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Conflicting Values: The Religious Killing of Federally Protected Wildlife

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COMMENT:

CONFLICTING VALUES: THE RELIGIOUS KILLING OF FEDERALLY PROTECTED WILDLIFE*

INTRODUCTION

In our increasingly crowded world, the balancing of conflicting interests between human beings can be very difficult. However, the balancing of conflicting interests between humans and other species is far more difficult.The relationships between humans and animals, as joint tenants on earth, are diverse and often contradictory.[1] Humans worship, love, and admire animals; they also fear, hunt, and exploit animals. Relations between humans and animals are often defined by whether humans see their interests as differing from those of animals.

When human beings do perceive their interests as conflicting with those of animals, one of two philosophical perspectives generally will control how the two interests are balanced.[2] The first perspective values animals according to their usefulness to humans.[3] The second perspective values animals intrinsically, without regard for their utilitarian value to humans.[4] This perspective encompasses an emerging environmental ethic which asserts that human beings should recognize moral and legal rights vested both in nature and in animals.[5] This Comment explores the current conflict between federal wildlife protection and Indian religious use of animals which reflects this philosophical debate.

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1. *See generally* K. Clark, Animals and Men (1977).

2. R. Nash, The Rights of Nature: A History of Environmental Ethics 4-10 (1989); Callicott, *On The Intrinsic Value Of Nonhuman Species*, in The Preservation of Species 138 (B. Norton ed. 1986).

3. *See generally* D. Decker & G. Goff, Valuing Wildlife: Economic and Social Perspectives (1987).

4. Frey, *Rights, Interests, Desires and Beliefs*, in People, Penguins, and Plastic Trees: Basic Issues in Environmental Ethics 40 (1986); VanDeVeer, *Interspecific Justice*, in *id.* at 51.

5. Closely related to the idea of intrinsic rights of nature is the idea that those rights should be legally enforceable. The best known proponent of legal standing for non-humans is University of Southern California law professor Christopher Stone. During a protracted fight over the proposed development of California's Mineral King area, Stone wrote a law review article timed to attract the attention of Supreme Court Justice William O. Douglas. Stone, *Should Trees Have Standing?*, 45 S. Cal. L. Rev. 450 (1972). Justice Douglas adopted much of Stone's position in his Mineral King dissent in Sierra Club v. Morton, 405 U.S. 727, 743 (1972) (Douglas, J. dissenting). Since that time, Stone has responded to criticism in a subsequent article, Stone, *Should Trees have Standing? Revisited: How Far Will Law and Morals Reach? A Pluralistic Perspective*, 59 S. Cal. L. Rev. 1 (1985). Meanwhile, a tiny bird in Hawaii became an official plaintiff in Palila v. Hawaii Dept. of Land & Natural Resources, 639 F.2d 495 (9th Cir. 1981). For a discussion of the idea of legal standing for nature and animals, see R. Nash, *supra* note 2, at 127-36.

As legal conflicts between federal wildlife protection and individual religious freedom multiply, it is increasingly apparent that courts have no consistent standard by which to measure the relative merits of the two interests. The infringement of individual religious practices raises issues of constitutional significance under the First Amendment. Federal wildlife protection, in turn, imposes strict prohibitions upon even the religious killing of protected species.

Not only is the existing criteria for demonstrating a threshold burden upon a religious practice vague and inconsistent, but if a religious practice is found to be burdened, the requisite constitutional analysis involves a balancing of the relative interests without clear guidelines. Although the legislative process provides the courts with some evidence of the weight of the governmental interest in wildlife protection, constitutional analysis of the right to free exercise of religion provides no principled means of measuring the countervailing weight of Indian religious claims.

This current lack of clear standards is symptomatic of a more fundamental uncertainty about how conflicting interests are valued within our society. This uncertainty is particularly acute in light of the deepening global environmental crisis. Human beings are beginning to realize that their well being and continued existence are intimately linked to the larger deteriorating environment. As human populations multiply and increasingly deplete natural resources, the environment is showing alarming signs of devastation,[6] from the pollution of air and water, to destruction of the world's rainforests, loss of habitat, toxic contamination of lands, overflowing landfills, and ozone depletion. These by-products of industrialization, individualism, and an emphasis on economic gain are the logical consequences of the perspective that nature exists solely as a resource to be utilized by humans. Internationally, both animals and plants are proving unable to overcome these ecological disruptions, and are vanishing at an unprecedented rate.[7]

The crisis, precipitated by a primarily utilitarian perspective and the resulting estrangement of humans from nature, is now forcing a reevaluation of fundamental values. As one commentator concluded, "the pollution and destruction of man's environment are religious and ethical problems that derive basically from irreverent and immoral attitudes toward nature, rather than from technological inadequacy alone."[8] Some commentators now warn that only a fundamental reassessment of values can avert irreversible global deterioration.[9]

6. Barbour, *Introduction*, in Earth Might Be Fair: Reflections on Ethics, Religion, and Ecology 1 (I. Barbour ed. 1972).

7. VanDeVeer & Pierce, *The Preservation of Species: Are They Special?*, in People, Penguins, and Plastic Trees: Basic Issues in Environmental Ethics, *supra* note 4, at 107; *see also*, N. Myers, The Sinking Ark: A New Look At The Problem Of Disappearing Species 4 (1979).

8. Schilling, *The Whole Earth is The Lords*, in Earth Might Be Fair: Reflections On Ethics, Religion, and Ecology 100 (I. Barbour ed. 1972).

9. Barbour, Introduction, *supra* note 6, at 1; N. Myers, *supra* note 7, at 14.

As part of this reassessment, certain values inevitably will be reexamined. Individual rights necessarily will be weighed against the collective rights of larger communities. The short-term benefits of various actions will be weighed against long-term consequences such as extinction. Economic interests, in turn, will be balanced against non-economic interests.[10] Any conduct, including religious practices, which may have detrimental environmental impacts will be increasingly scrutinized.

Since time immemorial, animals have played an important role in religious practices worldwide,[11] from purely symbolic roles, to actual animal sacrifices. Recent court cases in the United States demonstrate that many immigrants continue to practice the animal sacrifices central to the religions of their homelands.[12] Although most Indian religious practices[13] would not be characterized as animal sacrifices, many ceremonies do require eagle parts or entire eagle bodies, which necessitate killing prior to the ceremonies.[14] Human beings who believe that animals should be valued primarily for their usefulness to humans, may conclude

10. For an interesting look at the economic view of wildlife, see Valuing Wildlife: Economic And Social Perspectives (D. Decker & G. Goff, eds. 1987). For the most notable clash of economics and wildlife preservation to date, see Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978); and see *infra* text accompanying notes 135-58.

11. *See* K. Clark, *supra* note 1, at 13-22. Within the United States there are various religions which use animals in religious ceremonies. For example, snake handling by the Holiness Church of God in Jesus Name was enjoined by the Supreme Court of Tennessee upon finding: "handling of snakes in a crowded church sanctuary with virtually no safeguards, with children roaming around unattended, with the handlers so enraptured and entranced that they were in a virtual state of hysteria required holding that defendants had combined and conspired to commit a public nuisance . . ." State of Tenn. ex. rel. Swann v. Pack, 527 S.W.2d 99, 113 (Tenn. 1975), *cert. denied*, 424 U.S. 954 (1976). In a footnote, the court noted that the founder of the religion, George Went Hensley, was bitten four hundred times in the course of his ministry, and finally died as a result of a diamondback rattlesnake bite during a prayer meeting at Lester's shed near Altha, Florida on July 24, 1955. *Id.* at 105 n.8.

12. In 1989, for example, a federal district court in southern Florida heard a free exercise claim involving animal sacrifices. In Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, followers of the Lukumi religion, also known as Santeria, claimed that a city ordinance violated their religious right to sacrifice animals. 723 F.Supp. 1467 (S.D. Fla. 1989). Testimony established that there were an estimated 50,000-60,000 Santeria practitioners in South Florida. Sacrifices included chickens, pigeons, doves, ducks, guinea fowl, goats, sheep and turtles. The court found that the city had three compelling secular interests: 1) to prevent cruelty to animals; 2) to safeguard the health, welfare and safety of the community; and 3) to prevent the adverse psychological effect on children exposed to such sacrifices. *Id.* at 1477, 1485-87. Those interests were found to outweigh the religious free exercise claim. *Id.* at 1487.

13. Although religious practices differ amongst various Indian tribes, the word "Indian" is used in this Comment to include all tribes sharing the common characteristics discussed.

14. An exception to this general rule is the Hopi practice of taking eaglets from nests, which are adopted into the tribe, fed by hand, and eventually sacrificed. J. Hughes, American Indian Ecology 36 (1983); H. Tyler, Pueblo Birds And Myths 52-55 (1979). According to Mr. Keith C. Frederick, of the Department of the Interior, the Hopis hold the only permit ever granted under the religious exception to the Eagle Protection Act to take live eagles. The permit is issued in the name of the tribal chairman, for twelve golden eaglets annually. The permit, first issued in 1986, is reviewed annually. Mr. Frederick stated that the taking of twelve eaglets is equivalent to taking approximately six adults, since the mortality rate is about fifty percent. Interview with Mr. K.C. Frederick, Asst. Special Agent in Charge, Division of Law Enforcement, Department of the Interior, Regional Office in Albuquerque (Oct. 1989).

that humans should have a legal right to take the life of an animal for personal religious gratification. However, human beings who believe that animals have inherent rights such as an interest in continued survival, will conclude that humans have no right to subordinate the animal's rights to human religious desires. This debate constitutes the heart of the current conflict between individual constitutional rights to religious use of animals and government intervention on behalf of threatened species.

This Comment begins by examining the increasing federal preemption of wildlife regulation. Three federal wildlife protection statutes are introduced, and the applicability of those statutes on Indian lands is discussed. The second section examines the current confusion surrounding free exercise of religious standards. Finally, section three explores the unresolved issue of how to balance the conflicting interests of Indian religious use of animals with federal wildlife protection.

I. THE EMERGENCE OF FEDERAL WILDLIFE PROTECTION

A Disturbing Inaugural

Federal efforts to protect endangered wildlife made an inauspicious debut in the 1870s as the American buffalo hovered on the brink of extinction. The country was in the midst of an extended westward migration sparked by frontier dreams of inexhaustible land, abundant wildlife, and gold in California.[15] Wildlife was viewed primarily as existing to serve the needs of human beings, and the virtually unrestricted freedom to hunt was particularly exhilarating to recent immigrants from crowded European homelands.[16] It was an era when man measured his ability to survive by his ability to dominate nature and bend it to human purposes. When westward settlement began, at least forty million[17] buffalo roamed the plains in enormous herds. In the slaughter that followed, individuals asserted what they considered their unfettered right to kill wildlife, often by shooting buffalo from moving trains for sport.[18] Scarcely thirty years

15. *See generally* J. Tober, Who Owns the Wildlife? The Political Economy of Conservation in Nineteenth Century America 3-40 (1981). Although the California gold rush began in 1848, the completion of the first transcontinental railroad in 1869 sparked a new interest in western migration.

16. *Id.* at 4-5. In England, for example, the right to hunt wildlife was often unevenly distributed with landowners of the wealthier classes holding rights where less prosperous individuals were barred. *See* T. Lund, American Wildlife Law 8-10 (1980).

17. Estimates vary on the original population numbers, with forty million a low estimate. *See* J. Tober, *supra* note 15, at 97-102. For an exhaustive treatment of the subject of population estimates, see F. Roe, The North American Buffalo 334-520 (1951) (186 pages discussing estimates).

18. Buffalo hunters often prided themselves on their trophy numbers. For instance, Buffalo Bill Cody claimed he killed 4,280 buffalo in just a single twelve month period when he worked for Union Pacific Railroad. P. Matthiessen, Wildlife in America 149 (1959). Some commentators believe that it was the completion of the railroad which set in motion the "final frenzied assault upon the buffalo." *Id.* at 148. Not only did the railroad allow unlimited target practice from moving trains, it also created an unprecedented means of transporting hides to eastern markets. *Id.* at 149.

later, nearly all of the forty million buffalo lay dead upon the plains,[19] with only an estimated twenty animals safe within the protected boundaries of the new Yellowstone National Park.[20]

In 1874, while there was still time to intervene in this unprecedented slaughter, Representative Greenbury Fort of Indiana introduced a buffalo protection bill in the House of Representatives.[21] The bill proposed to "prevent the useless slaughter of buffalos within the territories"[22] and provided stiff penalties for the killing of male buffalo except for food, and prohibited the killing of female buffalo entirely.[23] The bill proposed an express and unlimited exemption from liability for Indians.[24]

Debate in the House of Representatives over the proposed bill revealed not only most of the major positions on wildlife protection still taken today, but also a chillingly candid record of early disagreement over Indian exemptions from federal wildlife statutes.

While some congressmen lamented the slaughter of thousands of buffalo solely for their hides or their tongues, and hundreds of thousands "without any object except to destroy them,"[25] other congressmen took the unapologetic position that the extinction of the buffalo should be encouraged as a means to force Indian tribes into economic and geographic dependency.[26] In one of the darker moments of federal-Indian relations, the Department of the Interior argued that Indians would not be civilized until the buffalo were gone,[27] and various congressmen endorsed the government's perspective.[28]

The debate also revealed a more fundamental human distrust of every-

19. Some historians estimate an annual kill of five million during the early 1870s. *See* J. Trefethen, An American Crusade for Wildlife 15 (1975).

20. P. Matthiessen, *supra* note 18, at 150-51. The state of Wyoming established a ten year closed season on the buffalo in 1890, and the twenty buffalo in Yellowstone slowly increased under that protection. In 1908, the National Bison Range was established in Montana. The American Buffalo narrowly escaped total extinction by the establishment of these limited reserves. *Id. See also* J. Tober, *supra* note 15, at 97-102 for another detailed account of the decline from millions of buffalo to a single herd of twenty animals.

21. Buffalo Protection Bill, H.R. 921, 43rd Cong., 1st Sess. 174 (serial set 1593) (1874).

22. 2 Cong. Rec. 2105 (1874).

23. *Id.* For a first offense, the proposed penalty was $100 per buffalo wounded or killed, and for a second offense, a prison sentence of up to thirty days.

24. *Id.*

25. *Id.* at 2106.

26. *Id.* at 2106-08.

27. *Id.* at 2106-09; *see* T. Lund, *supra* note 16, at 89 n. 85. The belief that destruction of the buffalo would effectively destroy the Indian way of life was apparently well founded. In F.G. Roe's detailed book on the buffalo, he notes that the independence of the Plains tribes was attributed to the ease with which they could obtain food from the inexhaustible supply of buffalo. In examining the relationship of Indians and buffalo, Roe further concludes "I know of no other instance throughout the entire world wherein from one source so many commodities of primary importance were derived." F. Roe, *supra* note 17, at 602, 608. Another historian describes buffalo as the "beef, coal, iron, plastic, cotton and wool of the Indian economy, all in one." J. Trefethen, *supra* note 19, at 8.

