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After the Religious Freedom Restoration Act: Still No Equal Protection for First American Worshipers

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AFTER THE RELIGIOUS FREEDOM RESTORATION ACT: STILL NO EQUAL PROTECTION FOR FIRST AMERICAN WORSHIPERS

I. INTRODUCTION

> Early settlement of [the United States] was in large part due to the search for a haven by persons whose religious beliefs and practices had exposed them to disabilities, or even persecution, in their native lands. This irrepressible need of the American to enjoy the freedom . . . 'to manifest his religion or belief in teaching, practice, worship and observance,' in time compelled . . . a reconstruction of all other conditions of private thought and public life to make democracy, with civil liberties as its basis and flower, a living reality. Religious freedom is thus not only the crowning feature but is also the basis of American society.[1]

This statement reflects one of the most important initial purposes for the colonization of the United States. Unfortunately, the founding fathers' philosophy did not consider that the new republic's constitutional protection of fundamental liberties would extend to persons not of their race.[2] Throughout American history this ethnocentrism has manifested itself in the interpretation of constitutional rights as applied to American Indians.

Although Native Americans have been given legal status as "wards" of the federal government, as individual citizens of this country, they ostensibly enjoy the same protection of fundamental rights in the Constitution as non-Indian citizens.[3] Unfortunately, however, Native Amer-

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1. MILTON KONVITZ, FUNDAMENTAL LIBERTIES OF A FREE PEOPLE 31 (1957).

2. According to the founding fathers, the settlement of the New World and the creation of a new form of government was not divinely meant to benefit those of other races:

> Providence has been pleased to give this one connected country to one united people — a people descended from the same ancestors, speaking the same language . . . . This country and this people seem to have been made for each other . . . it was the design of Providence, that an inheritance so proper and convenient for a band of brethren . . . . should never be split . . . . To all general purposes we have uniformly been one people; each individual citizen everywhere enjoying the same national rights, privileges and protection.

THE FEDERALIST No. 2, at 38-39 (John Jay) (Clinton Rossiter ed., 1961).

3. *See* Choate v. Trapp, 224 U.S. 665 (1912); Duro v. Reina, 110 S. Ct. 2053 (1990). "Indians like other citizens are embraced within our Nation's 'great solicitude that its citizens be protected . . . from unwarranted intrusions on their personal liberty.'" *Duro*, 110 S. Ct. at 2063 (quoting Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978)).

This article discusses the treatment of Indians by government as *individual* citizens protected under the Constitution. It does not deal with free exercise rights under their position as "wards" under the framework of the federal government-Indian relationship. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). The judiciary defers to regulatory treatment of Indians by the federal government under its plenary power to regulate Indian affairs utilizing Indian race-specific legislation.

icans have been consistently denied equal protection under the First Amendment. For the most part, the Anglo-American court system has found that the Constitution offers no protection for Indian worshippers in the exercise of their unique religions.

Not until after the 1990 case, *Employment Division v. Smith*,[4] when the United States Supreme Court overturned long-settled free exercise jurisprudence, was there an effort to remedy the threat to religious practice. In 1993, Congress enacted the Religious Freedom Restoration Act (RFRA).[5] The purpose of RFRA is to restore the judicial use of traditional strict scrutiny in cases where religion is burdened by neutral government action.[6] Unfortunately, the effect of RFRA in protecting Indian religious freedom is dubious.[7]

In this paper I argue for the application of Fourteenth Amendment principles to the unfair treatment of Free Exercise claims by Native American worshipers. Part II examines traditional constitutional doctrines formulated in non-Indian Free Exercise claims. Part III compares the judicial treatment of Indian and non-Indian religions, contending that native claims challenging the development of sacred land sites have not been given the same doctrinal treatment as those claims brought by mainstream Judeo-Christian plaintiffs. This comparison reveals a clear denial of equal protection of free exercise rights for Indians due to cultural bias on the part of Anglo-American courts. Part IV discusses the *Smith* decision and its placement of religious freedom protection into the political sphere. Part V examines RFRA's purpose and discusses whether RFRA will adequately protect Indian religious liberty. Finally, Part VI examines Indian free exercise claims from the standpoint of traditional and non-conventional equal protection theories. My goal is to construct a workable challenge to the unequal treatment of Indian

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See, e.g., Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903).

> If the modern doctrine of strict scrutiny were to be applied to all classifications based on "Indian-ness," the entire structure of Indian law would crumble. This result has been avoided, first, by characterizing [federal] classifications between Indians and non-Indians as political rather than racial and, second, by according the federal government special deference in the area of Indian legislation because of the sui generis status of Indians both constitutionally and historically.

Ralph W. Johnson & E. Susan Crystal, *Indians and Equal Protection*, 54 WASH. L. REV. 587, 592-93 (1979) (citing Morton v. Mancari, 417 U.S. 535, 552-53 (1974)); *see also*, Morton v. Ruiz, 415 U.S. 199 (1974); United States v. Antelope, 430 U.S. 641 (1977). Congress has not curtailed First Amendment religious freedom of Native Americans. In fact, the 1978 American Indian Religious Freedom Act [hereinafter AIRFA] embodies a federal policy to protect Indian religion, although the judiciary has not found that the act creates judicially-enforceable rights. See the discussion on the AIRFA in Section V.

4. 110 S. Ct. 1595 (1990).

5. Pub. L. No. 103-141, 107 Stat. 1488 (to be codified at 42 U.S.C. § 2000bb).

6. *Id.*

7. Some leaders, chief among them Senator Daniel Inouye, have recognized that Indian religions will not be adequately protected under the RFRA. They have successfully lobbied for the introduction of a bill, the new American Indian Religious Freedom Act, which specifically addresses Indian religious freedom concerns.

religions so that Native Americans may have their free exercise claims properly analyzed under the traditional First Amendment doctrine of strict scrutiny. Equal protection analysis of Indian free exercise claims would better insure the fair treatment of Indian religions and would offer constitutional protection to the free worship of the first Americans.

II. TRADITIONAL FREE EXERCISE DOCTRINES PRIOR TO *SMITH*

Before the Supreme Court's ruling in *Smith*,[8] free exercise claims were generally analyzed using a two-part test. In general, courts accepted a claimant's sincerity in his or her religious belief.[9] Following this, the government action was measured under the strict scrutiny doctrine. First, courts looked to see if the intrusion on religious liberty was in furtherance of a compelling governmental interest, then queried whether less restrictive means were available to allow the government to achieve its goal.[10] The full application of the strict scrutiny analysis made the government's burden substantial. In *Sherbert v. Verner*, the Supreme Court held that "no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'"[11] Even if the interest was deemed paramount, the government entity was still required to demonstrate that it was choosing means that were least burdensome to the harmed religious activity.[12]

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8. 110 S. Ct. 1595 (1990).

9. The sincerity test appears to have a low threshold for Indian as well as non-Indian worshipers. In Hobbie v. Unemployment Appeals Comm'n, 107 U.S. 136, 144 (1987), the Supreme Court considered newly-adopted religious beliefs to be sincere. The non-Indian plaintiff in that case converted after accepting employment which conflicted with her religious belief. Thus, she actually created the conflict herself. In Bowen v. Roy, 476 U.S. 693, 696 (1986), the Court accepted the Indian claimants' contention that their belief (that the government's use of a social security number injured the spirit of their daughter) was religious.

10. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972). The Supreme Court held that Amish parents were immune to criminal punishment for violating a state compulsory education law. The Court believed that the state's significant interest in educating its citizens was not "totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment . . . ." *Id.* at 214; *see also* Reynolds v. United States, 98 U.S. 145 (1878), wherein the Court upheld the federal conviction of a Mormon polygamist. Although the Court did not articulate the compelling government interest test as such, it believed that state prohibitions of actions "subversive of good order" were constitutionally permissible. *Id.* at 164. Before *Smith*, Sherbert v. Verner, 374 U.S. 398 (1963), was considered the leading free exercise case. In *Sherbert*, a Seventh-Day Adventist was fired and consequently denied unemployment benefits because she refused to work on Saturdays, her sabbath. *Id.* at 399-400. The state's interest in limiting unemployment benefits was considered significant, but was not deemed to be compelling enough when weighed against the burden on the plaintiff's religion. *Id.* at 406-08.

11. 374 U.S. at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

12. *See* Cantwell v. Connecticut, 310 U.S. 296, 306-07 (1940) (conditioning religious solicitation upon a license is a forbidden burden upon free exercise protected by the Constitution because the state was the agent determining what was a "religious" purpose for the permit, and it had less drastic means of preventing fraud and preserving peace, safety, and order). *See also* Murdock v. Pennsylvania, 319 U.S. 105 (1943). "[T]he notion at the core of *Murdock* was plainly that the state could reasonably meet its legitimate needs for regulation and revenue without imposing potentially

In the case of *United States v. Lee*, the Supreme Court retreated from its prior position which placed a heavy burden of proof on the government.[13] According to *Lee*, the government needed only to demonstrate a more broadly defined interest in a general law or governmental action and show that granting an exception for the claimant would "unduly interfere" with that interest.[14] The holding in *Lee* began a reversal of accommodations. Rather than explaining that its interest in denying the plaintiff an exemption was compelling, the government entity merely needed to argue that the policy behind its law or activity was compelling enough to warrant a burden on religious activity.

Moreover, the threshold at which courts found a constitutional burden on religion was much lower prior to *Smith*. The fact that a government activity only indirectly intruded upon religious liberty did not preclude a free exercise claim. This is evident in the *Sherbert* holding, where the Court ruled that First Amendment protection applied even where the government merely withheld an economic benefit from a plaintiff because of religious beliefs.[15] The Supreme Court reiterated this important principle in *Thomas v. Review Board*, holding that an indirect burden in the form of the denial of unemployment benefits could form the basis of a free exercise challenge.[16] The Court's treatment of indirect burdens as worthy of constitutional review, coupled with the least restrictive means test, essentially required the government to permit one's religious activity whenever such accommodation would be workable in the view of the court.[17] Most important, what remained consistent after *Lee* (for non-Indians at least) was the Court's rejection of an indirect-direct burden dichotomy.[18]

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crushing burdens on religious activity." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1253 (2d ed. 1988); *see also* Braunfeld v. Brown, 366 U.S. 599, 607 (1961) (Even indirect burdens are impermissible if the state can accomplish its purpose by means which do not impose such a burden.); Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (Governmental interest in combatting racial discrimination in education outweighs whatever burden denial of tax benefits places on religious beliefs; additionally, petitioners' interests cannot be accommodated with that compelling interest, and no less restrictive means are available.).

13. 455 U.S. 252 (1982). The Supreme Court rejected a claim for social security tax exemption for a self-employed Amish farmer.

14. *Id.* at 259.

15. *Sherbert*, 374 U.S. at 403-04. See the discussion on judicial treatment of Indian sacred site claims *infra* section III.

16. 450 U.S. 707 (1981). "Here, as in *Sherbert*, the employee was put to a choice between fidelity to religious belief or cessation of work; the coercive impact on *Thomas* is indistinguishable from *Sherbert* . . . ." *Id.* at 717.

17. The 1961 case, Braunfeld v. Brown, held that the Constitution does not prohibit a facially neutral law which merely operates to make the practice of religious beliefs more expensive. 366 U.S. 599 (1961). However, the opinion did apply strict scrutiny, holding that incidental burdens are forbidden if the state has less intrusive means available to achieve its goal. *Id.* at 607.

