BODIES OF BELIEF:

THE PROBLEM OF RELIGION IN *NAVAJO NATION V. USFS*

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Bodies of Belief: The Problem of Religion in *Navajo Nation v. USFS*

Thesis directed by Associate Professor Greg Johnson

In August of 2008, Justice Bea writing the opinion for the 9th Circuit panel in *Navajo Nation v. USFS* explains that although "the district court found the Plaintiffs' beliefs to be sincere," the production of artificial snow on the San Francisco Peaks does not violate the Indian tribe's right to religious freedom. In a remarkable and controversial justification for this ruling, Justice Bea decides that "the sole effect of the artificial snow is on the Plaintiff's *subjective spiritual experience*. [...] Nevertheless, a government action that decreases the spirituality, the fervor, or the satisfaction with which a believer *practices* his religion is not what Congress has labeled a "substantial burden" ... on the free exercise of religion." Underlying this opinion are profound claims of authority regarding how the body, and bodied movement, in this case located between Indigenous ritual practice and snow skiing, are imagined by the court, and in the larger sense, through American jurisprudence, as permissible or subject to regulation. Nested within this argument are centuries old paradigms of a civilized and enlightened society as imagined and enforced through the European and American colonial projects.

I wish to argue through this paper that these colonial projects have always been concerned with regulating and conforming the bodies and bodied movements of their subjects. Furthermore, I wish to demonstrate how the court's understanding of the free exercise of religion represents a particular body/mind (practice/belief) ontology that also predominates within the academic study of religion. By rethinking our assumptions about the body's relationship to religion and the study of religion I wish to create a space in which to critically examine the myths constructed in American legal and academic discourse regarding religious performativity as constitutive of the lived religious subject

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Introduction

In 2008, after years of litigation, appeals, district, and federal court decisions the *en banc* panel for the 9th Circuit Court of Appeals ruled that the production of artificial snow on the San Francisco Peaks did not violate the right to the free exercise of religion for several thousand Indian people.[1] The Indian plaintiffs in this case, the Navajo Nation, the Hopi Tribe, the Havasupai Tribe, the Hualapai Tribe, the Yavapai-Apache Nation, and the White Mountain Apache Nation argued that the use of treated sewage effluent for snow production at a skiing resort on Mt. Humphrey's would desecrate one of their sacred mountains, thus destroying their ability to practice their traditional religions.

In August of 2008, Justice Carlos Bea, writing for the majority opinion in the 9th Circuit *en banc* panel in *Navajo Nation v. USFS,* ruled that although "the district court found the Plaintiffs' beliefs to be sincere," the production of artificial snow on the San Francisco Peaks does not violate the Indian tribes' right to religious freedom.[2] In a remarkable and controversial justification for this ruling, Justice Bea decided that "the sole effect of the artificial snow is on the Plaintiff's *subjective spiritual experience* ... Nevertheless, a government action that decreases

[1] I have chosen to use the term 'Indian' to mean all of the people within the United States who identify as Indigenous, Native American, American Indian, or First Peoples. The use of the term 'Indian' in American Indian scholarship is a reclamation project by American Indians for American Indians. I use the term in keeping with its use in federal Indian law as to maintain a definitional solidarity and continuity between the language of the American courts and my own scholarship. My aim is to communicate clearly to a legal and an American Indian audience my overall argument in a fashion that is most accessible for those curious about religious freedom and American Indian Indigenous rights.

[2] Navajo Nation et al v. USFS, 535 F.3d (9th Cir. en banc. 2008) at 10041. (under the Religious Freedom Restoration Act of 1993.)

the spirituality, the fervor, or the satisfaction with which a believer *practices* his religion is not what Congress has labeled a 'substantial burden' ... on the free exercise of religion."[3] With this decision powerful claims were made regarding the nature of religion and the construction and protection of religion as a definable legal category.

What are the underlying mythologies of the court which enable a decision of this magnitude?[4] Is it possible that the religious claims of the Indian plaintiffs in *Navajo Nation* are fundamentally alien to the court and to how the court understands and defines religion?

This thesis explores how the court's construction and application of the right of religious freedom is built upon a particular body ontology. I define a body ontology as a fundamental epistemological frame regarding the nature of being that provides an explanation for what has been identified as 'mind' and 'body.' Body ontologies argue for a particular relationship regarding how we explain (or explain away) the existence of a mind and body connection.[5] The body ontology adopted in American law is indebted to an American and European philosophical tradition which has inherited the argument that reason, belief, thought, and the mind are separate from and independent of our bodies.[6] As philosophers George Lakoff and Mark Johnson have explained, mainstream "western philosophy" has inherited and reinforces a particular body

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[3] *USFS,* 535 F.3d at 10041, 10042*,* emphasis mine.

[4] Following Bruce Lincoln's understanding of myth as the "small class of stories that possess both credibility and authority" we can understand legal mythology as a primary mode of the production and reproduction of credible and authoritative stories. Lincoln further explains "that through the recitation of myth one may effectively mobilize a social grouping. Thus, myth is not just a coding device in which important information is conveyed, on the basis of which actors can then construct society. It is also a discursive act through which actors evoke the sentiments out of which society is actively constructed." Bruce Lincoln, "Myth, Sentiment, and the Construction of Social Forms," *Discourse and the construction of society : comparative studies of myth, ritual, and classification.* (New York: Oxford University Press, 1989), 24, 25.

[5] Body ontologies, although apparently universal, nonetheless exist in varying modes of possibility dependent upon the societies in which they emerge.

[6] George Lakoff and Mark Johnson, *Philosophy in the Flesh: The Embodied Mind and its Challenge to Western Thought*, (New York: Basic Books, 1999), 16.

ontology which claims that "human reason is the capacity of the human mind to use transcendent reason, or at least a portion of it. Human reason may be performed by the human brain, but the structure of human reason is defined by transcendent reason, independent of human bodies or brains. Thus, the structure of human reason is disembodied [and that] human concepts are the concepts of transcendent reason. They are therefore defined independent of human brains or bodies, and so they too are disembodied."[7] The body ontology at work within the legal construction of religious freedom is structured in such a way that transcendent reason is always posited as disembodied and agentic, where the body moves because the mind tells it to.

The United States' court can only imagine religion in relation to this body ontology. When 'subjective religious experience' is separated from embodied or physical religious exercise, when belief is separated from practice, what emerges is a regulatory onto-definitional exercise which is foundational to the court's construction of religious freedom. The decision in *Navajo Nation* is part of a greater legal mythology which forces religious bodies into secular bodies, which seeks to regulate certain types of religiosity through an unrelenting adherence to a body ontology that understands mind and belief to be separate and distinct entities from body and movement. This legal mythology has constantly resulted in the court's failure to understand Indians' religious lives, even in those cases where the court professes sympathy for them. In this thesis I propose a new reading of the legal regulation of religion in the United States. I argue that through the construction of "legal religion," haunted by body ontologies and mythic imaginings of the secular, an all too familiar politics of religious freedom that seeks to regulate religious 'otherness' is perpetuated. Furthermore, this ontology remains persistently present in

[7] Lakoff and Johnson, *Philosophy,* 21.

much of academia, including, and importantly so, the academic study of religion.[8] Through an examination of the body ontology underlying definitions of "free religion," scholars of religion can begin to rethink and question their own employment of a body ontology in their definitions of religion.

When considering 'religion' must we separate belief from practice, mind from ritual? The court, I will argue, has a structured habit of doing so and as such is fundamentally incapable of understanding or protecting Native American religions. Similar to what Patricia Penn Hilden has suggested, what results is a secular divide that constructs "the location of us and them [and] is inculcated early on until dozens of little-questioned assumptions veil both practice and theorizing about the quotidian acts of exclusion."[9] My aim is to unveil the 'little-questioned' assumptions regarding the legal definition of religion as constantly perpetuated and arising from a body ontology. My hope is that this critical exercise will contribute to a rethinking of these quotidian acts of exclusion inherent in the current juridical employment of religious freedom.

This thesis is organized into five sections. The first section presents the facts and the history of *Navajo Nation v. USFS* and then locates the court's body ontology within the Religious Freedom Restoration Act (RFRA). This section also sets forth a brief history that traces the presence and the consistency of a body ontology as it is employed through important and infamous Indian Law decisions.

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[8] Sam Gill explains that "Mind (spirit, soul, intellect) and body are in many ways inseparable despite the ease with which our Western religious and intellectual heritage has prepared us routinely to dualize and hierarchize them. Both theology and the academic study of religion, indeed the entire academy, tend to ignore the physical body while focusing on the mind, yet it must be seen that to focus on the mind remains no less a statement about the body and, even though explicitly ignored, our body practices and habits enact our theologies." Sam D. Gill, "Embodied Theology" in *Religious Studies, Theology, and the University: Conflicting Maps, Changing Terrain* ed. Linell E. Cady, Delwin Brown (Albany: State University of New York Press, 2002), 81.

[9] Patricia Penn Hilden, *From a Red Zone: Critical Perspectives on Race, Politics, and Culture.* (Trenton: The Red Sea Press, Inc., 2006), 160.

The second part of this thesis delves into Hopi arguments for the protection of the San Francisco Peaks. Utilizing testimony from the public record found in local newspapers, published community hearings, websites, amicus briefs, and in legal proceedings, I examine how different Hopi people represent and construct their religious claims in a court of law. Whereas the legal event gives rise to an articulation of religion, there also exists a measure of an inability to translate between cultural paradigms. This section will explore Hopi articulations of their religion as a means for locating an understanding of religion that operates from a different body ontology as that of the American courts.

The third section proceeds to deconstruct both the majority opinion, written by Justice Bea, and the dissent, written by Justice Stevens, in order to specifically understand how a specific body ontology is endemically present in the construction of a definition of religion. This section demonstrates that even when different justices disagree as to the nature of religion and how it should be protected, there nonetheless persists the American legal body ontology.

In the fourth and final section of this thesis I make theoretical conclusions regarding the prevalence of the court's body ontology within the greater secular and colonial project underlying the discourses of religious freedom. I examine how aporatic secular projects are haunted and bounded by a body ontology to the extent that the maintenance and perpetuity of secularism is contingent upon that ontology. Concluding, I examine the concept of movement ontogenesis as a possible alternative for constructing a more adequate and just legal definition of free religion.

Chapter I

Navajo Nation v. USFS

Navajo Nation v. USFS is a particularly salient example of how the American legal body ontology exists as a ground to regulate religious otherness. The case, once decided and *certiorari* denied, now stands as the enforceable culmination of how religious freedom, as a definitional exercise obsessed with regulating bodies and bodied movement, reveals and betrays itself for its own regulatory bias.[10] The American courts are always already biased against Indians due to the priority of their body ontology in defining and imagining religion and Indian religion.

Navajo Nation is a religious freedom case in which the plaintiffs collectively argued that the use and production of snow from reclaimed waste water on their most sacred mountain in the San Francisco Peaks violates their right to the free exercise of religion under the Religious Freedom Restoration Act (RFRA).[11] Humphrey's Peak is the tallest of the mountains within the San Francisco Peaks and is the site of the Arizona Snowbowl ski resort. The Snowbowl has been in operation since 1938 and is leased by the Arizona Snowbowl resort from the United States Forest Service. The Forest Service, as a branch of the federal government, is bound to manage

[10] Certiorari is a formal written order seeking judicial review from the Supreme Court. Once a case has been decided in a Federal District Appellate Court, the United States Supreme Court is the last court in which a case can be appealed. If the Supreme Court denies certiorari it means that they agree with the decision of the lower court and the decision stands as law.

[11] When a religious freedom case (RFRA) is brought in front of a court, the plaintiff must first show that she or he engages in an "exercise of religion." Once this has been shown, then it is up to the plaintiff to show that the government's actions (or non-action) has created a "substantial burden" on the plaintiff's exercise of religion. Once this has been shown, the burden then shifts to the government to prove whether or not the burden is justified through a "compelling government interest" and that the government's actions have been enforced through "the least restrictive means." The compelling government interest and the least restrictive means tests are known as "balancing tests" and are commonly used to decide whether or not a the government can constitutionally restrict rights. Navajo Nation et al v. USFS, 535 F.3d (9th Cir. en banc. 2008) at 10040, 10076.

the lands in accordance with federal law which mandates that the agency must promote open access to multiple-use recreation, must manage the area in accordance to environmental regulation, and must allow for the free exercise of religion as outlined under RFRA and the Religious Land Use and Institutionalized Persons Act (RLUIPA).

The tribes argued that the use of reclaimed sewage effluent to make snow would substantially burden their exercise of religion.[12] As the plaintiff-appellant tribes in this case are from diverse Indian tribes with different religious understandings and practices regarding the peaks, the types of burdens that were presented varied from tribe to tribe. Justice Fletcher writing for the United States Court of Appeals for the Ninth Circuit, 2007, summed up the collective argument for the tribes as predominantly two types of burdens: first, that the use of treated sewage effluent for snow production would create "the inability to perform a particular religious ceremony, because the ceremony requires collecting natural resources from the Peaks that would be too contaminated - physically, spiritually, or both - for sacramental use; and (secondly) the inability to maintain daily and annual religious practices comprising an entire way of life; because the practices require belief in the mountain's purity or spiritual connection to the mountain that would be undermined by the contamination."[13]

Navajo Nation is not the first time that some of the tribes have attempted to challenge the Forest Service over the desecration of the peaks by snow skiing construction and operations. In *Wilson v. Block*, in 1983, the Hopi Tribe, an association of Navajo Medicine Men, and two nearby ranchers in response to the then-owners' proposition to expand the ski area brought suit

[12] Navajo Nation v. U.S. Forest Service, 479 F.3d at 2855.