28. 2 Cong. Rec. 2106-08 (1874).

thing perceived as wild and uncontrollable.[29] Michigan Representative Conger, for example, complained that buffalo "are as uncivilized as the Indian" because they eat the grass, trample the plains, and destroy pastures."[30] Representative Conger also argued the inevitable futility position, claiming that the bill was "utterly useless" because "there is no law that Congress can pass that will prevent the buffalo disappearing before the march of civilization."[31]

To their credit, a majority of congressmen found the proposed policy of extinction as a way to render the Indians more submissive to be a "disgrace."[32] Many were incredulous that other representatives favored buffalo extinction as a means of forcing Indians into submission.[33] Representative Hawley of Connecticut, for example, responded sharply:

> As well you might burn the grass in [I]ndian country and around it kill every bird, dig every root, destroy every animal whatever and take away from the Indian the means of living, and in that way you will perhaps be able to get them under your control, and be able to board them at the Fifth Avenue Hotel and civilize them to your satisfaction. . . . I object to the inhumanity of gentlemen who wish to wipe out the buffalo in order to get the Indians upon reservations.[34]

Despite stiff opposition, the bill passed the House of Representatives with 132 votes in support.[35] The debate then moved to the Senate where disagreement focused on whether Indians should be exempted from liability.[36] In response to a proposal to remove the Indian exemption, various senators argued that not only did the Indians rely upon the buffalo for food, but that the Indians were "careful and cautious" about the destruction of the buffalo.[37] Representatives of the House agreed that "the Indian never goes into a herd of buffalo and shoots them down out of mere wanton wickedness. That is always done by white men. . . ."[38] Supporters of the exemption finally overcame opposition, and the bill passed the Senate on June 23, 1874.[39]

29. *Id.* at 2106-07, 2109.

30. *Id.* at 2107; *see also* J. Tober, *supra* note 15, at 9, for evidence that the abhorance of "uncivilized" Indians actually also extended to "uncivilized" white men. Tober cites a 1840 state legislative report which declares, "so far as game and hunting are concerned, the sooner our wild animals are extinct the better, for they serve to support a few individuals just on the borders of a savage state. . . ." *Id.*

31. 2 Cong. Rec. 2107 (1874).

32. *See, e.g., id.* (Comments by Representative Eldredge of Wisconsin).

33. *Id.* at 2107-09.

34. *Id.* at 2107.

35. *Id.* at 2109. There is no recorded number voting in opposition; however, the full membership of the House numbered 270 in 1874. Journal of the House of Representatives, 43rd Cong., 1st Sess. (serial set 1593) (1874).

36. 2 Cong. Rec. 5413-14 (1874).

37. *Id.* at 5413.

38. *Id.* at 2106.

39. *Id.* at 5414.

The ultimate demise of the bill by President Grant's pocket veto, and consequently of the wild buffalo itself, reflected an inauspicious debut for federal wildlife regulation. While the eventual loss of wild buffalo herds was arguably inevitable in the face of increasing settlement,[40] the failure of Congress to overcome the presidential veto demonstrated the ineffective early attempts to afford federal wildlife protection.

After presidential veto of the Buffalo Protection Act, a few states made an effort to stem the slaughter,[41] but due to the broad migration patterns of buffalo, only federal nationwide protection could have been effective. Nearly one hundred years later, passage of the Endangered Species Act of 1973[42] would reverse this ineffective federal role, but the eventual assertion of federal power would come too late to save the wild buffalo.[43]

Federal Authority to Regulate Wildlife

The premise that the United States government should concern itself with the well being of wild animals emerged very slowly in American law. Despite the harsh conditions of settlement life, wildlife was abundant and easily satisfied the needs of a sparse human population.[44] Consequently, the federal government had little incentive to test the scope of its constitutional authority to preempt local regulation of wild animals. There could have been exceptions for birds and animals such as buffalo, whose broad migratory patterns suggested that state regulation would be ineffective. However, more urgent matters preoccupied the federal government during consideration of the Buffalo Protection Bill in the extended aftermath of the Civil War. A wildlife population crisis probably paled in contrast to many of the problems which confronted the early Congress. As a result, recognition of a unique need for federal protection of migratory species did not occur until the early twentieth century.[45]

In the colonies and on the frontier, a hands-on rule defined an individual's legal right to kill wildlife. Early settlers applied the doctrine of capture,[46] borrowed from the English common law of property under which wild animals became the private property of an individual upon

40. P. Matthiessen, *supra* note 18, at 151.

41. Colorado and Kansas, for instance, enacted protective laws in 1875, but by then there were few remaining buffalo within their territories. J. Trefethen, *supra* note 19, at 16.

42. 16 U.S.C. §§ 1531-1543 (1988).

43. From the twenty buffalo in Yellowstone National Park at the turn of the century, other reserves were eventually created to maintain small controlled herds. P. Matthiessen, *supra* note 18, at 151. While the wild buffalo escaped near extinction as a species, the buffalo of today live a semi-domesticated life. New reserves are still being created; the Nature Conservancy recently purchased 30,000 acres in Oklahoma to re-establish a prairie ecosystem, and reintroduce a herd of bison. Eds., News, Wildlife Conservation 18 (Mar/Apr 1990).

44. J. Tober, *supra* note 15, at 3.

45. *See infra* notes 69-80 and accompanying text.

46. *See* Pierson v. Post, 2 Am. Dec. 264 (N.Y. 1805); Geer v. Connecticut, 161 U.S. 519, 522-23 (1896). For a general discussion of the historical relationship between royal ownership rights of wild animals and those of individuals, see J. Tober, *supra* note 15, at 146-47.

capture or physical possession. Individuals hunted with few restraints, particularly on an individual's own private property.[47] What minimal state regulations existed usually sought to regulate the taking of game to achieve a sustained yield or stable population by periodic closed seasons.[48] Many years would pass before the federal government would test its authority to intervene in wildlife matters and preempt the previously unquestioned authority of the state. Meanwhile, both the power and the incentive of the federal government to regulate wildlife lay dormant.

In 1896, the United States Supreme Court turned its attention to the ruffled grouse of Connecticut and fundamentally altered the legal principles which governed early wildlife law. In *Geer v. Connecticut*,[49] the Supreme Court decisively endorsed two principles: first, that state regulation of wildlife is subject to constitutionally vested federal rights,[50] and second, that ownership of wildlife is collective, with the government acting in a trustee capacity.[51] In affirming a Connecticut law prohibiting the shipment of any game birds out of the state, the Court concluded that the common ownership right vested in a sovereign included the right to keep the property within its jurisdiction.[52] With the assertion of federal authority under the Commerce Clause still dormant,[53] the Court found that the state prohibition of interstate commerce lay outside the scope of Commerce Clause concerns.[54] However, while the Court strengthened state authority vis-a-vis its citizens by the doctrine of state trusteeship of wildlife, it also stated that state authority is recognized where it is not "incompatible with, or restrained by, the rights conveyed to the Federal government by the constitution."[55]

The holding in *Geer* signaled a significant limitation of an individual's previously unfettered right to take wildlife, and laid the theoretical framework for increasing both federal and state restrictions on individual rights. The Court explicitly found that individuals have no right to hunt wildlife, but may be accorded the privilege to do so according to terms set by the state sovereign.[56] Because the sovereign serves as trustee for all citizens' interests in wildlife, the Court concluded that the state acts under a duty

47. Geer v. Connecticut, 161 U.S. 519, 523 (1896).

48. For a detailed history of state game laws and their goals, see generally, J. Tober, *supra* note 15, at 139.

49. 161 U.S. 519.

50. *Id.* at 528.

51. *Id.* at 529, 534. The Court noted that this finding builds upon its earlier finding in Martin v. Waddell, 41 U.S. (16 Pet.) 367, 420 (1842) that wildlife ownership is held in common by citizens, and vested in their sovereign. *Id.* at 529.

52. *Id.* at 530.

53. L. Tribe, American Constitutional Law, 404-08 (2d ed. 1988).

54. Geer, 161 U.S. at 531-32.

55. *Id.* at 528.

56. *Id.* at 533.

to regulate consistent with that trust,[57] even after an individual secures physical possession of the animal.[58]

Because the rationale of *Geer* rested upon a now outdated concept of the scope of federal authority under the Commerce Clause, it was inevitable that *Geer* eventually would be overturned. In *Hughes v. Oklahoma*,,[59] the Supreme Court described *Geer* as eroded to the point of virtual extinction[60] and held that state obstruction of wildlife entering interstate commerce was an impermissible restraint under the Commerce Clause.[61] Despite *Geer's* ultimate reversal in recognition of federal supremacy, the basic concept of governmental units as wildlife trustees dominated early development of wildlife law in the late nineteenth and early twentieth centuries.[62]

Just four years after *Geer*, the Lacey Act of 1900 initiated federal intervention in the regulation of wildlife, prohibiting the interstate transport of any animal killed in violation of state law.[63] Despite the fact that the Lacey Act is considered an early, tentative assertion of federal authority, it is still utilized today. For example, poachers are being prosecuted under the Lacey Act for the killing of American black bears to fill an Asian demand for bear gall bladders.[64] Although some courts interpreted the Lacey Act's continued deference to state regulation as confirming relinquishment of federal authority, that interpretation proved inaccurate with the subsequent enactment of increasingly assertive federal wildlife statutes.[65]

THE WILDLIFE TRILOGY

In 1918, the federal government began a policy of expanding intervention in wildlife protection. As federal intervention increased and grew more stringent, individual freedom to take wildlife for any purpose became subject to increasing regulation. There are three federal statutes which have primarily precipitated continual conflict between federal wildlife protection and individual religious use of wildlife: the Migratory Bird

57. *Id.* at 534.

58. *Id.* at 533.

59. 441 U.S. 322 (1979); for a general discussion of the erosion of the state ownership doctrine, see J. Tober, *supra* note 15, at 161-65.

60. *Hughes*, 441 U.S. at 332.

61. *Id.* at 337.

62. *See* M. Bean, The Evolution of National Wildlife Law, 16-36 (2d. ed. 1983).

63. Lacey Act, ch. 553, 31 Stat. 187 (current version at 18 U.S.C. §§42-44 (1988) and 16 U.S.C. §701 (1988)). Prior to the Lacey Act, there were only a handful of relatively insignificant efforts by the federal government. *See generally* M. Bean, *supra* note 62, at 14.

64. Nobbe, *Somebody's Killing Our Bears: The Korean Connection*, in Wildlife Conservation 48 (Jan/Feb, 1990).

65. M. Bean, *supra* note 62, at 18.

Treaty Act[66] of 1918, the Bald Eagle Protection Act[67] of 1940, and the Endangered Species Act[68] of 1973.

Migratory Bird Treaty Act

The earliest of the three statutes, the Migratory Bird Treaty Act (MBTA), is also the most recent to come under constitutional challenge.[69] Although the act represents an early congressional effort to comply with international treaty obligations,[70] today it still remains a viable means of affording migratory birds federal protection.[71] Perceived as a necessary response to declining bird populations, the act prohibits the taking, killing, possession, sale, or offer for sale of any bird listed under various treaties, absent approval by regulation or permit.[72] The act provides for both misdemeanor and felony criminal convictions, but only commercial activities involving protected birds give rise to felony charges, with fines of up to $2,000 and two years of imprisonment.[73] The felony provisions were amended in 1986 to require knowledge as an element of the crime.[74]

In 1920, the Supreme Court in *Missouri v. Holland* upheld the constitutionality of MBTA, finding federal authority to regulate wildlife pursuant to its treaty making power.[75] In so holding, the Court signaled the beginning of significant erosion of *Geer's* state ownership doctrine as a bar to federal regulation. The Court noted that while a state's authority

66. 16 U.S.C. §§ 703-15 (1988).

67. 16 U.S.C. §§ 668-668d (1988).

68. 16 U.S.C. §§ 1531-1544 (1988).

69. United States v. Hinds, No. 89-46 (D.N.M. Jan. 19, 1990).

70. *See* Missouri v. Holland, 252 U.S. 416, 432 (1920).

71. For an extremely stringent enforcement of MBTA, see United States v. Richards, 583 F.2d 491 (10th Cir. 1978). In *Richards*, a college professor "of good reputation and high community standing" who was convicted of selling three sparrow hawks, received three concurrent terms of eighteen months imprisonment for a first offense. *Id.* at 497.

The MBTA replaced the initial Migratory Bird Act of 1913, which had triggered a small flurry of constitutional attacks by its declaration that all takings of migratory and insectivorous birds were subject to federal regulation. Act of March 4, 1913, ch. 145, 37 Stat. 828 (repealed 1918). For constitutional attacks, see United States v. Shauver, 214 F. 154 (E.D. Ark. 1914), *appeal dismissed*, 248 U.S. 594 (1919); United States v. McCullagh, 221 F. 288 (D. Kan. 1915). In those cases, the United States unsuccessfully defended its regulatory authority as constitutionally derived from both the Property Clause and the Commerce Clause; both courts found that under *Geer*, the states had the superior regulatory right. *See* M. Bean, *supra* note 62, at 19-20. The Property Clause was later found to be a valid basis for federal wildlife regulation in Kleppe v. New Mexico, 426 U.S. 529 (1976), *reh'g denied*, 429 U.S. 873 (1976). Although the Supreme Court has never explicitly ruled on the issue, commentators believe the Commerce Clause provides an alternative basis. *See* M. Bean, *supra* note 62, at 26.

72. 16 U.S.C. § 703 (1988).

73. 16 U.S.C. § 707(b) (1988).

74. Pub. L. 99-645, Title V, § 501, 100 Stat. 3590 (codified as amended at 16 U.S.C. § 707(b) (1988)). The felony provision was likely amended in response to a 1985 Sixth Circuit opinion holding the provision in violation of due process because it did not require scienter. *See* United States v. Wulff, 758 F.2d 1121, 1122 (6th Cir. 1985).

75. U.S. Const. art. II, § 2; *see* Missouri v. Holland, 252 U.S. 416, 434 (1920).

may be superior as between the state and its citizens, it does not follow that state authority is exclusive.[76] In finding that wild birds are not in the ownership nor even the possession of the states, Justice Oliver Wendell Holmes, writing for the Court, concluded that a fleeting presence of migratory birds within a state does not warrant exclusive state authority to regulate them.[77]

As a statute enacted to implement the provisions of various treaties, MBTA contains no statutory exceptions. However, various exemptions do appear in specific treaties, typically allowing for subsistence takings by Eskimos and Indians.[78] Of particular importance to Indian tribes, eagles first received federal protection pursuant to the 1936 convention between the United States and Mexico.[79] In 1972, the entire Accipitridae family, which includes all eagles and hawks, received identical protection.[80]

Bald Eagle Protection Act

The second major federal statute currently involved in constitutional challenges is the Bald Eagle Protection Act (BEPA, after 1962: EPA).[81] It is not surprising that eagles were the first animals to warrant individual statutory protection under the fledgling federal laws. Eagles carry special significance for many peoples of North America, symbolizing both power and freedom. Not only are eagles considered sacred in native Indian cultures,[82] but the bald eagle is the national bird of the United States[83] and the golden eagle is the national bird of Mexico.[84] The bald eagle, for example, is described in the enacting clause of BEPA as "a symbol of the American ideas of freedom."[85]

76. 252 U.S. at 434.

77. M. Bean, *supra* note 62, at 21.

78. Exceptions appear in various treaties. For example, the 1916 Canadian Convention excepts the taking of birds by Eskimos and Indians for food and clothing. Convention for the Protection of Migratory Birds, Aug. 16, 1916, United States-Great Britain (on behalf of Canada), 39 Stat. 1702, 1703, T.S. No. 628. In contrast, the Mexican convention contains no such exception. *See* Convention for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, United States-Mexico, 50 Stat. 1311, T.S. No. 912.

79. The United States-Mexico Convention of 1936 provided for later inclusion of migratory birds at the request of the Presidents of both nations. *Id.*

80. On March 10, 1972, by diplomatic notes, the entire family of Accipitridae was added. 37 Fed. Reg. 22,633 (1972).

81. 16 U.S.C. §§ 668-668d (1988). The statute was referred to as BEPA until the 1962 amendments, when the golden eagle was added. The provision's official title now is Protection of Bald and Golden Eagles, and it is now referred to as EPA, for Eagle Protection Act.

82. *See generally* E. Parsons, Pueblo Indian Religion (1939); G. Reichard, 1 Navajo Religion: A Study of Symbolism (1950); H. Tyler, Pueblo Birds and Myths (1979).

