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The paper tiger and its predecessors: An ethnologic history of the American Indian Religious Freedom Act

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The Paper Tiger and Its Predecessors: An Ethnologic History of the American Indian Religious Freedom Act.

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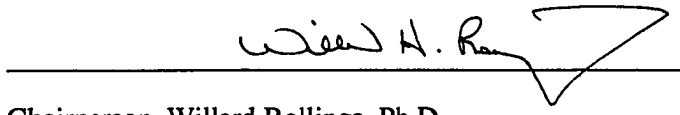

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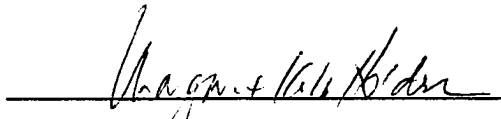

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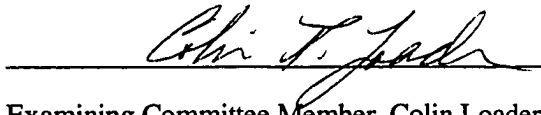

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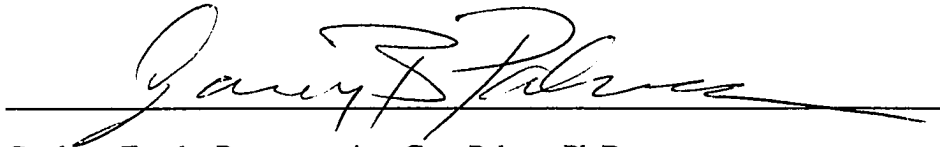

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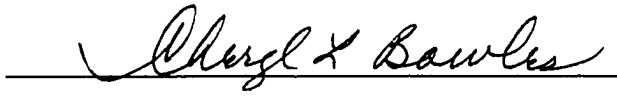

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ABSTRACT

The American Indian Religious Freedom Act has proven to be a terrible disappointment for the Indians all across the country. This act presupposed an analogy between Native American ceremonial practices and Euro-American religions, but Native American ceremonies involve a broader range social institutions than Euro-American "religion." Hence, the analogy between Indian ceremonies and Euro-American religions broke down after passage of the act, and Indians failed to receive the legal remedies sought under its provisions. The following is an attempt to address the problems associated with this act by examining the historical development of a Native American rhetoric of religious freedom in the twentieth-century.

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Acknowledgments

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Introduction.

Whereas the United States has traditionally rejected the concept of a government denying individuals the right to practice their religion and, as a result, has benefited from a rich variety of religious heritages in this country;

Whereas the religious practices of the American Indian (as well as Native Alaskan and Hawaiian) are an integral part of their culture, tradition and heritage, such practices forming the basis of Indian identity and value systems;

Whereas the traditional American Indian religions, as an integral part of Indian life, are indispensable and irreplaceable;[1]

-Preamble to the American Indian Religious Freedom Resolution of 1978.

The preamble to the American Indian Religious Freedom Act treats religion not only as of intrinsic worth, but as a central element of Indian culture, emphasizing the dual values of strengthening Indian personal identity and of enriching the larger society through diversity. . . While stressing cultural distinctiveness, the Act places Indian religion in the context of universal values, terming the exercise of traditional practices an 'inherent right,' and asserting that Indian practices should be accorded the respect due all religions.[2]

-Ellen M. W. Sewell, "The American Indian Religious Freedom Act."

The American Indian Religious Freedom Resolution of 1978 emerged during a time of heightened public concern for ethnic and cultural diversity.[3] This resolution affirmed that the United States would follow policies protecting the religious freedom of "traditional" Native American religions, and it directed the executive branch to evaluate federal policies in light of this resolution.[4] The resolution was signed into law on August 11th, 1978, (after which it became generally known as the American Indian Religious Freedom Act, or the AIRFA). Sewell argues above that the preamble to the AIRFA appeals to notions of both universal value and cultural diversity. This conjunction of two very different abstract

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[1]Preamble, The American Indian Religious Freedom, Statutes at Large, 92, 469 (1978).

[2] Ellen M. W. Sewell , "The American Indian Religious Freedom Act," Arizona Law Review, 25 (1983) 431. (Footnotes have been omitted, as has a quotation taken from sections of the preamble itself.)

[3]Sewell, 30

[4]The American Indian Religious Freedom, 469-70.

values shaped the distinctive nature of interests advanced through appeal to the AIRFA. The difference between these values remained, however, largely in the background of dialogue throughout the history of the act. The text of the AIRFA itself made it easy to speak as if maintaining the integrity of Indian culture(s) and preserving individual freedom of conscience could be embodied in the same notion. Both principles were subsumed under the rubric of "religious freedom," but this marriage of rhetorical themes continually came apart in the process of implementation. Not surprisingly, the AIRFA came to be something of a disappointment to Indians all over the United States.

Throughout the nineteen-eighties Indian activists appealed to the AIRFA in conjunction with the Free Exercise clause of the First Amendment to support a variety of legal interests, (e.g. access to sacred sites, ceremonial harvesting of endangered species, rights to distinctive fashions of bodily adornment, control of cultural artifacts, and protection of burial sites and ancestral remains). While an appeal to both the First Amendment and the AIRFA may appear to contain redundant references to the same abstract principle of religious freedom, each of these references actually invoked a different sense of the social context implicit within that principle. The sense of "religious freedom" informing the AIRFA could not be understood apart from the legal history of Indian-white relations, nor could it be understood apart from the culturally specific interests of Native Americans. Its preamble includes as attempt to model the value of cultural diversity as a secondary benefit of individual freedom (thus voicing James Madison's famous argument Federalist Ten), but many of the cultural values addressed within the act simply could not be understood in these terms.[5] Hence, the AIRFA borrowed from the language of the First Amendment, but it infused that language with a set of values tied closely to a working relationship between the federal government and Native American tribes. In keeping with

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[5]See James Madison, "The Federalist," Number 10, American State Papers, The Federalist, J. S. Mill, Volume 43, Great Books of the Western World, ed., Robert Maynard Hutchins, (Chicago, London, Toronto: Encyclopædia Britannica, Inc., 1952) 49-53 *passim*.

that working relationship the federal government asserted an interest in Native American religion quite different than that implied by concepts of individual freedoms. Under the AIRFA the rhetoric of "religious freedom" implied a broad range of cultural interests not normally associated with the First Amendment. This conjunction of appeal to religious freedom and cultural diversity under the AIRFA constituted a unique rhetorical stance in the history of Indian-white relations, playing on subtle features of the public imagination as well as technical facets of the American legal system.

Through the AIRFA Congress explicitly linked notions of religious freedom to aspects of Indian culture which policy-makers would normally have dealt with in secular terms. Few of the interests advanced under the AIRFA met with complete success, however; and with the determination of the Lyng (1988) and Smith (1990) cases by the U.S. Supreme Court, the working rationale behind AIRFA litigation became untenable. In the interim Native Americans could plausibly generate a distinct set of legal arguments in favor of mandatory accommodation for the aforementioned practices in the event that they conflicted with federal policies. Many of these claims involved a novel sense of the right of free exercise. The prospect that matters of free exercise could be implicated in general policy guidelines involving federal management of public lands, for example, seemed counter-intuitive to many schooled in free exercise jurisprudence. The prospect certainly struck Justice O'Conner as absurd, and the majority opinion she wrote in Lyng v. Northwest Indian Cemetery Protective Association (1988) effectively brought the prospect of sacred site litigation to a close.[6] The AIRFA linked other aspects of federal policy to novel questions of free exercise, and for a time this encouraged a host of unusual litigation strategies. All told, those active in the struggle for Native American rights enjoyed a unique set of strategic options from the passage of the AIRFA in 1978 to the decision of

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[6]Lyng v. Northwest Indian Cemetery Protective Association, 108 S. Ct. 1319 (1988).

Employment Division, Department of Health and Human Resources of Oregon, et al. v. Smith et al. in 1990.

The AIRFA has in fact led to some positive developments for Native American rights. Simply by laying the groundwork for dialogue about a broad range of subjects, the act has played a role in shaping public opinion, in transforming certain aspects of federal policy, and in generating the rationale for subsequent legislation dealing with similar issues.[7] Yet, the consensus of opinion about the AIRFA remains that the act has generally proven to be ineffective.[8] Perhaps this can be attributed to an unrealistic set of expectations regarding what was essentially no more than a joint resolution by Congress and the

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[7]E.g. Native American Graves Protection and Repatriation Act, Statutes at Large, 104, 3048 (1990); Religious Freedom Restoration Act of 1993, Statutes at Large, 107, 1488 (1993); American Indian Religious Freedom Act Amendments of 1994, Statutes at Large, 108, 3125 (1994).

See also, "Repatriation Act Protects Native American Burial Remains and Artifacts," NARF Legal Review, 16 (Winter, 1990) 1-4 *passim*; James E. Wood, Jr., "The Religious Freedom Restoration Act," Journal of Church and State, 33 (1991) 63-79 *passim*; Kristin L. Boyles, "Saving Sacred Sites: The 1989 Proposed Amendment to the American Indian Religious Freedom Act," Cornell Law Review, (July, 1991) 1117-1149 passim

[8]See Kristin L. Boyles, 1117-1149 passim; Celia Byler, "Free Access or Free Exercise?: A Choice Between Mineral Development and American Indian Sacred Site Preservation on Public Lands," Connecticut Law Review, 22 (1990) 416-420; Ward Churchill and Glenn T. Morris, "Key Indian Laws and Cases," The State of Native America: Genocide, Colonization, and Resistance, ed. M. Annette Jaimes, Race and Resistance Series, (Boston, Massachusetts: South End Press, 1992) 17; Vine Deloria, God is Red: A Native View of Religion, (Golden, Colorado: Fulcrum Publishing: 1994) 268; Vine Deloria and Clifford M. Lytle, American Indians, American Justice, (Austin: University of Texas Press, 1983) 237-239; Walter Echo-Hawk, "Loopholes in Religious Liberty: The Need for Federal Protection of Worship for Native People," American Indian Religions, 1 (Winter, 1994) 5-16 *passim*; Charlotte Frisbie, Navajo Medicine Bundles or Jish: Acquisition, Transmission, and Disposition in the Past and Present, (Albuquerque: University of New Mexico Press, 1987) 371-389; Paul E. Lawson and Jennifer Scholes, "Jurisprudence, Peyote and the Native American Church," American Indian Culture and resource Journal, 10 (1986) 21; Ira C. Lupu, "Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion," Harvard Law Review, 102 (March, 1989) 946n; Robert S. Michaelsen, "Is the Miner's Canary Silent? Implications of the Supreme Court's Denial of American Indian Free Exercise of Religion Claims," Journal of Law and Religion, 6 (1988) 97-98, 105-106; Patrick T. Noonan, "Mining Desecration and the Protection of Indian Sacred Sites: A Lesson in First Amendment Hurdling," Public Land and Resources Law Digest, 27 (1990) 317-321; Sharon O'Brien, American Indian Tribal Governments, (Norman and London: University of Oklahoma Press, 1989) 90; Stephen L. Pevar, The Rights of Indian Tribes: The Basic ACLU Guide to Indian and Tribal Rights, Second edition, An American Civil Liberties Union Handbook, ed. Norman Dorson, (Carbondale and Edwardsville: Southern Illinois University Press, 1992) 230-231; Steve Talbot, "Desecration and American Indian Religious Freedom," Journal of Ethnic Studies, 12 (1985) 14-15; Christopher Vecsey, ed., Handbook of American Indian Religious Freedom, (New York: Crossroad, 1991) *passim*; John R. Wunder, "Retained by the People": A History of American Indians and the Bill of Rights, (New York and Oxford: Oxford University Press, 1994) 193-199.

presidency. But the full significance of the AIRFA could not have been known at the time of its passage, and as with any legal conflict, a good deal of the AIRFA's implications were actually generated after the fact through debates which were ostensibly about its "real" meaning.

AIRFA Case History: A Record of Disappointments.

Soon after passage of the AIRFA a disparity emerged between the expectations of Indian activists and the policy provisions entertained by Federal agencies concerned with its implementation. Naturally the disparity between Indian activists and policy-makers led to extensive litigation. At the time of the AIRFA's passage some Native Americans were already involved in free exercise litigation. A collection of Navajos sought to enjoin the National Park Service to accommodate their ceremonial interests in Rainbow Bridge National Monument, and Cherokee litigants sought to prevent construction of the Tellico Dam (of Snail Darter fame) which would soon flood lands sacred to their own tribe. After passage of the AIRFA the Indian litigants in each of these disputes simply added AIRFA claims to their ongoing cases, but each of their respective claims ended in defeat.[9] The District Court of South Dakota then drew on these precedents in denying Lakota and Tsistsistas claims relating to management of the Bear Butte State Park in the Black Hills, as did United States Court of Appeals in its rejection of Hopi and Navajo efforts to block expansion of a ski resort in the San Francisco Peaks of Arizona.[10] The district court of Arizona further denied free exercise and AIRFA relief to Navajo plaintiff's forcibly relocated as a result of the Navajo-Hopi Land Settlement Act.[11] Thus, despite extensive

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[9]See, Badoni v. Higginson, 455 F. Supp. 641 (D. Utah, C. D., 1977); Badoni v. Higginson, 638 F. 2d. 172 (Tenth Circuit, 1980); Sequoyah v. Tennessee Valley Authority, 480 F. Supp. 608 (E. D. Tennessee, N. D., 1979); Sequoyah v. Tennessee Valley Authority, 620 F. 2d 1159 (Sixth Circuit, 1980).

[10]Crow v. Gullett, 541 F. Supp. 785 (D. South Dakota, 1982); Wilson v. Block, 708 F. 2d 735 (District of Columbia Circuit, 1983).

[11]Manybeads v. United States, 730 F. Supp. 1515 (D. Arizona, 1989).

litigation efforts the AIRFA did not generally improve the courts' willingness to back Indian interests in sacred geography.

During the nineteen-eighties there were a few rulings which seemed promising from the standpoint of Indian litigants. Three cases initially yielded favorable results for their Indian claimants: New Mexico Navajo Ranchers Ass'n v. I.C.C.; United States v. Means; and Northwest Coast Indian Cemetery Protective Association v. Peterson.[12] In 1988, however, the U.S. Supreme Court reversed Northwest Coast Cemetery Protective Association v. Peterson. In this case, known as Lyng v. Northwest Indian Cemetery Protective Association, the Supreme Court ruled that the internal policies of a government agency could not have posed a burden on any right of free exercise.[13] Following this Supreme Court ruling both Means and the New Mexico Navajo Ranchers Association lost their respective cases in continued litigation.[14] The Lyng case had effectively ended the prospect of successful sacred site litigation, and thereby produced a chilling effect on Indian attempts to secure federal accommodation for Indian interests in sacred geography.[15]

The case law dealing with federal game management includes a small number of victories for Indian claimants, as well as a few losses. Many of the issues involved in cases of game management turned on questions about the specific details of management policy. Hence, questions about the facts of such cases generally overshadowed debate over abstract principles of religious freedom. Before passage of the AIRFA federal agents

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[12]New Mexico Navajo Ranchers Ass'n v. I.C.C., 702 F. 2d 227 (District of Columbia Circuit, 1983); United States v. Means, 627 F. Supp. 247 (D. South Dakota, W.D. 1985), Northwest Indian Cemetery Protective Association v. Peterson, 764 F. 2d 581 (Ninth Circuit, 1985); Northwest Indian Cemetery Protective Association v. Peterson, 795 F. 2d 688 (Ninth Circuit, 1986).

[13]Lyng, 108 S. Ct. 1319 (1988).

[14]United States v. Means, 858 F. 2d 404 (Eighth Circuit, 1988); New Mexico Navajo Ranchers Ass'n v. I.C.C. 850 F.2d 729 (D.C. Circuit, 1988). See also Star Lake R. Co. v. Lujan, 737 F. Supp. 103 (D.D.C. 1990).

[15]Cf. Sharon O'Brien, in Handbook, 35-40.

successfully prosecuted members of the Shoshone-Bannock Tribe for sale of eagle feathers under the Bald Eagle Protection Act. The Ninth Circuit Court of Appeals subsequently rejected an appeal claiming that such actions infringed upon one defendant's right of free exercise.[16] In 1979, however, the Supreme Court of Alaska ruled in favor of an Athapaskan Indian who had killed a moose out of season for use in a funeral potlach.[17] This decision referred to the First Amendment and the written opinion did not mention the AIRFA, but the case did seem promising to those who hoped to employ notions religious freedom in the context of Indian ceremonialism. The District Court of New Mexico also dismissed charges against a member of the Isleta Pueblo for possession of eagle parts in violation of the Bald eagle Protection Act. That court cited concerns over the defendants' right of free exercise as well as the terms of the Treaty of Guadalupe Hidalgo.[18] On the other hand, courts upheld the confiscation of bald eagle parts from Chippewa tribal members in United States v. Thirty Eight Golden Eagles, and rejected the First Amendment / AIRFA appeal of an Indian claimant who had killed endangered birds for commercial gain in United States v. Dion.[19] Most of these cases turn of details of game management policies. With the exception of Frank v. State, a case largely ignored or misread by subsequent courts, the cases dealing with endangered species and game management have produced nothing that would constitute a clear principle of case law connecting principles of religious freedom to federal policies of game management.

The courts also dealt with a collection of AIRFA cases involving treatment of prison inmates. Indian inmates gained favorable rulings over dress codes as well as access to religious facilities and ceremonial authorities in three of these cases, Reinert v. Haas, Bear

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[16]United States v. Top Sky, 547 F. 2d 483 (Ninth Circuit, 1976).

[17]Frank v. State, 604 P. 2d (Supreme Court of Alaska, 1979).

[18]United States v. Abeyta, 632 F. Supp. (D. New Mexico, 1986).

[19]United States v. Thirty Eight Golden Eagles, 649 F. Supp. 269 (D. Nevada, 1986); United States v. Dion, 762 F. 2d 674 (Eighth Circuit, 1982).

Ribs v. Taylor, and Marshno v. McMannus.[20] In other cases, however, courts ruled against mandatory accommodation for Indian rights of free exercise at both the district and circuit levels, arguing that inmates' religious rights were over-ruled by the security interests of prison regulations.[21] The courts were thus split for some time on questions about mandatory accommodation of religious freedom for prison inmates, including those of Native Americans. In 1987 the U.S. Supreme Court ruled against Islamic inmates in a New Jersey prison, affirming the notion that deference to the disciplinary judgement of prison authorities should override a prison inmates right of free exercise.[22] This non-Indian case effectively shut down any general prospects that Indian litigants could obtain mandatory accommodation for their religious practices.

Some of the AIRFA-related cases are hard to classify. The Oneida Indian Nation, for example, fought denial of federal recognition based in part on questions about the role that attendance in a ceremony had played in preventing one of its members from signing the necessary petitions. They lost the case.[23] An Abneki Indian, Steven J. Roy, challenged a Department of Health and Human Services policy requiring that his daughter receive a social security number in order to gain health benefits. Roy had argued that a social security number would rob his daughter of her spirit, but the U.S. Supreme Court ruled that the internal policies of the Social Security administration could not have imposed a burden on either Roy's or his daughter's religious beliefs.[24] This rather unusual case involving the details of bureaucratic procedure would later provide the groundwork for the Lyng decision

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[20]Reinert v. Haas, 585 F. Supp. 477 (S.D. Iowa, 1984); Bear Ribs v. Taylor, Civ. No. 77-3985RJK(G) (C.D. California, 1979); Marshno v. McMannus, Case No. 79-3146 (D. Kansas, 1980).

[21]Shabazz v. Barnauskas, 600 F. Supp. 712 (D. M.D. Florida, 1985); Indian Inmates of Nebraska Penitentiary v. Grammar, 649 F. Supp. 1374 (D. Nebraska, 1986); Standing Deer v. Carlson, 831 F. 2d 1525 (Ninth Circuit, 1987).

[22]O'Lone v. Shabazz, 482 U.S. 340 (1987).

[23]Oneida Indian Nation of N.Y. v. Clark, 593 F. Supp. 257 (D. N.D. New York, 1984).

[24]Bowen v. Roy, 106 S. Ct. 2147 (1986).

in which the Supreme Court treated construction of a road through sacred lands as another internal matter beyond the scope of the Free Exercise clause.

Native American ingestion of peyote posed a unique set of problems during the years following passage of the AIRFA. Indian interests in the use of peyote seemed generally secure throughout the nineteen-eighties, at least insofar as the practice took place under the auspices of the Native American Church. This accommodation had actually been reached long before passage of the AIRFA, and the Native American Church would not be considered a "traditional" religion in many Native American communities. Hence, the right to ingest peyote occupied a marginal role in the development of AIRFA policies and case law. During the years immediately following passage of the AIRFA, Indians limited their peyote litigation to a defense of the special status given the Native American Church and its Indian members.

In three separate cases various courts pointed to the AIRFA as evidence of the special interest taken by the federal government on behalf of Native American religion, thereby effectively heading off attempts to use the Native American Church as a basis for a general religious exemption for drug use.[25] In the 1990 case of Employment Division, Department of Human Resources of Oregon v. Smith, however, the U.S. Supreme Court ruled that the Free Exercise clause could not be used to preclude the application of criminal laws, including those proscribing the use of peyote, unless such laws were clearly intended to discriminate against a given religion.[26] The Smith ruling effectively nullified long standing Constitutional protections exempting Indian members of the Native American Church from prosecution for ceremonial use of peyote.[27] The ruling also signaled the

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[25]Peyote Way Church of God, Inc. v. Smith, 556 F. Supp. 632 (D. N.D. Texas, 1983); United States v. Warner, 595 F. Supp. 595 (D. North Dakota, 1984); United States v. Rush, 738 F. 2d 497 (First Circuit, 1984).

[26]Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).

[27]See People v. Woody, 40 Cal. Rptr. 69 (Supreme Court of California, 1964); State of Arizona v. Janice and Fred Whittingham, 504 P. 2d 950 (Arizona Supreme Court, 1971); George L. Whitehorn v. State of Oklahoma, 561 P. 2d 539 (Oklahoma Court of Criminal Appeals, 1975).

Court's general unwillingness to extend any extra latitude to the religious practices of Native Americans. Many have therefore read the Smith decision as a denial of the principles associated with the AIRFA. The case subsequently led to new interest in legislation dealing with the topic of Indian religious freedoms. Moreover, it is the Smith case itself which led AIRFA proponents to link the interests of the Native American Church with the protection of "traditional" Native American religions, a link that many Indians themselves themselves had previously considered implausible.[28]

It is easy to look back on the history of AIRFA litigation and proclaim that the goals pursued by various Indian activists were unrealistic in relation to the provisions of the act itself, but this is to transform a historical fact into a teleological principle. Whatever the outcome of subsequent legal conflict the significance of the AIRFA remained in some sense an open question until the Lyng and Smith decisions. In retrospect it is clear that the AIRFA embodied an inconsistent set of principles. The principle of religious freedom could not be stretched far enough to reach the interests advanced under the provisions of the AIRFA, and once framed as matters of religious freedom, courts were reluctant to accommodate attempts to portray the act as something other than a restatement of the same principle implicit in the free exercise clause. Thus a significant part of the rationale behind passage of the AIRFA was lost on the courts, and the inconsistencies implicit within the text of the act remained largely in the background of the legal discourse following its passage. Interested parties simply invoked alternative visions of the AIRFA based on different ideological positions, each of which could be read into the text of the act itself. It is only through the coercive authority of the Supreme Court that a given construction of the AIRFA was finally determined. Moreover, it is only because the Supreme Court voiced an

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[28]As a result the AIRFA was amended in 1994, providing for the use of peyote in traditional Indian religious practices. See, U.S. Congress, House, Congressional Record, vol. 140 (August 8, 1994) 7155-57; U.S. Congress, Senate, Congressional Record, vol. 140 (September 27, 1994) 13433; U.S. Congress, House of Representatives, American Indian Religious Freedom Act Amendments of 1994, Report to accompany H.R. 4230, One hundred-third Congress, Second Session, House Report No. 103-675. (1994).

ideological position of its own that the AIRFA acquired a more or less fixed meaning. So long as the highest court in the land had not spoken clearly on the subject, Indian activists had reason to hope for a broad interpretation of the AIRFA. In the wake of the Lyng and Smith decisions, however, little remains of the AIRFA itself except a historical record of disputes about its significance.

"Religion" and Native American Culture: Some Preliminary Remarks.

Passage of the AIRFA laid the groundwork for a particular kind of argument in which Native Americans could pursue a concrete interest by linking that interest to generalized notions of their own cultural order. This strategy rested on an analogy between the significance that a given legal interest would receive in a Native American culture and the significance that it would receive within the relatively narrow category of Euro-American culture known as "religion". Under the AIRFA Native American practices of an ostensibly religious nature (e.g. the taking of endangered species, hunting out of season, maintenance of religious artifacts, performance of ceremonies, conduct of burial rites, etc.) would receive protection comparable to that of a right of free exercise. The AIRFA also brought the relatively narrow language of "religious freedom" into the service of a broader public interest in Native American "culture" - as such. The provisions of the AIRFA therefore applied to a potentially vast scope of legal subject matter. Yet, the AIRFA addressed this broad range of subject-matter by means of a term possessing a normally restricted scope of legal implications. Not surprisingly, AIRFA rhetoric consistently stumbled over the difference between the significance that various Indian practices would receive in Native American cultures and the significance made available through the Euro-American category of "religion." The prospective success of the AIRFA therefore rested on a tenuous analogy between Native and Euro-American cosmological systems and patterns of social organization.

It took the better part of this century to form the case for such an analogy in the American popular consciousness, and the (in)ability to maintain it under the full weight of law would prove a crucial stumbling block for interests advanced under the AIRFA. The Taos Indians of New Mexico had successfully used an abstract appeal to religious freedom in their efforts to reclaim Blue Lake, a natural feature long considered sacred by the tribe, from control of the Forest Service (See chapter 2). The tribe had been fighting for control of Blue Lake and its watershed since 1906, and efforts to cast their interest in terms of religious freedom evolved rather slowly along with changes in public opinion and federal Indian policy. The success of the Taos campaign in 1970, however, generated a vast number of similar claims by various Indian peoples. Yet, the problems associated with such an appeal could already be seen in the history of the Indian Civil Rights Act (ICRA) of 1968. Congressional debates over the passage of the ICRA touched on significant cultural differences between the major categories of tribal social organization and those presupposed by Euro-American notions of civil rights (see chapter 3). Tribal courts had already learned that placing Native American ritual practices under the heading of "religion" offered a mixed set of blessings.

Drawing the equation between any given feature of Indian culture and the significance of religious practices for Euro-Americans generally constitutes an artificial narrowing of its cultural significance. The Euro-American category of "religion" is normally contrasted with notions of "politics," "economics," aesthetics," etc. Hence, this Euro-American term presupposes a set of social divisions largely absent from Native American culture. It is possible to define Euro-American notions of religion in contrast to such institutions; but it is not really possible to contrast Indian religions from other aspects of Indian society. Native American appeals to "religious" freedom have therefore generally carried implications far beyond those normally contemplated under the First Amendment. Moreover, such Indian claims do not emerge from conventional Euro-American sources of religious discourse, written doctrines. This leaves them with an ambiguous source of

motivation by the standards of First Amendment jurisprudence. This in turn has made it easier for judges to view Indian claims as though they were rooted in something other than religion.[29] So, theoretical problems associated with glossing various aspects of Indian culture as "religious" matters led directly to mistrust of Native American claimants.[30]

The difference between various social institutions found in Native American cultures and those presupposed by the legal principles of religious freedom helped to give rise to the AIRFA, as an attempt to redefine the legal basis for free exercise cases involving Native Americans. Under the AIRFA a right of free exercise would constitute a kind of positive government interest in keeping with federal trust doctrine rather than serving as a limit on government interest to be exercised by individuals. According to trust doctrine, the relationship between Indian tribes and the federal government could be modeled as a relationship between ward and trustee (see chapter 1). During the nineteen-seventies, moreover, federal authorities had begun to understand tribal authority in terms of the distinct cultural patterns belonging to individual tribes. federal authorities therefore came to express an interest in maintaining generally intangible features of Indian cultures as a means of fulfilling its responsibilities to Indian tribes.

The rubric of "religion" helped to provide a category through which such interests could be understood, but the government interest at stake in fulfilling its trust responsibilities remained nominally secular. Implementation of federal trust responsibilities under the AIRFA effectively grounded the right of free exercise in a working relationship between governmental agencies rather than a theory about the natural rights of individual Native Americans. Whereas the AIRFA seemed called on the courts to adopt a broad interpretation of "religion," this reflected an historical expansion of federal trust responsibilities as much as it did an expansion of the principle of free exercise. As a

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[29]Cf. Deloria and Clifford M. Lytle, American Indians, American Justice, 237-8; Frisbie, 371-2.

[30]Cf. Robert S. Michaelsen, "American Indian Religious Freedom Act Litigation: Promise and Perils," The Journal of Law and Religion, 3 (1985), 63-64.

instrument of trust doctrine, the AIRFA engendered a practical subordination of individual religious freedom to cultural relativism. This recontextualization of "religious freedom" would, it was hoped, provide Native Americans with a device capable of extending the significance of this phrase to aspects of their own culture which would never have received such protection under the First Amendment.

Congressional efforts to recontextualize the significance of religious freedom through the AIRFA were frustrated by bureaucratic attempts to read it as a simple restatement of the Free Exercise Clause (see chapter 4). The Carter administration, responsible for signing the bill, and various federal agencies responsible for its implementation generally treated the AIRFA as a moral equivalent to the Free Exercise clause. Most of the courts hearing AIRFA cases seem to have followed their lead, effectively blocking attempts to recast questions about the government stance toward relevant Indian practices in terms of trust doctrine. This effectively returned questions about the legal viability of Native American interest in religious freedom to the standards of free exercise jurisprudence in effect prior to its passage. Having thus framed the legal context of AIRFA cases in terms of conventional free exercise doctrines, the courts naturally rejected each of the unusual claims advanced through its provisions. Hence, the abstract appeal to an American sense of "religious freedom" which made the AIRFA possible also rendered it generally ineffective.

AIRFA Scholarship: The Pragmatic Limitations of Cultural Awareness.

The unravelling of the AIRFA has been well documented by previous scholars and activists. Scholarship on the AIRFA typically dealt with themes about the differences between Native American religious practices and those of a predominantly Christian public. Native American perspectives on the environment provided a favorite theme for such scholarship. Peter Nabokov, for example, explained the religious significance that the American landscape held for Native Americans and provided an abstract commentary on the

role that this played in Indian-white relations.[31] Daniel McCool provided a detailed case study of Papago interest in a particular sacred Mountain, called "Baboquivari."[32] Such work helped to illustrate the vast differences between Native and Euro-American religious practices, effectively underscoring the need for unusual mechanisms of free exercise protection relating to Indian interests in the environment.

Other scholars attempted to relate the significance of the American landscape directly to legal disputes associated with the AIRFA.[33] Sarah Gordon, for example, related the inability of AIRFA claimants to secure their free exercise right over land claims to deficiencies in case law, a problem which in turn stemmed from the displacement of an American public from the Jewish and Christian holy lands.[34] The absence of such mainstream sacred geography in the American landscape has facilitated the assumption that land may be dealt with exclusively in economic terms. After the Lyng case in 1988, a host

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[31]Peter Nabokov, "America As Holy Land," North Dakota Quarterly, 48 (Autumn, 1980) 9-20 *passim.*

[32]Daniel McCool, "The Sacred Mountains of the Papago Indians," Journal of Ethnic Studies, 9 (Fall, 1981) 57-69 *passim.*

[33]E.g. Cynthea Thorley Andreason, "Indian Worship v. Government Development: A New Breed of Religion Cases," Utah Law Review, (1984) 313-336 passim; Celia Byler, 397-435 *passim*; Mark S. Cohen, "American Indian Sacred Religious Sites and Government Development: A Conventional Analysis in an Unconventional Setting," Michigan Law Review, 85 (February, 1987) 771-808 *passim*; Vine Deloria, "Sacred Land and Religious Freedom," NARF Legal Review, 16 (Summer, 1991) 1-6 *passim*; Laurie Ensworth, "Native American Free Exercise Rights to the Use of Public Lands," Boston University Law Review, 63 (1983) 141-79 *passim*; Jeff Fish, "Sacred Site Free Exercise Claims on Government Land: The Constitutional Slighting of Indian Religions," New Mexico Law Review, 20 (Winter, 1990) 113-34 *passim*; Scott David Godshall, "Land Use and the Free Exercise Clause," Columbia Law Review, 84 (1985) 1562-89 *passim*; Robert S. Michaelsen, "The Significance of the American Indian Religious Freedom Act," 93-115; Steven C. Moore, "Sacred Sites and Public Lands," in Handbook of American Indian Religious Freedom, ed., Christopher Vecsey, 81-99 *passim*; Patrick T. Noonan, 311-32 *passim*; Richard Pemberton, Jr., "'I Saw that it Was Holy': The Black Hills and the Concept of Sacred Land," Law and Inequality, 3 (1985), 287-342 *passim*; Michael N. Ripani, "Native American Free Exercise Rights in Sacred Land: Buried Once Again," American Indian Law Review, 15 (1991) 323-39 *passim*; Howard Stambor 59-89 *passim*; Dean B. Suagee, "American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers," American Indian Law Review, 10 (1982) 1-57 *passim*; David R. M. White, "Native American Religious Issues . . . Also Land Issues," Wassaja, The Indian Historian, 13 (1980) 39-44 *passim*; James H. Woodall, "American Indians and the First Amendment: Site-Specific Religion and Public Land Management," Utah Law Review, (1987) 683-702; and see below.

[34]Sarah B. Gordon, "Indian Religious Freedom and Government Development of Public Lands," The Yale Law Journal, 94 (1985) 1447-71 *passim.*

of articles appeared criticizing the Supreme Court's unwillingness to find place for sacred site interests within the framework of the American legal system.[35] Such works documented the unusual problems facing Indian litigants who asserted a religious interest in the physical environment. The cross-cultural problems were indeed substantial, but the authors working on this subject could do little other than lay the responsibility for resolving these problems associated with sacred site claims at the feet of the judiciary, a responsibility easily rejected by a conservative American Supreme Court.

Native American burial practices posed a number of problems that could be characterized in terms of sacred sites, but this issue also posed some concerns of its own. Many Indian remains had long been stored in various museums around the country, and the largest collection was located in the government owned facilities of the Smithsonian. Indians made an effort to ensure more respectful treatment for their burial sites and to secure the return of such remains as could be identified and linked to a given tribe. A number of works dealt with the contemporary legal status of Indian remains.[36] Some were critical of the present legal framework affecting Indian remains, and offered comments on

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[35]E.g., Nancy Akins, "New Directions in Sacred Lands Claims: *Lyng* v. *Northwest Indian cemetery Protective Association*," Natural Resources Journal, 29 (Spring, 1989) 593-605 *passim*; Donald Falk, "*Lyng* v. *Northwest Indian Cemetery Protective Association*: Bulldozing First Amendment Protection of Indian Sacred Lands," Ecology Law Quarterly, 16 (1989) 515-570 *passim*; Joani S. Harrison, " CONSTITUTIONAL LAW-First Amendment- Government Action Does Not Violate Free Exercise Clause of First Amendment When it Neither Coerces Action Contrary to Religious Beliefs Nor Prohibits Access to Practice Those Beliefs, But Merely Imposes an Incidental Burden on Religious Practice. *Lyng* v. *Northwest Indian Cemetery Protective Association*, - U.S. -, 108 S. Ct. 1319, 99 L. ed. 2d 534 (1988)." St Mary's Law Journal, 20 (1989) 427-451 *passim*; Robert J. Miller, "Correcting the Supreme Court's 'Errors': American Indian Response to *Lyng* v. *Northwest Indian Cemetery Protective Association*," Environmental Law, 20 (1990) 1037-1062 *passim*; S. Alan Ray, "*Lyng* v. *Northwest Indian Cemetery Protective Association*: Government Property Rights and the Free Exercise Clause," Hastings Constitutional Law Quarterly, 16 (Spring, 1989) 483-511 *passim*; Joshua D. Reisman, "Judicial Scrutiny of Native American Free Exercise Rights: *Lyng* and the Decline of the *Yoder* Doctrine," Environmental Affairs, 17 (1989) 169-199 *passim*; Michele L. Seger, "Unjustified Interference of American Indian Religious Rights: *Lyng* v. *Northwest Indian Cemetery Protective Association*," Creighton Law Review, 22 (1988) 313-31 *passim*.

[36]For a general discussion of the issue, see Margaret B. Bowman, "The Reburial of Native American Skeletal Remains: Approaches to the Resolution of a Conflict," Harvard Environmental Law Review, 13 (1989) 147-208 *passim*; Lawrence Rosen, "The Excavation of American Indian Burial Sites: A Problem in Law and Professional Responsibility," American Anthropology, 88 (March, 1980) 5-27 *passim*.

the policy (non-)implications of the AIRFA and a host of related laws.[37] Often such a critique involved a historical commentary relating differences between the legal status of Native and Euro-American remains to past policies of oppression and scientific racism.[38] All together, this work successfully demonstrated both the inequities of the current legal system and described the historical process through which Indian remains had become valuable "property" in the public eye.

Other scholars dealt with similar problems regarding a variety of sacred objects held by, or destined for, museums and private collections. Charllotte Frisbie, for example described the inadequacies of both the Archaeological Resources Protection Act and the American Indian Religious Freedom Act in reference to Navajo medicine bundles.[39] And Walter Echo-Hawk provided a general critique of the property rights affecting sacred Indian artifacts.[40] The return of eleven wampum belts to Iroquois leadership and the return of the Zuni war gods to that Pueblo provided some positive examples of respectful treatment by museums.[41] These examples seemed, however, only to underscore the fact that museums

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[37]E.g. David J. Harris, "Respect for the Living and Respect for the Dead: Return of Indian and Other Native Remains," Journal of Urban and Contemporary Law, 39 (1991) 195-224 *passim*; Dean Higginbotham, "Native Americans Versus Archaeologists: The Legal Issues," American Indian Law Review, 10 (1982) 91-115 *passim*; John E. Peterson II, "Dance of the Dead: A Legal Tango for Control of Native American Skeletal remains," American Indian Law Review, 15 (1988) 115-50 *passim*.

[38]E.g. Vine Deloria, Jr., "A Simple Question of Humanity: The Moral Dimensions of the Reburial Issue," NARF Legal Review, 14 (Fall, 1989) 1-12 *passim*; Walter R. Echo-Hawk and Roger Echo-Hawk, "Repatriation, Reburial, and Religious Rights," in Handbook of American Indian Religious Freedom, ed., Christopher Vecsey, 63-80 *passim*; Walter R. Echo-Hawk, "Tribal Efforts to Protect Against Mistreatment of Indian Dead: The Quest for Equal Protection of the Laws," NARF Legal Review, 14 (Winter, 1988) 1-5 *passim*; Steven C. Moore, "Federal Indian Burial Policy - Historical Anachronism or Contemporary Reality?" NARF Legal Review, 12 (Spring, 1987) 1-9 *passim*; Red Arrow Inc., "Why Were Native American Remains taken to Museums for Study and Research," Akwesasni Notes, 23 (Summer, 1991) 10-11.

[39]Frisbie, 365-400.

[40]Walter R. Echo-Hawk, "Museum Rights Vs Indian Rights: Guidelines for Assessing Competing Legal Interests in Native Cultural Resources," Review of Law and Social Change, XIV (1986) 437-53 *passim*.

[41]See William F. Fenton, "Return of Eleven Wampum Belts to the Six Nations Iroquois Confederacy on Grand River, Canada," Ethnohistory, 36 (Fall, 1989) 392-410 *passim*; William T. Merrill, Edmund J. Ladd,

and private collections across the country continued to hold artifacts sacred to a variety of Indian peoples.

As had been the case with burial rights, the principle threat to sacred artifacts lay in the potential economic value that such artifacts held for non-Indians as well as vast historical precedent for practices divesting Indian tribes of many of their most sacred objects. Many of the objects held in various public and private libraries had ironically been placed there by tribal elders hoping to preserve them in the days of rescue anthropology and government assimilation. At the same time that religious and government leaders sought to eradicate Indian ceremonial practices, a number of anthropologists and archaeologists attempted to document and preserve the artifacts of these "vanishing" cultures. Hence, Indian practitioners often turned to museums and private collections as likely repositories for sacred materials. Other artifacts had simply been stolen from Indian tribes by scholars and entrepreneurs seeking to profit from public interest in the material culture of Native Americans. In either event, by the nineteen-seventies it had become clear that Indians wanted many of these objects back, or that they wanted to have a say in the treatment and display of artifacts remaining in non-Indian hands. The AIRFA did not quite mandate the return of Indian artifacts; but it did provide a channel through which Indians could voice their interests and initiate dialogue with universities and museums holding such materials.