[13] Navajo Nation v. U.S. Forest Service, 479 F.3d at 2856.

under the first amendment claiming a violation of their free exercise of religion.[14] The court ruled that construction and snow skiing operations did not violate their first amendment right. The fact that Indian people have been fighting against the presence of any type of construction on the San Francisco Peaks is testament to the unique sacredness in which many Indian people hold these peaks. From the beginning it is apparent that any type of construction on the peaks profanes them.

In 2002, ASR, the current owners of the Snowbowl, presented the Forest Service with a facilities improvement proposal. The Forest Service, after reviewing the potential environmental and cultural impacts of the proposed Snowbowl expansion in 2005, issued a Final Draft Environmental Impact Statement and a Record of Decision granting the Snowbowl permission to expand the ski area. This expansion included, among other things, the construction of a new high speed lift, the relocation and upgrade of older lifts, the creation of 66 new acres of trails, and the use of treated sewage effluent for the production of artificial snow. Challenging this decision by the Forest Service, the plaintiff-appellants brought suit before the district court of Arizona in 2006 under a violation of RFRA and NEPA.[15] Before I examine the 9th Circuit *en banc* reversal of the 9th Circuit decision it is important that I explain the process by which a RFRA violation is tested.

The process of testing whether or not there has been a substantial burden of religious freedom, and whether or not that burden is grounds for a governmental exemption, reveals much about how religion is identified and regulated through a particular body ontology. The process itself reveals the jurisprudential definitional construction of religion as regulatory of religious

[14] see: Wilson v. Block, 708 F.2d 735 (D.C. Circuit, 1983).
[15] Navajo Nation v. U.S. Forest Service, 408 F. Supp. 2d 866, 907 (D. Ariz. 2006). NEPA is the National Environmental Protection Act, and as this part of the legal argument does not pertain to issues of religious freedom, I will not deal with this part of the legal argument in this thesis.

bodied otherness. Through understanding the RFRA test we can better track and deconstruct the judicial opinions as they articulate and reveal the American legal body ontology.

RFRA was enacted in response to the Supreme Court ruling in *Employment Division, Department of Human Resources of Oregon v. Smith*. The two plaintiffs in *Smith*, Alfred Smith and Galen Black, were Native American members of the Native American Church. The consumption of peyote is a key element in Native American Church ceremony. As such, their use of peyote was an essential part of their religious lives. They were both fired as counselors in a state run substance abuse facility for their religious ingestion of peyote, an illegal hallucinogenic cactus. They were refused unemployment because peyote was a controlled substance in Oregon and federal narcotics law. They challenged the state that their use of peyote was religious and not recreational and that this religious use exempted them from government regulation. They argued that the government created a substantial burden on their religious practice and did not supply a compelling government interest to substantiate that burden. They argued this under the line of precedent set forth in *Sherbert v. Verner*.[16] Smith and Black won in the Oregon state courts, but in a controversial Supreme Court ruling, Justice Scalia, writing for the majority, decided that since 'laws of general applicability' were not specifically targeted towards one or more religious group, and that the state retains a compelling government interest in the application of its general laws to the public, then Smith's burden on religious exercise did not exempt them from those laws. Scalia wrote that "we have never held that any individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate."[17]

[16] See discussion below.

[17] Winnifred Sullivan, *The Impossibility of Religious Freedom,* (Princeton: Princeton University Press, 2005), 27.

Congress found that the ruling in *Smith* "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral towards religion," and enacted RFRA in response to this finding.[18] Congress enacted RFRA "to provide a claim or defense to persons whose religious exercise is substantially burdened by government" and "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened."[19]

RFRA states that the federal government may not "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)."[20] Congress then undertakes the daunting task of defining what can be understood as an exercise of religion. They wrote that an exercise of religion is "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[21] This definitional mandate, as Winnifred Sullivan has pointed out, requires the courts, on a hearing by hearing basis, to decide what is and is not a religious exercise, based on where they place orthodoxy or centrality in systems of religious belief.[22] The process of deciding what constitutes a burden on the free exercise of religion put forward by Congress reveals how the American legal body ontology exists always already before the definitional process. According to the

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[18] Navajo Nation v. U.S. Forest Service, 479 F.3d at at 2842. see Pub. L. No. 103-141, #2(a), 107 Stat. 1488, 1488 (1993). Gonzales v. 0 Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 418 (2006).

[19] Navajo Nation v. U.S. Forest Service, 479 F.3d at 2842 see Pub. L. No. 103-141, #2(a), 107 Stat. 1488, 1488 (1993).

[20] Navajo Nation v. U.S. Forest Service, 479 F.3d at 2842 see Pub. L. No. 103-141, #2(a), 107 Stat. 1488, 1488 (1993).

[21] 42 U.S.C. 2000bb-1(4), 2000cc-5(7)(A).

[22] Sullivan, *Impossibility,* 10, 100.

definition, an 'exercise of religion' exists in relation to, and is qualified as authentic, based upon 'a system of religious belief.' The exercise, that is, the bodied movement, is *of* religion. The exercise exists because of religion. The *of* understands the body, the vehicle of religious movement, as subject to, and sometimes compelled by a transcendental symbolic system of something (which the judges end up getting to decide) called 'religion'. According to Congress, the body moves because of religion. So already, prior to judicial interpretation, religion and exercise are split into different definitional realms of what constitutes the religious, so that exercise arises and exists out of and because of religion. This definitional mandate, this enforceable body ontology is expressed and constructed uniquely and powerfully in the *Navajo Nation en banc* ruling where both the majority opinion and the dissent are bound by this ontology.

Subsection (b) of RFRA builds the compelling interest test for which the government may burden a religious exercise. This section states that the "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person - (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[23] RFRA requires that a compelling government interest test be applied if the case falls within the precedents set forth in both *Sherbert v. Verner* and *Wisconsin v. Yoder*.

Sherbert v. Verner is a case in which a Seventh-day Adventist refused to work on Saturday, the day her religion marked as a day of rest, and was subsequently fired from her job. Sherbert sought and was denied unemployment compensation through the state of South Carolina. The Supreme Court ruled that the state of South Carolina could not, under the Free

[23] 42 U.S.C. 2000bb-1(4)

Exercise Clause, deny Sherbert unemployment compensation based on her religious requirement to abstain from work on Saturdays. The court ruled that the state's requirement for her to choose between working on Saturdays and violating her religion's mandate "force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[24] *Sherbert* requires that the government cannot force an individual to choose between following the tenets of their religion or receiving a government benefit.

In *Wisconsin v. Yoder* an Amish family in Wisconsin was convicted of violating a state law that required children to attend school until the age of 16. The Amish family argued that the attendance of their children in high school was against their religion and way of life. The Supreme Court found that the state law "unduly burdened" their exercise of religion in that it "affirmatively compel[led the defendants], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs."[25] *Yoder* requires the government to ask whether or not the government, through its actions or laws, is forcing someone to act contrary to their "religious beliefs." If the government finds that it is indeed forcing someone in this manner, then a compelling government interest must be shown in order to continue the enforcement of the particular law in question.

These two cases, as set forth by RFRA, set a definitional standard for what may trigger a compelling interest test. Note that in both cases there exists a difference between religious belief and religious practice. Both cases recognize that a religious practice is separable and other than a religious belief. In *Navajo Nation* the extent to which these cases define a 'substantial burden'

[24] Sherbert v. Verner 374 U.S. 398 at 399-401.

[25] Wisconsin v. Yoder 406 U.S. 205 at 218.

was a central argument within the *en banc* ruling. As I will explain in section three, the majority relies on these two cases to define what constitutes a 'substantial burden.' This reliance does much to reveal the presence of the American legal body ontology. What becomes interesting is how this particular body ontology perpetuates itself in different mythic productions of legal argumentation. Throughout the course of *Navajo Nation*, from the district court ruling to the *en banc* hearing, and specifically as explicated through the majority opinion and dissent, even when the opinions vary on whether or not the use of treated sewage effluent constitutes a substantial burden on the religious practices of the Native plaintiffs, the court's body ontology remains indelibly intact.

Robert A. Williams, Jr. has identified a process in which American law has perpetuated its own racist attitude towards Native Americans, identifying them consistently as the savage other. He finds that in the long line of federal Indian law cases there exists a consistent racist approach that enacts and protects laws which work to remove 'the Indian,' as a real and distinct cultural and political other from the American cultural and political landscape.[26] He calls this a "racist legal mythology" and argues that "Indians get treated legally by our 'present day' justices just as Indians were treated by the justices in the nineteenth century: as savages whose rights are defined according to a European colonial-era legal doctrine of white racial superiority over the entire North American continent."[27] The presence of a racist legal mythology throughout federal Indian law follows the persistence of the American legal body ontology in that the 'enlightened'

[26] My examination of an American legal body ontology at work within federal Indian law is inspired by and is a continuation of what Williams has identified as a racist legal mythology. My aim is to trace the racist legal mythology to its ontological roots in order to reveal how, as ontology, the American legal body ontology permeates federal Indian law and is often the grounds on which racist opinions are made.

[27] Robert A Williams Jr. *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal Story of Racism in America*. Indigenous Americas., eds. Robert Warrior, Jace Weaver. (Minneapolis: University of Minnesota Press, 2005). xxv.

and 'civilized' mind of the Euro-American imagination is shown to be present only when it directs the body in ways associated with the ideals of a civilized human being. Therefore only those practices which fit into the *apriori* structures of what constitutes civilization are legally protected, thus forcing Indian people into a *de facto* legal status as inferior and savage people. The practices and the bodies of the American Indian continue to be regulated, as they were in colonial era doctrine, through the American legal body ontology which always already lies before the court justices as the ontological grounds from which they perceive the relationship of culture, religion, and movement.

Williams, building off of the work of legal scholar Robert Cover explains how these myths, and I would like to add, ontologies, are constructed and perpetuated through the process of "jurisgenesis."[28] Jurisgenesis is a concept which explains how laws are always constructed within social and cultural narratives and that they therefore are imbued with the tenets and principles of those cultural narratives. As more and more cases contain a racist legal mythology and, concurrently, the American legal body ontology, they become strengthened and built as foundational. Through this process the law itself becomes intrinsically linked to the mythologies in which it perpetuates thereby setting the American legal body ontology deeper and deeper within federal Indian law.

American law, although it claims a transcendental authority, is founded on the tenets of liberal humanism, tenets such as a-culturalism, tolerance, and the free rational subject. Peter Fitzpatrick explains how "law is imbued with this negative transcendence in its own myth of origin where it is imperiously set against certain 'others' who concentrate the qualities it

[28] Williams, *Like a Loaded Weapon,* 20.

opposes."[29] The transcendental authority of law, law as the force of transcendent reason, is constructed against what those imbuing law with its authority imagine as savage society. Through jurisgenesis this oppositional logic of savage and civilized becomes repressed behind the conceit of the a-cultural, free rational subject. Much of the history of American law, especially federal Indian law is constructed against Indian societies as they are often understood as antithetical to American civilization and progress.

Navajo Nation v. USFS is part of a larger historical narrative of colonial legal regulation and Indigenous resistance that is marked by a colonial obsession with regulating the body and bodied movement of its subjects. As this obsession is present through the course of colonial history in North America, I will highlight particularly salient moments in order to demonstrate the persistence of this underlying body-ontology of the court.[30] Beginning with Chief Justice John Marshall's ruling in *Johnson v. McIntosh,* I will trace the persistent presence of the court's body ontology through the changing currents in federal Indian law. Following *Johnson v. McIntosh,* I will briefly touch upon the 'Religious Crimes Code' then delve more deeply into the General Allotment Act. Upon examination, what begins to appear is a strong connection between property or land management and the American legal body ontology. As sociologist Andrea Mubi Brighenti argues, "law is inherently concerned with a relation between bodies and their reciprocal movement in space, or, in other words, with a composition of movements [... whereas] arguably, the territorial question at the core of law crucially concerns the issue of the movement of bodies in space – what could be termed motility – together with the ways in which

[29] Peter Fitzpatrick, *The Mythology of Modern Law*. (New York: Routledge, 1992), 10.
[30] The purpose here is not to compile an exhaustive history of the colonial legal regulation of the body as this would be a project beyond the scope of this thesis. Instead, the cases discussed were chosen for both their historical impact (and often infamous nature), and their relevance within the construction of United States federal Indian law.

movement shapes and articulates social relations."[31] Federal Indian law was, and is primarily concerned with regulating Indian bodies in such was as to secure colonial supremacy. This process has resulted in a history of Indian genocide, land theft, and cultural destruction. *Navajo Nation* is not only about religious freedom, but is deeply concerned with the management or the protection of religious freedom on public land. *Navajo Nation* concerns the management and the regulation of Indian bodies on public land.