83. In Pueblo Birds and Myths, the author notes that the choice of the bald eagle as the symbol of the United States is a curious one because the bald eagle is a carrion eater, robs weaker birds such as ospreys of their catches, and is cowardly in contrast to the golden eagle. H. Tyler, *supra* note 14, at 48.

84. 5 Encyclopedia Britanica, Miropaedia 340 (15th ed. 1987).

85. 16 U.S.C. § 668 (1988).

Because many Indian tribes consider eagles sacred, prosecutions under BEPA resulted in the majority of Indian free exercise of religion defenses to date. Simultaneously, prosecutions under BEPA raised questions regarding the continued viability of existing Indian treaty hunting rights. The conflict between eagle protection and Indian religious rights intensified when the golden eagle was also brought within federal protection. As originally enacted in 1940, BEPA afforded federal protection only to bald eagles.[86] In 1962, protection was extended to golden eagles,[87] both to better protect young bald eagles who are difficult to distinguish from golden eagles,[88] and in response to declining populations.[89]

Congressional House debate surrounding the 1962 amendments took particular notice of the fact that the golden eagle is "important in enabling many Indian tribes, particularly those in the southwest, to continue ancient customs and ceremonies that are of deep religious or emotional significance to them."[90] Similarly the Department of the Interior observed that "the eagle, by reason of its majestic, solitary, and mysterious nature, became an especial object of worship. . . . The mythology of almost every tribe is replete with eagle beings."[91] Congress concluded that with the addition of golden eagles to BEPA an exception should be created for Indian religious use.[92] Pursuant to that statutory authority, the Department of Interior promulgated regulations creating a permit process for Indians to obtain eagles for religious use, primarily through receipt of dead eagles already in the possession of the federal government.[93] Both the permit system and recent constitutional challenges to its provisions are discussed in detail below.

The Bald Eagle Protection Act represents a significant further assertion of federal regulatory power. The act makes it a federal crime to take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export, or import bald or golden eagles, or any part, nest or egg of an eagle.[94] In contrast to the MBTA, BEPA does not distinguish commercial activities by assigning higher penalties to selling protected birds, nor does it provide for felony convictions.[95] Since its enactment, Congress sub-

86. Act of June 8, 1940, Pub. L. No. 567, ch. 278, 54 Stat. 250.
87. Act of Oct. 24, 1962, Pub. L. No. 87-884, 76 Stat. 1246 (codified at 16 U.S.C. § 668).
88. The immature bald eagle is not marked with the characteristic white head and tails. *See* S. Rep. No. 1986, 87th Cong., 2d Sess. 1 (1962).
89. H. Rep. No. 1450, 87th Cong., 2d Sess. 2 (1962).
90. *Id.* at 6.
91. S. Rep. No. 1986, 87th Cong., 2d Sess. 6 (1962).
92. *Id.* at 2.
93. 50 C.F.R. § 22.22 (1988).
94. 16 U.S.C. § 668 (1988).
95. *Id.*; *see* MBTA, 16 U.S.C. § 707(b) (1988).

stantially amended BEPA twice, in 1962[96] and in 1972,[97] making the penalties more severe and providing for various exceptions from liability.[98] Significantly, the 1972 amendments also lowered the liability threshold by providing that "wanton disregard for the consequences of his act" could substitute for "intent to kill" under BEPA.[99]

During the 1972 congressional debate, the Department of the Interior revealed that only 32 federal convictions had been obtained under the act in the previous five years, with violators averaging a $50 fine per incident.[100] Congress responded by increasing criminal penalties to $5,000 and/or one year's imprisonment for first offenders, and $10,000 and/or two years' imprisonment for second offenders.[101] Congress also added civil penalties of $5,000 per violation for the first time.[102] The Senate also took congressional notice of the continued killing of eagles by ranchers and farmers, who sometimes destroyed large numbers by aerial shooting.[103] As a result, Congress designed a penalty designed to strike fear into the heart of ranching country: the cancellation of grazing rights.[104] To encourage enforcement, an innovative citizen enforcement incentive provision provided for payment of one-half of any fine up to $2,500 to any person giving information leading to a conviction under the act.[105]

The Endangered Species Act

The third federal wildlife statute to trigger constitutional challenges is the Endangered Species Act of 1973[106] (ESA). This act represents the culmination of increasingly stringent federal protection, and is described by the United States Supreme Court as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."[107] The act is also described as the "strongest legal expression to date of environmental ethics."[108] In enacting the ESA, Congress signaled

96. Act of Oct. 24, 1962, Pub. L. No. 87-884, 76 Stat. 1246 (codified at 16 U.S.C. § 668).
97. Act of Oct. 23, 1972, Pub. L. No. 92-535, 86 Stat. 1064 (currently codified at 16 U.S.C. § 668).
98. *Id.*
99. *Id.*
100. S. Rep. 1159, 92d Cong., 2d Sess. *reprinted in* 1972 U.S. Code Cong. & Admin. News 4285, 4288.
101. 16 U.S.C. § 668.
102. 16 U.S.C. § 668(b).
103. Senate Report *supra* note 100, U.S. Code Cong. & Admin. News at 4287-88.
104. 16 U.S.C. § 668(c).
105. 16 U.S.C. § 668(a).
106. 16 U.S.C. §§ 1531-1543 (1988).
107. Tennessee Valley Authority v. Hill, 437 U.S. 153, 180 (1978) (hereinafter TVA).
108. R. Nash, *supra* note 2, at 175.

a definitive end to an era.[109] Never again would wildlife in America be viewed as an inexhaustible resource to be carelessly harvested. Simultaneously, in 1973, the Convention on International Trade in Endangered Species went into effect, providing for international enforcement of trade prohibitions of endangered species and their products.[110]

The Endangered Species Act mandates a comprehensive, integrated approach to the preservation of vanishing species. Not only does the ESA restrict the taking of species listed as threatened or endangered, but it regulates both domestic and international trade, provides for the protection and acquisition of habitat necessary to ensure species survival, and mandates federal agencies to act consistently with the protections afforded under the act.[111] As one commentator concludes, the ESA embodies the legal idea that a "listed nonhuman resident of the United States is guaranteed, in a special sense, life and liberty."[112]

The Endangered Species Act is also an interesting hybrid of the two prevalent perspectives on man's relationship to nature. The act's statement of purpose reflects the classic utilitarian perspective, declaring that endangered species are "of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."[113] Yet protection under the act is not limited to species of use to humans. All species "listed" as endangered or threatened are afforded protection, and utility to humans is not a criteria for listing.[114] Taken as a whole, the ESA reflects an implied endorsement of the intrinsic value perspective.

The ESA replaced two earlier statutes designed to protect endangered species: the Endangered Species Act of 1966,[115] which was fatally flawed by its weak recommendation to federal agencies to protect endangered species "insofar as practicable"; and the Endangered Species Conservation Act of 1969,[116] which focused primarily on the identification of

109. D. Rohlf, The Endangered Species Act 1 (1989).

110. By 1980, 51 nations had joined the Convention on International Trade in Endangered Species (CITES). CITES completely prohibits international trade in the 600 most endangered species and their products. It also requires export licenses for another 200. Countries which are not signatories to the convention, however, are not bound. P. & A. Ehrlich, Extinction 194 (1981).

111. *See* M. Bean, *supra* note 62, at 330–41.

112. J. Petulla, American Environmentalism: Values, Tactics, Priorities 51 (1980).

113. 16 U.S.C. § 1531(3) (1988).

114. *Id.* at § 1533.

115. Pub. L. No. 89-669, §§ 1-3, 80 Stat. 926 (1966) (*repealed by* 87 Stat. 903 (1973)). The 1966 act did take the important step of declaring the preservation of endangered species to be a national policy. While the act encouraged consideration of impacts on endangered species, the act did not prohibit the taking of an endangered plant or animal (still deferring to state authority). Only on federal lands was some degree of protection afforded, however, even there it was qualified by the authority given to the Secretary of the Interior to allow hunting of even endangered species.

116. Pub. L. No. 91-135, 83 Stat. 275 (1969) (*repealed by* 87 Stat. 903 (1973)). This act was limited in that it focused on international aspects; protection was extended only to species which were in danger of extinction worldwide. Positive aspects were the provisions for identifying species worldwide who were at risk, and the implementing of import-export bans.

endangered species worldwide and import-export bans. By 1973, it was apparent that the existing statutory protections were ineffective and that the pace of species extinction appeared to be accelerating.[117] The Assistant Secretary of the Interior reported to Congress that "half of the recorded extinctions of mammals over the past 2000 years have occurred in the most recent 50 year period."[118] Congressional attention focused on this accelerated loss and on the incalculable value of genetic diversity.[119] Following hearings, Congress concluded that the two major causes of extinction were hunting and the destruction of natural habitats.[120]

The final version of the ESA suffered from none of the timid language characteristic of previous acts. The act orders, without qualification, all persons and federal agencies to act in the interest of preserving endangered species.[121] The taking[122] of any species listed as endangered is prohibited, subject to statutory exemptions. The ESA established two levels of listing for species placed within the act: 1) threatened species which are likely to become endangered within the foreseeable future, and 2) endangered species which are in danger of extinction.[123] Currently, bald eagles are listed as endangered,[124] while golden eagles are not on either list.[125]

The exemptions created in the statute are extremely narrow in contrast to earlier conservation acts.[126] The only Indian exemption is for subsistence takings,[127] and is only applicable in Alaska.[128] The exemption provides that takings by Indians, Aleuts or Eskimos who are Alaskan Natives residing in Alaska, or subsistence takings made by non-native permanent residents of Alaska native villages, are excepted from liability.[129] In a

117. H. Rep. No. 412, 93rd Cong., 1st Sess. 4 (1973).

118. *Id.*

119. *Id.*

120. S. Rep. No. 307, 93rd Cong., 1st Sess. 2 (1973).

121. *See TVA*, 437 U.S. 153, 184 (1978).

122. "Taking" is broadly defined in ESA to include harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or attempt to engage in such conduct. 16 U.S.C. § 1532(14) (1988). For litigation interpreting the meaning of "taking" under ESA, see Palila v. Hawaii Dept. of Land & Natural Resources (Palila II), 852 F.2d 1106, 1108-09 (9th Cir. 1988); Palila v. Hawaii Dept. of Land & Natural Resources (Palila I), 639 F.2d 495, 497 (9th Cir. 1981); Sierra Club v. Froehlke, 534 F.2d 1289, 1301-02 (8th Cir. 1976).

123. 16 U.S.C. §§ 1532(6) & (20) (1988).

124. 50 C.F.R. § 17.11 (1988). The bald eagle, *Haliaeetus leucocephalus*, is currently listed as endangered in "North America south to northern Mexico." Excepted from the listing are the following states: Washington, Oregon, Minnesota, Wisconsin, and Michigan. Four other eagles share endangered specie status: the white-tailed Greenland eagle, the harpy eagle of South America, the monkey-eating eagle of the Philippines, and the Spanish Imperial eagle of Spain, Morocco, and Algeria.

125. Golden eagles are not listed as threatened under ESA. *See* 50 C.F.R. § 17.11 (1988).

126. 16 U.S.C. § 1539 (1988).

127. Subsistence is defined within the exemption provision to include selling any edible portion of fish or wildlife in native villages or towns in Alaska for native consumption within the native village or town. 16 U.S.C. § 1539(e)(3)(i) (1988).

128. 16 U.S.C. § 1539(e) (1988).

129. *Id.*

unique provision, the exemption also provides that in conjunction with a subsistence taking, "authentic native articles of handicrafts and clothing" may be made or sold from the non-edible portions.[130] Consistent with the overall stringent nature of the statute, even this exemption remains subject to a determination by the Secretary of the Interior that if such taking will "materially and negatively affect the threatened or endangered species," it may be regulated or restricted.[131]

Legislative history reveals that Congress considered but rejected a religious use exemption for Indians residing in the lower states,[132] after reviewing a list of endangered species submitted by the Department of Interior identifying 65 birds, 26 mammals, 21 fish, and 7 reptiles whose habitats include Indian lands.[133] The bald eagle and the Florida panther, which appeared on that original list, have subsequently both been the subject of litigation over Indian takings.[134]

Economic Development vs. A Very Small Fish

Because the ESA adopts as a national public policy "to halt and reverse the trend toward species extinction, whatever the cost,"[135] a legal challenge on economic grounds was inevitable. In the confrontation, representing endangered species was a three inch minnow, described by Tennessee Representative John Duncan as inedible, slimy, and not much to look at.[136] When Representative Duncan later resorted to congressional tactics

130. *Id.*

131. 16 U.S.C. § 1539(e)(4) (1988).

132. In 1972, Congress considered, but rejected two alternative drafts of the proposed Endangered Species Act (H.R. 13081, 92d Cong., 2d Sess. (1972); S. 3199, 92d Cong., 2d Sess. (1972)). The two unpassed bills contained exemptions for the taking of protected species for Indian religious purposes, pursuant to a treaty, executive order or statute. In congressional hearings, the Department of the Interior argued for inclusion of an exception for "ritual" use by American Indians, Aleuts, and Eskimos, but the recommendation was rejected. *Endangered Species Conservation Act of 1972: Hearings on S. 249, S. 3199, and S. 3818 before the Subcommittee on the Environment of the Senate Committee on Commerce*, 92d Cong., 2d Sess. 66, 71 (1972).

133. The list was presented by Nathaniel P. Reed of the Department of the Interior. *Predatory Mammals and Endangered Species: Hearings Before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries*, 92nd Cong., 2d Sess. 143 (1972). There were separate lists for mammals, birds, reptiles, and fishes. The listed mammals, for example included: Indiana bat, spotted bat, Utah prairie dog, Northern Rocky Mountain wolf, Eastern timber wolf, red wolf, San Joaquin kit fox, grizzly bear, black-footed ferret, Florida panther, Eastern cougar, Columbia white-tailed deer, Sonoran pronghorn, California bighorn, peninsular bighorn, Arizona prairie dog, dog-eared kangaroo rat, Florida water rat or round-tailed muskrat, northern swift fox, pine marten, Sierra red fox, fisher, Everglades mink, wolverine, and Canadian lynx. *Id.* at 143.

134. *Id. See* United States v. Dion, 476 U.S. 734 (1986) (bald eagle); United States v. Billie, 667 F. Supp. 1485 (S.D. Fla. 1987) (Florida panther); United States v. Fryberg, 622 F.2d 1010 (9th Cir. 1980) (bald eagle).

135. *TVA*, 437 US. at 184.

136. *Endangered Species Hearings: House Committee on Merchant Marine and Fisheries, Subcommittee on Fisheries and Wildlife Conservation and the Environment* 95th Cong., 2d Sess. 54 (1978) (statement of Representative John Duncan of Tennessee).

which could also be described as "slimy,"[137] the impression probably became a mutual one. Representing man's economic interests was a virtually completed dam, which by most accounts already represented an enormous economic investment. In what was to become a bitter and divisive dispute reaching all the way to President Carter's Cabinet, the new federal policy was put to the test.