Although peyote constituted an important sacrament to many Native Americans; the legal disputes surrounding possession of this substance had been defined before passage of the AIRFA, and so the issue did not draw much additional attention for AIRFA proponents until the Smith decision in 1990.[42] The Smith decision, however, sparked a tremendous backlash from several different quarters. Mainstream religious organizations grew concerned about the principles of case law announced in Smith. This immediately led to a

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and T. J. Ferguson, "The Return of *Ahayu:da*," Current Anthropology, 34 (December, 1993) 523-67 *passim*.

[42]For an excellent example of pre-Smith scholarship on peyote law, see Paul E. Lawson and Jennifer Scholes, "Jurisprudence, Peyote and the Native American Church," 13-27 *passim*.

body of work critical of the Court's handling of case. Much of this criticism dealt with the reasoning offered by the court in Smith, and such complaints could be found in a variety of newspapers and legal journals.[43] Those interested in Indian law usually had something to say about this, and about the potential impact that the Smith case would have on existing accommodations for the Native American Church.[44] Ultimately backlash against the decision would lead Congress to deal with both lines of criticism. It passed the Religious Freedom Restoration Act in 1993 in an attempt to redirect the Court's handling of case law dealing with free exercise, and it Amended the Religious Freedom Act itself in 1994, largely out of concerns over the status of the Native American Church.[45]

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[43]For examples of the popular reaction to the Smith decision, see Linda Greenhouse, "Court is Urged to Rehear Case on Ritual Drugs: Religious Groups Team With Legal Scholars," The New York Times NATIONAL, (Friday, May 11, 1990) A16; Charles Levendosky, "Court Guards religious Liberty for Some, Not All," Las Vegas Review Journal, (Monday, December 9, 1991) 9b; Richard John Newhaus, "Church, State, and Peyote," National Review, (June 11, 1990) 40-44; David E. Williams, "Endangered 'Free Exercise' Clause," Christian Science Monitor, (May 21, 1990).

For examples of scholarly backlash against the reasoning used in Smith decision, see "The Supreme Court, 1990 Term - Leading Cases," Harvard Law Review, 104 (1990) 198-209 *passim*; Daniel A. Hess, "The Undoing of Mandatory Free Exercise Accommodation - *Employment Division, Department of Human Resources* v. *Smith*, 110 S. Ct. 1595 (1990)," Washington Law Review, 66 (1191) 587-603 *passim*; Michael W. McConnell, "Free Exercise Revisionism and the *Smith* Decision," University of Chicago Law Review, 57 (1990) 109-53 *passim*; Rebecca Rains, "Can Religious Practice be Given Meaningful Protection After *Employment Division* v. *Smith*?" University of Colorado Law Review, 62 (991) 687-710 *passim*; James E. Wood, Jr., "Abridging the Free Exercise Clause," Journal of Church and State, 32 (1990) 741-52 *passim*.

[44]E.g., Robert N. Clinton, "Peyote and Judicial Political Activism: Neo-colonialism and the Supreme Court's New Indian Law," Federal Bar News & Journal, 38 (March, 1991) 92-101 *passim*; Jerilyn DeConteau & Steven C. Moore, "1990 Decisions of the United States Supreme Court: Erosion of Native Tribal and Religious Rights," Indian Law Support Center REPORTER, 13 (September & October, 1990) 1-6 *passim*; 19 Paul E. Lawson and Patrick Morris, "The Native American Church and the New Court: The *Smith* Case and Indian Religious Freedoms," American Indian Culture and Resource Journal, 15 (1991) 79-91 *passim*; Steven C, Moore, Esq., "An Unwarranted Crusade: The State of Oregon's Persecution of the Native American Church," Indian Law Support Center REPORTER, 12 (August & September, 1989) 1-11 *passim*; Steven C. Moore, esq., "Supreme Court Deals Devastating Blow to Native American Church," Indian Law Support Center REPORTER, 13 (March-April 1990) 1-2 *passim*; Harry F. Tepker, Jr., "Hallucinations of Neutrality in the Oregon Peyote Case," American Indian Law Review, 16 (1991) 1-56 *passim*.

[45]See the Religious Freedom Restoration Act of 1993,107, 1488 (1993); American Indian Religious Freedom Act Amendments of 1994, 108, 3125 (1994). The potential impact of these laws remains an open question at present.

Much of the scholarly commentary on the AIRFA addressed the role that it was to play in shaping federal Indian law. Often these commentaries directly addressed the abstract differences between Native American and Euro-American religions and attributed the relative lack of constitutional protection for the former to these abstract cultural differences. From the standpoint of Indian activists and sympathetic scholars such differences pointed to a structural bias in the American legal system. Early commentaries located this structural bias in case law relating to the First Amendment, and interpreted the AIRFA as an attempt to overcome it. Later studies indicated that the AIRFA itself had come to embody this same bias, either because it had been written into the text of the law by Congress, or because it had been read into the text by policy-makers and judicial authorities. In either event, most saw the cultural gap between Indian notions of religion from those guiding the American legal system as the central problem facing Indias throughout the history of the AIRFA. In pointing out the gap between Indian and American legal cultures most of the scholars working on this subject sought to pressure courts and federal policy-makers to overcome any structural bias existing in the American legal system.

Such critics tacitly accepted the initial absurdity inherent in designating Native American ceremonial practices as a form of "religion." Their rhetorical strategy could only work to the extent that it remained consistent with a basically naive acceptance of the key term "religion." Scholars often took the time to explain that Indian practices could not easily be designated as forms of "religion," but in doing so they typically sought to create a more flexible sense of the term for use in reference to the AIRFA. Hence, they effected a kind of social criticism by turning the relative narrowness of this Euro-American term into evidence that Euro-Americans typically had an impoverished understanding of "religion".[46] One could as easily have taken the problems associated with the narrow sense of this term as

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[46]Cf. George E. Marcus and Michael M. J. Fischer's comments on defamiliarization in Anthropology as Cultural Critique: An Experimental Moment in the Human Sciences, (Chicago and London: University of Chicago Press, 1986) 137-64 *passim.*

evidence that Indians do not have "religions," at least not religions cognizable from the standpoint of the American legal system. Hence, the structural differences between Native and Euro-American cultures could only be viewed as a bias to the extent that one insisted on confounding them in a single utterance. Those willing to insist on their own categories of social organization, on the other hand, would have found little bias in the matter.

The immense record of scholarship on the AIRFA sheds little light on the process by which this term had become such an important aspect of Indian-white relations. So long as Indians perceived the AIRFA as a viable legal resource, most scholars and activists were content to illustrate the problems that Indians faced in implementing the law. This practice usually meant drawing attention to the awkward relationship between Indian religious practices and the sense that "religion" takes as legal category. Hence, it is with some irony that one must read the words of Justice Antonine Scalia in the majority opinion for the Smith case:

> It may be fairly said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[47]

Scholars had labored hard throughout the history of the AIRFA to demonstrate that the American legal system contained a systematic bias against Native American ceremonial interests . . . and now Justice Scalia seemed to be agreeing with them. Justice Scalia himself seemed to stress the cultural limitations implicit within the American legal system, and turned this in itself into an argument against granting free exercise relief for the Native American Church. There is little in the majority opinions of either Smith or Lyng to suggest that their respective authors did not understand the depth of problems stemming from cultural differences between Native and Euro-Americans. In each case the Supreme Court simply disclaimed responsibility for the problem, leaving each individual Indian claimant to

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[47]Smith, 494 U.S. 890 (1990).

resolve his or her religious dilemma according to the dictates of his or her own personal conscience.

In retrospect the decision to gloss a wide variety of Indian legal interests with the Euro-American term "religion" led to something of a dead end. Scores of articles written during the interval between passage of the AIRFA and its demise at the hands of the Rehnquist Court indicate both an awareness of the problems inherent to the use of this term and a hope that something could be done to overcome those problems. In the end, it is the critical points of these articles that have proven correct, whereas the aspirations for a more enlightened sense of religious freedom have proven unworkable. The term "religion" clearly does not convey an adequate sense of the legal interests associated with the AIRFA, and yet the act is a testament to the role that this term has come to play in the contemporary history of Indian-white relations. It therefore makes sense to inquire as to process by which such a variety of disparate legal interests could come to be understood under the heading of "religion." The following is an attempt to understand this process by analyzing those developments in the history of Indian-white relations which have played a role in defining the structure of the AIRFA.

Discourse and the Cultural Status of "Cultural" Categories.

In order to understand the history of the AIRFA one must explain both the inconsistencies inherent within the act itself, and the relative inability of AIRFA proponents to address those inconsistencies in a strait-foreword manner. As noted above, the inconsistencies associated with the AIRFA tended to remain in the background of debate over the significance of the act itself. Congressional proponents of the AIRFA argued about the specific implications of the act in debates over its passage, but they seemed to ignore substantial differences in the perception of contemporary Indian-white relations. This produced a text which invited at least two significantly different perceptions of the context behind its own passage. The text of the AIRFA seemed to invite either a reading informed

by the dominant principles of case law in free exercise jurisprudence or a reading informed by case law involving the trust relationship between Indians and the federal government. The principles derived from each of these two bodies of case law were unfortunately inconsistent with one another. Hence, the prospect that either of them could be used as a contextual framework for interpreting the AIRFA led those concerned with its implementation to adopt radically different notions of what was expected of them under the provisions of the act itself. Ambiguities within the text of the AIRFA thus led to real problems, but these problems remained implicit in the context of discourse throughout much of the history of the act rather than emerging as the focus of direct legal interpretation.

Contextual information rests by definition in the background of discourse, and so conflicting opinions over the general context of Indian-white relations seemed to escape the attention of key AIRFA proponents. Participants in AIRFA debates thus failed to address the full scope of relevant disagreement. The history of the AIRFA is this respect a study in meta-linguistic consciousness. Each episode in the history of the AIRFA represents an interesting study in the ability of historical actors to chart there own role in the history of the act according to the immediate context of their own discourse. It will therefore prove worthwhile to examine the relationship between discourse and culture before reviewing the empirical history of the AIRFA.

The term "discourse" refers to the context in which both language and culture make their appearance. It is literally "language in use", to borrow a phrase from Deborah Schiffrin.[48] Discourse may be thought of as the "real-time" context of verbal exchange, or

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[48]This approach focuses on "language use" as the defining feature of discourse. It can be contrasted with formalist notions of discourse which define it as a unit of language structure that is larger than a sentence. See Deborah Schiffrin, Approaches to Discourse, (Oxford, UK and Cambridge, U.S.A.: Blackwell, 1994) 20-43 *passim*; See also Greg Urban, A Discourse-Centered Approach to Culture: Native South American Myths and Rituals, (Austin: University of Texas Press, 1991) 8-24 *passim*.

as the interactional relationship between the author(s) and the reader(s) of a written text.[49] This sense of "language in use" may be contrasted with notions of culture. The term "culture" implies questions about social relationships and socially constructed meanings above and beyond the immediate context of verbal or written exchange. An explicit description of a culture therefore presupposes a process wherein moments of real-time discourse have been mapped onto an abstract model representing the social relationships implicit within that discourse.

The aforementioned mapping process is always problematic, but the problem is not only the concern of social scientists. The participants in any given discursive process must also form notions about the cultural patterns relevant to their own situation. At least one folk-model of social context is therefore implicit in every actual instance of discourse. Such a folk-model defines the immediate context of a discursive event, and thereby enables its participants to coordinate their discursive practices according to pre-established norms of behavior.[50] People engaged in a given instance of discourse frequently proceed according to very different models of what is happening in the very context of that discursive event.[51] Such has normally been the case throughout the legal history of Indian-white relations, and it has certainly been the case in disputes over the significance of the AIRFA. Such discrepancies normally rest in the background of a discourse event, though they may become apparent when that event itself becomes the topic of another moment of discourse.

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[49]Cf. Michael Silverstein, "The Indeterminacy of Contextualization: When is Enough Enough?" in The Contextualization of Language, eds., Peter Auer and Aldo Di Luzio, (Amsterdam and Philadelphia: John Benjamins Publishing Company, 1992) 55-76 *passim*; Michael Silverstein, "A Minimax Approach to Verbal Interaction: Invoking 'Culture' in Realtime Discursive Practice," Workshop on Language, Cognition and Computation: Lectures *Sala Prat de la Riba Institut d'Estudis Catalans November 25th and 26th Barcelona*, (Barcelona: Institut D'Estudis Catalanis, 1993) 79-89 *passim*.

[50]Cf. John J. Gumperz, Discourse Strategies, Studies in Interactional Linguistics, 1, (Cambridge: Cambridge University Press, 1982) 130-52 *passim*; Silverstein, "Indeterminacy," 55-76 *passim*; Silverstein, "Minimax," 79-89 *passim*.

[51]Gumperz, 130-31.

Reflection on the context of a discursive event requires a shift of attention away from its original topic. Such reflection therefore presupposes a form of meta-linguistic framing, a device which organizes discourse about discourse into a coherent pattern of utterance and response. The meta-linguistic framing used in focusing on the context of a discursive event must be distinguished from the use of paraphrasing and quotations which retain much the same focus of attention from one discursive moment to the next. For example, Justice Scalia's comments in the Smith case (see above) could be described either by paraphrasing his statements about democratic process, or by suggesting that in uttering those statements he "dismissed" a set of concerns advanced by the respondent. The former characterization of Justice Scalia's comments would serve to decontextualize the significance of his utterance by generating a theoretical position about the nature of the democratic process. The latter characterization of his comments on the other hand calls direct attention to the pragmatic or interactional significance of Scalia's utterance in that context. This illustrates a basic distinction between different patterns of meta-linguistic framing. Any given utterance can be modeled in terms of at least two different kinds of textual analysis; a "denotational text" consisting of what its participants have said or talked about, and an "interactional text" consisting of what they have done.[52]

The event-like qualities associated with discourse posses a number of distinct structural characteristics. The relationship between an utterance and a response provides any given stretch of dialogue with a definite pattern of role relationships.[53] Moreover, every language possesses a set of sign-vehicles, commonly referred to as indexicals, which provide a structural pattern to discursive events. An index refers to something within the

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[52]Silverstein, "Indeterminacy of Contextualization," *passim*; Michael Silverstein, "Minimax," *passim*.

[53]See M. M. Bakhtin, "The Problem of Speech Genres," Speech Genres & Other Essays, tr.) Vern W. McGee, ed., Carl Emerson and Michael Holquist, (Austin: University of Texas Press, 1986) 60-102 *passim*; Richard Bauman and Charles Briggs, "Poetics and Performance as Critical Perspectives on Language and Social Life," Annual Review of Anthropology, 19 (1990) 59-88 *passim*.

immediate context of discourse.[54] Deictic categories (which include pronouns) constitute an important subset of indexical signs; they determine the relationship between author, addressee, audience, etc. as well as the spatio-temporal parameters forming the immediate context of discourse.[55] The appearance of such patterns in an utterance or text conveys something about its author's sense of context. The study of indexical relationships and meta-linguistic framing (which defines the relationship between utterance and response) provides a model of discourse-in-context which can be distinguished from abstract notions of grammar as well as methods of textual analysis focusing on propositional content.

The necessary link between an indexical sign and its referent contrasts sharply with the arbitrary nature of the sign stressed by classical methods of structural analysis. An arbitrary link between a sign and its referent generally obtains for yet another set of sign-vehicles, dubbed "Symbols" by Charles Sanders Peirce.[56] "Symbolic" relationships constitute general categories of reference and predication ("red," "house," "guilty," etc.) which are used in the construction of propositions (sentences that are subject to truth evaluation). Such propositional content often constitutes the major focus of attention in any given discourse. Even in such cases, however, the ability to refer to objects-in-a-world

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[54]This is the classic formulation given for indexical signs by Charles Sanders Peirce, "Logic as Semiotic: The Theory of Signs," Philosophical Writings of Peirce, ed., Justus Buchler, (1940. New York: Dover Publications, Inc., 1955) 102, 107-108.

[55]A number of scholars have followed Peirce's lead in elaborating on a theory of indexical sign systems to provide a structural account of speech. C.f. Roman Jakobson, "Shifters, Verbal Categories, and the Russian Verb," Roman Jakobson: Selected Writings, (The Hague and Paris: Mouton, 1971) 131-132; Emile Benveniste, "The Nature of Pronouns," Problems in General Linguistics, tr. Mary Elizabeth Meek, (1966. coral Gables, Florida: University of Miami Press, 1971) 217-222; Michael Silverstein, "Shifters, Verbal Categories and Cultural Description," Meaning in Anthropology, ed., Keith Basso and Henry Selby, (Albuquerque: School of American Research, 1976) 29-30; William Hanks,"The Indexical Ground of Deictic Reference," Rethinking Context: Language as an Interactive Phenomenon, ed., Charles Goodwin and Allessandro Duranti, Studies in the Social and Cultural Foundations of Language, vol. 11, (Cambridge: Cambridge University Press, 1992) 71n.

[56]Peirce "Logic as Semiotic," 102-3, 112-115. Note that this terminology is directly opposed to that of Saussure who refers to the relationship between a sign and its referent as arbitrary and that of a "symbol" and its referent as one that is fixed. See Ferdinand de Saussure, Course in General Linguistics, ed. Charles Bally and Albert Sechehaye, tr. Roy Harris, (1972. LaSalle, Illinois: Open Court, 1986) 67-69, 73. The differences pose a minor semantic problem which will be avoided in the present context by using Peirce's terminology.

necessarily presupposes an implicit set of indexical relationships which define the context of reference. For example, a court may focus its attention on the guilt or innocence of a given defendant; but the process of deciding this question must take place within a structured set of social relationships defining the jurisdiction of the court itself and the role relations between authorized speakers (judge, jury, legal counsels, defendant, etc.). Hence, the focus of attention in a criminal trial consists of a proposition involving symbolic sign vehicles, but the conduct of the trial itself presupposes a working set of indexical relationships.

Although indexicals are by definition context specific sign vehicles, they are also the principle indicators of abstract cultural information. The actual employment of indexical patterns effectively relates contextual information about the micro-structural features of a discursive event to the macro-structural features of a given cultural order. Hence, "contextualization cues" index both the minimum role relations necessary for dialogue, (speaker, addressee, audience, etc.) and substantial cultural information about the status of such participants in a larger social network. For example, systems of deference such as T (familiar) an V (polite) forms of address in Standard Average European languages index a speaker and addressee relationship while at the same time conveying information about the social status of those involved.[57] Likewise, the inherently ambiguous boundaries of words like "we," "you(pl)," "here," "now," "there," and "then" are settled in terms of social parameters implicitly understood by those who use them. The implicit invocation of such large scale patterns of social order in the micro-social pattens of discourse provides a substantial basis for the cultural understanding of social interaction.[58]

These patterns can be found in the interactional structure of legal disputes. Matters of "jurisdiction" and "legal standing," for example, involve explicit questions about the

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[57]See R. Brown and A. Gilman, "The Pronouns of Power and Solidarity," Language and Social Context, ed. Paolo Giglioli, (1972. New York: Penguin Books, 1990) 252-82 *passim.*

[58]Cf. Silverstein, "Indeterminacy," 55-76 *passim*; Silverstein, "Minimax," 79-89 *passim.*

context of a given legal dispute. These legal categories pertain directly to questions about who is authorized to speak such a given legal dispute, and hence they constitute a set of indexical relationships crucial to the legal process. Moreover, burdens of proof are unevenly distributed in legal conflicts. This makes it possible for the courts to reach decisions in the event that empirical evidence proves inconclusive. Burdens of proof are often described as problems of evidence, but the assignment of a burden of proof to one or another party is also an attempt to distribute the responsibilities for moving the legal discourse along in an orderly fashion.[59] Burdens of proof serve to structure legal discourse according to an implicit pattern of utterance and response, enabling one party to structure its own case as a response to another. Hence, legal discourse is structured according to a definite set of indexical patterns.

The indexical patterns implicit in legal discourse furthermore contain numerous indirect references to an extended cultural order. Burdens of proof, matters of jurisdiction, and issues of legal standing in a trial are all conventions dealing with context specific questions about how to proceed in a legal dispute, but each also affects the role that larger social issues take in the courtroom itself. Questions of jurisdiction involve a kind of speaker addressee relationship, and burdens of proof involve a relationship between utterance and response. Each of these conventions therefore constitutes an implicit indexical relationship which can be mapped onto questions about large scale divisions of a social order. Questions of jurisdiction are necessarily related to the social categories available to the courtroom, and burdens of proof correspond to vested interests operating beyond the scope of any given case. Each of these conventions therefore ties the cultural significance of issues involved in a legal dispute to a specific set of role relations constituting the structure of the legal proceeding (as a discursive event). It is in this sense that James Boyd

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[59]Gaskins, 21-30.

White refers to the law as a constitutive branch of rhetoric.[60] Each legal dispute presupposes an established set of role relations (a kind of speech community) which in turn presupposes a regularized pattern of social organization (a culture).[61] Hence, the context of legal discourse certainly reveals many of the discursive properties normally associated with questions about language and culture. In reference to the AIRFA these properties can be used to generate questions about the legal identity fashioned for Indians under the auspices of the American legal system. One can thus determine the structural patterns of culture informing the history of Indian-white relations by examining the interactional relationship between Indians and various federal authorities involved in different phases of American history.

The participants in a given discourse as well as third parties (such as ethnologists and historians) may generate models of culture by examining notions of an extended cultural order implicit within an interactional text. A cultural order need not be described explicitly, however, to structure the possibilities of a given interaction. Moreover, any overt description of a cultural order presupposes a context of its own, and hence an overt description of culture will in itself presuppose a system of cultural order. One may always look for a set of cultural preconditions behind any given description of a culture. Overt descriptions of culture frequently (perhaps always) reflect political manipulation, a prospect which has led many to question the value of "culture" as a category of social analysis.[62]

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[60]James Boyd White, Justice as Translation: An Essay in Cultural and Legal Criticism, (Chicago and London: University of Chicago Press, 1990) xiv (and see chapter 1).

[61]C.f. J. Gumperz, "The Speech Community," Language and Social Context, ed., Paolo Giglioli, (New York: Penguin Books, 1972) 219-231 *passim;* J. Gumperz, "Types of Linguistic Communities," Readings in the Sociology of Language, ed., Joshua A. Fishman, (The Hague and Paris: Mouton, 1968) 460-472 *passim.*

[62]E.g. James Clifford and George F. Marcus, eds., Writing Culture: The Poetics and Politics of Ethnography, (Berkeley, Las Angeles, and London: University of California Press, 1986) *passim*; James Clifford, The predicament of Culture: Twentieth-Century Ethnography, Literature, and Art, (Cambridge, Massachusetts and London, England: Harvard University Press, 1988) *passim*, but see especially chapter 12; "Identity in Mashphee," 277-346; James A. Clifton, ed., The Invented Indian: Cultural Fictions & Governmental Policies, (1990. New Brunswick and London: Transaction Publishers, 1994) *passim.*

Yet, it is always possible to reduce the strategic values underlying an explicit description of a "culture" to another cultural order defining the interests served by that description. This fact underscores a thesis most closely associated with the work of Marshall Sahlins, that there is a culture of "culture," so to speak, and that this culture of "culture" provides important clues into the historical trajectory of a given form of social organization.[63] Discourse informed by explicit consciousness of cultural patterns may often appears spurious and inauthentic, but there is always an implicit cultural pattern behind social behavior, even in seemingly invented traditions.

This relationship between culture and discourse carries serious implications for study of the American Indian Religious Freedom Act. When under the provisions of this act Indians, lawyers, judges, politicians, and various political activists talk about Indian cultures, they effectively reduce these cultures to a stereotypical pattern of activity. Each such description of Indian "culture" must itself play a role in the cultural order of the American legal system. This makes it necessary to relate ethnographic questions about Indian worship of "Mother Earth", for example, to the rhetorical value that this concept has in facilitating land claims and other such political agendas.[64] Likewise, differences between various Indian "cultures" generally reflects the political divisions of contemporary Indian "tribes." Far from constituting a death knell to cultural theory, such matters simply enrich the body of data available for cultural analysis. And anyone who wishes to feign shock at the thought that Indian representations of their own culture may reflect a degree of political manipulation had best not look too closely at the course of western history.

The cultural significance of AIRFA dialogue can be found in a set of ostensibly straight foreword arguments about its legal implications and its potential impact on Indian

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[63]Cf. Marshall Sahlins, "Goodbye to Tristes Tropes: Ethnography in the Context of Modern World History," Journal of Modern History, 65 (1993) 3-4.

[64]Sam Gill, Mother Earth Earth: An American Story, (Chicago and London: University of Chicago Press, 1987) *passim*; Daniel S. Wall, "Space, Time, and Cultural Landscape in the Political History of Indian-white Relations," Unpublished M.A. Thesis. (University of Chicago, Spring, 1995) *passim*.

culture. For example, each judicial opinion relating to the act itself presents an argument which can be modeled in terms of a denotational text; but the ethno-historical significance of that argument must be related to an interactional text determining the social relationships at play in the case itself. In Badoni v. Higginson, for example, the District Court of Utah denied that Navajo interests in Rainbow Bridge constituted a religious belief (because they were not rooted in an organized religion).[65] This position involved both a factual assertion about the nature of Navajo culture and an assumption of authority by the court to define the normative relationship between individuals and religious institutions. The court's description of Navajo religion could be considered either true or false, but its assumption of authority over the structure of religious devotion could also be accepted or rejected independent of that truth value. Hence, AIRFA litigation provides both an interesting set of arguments containing explicit claims about Indian culture and Indian law, and a set of interactional texts containing implicit clues about the culture of Indian-white relations.

As sources of background information, interactional texts provide a likely source for the changing value of the AIRFA's basic rationale. The analogy between ritualized forms of Native American behavior and Euro-American forms of religion was no more nor less plausible at the time of the AIRFA's passage than it was earlier in this century when Indians could be jailed for such practices under the authority of the the Religious Crimes Codes (see chapter 2). Nor did the logical implications of this analogy change radically from the passage of the act itself to the determination of the Lyng and Smith cases. What had changed about the value of this analogy was the pattern of context informing official implementation of Indian law. AIRFA proponents had wanted an explicit federal commitment to maintain the integrity of traditional Indian cultures, but the Rehnquist Court had denied government aid to individual Native Americans. Hence, the Rehnquist Court had effectively answered a different kind of question than that informing the text of the

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[65]Badoni, 645-8 (D. Utah, C.D. 1977).

AIRFA. In one respect the difference just mentioned involved an explicit difference in the context of dialogue (the difference between discourse taking place in a court and a that taking place in a legislative body). In another respect that difference was constituted through ideological positions, as Congress sought to treat Indians as members of quasi-sovereign nations whereas the Rehnquist Court had addressed them as U.S. citizens. In either event, a good deal of the discursive significance attached to the analogy between Indian ceremonies and Euro-America religions had been determined by context specific conventions for processing information about Indian culture. However (in)accurate it may be to describe aspects of Native American culture as forms of "religion"; various changes in the use of this descriptive orientation tell us a lot about the cultural patterns of Indian-white relations. Such have been overdetermined by the indexical values associated with notions of Indian identity and citizenship, and hence they reflect the patterns of conflict over the role that Indians may play in the contemporary history of America.

Chapter by Chapter Outline.

Chapter one is an attempt to situate the AIRFA within the overall history of Indian-white relations. It begins with a theoretical discussion of the relationship between legal arguments and a sense of legal history. This discussion is intended to illustrate the paradoxical relationship between the explicit text of a judicial opinion and the contextual models implicit within it. Each such text is modeled as an explicit argument in favor of a concrete legal outcome, but its contribution to the history of case law is more deeply rooted in the contextualization strategies that it makes available to future litigants. The historical significance of an appellate decision therefore stems from the prospect of reading it according to a common set of ideological assumptions.

The rest of this chapter will contrast the case law dealing with Indian-white relations (as described through trust doctrine) to case law dealing with free exercise doctrine under the First Amendment. Each of these case histories embodies a legal principle linked to the

AIRFA, and hence each of them presents an alternative contextual model for a legal dispute involving the AIRFA. The text of the AIRFA itself never resolved which of these contextual models would inform its implementation, and it is important to see how each contributed to the development of the act itself. The events presented in this chapter should illustrate a theoretical approach to the interactional significance of legal argumentation as well as provide useful background information about the history of Indian law in the United States and the First Amendment.

Chapter two describes the efforts of the Taos Pueblo in New Mexico to reclaim a lake from the national Forest Service. This path-breaking campaign provides an excellent opportunity to discuss the role of "religion" as a category describing aspects of American Indian culture, and to assess the semantic implications of appeal to a principle of "religious freedom" by Native Americans. The concept of "religious freedom" played a central role in this campaign, and the campaign itself played a central role in developing a Native American rhetoric dealing with the subject. The history of the Taos campaign to recover Blue Lake foreshadowed many of the difficulties associated with the principle of religious freedom under the AIRFA, and the success of this campaign provides an interesting contrast with the (non)impact of the AIRFA.

Chapter three is an analysis of the relationship between "religious freedom" and cosmological principles implicit in governmental structures. The essay is intended to explore the limitations that appeal to "religious freedom" has, given the fact that such a principle presupposes a number of culturally specific political institutions. This may indicate something about the degree to which Native American culture is (in)compatible with the terms available under normal standards of Constitutional law. Hence, a number of the difficulties associated with the AIRFA can be ascribed to differences between Native and Euro-American forms of social organization. Indian tribes had already felt the impact of these long before the AIRFA's passage. Each of the points made in this chapter are illustrated by legal conflicts and Congressional discussions pertinent to the American Indian

Civil Rights Act of 1968, and so the chapter closes with a discussion of this act as well as the the legal conflicts which led up to it.

Chapter four covers passage of the AIRFA itself, and includes a discussion of its initial (lack of) impact on federal policy. Special attention will be given to the conflicting interpretations of the AIRFA which emerged between different branches of the federal government during the process of securing its passage. The Senate Select Committee on Indian affairs wanted a relatively strong piece of legislation that would mandate real changes in federal policy as an extension of trust doctrine to the protection of Native American religions. The Executive branch, however, wanted the AIRFA to do no more than affirm that Indians would be accorded the usual right of free exercise included in the First Amendment. AIRFA proponents in the House of Representatives secured its passage, but weakened the bill in the process of satisfying critics. An official 1979 report, mandated within the act itself, attempted to resolve many of these conflicts by articulating a general theory of Indian culture that would enable a strong reading of the act while at the same time limiting the scope of potential Indian claims. The report opens with a historical narrative outlining the context of Indian-white relations, and articulating a theory of cultural differences based on distinct cultural perspectives on space and time. This narrative conveys a distinct pattern of role relations between Indians and the federal government, one which its social theory reduces to an overly simplistic notion of both cultures. Hence, the most systematic exposition of the policies mandated within the AIRFA failed to resolve the basic tensions implicit within the act itself.

Chapter I:
Legal Argumentation and the Ritual Production of Indian Rights.

The law indeed works by argument, and does so under circumstances where agreement cannot be compelled by resort to logic or to data. It is thus a branch of rhetoric, conceived of both as the art of persuasion - necessary when intellectual or other compulsion is impossible - and as the art of deliberation, that is, as the art of thinking well about what ought to be done when reasonable people disagree. It can also be a branch of rhetoric in a third sense, which can be called constitutive, for through its forms of language and of life the law constitutes a world of meaning and action: it creates a set of actors and speakers and offers them possibilities for meaningful speech and action that would not otherwise exist; in so doing it establishes and maintains a community, defined by its practices of language. At every stage the law is in this sense an ethical and political activity and should be understood and judged as such.[66]

James Boyd White, Justice as Translation.

The text of the AIRFA employs an awkward analogy between various aspects of Indian culture and Euro-American notions of "religion," and AIRFA proponents could not successfully defend this analogy in efforts to enforce the act through litigation. Few denied that Indian cultures actually possessed religious features, but many were unwilling to extend a legally enforceable right of free exercise to those aspects of Indian culture that involved unusual religious claims (e.g. sacred site claims). Participants in AIRFA-related discourse therefore exhibited substantial differences of opinion over the historical significance of the act itself and the legal significance of its specific provisions. These differences seldom found direct expression in the denotational content of AIRFA-related debates. Instead they emerged out of the contextualization strategies employed by those debating the meaning of the act. Those who advocated a strong interpretation of the act generally viewed potential Indian claimants as members of semi-sovereign nations which were themselves wards of the federal government. This position effectively minimized the

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[66]James Boyd White, Justice as Translation, xiv.

role that the Free Exercise clause of the First Amendment played in defining the sense of religious freedom that would apply in AIRFA-related cases. Those who advocated a weak sense of the act generally viewed Indians as United States citizens, and sought to interpret the act according to traditional standards of free exercise. Hence, the two most prominent interpretations of the AIRFA rested on two very different contextualization schemas; one involving a relationship between collective governmental agencies, and one involving a limit on governmental authority over individual conscience.

Neither interpretation of the AIRFA could have been excluded by the text of the act itself, nor could either interpretation be viewed as an inaccurate description of the legal status of Indian concerned over its implementation. Each interpretation served to over-determine the specific legal significance that the AIRFA could play in the lives of Native Americans. Hence, each interpretation of the AIRFA emerges out of a complex relationship between a denotation text which employed notions of "religion" to describe aspects of Indian culture, and an interactional text which presupposed a stance toward the ongoing relationship between Indians and the American legal system. The following section is an examination of the historical precedent for both of these contextualization strategies and the relationship that each could play in the history of the AIRFA. This will entail a comparison of the case law dealing with Indian tribes and the case law dealing with the Free Exercise clause of the First Amendment as each were understood in 1978.

Between Text and Context: The Performative Side of Legal Argumentation.

An established set of ritual procedures underlies the production of any legal argument. The substance of laws and constitutional provisions are generated by fiat, receiving a cosmological significance sometimes described as "the will of the American people." Such pronouncements are generally rooted in images of a homogeneous

population residing within a bounded space at a "homogeneous empty time."[67] The American legal system establishes this image of cultural unity through recourse to its appellate system, a set of institutions which provide for the resolution of conflicting legal positions by imposing a hierarchy of legal interpretations.[68] These social institutions form an important part of the context of legal discourse in America, and they provide important constraints on the patterns of reasoning available to participants in any given legal dispute. These constraints make their appearance through a series of pragmatic presuppositions, some of which are likely to appear as vacuous premises from the standpoint of abstract reason. A long-standing precedent, for instance, may appear to be simply wrong-headed and yet continue to receive deference in legal briefs, judicial opinions, etc. Such conventions may seem foolish or gratuitous to laymen, but for those involved in legal professions such deference is simply a pragmatic necessity. Where such weaknesses in the logical rigor of legal discourse appear they generally correspond to moments in which the interactional text of a given argument is maximally salient to the flow of discourse. It is at such moments that the individuals involved in a particular dispute give voice to the institutional structure of the American legal system.

The American legal system clearly poses no threat to the truism that all reasoning is ultimately circular. An opinion authored by members of the U.S. Supreme Court is virtually guaranteed to have an explicit circular quality. Such opinions are ostensibly posed as arguments in favor of a specific legal action (condemning someone to prison, awarding damages to an injured party, etc.), but any case making it to the Supreme Court must involve some constitutional principle as such. Hence, the role of the Supreme Court is actually to supply something equivalent to the major premise of a syllogism rather than to

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[67]Cf. Benedict Anderson, Imagined communities: Reflections on the Origin and Spread of Nationalism, (1983. London and New York: Verso, 1992) *passim*.

[68]C.f. Richard H. Gaskins, Burdens of Proof in Modern Discourse, (New Haven and London: Yale University Press, 1992) 19-20.

establish the soundness of its conclusion, or "result." In fact, the "result" of a legal case is significant precisely to the degree that it instantiates the principles affirmed in the legal opinion itself.[69] For example, there is no inherent reason why anyone other than the litigants involved in the Smith case should have been concerned over the denial of unemployment benefits to Alfred Smith and Galen Black, but the rationale offered by Supreme Court in favor of this decision gave its result a degree of significance far beyond that experienced by Smith and Black themselves. Thus, it appears that in direct contrast to intuitive notions of how an argument works, it is the argument itself which constitutes a significant historical event within a legal opinion, and not its concrete "result." It is as if the entire process proceeds by misdirection; as the higher courts argue for a concrete outcome while using that outcome to persuade people in the value of their own assumptions.

The circularity of higher court opinions has its counterpart in the reasoning process used in lower courts. In his book, An Introduction to Legal Reasoning, Edward H. Levi described legal argumentation as "reasoning by example:"

> "It is a three step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation. The steps are these: Similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case. This is a method of reasoning which is necessary for the law, but it has other characteristics which under other circumstances might be considered imperfections."[70]

It is the apparent randomness of this process which constitutes the "imperfections" of which Levi speaks. The jump from a given case to a legal principle appears arbitrary from the standpoint of abstract reason, as is the selection of a case history which is supposed to bear out the principle. This weak link in the denotational text structure of legal reasoning corresponds to historical transformations in the principles of case law. Whereas the denotational text of a legal opinion offers up a logical demonstration in favor of a given

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[69]A thesis put foreword by James Boyd White in Justice as Translation, 91-93.

[70]Edward H. Levi, An Introduction to Legal Reasoning, (Chicago and London: University of Chicago Press, 1949) 1-2.

judgement, the assumptions used in this demonstration appear arbitrarily linked to a body of previous cases. A body of case law is held together by a judicious sense of the similarities between each case mentioned within it, but it is always possible to find alternative principles of case law based on an alternative selection of cases.

As if the preceding were not sufficient cause for concern, nothing appears sufficient to prevent the continual changes observed in case law. According to Levi, the formation and application of legal concepts follows a circular process in which rules pass through three successive stages of analogical reasoning:

> The first stage is the creation of the legal concept which is built up as cases are compared. The period is one in which the court fumbles for a phrase. Several phrases may be tried out; the misuse or misunderstanding of words itself may have an effect. The concept sounds like another and the jump to the second is made. The second stage is the period when the concept is more or less fixed, although reasoning by example continues to classify items inside or out of the concept. The third stage is the breakdown of the concept, as reasoning by example has moved so far ahead as to make it clear that the suggestive influence of the word is no longer desired.
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> The process is likely to make judges and lawyers uncomfortable. It runs contrary to the pretense of the system. It seems inevitable, therefore, that as matters of kind vanish into matters of degree and then entirely new meanings turn up, there will be an attempt to escape to some overall rule which can be said to have always operated and which will make the reasoning look deductive. The rule will be useless. It will have to operate on a level where it has no meaning. . . The statement of the rule is roughly analogous to the appeal to the meaning of a statute or of a constitution, but it has less of a function to perform. It is window dressing.[71]

Whereas changes in legal precedent may appear vacuous from the standpoint of deductive reasoning, (or inductive reasoning for that matter) this does not mean such changes are entirely random. In fact, the appearance of randomness in such cases can only follow from inattention to the interactional significance of any principles at issue. The logical gaps which appear in the relationship between a particular case and a legal principle are similar to those which occur for scientists in the jump from empirical data to the formation of an hypothesis. As Charles Sanders Peirce argued, the formation of an hypothesis must proceed through some plausible linkage (what he called an "abduction") even though this

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[71]Levi, 8-9 A footnote referring to John Stewart Mill's work, A System of Logic, has been omitted from the last sentence.

type of connection plays no role in demonstrating the truth of the hypothesis itself.[72] That such a link should fail to appear in the explicit demonstration of a scientific hypothesis or legal argument constitutes a problem in the denotational text models used to evaluate both types of discourse. This lack of a rational warrant appears to detract from the propositional rigor of judicial opinions, leading to tautological inferences and the endless historical transformations of case law.

In such transformations an important part of the discursive process is dropped from the focus of attention dealt with in a denotational text. As Levi notes, this apparently vacuous process is liable to make the participants in a legal process uncomfortable. Hence, people frequently attempt to address the weak points of legal argumentation through ad hoc principles, effectively providing a metalinguistic commentary on legal discourse without improving its logical rigor. These meta-linguistic principles address the subject matter of abductive inferences in terms of denotational text sentences, but the relationship between these timeless principles and the dynamic process of legal discourse remains unclear. Such statements provide an ideological objectification of the discursive framework involved in case law, in effect; transforming heuristic principles into cosmological statements. Hence, the social structure which guides a legal proceeding is typically projected onto the universe itself, generating ideological notions of "justice," "liberty," etc. Such ideological categories purportedly denote abstract concepts of great objective significance, though in effect they generally reflect the interactional patterns of a given cultural order.