This brief historical trajectory culminates with *Lyng v. Northwest Indian Cemetery Protective Association*. Not only is this case heavily cited in *Navajo Nation*, but concerns both the management of public lands and a religious freedom argument. The point of this brief history is to demonstrate that the decision in *Navajo Nation* does not stand alone as a singularity within federal Indian law and religious freedom cases. Instead, *Navajo Nation* is the most contemporary manifestation of this body ontology as employed in the construction of legally protected religion.

One of the landmark cases in federal Indian law is *Johnson v. McIntosh*, decided by the Supreme Court of the United States in 1823. This case currently stands as the legal foundation for all land ownership rights in the United States and, as Walter Echohawk has noted, "with the stroke of a pen" all Indian land rights were ceded to the United States government.[32] *Johnson v. McIntosh* concerns the validity of Indian land transfers made before the U.S. Revolution. At issue was whether or not a land title given by the government, or a land title issued from an Indian tribe was valid. Chief Justice John Marshall ruling for the Supreme Court, relying on the

[31] Brighenti, Andrea Mubi. 2010. "Lines, barred lines: movement, territory and the law," *International Journal of Law in Context* 6,3 (2010): 217.
[32] Walter R. Echo-Hawk, *In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided*, (Golden: Fulcrum Publishing, 2009), 76.

'Doctrine of Discovery'[33] wrote "that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise."[34] Although this case was primarily concerned with justifying colonial land title over Indian occupation, Justice Marshall's legal justification for this decision relied heavily on racist and assimilationist perspectives which understood the practices of land tenure and property cultivation to be the mark of a civilized and civilizing society. This line of argument and colonial epistemology paved the way for the displacement and land theft of millions of Indian people. The very notion of property as established through the colonization of North America is itself a type of appropriate exercise describing legitimate types of movement upon the landscape. This construction of property is built upon ideas of 'progress' and 'civilization' as opposed to the "fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest" so popular within the colonial discourse of the time.[35] By defining the Indian peoples as savages the colonial government, in the name of civilization, acted to remove the Indian people from their lands and separate them from their traditional modes of subsistence and political economy.

What was first articulated in *Johnson v. McIntosh* becomes the jurisprudential standard for regulating the bodies and bodied movement of Indians through the enforcement of Euro-American property law as well as federal laws on public land. *Navajo Nation* is a case

[33] The Doctrine of Discovery was a significant piece of colonial law that granted the United States government the right to the ownership of lands that upon *their* discovery were not in the possession or inhabited by other European nations.

[34] David Getches, Charles Wilkinson, Robert Williams, *Cases and Materials on Federal Indian Law*, 5 ed. (Eagon, West Publishing, 2004), 65

[35] Getches, Wilkinson, Williams, *Cases and Materials*, 66.

concerned with the regulation, or the enforcement, of a certain type of bodied movement on public land. As I explain later, the secular management of the Peaks has a large impact on the ability for many Hopi people to exercise their religion. In *Navajo Nation* the court is deciding, as it did in *Johnson*, that the type of bodied movement of the Indians is secondary to, and subject to a form of 'civilized' bodied movement, exemplified in *Johnson* through European agricultural land cultivation, and exemplified in *Navajo Nation* through the leisure activity of snow-skiing. And in keeping with the body ontology of the contemporary court, the argument that a civilized body gives the right of conquest over uncivilized bodies remains the ground for which the decision in *Navajo Nation* was handed down. What emerges from this type of reading is a trans-temporal connection for the American legal body ontology prevalent in both *Johnson v. McIntosh* and *Navajo Nation v. USFS.*

Spurred politically by the motivation and increasing presence of Protestant missions in Indian country, as well as by the increasing settler population, the lure of mining, and the push for land development, the federal government adopted an assimilationist policy towards Indian peoples. By the late 19th century and well into the 20th century, federal Indian policy revolved almost completely around an effort to dissolve Indians into the dominant cultural milieu of American democratic society.[36] Many of the protestant missionaries during that time believed that the Indians' means of subsistence and land tenure practices kept them from becoming civilized Christian members of a growing American society.[37] Furthermore, missionaries and assimilationists believed that the religious dances and practices of the Indian peoples,

[36] Assimilationist policy, in line with similar racist policies from the time, was aimed at destroying difference in order to force Indian people into a submissive state of dislodged identity where they were to be like the predominantly white colonial society, yet because of their racial difference, never quite equal.

[37] Tisa Wenger, *We Have a Religion: The 1920's Pueblo Indian Dance Controversy and American Religious Freedom*. (Chapel Hill: The University of North Carolina Press, 2009), 39.

particularly those of the plains peoples (which was primarily focused on the Sun Dance) was, as explained by historian of religions, Tisa Wenger, seen as "a violent and bloody display of Indian savagery [... which] prevented the Indians from adopting the concept of private property or any meaningful work ethic."[38] Many of the settlers in the great plains during this time period were already predetermined to see this ceremony as 'savage' and 'bloody' based upon their own ideals of what constituted civilized religious behavior. The piercing and dancing involved in a Sun Dance fit well into the already formed notions of the 'savage' in the colonial imagination of those settlers who were witness to those ceremonies. This is especially the case for those missionaries who came to the great plains region for the sole purpose of converting those Indian peoples who practiced the Sun Dance.

First developed in 1883 the "Religious Crimes Code" was passed specifically to target Indian religious ceremonies, including the Sun Dance, and gave government agents the authorization to use force and imprisonment to stop any Indian religious practice that they thought to be immoral, subversive, or counter to the assimilationist projects of the federal government.[39] The Religious Crimes Code is a clear example of how Indian culture is regulated and silenced through a direct enforcement and regulation of Indian bodies. The American legal body ontology is also present with the belief that if the colonial legal powers can regulate Indian bodies they can regulate Indian identity, religion, and society.

Assimilationist policy was a regulatory action specifically aimed at ending and altering the bodies and bodied movement of American Indians through the insistence that the civilized citizen was an industrious citizen, believing that the civilized citizen acted and comported their bodies in culturally specific ways. By forcing a certain type of movement, of cultural and

[38] Wenger, *We Have a Religion,* 39.

[39] Wenger, *We Have a Religion,* 39.

religious exercise, the missionaries and assimilationists believed that they could civilize and remove the 'savagery' of Indian culture from the Indians. Within assimilationist policies we find the American legal body ontology in its jurisgenesis. Once again, culture, religion, Indian-ness, and identity itself, is something separate from the body, which the body (and here understood in an extremely causal relationship) enacts, performs, and marks as the signifier of the degree of civilization. The Religious Crimes Code was a powerful piece of legislation aimed specifically at the regulation of religious exercise on reservations and is a strong example of the American legal body ontology was at work in the service of certain colonial goals.

Peter Nabokov explains that "the usurpation of American Indian lands was accomplished by an assault on their religious and emotional ties to place."[40] The General Allotment Act was one such effort to sever Indian connections and emotional ties to place. The General Allotment Act was signed by President Cleveland on February 8, 1887. Under the Act, the Indian land base was chopped up into individual parcels of private property, effectively dissolving many reservations as well as Indian governance over their own lands. Although the Act, on its surface, was intended to force Indian people to participate in the private property system of land cultivation and capitalist production, significant portions of the land were allotted to non-Indian people.[41] The purpose of the Act was not limited to the assimilation of Indian peoples. Over 90 million acres were taken from Indian tribes and allotted to non-Indian settlers or was possessed by the government. The General Allotment Act was as much about forcing Indian people into Euro-American forms of property tenure and cultivation as it was about the legal theft of

[40] Peter Nabokov, *Where the Lightning Strikes: The Lives of American Indian Sacred Places*. (New York: Viking Press, 2006), 283.

[41] Other than being obsessed with assimilation policies of Indian cultural genocide, the General Allotment Act was also adamant, although not legally apparent, about dividing Indian land title thus opening up more lands for an expanding white population and a growing U.S. economy.

millions of acres of land. Over the course of its tenure in federal Indian law, only 41 million acres of former tribal lands were allotted to Indian people.[42] Arising from the American legal body ontology stems the understanding that property, like the body, is to be ruled by the civilized mind. This form of property management, which is essentially the management of certain culturally approvable forms of bodied movement on a landscape, operates under a model of sedentary agriculturalism and strictly defined private property boundaries. Forms of subsistence practiced by diverse Indian peoples such as farming a commons, nomadic hunting and gathering, or seasonal horticulturalism defied the progress of colonization and therefore, under a colonial logic, allowed the colonists to grant themselves the right to the seizure of Indian lands. The results of this act were extensive in the dismemberment of the Indian land base and had a powerfully destructive effect on the sustained continuity of many Indian tribes. In 1934, giving a history of the General Allotment Act before the House Committee on Indian Affairs, Delos Sacket Otis explained that the "supreme aim [was to] substitute white civilization for [the Indian's] tribal culture."[43] A B.I.A. agent for the Yankton Sioux argued that the purpose of the Act was based on the belief that "as long as Indians live in villages they will retain many of their old and injurious habits. Frequent feasts, community in food, heathen ceremonies, and dances, constant visiting - these will continue as long as the people live together in close neighborhoods and villages ... I trust that before another year is ended they will generally be located upon individual lands [or] farms. From that date will begin their real and permanent progress."[44] By forcing a particular type of bodied movement upon a landscape, the federal action of the General Allotment Act sought to remove the Indian, as a disembodied concept of savagery, from the

[42] Getches, Wilkinson, Williams, *Cases and Materials*, 166.

[43] Getches, Wilkinson, Williams, *Cases and Materials*, 167.

[44]Getches, Wilkinson, Williams, *Cases and Materials*, 167.

North American populace. Considering the American legal body ontology as a way for understanding the General Allotment Act, the assimilationists wished to de-racialize the bodies of Indian peoples in order to merge their identities with the then budding concept of the American citizen. This rationale is subject when the very model for the civilized human being is the white male body of the Euro-American colonist. Summing up the philosophy of the General Allotment Act, Walter Echo-Hawk argues that the Act operated on the idea that "Indians could not become assimilated into society as useful citizens, it seems, while still in a tribal state, and their communally owned tribal land was seen as an obstacle to the government's civilization efforts [...] The allotment and sale process would benefit Indians, according to policy makers, by stamping out tribalism and savagery so the red race could be absorbed into mainstream society."[45] Does this force of assimilation imply a transformation of 'redness' to 'whiteness,' or does the assimilation argument amount to a force of racial power in which a particular ethnic group is isolated to a place of servitude in labor in which, regardless of the degree of their assimilation, remain held due to the physical characteristics of their bodies?

What should now be present to the reader is a rather overt obsession with the regulation of Indian bodies and bodied movement through the enforcement of particular epistemologies of property and boundary maintenance. On one hand there is the direct regulation of Indian religiosity as enforced through the Religious Crimes Code, and on the other there is the massive and wide reaching effect of the regulation of Indian movement (and following with the American legal body ontology) as a means for destroying Indian culture. Although, as we shall see, the language of the decision in *Navajo Nation* is not as explicit in its attempt to regulate Indian culture and bodied movement, the effects and the processes are remarkably similar. Albeit

[45] Echo-Hawk, *In The Courts*, 162.

seemingly indirect, the enforcement of certain permissible and federally recognized types of religious and secular exercise on the San Francisco Peaks is decided through the boundary maintenance and property law investments of secular public space.

In 1988 the Supreme Court handed down the decision in *Lyng v. Northwest Indian Cemetery Protective Association.* This case lies importantly within this brief history of the regulation of Native American religion within the United States' legal system because in many ways it is a powerful coagulation of the myths of colonial domination. Although there is a hundred year gap between the General Allotment Act and *Lyng,* the racist legal mythology and the American legal body ontology had become naturalized within the legal decisions and discourses of federal Indian law. The American legal body ontology as always already present had been nested deep enough within federal Indian legal epistemologies as to maintain its form as ontological ground and colonial force. By the time of *Lyng*, not only had the language of savagery been firmly embedded within federal Indian law, but also had the American legal body ontology become a powerful tool to be wielded as colonial power.

Lyng is a landmark case that expresses the American legal body ontology, regulates religious otherness through the reliance of this ontology and the maintenance of public lands, and is a powerful example for the abject misunderstanding and inability for cross-cultural translation within the highest court of the American legal system. Furthermore, and of central significance to this thesis, Justice Bea writing for the majority in *Navajo Nation* cites heavily from *Lyng* in the justification for his ruling.[46]

Ten years prior to the Supreme Court decision in *Lyng,* in response to an interest by the agency to upgrade a road to assist with timber harvesting in the Chimney Rock area in the

[46] Navajo Nation et al v. USFS, 535 F.3d (9th Cir. en banc. 2008) at 10042, 10055, 10056, 10058, 10059, 10060.

national forest, the U.S. Forest Service commissioned an in depth study of the Native American cultural and religious sites in the Hoopa Valley Indian Reservation and the Six Rivers National Forest in Northern California. The report commissioned by the Forest Service is called the Theodoratus Report. Through intensive research in local archaeological sites and records, as well as ethnographic and community based information gathering among the local tribal elders, the report found that any action by the Forest Service would have a destructive impact upon the archaeological remains belonging to the local Native communities as well as cause irreversible religious desecration for those communities and peoples.[47] According to the report, "research indicates that there is a direct relationship between active Forest Service involvement with these sites and the degrading of Native American religious life in these mountains. We urge the Forest Service not to take action to try to improve these sites and trails."[48] The Theodoratus Report, in sum, strongly recommended against any proposed development of the area.

