PROTECTING NATIVE AMERICAN RELIGIOUS FREEDOM: THE LEGAL, HISTORICAL, AND CONSTITUTIONAL BASIS FOR THE PROPOSED NATIVE AMERICAN FREE EXERCISE OF RELIGION ACT

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INTRODUCTION

The 103d Congress is considering comprehensive legislation to protect the religious freedom rights of Native Americans.[1] This landmark legislation is actively supported by a broad coalition of Indian tribes and organizations, environmental groups, and religious and human rights organizations. This Article will explain the cultural and legal concerns that have given rise to this effort and that demonstrate the critical need for enactment of the Native American Free Exercise of Religion Act (NAFERA).[2] This Article will also analyze the constitutionality of the legislation in its current proposed form.

For most of the United States' history, the federal government has actively discouraged and even outlawed the exercise of traditional Indian religions. For more than a century, the government provided direct and indirect support to Christian missionaries who sought to "convert[ ] and civiliz[e]" the Indians.[3] From the 1890s to the 1930s, the government moved beyond promoting voluntary abandonment of tribal religions to, in some instances, affirmatively prohibiting those religions.[4] On those reservations where it had the authority, the Bureau of Indian Affairs outlawed the " 'sun dance' and all other similar dances and so-called religious ceremonies," as well as the "usual practices of so-called 'medicine men'."[5] It was not until 1934 that the federal government fully recognized the right of free worship on Indian reservations.[6]

Even then many obstacles to free religious practice remained. For example, traditional Indian religious practitioners were frequently denied access to sacred sites located outside of reservations, often on federal lands.[7] In addition, many states prohibited the possession of peyote, a sacrament used in Native American Church religious ceremonies.[8]

Congress enacted the American Indian Religious Freedom Act (AIRFA) in 1978 in response to continuing obstacles to the free exercise of traditional Indian religions.[9] Congress found that "the lack of a clear, comprehensive,

1. Native American Free Exercise of Religion Act, S. 1021, 103d Cong., 1st Sess. (1993).

2. *Id.*

3. Walter R. Echo-Hawk, *Loopholes in Religious Liberty: The Need for a Federal Law to Protect Freedom of Worship for Native People*, NATIVE AM. RTS. FUND LEGAL REV., Summer 1991, at 7, 7.

4. *Id.* at 7-8.

5. BIA Court of Indian Offenses Regulations, *in* Regulations of the Indian Office, effective Apr. 1, 1904, at 102-103 (Sec'y of the Interior, 1904), *quoted in* Echo-Hawk, *supra* note 3, at 8.

6. *See generally* FEDERAL AGENCIES TASK FORCE, AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT 4-7 (U.S. Dep't of the Interior 1979) [hereinafter AIRFA REPORT]; Echo-Hawk, *supra* note 3, at 8 and sources cited therein. *See also* 25 U.S.C. §§ 279, 280, 280(a), 348 (1988) (recognizing land patents of religious organizations to Indian land used for missionary activities).

7. *See, e.g., American Indian Religious Freedom: Hearings on S.J. Res. 102 Before the Senate Select Comm. on Indian Affairs*, 95th Cong., 2d. Sess. 116-17 (1978) [hereinafter *1978 AIRFA Hearing*] (statement of Elmer M. Savilla, Executive Director, Inter-Tribal Council of California).

8. *See* OMER C. STEWART, PEYOTE RELIGION: A HISTORY 227-229 (1987).

9. Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified at 42 U.S.C. § 1996 (1988)).

and consistent federal policy has often resulted in the abridgement of religious freedom for traditional American Indians . . . [and that] such religious infringements result from the lack of knowledge or the insensitive and inflexible enforcement of federal policies and regulations."[10] Accordingly, AIRFA established a federal policy

> to protect and preserve for American Indians their inherent right to 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.[11]

However, AIRFA has been interpreted as having "no teeth."[12] As a result, it has not successfully fulfilled its original purpose in that it has not adequately protected the rights of the aboriginal peoples in this hemisphere to practice their traditional religions freely and fully.