The dispute began on deceptively simple facts. One hundred sixteen million dollars[138] had already been spent toward completion of the Tellico Dam by the Tennessee Valley Authority (TVA). When University of Tennessee zoologist David Etnier discovered[139] a unique "snail darter" minnow living in an area scheduled to be flooded, opponents of the Tellico Dam project saw an opportunity to challenge its completion.[140] Efforts began to get the tiny snail darter officially listed as endangered under the ESA and to have the Little Tennessee River declared its critical habitat; both efforts were to prove successful.[141] Meanwhile, TVA frantically began an incubation program with an eye to transplanting baby snail darters, which ultimately proved a dismal failure.[142] Simultaneously, TVA unsuccessfully petitioned the United States Fish and Wildlife Service to "delist" the location as the critical habitat, on the dubious theory that since partial construction of the dam had already blocked access to the snail darter's breeding area, the species was already doomed.[143]

The snail darter then became the best known obscure species on earth, as dam opponents took their fight into the courts via the citizens' suit provision of the Endangered Species Act.[144] Following a controversial trial, the district court dismissed the complaint, citing the near completion of the dam and the fact that enactment of the ESA occurred after initiation of the project.[145] The Sixth Circuit reversed, and ordered the district court to enjoin work on the dam.[146] As both sides scrambled to prepare for arguments before the Supreme Court, the case became a bitter issue within President Carter's Cabinet. Secretary of the Interior Cecil Andrus staunchly supported upholding the Endangered Species Act, while Attorney General Griffin Bell opposed it and claimed it was his right to file a brief in favor of TVA as the official government position.[147] When the justices of the

137. For a description of the devious tactics of Representative Duncan, *see infra* text accompanying note 156.

138. Estimates vary; the Supreme Court noted that district court estimates were approximately $131 million. *TVA*, 437 U.S. at 166.

139. W. Wheeler & M. McDonald, TVA and the Tellico Dam—1936-1979: A Bureaucratic Crisis in Post-Industrial America 156-57, 185, 188-89 (1986).

140. *Id.* at 185-96.

141. *Id.* at 191-96.

142. *Id.* at 196.

143. *Id.* at 198.

144. 16 U.S.C. § 1540(g) (1988).

145. 419 F. Supp. 753 (E.D. Tenn. 1976); *see TVA*, 437 U.S. at 153 (for a sequential history).

146. 549 F.2d 1064 (6th Cir. 1977).

147. W. Wheeler & M. McDonald, *supra* note 139, at 205.

United States Supreme Court finally gathered to decide the fate of both the snail darter and possibly the Endangered Species Act itself, at least one justice was reportedly furious to find two diametrically opposed government briefs.[148]

On June 15, 1977, by a five to three margin, the Court announced that the Endangered Species Act prohibited the impoundment of the Little Tennessee River by the Tellico Dam.[149] Citing the clear congressional intent that Congress intended "to halt and reverse the trend toward species extinction, at whatever cost,"[150] the Court upheld the new and uncompromising public policy.[151]

Following the decision, a frustrated Senator Howard Baker of Tennessee set about to find his constituent TVA a way out. He successfully secured an amendment to ESA which created a seven member committee of federal officials authorized to grant exemptions from ESA.[152] However, Senator Baker's frustration returned when the newly appointed "God"[153] committee unanimously refused to grant TVA an exemption.[154] A furious Senator Baker then unsuccessfully tried to abolish the committee.[155] Finally, in a rather devious move, TVA supporter, Tennessee Representative John Duncan first got an exemption attached as a rider to a public works appropriation bill, then managed to get the bill passed unread by a "nearly empty" House of Representatives.[156] The Senate, already alerted by this tactic, first rejected, but ultimately passed the bill by a four vote margin, despite President Carter's lobbying for rejection.[157] President Carter reluctantly signed the bill on September 25, 1977, signaling a victory of economics over the protection of endangered species.[158]

The lessons from the snail darter controversy are mixed. On one hand, the judicial process validated the dramatically stringent new federal policy. On the other hand, economic development proponents showed they could evade the act when necessary. However, Congress has continued its support of the statutory mandate of ESA; for example, by amendment in 1988, penalties were increased to $25,000 for most civil offenses and $50,000 for most criminal offenses.[159]

148. Justice Powell was reportedly "more than irritated." *Id.* at 208.
149. *TVA*, 437 US. 153.
150. *Id.* at 184. However, Justice Powell stated that he expected Congress to amend ESA in response to the TVA holding, to prevent grave economic consequences. *TVA*, 437 U.S. at 210 (Powell, J. dissenting).
151. *Id.* at 195.
152. W. Wheeler & M. McDonald, *supra* note 139, at 208.
153. *Id.*
154. *Id.* at 211.
155. *Id.*
156. *Id.* at 212.
157. *Id.*
158. *Id.* at 213.
159. 16 U.S.C. § 1540 (1988), *as amended by* 100 Pub. L. 478, at 1006; 102 Stat. 2306 (1988).

STATUTORY APPLICABILITY ON INDIAN LANDS

Indian Treaty Rights: Implied Abrogation?

With the enactment of the Migratory Bird Treaty Act, the Bald Eagle Protection Act, and the Endangered Species Act, the taking and possession of various animals and birds became prohibited on Indian lands for the first time. These progressively more stringent federal statutes not only restricted general hunting and fishing, but also restricted the taking of animals for religious purposes. After Congress rejected broad exemptions for Indian takings of protected animals,[160] the issue arose whether existing treaty rights shielded Indians from liability. With the extension of federal protection to golden eagles under the Bald Eagle Protection Act,[161] prosecutions of Indians increased dramatically.[162] In the litigation that followed, most Indian defendants argued that under various treaties their right to hunt and fish was guaranteed. Because none of the three statutes contains any provision which explicitly abrogates existing treaty rights, courts are forced to decide whether treaty hunting rights are abrogated by implication.

Historically, the United States obtained vast tracts of land by entering into treaties with Indian tribes.[163] In exchange for relinquishing land, Indians received various "rights" and "benefits." Recognition of tribal hunting and fishing rights on reservation lands was one of the most fundamental of treaty provisions.[164] Hunting provisions are considered so fundamental to treaty rights that they are often implied where there is no express treaty provision.[165]

Indian tribes occupy a unique position in the legal framework of the United States. Tribes are both recognized as sovereign entities on an equal footing with states,[166] and simultaneously as sovereigns who are subject to the plenary power of the federal government.[167] Despite the fact that

160. *Predatory Mammals and Endangered Species: Hearings Before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries*, 92d Cong., 2d Sess. 143 (1972).

161. Act of Oct. 24, 1962, Pub. L. No. 87-884, 76 Stat. 1246 (currently codified at 16 U.S.C. § 668).

162. *See* United States v. Dion, 476 U.S. 734 (1986); Andrus v. Allard, 444 U.S. 51 (1979); United States v. Fryberg, 622 F.2d 1010 (9th Cir. 1980), *cert. denied*, 449 U.S. 1004 (1980); United States v. L. Top Sky, 547 F.2d 483 (9th Cir. 1976); United States v. C. Top Sky, 547 F.2d 486 (9th Cir. 1976); United States v. White, 508 F.2d 453 (8th Cir. 1974); United States v. Abeyta, 632 F. Supp. 1301 (D.N.M. 1986); United States v. Thirty-Eight Golden Eagles, 649 F. Supp. 269 (D. Nev. 1986), *aff'd*, 829 F.2d 41 (9th Cir. 1987); United States v. Allard, 397 F. Supp. 429 (D. Mon. 1975); *see generally* Coggins & Modrcin, *Native American Indians and Federal Wildlife Law*, 31 Stan. L. Rev. 375 (1979).

163. Treaty making ended in 1871, pursuant to the Indian Appropriation Act of March 3, 1871. F. Cohen, Handbook of Federal Indian Law 33 (1942).

164. D. Getches & C. Wilkinson, Federal Indian Law 718 (1986).

165. *See, e.g.*, United States v. Billie, 667 F. Supp. 1485, 1488-89 (S.D. Fla. 1987).

166. Coggins & Modrcin, *supra* note 162, at 383.

167. *Id.* at 379; D. Getches & C. Wilkinson, *supra* note 164, at 269.

states are theoretically restrained in their authority to regulate Indian matters by virtue of tribal sovereignty, states are allowed to regulate some aspects of Indian hunting rights. The scope of state authority to regulate Indian hunting and fishing rights now appears to be extremely broad. In a 1973 case involving state regulation of Indian fishing rights,[168] Supreme Court Justice William O. Douglas indicated that when species populations are declining, state regulation even to the point of prohibition would be permissible:

> We do not imply that these fishing rights persist down to the very last steelhead in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.[169]

With increasing regularity authority recognized in states, and with the progressive entry of the federal government into the field of wildlife regulation, Indians now face even more formidable challenges to their existing treaty rights. Indian defendants charged with the taking, selling, or possession of protected animals under the three federal wildlife statutes discussed above have defended primarily on the theory that their hunting rights are guaranteed by treaty.[170] While this treaty defense includes the right to take animals for any purpose, some defendants have argued, alternatively, that they have a First Amendment right to take animals pursuant to their free exercise of religion.[171] Absolutely essential to the broader treaty defense is the position that the three wildlife statutes do not abrogate existing treaty rights.

168. Puyallup Tribe v. Department of Game, 414 U.S. 44 (1973).

169. *Id.* at 49.

170. For treaty defenses see, United States v. Dion, 476 U.S. 734 (1986) (Yankton Sioux 1858 treaty); United States v. Fryberg, 622 F.2d 1010 (9th Cir. 1980) (Tulalip—Treaty of Point Elliot); United States v. White, 508 F.2d 453 (8th Cir. 1974) (Chippewa—implied rights, not pursuant to a specific treaty); United States v. Abeyta, 632 F. Supp. 1301 (D.N.M. 1986) (Isleta Pueblo—Treaty of Guadalupe Hidalgo—but grounded in religious freedom under the treaty, not hunting rights); United States v. Thirty Eight Golden Eagles, 649 F. Supp. 269 (D. Nev. 1986) (Chippewa); United States v. Allard, 397 F. Supp. 429 (D. Mon. 1975) (Confederated Salish and Kootenai Tribe—Hell Gate Treaty); *and see* United States v. Cutler, 37 F. Supp. 724 (D. Idaho 1941) (holding MBTA did not abrogte treaty right to hunt birds on the reservation).

171. *See* United States v. Dion, 762 F.2d 674 (8th Cir. 1985) (this aspect of the *Dion* defense was not included in the appeal to the Supreme Court); United States v. L. Top Sky, 547 F.2d 483 (9th Cir. 1976); United States v. C. Top Sky, 547 F.2d 486 (9th Cir. 1976); United States v. Abeyta, 632 F. Supp. 1301 (D.N.M. 1986); United States v. Thirty Eight Golden Eagles, 649 F. Supp. 269 (D. Nev. 1986).

It is undisputed that Congress has the power to abrogate unilaterally an existing treaty between the United States and an Indian tribe by an express statutory provision.[172] However, none of the three federal wildlife statutes contains an express abrogation provision. Consequently, Indians frequently assert treaty rights defenses to prosecutions for killing wildlife.[173] Where no excess abrogation is indicated, courts must decide if abrogation was implied.[174] Applicability of each of the three wildlife statutes on Indian land will be discussed in turn.

Migratory Bird Treaty Act vs. Treaty Rights

The earliest of the three statutes, the Migratory Bird Treaty Act was the first wildlife statute to provoke an analysis of whether the statute abrogated existing treaty rights by implication. In 1941, in *United States v. Cutler*,[175] a federal district judge concluded that the Migratory Bird Treaty Act did not abrogate existing treaty rights.[176] However, because the court's holding rested upon the erroneous legal premise that Indian treaties are not subject to subsequent congressional amendment,[177] other courts largely disregarded the opinion. In 1986, *United States v. Dion*, virtually overruled *Cutler*.[178]

The question of treaty abrogation by the Migratory Bird Treaty Act has not reached the Supreme Court. However, in 1979, in *Andrus v. Allard*,[179] the Court considered the issue of whether the statute's prohibitions applied to bird artifacts taken prior to its enactment. In holding that the prohibitions were effective without regard to when the birds were originally killed,[180] the Court concluded that because Congress explicitly provided very narrow exceptions, no further ones would be implied.[181] In adopting a strict statutory interpretation of the Migratory Bird Treaty Act, it would arguably be inconsistent with *Allard* for the Court to find an implied treaty exemption.

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172. Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903); *see generally* F. Cohen, Federal Indian Law (2d ed. 1979).

173. *See* sources cited *supra* note 170.

174. *See* Wilkinson and Vilkman, *Judicial Review of Indian Treaty Abrogation: "As Long As Water Flows or Grass Grows Upon the Earth"—How Long a Time is That?*, 63 Calif. L. Rev. 601 (1975). The authors conclude that courts have primarily relied upon four tests in assessing possible abrogations: 1) abrogation only upon a clear showing of legislative intent, 2) abrogation not lightly implied, 3) abrogation only after liberal construction of the statute in favor of Indian treaty rights, and 4) abrogation only after express legislative reference to Indian treaty rights. *Id.* at 623.

175. 37 F. Supp. 724, 725 (D. Idaho 1941).

176. *Id.*

177. *Id.*

178. United States v. Dion, 476 U.S. 734 (1986); *see infra* text accompanying notes 194-201.

179. 444 U.S. 51 (1979).

180. *Id.* at 63.

181. *Id.* at 60.

Eagle Protection Act vs. Treaty Rights

The vast majority of the treaty defenses have occurred in response to prosecutions under the Eagle Protection Act.[182] Due to the habitat range of eagles, the majority of early cases arose in the Eighth and Ninth Circuits, which quickly became entrenched in opposing views of whether the EPA implied abrogation of treaty rights.[183]

In 1974, the Eighth Circuit, in *United States v. White*,[184] held that the Eagle Protection Act had not rescinded the treaty rights of the Chippewa Indians to hunt bald eagles because Congress had not clearly expressed an explicit intent to abrogate.[185] The court cited *Cutler* with approval,[186] and failed to consider any alternative tests[187] for implied rescission. In a now famous dissent,[188] Judge Lay argued eloquently that the statutory goal of eagle protection was inherently inconsistent with a finding of no abrogation.[189]

In 1980, the Ninth Circuit cited and adopted Judge Lay's analysis in *United States v. Fryberg*.[190] In affirming a conviction under the Eagle Protection Act for the killing of an immature bald eagle, the court held that treaty rights which were inconsistent with the Eagle Protection Act were abrogated, absent a permit granted pursuant to the statutory religious exemption.[191] The court found that the statutory restrictions involved a "relatively insignificant modification of the Indian's hunting rights"[192] and concluded that abrogation was implied because Congress clearly intended to prohibit all threats to the bald eagle's survival.[193]

Five years later, the Eighth Circuit returned to the question in *United States v. Dion*,[194] which involved a variety of charges pursuant to the Migratory Bird Treaty Act, the Eagle Protection Act, and the Endangered Species Act. Charges included takings, possession, and commercial sales of both bald and golden eagles.[195] Defendant Dwight Dion Sr. contended, *inter alia*, that both his treaty rights and First Amendment religious rights precluded liability.[196] When the Eighth Circuit held that neither the Eagle

182. 16 U.S.C. § 668 (1988).
183. M. Bean, *supra* note 62, at 95-97.
184. 508 F.2d 453 (8th Cir. 1974).
185. *Id.* at 457-58 (relying upon Menominee Tribe v. United States, 391 U.S. 404 (1968)).
186. *Id.* at 459.
187. *See supra* note 174.
188. *White*, 508 F.2d at 459 (Lay, J., dissenting).
189. *Id.* at 461 (Lay, J., dissenting).
190. 622 F.2d 1010 (9th Cir. 1980).
191. *Id.* at 1016.
192. *Id.* at 1014.
193. *Id.* at 1015.
194. There are two Eighth Circuit opinions of United States v. Dion: 752 F.2d 1261 (1985) (en banc), and 762 F.2d 674 (1985). This reference is to 752 F.2d 1261.
195. *Id.* at 1262.
196. 762 F.2d 674, 679 (1985).

