus participates in the erasure of, Native American master stories. In the process, the Court becomes a powerful instrument of cultural warfare despite its claims to employ “neutral principles.”

of this brief description of the cultural importance of
narrative, we turn now to a critical assessment of the Lyng
case. As we do, we shall be especially concerned with
identifying how the opinions of Justice O'Connor, for the
Court, and Justice Brennan, in dissent, do or do not take the
cultural stakes of the case into account in their legal analysis
of the dispute. In Part V we shall then explore how the
narrative method illuminates the critique of Part IV as well
as the possibilities and difficulties in rendering a more
hopeful result in future cases.

IV. THE CLASH OF CULTURES AT CHIMNEY ROCK: A CRITIQUE
OF LYNG V. NORTHWEST INDIAN CEMETERY PROTECTIVE
ASSOCIATION

The Chimney Rock case involved the question of whether
the government had a legal duty under the Constitution to
abandon a land-use plan for government-owned land which
would burden the use of the land for religious purposes by the
Indian people who held the Chimney Rock site as sacred. But
to describe it in these terms is to do so in the language and
worldview of the dominant culture in the United States—that
of the descendants of the European immigrants to North
America—and to ignore the radically different language and
worldview of the Native peoples who brought the case to
court.

The case involved a twenty-seven square mile area
located on land owned by the U.S. government inside a
national forest managed by the federal forest service. The
area is of supreme sacred importance to three Indian tribes,
the Yurok, Karok, and Tolowa people. Together they number
approximately 5,000 people. The case involved a government
land-use plan to build a road through the sacred site. The
planned road would be open to the public in addition to being
used for timber harvesting as part of the forest management
plan of the government. The dispute reached the courts in a
challenge to the government's plan to construct a six-mile
stretch of the road that would directly intrude upon the
Chimney Rock area. The Indian plaintiffs in the dispute
sought to prevent construction of the road and argued that
the government had a duty under the U.S. Constitution to
accommodate their religious practices associated with this
site by abandoning the planned road construction.
In addition to the testimony offered by the Indian plaintiffs on the spiritually sensitive cultural significance of the area, the Forest Service commissioned an extensive study of the cultural significance of the area to the Indian people, which included an assessment of the impact the proposed action would have on the cultural importance of the site. The study, which came to be known as the "Theodoratus Report" after its principal author, included the results of interviews with 166 representatives of the tribes together with a detailed and exhaustive ethnographic field study of the high country. The section focusing directly on "Religious Beliefs and Practices" opens with an acknowledgment of the cultural divide between the worldview of the Native Americans and the dominant culture in the United States.

The most important aspect of the present study has been the examination of those beliefs and practices which must be subsumed, although inadequately, under the discrete classification "religion." The "religious" aspects of the lives of Native Americans can only be roughly categorized into separate considerations. Because of the particular nature of the Indian perceptual experience, as opposed to the particular nature of the predominant non-Indian, Western perceptual experience, any division into "religious" or "sacred" is in reality an exercise which forces Indian concepts into non-Indian categories, and distorts the original conceptualization in the process.... It is also important to realize for the purposes of this study, that descriptions which single out specific cultural sites as isolates (e.g., Doctor Rock, Chimney Rock, Peak 8) are distortions of Indian conceptualizations of these important

62. See DOROTHEA J. THEODORATUS ET AL., CULTURAL RESOURCES OF THE CHIMNEY ROCK SECTION, GASQUET-ORLEANS ROAD, SIX RIVERS NATIONAL FOREST (A Report for the United States Department of Agriculture, Forest Service, Six Rivers National Forest, Contract No. 53-9158-8-6045, Apr. 9, 1979) (on file with author). This study consists of 450 pages of text plus eight appendices of supporting detail, and provides an exhaustive description of the site. See id. at 44-71 (addressing the religious beliefs and practices in the ethnography). For further detail on specific sites, such as Chimney Rock itself, see chapter two of the report entitled Ethnogeography of the Project Area. Id. at 72-95 (Chimney Rock is highlighted at 86). The description of the cultural significance and impact likely to be made on that significance by the proposed forest service road challenged in Lyng I offered in the text which follows is chiefly drawn from the aforementioned pages of the "Theodoratus Report" as well as descriptions of the area found in the opinions of Justice O'Connor and opinions of Justice O'Connor and Justice Douglas in Lyng.
The proposed site of the U.S. Forest Service road to connect the villages of Gasquet and Orleans in northwestern California included the site of several mountain peaks located in the Blue Creek area of the Siskiyou mountains rising 7,000 feet above the Klamath River Valley. The Native Americans living in northwest California have long held the peaks of Doctor Rock, Chimney Rock, and the surrounding area to be especially sacred because of the great power infused in the region. The Yurok, Karok, and Tolowa people refer to the entire area as the “high country” because the “the entire area appears to funnel into the high peaks and shares, in a general sense, the sacredness of the very high peaks.”

The great power present in the high country is one of the gifts of ancient “pre-human figures who are said to have inhabited the world and to have brought all living things and culture to mankind.” The high country is the site of a religious complex generally called World Renewal whose purpose is the stabilization and preservation of the earth from catastrophe, and of mankind from disease. These goals are expressed through the great dances held at specific times and places in the region . . . . The [d]ances are a reaffirmation of the gifts which the people had been given by the spirits and a technique for removing evil from the world by reestablishing balance to the earth.

The most important of the World Renewal ceremonies are the White Deerskin Dance and the Jump Dance. An indispensable participant in the World Renewal ceremonies is an individual . . . who recites set narratives at specific places in a fixed order. He is required to purify himself by abstaining from water, sex, and profane activity for a period of time and is obligated to fast, isolate himself in the sweat house, and to use tobacco or angelica root as part of the purification process. A necessary part of the World Renewal activity is the pre-dance preparatory medicine made by the medicine man at specific sites in the high country.

In addition to the World Renewal ceremonies, a number

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63. Id. at 44-45.
64. Id. at 74.
65. Id. at 45.
66. Id. at 48.
67. Id. at 46.
of other rituals are performed in the high country to secure power for specific purposes. Specific sites within the area are associated with power for specific purposes. "Doctors," who are often women, travel to the area to secure power that enables them to cure ill patients. "Medicine men," who are most often male, travel to the area to secure power for a variety of specific purposes other than for curing the sick. In addition, individuals travel to the area to secure personal medicine power to influence events of daily life. In all of these cases, including the cases of travelers seeking personal medicine power, the activities are understood as beneficial to the community and the world at large. Thus, the well-being of the world, the community, the individual members of the community, and the power available in the area to secure this well-being through the trained persons who travel through the area to perform a variety of rituals in quest of the power available in the area are all interrelated in an interdependent way. The well being of the community and the world is dependent upon the power of the high country, which is made available through travel on power quests in the area by persons trained and prepared for securing that power. The power available to cure the sick, for example, depends upon persons who have responded to a call to become "doctors" and who then train and prepare for travel on a power quest in the high country. These power quests are dependent upon maintenance of the high country in an undisturbed manner, free of intrusions by outsiders or anything else that may disrupt the pristine silence, solitude, and privacy of the high country.