This area is known locally by the different tribes as the 'High Country' and is considered an incredibly important sacred area. For the Tolowa, Yurok, Karok, and Hupa tribes the High Country is the spiritual center of the world and as such is central to their religion, cultural perpetuity, and tribal identity.[49] The tribal plaintiffs organized as the Northwestern Indian Cemetery Protective Association and challenged that the proposed developments violated their First Amendment rights to the free exercise of religion.

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[47] Brian Brown, *Religion, Law, and The Land: Native Americans and the Judicial Interpretation of Sacred Land,* "The Triumph of Property over Religion" (Westport: Greenwood Press, 1999), 128.

[48] Brown, *Religion*, 131.

[49] Echohawk, *In the Courts*, 338, 343.

Regardless, in 1982 the Forest Service went forward with its plan to build the road and harvest more than 700 million board feet of timber from the area.[50] Following this action the tribes sued and won in both the District Court and in the 9th Circuit, which found that the proposed action did violate the tribes' First Amendment right to the free exercise of religion. The Supreme Court reversed these decisions and found that "even if we assume that we should accept the Ninth Circuit's prediction, according to which the G-O road will 'virtually destroy the ... Indians' ability to practice their religion,' ... the Constitution simply does not provide a principle that could justify upholding respondents' legal claims. However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires."[51] In this case the court takes the slippery slope argument as reasoning for denying the Indian plaintiffs their religious freedom claim. Furthermore, in keeping with the American legal body ontology, religion and religious practice is something separate from the idea of the individual and can therefore be destroyed without fundamentally doing any violence to the individual.

Much of the same reasoning and line of argumentation used in the *Lyng* decision was also incorporated into the *Navajo Nation* decision. Justice Sandra Day O'Connor writing for the majority in *Lyng* distinguishes between 'destroy' and 'prohibit,' writing that the government can neither coerce or penalize people for acting in ways central to their religious beliefs. She clarifies that the key word in the free exercise clause is 'prohibit,' and is "written in terms of what the government cannot do to the individual, not in terms of what the individual can exact

[50] Brown, *Religion*, 131.

[51] Getches, Wilkinson, Williams, *Cases and Materials*, 743.

from the government."[52] Furthermore, she argued that if the Indian plaintiffs could claim a First Amendment burden it would impinge upon the government's property rights. The religious freedom rights, she writes, "do not divest the Government of its right to use what is, after all, *its* land."[53] What lies within both cases is a strong, yet subtly implicit presence of the American legal body ontology within the continued construction of religious freedom in American constitutional law. As I have already demonstrated in this paper, the legal justification for the regulation and maintenance of public lands is most directly concerned with the enforcement of certain privileged and idealized bodies and bodied movement upon that landscape.

The *Lyng* decision is a mine for the raw materials of religious exercise and its regulation through a body ontology that becomes more clearly refined in the *Navajo Nation* decision. Both cases have in common the regulation and maintenance of public property as idealized secular space, a space in which as Justice O'Connor clearly stipulates, and Justice Bea builds upon, is valued for its capitalist raw material benefit, for its ownership by an entity, through a governmentality that is explicitly secular. There also exists a language of coercion by which the government grants an *individual* the right to choose to practice their religion, even if that means they can choose to practice a religion that is being destroyed. Remember, the freedom of the individual is in her or his ability to freely choose to believe and therefore choose to practice whatever culture or religion they want. The freedom lies in the individual's ability as a rational a-cultural subject, not in the individual's commitment or involvement within a community or a particular cultural predilection. The body is subject and secondary to the transcendental and agentic individual who chooses to believe and subsequently chooses to embody their religion.

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[52] Getches, Wilkinson, Williams, *Cases and Materials*, 435, 742.

[53] Getches, Wilkinson, Williams, *Cases and Materials*, 744, emphasis in original.

In an almost oracular pronouncement, the Theodoratus Report attempts to explain the inability of the court, and in a sense, the inability of the greater American cultural milieu, to define and locate the 'religious' as highly problematic when trying to understand how the desecration of Native American sacred space affects Indians' free exercise of religion.

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 of "religion." The "religious" aspect of the lives of Native Americans can be only 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 of the process ...[54]

The premise for the court's distortion of Indian religion lies in the primacy of the American legal body ontology. The fundamental inability to translate the relationship of Indian religious practices to their use and conceptualization of sacred space is repeatedly denied the definitional and jurisprudential viability as a constitutionally protected religious exercise.

[54] Brown, *Religion*, 127.

Chapter II

From a Hopi Center: Body Ontology and the Question of Religion

In 1982, speaking during a panel discussion at the University of Northern Arizona on the development of the San Francisco Peaks, Hopi tribal member Stan Honanie describes the effects of the Snow Bowl developments as "sacreligious [sic] behavior on the part of the dominant society."[55] He goes on further to explain, "[a] handful of religious leaders coming to the Peaks to gather evergreens for their ceremonies or to pray to the mountains, does not outweigh, in the public mind, the 3000 people per day that are going to use the facilities. Hopi religious leaders will be weakened in their efforts to be humble and religious. The development distorts the religion of the Hopi people. Forced discussion of the issue further dilutes our religion. [...] Our culture and our ways are dying."[56] According to certain Hopi people, the use of recycled waste water for snow production pollutes their religion, cosmology, and way of life. The sacrilegious behavior of the federal government and the Arizona Snowbowl company is powerful enough to destroy their way of life.

My goal here is not to describe or define a Hopi ontology. I do not want to give the illusion of a monolithic, timeless Hopi way of understanding the world. My goal here is to point to Hopi difference as enunciated through Hopi testimony. I agree with scholar Homi K. Babha who has explained how "the question of the representation of difference is therefore always also

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[55] Stan Honanie, *Respecting a Mountain: proceedings of the Arizona Humanities Council, Northern Arizona University, Department of Geography, 1982 Forum on the Development of the Arizona Snow Bowl on the San Francisco Peaks, Arizona*. ed. George A. Van Otten, (June 1982), pg 18.

[56] Hanonie, *Respecting,* 17, 18.

a problem of authority."[57] With materials that the Hopi people have presented through the public media and through the court proceedings in *Navajo Nation,* my goal is to decenter my own authoritative position in order to locate Hopi narratives that constitute the 'otherness' that the court so continuously fails to comprehend. Hopi legal and media testimony constitute the majority of the material that I will analyze in trying to understand and locate the importance of the San Francisco Peaks within Hopi tradition. I will use anthropological and historical sources to contextualize the Hopi testimonies.

The Hopi argument for the protection of the San Francisco Peaks comes out of a zone of vast difference from that of the American courts and legislative constructions of 'free' religion. In the case of *Navajo Nation v. USFS* Hopi religion is produced and constituted through the legal testimonies and public statements given by Hopi people. Greg Johnson explains, "Native Americans' use of legal and academic categories is quite real and consequential, signaling one of the central ways native peoples emerge from their engagements with modernity to appear, paradoxically, more like their 'traditional' selves. In other words, through acts of legal representation, native witnesses engage in a creative (even procreative) process."[58] How different Hopi people argue for the protection of the San Francisco Peaks constitutes authentic religious language in that during the moment of their explication and defense for their sacred places they present to the public, although sparingly, those aspects of their religious lives that constitute them as religious.

For many Hopi, the use of recycled sewage effluent for snow production on the Peaks not only pollutes the mountains, but pollutes all aspects of Hopi life. Wayne Taylor, a previous Hopi tribal chairman, wrote an article in AZCentral News explaining that the production of snow from

[57] Homi K. Bhabha, *The Location of Culture*, (New York: Routledge, 1994), 128.
[58] Greg Johnson, *Sacred Claims*: *Repatriation and Living Tradition*, (Charlottesville: University of Virginia Press, 2007), 25.

recycled waste water will have devastating effects for the Hopi people. He cites Majol Honanie, a young initiate into the Katsina Society. Majol explains, "when the Katsinas come to our villages, we say our prayers to them and they carry them to the Peaks ... This is what I have been taught and this is what I respect today. Snowmaking will pollute the land and water and will affect the birds, animals and people. The Katsinam may abandon their home. Our clan roles will vanish. So, too, will our way of life."[59] This type of pollution infects Hopi tradition and ritual practice to the point where their rituals become ineffectual, and their traditions destroyed.

Water is central to Hopi life. In the arid region of the Hopi mesas life depends upon the presence of water; for drinking, crop irrigation, and ritual action. The Hopi people have historically been dependent upon rainfall for the irrigation of their crops and for the replenishment of their drinking supplies.[60] Rain, spring water, mist, these different forms of water are called *paahu* and refer to 'wild water,' or 'water found in nature.'[61] *Paahu* is associated with the presence of the Katsina and is believed to possess life giving and life sustaining qualities.[62] Furthermore, ritual efficacy and Katsina well being is dependent upon the 'purity' of *paahu*.

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[59] Wayne Taylor, "The Hopi Way May Vanish so Skiers Can Play," *The Arizona Republic,* Sept. 23, 2005, http://www.azcentral.com/arizonarepublic/opinions/articles/0923taylor,wayne.html.

[60] Ritual action and subsistence worked hand in hand to ensure Hopi survival and continuity. Richard Bradfield explains that"to guarantee 'the permanence which every social group requires,' a community must not only protect itself against attack from outside and disintegration from within; it must also strike a balance between its own needs and the natural resources available to it. In an environment as marginal as that in which the Hopi villages lie, the balance is necessarily a delicate one; that the Hopi have survived there for so many generations, implies that they early reached a stable relation between their own needs and the ability of the land to satisfy those needs - without a gradual drain on its resources. In striking such a balance, the Hopi, in effect, set a voluntary limit to their own use of the resources available to them..." Richard Bradfield, *A Natural History of Associations: a Study in the Meaning of Community,* (London: Duckworth, 1973), 197.

[61] Maria Glowacka, Dorothy Washburn, and Justin Richland, "*Nuvatukya'ovi*, San Franscisco Peaks," *Current Anthropology*, 50,4, (August 2009): 554.; Bradfield, *A Natural*, 187.

[62] Glowacka, Washburn, Richland, *Nuvatukya'ovi,* 554.; John D. Loftin, *Religion and Hopi Life* (Bloomington: Indiana University Press, 2003), 11.

The Katsina are deity like spiritual beings which are either ancestors, heroic ancestors, or certain deific entities which exist as a part of Hopi cosmology and mythology. At death the *hi'ksi*, (the breath-body) leaves the body and transforms into a cloud, as a Katsina. The rain and clouds are considered to be the actual presence of the Katsina spirits who are both ancestors and deities. It is believed that the Katsina are responsible for bringing or holding back rainfall each year. This in turn depends upon the correct comportment and execution of ritual activity as well as an unpolluted San Francisco Peaks. The maintenance of Hopi tradition ensures that the Katsina will continue to bring rain and the Hopi way of life will continue.

Ritual efficacy is not the only thing at stake here. The ways in which elements in Hopi life are interconnected mean that the cultural identity, the very life-ways of the Hopi are disrupted. In Hopi cosmology the world is divided into halves; the world of the above in which humans dwell, work, and live and the world of the below where the Katsinam dwell, work, and live. It is believed that the two worlds are mirror opposites of each other, so that when one ceremony is going on in the above world, the exact opposite ceremony (in the calendrical ritual cycle) is taking place in the other world.[63] In this cosmology the Katsinam enter into the upper world in two different ways. They will either come as clouds or rain in order to revitalize the Hopi people or they will appear in the forms of the Katsina Society dancers during the many ritual dances that take place throughout the ritual calendar year. The Katsinam are persuaded to come only if the Hopi people are correctly performing their ceremonies and living in ways prescribed by their traditions.[64]

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[63] This other world is also the fifth world into which the Hopi people have yet to emerge to. Hopi cosmogenesis involves a mythology of emergence from one world into the next. Bradfield, *A Natural,* 260.

[64] Glowacka, Washburn, Richland, *Nuvatukya'ovi*, 556.; Loftin, *Religion,* 11.; Bradfield, *A Natural,* 193.

Nuvatukya'ovi is the Hopi name for the San Francisco Peaks and roughly translates to 'snow-capped peaks,' and is believed to be one of the homes of the Katsina.[65] During a press conference at the Flagstaff City Hall in early February of 2004, Hopi vice chairman Caleb Johnson said, "the Hopi people believe the Katsinas live on the sacred mountain."[66] Wayne Taylor explained, "Nuvatukya'ovi is central to Hopi culture and religion. It is the home of the Katsina spirits who, in the growing season, drift as clouds from the Peaks and descend on my homeland, bringing rain, hope, and guidance to the Hopi people."[67] The San Francisco Peaks are simultaneously the home of the Katsina and the location from which rain storms originate. The purity of the peaks is paramount to the coming of rain. If the peaks are covered with polluted water, then that water not only affects the Katsina spirits, but also is seen to pollute the rain, and disrupt the cyclical and causal nature of the Hopi world.