Protection Act nor the Endangered Species Act applied to Indians exercising non-commercial hunting rights on Indian lands,[197] the Supreme Court immediately granted *certiorari*. The specific issue on *certiorari* was whether the Eagle Protection Act abrogated the right of Indians to hunt eagles.[198] While acknowledging that the Eagle Protection Act did not expressly abrogate that right, the Court concluded that the inclusion of a religious permit exemption within the act strongly suggested Congress intended Indians to be subject to the prohibitions.[199] The Court held unanimously that the EPA did abrogate, by implication, inconsistent treaty hunting rights.[200] Justice Marshall, writing for the court, noted that while the Court need not reach the issue of whether the Endangered Species Act similarly implied abrogation, the two acts in relevant part prohibit exactly the same conduct for the same reasons.[201]

Endangered Species Act vs. Treaty Rights

One year later, in 1987, the issue of abrogation by the Endangered Species Act came before a federal district court in *United States v. Billie*.[202] The United States charged James Billie, chairman of the Seminole Indian Tribe, with killing a Florida panther, listed as endangered under the Endangered Species Act.[203] In a motion to dismiss, Billie argued that tradition protected his right to freely hunt.[204] The court concluded that creation of the Indian reservation by executive order granted implied hunting rights to the same extent as a treaty, and proceeded with an abrogation analysis. The court cited Justice Douglas' famous Steelhead declaration[205] for the proposition that Indian treaty rights do not extend to the point of extinction.[206] Noting that legislative history indicated that Congress actually considered and rejected an Indian exemption, the court concluded that abrogation is implied because "Congress . . . could not have intended that the Indians would have the unfettered right to kill the last handful of Florida panthers."[207]

Following *Dion* and *Billie*, the viability of asserting a treaty rights defense to prosecutions under the three federal wildlife statutes discussed above is doubtful. Although the Supreme Court has only found the Eagle

197. 752 F.2d 1261, 1270 (1985).
198. United States v. Dion, 476 U.S. 734 (1986).
199. *Id.* at 740.
200. *Id.* at 746.
201. *Id.*
202. 667 F. Supp. 1485 (S.D. Fla. 1987).
203. 50 C.F.R. § 17.11 (1988).
204. *Billie*, 667 F. Supp. at 1488.
205. *Id.* at 1489.
206. *Id.* at 1489-90.
207. *Id.* at 1492.

Protection Act to imply an abrogation of treaty rights, the dictum in *Dion* strongly suggests that the Endangered Species Act would be similarly construed. The subsequent *Billie* opinion lends further support to this conclusion. The impact of the Migratory Bird Treaty Act on treaty rights also remains unresolved, but a finding of abrogation would be most consistent with the Court's recent holding in *Dion*. While some aspects of the treaty abrogation issue remain unsettled, there is little dispute that, following *Dion*, the probability of a successful treaty defense is extremely low. Consequently, as the treaty defense becomes progressively more limited, the alternative defense of First Amendment free exercise of religion takes on new significance.

II. FREE EXERCISE OF RELIGION STANDARDS

A majority of Americans in the twentieth century have never experienced religious persecution. But many of their ancestors came to the colonies seeking relief from the religious intolerance of their homelands. To their new land, they brought a fierce determination to establish a nation where religious oppression was unknown. The First Amendment to the Constitution contains the full measure of that resolve, forbidding Congress from enacting laws "respecting an establishment of religion, or prohibiting the free exercise thereof."[208]

In simultaneously protecting against both governmentally endorsed relgions and governmental prohibitions of religious practice, the framers of the Constitution created an uneasy tension between the Establishment Clause and the Free Exercise Clause. For example, exemptions granted under the Free Exercise Clause may raise allegations of the preferential treatment of religions prohibited under the Establishment Clause.[209] Recent court decisions that rejected Indian free exercise claims involving public lands have been denied on the ground that allowing exclusive access to Indians would favor Indian religions over other religions in violation of the Establishment Clause.[210] The tension between the two constitutional clauses is the source of only one of the many difficulties

208. U.S. Const. amend. I.

209. *See generally* L. Tribe, *supra* note 53, at 1166-69.

210. *See, e.g.*, Inupiat Community Of The Arctic Slope v. United States, 548 F. Supp. 182 (D. Alaska 1982), *aff'd*, 746 F.2d 570 (9th Cir. 1984), *cert. denied*, 474 U.S. 820 (1985), where the Inupiat Indians argued a free exercise claim that their religious beliefs are "inextricably intertwined" with their hunting and gathering life-style; therefore, the leasing of off-shore mineral rights created a burden upon their free exercise of religion. The claim was rejected in part because the relief sought ("a vast religious sanctuary") would create serious Establishment Clause problems, *id.* at 188-89; Badoni v. Higginson, 455 F. Supp. 641 (D. Utah 1977), *aff'd*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981). (Where, in response to a Navajo free exercise challenge involving continued access to Rainbow Bridge, the court found that restricting public access to Rainbow Bridge to accommodate Navajo religious practices would constitute a prohibited governmental preference for religion under the Establishment Clause.) *Id.* at 179.

which plague free exercise analysis. In 1991, the Free Exercise Clause will be two hundred years old, yet there is remarkably little judicial consensus concerning how courts should evaluate the merits of a free exercise claim.[211] These existing difficulties are intensifying as courts face increasingly complex claims involving Indian free exercise of religion.

Development of a Free Exercise Standard

Protection of individual constitutional rights necessarily includes a right of access to the courts when a protected right is threatened. When a free exercise violation is alleged, courts must weigh the validity of the claim, presumably by following an established standard of review. Defining an appropriate test, however, has proved elusive. Historically, the United States Supreme Court began defining a free exercise test by distinguishing between religious belief and religious conduct, finding that although freedom of belief is absolute, freedom of religious conduct remains subject to regulation for the protection of society.[212] Consistent with that principle, the Court concluded that governmental burdens upon religious practices will be tolerated only where the governmental interest outweighs the individual's interest in an exemption.[213]

By the early 1970s, a basic two part inquiry emerged from a series of Supreme Court cases.[214] The first inquiry is whether a burden upon religious practices is shown. The burden inquiry includes a showing that the religious practice is rooted in religious belief, and that the adherent is sincere in that belief.[215] If the claimant meets that burden of proof, the second inquiry is whether the government can justify its infringement of religious practices, usually by proof of a compelling interest.[216] If the government is able to show a compelling interest, the infringement may be upheld if there is no less restrictive alternative.[217] However, if the government's interest is outweighed by the individual's interest, an exemption may be granted.[218]

Although the rough contours of this free exercise test remained constant during the last several years, emphasis within the elements is shifting.

211. Johnson, *Concepts And Compromises In First Amendment Religious Doctrine*, 72 Calif. L. Rev. 817, 819 (1984).

212. Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) (overturning the conviction of Jehovah's Witnesses for soliciting funds without a license because they were engaged in distribution of religious materials).

213. Sherbert v. Verner, 374 U.S. 398, 403 (1963) (compelling government interest).

214. For the progressive development, *see* Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963); Braunfeld v. Brown, 366 U.S. 599 (1961).

215. *Yoder*, 406 U.S. at 205, 215-16.

216. *Sherbert*, 374 U.S. at 406.

217. Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. 707, 718 (1981).

218. For a general discussion of religious exemptions, *see* Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 Yale L. J. 350 (1980).

Of particular importance is the recent emergence of the burden element as a formidable threshold obstacle to First Amendment religious claims.[219] From 1963 to 1986, for example, no Supreme Court case found an alleged burden to be insufficient to satisfy the test's first requirement.[220] However, beginning in 1986, a significantly more stringent burden requirement emerged, primarily in Indian free exercise cases,[221] resulting in the denial of most free exercise claims. With the recent increase in complex Indian free exercise claims involving religious use of drugs,[222] public lands,[223] and animals,[224] the standard for free exercise analysis is increasingly plagued by both inconsistent elements and inconsistent analysis.

After treaty rights defenses lost their viability following *Dion*,[225] interest intensified in potential Indian free exercise of religion defenses to federal

219. *See* Lupu, *Where Rights Begin: The Problem Of Burdens On The Free Exercise Of Religion*, 102 Harv. L. Rev. 933 (1989); Note, *Burdens On The Free Exercise Of Religion: A Subjective Analysis*, 102 Harv. L. Rev. 1258 (1989).

220. Lupu, *supra* note 219, at 942.

221. Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988) (holding that virtual destruction of a site-specific Indian religion by completion of a logging road did not constitute a burden upon free exercise); Bowen v. Roy, 476 U.S. 693 (1986) (holding that governmental requirement of a social security number to receive benefits did not constitute a legally cognizable burden on Indian's free exercise of religion); Wilson v. Block, 708 F.2d 735, 744-45 (D.C. Cir. 1983) (finding land was indispensable to Navajo and Hopi site specific religious practices, but no burden was shown because expansion of pre-existing ski resort would not significantly restrict access).

222. Religious use of peyote came before the United States Supreme Court this term in Employment Division, Dept. of Human Resources of Oregon v. Smith, 58 U.S.L.W. 4433 (U.S. April 1989) (No. 88-1213) (holding that Oregon criminal statute prohibiting use of peyote is constitutional; consistent with the Free Exercise Clause, Oregon may deny unemployment benefits to persons fired for religious use of peyote). As the first Supreme Court opinion to directly address Indian use of peyote, the Smith opinion is consistent with the increasingly narrow First Amendment interpretations of the current Court. The federal government does exempt religious use of peyote by members of the Native American Church from controlled substance laws. 21 C.F.R. § 1307.31 (1988). In addition, eleven states expressly exempt sacramental peyote use from criminal prosecution. Twelve other states have exemptions linked to those available under federal law. 58 U.S.L.W. 3171 (U.S. Sept. 26, 1989).

See Peyote Way Church of God, Inc. v. Meese, 698 F. Supp. 1342 (N.D. Tex. 1988); Native American Church of New York v. United States, 468 F. Supp. 1247 (S.D.N.Y. 1979), *aff'd*, 633 F.2d 205 (2d Cir. 1980); Whitehorn v. State of Oklahoma, Okl. Cr. 561 P.2d 539 (1977); State v. Whittingham, 19 Ariz. App. 27, 504 P.2d 950 (1973); People v. Woody, 61 Cal. 2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964). *See generally* Note, *Religion: The Psychedelic Perspective: The Freedom of Religion Defense*, 11 Am. Ind. L. Rev. 125 (1983).

223. Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988); Crow v. Gullet, 541 F. Supp. 785 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983), *cert. denied*, 464 U.S. 977 (1983); Hopi Indian Tribe v. Block, 8 I.L.R. 3073 (D.D.C. June 15, 1981), *aff'd sub nom.* Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 956 (1983); Sequoyah v. Tennessee Valley Authority, 480 F. Supp. 608 (E.D. Tenn. 1979), *aff'd* 620 F.2d 1159 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980); Badoni v. Higginson, 455 F. Supp. 641 (D. Utah 1977), *aff'd* 638 F.2d 172 (10th Cir. 1980, *cert. denied*, 452 U.S. 954 (1981).

224. United States v. Hinds, No. 89-46 (D.N.M. filed Sept. 15, 1989) *vacated* Jan. 19, 1990 (trial date pending); United States v. Billie, 667 F. Supp. 1485 (S.D. Fla. 1987); United States v. Abeyta, 632 F. Supp. 1301 (D.N.M. 1986).

225. 476 U.S. 734 (1986).

wildlife regulation. As a result, debate also intensified over the applicable standard of review.[226] In the context of Indian free exercise claims, some commentators contend that Indians are subject to a higher burden of proof than similar non-Indian claimants.[227] This higher burden of proof generally requires Indian claimants to prove that a religious practice is central or indispensable[228] to their religion before it will be eligible to satisfy the burdened religious practice requirement.[229] Such a requirement is in striking contrast to previous free exercise analysis where claimants were required only to show a sincerely held religious belief.[230]

The Emergence of the Centrality Requirement

Despite numerous commentaries on the appearance of a higher centrality standard in Indian free exercise cases,[231] there has been little attention given to identifying the possible reasons for this new emphasis. The debate over centrality is now focused on the propriety and means of judicial evaluation of the relative importance of religious practices within a religion.[232] However, at the heart of this debate lies the more fundamental question of whether constitutional protection can be limited to selected religious practices, or whether protection extends to all religious practices identified as sincerely held and rooted in religious belief. Recent constitutional law analysis suggests that a redefinition of burden is occurring. This redefinition is taking two primary forms, first by increased emphasis on governmental coercion as the primary form of burden,[233] and second by recognizing only burdens upon central religious practices.[234] While there is some evidence that a higher standard is increasingly coloring all free exercise analysis,[235] its more frequent application in Indian free exercise cases raises disturbing ethical and practical questions. Although some commentators believe the centrality test is a deliberate attempt to

226. *See, e.g.*, Gordon, *Indian Religious Freedon And Governmental Development of Public Lands*, 94 Yale L.J. 1447 (1985); Pepper, *The Conundrum Of The Free Exercise Clause—Some Reflections On Recent Cases*, 9 N. Ky. L. Rev. 265 (1982); Rosenberg, *Native Americans' Access To Religious Sites: Underprotected Under The Free Exercise Clause?*, 26 B.C.L. Rev. 463 (1985).

227. Stambor, *Manifest Destiny And American Indian Religious Freedom: Sequoyah, Badoni And The Drowned Gods*, 10 Amer. Ind. L. Rev. 59 (1982); Comment, *Religious Freedom For Indigenous Americans*, 65 Or. L. Rev. 363 (1986); Comment, *First Americans And The First Amendment: American Indians Battle For Religious Freedom*, 13 So. Ill. U.L.J. 945, 967 (1989).

228. *See* Wilson v. Block, 708 F.2d 735 at 743.

229. Each of the commentaries in *supra* note 227 identifies centrality as the factor raising the burden of proof.

230. For a reversal based upon the lower court requiring centrality rather than a sincerely held religious belief, see Frank v. Alaska, 604 P.2d 1068 (Alaska 1979).

231. *See supra* note 227.

232. *See* Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439, 457 (1988).

233. *Id.* at 448-51.

234. *See infra* text accompanying notes 244-87.

235. *See generally* Lupu, *supra* note 219.

discriminate against Indian plaintiffs,[236] two more probable reasons exist.

First, centrality represents an attempt to overcome judicial unfamiliarity with Indian religious practices.[237] When a plaintiff comes before the court asserting a First Amendment right to not be forced to work on his or her Sabbath, most judges will have a certain familiarity with the place of Sabbath in western religions. However, when a plaintiff comes before the court claiming that restricted access to a particular rock or mountain peak is a religious crisis of constitutional significance, many judges are uncertain how to evaluate the claim. Yet, even if a centrality requirement were a sincere effort to understand the significance of a given religious practice, judicial evaluation of centrality raises a second question. As recently indicated by the Supreme Court, the propriety of a judicial inquiry into such internal religious matters is doubtful.[238] In addition, as Justice Brennan has noted, there are inherent ethnocentric implications of judicial evaluations of unfamiliar Indian religions.[239]

The second, and perhaps less charitable, explanation for the emergence of centrality is the possibility that it is a standard of convenience, used selectively to halt certain First Amendment claims which threaten various economic interests such as property rights or large public works such as dams. It is indisputable that a majority of Indian free exercise cases involving federal land interests or public works required a centrality element.[240] Although some federal district courts have denied Indian free exercise claims on the rationale that the Indians have no property right to the sacred site, appellate courts consistently overturned those findings on appeal.[241] However, a recent Supreme Court opinion, *Lyng v. Northwest Indian Cemetery Protective Association*, discussed in detail below, suggests that a property rights' analysis in the free exercise context is not precluded.[242]

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236. *See, e.g.*, Stambor, *supra* note 227.

237. *See, e.g.*, People v. Woody, 40 Cal. Rptr. 69, 394 P.2d 813 (1964).

238. The burden inquiry includes not only a determination of whether a restriction or burden is present, but also whether the claimant is sincere, and whether the belief is rooted in a religious belief. A determination of the validity of an asserted belief, however, is generally considered to be an inappropriate judicial inquiry. In *Ballard v. United States*, for example, the Court held that inquiries into the veracity of an asserted religious belief was not a judicial function. 322 U.S. 78 (1944). As a result, the Supreme Court has established a broad scope of protected religious beliefs. *See* L. Tribe, *supra* note 53, at 1179.

