The American Indian Religious Freedom Act

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The American Indian Religious Freedom Act,[1] passed with almost no opposition,[2] was signed into law by President Jimmy Carter in August, 1978.[3] The law is unusually general and cryptic. It states that it is the "policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions . . . ."[4] The statute specifically protects three aspects of religious practice: "access to sites, use and possession of sacred objects, and the freedom to worship through ceremonies and traditional rites."[5] The law states, however, that its protections are "not limited" to the enumerated practices.[6]

To effectuate the general policy, the law directed federal agencies to consult with "native traditional religious leaders in order to determine . . . changes necessary to protect and preserve Native American religious cultural rights and practices,"[7] and directed the President to report back in one year the results of the evaluations.[8] The administrative Task Force Report was presented in August, 1979.[9]

This Note explores the meaning of the American Indian Religious Freedom Act, and considers its potential range of protections. Beginning with the legislative history of the Act, this Note considers how the Act

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1. Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified) 42 U.S.C. § 1996 (Supp. IV. 1980)).

2. The original resolution, S.J. Res. 102, passed the Senate on April 3, 1978, and an amended version, incorporating the text of H.J. Res. 738, passed July 27, 1978. 124 CONG. REC. 8365-66, 23078-79 (1978). The Act passed the House of Representatives on July 18. 124 CONG. REC. 21451 (1978).

3. WEEKLY COMP. OF PRES. DOC. 1417-18 (1978).

4. 42 U.S.C. § 1996 (Supp. IV 1980). The Act, as codified, says in full:

> On or after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent freedom to believe, express and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonial and traditional rites.

5. *Id.*

6. *Id.*

7. Pub. L. No. 95-341, § 2, 92 Stat. 469 (1978) (omitted from the United States Code as executed).

8. *Id.* The law directed the President to report back his evaluations including any administrative changes that had been made and any recommendations for further legislation. *Id.*

9. FEDERAL AGENCIES' TASK FORCE, AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT (Aug. 1979) [hereinafter cited as TASK FORCE REPORT]. Cecil B. Andrus, Secretary of the Interior, was chairman. The report made no legislative recommendations.

relates to the government's historic trust responsibility toward Indians, and then reviews the case law interpreting the Act. Finally, it addresses the question that has surfaced throughout the Act's history[10]—whether the Act, if interpreted broadly, creates an unconstitutional establishment of religion.

I. INTERPRETATION OF THE AMERICAN INDIAN RELIGIOUS FREEDOM ACT

A. *Legislative History*

The American Indian Religious Freedom Act was passed during a period of ethnic consciousness in America, a period characterized by the search for personal authenticity and identity through "roots" in ancestral nationality, as well as by the political organization of ethnic groups. This development of the late 1960's and the 1970's, born in the black power movement, came to include an increasingly militant American Indian movement. Sociologists and popular commentators highlighted the continuing saliency of religio-nationality ties, and the value of such ties against the homogenizing and alienating tendencies of modern society.[11]

The values expressed by the ethnic movement stand in contrast to nineteenth and most twentieth century federal Indian policy that has been directed toward "civilizing" Indians,[12] and thus toward undermining distinctive Indian "backward" cultures, often with the explicit aim of destroying traditional culture.[13] It was in the context of the ethnic revival that President Nixon changed the goal of federal Indian policy from that of equality through assimilation and the termination of tribes, to the goal of "tribal self determination."[14] By 1978, there was little opposition to the

10. *American Indian Religious Freedom: Hearings on S.J. Res. 102 Before the United States Senate Select Committee on Indian Affairs*, 95th Cong., 2d Sess. 132, 133 (1978) [hereinafter cited as *Hearings*]. *See also* S. REP. No. 709, 95th Cong., 2d Sess. 10 (1978) (Statement of Larry Simms, Office of Legal Counsel). The relevant constitutional provision is U.S. CONST. amend. I, which states in pertinent part "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

11. *See, e.g.*, A. GREELEY, ETHNICITY IN THE UNITED STATES 26-28, 31-32 (1974); T. ISAACS, IDOLS OF THE TRIBE (1975); M. NOVAK, THE RISE OF THE UNMELTABLE ETHNICS (1972).

12. United States v. Sandoval, 231 U.S. 28, 40-45 (1913). *See also* D. GETCHES, D. ROSENFELT & C. WILKINSON, FEDERAL INDIAN LAW 77-79 (1979) [hereinafter cited as D. GETCHES], where the authors discuss the policy of assimilation and the means used to assimilate and "civilize" Indians. They discuss, for example, the Allotment Act, designed to transform Indians from communal owners to farmers (discussed in *infra* note 108 and accompanying text) and the government's creation of Indian boarding schools, where all manifestations of Indian culture were prohibited. *Id.*

13. *Id.* Justice Van Devanter for the Court in United States v. Sandoval, 231 U.S. 28, 42 (1913), quotes an Indian Affairs superintendent approvingly:

> Until the old customs and Indian practices are broken among this people we cannot hope for a great amount of progress. The secret dance, from which all whites are excluded, is perhaps one of the greatest evils. What goes on at this time I will not attempt to say, but I firmly believe that it is little less than a ribald system of debauchery. . . . The time must come when the Pueblos must give up these old pagan customs and become citizens in fact.

14. In 1953 Congress adopted a policy of termination of tribes. H. Cong. Res. 108, 83rd Cong., 1st Sess., 67 Stat. B132 (1953). In 1970, President Nixon declared termination to have failed, and asked Congress to adopt a policy of self-determination. President Nixon's Message to Congress, July 8, 1970, 116 CONG. REC. 23258 (1970).

idea that traditional cultures were of value, and that the United States should seek to avoid practices that could destroy these traditional cultures.

The preamble to the American Indian Religious Freedom Act treats religion not only as of intrinsic worth, but as a central element of Indian culture, emphasizing the dual values of strengthening Indian personal identity and of enriching the larger society through diversity.[15] It states in part: "[T]he religious practices . . . are an integral part of their cultures, . . . forming the basis of Indian identity and value systems; [the religions] . . . are indispensable and irreplaceable."[16] While stressing cultural distinctiveness, the Act places Indian religion in the context of universal values, terming the exercise of traditional practices an "inherent right,"[17] and asserting that Indian practices should be accorded the respect due all religions.[18]

Traditional Indian leaders requested the law,[19] following a series of conflicts between federal agencies and Indians engaged in religious activities. For example, the Bald Eagle Protection Act[20] had been enforced against Cheyenne and Arapaho who used Eagle feathers in religious ceremonies;[21] customs officials had examined medicine bags at the Canadian border, rendering the bags inefficacious;[22] and the F.B.I. had regularly maintained surveillance over the Sioux sundance.[23] In addition, other religious problems inspired the Act; for example, Indians using peyote for

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15. Pub. L. No. 95-341, preamble, cls. 2-4, 92 Stat. 469 (codified in part at 42 U.S.C. § 1996 (Supp. IV 1980)). Section Two, omitted from the United States Code as executed, asks the President to "preserve Native American Religious cultural rights and practices." *Id.* § 2.

16. *Id.* preamble, cls. 3-4. On the Senate floor, the Joint Resolution was introduced with the words "There is . . . great value in cultural and religious diversity. We would all be poorer if the American Indian religions disappeared from the face of the Earth." 123 CONG. REC. 39300-01 (1977). This expresses an idea popular in ecology and environmentalism at the time, that maximum diversity creates the most favorable conditions for evolution. Thus as many species as possible should be preserved. This idea is applied to the social field by, for example, F. DYSON, DISTURBING THE UNIVERSE 220-23 (1979).

17. Pub. L. No. 95-341, preamble, cl. 1 & § 1, 92 Stat. 469 (1978) (codified in part at 42 U.S.C. § 1996 (Supp. IV 1980)).

18. *Id.* preamble, cls. 1, 3, 5, & § 1. The final Senate committee report states that the law is to insure to the Indian traditionalists the "same rights" as are enjoyed by the more powerful religions, but "it is in no way intended to provide Indian religion with more favorable status than other religions . . . ." S. REP. No. 709, 95th Cong., 2d Sess. 6 (1978).

19. 123 CONG. REC. 39300 (1977). A national meeting of traditional Indian religious practitioners in 1974 had resulted in negotiations with federal officials and in some administrative accommodations, and had led, eventually, to initiation of the Act. TASK FORCE REPORT, *supra* note 9, at app. A.

20. 16 U.S.C. §§ 668, 668a-668d (1976 & Supp. IV. 1980).

21. TASK FORCE REPORT, *supra* note 9, at app. A.

22. *Id.*; *Hearings*, *supra* note 10, at 147-48.

23. *Id.* at 76, 80. According to the testimony of Richard Moves Camp, representative of the Ogalala Sioux Tribe in South Dakota, the F.B.I. in 1975 arrived in helicopters and raided the sundance grounds, holding several old people at gunpoint. He reported that a helicopter usually flies overhead during the sundance. *Id.* The sundance had been banned by the government in 1890. *Id.* Other sources of conflict included the refusal of forestry officials in some national forests to permit easy Indian access to religious sites and the gathering of plants and other natural objects for religious purposes, 123 CONG. REC. 39300 (1977), and the unmoving resistance of some prison authorities to Indian requests to worship in sweatlodges and to wear long hair for religious purposes. *Hearings*, *supra* note 10 at 152-61. The Senators noted that prison officers thought it impractical to build sweatlodges, yet provided tennis courts in prisons where some former members of President Nixon's administration had been sent. *Id.* at 152-53; Pub. L. No. 95-341, preamble, cls. 7-9, 92 Stat. 469 (1978).

religious purposes have faced continual conflicts with narcotics laws.[24]

Responding to the Indian requests, Senator James Abourezk of South Dakota,[25] joined by senators as diverse as Edward Kennedy[26] and Barry Goldwater[27], introduced the bill. The Senate Select Committee on Indian Affairs, chaired by Senator Abourezk, held hearings from which one can discern the general purposes of the Act.[28] The Senators felt that lack of policy was to blame for religious infringement; they wished to create an awareness of Indian religion on the part of government officials so that religion would not be infringed inadvertently, and to make a clear and consistent policy that agencies adjust their rules to Indian religion.[29]

The hearings were marked by a peculiar dichotomy in tone—and in expectations about the proposed law. Indians and Hawaiians related poignant personal incidents of religious suppression,[30] and expressed broad optimism that the law would finally put an end to official suppression of native religion,[31] and would begin a new era of support for traditional culture.[32]

By contrast, the Justice Department representative, Larry Simms, suggested that the government not attempt to undo old wrongs nor go too far too fast.[33] He proposed an amendment that read "[n]othing in this resolution shall be construed as affecting any provision of State or Federal Law."[34] The Justice Department feared that the resolution could be read

24. *See, e.g.*, *Hearings*, *supra* note 10, at 88, 93-94, 105.

25. 123 CONG. REC. 39299-01 (1977). South Dakota is the home of militant Indian activism, the home of the Battle of Wounded Knee in 1890 and a June, 1975 raid on the Sundance grounds. *Hearings*, *supra* note 10, at 76-77, 80; *supra* note 23.

26. Democrat of Massachusetts.

27. Republican of Arizona. They were joined by Mark Hatfield, Republican of Oregon; Hubert Humphrey, Democrat of Minnesota; both Senators from Alaska, Democrat Mike Gravel and Republican Ted Stevens; and both Senators from Hawaii, Democrats Daniel Inouye and Spark Matsunaga. 123 CONG. REC. 39299 (1977). Only Senators Abourezk and Hatfield were members of the Senate Select Committee on Indian Affairs. *See Hearings*, *supra* note 10, at II.

28. *Hearing*, *supra* note 10, *passim*. Representatives from various native American groups, Western, Eastern and Hawaiian, representing tribes, religious associations, traditional societies and rights organizations testified at the Senate Committee hearings. Officials from the Bureau of Indian Affairs, the Department of Justice and the Customs Office testified, as did representatives of the California Native Heritage Commission, set up in the administration of Governor Edmund G. (Jerry) Brown under a law somewhat similar to the proposed federal law. *Id.* at 203.

29. *See, e.g.*, *Hearings*, *supra* note 10, at 1-2, 82-83, 137; S. Rep. No. 709, 95th Cong., 2d Sess. 2, 3-5 (1978); 123 CONG. REC. 39300-01 (1977).

30. *See, e.g.*, *Hearings*, *supra* note 10, at 15, 33, 76-77, 80-81.

31. *See, e.g.*, *id.* at 40, 71, 102.

32. A Hawaiian mayor, for example, wrote that the Act would help Hawaiians "to perpetuate and rebuild [their] relation to the past." *Id.* at 40. One witness, Mr. Joe Little Coyote, expressed hope that the Cheyenne would attain "self actualization as a people," by using traditional culture as a basis for development. *Id.* at 102. Mr. Barney Old Coyote, in his statement said "When freedom of worship is assured for these people, it follows that their ways of life will be perpetuated. . . ." *Id.* at 89. Only a few witnesses expressed more skepticism. A letter from the Cheyenne Chiefs and Military Society asked a number of pointed questions, *id.* at 105, and Mr. Kurt Blue Dog, of the Native American Rights Funds Indian Corrections Project, offered specific legislative recommendations for assuring prisoners' rights, which the general language of the Act would not guarantee. *Id.* at 155.

33. *Id.* at 130, 135. The preamble to the Act notes the "old wrongs" of the government's intrusion upon and interference with traditional religion. Pub. L. No. 95-341, preamble, cls. 5, 10, 92 Stat. 469 (1978).

34. *Hearings*, *supra* note 10, at 135. The proposed amendment is reported in S. REP. No. 709,

to require that the administration protect native religions at the expense of other values and policies, and thus to require agencies to dispense with the usual balancing of interests characteristic of the administrative process.[35] In addition it feared that if the Act required preferential treatment of Indian religion it could present constitutional problems of denial of equal protection[36] and establishment of religion.[37] It was clear that the administration, while unwilling to oppose the Act, would have preferred that the matter be left entirely to administrative agencies, without congressional action.

The Senators' sympathy with the Indians was evident. In response to the proposed amendment that the bill not be construed to affect any law, Senator Abourezk accused the administration of "horrendous"[38] behavior and of violating its trust duty to the Indians[39] by attempting to "gut the whole bill."[40] The hearings did not directly address the precise powers of the Act, although Senator Abourezk did indicate that the Act would give the Indians a statutory basis for a lawsuit in addition to the constitutional basis.[41]

The bill passed the Senate with no opposition or discussion, but outspoken opposition suddenly surfaced in the House, transforming the previously noncontroversial bill into a problematic one. A few Congressmen expressed deep misgivings: they wanted assurances, like those requested by the administration, that the law would not bring about much change.

95th Cong., 2d Sess. 11 (1978). The administration also offered an amendment that Federal agencies "implement . . . changes as may be consistent with existing statutes." *Id.*

35. *Hearings*, *supra* note 10, at 133, 136; S. REP. No. 709, 95th Cong., 2d Sess. 10 (1978).

36. *Hearings*, *supra* note 10, at 134; S. REP. No. 709, 95th Cong., 2d Sess. 10 (1978). The guarantee to equal protection of the laws, found in U.S. CONST. amend. XIV, which states in pertinent part: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws," is directed to the states; it is an aspect of due process, assured by U.S. CONST. amend V: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

37. S. REP. No. 95-709, 95th Cong., 2d Sess. 10 (1978).

38. *Hearings*, *supra* note 10, at 136.

39. *See id.* at 130.

40. *Id.* at 136.

41. *Hearings*, *supra* note 10, at 135. The committee made a few changes in the wording of the Resolution. It changed the phrase "American Indian" to "Native American" in one place, and added, at the suggestion of the government, the requirement that the President report to Congress the results of the Administrative evaluation and the changes made in agency practices. S. REP. No. 709, 95th Cong., 2d Sess. 1-2, 5, 6 (1978). It also added the requirement of "administrative consultation with Native religious leaders." The report specified that the consultants should be practitioners, not political leaders or Indian experts. *Id.* at 5. By the time the resolution reached the House of Representatives, the word "traditional" had been inserted before "Native religious leaders," after a Hopi traditionalist had suggested the change. *Hearings*, *supra* note 10, at 242. The Reverend Caleb Holetstewa Johnson, of the Hopi Traditional Kikmonguis, called attention to the conflict between progressive Indians, active in tribal councils, and traditional Hopis. He stated feelingly "Let me say to you, that a Hopi Mormon can be just as destructive to the ceremonies of the Hopis as a non-Hopi Mormon." *Id.* at 243. In response to administrative suggestion, the committee changed the phrase referring to "agencies responsible for administering such laws" to refer instead to agencies "whose duties impact on Native American religious practices." S. REP. No. 709, 95th Cong., 2d Sess. 1 (1978). The bureaucratic vocabulary was put into ordinary language in the final version. 42 U.S.C. § 1996 (Supp. IV 1980). While the Senate committee members' sympathies with the Indians were clear, as was their intention that administrative practices should change so as to stop suppressing Indian religion, their expectations about the actual power of the law were somewhat vague. Senator Abourezk, for example, noted that the issue of whether the Act modifies existing law would "be discussed on the floor" and congressional intent would be "cleared up one way or another." *Hearings*, *supra* note 10, at 132.

They suggested that the Act was superfluous if it were only intended to assure constitutional rights,[42] and that it therefore must have other intentions.[43] They worried that the general language would permit entry onto private property to reach sacred sites,[44] condone the use of dangerous drugs,[45] and create an absolute protection for Indian religion, in the manner that the Endangered Species Act[46] protects listed species.[47] In addition, Congressmen raised the spectre of unconstitutionally preferential treatment for Indians,[48] and the establishment of religion by government action to preserve traditional Indian religion.[49]

Apparently surprised by the opposition, Representative Udall characterized the Act as "the sense of Congress,"[50] "merely a statement of policy,"[51] with "no teeth in it."[52] He assured the nervous Congressmen that the law "has nothing to do with private property" but only with federally owned lands that have been traditionally used for native American ceremonies.[53] Another supporter asserted that the Act "is not conveying any right to anybody," and urged Congress to get on to more important matters.[54]

The language of the House supporters suggests a less expansive interpretation of the bill than the language of the Senate committee. In any case, the Act was passed without being narrowed to quell the worries of those agitated about private property rights and without being amended to satisfy the administration.[55] The vote in the house was 337 to 81; the op-

42. 124 CONG. REC. 21444 (1978) (remarks of Mr. Cunningham, Democrat of Washington).