The First Amendment has also failed to provide adequate protection to Native American traditional practitioners. Recent Supreme Court decisions have effectively eliminated the First Amendment as a vehicle for protecting religious free exercise by Native Americans.[13]

For these reasons, a legislative effort is currently under way to strengthen AIRFA so that it will achieve its original goals. The proposed legislation, in the form of NAFERA, specifically focuses upon four basic Indian religious freedom issues: (1) the protection of sites sacred to traditional Native American religions; (2) the sacramental use of peyote by members of the Native American Church and similar Native American religious organizations; (3) the rights of Native American prisoners to practice their religions while in prison; and (4) the religious possession and use of eagle feathers and parts, and other sacred animals and plants.[14]

I
THE NATURE OF TRADITIONAL NATIVE AMERICAN RELIGIONS AND IMPEDIMENTS TO THE PRACTICE OF THOSE RELIGIONS

To fully appreciate the need for the proposed legislation, an overview of the aspects of Native American religions not readily understood by non-Indians and their treatment by the American legal system is necessary. This background helps explain why and how the legal response has been inadequate

10. S.J. Res. 102, 95th Cong., 2d Sess. (1978) (enacted).

11. 42 U.S.C. § 1996 (1988).

12. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 455 (1988) (quoting 124 CONG. REC. 21,444-45 (1978) (statement of Rep. Udall)).

13. *Id.*; Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872 (1990). *See* discussion *infra* parts I.A.2-3.

14. S. 1021, 103d Cong., 1st Sess. (1993).

when certain Native American religious practices have collided with the perceived needs of federal and state governments.

A. Sacred Sites

1. The Significance of Sacred Sites

Land and natural formations are inextricably intertwined with the practice of traditional Native American religions. The relationship between physical areas and religious ceremonies is a basic and essential component of those religions.

The continuation of traditional native religions over time is dependent on the performance of ceremonies and rituals that may, potentially, generate dreams and visions. These ceremonies and rituals are often performed at specific sites. These sites may be places where spirits live or that otherwise serve as bridges between the temporal world and the sacred.

Areas of sacred geography are often related to tribal creation stories and other historical events of religious significance. They may also be areas where sacred plants or other natural materials are available, or sites with special geographical features, or burial sites, or places where structures, carvings, or paintings made by tribal ancestors—for example, medicine wheels and petroglyphs—are located. For some tribal religions, there may be no alternative places of worship. The required ceremonies must be performed at certain sites to be effective. In many tribal religions, the location of these sites is a closely guarded secret. It is contrary to the beliefs and practices of the religions to discuss such sites with outsiders.[15]

A large number of those sites sacred to traditional Indian religions are located on land not owned by Indians. Western concepts of resource development, such as logging, mining, and tourism, may conflict with preserving the integrity and sanctity of sacred sites. The goals and needs of those who want to "develop" land are more readily incorporated into governmental land management policies and decision-making than are the religious beliefs of Native Americans affected by that development.[16]

For these reasons, Native Americans have been engaged in a decades-old struggle with the federal government (and occasionally state governments) to protect threatened sacred sites.

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15. This description of sacred sites is derived from a variety of sources including ASSOCIATION ON AMERICAN INDIAN AFFAIRS, PROCEEDINGS OF THE NATIONAL SACRED SITES CAUCUS (1991); Deward Walker, *American Indian Sacred Geography*, INDIAN AFFAIRS, Summer 1988, at ii, vi-vii; AIRFA REPORT, *supra* note 6, at 8-12; ARLENE HIRSCHFELDER & PAULETTE MOLIN, ENCYCLOPEDIA OF NATIVE AMERICAN RELIGIONS (1992).