239. *See, e.g.*, *Lyng*, 485 U.S. at 474 (Brennan, J., dissenting).

240. *See* Comment, *Indian Worship v. Government Development: A New Breed of Religion Cases*, 275 Utah L. Rev. 313, 323 (1984).

241. *See, e.g.*, *Badoni*, 638 F.2d at 176 ("[W]e reject the conclusion that the plaintiff's lack of property rights in the Monument is determinative"); *Sequoyah*, 620 F.2d at 1164 (finding a lack of property interest not conclusive, but one potential factor in balancing free exercise against governmental interests).

242. *Lyng*, 485 U.S. at 452-53.

Sequential Adoption of Centrality

Explicit recognition of centrality as a factor in free exercise analysis began in a Navajo challenge to criminal prohibitions on peyote use.[243] A series of court hearing cases involving Indian religious sites on federal lands adopted a centrality element,[244] and the requirement then appeared in the context of Indian killing of federally protected animals.[245] Considering the crippling effect that centrality was ultimately to have on Indian free exercise claims, it is ironic that it was first emphasized in an effort to exempt Indian peyote use from criminal penalties. In 1964, the California Supreme Court reversed the criminal conviction of a group of Navajo Indians in *People v. Woody*.[246] Although *Woody* is often cited as the case which established centrality as a "requirement" of free exercise analysis,[247] that conclusion is not supported either by the opinion itself or by subsequent cases.

At issue in *Woody* was whether Navajo members of the Native American Church were subject to criminal prosecution for participation in sacramental peyote rites.[248] The court acknowledged the undisputed sincerity of the church members, and began with the premise that the state may abridge religious practices only when a compelling state interest outweighs the individual's free exercise rights.[249] After concluding that peyote use constitutes the theological heart of the religion,[250] the court rejected the state's argument that prohibition was necessary to rescue Indians from their "shackles," declaring: "We know of no doctrine that the state, in its asserted omniscience should undertake to deny the defendants the observance of their religion in order to free them from their suppositious 'shackles' of their 'unenlightened' and 'primitive condition.'"[251]

In concluding that the record revealed peyote use to be essential to the religion, the court, by implication, distinguished the sacramental use of peyote from casual recreational use.[252] The only language in the *Woody*

243. People v. Woody, 40 Cal. Rptr. 69, 394 P.2d 813 (1964).

244. *Sequoyah*, 620 F.2d at 1164-65; *Wilson*, 708 F.2d at 743. (Agreeing with plaintiffs that First Amendment protection does not turn on the theological importance of the disputed activity; then finding, "[I]f 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.") *Id.*

245. United States v. Billie, 667 F. Supp. 1485 (S.D. Fla. 1987) (taking a panther); United States v. Abeyta, 632 F. Supp. 1301 (D.N.M. 1986) (taking an eagle).

246. 40 Cal. Rptr. 69, 394 P.2d 813.

247. *See Sequoyah*, 620 F.2d at 247; Lupu, *supra* note 219, at 958.

248. *Woody*, 40 Cal. Rptr. at 70, 394 P.2d at 813.

249. *Id.* at 71, 394 P.2d at 815.

250. *Id.* at 74, 394 P.2d at 818.

251. *Id.*

252. *Id.* at 73, 394 P.2d at 817.

opinion which in any way supports a claim of requiring centrality as an element is the description that the "test of constitutionality calls for an examination of the degree of abridgement of religious freedom involved in each case."[253] However, a distinction exists between the degree to which a governmental practice burdens a religious practice and the degree to which a religious practice is essential to the religion. Degree of abridgement suggests an impact analysis;[254] that is, whether a governmental restriction makes religious practice more expensive, more difficult, or virtually impossible. It does not imply a determination of the relative value of various practices acknowledged to be part of the religion. The *Woody* court found the impact of prohibition would be virtually to destroy the religion and concluded that the government could not justify such an impact.[255]

Following *Woody*, the issue of centrality was to lie dormant for nearly fifteen years.[256] Then, in the 1980s, centrality emerged to become a formidable obstacle in Indian free exercise cases involving federal public lands. This sudden appearance of centrality triggered debate whether centrality actually serves either to help the court understand an unfamiliar religion, or to provide a selectively applied standard of convenience.

The classic example of the adoption of centrality is the Sixth Circuit's opinion in *Sequoyah v. Tennessee Valley Authority*,[257] just one year after the snail darter lost its own battle against TVA.[258] In rejecting a claim that impounding the Tellico Dam would destroy the Cherokee's sacred areas, the court concluded that the "claim of centrality of the Valley to the practice of the traditional Cherokee religion, as required by *Yoder*, *Woody* and *Frank*, is missing from this case."[259] This rationale for application of a centrality requirement appears well supported until the cited cases are carefully reviewed.

In the first case cited, *Wisconsin v. Yoder*,[260] the United States Supreme Court found compulsory high school attendance to constitute an impermissible infringement of the religious rights of the Amish. In concluding that education was a religious endeavor central to their faith,[261] the Supreme Court distinguished the Amish from other communities where education was entirely a secular concern. The Court granted a religious

253. *Id.* at 76, 394, P.2d at 820.

254. *See Lyng*, 485 U.S. 467 (Brennan, J., dissenting).

255. *Woody*, 40 Cal. Rptr. at 74, 77, 394 P.2d at 818, 821.

256. In the free exercise cases involving drugs which followed *Woody*, for example, there is no discussion of centrality. United States v. Kuch, 288 F. Supp. 439 (D.C. 1968); Arizona v. Wittingham, 19 Ariz. App. 27, 504 P.2d 950 (1973); Whitehorn v. State, 561 P.2d 539 (Okla. 1977).

257. *Sequoyah*, 620 F.2d 1159.

258. *See supra* text accompanying notes 135-59.

259. *Sequoyah*, 620 F.2d at 1164.

260. 406 U.S. 205 (1972).

261. *Id.* at 210.

exemption on a finding that for the Amish their way of life was inseparable from their religious beliefs.[262] In *Sequoyah*,[263] the Sixth Circuit concluded that the Cherokees similarly failed to establish that the Valley was inseparable from their way of life.[264]

There is an important distinction between use of centrality for inclusion versus exclusion. In *Yoder* and in *Woody*,[265] the centrality of a given practice is cited as evidence that something which appears to be secular, such as education or recreational drug use, in fact carries religious significance. This is distinguishable from centrality's use as a threshold requirement, which will exclude constitutional protection of relatively minor practices. Such exclusion is totally inconsistent with the practice of applying a balancing test to evaluate free exercise claims. Even a relatively minor religious practice could still be accommodated if the corresponding governmental interest is similarly insignificant. Because the underlying purpose of the Free Exercise Clause is to guard against unwarranted restriction of religious practices,[266] a very strong argument can be made that a centrality threshold which excludes relatively minor practices violates the spirit of the Free Exercise Clause. *Sequoyah's* reliance upon *Yoder* for a requirement of centrality as a potentially exclusionary factor is particularly ironic, since *Yoder* stands for recognition of an extremely broad interpretation of religious practice.[267] Similarly, as discussed above, *Woody* also fails to establish the incorporation of centrality as a threshold exclusionary requirement.[268]

The third case cited, *Frank v. State*,[269] not only fails to support the incorporation of a centrality requirement, but actually opposes it. At issue in *Frank* was a violation of Alaska game laws by an Indian who killed a moose out of season for religious purposes, a potlatch funeral ceremony.[270] The lower court convicted Frank on the rationale that moose meat was not "an absolute necessity" of the potlatch.[271] The Alaska Supreme Court reversed, declaring: "Absolute necessity is a standard stricter than that which the law imposes. It is sufficient that the practice be deeply rooted in religious belief to bring it within the ambit of the free exercise clause."[272]

262. *Id.*
263. *Sequoyah*, 620 F.2d at 1159.
264. *Id.* at 1164.
265. *Yoder*, 406 U.S. at 216; *Woody*, 40 Cal. Rptr. at 73, 394 P.2d at 817.
266. L. Tribe, *supra* note 53, at 1154, 1158.
267. By extending First Amendment protection to the realm of compulsory education, *Yoder* broadened the definition of religious practice to incorporate what had been previously considered a secular realm. 406 U.S. 205, 216.
268. *See supra* text accompanying notes 249-56.
269. 604 P.2d 1068 (Alaska 1979).
270. *Id.*
271. *Id.* at 1072.
272. *Id.*

Despite the apparent lack of valid authority for imposing a centrality requirement, following *Sequoyah* centrality was imposed constantly, particularly in the context of free exercise challenges involving federal public lands. This constant imposition of centrality would ultimately culminate in Supreme Court review in 1988,[273] but meanwhile, application of the centrality standard spread from drug and public land cases to wildlife protection.

Centrality and Federal Wildlife Protection

Building on the rather dubious momentum initiated by *Sequoyah*, the centrality requirement recently reached free exercise analysis in the wildlife context. In *United States v. Billie*,[274] the United States charged James Billie, tribal chairman of the Seminoles, with killing a Florida panther, in violation of the Endangered Species Act.[275] Florida panthers are not only currently listed as endangered,[276] but were identified as endangered even prior to enactment of the 1973 act.[277] Testimony at the *Billie* trial estimated the total remaining panther population to be between twenty and fifty panthers.[278]

The federal district court's denial of a motion to dismiss turned on a finding that panther parts were not indispensable to Seminole religious practices.[279] The court did not reject the claim on the basis of an insufficient burden on religion, but rather contrasted it with the compelling government interest in protecting the species.[280] Noting the lack of an exception for Indian hunting under the Endangered Species Act and the statute's stringent mandate to protect endangered species, the court concluded that Congress "could not have intended that the Indians would have the unfettered right to kill the last handful of Florida panthers."[281]

273. *Lyng*, 485 U.S. 439.

274. 667 F. Supp. 1485 (S.D. Fla. 1987).

275. *Id.* at 1487.

276. 50 C.F.R. § 17.11 (1988).

277. The Florida panther appeared on the list of endangered species living on Indian lands which was submitted by the Department of the Interior to Congress during hearings for the proposed Endangered Species Act. *See supra* note 133. Recently, an interagency commission in Florida has launched an all out effort to save the remaining Florida panthers. In June 1989, the new 30,000 acre Florida Panther National Wildlife Refuge was created, abutting the existing Big Cypress National Park. To reduce the risk of panther-car collisions, 36 bridges and overpasses and a ten foot fence are being constructed along nearby highways. Complicating the rescue efforts is new evidence of mercury contamination in the panther food supply. *See* Rember, *Cougar: And Then There's The Florida Panther*, Wildlife Conservation 79 (Mar/Apr 1990).

278. *Billie*, 667 F. Supp. at 1496 (Testimony by David Maehr, a certified wildlife biologist employed by the Florida Game and Freshwater Fish Commission).

279. Testimony indicated that panther parts are "an important part of a medicine man's bundle" and that panther claws are good for various ailments, particularly muscle cramps. *Id.* at 1497. Citing *Sequoyah*, the *Billie* court found the evidence fell short of being central or indispensable to religious observances. *Id.*

280. *Id.* at 1496.

281. *Id.* at 1492.

The facts in *Billie* did not strongly support a finding of either religious use or the indispensability often required to show centrality. However, when eagles are involved, the facts are more likely to satisfy a centrality standard, due to the importance of eagles in most Indian religions. In 1986, for example, in *United States v. Abeyta*, a federal district court held, *inter alia*, that the taking of a golden eagle upon pueblo land for religious purposes was protected conduct under the Free Exercise Clause.[282]

In language tailored to satisfy any centrality requirement, the Court noted that "The Katsina,[283] or spirit of life, and the eagle, the embodiment of the overseer of life, are the central forces in pueblo religious belief."[284] The court concluded that "the eagle holds an exalted position in all religious societies. The use of their feathers . . . is indispensable to the ceremonies of the Katsina society and other pueblo rituals."[285] The court concluded that the government's interest fell short of compelling both because golden eagles are not an endangered species, and because the government's interest was outweighed by Abeyta's very compelling religious interest.[286]

Although the *Abeyta* court did not apply centrality as a requirement, its analysis reflects the increasing incorporation of centrality into Indian free exercise cases. In contrast to the nearly insurmountable difficulty of showing centrality in the context of sacred sites on federal lands, there is every reason to believe that Indian claimants will be able to establish that eagles are indisputably indispensable for ceremonial purposes.

Lyng v. Northwest Indian Cemetery Protective Association

In 1982, a case destined to become the most important Indian free exercise case to date began working its way toward the Supreme Court. As the first Indian free exercise case to easily satisfy the centrality requirement, *Lyng v. Northwest Indian Cemetery Protective Association*[287] finally provoked a Supreme Court discussion of the heightened centrality requirement. In retrospect, it is perhaps unfortunate that *Lyng* became the case to test the issue of centrality. As a free exercise challenge to management of federal public lands, the issue of federal land use management arguably controlled and clouded the Court's analysis.

At issue in *Lyng* was whether completion of a logging road by the U.S. Forest Service through an area of the Six Rivers National Forest in California would violate the First Amendment religious rights of Indians

282. 632 F. Supp. 1301 (D.N.M. 1986).

283. Defendant Jose Abeyta is a member of the Isleta Pueblo Katsina Society. The Katsina Society is described as "an independent and sometimes secretive religious society that engages in traditional ceremonial practices deeply rooted in ancient pueblo religion. *Id.* at 1303.

284. *Id.*

285. *Id.*

286. *Id.* at 1307-08.

