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FREEDOM OF RELIGION IN INDIAN COUNTRY

Sharon L. O'Brien

The Supreme Court's opinions in *Lyng v. Northwest Indian Cemetery Protective Ass'n.*¹ and *Employment Division v. Smith*² dealt devastating blows to Indian religious rights and their assumed protection under the First Amendment.³ In terms of historical precedent, the decisions were not surprising. The United States has a history of overt and covert policies designed to destroy or to impede the practice of Indian religions.⁴

The Court's ruling in *Smith* considerably narrowed the "compelling interest test" previously used by courts⁵ to determine whether the government illegally infringed on religious rights. The decision galvanized religious leaders and constitutional scholars around the country to pass the Religious Freedom Restoration Act of 1993 (RFRA).⁶ RFRA, finding that "laws 'neutral' toward religion may burden religious exercise"⁷ and that "governments should not substantially burden religious exercise without compelling justification,"⁸ restores the compelling interest test established in *Sherbert v. Verner*⁹ and *Wisconsin v. Yoder*.¹⁰

While prompted by the Court's failure to protect Indian religious rights, the passage of RFRA is, nonetheless, not expected to adequately secure to American Indians the free exercise of

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¹ See infra notes 20-32 and accompanying text.
² According to Justice Brennan a government's compelling interest included only those actions that posed a substantial threat to the public safety, peace, or order. Sherbert v. Verner, 374 U.S. 398, 403 (1963).
⁸ The only exception allowed by the act is if there is a compelling governmental interest which is the least restrictive means of furthering the government's interest. See 42 U.S.C. § 2000bb-1(b). The Act also provides for judicial remedies against the government. See 42 U.S.C. § 2000bb-1(c).
their First Amendment rights.11 To ensure the protection of Indian religious freedoms, the Indian Religious Coalition12 has lobbied for the last four years to obtain passage of legislation designed to fill the gaps in RFRA13 and to secure the unrealized promises of the previously enacted 1978 American Indian Religious Freedom Act (AIRFA).14

This article argues that the federal government is obligated by the special status of American Indians and Congress’ special trust relationship with tribes to ensure the preservation of Indian religious rights. Part I provides an overview of the historical events, cultural conflicts, and legal issues that have merged to create the current precarious state for Indian religious expression. The government’s historical treatment and cultural understandings of Indian religions is briefly examined as well as the courts’ findings in several recent decisions relating to peyote use,

11. See infra notes 141-43 and accompanying text.
12. The Coalition, which was founded in 1988 by the Native American Rights Fund (NARF), the National Congress of American Indians (NCAI), and the Association on American Indian Affairs (AAIA), is now comprised of more than 63 organizations. For a listing of the members (as of 1993) of the American Religious Freedom Coalition for the Amendments to the American Indian Religious Freedom Act, see Effectiveness of Pub. L. No. 95-341, The American Indian Religious Freedom Act: Oversight Hearing Before the Subcomm. on Native American Affairs of the House Comm. on Natural Resources, 103d Cong., 1st Sess. 69 (1993).
Another bill, American Indian Religious Freedom Act Amendments of 1994, H.R. 4155, 103d Cong., 2d Sess. (1994) introduced March 24, 1994, was not passed in the last Congress. The purpose of the bill is to provide for access to sacred sites on federal lands. See Proposed Amendments, supra at pt. 1.
14. 42 U.S.C. § 1996 (1978). This law instructed the President to direct all federal agencies to review their procedures and policies and determine changes needed to preserve Native American religious rights and practices. Agencies, which were to consult with traditional Indian leaders, were to report their findings to Congress within 12 months. For legislative history, see H.R. REP. No. 95-1308, 95th Cong., 2d Sess. (1978) reprinted in 1978 U.S.C.C.A.N. 1262.
the religious practices of inmates, the taking of ritual animals, and sacred site access.

Part II reviews the judicial interpretations and issues that still inhibit the protection of Indian religious rights, despite the best intentions of RFRA and the proposed Native American Cultural Protection and Free Exercise of Religion Act of 1994. Part III reviews the Court’s application of the trust doctrine and the government’s responsibility to preserve tribal existence and culture.

I. INDIAN RELIGIOUS PRACTICE

As many authors have written, Indian religions interweave and integrate all aspects of human and spiritual existence. Most Indian languages do not possess a word translatable as “religion.” Rather, the concept of religion permeates one’s existence and is indistinguishable from one’s cultural, political, and economic existence. Western religion, on the other hand, is understood and referenced to a linear concept of time and to the celebration of important messiahs, prophets, and sacred events.

The rituals of many Indian religions are required to maintain the spiritual and earthly harmony and balance of nature, the community, and the person. As Deward Walker has explained, “American Indian culture... entails actually entering sacredness rather than merely praying to it or propitiating it.”

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15. See supra note 13.
16. Indian religions cannot be discussed as a monolithic system of beliefs and practices. Tribal religions do tend to share some common features as do Judaism, Christianity, and Islam.


For a society accustomed to primarily attending services on Sundays and to worship at any of several locations, it is most difficult to appreciate a non-Western religion that requires the performance of a ritualistic act at a certain time and in a certain place.

American society's ignorance of and animosity towards Indian religions is long standing, deep seated, and multilayered. Hostility to Indian religions has assumed many forms, ranging from the direct to the indirect. The very premise of Christianity, which requires a belief in Christ as a source of redemption, inherently demands the proselytation of non-Christians. The saving of heathen souls is a directive of many Christian sects. As an admittedly Christian nation, it is understandable that efforts to christianize the American Indian very early suffused federal policies. From the beginning of the nation's development, federal efforts to civilize and christianize Indians were indistinguishable policies. The Bureau of Indian Affairs (BIA) turned to the churches for administrative, personnel, and financial support in their efforts to acculturate the Indian. The policy to exterminate the buffalo, thereby starving the Lakota and

at appropriate times.

Walker, supra note 16, at 104.


22. The government and the religious societies were intertwined in their efforts to civilize and Christianize the Indians throughout the 19th century. The government supported missionaries with funds, assigned agencies to religious societies, and provided land for the building of churches. The question is whether this intermingling constituted an establishment of religion. FEDERAL AGENCIES TASK FORCE, DEP'T OF THE INTERIOR, AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT 3-6 (1979) [hereinafter AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT]. This study was mandated by § 2 of the American Indian Religious Freedom Act (AIRFA), Pub. L. No. 95-341, § 1, 92 Stat. 469 (1978).

In Quick Bear v. Leupp, 210 U.S. 50 (1908), the Court ruled that the use of federal funds to establish a Catholic Church on the Rosebud Indian Reservation did not violate the Establishment Clause. See FRANCIS P. PRUCHA, THE CHURCHES AND THE INDIAN SCHOOLS 1888-1912 (1979).

23. It is estimated that white hunters had killed forty million buffalo within three decades. In 1889, 20 buffalo were known to still live within the Yellowstone Park. See FRANK G. ROE, THE NORTH AMERICAN BUFFALO: A CRITICAL STUDY OF THE SPECIES IN ITS WILD STATE 493 (1951); PETER MATTHIESSEN, WILDLIFE IN AMERICA
other plains tribes into submission, attacked the very cultural and spiritual psyche of the tribes. In 1892, Commissioner of the BIA, Thomas Morgan, directed Indian Courts of Federal Offenses to enforce a series of laws outlawing religious practices, including "heathenish" dances, plural marriages, ceremonies by medicine men, intoxicants, and the destruction of property at burials. Violators were punishable by imprisonment or denial of rations.

By 1934, BIA Commissioner John Collier had ended the Bureau's overt and repressive policies. However, society's and the government's failure to understand the tenets, premises and needs of Indian religious practices caused indirect attacks to persist. Prevention of access to sacred sites for ceremonies and the collection of herbs and medicines, imprisonment for the ritual killing and possession of animal parts, the use of sacramental peyote, and the display of sacred objects and human remains prompted tribal lobbying for passage of AIRFA.

This joint resolution directed the federal government to "protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian." After many unsuccessful legal attempts by Indians to cite the AIRFA for the protection of their rights, few would disagree with Justice O'Connor's description

(1959).