16. *See, e.g., Oversight Hearing on the Need for Amendments to the Indian Religions Freedom Act Before the Senate Select Committee on Indian Affairs*, 102d Cong., 2d. Sess. 11-24, 114-45 (1992) [hereinafter *AIRFA Oversight Hearing*] (statements and testimony of Pat Lefthand, Ola Cassadore, Davis Francis B. Brown, Jerry Flute, and Charles E. Kimbol, Sr.).

2. *Legal Protection of Sacred Sites Prior to* Lyng v. Northwest Indian Cemeteries Ass'n

In a few instances, Native American efforts to protect sacred sites have been successful. In 1970, President Nixon signed legislation returning to the Taos Pueblo part of the sacred Blue Lake in New Mexico, which had been annexed by the United States in 1906.[17] More recently, in 1987, an administrative law judge ruled that a proposed hydroelectric development involving Kootenai Falls in Idaho was against the public interest.[18] Nonetheless, most of the disputes between traditional Indian religious practitioners and federal and state governments have been resolved in favor of the government, notwithstanding the First Amendment and AIRFA.

Throughout the 1980s, there were a number of federal court cases in which Native Americans unsuccessfully sought to prevent the disturbance or destruction of sacred sites.[19] In each of these cases, the courts recognized that the First Amendment balancing test utilized in *Sherbert v. Verner*[20] should be applied to determine whether the governmental activity could continue. Under the *Sherbert* test, actions which burden religious practice must be justified by a compelling governmental interest and achieved by means narrowly tailored to address that interest.[21] In cases involving sacred sites, however, some courts added another element to the test—a requirement that the aggrieved religious practitioners show that the religious practice or geographical area affected was "central" or "indispensable" to their religions.[22] This additional hurdle made it more difficult for Native American religious practitioners to prevail in legal challenges to preserve sacred sites. The most notable of these "unsuccessful" cases are discussed below.

Sequoyah v. Tennessee Valley Authority[23] involved the proposed construction of the Tellico Dam in Tennessee that would flood (and ultimately did flood) the ancient Cherokee village of Chota. According to the plaintiffs, Chota was the birthplace of the Cherokee people and connected them with the Great Spirit. The Cherokees believed that flooding the village would impair or

17. Act of Dec. 15, 1970, Pub. L. No. 91-550, 84 Stat. 1437.

18. *In re* Northern Lights, Inc., 39 F.E.R.C. ¶ 61,352, at 62,107-08 (1987).

19. *See, e.g.*, Lyng v. Northwest Cemetery Protective Ass'n, 484 U.S. 439 (1988); Crow v. Gullet, 706 F.2d 856 (8th Cir.), *cert. denied*, 464 U.S. 977 (1983); Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981); Wilson v. Block, 780 F.2d 735 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 956 (1983) *and* 464 U.S. 1056 (1984); Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

20. 374 U.S. 398 (1963).

21. *Id.* at 403, 406; *see also* Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 699 (1989); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141 (1987); United States v. Lee, 455 U.S. 252, 257-58 (1982); Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981); Wisconsin v. Yoder, 406 U.S. 205, 214-15 (1972); Gillette v. United States, 401 U.S. 437, 461-62 (1971).

22. *See, e.g.*, Wilson v. Block, 708 F.2d 735, 742-44 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983) *and* 464 U.S. 1056 (1984); Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159, 1163-64 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

23. 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

destroy their ability to pass spiritual knowledge and beliefs from generation to generation. The area to be flooded was also a site for gathering sacred medicines.[24] In rejecting all claims by the Cherokees, the Court of Appeals for the Sixth Circuit held that they had failed to prove that the area was "the cornerstone of" or "central to" Cherokee religious observances.[25]

Badoni v. Higginson[26] was occasioned by the construction of the Glen Canyon Dam, which flooded an area around Rainbow Bridge National Monument in Utah. Rainbow Bridge, a nearby spring, prayer spot, and cave are of central importance to the practitioners of traditional Navajo religion. The Navajo people perform certain religious ceremonies at Rainbow Bridge, which they consider to be the incarnate form of Navajo gods.[27] Before the dam was built, Rainbow Bridge had been accessible only by foot or horseback. After the site was flooded, however, the National Park Service began to run boats to the bridge and allowed concessionaires in the area to sell alcoholic beverages.[28] The Navajos' unsuccessful suit sought to lower the lake level so that the area around Rainbow Bridge would be dry, to close the area during Navajo religious ceremonies, and to prohibit beer drinking at the bridge.[29]