In its own way, the ideological "window dressing" of legal argumentation does provide a link between the interactional significance of a legal text and its denotational text structure. They may be be thought of as instances of linguistic ideology. A linguistic ideology constitutes "a set of beliefs about language articulated by the users as a

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[72]Charles Sanders Peirce, Collected Papers of Charles Sanders Peirce, ed., Charles Hartshorne and Paul Weiss, (Cambridge Massachusetts: Belknap Press of Harvard University Press, 1960) 5.112-131 *passim.*

rationalization or justification of perceived language structure and use."[73] As such, an ideological position about any pattern of discourse (such as legal reasoning or historical narrative) constitutes a position describing that pattern in denotational terms. Whether or not this kind of ideological position effectively characterizes the interactional structure of a given cultural framework, adherence to it does effectively provide a individuals with a definite stance within that framework. Thus, ideological statements will normally address the social categories available in a given language or culture, often providing the interactional value of a social category with an illusory sense of objectivity. Hence, behind each of the fictive principles invoked to rescue case law from its historical context lies an interactional schema (an indexical relationship) which is in fact salient to the process of legal dispute.

Such ideological statements appear necessary because the conventions of legal argument are slow to address the dynamics of non-propositional discourse, or interactional texts.[74] Simply put; the courts are slow to recognize any convention of discourse that does not take the form of a proposition, even when that convention takes place within the courts themselves. This "linguistic unifunctionalism" informing the conventions of legal discourse makes it necessary to fill in the gaps of legal reasoning with apparently objective statements about the cosmological nature of legal principles, and of law as such.[75] Such a position may be suspicious when framed in terms of an explicit ideological proposition, but the indexical relationship behind it may yet structure the rhetorical options available to participants in a legal dispute. Judges and lawyers make use of such principles through

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[73]Michael Silverstein, "Language Structure and Linguistic Ideology," Papers from the Parasession on Linguistic Units and Levels, eds., P. Clyne, et. al. (Chicago: Chicago Linguistic Society, 1979) 193. See also Bernard Weissbourd and Elizabeth Mertz, "Rule-Centralism Versus Legal Creativity: The Skewing of Legal Ideology Through Language," Law & Society Review, 19 (1985) 623-59 *passim.*

[74]Mertz and Weissbourd, 623-59 *passim.*

[75]Mertz and Weissbourd, 649.

performative discourse, that is; by effectively assuming a posture consistent with the cultural categories available to them through the interactive framework of a legal dispute.[76]

Because the ideological nature of a timeless legal principle corresponds to the ideological nature of folk models about linguistics, historical narrative, social organization, etc., the invocation of an ideological position in case law may (depending on the visibility of the case) contribute to the construction of master-narratives common throughout other areas of American culture. Hence, ideological positions about the nature of legal reasoning draw support from discourses occurring outside of the courtroom, thereby providing a stable link between the micro-social interactions found in a given legal dispute and the patterns of a larger cultural system. In this respect an ideological position may form the interactional link between an indexical relationship and an abstract cultural order. Such a position may also provide the link between the interactional text and the denotational texts of a written legal opinion, because any viable legal strategy must take notice of existing cultural norms. Each such ideological position therefore dictates the range of plausible assumptions that someone may draw from in the process of constructing a legal argument. The "result" of a given court case will normally prove acceptable to those who share the court's expectations about the social identity of its participants, in which case it will find a welcome place in subsequent historical narratives, social commentaries, further case histories, etc. Thus, legal history shares a common ideological orientation with other aspects of historical narrative, and it is through the ideological positioning of legal disputants in some form of master-narrative that a legal outcome serves to shape the organization of society and the course of history. Without this step a legal decision is an event significant only to its own participants, but positioned within an appealing master-narrative a legal decision may in effect transform the prevailing cultural order.

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[76]C.f. James Boyd White's discussion of justification and performance in Justice as Translation, 105-109.

The Ideological Dimensions of Indian Identity.

The kind of process outlined in the preceding remarks can be seen clearly enough in the cases associated with the American Indian Religious Freedom Act, but many of the ideological themes associated with the AIRFA became enshrined during a much earlier phase of Indian law. Interaction between Indians and whites has been structured throughout American history along the lines of an ideological contrast between change and stasis. This contrast between past and future is normally tied to value assumptions in historical narratives. Thus, for example, visions of a better future dominate a great deal of the Euro-American historical consciousness.[77] Such visions of progress may be reversed, however, leading to a "declensionist " view of history.[78] Appeal to tradition is frequently tied to the latter view, as a means of halting the decline of history. Such value statements constitute a kind of meta-historical thesis, or historical ideology; they contribute to a stance toward the nature of history as such.[79] Moreover, such a meta-historical thesis need not always be explicit; they appear implicitly in a broad range of historical narratives concerned with more concrete subjects.

The contrast between a positively valued future and a negatively valued past emerged in early European discourse about colonization of the American hemisphere and treatment of its indigenous population. Just as the American hemisphere represented the colonial future of Europe; its indigenous population was taken to represent Europe's uncivilized past. Thus, Euro-American mythology typically assigned Native Americans a

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[77]Cf.George Lakoff and Mark Johnson, Metaphors We Live By, (Chicago and London: University of Chicago Press, 1980) 22-24; and Edward T. Hall, The Silent Language, (1959. New York: Anchor Books, 1981) 6-9.

[78]Cf. William Cronon, "A Place for Stories: Nature, History, and Narrative," The Journal of American History, 78 (1992) 1352 and *passim*.

[79]Cf. Elizabeth Mertz, "The Uses of History: Language, Ideology, and Law in the United States and South Africa," Law & Society Review, 22 (1988) 661-85 *passim*; Hayden White, Tropics of Discourse: Essays in Cultural Criticism, (Baltimore and London: John Hopkins University Press, 1978) 1-25 *passim*; Karl Löwith, Meaning in History, (Chicago and London: Phoenix Books, 1949) 1.

fixed place along a temporal dimension serving as an ideological prototype of past stages in the history of humanity. This ideology cast Euro-Americans as agents of progress an assigned Native Americans a negative value as the representatives of an uncivilized past.[80] The image of an uncivilized barbarian was of course counterbalanced with images of the "noble savage" in which Native Americans emerged as exemplars of a more perfect past.[81] A related version of this declensionist narrative emerged with the rise of Native American literature; one emphasizing the positive value of indigenous land rights, and advocating a strong environmental ethic in contrast to the destructive forces of European imperialism.[82] As Christopher Vecsey put it: "Perhaps Indians have taken the role of nature lover as way of identifying themselves as Indians. That is to say, it is 'Indian' to revere nature. Doing so is a political, ontological statement."[83] Thus, Indians have countered the the Euro-American rhetoric of "progress" with a native "environmentalism," and thus fashioned a source of ethnic identity out of the ideological basis for an ostensible description American history.

Both notions of "progress" and notions of "environmentalism" constitute an ideological position about the value of American history from the standpoint of Indian-white relations; and while neither position could be adequately justified on empirical

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[80]See for example the famous references to American living in "a state of nature" in Thomas Hobbes, Leviathan, Ed., C.B. Macpherson, (1951. New York: Penguin Books 1968) 187; John Locke, Two Treatise of Government, (New York and Scarborough, Ontario: New American Library, 1960) 286, 294, 317-18, 334-337, 338-40.

[81]E.g. Jean-Jacques Rousseau, The First and Second Discourses Together With Replies to Critics and Essay on the Origin of Languages, ed. and tr., Victor Gourevitch, (New York: Harper & Row Publishers, 1986) *passim.*

[82]See for example Russell Means, "Same Old Song," Marxism and Native Americans, ed., Ward Churchill, (1983. Boston: South End Press, 1992) 19-33 passim; Peter Nabokov, ed., Native American Testimony: A Chronicle of Indian-White Relations From Prophecy to the Present, 1492-1992, (1978. New York: Penguin Books, 1991) 381-403 *passim.*

[83]Christopher Vecsey, "Environmental Religions," American Indian Environments: Ecological Issues in Contemporary Native American History, ed., Christopher Vecsey and Robert W. Venables, (Syracuse, New York: Syracuse University Press, 1980) 6.

grounds, each of them also provides an indirect source of identity for both Native and non-Native Americans. Each of these positions appears to take a particular value as the objective basis for contrasting the ethnic identities of Native and Euro-Americans, whereas in reality the rhetorical value of this contrast changes freely from one context to another while preserving its structural properties.[84] Adherence to one or the other ideological position therefore constitutes an indirect or constitutive index of Native or Euro-American political identity.[85]

As an indirect index of Indian identity, the contrast between progressive whites and environmentally friendly Indians can seriously affect the outcome of any legal or political conflict. Such contrasts are frequently limited to the presuppositional aspects of political discourse, loading the political identity of participants in a given dispute with implications far beyond those necessary to establish who is talking to whom. And yet, it is because the implications of this contrast are established through an indexical relationship that its use becomes a powerful tool in political discourse. In identifying the participants in a given dispute through such terms one assigns a definite political value to the interests associated with either side, but without asserting any explicit proposition about those interests. Different variations of this contrast between Indians and whites therefore rest in the background of numerous legal and political disputes involving Native Americans.

Indian Identity and the Legacy of John Marshall.

Images of a dynamic white and a static Indian identity have occupied a prominent place in U.S. law throughout American history. This is clearly seen in a trio of cases defining the relationship between Indian tribes and the Federal government. In the 1823

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[84]C.f. Susan Gal, "Bartók's Funeral: Representations of Europe in Hungarian Political Rhetoric," American Ethnologist, 18 (August, 1991) 440-58 *passim.*

[85]C.f. Elinor Ochs, "Indexing Gender," Alessandro Duranti & Charles Goodwin, eds., Rethinking Context: Language as an Interactive Phenomenon, (Cambridge: Cambridge University Press, 1992) 335-358; Wall, "Space, Time and Cultural Landscape," *passim.*

case of Johnson v. McIntosh the U.S. Supreme Court was asked to decide the nature of Indian land title in the United States. In the majority opinion for this case Chief Justice John Marshall explained that the doctrine of discovery gave the United States ". . . an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest . . ."[86] Having established a legal groundwork for advances on Indian territory, Marshall explained that Indian land title was not thereby cancelled, and barring proper action by the U.S. government, Indians would retain legal title to the lands they occupied.[87] The McIntosh decision therefore denied legal title to land privately purchased from Indians living in Indian territory.[88] While the decision preserved the territorial claims of an Indian tribe, it did so by denying the capacity of Indians to sell their own lands without an action by the Federal government. By preserving the boundaries of Indian territory from private encroachment in this particular manner, the Marshall court denied a significant form of agency to Indians while at the same time securing a legal framework for further U.S. advances into Indian territory. Hence, the outcome of McIntosh ensured the march of history across the American continent.

If McIntosh made it clear that the Federal government reserved a right to extinguish Indian land title, the case did little to clarify the relationship between Indian tribes and state governments. So, in 1831 the Cherokee Nation brought suit against the state of Georgia which had recently extended its laws into Indian territory. The Supreme Court then refused original jurisdiction on the grounds that the Cherokee Nation did not constitute a foreign state in the sense required by the Constitution.[89] In his majority opinion for the Cherokee Nation case John Marshall fashioned a new political identity for Indian tribes:

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[86]Johnson and Graham Lesee v. William McIntosh, 8 *Wheaton*, 587 (U.S. 1823).

[87]McIntosh, 8 *Wheaton*, 587-94 (U.S., 1823).

[88]McIntosh, 8 *Wheaton*, 603-4 (U.S., 1823).

[89]The Cherokee Nation v. The State of Georgia, 5 *Peters*, 15-19 (U.S., 1831).

"Though the Indians are acknowledged to have an unquestionable, and heretofore unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether these tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. *They may, more correctly, perhaps, be denominated domestic dependent nations.* They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. *Their relationship to the United States resembles that of a ward to his guardian.*"[90]

This celebrated passage forms the basis for trust doctrine, a principle which remains the cornerstone of Indian law up to the present day.[91] Marshal's comparison of the relationship between Indians and the Federal government with a fiduciary responsibility implied a clear political hierarchy, but it did little to clarify the responsibilities of the Federal government. His analogy was flawed from the start, because sovereign nations such as the United States cannot easily be compelled by law to live up to such a responsibility.[92] Not surprisingly, early perspectives on trust doctrine rested on little more than a vague sense of cultural superiority, and that superiority usually meant the right to take away Indian land.[93] As wards of the federal government, Indians constituted little more than children; and attempts to change their cultures could be understood as a process of education. The Marshall court had once again created a legal framework for the march of history through Indian territory, and it fashioned that framework by modeling the relationship between Indians and the federal government after the image of a relationship between a parent and a child.

The decision in Cherokee Nation v. Georgia certainly had a substantial impact on Indian law, but it did not do much to resolve the conflict between Indian tribes and state governments. This was no small matter in the early years of the Republic wherein Federal

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[90]Cherokee Nation (emphasis added), 5 *Peters*, 17 (U.S., 1831)

[91]See "Notes: Rethinking the Trust Doctrine in Federal Indian Law," Harvard Law Review, 98 (1984) 422-40 *passim*.

[92]Sewell, 438-499.

[93]"Notes," 426-427.

and State governments struggled to define their own spheres of authority. So, Georgia's attempts to expand its jurisdiction over Indian territory soon led to another conflict between Federal and State authorities. When a missionary named Samuel Worcester was sent to the Cherokee nation under the authority of the President of the United States he was eventually prosecuted for failure to secure a permit from the state of Georgia.[94] He challenged Georgia's jurisdiction over Cherokee lands, and John Marshall (a staunch Federalist) wrote the majority opinion for the Court ruling in Worcester's favor. This effectively answered the question raised originally by the Cherokee nation and provided another lasting principle of Indian law: any tribal authority not explicitly extinguished by Federal legislation remains with the tribe itself, leaving state governments without any jurisdiction over tribal territory.

The denial of state jurisdiction over tribal land holdings has led to significant legal victories for both Indians and the Federal government. Often the one has led to the other as victories by tribal entities are often quickly followed by advances in Federal jurisdiction. For example, in 1883 a Lakota named Crow Dog was tried under state jurisdiction for the murder of another Lakota on a reservation in South Dakota. The Supreme Court declared that the District Court of South Dakota did not have the necessary jurisdiction to hear the case and subsequently overturned Crow Dog's conviction.[95] Public outrage over Crow Dog's release soon led to passage of the Major Crimes Act which redefined seven different crimes as Federal offenses when committed in Indian territory.[96] Over the years since then the American public has called upon the Federal government to fill numerous gaps in State jurisdiction over tribal territories, and to provide a general source of government authority on Indian reservations. This pattern of relations has served to strengthen ties between tribal interests and the Federal government and led to a gradual re-definition of trust doctrine.

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[94]Samuel A. Worcester v. The State of Georgia, 6 *Peters*, 515 (U.S. 1832).

[95]*Ex Parte* Kan-Gi-Shun-Ca, (otherwise known as Crow Dog), 109 U.S. 556-72 (1883).

[96]Francis Paul Prucha, Documents of the United States Indian Policy. 2nd Edition, Expanded. 1975. Lincoln: University of Nebraska Press, 1990) 167-68.

Vague notions of cultural superiority have gradually been replaced with a theory that the Federal government's fiduciary responsibilities stem from its control over Indian land, (a perspective dubbed "control theory").[97]

There is little evidence for trust doctrine in the text of the Constitution. Neither the Marshall court, nor many of the subsequent courts using trust doctrine have consistently attempted to ground that relationship in the text of the Constitution.[98] Thus, Vine Deloria Jr. has argued that the trust relationship rests on extra-Constitutional authority, and he has repudiated attempts to reduce the legal status of Indian tribes to any doctrine of legal theory.[99] Deloria thus Indian tribes as political entities which the Marshall court acknowledged to exist as a matter of common sense, so to speak. This certainly reflects the interpretive strategies employed by the Marshall court in its attempt to deal with the Cherokee land cases. In each of these cases the Marshall court did not so much articulate an explicit theory about any of laws that it was called upon to interpret as identify the parties before it and clarify their relationship to the jurisdiction of the U.S. Supreme Court, thus accomplishing a great deal of his legal task by merely identifying the issues before it.[100] Marshall was therefore able to derive a set of pragmatic implications from the context of each case simply by invoking the appropriate social indices for each of the relevant parties.

In fact, it is only through subsequent reflection on the interactional texts presented in the Marshall trilogy that the outcome of these cases has been fashioned into a theoretical

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[97]"Notes," 427-429.

[98]David E. Wilkins, "The U.S. Supreme Court's Explication of 'Federal Plenary Power:' An Analysis of Case Law Affecting Tribal Sovereignty," 1886-1914," American Indian Quarterly, 18 (1994) 349-68 *passim.*

[99]Vine Deloria, Jr. "The Distinctive Status of Indian Rights," The Plains Indians of the Twentieth-Century, ed., Peter Iverson, (Norman and London: University of Oklahoma Press, 1985) 237-48 *passim*; Vine Deloria, Jr., Beyond the Pale: American Indians and the Constitution," A Less than Perfect Union: Alternative Perspectives on the U.S. Constitution, ed., Jules Lobel, (New York: Monthly Review Press, 1988) 249-647 *passim*; Vine Deloria, Jr., "Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law," Arizona Law Review, 31 (1989) 201-23 *passim.*

[100]Mertz, "The Uses of History," 677.

doctrine. It is significant that Marshal's greatest contribution to the Indian law amounts to a literal non-event. For, in describing Indian tribes as "domestic dependant nations" Marshall was essentially placing the case before him beyond the authority of his own court, and it is only because non-action by the U.S. Supreme Court acquires an interactional significance by default that this decision meant anything to those involved at the time. Moreover, the effort required to transform Marshal's interactional texts into a legal doctrine (which is a type of denotational text) has produced some uncertainties. It is unclear, for instance, whether "trust doctrine" merely clarifies the implications of tribal status as "domestic dependant nation" or constitutes a countervailing principle.[101] Hence, later courts have read a principle known as the doctrine of "plenary powers" into the Marshall trilogy, declaring the Federal government immune to lawsuits from its Indian wards and asserting a right to make unilateral changes in the provisions of various Indian treaties.[102] Hence, the prospect that the Federal government is responsible for the protection of Indian tribes has enabled the courts to defend actions clearly injurious to Indian tribes. In theory "trust doctrine" implies "plenary powers," but in practice the exercise of plenary powers constitutes an escape from the trust responsibilities of the federal government. Had Marshall produced an explicit theory of Indian law this inconsistency might have been resolved but, as it stands, both principles have become theories only through attempts to read a legal precedent back into the interactional text of Marshal's judicial opinions.

Any notions of precedent found in the Marshall trilogy are closely tied to images of historical progress. It is an historical ideology that informed Marshal's treatment of the Cherokee land cases, and it is a similar ideology that guides placement of these cases in the

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[101]Hence, when Vine Deloria refers briefly to the overall significance of the Marshall cases he simply refers to "Trust doctrine." See for example, "Trouble in High Places," State of Native America, 272-73. Yet, when Vine Deloria and Clifford Lytle examined the impact of the cases in detail they suggest that the two principles are "contradictory," because Trust doctrine amounts to the denial of sovereignty to Native American tribes whereas the doctrine of "domestic dependant nations" in effect recognizes a form of sovereignty comparable to that of a small European state, American Indians, American Justice, 25-33.

[102]United States v. Kagama, 118 U.S. 375 (1886); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

history of Indian law. Each of the opinions authored by the Supreme Court in the Marshall trilogy makes an implicit appeal to an historical ideology contrasting progress and civilization with savagery. Without completely denying that Indians had a history, (a rhetorical option that was certainly available to him) Marshall placed the responsibility for historical progress in the hands of American citizens.[103] Moreover, his comparison of "Christian" "discoverers" with "savages" living in the "wilderness" served to provide a religious significance to the transfer of Indian lands to the United States.[104] The mere use of such terms placed questions about Indian status within a familiar historical scheme at least one level below and behind whites. Trust doctrine matched the abstract spatial dimensions of Indian territory with an abstract sense of time tied closely to images of the United States and its future. Marshall made it clear that the initiative for change on the American continent would come from from civilized Americans, and hence the language of trust doctrine has transformed a historical ideology into a principle of law.[105] The salience of this same principle to contemporary Indian law remains contingent on continued adherence to an historical ideology consistent with its terms.

Marshal's opinions facilitated the colonization of Indian territory, but he did not commit the judicial branch to an active role in that process. Following the Marshall hearings, the Supreme Court has served throughout American history as a comparatively stable source of protection for Indian interests.[106] By contrast, the majority of encroachments on Indian territory and rights have come from the legislative branch of government.[107] Neither of these facts can be surprising, given the text of the Marshall

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[103]Mertz, "The Uses of History," 673-677.

[104]Mertz, "The Uses of History," 674.

[105]Mertz, "The Uses of History," 673-677.

[106]Deloria and Lytle, 57.

[107]Mertz, "The Uses of History," 672.

opinions. His view of history forces the legislative branch to act deliberately and explicitly when limiting the rights and powers of Indian tribe's. Absent any such legislation, Indian tribes have commonly been able to defend their interests successfully in the American legal system, effectively ". . . turning the 'white man's' ideology of history to their own advantage."[108] Because the language of trust doctrine involves a relationship between forms of government, it is tribes themselves which can make use of this ideology rather than individual Native Americans. Thus in the twentieth-century the Federal government has developed an elaborate set of administrative policies for dealing with Indian reservations, effectively putting into operation a control theory of trust doctrine. In direct contrast to the assumptions of the Marshall court, its decisions have fashioned a permanent role for Indian tribes in the American legal system.

Trust Doctrine and the Survival of Native American Tribes.

The transition from an historical theory of trust doctrine based on imminent assimilation to a theory about a continuing government interest in the welfare of Indian tribes was not altogether a smooth operation. Throughout the nineteenth and twentieth-centuries various changes in Indian policy indicate a continuing tension over the value of a permanent relationship between Indian tribes and the Federal government. This tension rests on the implications of an indexical contrast between white visions of progress and Indian ties to the American landscape. Hence, the prospect of terminating the trust relationship between Indian tribes and the Federal government constitutes nothing less than the elimination of Indian tribes. Various attempts to eliminate the trust relationship have threatened the legal basis on which Indian tribes may continue to exist. Contrasting attempts to preserve trust doctrine under a control theory may in turn draw considerably from the rhetoric of Native American environmentalism. Contemporary threats to trust

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[108]Mertz, "The Uses of History," 678.

doctrine thus follow a narrative pattern emphasizing notions of progress which had originally been used in its own construction, whereas its defenders employ a similar schematic arrangement of space and time in combination with a different value orientation.

The history of Indian law has been described in terms of a cyclical pattern, alternating between attempts to protect and to destroy Indian culture and / or sovereignty.[109] For most of American history the protective phases of Indian law have involved objectives limited to the survival of Indian tribes as such, and attempts to eliminate Indian tribes have generally emerged out of the executive and legislative branches of of the U.S. government. The specific history of the AIRFA fits neither of these generalizations, though the law itself owes much to the contested nature of Indian culture. Much of the rhetoric associated with the AIRFA echoes themes associated with one or another phase of Indian policy, and the concerns addressed by the act itself fall into a range of issues shaped by the continuing alternation of hostile and protective forces in Federal Indian law.

Prior to the late twentieth-century the survival of Indian culture was primarily a question about the survival of Indian tribes as discrete political units. Following a century of efforts to acquire and limit the space of Indian country, the Federal government adopted a strategy that would once and for all eliminate Indian territory along with the political integrity of Indian tribes. This led to the Dawes Act, a law which effectively transformed the political objectives and interactional framework of Indian policy. Under the Dawes Act the federal government would concentrate its attacks on Indian tribes on cultural patterns defining tribal membership, effectively beginning a campaign of internal colonization. Rather than acquiring further pieces of Indian territory the federal government would eliminate the social foundation of Indian tribes and render the reservation system unnecessary. This was a classic example of the implementation of trust doctrine under assimilationist assumptions of cultural superiority. The rational warrant for this kind of

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[109]C.f. Charles F. Wilkinson, American Indians, Time, and the Law: Native American Societies in a Modern Constitutional Democracy, (New Haven and London: Yale University Press, 1987), 13-14.

action was precisely the relationship between ward and trustee outlined originally in the Marshall trilogy.

The Dawes Act resulted primarily in economic and cultural devastation for those Indian tribes subjected to its implementation.[110] It had been intended from its inception to force upon Indians a profound change in their way of life. Contrary to the expectations of its advocates, however, the Dawes Act did not turn Indians into good agricultural capitalists through its forced re-definition of their land claims. The problem with the expectations associated with the Dawes Act was articulated quite well during its own era in a report attached to the bill by dissenters on the House Committee on Indian Affairs. They charged that rationale for the Dawes Act was based on a flimsy social theory, stating that "it does not make a farmer out of an Indian to give him a quarter-section of land."[111] They further asserted that Indian ideas about communal land ownership would prove too substantial an obstacle for the act to achieve positive results,[112] Hence, this policy attacking notions of communal land ownership would succeed only in emiserating the conditions of Indian life, but its would not generate acceptance of a commodified sense of land ownership. As Karl Polanyi argued, the destruction accompanied by measures such as the Dawes Act is not primarily a function of the economic exploitation that accompanies their implementation; it is a result of suppressing a cultural system forcibly under the gratuitous expectation that a new market perspective will naturally take its place.[113]

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[110]On the effects of the Dawes Act, see Wilcomb E. Washburn, The Assault on Indian Tribalism: The General Allotment Law (Dawes Act) of 1887, ed., Harold M. Hyman, The America's Alternatives Series, (Philadelphia: J. B. Lippincott Company, 1975) 28-31. Robert M. Utley, The Indian Frontier of the American West 1846-1890, Histories of the American Frontier, ed., Ray Allen Billington. (Albuquerque: University of New Mexico Press, 1984) 268-269.

[111]Washburn, 37.

[112] Washburn, 35-40.

[113]Polanyi, 290-293.

With the passage of the Wheeler-Howard Act (or the Indian Reorganization Act) in 1934 Congress reversed the direction of Federal Indian policy. Under the Wheeler-Howard Act the Federal government outlined a policy providing for the permanent survival of Indian tribes. By establishing Federal responsibility to protect Indian communal land ownership, and by giving Indians some official control of their own political future; the Wheeler-Howard Act served to acknowledge Indians as subjects involved in the shaping of their own history. This in itself implied a great deal that is anathema to traditional Indian culture, particularly given the economic transformations deemed necessary for the success of tribal entities. Tribal governments accepting the provisions of the Wheeler-Howard Act were reformed along with the overall structure of Federal administration. Implementation of the act required individual tribes to accept a democratic form of government, thus replacing many of the traditional forms of Indian authority.[114] Some charged that the new governments were essentially government managed examples of communism.[115] Others maintain that the tribal governments formed during this era were explicitly designed to empower business interests so as to foster land development, often in direct conflict with traditional interests.[116] In any event, the legitimacy of tribal governments formed under the provisions of the IRA remains a subject of dispute throughout intra-Indian politics.

The Wheeler Howard Act did give Indian tribes a respectable base of power from which they could negotiate their own political future. Much that had been gained under the Wheeler-Howard Act was soon threatened, however, with the end of the Roosevelt administration. Apparently, the lessons of the Dawes Act were not well learned, because the Federal government soon returned to a policy of forced assimilation during the

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[114]See, Rebecca L. Robbins, "Self Determination and Subordination: The Past, Present, and future of American Indian Governance," The State of Native America, 95.

[115]E.g. Ramon Roubideaux, "Con. (in "Debate over IRA)" Native American Testimony, 328-29.

[116]E.g. Robbins, 92-98; Ward Churchill, Struggle for the Land: Indigenous Resistance to Genocide, Ecocide and Expropriation in Contemporary North America, (Monroe, Main: Common Courage Press, 1993) 145-47.

Termination era of the nineteen-fifties. Under this policy the Federal government paid any Indian tribe deemed self sufficient a lump sum of money and then promptly terminated its special relationship with the tribe and its members. The impact of termination policy was far from beneficial, and the Federal government soon moved toward another approach to Indian tribes.[117] By 1968 Lyndon Johnson articulated a principle of self-determination, a policy which was reaffirmed by Richard Nixon in 1970.[118]

Self-determination has a fairly obvious rhetorical significance, but its actual policy implications have never been particularly clear. Much as it is generally safe to say that the Wheeler Howard Act was beneficial to Indians insofar as it ended the policy of General Allotment, the policy of Self-determination is clearly beneficial only insofar as it constitutes an end to the termination era. By the late nineteen-seventies the preservation of autonomous Indian governments had become a basic assumption of national policy. The specific implications of Indian self-determination remain unclear, however, though they have expanded beyond the minimal implications of a control theory. Congressional action consistent with the policy of self-determination has added a legislative basis for tribal status in contemporary Indian policy, but neither this nor the case law affecting Indian tribes rests on a secure textual basis in the Constitution. Indian claimants must are therefore particularly vulnerable to ideological reconstructions of their legal standing in a given dispute. The status of an Indian tribe remains somewhat tenuous in contemporary Indian law, and the rhetoric surrounding Indian policy frequently eclipses the actual policy questions at hand. Moreover, the fate of Indian tribes remains subject to alteration by the new legislation, placing the rights of Indian tribes as such at the mercy of the continuing democratic process. Even as Indian tribes explore new possibilities of self-government, their legal status remains a highly contestable source of authority.

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[117]See Deloria, Custer, 54-77.

[118]Prucha, 248-249, 256-258.

During the self-determination era Congress has entertained a number of bills addressing Indian interests beyond the mere survival of Indian tribes as such. The American Indian Religious Freedom Act is a prime example of this kind of legislation. It is the prospect of appeal to trust doctrine (more appropriately to the prospect of invoking the social identity dictated by trust doctrine) which would eventually drive a great deal of the interests associated with AIRFA litigation. Yet the significance that Indian tribes play in shaping the Federal interest at stake in the AIRFA has never been very clear. Thus, Indians attempting to receive Federal relief under the provisions of the AIRFA have frequently been unable to invoke the indexical patterns dictated by trust doctrine. The courts generally treated AIRFA claimants as individual U.S. citizens rather than as members of semi-autonomous nations invoking federal trust responsibilities. To understand the ambiguous relationship between the AIRFA and Federal trust doctrine, one must therefore address a range of individualistic themes associated with the Bill of Rights.

Free Exercise and the Balancing Test.

Notions derived from free exercise doctrine had a profound affect on the case history associated with the AIRFA. As had been the case with trust doctrine the principles governing case law in free exercise disputes emerged out of a historical process, and they continue to have a transient existence. This fact is somewhat obscured by efforts to cast them as timeless legal principles. Such principles exhibit a certain heuristic value as they emerge into legal discourse, but nothing stops the courts from setting these principles aside once they prove inconvenient. When the AIRFA became law the courts generally employed a formula known as the balancing test in cases dealing with questions of free exercise. In following this procedure a court would weigh the government interest at stake in a given case against the religious needs of a litigant claiming a right of free exercise. Under the balancing test a good deal of the outcome of a given case clearly hinges on the personal judgement of the appellate justices hearing it, a fact which serves only to heighten the

impact of any personal or structural biases affecting the court's orientation toward minority religions. Most of the cases associated with the AIRFA would involve a pattern of reasoning tailored to meet the criteria spelled out in this approach; but these same cases would begin to strain the courts' willingness to stand by the balancing test, eventually leading the Supreme Court to all but renounce it in the Smith case.[119] In this respect the AIRFA set the stage for the final phase in the history of the balancing test, and the two would eventually share the same fate at the hands of the Supreme Court.

The balancing test emerged out of the demise of an earlier distinction between belief and action, which had been enshrined by the U.S. Supreme Court in the case of Reynolds v. United States (1878), a dispute involving the Mormon practice of polygamy. In keeping with his Mormon faith George Reynolds had taken a second wife, and was accordingly charged with polygamy.[120] His lawyers argued that no intent to break the law could be attributed to Reynolds, because such a marriage constituted a religious duty for members of the Mormon Church.[121] The Supreme Court decided against Reynolds, however, and in the majority opinion, Chief Justice Waite introduced a distinction between belief and action into the subject of religious freedom. Borrowing from the work of James Madison and Thomas Jefferson, Waite argued that the principle of religious freedom was intended to apply only to questions of belief. Through such a principle; "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[122] Chief Justice Waite moved on

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[119]Smith, 494 U.S. 882-890 (1990).

[120]Reynolds v. United States, 98 U.S. 145-53 (1878).

[121]Reynolds, 98 U.S. 161-62 (1978).

[122]There is an interesting poetic feature to this argument inasmuch as Waite's statement of this general principle follows a historical analysis of the struggles undertaken by Madison and Jefferson to ensure observation of both religious freedom and a separation of church and state in the state of Virginia. Yet, the language with which Waite summarizes this relates directly to "Congress," implicitly transforming the context of debate from that of the famous Virginia resolution to a dialogue directly relevant to the Supreme Court of the United States. (Note that it was a Federal law which was at issue in Reynolds, given the fact that the events in question took place in Utah territory, which would not become a state until January 4,

to describe laws against polygamy as valid statutes relating to actions rather than beliefs.[123] Thus, the court faced the prospect of accommodating a particular individual's actions on the grounds that they had been religiously motivated, a prospect which the court easily rejected:

> So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.[124]

The Reynolds decision matches a certain intuitive understanding of the First Amendment as a body of principles relating to ideas, and to those conditions necessary to ensure the free and safe communication of ideas. The court's distinction between belief and action thereby continued a trend towards privatization of religion which can be detected in the formulation of the text of the First Amendment itself. In protecting the state from practices based on the religious beliefs of individual citizens the Reynolds case further enshrined the artificial distinction between the recognizably "religious" beliefs protected by the First Amendment and the cosmological principles presumed by the First Amendment itself. This distinction between belief and action effectively defined any conflict between the State and a religious sect over a religious practice as a secular matter, even when, as in the

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1896.) This is not to say that Waite could not have inferred the relevance of this principle to his own case from a careful reading of the material relevant to Virginia; but that instead of making such an inference on logical grounds he did so through an interactional text, generating a trope in which Madison an Jefferson spoke directly to the case at hand. Reynolds, 98 U.S. 164 (1878).

[123]Reynolds, 98 U.S. 164-67 (1878).

[124]Reynolds, 98. U.S. 166-67 (1878). It is worth noting that while the belief action distinction may have emerged out of conflict between the Federal government and the Mormon church over polygamy; this distinction did not continue to define the boundaries of Federal interest in the subject. In 1882 Congress would pass the Edmunds Act, disenfranchising those who believed in the practice of polygamy as well as imposing more substantial penalties for those who practiced it. See Richard White, "It's Your Misfortune and None of My Own": A New History of the American West, (Norman and London: University of Oklahoma Press, 1991) 174.

case of the Reynolds decision, a good portion of the rationale for the State's own interest is intimately bound up with the development of religious traditions.[125]

The Court's reasoning in the Reynolds case did more to underscore the potential threats posed by an open ended interpretation of Free Exercise Clause than it did to resolve them. The distinction between belief and action rendered the Free Exercise Clause redundant, given the fact that laws affecting beliefs rather than actions would be covered by the Free Speech clause of the same amendment which could be called upon to ensure free expression.[126] Only by looking into areas of activity motivated by religious doctrines could the courts' give the Free Exercise clause any substantive domain not already covered by the protection of expression. The principle announced in the Reynolds case appeared to prevent just such an inquiry, thus rendering the Free Exercise clause ineffective as a means of protecting Americans from dangerous religious practices.

In 1940 the Supreme Court would begin to venture towards a more substantive interpretation of the Free Exercise clause, and thereby renew the potential threat that religious freedom holds for "the law of the land." In Cantwell v. Connecticut the U.S. Supreme Court reversed a lower court decision convicting Jehovas' Witnesses of violating a law prohibiting solicitation without official approval from the State's secretary of the Public Welfare Council, and in the instance of Cantwell himself; a conviction for inciting a breach of the peace.[127] In the majority opinion for the case Justice Roberts would revisit the distinction between belief and action produced over a half century earlier by the Reynolds court:

The constitutional inhibition of legislation on the subject of religion has a double aspect. One the one hand, it forestalls compulsion by law of the acceptance of any creed or the

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[125]In the language of the Court, "Marriage. while from its very nature a sacred obligation, is nevertheless, in most civilized nations a civil contract, and usually enforced by law." Reynolds, 98. U.S. 165 (1878).

[126]See Lupu, 938; Stephen L. Pepper, "The Conundrum of the Free Exercise Clause-Some Reflections on Recent Cases," Northern Kentucky Law Review, 9 (1982) 265-66.

[127]Cantwell v. State of Connecticut, 310 U.S. 300 (1940).

practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the chosen form of religion. Thus the Amendment embraces two concepts-freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.[128]

As in the Reynolds case, the argument presented in Cantwell suggests that the court was reluctant to extend free exercise protections to actual religious practices. In declaring the Connecticut law prohibiting unauthorized solicitation unconstitutional, the court was careful to indicate that laws prohibiting fraud could still be enforced against religious organizations.[129] And in declaring that Cantwell himself had not incited a breach of the peace, the court merely reviewed the facts of the case and decided that he had not exhibited any profane or indecent behavior.[130] The Court did not declare that fraudulent claims or indecent behavior would be protected in the event that such behavior constituted a form of proselytization; but it did reject regulations pertaining directly to the latter based on vague concerns about the prospect of fraud or indecency.

The Cantwell decision did not extend free exercise relief to a broad range of religious practices, but the court's willingness to entertain cases involving religious practices in itself constituted a radical break from the rationale guiding free exercise cases in the wake of the Reynolds decision. Following Cantwell, people would test the Supreme Court's willingness to extend free exercise protection to a great variety of activities. So, the rationale offered in the Cantwell decision did generate more substantive notions free exercise doctrine, leading to an approach that could not be reduced to other provisions within the First Amendment. This course renewed the dangers inherent to the Free Exercise clause by extending its denotational scope to a broad range of social practices. As the Supreme Court began to flesh out the new possibilities suggested in Cantwell, it would

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[128]Cantwell, 310 U.S. 303-4 (1940).

[129]Cantwell, 310 U.S. 304-6 (1940).

[130]Cantwell, 310 U.S. 307-11 (1940).

also have to find a new means of narrowing the potential scope of free exercise claims; it would have to construct a new "gatekeeper doctrine."[131]

The process of defining the Supreme Court's new approach to free exercise began in earnest during the early nineteen-sixties . In the 1961 case of Braunfield v. Brown the Supreme Court ruled against a free exercise challenge to Pennsylvania's Sunday closing laws. The petitioners in this case were orthodox Jews who argued that they should not be forced to close their places of business on Sundays, because they were obliged to refrain from work on Saturdays in observation of the Sabbath.[132] Enforcement of Sunday closing laws against such individuals would force them to choose between operating at an economic disadvantage and violating their own religious beliefs.[133] Although the Supreme Court did not agree with the petitioners, Chief Justice Warren's majority opinion underscored the possibility that such religious practices could find protection under the Free Exercise Clause. Citing Cantwell, Warren wrote that freedom of belief was absolute, but that the issue at hand involved the more constricted form of protection afforded the practice of religion.[134] Warren characterized the chief source of conflict between free exercise principles and legislative bodies in terms of indirect burdens generated through legitimate public interests.[135] He wrote:

> Of course, to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification. If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burdens may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious

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[131]Lupu, 937-39 and *passim.*

[132]Braunfield v. Brown, 366 U.S. 600-2 (1961).

[133]Braunfield, 366 U.S. 602 (1961).

[134]Braunfield, 366 U.S. 603-7 (1961).

[135]Braunfield, 366 U.S. 606-9 (1961).

observance unless the State may accommodate its purpose by means which do not impose such a burden.[136]

In keeping with this approach the Court decided against the petitioners on the grounds that granting exemption to Orthodox Jews would impede the purpose of Pennsylvania's Sunday closing laws.[137] Justice Brennan dissented from the Court's estimate of Pennsylvania's interest, arguing that exemptions were quite feasible and consistent with the intended purpose of Sunday closing laws.[138] While the Braunfield case produced neither a concrete outcome that could be described as an extension of religious freedom, nor a complete consensus within the court, it did provide an important step in defining the criteria by which the Court would come to evaluate religious practices.