43. *Id.*

44. *Id.* (remarks of Mr. Badham, Republican of California).

45. *Id.* at 21444-45. (remarks of Mr. Cunningham, Mr. Badham, and Mr. Wydler, Democrat of New York).

46. 16 U.S.C. § 1531 *et. seq.* (1976 & Supp. V 1981).

47. 124 CONG. REC. 21445 (1978) (remarks of Mr. Wydler and Mr. Badham). Representative Badham, Republican of California, expressed these anxieties:

> perhaps any hill . . . or forest glade might, on the request of one Indian . . . be set aside for some ostensibly religious purpose, whether it is wilderness, whether it be the home of endangered species, whether it is the site of drug abuse.

Id. Representative Badham, apparently agitated by the fact that "today, . . . we have Indians marching on the Capitol," stated what was probably the sense of the opposition. "In our headlong rush to change the face of America, . . . we may be going a little too far too fast." *Id.*

48. *Id.* at 21444-45. (remarks of Mr. Cunningham).

49. *Id.* at 21446. (remarks of Mr. Bonker, Democrat of Washington). Under the Indian Civil Rights Act, 25 U.S.C. § 1301-03 (1976), Indians are guaranteed, against tribal incursions, most of the rights of the first ten amendments, or Bill of Rights. Tribes, however, are permitted to establish religion.

50. 124 CONG. REC. 21445 (remarks of Mr. Udall, Democrat of Arizona).

51. *Id.* at 21446. (remarks of Mr. Udall). Representative Udall appeared astonished by the negative reactions, saying "It just seemed too simple and self evident." *Id.*

52. *Id.* at 21445. (remarks of Mr. Udall).

53. *Id.*

54. *Id.* at 21466. (remarks of Mr. Roncalio, Democrat of Wyoming). Representative T. Roncalio ended his short speech with "Let us . . . get on to a far more important matter today, and defeat the bill on the coal pipeline." *Id.* The House Interior Committee, chaired by Representative Udall, had not even held hearings, as the Act had seemed so uncontroversial. *Id.*

55. A letter from the Department of Justice, read into the Congressional Record, stated that the administration supported the Resolution only on condition that it "not be construed as affecting any provision" of existing law. *Id.* at 21444. The administration was now satisfied that that was the congressional intent. Although the Senate Counsel had pointed out that it was impossible for the Act to have any impact without affecting law, *Hearings*, *supra* note 10, at 136, the Senate Report states that the Resolution makes "no changes" in the law, S. REP. No. 709, 95th Cong., 2d

ponents were fairly evenly divided between Democrats and Republicans.[56]

The day after President Carter signed the bill into law, he issued a statement repeating in modified form the administration position taken in the Senate Hearings. Rather than asserting that the law will not "affect" other laws, he said that the law "is in no way intended to . . . override existing law, but is designed to prevent Government actions that could violate . . . constitutional protections."[57]

One year later the Task Force set up in compliance with the Act reported its results to Congress.[58] About thirty agencies participated in the Task Force, chaired by the Secretary of Interior.[59] The Task Force report documents meetings with Indian groups across the country, and states the policy and procedural changes being carried out at that time by various agencies.[60] The introduction to the report chronicles the misunderstanding and suppression of Indian religion by the hegemonic culture, and argues that because Indian religions are not doctrinal and proselytizing, they pose no threat of the establishment of religion.[61] The introduction provides vigorous support for a robust interpretation of the Act.

B. *Powers of the Act*

The thrust of the American Indian Religious Freedom Act is that the government should carry out the general purposes of laws in ways that accommodate Indian religious practice: laws and bureaucratic regulations should not be allowed to suppress religion unnecessarily.[62] As the com-

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Sess. 1, 2 (1978), and Mr. Udall agreed that the Act "in and of itself" does not change the law. 124 CONG. REC. 21444 (1978). The difference between the congressional and administrative language is one of nuance. Presumably the Act does not "change" existing law, either because Indians theoretically already possess the rights the Act protects, or because, as a policy statement, it is to be carried out in conjunction with other laws. However, creating awareness of religious rights and accommodating them would change the way laws were carried out, and would thus "affect" existing law, without "changing" it.

56. 124 CONG. REC. 21450 (1978).

57. WEEKLY COMP. OF PRES. DOC. 1417-18 (1978). *See also supra* note 55 and accompanying text.

58. TASK FORCE REPORT, *supra* note 9.

59. *Id.* The Bureau of Prisons, from which had come some of the greatest resistance to Indian free exercise claims, was notably absent. *Id.* For discussion of conflicts about prison policy, see *supra* note 23 and *Hearings*, *supra* note 10, at 152-61, 175-76.

60. The complaints of Indians at the meetings were largely aimed at the same problems or kinds of problems aired at the Senate hearings. TASK FORCE REPORT, *supra* note 9, *passim*.

61. *Id.* at 10, 12. The introduction, which has the imprimatur of the Task Force, was apparently written by an official of the Bureau of Indian Affairs, as a representative from that Bureau organized the Report.

62. The preamble, cls. 6-7, states:

> Whereas . . . religious infringements result from the lack of knowledge or the insensitive and inflexible enforcement of Federal policies and regulations premised on a variety of laws; Whereas such laws were designed for such worthwhile purposes as conservation and preservation of natural species and resources but were never intended to relate to Indian religious practices, and, therefore, were passed without consideration of their effect on traditional American Indian religions . . .

Pub. L. No. 95-341, 92 Stat. 469 (1978). The point is that because laws were passed without consideration of their effects on Indian traditional practice, and have been enforced inflexibly, the Act was necessary to promote flexible enforcement so that Indian religion would be protected. *See supra* notes 17-18 and accompanying text. A function of the hearings was apparently to pinpoint areas where the government could accommodate Indian religion while still carrying out its other policies. *Hearings*, *supra* note 10, *passim*. See especially the colloquy between the justice departmittee said, "America does not need to violate the religions of her native peoples."[63] Prisons can easily keep order, although some Indians sport long hair; customs officers can control borders nearly as effectively without opening sacred medicine bags; the environment can be protected although some Indians gather rare herbs. The law then envisions particularistic exceptions to general regulations.[64]

The Act was intended to effectuate Indian's "natural," or "inherent," and constitutional right to freedom of religion with some specificity.[65] Senator Abourezk pointed out that because Indian religious practices are very different from those of the Judeo-Christian mainstream, they often are not treated with the respect due religion nor the respect due traditional culture "of which religion is an integral part."[66] Therefore the Act specifies particular kinds of practices that should be preserved—ceremonies, sacred substances, access to religious sites.[67] Congress' interpretation of these practices as constitutionally protected would seem to be binding on the administration through the statutory guarantee. One issue, initially raised by the congressional opposition,[68] is whether the Act simply reiterates the free exercise guarantee of the first amendment and thus is limited to a constitutional minimum, or whether it provides broader protections.

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ment representative and the committee, *id.* at 135-37, where Senator Abourezk's intent to make a general principle of exceptions for Indian religion is resisted by the administration.

63. This phrase was used when the Act was first introduced, 123 CONG. REC. 39300 (1977), and later in the hearings, *Hearings, supra* note 10, at 2, and in the Senate and House Reports. S. REP. No. 709, 95th Cong., 2d Sess. 4 (1978); H. REP. No. 341, 95th Cong., 2d Sess. 3 (1978). A major theme of the Senate Committee report was that "it is possible to both uphold the intent of the laws and allow for religious freedom." S. REP. No. 709, 95th Cong., 2d Sess. 3 (1978).

64. *See supra* note 62 and accompanying text. The intent that there be particularistic exceptions for Indian religion is evident, for example, in the Senate Report that recommends, in particular, accommodations for Indian use of peyote, possession of proscribed feathers, crossing of borders with medicine bundles, burial of dead in federally regulated areas, and access to religious sites. S. REP. No. 709, 95th Cong., 2d Sess. at 2-4. The language of the report is direct and explicit that the Act intends "exception(s) to general regulatory laws" for Indians engaged in religious exercise. *Id.* at 4. Referring to the sacramental use of peyote, the report states "this apparent conflict can be overcome with the institution of well thought out exceptions," *id.* at 3, and, on the subject of possession of feathers, "Although the enforcement problems create . . . difficult issues, . . . it is possible to both uphold the intent of the laws and allow for religious freedom." *Id.*

65. *See supra* note 17 and accompanying text. The Preamble opens with the statement that "the freedom of religion for all people is an inherent right . . . and is guaranteed by the First Amendment. . . ." 123 CONG. REC. 39302 (1977); *Hearings, supra* note 10, at 137; Pub. L. No. 95-341, preamble, cl. 1, 92 Stat. 469 (1978). Senator Abourezk introduced the Act as one to guarantee to Indians that "inherent right of free exercise of religion." 123 CONG. REC. at 39300. The enactment clause refers to the inherent right to free exercise, but does not refer to the first amendment. 42 U.S.C. § 1996 (Supp. IV 1980). The final Senate report, affirming that "Native Americans have an inherent right to the free exercise of their religion," S. REP. No. 709, 95th Cong., 2d Sess. 2 (1978), states that the purpose of the Resolution "is to insure that the policies and procedures of the Federal Agencies are brought into compliance with the constitutional injunction that Congress shall make no laws abridging the free exercise of religion." *Id.*

See also *infra* text accompanying notes 86-89, 92-93 for discussion of the theory of natural rights implicit in the Indian law opinions of Chief Justice John Marshall. An "inherent" right is presumably equivalent to what in the eighteenth and nineteenth centuries was also called a "natural" right: a right that theoretically inheres in personhood and that cannot legitimately be taken away or suppressed by government. *Id.*

66. 123 CONG. REC. 39300 (1977).

67. *See supra* notes 5-6 and accompanying text.

68. *See supra* note 42 and accompanying text. The issue is considered more fully *infra* notes 131-37, 165-70, 180, 185-86, 204-43 and accompanying text.

While Congress certainly intended to make the first amendment guarantee effective for Indians, it designed a policy of adjustment to religion that would obviate the rigid kind of first amendment analysis carried out by the courts, and specifically, that would protect the kinds of practices Congress named. Neither the language of the Act nor the Congressional intent indicate that the Act's protections are dependent on a determination under judicial standards that practices would be protected by the first amendment. However, the powers of the Act are limited by its unusual form as a statutory policy statement. The law does not directly protect religious practice, but states a policy to protect religious practice. Therefore the Act would be violated not by administrative interference with Indian religion alone, but by administrative failure to pursue the policy of protecting religion. Therefore any demonstration that the law was violated would presumably have to show not only that Indian religious practice was restricted, but also that the policy of protecting religion had not been pursued.

There is a range of at least three possible interpretations of what the Religious Freedom Act requires.

First, at a minimum, pursuit of a policy mandates that those responsible to pursue the policy take the policy into consideration. A complainant could show a statutory violation if an agency had interfered with an Indian religious practice and had never considered the issue when planning its course of action.[69] Thus the statute creates a procedural right that Indian religion be taken into account in the administrative "balancing process." Congress clearly intended the Act to ensure administrative awareness of ways policies could affect Indian religion.[70] This minimum interpretation of the Act was favored by the administration under President Carter.[71]

There is good reason to believe that the Act requires more than this minimum procedural compliance. The complaints that led to the Act, the course of discussions at the Senate hearings, the language of the preamble,[72] and the very words "to protect and preserve" indicate that the law requires accommodation to Indian religion when at all feasible.[73] Otherwise, the expectations underlying the Act's introduction would not be carried out, and its passage would have been quite pointless. Under this reading of the law, a complainant could show a statutory violation by

69. This would be comparable to a complaint, in review of administrative agency action, that a stated agency or statutory policy had not been taken into account before the agency chose a course of action. See, for example, Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), where the issue was whether agency decisionmaking followed the statutory policy of holding a public hearing and of approving no program that uses parkland unless there is no feasible and prudent alternative. The Court, while not requiring that there be formal findings from the hearing, did say that a court should look at the full administrative record and could require participants in the decisionmaking to explain their actions, so a court could assess whether the statutory policy was followed. *Id.* at 420. Although the Court did not hold administrators to a particularly high standard, at a minimum the case would seem to demonstrate that an agency must be able to show in some way that it has followed a statutory policy by taking certain matters into account.

70. *See supra* notes 29, 35, 62 and accompanying text.

71. *See supra* note 35 and accompanying text.

72. *See supra* notes 62-64 and accompanying text.

73. *Id.*

showing that religion was restricted and that the agency could have pursued a practical alternative less restrictive to religion, without significant sacrifice of other goals. However, when the policy of preserving religion clashes directly with other agency goals, the law does not dictate the outcome. As a policy statement rather than a direct protection, the law permits the "administrative balancing process" so favored by the administration of President Carter.[74]

Although the Act does not explicitly set forth its provisions as a "trust duty," the third and most generous interpretation of the Act would see it as creating a duty arising from the "trust" or "guardianship" relation of the government to Indians, and enforceable in a trust action.[75] A trust action would permit closer scrutiny of agency decisions to assure that they are consistent with the spirit of the law. A trust duty would add to the statutory duty higher standards of good faith and active pursuit of the policy, and perhaps strict fiduciary loyalty.[76]

But whether or not the law creates a legally enforceable fiduciary duty, the more generalized trust relation between government and Indians obliges agencies and courts to read and carry out the Act in a spirit sympathetic to Indians.[77] Because any understanding of the Act must take into account the general framework of relations between government and Indians described by the terms "guardianship" or "trust," it is necessary to examine that trust framework before looking at cases interpreting the Act.

C. *Guardianship or Trust Relationship*

The trust doctrine is a pliable doctrine that the federal government has a trust or guardianship responsibility for Indian tribes.[78] It posits that

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74. *See supra* note 35 and accompanying text.

75. *See infra* notes 78-121 and accompanying text.

76. If there were a trust duty enforceable on the Bureau of Indian Affairs, the Bureau could perhaps be obligated to sue other agencies of government to enjoin them to protect Indian rights, or even be required to try to arrange or purchase access rights from private owners. The congressional supporters' emphatic denial that the Act has anything to do with private property might prevent such an action from succeeding. *See supra* note 53 and accompanying text. In any case under a trust duty, the Bureau would be responsible for active good faith pursuit of the policy of preserving Indian traditional religious practices.

77. *See, e.g.*, Morton v. Ruiz, 415 U.S. 199, 236 (1973); Eric v. Secretary of United States Dep't of Hous. & Urban Dev., 464 F. Supp. 44, 48 (D. Alaska 1978); *infra* note 104 and accompanying text. Several courts have interpreted the guardian duty for an agency charged in a particular instance with multiple loyalties. *See, e.g.*, Nance v. E.P.A., 645 F.2d 701, 711 (9th Cir. 1981) (the E.P.A. fulfilled its duty procedurally, by among other things, consulting with the affected Indian group, and substantively, by reasonably judging that its decision would not adversely affect the Indians, although the judgment later turned out to be mistaken) *cert. denied* 454 U.S. 1081 (1981); North Slope Borough v. Andrus, 642 F.2d 589, 612 (D.C. Cir. 1980) (the duty was fulfilled by action in accordance with environmental statutes, said to be compatible with the Indians' general interest, by "purposeful attention to the special needs of Indians," and by acceptance of recommendations to ease "adverse impacts on the Inupiats"); Ute Indian Tribe v. Utah, 521 F. Supp. 1072, 1141 n. 187a (D. Utah 1981) (the court cited the American Indian Religious Freedom Act as support for the proposition that *any* federal action dealing with Indians is subject to the United States' fiduciary responsibilities toward tribes, although it did not address the issue of how the responsibility was to be carried out). *See also infra* notes 104, 121-27 and accompanying text.

78. *See infra* notes 86-99, 103-04 and accompanying text. For more extensive discussion of the trust doctrine in historical perspective, see Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975) and Lobenz, *"Dependent Indian Communities": A Search for a Twentieth Century Definition*, 24 ARIZ. L. REV. 1 (1982). *See also infra* note

the relationship of the federal government is analogous to that of guardian to ward or trustee to beneficiary. This analogy is fundamentally flawed, because the federal government, unlike an ordinary trustee, can unilaterally abrogate trust agreements[79] and refuse, as sovereign, to be sued.[80] Therefore the accountability intrinsic to these traditional forms of equitable exercise of power for the benefit of another is absent.

According to the theory of sovereignty that underlies the Constitution, the legislature embodies the sovereign "will," which cannot be bound.[81] The sovereign, through the legislature, can decide that it will be held accountable to the Indians for particular purposes. But because the will itself cannot be bound, the sovereign can only be held accountable in its administrative capacity.[82] Thus Congress sets up the parameters of legal accountability, and is itself subject only to the "moral" duty of guardian. Before holding the administration responsible as trustee, courts ordinarily look for explicit indications, for example, in treaties or statutes, that the sovereign has bound itself to a trust relationship.[83] For some purposes, however, courts have found that the government has entered into a trust relationship through a course of conduct or through statutory obligations that explicitly set forth a trust.[84] A court must find both this sovereign

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86. For an example of a succinct application of general trust principles to the federal government's holding of Indian land, see United States v. Mitchell, 445 U.S. 535, 547-48 (1980) (White, J., dissenting); *see infra* note 108 for subsequent history of this case.

79. In Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), the Court upheld legislation that violated an earlier treaty, saying "The power exists to abrogate the provisions of an Indian treaty, . . . When . . . treaties were entered into between the United States and a tribe of Indians it was never doubted that the *power* to abrogate existed in Congress . . . ," *id.* at 566; therefore, "the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation." *Id.* at 568. The *Lone Wolf* principle may be somewhat limited due to subsequent interpretation that the Congressional power over Indians is subject to constitutional limits and perhaps even to some limits inherent in the purposes of guardianship. *See* D. GETCHES, *supra* note 12, at 248-52; Chambers, *supra* note 78, at 1229-30.