The Court of Appeals for the Tenth Circuit held that the government's interest in maintaining Lake Powell at its current water level outweighed the Navajos' religious interest.[30] The court also indicated that it would seem to be a violation of the Establishment of Religion Clause of the First Amendment for the Park Service to exclude tourists completely from the site,[31] although the court suggested that Native American practitioners could procure permits to allow them access during periods when the monument would otherwise be closed to the public.[32]

In *Wilson v. Block*,[33] the Navajo and Hopi Tribes sought to prevent the United States Forest Service from expanding a ski area in the San Francisco Peaks in Arizona, an area sacred to both peoples. For the Navajos, the Peaks are one of the four sacred mountains which mark the boundaries of their homeland. The Navajos believe that deities live in the Peaks and that the mountains are their bodies. The Hopis believe the Peaks are the home of their spiritual beings, known as "Kachinas," and are a sacred place to gather plants and animals for religious use.[34] The Court of Appeals for the District of Columbia Circuit refused to block the expansion of the ski area, finding that the

24. *Id.* at 1162-63.
25. *Id.* at 1164.
26. 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).
27. *Id.* at 177.
28. *Id.*
29. *Id.* at 177-78.
30. *Id.* at 178.
31. *Id.* at 179.
32. *Id.* at 180.
33. 708 F.2d 735 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 956 (1983) *and* 464 U.S. 1056 (1984).
34. *Id.* at 738.

Native Americans had not shown that the area was indispensable to their religion or that development of the ski area would prevent them from engaging in religious practices.[35] Specifically, the court held that the Native Americans had failed to show that they would not be able to hold their ceremonies and gather plants and animals at other locations.[36] Thus, the court concluded that expanding the ski area did not burden the plaintiffs' free exercise of religion under the First Amendment.[37]

Crow v. Gullet[38] involved construction by the state of South Dakota of viewing platforms, parking lots, trails, and roads at Bear Butte. Bear Butte is the most sacred ceremonial site in the Black Hills for the Lakota and Tsistsistas Peoples. For the Lakotas, Bear Butte was a frequent site of religious "Vision Quest" ceremonies, which require privacy and an undisturbed environment.[39] Affirming the district court's holding that the asserted state interests—preserving the environment, protecting the welfare of park visitors, and improving public access to the park—outweighed the religious interests of the Native Americans, the Court of Appeals for the Eighth Circuit refused to restrict South Dakota's land management prerogatives.[40]

3. Lyng v. Northwest Indian Cemetery Protective Ass'n[41]

In 1988, the Supreme Court dealt a devastating blow to the efforts of traditional Indian people to protect their sacred sites under the First Amendment.[42] The case involved the construction of a road in Northern California by the United States Forest Service that the government asserted would improve access to timber and recreational resources. The Forest Service's expert found that the road construction potentially could destroy " 'ceremonies . . . which constitute the heart of the Northwest Indian religious belief system . . . .' "[43] Based upon this finding and additional evidence that the benefits of the road were minimal, both the district and circuit courts had ruled in favor of the Indian religious practitioners. The lower courts determined that the negative impact upon the religious freedom rights of the practitioners out-

35. *Id.* at 744.

36. *Id.*

37. *Id.* at 745.

38. 706 F.2d 856 (8th Cir.), *cert. denied*, 464 U.S. 977 (1983).

39. *Id.* at 857.

40. *Id.* at 859. The author has visited the viewing platforms at Bear Butte and observed tourists loudly mocking the religious practices of Indian people in a manner intended to be heard by Indians who were fasting just out of sight of the platforms.

41. 485 U.S. 439 (1988), *rev'g* Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688 (9th Cir. 1986).