In the 1963 case of Sherbert v. Verner the Supreme Court would apply much the same criteria to the claims of a Seventh-Day Adventist. In keeping with her own faith Adell H. Sherbert refused to work on Saturdays, resulting in termination of her employment at a mill in South Carolina.[139] When she applied for unemployment compensation she was denied benefits on the grounds that she had refused to accept employment without good cause.[140] Sherbert had appealed the decision to the South Carolina Supreme Court on the grounds that it violated the Free Exercise clause.[141] Writing for the U.S. Supreme Court, Justice Brennan would again cite Cantwell, declaring that; "The door of the Free Exercise Clause stands tightly closed against any government regulation of religious *beliefs* as such."[142] Turning to the Braunfield decision, he wrote; "On the other Hand, the Court has

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[136]Braunfield, (reference to Cantwell omited), 366 U.S. 607 (1961).

[137]Braunfield, 366 U.S. 608-9 (1961).

[138]Braunfield, 366 U.S. 614-15 (1961).

[139]Sherbert v. Verner, 374 U.S. 399-400 (1963).

[140]Sherbert, 374 U.S. 400-1 (1963).

[141]Sherbert, 374 U.S. 401-2 (1963).

[142]Sherbert (emphasis in original), 374 U.S. 402 (1963).

rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even when the action is in accord with one's convictions, [it] is not totally free from legislative restrictions.'"[143] Following these remarks, Brennan moved on to frame the case in terms quite similar to those used in Braunfield:

> Plainly enough, appellant's conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation. If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'[144]

Brennan then proceeded to argue that denial of unemployment benefits did in fact constitute a burden on Sherbert's right of free exercise, and that South Carolina did not have a compelling interest in its unemployment policy, or at least not one that would preclude the kind of exemption sought by Sherbert.[145] Hence, the U.S. Supreme Court, reversed the decision of the South Carolina Supreme Court, and provided one of the earliest cases wherein a religious practice received the protection accorded by the Free Exercise Clause.

The outcome of Sherbert v. Verner posed a number of vexing problems. Brennan may have borrowed from the Braunfield case in constructing the majority opinion for Sherbert, but he was not altogether convincing in his attempts to show that the outcome of Sherbert was consistent with the earlier decision. Using the position taken by the court in Braunfield, that Sunday closing laws could not admit to exceptions without unduly straining the government's own interest (a point he had himself contended at the time); Brennan argued that Sherbert differed from Braunfield in the empirical sense that such an accommodation was indeed possible with respect to South Carolina's policies regarding

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[143]Sherbert, 374 U.S. 403 (1963).

[144]Sherbert, (reference to NAACP v. Button omited), 374 U.S. 403 (1963).

[145]Sherbert, 374 U.S. 403-9 (1963).

unemployment compensation.[146] Brennan's rationale effectively cast a key feature of any decision regarding free exercise in the form of an empirical question, one which would have to be decided on a case by case basis; but this also meant that important aspects of a free exercise case were left to the discretion of the Court itself. Without declaring in principle what would constitute a "compelling state interest," or how much trouble the government could be expected to take in accommodating a right of free exercise, the criteria outlined in Sherbert generated a discursive vacuum within the denotational text structure of cases dealing with a right of free exercise.[147] Implementation of such a criterion would therefore call increasing attention to the interactional contributions of appellate justices.

The very requirement that a justice should balance the interests of the government against the free exercise interests of a claimant constituted the principle discursive weakness of the balancing test. The notion that justices can actually "balance" such interests is nothing more than a rather stylized metaphor, because the literal significance of this term would require that some absolute unit of measure could be used to "weigh" one legal interest against another. In actual practice justices faced incommensurable claims in virtually every case, however, and hence each actual instance of balancing invited participants to assign their values to the interests at hand. Where diversity of expectation existed in relation to a free exercise case, which is assuredly the reason that such cases occur in the first place; there is little hope that a principle of law could be founded on the personal credibility of individual justices. In any event, following the introduction of the balancing test the case history of free exercise doctrine soon began to fill up with decisions backed by little more than common sense appeal and the credibility of appellate justices.

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[146]Sherbert, 374 U.S. 408-9 (1963).

[147]For example, Justice Stewart agreed with the decision reached in Sherbert, but he argued that the new decision could not be squared with the outcome in Braunfield, a fact which he seems to have regarded as a virtue, See Sherbert, 374 U.S. 417 (1963). Likewise, Justices Harlan and White rejected attempts to reconcile the cases with one another, Sherbert, 374 U.S. 421 (1963).

The first prong of the balancing test could also be taken to imply a kind of sub-phase in which the court determines whether or not a given practice constitutes a form of religion - as opposed to deciding in one and the same moment that such a practice does exist and that it has been burdened by a government policy. Justices have been unable to deal effectively with this question on its own terms; however, perhaps because raising questions about the religious nature of a practice simultaneously raises the prospect of arbitrary distinctions between religious and non-religious behavior, and because this calls upon justices to second guess the sincerity of claimants.[148] Rather than articulate tenuous judgements about the viability of a religious tradition and the sincerity of its practitioners in the actual text of a judicial opinion, justices have often conceded the religious nature of a given practice only to articulate an argument denying relief on some other grounds. Hence, the class of practices acknowledged by the courts to be religious in nature appears quite large indeed under the balancing test, but those practices actually afforded free exercise protection are generally clustered around prototypical notions of religious belief.

The balancing test emerged as a means of addressing the indirect burdens that government action could place on religious practitioners. In its willingness to review laws and policies passed for generally valid purposes the Supreme Court greatly expanded the potential scope of free exercise cases. The test itself placed the courts in a position to actively structure the relationship between religious practitioners and governmental agencies, because it enabled judges to determine when government policies would be required to accommodate religious practitioners. This expansion of free exercise doctrine matched coincided with an expansion of federal trust doctrine. In at least one respect the AIRFA could be seen as the logical outcome of both developments; it explicitly required government agencies to weigh their own interests against those of traditional Indian practitioners in the process of formulating their own policies. In another respect, however,

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[148]C.f. Marc Galanter, "Religious Freedoms in the United States: A Turning Point," Wisconsin Law Review, (Spring, 1966) 255-64.

notions of trust doctrine were inconsistent with the balancing test, because trust doctrine called for the federal government to express a positive interest in helping Indian tribes whereas the balancing test assumed an adversarial relationship between individual claimants and governmental policies. The adversarial stance presumed in the balancing test naturally reflected the interactional patterns of a free exercise dispute in which each of the parties were assumed to be at cross-purposes. Application of the balancing test therefore served to isolate the legal interests of both parties in a free exercise dispute, and hence its use in AIRFA related cases precluded the very prospect that Indian claimants were themselves entitled to active government support rather than mere accommodation.

The balancing test differed greatly from trust doctrine in another respect; it addressed the institution of religion rather than the overall integrity of a tribe. The values most likely to receive protection under the balancing test, those deemed most crucial to the free exercise interests of religious practitioners, could generally be isolated from other social interests. In many respects such values were closely related to the very sense of belief originally set forth in the Reynolds case. The courts would not protect actions which were not rooted in religious belief. Hence, those seeking free exercise relief for a social practice had to base their case on claims about the religious beliefs reflected in those actions. Social practices reflecting political and economic values might not receive protection under the balancing test, unless they could be related to the maintenance of a religious community.

The 1972 case of Wisconsin v. Yoder constituted the most likely precedent for tribal litigants pursuing AIRFA-related cases. This case involved a challenge to Wisconsin's compulsory education laws, stemming from the Amish practice of withdrawing their children from public schools beyond the eighth grade. Testimony given in the lower courts established that the Amish religion involved adherence to a distinctive pattern of living, one that generally required inhabitance within a distinct form of

community.[149] Lawyers for the Amish respondents Jonas Yoder and Wallace Millner further argued that attendance in a public school beyond the eighth grade threatened the values espoused by the Amish faith, and that such school attendance made it impossible for young adolescents to enter into their accustomed places within the Amish community.[150] The Court ruled in favor of the respondents, claiming that the government interest at stake in the case was insufficient to warrant a substantial burden on their right of free exercise. On behalf of the Court Justice Burger wrote:

> The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. We can accept it as settled, therefore, that, however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests.[151]

Burger went on to distinguish between the "religious" motivations of the Amish and those issuing from more secular interests (such as those guiding Henry David Thoreau's decision to live at Walden Pond).[152] Granting the Amish position that school attendance beyond the eighth grade constituted a serious threat to the practice of this faith, and that an exception for Amish children would not prevent the state of Wisconsin from satisfying its own interests in public education; the Court then ruled in favor of the respodents.[153] Hence, the Yoder case provided another precedent for the use of the balancing test in free exercise jurisprudence, and demonstrated the Court's increasing willingness to expand the actual protection offered under that test.

In Yoder the court went so far as to protect an entire community and a distinctive pattern of living from an otherwise valid state law. This kind of protection could have

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[149]Wisconsin v. Yoder 406 U.S. 209-10 (1972).

[150]Yoder, 406 U.S. 211-12 (1972).

[151]Yoder, 406 U.S. 215 (1972).

[152]Yoder, 406 U.S. 215-17 (1972).

[153]Yoder, 406 U.S. 218-36 (1972).

potentially brought a wide range of practices under the scope of the Free Exercise clause. As a means of narrowing the scope of potential cases, the Court could indicate little other than its requirement that such practices must stem from a form of religious belief. This kind of approach effectively raised a number of semantic difficulties associated with the significance of "religion" (chapter 3). Justice Douglas charged in his dissent that; although the Court had rightly rejected the distinction between belief and action outlined in Reynolds, thereby expanding the range of free exercise protections; its own distinction between "religious" behavior and that motivated by a mere philosophy of life constituted a "retreat" from the broad-minded approach taken in the Seeger decision (see chapter 3). This distinction between "religious" behavior and non-religious behavior appeared rather arbitrary when dealing with nominally secular philosophies, as in Justice Douglas' dissent; but such a distinction had become critical to the balancing test inasmuch as it constituted a gatekeeper doctrine, a means of narrowing the scope of *prima facie* claims associated with the Free Exercise clause.

Yoder thus established a precedent protecting the integrity of an entire community, but that precedent was itself predicated on the possibility of determining that an explicit religious value would be imperiled by any government action which threatened that community. Thus, it could be as a precedent for cases involving Indian communities, providing that they could establish differentiate between the religious values at stake in a given claim and those reflecting the economic and political interests of the tribe. The prospect of using the balancing test thus seemed plausible to many Indian "traditionalists," who saw themselves as the spiritual backbone of tribal communities. In claiming free exercise relief, however, Indian litigants acted as United States citizens rather than as members of a semi-sovereign nation. Thus, in many respects the balancing test invited judges to isolate the interests advanced by Indian litigants and distinguish them from both the interests of the government itself and the communities from which they came. Reference to the balancing test thus enabled practitioners of traditional Indian ceremonies to

represent their interests as plausible cases involving a right of free exercise, but the inability to distinguish Indian cases from other free exercise cases ultimately prevented Indian claimants from making full use of their trust relationship to the federal government.

As a document applying Euro-American notions of religious freedom to the context of Indian-white relations, the AIRFA was influenced by the case law involving both trust doctrine and the Free Exercise clause. Each of these two bodies of case law could be used to generate plausible scenarios for conflict between Native Americans and federal agencies. AIRFA proponents were clearly informed both by the notion that indirect burdens on a right of free exercise should be balanced against government interests and the notion that the federal government was itself responsible for protecting the cultural integrity of Native American tribes. In one respect these notions appeared to complement one another; they both led to an expansive notion of Indian religious freedoms. In another respect they were inconsistent with one another; each presupposed a different model of the relationship between an Indian claimant and a federal agency. Hence, the text of the AIRFA was informed by two very different contextualization schemata; two very different notions of the dialogue taking place between Indians and federal agencies in American history. What remains to be seen is the process by which these contextual models became fused in a common rhetoric of religious freedom.

Chapter II:
Taos Blue Lake and the Rhetorical Foundations of the American Indian Religious Freedom Act.

The Sun Dance and all other similar dances and so-called religious ceremonies are considered 'Indian Offenses' under existing regulations, and corrective penalties are provided. I regard such restriction as applicable to any dance which involves . . . the reckless giving away of property . . . frequent or prolonged periods of celebration . . . in fact any disorderly or plainly excessive performance that promotes cruelty, licentiousness, idleness, danger to health, and shiftless indifference to family welfare.[154]

-Circular released by the Office of Indian Affairs on April 26, 1921.

Since 1906, the Taos Pueblo Indians have hoped that the Blue Lake area would be returned to them so that they could enjoy their freedom of unrestricted worship in the traditional manner. This bill would assure them their hopes. It would also protect the cultural survival of the Taos Pueblo Indians.[155]

-Statement of the Under Secretary of the Interior delivered May 13, 1969.

Each of these texts represents the disposition of a federal bureaucracy towards behavior tentatively identified as part of an American Indian religion. But whereas the Indian Affairs circular of 1921 articulates a general strategy for prevention of that behavior, the Interior department's statement of 1969 supports a specific measure for the protection of at least one Native American religion, that of the Taos Indians. The two statements differ as much in tone of presentation as they do in their intended consequences. The author of the first passage could hardly admit to the religious nature of Indian ceremonies long enough to indicate that something should be done to stop them. This stands in sharp contrast to the second passage in which the author affirmed the religious character of the subject and evoked the principles of a civil liberties tradition in a single phrase. The latter

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[154]Circular No. 1665 (April 26, 1921) Quoted in Federal Agencies Task Force, American Indian Religious Freedom Act Report, P.L. 95-341. Washington, D.C. (August, 1979) 6-7.

[155]U.S. Congress, Senate, Subcommittee on Interior and Insular Affairs, Taos Indians - Blue Lake Amendments, Ninety-First Congress, Second Session, on S. 750 and H.R. 471, (July 9 and 10, 1970) 13.

statement more than departs from the previous ethos of overt religious oppression, it articulates a deliberate political interest in the safeguarding of Taos religion. Hence, the statement of 1969 anticipates later attempts to apply the concept of religious freedom to a broad range of Native American interests under the AIRFA.

The return of Blue Lake to the Taos Indians of New Mexico was accomplished in 1970 largely on the basis of arguments stressing its religious significance. Such an event could hardly be conceived in an earlier era when the Office of Indian Affairs was busy putting Indians in jail on the suspicion that they may be practicing just such a tribal religion. So long as the prevailing interpretation of trust doctrine remained that of immanent assimilation the prospects of Native American appeal to religious freedom were quite dim. The ideological position presupposed by assimilationist policies placed Native American culture, if not Native Americans themselves, outside of an "American" community vested with a right of free exercise. As extra-Constitutional entities Native American tribes were not subject to the Constitutional protections, and so the Free Exercise clause did not seem to preclude the government from prosecuting tribal authorities for practicing traditional Indian ceremonies.[156]

The significance of Indian rituals during the assimilation era could be dictated by the ostensibly secular goals of BIA policy. Under these conditions Native American ceremonies constituted an obstacle to federal policy, and their nominal inclusion within the category of "religion" implied a contrast with prototypically Euro-American forms of religion. The Indian Affairs Circular of 1921, for example, hedges about the matter; implying that Indian ceremonial practices might be considered religions without actually granting that they are such. Such statements treating Indian ceremonies as degraded or marginal forms of religion would later provide a ready gloss for those practices when Indians came to assert a positive interest in defending their ceremonial systems. These

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[156]Deloria, "The Distinctive Status of Indian Rights," 241-45.

pejorative references to Indian established a crucial historical precedent for identifying certain aspects of Native American cultures as matters of "religion." This in turn made it possible for Indian tribes to present their ceremonial practices in terms familiar to the American public, and it eventually enabled ceremonial practitioners to lay claim to the Constitutional protection normally afforded religious institutions.

As the prevailing sense of trust doctrine evolved into a permanent relationship between the federal government and Native Americans, the notion that Indian ceremonies constituted a form of religion would lead to substantive claims on the abstract principle of free exercise. So long as Native Americans were "Americans" they could not be denied the right of free exercise, but the distinct nature of tribal religions along with the distinct legal status of tribal governments combined to provide an unusual social context for appeal to free exercise. The religious practices of Native Americans were already profoundly affected by interaction with the federal government, a fact which initially laid responsibility for the free exercise of Indian religions at the feet of the executive and legislative branches of government rather than the courts. This ensured that Native American appeals to religious freedom would find a different footing within the institutional structure of American law. Hence, Native American appeal to religious freedom developed out of an unusual sense of both its denotational and interactional implications.

Blue Lake established a precedent for successful appeal to Euro-American notions of religious freedom in defense of tribal interests. The Taos Pueblo drew loosely from the language of the First Amendment in pursuing this campaign, and hence the tribe did not have to address the technical facets of free exercise doctrine in a courtroom. Yet, the return of Blue Lake provided a historical precedent which established at least an abstract sense that principles of religious freedom could be applied to tribal interests. In presenting its interest in Blue Lake as a matter of religious freedom Taos Pueblo employed the notion of religious freedom in novel ways, thus presenting an argument that stretched the usual sense of what the phrase "religious freedom" could denote in American politics. Moreover, the Taos

Indians obtained resolution of its case from Congress rather than a court, and Congress placed Blue Lake under trust title, thus framing the legal significance of Blue Lake in terms of the trust relationship. This unusual case therefore provided an important bridge between an era in which Indian tribes were beyond the scope of the First Amendment and an era in which the First Amendment would provide the basis for an expansive set of Indian claims.

Assimilationist Policies and the Suppression of Taos Religion.

The Taos campaign to recover Blue Lake established much of the groundwork for later Native American approaches to free exercise, but the Taos Indians were also familiar with the kind of legal sanctions once used to suppress Indian religion. BIA policies amounting to overt suppression of Native American religion were in effect from the eighteen-eighties to the nineteen-thirties, ending only with John Collier's administration of Indian Affairs.[157] The circular of 1921 merely reiterated a long-standing policy, but it came at a time which was particularly stressful to the Indians of Taos Pueblo.[158] In the early nineteen-twenties Charles Burke, the Commissioner of Indian Affairs personally confronted the Taos Indians over their ceremonies. In 1924 he travelled to the Pueblo itself and denounced their ceremonial practices to the Pueblo elders, commanded them to give up their religion, and eventually had members of the tribal council arrested and jailed in a conflict over the education of Taos youth.[159] Hence, the 1921 statement from the Office of

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[157]See Sharon O'Brien, "A Legal Analysis of the American Indian Religious Freedom Act," Handbook of American Indian Religious Freedom, 28.

[158]R.C. Gordon-McCutchan, The Taos Indians and the Battle for Blue Lake, (Santa Fe, New Mexico: Red Crane Books, 1991) 16. The following presentation of background material surrounding the events surrounding the Blue Lake controversy will closely follow Gordon-McCutchan's historical account.

[159]Gui de Angulo, Jaime in Taos: The Papers of Jaime de Angulo, (San Francisco: City Lights Books, 1985) 57-62; Gordon-McCutchan, 16-17; John T. Whatley, "The Saga of Taos Pueblo: The Blue Lake Controversy," The Indian Historian, 2 (Fall, 1969) 23; Nancy Wood, Taos Pueblo, (New York: Alfred A. Knopf, 1989) 69.

Indian Affairs articulated principles of institutional violence associated with earlier phases of trust doctrine and with events central to the history of Taos Pueblo.

The imprisonment of Taoseño elders provides a telling example of the state of Indian-white relations in the nineteen-twenties, and it illustrates the particular role that religion played in conflicts between Indians and federal policies during that era. A great deal of this conflict appears to have centered around the prospect of education. The boarding schools of the Bureau of Indian Affairs (the BIA) had been viewed as instruments of assimilation from the moment of their inception; they were as important for preventing the transmission of traditional Indian views to children as for any positive instruction that might take place within them.[160] The BIA quite deliberately separated Indian children from their homes, their families, and the prospect of using their own languages. In keeping with this policy, the BIA took children from the Taos Pueblo to be educated all across the country.[161] This practice placed particular strain on the maintenance of the kiva societies at Taos, because these secret societies had traditionally required up to eighteen months for the training of young male initiates.[162] Members of the Pueblo resisted BIA policies by removing Taos youth from schools for the length of time necessary to complete kiva training. This in turn led to government officials to imprison the Pueblo town council.

That religion is somehow at stake in this issue can readily be gathered from statements about the religious significance of education made by both BIA officials and

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[160]Deloria and Lytle, 241.

[161]Wood, 70-71.

[162]John J. Bodine writes that the initiation period for these males at Taos typically took 6, 12, or 18 months to complete, depending on the kiva for which they were undergoing training. The significance of Blue Lake can already be dimly seen already in this conflict. For the completion of any of these cycles was always timed to coincide with an annual migration to Blue Lake. See "Taos Pueblo," Handbook of North American Indians, gen. ed., William Sturtevant, Volume 9, ed., Alfonso Ortiz, (Washington: Smithsonian Institution, 1979) 262. Elizabeth Brandt provides an alternative perspective on the difference in time spent during initiation. She writes that kiva leaders are normally drawn from the ranks of long term initiates, those taking a full eighteen months to complete the process of initiation, "On Secrecy and the Control of Knowledge: Taos Pueblo," Secrecy: A Cross-Cultural Perspective, ed., Stanton K. Teft, (New York and London: Human Sciences Press, 1980)123-46 *passim.*

Native Americans. Along with the communal status of Indian land holdings, the BIA identified any Native American practices it considered to have religious significance impediments to "progress" in the years leading up to the Dawes Act.[163] This led the BIA to target ostensibly religious practices for repressive sanctions, and the provisions of this policy were strongly influenced by that same agency's plans for the education of Indian youth. Indian Courts had been charged with the punishment of religious offenses since the eighteen-eighties, and education clearly played a key role in in defining the provisions of these Religious Crimes Codes (RCC). Indians were not only jailed for dances, but for interference with the education of Indian youth. Sections 'a' and 'c' of the codes provide a number of clues as to the rationale behind imprisonment Indian offenders:

(a) Dances, etc. -Any Indian who shall engage in the Sun Dance, scalp dance, or war dance, or any similar feast, so called shall be deemed guilty of an offense, and upon conviction thereof shall be punished for the first offense by withholding of his rations for not exceeding ten days or by imprisonment for not exceeding ten days; and for any subsequent offense under this clause he shall be punished by withholding his rations for not less than ten nor more than thirty days, or by imprisonment for not less than ten nor more than thirty days.

"c) Practices of medicine men. -Any Indian who shall engage in the practices of so-called medicine men, or who shall resort to any artifice or device to keep the Indians of the reservation from adopting and following civilized habits and pursuits or shall adopt any means to prevent the attendance of children at school, or shall use any arts of a conjurer to prevent Indians from abandoning their barbarous rites and customs, shall be deemed to be guilty of an offense, and upon conviction thereof, for the first offense shall be imprisoned for not less than ten nor more than thirty days: *Provided*, that for any subsequent conviction for such offense the maximum term of imprisonment shall not exceed six months.[164]

Again one should note that the author of this code could hardly admit to the religious nature of the behavior that he had targeted for criminal sanctions. And yet there can be little doubt that he had assigned a religious significance to that behavior, a significance underscored in the circular of 1921. Here BIA policy cast the significance of Indian ceremonies and spiritual leadership in terms of a long standing master-narrative about the relationship

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[163]American Indian Religious Freedom Act Report of 1979, 5-6.

[164]U.S. Department of the Interior, Report of the Commissioner of Indian Affairs, (August 27, 1892) 29.

between civilization and so called primitive superstition.[165] The assumption of cultural superiority implicit within this theme placed any relevant native practices within the semantic domain of "religion," but only by negative juxtaposition with valued religious traditions.[166] The language used in these codes therefore provided Native American religions with a role comparable to that used by the Marshall court in defining the status of Indian tribes, effectively putting into practice an assimilationist theory of trust doctrine. Hence, Indian religion would be understood in the familiar terms of a historical contrast between primitive culture and Euro-American civilization, effectively placing Indian ceremonies on par with other areas of Indian culture targeted for change. The religious significance of Indian dances as well as the practices of medicine men therefore emerged out of the indexical patterns of Indian-white relations. Whatever the term "religion" could be meaningfully said to denote in reference to Native American culture, the use of the term

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[165]James Axtell writes that early French missionaries did not at first believe Native Americans possessed religion, and tended to regard them as superstitious heathens, The Invasion Within: The Contest of Cultures in Colonial North America, (New York and Oxford: Oxford University Press, 1985) 7-19. See also Francis Jennings, The Invasion of America: Indians, Colonialism, and the Cant of Conquest, (1975. New York and London: W. W. Norton & Company, 1976) 43-57. This view of Native Americans was complemented by colonial attitudes toward Africans, who formed the prototypical "heathen" for British sensibilities. See Winthrop D. Jordan, The White Man's Burden: Historical Origins of Racism in the United States, (London, Oxford, and New England: Oxford University Press, 1974) 10-13. The presumption of religious superiority towards "primitives" in general combined with visions of secular development under the ideology of American imperialism, creating a sense that a growing U.S. could serve as the salvation for Native Americans. See William Appleman Williams, Empire as a Way of Life: An Essay on the Causes and Character of America's Present Predicament Along with a Few Thoughts About an Alternative, (1980. Oxford: Oxford University Press, 1982) 27-30. About the turn of the century, these presumptions of superiority combined with a sympathy for the condition of reservation Indians to create a renewed push for assimilation. See, Frederick E. Hoxie, A Final Promise: The Campaign to Assimilate the Indians, 1880-1920, (1984. Cambridge: Cambridge University Press, 1989) 15. By defining aid to Native American communities in terms of a progress in which Indian ceremonial practices were built by definition into the bottom end of the scale, policy makers could interpret direct attacks on select aspects of Native life as genuinely beneficial reforms.

[166]Use of terms such as "superstition" or "heathen" serve to remove the beliefs and practices to which they are applied from the realm of plausible belief systems. In the words of Thomas Hobbes; "Fear of power invisible, feigned by the mind, or imagined from tales publicly allowed, Religion; not allowed, Superstition. And where the power imagined is truelly such as we imagine, True religion." Leviathan, 124. It is this same line of reasoning that leads Axtell to note that the term "superstition" normally serves to denigrate someone else's beliefs, 13.

effectively conveyed a something about the interactional significance of native ceremonies as an obstacle to the program of assimilation.

For the BIA religion was only indirectly at issue, as a point of theoretical contrast to native practices which were in direct competition with its own policies. Section 'c' of the code articulated a policy against "so-called medicine men" and added to this section a list of activities which would interfere with the education planned for Indian children and for the tribes as a whole. It might perhaps have been more appropriate to speak of genuine "medicine men" and a "so-called school," but in any event it is clear that that the Office of Indian Affairs held these practices to be incompatible. Moreover, the high strategic value of education is reflected in the comparatively stiff penalty provided for second offenders in section 'c'. The BIA's education policy was an important plank in the plan for eradication of Indian cultures, and the agency viewed continuation of traditional Indian ceremonies and healing practices as obstacles to that end. Hence, BIA's education policy required the forced suppression of Indian "superstitions," resulting in this case in the forcible confinement of the Taoseño council members.[167]

Over the centuries since the Spanish first came into the Southwest the Taoseño have understandably developed a reluctance to communicate information about their religion to

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[167]The imprisonment of Indians for religious offences involves a kind of performance trope. Commentators have generally embedded the imprisonment of the Taos elders in a narrative relating to early BIA policies of assimilation. This creates the impression that imprisonment of the Taos elders constituted an instrumental activity designed to aid an established authority in efforts to achieve an end value distinct from the significance of the imprisonment itself. Such accounts thus convey the explicit policy stance of the bureau itself in explaining its reasons for imprisoning the Taos elders. Yet, the ability to forcibly imprison any practitioners of traditional Indian ceremonies, ostensibly posed as an instrumental practice, could actually be seen as the real end value behind the action. In this respect the imprisonment of Taos elders could be seen as a performative demonstration of the cultural superiority assumed in assimilationists policies. In proving the capacity for domination of Indian religious authorities, such institutional violence demonstrated, as a practical fact, a form of superiority presumed in an assimilationist perspective. Hence, use of force in the implementation of BIA policy demonstrated the sense of authority presupposed in forming the policy itself. The confinement of Taos authority figures therefore provided a kind of "transcript," to borrow the language of Alan feldman, demonstrating Commissioner Burke's sense of the relationship between his agency and American Indians. Hence, the denotational texts describing BIA policy at the time may have assigned the decision to imprison native practitioners an instrumental value as a means of furthering other goals, but the actual implementation of the Religious Crimes Codes would have a more immediate interactional significance insofar as the practice itself served to affirm the ideological position defining BIA authority over Indians in the first place. C.f. Allen Feldman in Formations of Violence: The Narrative of the Body and Political Terror in Northern Ireland, (Chicago and London: University of Chicago Press, 1991) 1-9.

outsiders.[168] This secrecy about sacred matters has therefore had a certain strategic value, one which did not emerge with the Office of Indian Affairs. At the time that Elsie Clews Parsons studied the Taos Indians the sense of fear associated with information about sacred matters had become so pervasive that potential informants feared that death by supernatural causes would follow disclosure of secrets.[169] Moreover, Taoseño members found telling such secrets faced a more tangible corporal punishment in the form of a whipping and a fine.[170] When a Taos man who had been working on a history of the Pueblo died,

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[168]Naturally, Taos problems with outside interference in their religion did not begin with the BIA, and the behavior of Spanish missionaries must also have added to Taos concerns over the need for secrecy. In the eyes of many scholars this long history of abuse explains the secretive nature common to Pueblo ceremonial systems. See Gordon-McCutchan, 6; Edward P. Dozier, The Pueblo Indians of North America, (1970. Prospect Heights, Illinois: Waveland Press, Inc., 1983) 97; Edward H. Spicer, Cycles of Conquest: The Impact of Spain, Mexico, and the United States on the Indians of the Southwest, 1533-1960, (Tucson: University of Arizona Press, 1962) 185-86; John J. Bodine, "Blue Lake: A Struggle for Indian Rights," American Indian Law Review, 1 (1973) 25. As it stands now the need for secrecy must be considered a major feature of the Taos religion itself, rather than a function of continued friction with outsiders. The degree to which this aspect of Taos culture may be due to past abuses remains an open question, one that that involves far more than just the specific case of the Taos Indians. See, for instance, Howard Stambor's plea for a general study of the impact of religious oppression on current Indian practices "Manifest Destiny and American Indian religious Freedom: Sequohyah, Badoni, and the Drowned Gods," American Indian Law Review, 10 (1982) 60-62.

Elizabeth A. Brandt offers another interpretation of Taos approaches to secrecy, stressing the function of internal constraints over control of knowledge rather than concern over the actions of outsiders. She argues that the primary reason for limiting the flow of information to outsiders is that this flow of such information to outsiders constitutes a loss of control over ceremonial knowledge, leading to the prospect that such information will come back to unauthorized members of the Pueblo and disrupt the appropriate patterns of ritual authority, "On Secrecy and the Control of Knowledge" 123-146 *passim.*

Of course, it is possible to stress both aspects of secrecy at Taos. C.f. Carol Chiago Lujan, "A Sociological View of Tourism in an American Indian Community: Maintaining the Cultural Integrity of Taos Pueblo," American Indian Culture and Resource Journal, 17 (1993) 104. Concern over actual oppression by outsiders coincides with the need to control the availability of ceremonial knowledge within the Pueblo itself. Hence, approaches stressing conflict with outsiders and those stressing control over the internal distribution of ceremonial knowledge are consistent with one another in many respects. Both concerns may serve as adequate motivation for the same behavior, and the distinction between them may or may not arise depending on the salience of cultural boundaries to any particular situation. In fact, any problems related to the need to distinguish one or another form of motivation should indicate the tenuous nature of cultural boundaries, or rather; the contextual status of tropes wherein cultures are imagined to have boundaries.

[169]Elsie Clews Parsons, Taos Pueblo, General Series in Anthropology, Number 2. (ed.), Leslie Spier (Menasha, Wisconsin: George Banta Publishing Company, 1936) 15.

[170]Parsons, 14. This is also supported by Merton Leland Miller, A Preliminary Study of the Pueblo of Taos New Mexico, (Chicago: University of Chicago Press, 1898) 42.

members of the tribe are reported to have burned the text.[171] The publication of Parson's own book on Taos Pueblo caused considerable concern among the Taoseño, possibly leading to sanctions against a suspected informant.[172] Hence, Taos authorities met the institutional force imposed by outsiders with institutional sanctions over its own people.

In contrast to the concealment of religious matters in specific areas of Taos culture, another more general response to BIA policies involved a direct clash over the importance of religion to native culture. In the atmosphere of general repression prominent during the nineteen-twenties community leaders from the Pueblo tribes of New Mexico collaborated to produce the following statement:

> Our religion to us is sacred and is more important to us than anything else in our life . . . . Our happiness, our moral behavior, our unity as a people and the peace and joyfulness of our homes, are all part of our religion, and are dependent on its continuation. To pass this religion, with its hidden sacred knowledge and its many forms of prayer, on to our children, is our supreme duty to our ancestors and to our hearts and to the God whom we know.[173]

The passage is most significant in view of the fact that it meets the BIA's policy of religious intolerance in its own terms. The statement clearly affirms a stake in religion as such, and frankly commits to its continuation through the education of Indian children in traditional Pueblo ways. The release of this manifesto was a response to a policy which had already labeled and targeted various practices as having a religious significance, and so the statement's frankness did not necessarily entail a disruption of concealment strategies. In accepting the adequacy of the term "religion" as a description of their ceremonial practices, however, the statement bypassed a major source of contention. The word "religion" is itself quite heavily loaded in Euro-American traditions, and for the most part it is entirely absent

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[171]Parsons, 16.

[172]Brandt, 128n.

[173]This passage comes from Joe S. Sando, The Pueblo Indians, (San Francisco: The Indian Historian Press, 1976) quoted in Gordon-McCutchan, 17. A complete version of the statement was made available in 1992 in another publication by Joe S. Sando, Pueblo Nations: Eight Centuries of Pueblo Indian History, (Santa Fe, New Mexico, Clear Light Publishers, 1992) 92-96.

in Native American languages.[174] Such lexical asymmetry may not necessarily indicate a significant difference in social morphology, but the articulation of any Indian political agenda in terms of "religion" places such questions momentarily out of the picture.

Elsie Clews Parsons tells us that on being asked to identify Indian religion a Taos native responded by saying that it was "life."[175] Such cryptic statements only allude to the kind of problems entailed by the use of the term "religion" in the context of Indian beliefs and social organization. Robert S. Michaelsen writes that "modern western" cultures tend to break up various segments of their social systems into isolated spheres of activity, and yet this tendency is lacking in traditional Indian cultures.[176] Whereas religious activities are not part of an isolated sphere of traditional Indian culture, use of the word "religion" to describe an Indian practice implies a relatively exclusive category of activity. Moreover, legal and political norms for dealing with religion in America often rely heavily on the ability to distinguish religious activity from other areas of social life such as economics or politics. The Pueblo statement attempted to expand the scope of denotational reference comprehended by the term "religion" by explicitly relating it to all aspects of Pueblo life, thus finessing the awkwardness of discourse about "Pueblo religions" as such. Having formed its response to BIA authority by first conceding to the basic vocabulary of Euro-American social organization, the Pueblo Indians could neither operate within the normal constraints of that category nor directly address its applicability to their own interests. Accordingly the Pueblo statement printed above includes an attempt to redefine religion as a category referring to all aspects of life.

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[174] The observation of this fact is common-place in scholarship on Indian religion. On its relevance to the American Indian Religious Freedom Act, see Michaelsen, "American Indian Religious Freedom Act Litigation," 49.

[175] Elsie Clews Parsons, Pueblo Indian Religion, Volume I (Chicago: University of Chicago Press, 1939) preface.

[176] Michaelsen, "American Indian Religious Freedom Act Litigation," 49.

"Religion" certainly represents a plausible gloss for a number of Indian practices, it may even be the most appropriate English term available for them; but the usage remains problematic. If indeed many Indian practices may be placed in the nominal category of "religion," one could not use the customary sense of the relationship between this term and other Western categories of social organization as an accurate guide in assessing Indian perspectives. Moreover, the commitment to defense of an Indian religion is itself a long way from acknowledging the specific significance that religion holds within a civil libertarian tradition. Native Americans appeals to a sense of religious freedom are therefore likely to denote an odd range of legal interests. The peculiar denotational scope of Native American appeals to "religious freedom" is matched, however, by the peculiar context of Indian-white relations, particularly insofar as such claims may be affected by trust doctrine. Trust doctrine provided the basis or an immediate government interest in the spiritual welfare of Indians, leading initially to abusive policies such as the Religious Crimes Codes. When re-framed in terms of the values associated with religious freedom, trust doctrine would provide an unusually direct government interest in the welfare of Taoseño religion. Whereas the rhetoric of religious freedom normally relates to an exclusive set of activities and entails a limit to government interests, its use by Native Americans would apply to a broad range of activities and tie them to a positive government interest in the form of trust doctrine.

Taos officials and their legal representatives fashioned the details of this rhetoric through debates over the status of Blue Lake. Over the course of events surrounding Blue Lake various lawyers, Taos Indians, tribal members, elders, and other locals acted in ways which transformed the tacit logic of Indian-white relations, creating a climate of opinion under which Indian "religion" might be understood in a positive light. This rhetoric turned on a vocabulary which, like that used in the Religious Crimes Codes, failed to accurately represent the social organization of the Pueblo itself. Complying with terms supplied largely by representatives of the federal government, the Taoseño would extend the

denotational scope of the term "religion" to fit their own interest in Blue Lake, and in doing so lay the foundation for future government interest in Native American "Religion."

A Brief History of Blue Lake.

At its beginning the conflict over Blue Lake had little to do with the rhetoric of religion much less religious freedom. The issue began and remained in substance a dispute over environmental policy toward the lake and its watershed. Initial removal of Blue Lake from the tribe's control was not even the result of any special malice by federal officials. Whereas the Spanish and Mexican governments had *de facto* recognized Taos ownership over any territories occupied and used exclusively by the Pueblo, the United States Government recognized the Taos claims to only about 17,000 acres of land formally acknowledged under the Spanish. Since Blue Lake lay outside of the Spanish land grant, the treaty of Guadalupe Hidalgo left the tribe without legal title to an area which had traditionally been left to their control.[177] So, at the turn of the century the legal status and future of Blue Lake lay in an ambiguous position. Continued Taos control over the lake became unlikely as Americans grew increasingly more active in the region. Increased non-Indian activity in the area of Blue Lake furthermore disturbed the ceremonial practices of the Taoseño who had long regarded the lake to be sacred along with its watershed.[178] So, by the turn of the century, events at Blue Lake had become a major source of concern to members of the Pueblo.

Members of the Pueblo had expressed their concerns to government officials during the Roosevelt administration, and federal authorities apparently subsumed these complaints under its own concerns over environmental conservation through the creation of forest reserves. A mutual concern over the destructive impact of future development provided a

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[177]See Pueblo of Taos v. The United States of America, 15 Indian Claims Commission, 666-82 (September 8, 1965).

[178]See Gordon-McCutchan, 9-10.

reasonable link between the interests of conservationists and those of the Taos Indians. This led to the creation of the Taos Forest Reserve in 1906, which effectively negated any tribal claims to aboriginal title. While this move clearly subordinated the Taos interests in Blue Lake to the environmental policies of the Forest Service it appears that the initial Taoseño outlook was positive. The Taos Indians did not not fully understand the legal implications of Roosevelt's action, and they were given to believe the area would be managed under principles consistent with their own interests. Moreover, the Forest Service initially managed the region so as to protect the area's sanctity for the tribe's own purposes.[179] So, the creation of the reserve compromised the abstract legal position of the Taos Pueblo even as the move offered a tangible source of protection for the lake and its watershed.

Whatever informal understandings guided the early policies at the forest reserve, it was not long before differences between the interests of the Forest Service and those of the Taos Indians became evident. Under the Forest Service a multiple use policy served as the guiding principle of management, and this entailed both recreational use and careful harvesting of the area's natural resources.[180] Whereas the Taos Indians considered any commercial use of the sacred Lake and its watershed completely unacceptable, the principle ecological concerns of the Forest Service lay in the need to preserve the area's natural resources for the purpose of sustained use by a diverse number of outside interests.[181] Far from synonymous, it was soon evident that the ecological perspectives of the Forest Service and the Taos Indians were diametrically opposed.

Under the sustained yield policies of the Forest service the significance of Blue Lake was largely a question of potential development. By structuring an ecological policy

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[179]Gordon-McCutchan, 10-14.

[180]Gordon-McCutchan, 12.