Any intrusions into this area by outsiders is perceived as a violation of the spiritual purity that the high country represents. . . . [A]ny changes of the area would destroy the concept of cleanliness and purity now attached to the high country. . . . There is a physical-psychological interaction that takes places between those who go to get medicine and a sacred place which furnishes this medicine. If one feature of this interaction is disturbed, the flow of power if blocked. 68

The study emphasized the role and training of the "doctors" and "medicine men" who were the primary travelers to this region. In light of the importance of the silence,

68. THEODORATUS, supra note 62, at 74-75.
privacy, and solitude to be experienced in the vicinity of undisturbed pristine rock features, the report issued by Dorothea Theodoratus and her team concluded that the impact of the Forest Service plans to build roads would be devastating; thus, providing strong support for the claims of the Indian plaintiff. In the words of the report:

It is the general assessment of Theodoratus Cultural Research that the completion of the [proposed forest service] road via any of the proposed Chimney Rock Alternatives (Routes 1-9) will produce an irreparable impact on the spiritual and physical well-being of the adjacent Yurok, Karok and Tolowa communities. Such impact will be created through the degradation of salient environmental qualities pertinent to the power quests of medicinal and spiritual practitioners who serve these communities. It is recommended, therefore, that such an impact is, in fact, sufficient to justify the rejection of all proposed routes (Routes 1-9) of the Chimney Rock section of the G-O road. In addition, it is the general recommendation of Theodoratus Cultural Research that the Blue Creek area remain environmentally pristine in every respect, to insure appropriate access and use by Native American practitioners. It is only by such actions that the beliefs and practices of these Native American cultures can be protected and granted the freedom of expression necessary for their survival.69

When a description of the questions presented in the Chimney Rock case takes into account the divergent views of time and space, which made this a case of cultural conflict, then the cultural stakes can more easily be seen. Thus, two of the leading critics of the Court's decision in Lyng following the approach taken in the Theodoratus Report, demonstrate great sensitivity to Native American views of time and space and lift up the enormous significance of the case to the Native American plaintiffs.70 As we shall see, the Court itself is not completely blind to these facts. In their critique of the Court, however, the critics adopt the frame of reference of the Court, which ultimately proves to be disastrous when wielded by the Court in its assessment of the claims of the Indian plaintiffs. Thus, the critics, like Justice Brennan in his dissent, pursue their critique of the majority opinion by recourse to a

69. Id. at 422-23.
70. See infra note 75.
conventional approach to the facts, framed by legal categories from past cases that confine the possibilities for an approach that might yield a different result yet remain faithful to the constitutional quest for a "more perfect union." The critics and Justice Brennan would strike a "balance" in favor of the Indian plaintiffs within conventional categories, and thus, fail to see the broad scope of the horizon open to legal imagination informed by a narrative approach to the conflict presented in *Lyng*. Failure to take the narrative, within which Chimney Rock and the spiritual practices associated with this site are embedded, seriously as a master story in conflict with the American story, as understood by most European-Americans, consigns the worldview of the Native peoples to erasure by subsuming it within the worldview of the dominant culture. This occurs through the characterization of the issues on appeal in the language and worldview of one culture, the dominant European-American culture, when in fact, two are present in the court of law. Thus, the Anglo-American understanding of land, expressed through a conventional understanding of doctrinal principles of property law, shapes the Court's reading of the facts and adds to the difficulty of seeking a resolution that might heal the conflict. Ultimately, the conflict is exacerbated and extended by this approach rather than resolved and put to rest. This, we shall see, is precisely what happened in the Chimney Rock case, despite the acknowledgment, by both the majority and the dissent, of the critical cultural significance of the case to the Native peoples who brought the case to court.

The Chimney Rock case is the only case in which the U.S. Supreme Court has fully considered a challenge to a public land use plan that was in conflict with the historic Native American religious purposes associated with the government-owned land for which the plan had been prepared. The case reached the Supreme Court in 1988 after first being considered by the federal district court for northern California, and by the federal appellate court for the Ninth

71. In five other federal cases involving site-specific conflict in the 1980s, the Supreme Court denied petitions for a writ of certiorari without opinion. See supra notes 44-47, 49 and accompanying text. The Court also denied certiorari in the case involving Bear Lodge (Devil's Tower), brought against governmental efforts to accommodate Native American spiritual practices, which was decided on grounds which did not disrupt the precedent of *Lyng*. See supra note 49.

72. See Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F.
In the two lower judicial proceedings, the courts found in favor of the Indian plaintiffs and against the federal government. The Supreme Court reversed the lower appellate court and held in favor of the government.

The basic holding of the Supreme Court was that the government had no legal duty to accommodate the Native American religious practices at stake, despite the Court's awareness of the cultural injury sustained by the Native American plaintiffs at the hands of the government. Both the majority opinion, written by Justice O'Connor, and the dissenting opinion, written by Justice Brennan, explicitly recognize that the facts of the case present an issue of great cultural importance to the Native American people involved. In this sense they accept the Native American description of the importance of the site to the Native American people without offering any effort to incorporate Native American views of land as something other than an object governed by possession and title. They differ sharply over the question of whether and how such cultural stakes should be taken into consideration as a constitutional legal issue by the Court within the conventional principles of First Amendment law. These principles, as an expression of European-American culture, offer no significance for land other than as an object of possession and title. Thus, the majority held that the government had no duty to accommodate the Native American cultural interests on government-owned land to the property interest of the government. Justice Brennan, in dissent, argued that the government had a duty to show that it had a compelling property interest to justify the refusal to accommodate the Native American cultural interests. In the many comments and articles which have been written on Lyng, the cultural dimension related to the distinctive Native American view of land is only briefly mentioned, and never receives treatment in depth, perhaps because the Court itself does not discuss these dimensions in any depth. Indeed these articles spend less time analyzing the cultural significance than the Court does in its relatively brief discussion of these

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73. See Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688 (9th Cir. 1986).

factors." To see how the Court fails to fully deal with the cultural dimensions of the clash of stories at Chimney Rock in Native American terms we now turn to a close analysis of the opinions in *Lyng* informed by the narrative approach set out in part III above.