42. *Id.*

43. *Id.* at 463 (Brennan, J., dissenting) (quoting Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 594-95 (N.D. Cal. 1983) (quoting D. THEODORATUS, CULTURAL RESOURCES OF THE CHIMNEY ROCK SECTION, GASQUET-ORLEANS ROAD, SIX RIVERS NATIONAL FOREST 420 (1979), *reprinted in* Appendix K to Defendant's Exhibit G at 110, Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586 (N.D. Cal. 1983) (No. 86-1013))).

weighed the government's interest in building the road.[44]

In an opinion by Justice O'Connor, the Supreme Court reversed the lower courts, rejecting the application of a balancing test to government land management decisions. The Court ruled that unless the government's action coerced individuals to act contrary to their religious beliefs or penalized religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens, then the First Amendment provided no protection against governmental action, regardless of the impact upon Native American religious practitioners. In short, the Court held that the First Amendment did not "divest the government of the right to use what is, after all, *its* land."[45]

The *Lyng* decision also established that AIRFA does not "create a cause of action or any judicially enforceable individual rights."[46] In short, it "has no teeth."[47]

B. Sacramental Use of Peyote

1. The Nature of Ceremonial Peyote Use by Native Americans

Peyote is a species of small, spineless cacti that possesses psychedelic powers. Native American religious use of peyote in what is now Mexico can be traced back 10,000 years.[48] Religious peyote use within the borders of the United States was well established in the nineteenth century.[49] The practitioners of those traditional Native religions that include the use of peyote consider it a "holy sacrament" given to Indians by divine revelation. The use of peyote for non-religious purposes is considered sacriligious since peyote is a spiritual medicine embodying a spiritual deity. Peyote, when ingested as part of a religious ceremony, allows participants to communicate directly with the Creator.[50]

The Peyote ethical code constitutes a way of life called "The Road." The code has four main parts:

a. Brotherly Love. Members should be honest, truthful, friendly, and helpful to one another.

b. Care of Family. Married people should not engage in extra-

44. Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F.Supp. 586, 594-97 (N.D. Cal. 1983), *aff'd in part, vacated in part*, 764 F.2d 581 (9th Cir. 1985), *aff'd on reh'g*, 795 F.2d 688, 691-95 (9th Cir. 1986), *rev'd*, 485 U.S. 439 (1988). Both lower courts applied the "centrality" test in analyzing whether the road construction overly burdened the Native Americans' religious rights and found that the Native Americans had met that stringent test.

45. 485 U.S. at 435.

46. *Id.* at 455.

47. *Id.* (quoting 124 CONG. REC. 21,444 (1978) (statement of Rep. Udall)).

48. HIRSCHFELDER & MOLIN, *supra* note 15, at 213.

49. *Id.*; *see also* People v. Woody, 394 P.2d 813, 817 (Cal. 1964).

50. *See generally* STEWART, *supra* note 8; SVEN SAMUEL LILJEBLAD, THE IDAHO INDIANS IN TRANSITION, 1805-1960 (1972); *AIRFA Oversight Hearing*, *supra* note 16, at 21-36, 192-264 (statements by Native American Church members); *Woody*, 394 P.2d at 817 (describing a typical peyote ceremony).

> marital affairs and should cherish and care for one another and their children. Money should be spent on the family as a whole instead of selfishly.
> c. Self-Reliance. Members should work steadily and reliably at their jobs and earn their own living.
> d. Avoidance of Alcohol. Peyote and alcohol are not to be mixed.[51]

2. Legal Status

Prior to the United States Supreme Court decision in 1990, a number of state courts had considered whether the First Amendment protected the sacramental use of peyote. In *People v. Woody*,[52] the California Supreme Court found that the sacramental use of peyote was constitutionally protected—that the impact of a "no exception" prohibition of the use and possession of peyote upon the bona fide religious use of the drug outweighed the State's interest in the uniform and strict enforcement of its drug law. In so holding, the Court observed:

> We know that some will urge that it is more important to subserve the rigorous enforcement of the narcotic laws than to carve out of them an exception for a few believers in a strange faith. They will say that the exception may produce problems of enforcement and that the dictate of the state must overcome the beliefs of a minority of Indians. But the problems of enforcement here do not inherently differ from those of other situations which call for the detection of fraud. . . . We preserve a greater value than an ancient tradition when we protect the rights of the Indians who honestly practiced an old religion in using peyote one night at a meeting in a desert hogan near Needles, California.[53]

Courts in Oklahoma and Arizona reached similar conclusions in *Whitehorn v. State*[54] and *State v. Whittingham*[55] respectively.

Similarly, the Federal Drug Enforcement Administration, at Congress's direction, promulgated a regulation providing an exemption from the Controlled Substances Act[56] for the bona fide sacramental use of peyote by Native American Church members.[57] Twenty-seven states also provide for full or

51. *See* Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872, 914 (1990) (citing the Native American Church of North America membership card).
52. 394 P.2d 813 (Cal. 1964).
53. *Id.* at 821-22.
54. 561 P.2d 539 (Okla. Ct. App. 1977) (holding that the First Amendment protects the transportation and possession of peyote).
55. 504 P.2d 950 (Ariz. Ct. App.) (holding that the use of peyote in bona fide pursuit of religious faith is protected by the Free Exercise Clause), *review denied*, 517 P.2d 1275 (Ariz. 1973), *cert. denied*, 417 U.S. 946 (1974).
56. 21 U.S.C. § 812(c) (1988).
57. 21 C.F.R. § 1307.31 (1988).

partial exemptions from state drug laws for bona fide religious use of peyote by Native American religious practitioners.[58]

Nonetheless, in *Employment Division, Department of Human Resources of Oregon v. Smith*,[59] the United States Supreme Court, in an opinion written by Justice Scalia, ruled that there is no First Amendment requirement that states exempt sacramental use of peyote from their criminal laws proscribing the use of various substances. In so doing, the Court severely limited the First Amendment balancing test that had governed religious freedom cases for almost thirty years, since *Sherbert v. Verner*.[60]

Justice Scalia asserted that the *Sherbert v. Verner* balancing test had been applied to invalidate government action only in the unemployment compensation context, where "individualized government assessment" is possible and appropriate.[61] He also stated that laws of general application are not unconstitutional simply because they infringe upon the free exercise of religion, unless both freedom of religion and other constitutionally-based rights are implicated.[62] Thus, the Court refused to apply a balancing test and upheld the Oregon statute.[63] In short, the Court determined that leaving the protection of the religious liberties of minority religions to the legislative process is an "unavoidable consequence of democratic government," notwithstanding the First Amendment.[64]

In a concurring opinion, Justice O'Connor attacked the majority's abandonment of the balancing test.[65] However, unlike the three dissenting Jus-

58. *See AIRFA Oversight Hearing, supra* note 16, at 223 (listing of the states and a chart explaining the variations in state laws).

59. 494 U.S. 872 (1990).

60. 374 U.S. 398 (1963).

61. *Smith*, 494 U.S. at 883-84.

62. *Id.* at 881-82.

63. *Id.* at 878-82. In so doing, the Court ignored the fact that the *Smith* case was in fact an unemployment compensation case and *not* a criminal prosecution.

64. *Id.* at 890.

65. *Id.* at 891-903. Justice O'Connor may not have agreed with the majority's legal approach in *Smith*, but her decision in *Lyng* was one of the building blocks for the *Smith* decision. In *Lyng*, Justice O'Connor observed that "[w]hatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988). Justice Scalia specifically cited *Lyng* in arguing that the balancing test had not been applied in most cases and that the impact of a governmental action was insufficient by itself to trigger First Amendment protections. *Smith*, 494 U.S. at 883, 885. As he stated, "[i]t is hard to see any reason in principle or practicality why the government should have to tailor its health and safety laws to conform to the diversity of religious belief, but should not have to tailor its management of public land." *Id.* at 885 n.2.