[181]Gordon-McCutchan, 7-9.

around a concept of natural resources the conservation practices of the Progressive era defined environmental problems in terms of market conditions.[182] The Forest Service accordingly brought a centralized planning system which was intended to preserve natural resources for future economic use.[183] Moreover, Forestry policy was often open to influence from a range of commercial interests, and at times this could produce the very resource depletion that such policies were designed to prevent.[184] The assumption of federal control over Blue Lake thus entailed an opportunity for outsiders to begin modest commercial exploitation of the area around the lake. In sum, the Forest Service deliberately produced changes in the lake environment whereas the Taos Indians had preferred at least to prevent artificial changes from taking place.

Contemporary environmentalists as well as Indian activists are quick to call attention to the problems associated with progressive era conservationism. Today many would characterize conservationist policies as movements toward efficiency, thus highlighting the fact that such policies have been largely concerned with the means to better use of resources rather than with preserving an intrinsic environmental value.[185] Environmentalists often employ a distinction between ends and means to distinguish themselves from conservationists. Environmentalists (including many Indians for whom adherence to an environmental ethic constitutes source of ethnic identity) hold that nature has an intrinsic value. Both environmentalists and Indian activists are therefore quick to

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[182]Arthur F. McEvoy, "Toward an Interactive Theory of Nature and Culture: Ecology, Production and Cognition in the California Fishing Industry," The Ends of the Earth: Perspectives on Modern Environmental History, ed., Donald Worster, (1988. Cambridge: Cambridge University Press, 1989) 219-224.

[183]Gordon-McCutchan, 6-9; McEvoy, 219-224.

[184]Gordon-McCutchan cites at least one incident in which the transfer of land near Blue Lake to the Forest Service led prepared the way for a clear-cut. Throughout later debate over the status of the lake the possibility of foresting the region remained a serious incentive to the department of Agriculture's position that Blue Lake should not go to the Pueblo. 36 and *passim*.

[185]Clayton R. Koppes, "Efficiency, Equity, Esthetics: Shifting Themes in American Conservation," in Worster, 232-233.

condemn any approach to the natural environment that reduces it to "instrumental" values.[186] Hence, the tensions that emerged between the Taos Indians and the Forest Service over management of Blue Lake foreshadowed many of the larger divisions reflected in contemporary debate over environmental ethics.

Distinctions between instrumental and end values generally reflect a kind of hindsight, reflecting on practices wherein the initial relationship between means and ends seemed unclear.[187] A sense of history is therefore crucial to the abstract ideological position distinguishing utilitarian from end-values. Such a process is particularly evident in the history of Blue Lake wherein the initial innovations for dealing with the lake acquired implications which increasingly drove a wedge between the interests of the tribe and those of Forest Service. The eventual position taken by the Pueblo, that their own interests were inconsistent with the management principles guiding the Forest Service, would rest on a record of missed opportunities for agreement between the two parties. It is the actual experience of working with the Forest Service which drove the Taoseño to articulate a staunch position about the intrinsic value of the lake. The history of controversy over Blue Lake has in turn provided an exemplary illustration of the values associated with contemporary Indian environmentalism.

In contrast to the Forest Service's visions of development, the Taos Indians were opposed to any alteration of the sacred landscape. For the Taoseño the problem at Blue Lake was never a question of efficiency. The lake was crucial to Taos cosmology, and tribal members made an annual pilgrimage to its banks. This pilgrimage was always made in closely guarded secrecy, making it difficult to find ethnographic material describing the

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[186]Cf. Russell Means, "Same Old Song," 19-33 *passim*; Lynn White Jr., "The Historical Roots of Our Ecological Crisis," Science, 155 (March 10, 1967) 1203-1207 *passim*; Donald Worster, "Hoover Dam: A Study in Domination," Under Western Skies: Nature and History in the American West, (New York and Oxford: Oxford University Press, 1992) 71; Charles L. Woodard, Ancestral Voice: Conversations with N. Scott Momaday, (Lincoln and London: University of Nebraska Press, 1989) 69-71.

[187]Chaim Perelman and L. Olbrechts-Tyteca. The New Rhetoric: A Treatise on Argumentation, trans. John Wilkinson and Purcell Weaver, (1969. Notre Dame: University of Notre Dame Press, 1971) 275.

importance of the event. John J. Bodine, an anthropologist who had completed a doctoral dissertation of Taos Pueblo, has provided the best explanation for the importance of the lake in Taos life. He summarized the Taos interests in Blue Lake in terms of four points: The Taos people needed to "control of the entire region" around the lake; the complete ecological balance of the area had to remain undisturbed in order to protect plants used in ritual; they had to prevent non-Indian presence at secret rituals (because non-Indians would act as sources of contamination and diminish the spiritual power of the ceremonies); and the tribe needed to protect its religion as an integral part of the Pueblo's culture.[188] These general remarks indicate the degree of stress caused by outside presence at Blue Lake, and even by the proceedings necessary to impress Taos needs on public officials. Hence, the tribe held a vital interest in the lake and its surrounding region, one which could not be fully communicated. So long as Blue Lake remained in the control of the Forest Service this vital interest in Blue Lake was protected only by an informal understanding of the sort quickly lost in a Bureaucracy such as the Forest service.

In 1910 the assistant commissioner of Indian Affairs, F. H. Abbott, proposed the creation of an executive order reservation at Blue Lake using 3,200 acres of public land and 41,440 acres of national forest. This plan was stifled by the Forest Service, and a second attempt was likewise rejected by officials in Indian Affairs anticipating the objections of the Forest Reserve. In 1916 Eliot Barker assumed control of the Carson National Forest and pursued a vigorous multiple use policy at Blue Lake. He cut trails into the area, stocked Blue Lake with fish for recreational harvesting, and forced the Taoseño to allow cattle grazing on one side of the lake; thus ending exclusive use of the watershed by the Taos Indians.[189] Such actions naturally fueled tribal interest in changing the legal status of the lake, even as their initial efforts to accomplished this met with failure.

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[188]Bodine, (1973) 30.

[189]See Gordon-McCutchan, 15-16.

Another threat to the Taoseño came in the wake of United States v. Sandoval, rising out of subsequent attempts to legitimize squatters' claims to Pueblo lands via the Bursum Bill.[190] When the United States assumed control over New Mexico many local residents argued that the Pueblo Indians had effectively become United States citizens, (though the states of both New Mexico and Arizona continued to deny Pueblo voting rights well into the nineteen-forties).[191] For a time this placed the Pueblo Indians in an awkward situation; they possessed neither the complete rights of state citizenship, nor the corporate rights afforded Indian tribes under federal trust status.[192] In the 1913 case of the United States v. Sandoval the U.S. Supreme Court affirmed that Pueblo territories did in fact constitute Indian lands governed by principals of trust status.[193] This decision provided Pueblo lands with much the same protections that had obtained in the original Cherokee land cases, effectively preventing the transfer of individual title to non-Indians. Absent a clear legal precedent affirming the trust status of a pueblo tribe, non-Indian residents on Pueblo lands could plausibly claim to have secured title to the land on which they lived. The Sandoval decision, however, effectively denied many non-Indians legal title to their homes, many of which had been occupied by the same families for generations. Local efforts to remedy this situation by securing title for the squatters living on Pueblo lands through federal legislation

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[190]Gordon-McCutchan, 17.

[191]See Willard H. Rollings, "Indian Land and Water: The Pueblos of New Mexico (1848-1924)," American Indian Culture and Resource Journal, 6 (1982) 4-5; Daniel McCool, "Indian Voting," American Indian Policy in the Twentieth-Century, ed., Vine Deloria Jr. (Norman: University of Oklahoma Press, 1985) 106-16 *passim.*

[192]Rollings, 4-5.

[193]The case involved a challenge to Congressional legislation prohibiting sale of liquor on an Indian reservation, which the State of New Mexico argued constituted an infringement upon its own police powers. Writing for the Court, Justice Van Devanter declared that "The question to be considered, then, is whether the status of the Pueblo Indians and their lands is such that Congress competently can prohibit the introduction of intoxicating liquor into those lands notwithstanding the admission of New Mexico to statehood." In answering this question in the affirmative the Court also provided an implicit answer to the claims of squatters living on Pueblo lands. See United States v. Sandoval, 231 U.S. 28-49 (1913).

would in turn threaten the territorial integrity of Pueblo tribes all across New Mexico and Arizona.

Taos Pueblo stood to loose a considerable amount of its lands in the conflict over squatters rights. Its leadership had at one time allowed a substantial number of non-Indians to live in the area to help defend against raids by other tribes.[194] Estimates as of 1898 suggested that the Taos Indians occupied only about half of their actual land grant, placing the other half in the hands of Anglo and Mexican squatters.[195] Following the Sandoval decision Senator Holm O. Bursum drafted a bill that would have enabled squatters to establish title to any lands on which they could prove occupancy since June 10, 1910.[196] The Senate passed the Bursum bill without a vote, but it was recalled from consideration in the House at the request Senator William Borah.[197] The Bursum Bill eventually died in subsequent committee hearings, and in 1924 it was replaced by the Pueblo Lands Board. The Pueblo Lands Board was authorized to determine whether or not various non-Indians had maintained continuous occupancy on Pueblo lands since 1902, and to compensate any parties for lands lost over the conflicting claims.[198] In theory the Pueblo Lands Board provided a reasonable means of accommodating non-Indians residing in Pueblo territory without presenting a direct threat to the integrity of Pueblo lands. In practice the Pueblo Lands Board often cheated Pueblos out of valuable resources, and this was particularly true of its dealing with Taos.

When the Bursum Bill gave way to the Pueblo Land Act the Taos Pueblo offered to concede the claims made by squatters on their land if the Pueblo Lands Board would

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[194]Miller, 16.

[195]Miller, 16.

[196]See U.S. Congress, Senate, Congressional Record, vol. 62 (September 11, 1922) 12323-25.

[197]See U.S. Congress, Senate, Congressional Record, vol. 64 (December 21, 1922) 806-9.

[198]Pueblo Lands Act, Statutes at Large, 43 (1924).

recommend a transfer of Blue Lake from the Forest Service to the Interior Department as an executive order reservation. Thus, the Taos Indians proved flexible and persistent in their attempts to secure Blue Lake. Ironically, the chairman of the Lands Board saw the Taos offer as an opportunity to prevent the annual religious ceremonies at Blue Lake, because the transfer of jurisdictions would enable the Interior Department to exercise direct control over activities conducted at the site.[199] By this time the ceremonies at Blue Lake had become the subject of numerous rumors, creating an atmosphere of general suspicion among outsiders. Left to their imagination by the secrecy of the annual ritual taking place at Blue Lake, the non-Indian public had dreamed up stories about everything from a history of human sacrifice to the practice of communal orgies.[200] Public opinion at the time generally favored the suppression of Taos religion. The federal bureaucrats, however, were apparently less flexible in their approach to the issue than the Taoseño as the Lands Board made no such recommendation; though they did accept the tribe's concessions regarding local claims on their land without disclosing the reason for it to the public at large.[201] When the tribe appealed directly to Commissioner Burke for title to the area, the Department of Agriculture, objected out of concerns over the value of its timber.[202] Thus Taos Pueblo forfeited substantial legal claims in an unsuccessful effort to barter land claims for control of Blue Lake.

In 1927 Taos lawyers worked out a cooperative agreement for use of Blue Lake with the Forest Service. This agreement left control of Blue Lake in the hands of the Forest

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[199]See Gordon-McCutchan, 18.

[200]Gordon-McCutchan, 18; Wood, 72-73; Parsons, 99. Amid all of the controversy over the nature of the ceremonies conducted at Blue Lake, John Collier and James W. Young were invited to witness the ceremonies at Blue Lake, but they were prevented from completing the entire pilgrimage. Collier's experience is related in his book, On the Gleeming Way: Navajos, Eastern Pueblos, Zunis, Hopis, Apaches, and Their Land; and Their Meanings to the World, (1949. Denver: Sage Books, 1961) 120-128.

[201]See Pueblo of Taos v. The United States of America, 15 Indian Claims Commission, 685 (September 8, 1965).

[202]See Gordon-McCutchan, 18-19.

Service, but it also committed the Forest Service to policies consistent with the Taoseño sense of proper treatment of Blue Lake. For example, mining was prohibited by executive order for 30,000 acres of the Rio Pueblo Basin. The Pueblo had no mechanisms by which to enforce the terms of the agreement, however, and so it broke down over time as a result of infractions by the Forest Service. The agreement allowed the Forest Service to take measures normally associated with care of national forests, but they took additional steps which were insulting to the tribe. The Forest Service allowed numerous visitors to the area without informing the tribe, and they constructed a cabin within sight of the lake itself. Taos leadership thus began to look for more substantial means of protecting Blue Lake. Under the cooperative agreement protection of this sacred site was contingent on bureaucratic policies easily changed through administrative discretion. A more secure source of political power would have to come from a source other than the specific policy provisions of the Forest Service.[203]

The Taoseño soon received help from John Collier, the very Commissioner of Indian Affairs responsible for the Indian Reorganization Act. Collier had once lived in Taos, and he been active in the struggle to defeat the Bursum bill. Before his appointment as Commissioner of Indian Affairs Collier had formed the Indian Defense Association, an organization active in Senate investigations relating to the activities of the Pueblo Lands Board. These investigations revealed that the Board had regularly paid the Pueblos far less than the market value for lands lost to squatters.[204] In 1933 Congress approved funds compensating various Pueblos for the remaining value of lands lost under the provisions of the Pueblo Lands Act, and Taos pueblo secured a provision authorizing a fifty year permit

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[203]See Gordon-McCutchan, 20-22.

[204]See Pueblo of Taos v. The United States of America, 15 Indian Claims Commission, 666 (September 8, 1965); Pueblo of Taos v. The United States of America, 24 Indian Claims Commission, 406 (February 10, 1971); Pueblo of Taos v. The United States of America, 24 Indian Claims Commission, 414 (February 10, 1971).

for use of the lake and its watershed.[205] The permit was finally established in 1940, largely through the efforts of Collier himself, granting the Taoseño limited use of Blue Lake and much of its watershed. Relations between Taoseño and the Forest Service were heavily strained under this agreement, however, and Taos efforts to obtain portions of watershed not included in the permit were blocked consistently by the Department of Agriculture. Hence, Collier's solution to the Taoseño's problems at Blue Lake proved unsatisfactory; they lead only to further conflict with the Forest Service.[206]

In 1946 Congress passed the Indian Claims Commission Act, enabling Indian tribes to sue the federal government over a variety of issues including treaty violations.[207] This act authorized only monetary compensation for successful lawsuits, but Taos Pueblo made novel use the Commission to secure moral backing for its claims on Blue Lake. The Pueblo council authorized its lawyers to take its case before the Indian Claims Commission. These lawyers gained a favorable ruling regarding the facts of their case from the Indian Claims Commission, but they did not seek to recover any monetary compensation.[208] Instead Taos Pueblo used the findings of the Indian Claims Commission to build its political case for restoration of trust title over Blue Lake.[209] This strategy would eventually prove successful, though it would require an extensive public relations campaign.

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[205]See section four of the Statutes at Large, 48 (May 31, 1933) 109-10.

[206]See Gordon-McCutchan, 23-43.

[207]Indian Claims Commission Act, Statutes at Large, 60 (1946).

[208]The Commission determined that Taos Pueblo possessed aboriginal title to Blue Lake and the surrounding region when the United States assumed control over New Mexico under the treaty of Guadalupe Hidalgo, and that the tribe had retained exclusive use of the region until it was placed under the control of the Forest Service in 1906. See Pueblo of Taos v. The United States of America, 15 Indian Claims Commission, 666 (September 8, 1965); Pueblo of Taos v. The United States of America, 22 Indian Claims Commission, 444 (February 18, 1970).

[209]See Gordon-McCutchan, 44-63.

"Religion" and the Rhetorical Packaging of Taos Interests.

Blue Lake embodies a concrete value within the Taos universe, representing the source of life and the site of emergence.[210] Naturally, the Taoseño can relate Blue Lake to a body of abstract values defined in terms their own cosmology. In order to compel changes in federal policies affecting the lake and its watershed the Taos Indians had to resort to abstract sources of rhetorical value salient to other Americans. Such abstract values would have to denote ideas appealing to the American public and to some institutional base of authority within the framework of American politics. Taoseño attempts to articulate their interest in Blue Lake therefore required both a translation from concrete to abstract values and a problematic inference across culture schemes.[211] Likewise, changes in the official institutional structure surrounding control of Blue Lake would entail changes in the abstract values governing policies affecting the Lake.

The initial transfer of Blue Lake and its watershed to the National Forest Service effectively defined the region as a natural resource whose value could be defined by market conditions. Forest Service policy differed from normal market conditions, however, in its attempts to discount the present value of Blue Lake for the use of future generations. Assumption of control over the lake had initially been attractive insofar as it served to centralize authority over and provide a shelter from exploitation by private interests. By placing the lake into a forest reserve the Roosevelt administration could therefore be seen as offering a shield against aspects of the market system. The policy did little to prevent the comodification of resources at Blue Lake, however, though it did provide a forum wherein the Taoseño could assert a collective interest in the region and negotiate that interest with government officials. When dialogue with the Forest service proved ineffective, the tribe attempted to find another means of negotiating the status of Blue lake with outsiders,

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[210]Parsons, 11; Miller, 42.

[211]On the distinction between abstract and concrete rhetorical values, see Perelman and Tyteca, 77-79.

eventually settling on efforts to obtain trust title to the region. This would effectively give the tribe direct control over the Blue Lake and its resources, placing them in a position to define its significance in terms consistent with their own cosmology, and to dictate the values guiding any human interaction with the lake itself. Appeal to religious freedom would provide outsiders with a rough sense of the values defining Taos interest in Blue Lake and allow the tribe could interact with the lake and its its environment in terms of their own cosmology.

If appeal to "religious freedom" did not clarify the exact nature of Taoseño interest in Blue Lake, this abstract principle had the negative virtue of excluding many of the things to which the Taoseño were themselves opposed. Within the proper context, religious values would constitute a limit on market sensibilities for most Americans, and notions of religious freedom would be readily understood as a limit to government interest. Therefore, appeal to "religious freedom" could successfully imply the conditions of sanctity and secrecy defining Taos interest in Blue Lake, even if the abstract values denoted by the phrase itself did not really match those normally used by Taoseño themselves. Moreover, the implications of appeal to "religious freedom" had the additional virtue of generating potential allies in the non-Indian public. Given the combination of spiritual concerns with a specific environmental feature, this strategy had a certain additional appeal to both religious and environmental organizations.[212] So, an appeal to "religious freedom" could generate a plausible case for Taos interest in Blue Lake, and the language of this appeal placed the Taoseño in a position to garner much needed support from outside groups.[213]

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[212]Gordon-McCutchan, 137.

[213]Some measure of the success of this campaign can be gathered from the appearance of favorable media coverage both before and after passage of the Blue Lake Amendment. See "Taos Pueblo Indians Seek Sacred Lake," Herald Examiner, (April 16, 1966) B-2; Keith Green, "As History Sees It," Taos News, (April 19, 1966); "The Indians Need Blue Lake," New York Times, (July 17, 1968); "Restore the Taos Lands," Washington Post, (July 30, 1968) A8; Warren Weaver, Jr. "Nixon to Sign Pueblo Bill," New York Times, (December 3, 1970); Jack Waugh, "Indians Smile at Last," Christian Science Monitor, (December 4, 1970) 2; "New Era in Indian Affairs," Time, (December 14, 1970) 49.

The term "religion" remained an imperfect gloss for Taoseño interest in Blue Lake, however, and this generated a number of problems for the campaign to obtain trust title. Many conservationists, for example, were quite displeased with the notion that Congress might set aside a segment of public land for the specific use of an Indian tribe. Organizations such as the National Wildlife Organization, the New Mexico Wildlife & Conservation Association, Inc., and the Sportsmen's Legislative Action Committee of New Mexico opposed the move, arguing for a continuation of established conservation policies in conjunction with an exclusive use agreement between the Forest Service and the Pueblo.[214] These organizations voiced a number of concerns, one being that wealthy members of the tribe really wanted to use the lake for commercial purposes.[215] Congress eventually resolved the prospect that Taos leaders might use Blue Lake for commercial gains by arranging to have the lake and its watershed designated a wilderness region even as it was given over to the tribe.[216] This provision effectively bound Taos interests in the Blue Lake and its watershed to behavior consistent with the rationale offered by the tribe in support of their case. Yet, many conservation organizations continued to oppose Taos efforts until the very end. As Stewart Udall would later comment; "To most conservationists, once land was designated as a national forest or a national park it became, for them, a different kind of sacred ground . . ."[217]

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[214]Taos Indians - Blue Lake Amendments, (1970) 198-34.

[215]Taos Indians - Blue Lake Amendments, (1970) 198-34. See also Gordon-McCutchan, 102-103.

[216]Gordon-McCutchan, 155; The act itself reads in part, "The lands held in trust pursuant to this section shall be a part of the Pueblo de Taos Reservation, and shall be administered under the laws and regulations applicable to other trust Indian lands: *Provided*, that the Pueblo de Taos Indians shall use the lands for traditional purposes only, such as religious ceremonials, hunting and fishing, a source of water, forage for their domestic livestock, and wood, timber, and other natural resources for their personal use, all subject to such regulations for conservation purposes as the secretary of the Interior may prescribe. Except for such uses, the land shall remain for ever wild and shall be maintained as a wilderness as defined in section 2 (c) of the act of September 3, 1964 (78 stat. 890). Statutes at Large, 1438 (1970)." Indians-Pueblo de Taos-Lands, Statutes at Large, 84, sec. 4b 1681 (1970).

[217]Stewart L. Udall, Foreword to Taos Pueblo and Its Sacred Blue Lake, by Marcia Keegan, (Santa Fe, New Mexico: Clear Light Publishers, 1991) 7.

The secretive nature of Taos religion presented another problem to the activists working on their case.[218] Many of the tribe's supporters were unsure how to represent this facet of Taos interests. Dean Kelly, from the National Council of Churches wrote that discussing the question of secretiveness before a Congressional subcommittee would prove counter-productive:

> I agree that the details of their ceremonies are the Indians' business and not outsiders', but it is not necessary to make more of an issue of it than the Indians do, and they have occasionally divulged some details to non-Indians or permitted non-Indians to see their ceremonies.
>
> It is unreasonable to expect people to give a 'blank check' to the Indians unless they have enough of a glimpse of what is involved to make it convincing. I felt the same until the Tribal Council told me enough about their religious uses of the land to give some texture to their claims. I would be surprised if the committee found the 'secrecy' argument ingratiating. It may be cogent; it is largely true, but it does not tend to elicit cooperation. Instead it tends to 'turn off' even those disposed to help the Indians.[219]

One of the tribe's lawyers, William C. Schaab, answered Kelly's concern over Pueblo secrecy regarding the significance of Blue Lake. Schaab argued in favor of raising the issue as an important way of explaining its religious significance, and as a way of explaining the reluctance of Taos elders to provide detailed information on the subject.[220] Schaab obtained permission from the Pueblo council to decide whether or not to raise the issue of secrecy before Congress, and he considered the subject ar too important not to address.[221]

Although the need for secrecy would eventually prove to be an important plank of the campaign for Blue Lake the issue clearly cut against the tribe interests in many ways. The clearest statement on the tribe's religion actually came from a letter written by the anthropologist John J. Bodine during the final hearings in 1970. In the letter he explained that no particular member of the tribe knew the full extent of their rites and doctrines,

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[218]Gordon-McCutchan, 130.

[219]Dean M. Kelly, to William C. Schaab, esq., 28 March, 1968, Paul J. Bernal Papers, # 46. State Record Center and Archives. 404 Santa Fe, New Mexico.

[220]William C. Schaab, to Dean M. Kelly, 1 April, 1968, Paul J. Bernal Papers, # 46. State Record Center and Archives. 404 Santa Fe, New Mexico.

[221]Schaab to Kelly.

because that knowledge is broken up into various discrete offices. He also mentioned the existence of a number of minor shrines around the lake routinely visited by individual priests at various times during the year, and that the tribe had been reluctant to reveal the full importance of these shrines because that in itself "would cripple their faith."[222] Blue Lake occupied a crucial place in the ceremonial system practiced at Taos, but its significance to that ceremonial system could not be reduced to a single body of doctrines. Moreover, ceremonial experts guarded any explicit knowledge that they possessed about the details of particular shrines and ceremonies, because the ritual efficacy of such ceremonies required an element of secrecy. This placed the Taoseño in an untenable position from the standpoint of free exercise doctrine, because in order to gain federal protection for their ceremonial interests they would have to satisfy Congress that they were indeed practicing a form of religion at Blue Lake.

Today Bodine's letter serves as the most clear public statement about Taos interest in Blue Lake, explaining the reluctance of the tribe to communicate its significance fully to Congress and demonstrating that this reluctance was itself one of the reasons why Congress should act in favor of the Pueblo. Complete disclosure of the religious tenets violated by Forest policy was, according to Bodine, neither feasible, nor consistent with the very interests that the Taos Indians were concerned to defend. Bodine's letter itself threatened the principle of secrecy governing the ceremonial system at Taos, and he was well aware of this.[223] Bodine had been careful to reveal just enough information to help the Taos case, and so he appears to have played a positive role in the history of that Pueblo.[224] Bodine's letter served to resolve the issue of secrecy in favor of the Taos

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[222]See Taos Indians - Blue Lake Amendments, (1970) 299. See also U.S. Congress, Senate, Congressional Record, vol. 116 (December 2, 1970) 39596-8.

[223]Taos Indians - Blue Lake Amendments, (1970) 300.

[224]It appears that Taos elders have looked on Bodine's intervention with approval, because he would eventually author a pamphlet distributed by the Pueblo to visitors, John J. Bodine, Taos Pueblo: A Walk

Indians, though it probably did little to alleviate any genuine concerns about the tribe's motivations.

Part of the tribe's rhetorical strategy for casting Blue Lake as an issue involving religious freedom lay in the conscious construction of a metaphor describing the region as a church.[225] Through reference to a church the tribe's lawyers could effectively touch upon a sense of sacred space familiar to most Americans. Somewhere in the transition from abstract space to actual geography, however, this strategy produced some rather problematic implications. A number of congressman expressed misgivings about the kind of precedent established in returning Blue Lake to the Taoseño on the basis of an appeal to religious freedom. Senator Lee Metcalf, for example, offered the following remarks:

> The Blackfeet Indians have this same worship in Glacier National Park and I would suggest, if this bill passes in the way it came out of the House, there are Indian tribes all over America just waiting at the barrier to have bills introduced to get thousands of acres of land that they can justifiably claim has a spiritual relationship to their tribe.[226]

Many were also concerned about the precedent set by this action as a resolution to a case heard by the Indian Claims Commission.[227] Hence, they asked why Taos religion could not be accommodated by smaller concessions of land which would have been adequate had Blue Lake literally represented a "church" to the Taoseño. William Schaab wrote:

> Many people, including senator (Clinton P.) Anderson, have legitimately asked why the Indians need 48,000 acres for religious purposes. The American concepts of 'church' and 'shrine' do not clearly reflect the Indians' religious view of the Blue Lake area; their frequent use has tended to suggest that the Indians' religious attachment relates to small areas within the total watershed rather than to the watershed as a whole. It has also

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Through Time, A Visitor's Guide to the Pueblo, Its People and their Customs and their Long History, (Santa Fé, New Mexico: Lightning Tree - Jene Lyon, Publisher, 1977).

[225]Michaelsen, "American Indian Religious Freedom Act Litigation," 65-68.

[226]United States Congress, Senate, Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, Taos Indians-Blue Lake, Ninetieth Congress, Second Session, on H.R. 3306, S.1624 and S. 1625, (September 19 and 20, 1968) 62. See Also R.C. Gordon-McCutchan, 140-143.

[227]Taos Indians-Blue Lake, (1968) 62. See Also R.C. Gordon-McCutchan, 140-143.

been unsatisfactory to explain the Indians' attachment to the land in terms of interference with their economic use of the area.[228]

As can be seen, the very suggestive qualities which made this metaphor attractive to the Taoseño effectively inhibited their ability to communicate the full significance that Blue Lake and its watershed had in their cosmology. Describing the area as a church allowed the Taos Indians to present their interest in terms familiar to a predominantly Christian public, but this same metaphor invited a counter-argument inasmuch as the idea of 48,000 acre church seemed a bit of a stretch.

Bodine's letter also provided an answer to these concerns, arguing that the Taos case was entirely unique in view of the complete reliance of the Pueblo on the physical and spiritual integrity of the region around Blue Lake. Bodine argued that Blue Lake constituted a unique feature of the Taoseño cultural landscape, and that the Taos claim to Blue Lake itself was unique among tribal religions:

> I made a very bold statement when I said that if these lands are not returned Taos culture would be destroyed. I was asked by my doctoral examining committee in 1966 the following question: If you had complete power over the Taos and wished to destroy their culture what would you do? I replied unhesitatingly that I would destroy Blue Lake. The question may sound facetious and the answer absurd. But neither is ridiculous. You (Senator Lee Metcalf) pointed out at the hearings that when property is taken from an individual according to our custom he is compensated for his loss with a cash settlement. And so we have properly settled most Indian claims. Let us suppose that we decided to confiscate all the property owned by the Roman Catholic Church in the United States and properly compensated them for it. Would Catholicism cease to exist? Obviously not. As most religions are capable of doing, they could erect churches elsewhere. Even more to the point is that Navaho Mountain is sacred to the Navaho, just as peaks in Glacier are sacred to the Blackfeet, but their entire religion does not depend on those particular shrines and therefore they differ from the Taos case. All of Taos religion is dependent on Blue Lake and its associated shrines in the 48,000 acres in question. They have no other 'church' nor any possibility of constructing one. Therefore monetary compensation for Blue Lake is out of the question. It provides them with no alternative whatsoever. There is only one Blue Lake just as there is only one Mecca.[229]

Thus, Bodine effectively answered questions about the prospect of monetary compensation by distinguishing the Taos claim to Blue Lake from all other Indian claims. Taos Pueblo

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[228]Schaab to Kelly.

[229] Taos Indians - Blue Lake Amendments, (197) 298-300.

could not be adequately compensated for the loss of Blue Lake, but neither could the return of Blue Lake to the Pueblo to Taos constitute a significant precedent, because no other Indian tribe was so dependent on the spiritual significance of one particular geographic feature.

Others answered questions about the precedent set by the return of Blue Lake to Taos Pueblo in moral terms, arguing that it was simply the right thing to do. Morris Udall, for example, responded to concerns over precedent by stating simply that "you never set a bad precedent when you do what is right."[230] The opposition had raised concerns over the practical consequences of the precedent, and Udall's statements served to call attention to the moral dimensions associated with this same term. Swayed by these and other arguments, Congress passed legislation amending the act of 1933 (see above) to place the 48,000 acres in question under trust title. This legislation presented Richard Nixon with a welcome opportunity to demonstrate his goodwill and commitment to an Indian policy based on self-determination. He signed the amendment into law on December 15, 1970, creating Public Law 91-550. The return of Blue Lake could have symbolized self-determination in one other respect as well, because whatever the merits of the legislation; it carried few general implications for Indian policy. In passing the Blue Lake amendment Congress did not commit itself to responding in like form to further cases emerging out of the Indian Claims Commission, or to any future cases involving questions of religious freedom. In the future Congress would have the latitude to reverse its priorities in the face of new demands, and this facet in itself quietly answered many concerns over the precedent set by Blue Lake.

As an historical event, passage of Public Law 91-550 appeared to set an impressive precedent protecting the religious freedom of Native Americans, but many aspects of this event could not be generalized beyond its immediate context. The interactional value of the

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[230]U.S. Congress, House, Congressional Record, vol. 115 (September 9, 1969) 24882.

Blue Lake amendments alleviated many of the burdens normally associated with the rhetoric of religious freedom. The Taoseño called upon abstract notions of religious freedom, but they did not invoke the Free Exercise clause. A free exercise dispute would have placed Taos lawyers in an appellate court, and effectively placed them in an adversarial relationship with the federal government. Instead, the return of Blue Lake took the form of a positive government interest entailed by trust doctrine, as reflected in the provision that Blue Lake and its watershed would be held in trust for the tribe by the federal government.

Notions of "justice" and "religious freedom" may have motivated this legislation, but they were not anchored to concrete bases of institutional authority. Those Congressmen who voted in favor of the Blue Lake Amendments were not responsible for determining the merits of the Taos claims according to a set theory of case law such as the balancing test. This gave individual Congressmen considerable latitude to exercise their own judgement with respect to the authenticity of the tribe's self-representations. Moreover, each Congressmen would have the latitude to change their priorities in future cases. Any Congressmen persuaded in the authenticity of Taos statements about the significance of the lake, could simply vote in favor of the provision without demonstrating to an appellate court that he had been fair to the opposition or that his decision was in accordance with the principles established in past precedent. With passage of the Blue Lake amendment, however, Congress appeared to concede a basic point to its wards in Indian country; that they too possessed a right of religious freedom, and that Congress had a tangible interest in protecting this freedom. Passage of the Blue Lake amendment would therefore serve as a key event in the development of free exercise doctrine as it would relate to Indians.

Chapter III
Religious Prejudice As Principle: The Limitations of a Civil Libertarian Approach to Indian Law.

Congress Shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances.[231]

-First Amendment to the United States Constitution.

No Indian Tribe in exercising powers of Self government shall-

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people to peaceably assemble and to petition for a redress of grievance.[232]

-Indian Civil Rights Act, 1968.

Today the Blue Lake Amendments are generally considered a successful example of legislation protecting the religious freedom of Native Americans. Congress had specifically tailored the provisions of this legislation to meet the needs of Taos Pueblo, however, and so the P.L. 91-550 lacks the open ended consequences of a more general law or Constitutional principle. As a historical event, passage of P.L. 91-550 signalled a revolution in the trust relationship between Indians and the federal government. During the assimilationist era the trust relationship effectively defined all conflict between BIA policy and Indian traditionalist as secular matters, and thus shielded such policies from application of the Free Exercise clause. Now the trust relationship had been used as a basis for protection of a traditional Indian religion, thus providing a novel remedy for a threat to religious freedom. The trust relationship had provided a novel context for arguments claiming a right of religious freedom, and this had enabled Congress to exercise considerable discretion in its evaluation of Taos claims. Hence, Congress had been able to

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[231]United States Constitution, Amendment I.

[232]Civil Rights-Riots-Fair Housing-Civil Obedience, Statutes at Large, Title II, sec. 202, 94 (1968).

finesse the awkward relationship between Indian ceremonies and Euro-American notions about "religion."

Long before passage of the Blue Lake Amendments tribal governments had themselves begun to face tough questions about the management of religious diversity. The notion that a citizen might have rights against his government, and that these included a right to practice a religion other than that practiced by his fellow tribesmen, could not easily be squared with many Indian notions of tribal membership. Often tribal authorities took the position that the heterodoxical practices of individual members posed a serious threat to the ceremonial foundations of their social order. Hence, the notion that membership in a religious community could be separated from membership in a civil community appeared quite foreign to many Indians. This among other things, posed a great deal of difficulty for BIA officials and tribal authorities working in the wake of the IRA, as each sought to put into practice a theory of government combining elements of both social contract theory and Native American traditions.

The relationship between religious an political institutions became a crucial site of conflict for the newly revitalized tribal governments. The growth of the Native American Church combined with emerging sectarian conflicts between Christian (or syncretic) Indians living on the reservations to create a series of legal conflicts regarding tribal authority over religious matters. This would eventually lead to the cases of Toledo v. Pueblo de Jemez, decided on March 8, 1954, and Native American Church v. Navajo Tribal Council, decided on November 17, 1959. In each of these cases, the courts made it clear that the Bill of Rights did not apply to the actions of tribal governments. These cases helped give rise to new legislation creating the jurisdiction necessary for enforcement of the Bill of Rights in Indian country. If these native experiments in free exercise litigation proved anything, however, it was that the principles embodied in the Bill of Rights posed an unusual set of problems for Indian tribes. Each of these cases had revealed the intimate linkage between traditional ceremonial practices and the authorities of tribal governments.

When Congress passed the Indian Civil Rights Act in 1968 (ICRA) the inability to distinguish the institutions of tribal politics from those forming tribal religions made its difficult for Congressmen to formulate a strategy for incorporating the First Amendment into the jurisdiction of tribal governments. For many tribal governments it would prove difficult to accommodate basic American principles of civil rights, and for the U.S. Congress it would prove difficult to accommodate the structures of a tribal government while seeking to ensure observation of the Bill of Rights.

Aspects of conflict surrounding the Indian Civil Rights Act of 1968 would foreshadow later problems associated with the AIRFA. Like the Blue Lake Amendments, passage of the ICRA extended Euro-American notions of religious freedom into Indian territory. In contrast to the example of Blue Lake, however, the ICRA created a standing set of legal principles and thereby provided an open ended prospect for future litigation. Congressmen therefore had to contend more seriously with the differences between Indian and Euro-American forms of social organization when considering the provisions of the ICRA. To complicate matters further, the ICRA played a controversial role in the general history of Indian-white relations. Proponents of the bill had argued that it would constitute a major step toward extending civil rights to Native Americans whereas critics have argued that passage of the ICRA constituted an attack on tribal customs and a imposition on the proper jurisdiction of tribal governments. Of course, both positions may adequately characterize the facts associated with the ICRA, but between them lies a vast difference in world views. In any event, passage of the ICRA would underscore a number of problems implied whenever Euro-American notions of religious freedom are applied to Indian practices.

A quick look at the passages above will reveal one major difference between the First Amendment and its counterpart in the Indian Bill of Rights; the latter contains no Establishment clause. The passages differ in yet another respect, for the First Amendment applies primarily to federal and state jurisdiction (via the Fourteenth Amendment in the

latter case) whereas the Indian Bill of Rights refers directly to the powers of Indian tribes. It would be easy to view the ICRA as though it were merely the tribal equivalent to the Fourteenth Amendment, incorporating most of the provisions of the Bill of Rights into the limitations of tribal authority; but the ICRA poses a distinct set of questions regarding the historical trajectory and legal status of Indian tribes as such. It is within this highly contested interactional framework that Congress formed the specific provisions of the ICRA. The fact remains that the ICRA leaves open the possibility that a tribal government may support a form of religious establishment, and in doing so the bill accommodates aspects of Native American social organization seemingly forbidden by an ideological orientation normally associated with civil libertarian traditions. The concerns leading to the ICRA are worth examining, because they would appear again to haunt Indian litigants concerned with the implementation of the AIRFA.

Cultural Presupposition and the Denotational Scope of "Religion" in the First Amendment.

As noted earlier (chapter 2), notions about "religion" in general, and "religious freedom" in particular, are only salient in reference to particular patterns of social organization. Hence, legal discourse about "religious freedom" contains a number of clues about the role of religious institutions in America. The courts lack recourse to an objective definition of religion.[233] Neither is such definition available to the social sciences, which is to say that the term "religion" itself cannot be made intelligible as the object of a single theoretical reduction.[234] Yet, a certain degree of ethnocentrism regarding the nature of "religion" may seem unremarkable as long as it does not appear outside of the cultural context which gives rise to it in the first place. Hence, American courts can generally get by

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[233]Lupu, 957-58.

[234]This amounts to a rejection of the doctrine that religion is itself a complete phenomenon which could not be reduced to areas of human experience. See, for example, Robert Segal and Donald Weibe, "Axioms and Dogmas in the Study of Religion," Journal of the American Academy of Religion, 57 (1989) 591-605 *passim.*

with using notions about religion tailored to the experience of a predominantly Christian public. When dealing with distinctly non-Christian traditions the courts sometimes equate religion with Christianity, thereby leaving such traditions beyond the scope of the First Amendment; and sometimes they use Christianity as a kind of prototype on which to model its approach to other religions.[235] Hence, the best case scenario for unusual free exercise claims involves a metaphorical understanding of the issue wherein Christianity supplies the source, or *phoros*, of the court's tropical understanding.[236]

Perhaps the best example of such reasoning comes from the 1968 case of United States v. Seeger. Here the United States Supreme Court was faced with a challenge to the constitutionality of a provision for conscientious objector status included in the Selective Service Act of 1948. This provision restricted the status of conscientious objectors to those with a belief " . . . in relation to a Supreme Being."[237] Justice Clark wrote the majority opinion for the case, which included this rather interesting rationale:

> We have concluded that Congress, in using the expression 'Supreme Being' rather than the designation 'God' was merely clarifying the meaning of religious training and *belief so as to embrace all religions and to exclude essentially political, sociological, or* philosophical views. We believe that under this construction, the test of belief 'in relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of the possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for that exemption. Where such beliefs have a parallel position in the lives of their respective holders we cannot say that one is 'in relation to a Supreme Being' and that the other is not.[238]

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[235]Lupu, 958.