To begin with, it must be pointed out that the government was not unmindful of the religious significance of the Chimney Rock area on its land. Recall the *Theodoratus Report* discussed earlier, which came out of a study commissioned by the government in 1978 to study the impact on the Chimney Rock area of the road it planned to build through the sacred site area. The report of this study became the principal piece of evidence in the lawsuit initiated by the Indian people to protect Chimney Rock. The Supreme Court quoted the significant findings and conclusion of the report as follows:

The commissioned study, which was completed in 1979, found that the entire area "is significant as an integral

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75. This is true even of the sympathetic extended criticisms of the Court's decision and reasoning in *Lyng* by Robert Michaelsen and Brian Edward Brown. Michaelsen and Brown, among the many commentators on *Lyng*, are distinctive because they focus on the importance of the Native American view of land and discuss it at length. But they, like the Court, mount their criticism within an argument about the Court's reasoning that is largely framed in the conventional, abstract rule-based, non-narrative approach to scholarship on the work of the Court. This risks offering further support to the Anglo-American view of land as property embraced by those rules and fails to imaginatively explore the further possibilities of those rules to embrace differing master stories at the same time. The result is that the critiques of Michaelsen and Brown play into the view of many that the conflict over Native American sacred sites on public land is a zero sum game, that one side must win and one side must lose. In such a situation it is almost impossible to avoid erasure of Native American culture by subsuming it within the dominant culture. For Brown's book length critique and argument of how "Property Triumphs Over Religion" in *Lyng*, see BRIAN EDWARD BROWN, RELIGION, LAW AND THE LAND: NATIVE AMERICANS AND THE JUDICIAL INTERPRETATION OF SACRED LAND 9-170 (1999). For Michaelsen's sympathetic treatment of Indian claims coupled with trenchant criticism of the decisions by the courts in sacred site cases see ROBERT S. MICHAELSEN, AMERICAN INDIAN RELIGIOUS FREEDOM LITIGATION: PROMISE AND PERILS, 3 J.L. & RELIGION 47 (1985); ROBERT S. MICHAELSEN, IS THE MINER'S CANARY SILENT? IMPLICATIONS OF THE SUPREME COURT'S DENIAL OF AMERICAN INDIAN FREE EXERCISE OF RELIGION CLAIMS, 6 J.L. & RELIGION 97 (1988); ROBERT S. MICHAELSEN, WE ALSO HAVE A RELIGION: THE FREE EXERCISE OF RELIGION AMONG NATIVE AMERICANS, 7 AM. INDIAN Q. 111 (1983); ROBERT S. MICHAELSEN, SACRED LAND IN AMERICA: WHAT IS IT? HOW CAN IT BE PROTECTED?, 16 J. RELIGION 249 (1986); and ROBERT S. MICHAELSEN, DIRT IN THE COURT ROOM: INDIAN LAND CLAIMS AND AMERICAN PROPERTY RIGHTS, IN AMERICAN SACRED SPACE 43 (DAVID CHIDESTER & EDWARD T. LINENTHAL EDs., 1995).
and indispensable part of Indian religious conceptualization and practice.” Specific sites are used for certain rituals, and “successful use of the [area] is dependent upon and facilitated by certain qualities of the physical environment, the most important of which are privacy, silence, and an undisturbed natural setting.” The study concluded that constructing a road along any of the available routes “would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and life way of Northwest California Indian peoples.”

Neither the government nor the Court questioned these findings or conclusion. Indeed the Court went so far as to acknowledge the severity of the harmful effect of the road in dramatic language: “[W]e have no reason to doubt, that the logging and road-building projects at issue in this case could have devastating effects on traditional Indian practices.” At another point the Court observed, “we can assume the threat to the efficacy of at least some of the religious practices is extremely grave.”

Despite what the Court called “the sympathy that we must all feel for the plight of the Indian [people involved in the case],” the Court held that the government was under no legal duty to alter its plan of action to lift the burden the road would place on the religious practices of the Indian people. Two facts were of crucial importance to the Court’s decision. One was the fact of government-ownership of the area in which the sacred site was located. The second was the absence of any explicit and direct prohibition by the government of the Indian religious practices associated with the sacred site. In reaching its conclusion the Court made several observations that shed light on its reasoning. With respect to how it viewed the importance of what it called “the diminution of the Government’s property rights, and the concomitant subsidy of the Indian religion” that would occur.

76. Lyng, 485 U.S. at 442.
77. Id. at 451.
78. Id.
79. Id. at 456.
80. The court reasoned that the Indian people were protected against government coercion to subscribe to or refrain from a particular religious belief, but in determining what constituted coercion the Court placed great reliance on the word “prohibit” in the text of the free exercise clause of the First Amendment. See id. at 450-51.
if the lower court’s order permanently enjoined commercial timber harvesting or construction on any two-lane road in the entire twenty-seven square mile Chimney Rock area, the Court said that both “would in this case be far from trivial.” Ultimately the Anglo-American understanding of land, expressed in the legal doctrine of property, trumped the legal doctrine on religious freedom. More importantly, Anglo-American legal doctrine on property trumped the Native American view of land in the Court’s decision; thus, providing once again, a legal sanction of the long-running pattern of Native American dispossession in the United States. This reaffirms the long-standing practice of the Court, since the time of Chief Justice Marshall of imposing Anglo-American property concepts such as possession and title on the land—concepts foreign to and incomprehensible within the Native American worldview.

In the end, despite the Court’s explicit recognition of the cultural stakes, the Court was unable to honor and respect the Native American understanding of land on either its own terms or within the conventional principles of First Amendment law. After taking note of the potential devastation to Native American culture and way of life which the planned road presented, Justice O'Connor retreated to rest her opinion on the Anglo-American understanding of land as property when she wrote that “whatever rights the Indians may have to the use of the area... those rights do

81. Id. at 453.
82. This is the central argument of Brian Edward Brown's extended critique of the Native American Sacred site cases. Regarding Lyng, Brown notes that despite the United States Supreme Court's acknowledgement of the religious significance of the land in question, the decision represents a “triumph of property over religion.” Brown, supra note 75, at 5, 119-70. Brown’s argument is that if the Court had been faithful to its own established doctrinal principles regarding accommodation of religiously based claims, the decision would have been different. See id. Brown’s critique is powerful, but it is bound by the framework of conventional rule-based doctrinal analysis. This is not surprising, since it is the form that virtually all advocacy scholarship takes. Brown's critique is valuable, but it suffers because it presents the conflict as one involving a conflict over application of doctrine set within a single shared narrative (the story of American tolerance for and accommodation of religion as developed in free exercise clause doctrine), thus obscuring the insight to be gained from a narrative approach that understands the conflict over doctrine as ultimately involving a deep conflict between two different narratives—what I have called in this article as conflict between master stories.
83. See Johnson & Graham's Lessee v. M'Intosh, 21 U.S. 543 (1823); see also Cheyfitz, Savage Law, supra note 61.
not divest the Government of its right to use what is, after all, its land.”