18. At times, federal courts have applied strict scrutiny to invalidate legislation which burdened some Indian religious activities not involving sacred sites. *See* Frank v. State, 604 P.2d 1068 (Alaska 1979) (Alaska state law which prohibited the killing of moose out of season was held inapplicable to Indian plaintiffs who took moose for religious ceremony.); *see also* People v. Woody, 394 P.2d 813 (Cal. 1964) (California state law prohibiting possession of peyote held inapplicable to bona fide members of the Native American Church.); Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975) (Indian

The use of the two-part strict scrutiny analysis for First Amendment claims involving either direct or indirect burdens upon religious activity insured that courts conducted a meaningful balancing of governmental and individual interests. Government intrusion upon religious liberty was permitted for "only those interests of the highest order and those not otherwise served . . . ."[19] In the few Native American cases where courts have applied strict scrutiny, the standard allowed some Indian plaintiffs to successfully challenge government regulations which placed even an indirect burden on certain types of religious activity.[20] On the other hand, some non-Indian free exercise challenges were unsuccessful.[21] Indeed, it seemed Indian religious activity and Judeo-Christian worship were treated equally whenever courts actually required the government to show both a compelling interest and that less restrictive means were not available.

Although strict scrutiny was the established method of analyzing religious freedom claims before *Smith*, the test was not always used in cases involving native religions. An interesting 1986 case, *Bowen v. Roy*, involved an unsuccessful Indian challenge to the operation of the federal government's social security system.[22] In *Bowen*, the Supreme Court held that a neutral law which was a reasonable means of promoting a legitimate public interest was not subject to strict scrutiny, even though it caused the plaintiff to violate an important tenet of his religion.[23] The holding in *Bowen* is intriguing when one considers that it involved a Native American plaintiff. In the following year in *Hobbie v. Unemployment*

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prison inmate permitted to wear his hair long on the ground of religious freedom).

Since *Teterud*, a lower level of review has been applied to prison regulations. *See, e.g.*, O'Lone v. Shabazz, 482 U.S. 342, 348-50 (1987) (courts defer to prison administrators, requiring the government to show only that its prison regulation is reasonably related to a legitimate phenological interest). This deference exists apparently because courts are reluctant to substitute judicial judgment for that of prison administrators in determining what, if any, least restrictive means are available. Thus, the governmental goal is automatically considered paramount when measured against the prison inmates religious interest.

Notwithstanding these cases, the Supreme Court has denied equal protection to native religions by its *ad hoc* use of the indirect-direct burden dichotomy and judicial tests of centrality and establishment. See discussion on sacred sites *infra* Section III. After *Braunfeld*, the Court's use of the indirect burden analysis to find facially neutral laws constitutionally permissible did not again occur until Bowen v. Roy, 476 U.S. 693 (1986). *See also* Lyng v. Northwest Cemetery Protective Association, 485 U.S. 439 (1988); Employment Div. v. Smith, 110 S. Ct. 1595 (1990). *Bowen*, *Lyng*, and *Smith* all involved claims by Native American worshipers.

19. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

20. *See supra* note 18.

21. *See* Reynolds v. United States, 98 U.S. 145 (1878); United States v. Lee, 455 U.S. 252 (1982). *See also* Bob Jones Univ. v. United States, 461 U.S. 574 (1983) wherein the Court rejected a non-Indian religious university's claim for special tax treatment on the grounds that the school had racially discriminatory admissions policies. Although the policies were religiously motivated, the government's interest in eradicating such discrimination outweighed the burden on the university's rights, and no least intrusive means were available to the government to achieve its goal. *Id.* at 604. *See also* Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985), where the Court denied a non-Indian religious organization's claim for exemption from labor laws on the grounds that the government interest in uniformly enforcing its laws outweighed the very minimal burden on plaintiff's religion. *See also* Goldman v. Weinberger, 475 U.S. 503 (1986), where the Court rejected an Orthodox Jew's claim to wear a yarmulke while on military duty because of judicial deference to the military. As in prison regulation cases, the Court feels it improper to second-guess military decisions.

22. Bowen v. Roy, 476 U.S. 693, 707-08 (1986).

23. *Id.*

Appeals Commission, the Supreme Court rejected the notion that incidental burdens on religious freedom resulting from the operation of a generally applicable law did not deserve strict scrutiny.[24]

III. THE UNEQUAL TREATMENT OF INDIAN SACRED SITE CLAIMS: A COMPARISON OF INDIAN AND NON-INDIAN FREE EXERCISE CLAIMS REVEALS CULTURAL AND RELIGIOUS BIAS

Sacred land sites are an integral part of native theology. Continued access and preservation of the pristine character of these lands is critical to Indian religion practitioners. Medicine men gather natural plants and healing herbs for traditional ceremonies handed down centuries ago from the holy people. Prayers are directed to specific sites, as many Indian nations have origin narratives which speak of mountains, lakes and valleys as the very embodiment of holy beings.[25] The newly proposed Native American Free Exercise of Religion of 1993 explains: "the religious practices of Native Americans are integral parts of their cultures, traditions and heritages and greatly enhance the vitality of Native American communities and tribes and the well-being of Native Americans in general."[26] Since the take-over of the continental United States by non-Indians, and the restriction of Indian people to reservations, most tribes' sacred sites have since fallen into government or private non-Indian hands.[27] Because of the land-based nature of native religion, government action to develop land or regulate non-Indian activity most often and most seriously threatens Indian religion.[28]

Unfortunately, the strict scrutiny doctrine has generally been ignored by courts in dealing with Native American challenges involving sacred religious sites on non-Indian lands. In fact, in sacred site cases American Indians have been systematically denied the doctrine's balancing process. As discussed below, because such cases involve challenges to government control of non-Indian land, federal courts have refused to regard such claims as deserving of First Amendment protection. As a result, sacred site challenges have been invariably unsuccessful.

A. Indispensability

In the opinion of the courts, burdened religious activity on Indian holy sites is not central or indispensable to native religions. If worship can be performed at places other than the site of the proposed government activity, no burden on free exercise is found. Therefore, the government is not required to come forth with a compelling reason for its proposed

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24. 480 U.S. 136 (1987).

25. *See* R.S. Mandosa, *Another Promise Broken: Reexamining the National Policy of the American Indian Religious Act*, 40 FED. B. NEWS & J. 109 (1993).

26. S. 1021, 103d Cong., 1st Sess. § 101(2) (1993).

27. *See* Kristen L. Boyles, *Saving Sacred Sites: The 1989 Proposed Amendment to the American Indian Religious Freedom Act*, 76 CORNELL L. REV. 1117, 1122-25 (1991).

28. *Id.*

activities, nor demonstrate a less burdensome alternative for achieving its goal. In *United States v. Means*, the Eighth Circuit summarized the judicial treatment of sacred site cases in which there has been a consistent refusal to disturb governmental land management decisions that have been challenged by Native Americans on free exercise grounds.[29] The court in *Wilson v. Block* went even further, placing an impossible burden on Indian worshippers. "If the plaintiffs cannot demonstrate that the government land at issue is indispensable to some religious practice, *whether or not central to their religion*, they have not justified a First Amendment claim . . . . [Plaintiffs must] demonstrate that the government's proposed land use would impair a religious practice that could not be performed at any other site."[30]

The only Indian free exercise case involving a challenge to government development of a sacred site in which the court purported to employ strict scrutiny was *Badoni v. Higginson*.[31] In *Badoni*, however, the court first reasoned that the government interest was so compelling it automatically outweighed the religious interests of the Indians.[32] Thus, the court ignored the important question of whether, and to what extent, the government action—flooding a holy site—burdened Indian religion. The court did not properly balance or even consider the Indian parties' interest in the sacred land. "The *Badoni* court essentially changed the whole nature of free exercise analysis by allowing the government to justify its actions first, rendering the degree of infringement analysis unnecessary."[33]

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29. 858 F.2d 404, 407-08 (8th Cir. 1988). The court in *Means* listed:
Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983) (Decision to permit private interests to expand and develop government-owned ski area did not violate the First Amendment rights of Navajo and Hopi Indian tribes, who were not denied access to the San Francisco Peaks in the Coconino National Forest or impaired in their ability to gather sacred objects or conduct ceremonies.); Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980) (Impounding water to form Lake Powell and allowing tourists to visit the Rainbow Bridge National Monument did not violate the free exercise rights of the Indians residing in the area because they were able to enter the monument and because the Government had a compelling interest in maintaining the lake's capacity.), *cert. denied*, 452 U.S. 954 (1981)); Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159 (6th Cir. 1980) (Cherokee Indians' free exercise rights were not infringed by the flooding of the Tellico Dam on the Little Tennessee River in the absence of evidence of centrality or of indispensability of the particular valley to be flooded to Cherokee religious observances), *cert. denied*, 449 U.S. 953 (1980); Inupiat Community of Arctic Slope v. United States, 548 F. Supp. 182 (D. Alaska 1982) (Inupiat religious claims were found to be without foundation as they offered no explanation of the religious significance of the site or of how the Government's activities might interfere with plaintiffs' religious beliefs.), *aff'd on other grounds*, 746 F.2d 570 (9th Cir. 1984), *cert. denied*, 474 U.S. 820 (1985); Crow v. Gullet, 541 F. Supp. 785 (D.S.D. 1982) (Indian plaintiffs' free exercise rights were not infringed by state's construction of a paved access road and parking area near ceremonial religious grounds because plaintiffs failed to establish that particular religious practices were impaired by the construction.).

30. 708 F.2d 735, 743-44 (D.C. Cir. 1983) (emphasis added).

31. 455 F. Supp. 641 (D. Utah 1977), *aff'd*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

32. Badoni v. Higginson, 638 F.2d 172, 177 (10th Cir. 1980).

33. Camala Collins, *No More Religious Protection: The Impact of Lyng v. Northwest Indian Cemetery Protection Association*, 38 WASH. U. J. URB. & CONTEMP. L. 369, 380 (1990).

In contrast, non-Indian free exercise claims are rarely scrutinized for the centrality or indispensability of the burdened religious conduct. In *Thomas v. Review Board*, the Supreme Court stated that "the resolution of [what is religious] is not to turn upon a judicial perception of the particular belief or practice in question . . . ."[34] In most conventional free exercise cases like *Thomas*, there is no inquiry into the question of centrality; the indispensability of the activity to the faith is simply a given.[35] In fact, although the centrality of a particular activity has been plainly arguable, the Court has still applied First Amendment protections. In *Thomas*, "the claimant was admittedly struggling with his beliefs; other members of his religion disagreed with his views as to what actions the beliefs forbade; and his translation of beliefs into actions seemed inconsistent. Nonetheless, the free exercise clause applied."[36]

Compare the *Thomas* holding with the rationale in *Sequoyah v. Tennessee Valley Authority*.[37] In *Sequoyah*, the flooding of Indian holy places, ancestral burial grounds and ceremonial medicine gathering sites was not considered a burden upon native religion:

> The claim of centrality of the Valley to the practice of the traditional Cherokee religion . . . is missing from this case. The overwhelming concern of the affiants appears to be related to the historical beginnings of the Cherokees and their cultural development. It is damage to tribal and family folklore and traditions, more than particular religious observances, which appears to be at stake . . . . These are not interests protected by the Free Exercise Clause of the First Amendment.[38]

The Sixth Circuit's cultural bias is plainly evident in its relegation to the status of "folklore" the plaintiffs' religious activity on land that represented the very basis of Cherokee religion and cultural identity.[39]

Ironically, such places of "historical beginning"[40] are often considered to be the most sacred locations to many native religions. What non-Indians often see as folklore and tradition are in fact the essence of Indian life, religion and cultural identity. In *West Virginia Board of Education v. Barnette*, the Supreme Court stated: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion."[41] Despite the Court's reasoning in *Barnette*, the decision in *Sequoyah* clearly rested on judicial perception, an Anglo-American view, of what constituted "religious" activity.