287. 485 U.S. 439 (1988).

who used the area for religious practices. The United States Forest Service ironically provided the strongest evidence that the element of centrality was satisfied. During the planning stage for the proposed road, the U.S. Forest Service commissioned a study on the potential ethnographic impacts of the road. The resulting Theodoratus Report[288] confirmed that three local tribes used the area for religious practices, and found that completion of the road would be "potentially destructive of the very core of Northwest [Indian] religious beliefs and practices."[289] This destruction would result not from denied access, but from the destruction of the privacy, silence, and pristine natural setting required for sacred ceremonies.[290] When the Forest Service failed to show a countervailing compelling interest, the district court granted a permanent injunction,[291] which the Ninth Circuit subsequently affirmed on appeal.[292]

In 1986, the Ninth Circuit *Lyng* opinion represented the only successful assertion of an Indian free exercise claim involving federal public lands. This distinction, however, proved short lived, when the Supreme Court granted *certiorari*. In 1988, Justice O'Connor, writing for the majority, concluded that the Indians' religious practices were not unconstitutionally burdened, despite an undisputed finding that the road would virtually destroy the site-specific religion.[293] The Court narrowly focused its analysis on a search for governmental coercion.[294] Finding that completion of the road would not coerce Indians into violating their beliefs, Justice O'Connor concluded that no burden existed.[295]

The Court found the facts of *Lyng* analogous to a previous Indian free exercise case, *Roy v. Bowen*,[296] where an Indian unsuccessfully challenged the governmental requirement of an assigned social security number to receive government benefits.[297] Justice O'Connor described the federal land management issues of *Lyng* as "indistinguishable" from the internal governmental procedures at issue in *Roy*.[298] The majority cited *Roy* with approval: "The Free Exercise Clause simply cannot be understood to require the government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."[299] The three-

288. *Id.* at 442, 459.
289. *Id.* at 463.
290. *Id.* at 462.
291. Northwest Indian Cemetery Protective Assn. v. Peterson, 565 F. Supp. 586 (N.D. Cal. 1983).
292. Northwest Indian Cemetery Protective Assn. v. Peterson, 795 F.2d 688 (9th Cir. 1986).
293. *Lyng*, 485 U.S. at 447, 451.
294. *Id.* at 448-53.
295. *Id.* at 451-52, 465, 472 (Brennan, J., dissenting).
296. *Id.* at 448 (citing Bowen v. Roy, 476 U.S. 693 (1986)).
297. *Id.*
298. *Id.* at 449.
299. *Id.* at 448.

justice dissent strongly objected that this was a distinction of form over substance,[300] and urged the majority to consider the effect of the government action rather than the mere fact that it was "internal."[301] The dissent also viewed the majority's exclusive focus on coercion as fundamentally inconsistent with prior free exercise analysis because it disregarded the effect of the government action.[302]

Acknowledging that a law forbidding Indian access to the area would raise constitutional questions different from the destruction of privacy and silence at issue in *Lyng*,[303] Justice O'Connor declared that "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."[304] This statement is remarkable in its disregard of the First Amendment mandate that government conduct conform to constitutional standards. In contrast, the Tenth Circuit recently reviewed a similar Indian free exercise challenge to federal land use, and concluded that "The government must manage its property in a manner that does not offend the Constitution."[305] The *Lyng* dissent described the majority's refusal to recognize a cognizable burden as stemming from a fear that such recognition could strip the government of its ability to manage and use federal lands.[306]

The dissent also raised the issue of the validity of a centrality requirement. Although the dissenters acknowledged that a centrality requirement is inherently ethnocentric because it incorrectly assumes that Indian religions are organized in a typically western hierarchical manner,[307] they concluded that a centrality requirement could help reconcile these fundamentally incompatible interests.[308] To avoid a seemingly inappropriate judicial determination of what is central to a given Indian religion, the dissent suggested that the Indians themselves should make the determination.[309] In response, Justice O'Connor argued that neither means of determining centrality was acceptable.[310] If the Indian claimant made the centrality determination, the centrality requirement would be reduced to a mere untested assertion.[311] In the alternative, if the court made the

300. Justices Brennan, Marshall and Blackmun dissented. *Id.* at 470 (Brennan, J., dissenting).
301. *Id.* at 467 (Brennan, J., dissenting).
302. *Id.*
303. *Id.* at 453.
304. *Id.* (emphasis in original).
305. *Badoni*, 638 F.2d at 176.
306. *Lyng*, 485 U.S. at 473 (Brennan, J., dissenting).
307. *Id.* at 474 (Brennan, J., dissenting).
308. *Id.*
309. *Id.* at 475 (Brennan, J., dissenting).
310. *Id.* at 457-58.
311. *Id.* at 457.

determination, it would "cast the judiciary in a role that we were never intended to play."[312]

By granting *certiorari* in *Lyng*, the Supreme Court raised hopes that a clear standard for evaluating Indian free exercise claims finally would emerge. Instead, the opinion further obscured the already confused issue of applicable standards. With both the majority and the dissent in agreement that a judicial evaluation of centrality is suspect for various reasons, not only the propriety of a centrality standard is now at issue, but also whether there are any acceptable means of achieving that evaluation. Although *Lyng* casts doubt on the continued viability of applying a centrality requirement, the opinion simultaneously fails to provide lower courts with any guidelines to use in considering the next free exercise challenge. The majority's narrow and exclusive focus on coercion, to the exclusion of other aspects of the burden analysis, leaves a frustrating lack of principled guidelines. Further, the entire analysis appeared indelibly colored by the fact that management of federal lands was at issue; a fact which arguably should not have intruded into the first stage burden evaluation.

As testimony to the lack of resolution achieved by *Lyng*, it has been rarely cited by the Supreme Court in subsequent free exercise cases.[313] Even more confusing evidence of the lack of resolution is the fact that despite Justice O'Connor's rejection of centrality in *Lyng*, she now describes the free exercise test as including a centrality element. In the first free exercise opinion of 1990, Justice O'Connor, writing for the majority, described the free exercise inquiry as "whether [the] government has placed a substantial burden on the observation of a *central* religious belief or practice. . . ."[314] In contrast, just six months earlier, Justice Marshall used the identical description as Justice O'Connor, then qualified it by adding, "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interepretations of those creeds."[315] Following *Lyng*, lower courts still have no consistent standard by which to weigh the conflicting interests of Indian free exercise of religion and governmental regulation.

Accommodation of Religious Practices

Religious freedom is considered such a fundamental right that the goal of accommodating religious practices is inherent in free exercise analy-

312. *Id.* at 458.

313. *See, e.g.*, Frazee v. Illinois Dept. of Employment Security, ___ U.S. ___, 109 S.Ct. 1514 (1989) (upholding an individual's right to refuse to work on their sabbath, despite the fact that he was not a member of an established religion. *Lyng* is not cited, in a case which suggests a similar coercion analysis).

314. Swaggart Ministries v. Board of Equalization, ___ U.S. ___, 110 S.Ct. 688, 693 (1990) (emphasis added).

315. Hernandez v. Commissioner of Internal Revenue, ___ U.S. ___, 109 S.Ct. 2139, 2149 (1989).

sis.[316] The degree of accommodation possible is determined by balancing the individual's interest against the governmental interest. In the case of Indian free exercise of religion, for example, there is a very strong argument that religious practices involving sacred sites on public lands could and should be accommodated.[317] The governmental interest in land management is considerably less compelling than protection of endangered species.[318] In addition, the American Indian Religious Freedom Act of 1978 declares the preservation of Indian religious practices to be federal policy.[319] Legislative history reveals that continued access to religious sites was a primary concern of Congress.[320]

There is one relevant example of an effort to accommodate Indian religious use of animals in the context of federal wildlife protection. When Congress amended the Eagle Protection Act in 1962[321] to include golden eagles, it recognized that the new prohibitions would seriously impair Indian religious practices.[322] To accommodate the need for eagles without defeating the purpose of the statute, Congress authorized an Indian religious permit system.[323] Under Department of the Interior regulations promulgated pursuant to the Eagle Protection Act, Indians may apply to the United States Fish and Wildlife Service for a permit to kill an eagle, or may apply to receive eagle parts or entire bodies.[324] The Secretary of the Interior must personally approve a permit to kill an eagle, and only one such permit has ever been issued.[325] The permit process to

316. Accommodation of religious free exercise necessarily involves a determination of what is mandatory accommodation, what is permissible accommodation, and what accommodation is forbidden as a violation of the Establishment Clause. *See generally* L. Tribe, *supra* note 53, at 1169.

317. Despite the fact that Indian free exercise claims involving sacred sites have been uniformly unsuccessful, religious practices on public lands and governmental interests are still more compatible than conflicts involving protected wildlife. In the seventies, for example, Congress returned a sacred lake to the Taos Pueblo in New Mexico. Act of 1970, Pub. L. No. 91-550, 84 Stat. 1437 (1970). In the same decade, Congress guaranteed access rights to sacred sites in the Grand Canyon to the Havasupai. Act of 1975, Pub. L. No. 93-620, § 10, 88 Stat. 2091 (codified at 16 U.S.C. § 2281 (1988)). Although recent sacred sites cases have been less successful, many of those cases were fatally flawed by their timing. In balancing the interests, the governmental interest is going to be considered very compelling where millions of dollars are already spent on a public works project. Although *Lyng* suggests otherwise, for many sacred site claims, early action could reduce the weight of the governmental interest.

318. *See, e.g., Lyng*, 485 U.S. at 465.

319. American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996 (1982). Although AIRFA declares preservation of Indian religions to be federal policy in sweeping language, the statute has been held to create no legally enforceable rights. *Lyng*, 485 U.S. at 455; *but see id.* at 471 (Brennan, J., dissenting): "the absence of any private right of action in no way undermines the statute's significance. . . ." Unfortunately, most courts are concluding that all that the statute requires is for federal agencies "to consider but not necessarily to defer to, Indian religious values." *Wilson*, 708 F.2d at 747. *See also* Note, *The First Amendment and the American Indian Religious Freedom Act: An Approach To Protecting Native American Religion*, 71 Iowa L. Rev. 869 (1986).

320. *See* S. Rep. No. 709, 95th Cong., 2d Sess. 2-4; H.R. Rep. No. 1308, 95th Cong., 2d Sess. 2-3.

321. 16 U.S.C. § 668 (1988).

322. *See supra* text accompanying notes 87-96.

323. 16 U.S.C. § 668a.

324. 50 C.F.R. § 22.22 (1988).

325. *See supra* note 14.

obtain eagle parts, however, is heavily utilized. In the period from October 1988 through September 1989, for example, U.S. Fish and Wildlife provided 572 whole eagles, plus many parts, such as wings.[326] As of March 1989, 1,007 applications have been approved and are being processed, 825 of which are for entire eagles.[327] A federal distribution center in Ashland, Oregon processes the eagles which die from natural causes or are confiscated as a result of some illegal activity.

Despite this attempt to accommodate Indian religious needs, the permit system recently came under constitutional attack. Both the existence of a permit system and the administration of the system recently have been held to be impermissible burdens on the free exercise of Indian religious practices.[328]

The first challenge to the permit system occurred in 1976. *United States v. C. Top Sky*[329] involved an appeal of the conviction of a member of the Chippewa-Cree tribe for selling golden eagles in violation of the Eagle Protection Act. The defendant argued that the permit system burdened his free exercise of religion.[330] The Ninth Circuit found this claim rather disingenuous since the defendant received twenty-one whole eagles through the permit system, many of which he then sold.[331] In addition, the court found commercial sales to be outside the scope of religious practices.[332]

Ten years later, the debate resumed in *United States v. Thirty-Eight Golden Eagles*,[333] a forfeiture action, following charges of selling eagles, against a member of the Red Lake Band of Chippewa Indians. Defendant Adam Norwall argued that the permit system was facially unconstitutional because it forced Indians to comply with a regulatory scheme in order to practice their religion.[334] The federal district court concluded that although the regulatory scheme admittedly interfered with religious practice, wildlife protection interests outweighed the individual interest.[335]

In New Mexico, two federal district courts recently concluded that the permit system was unconstitutional. In 1986, in *United States v. Abeyta*,[336]

326. Of the 572 whole eagles, eighty percent were golden eagles, and twenty percent were bald eagles. Interview with Mr. K.C. Frederick, Asst. Special Agent, Division of Law Enforcement, regional office of the Department of the Interior in Albuquerque, October, 1989.

327. Of the 1007, 675 are for whole golden eagles, 150 for whole bald eagles, and 182 are for eagle parts. Interview with Mr. K.C. Frederick, Mar. 7, 1990. *Id.*

328. *See* United States v. Abeyta, 632 F. Supp. 1301, 1302-4, 1307 (D.N.M. 1986); United States v. Hinds, No. 89-46 (D.N.M. order filed Sept. 15, 1989; order vacating filed January 19, 1990) (trial date pending).

329. 547 F.2d 486 (9th Cir. 1976).

330. *Id.* at 488.

331. *Id.* at 487.

332. *Id.* at 488.

333. 649 F. Supp. 269 (D. Nev. 1986).

334. *Id.* at 274.

335. *Id.* at 277.

336. 632 F. Supp. 1301 (D.N.M. 1986).

the permit system was found impermissibly to burden Indian religious practices. The court described the permit system as: "utterly offensive and ultimately ineffectual,"[337] and the application process as "cumbersome, intrusive and demonstrat[ing] a palpable insensitivity to Indian religious beliefs."[338] The court also found that delays in the process rendered the permit system ineffective.[339]

In granting a motion to dismiss charges of killing a golden eagle in violation of the Eagle Protection Act, the *Abeyta* court held, *inter alia*, that the First Amendment barred prosecution because the government's interest could be achieved by less burdensome means.[340] The court concluded that eagle protection measures were unnecessary for golden eagles: "Since some depradating golden eagles are taken by ranchers for non-religious purposes, it is plain that some birds *could* be made available for religious purposes."[341] This statement contains two fallacies. First, as a matter of administrative policy, the Department of the Interior stopped issuing predator permits in 1970.[342] Second, the argument that one exception which allows depletion of a protected wildlife population justifies other exceptions is entirely inconsistent with the purpose of the Eagle Protection Act.

In 1989, in *United States v. Hinds*,[343] a prosecution for selling a golden eagle in violation of the Migratory Bird Treaty Act, another federal district court made similar findings in granting dismissal. Although the constitutionality of the eagle permit system is discussed at length in both the *Hinds* opinion and the parties' pre-trial motions,[344] the court's finding of unconstitutionality is clearly dictum. The indictment charged Hinds with two counts of selling a golden eagle in violation of the Migratory Bird Treaty Act,[345] which has no statutory permit exemption process. However, it is the Eagle Protection Act which authorizes statutory exemptions by permit.[346] If Hinds had been charged with the possession of a golden

337. *Id.* at 1307.

338. *Id.*

339. *Id.*

340. *Id.* at 1303.

341. *Id.* at 1307 (emphasis in original).

342. Despite the fact that Dept. of the Interior has legal authorization to issue permits for predatory killing, they have not issued permits as a matter of administrative policy since 1970. 41 Fed. Reg. 50,355 (Nov. 15, 1976) (reprinting the memorandum of Mar. 5, 1970 from Secretary of the Interior Walter J. Hickel which established the policy). Interview with K.C. Frederick, Mar. 7, 1990, confirmed that the policy is still in effect. *See supra* note 327.

343. *Hinds*, No. 89-46 (D.N.M. 1990).

344. *Id.* (order vacating Jan. 19, 1990), and see Memorandum Opinion and Order filed Sept. 15, 1989 p. 13-19, *Hinds*, No. 89-46 (D.N.M. 1990) (six pages of nineteen); Defendant's Supplemental Memorandum In Support Of Motion To Dismiss, at 10-11, 14-15. *Hinds*, No. 89-46 (D.N.M. 1990).

345. Indictment, *Hinds*, No. 89-49 (D.N.M. 1990).

346. *See supra* text accompanying notes 321-28.

eagle under the Migratory Bird Treaty Act, and he had obtained the eagle through the permit process pursuant to the Eagle Protection Act, he presumably would have had an affirmative defense. However, the permit process in no way authorizes any *sale* of eagles secured by the permit process, but only the possession of eagles for religious practices.[347]

Curiously, Hinds raised the constitutionality of the permit system after stating in both a Motion[348] and Amended Motion to Dismiss[349] that he was charged with unlawfully *possessing* a golden eagle. Because he was not charged with either the killing or possession of an eagle, resolution of the permit issue was unnecessary. Not only was addressing the issue unnecessary, but it was also inconsistent with the judicial principle that the constitutionality of statutes be addressed only as a last resort.[350]

Despite these obstacles, in granting defendant's motion to dismiss, the federal district court concluded that the Migratory Bird Treaty Act was unconstitutional because it provides no exceptions for Indian religious use, and therefore does not adopt the least restrictive means possible.[351] Turning to the existing exception of the religious use permit system under the Eagle Protection Act, the court concluded it constituted unconstitutional government entanglement in religion.[352] Three specific objections to the permit system were listed by the court: first, a "complicated and time consuming application process;" second, a lack of information about the manner in which the eagle was killed; and third, a government determination of the "validity of the religious ceremony" in the application process.[353]

The validity of the three allegations cited in *Hinds* to support a finding of unconstitutionality has yet to be directly determined because both *Abeyta* and *Hinds* involved orders granting motions to dismiss.[354] The first allegation, that the application process is complex and intrusive, is contested by Department of Interior officials,[355] and to some degree by the application form itself[356] which requires minimal information. The

347. 50 C.F.R. § 22.22 (1988).

348. Defendant's Motion And Supporting Authorities For Dismissal, *Hinds*, No. 89-46 (D.N.M. 1990).

349. Defendant's Amended Motion And Supporting Authorities For Dismissal, *Hinds*, No. 89-46 (D.N.M. 1990).

350. *Lyng*, 485 U.S. at 445.