80. "It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued. . . .'" United States v. Mitchell, 445 U.S. 535, 538 (1980) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)). The combination of jurisdictional complications and the doctrine of sovereign immunity has made Indian trust relief often difficult to obtain. For example in Scholder v. United States, 428 F.2d 1123, 1130 (9th Cir. 1970), the court chastized the Bureau of Indian Affairs for "shocking" behavior, but found that sovereign immunity shielded it from "judicial scrutiny." Of course, the judiciary did scrutinize the behavior; it simply did not order a remedy. Whether a court will enforce a trust duty also depends on the remedy requested and on whether or not there is jurisdiction and waiver of immunity as to that remedy. This Note will not consider the separate problems of sovereign consent, jurisdiction to hear Indian claims, and remedial choice. *See infra* note 85.

81. This in the abstract is the enlightenment theory of sovereignty which underlies, for example, the Federalist Papers' discussion of separation of powers, THE FEDERALIST PAPERS NOS. 47-51 (J. Madison 1788), but is not explicitly set forth. It derives from an earlier theory that the Monarch embodied the sovereign will; with the democratic idea that government originates in the people, the legislature, made up of the peoples' representatives, became the repository of the sovereign will. *See, e.g.*, Baker, *French Political Thought at the Accession of Louis XVI*, 50 J. MODERN HISTORY 279, 298-301 (1978). The federal government was of course a government of limited power. The federal sovereign "will" was thus 'bound' to the extent that it was never given powers retained by the states or the people. Because Indian tribes were theoretically "semi sovereigns," the federal sovereign was not so limited in relation to Indians.

82. *See* Chambers, *supra* note 78, at 1227, 1230.

83. *See infra* notes 106, 108-19 and accompanying text.

84. In Cramer v. United States, 216 U.S. 219 (1928) the Court, invalidating a land patent granted a railroad for land occupied by Indians, said "The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive. The right

consent to assume the duties of a trustee, and sovereign consent to be sued as a trustee.[85]

The guardianship theory entered the law through the opinions of Chief Justice Marshall[86] as an alternative to the social contract theory to legitimate and explain federal governmental powers over Indians. According to the social contract theory which underlay the American Revolution and the Constitution, individuals have natural rights and compact to protect them by forming a government.[87] The legitimacy of government is

. . . flows from a settled governmental policy." *Id.* at 229. For statutory obligations implicitly creating trust duties, see *infra* notes 112-19 and accompanying text.

85. *See supra* note 80 and accompanying text. Thus, while it may be intrinsic to the character of a private trust that the trustee's obligation may be judicially enforced, *see, e.g.*, RESTATEMENT (SECOND) OF TRUSTS § 25 (1959), the sovereign differs from a private trustee because it can assume an unenforceable trust duty. While the right to recover for breach of trust is inferrable from the assumption of a trust duty, sovereign consent to suit is not itself implicit in the assumption of the duty. The source of sovereign consent to suit was in dispute in United States v. Mitchell, 445 U.S. 535 (1980) (discussed *supra* note 108 and accompanying text). Hughes, *Can the Trustee Be Sued For Its Breach? The Sad Saga of United States v. Mitchell*, S.D. L. REV. 447 (1981), discusses this issue of separate sovereign consent, arguing that there has been recent conceptual confusion on the subject and severely criticizing the *Mitchell* reasoning. *Id.* at 458-59, 467-72. Hughes was counsel for the plaintiff Navajos in Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *cert. denied* 452 U.S. 954 (1981) (discussed *supra* notes 152-69 and accompanying text).

86. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823). The following discussion in the text relies on these cases in which Chief Justice Marshall's concept of guardianship is developed. Each opinion is distinct and subtle, and, of course, there is much room for disagreement in interpreting them. The Note in the discussion following presents a simplified clarification of the central themes of guardianship. For other discussion of the original concept of guardianship, see Chambers, *supra* note 78 and Lobenz, *supra* note 78.

Surveying the trust field of Indian law, and highlighting the different emphases of the trust doctrine at different historical periods, Chambers argues that the underlying purpose of the guardianship, as it was elaborated by Justice Marshall, is the guarantee of "territorial and governmental integrity." *Id.* at 1246. He argues that courts can use the trust duty effectively to preserve tribal autonomy by enforcing a general trust duty through equitable remedies. *Id.* at 1234-36, 1246-47. Chambers maintains that precedent permits this, and that it is consistent with the initial guardianship theory to suppose that Congress intends the trust to be carried out strictly by the administration unless Congress expresses itself to the contrary. *Id.* at 1234 n.100, 1248. This author and Chambers diverge slightly in interpretation of Chief Justice Marshall's theory, in that Chambers considers the theories that Indians were a conquered people and that they were semi-sovereign nations as distinct, with Chief Justice Marshall on the side of the second theory, Chambers, *supra* note 78, at 1215-20, 1223-24, 1246-47, whereas this author believes that Justice Marshall embraced the contradiction, and that intrinsic to his theory are both the conquest of Indians by Europeans and respect for Indians' natural rights of self governance.

Lobenz, emphasizes the expectation in the original guardianship theory that the guardianship would end when Indians learned the art of civilization, Lobenz, *supra* note 78 at 1-4, 13-15, and argues, in a position consistent with the ethnic revival, *see supra* notes 11-16 and accompanying text, that tribal autonomy should be maintained for its own sake. Thus the special legal status of Indians tribes should be maintained, but supported now by respect for cultural distinctness. *Id.* at 27.

It is of some relevance to note, in the context of the American Indian Religious Freedom Act, that the major initial legitimation for European exercise of dominion over Indians was that Indians were heathen, in need of conversion by Christians. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 573, 576-77 (1823). Referring to the era of discovery, carefully dissociating himself from this position and refusing to justify it, Chief Justice Marshall noted: "The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence." *Id.* at 573. Chief Justice Marshall noted that the rules of discovery among the European nations accepted the prior title of any Christian people, but gave title to the discoverer of lands then unknown to Christians. *Id.* at 576-77.

87. See generally J. LOCKE, TWO TREATISES OF GOVERNMENT (1792) (P. Laslett 2d ed. Cambridge 1967) for the basic statement of the social contract theory.

therefore based on the compact and the government's continuing protection of individual rights.[88] This theory could hardly justify the European conquerors' exercise of power over Indians. Thus the Marshall Court faced the task of formulating the government's authority over Indians in terms as compatible as possible with the enlightenment theories of natural rights.[89] According to Justice Marshall, guardianship originated in the discovery by a civilized people of land occupied by an inferior, or uncivilized people, giving the sovereign-discoverer title to the land, independently of the will of those who occupied the land.[90] To this extent, the right of discovery was indistinguishable from the right of conquest.[91] Admitting that the sovereign, by taking title to their land, has violated natives' natural rights,[92] Chief Justice Marshall concluded that natural law enjoins the sovereign to respect the natives' natural rights of occupancy and self governance within the limits compatible with its superior sovereignty, and to govern for the benefit of the natives.[93] "Meanwhile they are in a state of pupilage. Their relation to the federal government resembles that of a ward to his guardian."[94]

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88. *See id.*; T. Paine, The Rights of Man (Part 1, 1791) (Part 2, 1792) (another influential exposition of the reigning theory of legitimacy).

89. The sense of contradiction is evident throughout the opinions. Chief Justice Marshall admitted:

> However this restriction [on the right of Indians to dispose of their property] may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.

Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 591 (1832). The *Johnson* opinion opens with the observation that it is necessary to examine not only "those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate . . . the rights of civilized nations, . . . but those principles also which our own government has adopted in the particular case. . . ." *Id.* at 572. *See also id.* at 588-89. And in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 22 (1831), Chief Justice Marshall wrote "It is in vain now to inquire into the sufficiency of the principle, that discovery gave the right of dominion over the country discovered." This contradiction between the philosophical foundation of the Constitution, which the courts are to uphold, and the right of conquest is still felt and expressed by the courts, and in similar terms.

> The Court cannot pretend that justice in a Platonic sense can be rendered in this case. Perhaps in an ideal system of moral accounting, plaintiffs would be entitled to all of the lands they have claimed regardless of the interests claimed by the State of Alaska and others in those lands. This Court is, however, not free to allow plaintiffs to proceed on such a theory when decision of the Supreme Court and Acts of Congress foreclose it.

Edwardsen v. Morton, 369 F. Supp. 1359, 1381 (D.D.C. 1973).

90. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). *See also* Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 572-74, 587-91 (1823).

91. "We will not enter into the controversy," wrote Chief Justice Marshall, "whether agriculturalists, merchants and manufacturers have a right, on abstract principles, to expel hunters from the territory they possess . . . ." *Johnson*, 21 U.S. (8 Wheat.) at 588. The same statement, in the form of a rhetorical question, is found at Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 543 (1832). The statement refers to the argument that those who labor and make land fruitful have a right to take land from nomads, who, because they have not made the land productive, have no real property right. *Johnson* 21 U.S. (8 Wheat.) at 567, 569-70 (argument of defendants).

92. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 591 (1823). See *supra* note 89 and accompanying text.

93. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-61 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 574, 587-88, 591-92 (1823).

94. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

Like the "three-fifth compromise,"[95] the guardianship theory was a compromise of incompatibles. It was forged from two contradictory legitimations of power: conquest and natural rights. It asserts both the superior power of the conqueror-discoverer, and the superior's obligation to exercise it in the interests of the inferior, recognizing, within practical limits, rights of the inferior. Therefore the doctrine can be used to serve each side of the contradiction that gave it birth: it has been used as a source of federal power against both states[96] and Indian tribes,[97] and also as a source of Indian rights against the government.[98]

The doctrine describes a dependency relation between a partly self-governing community that lacks essential elements of sovereignty, and a theoretically benevolent superior power. The "guardianship," then, articulates an anomalous legal status for tribes.[99] Tribal status as a "domestic dependent nation"[100] or "quasi sovereign" is akin to the status of a pre-

95. The "three-fifths compromise" was the constitutional compromise between the Northern position that slaves, having no vote, should not be counted for purposes of representation, and the Southern position that slaves should be fully counted. The compromise, counting each slave as three-fifths of a person, was intellectually absurd but politically workable, at least for a time. U.S. CONST. art. I, § 2, cl. 3.

96. For example, in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), the doctrine was used to find that Georgia did not have the right to govern who could enter Indian territory. More recently, a court found that, acting under the guardianship duty, the federal government had protected native hunting in some legislation, and this preempted the field, preventing state regulation. People of Togiak v. United States, 470 F. Supp. 423, 428-29 (D.D.C. 1979).

97. *See, e.g.*, United States v. Sandoval, 231 U.S. 28, 46 (1913) (the Court, asserting that the United States had, as a "superior and civilized nation, the power and duty of exercising a fostering care and protection over all dependent Indian communities," affirmed the right of the United States to prevent liquor from being sold in Pueblo lands, even though the Pueblo community was owner in fee simple and had signed no treaty with the federal government); Lone Wolf v. Hitchcock, 187 U.S. 553, 565-67 (1903) (in a particularly high-handed opinion, the Court relied in part on the relation of dependency to justify federal power to abrogate unilaterally an Indian treaty); United States v. Kagama, 118 U.S. 375, 383-84 (1886) (the Court affirmed the federal government's assertion of jurisdiction over serious crimes committed by Indians on Indian reservations. "From 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.").

98. *See, e.g.*, Seminole Nation v. United States, 316 U.S. 286 (1942) (turning to a "well established principle of equity," the Court found the government liable in trust for money it paid out to tribal members who it knew were misappropriating funds); Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 113-14 (1919) (the Court stopped the Interior Secretary from disposing of Pueblo lands, on the grounds that the Secretary's duty was to regulate lands to benefit Indians, rather than to rob them); Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 254-57 (D.D.C. 1973) (the court found that the Interior Secretary had violated his trust duty to assure the maintenance of the water level in a tribal lake needed for tribal livelihood; the finding that the trust duty had been violated did not guarantee the water level to Indians, however.) *supp. op.* 360 F. Supp. 669, *rev'd on other grounds* 499 F.2d 1095, *cert. denied* 420 U.S. 962 (1975).

99. The position has been recognized as anamolous in numerous opinions. *See, e.g.*, United States v. Kagama, 118 U.S. 375, 381 (1886) ("[t]he relation of the Indian tribes . . . to the people of the United States has always been an anomalous one and of a complex character"); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 581 (1832) (McLean, J., concurring) ("the Indians sustain a peculiar relation to the United States"); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831) ("But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else."). The Court more recently discussed the status, justifying legislation that singles out Indians for special treatment against charges of race discrimination and unequal protection of the laws. Morton v. Mancari, 417 U.S. 535 (1974). It is probably accurate to say that the relation of Indians to the federal government is that of a colonized people to the colonial power, where the colonized and colonial power coexist within the same territory.

100. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

modern corporation with its usages and privileges founded largely on custom, but ultimately dependent on the grace of the sovereign.[101] Within a political system based on the social contract and abstract individual rights, tribes exist, in the words of Mr. Justice Johnson in 1831, "in a state of feudal dependence."[102]

The guardianship, then, describes the initial relationship between Indians and the national sovereign—it underlies all interaction between federal government and Indian tribes, preceding treaties and legislation that specify its terms in particular circumstances.[103] The underlying relationship gives rise to the obligation of government agents to be scrupulously fair in dealings with Indians and to the related Indian law principle of interpreting government dealings with Indians—treaties, legislation, administrative rules—favorably to Indians.[104] But only in some instances

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101. See, for example, the definitive work on the legal status of the corporation in old regime France, F. OLIVIER-MARTIN, L'ORGANISATION CORPORATIVE *de la France d'ancien regime* (Paris 1938).

102. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 27 (1831) (Johnson, J., concurring).

103. The guardianship, like the social contract theory, is a political theory explaining and describing the limits and the legitimacy of governmental authority. The theory is manifest in relations between Indian tribes and the government. Many cases affirm the principle that the general trust relationship underlies or permeates all relations between the federal government and Indians. *See, e.g.*, Morton v. Ruiz, 415 U.S. 199, 236 (1973); Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942); United States v. Sandoval, 231 U.S. 28, 46 (1913); United States v. Kagama, 118 U.S. 375, 384 (1886); Nance v. E.P.A., 645 F.2d 701, 711 (9th Cir. 1981) ("It is fairly clear that *any* Federal government action is subject to the United States fiduciary responsibilities toward the Indian tribes.") *cert. denied* 454 U.S. 1081 (1981); Eric v. Secretary of United States Dep't of Hous. & Urban Dev., 464 F. Supp. 44, 46 (D. Alaska 1978); Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238, 1243 (N.D. Cal. 1973) ("the United States has a solemn obligation to the Indian people"). It is this underlying relationship that the courts have referred to when using the guardianship to justify federal assertions of power over Indians. *See supra* note 97 and accompanying text.

The general guardianship relation is effectuated in documents that, for example, specify who is an Indian tribe to whom a duty is owed, and that provide for Indian services or set forth other particulars. Only some of these documents or combinations of them are interpreted to express, in effect, the sovereign's will to be held accountable as trustee. *See supra* notes 83-85 and accompanying text; *infra* notes 106, 108-19 and accompanying text.

104. *See* D. GETCHES, *supra* note 12, at 200-04 (discussion of canons of construction in Indian law).

In 1832, Justice McLean, concurring in Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832) said "The language used in treaties with Indians should never be construed to their prejudice. . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction." (McLean, J., concurring). Less poetically, a more recent court stated the same principle " [U]ndertakings with Indians are to be liberally construed to the benefit of the Indians." Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 256 (D.D.C. 1973).

With respect to principles of statutory construction in Indian law, see, for example, Eric v. Secretary of United States Dep't of Hous. & Urban Dev., 464 F. Supp. 44, 48 (D. Alaska 1978), where the court said "In construing the legislative history [of an act serving native Alaskans] ambiguities should be resolved in favor of the Natives."

For the duty to be scrupulously fair with Indians in administering Indian programs, see Morton v. Ruiz, 415 U.S. 199, 236 (1973) where, finding that an unpublished change in a regulation could not be applied adversely to an Indian, the court referred to the "overriding duty to deal fairly with Indians." *See also supra* note 77 and accompanying text.

The general guardianship principle that dealings with Indians are to be scrupulously fair and interpreted to benefit Indians is in some circumstances enforced strictly. Thus, in Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942), where the government held tribal funds, the Court, in one of the classic statements of the trust relationship said

> this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. In carrying

has the government consented to take on a trustee's duties and to be legally responsible to its wards. When the government holds and manages Indian property, ordinarily stating in treaties or statutes that it is holding the property in trust,[105] the analogy to a private trust is most apt, and since about 1934, courts have been willing in such circumstances to hold the government legally accountable in trust actions.[106] When courts find that the government has taken on a trusteeship, courts look beyond statutes to common law to spell out the trustee's duties.[107]

But, in 1980, in *United States v. Mitchell*,[108] where the question was the government's duty to manage timber on land allotted to individual Indians, the United States Supreme Court found no fiduciary duty in the

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> out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

105. According to Chambers, *supra* note 78, at 1213 n.1, the early treaties did not use the word "trust," but contained promises to "protect" the tribes, and it is from this language of protection that the guardian-ward relationship is thought to have arisen.

106. According to Hughes, *supra* note 85, at 461 n.6, "[t]he first damages judgment based primarily upon trust principles" rather than on statutory duties was in United States v. Creek Nation, 295 U.S. 103 (1934).

107. In Navajo Tribe of Indians v. United States, 624 F.2d 981, 989 (Ct. Cl. 1980) (citing Coast Indian Community, 550 F.2d 639, 652 (Ct. Cl. 1977), the court noted that where a trust relationship was established, with the government managing Indian property, the governmental actions are to "be 'judged according to the standard applicable to a trustee engaged in the management of a trust property.'" In Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238, 1243-48 (N.D. Cal. 1973), the court eschewed the terms of a statute and turned instead to the Restatement of Trusts to find that the standard of care of a trustee required that the government invest Indian funds at a higher rate of interest than that specified in the statute.

Noting that the "doctrine that the federal government stands in a fiduciary relationship to Native Americans has been a part of our common law since the early days of the Republic," Eric v. Secretary of United States Dep't of Hous. & Urban Dev., 464 F. Supp. 44, 46 (D. Alaska 1978), the Alaska court observed that once some treaty or statute set up an obligation, the obligation "is not limited by the statute . . . [but] by common law trust principles." *Id.* at 49.