Justice O'Connor attempted, in her *Smith* concurring opinion, to distinguish her decision in *Lyng* by asserting that "internal affairs" of government were involved in that instance. *Id.* at 900. Justice Brennan had forcefully rebutted this distinction in his *Lyng* dissent, however, by observing that land use decisions are likely to have "substantial external effects that government decisions concerning office furniture and information storage obviously will not, and they are correspondingly subject to public scrutiny and public challenge . . . ." 485 U.S. at 470-71.

Thus, Justice O'Connor was willing to dispense with the balancing test in the context of

tices, who also rejected the Court's refusal to apply the balancing test,[66] she would have held that Oregon's interest in regulating drug use was compelling and that an exemption for the sacramental use of peyote would impair Oregon's ability to uniformly enforce its drug laws.[67] She came to this conclusion in spite of substantial evidence that peyote use is insignificant in terms of overall illegal drug use and the lack of any showing that refusing an exemption for sacramental use of peyote was required to combat drug abuse.[68] Justice O'Connor also ignored evidence showing the absence of drug abuse among Native Americans who practice the peyote religion and the positive role of the Native American Church in combatting substance abuse within the Indian community.[69] Justice O'Connor's questionable application of the balancing test illustrates the potential for ethnocentric applications of a facially neutral balancing test.

C. *Practice of Religion by Native American Prisoners*

Many Native American religious ceremonies require the use of ceremonial objects such as pipes, eagle feathers, or medicine bundles. In addition, a fairly common religious ceremony among many tribes is the use of the sweat lodge. A sweat lodge is a small domelike structure constructed of sapling poles and covered with blankets. Heated stones are placed inside the lodge, and water is poured over them after the opening is closed. In the tent, prayers are made and ceremonial songs are sung. The spiritual purification that is an integral part of such a religious ceremony cannot be obtained in an all faiths chapel.[70] Additionally, in many Native American religions there are individuals, sometimes known as "medicine men," who have the authority to conduct religious ceremonies or serve as spiritual advisors. As is the case with all religions, such individuals serve an important role in facilitating the practice of religion by it adherents—here Native American prisoners.[71] Nonetheless, prison authorities sometimes refuse to grant access to sweat lodges or medicine men, or they prohibit possession of a variety of religiously significant objects.

While a number of courts in the 1970s and 1980s upheld various religious freedom rights of Native American prisoners in some circumstances,[72] the

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Native American sacred sites, but, when faced with the ramifications of her reasoning as it might apply to other, more mainstream religions, she retreated.

66. The three dissenting Justices were Blackmun, Brennan, and Marshall. 494 U.S. at 907.

67. 494 U.S. at 902-07.

68. 494 U.S. at 916-17 (Blackmun, J., dissenting).

69. *Id.* at 913-15.

70. *See, e.g.*, HIRSCHFELDER & MOLIN, *supra* note 15, at 287.

71. *See generally AIRFA Oversight Hearing*, *supra* note 16, at 36-40, 256-80 (statements of Lenny Foster, Truman Dailey, Parrish Williams, and Lee Foster); *see also* Indian Inmates of Neb. Penitentiary v. Gunter, 660 F. Supp. 394, 400 (D. Neb. 1987) (holding that prisoners must have access to a religious leader who shares their beliefs absent a legitimate penological justification), *aff'd*, 857 F.2d 463 (8th Cir. 1988).