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34. 450 U.S. 707, 714 (1981).

35. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Gillette v. United States, 401 U.S. 437 (1971); Sherbert v. Verner, 374 U.S. 398 (1963); Reynolds v. United States, 98 U.S. 145 (1878). In *Yoder*, the Court did emphasize the centrality of the Amish beliefs and, the holding in *Sherbert* rested partly on the undisputed notion that the burdened activity was a cardinal principle of the plaintiff's faith. However, these inquiries were merely used as an evaluation of the extent of the burden which the religion suffered as a result of the government rule. TRIBE, *supra* note 12, at 1243. In Indian sacred site claims, the centrality question is used as an absolute test.

36. TRIBE, *supra* note 12, at 1243.

37. 620 F.2d 1159, 1164-65 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

38. *Id.*

39. *Id.*

40. *Id.* at 1164.

41. 319 U.S. 624, 642 (1943).

B. *Establishment*

Concerns over governmental establishment of religion have also caused courts to misconstrue Indian sacred site claims. In *Crow v. Gullet*, the federal court rejected the Indian plaintiffs' claim, believing that government accommodation of the Indians' worship would violate the Establishment Clause.[42] The court stated, "at Bear Butte State Park, religious campers have a special camping area [among other privileges], from which the general public is excluded . . . . Thus, defendants have gone far to afford special treatment and special privileges to American Indian religious practices at the Butte."[43] The *Crow* court felt that protecting the sacred area from intrusion by tourists would violate the Establishment Clause because it would aid the conduct of the Indians' religious ceremonies.[44] Similarly in *United States v. Means*, the Eighth Circuit reasoned that "the [Indians'] Monument [might] become a government-managed religious shrine . . . . Query whether granting a special use permit for the construction of a permanent religious community on 800 acres of public land would raise similar issues of government aid to religion in violation of the Establishment Clause."[45]

The judicial application of the Establishment Clause to sacred site claims is perhaps the best illustration of unfair treatment of Indian free exercise claims. Indeed, there is often the potential for conflict between the Establishment Clause and the mandate that government not prohibit the free exercise of religion. However, "[w]hile the two clauses are in tension in some respects, the Supreme Court has made it clear that anti-establishment principles may not serve as the means of denying valid

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42. 541 F. Supp. 785, 794 (D.S.D. 1982).

43. *Id.*

44. *Id.*

45. United States v. Means, 858 F.2d 404, 408 n.6 (8th Cir. 1988) (quoting Badoni v. Higginson, 638 F.2d 172, 179 (10th Cir. 1980)). The Eighth Circuit ignored the district court's ruling for the Indian plaintiffs. The district court resolved the establishment concern by comparing the Indians' requested relief to affirmative measures already taken by the Forest Service in accommodating Christian worshipers. The district court in *United States v. Means* stated:

> The Forest Service expresses concern that by allowing Means and others use of this federal property it may be advancing the religious interests of a particular group in violation of the Establishment Clause of the First Amendment. This position is particularly ironic in light of the number of Christian churches which exist on land in the Black Hills National Forest and the Placerville Camp of the United Church of Christ. The irony is further enriched by the fact that Christian groups, unlike the Lakota, do not consider the Black Hills to be a location central to their religious beliefs. The Court recognizes that it is not always easy to determine when accommodation is prohibited and when it is required under the Religious Clauses . . . the Court concludes that making the 800-acre site available to Means and others through the use of a special use permit would not violate the Establishment Clause. Indeed, it is a necessary accommodation under the Free Exercise Clause.

627 F. Supp. 247, 264 (W.D.S.D. 1985).

In fact, there are several religious facilities, the operation of which would seem to violate the Establishment Clause. "The Gloria Dei (Old Swedes) Church and St. Joseph's Roman Catholic Church in Philadelphia, the Shrine of the Ages Chapel in Grand Canyon National Park, the Yellowstone National Park Chapel and Yosemite National Park Chapel are each owned and operated by the National Park Service." Sarah B. Gordon, Note, *Indian Religious Freedom and Governmental Development of Public Lands*, 94 YALE L. J. 1447, 1456 n.38 (1985).

free exercise rights."[46] Nonetheless, in *Means* the Eighth Circuit reversed the state district court's finding that the free exercise clause required accommodation of Indian worshipers' activity through use of a special permit allowing access to restricted sites on United States Forest Service land.[47] The Eighth Circuit's ruling rested on the *Badoni* Court's establishment concerns.

The issues of centrality and establishment have generally not presented hurdles for non-Indian plaintiffs who sought government accommodation of some sort for their religious activity. For example, in a case where non-Indians have similarly challenged government land-based regulation on free exercise grounds, their religion was considered worthy of the traditional strict scrutiny balancing test. In *Pillar of Fire v. Denver Urban Renewal Authority*, the court held that urban renewal plans must avoid conflicting with religious facilities on private land because "religious faith and tradition can invest certain structures and land sites with significance which deserves First Amendment protection."[48] The court did not attempt to decide if the site was central or indispensable to non-Indian religion, it simply held that the plaintiffs' church was burdened and deserved constitutional protection. The Colorado Supreme Court demonstrated that the First Amendment, at times, requires what may seem like government establishment, but in fact is merely protective accommodation of particular religious sites.

C. *The Indirect Burden Analysis*

The United States Supreme Court has condoned and reinforced this unequal treatment of Indian sacred site claims. The Court does not feel such cases deserve strict scrutiny, even when government action threatens to destroy Indian religion. This is illustrated in *Lyng v. Northwest Cemetery Protective Association*, where the Court held that there was no constitutionally recognizable burden on Indian religion resulting from the building of a road through a Native American sacred site because the United States Forest Service did not intentionally set out to burden Indian religion.[49] One commentator has noted that "because the *Lyng* Court focused on the nature of the government action rather than the effect of the action, the Court severely narrowed the protection that the first amendment has traditionally given religious practices and incorrectly concluded that there was no burden on any Native American Indian religious practice."[50]

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46. *See* Gordon, *supra* note 45, at 1470-71 n.102 (citing McDaniel v. Paty, 435 U.S. 618 (1978); School Dist. of Abington Township v. Schempp, 374 U.S. 203, 296-99 (1963) (Brennan, J., concurring); Zorach v. Clauson, 343 U.S. 306, 314 (1952)).

47. *United States v. Means*, 858 F.2d 404, 410-11 (8th Cir. 1988).

48. 509 P.2d 1250, 1254 (Colo. 1973).

49. 108 S. Ct. 1319, 1326 (1988) ("[I]ncidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs [do not] require government to bring forward a compelling justification for its otherwise lawful actions.").

50. Samuel D. Brooks, Note, *Native American Indians' Fruitless Search for First Amendment*

Measure *Lyng* against the non-Indian unemployment compensation cases wherein the withholding of benefits was seen as an indirect burden not only worthy of strict scrutiny, but deserving of protection under the First Amendment.[51] This same application of the First Amendment to the denial of government benefits which create an indirect penalty for adherence to religious belief has not occurred in Indian sacred site challenges. This discrepancy exists because "no benefit in the commonly understood sense of the term flows from government's leaving sacred sites on public land undisturbed."[52]

D. Judicial Ethnocentric Views of Indian Religions

The manner in which sacred site cases are handled by the American judiciary reflects ethnocentric Anglo concepts of religion and property. The judicial belief that continued access to sacred sites prevents a burden on Indian religion ignores the harm to the natural and sacred state of the land. Road construction, opening of a site to public access and tourism, or otherwise disrupting the natural character of the sacred area is desecration. These acts may virtually destroy the basis for the native religion and render worship at such sites pointless.[53] Given that non-

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Protection of Their Sacred Religious Sites, 24 VAL. U. L. REV. 521, 545 (1990). In a scathing dissent in *Lyng*, Justice Brennan stated:

> [T]he Court embraces the Government's contention that its prerogative as landowner should always take precedence over a claim that a particular use of federal property infringes religious practices. Attempting to justify this rule, the Court argues that . . . 'incidental effects of government programs,' . . . even those 'which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs,' simply do not give rise to constitutional concerns . . . . Since our recognition nearly half a century ago that restraints on religious conduct implicate the concerns of the Free Exercise Clause, . . . we have never suggested that the protections of the guarantee are limited to so narrow a range of governmental burdens. The land-use decision challenged here will restrain respondents from practicing their religion as surely and as completely as any of the governmental actions we have struck down in the past, and the Court's efforts simply to define away respondents' injury as nonconstitutional are both unjustified and ultimately unpersuasive . . . . Ultimately, the Court's coercion test turns on a distinction between governmental actions that compel affirmative conduct inconsistent with religious belief, and those governmental actions that prevent conduct consistent with religious belief. In my view, such a distinction is without constitutional significance. The crucial word in the constitutional text . . . is 'prohibit,' . . . a comprehensive term that in no way suggests that the intended protection is aimed only at governmental actions that coerce affirmative conduct.

Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 465-68 (1988) (Brennan, J., dissenting).

51. *See* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Sherbert v. Verner, 374 U.S. 398 (1963).

52. Gordon, *supra* note 45, at 1460.

53. *See* Wilson v. Block, 708 F.2d 735, 740 n.2 (D.C. Cir. 1983) (testimony of Hopi tribal leader that development would destroy basis of religious belief); Badoni v. Higginson, 638 F.2d 172, 177 (10th Cir. 1980) (the religious infringement was the drowning of Navajo gods); Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 592 (N.D. Cal. 1984) (government logging activities would impair the religious significance of the sacred area).

Indian religions were portable from the time of their arrival in this country, it is easy to see why Judeo-Christian courts simply do not recognize that unique landmarks of mother earth are the very cornerstone of Native American Indian religion.

This theological bias has its roots in the Anglo-American view of property ownership. In *Sequoyah v. Tennessee Valley Authority*, for example, the Cherokee's challenge to the flooding of their sacred sites failed in part because the Indians had no property rights in the area that was to be developed.[54] Likewise, in *Lyng*, the majority opinion held that "such [religious] beliefs could easily require de facto beneficial ownership of some rather spacious tracts of public property."[55] In fact, Indian theologies are fundamentally at odds with non-Indian concepts of religion and property:

> The pioneer and development ideals of the westward movement in the nineteenth century glorified taming the wilds in the interests of progress and prosperity. These ideals still inform the national civil religion and stand in opposition to Indian concepts of cyclical rather than linear history . . . . To the extent, therefore, that the judiciary is influenced by American civil religion and traditional monotheistic understandings of spiritual separation from the physical world, claims by Indians that development of public lands violates their religious beliefs would seem at once obstructionist and counterproductive. In this land of great freedom and republican virtues, this ideology argues, we must not allow regressive attitudes—even religious ones—to get in the way of the greater good. Some exceptions are allowable, because they are relatively cost-free, but Indian free exercise claims would require government to alter its understanding of its property rights in public lands.[56]

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54. Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159 (6th Cir. 1980). The *Pillar of Fire* holding (*supra* text accompanying note 48) has been distinguished, based on the view that "a governmental taking of privately owned religious property . . . involves different considerations than does a claimed First Amendment right to restrict government's use of its own land." Wilson v. Block, 708 F.2d 735, 742 n.3 (D.C. Cir. 1983). Similarly, Justice O'Connor stated in Lyng v. Northwest Indian Protective Ass'n: "Whatever rights the Indians may have to the use of the area . . . however, those rights do not divest the Government of its right to use what is, after all, its land." 485 U.S. 439, 453 (1988). One commentator has observed:

> The existence of a property right in a sacred site is not a prerequisite of a free exercise claim, however. As the legislative history of AIRFA states: 'The issue is not ownership . . . of the lands involved. Rather, it is a straightforward question of access in order to worship and perform the necessary rites.' . . . The 'property interest' basis for denying free exercise claims raises the question, of course, of where the government 'got' the property in the first place. As Representative Udall noted, 'it is stating the obvious to say that this country was the Indians [sic] long before it was ours.' . . . If the taking was unjust to begin with, it seems especially egregious to use the lack of a legal interest in land to deny a free exercise claim for protection of preexisting sacred sites.