24. In 1840 a state legislative report concluded, "[S]o far as game and hunting are concerned, the sooner our wild animals are extinct the better, for they serve to support a few individuals just on the borders of a savage state . . . ." JAMES A. TOBER, WHO OWNS THE WILDLIFE?: THE POLITICAL ECONOMY OF CONSERVATION IN NINETEENTH CENTURY AMERICA 714 (1981). During congressional discussion of the Buffalo Protection Bill, congressmen argued that the extermination of the buffalo promoted the submission of the Indian. 2 CONG. REC. 2105-08 (1874).

25. REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 29-30 (1892); see AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT, supra note 22, at 6; see also Circular No. 1665 6-7 (April 26, 1921).

26. REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 29-30 (1892) at 29; see AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT, supra note 22, at 6.


29. See Circular No. 2970, signed by Secretary of the Interior Harold C. Ickes at the request of Commissioner John Collier, and sent to all Indian agencies. Entitled "Indian Religious Freedom and Indian Culture," the circular stated that "no interference with Indian religious life or ceremonial expression will hereafter be tolerated." Id.


31. See Sharon O'Brien, A Legal Analysis of the American Indian Religious Freedom Act, in HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM, supra note 16
of the policy as a law with "no teeth." 32

A. Religious Rights: Tests and Interpretations

Over the last one hundred years, the Supreme Court has developed a number of tests and interpretative approaches to determine when the government is impermissibly prohibiting the free exercise of one's religion and/or when it is improperly involved in the establishment of religion. When seeking to protect their religious rights from governmental interference, individuals must answer a number of questions developed by the courts and must convince the judiciary to employ those tests and interpretations that will most benefit their arguments. For example, is the belief sincerely held? Is the practice in question central to the plaintiff's practice of his religion? Does the governmental law or regulation prohibit belief, interfere with religious practice or actually prevent the practice of the religion? If a governmental exemption from the law in question is needed, is the exemption a "proper accommodation" or a violation of the Establishment Clause? Will the exemption violate the equal protection rights of non-members?

The Court first considered the proper interpretation of the Free Exercise Clause in Reynolds v. United States, an 1878 case. 33 Reynolds, a Mormon arrested for polygamy, argued the First Amendment protected his right to marry more than one wife. The Supreme Court ruled that a Mormon's religious directive to engage in polygamy did not exempt him from adherence to a criminal statute. 34 Establishing a test that distinguished between belief and conduct, the Court reasoned that the First Amendment protected belief, but not conduct. 35 Conduct threatening the civil order could be regulated by the government. 36

In West Virginia State Board of Education v. Barnette, the


33. 98 U.S. 145 (1878).

34. Id. at 166-67.

35. Id. at 167.

36. Id. at 164-65; see also Cantwell v. Connecticut, 310 U.S. 296 (1940); Davis v. Beason, 133 U.S. 333 (1890).
Court revised the belief/conduct test. In that case, the Court ruled that the government could not interfere with the exercise of religious rights without a compelling interest. In the 1963 case *Sherbert v. Verner*, the Court instructed that the “compelling interest” test be construed as narrowly as possible. According to Justice Brennan, a government’s “compelling interest” entailed only those actions that posed a substantial threat to the public safety, peace, or order. The Court again applied this reasoning in *Wisconsin v. Yoder*, a case in which the Amish requested an exemption from Wisconsin’s school attendance laws on the grounds that their religion forbade them to send their children to school past the eighth grade. The Court acceded, ruling that the state’s need for its school attendance policy did not outweigh the rights of the Amish to be protected in the exercise of their religious duties.

The next section of this article briefly reviews the judicial efforts of Indian people in the last three decades to protect their religious practices by navigating through the courts’ various First Amendment tests and interpretations. Practices briefly reviewed include the Native American Church’s use of peyote; the right of Indian inmates to gain access to religious expression, rites, and spiritual leaders; the right to hunt and use animals in religious ceremonies; and Indian access to sacred lands.

**B. Use of Peyote**

Archaeologists estimate that peyote use among Indians is more than 10,000 years old. Obtained from the button of the cactus Lophophora Williamsee, religious practitioners ingest peyote by chewing, making a tea of the button, or swallowing a capsule. Peyote, which contains mescaline, induces a hallucinogenic state. This condition, according to believers, allows the opening of their minds to God’s teachings. Peyote is revered as a deified messenger. Today, the majority of Indian people who use peyote are members of the Native American Church. Incorporated in 1918 in Oklahoma, the Native American Church is estimat-
ed to have approximately 250,000 members.

Indians have suffered historically from repeated efforts to prohibit and to eradicate their use of peyote. The Spanish outlawed peyote use in 1620. The BIA directed its Indian agents throughout Oklahoma, formerly the Indian Territory, between 1888 and 1934 to consider peyote an intoxicating liquor and to “seize and destroy” it. In 1889, the Oklahoma Territory enacted the first statutory prohibition of peyote, which was subsequently repealed in 1908. Congress considered, but did not enact, twelve bills between 1917 and 1933 to ban peyote. 44

By the 1960s, government officials had acquired a more sophisticated understanding of the role and function of peyote in Indian religious services. Although the 1965 Drug Abuse Control Amendments Act 45 and the Comprehensive Drug Abuse Prevention and Control Act of 1970 46 list peyote as an illegal Schedule I intoxicant, Drug Enforcement Agency (DEA) regulations specifically exempt peyote used in Indian religious ceremonies. 47 Laws in twenty-two states now permit peyote use. 48 In at least three of these states, exemptions resulted from state court rulings that laws prohibiting peyote use violated the religious rights of American Indians. 49

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47. 21 C.F.R. § 1307.31 (1994) (“The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious[sic] ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration.”)
49. In People v. Woody, 394 P.2d 813 (Cal. 1964), the California Supreme Court dismissed the conviction of two Native American Church members arrested for ingesting peyote. In an often cited passage, the court reasoned:

[The right to free religious expression embodies a precious heritage of our history. In a mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty. We preserve a greater value than an ancient tradition when we protect the rights of the Indians who honestly practiced an old religion in using peyote....]
Somewhat ironically, the courts have supported and justified Indian sacramental peyote use most strongly in cases that have not involved Indians as plaintiffs or defendants. In several instances, non-Indians have requested that an exemption for religious drug use either be extended to their drug of choice, such as marijuana, or to their churches. To not extend a similar exemption, these groups have argued, violated their free exercise rights, the Equal Protection Clause, and the Establishment Clause.

In Olsen v. DEA, for example, members of the Ethiopian Zion Coptic Church argued that the government's refusal to provide an exemption for marijuana use in their church services unfairly infringed upon their Equal Protection rights and violated the Establishment Clause in light of the peyote exemption for American Indians. In response, the court distinguished between the central role played by peyote in the Native American Church and the function of marijuana in the Ethiopian Zion Coptic Church. Within the Native American Church, the court stated, peyote is regarded as a deity; it is an object of worship. The use of peyote outside of church services by any Native American Church member is regarded as sacrilegious. The court stressed that the Ethiopian Coptic Church allowed for marijuana use outside the church.


\[50.\text{ See United States v. Rush, 738 F.2d 497, 512-13 (1st Cir. 1984) (denying marijuana exemption for Ethiopian Zion Coptic Church); Leary v. United States, 383 F.2d 851, 861 n.11 (5th Cir. 1967). In at least one case, a court has denied a request by Indians to exempt use of marijuana on religious grounds. United States v. Carlson, No. 90-10465 (9th Cir. Apr. 2, 1992) (unpublished disposition at 958 F.2d 242 (9th Cir. 1992) (finding no religious exemption for marijuana use by Yurok Indian in religious ceremonies).}

\[51.\text{ See Peyote Way, 922 F.2d at 1212; Kennedy v. Bureau of Narcotics and Dangerous Drugs, 459 F.2d 415, 417 (9th Cir. 1972) (refusing request by Church of the Awakening that peyote exemption extend to their church); Warner, 595 F. Supp. at 597.}

\[52.\text{ Olsen at 878 F.2d 1458, 1469 (D.C. Cir. 1989).}

\[53.\text{ Olsen 878 F.2d at 1464-65.}

\[54.\text{ Id. at 1464.}

\[55.\text{ Id. at 1467.}

\[56.\text{ Id.}

\[57.\text{ Id.}

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A second line of challenges has come from peyote users who are not members of the Native American Church but of other non-native churches that incorporate the use of peyote. In *Peyote Way Church of God v. Thornburgh*, members of the Peyote Way Church of God argued that the Free Exercise and the Equal Protection Clauses of the Constitution required a similar exemption for their church. The Fifth Circuit recognized that the federal government's political relationship with tribes and its obligation under the trust relationship to protect Indian culture and religion ameliorated violations of the First Amendment and Equal Protection Clause. Specifically, the court stated: "We hold that the federal [Native American Church] exemption allowing tribal Native Americans to continue their centuries-old tradition of peyote use is rationally related to the legitimate governmental objective of preserving Native American culture."