108. 445 U.S. 535 (1980). The Court found that the government could not be held accountable as a trustee for its management of timber on Indian allotments, despite the facts that the allotments were on an Indian reservation, *id.* at 537, that the United States held trust title to the land, *id.* at 541, that it managed timber sales, *id.* at 545-46, and that the duty of a trustee to account for destruction or sale of timber has regularly been applied to the United States in its role as trustee for Indian lands. Navajo Tribe of Indians v. United States, 624 F.2d 981, 989 (Ct. Cl. 1980). The *Mitchell* Court found that the legislative intent of the Indian General Allotment Act (Dawes Act) of 1887, 25 U.S.C. §§ 331 *et. seq.* (1976) was that management of the land be put in the hands of the individual allottees and that the trust intended was thus a limited one. 445 U.S. at 543. Allotments are small farm-sized plots of land allocated to individual Indians under a plan to turn Indians into individual proprietors. *See* D. GETCHES, *supra* note 12, at 69-71 (abridging Otis, *History of the Allotment Policy: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73rd Cong., 2d Sess. 428-29 (1934)).

The *Mitchell* case is unusual in that three important factors which are most often found to lead to an enforceable trust duty were present: Indian property, explicit statutory language of trust, and an applicable, well established trust duty. The Court violated the Indian law canons of construction, *see supra* note 104 and accompanying text, by reading statutory language narrowly to the detriment of Indians, insisting that the duty to account for timber management be unambiguous.

The Court also found that the Tucker Act, 28 U.S.C. § 1491 (1976), setting up the court of claims, and the Indian Claims Commission Act, 28 U.S.C. § 1505 (1976) did not waive sovereign immunity for Indian trust claims. 445 U.S. at 538-40. Hughes, *supra* note 85, vehemently criticizes this conclusion, which could severely limit the accountability of the government to Indians. The Court said that it need not consider whether the Allotment Act itself waived sovereign immuabsence of explicit language unambiguously specifying the particular duty, despite the fact that under the statutory language, the United States held the property in trust. The *Mitchell* Court significantly relies on no Indian law precedent in support of the requirement of lack of ambiguity. Even though a trust obligation, as in this case, is ordinarily tied to some written documents, such lack of ambiguity is probably rare. Duties of the government are regularly derived from the duties of a trustee in an analogous private trust.[109] *Mitchell* therefore appears to be setting a stricter standard of explicitness to find a trust duty than required by earlier cases.[110] While the *Mitchell* result can be limited to claims for damages, as opposed to mandatory relief, and limited to the peculiar facts of Indian allotment, its reasoning may signal a tightening of requirements for holding the government accountable to Indians.[111] In fact, courts in the past have regularly

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nity, as the Allotment Act did not create any trust duty to manage timber for which the government would be liable, even if immunity were waived.

When the *Mitchell* case came back to the court of claims, the court concluded that certain specific statutes having to do with government management of forest property and timber sales created a fiduciary duty for whose breach Indians, if they proved their case, could recover. United States v. Mitchell, 664 F.2d 265, 269-73 (Ct. Cl. 1981).

The court of claims found that specific statutes gave consent to suit for illegally keeping Indian money or for misapplying Indian funds. *Id.* at 270-71. While this Note was in press, the United States Supreme Court affirmed the court of claims result. Although the Court did not overturn the earlier *Mitchell* decision, it made an about-face in reasoning, moving toward the position argued in this Note. United States v. Mitchell, 43 CCH S. Ct. Bull. P. B4256. Both *Mitchell* opinions were written by Justice Marshall.

The Court disavowed earlier *Mitchell* language which had suggested that the Tucker Act does not waive sovereign immunity, and held that the Tucker Act gives sovereign consent to sue for claims that come within its jurisdictional terms, including Indian claims for damages in breach of trust. *Id.* at B4267. The Court affirmed the court of claims conclusion that the language of a number of statutes and regulations establishes a fiduciary duty over the Indian timber, *id.* at B4275, and stated additionally that "a fiduciary relationship necessarily arises when the Government assumes such elaborate control over . . . property belonging to Indians," *id.* at B4276, even in the absence of explicit trust language. Where a trust exists, the government is "naturally" accountable in damages for breach of duty. *Id.* at B4277. To support its reasoning, the Court turned to Indian law precedents, including Navajo Tribe of Indians v. United States, 624 F.2d 981 (Ct. Cl. 1980), discussed *infra* in note 110, the common law of trusts, see *infra* notes 109-115, and the general trust relationship between the federal government and Indians.

This suggests that the earlier *Mitchell* case should be read narrowly, and that its apparent requirement that a trust duty be explicit and unambiguous be ignored. The dissent, by Justice Powell, joined by Justices Rehnquist and O'Connor, sees the *Mitchell* decision as, in effect, overruling the first, *id.* at B4283, B4284, and as creating a presumption applicable to Indian affairs that the United States is liable in damages for departures from rules that govern private fiduciaries. *Id.* at B4281.

The following paragraph of this Note, *infra* notes 109-119 and accompanying text, should be read in light of this recent development, which took place while the Note was in galleys.

109. *See supra* note 107 and accompanying text.

110. *See supra* note 108 and accompanying text. In Navajo Tribe of Indians v. United States, 624 F.2d 981, 987 (Ct. Cl. 1980), in a decision announced one month after *Mitchell*, the court stated that where the federal government has control over federal monies or property, "the fiduciary relationship . . . exists (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection." The court cited a long list of authorities, including all those United States Supreme Court cases cited *supra* note 98. It said "insistence on express . . . terms of trust is . . . irrelevant to these claims." 624 F.2d at 988. The thrust of this case is clearly contrary to that of *Mitchell*, although *Mitchell* could be distinguished as involving a situation where the federal government did not intend real control over property. The *Navajo Tribe* court agreed that where the government was not holding or controlling Indian property, then there must be a more explicit authorizing document. *Id.* at 987-88.

111. The reasoning of *Mitchell* and its interpretation of legislative history have been roundly

looked beyond explicit and unambiguous language—to "settled government policy,"[112] to legislative intent,[113] to well-established trustee duties,[114] and to combinations of these with written documents[115]—to find that the government has assumed a trustee's duties, duties it can be compelled to carry out, or duties for which it can be held accountable in money. While most legally enforceable trust relationships involve government management of Indian property[116] and damages claims, courts have also elaborated trusteeship beyond caring for property.[117] Some Alaska

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criticized. Hughes, *supra* note 85; Comment, *Whom Can Indians Trust After* Mitchell?, 53 U. COLO. L. REV. 179 (1981). Barsh, *U.S. v. Mitchell Decision Narrows Trust Responsibility*, 6 AM. INDIAN L.J. 2, 12-14 (Aug. 1980) agrees that *Mitchell* narrows the government's trust responsibility, but argues that it thus also narrows the government's trust powers, a result which should be welcomed by Indians who wish to restrict federal paternalism and to exercise more power over their own affairs.

112. Cramer v. United States, 261 U.S. 219, 229 (1923).

113. *See infra* notes 118-19 and accompanying text.

114. *See supra* note 107 and accompanying text.

115. *See supra* note 110 and accompanying text. As described in *supra* note 110, when the government controls Indian property, courts are most likely to look beyond the precise terms of the document authorizing control to the intent behind the words or to appropriate well-established trust duties. Inferring specific duties in this way has not always been limited to property holding. *See* cases cited *supra* note 98. A prime example of a court's piecing together documents, legislative intent, general guardian duties and judicially established principles to find a trust duty is Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D.D.C. 1973). The court found that the Secretary of the Interior violated his trust duty to protect the water level of a lake necessary to the tribal livelihood, by diverting water and pursuing a series of action contrary to the Indians' interests in the water. *Id.* at 254-58. Written documents included those setting aside the reservation and Interior Department rules recognizing a trusteeship duty on the part of the Secretary, *id.* at 254, 256 n.4, but no document made the Secretary explicitly responsible for tribal water. The *Winters'* doctrine, from Winters v. United States, 207 U.S. 564 (1908), established that tribes have rights to water sufficient to fulfill treaty purposes, even though treaties do not mention water. The *Pyramid Lake* case is somewhat different from the usual kind dealing with management of Indian property, as the Secretary, authorized to pursue other interests and policies besides those benefitting Indians, had been engaged in "balancing" the Indian interests against the others, 354 F. Supp. at 255-57, and was not precisely "managing" the water.

Pyramid Lake was considered significant by Chambers, as suggesting the principle that the underlying trust relationship, independently of any express provision, limits executive authority so as to affect adversely Indian trust property. Chambers, *supra* note 78, at 1234. Chambers suggested, as consistent with the reasoning of *Pyramid Lake*, that it is logical to presume that Congress intends the administration to perform duties attached to the trust responsibility strictly, until Congress expresses itself otherwise. *Id.* at 1234 n.100. *Mitchell* suggests the reverse: the presumption under *Mitchell* is that Congress intends that the administration not be held to a strict trust duty unless Congress explicitly and unambiguously expresses an intention otherwise. 445 U.S. at 542. *See also supra* note 108 and accompanying text.

116. See *supra* note 110 and accompanying text.

117. Eric v. Secretary of United States Dep't of Hous. & Urban Dev., 464 F. Supp. 44, 49 (D. Alaska 1978) ("[t]he trust doctrine is not limited to situations in which the government is managing property owned by an Indian tribe"). For discussion of this and other Alaska cases interpreting trusteeship broadly to encompass duties beyond property management, see *infra* notes 118-19 and accompanying text. Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D.D.C. 1973) (discussed *supra* note 115) is taken to stand for the proposition that the United States has an enforceable trust duty beyond that of simple property management, a duty to maintain traditional Indian subsistence resources. People of Togiak v. United States, 470 F. Supp. 423, 428 (D.D.C. 1979).

Where nonproperty-management duties are at issue, there must be explicit statutory basis for the duty. Navajo Tribe of Indians v. United States, 624 F.2d 981, 987-88 (Ct. Cl. 1980). However, the degree of explicitness that has been required of the authorizing document has varied depending on the particular facts and the interpretive style of the court. So, in Gila River Pima-Maricopa Indian Community v. United States, 427 F.2d 1194 (Ct. Cl.) *cert. denied*, 400 U.S. 819 (1970), the court rejected the claim that the general duty of protection creates any specific duties to provide services, or, having provided them, to provide them well. In the absence of any document specificases have even reasoned that if legislative consciousness of the guardianship duties accompanies the passage of a law serving Indians, the law creates a legally binding fiduciary obligation, even though the law itself contains no explicit trust language.[118] So, for example, because Congress was consciously enacting its trust duty when it passed housing legislation for Alaska natives, a district court found that the government could be held responsible as trustee for poor quality housing built under the legislation and could be made to improve the standards of the housing.[119]

Under the reasoning of the Alaska cases, it can be argued that the American Indian Religious Freedom Act creates an enforceable trust duty, but under the *Mitchell* requirement of a lack of ambiguity, the Act would create no such duty. While Congress passed the Act conscious of the government's responsibility for protecting traditional Indian religion against the depradations created by its own regulations, the Act lacks explicit trust language. In addition, the framing of the Act as a policy rather than as a protection per se, and the final willingness of members of Congress to agree that the Act did not override existing laws[120] indicate that Congress did not intend absolute protection of Indian religious exercise at the expense of other policies. While agencies with multiple responsibilities can be charged with trust duties suitable to their responsibilities, still a duty of strict fiduciary loyalty permitting agencies entrusted with wide ranging

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cally setting up a trust to provide services, there was no trust duty. *Id.* at 1198. By contrast, the court in *Togiak* interpreted specific legislation protecting native hunting in light of the trust duty to maintain tribal subsistence and way of life. 470 F. Supp. at 426-28. It then found that the statutes, although they do not themselves use trust language, carried out the general guardianship obligation by imposing an enforceable duty to protect native hunting. *Id.* at 428. *See also infra* notes 118-19. Thus the reading of statutes depends in the first place on an interpretation of the government's trust duties.

118. First, the Alaska cases recognize that the United States has a general trust relation to Alaskan natives, despite the absence of treaties or reservations, Eric v. Secretary of United States Dep't of Hous. & Urban Dev., 464 F. Supp. 44, 46-47 (D. Alaska 1978) (citing Joint Tribal Council of Passaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975), and despite the settlement of land claims, which was interpreted to have left intact the "obligation of the United States as trustee to protect the subsistence of the Eskimos." Adams v. Vance, 570 F.2d 950, 953 n.3 (D.C. Cir. 1978). In People of Togiak v. United States, 470 F. Supp. 423 (D.D.C. 1979), the court reasoned that there was a general obligation to "protect the way of life of the Alaskan natives," *id.* at 426, "so to regulate as to protect the subsistence resources of Indian communities," *id.* at 428, and "to preserve such communities as distinct cultural entities against interference by the States." *Id.* It found that Congress passed a series of statutory exceptions to environmental legislation exempting native Alaskans from hunting proscriptions in conscious fulfillment of the trust responsibility. *Id.* Thus with the statutory exemptions, Congress took on a trust duty to protect native hunting, preempting the field, and preventing the administration from turning over native hunting regulation to the state of Alaska. In North Slope Borough v. Andrus, 642 F.2d 589, 612 (D.C. Cir. 1980), which followed *Mitchell*, 445 U.S. 525 (1980) (discussed *supra* note 108 and accompanying text), the court commented that *Togiak* was "arguably consistent" with *Mitchell*, as long as the trust duty was confined simply to the statutory provisions.

Reasoning similar to that in *Togiak* was used in Eric v. Secretary of United States Dep't of Hous. & Urban Dev., 464 F. Supp. 44 (D. Alaska 1978) (discussed *infra* note 119 and accompanying text), where the court found that the legislation imposed the specific trust relationship with respect to housing, *id.* at 48, and the duties were limited by common law principles, *id.* at 49.

119. Eric v. Secretary of United States Dep't of Hous. & Urban Dev., 464 F. Supp. 44, 48 (D. Alaska 1978). The court found that Congress had waived sovereign immunity for relief other than money damages so the plaintiffs could get a declaratory judgment that the government had violated its trust duty and could get forms of equitable relief that were not essentially claims for money judgment. *Id.*

120. *See supra* note 55 and accompanying text.

public duties to make decisions adverse to Indians only when their choices could pass fiduciary standards would make the kind of "balancing process" intended by the Act difficult, if not impossible.[121]

Congress, then, did not appear to intend that the Act impose a fiduciary duty enforceable in a trust action. However, Congress was consciously fulfilling its responsibility for creating Indian policy that, consistent with the guardian duty as conceived by John Marshall, respected the "inherent" or natural rights of Indians.[122] Congress' consciousness of its special duty to Indians was evident in the tone of the Senate hearings, in the language of the Act's sponsor,[123] and in the acknowledgment of past governmental infringements of Indian religious exercise.[124] It was evident in congressional concern to take responsibility by stating a policy specifying the types of practices that should be protected, so that the interpretation of Indian religious rights would no longer be left up to separate agencies.[125]

Thus, any reading of the American Indian Religious Freedom Act must take into account the general framework of relations between government and Indians and the congressional sense of unique responsibility for Indians; while the Act may not create a duty enforceable in a trust action, it still creates enforceable duties. The law must still be read as an act of guardianship.[126] To read the Act as a general act of guardianship means to interpret the words in light of the legislative intent to benefit Indians.[127]

First, the law should be read to impose not merely minimal procedural requirements, but to mandate that agencies carry out their policies in ways that do not restrict Indian religion when the agencies can do so without seriously sacrificing other goals. That is, the Act would require a search for less restrictive, but practical, alternatives. Second, the law's coverage should be read broadly: Congress enumerated three types of practices but stated that protections were not to be confined to those enumerated. The law should be read to cover the widest range of practices and to require effective protections. Third, the constitutionality of the Act's protections should be seen in the context of the whole guardian relationship between the federal sovereign and the dependent semi-sovereign tribes. The guardianship is not simply a moral plea to the government: it

121. Although trust obligations have been imposed on agents charged with broad public duties that might conflict with Indian interests, *see* Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D.D.C. 1973) (discussed *supra* note 115), it seems unlikely that Congress intended under a statement of policy that the wide range of public officers affected by the American Indian Religious Freedom Act be accountable in trust. Rather, it appears more likely that Act imposes statutory duties that Congress intended to be construed in light of the general principles of guardianship and the canons of construction that are derived from them. *See supra* note 104 and accompanying text.

122. *See supra* notes 17, 65, 87-89, 92-93 and accompanying text.

123. *See supra* notes 38-40 and accompanying text.

124. *See supra* note 62 and accompanying text.

125. *Hearings*, *supra* note 10, at 1-2.

126. In a letter from former Attorney General Griffin Bell to former Interior Secretary Cecil Andrus, the Attorney General wrote: "we must . . . take into account the rule of construction now firmly established that Congress' actions toward Indians are to be interpreted in light of the special relationship and special responsibilities of the government toward the Indians." Letter from Attorney General Griffin Bell to Interior Secretary Cecil Andrus, May 31, 1979, *reported in* 6 INDIAN L. REP. M-19 (1979). *See also supra* notes 103-04 and accompanying text.

127. *See supra* note 104 and accompanying text.

is based in part on a recognition of tribes as self governing, though dependent, communities, with rights and privileges. In the American Indian Religious Freedom Act, Congress gives statutory recognition to customary tribal rights.

D. *Judicial Interpretation of the American Indian Religious Freedom Act*

The American Indian Religious Freedom Act is now being interpreted by the courts.[128] Because it was designed to state policy for the executive branch, the Act will almost certainly have its greatest effect in the administrative process. Administrators and Indian groups can be expected to bargain and reach solutions accommodating Indian religious activity.[129] One lawyer has recommended that lawyers representing Indians should stay in the background during such bargaining, because Indians may be more effective and administrators more flexible when the Indian requests are not placed in a legalistic, adversarial context.[130]

However, some Indian religious requests have reached the litigious stage, where lawyers and legal arguments have come to the foreground. As expected,[131] Indian claims under the Act have been made in conjunction with claims to free exercise of religion;[132] any devotional practice protected by the Act is arguably also protected by the free exercise clause.