[236]This is a reference to a common distinction in metaphor theory. Inasmuch as metaphors involve the tropical use of a word, a turning of its sense into something other than its common usage, one must observe a distinction between the normal sense of the term and that which informs its metaphorical usage. In Cognitive theory, the former is referred to as the *target domain* and the latter the *source domain*. See George Lakoff, Women, Fire, and Dangerous Things: What Categories Reveal About the Mind, (Chicago and London: University of Chicago Press, 1987) 380-96. Drawing on Aristotelian models, Perelman an Tyteca refer to the normal sense of a term as the *theme* and the source of the tropical understanding the *phoros*, 373. It is worth noting that the relationship between source and target domain in cultural semantics (*phoros* and *theme* according to rhetorical models) is also implicit in analogical reasoning. This semantic distinction may therefore appear in either the premise structure of an argument (analogy) or in the phrase structure of a sentence (metaphor).

[237]United States v. Seeger, 85 U.S. 850 (1965).

[238]Seeger, 85 U.S. 854 (1985).

Notwithstanding the Court's poor reasoning, this passage does provide an excellent example of the use of analogical reasoning in a First Amendment case.[239] Here the Court essentially determined the religious nature of Seeger's own beliefs by drawing an analogy between those beliefs and those expressly covered by the statute in question, beliefs which might be expected from those of Jewish or Christian faith.

In one respect the Seeger case represents a poor example of the use of analogical reasoning in free exercise cases, because the Supreme Court's analogical interpretation of the phrase "belief in relation to a Supreme Being" directly contradicted the literal sense of the phrase itself. The Court had viewed the statute in question as an attempt to achieve a practical goal, the exemption of religious beliefs in general from military duty. The Court then based its interpretation of the phrase in question on an analogy between the function of Theism in reference to the exemption clause and the role that Seeger's own beliefs might also play in reference to the same goal. In explaining the functional intent of the phrase the Court had implicitly taken issue with the language of the statute in question. The Court had essentially argued that the explicit language of the statute in question was more narrow than it needed to be. Hence, the analogical reasoning used by the Court in Seeger actually facilitated a complete transformation of the sense of "religion" included in the original statute.

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[239]It is easy enough to see how the court could construe the rational purpose of the provision in question as a mere attempt to exclude spurious claims to conscientious objection, but there are a variety of different approaches to intentionality; all of which are problematic for one reason or another. Here the court has attributed an instrumental purpose to Congress, which is a rather narrow sense of intentionality; one which does not address the language of the statute itself. A popular legal textbook, for example, includes the following study question in its treatment of the case; "Isn't the Court's description of what Congress meant . . . exactly the opposite of what Congress said?" William Cohen and John Kaplan, Constitutional Law: Civil Liberty and Individual Rights, Second Edition, University Casebook Series, (Mineola, New York: The Foundation Press, Inc., 1982) 451. One would imagine that most of students reading this text would answer that question in the affirmative.

It is not at all uncommon to find that a given reading of legal text has been constructed around ideological assumptions pertaining to an intentional state (c.f. Elizabeth Mertz, "Linguistic Ideology and Praxis in U.S. Law School Classrooms," Pragmatics, 2 [1992] 325-43 *passim*). Likewise, the particular bias in favor of a narrow instrumental model of intent is also widely prevalent throughout legal circles, and it may be attributed to a kind of linguistic unifunctionalism. See Weissbourd and Mertz, 648-55 and *passim*.

The courts need not always contend with legislation including such explicit definitions of the term "religion." Most free exercise cases involve a claim about religion emerging from a source other than the legal statutes involved in the case. Indirect burdens on the free exercise of religion typically involve legislation containing no explicit references to religion. In such cases it is the free exercise claimant who raises the issue of religion, and this leaves the courts room to define the scope of meaning of "religion" as they see fit. Hence, the courts are generally free address the scope of free exercise principles through analogical strategies like that used in Seeger, but without facing the obstacle posed by of explicitly narrow statutory language. At times such analogies have proven crucial to the interests of minority religions, but there is considerable irony in the fact that protection for a minority religion may rest on a proximity between its conventions and those of more popular religious traditions.

One may gather from the preceding that the courts do not merely exhibit a kind of intellectual inertia when dealing with minority faiths, but that their ability to conceive the interest at stake in a minority religion is contingent on structural analogies between that religion and those more commonly practiced in America. In one respect, this involves questions about the implications of such an analogy. In another respect, this involves pragmatic questions about the prospect of fitting a minority religion into an interactional role envisioned within popular notions of American social order. Both constraints serve to skew the legal significance of the term "religion," providing different aspects of nominally religious behavior with a greater or lesser degree of protection under the First Amendment.

The Establishment Clause and the Cosmology of the Constitution: A Persistent Paradox.

The prospect that a given set of cosmological precepts may not be considered "religious" does not always, or merely, indicate that the practice will fail to receive the protection of the Free Exercise clause. It may also mean that a given set of cosmological principles will escape the notice of the Establishment clause. The cultural order presupposed in government proceedings will itself contain a folk model of the universe. Hence, the cultural presuppositions implicit in the text of the United States Constitution as well as any other government document or political speech will contain indexical references to a form of cosmological order (natural rights, first principles, social contracts, etc.). Thus, it is fair to ask if the Constitution does not itself presuppose a form of religion, even as it forbids the establishment of religion? And it is worth inquiring as to whether or not there are any consistent distinctions between the kind of cosmology presupposed in documents and proceedings related to the First Amendment itself and the kinds of cosmological order discussed in such proceedings under the heading of "religion?"

Many assume that there is some layer of religious practice that is not covered by the Establishment clause on the United States Constitution. Such notions are strongly associated with master-narratives pertaining to the "original intention" behind the Constitution. According to such theories the "founding fathers" did not intend for the Establishment clause to forbid any general form of support for religion, but that the Establishment clause was originally designed to prevent the establishment of a state church.[240] Advocates of this position, known as "non-preferentialism," typically maintain that non-sectarian forms of government support for religion are not proscribed under the Establishment clause. Non-preferentialists therefore maintain that government is free to aid religious causes in general provided that it does not favor any particular sect over others.

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[240] See, for example, Russell Kirk, The American Cause, (Chicago: Henry Regnery Company, 1957) 41; Francis A. Schaeffer, A Christian Manifesto, (1981. Westchester, Illinois: Crossway Books, 1982) 31-39; Robert Bork, The Tempting of America: The Political Seduction of the Law, (New York and London: The Free Press, 1990) 94-95.

Under this theory the federal government would be free to incorporate religious prayers into its functions (as it does indeed), for example, though it could not prevent individuals from conducting prayers of their own. Hence, the non-preferentialist position provides a narrow construction to the sense of religion in the text of the Establishment clause and that implicit in the Free Exercise clause.

It is difficult to see how the text of the First Amendment could produce this asymmetric notion of religion. As Justice Rutledge argued in his dissent for the the case of Everson v. Board of Education the same term covers both of the religion clauses in the First Amendment. It is therefore inconsistent to read the Free Exercise clause as a provision affecting "religion" in general while treating the Establishment clause as a proscription against the relatively narrow prospect of a state church.[241] The term "religion" denotes an equally abstract value in both clauses of the First of Amendment, and yet the need to ground any government practice in a cosmological framework seems to require a relatively narrow construction of the Establishment clause. Hence, the denotational scope of both religion clauses in the First Amendment refer to "religion" in the abstract, even though the interactional significance of each clause may be somewhat different.

The courts are not the only institutions to find that abstract notions of religion have proven to be clumsy. The social categories used to differentiate between one religion and the next appear to follow conventions developed in order to handle the sectarian disputes characterizing various Christian denominations. Individual religions are typically defined in terms of beliefs, which is to say that a religion is characterized as a set of propositions - the truth of which is vouched for by its adherents. The difference between Theism and Atheism, for example, can be characterized as a dispute over the truth of the proposition that "God Exists," (or that "a Supreme Being Exists," for those adhering to the precedent

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[241]Everson v. Board of Education of Ewing TP, 64 S. Ct. 519-520 (1947). Others have attacked the historical accuracy of non-preferentialist rhetoric. Leonard Levy, for example, demonstrates that early American concerns over the establishment of religion could not be reduced to the question of a state church, The Establishment Clause, (New York: Macmillan Publishing Company, and London: Collier Macmillan Publishers, 1986) *passim.*

established in Seeger.) Such an approach effectively characterizes individual religions in terms of a personal orientation towards statements denoting something about a cosmological order. As a body of doctrines, each religion embodies an argumentative stance about cosmological themes. Each religion is therefore comprehensive inasmuch as it provides a place for all possible objects of discourse, and yet each religion is also exclusive inasmuch as it is inconsistent with alternative cosmological systems. Hence, the ability to differentiate one religion from another emerges rather paradoxically out of the conventions of polemic discourse.

A number of problems, both practical and theoretical, can be seen to stem from this tension between the reductive scope of a religious system and the prospect of a general theory dealing with the variety of individuated religions. Clifford Geertz, for example, began his famous essay on religion with the following selection from George Santayana:

> Any attempt to speak without speaking a particular language is not more hopeless than the attempt to have a religion that shall be no religion in particular . . . Thus every living and healthy religion has a marked idiosyncrasy. Its power consists in its special and surprising message and in the bias which that revelation gives to life. The vistas it opens and the mysteries it propounds are another world to live in; and another world to live in-whether we expect ever to pass wholly over into it or no-is what we mean by having a religion.[242]

Having thus, indicated the exhaustive scope of any particular religious discourse, Geertz proceeds to articulate and expound upon a general theory of religion, thereby reducing the great variety of religious discourse to a single paradigm. He writes:

> (1) A system of symbols which acts to (2) establish powerful, pervasive, and long lasting moods and motivations in men by (3) formulating conceptions of a general order of experience and (4) clothing these conceptions with such an aura of facticity that (5) the moods and motivations seem uniquely realistic.[243]

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[242]Clifford Geertz, The Interpretation of Culture: Selected Essays by Clifford Geertz, (New York: Basic Books, Inc. Publishers, 1973) 88. The original passage is taken from George Santayana, "Reason in Religion," The Life of Reason or The Phases of Human Progress, One Volume Edition, Revised by the author in collaboration with Daniel Cory, (New York: Charles Scribner's Sons, 1955) 180.

[243]Geertz, 90.

Of course, Geertz presupposes a distinctive order of reality inherent to the conditions of his own discourse at the same time that he describes "religion" as a body of symbols defining a distinct order of reality. Geertz calls our attention to the layer of symbolic discourse associated with religious propositions, but the discursive conventions used in disseminating his views index an order of reality that one might also consider a form of religion.[244] One may notice for instance that his focus on the symbolic nature of religion is particularly consistent with modern notions of social organization in which "man has created God," so to speak. Such a position has indeed been spelled out in the form of an explicit set of religious doctrines, that of Secular Humanism.[245] So Geertz's definition of "religion" is potentially self-referential, though this does not make his account incoherent. One need not attribute any personal agenda to Geertz himself; the point is that he has adopted a language which presupposes facets of a specific world view, and that world view may at times conflict with the religions that Geertz himself seeks to describe.

A similar set of reflexive structural features creates a substantial problem for the appellate courts dealing with First Amendment cases. The courts must protect the religious freedom of American citizens while presuming the principles of a cosmological order which could itself be described as a religious perspective. Perhaps the problem would not be so distressing were it not for the fact that the First Amendment serves both to affirm a right of religious freedom and to preclude its establishment as well. This entails a conceptual dilemma in that the affirmation of religious rights necessitates a working definition of "religion," but any bias contained in a working definition of religion could be construed as a covert establishment of religion. Hence, the courts must somehow maintain a distinction

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[244]C.f. John R. Farella, The Main Stalk: A Synthesis of Navajo Philosophy, (Tucson, Arizona: University of Arizona Press, 1984) 6.

[245]See, for example, Paul Kurtz, ed., The Humanist Manifestos I & II, (1973. Buffalo, New York: Promethius Books, 1984) *passim*. Note that the claim made above is not that the definition offered by Clifford Geertz is intended as a piece of Humanist philosophy, but that the assumptions which make his approach to religion possible are not without cosmological implications, implications which have been spelled out in other contexts as a form of religion.

between the "religion" contemplated under the First Amendment and the potentially "religious" perspectives implicit in the principles of the First Amendment jurisprudence.

The exclusion of "religion" from government activities may itself provide a clue into the cosmological order presupposed in American constitutionalism. As a critical part of American social order much of the historical and cultural implications of this principle are commonly taken for granted. Leonard Levy, for instance, writes,

> . . . the establishment clause functions to depoliticize religion; it thereby helps to defuse potentially explosive situation. The clause substantially removes religious issues from the ballot box and from politics. Mr. Dooley, Finnley Peter Dunne's irrepressible Irish wit, whom Justice Frankfurter called 'a great philosopher,' said of church and state: 'Rellijon is a quare thing. be itself it's all right. But sprinkle a little pollyticks into it an' dinnymit is bran flour compared with it. Alone it prepares a man for a better life. Combined with polyticks it hurries him to it.'[246]

The establishment clause appears in this passage as a limitation on the possibility of arbitrary connections between religion and the government; a check against corruption of both the state and the clergy. Yet, the assumption that such connections are themselves arbitrary is itself a crucial commentary on the cultural order informing the construction and implementation of the Constitution. Granting the assumption that no substantial meaning is lost to the area of religion by removing official connections to politics, the Establishment clause appears to be a fantastic innovation in the development of human freedom. Where this assumption is not valid the principle itself negates an essential component of religious freedom. Thus, depending on the religion in question, the Free Exercise and Establishment clauses of the First Amendment may serve contrary interests.

The fabled separation of church and state in American life would have a substantial impact on areas of discourse in which religious authorities might be expected to have a say in government policy. So, the exclusion of religion from political discourse may serve as an index of political interests inconsistent with religious authority. The terms of the First Amendment may reflect a comodified sense of land tenure and labor relations, for example,

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[246]Levy, ix.

indexing a social order regulating public life according primarily to market values.[247] When Taos Pueblo asserted both a political and a religious interest in Blue Lake, for example, this violated the cultural sensibilities of Congressmen accustomed to land claims defined according to economic values. One could interpret their subsequent complaints about a 48,000 acre church, as a reflection of the vested interests of commercial enterprises such as logging (see above). This is not to say that such complaints do not reflect genuine value propositions about the role that religion should play in American society; it is only to suggest that such propositions also reflect the relatively limited role that religion already plays in American society. The Constitution can therefore be read as a blueprint for the economic enterprises of a colonial elite, but more importantly, it may also be read as a document presupposing a world view which was already quite distinct from that implicit in Christian ceremonies.

In contrast to the industrial and political revolutions of Europe; a place wherein market values had to compete for a time with the claims of the church, nobility, and a host of related institutions; little stood in the way of economic development in North America. Whereas the French and British experienced the growth of Capitalism as a complex series of internal reforms, their counterparts in North America had merely to dispossess the natives.[248] This left Americans in an ideal position to fashion a political system based largely on bourgeois social theory, itself a rationalization of bourgeois social practice.[249]

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[247]C.f. Karl Polanyi, The Great Transformation: The Political and Economic Origins of Our Time, (1957, Boston: Beacon Press, 1963) 68-76.

[248]C.f. E.J. Hobsbawm, The Age of Revolution: 1789-1848. (New York: New American Library, 1962) 182-183.

[249]On the relationship between social contract theory and the the actual conditions of bourgeois social organization, see C.B. Macperson, The Political Theory of Possessive Individualism: Hobbes to Locke, (1962. Oxford and New York: Oxford University Press, 1990) 1-106 *passim*; Marshall Sahlins, Culture and Practical Reason, (Chicago and London: University of Chicago Press, 1976) 50-54; Marshall Sahlins, Stone Age Economics, (New York: Aldine, 1972) 1-39 *passim*.

On the relationship between such theories and American political discourse, see for example, Robert N. Bellah, "The Revolution and the Civil Religion," Religion and the American Revolution. eds., Jerold C.

The Constitutional perspective on the relationship between religion and government reflects a historical subordination of both to market values. The presumption that links between religion and the State constituted an arbitrary and dangerous political arrangement signals the degree to which colonists had already grown accustomed to a public life free of direct links to religious authority.

So, it appears that the separation of religious authority from the practice of government is itself an index of the degree to which religion has become a privatized area of American social practice. And yet, this separation of religion from government does create a certain amount of tension for most Americans, and in practice the division has never been complete. Alexis de Tocqueville once observed that:

> Religion in America takes no direct part in the government of society, but it must nevertheless be regarded as the foremost of political institutions of that country; for if it does not impart a taste for freedom, it facilitates the use of free institutions. I do not know whether all Americans have a sincere faith in their religion, for who can search the human heart? but I am certain that they hold it to be indispensable to the maintenance of republican institutions.[250]

Along a similar vein of thought Will Herberg suggests that; "America seems to be at once the most religious and the most secular of nations."[251] The Reverend Billy Graham must have been pointing to much the same thing when he suggested in somewhat more derogatory terms that modern Western culture "has become a mixture of paganism and Christianity."[252] Although each of these remarks are framed in reference to something along the lines of an essential national character (a theoretically disreputable venture indeed), they may yet describe something important about the discursive conventions of

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Brauer, Sidney E. Mead, and Robert N. Bellah, (Philadelphia: Fortress Press, 1976) 55-73 *passim*; Michael Parenti, Democracy for the Few, (New York: Saint Martin's Press, 1988) 54-68 *passim.*

[250]Alexis de Tocqueville, Alexis De Tocqueville on Democracy, Revolution, and Society: Selected Writings, ed. John Stone and Stephen Mennell, (Chicago: The University of Chicago Press, 1980) 93.

[251]Will Herberg, Protestant, Catholic, Jew: An Essay in American Religious Sociology, (1955. Garden City, New York: Anchor Books, Doubleday & Company, Inc., 1960) 3.

[252]Billy Graham, World Aflame, (Garden City, New York: Doubleday & Company, Inc., 1965) 42.

American politics. The formal separation of religion and government has not prevented Americans from combining the two in a variety of informal patterns of discourse.

Official government institutions may even invoke explicit religious themes from time to time. The phrase "In God We Trust" is printed on United States Currency, for example, and both Congress and the Supreme Court open with a prayer. Such obvious references to religious themes constitute a kind of civil religion, a set of institutions that has proven very difficult for Constitutional theorists to grasp.[253] This concept comes from the writings of Robert Bellah, who defines "civil religion" as a "transcendent reality" which informs "the life of every people."[254] Bellah argued that institutions of government presuppose a form of cosmology, thus illustrating that such instances of official religious rhetoric reflect a systematic feature of political discourse. The invocation of quasi-religious themes may therefore constitute a ritual performance every bit as powerful as one might expect to find in a sectarian church.

Explicit references to religious themes are but the tip of the iceberg when it comes to civil religion. Most political rhetoric carries an abundance of cosmological imagery, but this imagery is normally implicit in government proceedings. The very notion that humans are endowed with "natural rights," for example, serves to project the dimensions of bourgeois social practice onto the universe itself. Such notions effectively transform the interactional framework of American government into cosmological principles. The very distinction between the civil religion normally implicit in government procedures and explicit sectarian religion can therefore be eliminated by shifting the focus of analysis from sectarian disputes to the significance of a national agenda. Vine Deloria has written that in the context of

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[253]Cf. Yehuda Mirsky, "Civil Religion and the Establishment Clause," Yale Law Journal, 95 (1986) 1237-1257 *passim.*

[254]Robert N. Bellah, The Broken Covenant: American Civil Religion in Time of Trial, Second Edition, (1975. Chicago And London: University of Chicago Press, 1992) 3 and ix. See also Robert N. Bellah, "The Revolution," in Religion and the American Revolution, 53-73 *passim*; Robert N. Bellah and Phillip E. Hammond, Varieties of Civil Religion, (San Francisco: Harper & Row Publishers, 1980) 3-23 *passim.*

Indian-white relations American civil religion presence a crucial rational for the white presence on this Continent.[255] He attributes the apparent compromise between secular institutions and sectarian theology to the denominational framework which informs many discussions of civil religion.[256] It is only in comparison with explicit sectarian disputes that civil religion takes on the appearance of an unthreatening, non-denominational religious sentiment; but for a nation's enemies civil religion is serious business. What differentiates the significance of civil religion from that of sectarian denominations may in the end be no more than a relative absence of polemic debate over its tenets, a condition which normally leaves the cosmological significance of American government in the background of political discourse.

Native and Immigrant Cosmologies in American Law.

The interactional framework of American civil religion does not readily reflect the experience of Native American social life. Hence, the prototypical notions of citizenship informing American Constitutionalism do not speak directly to the concerns raised by many American Indian political activists. Vine Deloria argues, for example, that one must distinguish between "political minorities" which are arbitrarily formed as part of a political process and "permanent minorities" which are defined in terms of biological criteria or radical differences in culture (black people, Indians, women, etc.).[257] The social contract theory enshrined in the Constitution is explicitly designed to protect political minorities, whereas history has demonstrated that other categories of minority status have a longevity

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[255]See Vine Deloria, "Completing the Theological Circle," Religious Education, 71 (1976) 278-87 *passim*; Robert S. Michaelsen, "Red Man's Religion / White Man's Religious History," Journal of the American Academy of Religion, 4 (1983) 675-78.

[256]Deloria, "Theological Circle," 287.

[257]Vine Deloria, "Minorities and the Social Contract," Georgia Law Review, 20 (1986) 917-919.

independent of the specific checks and balances of American Law.[258] Likewise, the members of such "permanent minorities" face dramatic forms of oppression not fully contemplated under the normal functions of social contract theory.[259] The functional significance of minority status differs according to the social and historical parameters which give rise to it, whereas social contract theory (America's civil religion) presupposes that the problems facing minorities are a function of individual interests. Hence, American Constitutional theory has been slow to address political interests defined by ethnicity and gender, and today the difference between these conceptions of minority status often defines the difference between Liberal and Conservative political agendas.

As members of Indian tribes Native Americans also occupy a role which cannot be reduced to that of either a "permanent" or a "political" minority. Trust doctrine emerged out of a case history rather than a Constitutional document, providing the political authority of Indian tribes with an obscure textual basis (see chapter 1), one that would be unfamiliar to most Americans. So, whereas Indian tribes constitute a substantial form of American government, the specific role that they play in defining the political interests of individual Native Americans remains unclear to the American public. Therefore, Native American issues relating to these semi-autonomous political entities are vulnerable to rhetoric which positions them in terms of a typical debate between liberals and conservatives.[260] Indian gambling is often portrayed as a kind of affirmative action program, for example, rather than a function of tribal jurisdiction (most gambling regulations are state laws). This asymmetry between the legal rationale for tribal interests and the significance that such interests take in popular debate cannot but work to the detriment of many Indian tribes. Whereas the courts can be expected to observe the institutional role that tribes play in

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[258]Deloria, "Minorities," 919-930.

[259]Deloria, "Minorities," *passim.*

[260]C.f. Vine Deloria, the chapter "The Red and the Black," in Custer Died For Your Sins, (1970. Norman and London: University of Oklahoma Press, 1988) 168-196.

defining certain issues connected with Native American life, popular rhetoric frequently ignores this distinction; and this rhetoric may have a significant impact on executive policies and legislative decisions. Thus, the legal identity made possible under trust doctrine does not speak to the context of every political dispute involving Native Americans. Tribal governments do occupy a significant place in American political law, but they do not occupy a significant place in the American legal imagination.

Tribal politics contrast with the political assumptions of mainstream America, and those assumptions are not without canonical expression in American state papers as well as the writings of key political theorists and the "founding fathers." This has often made the reality of tribal politics appear inconsistent with the precepts of American government; both in the sense that many Americans find it inappropriate for the government to treat people in collective terms, and in the sense that the rationale offered by many Indian tribes for their own practices frequently conflicts with Euro-American norms of government. The same juxtaposition of cosmological systems has often made it difficult for Native American tribes to cope with many of the norms of government imposed on them through the oversight of BIA officials. The notion of individual rights poses a threat to the specific cosmological order implicit in tribal patterns of government. Tribal practices generally lack the discursive conventions characteristic of Euro-America's sectarian rivalries, and so it should come as no surprise that tribal social structure generally lacks the conventions separating religious and political institutions. Hence, the formation of government structures capable of protecting individual rights, including the right of free exercise, presupposed social distinctions not generally observed by tribal authorities. Such distinctions would slowly become a part of Indian life, however, as democratic institutions became a part of reservation politics.

Federal support for tribal government under the IRA brought with it pressure to observe secular conventions of government; Council hearings, tribal courts, official budgets, etc. All of these institutions constitute a set of rituals unconnected to the

cosmological systems implicit within ceremonial systems normally observed by individual tribes. Of course, each Indian tribe could build its own ties between the newly formed secular institutions of government and its own cosmological system.[261] And with the elimination of the Religious Crimes Codes each tribe could continue to articulate its cosmological system through traditional rituals. In practice Indian tribes generally pursued both approaches, leading them to observe two different sets of ceremonial systems: a set of rituals associated with the nominally secular practice of government, and a set of rituals associated with explicit mythological themes of tribal mythology. The ability to generate discursive ties between these systems of ritual organization may be sufficient to provide each Indian government with a cosmological significance salient to its own culture, generating a series of tribal civil religious, so to speak; but the development of distinct ritual systems had already generated the foundations for separating Indian social life into distinct spheres of "religious" and "political" activity. Thus, under the influence of Euro-American notions of government Indian tribes came to possess a form of "religion," that is; a set of practices that could be juxtaposed with other aspects of Indian social life.

Religious Freedom and Tribal Governments in the Early Twentieth-Century.

Tribal cosmologies differ from those expressed in Euro-American religions inasmuch as those adhering to a tribal cosmology need merely participate in the rituals of the tribe rather than attest to the truth of a select body of disputed doctrines. As these Native American cosmologies came to be viewed as forms of religion this difference in participation would lead to sects with a distinctive body of membership. The membership in a tribal religion generally continued to correspond with the political membership of the tribe itself, making it easier to draw links between the tribal religion and its official

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[261]Cf. Loretta Fowler, Arapahoe Politics 1851-1978: Symbols in Crisis of Authority, (Lincoln and London: University of Nebraska Press, 1982) *passim*; Loretta Fowler, Shared Symbols, Contested Meanings: *Gos Ventre* Culture and History, 1878-1984, (Ithaca: Cornell University Press, 1987) *passim*.

government institutions. This in turn made it more difficult to deal with religious deviation among the members of a given tribe, because such differences in practices could not be dismissed as a dispute between sects unconcerned with the welfare of the tribe itself. To question the ceremonial practices of an Indian tribe was therefore to question its political authority. Quite understandably, tribal officials have often viewed heterodoxical religious practices as direct threats to the people whom they represent.

When a few residents of Taos Pueblo took up the ritual practice of ingesting peyote (around 1910), for example, they met with near immediate resistance from the tribe's own religious authorities. These authorities (the Town Council, the Governor, and the Lieutenant Governor of the Pueblo) argued that peyotists would neglect their ceremonial duties in the kivas, disrupting the natural cycle of rainfall and threaten the existence of the tribe itself.[262] Such differences among the membership of the tribe itself seemingly constituted a serious threat to the Taoseño universe, just as had been the case with the external conflict with the BIA and the Forest Service. John Collier would eventually arbitrate the dispute, leading to a compromise in which the "peyote boys" agreed to keep up with their kiva duties in addition to any practices associated with the controversial drug.[263] Collier's approach to the conflict illustrated a concern for the religious freedom of individual Taoseño, but the event also illustrated that such religious freedom constituted a threat to the ceremonial foundations of the tribe itself. In the end compromise was possible only because the practices at issue could be viewed as something other than mutually exclusive religious propositions, a fact owing to the difference between Indian and Euro-American "religions." It was not to be the last time that support for tribal self-government conflicted with the freedom of conscience belonging to individual Indians.

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[262]See Burton C. Dustin, Peyotism and New Mexico, Farmington, New Mexico: Vergara Printing Company, 1960) 8-16; Omar C. Stewart, Peyote Religion: A History, (1987. Norman and London: University of Oklahoma Press, 1990) 202-209.

[263]Dustin, 8-16. Note that prior to the Collier administration Taoseño authorities found ready support from Commissioner Edmund Burke over the need to suppress peyotism at Taos; Stewart, 208.

The practice of ingesting peyote, or *Lophophora williamsii*, has its origins among native peoples of Central America such as the Aztec and Huichol.[264] The top of this variety of cactus is normally dried out yielding something often described as a "button," and these "peyote buttons" contain several different alkaloids which are the source of a variety of hallucinogenic affects.[265] The natural habitat of this cactus extends into only a small portion of the United States, being entirely contained within the borders of Texas.[266] Yet, today the famed buttons are regarded as a kind of sacrament by members of the Native American Church practicing throughout North America. The contemporary form of peyote rituals can be traced to the practices of Kiowa, Commanche, and Caddoan natives settled in Oklahoma during the late nineteenth-century who popularized a pattern of rituals associated with the use of the peyote in North America.[267] Peyotism spread from these tribes throughout North America, creating a novel form of religion as well a novel set of legal disputes involving tribal, state, and federal officials.

Peyotism is a proselytizing faith, and its spread throughout the Indian population of North America during the late nineteenth and early twentieth centuries generated a pattern of religious diversity unfamiliar to most tribal authorities. Peyotism incorporated nativistic themes, but the practice of peyotism did not match the particular ceremonial framework traditionally associated with any particular tribe. Hence, the appearance of peyotism at any particular reservation posed a novel problem to tribal authorities unaccustomed to sectarian differences. As peyotism grew into something of a pan-Indian religion it met with considerable opposition from tribal, state, and federal officials. Federal attempts to pass a national anti-peyote ordinance stimulated the incorporation of an official organization

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[264]Weston LaBarre, The Peyote Cult, Fifth Edition, (1938 Norman and London: University of Oklahoma Press, 1989) 7; Stewart, 16-30.

[265]LaBarre, 7.

[266]Stewart, 10.

[267]LaBarre, 7-9; Stewart, 30-42.

known as the Native American Church in 1918.[268] And while attempts to suppress peyotism at the federal and state level have frequently been associated with a general concern over the drug's narcotic affects, tribal efforts to proscribe its use generally dealt with the ceremonial significance of peyote religion as a potential threat to traditional ceremonial systems.

The Native American Church met with particularly staunch resistance on the Navajo reservation. Navajo authorities arrested two peyotists in 1938 and charged them with "possession of dope on the Navajo Reservation."[269] Jacob C. Morgan, then chairman of the Navajo tribe, marshaled subsequent efforts to prevent the spread of peyotism on the reservation, leading to a 1940 ordinance proscribing the use or possession of peyote on the Navajo reservation.[270] The introduction of peyote rituals into the Navajo Reservation was not the only innovation then facing the tribe. In passing the ordinance the Tribal Council expressed a similar concern over changes then taking place in the Squaw Dance part of a ceremony known as the Enemy Way, and debate over the significance of peyote appears to have been colored somewhat by general concerns over the integrity of the entire Navajo ceremonial system.[271] Such concerns were directly reflected in the wording of the law itself:

> WHEREAS its use is not connected with any Navajo religious practice and is in contradiction to the traditional ceremonies of the Navajo people;
> THEREFORE, BE IT RESOLVED that as far as the Navajo people are concerned peyote is harmful and foreign to our traditional way of life.[272]

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[268]Stewart, 222-25.

[269]Stewart, 295; David Aberle, The Peyote Religion Among the Navaho, Second Edition, (1966. Norman and London: University of Oklahoma Press, 1982) 110.

[270]Stewart,295-97; Aberle, 110-113; Peter Iverson, The Navajo Nation, (Albuquerque: University of New Mexico Press, 1981)39; Garrick Bailey and Roberta Glenn Bailey, A History of the Navajos: The Reservation Years, (Santa Fe, New Mexico: School of American Research Press, 1986) 226-227.

[271]Aberle, 112.

[272]Navajo Tribal Council Resolutions, 1922-1951, (n.d. Mimeo., Window Rock, Arizona: 107-8. Quoted in Aberle 113.

The ordinance went on to prescribe a sentence of up to nine months of labor and / or a fine of up to $ 100.00 for anyone convicted of possession on the Navajo Reservation.[273]

Navajo response to the Native American Church placed BIA officials in a tenuous position, illustrating the paradoxical effects of a policy designed to support tribal governments while ensuring that the actions of tribal authorities were consistent with democratic principles of government. Unlike previous Commissioners, John Collier viewed the practices associated with peyotism as matters involving freedom of conscience. Such a view could not have been more inconsistent with that of Navajo Council-members who were trying to protect the ceremonial foundations of the Navajo community. Collier deferred to the discretion of the tribe over the use of its own "police powers" and recommended approval of the ordinance.[274] He later stipulated, however, that no federal employee (including Navajo policemen) could be used to enforce it.[275] Hence, the 1940 ordinance remained on the books, but received only sporadic enforcement even after Collier had left his position as Commissioner of the BIA. The Navajo Tribal Council held further hearings on the matter, and members of the Native American Church sought to reassure Council-members that their actions would not conflict with traditional patterns of Navajo ceremonial organization.[276]

During the nineteen-fifties the Native American Church sought with the aid of the American Civil Liberties Union to have the Navajo ordinance overturned as an infringement on the right of free exercise. In 1959 the Tenth Circuit of the U.S. Court of Appeals delivered what was to be the final word from the courts on the issue. Justice Walter A. Huxman wrote the opinion of the Court in Native American Church v. Navajo Tribal

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[273]Navajo Tribal Council Resolutions, in Aberle, 113.

[274]Stewart, 296-97; Aberle, 114.

[275]Aberle, 114.

[276]Stewart, 297-303; Aberle, 113-119.

Council. Citing Felix S. Cohen's influential Handbook of Federal Indian Law, Huxman established that (1) Indian tribes originally possessed all the powers of a sovereign state, (2) Conquest of Indian tribes negated "external powers" of sovereignty such as the power to negotiate treaties with foreign nations but left the internal powers of self government intact, and (3) the internal powers of tribal government were subject to change through explicit means such as treaties or legislation.[277] Having thus recounted the basic tenets of Marshal's theory, Huxman wrote:

> No law is cited and none has been found which undertakes to subject the Navajo tribe to the laws of the United States with respect to their internal affairs, such as police powers and ordinances passed for the purposes of regulating the conduct of the members of the tribe on the reservation. It follows that Federal courts are without jurisdiction over matters involving purely penal ordinances passed by the Navajo legislative body for the regulation of life on the reservation.[278]

Thus, the case before the Tenth Circuit Court failed to meet the criterion spelled out in the third prong of Cohen's narrative, leaving the matter solely at the discretion of tribal authorities. Having thus established that no specific law provided his court with jurisdiction to hear the case, he would go on to dispense with the First Amendment claims of the Native American Church in like manner:

> No case is cited and none has been found where the impact of the First Amendment with respect to religious freedom and freedom of worship by members of Indian tribes has been before the court. . .
> No provision in the Constitution makes the First Amendment applicable to Indian nations nor is there any law of Congress doing so. It follows that neither, under the Constitution or the laws of Congress, do the Federal courts have jurisdiction of tribal laws or regulations, even though they may have an impact to some extent on forms of religious worship.[279]

Thus, the court made it clear that no general appeal to the First Amendment would be sufficient to gain free exercise relief for the Native American Church, at least not from actions taken by the Navajo Tribal Council.

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[277]Native American Church v. Navajo Tribal Council, 272 F. 2d 133-34 (Tenth Circuit, 1959).

[278]Native American Church, 272 F. 2d 134 (1959).

[279]Native American Church, 272 F. 2d 134-35 (1959).

The Native American Church would eventually settle its differences with Navajo authorities, but the decision reached in Native American Church v. Navajo Tribal Council would call public attention to the case law regarding provisions of the Bill of Rights in cases involving tribal authorities. The dispute theoretically involved questions about freedom of conscience and the integrity of tribal institutions. Viewed in such terms, it would have been very difficult to see how a federal court could fail to uphold the values of the First Amendment, but of course the court itself did not have the luxury of approaching the First Amendment from such a decontextualized vantage point. Huxman had in effect demonstrated his court's own lack of authority to hear the case, and hence denied the interactional pattern necessary to consider the merits of any free exercise case dealing with a tribal ordinance. In this respect, the Tenth Circuit decision would take its place in a string of cases denying the relevance of the Bill of Rights to matters involving tribal authorities.

The idea that the Bill of Rights did not apply to tribal jurisdiction followed directly from the principles of trust doctrine. Trust doctrine and the related principle of plenary power effectively gave Congress the authority to do as it liked with Indian tribes, but it also required explicit legislation from Congress for each such encroachment on Indian sovereignty. This requirement even applied to Constitutional principles, and so until Congress had passed legislation applying the Bill of Rights to American Indians they would remain without any of the Constitutional protections enjoyed by other Americans. In Talton v. Mayes, the U.S. Supreme Court had held that the Fifth Amendment did not apply to legislation passed by the Cherokee Nation.[280] In Barta v. Oglala Sioux Tribe of Pine Ridge the Eighth Circuit Court of Appeals ruled that neither the Fifth nor the Fourteenth Amendments applied to tribal legislation regarding taxation.[281] And in Toledo v. Pueblo de Jemez, The District Court of New Mexico ruled against a free exercise complaint quite

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[280]Talton v. Mayes, 163 U.S. 376 (1896).

[281]Barta v. Oglala Sioux Tribe of Pine Ridge, 259 F. 2d 553 (Eighth Circuit, 1958).

similar to that brought by the Native American Church against Navajo authorities.[282] In this case Protestant members of the Pueblo had argued that its authorities;

> denied them the right to bury their dead in the community cemetery; denied them the right to build a church of their own on Pueblo land; prohibited them from using their homes for church purposes; refused to permit Protestant missionaries freely to enter the Pueblo at reasonable times; deprived some of them of the right to use the communal threshing machine which threatened the loss of their wheat crop. They (the protestant plaintiffs) also allege that the Pueblo threatened them with the loss of their birth rights, homes and personal property unless they accept the Catholic religion.[283]

In this passage one can see the influence of Catholic and Protestant churches reproducing old sectarian disputes in Indian territory, but more importantly one can also see the Pueblo's own struggle to maintain a kind of ceremonial integrity in the context of a small interdependent community (not to mention the vulnerability of Protestant members to official coercion in such a community). Pueblo Indians had long since learned to accommodate their own ceremonies and those of the Catholic Church, but the introduction of Protestant views into the tribe generated a new pattern of sectarian disputes; and this free exercise challenge to the tribal authorities at Jemez threatened to make such dissidence a fundamental right and create an official place for such squabbles in the future. Only the absence of appropriate jurisdiction prevented this fundamental change in Pueblo social life, and the specific finding that it lacked such a jurisdiction by the District Court of New Mexico provided yet another precedent demonstrating the irrelevance of the federal Bill of Rights to actions taken by tribal authorities throughout the United States. Huxman cited each of these rulings in the opinion rendered for Native American Church v. Navajo Tribal Council, building up a case history supporting his own approach to the issue.[284]

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[282]Toledo v. Pueblo de Jemez, 119 F. Supp. 429 (D. New Mexico, 1954).

[283]Toledo, 119 F. Supp. 430 (1954).

[284]Native American Church, 272 F. 2d 134 (1959).

The American Indian Civil Rights Act: Cosmology and Compromise.

If a case history demonstrating the inapplicability of the Bill of Rights to tribal jurisdiction could be seen as a warrant for a judicial decision denying Native Americans a right of free exercise, this same case history could also be seen as a reason for passing legislation. Much as the decision in Crow Dog precipitated efforts to extend the long arm of Anglo law onto the reservation, the decision in Native American Church sparked efforts to ensure tribal respect for civil rights through federal legislation. The subject was the focus of hearings for seven years before a Senate Subcommittee on Constitutional Rights run by Senator Sam Ervin of North Carolina. Testimony before the subcommittee demonstrated that substantial abuses were occurring throughout America's tribal courts, many of which were attributed to the lack of training and financial resources provided to the Indian court system.[285] Indian witnesses told Congress about a range of alarming practices ranging from illegal extradition of Native Americans to off-reservation authorities to court procedures which in effect forced a witness to testify against himself.[286] Such graphic testimony pertaining to the abuse of Indian prisoners combined with the realization that Indian courts were not obliged to answer for these abuses to any higher jurisdiction, creating a substantial case for new legislation.