Despite these legislative, regulatory, and judicial advances, Indians were still prohibited in approximately twenty-eight states from using peyote—laws which the Supreme Court judged in *Employment Division v. Smith* do not violate the First Amendment rights of American Indians. In *Smith*, the Supreme Court considered a case involving two Indian alcohol drug counselors who were fired from their jobs for testing positive for peyo-
te use. The two counselors, both recovering alcoholics, were prac-
ticing members of the Native American Church.\textsuperscript{62} Their use of
peyote and their spiritual beliefs had played a major role in their
own recovery from alcoholism. Arguing they were fired for legiti-
mate cause, the State denied them unemployment benefits. The
men appealed, charging the state with a violation of their First
Amendment rights.\textsuperscript{63} Justice Scalia, writing for the majority,
rules that state law forbidding the ingestion of peyote did not
violate the counselors’ First Amendment Rights.\textsuperscript{64} Justice Scalia
reasoned that, in essence, states may choose to allow or to pro-
hibit the religious use of peyote by American Indians, depending
upon the state’s definition of “public safety.”\textsuperscript{65}

In reaching its decision, the Court declined to use the two-
part compelling interest test that it had previously employed to
determine if a law impermissibly burdened religion.\textsuperscript{66} In a re-
turn to the belief/conduct interpretation, Justice Scalia stated
that allowing individuals to determine which laws they would
obey according to their personally held religious beliefs would
allow a religious objector “to become a law unto himself.”\textsuperscript{67} The
protection of minority religions, according to Justice Scalia, was a “luxury” that would “court[ ] anarchy.”\textsuperscript{68} The Court concluded
that if minority religions desired such protection, the most ap-
propriate forum was the political process and the passage of
specialized laws.\textsuperscript{69}

On October 6, 1994, Congress responded to Justice Scalia’s
invitation with the passage of AIRFA.\textsuperscript{70} The law provides that
“the use, possession, or transportation of peyote by an Indian for
bona fide traditional ceremonial purposes in connection with the
practice of a traditional Indian religion is lawful, and shall not
be prohibited by the United States or any State.”\textsuperscript{71}

\begin{thebibliography}{9}
\bibitem{62} Id. at 874.
\bibitem{63} Id., at 874.
\bibitem{64} Id. at 890.
\bibitem{65} Id. at 878-89; see, e.g., State v. Bullard, 148 S.E. 2d. 565, 569 (N.C. 1966);
State v. Big Sheep, 75 Mont. 219, 239, 243 P. 1067, 1073 (1926).
\bibitem{66} \textit{Smith}, 494 U.S. at 885. According to Scalia, the Court had used the
Sherbert test only in instances related to a denial of unemployment compensation.
\textit{Id.} at 883-85.
\bibitem{67} Id. at 879 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)).
\bibitem{68} Id. at 888.
\bibitem{69} Id. at 890; see supra notes 11-13 and accompanying text.
3(4) of the law specifically cites the \textit{Smith} decision and the uncertainty raised
by the case as to the protection of peyote under the compelling interest test. Section
\end{thebibliography}
C. Exercise of Prisoners’ Religious Rights

Minorities comprise a disproportionate number of inmates in the federal and state prisons. Indians are no exception. According to the 1980 census, there are as many Indians living in prison cells as live in college dorm rooms.⁷²

Prisoners do not forfeit all their constitutional rights once incarcerated.⁷³ The right to practice one’s religion is clearly retained.⁷⁴ From a rehabilitative standpoint, an inmate’s re-identification with his or her religious and cultural teachings has proven beneficial.⁷⁵ For many Indian prisoners, access to spiritual leaders; the practice of their traditional ceremonies, including those associated with the sweat lodge, the pipe and the Native American Church; the wearing of a medicine bag, or wearing one’s hair long or with a headband are important to Indian spiritual existence. The judiciary has supported Indian prisoners in their requests to express their religious needs only in those instances in which penological interests relating to security and health are found to be of less importance. The test employed by the courts to determine how one’s religious needs are weighed against the prison’s interest is obviously critical to the outcome.

The courts have employed two primary tests to determine if prison regulations legitimately interfere with prisoners’ constitutional rights.⁷⁶ The older of the two is the “least restrictive means” test, which requires prison officials to attain their objectives by using the least restrictive procedures or methods.⁷⁷ The


Although the courts have not yet adjudicated Pub. L. No. 103-344, supporters hope that this law will finally secure to Indians the complete protection of religious peyote use that the First Amendment and AIRFA failed to provide.

⁷⁵. Alcohol use is implicated in a significant portion (97%) of crimes for which Indians are convicted. See RONET BACHMAN, DEATH AND VIOLENCE ON THE RESERVATION 30-32 (1992). One of the most effective methods for reversing alcohol use on reservations has been the use of religious and cultural teachings.
⁷⁶. See Comment, The Religious Rights of the Incarcerated, 125 U. PA. L. REV. 812, 837-56 (1977) (arguing that courts have employed at least seven different standards to determine prisoners’ free exercise claims).
more recent test, enunciated in two 1987 Supreme Court cases, *Turner v. Safley*78 and *O'Lone v. Estate of Shabazz*,79 provides that prison regulations may interfere with First Amendment guarantees if "reasonably related" to the legitimate interests of the prison facility.81

Indian inmates, on balance, have successfully argued that they, like Christian and Muslim prisoners, have a right of access to their own spiritual leaders and ceremonies.82 How often and under what conditions this right of access occurs is more problematic. In *Allen v. Toombs*,83 an Indian inmate requested daily access to a sweat lodge, arguing that his fellow Christian prisoners were able to attend church daily. The Ninth Circuit ruled that access to a weekly sweat lodge ceremony provided inmates with a reasonable ability to exercise their religious rights.84 In 1992, the Seventh Circuit ruled that an Indian prisoner's attendance at three ceremonies within a four month time period, provided him with an adequate opportunity to practice his religious ceremonies.85 In *Indian Inmates v. Grammer*,86 the court held that not permitting Indian inmates to use peyote during their Native American Church services was a "serious interference with their free exercise rights," but that prisons, nonetheless, have the right to refuse peyote use for purposes of security, safety, and discipline.87

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79. 482 U.S. 342 (1987) (upholding prison regulations which prevented Islamic prisoner from attending Friday services and from wearing a beard).
80. In *Turner*, the Supreme Court established a four prong test to determine the validity of a prison regulation in the face of constitutional guarantees: (1) whether a "valid, rational connection" existed between the regulation and the legitimate government interest; (2) whether an alternative means was available to allow for the exercise of the right in question; (3) the manner in which an accommodation would affect the prison resources and the impact the accommodation would have on prison guards and other inmates; (4) if an alternative exists to the impeding prison function. 482 U.S. at 89-91.
81. *O'Lone*, 482 U.S. at 349.
83. 827 F.2d 563 (9th Cir. 1987).
85. *Frederick v. Murphy*, No. 91-3699, 1994 WL 4851 (7th Cir. Jan. 12, 1993); see also *Gunter*, 660 F. Supp. at 398-99 (concluding that Indian prisoners had a right to visit with medicine men, but not to access sweat lodges).
87. *Gunter*, 649 F. Supp. at 1379. H.R. 4230 provides: "This section shall not be construed as requiring prison authorities to permit, nor shall it be construed to prohibit prison authorities from permitting, access to peyote by Indians while incarcerat-
Many penological institutions argue that the same objectives of security, safety, and discipline require inmates to maintain short hair. For the vast majority of prisoners this mandate represents little hardship. For many Indian people, however, the wearing of long hair is of deep religious importance, signifying oneness with the Great Spirit. Braids symbolize the integration of one’s mind, body, and spirit. In two earlier cases, *Teterud v. Burns* and *Gallahan v. Hollyfield*, the courts held that the two prisons in question had violated the Indian inmates’ First Amendment right by requiring the wearing of short hair. The courts’ current interpretation has severely compromised Indian rights in this regard. In *O’Lone v. Estate of Shabazz*, the Court ruled that penological requirements for short hair outweighed a Moslem prisoner’s religious requirement to maintain long hair. Two subsequent appellate decisions applied the Court’s ruling to Indian inmates. In *Hall v. Bellmon* and *Holmes v. Schneider*, the courts held that the prisons’ right to force the cutting of hair for reasons of safety overrode the Indian inmates’ constitutional claims to First Amendment protection.