In one case, plaintiffs have even argued that the Act adds nothing to the free exercise clause;[133] others have contended that the Act provides distinct protections for Indians.[134] Indian plaintiffs have insisted that the

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128. In addition to its use in the cases discussed, the Act has been used in other situations. For example, in 1981 a dormitory counselor in an Indian school had his physical examination form filled out by his medicine man, Mr. Richard Two Dogs. The Director of the Office of Indian Education Programs found that rights under the American Indian Religious Freedom Act were not violated as "The employee . . . has always the option of a joint examination by a Spiritual Leader and Physician, if he so desires, so long as he/she submits a properly completed medical form . . . signed by a physician." Letter from Earl Walker, Director of the Office of Indian Education Programs, to Gay Forrester, Apr. 1, 1981, *reported in* 8 INDIAN L. REP. 5034 (1981). Also in 1981, the National Endowment for the Humanities announced a code of ethics, based in part on the Act, for researchers conducting studies of Native Americans. The code requires that researchers try to engage the advice and agreement of the community before embarking on a project, and that researchers reflect on the repercussions of their research and its probable impact on the subject of study. ANTHROPOLOGY NEWSLETTER 1, 3 (No. 8 1981). In 1979, in United States v. Buerk, No. CR77-121 (N.D. Ohio Jan. 16, 1979), the court relied on the Act to dismiss a case against a nonIndian, an accepted participant in most ceremonies of the Native American Church, who possessed parts of birds which were protected endangered species. 6 INDIAN L. REP. F-66 (1979).

129. Some of the accommodations made during the administration of President Jimmy Carter are reported in the administrative TASK FORCE REPORT, *supra* note 9.

130. John MacKinnon, Attorney for Navajo Medicinemen's Association, Panel discussion on the American Indian Religious Freedom Act, (National Lawyers' Guild Convention, Santa Fe, New Mexico (Feb. 20, 1982)).

131. *See supra* text accompanying note 41.

132. Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981); Sequoyah v. T.V.A., 620 F.2d 1159 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980); Fools Crow v. Gullet, 541 F. Supp. 785 (D.S.D. 1982), *aff'd*, No. 82-1852 (8th Cir. May 10, 1983); Hopi Indian Tribe v. Block, 8 INDIAN L. REP. 3073 (D.D.C. 1982), *aff'd* No. 81-1905 (D.C. Cir. May 20, 1983); Northwest Indian Cemetery Protective Ass'n v. Peterson, 552 F. Supp. 951 (N.D. Cal. 1982). An exception is New Mexico Navajo Ranchers Ass'n v. I.C.C., 702 F.2d 227 (1983). *See also infra* notes 144-79 and accompanying text.

133. *See infra* text accompanying notes 165-66.

134. *See infra* text accompanying notes 175-76; *see also infra* text accompanying notes 245-59.

Act must be interpreted in light of the guardian relation,[135] one arguing that failure to abide by the Act is a breach of trust.[136] Courts in turn have raised the spectre of religious establishment, suggesting that any special protection of Indian religion that goes beyond free exercise requirements may constitute an establishment of religion.[137] But the courts for the most part have failed to examine seriously how the guardianship affects the issue of religious establishment. Thus, dispute about the Act has been inextricably intertwined with dispute about the parameters of the first amendment religious guarantees.

In four significant cases interpreting the Act, Indians have claimed that development on federal land has infringed on Indian religious practices. In two, *Sequoyah v. T.V.A.*[138] and *Badoni v. Higginson*,[139] litigation had begun long before the Act was passed, and the statutory claim was a late addition to what was basically a constitutional argument. In two other cases, *Hopi Indian Tribe v. Block*[140] and *Northwest Indian Cemetery Protective Association v. Peterson*,[141] the Act was seriously argued by the plaintiffs. *Northwest Indian Cemetery Protective Association* was handed down after this Note was complete. Additionally, the *Hopi* appellate decision was announced while this Note was in press. As the argument of this Note was framed around *Sequoyah* and *Badoni* and the *Hopi* district court opinion, the later decisions will be discussed in an addendum. In a fifth case, *Fools Crow v. Gullett*,[142] Indians used the Act along with the Constitution to claim that officials of the state of South Dakota violated Indian religious rights on state owned land. The statutory claim was rejected primarily on the grounds that the Act did not cover state conduct, but the court went even further to suggest that the Act created no cause of action.[143] This

135. *See* Petition for Certiorari at 21, Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981). The petitioners said "Enacted in the exercise of Congress' unique fiduciary relationship with the Indian people, the Act mandates a policy of. . . . sensitivity to and accomodation of traditional Indian religions." *Id.* (citations omitted).

136. *See infra* text accompanying note 176.

137. *See infra* text accompanying notes 162-63, 165-69, 179-80, 184-94, 207-43; *see also supra* note 193.

138. 620 F.2d 1159 (6th Cir. 1980) *cert. denied*, 449 U.S. 953 (1980).

139. 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

140. Hopi Indian Tribe v. Block, No. 81-0481, Navajo Medicinemen's Ass'n v. Block, No. 81-0493, Wilson v. Block, No. 81-0558 (D.D.C., June 15, 1981) (unpublished memorandum opinion), *reported in part in* 8 INDIAN L. REP. 3073 (1981) [hereinafter cited to 8 INDIAN L. REP. 3073], *aff'd* Nos. 81-1905, 1912, 1956, 82-1705, 1706, 1725 (D.C. Cir., May 20, 1983). While this Note was in press the *Hopi* district court decision was affirmed. It will be discussed in an Addendum, *see infra* notes 245-253 & 259 and accompanying text. Subsequent references to the *Hopi* opinion are to the district court opinion unless otherwise specified.

141. Northwest Indian Cemetery Protective Ass'n v. Peterson, 552 F. Supp. 951 (N.D. Cal., 1982).

142. 541 F. Supp. 785 (D.S.D. 1982), *aff'd* No. 82-1852 (8th Cir., May 10, 1983). The appellate court stated that the lower court result was not clearly erroneous and was not mistaken as to law.

143. *Id.* at 793. It is not clear what the court meant by denying the "cause of action." Earlier cases did not question the right of an Indian plaintiff to sue for injunctive relief under the Act, or to base an appeal of an administrative decision on the failure of the government to pursue the mandated policy. Because the Act sets up a duty on the part of government officials, it would appear that the Act, in conjunction with 28 U.S.C. § 1361 (1976) permitting suit to require an official to perform his or her duty, would certainly create a "cause of action." During the course of Senate hearings, Senator Abourezk specifically indicated that the statute would create the basis for a lawsuit. *See supra* note 41 and accompanying text. It is possible that the court meant that

Note focuses on the first three cases involving religious use of federal land. In each, the dispute was resolved in summary judgment against the Indians. While the reasoning of each is not identical, together the cases spell a potentially restrictive reading of the Act.

In *Sequoyah v. T.V.A.*,[144] Cherokees were trying to prevent completion of the Tellico Dam on the Little Tennessee River, because its construction would result in flooding ancient Cherokee burial sites and sacred lands. The dam was substantially complete, but its construction had already been slowed by the court, because the flooding would destroy the home of the snail darter protected by the Endangered Species Act.[145] Congress then passed a statute authorizing completion of the dam, notwithstanding any statutes to the contrary.[146] Thus any arguments based on the religious freedom act were doomed to fail.[147] The district court had held that the Cherokees' lack of property interest in the Tellico area prevented the Cherokees from having any religious claim.[148] But the appellate court, referring to the Cherokee expulsion from that territory, followed by the "trail of tears" to Oklahoma, found that a property interest was not necessary for a cognizable first amendment claim.[149] The court however, held that the Cherokees' first amendment rights were not violated, as the site was primarily of historical interest to the tribe and was not now central to the religion.[150] It noted that the arguments of the plaintiffs had initially been directed to preservation of tribal culture, artifacts, and history rather than to preservation of tribal religion.[151]

In *Badoni v. Higginson*,[152] Navajos sued to gain protection for the Rainbow Bridge, a Navajo God, located in Rainbow Bridge National Monument, and surrounded by Navajo reservation. The Navajos wanted protection both for Rainbow Bridge and for religious ceremonies held there.[153] As in *Sequoyah*, litigation began after major damage had been done to the sacred area. The federal government had constructed a dam creating Lake Powell and, according to the plaintiffs' undisputed claim,

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the statute created no cause of action against state officials, or that it created no cause of action for damages; the plaintiffs were asking for damages under 42 U.S.C. § 1983 (1976). 541 F. Supp. at 793. The court may have been asserting that the Act created no cause of action as it is "merely a statement of . . . policy," and is totally encompassed by the first amendment. *Id.* As the ostensible lack of a "cause of action" was an alternative basis for denying relief, it can be read as dictum. But it is an ominous sign for those who thought that Congress intended that the Act have some impact on protecting Indian religious practices.

144. 620 F.2d at 1160.

145. *Id.* at 1161 (referring to the Endangered Species Act, 16 U.S.C. §§ 1531-43 (1976 & Supp. V. 1982)).

146. Energy and Water Development Appropriation Act, Pub. L. No. 96-69, 93 Stat. 437 (1979).

147. As a practical matter, given the state of construction and the clear statement of congressional intent to finish the dam, an argument based on the first amendment, unless extraordinarily powerful, was also doomed to fail.

148. Sequoyah v. T.V.A., 480 F. Supp. 608, 612 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir.) *cert. denied* 449 U.S. 953 (1980). *Also see infra* note 158 and accompanying text.

149. 620 F.2d at 1164. The court also noted the unique nature of the religion. *Id.*

150. *Id.*

151. *Id.* at 1164-65.

152. 638 F.2d at 175-76.

153. *Id.*

drowning plaintiffs' gods.[154] The diversion of water provided easy access to Rainbow Bridge by boat, and the park service permitted concessionaries to run a tour boat service, complete with alcoholic beverages, to the monument.[155] The Navajos claimed that drunken tourists throwing beer cans desecrated the area, violating Navajo first amendment rights.[156] Just as in the Tellico dam case, the district court had found that the plaintiffs had no first amendment claim where they had no property interest,[157] but the appellate court agreed with the Indian plaintiffs that a property interest was not essential to claim a first amendment right to a sacred place.[158] Without questioning the sincerity of the religious claims,[159] however, the appellate court found that the government interest in maintaining the level of Lake Powell was compelling, outweighing the Navajo interest in the drowned Gods or in access to the site now covered by water.[160] As to the issue of desecration by tourists, the appellate court found no first amendment infringement, for it said Indians were neither compelled to violate tenets of their religion nor prohibited from religious exercise.[161] Therefore, any attempt either to prevent tourist access or to regulate tourist behavior would constitute an establishment of a "religious shrine."[162] In effect, the court found that it would be unconstitutional to prohibit alcohol on the tour boat for the purpose of respecting the religious character of the monument.[163] The court found that the American Indian Religious Freedom Act was not violated because the Indians were not denied access—they had not requested and thus had not been denied a permit to conduct private off-hours ceremonies in the area.[164]

Interestingly, the *Badoni* plaintiffs themselves had provided some fuel for the court's reasoning. The plaintiffs asserted that the religious freedom act only effectuated the constitutional guarantee, and that if the Act were

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154. *Id.* at 176, 177.

155. *Id.* at 175.

156. *Id.* at 177-78.

157. Badoni v. Higginson, 455 F. Supp. 641, 644-45 (D. Utah 1977), *aff'd*, 638 F.2d 172, (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981). This justification for a lack of a religious right was somewhat disingenuous as the area had been Navajo territory, recognized as such by the federal government. The government took a portion of the territory, and then gave it back, except for the Rainbow Bridge Monument area now surrounded by Navajo reservation; Navajos continued to worship in the monument area during all the changes of ownership. Appellant's Brief at 4-5, Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981). Grounding an Indian religious right on a property right is somewhat disingenuous in any case, because Indian property rights are so dependent on the government.

158. 638 F.2d at 176.

159. *Id.* at 177 n.4.

160. *Id.* at 177. If the court had taken the religious claim seriously, it would have been far more difficult for it to have decided with such ease that the government's interest was compelling and outweighed the Indian religious interest. To drown a God is seriously to impair a religion. The claim was undoubtedly novel to the court, and assessment of such a claim would be difficult for a judge who thinks in terms of Judeo-Christian theology with its transcendant deities.

161. *Id.* at 178.

162. *Id.* at 179.

163. *Id.* at 179-80.

164. *Id.* at 180. In an enigmatic phrase, referring to the Act, and to proposed Grand Canyon Park guidelines prohibiting entry on sacred religious Indian sites, the Court said "But we do not have before us the constitutionality of those laws or regulations . . . ." *Id.* This appears to cast doubt on the constitutionality of accommodating Indian religion, as the plaintiffs noted. Petition for Certiorari at 21.

interpreted to do more, it would raise a problem of establishment of religion.[165] The plaintiffs rested their entire argument on the constitutional right to freedom of religion, and used the Act, which it said embodied Congress' views of Indians' first amendment rights, to support their view that Indians have a constitutional right to worship at traditional sacred sites on government owned property.[166] The court accepted the plaintiffs' reasoning that to require any protection beyond that mandated by the free exercise clause of the Constitution would be an establishment of religion.[167] But the court disagreed with the plaintiffs about the breadth of the protections the Constitution mandates. The court in effect still tied its analysis of religion to the issue of property rights: because the monument area is government property dedicated to public use, any government act beyond simply permitting Indian access to sites would constitute an establishment of religion.[168] Any action depriving the public of its "normal use" to protect Indian religion would fail the establishment test, as it would not have a secular purpose and primary effect.[169]

The court's conception of what creates an establishment of religion would narrow the statutory rights guaranteed by the American Indian Religious Freedom Act to the most minimal rights of access and ceremonial worship. Under this reasoning, the administrative accommodations intended by Congress under the religious freedom act would be unconstitutional, as any agency choice made with the intent to protect Indian religion at the expense of some other public interest would establish religion. Indian religious interests constitutionally could not be "weighed in" in the "administrative balancing process."

The Arizona Snow Bowl case, *Hopi Indian Tribe v. Block*,[170] pitting Hopis, Navajos and environmentalists against downhill skiers was the first brought after passage of the American Indian Religious Freedom Act. The Hopi Tribe, the Navajo Medicinemen's Association, and some local non-Indian residents participated in administrative hearings to convince the Forest Service not to expand the Arizona Snow Bowl skiing facilities near Flagstaff, Arizona, and later appealed the administrative decision.[171] The religious freedom act was used in the decisionmaking process itself, rather than after the fact, as in *Sequoyah* and *Badoni*, to roll back government action. Traditional Indian leaders spoke at hearings, and the impact

165. Appellants' Reply Brief at 13. Appellants also suggested that if the Act protected more than that required by the first amendment, it would raise equal protection problems. *Id.*

166. *Id.* at 12-13.

167. 638 F.2d at 178-79. *See supra* notes 162-63 and accompanying text.

168. 638 F.2d at 178-79.

169. *Id.* at 179. The court oddly elevated the tourists' right to visit the monument to the level of a public right to exercise free speech and to assemble in city streets and parks. *Id.*

170. 8 INDIAN L. REP. 3073 (D.D.C. 1981), *aff'd* No. 82-1852 (8th Cir. May 10, 1983); *see supra* note 140 and accompanying text, and *infra* notes 245-46, 250-52 and accompanying text for subsequent history of this case.

171. U.S. Dep't of Agri., Forest Serv., Chief's Decision on Request for Administrative Review of Southwestern Regional Forester's Decision Involving Arizona Snow Bowl Skiing Facilities and the Snow Bowl Road, Coconino National Forest (Dec. 31, 1980), *reported in part in* 8 INDIAN L. REP. 5011 (1980) [hereinafter *Chief Forester's Decision*]. The Chief Forester's decision restored a 1979 decision of the Forest Supervisor, conditionally authorizing construction for the expansion of facilities, and reversed a 1980 decision of the Regional Forester. *Id.* at 5014.

on Indian religion of each alternative course of action was categorized as a "social impact" in the environmental impact statement.[172] The Indians contended that the peaks were themselves holy, and that government development of the area was desecration.[173] The environmental impact statement concluded that while expansion of the ski area would indeed have a largely negative impact on Indian religious practices, the religious rights were not so seriously infringed as to inhibit the other policy goals of the Forest Service, in particular, the development of a recreational ski area.[174]

In appealing the Chief Forester's decision[175] to expand the Snow Bowl facilities, the Indians made three claims: a constitutional claim, a claim of statutory right, based on the American Indian Religious Freedom Act, and a claim, also based on the Act, that the government had a trust duty to protect Indian religious practices.[176]

The district court agreed with the Chief Forester that there had been no first amendment infringement because the Hopis and Navajos had not been compelled to violate religious tenets, and no specific religious practices were inhibited by the Snow Bowl expansion.[177] The court added, in dictum, that the Indians had not shown that the ski area was central or indispensable to the Indian religions, implying that the Indians would have to show that the ski area was central or indispensable before they suffered a constitutional violation.[178] Adopting the reasoning of *Badoni*, the court said further that to restrict the public's use of the mountain to facilitate Indian religion would be an unconstitutional establishment of religion.[179]

Turning to the American Indian Religious Freedom Act, the court stated that the Act's purpose was to bring policies and procedures in line

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172. Final Environmental Statement, Arizona Snow Bowl Ski Area Proposal, Coconino National Forest, U.S. Dep't of Agri. Forest Serv. 03-04-78-01 (Feb. 1979) (No. 03-04-78-01) [hereinafter *FES*]. The *FES* documents the consultations, *id.* at 164-74, and summarizes the evaluations of impact in a table. *Id.* at 132-34.

173. 8 INDIAN L. REP. at 3074.

174. *FES*, *supra* note 172, at 6. The draft report section dealing with Indian religion had been highly criticized by its readers. The expert analyst, a political scientist who was a downhill skier but no expert on Navajo or Hopi religion, had implied that the Indian religious claims were not serious, but were put forth for political purposes. *See, e.g.*, *FES*, *supra* note 172, at 246-48, 274-75. The final environmental statement excluded his analysis.

175. *Chief Forester's Decision*, *supra* note 171. A lower level decision fairly favorable to the Indian claims was overturned by the Chief Forester, who said that the Indians were not restricted in their extensive use of the area for traditional religious practices, and so suffered no deprivation under the Constitution or the American Indian Religious Freedom Act. *Id.* at 5012, 5014. The history of the litigation is described in detail in the appellate decision, No. 81-1905 (D.C. Cir., May 20, 1983).

176. *Hopi*, 8 INDIAN L. REP. at 3074, 3076.

177. *Id.* at 3074-75.

178. *Id.* at 3075. This is dictum because the court had already found there was no injury. See *infra* note 185 for treatment of the centrality issue by the *Hopi* appellate court.