Ervin originally submitted eight bills and one resolution on the subject of Indian civil rights to the Senate, including one provision which would have literally incorporated

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[285]Wunder, 133-34. Some of the more graphic evidence of abuse by both Indian and state officials came from field hearings. For example, see testimony gathered at Sacaton, Arizona in U.S. Congress, Senate, Subcommittee on Constitutional Rights of the Committee on the Judiciary, Constitutional Rights of the American Indian, Eighty-Seventh Congress, First Session, (on November 25, 29, and December 1, 1961) 357-420; See also testimony conducted at field hearings in Denver, Colorado; Pierre, South Dakota; and Minot, North Dakota in U.S. Congress, Senate, Subcommittee on Constitutional Rights of the Committee on the Judiciary, Constitutional Rights of the American Indian, Eighty-Seventh Congress, Second Session, (on June 1, 2, and 6, 1962) 512-810.

[286]For these specific examples see Congress, Senate, Subcommittee on Constitutional Rights of the Committee on the Judiciary, Constitutional Rights of the American Indian, Eighty-Seventh Congress, First Session, (on November 25, 29, and December 1, 1961) pages 371-72 and 366 respectively.

the federal Bill of Rights into the jurisdiction of the tribal authorities.[287] Ervin's proposals drew harsh criticism from Native Americans concerned that such constitutional scrutiny would prove anathema to the political authority of native "theocracies," lead to challenges over the criteria used to define tribal membership, overtax the limited resources of tribal courts with additional procedures, and force those courts to over-emphasize the value of "confrontation and punishment" in dealing with legal disputes.[288] In response to these concerns Ervin amended his proposals creating a single bill, known as the "Indian Civil Rights Act" or the "Indian Bill of Rights," which comprised six of the seven provisions of the Civil Rights Act of 1968 (Titles II-VII). Title II of the ICRA includes most of the provisions of the Bill of Rights, though not - as noted before; the Establishment clause. There are other differences between the ICRA and the Bill of Rights. For example, Title II omits aspects the Fifth and Sixth Amendment as well as the entire provisions of the Second, Third, Seventh, Ninth, and Tenth Amendments in their entirety.[289] For the most part, however, passage of the ICRA established a legal framework sufficient to protect the civil rights of Indians from tribal authorities.

Ervin attached his proposal to the Civil Rights Act of 1968, and argued convincingly for its passage. The same case history cited by Justice Huxman in support of the decision in Native American Church v. Navajo Tribal Council provided Ervin with material supporting the need for an Indian Bill of Rights. He entered his own version of this case history into the Congressional record, adding remarks about additional cases relevant to the subject and devoting a significant portion of his remarks to the Native American Church and Toledo cases. Ervin's remarks included references to State v. Big

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[287]Wunder, 135-36.

[288]Wunder, 136.

[289]Civil Rights-Riots-Fair Housing-Civil Obedience, Statutes at Large, Title II, sec. 202, 94-95 (1968). For a detailed comparison of the of the provisions contained in the federal Bill of Rights and those of the Indian Civil Rights Act, see Wunder, 136-39.

Sheep, an early peyote case which received an unfavorable ruling from the Supreme Court of Montana.[290] He also cited the case of Glover v. United States in which the District Court of Montana had denied a petition for habeus corpus in relation to a drinking and driving conviction on the Flathead Indian Reservation.[291] Ervin contrasted these and other cases pertaining to tax laws and tribal membership with Colliflower v. United States, a case which in his terms "virtually stands alone in upholding the competence of a federal court to inquire into the legality of an Indian court."[292] This single example provided Ervin with the proverbial exception that proves the rule. The Colliflower decision made it possible for him to contrast a long string of cases of which he disapproved with a single case upholding constitutional values, thus effectively articulating his own sense of value through the narrative form of a misbegotten case history. Only one court in all the land had been able to defend the civil rights of an Indian facing the wrath of a tribal court based on constitutional principles, and it was up to Congress to come to the rescue.

Such a case history provided ample fodder for a political decision motivated by much an historical ideology by now familiar to the history of Indian-white relations. Ervin had framed the significance of his bill in terms of a projected historical narrative:

> In introducing these proposals, I wish to emphasize that these bills should not be considered the final solution to the many serious constitutional problems confronting the American Indian. A system of law and order for the Indian tribes of America which is in keeping with the rights and privileges other Americans enjoy, will take years to develop.

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[290]U.S. Congress, Senate, Senator Ervin of North Carolina, Congressional Record, vol. 113 (May 23, 1967) 13474. Note that State v. Big Sheep, was decided in 1926, not 1962 as indicated in the Congressional Record, And that the controlling principle of case law in dealing with the Free Exercise clause was still defined under the belief action distinction introduced under Reynolds (see chapter 1). This fact was cited by the court in Big Sheep, indicating that the claim had dim prospects even in the absence of jurisdictional questions, State v. Big Sheep, 243 Pacific Reporter, 1073 (Supreme Court of Montana, January 26, 1926).

[291]The motion for a writ of habeus corpus charged that the defendant had been convicted without legal representation, but given the fact that the case took place on an Indian reservation the District Court ruled that he had no right to representation, at least not one that could be enforced by a federal court. See Congressional Record, 113 (May 23, 1967) 13474; Glover v. United States, 219 F. Supp. 19 (D. Montana, Missoula Division, 1963).

[292]Congressional Record, 113 (May 23, 1967) 13474.

The substance of these bills, however, is an exceedingly important and necessary part of this goal.[293]

Presented in these terms the proposals would prepare the way for a future in which Indians enjoy the same "rights and privileges" as other Americans, effectively providing a happy solution to the plot formed in a dismal case history. Thus, Ervin characterized the conflict in terms of individual actors all of whom were basically "Americans," thus effectively eliding any questions about the relationship between Indian tribes and other government entities. This sense of the historical context behind the ICRA was clearly informed by the world view described earlier as a form of American civil religion, a cosmology filled by individuals vested with natural rights. And the historical significance of Ervin's proposals could be derived from a narrative role projected into the future. Passage of the ICRA would reverse the trend cases denying federal Courts jurisdiction to protect the civil rights of the American Indian, providing a glorious chapter in the progress of freedom, a theme appealing to both liberals and conservatives.[294]

At stake in the passage of the ICRA was the ability to create a legal foundation for popular sentiments that the principles of American jurisprudence were significantly implicated in the relationship between Indians and their tribes. In a sense the Colliflower decision had been predicated on a similar contextualization strategy. Justice Merrill Dunaway wrote the opinion for the court in Colliflower, arguing that because Indian courts act in effect as a kind of federal agency, and as such; they are bound by the terms of the

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[293]Congressional record, 113 (May 23, 1967) 13473.

[294]The final text of the ICRA did not extend full Constitutional protections to Native Americans, due largely to the fact that its only provision for enforcement lay in a writ of habeus corpus. See Statutes at Large, Title II, sec. 203, 95 (1968). This would allow individuals imprisoned by tribal authorities to obtain their freedom in the event that their rights had been violated under the terms of the ICRA, but it would not provide a remedy for civil claims emerging from tribal practices. It initially appeared that the courts might miss this fact when the district court of Arizona ruled that the Navajo tribe had acted improperly in banishing a white lawyer from the reservation. See Dodge v. Nakai, 298 F. Supp. 17 (D. Arizona, 1968); Dodge v. Nakai, 298 F. Supp. 26 (D. Arizona, 1969). In 1978, however, the United States Supreme Court ruled against a Santa Clara woman who claimed that her rights had been violated when her children had been denied membership in this patrilineal tribe. The Supreme Court thus clarified that the ICRA provided no relief for such claims insofar as they did not involve criminal proceedings. See, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

federal Constitution.[295] Read as such the interactional significance of a tribal court cannot but implicate the moral responsibilities of the federal courts and every American. Hence, the rationale for both the Colliflower decision and the Indian Civil Rights Act was rooted in a need to enforce the cosmology of Western style constitutionalism on the actions of tribal authorities. But whereas the Colliflower decision reflected an idiosyncratic position that the federal courts already possessed the ritual authority to enforce this position, support for the ICRA was predicated on the need to create that authority in through federal legislation. Federal legislation is itself a form of ritual authority, and as Mertz has illustrated (see chapter 1); it is the proper such of ritual authority for advances into indigenous territory within the boundaries of the United States. Prior to the passage of the ICRA both Ervin's position and that of Justice Dunaway could be dismissed as little more than a poetic trope, but with the passage of this act it would become a poetic trope backed by federal law.

From the preceding remarks it appears that the campaign for an Indian Bill of Rights shares some of the features of a sectarian dispute, at least insofar as the images used to support the bill were derived from a fundamental sense of cosmological order. Federal and tribal authorities did not share a common set of assumptions about the social composition of legal authority and its relationship to a natural order, and had this been the case neither Toledo nor the Native American Church cases would have occurred. The campaign to pass an Indian Bill of Rights differed from a sectarian dispute, however, inasmuch as it was not a function of theoretical polemics; supporters of the ICRA sought direct control over the practices of Native American courts rather than theoretical concessions about the shape of the universe. ICRA supporters did not frame their differences in terms of an abstract dispute over the religious beliefs.. For those tribes

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[295]Colliflower v. Garland, 342 F. 2d 369 (Ninth Circuit, 1965). Note also that a similar line of argument had been attempted in connection to Native American Church v. Navajo Tribal Council. The defendant's in this case sued then Secretary of the Interior, Stewart Udall, arguing that his approval the anti-peyote ordinance constituted an abridgement of the First Amendment. This attempt to address federal involvement in a tribal anti-peyote ordinance, failed, however, when the court ruled that no federal officials had actually endorsed the ordinance itself, James Oliver et. al. v. Stewart Udall, 306 F. 2d 819 (Tenth Circuit,1962).

whose political authorities were deeply rooted in a cosmological order other than that presupposed in a civil libertarian tradition, however, the act had all the potential implications of an attack on their world view. The ICRA would force Indian tribes to adopt an orientation towards legal matters derived from an entirely different vision of social organization and cosmology.

Congress dealt with the conflict between the prospect of an Indian Bill of Rights and the religious concerns of Indian tribes, at least to the extent that it chose to omit an Establishment clause from the provisions of the ICRA.[296] This decision made sense in view of the fact that a distinction between "religious" and "political" practices remained foreign to many Indian tribes (particularly the Pueblos). And yet, the decision is also something of a paradox, given the fact that concern over tribal actions limiting free exercise had played such a key role leading up to the ICRA in the first place.[297] The principles behind the Establishment clause and the Free Exercise clause are frequently combined in master-narratives explaining the significance of the First Amendment. Indeed, it is quite common to speak of them as though they constituted a single provision dictated by a single principle. And this is precisely what one might expect, given the fact that the cosmology implicit in American constitutionalism serves to isolate sectarian disputes, envisioning "religion" as something that can be divorced from "politics." Thus, many would argue that prohibition of an established religion is itself a crucial guarantee against infringement on the right of free exercise. Hence, the omission of an Establishment clause constitutes no small concession to the interests of tribal cosmology.

So, it appears that Congress recognized the degree to which a total separation of religious and political institutions would undermine the ritual foundations of Indian

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[296]See Felix S. Cohen, Handbook of Federal Indian Law, Charlottesville, Virginia: Michie Bobbs-Merrill, 1982) 667; Robert S. Michaelsen, "The Significance of the American Indian Religious Freedom Act of 1978," Journal of the American Academy of Religion, LII (1984) 95; Michaelsen, "American Indian Relgious Freedom Act Litigation," 51-52; Pevar, 242; Wunder, 136, 138.

[297]This is a point raised by Cohen, 667n.

government as such. But to the extent that the ICRA does contain a version of the Free Exercise clause the bill does require Indian tribes to work with some definite notions about "religion," thus generating a conceptual isolation between a specific set of rituals and other aspects of social life. To the extent that tribal court's must be able to define "religion" in order to protect free exercise they must be able to distinguish it from non-religious practices in order to narrow the prospects for free exercise litigation. This same sort of distinction would provide the state and federal courts of the United States with enough trouble once they began to deal with the AIRFA, but for now the problem was passed off on to tribal institutions. Hence, the ICRA does serve to generate a set of distinctions foreign to the workings of tribal cosmology.

The simple omission of an Establishment clause provided a important compromise, because had Congress insisted on such a clause it would have in effect canceled the authority of many tribal institutions. Such a compromise could be made to the extent that it functioned only within the context of tribal jurisdiction; but the pattern of events leading up to passage of the ICRA nevertheless reveals an underlying conflict between Indian cosmology and the social categories used in constitutional thought. The presumption by federal authorities that the conflict related to political matters cast the difference between these systems in terms other than the sectarian conflicts defining matters of "religion." For many Indians this was and continues to be an arbitrary distinction.

Chapter IV:
Sacred Geography and Historical Ideology in the American Indian Religious Freedom Act.

When the domestic ideology is divided according to American Indian and Western European immigrant, however, the fundamental difference is one of great philosophical importance. American Indians hold their lands - places - as having the highest possible meaning, and all their statements are made with this reference point in mind. Immigrants review the movement of their ancestors across the continent as a steady progression of basically good events and experiences, thereby placing history - time - in the best possible light. When one group is concerned with the philosophical problem of space and the other with the philosophical problem of time, then the statements of either group do not make much sense when transferred from one context to the other without the proper consideration of what is happening.[298]

Vine Deloria, Jr., God is Red: A Native View of Religion.

The Indian Civil Rights Act of 1968 came up for a vote before Congressmen familiar with a brand of civil rights activism strongly associated with desegregation efforts following the 1953 case of Brown v. Board of Education. This notable case had given birth to the famous statement that "Separate educational facilities are inherently unequal."[299] That concise principle would capture the imagination of civil rights activists for years to come and define the terms of national debate over civil rights long after support for affirmative action programs had replaced opposition to Jim Crow laws as the primary cause of liberal activism in America. Had the Supreme Court merely decided in Brown that the system of school segregation at issue had in fact perpetuated inequality, history might have followed a very different course; but instead the Court declared that segregated schools were "inherently unequal," thus displaying a kind of moral certitude regarding the case

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[298]Vine Deloria Jr., God is Red, (New York: Grosset & Dunlap, 1973) 75-76.

[299]Brown v. Board of Education of Topeka, 347 U.S. 493-95 (1954).

before it through reference to a universal principle.[300] The text of the Brown decision therefore seems to have offered the notion that separate facilities were "inherently unequal" as a principle of faith.[301] And indeed this was a principle of faith that many were willing to adhere to, as subsequent thought would decontextualize the notion into the basis for an expansive philosophy of civil rights.

Despite the rhetorical stance taken by the Supreme Court in Brown, its decision was a historically specific response to a historically specific form of persecution. The Court's famous pronouncement may have been well suited to the context of civil rights activism in the nineteen-fifties and sixties, but only a perverse inattention to historical context could equate the moral significance of desegregation with that of later opposition to affirmative action.[302] An equation between either of these issues and the interests associated with reservation life would seem even more implausible. And yet such an equation had been made in 1968, (and it would again be made in 1990). Senator Ervin, himself a segregationist, had championed the ICRA through rhetoric familiar to the civil rights movement (and to conservatives supporting assimilation of Native Americans), but his efforts actually preceded the major voices of an American Indian civil rights movement.[303] Radical Native American political activism would reach its peak of public attention during

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[300]Recourse to the a-prioristic language implied by the phrase "inherently unequal" may be read in this respect as a kind of affect display, signalling the surety of the court about its judgement. Whereas the notion that separate facilities are constitute an "inherently unequal" institutional arrangement would seem to form a universal proposition easily applicable to a broad range of subjects, the interactional significance of the phrase is perhaps best read as an index of the court's moral certitude in the context of the Brown case itself. C.f. William Labov's work on the affective significance of adverbial quantifiers, "Intensity," Meaning, Form and Use in Context: Linguistic Applications, ed., Deborah Schiffrin, (Washington D.C.: Georgetown University Press, 1984) 48-67 *passim.*

[301]See J. Harvie Wilkinson, From *Brown* to *Bakke*: The Supreme Court and School Integration 1954-1978, (Oxford: Oxford University Press, 1976) 34-35. Wilkinson notes that members of the the Supreme Court had expressed fears that a decision declaring segregation wrong in theory could be undermined in practice, 24. He also notes that many defenders of the Brown decision have been reluctant to undertake any proof that Southern segregation was in fact harmful to Blacks, viewing this as an obvious fact, 34-36.

[302]C.f. Stanley Fish, There's No Such Thing As Free Speech: And it's a Good Thing, Too, (New York and Oxford: Oxford University Press, 1994) 60-69, 78.

[303]See Wunder, 124-46 *passim.*

the nineteen-seventies; and its leadership would pursue a set of interests entirely distinct from those which defined the struggle over desegregation.[304] Such activists often found themselves at odds with both liberal and conservative political philosophies and the constant preoccupation with equality that had grown to characterize debates between them.

Whereas early civil rights activists had pushed for a kind of equality (effectively framing their political identity in terms consistent with social contract theory), and later efforts would focus on problems associated with a more permanent minority status; Indian activists typically presented a strong case for separatism throughout the nineteen-seventies. In this regard Native American political activism could potentially be equated with later developments in civil rights struggles such as the "Black Power" movement, except that its own agenda was generally predicated on a distinct set of political relationships associated with tribal sovereignty. The trust relationship between Indian tribes and the federal government effectively provided certain Indian claims to differential treatment under the law with a stronger legal footing than had been the case for their largely Afro-American counterparts. Thus, a good deal of Indian activism centered around interests defined in varying degrees by tribal institutions, and many activists developed a rhetorical position consistent with the basic ideological framework of trust doctrine.[305]

Whereas the Marshall court had generated the legal foundations of trust doctrine out of rhetoric which placed a positive value on the future and defined the space of Indian territory as an obstacle to that future; contemporary Indian activists sought to defend the space of Indian territory from the oppressive march of American imperialism. The rhetorical dimensions of either position rested on a largely identical descriptive sense of American history, one constituting a meta-historical thesis, or "philosophy of history."[306]

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[304]Wunder, 144-46; Deloria, Custer, 168-96.

[305]Mertz, "The Uses of History," 678-81; Wall, "Space, Time and Cultural Landscape," *passim.*

[306]C.f. Löwith, 1-19 *passim*; Hayden White, 1-25, 101-120 *passim.*

Such a meta-historical thesis (that "U.S. history is progress / imperialism") could be employed as an implicit narrative theme prefiguring each of the empirical events dealt with in a given utterance or text. In this respect the rhetorical stance taken by many Indian activists has not differed much from the structural pattern employed by Marshall, but they have inverted the values associated with assimilationist versions of trust doctrine. Indian political activists typically sought to impress upon others the distinctive virtues of an Indian land ethic, fashioning a pan-Indian spiritualism out of images such as "Mother Earth."[307] Hence, pan-Indian rhetoric transformed the space of Indian territory, once presented as an obstacle to American progress, into a sacred bulwark against economic exploitation of the American landscape. By reversing the values attached to the structural framework of Indian-white relations in this manner, Indian activists began to develop a master-narrative providing them with considerable symbolic capital for use in a broad range of political conflicts.

In his book, God is Red, Vine Deloria, Jr. articulated the prospects of a distinctly Native American theology and illustrated the significance of that theology through an historical commentary on the political ethos of American Indian activism. A Hunkpapa Lakota with degrees from both seminary and law schools, Deloria had been the executive director of the National Congress of American Indians; and his work has consistently reflected a strong concern for both the legal and spiritual dimensions of Indian life.[308] Originally published in 1973, God is Red served to define the much of the religious thought found in subsequent Indian activism. In the second edition of God is Red, published in 1994, he would recall:

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[307]See Gill, Mother Earth, 129-50 *passim*.

[308]On his life and relationship to the early years of American Indian activism, see Vine Deloria, Jr., "This Country Was a Lot Better Off When the Indians Were Running it." Red Power: The American Indians' Fight For Freedom, ed., Alvin M. Josephy, Jr., (1971. Lincoln and London: University of Nebraska Press, 1985) 235-47.

In 1972 when I was writing the first version of this book, I sought to emphasize the role that spaces and places play in our human religious experience.

From the invasion of Alcatraz in 1969 to the occupation of Wounded Knee in 1973, I felt that the various Indian protests had a much deeper meaning than simply securing additional lands for reservations. At the bottom of everything, I believed then and continue to believe, is a religious view of the world that seeks to locate our species within a fabric of life that constitutes the natural world, the land and all its various forms of life. As long as Indians exist there will be conflict between the tribes and any group that carelessly despoils the land and the life it supports. At the deepest philosophical level our universe must have as a structure a set of relationships in which all entities participate. Within the physical world this universal structure can best be understood as a recognition of the sacredness of places.[309]

Deloria's conviction that Indian activism had its roots in a distinct philosophy of religion was in many respects a self-fulfilling prophesy. To the extent that he and others concerned with Indian political rights characterized their political agenda in such terms, they successfully refashioned an ostensibly political conflict into an ostensibly religious debate. And this seems fair enough, given the artificial grounds on which American constitutionalism separates religion from politics into distinct spheres of social activity. Much of Deloria's position is an essentially accurate appraisal of the interests defining Indian activism (a kind of self awareness, to the extent that he himself was interested in the cause of Indian rights); but his position also betrays a kind of rationalization of the categories of Indian-white relations. At times he seems to load the significance of an entire environmental ethic into the terms "space" and "place," thus characterizing a presumably universal structure of relations between all entities in terms more familiar to to the dynamics of human territorial consciousness. In this manner his attempt to describe the interactional schema relating people to the environment is skewed by an interactional schemata in which humans are the major actors and the environment is confined to the role of objective consciousness.

Deloria's writings contain many passages attributing a deep spiritual significance to the environment, but his message is hindered by reliance on the spatial categories defining

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[309]Deloria, God is Red, (1994), 1-2.

Indian territory.[310] Given that contemporary federal control over Indian life is normally defined in terms of spatial consciousness (as federal jurisdiction over reservation lands), Deloria's attempts to situate the significance of Native American environmentalism in terms of "space" and "place" conveys a specific set of legal implications; but this strategy does have its limitations. It is easy to see how a general respect for the environment could lend support for a political agenda designed to safeguard or expand the territory of an Indian reservation; but it is difficult to see how the defense of such a territory would prove an adequate response to the threat posed by an American public "carelessly despoiling the land and the life it lives on." Thus, Deloria's position exhibits a kind of ambivalence regarding the dimensions of political conflict between Indians and whites. His commentary moves freely back and forth between the terms of a general dispute over the significance that the environment "should have for us all," so to speak, and the particular significance that it takes for Native Americans given the role provided them within the structure of Indian-white relations.

Deloria's more general statements generate a (by now familiar) pro-Indian Master-narrative. He and other Indian activists have successfully used this master-narrative to confer an abstract significance to the concrete circumstances of numerous political disputes involving Native Americans. Each particular battle over an Indian policy can then be seen as another event in a long history of conflict between Indians and whites over the proper significance of the American landscape. According to Deloria Euro-Americans have essentially forsaken the spiritual dimensions of their own interaction with nature and are far more interested in pursuing a historical vision in which the environment is confined to the domain of utilitarian values. Thus, it is left to Indians to speak on behalf of the natural order, report on the proper dialogue between man and nature, and illustrate such a dialogue through their own actions. Deloria's philosophy of history allows him to situate any

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[310]See also Vine Deloria, The Metaphysics of Modern Existence, San Francisco: Harper & Row, Publishers, 1979) *passim.*

particular victory for a Native American cause within a broader sense of historical teleology, thus portraying it as a kind of victory for the environment with which (or whom), he maintains, they have a special relationship. According to such a view the major political interests of Native Americans are defined by a distinct set of political relationships and an equally distinctive pattern of environmental praxis. There is little place for "equality" in this rhetoric, and a good deal that celebrates difference.

Deloria's works reflected the general sense of an emerging brand of political activism, and he sharpened the terms through which its advocates could address a larger audience. Cultural differences formed a key theme in the rhetoric used by Native American civil rights activists, and a healthy respect for the environment generated the most recognizable of these differences. By affirming an orientation towards the environment which was understood to be inconsistent with the terms of Euro-American social organization, Native American activists forced environmental issues into the arena of discourse about civil rights. Many young activists demanded the right to interact with nature in terms defined within their own sense of cultural order, and they drew frequent support from elder practitioners of "traditional Indian religions." Thus, it should come as no surprise to find that environmental issues would play a significant role in the politics of Indian rights.

It should also come as no surprise that the category of "religion" would serve as a key theme through which Indians could articulate their own distinctive patterns of interaction with the environment to a broader American public. The Taos campaign for control of Blue Lake had already prepared many of the themes defining this role. Americans were by now familiar with a general sense that Indian culture involved a kind of religious devotion to the environment; and Congress had already supplied a legislative precedent defining this ethos as a kind of free exercise interest, at least to the degree that it could be related to specific features of the natural environment. Moreover, the principle compromise included in the ICRA, its omission of an Establishment Clause, further

illustrated Congressional willingness to accommodate cultural differences insofar as they affected religion. Thus, notions of "religious freedom" came to form a privileged rhetorical theme through which to gloss unusual Native American interests, particularly those pertaining to the environment, as an issue involving civil rights.

Federal lands outside of the reservation system also served as strategic site for conflict between federal agencies and Native Americans, particularly for conflict falling under the heading of "religion." Political conflicts which could be located within the space of a reservation could usually be addressed in terms of trust doctrine, and to the extent that such issues involved living conditions on the reservation it was often more productive for activists to focus on this affect than any questions of religious freedom. Enforcement of federal policies on federal lands outside of the reservation system, however, posed an altogether different set of problems. Indian tribes could not claim direct control over the resources contained within such territories, but they could invoke trust responsibilities as an argument in favor of specific federal policies.

Contemporary notions of trust doctrine were already defined largely in terms of spatial concepts - as a matter of federal jurisdiction over Indian territories; and so by calling attention to resources located on off-reservation federal lands Indians could expand the spatial parameters relevant to trust doctrine while still working within the language of its basic rationale. Such arguments called upon the federal government to exercise control over its own territories in a manner consistent with Native American interests. A number of Indian tribes had a variety of plausible interests in aspects of federal policy affecting management of public lands, because the very public status of such territories had long enabled Indians to continue ceremonial practices in remote and undeveloped regions of the American landscape. As the general public made more and more use of such regions and environmental legislation mounted, however, many Indians found it increasingly difficult to practice traditional rites in customary places. A number of concrete interests could

therefore be directly related to an emerging pattern of dialogue with federal authorities over principles of land management.

Throughout the early nineteen-seventies Native American religious leaders sought to negotiate with federal officials concerning the enforcement of laws affecting Native American ceremonial practices. In 1977 Senator Abourezk, chairman of the Senate Select Committee on Indian Affairs, began to hold hearings to discuss the matter with tribal leaders. On December 15, 1977 Abourezk introduced Senate Resolution 102, the product of these hearings, into the Senate on behalf of himself and ten other Congressmen (Senators Humphrey, Kennedy, Inouye, Matsunga, Hatfield, Stevens, Gravel, Goldwater, Domenici, and Bartlett). On February 14, 1978 Senators Udall and Blouin introduced a companion measure for consideration of the House of Representatives (House Joint Resolution, 738). These measures would eventually take form as the American Indian Religious Freedom Act which was signed into law on August 11, 1978.

In manner respects passage of the AIRFA appeared to follow the precedent set earlier by the Blue Lake Amendment of 1970. For those Congressmen who had been concerned about the precedent set by Blue Lake, however, passage of the American Indian Religious Freedom Act must have been a complete nightmare. The AIRFA was a general policy statement presenting an open ended range of possible applications, and by this time it was obvious that several tribal entities asserted a definite religious interest in a significant portion of public lands. Thee claims would eventually strain the credibility of the federal policy-makers, the courts, and the general American populace. People would soon learn that the American landscape possessed a number of sacred sites, and that this might interfere with federal water projects, private logging operations, perhaps even personal vacation plans. Thus, in 1978 Congress faced precisely the sort of scenario hinted at so darkly in debates over the status of Blue Lake. Under the AIRFA various courts and federal policy makers would face a number of unusual free exercise claims, many of which dealt specifically with the use of public lands. So, in passing the AIRFA Congress had to

construct a vision of how principles of religious freedom might be applied to those who asserted a spiritual interest in the American landscape.

Senate Joint Resolution 102: the AIRFA Goes to Congress.

Congressional authorities fashioned a discursive role for the AIRFA out of ideological patterns familiar to the history of Indian-white relations. Much as the ICRA had been presented as an extension of rights properly belonging to all Americans, thus invoking a sense of history dominated by images of methodological individualism; the case for passage of the AIRFA was always presented in the shadow of the Free Exercise Clause of the First Amendment. The chairman of the Senate Select Committee on Indian Affairs prepared a report which accompanied S. J. Res. 102; it included a brief statement describing the purpose of the bill. "The intent of Senate Joint Resolution 102" it reads "is to insure that the policies and procedures of a variety of federal agencies are brought into compliance with the constitutional injunction that Congress shall make no laws abridging the free exercise of religion."[311] The report would follow this statement of purpose with a discussion of its historical context. This historical commentary served to situate the act itself within the relatively narrow context of recent events in federal policy; it also situated the act in the context of broader questions about the social and historical relationships between Indians and whites. The narrative begins:

> Native Americans have an inherent right to the free exercise of their religion. That right is reaffirmed by the U.S. Constitution in the Bill of Rights, as well as by many state and tribal constitutions. The practice of traditional native Indian religions, outside the Judeo-Christian mainstream or in combination with it, is further upheld in the 1968 Indian Civil Rights Act.[312]

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[311]U.S. Congress, Senate, Native Americans' Right to Believe and Exercise Their Traditional Native Religions Free of Federal Government Interference, Report to accompany S. J. res. 102 submitted by James Abourezk, Ninety-fifth Congress, Second Session, Report No. 95-709. (1978) 2.

[312]Report to accompany S. J. Res. 102, 2.

By affirming that Indians had an "inherent right of free exercise" the report served to naturalize the significance of its own cultural categories, and by linking this inherent right with the texts of the Constitution and the ICRA the report generated a historical master-narrative in which Congress had increasingly recognized these "inherent rights" (as opposed to an equally plausible master-narrative in which Congress gradually imposed the terms of methodological individualism onto the institutional framework of tribal affairs).

This commentary provided everything that would follow in the text of the report with a solid rationale, one in keeping with the terms of American civil religion. In passing the proposal Congress would in effect make sure that Indians received normal protections due them as well as any other Americans under the First Amendment. Yet, this same rationale could and did serve as a substantial limitation on the significance that the bill would take in public policy, a limitation which served to mitigate claims rooted in the interactional patterns of trust doctrine. If the "intent" of the AIRFA was to provide Indians with a constitutional protection due other Americans, then as many would come to argue; it must not provide them with any protection other than those enjoyed by every other American. This would prove to be a crucial stumbling block for AIRFA litigation given the highly unusual nature of practices for which Native Americans sought government protection.

Following its remarks on the First Amendment and the Indian Civil Rights Act Abourezk's report would go on to assert that infringement of Native American rights to the free exercise of religion had become a widespread practice among federal agencies.[313] The report further asserted that such infringements were the result of attempts to enforce otherwise sound pieces of legislation which had been passed without considering their impact on Indian religious traditions.[314] The report next cited three principle areas of

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[313]Report to accompany S. J. Res. 102, 2.

[314]Report to accompany S. J. Res. 102, 2.

conflict between native American religious practices and federal policies. The first of these involved access to sacred sites and cemeteries located on federal and state lands.[315] Next the report cited a number of conflicts relating to the possession of substances and objects associated with Native American rituals; restrictions on the use and possession of plants and substances such as the hallucinogenic peyote (but also sweet grass and pine needles confiscated on the suspicion that they might be some form of narcotic), profane treatment of medicine bundles by customs officials (such bundles are normally opened only under ceremonial conditioned and by proper religious authorities), and confiscation of eagle feathers and body parts belonging to other endangered species used in Indian ceremonial garb (as well as the feathers of common species of birds confiscated by officials suspecting that they might have belonged to endangered species.[316] Finally, the report called attention to federal interference in Native American ceremonies as a problem in itself; both through failure to police ceremonial grounds properly within federal jurisdiction, and through direct interference such as creating an intrusive presence at "ceremonies which require strict isolation."[317] Thus, the report sought to address a broad range of interests associated with Indian ceremonial practices under three general headings, sacred sites, sacred objects, and sacred events (ceremonial practices).

In finishing its summary of conflict between the religious practices of Native Americans and the actions of federal agencies by referring to direct federal interference with ceremonies, the report called forth images of deliberate religious oppression. This abstract reference to deliberate government oppression of a religious tradition carried an unusually graphic significance in reference to Native American subjects, given that such practices had

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[315]Report to accompany S. J. Res. 102, 2-3.

[316]Report to accompany S. J. Res. 102, 3-4.

[317]Report to accompany S. J. Res. 102, 4. Note that the report's reference to Federal presence at ceremonies requiring isolation alludes to the FBI surveillance practice of circling Sun Dance grounds in South Dakota in a helicopter. In at least one instance, occurring in 1975, the FBI is reported to have landed its helicopter and held elder members of the Sioux tribe at gunpoint. See also, Sewell, 431.

been official BIA policy as late as the nineteen-twenties. This allusion to contemporary abuse of police power also ensured that Congressmen would identify with at least one instance of a prototypical free exercise complaint out of a list otherwise composed of questions about bureaucratic policies. After condemning such deliberate interference, the report moved on to reaffirm that the majority of conflicts between Native Americans and federal officials had been the result of laws which incidentally impaired the free exercise interests of the former.[318] The solution, according to Abourezk's report on Indian Affairs was to reassess the application of these laws to Native American religious practices. What traditional Native Americans needed was not so much a reprieve from an oppressive government policy as a new set of general policy guidelines administering the specific policies of various federal agencies in a manner consistent with the interests of tribal religious authorities.

The Senate Select Committee on Indian Affairs recommended several amendments to the original legislation, two of which they considered substantial. They asserted that "Native American religious leaders" should be consulted in order to establish the nature of any interests addressed through the AIRFA, and stressed that Native American practitioners should constitute the proper source of such information rather than "Indian experts, political leaders, or any other non-practitioner."[319] The Committee also recommended the inclusion of language directing administration officials to "implement" any changes in federal policies through "Executive action."[320] The committee members did not merely want the Executive branch to reevaluate its policies, they wanted to ensure that changes relevant to the religious freedoms of Native American practitioners would actually take place.

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[318]Report to accompany S. J. Res. 102, 4-5.

[319]Report to accompany S. J. Res. 102, 1-2, 5.

[320]Report to accompany S. J. Res. 102, 6.

Perhaps the first hint of conflict over the meaning of the AIRFA came from a statement issued by Larry L. Simms, an attorney working for the Office of Legal Council. Simms argued that any provisions requiring implementation of changes necessary to protect Native American rights; " . . . might be read to modify existing statutory law or to dispense with the usual balancing of the right to religious freedom against other societal interests . . . It might also be read to require that religious freedom protected by this resolution be accorded a position not accorded to non-Indian religious freedom under the first amendment."[321] This raised two separate concerns, Simms argued; a potential conflict with the Establishment clause of the Constitution, and the possibility that the AIRFA would modify substantial areas of federal law and "preempt" a number of State laws affecting Native American religious practices.[322] Thus, Simms argued that the act should contain language stipulating that after reevaluation of federal policies the executive branch should implement only changes consistent with existing statutes and make recommendations to Congress regarding any legislation deemed necessary to alter existing statutes on behalf of relevant Indian practices.[323] He also wanted a provision explicitly denying that anything in the act could be construed to alter existing provisions of State and federal law.[324] Such provisions would effectively prevented the AIRFA from directly altering many of the agency practices which had given rise to the bill in the first place, though they would left intact the possibility that such laws could be altered by more specific legislation in the future.

The Senate Select Committee did not adopt Simms' proposed changes, but his argument did serve to underscore some of the ambiguities contained in the act itself.

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[321]Report to accompany S. J. Res. 102, 10.

[322]Report to accompany S. J. Res. 102, 10.

[323]Report to accompany S. J. Res. 102, 10-11.

[324]Report to accompany S. J. Res. 102, 11.

Whereas the resolution was purportedly "intended" to guarantee that Indians would be accorded a right of free exercise comparable to that enjoyed by other Americans; its specific provisions seemed to go beyond that. Yet nothing in the proposed bill could be used to determine precisely how far Congress intended to go in order to meet the unusual needs of Native American religious practitioners. By requiring the executive branch to reevaluate and implement changes in federal policies the bill generated a number of open questions regarding its own significance. Did it require modification of the Endangered Species Act, for example, or would Native Americans found in possession of eagle feathers still be subject to imprisonment? In this initial form (and in its final form, for that matter), the AIRFA left this decision up to the discretion of federal policy makers. And whereas S. J. 102 did not explicitly deny that it required substantive changes in federal and state laws, as Simms had proposed; neither did it specify the means by which any necessary changes might be enforced. On April 3, 1978 the main text of the Senator Abourezk's report was entered into the Congressional record, and Congress passed S. J. Res. 102 with all of its attendant ambiguities without debate by means of a voice vote.[325]

House Joint Resolution 738: A Little Spat and an Unfortunate Phrase.

House Joint resolution 738 was essentially identical to the resolution introduced into the Senate, except for one minor amendment adding the word "traditional" to a phrase contained in the bill.[326] Representative Udall of Arizona presented the main text of Abourezk's report on S. J. Res. 102 within his own report to accompany H. J. Res. 738, adding that the proposal would not incur any additional cost to the government of the

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[325]U.S. Congress, Senate, Congressional Record, vol. 124 (April 3, 1978) 8365-66.

[326]U.S. Congress, House of Representatives, American Indian Religious Freedom, Report to accompany H.J. Resolution 738 submitted by Morriss Udall, Ninety-fifth Congress, Second Session, Report No. 95-1308. (1978) 1.

United States.[327] On July 18, 1978 House Joint Resolution 738 came up for a vote, but the bill met with unexpected opposition on the floor of the House. Representative Udall framed the case for this proposal in terms of the asymmetry between Christian and Native American religious traditions:

> Mr. Speaker, this country is primarily a Christian country with a large Jewish population and substantial numbers of people practicing various other European and Asian religions. Were we to consider legislation which adversely impacted upon these religions and infringed upon the first amendment right to the free exercise of religion, we would, from our own knowledge and background be aware of that impact and would modify the legislation to eliminate the offensive language.
>
> But the traditional religions of our native American people are not our religions and we are unaware of practices, rites, and ceremonials of these religions (sic). We have, in the past, enacted legislation where we have unknowingly brought about the infringement of the religious rights of the Indians.
>
> Administrative regulations implementing certain laws have, again unknowingly, denied certain religious practices of the Indian people.
>
> It is stating the obvious to say that this country was the Indians long before it was ours. For many tribes, the land is filled with physical sites of religious significance to them. Can we not understand that? Our religions have Jerusalems, Mount Calvaries, Vaticans, and Meccas. We hold sacred Bethlehem, Nazareth, the Mount of Olives, and the Wailing Wall. Bloody was have been fought over these religious sites.[328]

Udall's comments are interesting in a number of respects. In the remarks presented above he had openly addressed the prospect of a general bias in favor of Jewish and Christian religions, and by presenting this bias as a kind of cultural artifact he had successfully raised the question without accusing anyone of overtly bigoted behavior. In a sense he had touched on a kind of structural bias that is indeed implicit within a good deal of legal reasoning dealing with questions of religious freedom. He even responded to the problem in plausible terms by constructing an analogy between the unusual interests associated with his bill and religious sensibilities more recognizable to his fellow Congressmen. And by continually stressing the lack of malice on the part of federal officials Udall's argument helped to frame the prospective legislation as a matter of internal policy revisions, reassuring his fellow representatives that H.J. 738 would not lead to major constitutional

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[327]Report to Accompany H.J. Res. 738, 5.

[328]U.S. Congress, House of Representatives, Representative Udall of Arizona, Congressional Record, vol. 124 (July 18, 1978) 21444.

confrontations. Udall moved on to suggest, however, that the practice of including sacred sites in wilderness areas and national parks constituted a "callous," if also an "unwitting" practice under existing policy.[329]

Following his initial remarks on sacred sites Udall proceeded through a haphazard list of comments regarding H. J. 738. Udall proceeded to comment on the religious significance that animal parts, including those of endangered species, played in many Indian religions.[330] He also gave assurances that it was "not the intent" of his bill to countermand laws generally beneficial to the American public.[331] He also introduced into the record a statement from the Department of Justice indicating its support for the bill, given that it was not "intended" to alter any existing laws.[332] Udall had himself requested an amendment striking a phrase requiring implementation of changes deemed necessary to accommodate the religious practices of Native American practitioners.[333] So, it was clearly his own sense that the bill did not require overt changes in existing federal laws, whereas the AIRFA's main sponsor in the Senate, James Abourezk, had strongly resisted efforts by administration officials to limit its significance in such a manner.[334] Already surprised by

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[329]Representative Udall, Congressional Record, 21444.