Prisoners’ requests to wear headbands—the symbol of the sacred circle—have received an equally mixed reception. In a district court decision, *Reinert v. Haas*, the court analogized the headband’s symbol to the sacred circle with the sign of the Christian cross and found that Indian inmates possessed a constitutionally protected right to wear their headbands. More recent-
ly, however, the Ninth Circuit in *Standing Deer v. Carlson*, \(^{96}\) ruled that prison regulations against wearing headgear were “logically connected” to prison objectives to maintain security.\(^ {97}\)

It is too early to determine if RFRA will adequately assist Indian prisoners in the protection of their First Amendment rights.\(^ {98}\) In several opinions courts have ruled that RFRA has provided a new standard of judicial review. By reinstating the “compelling interest” test, justices are now to consider “the least restrictive means” of furthering prison objectives rather than considering whether prison restrictions serve a “legitimate penological interest.”\(^ {99}\)

D. Use of Animals for Ceremonial Purposes

Animals play a central role in many Indian religious ceremonies. Fishing tribes of the Pacific Northwest celebrate salmon. Alaskan natives consider the bear, moose, and elk to be of ritualistic importance. Whales are central to the spiritual integrity of Inuit groups. Many Indian peoples believe the eagle is preeminent, symbolizing a spiritual connection with the Great Creator. The necessity to incorporate certain animals into Indian rituals directly conflicts with state and federal laws protecting wildlife.\(^ {100}\) The 1918 Migratory Bird Treaty Act,\(^ {101}\) the 1940 Bald Eagle Protection Act,\(^ {102}\) and the 1973 Endangered Species

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96. 831 F.2d 1525 (9th Cir. 1987).
97. *Standing Deer*, 831 F.2d at 1528.
98. As of fall 1994, courts had not heard any cases involving Indian inmates and alleged violations of RFRA.
100. However, various exemptions do appear in specific treaties, typically allowing for subsistence takings by Eskimos and Indians. For example, the 1916 Canadian Convention excepts the taking of birds by Eskimos and Indians for food and clothing. Convention for the Protection of Migratory Birds, Aug. 16, 1916, United States-Great Britain (on behalf of Canada), 39 Stat. 1702, 1703, T.S. No. 628. Eagles first received federal protection pursuant to the 1936 convention between the United States and Mexico. See Convention for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, United States-Mexico, 50 Stat. 1311, T.S. No. 912 (providing for later inclusion of migratory birds at the request of the Presidents of both nations).
102. See Tina S. Boradiansky, *Comment, Conflicting Values: The Religious Killing of Federally Protected Wildlife*, 30 NAT. RESOURCES J. 709 (1990), for a discussion of how these acts have impacted on the religious taking of animals. The author argues
Act\textsuperscript{103} prohibit Indians from taking protected animals from their own lands. To counter these federally imposed prohibitions and state game laws, tribes have argued that these laws violate protected hunting and fishing rights\textsuperscript{104} and violate their First Amendment rights.\textsuperscript{105}

Again the courts’ understanding of and rulings concerning ceremonial animal use has been inconsistent. In \textit{United States v. Billie},\textsuperscript{106} the court refused to find the defendant, the tribal chairman of the Seminole Tribe, exempt from violating the Endangered Species Act on the basis of his First Amendment rights. Employing the centrality test,\textsuperscript{107} the court ruled that the panther was not indispensable to the practice of the Seminole religion. Moreover, the court asserted, the panther’s importance to Billie’s spiritual life was outweighed by the government’s interest in protecting wildlife.

However, in \textit{United States v. Abeyta},\textsuperscript{108} the court ruled that the First Amendment protected the Pueblos’ taking of golden eagles on their own lands. As the symbol of the overseer of life, the eagle holds an exalted position in Pueblo religious life. The government’s use of a permit system to dispense eagle parts for religious purposes was found to be an impermissible burden on Indian religious practices.\textsuperscript{109}

Not surprisingly, tribes have proven most successful in pro-

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that Indian religious rights should not be interpreted as more protected than the rights of endangered species.


\textsuperscript{106} 667 F. Supp. 1485, 1497 (S.D. Fla. 1987).

\textsuperscript{107} Billie, 667 F. Supp. at 1497.

\textsuperscript{108} 632 F. Supp. 1301 (D. N.M. 1986).

\textsuperscript{109} Abeyta, 632 F. Supp. at 1307. The permit system was also challenged in Top Sky, 547 F.2d at 483 (ruling that the defendant did not have standing to assert infringement on Indian Religious practices and free exercise and that commercial purposes were outside scope of religious practices). See also Golden Eagles, 649 F. Supp 269 (recognizing permit system as a burden, but holding wildlife protection an appropriate governmental interest).

In recognition of this impediment, President Clinton established new policies for use of eagle feathers by Indian religious leaders. See Memorandum for the Heads of Executive Departments and Agencies, Policy Concerning Distribution of Eagle Feathers for Native American Religious Purposes from William J. Clinton, April 29, 1994.
tecting their rights before courts when they have successfully translated for the courts their practices into Christian analogies. In *Frank v. Alaska,* the Alaska Supreme Court upheld the First Amendment rights of an Alaskan native by exempting him from criminal charges for killing a moose out of season. The use of moose meat in a funeral ceremony, the court concluded, was of equal symbolism to the “wine and wafer in Christianity.”

## E. Access to and Protection of Religious Sites

Given the courts' application of First Amendment tests and interpretations, Indians have found it virtually impossible to obtain protection of and access to their sacred sites. In

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111. *Frank*, 604 P.2d at 1072. The court further ruled that exempting Indians from state game law was a justifiable accommodation of religious practice that did not violate the Establishment Clause. Rather, such an approach reflected the government's “obligation of neutrality in the face of religious differences.” *Id.* at 1075 (quoting Wisconsin v. Yoder, 406 U.S. 205, 234 (1972)); *see also* Golden Eagles, 649 F. Supp. at 276 (“As the claimant's affidavits demonstrate, experts in comparative religion have likened the status of the eagle feather in Indian religion to that of the cross in the Christian faith.”).

It is ironic at the minimum, and unfair, at the maximum, that the courts are most understanding of Indian religious rights when they are able to translate Indian religious practices or to favor Christianity as the preeminent religion—in contravention to the Establishment Clause.

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113. A number of legal scholars have detailed the problems which arise for tribes in their efforts to protect their sacred lands. *See,* e.g., Robert C. Ward, *The Spirits Will Leave: Preventing the Desecration and Destruction of Native American Sacred Sites on Federal Land,* 19 ECOLOGY L. Q. 795 (1992).


In 1992 the Blackfeet of Montana filed a suit to restore their rights to hunt, fish, graze livestock, and operate commercial ventures in Glacier National Park under the terms of their 1895 treaty. More than 120 tribes border federal parks.
Montana Law Review, Vol. 56 [1995], Iss. 2, Art. 4

Sequoyah v. Tennessee Valley Authority, the Cherokees filed suit for an injunction against the flooding of lands by the Tellico dam. Flooding would prevent access to their sacred birthplace, Chota—an area important for the collection of medicinal herbs—and to their ancestral burial grounds. Dismissing the centrality of the Cherokees’ religious beliefs, the court ruled that the tribal members were expressing “a personal preference;” their concerns were not with religious beliefs, but with the “historical beginnings of the Cherokees and their cultural development.”

That same year, the Tenth Circuit refused a request by Navajo religious leaders that Rainbow Bridge National Monument be closed periodically to tourists and that alcoholic beverages not be sold at the monument. The court acknowledged that the Navajos regarded Rainbow Bridge as the incarnation of a deity and that it was therefore of central importance to Navajo religion. But, in a return to the Reynolds test, the court concluded that although the Park Service’s regulations hindered the Navajo’s religious exercise, the regulations did not compel the Navajos to violate the tenets of their religion. Moreover, the government’s need for low-cost electricity and to promote tourism outweighed the Navajo’s right to freedom of expression. Finally, the government’s closure of the monument to tourism—even periodically—would constitute impermissible support of a religion in violation of the Establishment Clause.