179. 8 INDIAN L. REP. at 3075-76. The reasoning of *Badoni* and *Hopi* was followed by the court in Inupiat Community of the Arctic Slope v. United States, 548 F. Supp. 182, 189 (D. Alaska, 1982) where the court asserted that a "free exercise claim cannot be pushed to the point of awarding exclusive rights to a public area." The Inupiat had claimed an offshore area where the United States had leased oil rights, in part on the grounds that the area was necessary to support the community's hunting and gathering lifestyle, inextricably interrelated with their religious beliefs. 548 F. Supp. at 188-89.

with the constitutional injunction not to abridge religions, but to grant no "rights in excess" of the constitutional guarantee.[180] The Act, then, required only that agencies evaluate policies with the aim of protecting Indian religious freedoms, consult with Indian groups on proposed actions, and not deny Indian access, use of sacred objects, or freedom of ceremonial worship.[181] Because the Navajos and Hopis were consulted in the decisionmaking process, the court concluded, they had no grounds, under the law, to complain about the outcome.[182] The *Hopi* court also found that the Act imposed no fiduciary obligation, as the statutory language does not spell out any such duty.[183] The district court, then, found that the Act, in addition to imposing an obligation not to interfere with the enumerated practices, created basically a procedural duty, to take Indian religion into account in decisionmaking. The court did not find that the Act imposed a positive duty on an agency to accommodate Indian religion by pursuing alternatives less restrictive to religious practices.

The *Hopi* court's warning that any restriction of public use for the purpose of facilitating Indian religion would be a religious establishment is at odds with its easy acceptance of the Act's procedures. The procedures carried out by the Forest Service of consultation, weighing and balancing without any determination of whether a practice is constitutionally protected, would be pointless unless a possible outcome of the procedures would be to favor Indian religion at the expense of other interests.[184] There could be no balancing if Indian devotional practices could not constitutionally be weighed in the scale.

The thrust of these three decisions is to confine the American Indian Religious Freedom Act to the procedural requirements enumerated in the statute and to the protection of practices already protected by the Constitution. The *Hopi* and *Badoni* decisions imply that any further obligation to religion, at least where government property is involved, or public rights are affected, must of necessity be an unconstitutional establishment of religion. At the same time, the *Sequoyah* and *Hopi* opinions potentially narrow the range of religious practices that are constitutionally protected, by suggesting that the free exercise clause protects only those practices that are central and essential to a religion.[185] The *Badoni* court, while not in-

180. *Id.* at 3076.

181. *Id.*

182. *Id.*

183. *Id.* The Chief Forester had disavowed any trust responsibility whatsoever on the part of the Forest Service. *Chief Forester's Decision*, *supra* note 171, at 5013. The government did not even argue the Chief Forester's position, but simply stated that while the Forest Service does not have the same kind of direct relation to Indians that some agencies have, in any case the Service has furthered the religious interests of Indians. Memorandum of Points and Authorities in Support of Defendant's Cross Motion for Summary Judgment at 19, Hopi Indian Tribe v. Block, 8 INDIAN L. REP. 3073. The court also rejected an argument that an 1850 treaty or other statutes imposed a trust duty to protect Indian religion. *Id.* at 3076 n.5.

184. The *Hopi* court may have feared that the Indians' claims were exclusive, and threatened the concept that national forests be dedicated to multiple use. *See supra* notes 168-69 and accompanying text.

185. This position is central to *Sequoyah*. *See supra* notes 150-51 and accompanying text. The district court took this position in *Badoni*, 455 F. Supp. at 645-46, but the *Badoni* appellate court simply decided there was no infringement, so it did not need to consider the question of

sisting that a practice be central before it is protected, reads the clause equally narrowly to protect primarily against government action that compels violation of a religious belief, or directly prohibits a practice.[186] The courts' reasoning makes for a two-pronged attack on the Act: first, it narrowly conceives the range of practices within the ambit of the free exercise clause, and second, it expansively interprets the establishment clause as a prohibition against every protection of religion not absolutely mandated by the free exercise clause. It would constitutionally forbid the government to "preserve and protect" minor rituals or less than essential religious practices. The result is absurd as applied to Indians, especially those who have long lived or worshipped in territory now managed by the federal government, and whose traditional ceremonies could be effectively destroyed by the kinds of management policies the courts are asserting are constitutionally compelled.

Fools Crow v. Gullet,[187] involving Indians engaged in religious activities in Bear Butte State Park in South Dakota, displays the dangers of this logic. To demonstrate its accommodation to Indian religious exercise, the state gave evidence that it maintained the park not only to serve the public, but also to "serve and assist Indian worshippers," that it permitted worshippers various camping and hiking privileges not accorded the general public, that it instructed park employees to tell tourists not to interfere with Indian ceremonials and the like.[188] The court followed *Badoni* in its restrictive reading of the free exercise coverage. Noting in an apparent aside that the Indians have no property interest in the park,[189] the court said the state had no constitutional duty to provide the environment for carrying out religious practices, and, in effect, scolded the state for making

centrality. *See supra* note 161 and accompanying text. The position is dictum in the *Hopi* opinion, as, like the *Badoni* court, the court found that no practices were inhibited. *See supra* notes 177-78 and accompanying text. At the appellate level, *Hopi* plaintiffs argued that a religious practice need not be central to be protected, and that the government was impermissibly burdening religious belief by governmental action and desecration which would force Indians to modify their beliefs. Hopi Indian Tribe v. Block, No. 81-1905 (D.C. Cir. May 20, 1983). The appellate court, in its decision handed down while this Note was in press, stated that there is no protection against government action that may cast doubt on the veracity of religious beliefs. *Id.* Thus government land use can never burden freedom of belief, although it could unconstitutionally infringe on religious practice. *Id.* The appellate court agreed with the plaintiffs that theological centrality was not necessary for a practice to be protected, but said the earlier cases were being misread to require centrality. *Id.* The proper test, according to the court, was whether the government land in question was essential to some religious practice. It held that Indians "seeking to restrict government land use in the name of religious freedom must, at a minimum, demonstrate that the government's proposed land use would impair a religious practice that could not be performed at an other site." *Id.* It found that this minimum was not demonstrated. *See* discussion *infra* note 199. The court explicitly declined to follow cases which seemed to hold that the government's property rights could not be superseded by free exercise rights of Indians. No. 81-1905 (D.C. Cir. May 20, 1983). The court also specifically declined to reach the question whether granting the Indians the requested relief would be an establishment of religion. *Id.* The court, then, did not foreclose the possibility that protection of Indian religion could raise establishment problems, but it did not wish to raise the establishment spectre.

186. 638 F.2d at 178. The court also noted that some claims challenge government action that conditions a right on renunciation of a religious practice. *Id.* This is a kind of government compulsion to violate religious tenets. *See supra* note 161 and accompanying text.

187. 541 F. Supp. 785, 787-89 (D.S.D. 1982), *aff'd* No. 82-1852 (8th Cir.) May 10, 1983).

188. *Id.* at 789.

189. *Id.* at 791.

so many accommodations to Indian worshippers, warning that the "government risks being haled into court by others who claim that the . . . rights of the general public are being unduly burdened, or that state government has become excessively entangled with religion . . . ."[190] The court scolded the state for pursuing precisely the kinds of practices the American Indian Religious Freedom Act was designed to promote, and which Congress had hoped to encourage on the part of the states, as well as the federal government.[191]

In sum, the logic of this two-pronged attack, if applied consistently, would effectively nullify the intent of Congress in passing the American Indian Religious Freedom Act. The practices Congress intended to protect, at least practices having to do with government property—the gathering of healing plants, for example, or access to sacred sites—could only be protected after a determination that they were central and essential to an organized community religion. Congress clearly did not envision that a determination of centrality take place before an agency could decide to accommodate religious practices. The courts themselves may not have intended to take their argument so far,[192] but their logic could lead them to this position.

The critical issue is establishment. Congress' intent in the religious freedom act to protect a wide range of religious practices can be carried out even if those practices are not absolutely protected by the free exercise clause, but only if the Act's protections do not constitute an establishment of religion. The courts have misconstrued the constitutional limits to government action accommodating Indian religion because they have failed to look at the historic legal relationship between the federal government and Indians. When the issues are recast as issues in Indian law, and seen from the perspective of the fiduciary relationship of the government to Indians, including the peculiar legal status of Indian tribes the guardianship embraces, then the supposed constitutional barriers to carrying out congressional intentions disappear.[193]

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190. *Id.* at 794. The *Crow v. Gullett* result was recently affirmed in the 8th Circuit, see *supra* note 142, at nearly the same moment that this reasoning was criticized by the D.C. Circuit in the *Hopi* appellate decision, No. 81-1905 (D.C. Cir., May 20, 1983).

191. *Hearing, supra* note 10, at 135. In other words, the Act was designed in part to create a federal duty the court denied on the part of the state—the duty to provide the environment for carrying out religious practices. 541 F. Supp. at 794.

192. The *Badoni* appellate court appeared to want to extend its logic about establishment to find that the American Indian Religious Freedom Act imposed unconstitutional requirements. *See supra* note 164, 168-69 and accompanying text. However, the *Hopi* court, in adopting the *Badoni* reasoning, did not appear to intend this result. *See supra* note 184 and accompanying text.

The *Hopi* appellate decision, announced while this Note was in press, declined to take the logic of the argument this far. No. 81-1905 (D.C. Cir., May 20, 1983). The court accepted the procedures without apparent concern that the procedures could lead to an unconstitutional deference to Indian religion. *See supra* note 185 and *infra* discussion in text and accompanying notes 251-533. The procedures were accepted in the same manner in New Mexico Navajo Ranchers Ass'n v. I.C.C., 702 F.2d 227, 231-32 (D.C. Cir., 1983), handed down while this Note was in press, and in Northwest Cemetery Ass'n v. Peterson, 551 F. Supp. 951, 954, 957 (1982). These cases are discussed in the addendum. See *infra* notes 247-50 and 254-58 and accompanying text.

193. A recent case, *Peyote Way Church of God v. Smith*, 556 F. Supp. 632, 637-40 (N.D. Tex. 1983) has done just this: it has cast the issues as issues in Indian law, and viewed them from the

II. The Constitutional Limits of the American Indian Religious Freedom Act

A. *Prong I: Free Exercise and the Problem of Centrality*

The first prong of the courts' two-pronged attack on the religious freedom act is the suggestion that for a practice to be protected under the free exercise clause it must be central to a religion or a matter of "deep conviction, shared by an organized group and intimately related to daily living."[194] The test was developed in *Wisconsin v. Yoder*,[195] where it was used to decide whether a practice, not manifestly religious, was nevertheless so essential to the religion that it was itself protected by the free exercise clause. In *Yoder*, the question was whether the Amish practice of taking children out of school at an early age could prevail against the state interest in education.[196] Leaving school at an early age was said to be necessary to the Amish way of life, which was in turn necessary to the religion.[197] But where a practice is unquestionably religious, where the practice is itself devotional, the *Yoder* analysis is not apt:[198] religious conduct constitutes an exercise of religion and is protected by the words of the first amendment. The only question then is whether the practice should be protected in the context of a particular conflict.[199]

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perspective of the historically unique legal status of Indians. *See infra* notes 260-66 and accompanying text.

194. Wisconsin v. Yoder, 406 U.S. 205, 216 (1972) cited in Sequoyah v. T.V.A., 620 F.2d at 1164, and Badoni v. Higginson, 455 F. Supp. at 645. The test of centrality or indispensibility is also used in Hopi Indian Tribe v. Block, 8 INDIAN L. REP. at 3075. *See supra* note 185 for a discussion of the rejection of the centrality criterion by the *Hopi* appellate court, and *infra* note 199 for its interpretation of "indispensibility."

195. 406 U.S. 205, 211-12, 215-19 (1972). This argument that the test is being applied inappropriately was made effectively by the *Badoni* plaintiffs, in their brief on appeal. Appellants' Brief at 10-12, 21-23. The Court of Appeals did not apply or even mention the *Yoder* or centrality test. Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980) *cert. denied*, 452 U.S. 954 (1981).

196. 406 U.S. at 207-13.

197. *Id.* at 209-13. Thus the way of life was specifically put in issue by the plaintiffs; it was not intended as a general test of religiosity.

198. Thus the test was not necessarily inappropriate in Sequoyah v. T.V.A., 620 F.2d 1159, 1162 (6th Cir. 1980), where there was a question whether a historical site was of contemporary religious significance and where the plaintiffs apparently made their original objection to Tellico dam on the grounds of injury to cultural heritage. In Hopi Indian Tribe v. Block, 8 INDIAN L. REP. at 3074 (D.D.C. 1981), however, no one alleged that the beliefs and practices involved were not religious. "Defendants . . . do not challenge the fact that the plaintiffs' religious beliefs are sincerely held . . . . Therefore, . . . the only real issue is whether there is a 'coercive effect of the enactment as it operates against the practice of [their] religion.' " *Id.* The centrality issue therefore should have been entirely irrelevant, as the court decided in *Hopi* that development of the ski area had no coercive effect on Hopi or Navajo religion. *Id.* at 3074-75.

199. An analysis under the free exercise clause commonly involves first, finding that there is a burden on religious conduct (the threshold test), second, applying a balancing test to ascertain whether the government interest is sufficiently great to outweigh the religious interest, and third, determining whether the government could attain its goals in an alternative, less restrictive way. To meet the threshold test, courts must find that the action is based on a belief that is indeed religious and is sincerely held. *See, e.g.*, *Badoni*, 455 F. Supp. at 645. Some courts, such as the *Sequoyah* appellate court, have used the centrality test at the threshold. 620 F.2d at 1164. Others, such as the *Badoni* district court, have asked the centrality questions more appropriately at the second step, to balance the severity of the religious burden against the importance of the government interest. 455 F. Supp. at 645-47. The court however asked the irrelevant question about whether the practices were essential to the way of life of an organized community, *see supra* notes 195-98 and accompanying text, and applied the test showing little understanding of the religion in question. The centrality question was also asked at the balancing stage in People v. Woody, 40

If the courts insist that a practice must be central to come within the ambit of the free exercise clause, the impact would be particularly severe on Indians. In the predominantly ritualistic and ceremonial religions of Indians, a wide range of actions is infused with spiritual meaning. By contrast, in mainstream faith-centered religions, devotional conduct is quite circumscribed, and government inhibition of devotional conduct is rare.[200] Litigation has centered around state-mandated conduct, such as saluting the flag or entering military service, that violated the religious conscience.[201] The wide-ranging Indian devotional activity has regularly con-

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Cal. Rptr. 69, 394 P.2d 813 (1966) (the California court found the use of peyote central to the Navajo American Church, and held it a protected religious practice). It is appropriately asked at the balancing stage; it is parallel to asking whether a government's interest is minor or compelling. One might be critical of the "ad hoc" balancing of religious and governmental interests, and urge that once the threshold test is met, and it is determined that there is a burden on religion, the government should have to demonstrate a compelling state interest. This method was followed by the court in Sherbert v. Verner, 374 U.S. 398, 406 (1963) (the court found that denial of unemployment benefits because of a religiously based refusal to work on Saturday violates free exercise of religion), rather than the more genuine balancing of *Yoder*. Perhaps courts are attempting to avoid the strictness of the compelling state interest test by inserting centrality in the threshold test. But in so doing, they remove noncentral practices completely from the ambit of first amendment protection; a genuine balancing in the context of a particular conflict would be both more logical and less destructive of religious practice. There is of course a danger in wooden application of the test, with central practices always receiving protection, but peripheral practices always being outweighed by governmental interests.

It is possible that the "centrality" requirement has been laid to rest by the recent appellate opinion in *Hopi*. *See* discussion *supra* note 185. However, that opinion announced another threshold test—demonstration that the government's proposed land use would impair a religious practice that could not be performed at any other site. Hopi Indian Tribe v. Block, No. 81-1905 (D.C. Cir. May 20, 1983). The court was explicit that this was a minimum requirement and might not be sufficient even to demonstrate that there was a burden on religion. *Id.* at n.5. Like the centrality requirement, this test would leave out of the ambit of any free exercise protection a vast range of devotional practice, unquestionably religious. It would seem more consistent with the meaning of "free exercise" to set forth a less onerous threshold requirement, which would leave Indian ritual practice on federal land almost completely unprotected, and instead genuinely balance interests. It is clear that it is difficult to work out a satisfactory free exercise analysis applicable to Indian ceremonial religion. *See infra* notes 200-03 224-29 and accompanying text. Thus it is essential, if Indian religion on federal land is to have any protection, to see that the American Indian Religious Freedom Act has a distinct function outside the rigid framework of first amendment rights. *See supra* note 68 and *infra* notes 202-04.

200. Also, because the country has been culturally Christian, and much of the organization of life—such as the Sunday day of rest and Saturday work day—has been structured around mainstream Christian practice, government regulation conflicts relatively rarely with Christian religious practice.

201. *See, e.g.* Wooley v. Maynard, 430 U.S. 705 (1977) (mandated slogan on license plate violated religious belief); United States v. Seeger, 380 U.S. 163, 166 (1965) (refusal to serve in military because of belief that occupies a place parellel to that of belief in God is protected as a religious belief by conscientious objector statute); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (compulsory flag salute violates religious belief); Torasco v. Watkins, 367 U.S. 488 (1961) (declaration of belief in God as a condition of being a notary public violates free exercise); Sherbert v. Verner, 374 U.S. 398 (1963) (refusal to work on Saturday because of religious beliefs is a bona fide religious practice; to use it as a basis for denying unemployment compensation violates free exercise). *Sherbert* is a case where religion conflicts with the structure of the work week. *See supra* note 199. Litigation, then, has tended to involve either state mandated conduct that would compel a person to violate a religious tenet, or state benefits or rights conditioned on a violation of a religious tenet. The religious practice in most cases is not manifestly religious, but related to religion through some religious belief, for example, that it is a sin to swear an oath to a secular power or to work on Saturday. By contrast, Indian ceremonies, like prayer, are themselves religious practice. Interference with Indian sacred locations or rituals may render religious powers inefficacious, but not compel a practitioner to act contrary to faith, nor turn the practitioner into a sinner. *See, e.g.*, *Hopi*, 8 INDIAN L. REP. at 3074, where one complaint was that

flicted with an extensive web of federal regulation. The American Indian Religious Freedom Act was designed to resolve the conflicts by protecting Indian practices wherever possible.[202] If the Act is confined to free exercise rights, and if free exercise rights are confined to central practices, then even the most minor government interest will prevail over the vast range of less-than-central Indian religious activities. It was precisely this kind of needless interference with Indian religion by government that inspired the Act.[203] By the same token, if the free exercise clause is read, as in *Badoni*, primarily to prohibit government compulsion to violate religious beliefs, burdens on Indian ceremonial life are left almost entirely out of the ambit of the free exercise clause—except where there is an outright prohibition. Congressional intent in passing the Act was to create an awareness that Indian sacred practices are indeed religious, to be accorded the same respect that other religions receive.