Gordon, *supra* note 45, at 1455.

55. *Lyng*, 485 U.S. at 453. "Lyng demonstrates that either the courts fundamentally do not understand the significance of the government-sanctioned desecrations to Indian religion or they are intentionally carving Indian religious expression out of the protected arena of the first amendment." Anita Parlow, *Cry, Sacred Ground: Big Mountain, U.S.A.*, 14 AM. IND. L. REV. 301, 316, n.56 (1989).

56. Gordon, *supra* note 45, at 1464.

IV. THE *SMITH* DECISION'S RELEGATION OF FREE EXERCISE PROTECTION TO THE POLITICAL ARENA

Cultural and religious bias by courts have denied Indian worshipers the equal protection of the First Amendment in sacred site cases. In *Smith*, the Supreme Court went even further by taking the fundamental right of religious freedom out from under the First Amendment, and placing it squarely into the political process:

> In *Smith*, the Court departed sharply from its precedent in the religious liberty area by rejecting the compelling interest test. The Court held that, except in a few nebulously defined cases, the government is not required to make exceptions from a generally applicable law for religious groups whose free exercise is burdened by the law. Though the Court explicitly affirmed the power of the legislature to accommodate burdened religious groups, it held that such accommodations are not required by the Free Exercise Clause of the First Amendment.[57]

Smith held that a facially neutral law which only indirectly burdens free exercise is not assailable under the First Amendment.[58] This necessarily meant that worshipers had to be pro-active in the legislative process in order to get specific exemptions in generally applicable laws which would otherwise burden their religion. The narrow reading of the Free Exercise Clause in *Smith* gave "a decided advantage to 'majority' religions, that is, religions that have a substantial number of followers or which for some other reason command a great deal of respect in society."[59] Indian worshipers, however, are not part of mainstream culture and thus will have a more difficult time securing specific legislative exemptions for their religious practices, compared to Judeo-Christian sects.[60] Although

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57. Michael W. McConnell, *Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion?*, 15 HARV. J. L. & PUB. POL'Y 181, 183 (1992). *See generally* Susan E. Simoneau, *An Anomaly: Religious Freedom Protected Through Political Process Rather Than the First Amendment*, 13 BRIDGEPORT L. REV. 155 (1992).

58. Employment Div. v. Smith, 110 S. Ct. 1595, 1606 (1990).

59. *McConnell*, *supra* note 57, at 186.

60. Legislative exemptions are not the method by which the Framers intended the fundamental liberty of religious freedom to be protected.

> When religious conscience came into conflict with a generally applicable law prior to the enactment of the First Amendment, it was not unusual for the colonies and the states to allow exemptions from these laws. The most notable accommodation occurred when the Continental Congress created an exemption from military conscription for adherents to faiths that forbade participation in war.

McConnell, *supra* note 57, at 186. *See also* Justice Blackmun's dissent in *Smith*:

> This distorted view of our precedents leads the majority to conclude that strict scrutiny of a state law burdening the free exercise of religion is a 'luxury' that a well-ordered society cannot afford, and that the repression of minority religions is an 'unavoidable consequence of democratic government.' I do not believe the Founders thought their dearly bought freedom from religious persecution a 'luxury,' but an essential element of liberty — and they could not have thought religious intolerance 'unavoidable,' for they drafted the Religion Clauses precisely in order to avoid that intolerance.

Smith, 110 S. Ct. at 1616.

the *Smith* rationale had potentially harmful impacts on other non-Indian religions, it primarily threatens Native American religions and their practitioners.[61]

V. CONGRESS RESPONDS TO *SMITH* WITH THE RELIGIOUS FREEDOM RESTORATION ACT

The *Smith* decision was seen as abolishing the religion clause of the Bill of Rights.[62] After *Smith* was decided, a broad movement of concerned organizations introduced legislation to restore the compelling interest and least burdensome means tests which the Supreme Court had essentially discarded for all but those cases involving government action directly aimed at suppressing religious conduct. In 1991, an act was proposed with the narrow purpose of circumventing *Smith* and restoring traditional free exercise doctrines.[63] The result was the November 1993 enactment of the Religious Freedom Restoration Act.

A. The Language and Purpose of the Religious Freedom Restoration Act

RFRA codifies the compelling interest test as it existed in free exercise case law prior to *Smith*. Specifically, its purpose is to restore the use of the *Wisconsin v. Yoder* and *Sherbert v. Verner* strict scrutiny analyses.[64]

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61. *See* Part VI of this article for a discussion on the application of equal protection theory to Indian religion claims. "As federal courts are now constrained to follow *Smith*, we can expect a rash of decisions denying citizens who are not members of mainstream Judeo-Christian religions the protections of the First Amendment." Daniel L. Inouye, *Discrimination and Native American Religious Rights*, 23 U. WEST L.A. L. REV. 3, 18 (1992) (citing Hunafa v. Murphy, 907 F.2d 46, 48 (7th Cir. 1990); International Center for Justice and Peace v. I.N.S., 910 F.2d 42 (2d Cir. 1990); Salvation Army v. New Jersey Dep't of Community Affairs, 919 F.2d 183, 194-95 (3d Cir. 1990); Salam v. Lockhart, 905 F.2d 1168, 1171 n.1 (8th Cir. 1990); South Ridge Baptist Church v. Indus. Comm'n of Ohio, 911 F.2d 1203, 1213 (6th Cir. 1990); Cornerstone Bible Church v. City of Hastings, Mich., 740 F. Supp. 654, 669-70 (D. Mich. 1990); Montgomery v. County of Clinton, 743 F. Supp. 1253, 1259 (W.D. Mich. 1990); Yang v. Sturner, 750 F. Supp. 558, 559 (D.R.I. 1990)).

The application of the *Smith* rationale to other minority religions should in no way diminish the validity of equal protection claims by a particular minority, namely American Indians. In fact, courts predisposed to defending traditionally-protected non-Indian religions have had leeway to circumvent *Smith*. In State v. Hershberger, 444 N.W.2d 282, 284 (Minn. 1989), Amish appellants, adhering to the most basic tenet of their religion to remain separate from the modern world, refused to display a florescent triangular emblem on their horse drawn carriages when operating on state public highways. The Minnesota Supreme Court utilized traditional strict scrutiny and held that appellants' religion had been infringed upon by the state's issuance of a traffic citation for legitimate reasons of highway safety. *Id.* at 289. However, because requiring the Amish to use lighted lanterns was a less restrictive available means of furthering the state interest, the court upheld the Amish claim. *Id.* The Supreme Court vacated the judgment and remanded the case for reconsideration in light of *Smith*. Minnesota v. Hershberger, 495 U.S. 901 (1990). On remand, the state court again dismissed the charges against the Amish defendant, reasoning that Minnesota's constitution guaranteed state citizens a greater degree of religious liberty protection than the First Amendment. State v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990).

62. *Inouye*, *supra* note 61, at 17.

63. Paul S. Zilberfein, Note, *Employment Division, Department of Human Resources of Oregon v. Smith: The Erosion of Religious Liberty*, 12 PACE L. REV. 403, 440 (1992) (citing H.R. 2797, 102d Cong., 1st Sess. (1991)).

64. Religious Freedom Restoration Act of 1993 §2(b)(1), Pub L. No. 103-141, 107 Stat. 1488 (1993) [hereinafter RFRA].

RFRA narrowly answers the Supreme Court's assumption in *Smith* that the compelling interest and least intrusive means tests are not to be applied whenever neutral, generally applicable government action is challenged. Under RFRA, strict scrutiny is now required if government "substantially" burdens religious exercise, even if only indirectly through a neutral law.[65] Once a substantial burden is found to exist, courts must then determine if the means used are "in furtherance of a compelling government interest."[66]

B. RFRA Will Not Protect Native Americans

Unfortunately, RFRA will not "restore" religious freedom to Indian people. It must be remembered that both *Lyng* and *Smith* were Native American free exercise claims. The Supreme Court in these cases strengthened the notion that the Constitution does not prohibit neutral government action from impinging upon or even destroying religious liberty. Even though RFRA was enacted to overturn this reasoning, it will not guarantee Constitutional strict scrutiny protection to Native American worshipers. Simply speaking, there is nothing to "restore" since Native Americans did not enjoy the full judicial protection of their religious freedom even before *Smith*.

Moreover, RFRA is not meant to address the ingrained judicial misconceptions of Indian religions. There is nothing in RFRA that changes pre-*Smith* misconceptions about Native American sacred sites and religions. The Congressional Judiciary Committee that reviewed RFRA stated:

> It is [our] expectation that the courts will look to free exercise of religion cases decided prior to *Smith* for guidance in determining whether or not religious exercise has been burdened and the least restrictive means have been employed in furthering a compelling governmental interest . . . . This bill is not a codification of any prior free exercise decision but rather the restoration of the legal standard that was applied in those decisions.[67]

Thus, the language used in RFRA—"substantially burden"—will enable courts to approach Indian claims with a business as usual attitude. Given the usual judicial insensitivity to native religions, it is possible that no Indian religious activity, especially on sacred sites, will be considered substantially burdened. Since RFRA mandates that strict scrutiny be used only if a burden is first found, Indian free exercise claims will likely be resolved in the very same manner as before. In fact, the Judiciary Committee took care to assure Congress that the pre-*Smith* treatment of Native American cases would remain undisturbed under RFRA. The committee stated, "[p]re-*Smith* case law makes it clear that strict scrutiny does not apply to government actions involving only management of internal Government affairs or the use of the Government's own property

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65. *Id.* §3(a).
66. *Id.* §3(b)(1).
67. H.R. REP. No. 88, 103d Cong., 1st Sess. 6 (1993).

or resources."[68] Interestingly, the committee referred in this statement to the *Bowen* and *Lyng* decisions, both of which involved unsuccessful Native American free exercise claims.

Similarly, courts will fail to find legally cognizable burdens upon religion because RFRA only requires the government to show its means *further* a compelling interest, rather than prove its means are *essential* to that interest. To clarify, a three-step inquiry into the language "least restrictive means of furthering a governmental interest" would be helpful. First, is the general goal of the government serious and compelling enough to possibly warrant intrusion on religious liberty? A proper approach to this first question fully compares the interests of the government entity and the individual. For example, one possible determination which could result from such a thorough weighing process is a holding that the government goal is simply not important enough to justify destroying the ability to worship, even if the goal involves some type of economic development of a certain piece of public land. Prior case law makes it clear that such a holding for a Native American plaintiff is highly unlikely. Only after this first step is fully explored and the court is satisfied that the government interest is paramount, should it proceed to the next two questions.