351. Memorandum Opinion And Order at 18, *Hinds*, No. 89-46 (D.N.M. 1990).

352. *Id.* at 16-18.

353. *Id.* at 16.

354. United States v. Abeyta, 632 F. Supp. 1301 (1986); *Hinds*, No. 89-46 (D.N.M. 1990).

355. K.C. Frederick interview, *supra* note 327.

356. The "Request To Receive Eagle Parts/Feathers For Use In Religious Ceremonies" requires seven items: 1) specification of golden or bald eagle, whole or parts, adult or immature, and single or pair; 2) identification of tribal membership, 3) name of religious ceremony, 4) certification of tribal membership, 5) certification from a duly authorized official of your religious group that applicant is authorized to participate in religious ceremonies, 6) location of nearest bus station (for shipping), and 7) phone number where applicant wants to be notified as to shipping date. Department of the Interior application form.

second claim, that Indians are unable to verify how the eagle was killed, appears indisputable; the issue remains whether there is an alternative. Finally, the third allegation that the government must approve of a given ceremony before it will agree to provide eagles, is also disputed. Department of the Interior personnel say they do not investigate the specifics of any ceremony identified as religious, nor have they ever denied a permit on that basis.[357] The two essential requirements, according to administrators of the permit system, are tribal enrollment, and a signature of someone attesting that the eagle will be used for religious purposes.[358]

Although two courts[359] have concluded the permit system is an impermissible free exercise burden, the facts supporting their conclusions were not proved. At this time no viable alternative is evident. The alternative implied in the opinions[360] is a complete exemption for Indians from the relevant statutes. Congress did consider, then reject a complete exemption for Indians for two of the three statutes,[361] becuase it would directly undermine the purposes of the three acts. Furthermore, if Indians were the only persons legally permitted to kill eagles, there would be great economic pressure to contribute to the existing illegal market in eagles.[362]

The argument for a complete religious exemption also assumes that the impact on a species would be de minimus. However, Indian use of eagles is far from de minimus; the present number of eagle requests from the unpopular permit system is 1,007.[363] Because the permit system is unpopular, these numbers probably reflect only a fraction of the actual number of eagles sought by Indians. The Supreme Court in *Dion* noted that congressional reports cited the Indian demand for eagle feathers as one of the threats to the continued survival of the golden eagle which necessitated passage of the Eagle Protection Act.[364]

357. K.C. Frederick interview, *supra* note 327.

358. *Id.*

359. *Abeyta*, 632 F. Supp. at 1304; *Hinds*, Order of Sept. 15, 1989, at 18, No. 89-46 (D.N.M. 1990).

360. The *Abeyta* court explicitly states that the permit system "is apparently unnecessary as a conservation measure" because the Dept. of the Interior is approving predator permits. *Abeyta*, 632 F. Supp. at 1304. Although the court's information is factually incorrect, the implication is that Indians should be free from any restrictions on killing eagles. The *Hinds* court similarly dwells on the imperfections of the permit system without proposing any alternative that would be consistent with the congressional intent expressed in the Eagle Protection Act. *See Hinds*, No. 89-46 (D.N.M. 1990).

361. Congressional hearings during debate over both the Eagle Protection Act amendment (adding golden eagles) and the Endangered Species Act indicate that a blanket exemption for Indian takings was considered and rejected as being inconsistent with the protection goal of the acts. Hearings, *supra* note 132 (Endangered Species Act, explicitly, and Eagle Protection Act by implication, *see Dion*, 476 U.S. 734 (1986) *see supra*.

362. Recent testimony established that golden eagles recently purchased in New Mexico cost five hundred dollars. *See Hinds* indictment, No. 89-46 (D.N.M. 1990).

363. K.C. Frederick interview, *supra* note 327.

364. H.R. Rep. No. 1450, 87th Cong., 2d Sess. (1962).

Despite the listed criticisms, the permit system is successful to some degree as an attempt to accommodate Indian religious use of federally protected animals, as obvious from the large volume of Indians receiving eagles. There is little doubt that the permit system has serious flaws, but some of the administrative problems could be revised by Congress. Alternatively, if the permit system is ultimately held unconstitutional, Congress will be forced again to weigh the respective interests of religious killing of animals and wildlife protection, and develop other means of satisfying both interests.

III. BALANCING CONFLICTING INTERESTS

Indian Religious Interest in Animals

Although animals are important to many religions of the world, they are particularly important to American Indian religious practices.[365] Indian religions vary from tribe to tribe, but most are characterized by a strong animist belief that all entities, living and nonliving, have spiritual lives.[366] Wild animals are seen as kindred spirits by most tribes, who therefore deserve a certain respect and consideration. In a study entitled *American Indian Ecology*, one historian concluded: "Animals thus were regarded as closely related to human beings, but also as powerful spirits with mysterious, separate lives of their own, . . . and able to help or hurt with their power."[367]

The hunting practices of tribes indicated the high regard that Indian cultures traditionally had for animals.[368] Elaborate rituals accompanied hunting, whether for subsistence or ceremonial purposes. In addition, some hunting practices reflected a concern for the survival of various species.[369] Among the Papago, for example, "it was not thought right to kill more than one eagle in one year."[370] Despite the fact that tribes depended upon the utilitarian value of animals for survival, their hunting was constrained by a simultaneous recognition of animals' intrinsic value.

There is considerable irony in the fact that Indian religious practices are now identified as contributing to depletion of certain species. Indians share with non-Indians a parallel interest in species preservation, particularly of the animals which are considered sacred. Yet by virtue of the growing numbers of Indians, the number of certain animals sought for religious use has multiplied, and the impact on those species has con-

365. J. Hughes, *supra* note 14, at 23 (*The Powerful Animals*).

366. *See* R. Nash, *supra* note 2, at 92.

367. J. Hughes, *supra* note 14, at 25.

368. *Id.* at 23-48.

369. *Id.* at 35-42. The Hopi, for example, when they caught a herd of mountain sheep, would reportedly release one male and one female. *Id.* at 35.

370. *Id.* at 36.

sequently multiplied. Indians now have simultaneously conflicting interests in short-term freedom to kill federally protected animals, and long-term preservation of species considered sacred. Furthermore, in securing animals for religious purposes, it is doubtful that individual interests are even synonymous with collective tribal interests. Tribes may favor some form of present regulation to ensure to future generations the continued availability of sacred animals.

Federal Interest in Wildlife Protection

The federal interest in preservation of wildlife is multifaceted. First, as defined by the Supreme Court, the federal government now acts as trustee, with the right and duty to protect the public's interest in wildlife.[371] As one federal court recently concluded, "such right does not derive from ownership of resources but from a duty owing to the people."[372] The federal government has increasingly taken that duty seriously, and enacted a series of progressively more stringent wildlife protection laws.[373] As laws formulated by state representatives, these statutes reflect a broad public concensus favoring wildlife regulation.[374]

In the field of wildlife protection, there is an inherent need for both national and worldwide uniformity. Isolated enforcement of prohibitions on killing animals will be to little avail if individuals can hunt nearby in alternative locations. It is also difficult for most individuals to understand the larger ecological consequences of their actions. Typically, when humans can empathize with an animal, they tend to feel more protective of that animal.[375] This is usually limited to mammals who are cute, beautiful, or easy to communicate with. A cuddly panda bear or a beautiful leopard is far more likely to arouse international concern than a less sympathetic species such as a swamp snake.[376] Selective preservation carries dangers of its own, not the least of which is our profound ignorance of the consequences of any species' extinction on larger ecological chains.[377]

371. *See supra* text accompanying notes 49-60; *see generally* Meyers, *Variation On A Theme: Expanding The Public Trust Doctrine To Include Protection of Wildlife*, 19 Envtl. L. 723 (1989).

372. *In re* Steuart Transp. Co., 495 F. Supp. 38, 40 (E.D. Va. 1980).

373. *See generally* M. Bean, *supra* note 62.

374. Kellert, *Social And Perceptual Factors In The Preservation Of Animal Species*, in The Preservation Of Species, *supra* note 2, at 50.

375. *Id.* The Kellert article included the results of a study measuring public attitudes toward wildlife protection. When asked "Which of the following endangered species the person would favor protecting even if it resulted in higher costs for an energy development project?", the results were: Bald Eagle 89%; Eastern Mountain Lion 73%; Agassiz Trout 71%; American Crocodile 70%; Silverspot Butterfly 64%; Indigo Snake 43%; and the Kauai Wolf Spider 34%. *Id.* at 55.

376. *Id.*

377. As Aldo Leopold concluded: "The outstanding scientific discovery of the twentieth century is not television, or radio, but the complexity of the land organism. The last word in ignorance is the man who says of an animal or plant: 'What good is it?'" *Quoted in* J. Krutch, The Best Nature Writing Of Joseph Wood Krutch 320 (1949).

Some of the most severe consequences of our individual and local perceptions could be overcome by a legislative process which gathers and incorporates broader information.

A second factor arguing against a laissez-faire wildlife policy is economics. Individual or local economic interests often conflict with wildlife protection.[378] Few human beings are willing to relinquish the economic benefits that a purely utilitarian perspective provides. International efforts to curb previously unfettered freedom to kill animals for their fur, horns, or tusks have resulted in widespread poaching and considerable bloodshed.[379] As more animals join the ranks of the threatened or endangered, the value of their skins, furs, and other body parts increases dramatically. Even cultures where specific animals are considered sacred often contain individuals willing to exploit those animals for economic gain. For example, a disturbing number of Indian cases claiming religious exemptions involving the selling of eagles,[380] a practice which is offensive to most Indian religions.[381] The federal government, as trustee of wildlife, has a strong interest in preventing the decimation of wildlife for economic gain.

The weight of the federal government's interest in wildlife protection varies according to the circumstances of each species' status. However, once Congress explicitly identifies a species as warranting protection, that designation carries great weight. In the case of the golden eagle and the bald eagle, for example, federal law protects both. The Migratory Bird Treaty Act and the Eagle Protection Act protect the golden eagle.[382] The same statutes protect the bald eagle, plus the Endangered Species Act.[383] Some courts, in weighing the governmental interest in protecting golden eagles, as expressed by the Eagle Protection Act, have concluded that the governmental interest is not compelling because the golden eagle is not currently endangered.[384] This begs the question, since prevention of endangered status is the entire purpose of wildlife protection. Once Congress has designated a species as within federal protection, the exact degree of threat should not be estimated by a court using less comprehensive information. Due to budgetary cuts, neither federal nor state counts of golden eagles have been made in the last decade.[385] Conse-

378. N. Myers, *supra* note 7, at 7.

379. *See* D. Anderson & R. Grove, Conservation in Africa: People, Politics, and Practice (1987).

380. *See, e.g., Dion*, 476 U.S. 734; *L. Top Sky*, 547 F.2d 483 *C. Top Sky*, 547 F.2d 486; *Hinds*, No. 89-46 (D.N.M. 1990); *Thirty-Eight Golden Eagles*, 649 F. Supp. 269.

381. *See, e.g., C. Top Sky*, 547 F.2d at 488 (the act of selling is deplored by Indian religion).

382. For discussion of the full scope of protection under the Migratory Bird Treaty Act, *see supra* text accompanying notes 66-80; for the Eagle Protection Act, *see supra* text accompanying notes 81-105.

383. *Supra* note 124.

384. *Abeyta*, 632 F. Supp. at 1304.

385. Neither Department of the Interior, nor comparable state agencies have data more recent than fifteen years ago for golden eagles, according to the Department of the Interior, Albuquerque Regional Office, March 1990.

quently, there is no statistical information available. Where the status of a species is not determined, the congressional mandate to *prevent* further losses should govern.

CONCLUSION

Taking the life of another living creature is unique among religious practices. Unlike most religious rituals, it necessarily involves extinguishing another life to further one's own spiritual growth. At one time human beings did believe that even the sacrifice of other human beings was justified for religious purposes.[386] However, as most societies came to believe that all humans have intrinsic rights, human sacrifice ceased. With increased recognition of the intrinsic value of human beings, many relationships based upon utilitarian concepts, such as slavery, were relinquished.

Recently, proponents of a new environmental ethic warn that to avoid a profound global crisis, humans must replace their remaining utilitarian perspectives with new outlooks of self-restraint and respect for the intrinsic value of non-human entities.[387] In the case of wildlife protection, both a utilitarian perspective and an intrinsic value perspective support stringent regulation of the killing of certain animals. The utilitarian view argues that the loss of biological diversity through extinction means a loss of potential resources to humans. The intrinsic view argues that species have an intrinsic value and should be preserved regardless of their usefulness to humans. Although both perspectives support wildlife protection, the intrinsic value perspective is incompatible with the concept of killing animals to satisfy the religious desires of humans. The conflict between Indian religious practices and federal wildlife protection symbolizes this broader philosophical debate.

Indian killing of animals for religious use has not been the major or only cause of the dramatic reduction of many species. For example, loss of habitat, DDT, and high voltage wires have all contributed to declining eagle populations.[388] Yet one of the hardest lessons of our time is that we do not need to participate in creating a problem to suffer its consequences, and share the responsibility to remedy it. One does not have to contribute personally to air pollution, oil spills, or acid rain to have the quality of one's life degraded, or one's health impaired.

It is an unfortunate reality that although the religious killing of animals may be done with great respect and gratitude, the result is identical to killing for other motives. A panther is equally dead whether it is killed

386. For a discussion of the role of human sacrifice in various religions, see 5-6 Encyclopedia of Religion & Ethics 840-66 (J. Hastings ed. 1951).

387. Norton, *On The Inherent Danger Of Undervaluing Species*, in The Preservation Of Species, *supra* note 2, at 110-37.

388. Dunstan, *The Golden Eagle*, in Audubon Wildlife Report: 1989-1990 at 507 (1989).

by a trophy hunter, or killed by an Indian for religious purposes. As the price for exercising a virtually unrestricted freedom to kill animals for individual desires, Americans are now witnessing the irreversible loss of many species. As the human population has increasingly appropriated wildlife habitat for living, farming, ranching or profit-making, species are being extinguished daily by some estimates, and that trend is accelerating.[389]

To ensure the survival of all species, including our own, we must reevaluate our relationship to animals which has brought us to this point. All killing of animals whose numbers are declining should be prohibited. Current federal wildlife statutes now afford many species approaching extinction stringent federal protection. Undoubtedly, some Americans accustomed to unrestricted freedom to kill will resent the restraints forced upon them by the federal government. However, simultaneously, other Americans are voluntarily taking measures necessary to restore ecological integrity.[390]

The free exercise of religious practices is a powerful symbol of individual freedom which Americans value. Yet it pales beside the spector of the irreversible loss of animals such as the eagle, or the Florida panther. Unless religious practices involving protected animals can be accommodated by means such as the permit system,[391] which do not allow additional killing, many species will continue to decline. We have reached a time where individual freedom to seek religious gratification at the expense of another species may be an individual freedom which we can no longer afford. The choice is ours.

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389. N. Myers, *supra* note 7 at 3-5. Myers warns that although extinctions are soaring, many go undocumented. The documented rate shows roughly one species per year became extinct by man's action from 1600-1900. By 1974 it was estimated that the rate may have reached one hundred a year. Myers estimates that due to widespread habitat loss, the extinction rate could now be exceeding one hundred *a day. Id.*. For a discussion of the difficulties in estimating the rate of extinctions, *see* Lovejoy, *Species Leave The Ark One By One*, in The Preservation of the Species, *supra* note 2, at 13-16.

390. In recent years, for example, people are voluntarily boycotting fur coats, ivory jewelry, and other animal products to help decrease the market for poachers. Similar actions are beginning for other resources also, such as recycling and water conservation.

391. The important characteristic of the current permit system is that it secures eagles for individuals without the species suffering additional killings.