B. *Prong II: Establishment of Religion in All Protections Not Mandated by the Free Exercise Clause*

The courts then are interpreting the free exercise clause as applied to Indian religion far more narrowly than Congress did in the American Indian Religious Freedom Act. It is clear from the legislative history that Congress framed the Act as an interpretation and effectuation of the "inherent" and constitutional right to free exercise of religion.[204] The question then arises whether the Act's protections must be restricted to first amendment protections as the courts interpret the first amendment, or whether congressional intent to protect a broad range of Indian practices can be carried out. All branches of the government are charged with enforcing the Constitution. Congress is free to effectuate constitutional rights more broadly than a court, as long as congressional effectuation does not infringe other rights. As long as the Act's protections themselves do not violate the Constitution, the Act's coverage need not be confined by judicial construction of the free exercise clause, and Congress' intent to protect a wide variety of practices can be carried out.

But the judicial logic suggests that the Act's protections are indeed unconstitutional—on the grounds that any special protection of religion not mandated by the free exercise clause would unconstitutionally establish religion. The courts, in the words of the *Badoni* plaintiffs, are using the prohibition against establishment "to swallow up the freedom" that both the free exercise and establishment clauses were "meant to foster."[205]

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disturbance of the natural state of the mountain peaks causes the deity of the peaks to lose its healing power over the Navojos, and to fail to bring harmony and natural order into Navajo life. *Id.*

202. *See supra* notes 19-24, 62 and accompanying text.

203. *See supra* notes 19-24, 53, 60, 62 and accompanying text.

204. *See supra* notes 65 and accompanying text.

205. Petition for Writ of Certiorari at 17, Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981), calling attention to McDaniel v. Paty, 435 U.S. 618 (1978) for the principle that "goals of preventing church-state entanglement and religious establishment do not justify abridging religious freedom." In *McDaniel*, a Tennessee law excluding clergy from becoming legislators was held to violate religious freedom. 435 U.S. at 629.

The *Badoni* and *Hopi* courts concluded that any but the most minimal protection of Indian practices at the expense of public use in national forests or monuments would unconstitutionally establish religion.[206] Federal protection of the variety of practices the Act was intended to cover would, by this reasoning, be unconstitutional—and any notion that religion could be administratively balanced against other interests, as the Act supposed, would be erroneous.

C. *Protection of Indian Religion Poses No Threat of Religious Establishment*

It is the thesis of this Note that the American Indian Religious Freedom Act intends extensive protections of Indian traditional practices, whether or not those practices would necessarily be protected by the free exercise clause, as judicially interpreted, and that the Act's protections are not prohibited by the establishment clause. The courts' analysis of establishment is objectionable for three general reasons. First, the judicial logic does not square with the widespread practice of administrative accomodation to religion. Second, it fails to take into account the distinctive nature of Indian religion. Third, and most importantly, it ignores the complex and historically distinctive relationship between the Indians and the federal government.

1. *Existing Accommodation to Religion*

The courts' expansive view of establishment casts "under a cloud of constitutional doubt"[207] a vast range of government accommodations to religion, documented by the *Badoni* plaintiffs and *amici curiae*.[208] These accommodations have been made both at congressional and administrative levels. Congress has passed legislation exempting religious practitioners from conservation requirements, such as the exception to the crime of possessing eagle feathers,[209] and has passed numerous statutes guaranteeing religious rights to particular tribes in national lands.[210] It has even

206. Badoni v. Higginson, 638 F.2d 172, 179-80 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981) *aff'd* No. 81-1905 (D.C. Cir. May 20, 1983) (any exclusion of the public to insure privacy during religious exercise would deny the public's first amendment rights to assemble in a public place, and any regulation of tourist behavior would turn the bridge into a religious shrine, but Indians may, like the rest of the public, apply for an after-hours public assembly permit; Hopi v. Block, 8 INDIAN L. REP. 3073, 3074-75 (D.C.C. 1981) (exclusion of tourists to aid religious ceremonies would establish religion, but Indian access and ceremonies without government interference may be permitted); *see also* Crow v. Gullet, 541 F. Supp. 785, 794 (D.S.D. 1982 *aff'd* No. 82-1852 (9th Cir. May 10, 1982). The *Hopi* appellate court declined to consider the issue of establishment, No. 81-1905 (D.C. Cir. May 20, 1983).

207. Petition for Writ of Certiorari at 21, Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

208. *Id.* at 21-23; Petition for Writ of Certiorari *Amici Curiae* Brief at 7-11, 7-11 nn.3-7, 1A-9A (Exhibit A lists churches in National Park System areas).

209. 16 U.S.C. § 668(a) (Supp. V 1981).

210. Petition for Writ of Certiorari at 21-23 (citing, for example, 16 U.S.C. § 228i(c) (1976). Section 228i(c) ensures Havasupai Indian access to sacred sites in Grand Canyon National Park. The Havasupai live in the Park. Access to some areas of the park is exclusive to particular groups of Indians.

reconveyed public land of religious significance to Indians[211]—thereby permanently sacrificing public rights in the land for the benefit of Indian religion. In addition, the National Park Service manages about 121 church properties.[212] Some, such as the Old North Church, are of historical interest; a few are Indian churches; and others are maintained for the convenience of tourists.[213] Presumably all these churches engage in religious practices that receive governmental accommodation. It hardly seems reasonable that the courts would wish to invalidate all these longstanding accommodations of governmental policy to religion. Yet the courts' logic would force them to do so.

2. *Nature of Indian Religion—Nonproselytizing*

The courts' position that protection of Indian religion constitutes religious establishment fails to take into account the peculiar character of Indian religion as compared to religions of faith and doctrine.[214] The government's introduction to the Task Force Report, in a position taken up by the Navajo Medicinemen's Association, has argued in effect that government aid for Indian religion poses no establishment threat because of the unique character of Indian religion.[215] The argument is that because Indian religions are ceremonial, not doctrinal, they are not proselytizing, making no claims to ultimate truths that believers are obligated to spread. Therefore they have no impulse to impose the religion beyond the tribe, and so pose no threat of establishment. By contrast, Christianity has been devoted to conversion of the nonbeliever; the establishment clause was carved out of battles for power among Christians who asserted exclusive claims to truth.

The *Badoni* court did not look carefully at the nature of Navajo religion, and mischaracterized the Navajo's wish for solitude at Rainbow Bridge as a demand for reverence on the part of tourists.[216] The Navajos were not interested in inducing beer-drinking tourists to join the fold, nor in compelling a religious frame of mind, which would clearly have been unconstitutional. Rather, they were interested in preventing their ceremonies from being ruined. The establishment threat that so agitated the court was simply not present.

211. Pub. L. 91-550, 84 Stat. 1437 (1970) returned a sacred Blue Lake and surrounding area to the Taos Indian Pueblo for its religious purposes.

212. Petition for Writ of Certiorari, *Amici Curiae* Brief at 7 n.1, Exhibit A. Exhibit A is a list of all churches within the National Park System.

213. *Id.*

214. See *supra* notes 200-01 and accompanying text for discussion of how the courts' interpretation of free exercise coverage of religious practices would leave nearly unprotected Indian ceremonial and ritual life.

215. TASK FORCE REPORT, *supra* note 9, at 12. The argument is taken up by the Navajo Medicinemen's Association in their Statement of Points and Authorities, Affidavits and Exhibits In Support of Plaintiffs' Motion for Preliminary Injunction at 30, Hopi Indian Tribe v. Block, 8 INDIAN L. REP. 3073 (D.D.C. 1981) *aff'd* No. 81-1905 (D.C. Cir. May 20, 1983). It should be noted that the traditional religion of a number of Indian tribes in the southwest is Catholicism, which could pose some unique problems.

216. 638 F.2d at 179.

3. *Historic Relations Between the Federal Government and Indian Tribes*

By far the most important objection to the judicial reading of the establishment prohibition is that courts have failed to take into account the distinctive character and history of relations between the federal government and Indians.

a. *Entanglement*

A government action that in some way aids religion can ordinarily avoid prohibition as an establishment if it meets three criteria: if it (1) has a secular purpose, (2) has a primary secular effect, and (3) avoids "excessive entanglement" of the government with religion.[217] In the case of aid to Indian religion, the entanglement criterion can of course never be met, because the federal government is already thoroughly entangled in all of Indian life—including religion. The real question to the supporters of the American Indian Religious Freedom Act was whether the entanglement will be used to repress or to protect religion.[218] Because the government impinges on every facet of Indian life, failure to facilitate actively will often be to destroy. Under the courts' over-enthusiastic interpretation of establishment, Indian religion could be repressed as effectively as it was under the explicit policy to convert Indians to Christianity.[219] The judicial establishment analysis leads to an absurd result: Indians could have greater religious freedom if their practices were not accorded the legal status of religion, but were once again treated as pagan practices, superstitions, or mere rituals, "quaint" or "licentious." The government, after all, can legally accommodate "superstitious rituals" without danger of establishing religion.

In their petition for writ of certiorari, to which they added noted constitutional scholar Laurence Tribe, the *Badoni* petitioners pointed out that the government was not merely entangled, but had itself infringed Indian free exercise of religion.[220] They argued that if the government does not rectify the injuries it has caused, its actions are hostile to religion.[221] The

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217. Widmar v. Vincent, 454 U.S. 263, 271 (1981); Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); L. TRIBE, CONSTITUTIONAL LAW § 14-8, at 835 (1978). Laurence Tribe argues that if a governmental accommodation to religion, thus a potential establishment of religion, is at the same time "arguably" necessary to ensure the free exercise of religion, the free exercise claim should prevail against the establishment claim. He argued that if the accomodation does not prevail, in our society where government has vast entanglement in all areas of life, the result of the application of the establishment clause will be the suppression of religion. *Id.* at 822-24, 827-28. Examples of this kind of accomodation are permission for children to leave school for religious observances, provision for clergy in the military and in prisons, and indeed, maintenance of churches in the national parks and forests, *see supra* notes 207-12 and accompanying text.

218. *See supra* notes 19-32, 53, 62-65 and accompanying text.

219. *See supra* notes 12-13 and accompanying text. Conversion of the heathen to Christianity was one of the initial justifications for European domination over Indians. *See* Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 573, 576 (1823); *supra* note 86 and accompanying text.

220. Petition for Writ of Certiorari at 12. The addition of Laurence Tribe highlights the first amendment framework of the *Badoni* plaintiffs.

221. *Id.* at 12-13, 15-17, 23.

> [A] most decided hostility would mark an insistence on importing tourists to overrun public lands whose availability for worship has been all but destroyed by a flood of [the]

petition highlighted the disingenuousness of the government's stance: after having taken the sacred Rainbow Bridge area from the Navajos, the government then stood on its rights as property owner to refuse accommodation to the religious practices that had preceded its appropriation of the territory.[222] The petitioners argued that this is comparable to the government declaring the Mormon Tabernacle in Salt Lake City a national monument, and then managing it so the congregation is prevented from worshipping there.[223] After all, as the petitioners pointed out, the Rainbow Bridge is a religious shrine and it continued to be one through the changes in ownership.[224]

The Mormon Tabernacle example makes a basic argument applicable to cases of Indian access to sacred sites on federal property: when the government itself created the injury to religion, moderation of the injury would be the religiously neutral course. The government is in the hypocritical position of using the high principle of religious neutrality to support a hostile policy.

However, there is a critical difference between the Mormon Tabernacle example and Rainbow Bridge. The appropriation of the Rainbow Bridge area and partial submerging of the bridge is in some respects a more serious violation than appropriation of the Mormon Temple would be to the Mormon religion. The transcendent deity of Christianity and of other "world" religions can be worshipped in houses of worship whose locations are irrelevant.[225] Christian churches are theologically equivalent. Confiscation of a tabernacle will not destroy a personal or priestly communication with God, nor render a prayer inefficacious. But to Navajo medicinemen, deities inhabit specific locations.[226] To confiscate property has theological significance, as physical places are themselves sacred.

> Government's own making. Under the decision below, the more direct and substantial the Free Exercise violation, the more impotent the court to grant relief.

Id. at 16.

222. *Id.* at 15-17, 20, 24. *See also supra* note 157 and accompanying text. The movement of property back and forth between Navajos and the government is described in Appellants' Brief at 2-4. It points out that many of the Navajos had never accepted the validity of the cession of aboriginal lands. *Id.* at 4 n.5.

223. Petition for Writ of Certiorari at 20. One could take the comparison further, and imagine that the government permitted concessionnaires to sell alcohol nearby and was unwilling to prevent rowdies from throwing beer cans during services.

224. Although the government owned the rock formation, access was difficult until Lake Powell was formed. From 1909 through 1962, 23,890 tourists visited the bridge; in 1975 alone over 65,000 tourists visited. *Id.* at 5 n.3, (information derived from interrogatory responses by the National Park Service).

225. A Colorado court has recognized a religious right in a physical structure, a church threatened by condemnation, that was the birthplace of a religion. Pillar of Fire v. Denver Urban Renewal Auth., 181 Colo. 411, 509 P.2d 1250 (1973). More recently, a New Jersey court, citing *Badoni*, found that interest in the physical location of a church was not a religious interest, but a secular one. State v. Cameron, 184 N.J. Super. 66, 80-81, 445 A.2d 75, 83 (1982).

226. *See* K. LUCKERT, NAVAJO MOUNTAIN AND RAINBOW BRIDGE RELIGION (1977). This book was filed as an exhibit, in manuscript form, in the district court, and its conclusions were accepted as true by the court for purposes of summary judgment. Badoni v. Higginson, 455 F. Supp. 641, 645 n.8 (1977), *aff'd*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981). It was filed in published form, as Exhibit A to the Petition for Writ of Certiorari. Petition for Writ of Certiorari at 5 n.2.

b. *The Problem of Property*

Indian belief in the sacred character of physical places is precisely the problem for the first amendment analysis of Indian sacred sites. To most modern Americans, the tabernacle is easily identifiable as a house of religion: its religious purpose is manifest and singular; it appears useful only for a religious purpose. But in a modern industrial culture, where property is considered the basic resource to be exploited for the creation of value, the sacralization of a physical place is necessarily threatening. To recognize a religious right in a piece of land or body of water puts at risk other uses of physical places: farming, mining, industry, in fact, every kind of exploitation of land and water, from the construction of fast food chains to the development of downhill ski areas. Control by the property owner, which assures easy transferability and the possibility of putting property to different and more efficient uses, is thought to be essential to economic development and progress.[227] It was this potential threat to property that agitated several congressmen.[228] It was to be expected that the outcome of the court decisions dealing with sacred lands would ultimately depend on the fact that the public is the property owner.[229] It is not surprising that judges resist recognizing an absolute first amendment right in property. In their resistance, they have put roadblocks in the way, such as the requirement that a religious practice be central before it can be protected, or the suggestion that any accommodation not absolutely mandated may be forbidden.

There are two possible routes to take to solve the conflict between Indian religious rights and the rights of the public as landowner. The first is to categorize as a property right those Indian religious practices amenable to a property conception. If the practices themselves are treated as a form of property, they do not threaten property rights and accommodation of interests is made possible within a single scheme. Access to sites can be

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227. For an early, formative theoretical exposition of the central significance of property, see J. LOCKE, *supra* note 87.

228. *See supra* note 44 and accompanying text.

229. *See supra* notes 168-69 and accompanying text. The centrality of property ownership to the reasoning is not only implicit, but occasionally explicit in the opinions. See, for example, Hopi v. Block, 8 INDIAN L. REP. 3073, 3075 (D.D.C. 1981) *aff'd* No. 81-1905 (D.C. Cir. May 20, 1983):

> They are essentially claiming that anyone asserting a religious interest in government property, albeit a sincere one, has a constitutional right to demand that the government grant them access to it, yet restrict the rights of the public to, and any development of, this property in order to facilitate the exercise of their religious beliefs. This Court will not extend the First Amendment to such limits.

A moral justification for white settlers taking control of the land from Indians was that those who could make the land fruitful and profitable with their labor have a right to take the land from nomads and hunters, who let the land lie useless. See, for example, the reference by Chief Justice Marshall to the dispute whether farmers and industrialists have an abstract right to expel hunters. *See supra* note 91 and accompanying text.

From the Indians' point of view, a property right is not as satisfactory as a religious right, because property can be condemned for monetary compensation, whereas if the property were invested with a religious right, the government presumably could not take the property without demonstrating a compelling reason. A property right cannot guarantee the continuance of the religious practice. Indians have expressed little interest in monetary compensation, but only in continuing the religious practices. In only one case have plaintiffs sued for damages. Crow v. Gullet, 541 F. Supp. 785, 788 (D.S.D. 1982) *aff'd* No. 82-1852 (8th Cir. May 10, 1983).

seen as a kind of easement. Sacred sites at issue tend to be in territory where Indians continued to worship despite changes of ownership. In areas such as that around Rainbow Bridge, where Indian religious practices continued virtually uninterrupted after the territory was ceded to the government,[230] neither party seems to have contemplated that Indians were giving up their religious access and use. Such "religious easements" or "religious usufructs" could even be thought of as a kind of "reserved right." Courts have found that tribes retain sufficient water to fulfill treaty purposes, although water was unmentioned in the treaties.[231] By analogy, tribal religion was necessary for tribal self sufficiency and tribes could be said to have retained the access and usages necessary to maintain their religions.[232] The right of tribal members to conduct ceremonies or to gather plants on land they do not own is a kind of "corporate" or communal property right. Communal rights or usages, such as the rights of residents to gather wood from forests held by the crown or local lord, or the rights to graze animals on a lord's land, have a long history in English law, and provide ample precedent for the recognition of tribal rights. Such communal rights, though of feudal origin, easily exist within a modern system of property rights.[233]

c. *The Trust Relationship and Dual Legal Status of Tribal Members*

The second route out of the conflict between religious and property rights is to place the problem in the context of the historic legal relationship between the federal government and Indian tribes. Case law dealing with Indians is Janus-faced: one face is that of Indian law, and the other, the face of relevant substantive law, which is applied ignoring the Indian or tribal status of a party.[234] Similar facts give rise to utterly different results. This Janus-faced character is an understandable result of the dual legal status of an Indian—the status as individual, with individual rights,

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230. *See* Appellants' Brief at 4, *see also* K. LUCKERT, *supra* note 228.