The Navajos, joined by the Hopis, were equally unsuccessful in preventing the Forest Service’s and the Department of Agriculture’s expansion of a ski area in the San Francisco

Todd Wilkinson, Ancestral Lands: Native Americans Seek to Restore Treaty Rights to Worship and Hunt in Many National Parks, 67 NATIONAL PARKS 30 (July 1993). In the Rocky Mountain region alone, more than 50 Indian nations possess a historic or spiritual interest in 41 park units. Id. at 35. Recent improvements in negotiations and communications have also been undertaken in very recent years between the Park Service and the tribes. Id.; see also Patrick Dawson, Indian Religion a Matter of Land, CHICAGO TRIBUNE, June 7, 1993, at 8; Jessica Maxwell, Curly Bear’s Prayer; One Blackfeet Indian’s Effort to Stop Gold Mining in the Sweet Grass Hills Area of Montana, 95 AUDUBON 114 (Mar. 1993) (discussing the BLM’s proposed expansion of a gold mine on the edge of the Fort Belknap Reservation in Montana).

116. Sequoyah, 620 F.2d at 1160.
117. Id. at 1164.
118. Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980).
119. Id. at 176.
120. Id. at 178.
121. Id. at 176-78.
122. Id. at 179.
The court concluded that while the religious leaders had demonstrated the importance of the peaks to their religion, they had not proven their "indispensability." Accordingly, the proposed development only "offended," but did not "penalize" members for their religious practices.

The Lakota and Tsistsistas (Cheyenne) confronted similar reasoning in Crow v. Gullet where religious leaders attempted to halt the expansion of tourist facilities at Bear Butte. State projects and regulations had seriously compromised tribal members' ability to worship at this sacred location. Again, the courts recognized that Bear Butte was one of, if not the most sacred of the ceremonial sites in the Black Hills. However, interference with the tribal members' ability to practice their religion did not force them to relinquish their religious beliefs or to totally abandon their religious practices. Furthermore, the lower court warned that if the government acceded to the spiritual leaders' requests, its actions could be construed as overly accommodating and possibly in violation of the Establishment Clause.

The Court echoed this analysis in Lyng v. Northwest Indian Cemetery Protective Ass'n. Members of the Yurok, Karok, and Tolowa tribes sought to prevent the Forest Service from constructing a five-mile logging road through their sacred lands. The Court again declined to apply the strict scrutiny test that required careful assessment if religious rights were even indirectly coerced or penalized. Justice O'Connor, writing for the majority, agreed that "the Indian respondents' beliefs are sincere and that the Government's proposed actions will have severe adverse effects on the practice of their religion." The

124. Id. at 744.
125. Id. at 745.
126. 541 F. Supp. 785, 794 (D.S.D. 1982), aff'd, 706 F.2d 856 (8th Cir. 1983), cert. denied, 464 U.S. 977 (1983). In Badoni, the court ruled that to exclude tourists from the Navajo's sacred area as requested "would seem a clear violation of the Establishment Clause." 638 F.2d 172 at 179. The Fifth Circuit has used Smith to find that "the federal and Texas statutes prohibiting peyote possession do not offend the First Amendment's free exercise clause." Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1213 (5th Cir. 1991).
128. Id. at 794.
130. Lyng, 486 U.S. at 442.
131. Id. at 447.
132. Id.
government's proposed actions, nonetheless, would not prohibit the tribes from exercising their religious beliefs.\textsuperscript{133} Furthermore, the Court ruled that the hands of the federal government could not be tied in the conduct of its own business on its own land.\textsuperscript{134}

II. RFRA, AIRFRA, AND THE FUTURE OF INDIAN RELIGIOUS RIGHTS

From the perspective of Indian religious practitioners, it is difficult to escape the conclusion that the courts have subjected Indian religious rights to a more rigorous standard of review than other religious groups.\textsuperscript{135} In several non-Indian decisions, courts have stated that they were not competent, nor would they question or judge the accuracy of a religious belief.\textsuperscript{136} However, in the \textit{Seqoyah} and \textit{Badoni} cases, the courts engaged in exactly that speculation.\textsuperscript{137} Even if Indian plaintiffs pass the sincerity and centrality tests, they have found it difficult to win the compelling-interest test and convince the courts that their right to practice their religion outweighs the government's overriding need to pursue its own interest.\textsuperscript{138} In many instances, when

\textsuperscript{133} Contrast the Court's decision in this case with the laws of Israel and Saudia Arabia protecting sacred places. Israel's Law states:

1. The Holy Places shall be protected from desecration and any other violation from anything likely to violate the freedom of access of the members of the different religions to the places sacred to them or their feelings with regard to those places.

2. (a) Whosoever desecrates or otherwise violates a Holy Place shall be liable to imprisonment for a term of seven years. (b) Whosoever does anything likely to violate the freedom of access of the members of the different religions to the places sacred to them or their feelings with regard to those places shall be liable to imprisonment for a term of five years.

\textsuperscript{134} \textit{Lyng}, 485 U.S. at 453. See Ward, supra note 113 for a discussion of those federal uses most endangering access and protection of Indian sacred sites and the range of current federal laws designed to protect some aspect of land use. As Ward concludes, none of these federal laws, e.g., the Antiquities Act of 1906 or the National Historic Preservation Act of 1966, are adequate to the protection of sacred lands. Ward, supra note 113, at 820.

\textsuperscript{135} As many commentators have pointed out, the Court's standards are ethnocentrically based. See Timothy L. Fort, \textit{The Free Exercise Rights of Native Americans and the Prospects for a Conservative Jurisprudence Protecting the Rights of Minorities}, 23 N. M. L. REV. 187, 204 (1993).


\textsuperscript{137} See \textit{Seqoyah} v. TVA, 620 F.2d 1159, 1164 (6th Cir. 1980); \textit{Badoni} v. Higginson, 638 F.2d 172, 178 (10th Cir. 1980); see also Inupiat Community v. United States, 548 F. Supp. 182, 188 (D. Alaska 1982).

tribes had hoped to prove the validity of their claims using a compelling-interest test, courts have declined to apply the test and have instead retrenched to the stricter belief-conduct interpretation. The re-use of this test has allowed the government to conclude that as long as the government is not telling Indians how to believe or preventing them from believing, the government may restrict and even destroy their ability to practice their religion. Finally, when Indian religious leaders have hoped to obtain a permissible exemption or accommodation from the government as the Court has extended to other religious groups, Indians have been told that such an exemption would be an impermissible violation of the Establishment Clause.

RFRA directs the courts to return to the pre-Smith position and to employ the compelling interest test when evaluating government infringement on religious rights. The legislation, although supported by tribes, does not offer Indian people adequate protection in the preservation of their religious practices. The reasons for this concern are substantial. The constitutionality of RFRA may be challenged. Does Congress have the authority to dictate to the judiciary which tests or which preferred interpretations the courts should use? Will RFRA pass the Court's analysis of the Acts Establishment Clause implications?

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139. Id. at 451-52.
141. See, e.g., Canedy v. Boardman, 16 F.3d 183, 186 n.2 (7th Cir. 1994) (“The constitutionality of this legislation—surely not before us here—raises a number of questions involving the extent of Congress’s [sic] powers under Section 5 of the Fourteenth Amendment.”).
142. Congress ostensibly has the authority under § 5 of the Fourteenth Amendment to pass RFRA. Section 5 provides Congress with the authority “to enforce, by appropriate legislation, the provisions of this article.” U.S. CONST. amend. XIV, § 5. According to Ex parte Virginia, 100 U.S. 339, 345-46 (1879), Congress possesses the authority to pass legislation to enforce constitutional amendments as long as that authority is not prohibited. See South Carolina v. Katzenbach, 383 U.S. 301, 326-27 (1966).
143. Establishment Clause cases have proven the most troublesome for the Court in the last thirty years. See Fort, supra note 132, at 188 & n.3.

The Court currently employs a three-prong test to determine if a government action violates the Establishment Clause: the action must neither advance nor inhibit religion, have a primarily secular effect, and not excessively entangle the government with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). “Excessive entanglement” is concluded by determining: the nature and character of the religion benefiting from the governmental action, the nature of the governmental assistance, and
Even if the constitutionality of RFRA is secure, it is unlikely that RFRA's provisions are sufficiently broad to cover all instances pertaining to important Indian religious practices. The Justice Department, for example, has already indicated that it does not consider RFRA to protect access to sacred sites.