In coming to this conclusion she added that “however much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires.”

In making these comments the Court rejected the invitation to serve as an “arbiter” of a conflict between two cultures. Instead, the Court vindicated the notion of property in the American story at the expense of the heart of the Native American story with which it was in conflict in this case.

The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that did not prohibit the free exercise of religion. The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent that it is feasible, is for the legislatures and other institutions.

In taking this approach the Court affirmed the high value traditionally placed on both property rights and on religious liberty under the American Constitution, but declined to interfere with the government’s exercise of its property rights for the reasons I have already discussed above. In these circumstances, the Court's rejection of the invitation to serve as “arbiter” of a cultural conflict, rings hollow at best. At worst it signals clearly that in cases of cultural conflict involving Native American spiritual practice at sacred sites on public land, the Court will rise up to serve as champion for the American master story with its Anglo-American view of land as property subject to possession and title, and enforce its dominance over that of the master story of Native American peoples in such disputes. Such has been the sad history not only in Lyng but in all the cases which present similar issues. This is not to suggest that some voluntary accommodation may not be undertaken by the

84. Lyng, 485 U.S. at 453.

85. Id. at 452.

86. In taking this stand the Court expressly rejected the willingness to adjudicate the cultural conflict by use of a balancing test to weigh the competing interests at stake advocated by Justice Brennan in his dissenting opinion. See id. at 473-76 (Brennan, J., dissenting).

87. Id. at 452 (emphasis added).
government, as the Devil's Tower case in the 10th Circuit recently indicates. But such accommodation is to be had only at the sufferance of the dominant culture, which does not go very far in honoring and respecting the diversity found in Native American culture.

From a purely doctrinal point of view, this result might be explained as a vindication of the historic Anglo-American right of private property, which includes the owner's right to control the uses to which that property is put as the owner wishes. The power of an owner to control use of property, so the argument goes, necessarily includes the right to refuse to accede to demands by others to put the property to another use other than the one chosen by the owner. In simple terms, if my neighbor asks to come into my home for any purpose, religious or otherwise, I have no legal duty to accede to his request. To impose a duty on me to agree to my neighbor's request would defeat what it means to have a possessory interest in property that is at the heart of Anglo-American property law. The long history of support and vindication of private property rights by the U.S. Supreme Court reflects the central place that this view of land occupies in American constitutional law.

Perhaps this is what lies behind the Court's statement that to impose a duty on the government in the Chimney Rock case is to "require de facto beneficial ownership of some rather spacious tracts of public property." For those who read the Court's opinion through the lens of conventional property rights doctrine, this is not a surprising statement. For them, this case is a property rights case, not a case involving discrimination on religious grounds. Thus, in the absence of creating a burden on the religious practices as such, the property rights prevail. In this light, Lyng is the most recent case in a very old story about the coercive transformation of Native American understandings of land to conform to the Anglo-American understanding of land familiar to students of property law.

88. See Bear Lodge Multiple Use Assoc. v. Babbitt, 175 F.3d 814 (10th Cir. 1999), cert. denied, 529 U.S. 1037 (2000); see also supra note 49.
90. Lyng, 485 U.S. at 453.
91. See Cheyfitz, Savage Law, supra note 61 (providing a trenchant analysis of this as a phenomenon in the work of the Marshall Court and the fiction of
In addition to discussing the questions presented as property rights issues, the Court also engaged in an extended analysis of the way in which religious liberty, as a constitutional value, was presented in the case. Here the Court "erases" Native American understanding of land as communal and sacred—a recognition made in the Theodoratus Report\(^9\)—by imposing the "individual rights paradigm" of property on the Theodoratus Report in discussing the religious liberty/free exercise issues in the case.\(^9\)

Beyond the Court's transformation of the Theodoratus Report from a collective communitarian understanding of the religious dimension of the cultural stakes presented to an individualist understanding more congruent with the conventional understanding of rights found in the dominant culture, the analysis of religious liberty presents a sharp point of contrast between the conventional non-narrative approaches taken by the majority and dissenting opinions written respectively by Justices O'Connor and Brennan. Justice O'Connor's majority opinion emphasizes that the government plan did not explicitly "prohibit" the religious practices which were so severely burdened in the case.\(^9\) In emphasizing the word prohibit from the text of the First Amendment dealing with religious liberty, Justice O'Connor takes a categorical approach to religious liberty in the case.\(^9\) As we shall see, there is an alternative approach to relying on definitions in deciding these cases. It is the balancing approach embraced by Justice Brennan in his dissent. As we shall also see, both approaches are not without their problems.

In his dissent, Justice Brennan criticizes the Court's reasoning as a triumph of form over substance. He describes

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James Fenimore Cooper).

92. THEODORATUS, supra note 62.
93. See BROWN, supra note 75, at 156-58.
94. See Lyng, 485 U.S. at 449-53.
95. See id. at 451-54. As used here, the term "categorical" refers to the approach of the Court that relies on definition to establish categories of facts for deciding cases. It is in contrast with the approach that relies on balancing interests present in a dispute. It should be noted, however, that the balancing approach can, and often does, involve the use of definitional categories to set up the balance of interests that leads to a decision. A strictly categorical approach, on the contrary, relies entirely on definitions and eschews any balancing of interests as a form of policy choice not to be engaged in by courts.
the supreme religious importance and severity of the impact on Chimney Rock in great detail. Over several pages of his opinion he notes the following features of the facts as they relate to the religious significance of the case to the Indian people.