For the 9th Circuit Court of Appeals in *Navajo Nation,* Hopi member and director of the tribe's Cultural Preservation Office Leigh Kuwanwisiwma testified in defense of the Peaks claiming that the mountains needed to remain pure from pollutants:

> The purity of the spirits, as best we can acknowledge the spiritual domain, we feel were content in receiving the Hopi clans. So when you begin to intrude on that in a manner that is really disrespectful to the Peaks and to the spiritual home of the Katsina, it affects the Hopi people.[68]

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[65] The translation reads, *nuva* means 'snow,' *tukya*, a distortion of *tuukwi,* means 'mountain crest,' and *-vi*is a suffix which indicates 'place of.' Glowacka, Washburn, Richland, *Nuvatukya'ovi*, 556.

[66] Daniel Kraker, "On Sacred Snow; Culture an Commerce Clash Over Development on Arizona's San Francisco Peaks," *American Indian Report,* 20,4 (2004): 7.

[67] Taylor, "The Hopi Way", Sept. 23, 2005.

[68] Navajo Nation et al v. USFS, 535 F.3d (9th Cir. en banc. 2008) at 10121.

The importance of the purity of the Peaks can be understood in relation to the overall effect of the pollution caused by the use of treated sewage effluent. If the Peaks are polluted, then everything becomes polluted, and as Hopi member Antone Honanie testified in *Navajo Nation*, the ceremonies become "simply ... a performance for performance sake."[69] This form of pollution is both environmental and cosmological. Environmentally, the treated sewage effluent contains trace amount of fecal coliform bacteria, organic pollutants, viruses, and protozoa such as Giardia.[70] Although present in only small amounts per gallon, when up to 1.5 million gallons of treated water is sprayed per day over a large part of the mountain, the presence of pollution is indisputable. For the Hopi people, the spreading of feces and human waste on the home of the Katsinam is cosmologically a very dangerous act. For many Hopi, the type of pollution that comes from recycled waste water is of a religious nature and is not removable by technology.[71] That is, machines and chemical processes are not sufficient for water purification, only through ritual is the water able to be properly cleaned.

The spraying of treated sewage effluent on the 'home' of the *Katsinas* is a pollutive action of a cosmological order. Cosmological pollution, as Mary Douglas has suggested, "is the by product of a systematic ordering and classification of matter, in so far as ordering involves rejecting inappropriate elements."[72] According to Douglas, pollution is "that which must not be included if a pattern is to be maintained."[73] The use of treated sewage effluent for snow production on a cosmologically important mountain is a violence upon the ordering of Hopi

[69] Navajo Nation et al v. USFS, 535 F.3d (9th Cir. en banc. 2008) at 10121.

[70] Navajo Nation et al v. USFS, 535 F.3d (9th Cir. en banc. 2008) at 10079.

[71] Glowacka, Washburn, Richland, *Nuvatukya'ovi*, 554.

[72] Mary Douglas, *Purity and Danger*, (New York: Routledge, 1966), 44.

[73] Douglas, *Purity and Danger,* 65.

culture. This violence disrupts ritual ordering so that the moving body and the structure of the cosmos experience a break in the process of meaning making and cultural becoming. This break disrupts the ritual as making experience. Unlike secular space which is separate from acting bodies, Hopi space and Hopi people are interconnected and dependent upon each other. When the court decides that the use of recycled waste water for snow production does not create an objectively substantial burden for the Hopi people's free exercise of religion, they unfairly, and inappropriately apply a secular logic to a case which operates under drastically different paradigms.

How is it that the desecration of a sacred place, a place in which very few Hopi people actually ceremonially attend, can disrupt and potentially destroy their way of life? The understanding of place adopted by the court absolutizes geography as "a condition in which space exists independently of any object(s) or relations: space is a discrete and autonomous *container*."[74] This model of absolutized space is foundational for the modern hegemonic understanding of property which, in line with Sam Gill's interpretation of territory, "tends to be considered as objectified and impersonal."[75] The concept of space or property as an objective container which is inhabited, alienated, built with or on, and engendered is a space that is objectively separate and present in its relation to human actors. As Gill has explained, "many of the limitations on the present conceptions of territory stem from the Western style of separating mind and body that elevates the mind over the body."[76] The Peaks lie within the boundaries of a National Forest and as such they are legally constructed as secular space. Within the

[74] Martin Jones, "Limits to 'thinking space relationally'" in *International Journal of Law in Context*, 6, 3 (2010), 244, emphasis in original.

[75] Sam Gill, "Territory" in *Critical Terms for Religious Studies* ed. Mark Taylor (Chicago: University of Chicago Press, 1998), 310.

[76] Gill, "Territory," 310.

construction of secular space as an objectified and impersonal territory we once again find the American legal body ontology at work. Secular space, like the body, is understood to be separate from the human actors who engendered it with meaning and structure. In other words, the self does not need a particular place to maintain its identity.

A Hopi conception of space differs greatly from these notions of American secularism. To address this issue I want to look to the *Nima'n*, which is the last and the greatest of the all day *Katsina* dances in the Hopi ritual calendar. The *Nima'n*, or 'Home-going dance,' takes place in late July and serves the purpose of sending the Katsina back to their homes in the San Francisco Peaks and elsewhere.[77] The Katsina are sent home so that they may come back as rain during the planting season. *Nuvatukya'ovi* is intimately a place of presence, in that it is constantly described as a home for the Katsina. As the home for the Katsina who are both spiritual entities and deceased ancestors, *Nuvatukya'ovi* is both a real and intensely present geographical entity, while also being the cosmological location for the afterlife and the fifth world of emergence.

During the *Nima'n*, Hopi dancers wear masks, body paint, and elaborate costumes and perform as the Katsina. This is not an allegorical identity play. When the Hopi dancer puts on the mask and dances as a Katsina, he becomes the Katsina.[78] At this point subjective and objective are collapsed. The belief of the Katsina is not objectified through dance, instead the Katsina is corporeal as a lived and moved identity born through the experience of the dancer. Gill understands this as a process of dancing as making. "Dancing," he writes, "is distinguished by the relationship between the maker and the thing made. The dancer, in dancing, makes the

[77] Bradfield, *A Natural,* 142., Edna Glen, "Commentary II: Ceremony" in *Hopi Nation: Essays on Indigenous Art, Culture, History, and Law*. University of Nebraska Digital Commons 2008 http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1010&context=hopination.

[78] Bradfield, *A Natural,* 50.

dance. The dance is inseparable, physically inseparable from the body of the dancer, from the body of the maker of the dance ... so the dance is other than the dance while being identical with the dancer ... yet the dancing body presents a fascinating new wrinkle: there is no physical separation between the two parts, dance and dancer, these are identical bodies."[79] In the moment of the *Nima'n*, the Hopi dancer is Katsina, his home is the San Francisco Peaks which he sees off in the distance. The Hopi community in attendance sees Katsina dancing while also seeing their family members, friends, and tribal members. Just as the Katsina as sign is collapsed into the movement of the dancer, so too are the Peaks as sign collapsed into the real and constitutive space of Hopi geography. The sign is not separate from the signifier. Dancing as making removes this divide which is the constant mark of a body ontology. Sam Gill elucidates, "dancing creates artifact, that is, what is created and experienced as other is not a real other, but the signs of the other, even an ideal other. Yet, this artifactual construct is bodily experienced, thus having the kind of presence that distinguishes the real."[80] Ritual action contains this element of reflexivity where the ideal other, in this case the Katsina, and by extension the Peaks, becomes of the body. In this reading, religion is not something that is experienced, it is the experience. A court that constructs religion upon a body ontology will always separate Hopi belief from Hopi practice and will allow space for the regulation of Hopi religion.

[79] Sam Gill, *Dancing as Making,* June 2009, http://sam-gill.com/print-matter/, 12.

[80] Sam Gill, *Dancing and the Poetics of Place,* 2009, http://sam-gill.com/print-matter/, 6.

Chapter III

The Court's Body Ontology and the Construction of a Definition of Religion

In the *en banc* hearing for *Navajo Nation v. USFS,* the majority found that the production of artificial snow on the San Francisco Peaks did not violate the Indian tribes' right to the free exercise of religion.[81] *Navajo Nation v. USFS* currently stands as law in the United States. *Navajo Nation* is representative of a particular American and colonial mythology regarding the nature of religion and the role of the individual within and apart from that understanding of religion. This understanding of religion is perpetuated through what Fitzpatrick has labeled as the 'mythology of modern law.'[82] This mythology is constructed around and by a particular body ontology which seeks to separate belief from practice, thought from movement, identity from body.

What is truly remarkable about this case is the almost complete inability of the justices to effectively translate Hopi religious claims into a legal and jurisprudential understanding of religion. Both the majority and the dissent failed to acknowledge Hopi religion. Whether or not members of the court were for or against a RFRA claim, both sides constructed and perceived Hopi religion in terms of their own definitional frameworks. This, on its own, is not that irregular in colonial law. What this massive mistranslation reveals is not merely the resiliency of power, but also the underlying and persistent American legal body ontology employed for the purpose of power *and* its resistance. The court has yet to imagine Hopi religion outside of its own mythologies and body ontologies.

[81] Navajo Nation et al v. USFS, 535 F.3d (9th Cir. en banc. 2008) at 10041. (under the Religious Freedom Restoration Act of 1993).

[82] Fitzpatrick, *Mythology.*

I am going to analyze the court's mythology of religion and its body ontology through a textual analysis of the majority's opinion, written by Justice Bea; and the dissent, written by Justice Fletcher, joined by Justice Pregerson and Justice Fisher. The majority opinion expresses a mythology which radically locates and splits belief from practice; in doing so they isolate religion as a definable attribute or 'perspective' of the individual. This mythology is situated firmly within the Enlightenment project and, concurrently, within certain tendencies of American liberalism in that the religious is consistently defined in relation to and subject to the rational and secular individual.

The dissent expresses a mythology which understands the body and religious bodied movement as an expression, or an enactment of religious belief. The dissent's utilization of the court's body ontology departs from the majority's in interesting and challenging ways. Justice Steven's conception of religion resembles, in some respect, how Judith Butler understands speech act theory and performativity. In what follows, I will first analyze the majority opinion with an eye to how it reveals and perpetuates the American legal body ontology, and second, I will analyze the dissent under the lens of Butlerian performativity.

In order to understand the weight and the mythological tenacity behind Justice Bea's exclamation that "the sole effect of the artificial snow is on the Plaintiff's subjective spiritual experience," we must attempt to locate the definitional process in which Justice Bea argues his ruling. It is in the construction of a definition of religion that the court perpetuates and enforces the body ontology nested within its own mythology of religion. What exactly is "subjective spiritual experience" and how is this perceived by the majority to be different, or at least 'substantially' different, from an exercise of religion?

Judge Bea upholds the district court's finding that the plaintiffs' beliefs are "sincere." Following the correct legal protocol to ascertain if there has been a RFRA violation, Judge Bea then looks to see whether or not the "sincere" beliefs of the tribes have been substantially burdened. Since Justice Bea found that the use of treated sewage effluent for snow production on Humphrey's Peak does not constitute a substantial burden, the line of inquiry ended there. For the majority, the sincerity, or the authenticity of the Plaintiffs' beliefs were not an issue. A primary concern for the majority was whether or not the sincere and authentic religious beliefs of the Indians were being burdened by a government action.

The definition of religion put forth by RFRA, that a religious exercise is "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," can be interpreted to be overly vague and inclusive to the point of inapplicability. [83] As Justice Bea explained, if every sincere religious belief could be burdened by the government, based solely upon the effect of the government action upon their ability to exercise religion, then "each citizen would hold an individual veto to prohibit the government action solely because it offends their religious beliefs, sensibilities, tastes, or fails to satisfy his religious desires."[84] In other words, Justice Bea found the definition set forth by Congress to be inclusive and vague enough to satisfy any claim to religiosity and therefore could potentially grant any citizen the ability to challenge a governmental action. This is a slippery slope argument, one in which Justice Bea attempts to resolve through a redefining of religious practice and of what constitutes a "substantial burden" on religion. With the construction of what constitutes a "substantial burden," Justice Bea defines what is religious enough, that is, what counts as free religion and what does not. His reading of RFRA pulls forth and enacts the latent but ever present body ontology within the myth of an

[83] 42 U.S.C. 2000bb-1(4), 2000cc-5(7)(A).

[84] Navajo Nation et al v. USFS, 535 F.3d (9th Cir. en banc. 2008) at 10041.

"exercise *of* religion." In similar ways to the Religious Crimes Code, Justice Bea is regulating Indian religions because they do not coincide with the court's notion of civilized or 'free' religion as imagined in our modern secular courts.

Judge Bea grounds his definition of what constitutes a substantial burden in *Yoder* and *Sherbert,* the Supreme Court cases set out in RFRA. He explains that "the presence of recycled wastewater on the Peaks does not *coerce* the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, nor does it condition a governmental *benefit* upon conduct that would violate their religious beliefs, as required to establish a 'substantial burden' on religious exercise under RFRA."[85] Following *Yoder*, Bea argues that the government must coerce someone in order for there to be a substantial burden, and following *Sherbert*, Bea argues that the government must supply or withhold a benefit for there also to be a violation. Bea argues that the production of snow from treated sewage effluent does neither of these things so therefore does not constitute a substantial burden.