Recognizing the possible shortcomings of RFRA and the obvious failures of AIRFA, congressional supporters of Indian religious rights have introduced a number of bills designed to protect Indians' First Amendment rights. The most compre-

the characterization of the resulting relationship between the government and the religion. Id. at 615.


Several authors have argued that the protection of Indian religious sites and practices would not excessively entangle the United States government with Indian religions. See, e.g., Michaelsen, supra note 16; Ward, supra note 114.

In Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991), the court addressed the establishment issue:

The unique guardian-ward relationship between the federal government and Native American tribes precludes the degree of separation of church and state ordinarily required by the First Amendment. The federal government cannot at once fulfill its constitutional role as protector of tribal Native Americans and apply conventional separatist understandings of the establishment clause to that same relationship.

Thus, we hold that the federal NAC exemption represents the government's protection of the culture of quasi-sovereign Native American tribes and as such, does not represent an establishment of religion in contravention of the First Amendment.

Id. at 1217.

144. For a detailed examination of those areas in which RFRA is unlikely to protect Indian concerns, see Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm., 102d Cong., 2d Sess. 424-43 (1992); see also Trope, infra note 114 (summarizing the concerns expressed in the hearings).

145. See Statement by Philip P. Frickey, Hearings, Senate Select Committee on Indian Affairs, Mar. 8, 1993, pp. 13-14; 105-13.

146. President Clinton stated at his meeting with tribal leaders in April:

Last year, I was pleased to sign a law that restored certain constitutional
hensive is Senate Bill 2269, which is intended to supplement RFRA and is designed to overcome the Court’s decisions in *Lyng* and *Smith*. In general, the proposed legislation provides for a scheme by which sacred sites are to be identified and protected; an exemption for the religious use, possession, or transportation of peyote by American Indians at the federal and state levels; Indian inmates to have access to spiritual leaders, sacred objects and religious facilities, and to have the right to wear their hair long (the use of peyote by prisoners is neither exempted or promoted); and the prompt disbursement of bald and golden eagles and simplification of the permit process for the taking of bald and golden eagles. In addition, the legislation provides for the levying of penalties and fines for violation of the Act’s provisions.

Passage of this Act and the one proposed in the House to protect religious sites remains uncertain. Like RFRA, the bills’ constitutionality may be challenged or the bills may be interpreted so weakly as to offer Indians little protection. If passed, the bills face uncertain adjudication before the courts. The Court’s support of any religious rights—but especially those of Indians—is speculative. Religious freedom cases by definition are complex cases to resolve. This is understandable given the changing nature of American society, the innate tension between the Free Exercise and Establishment Clauses, and the First

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149. This is the fate of the American Indian Religious Freedom Act. See supra note 14.
Amendment’s importance within constitutional law.

The inherent difficulties of religion cases when combined with American society’s ignorance of native religious practices severely handicap Indian people in the preservation of their religious identities. Indian people, by having to struggle against a pervasive lack of knowledge and against a sense of superiority that has generated years of persecution, are inextricably placed at a disadvantage.\(^\text{151}\) Perhaps no other field of American law is so replete with examples of judicial activism and redefinition as that which concerns the general rights and status of Indians. And, as described above, tribes are particularly perplexed about the rationale for the courts’ use of interpretative tests in deciding their religious rights.\(^\text{152}\)

It is for these reasons that tribes cannot rely solely on legislation such as AIRFA or RFRA and their legal interpretations to adequately protect tribal religious rights. In addition to their efforts to pass protective legislation and adjudication, tribes must continue to push for expanded recognition and interpretation of their special status as inherent sovereigns that maintain a trust relationship with the federal government. Courts’ acknowledgement of the government’s obligation to protect Indian existence under the trust relationship should provide the courts with the necessary “hybrid” situation described by Scalia in the Smith case or the necessary “weight” needed to tip the balance for the protection of Indian First Amendment Rights under a restored compelling interest test.

III. THE TRUST DOCTRINE AS A COROLLARY TO FIRST AMENDMENT PROTECTION

The federal government, by virtue of the unique political status possessed by tribes, may extend special treatment to Indian people. Indeed, the extension of positive rights and special treatment may be necessary (or even required), as in the case of religious exemptions, to preserve Indian existence.

Tribes, as inherent sovereigns, lie outside the constitutional

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\(^{151}\) See Firmage, supra note 20, at 282 (explaining how Christianity in the last century suffused the Court’s writings). For examples of such writings see Vidal v. Girard’s Ex’r, 43 U.S. 127 (2 How. 1844) and Holy Trinity Church v. United States, 143 U.S. 457 (1892).

\(^{152}\) For an updated description of the problems confronted by Indian people, see the hearings held by the House and Senate since passage of AIRFA. Oversight Hearing on the Need for Amendments to the Indian Religions Freedom Act Before the Senate Select Committee on Indian Affairs, 102d Cong., 2d. Sess. (1992).
standards imposed by the Bill of Rights upon other groups and individuals in American society. Unlike the states, tribal governments are not pro-forma bound by the United States Constitution’s Bill of Right guarantees when regulating actions of their members.\(^\text{153}\) Tribal status and the special political relationship that Congress maintains with Indian people, taken together, allow for a separate standard of individual treatment in seeming contradiction to the Fourteenth Amendment Equal Protection Clause.

The Supreme Court most squarely recognized this principle in the 1896 *Talton v. Mayes*\(^\text{154}\) case, which considered the applicability of the Fifth Amendment to the Cherokee Nation. The previous year, the Cherokee Nation Supreme Court had sentenced Bob Talton, an enrolled member of the Cherokee Nation, to death for murder. Talton appealed his conviction to the United States Supreme Court alleging that the Cherokees had violated his Fifth and Fourteenth Amendment rights under the United States Constitution by empaneling a Cherokee grand jury of five members. In finding that the Cherokees were not bound by the requirements of the Fifth Amendment, the Court ruled that “the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment.”\(^\text{155}\)

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153. This does not mean that tribal individuals do not possess individual protections against their tribal governments. Most tribal governments have adopted within their tribal constitutions their own set of individual guarantees. And, in 1968 Congress passed the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303, which applied many rights found in the federal Bill of Rights to tribal governments. The fact remains, however, that tribal sovereignty is inherent and does not receive its political authority from the United States Constitution.

154. 163 U.S. 376 (1896).

155. *Talton*, 163 U.S. at 384. The Court also stated:

[Whether the Fifth Amendment applies to the Cherokee nation] depends upon whether the powers of local government exercised by the Cherokee nation are Federal powers created by and springing from the Constitution of the United States, and hence controlled by the Fifth Amendment to that Constitution, or whether they are local powers not created by the Constitution, although subject to its general provisions and the paramount authority of Congress.

*Id.* at 382-83.

In *Kobogum v. Jackson Iron Co.*, 43 N.W. 602 (Mich. 1889), the state court ruled that Indian marriages involving polygamy did not violate state or federal law:

While most civilized nations in our day very wisely discard polygamy, and it is not probably lawful anywhere among English speaking nations . . . .We must either hold that there can be no valid Indian marriage, or we must hold that all marriages are valid which by Indian usage are so regarded . . . .They did not occupy their territory by our grace and permis-
In 1959, the Tenth Circuit applied the same logic to the applicability of the First Amendment to the actions of the Navajo government. In deciding that the Free Exercise Clause did not prevent the Navajo tribal government from barring the sale, use, or possession of peyote on the reservation, the court stated:

[Indian tribes] have a status higher than that of states. They are subordinate and dependent nations possessed of all powers as such only to the extent that they have expressly been re-quired to surrender them . . . . No provision in the Constitution makes the First Amendment applicable to Indian nations nor is there any law of Congress doing so.\textsuperscript{156}