The next two queries would then involve a judicial determination of the range of available options which the government may use in achieving its goal.[69] The second question should ask: Does the method which the government has chosen merely assist in its compelling program, or is it absolutely essential in enabling the government to achieve that goal? The final question is closely related, but must be carefully distinguished. It should ask: Are the means which intrude upon religious activity somehow modifiable so that the intrusion is lessened as much as possible, e.g. statutory exemptions, or should the method be discarded altogether in favor of another which impinges on religion the least? Under this approach, a court with the usual insensitivity to native worship could decide either: 1) the means used are acceptable and, although they are not essential to the government goal and alternatives do exist, it does not legally matter because the method does not "substantially" burden religion; or 2) the means used are absolutely critical in achieving the government goal, and although they substantially burden religion, the Constitution permits them because no other practical less intrusive alternative is available.

This analytical breakdown of the legal test in RFRA shows that there is much room for judicial insensitivity and cultural bias in determining the outcome of an Indian RFRA claim. It seems only fair that, in the balancing test between government action and individual religious conduct,

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68. S. REP. No. 111, 103d Cong., 1st Sess., pt. V(c); *see also* 139 CONG. REC. S6464 (1993) (statement of Sen. Inouye).

69. The Court has recognized that this is the case, for, in the area of prisoner free exercise rights, it has declined to make this inquiry because it feels it is not in an appropriate position to determine which methods should be permitted and which should be invalidated. *See, e.g.*, O'Lone v. Shabazz, 482 U.S. 342 (1987).

each activity be considered at least important enough to the respective interests to create a meaningful weighing process. However, under RFRA, government action need only further a goal, while Indian religious activity will continue to be misunderstood and held to a requirement of essentiality or indispensability. This burden upon Indian religions has proven impossible to meet in the eyes of courts who possess a theology completely at odds with native religion.

In an Indian sacred site case where the state or federal interest may possibly be achieved through some other means more directly connected to the goal, the judiciary will likely not require the government to prove that such workable alternatives exist. Courts will simply look to the legislative history of RFRA and stick to their previous jurisprudential regime.

In a non-sacred site case such as *Smith*, it is also questionable whether a RFRA-based free exercise challenge would be successful. Adhering to RFRA's codification of the *Yoder* analysis, perhaps courts will define the state interest narrowly as an interest in denying an exemption for peyote use. Courts could then require the government to prove how such an exemption would undermine the general workability of the drug laws:

> In terms of the specific issue addressed in Smith, this bill would not mandate that all states permit the ceremonial use of peyote, but it would subject any such prohibition to the aforesaid balancing test. The courts would then determine whether the State had a compelling governmental interest in outlawing bona fide religious use by the Native American Church and, if so, whether the State had chosen the least restrictive alternative required to advance that interest.[70]

However, Justice O'Connor's concurring opinion in *Smith* indicates that the peyote religion would fail to pass strict scrutiny,[71] and as the statement above indicates, that there is no intent behind the RFRA to protect the Native American Church in its religious use of peyote.[72]

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70. H.R. REP. No. 88, 103d Cong., 1st Sess. (1993).

71. Employment Div. v. Smith, 110 S. Ct. 1595 (1990).

72. A stronger American Indian Religious Freedom Act, while not guaranteeing that Indian plaintiffs would always win, would at least better ensure that their religions would be treated fairly. The proposed Native American Free Exercise of Religion Act of 1993 (NAFERA) would legalize religious use of peyote and apply the compelling interest test to government agencies harming sacred sites through development on federal land. It would also ensure tribal control over federal projects on Indian land which would potentially harm sacred areas. The new NAFERA would strengthen Indian free exercise rights with respect to procurement of endangered species animal parts and would make it more difficult for penal institutions to deny native inmates their right to worship. *See generally* S. REP. No. 1021, 103d Cong., 1st Sess. (1993).

The Fourteenth Amendment provides a firm basis for a new, stronger American Indian Religious Freedom Act. Congress has specific authority under Section Five of the Fourteenth Amendment "to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, §5. To the extent Congress finally recognizes that Indians do not enjoy equal treatment with regard to their Free Exercise rights, Congress may act to guarantee equal protection of the First Amendment through legislation which requires government accommodation of Indian religion. *See generally* Michael W. McConnell, *Accommodation of Religion: An Update and Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992). In Katzenbach v. Morgan, the Supreme Court held that Section Five is "a positive grant of legislative power authorizing Congress to exercise its discretion in

VI. AN EQUAL PROTECTION ARGUMENT FOR INDIAN RELIGIOUS CLAIMS

Traditional free exercise analysis[73] under the First Amendment has consistently failed to protect Indian worshipers. In evaluating Native American religious claims, the courts have consistently refused to consider such cases under strict scrutiny because of establishment concerns, the absolute test of centrality, and the indirect burden analysis. These judicial doctrines have not been applied to deny Judeo-Christian plaintiffs the protection of the First Amendment. Unfortunately, RFRA will not alleviate this problem.[74] The Fourteenth Amendment, however, would offer a method for challenging the unfair treatment of Indian religions. Unlike a non-Indian religion claim under First Amendment analysis, there is an element of discrimination in the courts' treatment of Indian free exercise claims. Thus, there is a need to include equal protection theory within an Indian religious liberty claim.

Arguing equal protection would not be a hybrid of the doctrines used in First and Fourteenth Amendment cases. Rather, an Indian plaintiff should bring a free exercise or RFRA claim and utilize equal protection theory to challenge the unequal treatment of Indian religions. This disparate treatment has come primarily from the courts, and most recently from Congress in the form of RFRA. The goal is to prompt courts to treat Indian religion cases the same as those of non-Indians, by considering Indian claims under the compelling interest and least restrictive means tests.

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determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." 384 U.S. 641, 651 (1966).

If enacted, the new NAFERA would significantly alter the status quo with its extensive, Indian-specific mandates. Therefore, it could be considered that NAFERA would grant special treatment to Indian worshipers. However, it would not violate the Establishment Clause. *See generally* Boyles, *supra* note 27. However, even if its enactment constituted special treatment, Congress has full authority under Section 5 to remedy past racial discrimination with race-specific legislation. *See generally* Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. REV. 221. Professor Laycock draws a comparison between the RFRA and the Voting Rights Acts, which were passed in an effort to guarantee voting rights to African-Americans who were the primary group being denied their rights because of prejudice.

The Voting Rights Acts do not confer race-specific legal benefits as the NAFERA proposal does. However, the Supreme Court has permitted racially based remedial legislation, even without a finding of past racial discrimination in a particular area. *See, e.g.*, Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990). The Court has also allowed preferential treatment for Indians based on their special relationship with the federal government. *See, e.g.*, Morton v. Mancari, 417 U.S. 535 (1974). Moreover, it can be strongly argued that the United States Government has an affirmative duty to protect Indian religions and sacred sites because of the trust doctrine. *See generally* Jeri Beth K. Ezra, *The Trust Doctrine: A Source of Protection for Native American Sacred Sites*, 38 CATH. U. L. REV. 705 (1989).

73. Of course, after *Smith*, the First Amendment no longer protects religious activity from generally applicable laws, even if the laws effectively destroy the basis of the entire religion itself. Employment Div. v. Smith, 110 S. Ct. 1595, 1603 (1990). The criminalization of peyote, in particular, which the *Smith* decision sanctions, threatens to destroy the religion of the Native American Church. "Although peyote serves as a sacramental symbol similar to bread and wine in certain Christian churches, it is more than a sacrament. Peyote constitutes in itself an object of worship; prayers are devoted to it much as prayers are devoted to the Holy Ghost." People v. Woody, 394 P.2d 813, 817 (Cal. 1964).

74. *See supra* Section V.

A. Equal Protection Theory

The Free Exercise Clause of the First Amendment states that "Congress shall make no law . . . prohibiting the free exercise [of religion]." This clause applies to the states through the Fourteenth Amendment.[75] In turn, the Fourteenth Amendment of the United States Constitution says that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[76] By reverse incorporation, the Supreme Court held in *Bolling v. Sharpe*[77] that the equal protection prohibition of the Fourteenth Amendment also binds the Federal Government.

Equal protection challenges are directed at government action which disparately affects a member of a suspect class or burdens a fundamental right.[78] Also, equal protection analysis applies regardless if the challenged law is only indirectly burdensome.[79]

Once a court has determined that the operation of a legislative scheme burdens a suspect class or a fundamental right, that law is considered presumptively invidious.[80] The burden then shifts to the government and the law will only be upheld if it is "precisely tailored to serve a compelling government interest."[81]

1. A Fundamental Right is Burdened

In a Native American religious liberty claim, the fundamental right to religious freedom is involved.[82] "The individual guarantees contained in the First Amendment, including the free exercise of religion, were among the first to be afforded fundamental right status . . . . As a textual guarantee, the free exercise of religion has a strong claim on heightened scrutiny."[83]

The first level of burden which American Indian religions currently suffer is due to government action. Twenty-three states still have no protection for bona fide religious use of peyote; it is considered a

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75. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

76. U.S. CONST. amend. XIV, § 1.

77. 347 U.S. 497 (1954).

78. Shelly v. Kramer, 334 U.S. 1 (1948).

79. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886).

80. Plyler v. Doe, 457 U.S. 202, 215-17 (1982). Once a plaintiff is determined to be a member of a suspect class, the Court then approaches the individual's claim with a presumption that 1) the law disparately affecting the person was enacted with at least a collateral purpose of discriminating; or, 2) benefits of a law are somehow being withheld from that person because of his or her membership in the suspect class. Personnel Adm'r of Mass. v. Feeny, 442 U.S. 271, 272-73 (1979). This presumption exists because in the Court's view, laws which affect suspect classes in a discriminatory manner are "more likely than not to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. *See Plyler*, 457 U.S. at 218.

81. *Plyler*, 457 U.S. at 217.

82. *See supra* note 45 for a discussion of the theory that religious freedom is indeed a fundamental right that was meant to be strictly preserved under the Bill of Rights.

83. Rex E. Lee, *The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 B.Y.U. L. REV. 73.

controlled substance and Indians may be arrested and criminally prosecuted for its use.[84] As explained above, RFRA will not offer adequate protection to Indian peyote users.[85] In addition, the basis of many tribal religions is endangered. Forty-four sacred sites within the United States are currently threatened by government development.[86]

Native American worshipers have also been burdened by the federal and state judiciaries. When Native Americans have challenged government action such as that mentioned above, they have been denied equal treatment under the First Amendment because their worship is so unusual from the perspective of Judeo-Christian courts. The comparison between the Supreme Court's treatment of Indian free exercise claims and those claims of mainstream worshipers reveals a true disparity.

In the non-Indian cases which established the traditional free exercise use of strict scrutiny, most individuals sought an exemption from generally applicable government regulation. In sacred site cases, Indians seek injunctive relief to prevent the desecration of holy places. This relief is considered too extraordinary to be granted.[87] Because in such cases "the requested relief and the underlying faith are different than those usually involved in free exercise claims, [courts] have generally treated the uniqueness of the claim as vitiating against the Indians' claim . . . courts have implied that the very uniqueness of Indian religions provides a basis for denying the claims."[88]

2. Indians Are a Suspect Class

With respect to religious liberty, American Indians certainly qualify as a suspect class. In *San Antonio School District v. Rodriguez*, the Supreme Court defined a suspect class as one that has been "subjected to such a history of purposeful unequal treatment, or relegated to such a position

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84. ROBERT M. PEREGOY, BRIEFING DOCUMENT: THE NEED FOR SPECIFIC NATIVE AMERICAN RELIGIOUS FREEDOM LEGISLATION NOTWITHSTANDING RFRA 7 (1993).

85. *See supra* Section V(B).

86. WALTER ECHO-HAWK, BRIEFING DOCUMENT: NATIVE AMERICAN FREE EXERCISE OF RELIGION ACT (S.1021)(NAFERA) 3 (1993).

87. *See* Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980) (holding that government interest outweighed Indian interests in sacred rites, without considering the burden on Indian worshippers).