231. Winters v. United States, 207 U.S. 564, 576-77 (1908).

232. The analogy is of course imperfect, but is surprisingly apt. The traditional religion is arguably necessary to the purpose of reservations—the maintenance of tribes as separate, self-governing entities. For religion, as for water, the doctrine would require that the government must manage property and affairs surrounding and affecting the reservation, so that the implied understandings in the treaties are effectuated and the purpose of the reservation can be sustained. *See* Pyramid Lake Piaute Tribe of Indians v. Morton, 354 F. Supp. 252 (D.D.C. 1972) (discussed *supra* notes 98, 115 and accompanying text).

233. In modern England, for example, many corporations chartered in feudal times still maintain a similar status, their particular privileges, which are a kind of "property," coexisting with modern property rights. Such "corporations" include universities, public schools, the Inns of Court, artisan corporations of London, and the like. For a discussion of this kind of coexistence of forms during a period of rapid industrial growth, see generally L. BRENTANO, A HISTORY OF GILDS (1870).

234. Often the briefs of counsel seem to be dealing with different cases. One side will argue Indian law precedent while the other will brief contract principles, ordinary rules of construction, general constitutional law, or common law jurisdictional concepts. The final shape of many such cases is determined simply by which broad view the court takes of the case.

> D. GETCHES, *supra* note 12, at 204.

and the status as tribal member, with traditional rights or "privileges" derived from membership.

The dual legal status is expressed in the guardianship doctrine, a kind of compromise theory, uniting in one concept a validation of the power of the conqueror and the duty of the conqueror to exercise power in the interests of the conquered, and to respect the natural rights of the conquered within the limits consistent with the conqueror's superior power.[235] The guardianship was not a clean solution, intellectually or practically and has continued to plague Indian policy and the courts.[236] Within the American system of individual rights, tribes occupy a peculiar niche. The equal protection clause does not eradicate their corporate-like status, with its particularistic rights and privileges.[237] Whether this odd status has in the long run been used more to manipulate and exploit Indians than to benefit or "elevate" them, it is still true that many of the rights and powers Indians hold are theirs by virtue of tribal membership. Whenever universalistic egalitarian principles are applied to Indians in the guise of extending individual rights, there is the danger that valuable tribal rights will be taken away, and nothing given in return. So in this instance, if Indian religious practices are treated with the "respect" due religion, and the first amendment applied relentlessly, without regard for the special status and traditional rights of tribes, the perverse result will be greater limitation of Indian exercise of religion than previously existed. Such destructive results can be avoided.

When this dual legal status is appreciated, when application of universalistic principles is accompanied by acknowledgement of the corporate-like status of tribes, with its attendant particularistic rights or privileges, many of the constitutional problems vanish. Indian tribes' particularistic usages on federal lands can be recognized and legally sanctioned, as they were by the American Indian Religious Freedom Act, without threatening the general principle of the ownership control of property because rights accorded to tribes do not necessarily create general precedents for religious rights in property. This resolves a predicament posed by the district court in *Badoni*.[238] The *Badoni* court posited the case of a religious visionary who sincerely believed the Lincoln Memorial was sacred, and essential to his religion: then, the court asked, if the court recognizes Indian rights to Rainbow Bridge, would it not be obligated to

235. *See supra* text accompanying notes 86-102.

236. *See supra* text accompanying notes 95-102, 108-119.

237. *See supra* notes 100-02 and accompanying text.

238. Badoni v. Higginson, 455 F. Sup. 641, 645 (1977), *aff'd*, 638 F.2d 172 (10th Cir. 1980), *cert. denied* 452 U.S. 954 (1981). The approach taken by the *Badoni* plaintiffs, *see supra* notes 220-24 and accompanying text, that where the government creates the injury, it must rectify the wrong, would intellectually solve this predicament, as in the case of Lincoln Memorial there has been no initial injury to rectify. But the approach would still leave the court in the position of having to recognize first amendment rights in property, and of constitutionally rectifying injuries inflicted on Indians that courts have simply accepted as an aspect of European settlers' dominance of the country. It is doubtful that courts can be convinced to take the step in reasoning that the *Badoni* plaintiffs urge. See *supra* note 89 and accompanying text for discussion of this contradiction at the heart of any "enlightenment" theory legitimizing European power over Indians, and for examples of judicial acceptance of the initial injury by which European dominance came about.

recognize the visionary's rights to the Lincoln Memorial?[239] The answer is no. The tribal rights arise (1) from the status of tribes as corporate-like entities, (2) from a history of ritual practices on particular federal property, and (3) from the federal responsibility for Indians under the guardianship doctrine carried out by Congress in the religious freedom act. Thus, even if the courts are unwilling to recognize free exercise rights in pieces of real estate, the government legally can choose to protect Indian activities on public lands, even at the expense of other public interests. With the American Indian Religious Freedom Act, the sovereign property owner has limited its powers of ownership by giving statutory protection to traditional Indian religion exercised on its lands.

Because of the peculiar legal relation between tribes and government, it makes little sense to apply the religious establishment "checklist" to federal preservation of tribal activity.[240] The test was simply not designed for Indian policy. The guardianship not only entails entanglement, but entanglement with a positive duty to exercise power for the benefit of Indians with respect for Indians' natural rights. While the duty to protect traditional Indian religion might not be legally enforceable as a trust duty, neglect of the duty would still be a violation of the guardianship obligation which, as described by Chief Justice Marshall, underlies all the federal government's relations with Indian tribes.[241] Federal protection and preservation of traditional Indian religion then is not action in pursuit of religion. Its purpose is to carry out a secular responsibility to Indian tribes. The American Indian Religious Freedom Act carries out that responsibility.

CONCLUSION

In sum, the American Indian Religious Freedom Act is a constitutional exercise of Congress' peculiar responsibilities for Indians that recognizes tribal customary rights. The Act was designed to protect Indians' "inherent" right to free religious exercise. While Congress intended to classify a range of Indian practices in the ambit of the free exercise clause, at the same time it stated a policy to protect the Indian practices, whether or not they would be absolutely protected under a free exercise analysis. The purpose was to promote Indian liberty to practice traditional religion by minimizing governmental interference. Framing the Act as a policy statement, rather than as an absolute protection, Congress expected an administrative balancing process. It therefore did not intend the Act's protections to be confined solely to the more absolute protections of a free exercise right, as judicially interpreted—the religious freedom act casts its net more broadly. The fact that Congress intended an administrative balancing process shows that it did not doubt the constitutionality of sacrificing some public interests to preserve traditional Indian practices. The Act

239. 455 F. Supp. at 645. The court did not present the issue in the form of a rhetorical question, but the argument is the same.

240. *See supra* note 217 and accompanying text.

241. *See supra* notes 86, 90-96, 103-04 and accompanying text.

permits agencies to work out their own means of accommodation, but what constitutes pursuit of the policy must be interpreted in light of the underlying guardian relations and the duty to respect Indian tribal rights. Thus agencies must seek means to carry out their public duties that are as unrestrictive as possible to Indian religion.

The status of Indian religious activities on federal lands has posed the most difficulty for courts. Courts resist recognizing a free exercise right in real property. First, judges think of religion in terms of faith-centered worship, and find a right in property incompatible with the notion of a religious right. Second, courts do not like the implications of recognizing a free exercise right in government property which could freeze uses of the property, possibly seriously restrict property management choices and limit public access. The argument that the property was originally taken from the worshippers unjustly is unlikely to be convincing to courts, as it sweeps too broadly—there is injustice at the foundation of Indian-government relations. The problem faced by Chief Justice Marshall is still faced by contemporary courts and by Congress: white European power over Indian lands was based on an initial violation of Indians' "natural rights" in their property. Congress and the courts are faced with working out rules of law that place some limits on the injustice the more powerful sovereign can wreak on the Indians—but that do not undo the original injustice on which superior sovereign power is based.[242] As Chief Justice Marshall pointed out, even if a principle "be opposed to natural right," "if it be indispensable to that system under which the country has been settled . . . [it] certainly cannot be rejected by courts of justice."[243]

The religious freedom act provides an alternative to the potential rigidity of a "proprietary" religious right, as it mandates deference to traditional Indian practices, but leaves administrative choice and flexibility. It seeks to do some justice, without undoing the underlying injustice. Courts have seriously misread the dangers of religious establishment in carrying out the Act with respect to federal lands, as they have failed to see the distinct legal basis of the Act. The Act is based on the historic guardianship, with its recognition of Indian tribes as legal entities having rights and privileges of their own, and its acknowledgment of government duties to Indians, duties distinct from government obligations to the general public. Thus the Act's protections pose no general threat of religious establishment. The courts appear to be using the establishment clause to thoroughly undermine the Act. This is a perverse use of a clause designed to promote religious liberty in a way that can only work to destroy Indian ceremonial religion on federal lands. Such a destructive result is unjust and unnecessary. As the Senate Committee said, "America does not need to violate the religions of her native peoples."[244]

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242. *See supra* note 89 and accompanying text.
243. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 591-92 (1832) (discussed *supra* note 89).
244. *See supra* note 63 and accompanying text.

ADDENDUM

Since the completion of this Note, three cases that rely on the American Indian Religious Freedom Act have been decided.[245] Additionally, while this Note was in press, *Hopi Indian Tribe v. Block* was affirmed.[246] Although not all of the results were favorable to Indians, these four decisions, for the most part, interpret the Act consistently with the positions advocated in this Note. That is, they read the Act not just as a reminder of the free exercise right, but as the source of a distinct obligation to minimize impositions on Indian religion. Furthermore, such a special accommodation is not seen as posing a danger of religious establishment. These decisions indicate an apparent trend away from the restrictive interpretations criticized in this Note.

Three of the recent decisions involve conflicts between land development and Indian religion. In *Northwest Indian Cemetery Protective Ass'n v. Peterson*, the court refused to enjoin the Forest Service from paving a road across sacred Indian land.[247] It found that the Forest Service had complied with the Act by first commissioning studies on Indian beliefs and practices and then selecting a route for the paved road that would minimize "adverse visual and audible impact" on the religious sites.[248] The decision followed the *Hopi* district court opinion in its acceptance of Forest Service procedures,[249] but, unlike the *Hopi* district court,[250] it did not undermine that acceptance by questioning the constitutionality of providing special protections for Indian religion.

The *Hopi* appellate opinion followed basically the same course. In a thoughtful discussion, the court elaborated on the district court's interpretation of the Act and arrived at a more consistent reading of it. Looking at the legislative history, the court found that the Act was intended to prevent "unnecessary" interference with Indian religious values.[251] The court held that "an agency undertaking a land use will be in compliance" with the Act if it "obtains and considers the view of Indian leaders, and if, in project implementation, it avoids unnecessary interference with Indian reli-

245. New Mexico Navajo Ranchers Ass'n v. I.C.C., 702 F.2d 227 (D.C. Cir. 1982); Northwest Indian Cemetery Protective Ass'n v. Peterson, 552 F. Supp. 951 (N.D. Cal. 1982); Peyote Way Church of God, Inc. v. Smith, 556 F. Supp. 632 (N.D. Texas, 1983).

246. Wilson v. Block (consolidated with Hopi Indian Tribe v. Block and Navajo Medicinemen's Association v. Block), No. 81-1905 (D.C. Cir. May 20, 1983). Additionally, during this same period the 8th Circuit affirmed Fools Crow v. Gullett, 541 F. Supp. 785 (D.S.D. 1982) in No. 82-1852 (8th Cir., May 10, 1983), simply concluding that the lower court was neither clearly erroneous in its factual determination nor mistaken as to the law. If there is any trend toward a more sympathetic or generous view of the American Indian Religious Freedom Act, this decision is an exception.

247. 552 F. Supp. 951, 954, 957 (N.D. Cal. 1982).

248. *Id.* at 954.

249. *Id.*

250. *See* discussion *supra* notes 178-85 and accompanying text. The court did assert a restrictive view of Indian free exercise rights on federal land, saying that the government is not obliged "to control or limit public access to public lands in order to facilitate [religious] practices," *id.*, a view with which the *Hopi* appellate court took issue. No. 81-1905 (D.C. Cir. May 20, 1983). Despite its narrow conception of Indian free exercise rights on public lands, the *Northwest Indian Cemetery* court did not suggest that the Forest Service would be establishing religion if it chose to limit public access in order to provide special protections for Indian religion.

251. No. 81-1905 (D.C. Cir., May 20, 1983). *See also supra* note 62 and accompanying text.

gious practices."[252] The court declined to reach the question of whether the relief demanded by the Indian plaintiffs would be an establishment of religion, because it found the plaintiffs were not entitled to relief.[253] The clear implication, however, is that an agency will be free to defer to Indian religious values without danger of religious establishment so long as the procedures followed are in compliance with the Act.

Significantly, the same court only two months earlier had rejected agency action for failure to comply with the Act. In *New Mexico Navajo Ranchers Association v. I.C.C.*, the court remanded for further consideration I.C.C. approval of a rail line in an area rich in coal reserves[254] and in archaeological and religious sites.[255] While the I.C.C. had received assurances from the company that it would take steps to mitigate damage to historic and religious sites, the I.C.C. had failed to investigate charges that the railroad had engaged in unconscionable dealings in acquiring right-of-way from Indian allottees.[256] The court held that the allegations of bad faith in dealing with Indians were relevant to the likelihood that the railroad company would not fulfill its promises to protect religious sites.[257] This case, which involved land that was not federally owned, marks the first time that a court has rejected agency action because of noncompliance with the Act.[258] It establishes that the Act not only has "teeth" but offers protections distinct from those of the free exercise clause.

These recent cases reflect acceptance of the "administrative balancing process" intended by Congress.[259] Federal procedures complying with the Act have become more routine, and the Act can be seen in practice to offer something distinct from and more flexible than absolute first amendment protections. Unlike recognition of a first amendment right to property designated as sacred, the Act poses no real threat to potential land development. These decisions allow an agency intent on development to pursue that development so long as the agency exercises procedural care and does not utterly ignore Indian interests. In this context, concern that federal protection of Indian religion is religious establishment seems to be fading away.

Perhaps the most interesting interpretation of the Act is in *Peyote Way Church of God v. Smith*, where the Act was used to justify special protections of Indian religious use of peyote.[260] Under state law, religious use of the hallucinogenic drug by Indians is allowed while religious use by non-

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252. No. 81-1905 (D.C. Cir. May 20, 1983).

253. *Id. See supra* notes 185 and 199 for a discussion of the appellate court's interpretation of Indian free exercise rights on federal land.

254. 702 F.2d 227, 228 (D.C. Cir. 1982).

255. *Id.* at 232. The sites were protected by the National Historic Preservation Act, 16 U.S.C. § 470f (1981) as well as by the American Indian Religious Freedom Act; the I.C.C. failed to comply with both Acts.

256. 702 F.2d at 232.

257. *Id.*

258. Interestingly, it is also probably the only case that has interpreted the Act without considering any constitutional question.

259. *See* discussion *supra* note 74 and accompanying text.

260. 556 F. Supp. 632, 637-38 (N.D. Texas, 1983). *See supra* note 67.

Indians or those with less than 5% "Indian blood" is proscribed.[261] The Act was used to support the constitutionality of the peyote laws against challenges that a special exception for Indians violates the establishment and equal protection clauses.[262] The court said that the Act sets forth a public policy to preserve Indian religion and culture and embodies a legislative finding that certain Indian practices, including the use of peyote, are necessary to the survival of Indian religions and culture.[263] It is the only decision yet to highlight the cultural intent of the Act.

In *Peyote Way Church*, the court presented a rationale almost identical to the guardianship argument put forth in this Note. It looked at the historic legal status of tribes since the early opinions of Chief Justice John Marshall.[264] It cited *Morton v. Mancari*, which upheld hiring preferences for Indians, saying "as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation to Indians, such legislative judgments will not be disturbed."[265] Reasoning that the government's duty to maintain tribes as dependent nations is a duty owed not just to legally organized tribes, but to distinctive Indian cultures, the court concluded that "Congress has the power or duty to preserve our Native American Indians as a cohesive culture" until such time as they become assimilated into the mainstream of American culture and are no longer "a people apart."[266] This duty was acknowledged by the American Indian Religious Freedom Act.

The *Peyote Way Church* decision places the Act in both its historical and Indian law context. It is a firm statement that special protections for Indian religious and cultural practices do not constitute invidious discrimination but carry out a secular duty to Indians. The opinion is a vigorous affirmation of the Act and its constitutional legitimacy.

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261. 556 F. Supp. at 635.

262. *Id.* at 636. (The question of whether nonIndians should have a free exercise right to use peyote as a sacred substance is completely separate from that of preferential treatment of Indians.)

263. *Id.* at 637.

264. *Id.* at 638. *See also supra* notes 86-94 & 100 and accompanying text.

265. 556 F. Supp. at 638, citing *Morton v. Mancari*, 417 U.S. 535, 555 (1973).

266. 556 F. Supp. at 639. Of course, if Congress fulfills the duty to maintain a cohesive culture, there would presumably be no full assimilation. The contradiction between supporting tribes as "dependent nations" and aiming at equality through assimilation has dogged federal Indian policy from the beginning. *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1931), and *supra* notes 11-16, 99-102, 235-37 and accompanying text. The point for the American Indian Religious Freedom Act, however, is that preferential treatment for Indians is perfectly legal and not invidious discrimination, so long as it is tied to the historic legal relation between the government and Indians and to the duties the government has assumed. The *Peyote Way Church* decision largely avoids the language of "trust" or "guardianship" but refers generally to what this Note has placed under the rubric of the guardian relationship. *See supra* notes 78-104, 122-24, 193, 234-41 and accompanying text.