Tribal exemptions from the usual standards of constitutional application are most readily apparent in the number of cases involving Indian exemptions from the Fourteenth Amendment Equal Protection Clause. In 1978, the Supreme Court issued two decisions concerning the applicability of the Equal Protection Clause to the rights of Indian individuals and the rights of tribal governments. In \textit{Morton v. Mancari,}\textsuperscript{157} two non-Indian BIA employees sued the federal government for violation of the Fifth Amendment.\textsuperscript{158} They charged that the BIA's Indian preference requirement constituted improper racial discrimination and violated their right to equal treatment.\textsuperscript{159} The Indian preference laws, which had operated since 1934, mandated that Indian individuals be given preferential hiring and promotion with the BIA.\textsuperscript{160} The Court ruled that such a provision was not violative of the Due Process Clause.\textsuperscript{161} Preferential hiring of American
Indians was not a racial arrangement but a political arrangement that was tied rationally to the government’s fulfillment of its special political relationship with tribes.\(^\text{162}\)

In *Santa Clara Pueblo v. Martinez*,\(^\text{163}\) Maria Martinez challenged the validity of the Santa Clara Pueblo’s enrollment requirements.\(^\text{164}\) Children born to Santa Clara Pueblo women who married outside the tribe were ineligible for membership; yet, the ordinance extended membership to children of male members who married outside the tribe.\(^\text{165}\) Mrs. Martinez, on behalf of herself and her children, argued that the tribal laws constituted impermissible sex and ancestry discrimination in violation of the Indian Civil Rights Act of 1968.\(^\text{166}\)

The Court ruled, “[T]ribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the Federal and State Governments.”\(^\text{167}\) Therefore the Court held that the United States was obligated to protect Indian status and culture and denied Mrs. Martinez’s claim.\(^\text{168}\)

As discussed previously, challenges to special treatment for American Indians have arisen in a number of cases dealing with federal and state exemptions for sacramental peyote use by American Indians.\(^\text{169}\) Courts have supported differential treat-

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162. Morton, 417 U.S. at 553-55. The Court based its decision on: (1) the historically unique guardian-ward trust relationship of the federal government with quasi-sovereign Native American tribes; (2) Congress’ plenary authority under Article 1 “to regulate Commerce . . . with the Indian Tribes;” (3) the federal government’s treaty power in Article II, § 2; and (4) precedent in which the Court had upheld preferential treatment of Indians. *Id.* at 551-55.


164. *Id.* at 51.

165. *Id.*

166. *Id.*

167. *Id.* at 71. “As [the Supreme Court has] repeatedly emphasized, Congress’ authority over Indian matters is extraordinarily broad . . . .” *Id.* at 72; see United States v. Antelope, 430 U.S. 641 (1977) (finding an equal protection violation by prosecuting Indians under stricter federal law rather than less-strict state law); see also Fisher v. District Court, 424 U.S. 382, *reh’g denied*, 425 U.S. 926 (1976); Livingston v. Ewing, 601 F.2d 1110 (10th Cir.), *cert. denied*, 444 U.S. 870 (1979) (upholding New Mexico’s right to pass legislation allowing for Indian commercial sales to the exclusion of other artists in defined locations); White v. Califano, 437 F. Supp. 543 (D.S.D. 1977) (“[A]n equal protection analysis cannot be reached in this case because federal law requires that Florence Red Dog be treated differently than other South Dakota citizens precisely because she is an Indian person residing in Indian country.”). For a discussion of the Equal Protection Clause as it relates to American Indians, see Ralph W. Johnson & Susan E. Crystal, *Indians and Equal Protection*, 54 WASH. L. REV. 587 (1979).


169. See supra text accompanying notes 46-60.
ment for Indian peyote use when challenged by non-Indians. In *Peyote Way Church of God v. Thornburgh*,¹⁷⁰ the Fifth Circuit held that federal and state exemptions for the use of peyote by Native American Church members did not violate the petitioners’ free exercise rights, equal protection rights, or the Establishment Clause.¹⁷¹

If, as courts have concluded, Indians are not necessarily judged by the same standards of constitutional interpretation as non-Indians, an important question remains: By what standards are Indians’ rights to be judged? The answer to this question is found partly in the answer to why Indians are not judged by the same constitutional standards. Indians are accorded a different standard of protection and review because of their special status and relationship to the federal government. This relationship, referred to as the trust relationship, obligates the federal government to protect tribal existence for as long as the tribes request such protection. Accordingly, the courts must interpret Indian First Amendment rights such that Indian religions are preserved.

The trust doctrine is, admittedly, one of the most reinvented and reconstructed concepts in federal Indian law.¹⁷² The source of its creation,¹⁷³ to whom it extends, and what it entails are debated issues. The source of this debate lies in the shifting history of federal-Indian relations. The European powers, followed by the United States, recognized the Indian nations as independent sovereigns, conducting their relations through the treaty process. As Indian power diminished and American objectives towards Indian lands, resources and existence transformed over time, federal policies changed. The government embarked on a process of “domesticating” Indians both legally and sociologically into the American mainstream. The judiciary has supported these changes in federal policies through creative legal find-

¹⁷⁰. 922 F.2d 1210 (5th Cir. 1991).
¹⁷¹. Id. at 1213, 1216, 1220.
ings and new interpretations and tests. The trust doctrine or relationship has prevailed despite changing federal policies and definitions of Indian status.

Today the trust relationship can be described as an implicit compact between the United States government and the aboriginal peoples of the United States. It is a relationship derived and emanating from the natives’ cession of lands to the United States. In return for land, the United States has obligated itself to protect native existence. Given that existence is self-defining, the trust relationship requires a cooperative and equitable relationship between the two parties.

The existence of the trust doctrine is well documented through treaties, legal opinions, and congressional legislation. Chief Justice John Marshall first referred judi-

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174. The Court’s distinction between recognized and aboriginal title in Tee-Hit-Ton Indians v. United States, 348 U.S. 2721 (1955), and United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339 (1941) is one example. See Joseph W. Singer, Well Settled?: The Increasing Weight of History in American Indian Land Claims, 28 GA. L. REV. 481 (1994) (discussing how the Court’s definition of aboriginal rights deviates from Justice John Marshall’s description of Indian property rights). Given this historical context, the attempt to provide an overall and coherent framework for federal Indian law, based on logical precedent, is an enterprise taxing to even the most creative legal minds.

175. Several authors have pointed to the trust doctrine’s importance in assisting tribes to protect their religious rights, but have understandably concluded that the courts’ use of the trust relationship is too misunderstood and misapplied. See Ward supra note 113, at 809. But see Jeri Beth K. Ezra, Comment, The Trust Doctrine: A Source of Protection for Native American Sacred Sites, 38 CATH. U. L. REV. 705 (1989).


As the Court made clear in Mitchell, there is an “undisputed existence of a general trust relationship between the United States and the Indian people.” 463 U.S. at 225. This general trust relationship, however, does not automatically provide Indian people with a cause of action for money damages for the breach of the trust. See Gila River Pina-Maricopa Indian Community v. United States, 427 F.2d 1194, 1201 (Ct. Cl. 1970) (Davis, J., concurring) (“[T]he ‘fair and honorable dealings’ clause was [not] a catch-all allowing monetary redress for the general harm—psychological, social, cultural, economic—done the Indians by the historical national policy of semi-apartheid.”), cert. denied, 400 U.S. 819 (1970).

177. The United States has negotiated more than 800 treaties with tribes. Of these, 371 remain legally binding. For a listing of most treaties negotiated with Indian Nations, see CHARLES J. KAPPLER, INDIAN AFFAIRS, LAWS AND TREATIES (1904).

178. See infra text accompanying notes 180-99.

179. See infra text accompanying notes 200-04. The existence of a trust duty between the United States and an Indian or Indian tribe can be inferred from the provisions of a statute or regulation, “reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people.” Mitch-
cially to the relationship in *Cherokee Nation v. Georgia* and in *Worcester v. Georgia*. The Cherokees were a domestic dependent nation that exercised exclusive authority within its territorial boundaries. According to Marshall, the relationship between the Cherokees and the United States was that of a ward to his guardian. The Cherokees were a protectorate of the United States; a weaker state, which without giving up its sovereignty, had accepted the protection of a more powerful state.

Over the years, the courts have continually reinterpreted the trust relationship as that of guardian to a ward. As guardian, the United States possessed total rights and control to dictate the content and parameters of the relationship. The Court's reasoning was carried to its most extreme in the *United States v. Kagama* and *Lone Wolf v. Hitchcock* decisions. In *Kagama*, the Court emphasized that tribes are the wards of the government and stated that as a result of "their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power." In *Lone Wolf*, the Court found that the only limitations on the government's authority were those "considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race."