As the Forest Service's commissioned study... explains, for Native Americans religion is not a discrete sphere of activity separate from all others, and any attempt to isolate the religious aspects of Indian life "is in reality an exercise which forces Indian concepts into non-Indian categories." Thus for most Native Americans, "[t]he area of worship cannot be delineated from social, political, cultural, and other areas of Indian lifestyle." A pervasive feature of this lifestyle is the individual's relationship with the natural world; this relationship, which can accurately though somewhat incompletely be characterized as one of stewardship, forms the core of what might be called, for want of a better nomenclature, the Indian experience. While traditional Western religions view creation as the work of a deity "who institutes natural laws which then govern the operation of physical nature," tribal religions regard creation as an ongoing process in which they are normally and religiously obligated to participate. Native Americans fulfill this duty through ceremonies and rituals designed to preserve and stabilize the earth and to protect humankind from disease and other catastrophes. Failure to conduct these ceremonies in the manner and place specified, adherents believe, will result in great harm to the earth and to the people whose welfare depends upon it.... The site-specific nature of Indian religious practice derives from the Native American perception that land is itself a sacred, living being. Rituals are performed in prescribed locations not merely as a matter of traditional orthodoxy, but because land, like all other living things, is unique, and specific sites possess different spiritual properties and significance. Within this belief system, therefore, land is not fungible; ... [T]he most sacred of lands is the high country where, they believe, prehuman spirits moved with the coming of humans to the Earth. 96

Against this description of the religious significance of the Chimney Rock area, Justice Brennan argues that the Court's focus on whether the government has "prohibited" the

96. Id. at 459-61.
practices in a formal sense is unconvincing. He argues that the practical effect is such that the religious practices will be rendered impossible.

Here, respondents have claimed—and proved—that the desecration of the high country will prevent religious leaders from attaining the religious power or medicine indispensable to the success of virtually all their rituals and ceremonies. Respondents here do not even have the option, however unattractive it might be, of migrating to more hospitable locales; the site-specific nature of their belief system renders it nontransportable.

Justice Brennan goes on to squarely acknowledge the dispute as one of cultural conflict, which the court should address as such. Here is the basic difference between his approach and that of Justice O'Connor. 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. Rather than address this conflict in any meaningful fashion, however, the Court disclaims all responsibility for balancing these competing claims and potentially irreconcilable interests, choosing instead to turn this difficult task over to the Federal Legislature. 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 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.

Justice Brennan's approach to actually dealing with this cultural conflict is to apply a balancing test instead of relying on the categorical approach we saw in Justice O'Connor's opinion. In taking this approach, Justice Brennan looks first to the religious practices at stake and determines whether the
proposed governmental action "poses a substantial and realistic threat of frustrating [these] religious practices. Once such a showing is made, the burden . . . shift[s] to the Government to come forward with a compelling state interest sufficient to justify the infringement of those practices."

Notice that in taking this balancing approach, Justice Brennan creates a duty on the part of the government to justify the means it has chosen to accomplish its objectives. He does not formally set up one interest as superior to the other. They must both be examined in the context of the facts in light of each other and the alternatives available, if any. When this is done, the Court is proceeding more by way of balancing the interests against each other than it is by applying a categorical definition in an effort to reach a decision. This contrast between an approach that emphasizes balancing and one which emphasizes the categorical approach is a key contrast between Justice O'Connor and Justice Brennan in this particular case. The categorical approach can be criticized for not taking the facts of a case with the deep seriousness that asks whether the letter of the law violates its spirit in a given case. The balancing approach seeks to avoid this, but in doing so creates new problems that open a court to criticism of a different sort.

The balancing approach requires great sensitivity to the context. Such sensitivity can seem like pure policy analysis performed by courts. Because of this it is often criticized as "unprincipled" or "legislative" in character. In other words, the critics of this approach argue that the court has moved from the realm of adjudication into the realm of legislation and thus, stepped outside of the proper institutional role of the court. This is a longstanding argument across many constitutional doctrinal developments in the United States. A discussion of the full scope of the debate is beyond the bounds of this essay. Suffice it to say that it is an expression of the central structural dilemma of the American commitment to constitutional government on the one hand and democratic government on the other. Or, in other words, to a government limited by the rights of the people, which is at the same time a government that is an expression of the will of the people. This tension between the commitment to

101. Id. at 475.
constitutionalism and democracy is another form of Lincoln's Dilemma discussed above. The stance taken by both of these Justices can be viewed sympathetically. Justice O'Connor seeks to be true to the principle of government "neutrality" so distinctive of the American approach to religious liberty, while at the same time being true to the sanctity of property rights, which are also enshrined in the Constitution. Her resolution of the problem is to require formal equality—no religion may be singled out for preference or burden and property owners are not compelled to put their property at the disposal of others. In formal terms, the government's action cannot be assailed in this view. Taking this approach the Court need not make any subjective determination of the importance of the religious interest involved. This keeps the Court out of religious matters and preserves religious liberty, so goes the argument.

Justice Brennan, on the other hand, seeks to be true to the purpose for which religious liberty is protected under the Constitution. For him, liberty in the abstract, without the ability to exercise it in the observance of religious practices, requires careful scrutiny of governmental action, which might burden such practices. Without such scrutiny the commitment to religious liberty is called into serious question.

Justice Brennan also seems to differ from Justice O'Connor in his view of how to take into account the government's property interest in this case. The public nature of the government's property is of special importance for Justice Brennan, as compared, say, to the private nature of the property I call my home. Although he does not discuss this at length, a close reading of the opinion suggests that the nature of government property as "public" as opposed to the nature of my property rights in my home as "private," justifies imposition of a legal duty on the government but not on me with respect to my home. Accordingly, the argument goes, government can be required to take steps to avoid burdening religious liberty on public property where possible, even when that burden is not one shared by the public in general. Justice Brennan does not elaborate on this
private/public property distinction, but it seems important to his approach. There is room here to argue that the very public nature of government property does not permit the government to use it in a way that burdens a constitutional value such as religious freedom unless the government satisfies the burden of proof to show that it has a compelling reason to burden the public interest in religious liberty.

We might well consider whether a sympathetic reading of the opinions of Justices O'Connor and Brennan might lead to an accommodation, which honors the concerns they express. Justice O'Connor seeks to avoid favoring one religion over another, and to avoid placing undue restraint on the government in the decisions it makes concerning the management of governmental property for the public good. Justice Brennan seeks to avoid the use of governmental power in a way which places a severe burden on a religious practice by members of the political society who are not members of the dominant culture. So where does this leave us? It leaves us with the task of exploring how we might deepen Justice Brennan's approach to accepting the adjudication of cultural conflict while trying to avoid the difficulties of which Justice O'Connor warns us.