[330]Representative Udall, Congressional Record, 21444.

[331]Representative Udall, Congressional Record, 21444.

[332]Representative Udall, Congressional Record, 21444. Note that the letter itself refers to the report that accompanied S.J. Res. 102, and indicates the satisfaction of the department that the prospective bill would neither provide Indians with protection beyond that of other Americans nor alter existing laws. The Letter was signed by Patricia M. Wald, Assistant Attorney General.

[333]Representative Udall, Congressional Record, 21444.

[334]U.S. Congress, Senate, Senate Select Committee on Indian Affairs, American Indian Religious Freedom, Ninety-Fifth Congress, Second Session, (February 24 and 27, 1978) 127-41. Ellen Sewell points out that whereas Udall merely indicated that the act did not "change" existing laws the administration wanted to ensure that the AIRFA would not "affect" existing laws. She writes that; "The difference between the congressional and administrative language is one of nuance. Presumably the Act does not 'change' existing law, either because Indians theoretically already possess the rights the Act protects, or because, as a policy statement, it is to be carried out in conjunction with other laws. However, creating awareness of religious rights and accommodating them would change the way the laws were carried out, and would thus 'affect' existing law, without 'changing' it,"434-35n.

the sudden need to argue in favor of H. J. 738, Udall further underscored his own sense of the bill's limited meaning in subsequent debate (and whether this position was merely a function of his own limited sense remains an open question).

Representative Cunningham of Washington led the attack on House Joint Resolution 738. He began by disclaiming that he or any of his colleagues had any intent to deny the religious freedom of any American citizen, but he went on to ask why was the bill needed.[335] Cunningham reminded the House that members of the Supreme Court had once denied members of the Mormon Church the right to practice polygamy despite its religious significance to them.[336] Next he turned his attention to the sense of legal identity defining an "American Indian" as it would relate to the AIRFA:

> Every time we address the problem of treaty Indians , and these are the only native Americans who have these alleged special rights, what we are doing is to compound the problem we have with respect to reinterpreting the Constitution as far as equal protection under the law is concerned, with no special class of U.S. citizen over another U.S. citizen.
>
> Mr. Speaker, I would respectfully yield to the chairman (Representative Udall) if he would care to answer. What is the definition of an American Indian?[337]

These remarks exhibit a familiar slippage between issues involving Native American tribal sovereignty and those involving more familiar public debate over civil rights. Indeed Cunningham appears to have insinuated that legislation benefiting "treaty Indians" constitutes a kind of affirmative action program to which he would clearly be opposed. He thus took the special status afforded Indians by treaties to be a genuine threat to an egalitarian vision of American social order, but he chose to elide questions about the historical derivation of this status. (It is incidentally not quite accurate to suggest that treaties are the only basis for special Native American rights, given that official recognition

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[335]Representative Cunningham of Washington, Congressional Record, 21444.

[336]Representative Cunningham of Washington, Congressional Record, 21444. Here it is worth noting that Cunningham was alluding to a legal precedent declaring that the principle of free exercise applied to beliefs, but not to actions. This principle of case law had long since been overturned by the Supreme Court (see chapter 1).

[337]Representative Cunningham of Washington, Congressional Record, 21444.

of an Indian tribe takes a variety of forms.) Indeed the presupposition that Indians are U.S. citizens (a position long since authorized by Congressional legislation), and that this is the most salient aspect of anyone's identity in a debate over civil rights, in itself constituted a major transformation of the principles of Indian law. This assumption effectively inverted the logical presumption, established under trust doctrine, that Indian tribes retained authority over internal matters barring specific federal legislation stating otherwise. Cunningham also inverted the historical trajectory of Indian-white relations insofar as he seemed to imply that Indians had been treated as full-fledged American citizens, until someone (presumably a liberal) had decided to treat them differently. Cunningham thus rewrote history in the process of assigning AIRFA proponents the burden of demonstrating what Constitutional principle authorized Congress to treat Indians as a special class of citizens. Whereas Indian tribes are normally presumed to possess rights independent of U.S. citizenship until Congressional legislation indicates otherwise, Cunningham presented such "alleged special rights" as the product of an over-zealous (and overly liberal) civil rights agenda.

Not withstanding the ideological tangent implied in Cunningham's remarks, he did ask a fair question; who would count as an Indian for purposes of the AIRFA? Udall responded by declaring that provisions defining the legal status of Native Americans were detailed in numerous other instances of legislation dealing with Indians, but he said that; "for the purpose of this little sense of Congress resolution, it is anyone who undertakes to practice religion and calls himself a native American and has these kinds of religious rights."[338] In this statement Udall had embedded a vague reference to the technical sense of "Indian-ness" used in legal and political contexts. Representative Cunningham ignored this vague reference and appeared to interpret the answer as an open invitation to any ethnic non-Indian to adopt the posture of a practicing American Indian traditionalist.

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[338]Representative Udall of Arizona, Congressional Record, 21444-45.

Cunningham pressed the matter of Indian identity even further, asking; "Mr. Speaker, would the chairman concur that if one of our Members should say that he is practicing the American Indian religion, he would be authorized ingress to and egress from private property and/ or would be authorized to use peyote?" [339] This rather crude line of inquiry served to underscore Cunningham's own rhetorical stance in more ways than one. While Cunningham raised the prospect that ethnic non-Indians might be able to claim the special status due an Indian, his question presupposed that the AIRFA would directly affect the property rights of a private citizen. This enabled him to refashion the interactional framework inscribed within the resolution into a stereotypical civil rights dispute between liberal and conservative notions over the general significance of minority status. For Cunningham the major actors in this drama were not federal agents and members of semi-autonomous tribal governments, but individual Americans each endowed with the same rights as any other. He thus framed his own opposition to the bill in terms of a rigorous (and rigorously formalist) defense of equality before the law.

As with any complex question, the attempt to answer Cunningham's inquiry was doomed to produce an implausible answer, and Udall's response was no exception:

> We will make him (Rep. Cunningham's would-be Indian Congressmen) an honorary member of the Navaho Tribe if he wants to take that kind of position. However, I suppose that in the same way in which someone can embrace the Jewish faith or the Catholic faith, if someone honestly and sincerely wants to embrace the American Indian native way of religious ceremony, I suppose a person can do that if he chooses.
>
> The joint resolution on page 3 specifically talks about the traditional religions of the American Indian, Eskimo, Aleut, and native Hawaiians.[340]

Cunningham's question had presumed that the AIRFA would give Indian claimants a right to enter private property, and by answering this question in its own terms Udall tacitly essentially granted the presumption. More importantly, his response also produced a number of telling absurdities relating to the legal identity of Native Americans. In this

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[339]Representative Cunningham of Washington, Congressional Record, 21445.

[340]Representative Udall of Arizona, Congressional Record, 21445

utterance Udall had effectively illustrated the degree to which the provisions of the AIRFA confounded ethnic, political, and religious categories. As a bill regarding questions of religious freedom the AIRFA invited a notion of "Indian-ness" defined after the pattern of Euro-American religious traditions, a prospect that would render the category quite fluid and thereby invite the kind of pretense with which Cunningham was so concerned.[341] Yet, a good portion of the rationale for this bill actually rested on the political relationships which bound the federal government to oversee Indian tribal practices. From this perspective it would have been absurd to suggest that the rights conferred by the AIRFA could be applied to a significantly larger set of individuals than those already belonging to tribes covered by trust doctrine. Ultimately, Udall could do little more than indicate that the bill should affect the "traditional religions" of various Native American peoples, but this merely begged the question; what is a "traditional Native American religion?"

The exchange between Udall and Cunningham had illustrated a number of the problems implicit in the bill which would later plague its implementation. The proposal

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[341]The problem here lies in the fact that such "traditional" Native American religious practices are not defined in terms of beliefs or faiths; one does not enter into these cosmological systems by affirming a set of denotational text sentences. Most of the traditions targeted by the AIRFA for protection would derive their membership from those who had a recognized place in an Indian community, often determined by inclusion in the appropriate tribal role. Whereas the Euro-American practice of defining religious differences in terms of an ongoing dispute over doctrine implies the prospect of changing a religion by deciding that its tenets are true, no such profession of faith would be sufficient for many Native American ceremonial systems wherein membership in the religious community is closely tied to the political and economic life of a specific tribal community.

This has subsequently proven to be a serious concern for many Native Americans, given the rise of various New Age sects and do it yourself brands of spiritualism prone to borrowing from Native American traditions. Many Indians have seen this as a direct attack on their religious traditions, a kind of theft, so to speak. Given the discourse patterns of Euro-American theological disputes, this kind of reaction to a potential convert would seem absurd as the primary discursive significance at issue in such arguments would always be a question of truth evaluation. But the discursive patterns used in Native American ceremonies are defined by other means. Many Native Americans have reacted to the theft of this symbolic capital as a threat to their communities. See for example, Andy Smith, "For All Those Who Were an Indian in a Former Life," Ms 44 (November / December, 1991) 44-45 *passim*; Alice B. Kehoe, "Primal Gaia, Primitivists and Plastic Medicine Men," and Christian F. Feest, "Europe's Indians," in The Invented Indian: Cultural Fictions & Government Policies, ed., James A. Clifton, 313-32 *passim*; Ward Churchill, "Spiritual Huxterism: The Rise of Plastic Medicine Men," Fantasies of the Master Race: Literature, Cinema and the Colonization of American Indians, (Monroe Maine: Common Courage Press, 1992) 215-30 *passim*; Ward Churchill, Indians Are Us? Culture and Genocide in Native North America, (Monroe Maine: Common Courage Press, 1994) *passim*; Wendy Rose, "The Great Pretenders: Further Reflections on Whiteshamanism," in The State of Native America, ed., M. Annette James, 403-22.

could be read in terms of at least two different forms of identity; that defining membership in a religious faith, and that defining membership in a tribal system. Udall's rather flippant suggestion that adoption into an Indian tribe might resolve the tension between these alternative notions of "Indian-ness" thus reflected a probable desire to have it both ways. Yet, he could offer no genuine context in which such a measure would have been appropriate, and so he employed the deictic marker "we" as an imaginary authority for such a pronouncement. This usage was completely vacuous, because no-one in Congress was in a position to make anyone a member of an Indian tribe. Earlier that very year the U.S. Supreme Court had declared that tribal authorities had the right to determine their own membership.[342] And Congress could neither be sure that tribal authorities would maintain a tight reign on their membership, nor that they would embrace those who had sincerely adopted a Native American form of religion.[343]

Once again it appeared as though the category of "religion" shaded rather quickly over into political matters insofar as it was applied to Indian subjects, a prospect inconsistent with Euro-American notions of religion. The problem had emerged in relation to both Blue Lake and the ICRA, but in each of these cases Congress had been able to accommodate the distinctive qualities of Indian cultures through context specific measures. The Blue Lake Amendments had dealt with only one specific case, and the omission of an Establishment Clause in the ICRA could only affect the already limited jurisdiction of tribal authorities; but the AIRFA would put in place an abstract statement of policy principles capable of generating an open-ended set of legal conflicts involving direct federal jurisdiction. Representative Udall had fashioned an imaginary discursive framework in which the political and religious dimensions of Indian-ness could be addressed as one, but

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[342]Santa Clara Pueblo, 436 U.S. 49 (1978).

[343]The Navajo Tribal Code itself, for example, does not offer any provisions for adoption into the tribe or assumption of an honorary Navajo status. Representative Udall's comments not-withstanding, the tribal code expressly discounts any interest in such practices. Navajo Tribal Code, Volume 1, Title 1 Through 10, (Oxford New Hamshire: Equity Publishing Corporation, 1962) Title I § 22.

he could not ground that image in a plausible context involving real people (much less "real" Indians).

The House opposition the AIRFA took full advantage of the vagueness of H. J. Res. 738 as well as uncertainties implicit within Udall's own statements. Representative Wydler asked if there was a list anywhere of the sites that Indians might want to visit as part of their religion.[344] Udall attempted to counter by claiming that no such list was kept for "Baptists, Episcopalians, or Catholics," thus appealing to a sense of fair play and equality before the law; but this merely served to underscore the weakness of his own analogy.[345] Wydler immediately added that "Baptists go to their churches; they own their churches," thus underscoring the fact that the AIRFA addressed interests quite different from those normally expected under the rubric of "free exercise."[346] To the House opposition H. J. Res. 738 constituted a form of differential treatment insofar as it could affect the use of public lands, and they clearly viewed this as an affront to the general patterns of American land tenure. Thus, thrown on the defensive Udall offered reassurances that the bill applied only to federal lands and that it would not affect anyone's private property.[347] In language that would haunt Native American practitioners for years to come, he explained that the bill "had no teeth in it," and that it was a Resolution which merely expressed the sense of Congress.[348] Thus, Udall's most persuasive point in favor of his own bill seemed to be a disclaimer indicating that the issue was merely a symbolic gesture. In later disputes Udall's comments to that effect would provide others with evidence that the AIRFA was always intended to be a toothless paper tiger. After some

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[344]Representative Wydler of New York, Congressional Record, 21445.

[345]Representative Udall of Arizona, Congressional Record, 21445.

[346]Representative Wydler of New York, Congressional Record, 21445

[347]Representative Udall of Arizona, Congressional Record, 21445.

[348]Representative Udall of Arizona, Congressional Record, 21445.

additional debate the House passed H. J. Res. 738; with 396 voting in favor of the resolution, 20 opposing it, and 16 abstentions.

The AIRFA in Itself: An Implausible Entity at Best.

On August 11, 1978 then President Carter signed the AIRFA into law. On the following day he issued a statement declaring that; "It is a fundamental right of every American, as guaranteed by the First Amendment of the Constitution, to worship as he or she pleases. This act is in no way intended to alter that guarantee or override existing laws, but is designed to prevent government actions that would violate these constitutional protections."[349] Thus, administration officials settled on the weakest possible interpretation of the AIRFA, one for which they had argued throughout the legislative process. President Carter's disclaimer combined with the statements by Representative Udall to provide some of the most public commentary on the significance of the act itself. Consequently, when various courts and federal agencies used these pronouncements to fashion a sense of the legislative intent behind the AIRFA the resulting interpretation of the act would generally carried little weight.

The written text of the AIRFA changed little through the course of Congressional debate. In its final form the AIRFA included two major provisions and a long preamble. The preamble to the AIRFA affirms that the free exercise of religion is an inherent right protected by the First Amendment, that the United States has generally benefitted from the number of religions flourishing under its protection, that religion constitutes an important part of Native American cultures, and that "traditional American Indian religions"were an important aspect of "Indian life."[350] The preamble also declares that; "the lack of a clear and consistent federal policy has often resulted in the abridgement of religious freedom for

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[349]American Indian Religious Freedom Act Report, Appendix A.

[350]Preamble, The American Indian Religious Freedom Act, Statutes at Large, 92, 469 (1978).

traditional American Indian religions."[351] Much as in Abourezk's original report, the AIRFA attributes the abridgement of Native American religious freedom to enforcement of otherwise sound pieces of legislation, and it singles out sacred sites, sacred objects, and religious ceremonies as the key sources of conflict between Indians and federal agencies.[352] Thus, in many respects the preamble to the AIRFA generates the same narrative pattern that had been used to argue for passage of the act itself.

Through the AIRFA, its preamble seemed to suggest, an increasingly benevolent federal government would begin to enforce a set of rights which naturally belonged to Native Americans. Such a natural right could be read in the usual terms of social contract theory, implying that the AIRFA dealt with Native Americans as individuals endowed with no special rights as Native Americans. And yet, the many references to the role that religion played in traditional Indian culture could be taken to suggest that the natural right belonged to larger social units, thus implying that the "inherent rights" in question were specifically those rights reserved to Indian tribes under trust doctrine. The language of the AIRFA itself could therefore be used to suggest at least two contrary interpretations; one involving the political interests of tribal organization, and one involving the freedom of conscience presumably owed every individual.

The ambiguity implicit within the AIRFA's preamble facilitated alternative interpretations of its implications. This in turn made it possible to interpret the pragmatic implications of the Act's main provisions according to very different principles. The two main provisions in the AIRFA read as follows:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

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[351]Preamble, The American Indian Religious Freedom Act, Statutes at Large, 92, 469 (1978).

[352]Preamble, The American Indian Religious Freedom Act, Statutes at Large, 92, 469 (1978).

> Sec. 2. The President shall direct the various Federal departments, agencies, and other instrumentalities responsible for administering relevant laws to evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices. Twelve months after approval of this resolution, the President shall report back to the Congress the results of his evaluation, including any changes which were made in administrative policies and procedures and any recommendations he may have for legislative action.[353]

The absence of any provisions regarding enforcement in the AIRFA certainly bore witness to the truth of Morriss Udall's statement that the act had "no teeth." This absence further made it possible for administration officials charged with the implementation of the AIRFA to argue that the it carried few specific legal implications. And yet the AIRFA conveyed plausible legal obligations for federal agencies as an official statement of public policy. As Ellen Sewell writes:

> The law does not directly protect religious practice, but states a policy to protect religious practice. Therefore the Act would be violated not by administrative interference with Indian religion alone, but by administrative failure to pursue the policy of protecting religion. Therefore any demonstration that the law was violated would presumably have to show not only that religious practice was restricted, but also that the policy of protecting religion had not been pursued.[354]

Thus, it appears that the immediate practical effect of the AIRFA was actually quite similar to the arrangement which placed Blue Lake in the hands of the Forest Service. An admittedly unusual set of ceremonial practices had been entrusted to the protection of bureaucratic authorities, leading ultimately to a notion that questions about religious freedom had been given over to the inherently unstable discourse of public policy. Given that the AIRFA was primarily a policy statement, however, it was still not clear just what kind of policy the act called for.

Ellen Sewell divides the range of debate over the AIRFA into three plausible interpretations. "At a minimum," she argues, the act required responsible authorities to

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[353]Section 1 and 2, The American Indian Religious Freedom Act, Statutes at Large, 92, 469 (1978) emphasis in original.

[354]Sewell, 437.

consider Indian needs in the course of implementing their normal policies.[355] This would create a kind of procedural right, meaning that; "A complainant could show a statutory violation if an agency had interfered with an Indian religious practice and had never considered the issue when planning its course of action."[356] She argues that the law is best viewed as requiring more than this; at least to the extent that it ". . . mandates accommodation to Indian religion when at all feasible."[357] "Under this reading of the law," she continues, "a complainant could show a statutory violation by showing that religion was restricted and that the agency could have pursued a practical alternative less restrictive to religion without significant sacrifice to other goals."[358] Finally, she argues that the AIRFA does invoke the principles of trust doctrine, and that this could be taken as an indication that Congress was making its usual trust responsibilities to Indian tribes legally enforceable.[359] This last option would render the usually metaphorical significance of the "ward" / "trustee" relationship in terms of a decidedly more literal significance, in affect providing Indians with a cause of action in the event that federal agencies failed to actively pursue the new policy to "protect and preserve" traditional Indian religions.

Any theoretical position about the significance of the AIRFA corresponds to a different sense of the interactional relationship between an Indian "complainant" and a federal agency in the context of a court of law. Each of these micro-structural indices (complainant, federal agency, and court) would receive a different macro-structural inflection according to the differences between each of the positions outlined by Sewell. For, each legal dispute involving the AIRFA would raise questions about the relationship

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[355]Sewell, 437.

[356]Sewell, 437.

[357]Sewell, 437.

[358]Sewell, 437-38.

[359]Sewell, 438.

between Indians and the federal government, or rather; each argument over its policy implications would presuppose answers to questions about the relationship between Indians and federal authorities. Thus, each of these positions refers to a plausible set of indexical relationships that might or might not obtain in a court of law, depending on the will of its participants (or at least the will of a judge or jury). When complainants actually did begin to take federal agencies to the courts in order to press for policies more favorable to their own religious practices a good deal of the rhetoric contained in those proceedings would involve subtle manipulation of some rather sweeping historical master-narratives.

President Carter's statement took the weakest possible construction of the AIRFA (as opposed to the weakest plausible construction outlined above), one which reduced it to a symbolic gesture with no direct implications for public policy. This reading belied the terms of the AIRFA itself insofar as the act included provisions designed to create changes in federal policy, but the reading had a strong appeal insofar as it tied the significance of the act itself to orthodox notions of American constitutionalism This approach generally hinged on a sense of political relationships defined through social contract theory; a position wherein practicing Indian traditionalists constitute a political minority whose interests are a function of individual rights, and the government's interests (as well as the court's) are a function of the need to ensure that all individuals are afforded equal protection under the law. A moderate construction of the AIRFA (i.e. an approach based on the weakest plausible construction described by Sewell) would characterize it as a measure designed to shore up the substantive problems of a more permanent minority (practicing Indian traditionalists) by creating a positive government interest in off-setting the problems which they would naturally face in a generally hostile social environment. The strongest construction of the AIRFA would presume that the most salient aspect of an Indian complainant under the provisions of the AIRFA stems from a specific relationship to some tribal sovereignty. Having framed a given case under this last set of terms, a court would have to decide whether or not the AIRFA constituted explicit government consent to be be

held accountable for any failure to live up to the terms implied by trust doctrine.[360] This would effectively mean the difference between the second and third plausible readings of the AIRFA described by Sewell, each being predicated on the same set of political relationships.

Of course, the particular facts of a given case would not always match any of these master-narrative patterns (practicing Indian traditionalists were not always members of a tribe, for example), but the vast majority of legal disputes dealing with the provisions of the AIRFA were actually consistent with any of the preceding approaches. Recourse to such an ideological position therefore provided litigants with a powerful tool through which they could contextualize most any dispute and thereby generate the terms of an argument favoring a given legal outcome. This process involved the derivation of a principle of case law from a broad range of possible legal precedents through a selection process guided only by ideological preconceptions about the prevailing social order. This process lent special weight to a distinction between two alternative visions. "Case law dealing with Indians is Janus-faced:" writes Sewell "one face is that of Indian law, and the other, the face of relevant substantive law, which is applied ignoring the Indian or tribal status of a party."[361] Such a major division between the plausible contextualization strategies available to litigants combined with the ambivalent textual footing of the AIRFA itself (calling on the authority of both free exercise principles and trust doctrine) to ensure that the legal implications of the act would remain largely unstable. Ideological presuppositions about the legal status of Indian identity would consistently over-determine the conclusions reached by legal authorities charged with interpretation of the AIRFA, and insofar many courts chose to focus primarily on case law dealing with the First Amendment when

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[360]Sewell, 38-49.

[361]Sewell, 466 (footnote omitted).

dealing with the AIRFA they superimposed the terms used in popular debate over equality and differential treatment onto the context of Indian-white relations.

The American Indian Religious Freedom Act Report : Now About that Red Deity Again.

Immediately following passage of the act the federal government had a chance to set the tone for these discussions when it evaluated its own policies and reported them back to Congress. In keeping with the second of the AIRFA's provisions, a special task force was formed under the leadership of Cecil D. Andrus, the Secretary of the Interior, in order to study prospects for implementation of the act. The task force published its findings in a report delivered to Congress in 1979. By this time it was clear that access to federal lands posed the most significant threat to existing policy, and even questions about treatment of sacred objects (Pine needles, eagle feathers, animal pelts, etc.) frequently implied many of the same questions as were found in sacred site cases. Hence, the report treated notions about federal land management policy and Native American sacred geography as the prototypical instance of a prospective issue involving the AIRFA. The task force positioned these questions in the context of trust doctrine, thus providing federal agencies with ample authority to provide Native Americans with differential treatment; but it also constructed an artificial image of what all of this would entail.

The introductory essay contained in the 1979 report reveals a great deal about the approach taken by the task force to questions about sacred geography. Part of the task force's strategy for dealing with that question can be gleaned from the historical overview contained in this essay. The 1979 report also contains references to a folk theory of culture change that serves as an implicit response to fears about excessive Indian claims on public lands. Both the abstract social theory and historical narrative contained in this document elaborate on the contextualization cues already implicit within the AIRFA itself as well as Senator Abourezk's report explaining S. J. 102. The task force effectively used them to narrow the scope of Indian activity covered by the act along a temporal axis, and in so

doing the task force also narrowed the potential space of Native American sacred geography that would be recognized under the AIRFA. Through the report the task force seemed to be saying that the actual claims made by Indian traditionalists would not generate a significant burden on public policy because; 1) any such claims would be limited to specific sites, and 2) no new claims would occur. Thus, the task force endeavored to reduce the scope of legitimate claims to a finite set of definite places, and to preempt spontaneous native assertions of religious interest with a theory tying legitimate claims to known historical traditions.

Before addressing any questions about change in Indian country the task force first dealt with a more reflexive issue, addressing changes in public policy towards Indian religion. The report contains several passages about centuries of deliberate repression of Indian religion.[362] This bleak narrative covers events such as use of the Requiremento, William Bradford's comments on the slaughter of the Pequots, and the development of Religious Crimes Codes (RCC) listed under Courts of Indian Offense.[363] In revisiting the history of the RCC, a topic culminating its discussion of Euro-American oppression, the task force report generated an imaginary dialogue between the proponents of the RCC and those of the AIRFA. For, the historical ideology which produced the RCC measured prospective changes in Indian practices against negative value judgements about generalized notions of Indian culture (See chapter 2). The AIRFA report itself places the RCC in its own historical narrative as a pivotal moment after which progressive changes would take place in federal policy, leading ultimately to a positive orientation toward Native American cultures. Hence, the master-narrative principles implicit in each policy contrasted sharply with one another, both in their evaluation of Indian culture and their sense of general trajectory of American history; but viewed from the standpoint taken by the task force the

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[362]American Indian Religious Freedom Act Report, (P.L. 95-341. Washington D.C. August, 1979) 1-7.

[363]American Indian Religious Freedom Act Report, 1-7.

provisions of the RCC were both cruel and quite fortunately dated. The AIRFA report was therefore an answer to the RCC; both in the sense that it afforded Indian religious traditions their proper respect, and insofar as it pertained to an event that would follow the RCC in a master-narrative sequence weighted towards positive evaluation of later historical events. The AIRFA report thus voiced the interests associated with the Religious Crimes Codes in its text, only to answer those interests in its own terms.

This imaginary dialogue with the stance taken in the Religious Crimes Codes helped the task force generate a specific sense of the interactional significance of the AIRFA. The major actors in policies associated with the RCC had been federal agents acting under the authority of the ward-trustee relationship defined in trust doctrine. The AIRFA had itself invoked trust doctrine in its own text, and its implementation would require a sense of federal authority different from that implied by the phrase "religious freedom." So, whereas the task force clearly opposed the values informing BIA policy under the Religious Crimes Codes, it generated its own authority through a narrative describing the relationship that had obtained between Indians and the BIA under the RCC. Because the AIRFA hinged on roughly the same body of legal doctrine that had formerly been used to justify past policies of oppression, a discussion of those policies served ironically to help define the interactional relationship needed for enforcement of its provisions. Not withstanding its references to the Free Exercise Clause, a principle generally informed by notions of methodological individualism; the text of the AIRFA asserted a positive government interest in protecting Indian religion. By recalling government abuse of Native American religions the historical narrative in the report thus served an indexical function, defining its notions about Indian religious freedom in the context of trust doctrine.[364] This in turn serves to remove the question of Indian religious freedom from the domain of individual tolerance and pro-minority liberalism and to place it firmly in the context of Indian-white relations.

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[364] American Indian Religious Freedom Act Report, 7; C.f. James Boyd White, 89-112, and *passim.*

After is discussion of the RCC the narrative contained in the task force report provided tangible examples of the federal government's turn toward a more benevolent stance toward Native American culture. As with the oppressive policies of the nineteen-twenties, the task force's historical vision placed the federal government in a key position to influence the kind of changes that might affect traditional Indian religions. The report offered examples like the return of Blue Lake as visible signs that the trust relationship may work in favor of Native American interests, and that federal policy was moving in that direction.[365] In this narrative it was the federal government, rather than its Indian wards, which would grow increasingly more enlightened by the passage of history.

Whereas the master-narrative implicit within the policy framework of the RCC framed federal Indian policy in the context of progress and assimilation, that of the Religious Freedom Act suggests an increasingly benevolent federal administration. In both cases, however, some generalized notion of Indian culture or Indian religion were necessary to lend credibility to, and guide implementation of government policy. For the task force this theory took the form of a comparison between "world religions" and "tribal religions."[366] The task force characterized world religions as "commemorative" religions, indicating that they were founded in a particular historical event.[367] The report contrasts this with tribal religions which it describes as "continuing" religions, indicating the absence of a historical tradition separating the foundation of the religion from its present day practices.[368] According to the task force native practitioners of a tribal religion therefore operate by definition without any significant sense of history.

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[365] American Indian Religious Freedom Act Report, 7.

[366] American Indian Religious Freedom Act Report, 8-12.

[367] American Indian Religious Freedom Act Report, 9.

[368] American Indian Religious Freedom Act Report, 10.

This dichotomy has numerous predecessors in social and religious thought, though it is probable that the task force drew directly from Vine Deloria in writing the report.[369] The sense of the spatio-temporal dimensions of Indian religion contained in the report echoed Deloria's position on the subject in God is Red. The report assumed that continuing tribal religions are older than commemorative religions.[370] They went on to argue that continuing tribal religions differ from commemorative world religions in that they are not based on established truths, because such doctrines are less important for continuing religions than ceremonial practices.[371] The task force inferred from this that; ". . . no institutions can arise in (tribal) religions," and that "Only one interpretation (of the religion) is possible in each generation."[372] Apparently tribal religions also differ from world religions in their notion of creation. World religions regard creation as an accomplished fact, according to the task force, whereas tribal religions view creation as a continuous process.[373] The report therefore concluded that religious freedom for Native Americans entails a ". . . right to maintain relationships with the natural world. . ."[374]

Having read this much, one might suspect that tribal religions were more dynamic than world religions, but the authors of the report did not see it that way. They stated in the report that ". . . it would be the rarest of events for a new ceremony to be introduced (into a tribal religion)."[375] It is difficult to determine how the task force inferred this fact from the characteristics that they themselves had assigned to tribal religions, but the statement does

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[369]Robert Michaelsen, "The Significance of the American Indian Religious Freedom Act," 108.

[370]American Indian Religious Freedom Act Report, 10.

[371]American Indian Religious Freedom Act Report, 10.

[372]American Indian Religious Freedom Act Report, 10.

[373]American Indian Religious Freedom Act Report, 11.

[374]American Indian Religious Freedom Act Report, 12.

[375]American Indian Religious Freedom Act Report, 12.

anticipate one of the recommendations included in the report. To minimize conflict between tribal religions and commercial interests the task force stated:

> The major sites of Native American religious ceremonials are already well known, and any future controversy must revolve around known sites, not any additional sites that might come into being. No tribes that are presently constituted and possess a living religious tradition can be expected to move beyond those ceremonials and rituals they are using already. The known shrines and sites originate in creation and migration traditions, which by their very nature are foreclosed for the remainder of this world.[376]

This qualification ensured the plausibility of accommodating claims to sacred sites, but it did so at the risk of arbitrarily discriminating between different Indian claims. By insisting that traditional Indian religions are inherently static, the task force was able to provide a rationale for distinguishing legitimate from non-legitimate claims on the basis of historical continuity. Hence, the report suggested that contrived religious claims could easily be exposed and it argued that they should naturally be rejected.[377]

The confidence expressed in the report that fraudulent claims to sacred sites could easily be distinguished from real ones appears to have been sadly mistaken. Moreover, the report's own narrow vision of Indian culture may have contributed to this problem by reinforcing stereotypes of Indian behavior. As Michaelsen later pointed out, the notion that claimants might not be Indian enough could easily work against them in pursuit of access to a sacred site.[378] The task force's own distinctly a-historical sense of tribal religions endorsed an abstract form of this prejudice inasmuch as it created a notion of social stability that no truly "continuing religion" could hope to achieve. According to its theory a new sacred site would not be Indian enough to warrant consideration under the AIRFA.

The report's treatment of tribal views on creation would seem to belie the assertion that creation stories cannot produce a new interest in a sacred site. If creation is continual, then how can a creation myth be so remote from present concerns? Faced with such an

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[376]American Indian Religious Freedom Act Report, 89.

[377]American Indian Religious Freedom Act Report, 91.

[378]Robert S. Michaelsen, "American Indian Religious Freedom Act Litigation," 63-64.

unconvincing argument, David White and Robert Michaelsen issued scathing critiques of the task force's approach to the issue, arguing that tribal religions were far more dynamic than had been alleged in its report.[379] Both authors further argued that the task force was overly confident about its own ability to establish the range of existing sites, because sacredness often entails secretiveness in a tribal religion.[380] White even argued that limiting application of the AIRFA to specific sites constituted an unwarranted reduction on the part of the task force.[381] As Deloria had himself illustrated Native American interaction with the environment had global as well as local / site specific implications; but the report had narrowed its own treatment of the subject to the latter. It underestimated the scope of geography sacred to Native Americans as much as it underestimated the vitality of their religions. As Michaelsen argued ". . . Tribal religions appear (in the report) as museum pieces, static entities which have little or no relation to the world about them today."[382] The report serves in this manner to make the AIRFA appear less threatening, but it does so by articulating a limited view of the activities which could legitimately be considered part of an "Indian religion."

Whatever the theoretical accuracy of the terms "continuing religions" and "commemorative religions" as applied to the Native and Euro-American traditions in themselves, it is clear that their use in the report derives a good deal of its significance from the history of Indian-white relations. The ideological stance implicit in trust doctrine defines the role that Indians play in American history in terms of spatial concepts, and government policy based on trust doctrine has always been predicated on an impoverished sense of

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[379]David R. M. White, "Native American Religious Issues . . . Also Land Issues," 39-44 *passim*; Michaelsen, "The Significance of the American Indian Religious Freedom Act," 106-109.

[380]David White, 42; Michaelsen, "The Significance of the American Indian Religious Freedom Act," 108.

[381]David White, 42.

[382]Michaelsen, "The Significance of the American Indian Religious Freedom Act," 107. Note that the image of a museum piece implies an impoverished sense of both space and time inasmuch as such an object would insulated from the dynamics of history and presented in an isolated visual for the benefit of a viewing public.

history as it relates to Indian culture. Likewise the significance that history plays in reference to "world religions" in the report is clearly overdetermined by the claim to historical agency made by any government policy under trust doctrine. The task force's references to "commemorative" religions pertain directly to (Jewish and Christian) traditions closely identified with its own membership. In fact the task force seemed to recognize that it derived its own ritual authority from a kind of world religion, because the report clearly identifies "commemorative" religions as the source of government authority in the recognition of "natural law."[383] Thus, the task force report itself identified the link between its notions about world religion and the cosmological precepts of American civil religion, precepts which defined its own interests in safe-guarding a right of free exercise. So, all questions about the theoretical accuracy of the dichotomy between "commemorative" and "continuing" religions aside; the distinction carries an indexical function insofar as it is clear that federal authority is rooted in a "commemorative religion," and Native American tribal cosmologies are consistently translated into the form of a "continuing religion" insofar as they relate to federal policy. Hence, the interaction between Native Americans and federal officials could be seen in terms of the report as an interaction between adherents to a "commemorative" world religion and those of a "continuing" tribal religion.

The task force had articulated both a historical narrative and a social theory purportedly describing the interests of Native American religious practitioners, and each of these turned out to be self-referential. Through its Introduction and Historical Overview, therefore, the report served to recontextualize the subject of Indian religious freedom in terms of trust doctrine, but it did so at the cost of caricaturizing the very interests AIRFA proponents had sought to protect. In denying that Native American religions had a sense of history the report came perilously close to denying that they had a future as well. Deloria's

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[383] American Indian Religious Freedom Act Report, 11.

original distinction between world and tribal religions elided a number of questions about the dimension of history implicit in many Native American traditions.[384] And in its acceptance of Deloria's theory the task force effectively set aside any political concerns not fully comprehended under that theory. By construing Indian traditionalism in terms of a pristine and timeless set of traditions, the report failed to acknowledge the historical agency that many Indians hoped to assert with the aid of the AIRFA. Many were hopeful that implementation of the act would play a positive role in shaping the future of Indian tribal customs. This was unfortunately not the understanding that emerged from those charged with planning its implementation.

Conclusion: The AIRFA Comes Apart.

The American Indian Religious Freedom Act report of 1979 had not done much to resolve the fundamental ambiguities contained within the act itself. The AIRFA had not specified any particular measures to be taken by federal agencies, and the report had not resolved the matter. Furthermore, the contextualization patterns used in the report contrasted with those expressed by Representative Udall and President Carter in passing the AIRFA. So, it remained unclear to whether the AIRFA should be read as a function of federal policy interests in Indian welfare or as a recognition of the right of free exercise, a principle normally envisioned as a limit on government interests. Federal agencies were more concerned with policy objectives defined long before passage of the AIRFA; and so they typically responded to it by providing for minor concessions to Indian traditionalists, and by arguing for the least significant interpretation of the act itself when pressed into legal disputes over their policies.

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[384]See Raymond Fogelson, "Interpretations of the American Indian Psyche: Some Historical Notes," ed., June Helm, The Social Context of American Ethnology: Proceedings of the American Ethnological Society, (1985) 23.

A number of diverse agencies declined to participate in task force hearings indicating that policy planners foresaw little to no potential conflict between themselves and practicing Native American traditionalists.[385] Participating agencies generally reviewed their policies and accommodated Indian practices insofar as the latter did not conflict with any significant policy goals. For example, the U.S. Customs Service opened a dialogue with the American Indian Law Center and the Native American Rights Fund as well as individual representatives from a number of Indian tribes and religious traditions, thus improving communications between themselves and practicing Native American traditionalists.[386] This in itself solved a number of problems by clarifying procedures and ensuring that Indians were able to take full advantage of existing policy provisions; but the Customs Service was unable to completely resolve questions regarding the examination of medicine bundles or treaty rights involving duty free passage across the U.S. - Canadian border.[387] More importantly none of the major agencies concerned with the management of federal Lands (the Forest Service, the National Park Service, and the Bureau of Land Management) adopted specific changes in their policy procedures; though each incorporated incorporated language expressing concern for Native American cultural values in their general statements of procedure.[388] Clearly the notion of religious freedom made an anticlimactic appearance as a function of bureaucratic policy. The stage was set following publication of the 1979 report for legal conflict over the meaning of the AIRFA, and Indian traditionalists consistently lost this conflict.

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[385]See American Indian Religious Freedom Act Report, 19-21.

[386]American Indian Religious Freedom Act Report, 36-38.

[387]American Indian Religious Freedom Act Report, 38.

[388]American Indian Religious Freedom Act Report, (Forest Service) 26-27, (Bureau of Land Management) 33, and (National Park Service) 35; see also Steven C. Moore, Sacred Sites and Public Lands, in Handbook of American Indian Religious Freedom, ed., Christopher Vecsey, 84-87.

It had never been particularly clear whether or not the AIRFA was intended as a means of fulfilling the government's responsibilities to its Native American wards or as a means of limiting the negative impact that government policy would have on the practitioners of traditional Indian religions. The difference had remained unclear so long as debate over the AIRFA took place in the context of legislative and executive committees, but subsequent legal disputes involving the AIRFA required that someone decide on one or the other interpretation of the act. The courts consistently sided with federal agencies on thus matter, and they interpreted the AIRFA as a mere reiteration of the First Amendment. This generally led the courts to adopt the balancing test as a means of deciding AIRFA-related cases, and undermined the ability of AIRFA claimants to invoke federal trust responsibilities. The courts therefore modeled the relationship between Indians and the federal government in terms of a conflict between individual freedom of conscience and oppressive government interests rather than a claim to government support.

Under these circumstances AIRFA-related cases consistently foundered on the same problems which had plagued Taos proponents in the battle for Blue Lake and Congressional advocates of the Indian Civil Rights Act. The inability to differentiate Indian religions from other tribal institutions made it possible for AIRFA claimants to express a religious interest in aspects of government policy normally treated as secular matters. Each of these claims, however, raised novel questions about the relationship between religion and American government. Just as Senator Metcalf had been skeptical about the notion of a 48,000 acre church surrounding Blue Lake, various courts also doubted that AIRFA-related cases could involve a substantial right of free exercise. The courts consistently denied that sacred site claims involved a burden on Indian rights of free exercise, imprisoned ceremonial practitioners for the taking of endangered species, minimized the importance of inmate's religious practices, and ultimately rejected even the long established legal accommodations for the Native American Church. AIRFA-related cases generally came apart whenever they were subjected to the usual terms of the balancing test, and hence

the very rhetoric of religious freedom which had made the AIRFA possible became a serious liability to AIRFA claimants in the years following its passage.

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