On the surface of Judge Bea's argument a substantial burden only exists when the government either coerces with the threat of sanctions or if the government withholds a benefit based upon an individual's religious beliefs. A burden can exist on "subjective, spiritual experience" as long as the government is not coercing, through the threat of criminal sanction or government benefit, the individual to act contrary to their religious beliefs. Through these two cases, the court argued a preconstructed definition of religion, a definition of religion consistent with a particular body ontology perpetuated through the history and mythology of secular liberalism. What becomes apparent through the majority's reliance on *Yoder* and *Sherbert* to define a 'substantial burden' is a particular construction of legitimate religion. In essence, a

[85] Navajo Nation et al v. USFS, 535 F.3d (9th Cir. en banc. 2008) at 10048, emphasis mine.

subjective spiritual experience is not part of, or protected as a legitimate religious practice.[86] Is the court's protection of a legitimate religious practice the very act of defining that which constitutes 'true' religion? By deciding what is defined as protectable religious practice the court is perpetuating a colonial violence which has consistently sought to regulate and remove Indians as distinct cultural groups.

The crux of Justice Bea's argument is that the use of treated sewage effluent only effects the beliefs of the Indian peoples who understand the mountain to be sacred. The effect upon the Indians, he argues, is not actual, not objective, but merely a subjective and emotional burden; the only effect of the proposed upgrades is on the Plaintiffs' subjective, emotional religious

> experience. That is, the presence of recycled wastewater on the peaks is offensive to the Plaintiffs' religious sensibilities. To Plaintiffs, it will spiritually desecrate a sacred mountain and will decrease the spiritual fulfillment they get from practicing their religion on the mountain. Nevertheless, under Supreme Court precedent the diminishment of spiritual fulfillment - serious though it may be - is not a "substantial burden" on the free exercise of religion.[87]

This statement is the lynchpin to the majority's entire judicial opinion. In line with secular liberalist theories for a rational and a-cultural individual, this decision is contingent upon a dichotomy between belief and practice, between thought and bodied movement. The liberation of the individual sees the body as second to, and often times adverse to, the freedom of the self as expressed and understood through language as both primary and transcendental.[88] In this

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[86] It is also important here to note that both *Yoder* and *Sherbert* are cases regarding the free practice of Christian religion, and as such they fall within the paradigms of protectability.

[87] Navajo Nation et al v. USFS, 535 F.3d (9th Cir. en banc. 2008) at 10054.

[88] Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford: Stanford University Press, 2003), 68.

understanding, the body moves because the mind both chooses and tells it to. Hence, the public sphere can be a place of pluralist and humanist participation in which the secular comportment of the body can exist through choice. As fundamentally a-cultural beings, we do not have to act in accordance with our traditions, cultures, and religions. In other words, the belief that we are a-cultural means that our true nature is purely rational and transcendent of culture, and that culture is something that we can then have the ability to choose to participate in. Under an a-cultural secular paradigm, religious experience, and especially religious otherness (non-Christian religion) is preserved for the private sphere, for a space supposedly outside of government, politics, and our right to be religious. The Hopi, the Navajo, or any of the other Indian groups fighting for the protection of Humphrey's Peak are not being fundamentally violated as a-cultural beings (subjected to religion). Instead, the burden is upon their subjective spiritual experience, something that, regardless of the authenticity, orthodoxy, or community and historical continuity of these religious practices is not a substantial burden on religious exercise. The violence of an a-cultural secular epistemology is that, while being cultural in its own right, wields its idea of its own transcendent superiority to regulate those who are culturally different. By elevating the rational mind above the objectified body, the violence of a-cultural secularism lies within the American legal body ontology.

According to the courts, a 'diminishment of spiritual fulfillment' does not violate a free exercise of religion? Under the court's body ontology, spiritual fulfillment is separate from bodied exercise. The mind has the ability to choose whether or not to move the body in accordance with belief. The a-cultural being has the rational ability to decide to be cultural, religious, ethnic, etc. Following this line of argument, bodied exercise is not contingent upon

spiritual fulfillment due to the belief that spiritual fulfillment is transcendent and separate from bodied exercise.

In order to find how objective religious experience is defined and protected, as opposed to the subjective religious experience of the Indian plaintiffs, we must look to the majority's reliance upon *Sherbert* and *Yoder* to define a substantial burden. These two cases are used to set a standard of religious burden in which other cases can be tested against.[89] Since a burden upon a 'subjective spiritual experience' does not constitute a substantial burden under RFRA something must be replaced which could be recognized as a substantial (and objective) burden upon religious exercise.

Religious exercise is not itself protected, instead the ability or the right to choose to practice religion is protected. 'Exercise' is understood as the ability to make a decision. As Justice Bea argues, the government cannot coerce you into being religious or into not being religious. The focus here is on the free ability to choose to practice religion.

For Judge Bea (speaking for the majority and, arguably, for American law in general), religious freedom is a matter of choice. Talal Asad, in his contemplations on agency and pain, points out that "when the word 'body' is used, it is more often than not a synonym for the individual whose desire and ability to act are taken as unproblematic."[90] Asad argues that there is a link in secular thought between the body, or what I would like to label as religious exercise, and the subject's ability to make a free and rational decision. Religious freedom in this understanding is located in the individual's ability to choose to move their body.

[89] The court does not recognize that both of these cases involve violations of Christian religions, instead the court takes an interesting and profoundly secular approach to what constitutes a substantial burden.

[90] Asad, *Formations of the secular*, 68.

This decision demonstrates how fundamentally embedded the American legal body ontology is in religious freedom cases. When the court isolates a substantial burden it operates on an ontology which places the body secondary to the actor's ability to construct herself. "Religious sensibilities, subjective, emotional religious experience," this is Enlightenment secularized language which locates and divides religious bodies from religious belief. This language places religious otherness, in particular Native American religions, in opposition to a "civilized" and historically Protestant society. The "savage" practices which incorporate religion into their forms of government and public life are antithetical and detrimental to a functioning secular democracy. Peter Fitzpatrick forcefully argues how occidental law, the law of Europe and the colonial projects, and American law which developed from and out of these, is built upon the dialectic of the savage other, of the colonized Indigenous subject that fundamentally represents the antithesis to progress and the modern liberal state. He writes that "the colonized are relegated to a timeless past without a dynamic, to a 'stage' of progression from which they are at best remotely redeemable and only if they are brought into history by the active principle embodied in the European. It was in the application of this principle that the European created the native and the native law and custom against which its own identity and law continued to be created."[91] The disconnect between religion as consisting of "sensibilities" or "subjective, emotional" experiences and religion as real, bodied, and lived is a gap only crossable by a body ontology which allows for a private and secular religion. Private and secular religion is protected as the objective and real religion in which the "subjective, emotional" religions of the Native Americans stand as antithesis to. Indian religions are situated as antithetical to free religion due to the persistence of the American legal body ontology that frames practice as separate from belief, and the secular public sphere as distinct from the religious private sphere. The traditions

[91] Fitzpatrick, *Mythology*, 110.

and religions of the Native Americans are perpetuated as the constant savage other to be conquered and assimilated precisely because they so commonly fall outside of the paradigmatic norms for what constitutes acceptable religious practice according to the United States construction of 'free' religion.

According to the majority opinion, religious actions are recognized as protectable only if the government threatens an individual's right to free exercise by denying the individual the ability to choose whether or not they can practice their religion. With this, the secular separation of belief and body becomes the central trope of a liberated subject in which the "subjective spiritual experiences," exemplified in the legal discourse by Native American religion, is understood as antithetical to the free exercise of religion. This reduces and isolates the religious to a perspective, to a performance in which religion is something that exists outside of and prior to experience, to movement. Furthermore this ruling opens the door for regulatory action (as certainly this case is) towards religious practices that operate on fundamentally different embodied epistemologies. According to the court, the Hopi tribal member can still choose whether or not to practice their religion because there does not exist a direct burden, or effect, upon that person's ability to choose to practice their religion. Once again we find the perpetuation of colonial violence through the legally justifiable regulation of Indian religion.

The dissent constructs a definition of religion (and a substantial burden) that is categorically and ontologically the same as the majority's, yet comes to a completely different decision. The dissent, written by Justice Stevens, argues that the use of treated sewage effluent for snow production creates a substantial burden upon the Indians' free exercise of religion and furthermore, the state does not have a compelling interest in creating this burden. In service of his argument, Justice Stevens claims that "the majority misunderstands the nature of religious

belief and practice," and has therefore wrongly defined and applied substantial burden in this case.[92] What is interesting is that the American legal body ontology underlying the majority's opinion is also present within the dissent. This American legal body ontology endures because it is the binding mechanism, the core ontology behind which the legal construction of religious freedom exists. Because the American legal body ontology is at work within the dissent, their argument retains a measure of colonial force in that they remain incapable of understanding and arguing for the protection of Hopi religion from a position which values Hopi religion and philosophy from its own place of authority. By saying that religion is essentially subjective practice the dissent is still saying that Hopi religion is subjective, and therefore remains a means of colonial regulation.

Both the majority and the dissent argue from the same "nature of religious belief and practice." The difference lies in the application of this definitional ontology and is testament to its pervasiveness and impassable boundaries. The free exercise of religion means that the body is moved because of belief. This is the inescapable ontology of the court. Instead of understanding religious exercise to be prior to or co-existent with spiritual fulfillment, Justice Stevens perpetuates the body ontology of the court by emphasizing that "religious exercise invariably, and centrally, involves a 'subjective spiritual experience.'"[93] For Justice Stevens, religious exercise can be a subjective spiritual experience. Justice Stevens recognizes that the majority's main argument lies within the use and the application of a substantial burden as a definitional action which focuses the question of free exercise upon the action of the government to either deny an individual the right to practice their religion or benefit a particular type of

[92] Navajo Nation et al v. USFS, 535 F.3d (9th Cir. en banc. 2008) at 10104.

[93] Navajo Nation et al v. USFS, 535 F.3d (9th Cir. en banc. 2008) at 10105.

religious action.[94] In the same vein as the court's body ontology, Justice Stevens defines religion as a belief that exists prior to physical embodied experience. He writes:

> Religious belief concerns the human spirit and religious faith, not physical harm and scientific fact. Religious exercise sometimes involves physical things, *but the physical or scientific character of these things is secondary to their spiritual and religious meaning.* The centerpiece of religious belief and exercise is the "subjective" and the "spiritual." As William James wrote, religion may be defined as "the feelings, acts, and experiences of individual men [and women] *in their solitude*, so far as they apprehend themselves to stand in relation to whatever they may consider the divine.[95]

Justice Stevens is not arguing that there exists an objective religious burden. Since the physical comes second to the religious, Justice Stevens finds that a true substantial burden is that which necessarily affects the subjective spiritual experience. Where the dissent diverges from the majority's use of the body ontology is in the implied causality of the body from belief. Where the majority finds that a burden upon subjective spiritual experience has no real objective (physical, embodied) effect, Justice Stevens believes that a burden upon a subjective spiritual experience will have an effect upon the physical and embodied religious exercise. Although this sort of belief/body causality is different than the belief/body framework employed through the majority's opinion, both rely on an ontology of the body that places belief and discourse prior to bodied movement. Whereas they arise from the same ontological roots, the differing constructions of the relationship between belief and body represent a double and alternating

[94] Justice Stevens argues that neither *Sherbert* or *Yoder* define a substantial burden and, relying on a series of court precedents, defines substantial burden by its "plain and ordinary meaning." Navajo Nation et al v. USFS, 535 F.3d (9th Cir. en banc. 2008) at 10086. This plain and ordinary meaning regards a burden on the spiritual exercise (or as we shall see) upon the subjective spiritual fulfillment of the individual.

[95] Navajo Nation et al v. USFS, 535 F.3d (9th Cir. en banc. 2008) at 10105. emphasis mine.

definitional attempt which can be found within the greater American mythology of religion. The majority opinion, written by Justice Bea, represents a dominant stream in American secular liberalism that understands the subject to be a fundamentally a-cultural and potentially rational being who has the agency, the rational and conscious ability, to choose whether or not to exercise their religious beliefs. This is a manifestation of the American legal body ontology that separates the body from belief into a non-causal, agentive relationship.

The dissent, written by Justice Stevens, represents a persistent stream of thought that I would like to argue has become increasingly more prevalent in the academic study of religion as well as the academy at large. Through an analysis of the dissent I wish to demonstrate the prevalence of the court's body ontology within a greater academic culture which seeks to understand the relationship between moving bodies and discourse. Following Derrida on the function of an aporia, we can see how the impassable boundary, the non-deconstructable contradiction of religious freedom is such that anyone participating in this discourse within the American legal and academic culture at large has yet to really move beyond it. The dissent imagines bodied movement as secondary and causally related to belief. This relationship places belief as the primary religious reality in that it is symbolic, discursive, believed, and imagined.