88. Gordon, *supra* note 45, at 1461-62.

The sacred site decisions arguably reveal what Professor Derrick Bell labels the "interest conversion theory." His contention is that white institutions, in enacting remedies for minorities under the equal protection doctrine, have failed to initiate approaches which may ultimately infringe upon their interests in some significant way. This "interest convergence" phenomenon can clearly be seen in the school desegregation measures after the *Brown v. Board of Education* decisions:

> The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites . . . the availability of fourteenth amendment protection in racial cases may not actually be determined by the character of harm suffered by blacks or the quantum of liability proved against whites. Racial remedies may instead be the outward manifestations of unspoken and perhaps subconscious judicial conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites.

Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980). In sacred site cases, native worshipers have not been granted the remedies they sought.

of political powerlessness as to command extraordinary protection from the majoritarian political process."[89]

The political powerlessness of American Indians in the protection of their religious freedom will be discussed further;[90] however, purposeful unequal treatment of native worshipers by the federal government began in the 1890's in the form of outright prohibition of Indian religions.[91] Although bans were lifted in 1934, Indians may still be arrested for possession of sacred objects such as peyote and eagle feathers.[92]

Today, this unequal treatment continues in legislative form through state criminalization of peyote use, governmental land management policy, and judicial mistreatment of sacred site claims. It also continues in the Supreme Court's relegation of religious liberty protection to the political arena where American Indians lack the lobbying power to ensure that specific exemptions for their religious activity will be included in generally applicable laws. Finally, unequal treatment continues with the implementation of RFRA. It is clear that RFRA is not intended to change the pre-*Smith* jurisprudence of the courts as it has been applied to the disadvantage of native practitioners.

B. Using Equal Protection Theory to Challenge Unequal Judicial Treatment of Indian Religions

Admittedly, there would be considerable difficulty in getting the courts to examine their own unjust treatment of Indian religions. But, the equal protection argument is an alternative framework for the appellate courts to justify employing strict scrutiny. Courts should recognize that the American judiciary has essentially acted just as the legislatures in equal protection claims. With concerns regarding centrality, establishment, and the use of the indirect burden test, judges have applied First Amendment

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89. 411 U.S. 1, 28 (1973).

90. Of course, Native Americans also suffer political powerlessness due to extensive federal control over Indian nations. *See generally* Robert A. Williams, *Columbus's Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples' Rights of Self-Determination*, 8 ARIZ. J. INT'L & COMP. L. 51 (1991).

> From its assumptions of a presumed superior sovereignty in a European-derived government over indigenous tribal peoples, subsequent Supreme Court decisions constructed the principle of Congressional plenary power in Indian affairs. Its impairment of rights to self-rule and property for "savages" provided the origins of the diminished tribal sovereignty doctrine in United States Federal Indian Law.

Id. at 74.

91. Inouye, *supra* note 61, at 13.

92. *Id.* at 14. "In the wake of *Smith*, the State of Oklahoma is currently prosecuting a lifelong member of the Native American Church for possession of peyote." Inouye, *supra* note 61, at 17. Again, the legislative history of the RFRA demonstrates no intent to stop states from prohibiting peyote possession. *See also* United States v. Dion, 476 U.S. 734 (1986). Several federal acts provide for criminal prosecution of anyone killing bald eagles and selling their parts. Although the Bald Eagle Protection Act has an exemption for Native Americans to take birds for religious purposes, there is a long and burdensome procedure to first secure a permit for such a taking from the Secretary of the Interior. 50 C.F.R. § 22.22 (1992). NAFERA would streamline this process.

doctrinal tests in an unequal fashion to Indian plaintiffs. These tests are requirements which suspect class Indian plaintiffs have been unable to meet.

Although most equal protection challenges are directed at legislative action, there is precedent under the doctrine for the invalidation of judicial action as well. In *Shelly v. Kramer*, the Supreme Court nullified the state court enforcement of a private housing covenant which was racially discriminatory.[93] Similarly, in *Palmore v. Sidoti*, the Court reversed a state family court's decision removing a child from her mother's custody, since the ruling was apparently based on the mother's remarriage to a black man.[94] The majority in *Palmore* reasoned "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[95] Thus, it is not unreasonable to suggest that appellate courts and the Supreme Court strictly scrutinize lower court decisions which burden Indian religions.

The notion that this unequal treatment of Indians by the Judeo-Christian judiciary has been "purposeful" is, of course, arguable. However, when one considers that sacred site cases have been so consistently treated unfairly compared to non-Indian claims, to the detriment of native worshipers, and that *Lyng* and *Smith* departed severely from well-settled First Amendment doctrine and involved Indian religions, the argument is certainly persuasive that Anglo-American courts have discriminated invidiously.[96] Courts at the very least have "reflect[ed] a tradition of hostility toward an historically subjugated group, or a pattern of blindness or indifference to the interests of that group."[97]

C. *Using Equal Protection Theory to Challenge Smith*

The *Smith* holding itself should be invalidated under Fourteenth Amendment analysis. As discussed, the judicial notion that an indirect burden on religious activity does not warrant First Amendment strict scrutiny places minority rights into the political process. Thus, a comparison of

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93. Shelly v. Kramer, 334 U.S. 1 (1948). In *Shelly*, the covenant actually specified racial restrictions. However, the Court has also invalidated the judicial enforcement of neutral laws when there is a racially discriminatory impact. *See, e.g.*, Hernandez v. Texas, 347 U.S. 475, 478-79 (1954) (Although state jury selection system was "fair on its face and capable of being utilized without discrimination," the criminal conviction of a Mexican-American was overturned since members of his race were systematically excluded from jury service and there were many Mexican-Americans qualified to serve.). In fact, "[d]iscrimination in jury selection . . . has frequently been demonstrated by reliance on statistics showing a racially discriminatory pattern of administration." TRIBE, *supra* note 12, at 1483.

94. 466 U.S. 429 (1984).

95. *Id.* at 433.

96. Mandosa argues, "The centrality test articulated in Sequoyah and the coercive effects test of Crow represent alternative ways courts have used to defeat Indian religious plaintiffs. In these cases, the government was never required to show a compelling interest, in a departure from precedent, because the courts have been reluctant to make the preliminary finding of burden upon the free exercise right. These sacred site cases, taken together, reveal an inescapable pattern of prejudice against Native American religion . . . ." Rita Sabina Mandosa, *Another Promise Broken: Reexamining the National Policy of the American Religious Freedom Act*, 40 FED. B. NEWS & J. 109, 109-10 (1993).

97. TRIBE, *supra* note 12, at 1520.

the *Smith* holding to equal protection cases reveals that its rationale violates the Fourteenth Amendment. After the landmark *Brown* decisions,[98] some state legislatures felt that court-ordered busing as a remedy for racial discrimination subverted the democratic wishes of the majority. However, in *Washington v. Seattle School District No. 1*, the Supreme Court struck down a state law which preserved a system of segregation by preventing student assignments to other than the closest schools.[99] "By selecting out a form of legislative action of particular interest to racial minorities and removing it to a different and less accessible level of government, the Washington initiative changed the rules of the game and put minorities at a distinct disadvantage."[100] Similarly, the Court invalidated a state law which prohibited student busing assignment on the basis of race.[101] It recognized that minorities could not effectively protect their interests through legislative action, and busing was a legitimate judicial remedy not to be undermined by apparently race-neutral legislative action.

The Supreme Court's removal of Indian free exercise rights from the protection of the First Amendment means that minorities will suffer disparate treatment in the protection of their fundamental rights:

> These [mainstream] religions, because their numbers give them substantial political influence, will be able to enter and win protection in the political arena. In addition, their members are often involved in the drafting of legislation, and they generally design the laws (consciously or unconsciously) in light of their religious mores. The religions that suffer under the narrow interpretation of the Free Exercise Clause are the unpopular, the unknown, and the unconventional.[102]

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98. Brown v. Board of Educ., 347 U.S. 483 (1954) (*Brown I*); Brown v. Board of Educ., 349 U.S. 294 (1955) (*Brown II*).

99. 458 U.S. 457 (1982).

100. TRIBE, *supra* note 12, at 1486.

101. *Id.* at 1521 n.2 (citing North Carolina v. Swann, 402 U.S. 43 (1971)). *Swann* is one of many cases in which the equal protection argument has been used to successfully challenge laws prohibiting any kind of racial consideration in government actions designed to remedy discrimination. The Supreme Court has held that such "racial-remedy laws" must be protected from dilution by counter-legislation which appears to prevent racial discrimination by prohibiting any government action, legislative or judicial, that is specifically based on racial determination. In Hunter v. Erickson, 393 U.S. 385 (1969), the Supreme Court invalidated a city charter amendment which prevented the enactment of ordinances addressing racial discrimination without the approval of a majority of the city's voters:

> The Court reasoned that 'although the law on its face treat[ed] Negro and white, Jew and gentile in an identical manner, the reality [was] that the law's impact [fell] on the minority,' [because minorities were the groups] who would obviously benefit from laws barring racial, religious or ancestral discriminations, and thus it was minorities whom the amendment deliberately disadvantaged.

TRIBE, *supra* note 12, at 1485 (quoting *Hunter*, 393 U.S. at 391).

Hunter is significant because the Court recognized that the majority voter requirement would probably never be met and therefore it presumptively burdened politically powerless minorities. A close analogy can be drawn between this case and the majority's placement of minority religion protection into the political process in Employment Div. v. Smith, 110 S. Ct. 1595 (1990).

102. McConnell, *supra* note 57, at 187. The *Smith* majority, in fact, acknowledges that minority

This statement by Michael W. McConnell aptly describes Indian religions, which will suffer because Indians have historically and consistently had much less political power in comparison to non-Indians.[103]

Specifically, in the area of religious freedom protection, the political power of the Indian lobby has proven ineffective. Originally, the 1978 American Indian Religious Freedom Act (AIRFA)[104] was enacted to respond to sacred site-specific concerns. Despite AIRFA's purpose, however, it did not enhance the protection of native religions as was hoped. AIRFA was intended only to ensure regular free exercise protection to native religions,[105] and courts have interpreted it as such.[106] For example, the Supreme Court made it clear in *Lyng* that AIRFA was no more than a policy gesture. The majority opinion noted that "[n]owhere in [AIRFA] is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights."[107] Indeed, the passage of

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beliefs such as the peyote religion will suffer, but that such a result is a necessary evil:

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

Smith, 110 S. Ct. at 1606.

103. Vine Deloria and Clifford Lytle explain:

> Hostility between Indians and whites . . . has been a continuing theme in Indian-white relations since the colonial farmers sought Indian hunting lands. State political leaders, executive and legislative, have a tendency to respond to the economic interests within the state, and these powerful groups, although frequently few in numbers, represent the forces that constitute important elements of the society . . . . While Indians participate in state elections, their influence and priority in state affairs have always been minimal.

VINE DELORIA & CLIFFORD LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 42 (1983).

104. Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified at 42 U.S.C. § 1996 (1988)). The Act embodied:

> formal congressional acknowledgement that government action on public lands does infringe Native American beliefs and practices to some extent, and that Indian religions must be accorded meaningful protection in ways not generally necessary for protection of Euro-American religious interests. The legislative history of the AIRFA reveals that there was a need for such statutory protection of Native American religion, because "[l]ack of knowledge, unawareness, insensitivity and neglect are the keynotes of the Federal Government's interaction with traditional Indian religions and cultures."

Gordon, *supra* note 45, at 1458 n.55.