By the mid-1930s, in *United States v. Creek Nation*, the Court had begun to re-balance the trust relationship, acknowl-

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183. *Id.* at 17, 53, 74.
184. *Id.* at 17.
185. *Id.* at 17, 24.
188. 187 U.S. 553 (1903).
190. 187 U.S. at 565 (quoting *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877)). In *Sioux Nation of Indians v. United States*, 601 F.2d 1157 (Ct. Cl. 1979), Judge Nichols referred to the date of the *Lone Wolf* decision as "one of the blackest days in the history of the American Indian, the Indians' Dred Scott decision." *Id.* at 1173 (Nichols, J., concurring).
edging that the United States possessed judiciable obligations in its relationship with Indian tribes.\textsuperscript{192} A series of cases followed in which the Court ruled that the United States possessed a fiduciary responsibility to protect tribal lands\textsuperscript{193} and resources.\textsuperscript{194}

Subsequent decisions\textsuperscript{195} confirmed the United States’ obligation to protect Indian culture and existence, including health\textsuperscript{196} and education. In \textit{Peyote Way Church of God, Inc. v. Smith}\textsuperscript{197} the court stated, “Congress has the power . . . to preserve our Native American Indians . . . as a cohesive culture until such time, if ever, all of them are assimilated in the main stream of American culture.”\textsuperscript{198} The court held that the federal exemption “allowing tribal Native Americans to continue their centuries-old tradition of peyote use is rationally related to the legitimate governmental objective of preserving Native American culture.”\textsuperscript{199}

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\textbf{192.} \textit{Id.} at 108-09. In \textit{Lane v. Pueblo of Santa Rosa}, the Court held that the government’s disposition of tribal lands under the public land laws would be an act of confiscation, not guardianship. 249 U.S. 110 (1919)
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\textbf{194.} In \textit{Seminole Nation v. United States}, 316 U.S. 286, 297 (1942), the Court extended the government’s responsibility to include tribal funds held in trust. See Ezra, supra note 193, at 719-20.
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\textbf{196.} See, e.g., \textit{White v. Califano}, 581 F.2d 697, 698 (1978) (“We think that Congress has unambiguously declared that the federal government has a legal responsibility to provide health care to Indians.”). In \textit{Lincoln v. Vigil}, 113 S. Ct. 2024, 2033 (1993), the Court refused to determine whether the Secretary’s decision to cancel a program for handicapped children violated the trust relationship, but stated: “Whatever the contours of that relationship, though, it could not limit the Service’s discretion to reorder its priorities from serving a subgroup of beneficiaries to serving the broader class of all Indians nationwide.”
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\textbf{198.} \textit{Id.} at 639.
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\textbf{199.} 922 F.2d 1210, 1216 (1991). In at least two cases, the courts have found that the states may legitimately exercise a trust relationship towards Indians. See, e.g., \textit{Livingston v. Ewing}, 601 F.2d 1110 (10th Cir. 1979) (upholding a Sante Fe, New Mexico ordinance which allowed Indian artisans exclusive commercial areas against equal protection claims by finding that states may exercise the federal trust power for the benefit of American Indians), \textit{cert. denied}, 444 U.S. 870 (1979); \textit{St. Paul Intertribal Hous. Bd. v. Reynolds}, 564 F. Supp. 1408, 1412 (D. Minn. 1983) (“State action for the benefit of Indians can also fall under the trust doctrine and therefore be protected from challenge under the equal protection clause or civil rights statutes.”).
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In several recent bills, Congress has acknowledged the special political relationship that it maintains with tribes and has accepted its responsibility to ensure the continued future of Indian people. In the 1978 Indian Child Welfare Act, Congress stated:

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people . . . Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources . . . .

The 1976 Indian Health Care Improvement Act affirms that "Congress hereby declares that it is the policy of this Nation, in fulfillment of its special responsibilities and legal obligations to the American Indian people, to meet the national goal of providing the highest possible health status to Indians." The recently passed Indian Tribal Justice Act states that "the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government.

The proposed Native American Cultural Protection and Free Exercise of Religion Act of 1994 emphasizes:

[T]he United States has a unique, government-to-government relationship . . . which permits the United States to take measures to protect against interference with the continuing cultural cohesiveness and integrity of Indian tribes and Native American traditional cultures . . . as part of the historic Federal-Indian trust relationship it is the intent of the United States to pursue enforceable Federal policies which will protect the Native American community and tribal vitality and cultural integrity . . . .

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201. Sub-section (3) continues: "[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and . . . the United States has a direct interest, as trustee, in protecting Indian children . . . ."
202. Pub. L. No. 94-437, § 3, 90 Stat. 1400, 1401 (1976) (codified in scattered sections of 25 U.S.C.); see White v. Califano, 437 F. Supp. 543, 555 (D. S.D 1977), aff'd per curiam, 581 F.2d 697 (8th Cir. 1978) ("We think that Congress has unambiguously declared that the federal government has a legal responsibility to provide health care to Indians. This stems from the 'unique relationship' between Indians and the federal government, a relationship that is reflected in hundreds of cases . . . .").
204. S. 2269, 103d Cong., 2d Sess. § 101(4)(5) (1994); see also The Indian Self-
Recent presidential addresses provide further proof of the government's responsibility to protect Indian existence. In a meeting with Indian leaders in 1991, President Bush stated, "[t]oday we move forward toward a permanent relationship of understanding and trust, a relationship in which the tribes of the nation sit in positions of dependent sovereignty along with other governments that compose the family that is America." 205

In April 1994, President Bill Clinton held a historic meeting with tribal leaders at the White House. In his address he not only reaffirmed the importance of the government's obligation, but specifically spoke of the government's responsibility to preserve Indian existence and religion:

Today I reaffirm our commitment to self-determination for tribal governments. I pledge to fulfill the trust obligations of the Federal Government. I vow to honor and respect tribal sovereignty based upon our unique historic relationship. And I pledge to continue my efforts to protect your right to fully exercise your faith as you wish . . . your culture and your very existence. 206

IV. CONCLUSION

Justice Scalia based his rejection of the strict scrutiny/compelling state interest test in Smith on the Court's prior refusal to grant exemption unless the free exercise claim was supported by another constitutional claim, such as the right to free speech in the Sherbert 207 decision and the right to educate one's children in Yoder. 208 However, the Court has at its disposal the trust doctrine, which not only meets this hybrid requirement, but by the Court's own analysis, must be used to

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205. 27 PUB. PAPERS 783, 785 (June 14, 1991).
206. President William Clinton further emphasized:
This then is our first principle: respecting your values, your religions, your identity, and your sovereignty. This brings us to the second principle that should guide our relationship: We must dramatically improve the Federal Government's relationships with the tribes and become full partners with the tribal nations . . . . The judgement of history will be that the President of the United States and the leaders of the sovereign Indian nations met and kept faith with each other and our common heritage and together lifted our great nations to a new and better place.
Remarks to American Indian and Alaska Native Tribal Leaders, in 30 PUB. PAPERS 941, 942, 944 (April 29, 1994).
protect tribal rights. As the Court has recognized, the United States government is not mandated by the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment to hold Indians to the same standards of constitutional protection as other groups. The Court's decisions in Talton, Mancari, Martinez, and a number of other cases have conclusively proven this. The tribes' status as inherent sovereigns predating the existence of the United States Constitution precludes any other analysis.

The courts then may apply a separate standard to tribes. The trust doctrine, as discussed, obligates the United States government to take those measures, which, as trustee, will ensure continued tribal existence. Congress, the President, and the courts have recognized that religion is an immutable aspect of Indian culture, life, and existence. As the receiver of more than ninety-seven percent of the continental United States, the government has obligated itself, as trustee, to be held to high fiduciary standards.

209. See Fort, supra note 135, at 205-08 (offering an analysis whereby the Court can protect the rights of minorities through the First Amendment).

210. From a political philosophical perspective, one can also argue that Indian people are not part of the consent of the governed.

211. See supra text accompanying notes 153-69.

212. See supra text accompanying notes 153-69.

213. See Michaelsen, supra note 16 at 47.

214. Over the years the Court has developed canons of construction to be applied in deciding Indian rights cases. See, e.g., Bryan v. Itasca City, 426 U.S. 373 (1976); County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) (requiring clear and specific statement by Congress before divestment of Indian authority); DeCoteau v. District County Court, 420 U.S. 425 (1975).