Judith Butler would argue that the constructivist causality of Justice Stevens' dissent can be understood "to be a kind of manipulable artifice, a conception that not only presupposes a subject, but rehabilitates precisely the voluntarist subject of humanism that constructivism has, on occasion, sought to put into question."[96] Although Justice Stevens is not a self-proclaimed constructivist, his argument none-the-less falls under similar paradigms. The argument that the body arises from belief creates a believing subject that is separate (and transcendent to) their

[96] Judith Butler, *Bodies that Matter: On the Discursive Limits of Sex,* (New York: Routledge, 1993), 6, emphasis in original.

body. Butler collapses the causality to a single co-determinant and co-constructive act in which the performance of the subject is that which constitutes the identity/materiality of that subject. Butler explains that

> "the body posited as prior to the sign, is always *posited* or *signified* as *prior*. This signification produces as an *effect* of its own procedure the very body that it nevertheless and simultaneously claims to discover as that which *precedes* its own action. If the body signified as prior to signification is an effect of signification, then the mimetic or representational status of language, which claims that signs follow bodies as their necessary mirrors, is not mimetic at all. On the contrary, it is productive, constitutive, one might even argue *performative*, inasmuch as this signifying act delimits and contours the body that it then claims to find prior to any and all signification."[97]

The performative act is a simultaneous constitutive act in which the body is signified, is 'materialized' through the signification. The actual materiality of the body is never separate from its signification, and as performative, is always mediated and materialized through the signification. The speech act, introduced through the work of J. Austin and famously encountered by Derrida is politicized and advanced as a constitutive performativity by Butler. As I read Butler, performativity is the process, the moment, in which the sign, discourse, or what I would like to translate as 'belief' is brought into existence through the act of performing that belief. Belief is co-determinous with the performative act. In this sense, the belief, constituted through language by the speech act, is the only accessible body; it is the materiality of the body.

[97] Butler, *Bodies*, 30.

Butler understands the performative to be situated and limited by a small range of possible roles.[98] Influenced by Foucault, Butler understands that the success of performativity is "not because an intention successfully governs the action of a speech, but only because that action echoes prior actions, and *accumulates the force of authority through the repetition or citation of a prior and authoritative set of practices*."[99] Power and the structures that constitute a tradition or cultural milieu are perpetuated by their repeated performance to the point where they become the most viable modes of performance within a particular group. This way, power is constantly materialized through its performativity.

Where exactly is the body? Butler's reliance on discourse and the construction of the subject through the performance of the discursive is representative of a body ontology that cannot imagine the materiality of the body, the bodied movement of living beings, as prior to or constitutive of the discursive. For Butler, the body is not erased nor is it understood as a causal response to a belief or thought, instead the body is always mediated by the sign as the sight for the performance and the citation of the sign. The body is absorbed by the sign as the sign. There does not exist a very great divide between Justice Steven's understanding of the relationship between belief and body and Butler's sign as body/body as sign. A Butlerian deconstruction of the dissent would, I imagine, reconfigure the substantial burden to be upon the viability of the religious act, that the use of treated sewage effluent would effectively work to reconstruct the religious performance because the very nature of the burden falls upon the validity of the sign. The possibility of the type of performance, the type of bodied movement, is dependent upon the viable discursive options constituting the range of performances. This operates on a body

[98] James Loxley, *Performativity*, (New York: Routledge, 2007), 119.

[99] Judith Butler, *Excitable Speech: A Politics of the Performative*, (New York: Routledge, 1997), 51, emphasis in original.

ontology that, like Justice Bea and Justice Stevens, understands the body, the objective physicality of bodied movement, to be secondary to and causally connected to belief.

Justice Stevens' dissent is not that radical or out of place. The dissent tends to see 'lived tradition' as the embodied performance of a belief system. Once again the American legal body ontology appears. How often, and for how long has the study of religion operated under these same assumptions? This body ontology, as represented through both the majority opinion and the dissent is endemic to an understanding of the relationship between belief and religious exercise. Butler's theory of performativity, in many ways, follows the same colonial paradigm as Justice Stevens. The problem within these theoretical or judicial iterations of performativity is that racial difference, and particularly, bodied racial difference is silenced. Robert Warrior, commenting on the erotic poetry of Joy Harjo, argues that a just theory about bodies cannot be separate from the living bodies of American Indians. He writes, "Harjo speaks of 'thinking in skin and our pleasure' as she declares, 'there is something quite compelling / about this skin we're in.' For Harjo, then, our bodies - or our skins, which are the parts of us that most immediately touch and relate to the rest of the world around us - are not only the most immediate site of the battle for our selves, but also the primary guide to where we ought to be headed. Our skin, as Harjo puts it, is the map."[100] From Warrior's perspective then, a Butlerian performativity is only *performative* for those culturally unmarked bodies. The bodied difference of American Indians is both the site for which power and performance are employed as regulative of identity, as well as the site for which American Indians can reclaim their identities in ways resistant to an American legal body ontology - an ontology which will always attempt to elevate a transcendental a-cultural individualism over an objectified and machine like body.

[100] Robert Warrior, "Joy Harjo's Erotic Poetics," in *Reasoning Together: The Native Critics Collective*, ed. Janice Acoose, Craig S. Womack, Daniel Heath Justice, Christopher B. Teuton, et. al. (Norman: University of Oklahoma Press, 2008), 345.

Chapter IV

Religious-Freedom as Movement Ontogenesis

The Religious Freedom Restoration Act defines an exercise of religion as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[101] The language of religious freedom presupposes, and sets forth the myth that lived religious experience, the bodied movements of religious actors, arises from *belief*. In religious freedom cases the courts must decide whether or not an action under question results from a sincerely held religious belief. Once the court has decided whether or not an action is religious, they must then ask whether or not the government has caused a "substantial burden" on that religious exercise.

In an interesting twist of regulatory power, the definitional burden switches from the claim of religious authenticity to the question of whether or not the exercise is important enough to constitute an exemption. In other words, since (or if) the court cannot tell someone whether or not they are practicing their religion, or that they believe it sincerely, the court must decide if that action is religious enough to constitute an exemption from a governmental burden. This is a definitional exercise in which the boundaries of religion, drawn around what is religious enough, regulate religious practice.

Religion is a category constructed from and within the European and American history of secularization, imperialism, and colonization. Talal Asad, among others, has presented substantial evidence that religion, as understood in Euro-American secular society, as well as championed and explored within the academy, is largely a product of a specific Christian

[101] 42 U.S.C. 2000bb-1(4), 2000cc-5(7)(A).

history.[102] The study of religion, along with the increased secularization of society and the state regulation of institutionalized formal religious power, has come to define religion primarily as a set of symbolic meanings within a greater order, which is itself distinguishable from other categories of study, such as culture or law.[103] In turn, Asad argues that this particular historicization has come to understand the religious as invested within and by the individual.[104]

Through her critical analysis of American liberalism, Wendy Brown examines the dominant epistemology which structures religion and culture as bound and located within the individual. She challenges the liberal assumptions of governmentality and politicization as being primarily a-cultural. American liberalism, she writes, has championed certain claims to universal truth and has, in light of its pluralist democratic structure, positioned these truths above and behind the various subjective truth claims proposed by the many and differing politically represented groups.[105] It is because American liberalism as governmentality (and scholarship) proclaims itself as a-cultural is it capable of claiming superiority above and beyond the 'cultural' truth claims of its subjects.

Brown defines three reasons for the appearance and belief that American liberalism is a-cultural and superior. First she argues that liberalism's claim to universal truth makes political power not a matter of culture, since it is outside all cultures.[106] Secondly, the notion of individual freedom supports the conceit that individuals can be apart from culture, that they can,

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[102] Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam*, (Baltimore: The John Hopkins University Press, 1993), 42.

[103] Asad, *Genealogies*, 42. I am not going to enter into a discussion about how the academy is currently debating and struggling over the very possibility of defining religion. My intent here is to understand how religion has been constructed as something to be defined and regulated.

[104] Asad, *Genealogies,* 45.

[105] Wendy Brown, *Regulating Aversion* (Princeton: University of Princeton Press, 2006), 150 -151.

[106] Brown, *Regulating*, 39 - 40.

with the right governmentality, stand without culture.[107] Thirdly, and most importantly, "liberalism presumes to master culture by privatizing it and individualizing it, just as it privatizes and individualizes religion. It is a basic premise of liberal secularism and liberal universalism that neither culture nor religion are permitted to govern publicly; both are tolerated on the condition that they are privately and individually enjoyed."[108] They are believed to be privately and individually enjoyed because the religious or cultural body is subject to the unfettered free-will of the individual.

Robert Wolff argues that the existence of an a-cultural epistemology behind American liberalism can be seen as a result of the pluralist necessity for a transcultural, non group affiliated governmentality. He writes that for the majority, culture, religion, and group identity come to be seen as a "social inheritance ... to be cast off, a spell from which we must be awakened." [109] For the population majority that is not marked by an alternative cultural or religious affiliation the individual is no longer seen as a cultural being, but an individual free from the influence of culture. Because the individual (predominantly, the white male) can choose whether or not to be affiliated with a cultural group, and can choose whether or not to socially live the practices of that cultural or religious group, then the false belief that the individual is somehow beyond or fundamentally and purely without culture is advanced. *In one sense, religion is reduced to its performativity.* Brown explains that "in liberalism, the individual is understood to have, or have access to, culture or religious belief; culture or religious belief does not have him or her. The difference turns on which entity is imagined as governing in each case: sovereign individuals in

[107] Brown, *Regulating*, 151 - 152.

[108] Brown, *Regulating,* 21.

[109] Robert Paul Wolff, "Beyond Tolerance," in *A Critique of Pure Tolerance* by Robert Paul Wolff, Barrington Moore, Jr., and Herbert Marcuse (Boston: Beacon Press, 1965), 18.

liberal regimes, culture and religion in fundamentalist ones. At the same time, liberal legalism and the liberal state are identified as fully autonomous of culture and religion."[110] The American Indian who resides in a political economy where the line between the religious and the political is necessarily blurred is often the subject for which the forces of liberal legalism attempt to control through their very insistence on their own transcendental autonomy. The aim of those wielding the force of liberal legalism is to 'free' those members of the human race who they imagine to be repressed by the religious and cultural forces in which they interact. This is a colonial conceit, one which privileges a particular type of colonial governmentality by its very promise of a rational and a-cultural justice.

Since the individual is considered the site of cultural or a-cultural agency, that is, if the individual has the ability to choose whether or not to act on their beliefs, to *exercise* their beliefs in the public sphere then, as Justice Bea understood it, regulating the exercise of religion does not necessarily amount to a burden on the practitioner's religion. Why? When religion amounts to a choice of individual preference, or "perspective," religious experience is divided into precariously connected subjective and objective realms. When the body does not have to exercise belief an improper act of individual will can be regulated.

American jurisprudence places the individual as the sole bearer of rights. Furthermore, the very notion of a peoplehood, of a collective American identity, and the nationalist discourses of freedom are based in the belief that our fundamental freedoms are realized through the legal protection of individual rights.[111] Legal scholar Peter Fitzpatrick locates the rise of the individual as the great recipient of rights, as the source of all rights (for some, namely those with power) as outlined through the myth of progress. He writes, "there is an integral connection

[110] Brown, *Regulating*, 170.

[111] Kristen A. Carpenter, "Real Property and Peoplehood" *Stanford Environmental Law Journal,* 27,2 (2008): 315.

between the specific Western construction of reality as unitary, exclusive and objectively knowable and the construction of the individual as the pre-social, the ultimate and sufficient site of knowing and acting on that reality. The subject is invested with a capacity to know universally, a capacity responsive to universal forms of reality."[112] The progress of civilization, he argues, was (and is) imagined to require a freeing of the individual from the bonds and structures of savage society. The colonial concept of 'savage society' in North America has often been constructed based upon the different American Indian societies that the colonists encountered. Fitzpatrick explains that "law, like social solidarity, is seen in terms of an evolution from one polar position to another. The origin of law is located in mechanical solidarity where, among 'the lower forms of society', it is penal, repressive and *religious*; its culmination is found in organic solidarity where law is based on co-operation among individuals, its sanctions are 'purely restitutory', its rules tend to be 'universalized' and rational, and where (quoting Durkheim) 'it is no longer wrath which governs repression, but ... foresight'."[113] The belief is that the individual can be autonomous from the repressive nature of religion and therefore it is the duty and reason of individual rights that the citizen is able to free himself from the 'primitive' repression of religion and culture.

The individual is both simultaneously capable of being free from religion while being able to freely believe a religion of their choice. Winnifred Sullivan explains that religious authority has been relocated within the individual instead of within the community. She explains how the "precondition for political participation by religion increasingly became cooperation with liberal theories and forms of governance. As a result, the modern religio-political arrangement has been largely, although not exclusively, indebted ... to protestant reflection and

[112] Fitzpatrick, *Mythology,* 36.

[113] Fitzpatrick, *Mythology,* 105, emphasis mine.

culture."[114] This has resulted in an understanding of religion, or "true religion, some would say - on this modern protestant reading, to be understood as private, voluntary, individual, textual, and believed ..." so that "crudely speaking, it is ... modern protestant (religion) - that is free."[115]

If the individual is expected to progress beyond religion and culture and participate (publicly?) in a secular civilized society, then the important question must be asked; what does secular society expect and demand of public religious bodies and bodied movement? In other words, which forms of religious exercise are protected by law and constitutional right? It would seem antithetical that any religious exercise would be protected under the first amendment, if that amendment was, in many ways, a way to liberate the individual from the believed repression that religion and culture have created.

Religious freedom is aporia. That is, the concept (the promise?) of religious freedom cannot be deconstructed; it poses an impassable limit, a horizon that can be neither approached, nor passed beyond. Certainly we can trace genealogies of religious freedom, we can find histories and uses of the subject, we can gesture to its natal genesis, but the concept itself exists in its own contradiction. As aporia, religious freedom in our democratic society cannot be discarded as an effect of its promise and accountability. Therefore, as elemental and aporetic, our discussions on religion and politics are always irreducible to religious freedom. In comes the logic of the secular. In comes the unabashed regulation of Indian religion. The idea of the a-cultural individual, the secular in all its might, is dependent for its very existence upon the aporia of religious freedom. Without the divide of religion and self, religion and politics, individual and cultural, mind and body, there could not exist a theory of the secular at all.