105. The Act was intended to "insure that the policies and procedures of various Federal agencies, as they may impact upon the exercise of traditional Indian religious practices, are brought into compliance with the constitutional injunction that Congress shall make no laws abridging the free exercise of religion." Gordon, *supra* note 45, at 1457 n.49 (quoting S. REP. No. 709 & H.R. REP. No. 1308, 95th Cong., 2d Sess. 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1262).

106. Gordon, *supra* note 45, at 1458 n.53 (quoting Wilson v. Block, 708 F.2d 735, 746 (D.C. Cir. 1983) (purpose of AIRFA is limited to ensuring that federal government's policies and procedures are brought into compliance with Free Exercise clause)). The most that has been required in government development projects is consultation with Indian religious leaders. *See, e.g.*, New Mexico Navajo Ranchers Ass'n v. ICC, 702 F.2d 227 (D.C. Cir. 1983) (railroad was required to consult with tribal religious leaders before approving new construction).

107. Lyng v. Northwest Cemetery Protective Ass'n, 485 U.S. 439, 455 (1988).

AIRFA would not likely have been brought about at all, except that it had "no teeth in it."[108] This unfortunate fact displays the failure of Indian political pressure to influence non-Indian lawmakers to make AIRFA an effective mechanism for Indians to use in challenging government development of sacred sites.

The public reaction to *Lyng* also demonstrates the lack of Indian political power to protect religious freedom. In 1988, the Supreme Court held in *Lyng* essentially the same way it did in *Smith* two years later, dispensing with the need for strict scrutiny. The majority held that, since the Indian plaintiffs were not directly coerced by the government action into violating their religious beliefs, "the Constitution simply does not provide a principle that could justify upholding respondents' legal claims."[109] Although the Supreme Court's reasoning in *Lyng* should have been considered just as potentially devastating to everyone's religious liberty, a broad based group of non-Indians did not recognize a threat to fundamental rights until *Smith*.[110]

Most importantly, RFRA itself is evidence of the politically disadvantaged status of American Indians in comparison to that of whites. After *Smith*, it took only three years to get RFRA passed. New AIRFA amendments have been proposed in every congressional session since before the *Lyng* decision. Yet, it is still not certain if NAFERA will be passed any time soon. This is partially due to a lack of consensus among lobbying tribes as to the best version of the amendments. However, there also is significant opposition in Congress due to Establishment Clause concerns.[111] Furthermore, the lack of congressional intent in RFRA to give greater safeguards to Indian religious activity through the use of a strict scrutiny guarantee most clearly proves the fact that American Indians are politically unable to protect their First Amendment free exercise rights. Because *Smith* itself places such Indian rights into the political process, *Smith* violates the equal protection principle and should be overturned.

D. Challenging Government Action: Perhaps RFRA Violates Equal Protection

This section raises the question of whether an Indian plaintiff could challenge RFRA itself under the equal protection theory. On its face, RFRA mandates the use of the *Yoder* strict scrutiny analysis in all free exercise cases, even where generally applicable laws indirectly intrude upon religious conduct. Thus, Congress evidently believes it does not

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108. 124 CONG. REC. 21445 (1978) (statement of Rep. Udall).

109. *Lyng*, 485 U.S. at 440.

110. "[T]he retreat from First Amendment religious protection signified by *Lyng* went largely unnoticed, probably because the worship of the land, including mountain tops and waterfalls, is a practice unique in our country to Native Americans. It was not until its 1990 decision in *Smith* that the Supreme Court's insensitivity to Native religious rights came to the attention of the general public." Daniel K. Inouye, *Discrimination and Native American Religious Rights*, 23 U. WEST L.A. L. REV. 3, 15 (1992).

111. *See* 139 CONG. REC. 56464-65 (1993) (statement of Sen. McCain).

matter if a harm to religious activity is merely an incidental effect of a neutral government action, or that a free exercise burden was inflicted intentionally or inadvertently. The critical constitutional factor to Congress is whether religion is "substantially burdened."

However, as explained in Section V, RFRA's legislative history clearly indicates that this reasoning does not apply to Indian free exercise claims.[112] In limiting the purpose of RFRA to pre-*Smith* doctrines, Congress has refused to recognize the unique obstacles Indian religions alone have suffered under that jurisprudence. By deferring to courts' treatment of Indian claims, Congress has essentially codified judicial and legislative discrimination against Indian religions. In taking it upon itself to rectify the problems that *Smith* posed for free exercise plaintiffs, it is illegitimate under the Fourteenth Amendment for Congress to practically deny the benefits of RFRA to Indian worshipers.[113]

Perhaps Congress did not set out to treat Native religion practitioners maliciously. However, legislators had a very definite mind set surrounding native religious claims when they carefully crafted RFRA:

> It is worth emphasizing that although this bill is applicable to all Americans, including Native Americans and their religions in keeping with the Congressional policy set in the American Indian Religious Freedom Act of 1978, the Committee recognizes that this bill will not necessarily address all First Amendment problems by itself. Native Americans have unique First Amendment concerns that Congress may need to address through additional legislation.[114]

This language is evidence that Congress foresaw the practical exclusion of Indian religion from RFRA's strict scrutiny protection. Congress was aware that an Indian sacred site case would likely be decided no differently under RFRA today than before the act was implemented. Thus, it is arguable that RFRA discriminates against a suspect class in violation of the Fourteenth Amendment. "When the legal order that both shapes and mirrors our society treats some people as outsiders or as though they were worth less than others, those people have been denied the equal protection of the laws."[115]

Under the equal protection standard, once disparate impact is found, a prima facie case for an equal protection violation is made and the burden is shifted to the government.[116] The government action is then

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112. See *supra* section V(B) for a discussion of the Judiciary Committee's reference to the *Bowen* and *Lyng* decisions, and its statement that RFRA does not legalize peyote.

113. *See generally* Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. REV. 221 (asserting that under the powers granted by § 5 of the Fourteenth Amendment, Congress may not dilute the Bill of Rights, but it may enhance those rights on the basis of race).

114. H.R. REP. No. 103-88, 103d Cong., 1st Sess. 7 (1993).

115. TRIBE, *supra* note 12, at 1515 (quoting Plyler v. Doe, 457 U.S. 202, 217 n.14 (1982)).

116. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose.

But we would not be faithful to our obligations under the Fourteenth Amendment if we applied so deferential a standard to every classification . . . . Thus we have

considered constitutionally infirm without a good explanation on the part of policy makers. This explanation must be good - it must make it clear that a law was not enacted, even as a *collateral goal*,[117] for the purpose of discriminating against a suspect class.

Washington v. Davis, however, stands for the general rule that a plaintiff must prove discriminatory intent somewhere behind a law to sustain an equal protection challenge.[118] If there is a legitimate purpose for the government scheme besides discrimination against a suspect class, disparate impact itself does not violate the Fourteenth Amendment.[119] Nevertheless, because of the presumption of improper motive, that governmental scheme must be "precisely tailored to serve a compelling governmental interest."[120]

Congress and the courts may fear that allowing the application of *Yoder* to Indian sacred site claims would set judicial precedent for the virtual return of the continent to the Indians. Therefore, Congress has deferred to the judiciary's reluctance to examine Indian claims under strict scrutiny because the proper application of the compelling interest and least restrictive means test could possibly mean that 1) the building of a road for access by tourists to a national park would have to be considered subordinate to a First Amendment interest by Indian worshipers that their ancient religion be allowed to continue to exist, and 2) the government would be limited in the development of its own land for the general non-Indian public, because building of a road in an area not sacred would be an alternative less restrictive means.

Under the equal protection test of close and substantial relationship, however, these fears are unfounded. Not all non-Indian land would be considered sacred. The proposed new Native American Free Exercise of Religion Act contains a list of forty-four very specific and limited areas nationwide that are Indian sacred sites currently threatened by government development.[121] Also, many tribes share the same sacred sites, e.g., the Navajo and Hopi share San Francisco Peaks in northern Arizona, and

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> treated as presumptively invidious those classifications that disadvantage a 'suspect class,' or that impinge upon the exercise of a 'fundamental right.' With respect to such classifications, it is appropriate to enforce the mandate of the equal protection clause by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest. In addition, we have recognized that certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the state.

Plyler v. Doe, 457 U.S. 202, 216-18 (1982).

117. *See* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 & n.25 (1979).

118. "Disparate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable by the weightiest considerations." Washington v. Davis, 426 U.S. 229, 242 (1976).

119. *Id.*

120. Plyler v. Doe, 457 U.S. 202, 217 (1982).

121. *See* ECHO-HAWK, *supra* note 86, at 3.

the Yarok, Tolowa, and Karuk Indians share Chimney Rock in Northern California. Chimney Rock is the piece of land which the United States Forest Service sought to build a road upon in the *Lyng* case.

Regardless of the facial neutrality of RFRA, its operational failure to protect Indian worshippers should be considered purposeful discrimination because the exclusion of Indian religions is not precisely tailored to a compelling government interest. Thus, notwithstanding the legislative history of RFRA, the *Yoder* doctrine of strict scrutiny, as required by the statute, must be applied fully and equally to Indian plaintiffs if it is to be applied to anyone. *Yoder* stands for the notion that the state must go a step further than merely arguing its general law furthers a societal goal. The government must also show that the refusal to grant an exemption for religious plaintiffs is critical to achieve its public purpose.[122]

With the full *Yoder* protections, traditional free exercise scrutiny would become available to Indian plaintiffs for the first time in decades. An Indian peyote user could challenge a state's refusal to grant an exemption for religious use of the drug. That refusal itself must be justified under a compelling government interest standard. Just as in the *Yoder* scenario, allowing an exemption for the Native American Church would not undermine the state's interest in fighting societal harms due to drug use.[123] In fact, an exemption would actually help further the state interest.[124] Similarly, the least restrictive means test could offer better protection for sacred sites. The government entity would have the burden of proving that an option to develop a different piece of government land for public purposes must be unavailable. The operation of a general government regulatory scheme is not enough of a compelling interest to deny free exercise plaintiffs their fundamental rights. *Yoder* applied the compelling interest test to the denial of exemptions.

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122. For example, the refusal to grant an exemption to bona fide users of peyote in the Native American Church should further the general governmental purpose of combatting the drug problem. In Wisconsin v. Yoder, the Court defined the state's interest as an interest in denying the Amish parents an exemption from the compulsory school attendance law. The Court upheld the Amish claim because it felt that the parents did not frustrate the state's goal by teaching their children at home past the eighth grade, but in fact assisted the state in reaching its general public goal in ensuring educated citizens. 406 U.S. 205, 214 (1972).

123. Because of Congress' failure to legalize peyote use, it would seem that the legislators perhaps deferred to Justice O'Connor's opinion that a state's prohibition of peyote would withstand strict scrutiny. Employment Div. v. Smith, 110 S. Ct. 1595, 1614 (1990) (O'Connor, J., concurring). However, because such bona fide use of peyote does not, in fact, harm the state's overall interest in combatting the evils of drug use, it is hoped that a full judicial inquiry into a state's reason for denying an exemption would yield a favorable holding for Indian peyote users. Nevertheless, Congress' failure to legalize peyote should also be invalidated on equal protection grounds.

124. Justice Blackmun's dissent in Employment Div. v. Smith explains:

> [J]ust as in Yoder, the values and interests of those seeking a religious exemption in this case are congruent, to a great degree, with those the State seeks to promote through its drug laws. Not only does the Church's doctrine forbid nonreligious use of peyote; it also generally advocates self-reliance, familial responsibility, and abstinence from alcohol . . . . Far from promoting the lawless and irresponsible use of drugs, Native American Church members' spiritual code exemplifies values that Oregon's drug laws are presumably intended to foster.