Despite his willingness to engage in a balancing of the interests presented, Justice Brennan gives us little guidance for applying the test he proposes. Ultimately, his approach, like Justice O'Connor's, pits the European-American worldview against the Native American worldview. Herein lies the problematic character of Brennan's clear adherence to the Anglo-American understanding of land as property. At best, Justice Brennan's analysis demonstrates sensitivity to the cultural stakes involved within the balancing approach for dealing with conflicting choices within the conventional analytical framework informed by the individual rights approach of the American story. That analysis does not consider the possibility that the American story might be read to include a variety of stories, with their differing views of land, on an equal footing. The tragedy of Justice Brennan's sympathetic opinion is the fact that by employing the conventional balancing approach, as an alternative to Justice O'Connor's use of the conventional categorical approach, he does not challenge the dominant reading of the American story. This can be seen in the fact that his use of the
balancing approach asks simply whether the dominant reading of the American story, with its Anglo-American view of land as property, may bear the burden of accommodating the Native American interests present in this case, rather than imaginatively asking whether the American story can be read as one which includes more than one narrative about the meaning of land. Thus, even for Justice Brennan, when push comes to shove, the Native American interest in another case, if not in Lyng, may well be required to give way to the conventional reading of the American story with its predominant view of land as property subject to possession and title. This places into doubt any possibility of developing a transformative approach to secure social healing through the use of conventional analytical approaches to cultural conflict. The upshot is that despite the disagreement between Justices O'Connor and Brennan on which conventional principles to apply in this case, the application of a categorical approach (O'Connor) or a balancing approach (Brennan)—and regardless of the outcome—the result will include further imposition of the European-American worldview on Native American communities in conflict with the government over sacred sites on public land. Thus, even if Justice Brennan's view had prevailed, the "victory" for the Native American plaintiffs would have been on European-American terms. Such a "victory" is not one which can secure long-term social healing between communities shaped by different master stories who come into conflict on public land.103

103. This phenomenon is replicated in the experience of African Americans by the choice of noted filmmaker Steven Spielberg to address slavery through a dramatization of the case involving The Amistad, 40 U.S. 518 (1841), rather than through the case involving The Antelope, 23 U.S. 66 (1825). See AMISTAD (Dreamworks 1997). In both cases ships suspected of being engaged in the international slave trade, which had by then been outlawed in the United States, were stopped by American forces and brought into American ports. The Africans on board the Antelope were held in temporary quarters in Savannah, Georgia while the competing claims of foreign nationals (Spain and Portugal) contested their right to the slave cargo under international law. See Antelope, 23 U.S. at 119. Chief Justice Marshall decried the slave trade as "odious" and "unnatural" but nevertheless held that the positive law of nations required the Court to return the slave cargo to its owners who resided in sovereign states that had not outlawed the slave trade. See id. Indeed some of the Africans eventually were acquired by a Georgia congressman. For a definitive history of the Antelope case, see JOHN T. NOONAN, JR., THE ANTELOPE: THE ORDEAL OF THE RECAPTURED AFRICANS IN THE ADMINISTRATIONS OF JAMES MADISON AND
Reading the American story as one in which land is viewed as property, subject to possession and title, surely comports with the history and understanding of the American experience in European-American terms, informed as it is by the ideas of discovery and conquest. But that does not preclude a reading of the American story as one with a wider gauge concerning the meaning of land, that might lead to a transformative approach to culture conflict in an effort to secure social healing rather than to entrench and deepen the divide between the competing worldviews present in such cases. A deep appreciation of the cultural stakes presented in cases of cultural conflict might yield such a transformative approach in terms that are similar to what Justice Brennan advocates while at the same time taking into account the concerns that Justice O'Connor expresses for both the substance of religious liberty as well as the court's institutional role in deciding cases of cultural conflict. We may be able to reach for this deeper appreciation by adding narrative method to our analysis of the Chimney Rock case. By supplementing the balancing and categorical approaches with narrative method in our description of the cultural dimensions and stakes in the dispute, we shall see that, at their core, these cases are marked by a clash of master stories which need to be regarded with utmost seriousness if we have any hope of being able to bridge the split between these two

JOHN QUINCY ADAMS (1990). In Amistad the Africans, with assistance from American abolitionists, were successful in arguing for their freedom on the property rights theory that they, the Africans, owned the property interest in themselves, given the circumstances under which they were captured. See Amistad, 40 U.S. at 522-23. Thus, the declaration of the United States Court is portrayed in triumphant terms at the end of Spielberg's rendering of the story in the movie. See AMISTAD (Dreamworks 1997). Indeed, this is underlined by the cameo appearance of then Associate Justice Harry Blackmun, who read the Court's judgment in the climactic scene of the movie. See id. For a definitive history of the Amistad case, see HOWARD JONES, MUTINY ON THE AMISTAD: THE SAGA OF A SLAVE REVOLT AND ITS IMPACT ON AMERICAN ABOLITION, LAW AND DIPLOMACY (1987). In retrospect, the ambiguous story of the Africans in the Antelope is much more faithful to the actual experience of African Americans in the almost 60 years between the legal end of American participation of the slave trade (1808) and the formal legal abolition of slavery in the United States by the Thirteenth Amendment (1865). Indeed the many decades of racial apartheid which followed the end of slavery, to say nothing of the continuing racial injustice that has followed the formal legal end of that system in the United States, marks the African American experience within the American story as one marked by deep ambiguity and injustice which continues into America's third century.
approaches and provide for a way to deal with similar problems of cultural diversity more successfully in the future. It remains for me to sketch out what taking master stories in conflict with *utmost seriousness* means in helping us learn the lessons of Chimney Rock for dealing with cultural conflict in a culturally diverse society and world in the twenty-first century.

V. THE LESSONS OF CHIMNEY ROCK FOR DEALING WITH CULTURAL DIVERSITY IN THE TWENTY-FIRST CENTURY

What lessons can be learned from the Chimney Rock case? When we augment our understanding of the decision, with the additional perspective narrative method can provide, we can clearly see that a commitment to the principle of *abstract neutrality* in religious liberty cases can serve to entrench a dominant cultural view of human experience even where there is a commitment to cultural diversity as in the United States. Here we would do well to recall Justice Jackson’s eloquent words against the idea of enforcing an orthodoxy through constitutional adjudication. On the pretext of avoiding orthodoxy, the Court’s decision in the Chimney Rock case serves to perpetuate the cultural hegemony of the dominant European-American cultural attitude toward religious experience and property. Behind the mask of neutrality, the Court has enforced a feature of the American story, indebted to English common law, concerning property and the moral authority of the possessory owner to exercise dominion against all others. This is a radical departure from, and in serious conflict with, the Native American understanding of the land involved in this case. From this perspective, the Court reads the American story in a particular way and then enforces that reading on the facts of the dispute. The cost to the culture of the Yurok, Karok, and Tolowa people is enormous. The very basis of their cultural identity is placed at risk. As the Court acknowledges, the reenactment of the Indian people’s master story, through religious practices associated with Chimney Rock, will be rendered virtually impossible by the

104. See *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); see also *supra* notes 22-23 and accompanying text.

government's action. Without the opportunity to reenact their master story by engaging in religious practices in the Chimney Rock area, their understanding of their experience as well as the means for its remembrance and transmission across the generations is jeopardized.