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[114] Sullivan, *Impossibility,* 7.

[115] Sullivan, *Impossibility,* 8.

Despite the impassability of religious freedom, perhaps we may arrive upon the aporetic threshold as exorcists and as architects. For as much as an effect of spectrality can perpetuate an aporia, a regular and persistent presence of the American legal body ontology haunts religious freedom within the history of federal Indian law. Religious freedom depends upon the constant re-appearing and employment of the American legal body ontology. The freedom of religion, or the freedom from religion relies on the idea that the mind is separate from the body. And so with religious freedom we find the constant, yet ghost like presence of a particular body ontology. [116] This presence is important to recognize precisely because of the relationship between religious freedom and the American legal body ontology. As an exorcist, can we attempt to drive this specter, this ghostly haunting, from the aporia of religious freedom?

To the extent that the relationship between religious freedom and the American legal body ontology can be imagined as a place of spectrality, or as Ananda Abeysekra has called such places, "ghostly locations," we must recognize that such places exist as the virtual landscapes of colonialism. Abeysekera suggests that spectrality is deeply connected to the construction of an other. He writes that "if the ghostly, disjunctured present is the very possibility of the other, it is also the im-possibility of justice beyond law. In other words, ordinary notions of justice that is possible here and now does not help us think about those others who are dead, who are no longer present, who are victims of imperialisms, totalitarianisms, or other racist colonial

[116] Derrida writes that "whatever one may think of this event, of the sometimes terrifying failure of that which was thus begun, of the techno-economic or ecological disasters and the totalitarian perversions to which it gave rise (perversions that some have been saying for a long time are precisely not perversions, that is, they are not pathological and accidental, corruptions but the necessary deployment of an essential logic present at the birth, of an originary dis-adjustment - let us say, for our part, in a too-elliptical fashion and without contradicting this hypothesis, they are the effect of an *ontological* treatment of the spectrality of the ghost - whatever one may think also of the traumatism in human memory that may follow, this unique attempt took place. A messianic promise, even if it was not fulfilled, at least in the form in which it was uttered, even if it rushed headlong toward an ontological content, will have imprinted an inaugural and unique mark in history." Ontologies can be spectral. The ghost becomes so hidden and yet so ordinary that its presence, which is essentially spectral, exists ontogenetically. Jacques Derrida, *Specters of Marx: The State of the Debt, The Work of Mourning, and the New International*, (New York: Routledge, 2006), 55.

exterminations."[117] Our present notions of justice, the justice of cases like *Navajo Nation v. USFS,* effectively works to silence American Indian difference. The specter of the American legal body ontology haunts our legal notions of difference and perpetuates forces of colonial power.

Reading this discussion of spectral hauntings and colonial exorcisms into Danika Medak-Saltzman's discussion of transnational Indigenous experience, it becomes apparent how the presence of colonial specters reinforces the dominant forms of colonial power over the possibilities for defining and constructing Indigeneity. She writes how "textual laments that allow readers and scholars alike to be comfortable with dismissing the importance of Indigenous experiences effectively reinscribe the 'vanishing Native' archetype that still plagues contemporary representations of Native peoples."[118] The force of the American legal body ontology is a force of constant reinscription of a colonial ontology upon Native systems of governance, culture, and religion. As we have seen in *Navajo Nation v. USFS,* this reinscription takes place through the force of law.

To re-imagine religious freedom without its colonial specters is to counter the very presence of aporia itself. If we cannot do without aporia, perhaps we can do away with its ghosts. What would religious freedom be like without the presence of the American legal body ontology? Would religious freedom continue to exist as a permissible category of human rights and governmentality?

The problem seems to be in the supposed notion that an aporia is a wall, a horizon, an impassable limit. Catherine Keller has suggested otherwise in her essay "The Cloud of the

[117] Ananda Abeysekera, "The Politics of Postsecular Religion: Mourning Secular Futures." (New York: Columbia University Press, 2008), 213.

[118] Danika Medak-Saltzman, "Transnational Indigenous Exchange: Rethinking Global Interactions of Indigenous Peoples at the 1904 St. Louis Exposition." *American Quarterly.* 62,3 (2010): 597.

Impossible: Embodiment and Apophasis." She argues that it is in the moment of the movement between the coincidental opposites, between an unsaying of the body and the materiality of the body itself where the aporia turns to porosity, to a cloud of impossibility.[119] At this moment, passage through the aporia is possible.

At the heart of the contradiction of religious freedom is the problem posed by the specter of the body ontology. What of the materiality of the body? What exactly is the relationship between the body and sign, between movement and belief, performance and culture? In order to exorcise this body ontology from religious freedom, in order to pass into the cloud of impossibility, we must first attempt to encounter this contradiction, perhaps to dwell within it as the ever in-between, as the dance, the play, the flesh.

In his essay, *The Concept of Nature, I*, Maurice Merleau-Ponty addresses the inherent problem with a Cartesian idea of nature, one which dictates a dialectic of man and nature. Nature, understood as the primordial ground of being, (not as an ecologic totality opposed to city or civilization), cannot be understood to exist apart from man. Nature, he argues, "presents itself always as already there before us, and yet as new before our gaze," and so only exists in any continuity or totality *sui generis* because of reflective thought.[120] If this is the case, then when consciousness is removed from nature, nature will cease to exist at all, except as a condition of our experience. But, if nature is understood to engender itself, that is, exist regardless of human reflection, "then we must recognize that primordial being which is not yet the subject-being nor

[119] Catherine Keller, "The Cloud of the Impossible: Apophasis and Embodiment," in *Apophatic Bodies: Negative Theology, Incarnation, and Relationality.* ed. Chris Boesel, Catherine Keller, (New York: Fordham University Press, 2009), 29.

[120] Merleau-Ponty, Maurice, "Concept of Nature, I," *Themes From the Lectures* (Evanston: Northwestern University Press, 1970), 65.

the object being ... in every respect baffles reflection."[121] Reflection upon nature would be a constant illusion, which would be to say, that reflection is impossible. Neither can nature be thought of as "being engendered by another, which would reduce it to the condition of a product and a dead result." [122] Nature, understood as a causal product of creation, would remove its status as primordial being. This is not viable either, for nature is primordial being because everything exists within nature. Any philosophical approach which separates man from nature is bound to enter into this conundrum, this problem.

Merleau-Ponty resolves this conflict and replaces man within nature by recognizing that "the solipsistic object of perception can only become pure object on the condition that my body enters into systematic relations with other animate bodies."[123] The body as the acting vehicle of perception exists within a nature that it helps constitute, a nature that it touches and feels to exist, and a nature that it cannot separate itself from. No longer can there exist human and nature as something separate, because a real continuity of relationships would negate the existence of any dualism. Within a realm of systematic relations, in a world of constant continuity, all parts are dependent upon all other parts and exist only in relation to each other. Merleau-Ponty argues for the primacy of perception as proof for this continuity. Conceptual thought is built from physical/sensational experience, and the world - nature - is experienced to exist through our perception of it. And nature, as we perceive it, is "pregnant with its form," that is, it reveals itself as real only as a synthesis of relational animate objects or beings meaningfully constructed by our perception. This "synthesis which constitutes the unity of the perceived objects and which gives meaning to the perceptual data is not an intellectual synthesis ... it is rather a totality

[121] Merleau-Ponty, *Concept*, 65-66.
[122]Merleau-Ponty, *Concept*, 66.

[123] Merleau-Pony, *Concept*, 81.

open to a horizon of an indefinite number of perspectival views which blend with one another according to a given style, which defines the objects in question."[124]

The primacy of perception offers evidence that, although we experience a self in a body and a world outside of ourselves, the self and nature are not bounded totalities but exist in a fluid and dynamic relationship with each other. Merleau-Ponty calls this continuity of existence 'Flesh'. Instead of a world and a body, "there is reciprocal insertion and intertwining of one in the other ..." and "flesh is not matter, is not mind, is not substance ..." but exists "midway between the spatio-temporal individual and the idea, a sort of incarnate principle that brings a style of being wherever there is a fragment of being. The flesh is in this sense an element of Being."[125] Flesh is the interrelation of existence that gives rise to substance. To understand religious freedom without its body ontology, that is, without constantly and inevitably separating man from nature, mind from body, subject from object is to re-understand the aporia as flesh. In this light, nature exists as the in-between, as relation itself; for if there is no real split between man and nature, subject and object, then boundaries are dynamic and dependent upon the intertwining.

Interrelation is a concept of movement. Flesh moves. Flesh is movement. Brian Massumi writes that "this movement-slip gives new urgency to questions of ontology, of ontological difference, inextricably linked to concepts of potential and process and, by extension, event - in a way bumps 'being' straight into becoming."[126] Massumi has labeled this extension

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[124] Merleau-Ponty, Maurice, "The Primacy of Perception," *The Primacy of Perception and Other Essays on Phenomenological Psychology, the Philosophy of Art, History and* Politics (Evanston: Northwestern University Press, 1964), 16, 17.

[125] Merleau-Ponty, Maurice, *The Visible and the Invisible* (Evanston: Northwestern University Press, 1968), 138, 139.

[126] Brian Massumi, "Parables for the Virtual: Movement, Affect, Sensation." (Durham: Duke University Press, 2002.), 8.

of becoming 'ontogenesis.' Within the cloud of the impossible, broaching upon the aporetic, flesh moves ontogenetically, where the relationality of contradictions folds the experience of self into the sign as a constant state of emergence. This movement of movement is dance. Dance is the movement ontogenesis. The sign, the subject, the body, are all whirled together in infinite reversibility, dancing through the aporia in a state of constant becoming.

Religious exercise, like dance, is ontogenetic. There is no longer an exercise *of* religion. Instead, religion embodied in the reversibility of the sign and signifier is a 'becoming,' itself never separate from movement. Religious freedom without the specter of the American legal body ontology is religious freedom in a movement ontogenesis. If we were to read this back into *Navajo Nation v. USFS*, religious-freedom resembles the right to sovereignty where the Hopi people, "like all peoples, have the right to describe their experiences and claim them as their own."[127]

As is evident in the construction and enforcement of our current legal definition of religious freedom, any definition of religion that continues to maintain an ontological disjuncture inherent within an exercise *of* religion will only perpetuate our obsession with the primacy of discourse and belief. As is the case with the 9th circuit's misperception of Hopi religion, definitions of religion that rely on body ontologies force the religious into inadequate categories of permissibility. If we can begin to re-theorize and judicially encode religion from a movement ontogenesis, then perhaps we can begin to radically redefine religion based upon the play and the relation of movement as cultural, religious, and bodied.

[127] Craig S. Womack, "Theorizing American Indian Experience," in *Reasoning Together: The Native Critics Collective*, ed. Janice Acoose, Craig S. Womack, Daniel Heath Justice, Christopher B. Teuton, et. al. (Norman: University of Oklahoma Press, 2008), 384.

As Vine Deloria, Jr. has pointed out, "the nature of tribal religions brings contemporary America a new kind of legal problem. Religious freedom has existed as a matter of course in American *only* when religion has been conceived as a set of objective beliefs ... so far in American history religious freedom has not involved the consecration and setting aside of lands for religious purposes or allowing sincere but highly divergent behavior by individuals and groups."[128] The protection of Native American sacred place as a religious freedom would require a new conceptualization of public property in American law. This new conceptualization would have to legally encode a jurisprudential understanding of public property from a movement ontogenesis, as opposed to an objectified and engendered landscape constructed out of the American legal body ontology, thereby recognizing a non-essentialized becoming of cultural identities based on the movement of people with landscapes.

The problem with law as mediator between government power and the multiple possibility of religious claims to religious-freedom still beckons the greasy and oiled slope. The difference is that with the exposure of the *myth* of secularism and its conceit of a body ontology comes the application of an enormous amount of dispersant (hopefully biodegradable), converting the slippery slope into a projectable climb. Areas such as the San Francisco Peaks can no longer be understood as places of secular comportment, with its alleged 'freedoms,' but a place in which the ontogenetic takes precedent, a place in which Hopi religion is absolutely burdened by the use of treated sewage effluent precisely because such an action halts ontogenesis.

Jonathan Z. Smith gave a lecture last year at the University of Colorado entitled, "Now you see it, now you won't: The Future of the Study of Religion over the Next 40 Years." During

[128] Vine Deloria, Jr., "God is Red: A Native View of Religion." (Golden: Fulcrum Publishing, 1994), 279.

this lecture, Smith self-admittedly played the oracle and suggested areas of study that offer the greatest potential for the next generation of scholars of religion. Smith highlighted the importance of a future study that focuses on the body, movement, and gesture. I do not believe this prediction to be an outline of an academic fad, instead I see this prediction as a response to a necessity within the field of religious studies. Unless religious studies, haunted by its own specters of a body ontology, wishes to willingly perpetuate the discriminate and inevitably biased power play inherent within the present aporia of the body, as action and belief, then those of us in the field must seriously exorcise our own 'bodies' of the dangerous binaries that haunt us.

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