110 S. Ct. 1595, 1619-20 (1990) (Blackmun, J., dissenting).

E. The Requirement of Purposeful Discrimination Should Not Bar Application of the Equal Protection Analysis

Even if one cannot accept the notion that intentional racial discrimination has occurred against Indian worshipers, equal protection analysis should still be applied to the disparate treatment of Indian religions. "Under traditional psychoanalytical theory, one would anticipate that much, if not most, irrational prejudice operates at a level below the conscious mind."[125] As discussed earlier, the very uniqueness of Indian religions causes non-Indian misunderstanding and cultural bias to operate against Indian people.

Furthermore, since religious liberty is such a fundamental right, it is improper to require an invidious purpose behind a facially neutral law, such as RFRA, which burdens that right. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[126] the first free exercise case in the Supreme Court since *Smith*, the concurring opinion by Justice Scalia and Chief Justice Rehnquist criticized the majority's inquiry into the city government's intent behind the city ordinance burdening the unpopular Santeria religion. "[I]t is virtually impossible to determine the singular 'motive' of a collective legislative body,[127] . . . and this Court has a long tradition of refraining from such inquiries."[128] Perhaps in a Fourteenth Amendment case not involving constitutionally enumerated rights the Court may inquire into invidious purpose, but in a free exercise case, it should not.

Often, the concept of equal justice under the law can only be preserved without requiring minority plaintiffs to prove that lawmakers intentionally chose a policy "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[129] Tribe explains:

> In *Washington v. Davis* the Supreme Court feared that adoption of a disparate impact test for equal protection analysis would threaten a whole panoply of socioeconomic and fiscal measures that inevitably burden the average black more than the average affluent white. That might be a concern if all resource allocations that had a statistically differential impact by race were automatically subject to strict scrutiny. But there is a difference between an admittedly implausible affirmative duty to help subjugated groups by every means possible[130] . . . and a government responsibility not to sanction tests, rules, practices and policies that predictably and avoidably perpetuate the inferior position

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125. TRIBE, *supra* note 12, at 1519.

126. 113 S. Ct. 2217 (1993).

127. *Id.* at 2239 (citing Edwards v. Aguillard, 482 U.S. 578, 636-39 (1987) (Scalia, J., dissenting)).

128. *Id.* (citing Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130-31 (1810); United States v. O'Brien, 391 U.S. 367, 383-84 (1968). Tribe argues:

> [I]f government is barred from enacting laws with an eye to invidious discrimination against a particular group, it should not be free to visit the same wrong whenever it happens to be looking the other way. If a state may not club minorities with its fist, surely it may not indifferently inflict the same wound with the back of its hand.

TRIBE, *supra* note 12, at 1519.

129. TRIBE, *supra* note 12, at 1518 (quoting Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

130. See *supra* notes 46 & 72 for a discussion on why judicial recognition of government responsibility to protect sacred sites does not violate the establishment clause.

> of a group originally relegated to that position by a ruthless regime of official discrimination and exploitation.[131]

This discussion illustrates exactly the state of affairs for Indian free exercise plaintiffs. Disparate judicial tests for Indian plaintiffs, and legislative refusals to include exemptions for Indian worshipers in general government laws or policies are the mechanisms by which mostly whites in positions of power are perpetuating the denial of religious freedom, and indeed culture and identity, to Indian people. With RFRA, Congress has codified this regime of unequal treatment by structuring the act to effectively exclude American Indians from the strict scrutiny protection of the *Yoder* doctrine.

F. The Social-Relations Approach

Under the constitutional mandate of equal protection, the government cannot be callously indifferent to the needs of minorities. But, in what manner should the government treat them differently? One commentator, Martha Minow, advocates a social-relations approach to equal protection analysis.[132] Rather than focusing on individual rights, judicial interpretation of the Constitution should recognize that individuals have an inherent right to the maintenance of their social relationships.[133] Without the continuation of these relationships, the concept of individual rights becomes meaningless, for "people live and talk in relationships and never exist outside them."[134]

In the case of American Indians, their unique religious activities are an essential means by which they maintain their social relationships. As with any faith, active traditional worship furthers and protects the unique identity and spirituality of Native Americans as persons, both individually and as tribal members. To traditional Indians holding on to what is left of their culture and religion, it is essential that they remain Indian in some appreciable way, rather than becoming totally assimilated into the dominant culture. Thus, for Indian people, it is important that they be

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131. TRIBE, *supra* note 12, at 1520. Concededly, legislators may not consciously set out to eradicate Indian religions by choosing a particular sacred site to develop, or by refusing a peyote exemption in a state drug law. However, the First and Fourteenth Amendments combined should require that courts engage in strict scrutiny of even neutral government actions that burden Indians' free exercise because non-Indian government decision-makers often do not consider, are unaware, or simply don't care that their actions may harm Indian religions more than others. The American political process is not the truly representative democracy it should be. Legislators do not engage in a full and proper balancing of interests before enacting generally applicable laws. Thus, courts must be the agents to patch up representative democracy by strictly scrutinizing, and sometimes invalidating, those government actions that burden discrete and insular minorities. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

132. MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 110 (1990). *See generally* Richard Hertz, *Legal Protection for Indigenous Cultures: Sacred Sites and Communal Rights*, 79 VA. L. REV. 691 (1993).

133. MINOW, *supra* note 132, at 110-11. According to Minow, "the social-relations approach assumes that there is a basic connectedness between people, instead of assuming that autonomy is the prior and essential dimension of personhood." *Id.*

134. *Id.*

allowed to maintain the special character of their social relationships through traditional spiritual activities in concert with Mother Earth and the sacred plants she offers.

Unfortunately, because native religions are fundamentally different from those of Judeo-Christian society, the judiciary has treated them with ethnocentric insensitivity.[135] Courts have presumed that the special character of native religions is a basis for denying the claims of Indian worshipers.[136] Congress, in turn, has accepted this biased reasoning. Thus, the very uniqueness of native religion is viewed as a negative characteristic.[137] Minow argues that this type of attribution of difference

> hides the power of those who classify and of the institutional arrangements that enshrine one type of person [in this case, religion] as the norm, . . . When public officials organize the world through categories of difference, they select some traits from among many and give them significance in distributing benefits and burdens. And the traits usually selected reflect the experiences and privileges of those making the selection.[138]

Under a social-relations approach to equal protection analysis, Congress and the courts would necessarily consider their own inclination to recognize differences in a negative manner. If institutional decision-makers openly acknowledged their own cultural intolerance of native religions, they would more fully recognize their impact on those affected by their decisions. Under equal protection theory, this ethnocentrism would be formally acknowledged in the courts, and perhaps the proper balancing of religious and governmental interests could take place.

VII. CONCLUSION

The treatment of Indian sacred site claims by American courts has revealed a distressing insensitivity to native religions. Misguided centrality and establishment concerns and the indirect burden rationale have resulted

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135. Ethnocentrism, at the very least, if not racism. *See generally* Williams, *supra* note 90. "Supreme Court decisions . . . acquiesce in the cultural racism of Christian Europeans who regarded the 'character and religion' of Indian peoples as providing 'an apology' for claiming an 'ascendancy' over them . . . ." *Id.* at 74. "Those who came to the New World seeking to pursue their own vision of freedom and self-determining rights did so by transplanting an Old World form of cultural racism denying respect to indigenous tribal peoples' own fundamental human rights of self-determination." *Id.* at 75.

136. Gordon, *supra* note 45, at 1464.

137. In essence, the conflict this article deals with is the irony that many native people wish to preserve their cultural and religious heritage, remaining separate and apart from the American mainstream much like their lighter-skinned Amish counterparts. Traditional Indians enjoy and even depend on the preservation of their differences for a sense of identity and spiritual fulfillment. "Yoked to the notion of difference . . . is the pride rooted in pre-Columbian sources from which Indian tribes and tribal communities find cultural continuity and spiritual richness." Frank Pommersheim, *Liberation, Dreams and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 410, 424. However, the mainstream has so far penalized native peoples for their differences. "Neither the legal community nor the dominant community at large well understand this pride of difference. It is this pride that tests the vitality of 'old promises' in a diverse society that professes a commitment to both equality and pluralism." *Id.*

138. MINOW, *supra* note 132, at 111-12.

in judicial refusal to employ strict scrutiny even when government action threatens to destroy Indian religions. In comparison to claims of non-Indians, Indian free exercise claims have not been given the same treatment under traditional First Amendment doctrines. After *Smith*, and because the Religious Freedom Restoration Act is not likely to alleviate matters, Indians may have to lobby non-Indian legislatures to get specific exemptions for their religious conduct. Unfortunately, legislatures are often opposed to Indian needs. Thus, native worshipers will suffer an even greater disadvantage than most in the protection of their religious freedom.

It is ironic that Congress should respond to the denial of American Indian religious liberty in the *Smith* case with a law designed to return free exercise cases to pre-*Smith* jurisprudence. In *Smith*, the Supreme Court asserted that constitutional free exercise rights could be protected from generally applicable laws through legislative action. The Court explained that the failure to find constitutional protection for religious activity did not necessarily stand for the idea that statutory protection was not permitted or even desirable.[139] Indeed, the Court must have realized the extreme departure it was making from traditional doctrine.

Congress did respond to *Smith*, but merely sent the ball back to the courts. Yet, RFRA addresses *Smith* with language and intent that will allow the usual judicial maneuvering around a proper compelling interest inquiry and, most importantly, the least restrictive means analysis. This passing of the buck by Congress fails to deal with the unique character of Indian land based theology. Congress has so far refused to acknowledge the disturbing fact that Judeo-Christian courts are blind to the severe hardships faced by native religion, hardships which should rise to the level of First Amendment infringement deserving of the *Yoder* strict scrutiny application.

This article argues for the use of an equal protection analysis to prevent Congress and the courts from denying native religious freedom claims the proper protection of traditional free exercise doctrines. At issue is the fundamental right of religious liberty enumerated in the Bill of Rights. Native Americans are clearly members of a suspect class who have suffered all manner of historic discrimination. The Fourteenth Amendment offers an alternative framework for courts to dispense with unfair tests and to challenge Congress' failure to include Indian religions within the strict scrutiny protection of RFRA. Courts should then impose the compelling government interest and least restrictive means criteria. Strict scrutiny would not necessarily guarantee that all Indian claimants would be successful. However, it would offer the equal protection of First Amendment legal standards that have historically been used with Judeo-Christian religious claims.

Currently, American "legal categories embody dominant cultural assumptions that mistranslate the inner reality of Native American com-

139. *See* Employment Div. v. Smith, 110 S. Ct. 1595 (1990).

munities and require cultural conformity as the price of legal recognition."[140] American Indians and native cultures should not be legally and institutionally penalized simply because their religions are different from the mainstream and are incomprehensible to non-Indian lawmakers and courts. It takes no wrenching of the equal protection doctrine to come up with a workable approach that would give the meaningful constitutional protection enjoyed by others to the worship of those whose timeless religions pre-date the coming of whites to this continent and the Constitution itself.[141]

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140. Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 759.

141. Indians do not have the same religious freedoms as other Americans, even though their ceremonies developed thousands of years before Europeans—many of them fleeing religious persecution—settled in the United States . . . . Respect should be given to a religion that does not involve going to church one day a week, but which is based on animals, the world and the universe, and whose church is the mountains, rivers, clouds and sky . . . .

Navajo Nation President Peterson Zah, *quoted in* ALBUQUERQUE J., Nov. 23, 1991, at 1.