We can now see that the "devastation" Justice O'Connor forthrightly anticipates if the road is constructed, is a devastation which comes from the suppression of the Indian peoples' master story because it can no longer be reenacted in its traditional way in its traditional setting near Chimney Rock. The burden created by the exercise of governmental power in this case is placed directly upon a major feature of the master story of the Indian people involved as parties. Thus, to characterize the conflict and the burden involved as simply a clash between individual rights and governmental power depreciates the stakes to the communities from which the individual parties come to the court. It subordinates the Native American master story to the dominant American master story. A narrative approach, however, would take the conflict in narratives as the source of the core issue involved in the case. From a narrative perspective, the full impact of the burden is more clearly seen—namely, that the communities of the Yurok, Karok, and Tolowa people now find it impossible to honor and remember their master stories as they have done so in times past, because a major feature of that remembrance, the reenactment of rituals at Chimney Rock, will likely die out over time. As the master story is burdened, so is the cultural heritage and identity of the people who hold the story dear. The consequences are likely to be that, over time, the meaning of the site and its place in the story of the people will gradually be extinguished and thus forgotten, because the master story will be forgotten. A narrative approach reveals the stakes in their fullest dimension because it proceeds from a different starting place, with a different approach to describing the facts of the case, than conventional, rule-based, doctrinally driven, approaches. Narrative requires us to start with the stories that are brought to the court in a case of cultural conflict, and resists any effort to frame those issues within the worldview of only one of the stories, such as the American story, presented in the conflict. A narrative approach does not ignore or blithely dismiss doctrine, but it does resist forcing the facts into
doctrinal categories that obscure and suppress the different narratives present in a case of cultural conflict. A narrative approach does this by starting with a narrative reading of the facts that does not privilege one particular story over another. In this way the narrative approach neither ignores the disparate master stories that may be present, nor does it define one community within the worldview of another. On the contrary, a narrative approach looks carefully for the presence of conflicting master stories underlying the dispute and takes them seriously.

In taking the master stories in a dispute seriously, a narrative approach is more faithful to the full scope of the American constitutional vision than conventional approaches to adjudication of cases of cultural conflict. This is so because a narrative approach seeks to resolve the dispute through the creation and application of doctrinal principles in the service of the constitutional commitment to form one nation (unum) out of several diverse sovereign states, inhabited by several diverse sovereign peoples (pluribus) in a "more perfect union." The narrative approach requires that the diversity of these several states and peoples be embraced, rather than erased. The very constitutional recognition that the union springs out of, and is an expression of, the diverse character of the people that inhabit the several states, as Chief Justice Marshall's opinion in *McCulloch v. Maryland*\(^6\) recognizes, requires no less. To suppress the reenactment of a people's story through suppression of those practices which are the vehicle and discipline through which those people embody and become embodied by the master story they hold dear, as the court did in *Lyng*, is thus, not only to strike a death blow to the very character and being of the people embodied by that story, it is also to strike a death blow to the American constitutional vision of a diverse union. To suppress the life-ways, and thus, the life, of the community of which the members of Native American communities are a part, and to force change upon them as a people—or as some might have it, to encourage them to be more American—is ultimately not only an insult to their sense of being, but to the sense of being that lies at the root of the American constitutional vision.

The examples of the dead stories of the past serve as a

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106. 17 U.S. 316 (1819).
warning to the possibilities for an American future, as each year the peoples who inhabit the several states of the union become more diverse. With the passing of the dead stories of the past, a people died, and the richness of human experience was narrowed in the process. Who remembers the stories of the Easter Island residents? And who but a few scholars knows the story of the Cult of Mithras, whose artifacts can be found littered across Western Europe as far north as Hadrian's Wall in Scotland? This phenomenon is already occurring elsewhere in the United States, especially in the eastern portion of the country where the earliest and deepest intrusions on Indian life have been experienced. The area around Mount Katahdin, in the State of Maine, is an example. This area, once a site of great power for the Native Americans in the area, has all but lost its significance. Today it is the site of Arcadia National Park. The summit itself is easily reached via a "scenic drive" which takes no note of its ancient spiritual significance. It is not surprising that Mount Katahdin was held as sacred. Each morning the sun first strikes the North American continent in that area. Today, Indian people have little more than a dim memory of whatever rituals might have been performed there or the importance of those rituals to their identity and understanding of reality. This stems from the fact that in the eastern United States may be found the deepest and most long lasting intrusions on Indian culture. Is this to be the future history of Chimney Rock? Is there another way to avoid the fate of Mount Katahdin at the sacred sites now under pressure in the western United States?

Narrative method does not provide an easy answer to these questions. It does suggest that understanding the deep cultural stakes present, when master stories are in conflict with each other, may help us find the depth of empathy from which imaginative legal approaches to resolve these conflicts might be fashioned. The development of such empathy requires humility, born out of the recognition of the limits of conventional anthropological descriptions of communities that are different from our own. These carefully detailed descriptions can do no more than provide an intricate description of the external features of a particular society. A good example is the continuing fascination that non-Native people exhibit concerning the Snake Dance, one of the
spiritual ritual ceremonies of the Hopi people. The Snake Dance is part of the Snake-Antelope Ceremony, one of the nine great ritual ceremonies in the annual cycle observed by the Hopi each year. This annual cycle expresses the "Hopi Road of Life." As such they inform and give shape and meaning to the lives of the Hopi people. The annual cycle "correspond[s] to the nine universes of Creation." They "are endlessly repeated each year in annual cycles of germination, growth, and harvest. So the ceremonies also plan, confirm, and help carry through the agricultural cycle upon which all life depends." Of all the dances in the Hopi cycle, the Snake Dance is the most unusual to European-American eyes. In it the participants dance with poisonous snakes held by the teeth in the dancer's mouths. Because of this it has long received the most attention from academic investigators as well as the public around the world. The unusual character—to European-American eyes—of the Snake Dance gave rise to a set of classic, painstaking anthropological descriptions published in the late 1890s by the Bureau of Ethnology of the Smithsonian Institute. Today, these particular academic studies describing the snake dance, now almost 100 years old, together with photographs that accompany those studies, plus additional photographs from other sources, have been gathered and published together in a form for sale in tourist shops today in Hopi country.

108. Id. at 238.
109. See id. at 218, 226-27.
110. See JESSE WALTER FEWKES, HOPI SNAKE CEREMONIES (1986) (previously published as Tusayan Snake Ceremonies, in SIXTEENTH ANNUAL REPORT OF THE BUREAU OF AMERICAN ETHNOLOGY 267-314 (1897), also published as Tusayan Flute and Snake Ceremonies, in NINETEENTH ANNUAL REPORT OF THE BUREAU OF AMERICAN ETHNOLOGY 957-1101 (1900)) (reprint augmented with additional photographs from the Museum of New Mexico by Avanu Publishing. A cover with original Hopi art is also added to this collection). The reprinted volume was observed by the author on sale in a national park gift shop in 1992. No other ethnological studies of dances or other ethnological study series were offered for sale in the gift shop. The Hopi snake dance also received attention from European observers. Aby Warburg, a German anthropologist was captivated by the Hopi ritual, and described it with considerable sympathy that approached awe. See ABY M. WARBURG, SCHLANGENRITUAL: EIN REISEBERICHT (Verlag Klaus Wagenbach 1988). For him it offered an occasion to leave behind museums and literature, the primary fields of his inquiries into iconography in religious history, and to observe the
We must be careful to avoid being seduced by the detail of what we might regard as exotic when we engage in descriptions of others. There is more to the truth of the matter here than what our most detailed empirical descriptions might produce. Rather, despite impressive "scientific" detail, we must regard these empirical anthropological descriptions with a certain amount of suspicion when it comes to making claims about the meaning of the features of other societies that we observe through our socially conditioned eyes. Any claims we might have about the truth that the Hopi have found and express in their ancient cycle of dances is not something that is available to simple external observation by outsiders. Rather, it is a truth which is both experienced as well as expressed by the Hopi themselves within the dances. Thus, the truth of the Hopi rituals is internal—it is what we might call an esoteric truth that comes in part from the experience of being Hopi—rather than an esoteric truth that might be described by a "scientific" observer. In one sense the whole Hopi people are the dances, and the dances are the Hopi, and no amount of external observation by an "objective" outside observer can gain access to the community that is present within the shared reality of embodied dance, story, and people. The same may be said of Torah (law) observance, which is central to the Jewish tradition or the ritual observance of the Passion, Death, and Resurrection of Jesus, which is central to the Christian tradition. In light of this, our description of others requires the practice of humility lest we corrupt the truth of their experience.

By gaining an understanding of these cases from this point of departure, despite the difficulties narrative method presents, we may hope to yet develop a creative approach to dealing with clashes of culture that may lead to social healing.
where these cultures come in the conflict within a particular political society, whether that be in the courts or the political life of the nation. To simply acknowledge the narrative dimension of the cultural stakes without taking the master stories with equal utmost seriousness is likely to perpetuate the disaster of Lyng and similar cases. To take the master story of the other with utmost seriousness involves an effort to honor the other, in recognition of one's own master story as contingent and particular, yet nevertheless significant.

The warning of the Chimney Rock case is that the Indian peoples' master story suffered a terrible defeat at the hands of another master story—the American story—held dear by the dominant European-Americans who, as carriers of European culture, planned and executed the "discovery" and settlement of the Western Frontier in the United States, in the same way that their forbears had first planned and executed the "discovery" of the "New World." In this recognition we can hope to find the seeds of a new approach to adjudicating cultural conflict in the American courts, which might some day be helpful not only in America but other distant places such as Belfast, Jerusalem, and Sarajevo. How the core values of the competing stories may be honored must be worked out in each case. What I have argued here is that despite this difficulty, the task must be undertaken. Stories must be taken seriously in cases presenting cultural conflict—so seriously that courts look for ways to accommodate the conflict in ways that honor and respect the stories rather than choosing between them and elevating one over the other.

To make this argument is not simply to embrace an easy cultural relativism, rather it is to look for ways to embrace the contrast presented in the conflict in a way that can lead to the intensification of experience by all of the parties to the dispute within a larger synthesis that can hold these parties together without suppressing the contribution that each makes to the larger whole. Such interest-based analysis is not uncommon in constitutional law. It is a call to recapture the legal imagination needed to read the American story as one which is deeply committed to the pluribus as well as the unum which ushers out of it. The example of the court's approach to dormant Commerce Clause analysis, which has occupied it in so many cases over the last century comes
immediately to mind. The balancing test used in many of these cases of conflict between the states and the federal government over the regulation of the economy under the Commerce Clause makes it difficult to synthesize them in a way that produces a neat bright line rule. If there is any hope of securing a meaningful understanding of these cases it is likely to be one which embraces the idea of the important and central commitment to diversity within community that lies at the deepest depths of the American vision of the more perfect union. If this can be done within the scope of federalism and concerns over economic matters, why not in religious liberty?

As we come to appreciate the master stories of other people, and the importance they have for the life of these people, so too might we see the presence of the master stories in our lives and the ways in which the law embraces and protects or burdens our stories. If we would seek protection for our own stories, and the communities we inhabit, can we settle for any less protection for those among us for whom another story is the center of life and hope? The first step toward the imagining of new and more creative solutions in law toward cultural conflict, is to deepen the understanding we have of our own master stories, and to discover the way in which our stories are entwined with other master stories far different from our own that are held dear by the people who live perhaps just next door or down the block around the corner. For this we must grasp the significance of both the unum and the pluribus from which it springs. From such recognition we may learn that we share a common humanity even though we are irreducibly different from each other in important ways because of the presence of unique master stories in our lives, which inform our existence.

Imagination, inspired by empathy and humility in listening to the stories of others far different than our own, can help us understand our own stories better and thus come to see the encounter with difference as an opportunity rather than as a threat. From this perspective we stand to recover the meaning of our own stories because we are in

111. For the current formulation of the balancing test in dormant Commerce Clause cases, see Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (citing Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960) and Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945)).
conversation with those whose stories differ from our own. In that vital conversation, engaged in with utmost seriousness, sensitivity, and appreciation of our master stories, we may yet learn to live with our differences rather than going to war over them.