72. *See, e.g.*, Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975) (upholding right to wear long

religious freedom rights of all prisoners became much more problematic following *O'Lone v. Estate of Shabazz*.[73] In that case, the Supreme Court held "that so long as prison regulations are reasonably related to legitimate penological interests, they are valid."[74] Since *O'Lone*, it has become much more difficult for Native Americans to successfully bring First Amendment free exercise claims in the courts.[75]

D. Use of Eagle Feathers and Parts

Eagle feathers and parts are an integral part of many traditional Native American religious ceremonies. In many Indian religions, eagles are considered to be messengers from the Great Spirit. The use of eagle feathers in Native American rituals can be analogized to the use of the cross in Christian services.[76]

The religious use and possession of golden and bald eagles by Native Americans are recognized by statute.[77] However, eagles may only be obtained through a permit system administered by the United States Fish and Wildlife Service.[78] The service is understaffed, and as a consequence, practitioners sometimes wait many years to receive eagles after filing a request with the Fish and Wildlife Service.[79] In addition, many dead eagles that are found in the field are never sent to the federal repository for distribution to religious practitioners. Thus, the existing system has not responded adequately to the need of Native American religious practices for eagle feathers.

II

PROPOSED NATIVE AMERICAN FREE EXERCISE OF RELIGION ACT

In 1988, three national organizations, the Native American Rights Fund of Boulder, Colorado, the National Congress of American Indians in Washington, D.C., and the Association on American Indian Affairs in New York City, N.Y., formed the American Indian Religious Freedom Coalition. Since its inception, the AIRFA Coalition[80] has expanded to include Indian tribes and other Indian, religious, environmental, and human rights organizations.

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braided hair for religious reasons); Indian Inmates of Neb. Penitentiary v. Gunter, 660 F. Supp. at 400 (granting prisoners access to medicine men, but not to sweat lodge).

73. 482 U.S. 342, 350 (1987) (holding prison regulations that precluded Islamic inmates from attending Friday religious service constitutional).

74. *Id.* at 349 (quoting Turner v. Sofley, 482 U.S. 78, 89 (1987)).

75. *See, e.g.*, Iron Eyes v. Henry, 907 F.2d 810, 814 (8th Cir. 1990) (denying a First Amendment right to wear long hair for religious purposes); Standing Deer v. Carlson, 831 F.2d 1525 (9th Cir. 1987) (denying right to wear religious headband).

76. *See, e.g., AIRFA Oversight Hearing, supra* note 16, at 41-43 (statement of John Pretty on Top); *see generally* HIRSCHFELDER & MOLIN, *supra* note 15.

77. 16 U.S.C. § 668a (1988).

78. 50 C.F.R. § 22.22 (1992).

79. *See, e.g., AIRFA Oversight Hearing, supra* note 16, at 42-43 (statement of John Pretty On Top).

80. Although the acronym of the Coalition is *AIRF*, not *AIRFA*, the Coalition is widely referred to as the *AIRFA Coalition*.

The Coalition's purpose is to advocate for the protection of Native American religious freedom and to educate the American public and Congress about the devastating effect of the *Lyng* and *Smith* decisions upon traditional Native American communities.

As part of that effort, the AIRFA Coalition has advocated legislation addressing Native American cultural and religious concerns. Several Coalition members were intimately involved in the effort that culminated in the Native American Graves Protection and Repatriation Act in 1990.[81] That Act protects Native American grave sites and provides for the repatriation of human remains, funerary objects, sacred objects, and objects of cultural patrimony from museums and federal agencies.[82]

In early 1991, the Coalition turned its full attention to the failure of AIRFA to effectively protect Native American religious practices. Working with tribes, interested Indian and non-Indian individuals, and organizations around the country, the Coalition developed a comprehensive proposal to address the inadequacy of AIRFA. The Coalition submitted this proposal to the Senate Select Committee on Indian Affairs, and in August of 1991, Senator Daniel Inouye, the Committee Chairman, circulated a revised version of the proposal to Indian tribes across the country for comment.[83]

After the draft was circulated, the Committee held AIRFA oversight hearings in Portland, Oregon (March 1992), Los Angeles (November 1992),[84] Honolulu (February 1993), Phoenix (February 1993), Albuquerque (February 1993), and Minneapolis (March 1993).[85] The Committee heard powerful testimony concerning the threat to Native American religions.[86] The House Committee on Natural Resources, Subcommittee on Native American Affairs, also held oversight hearings in Washington, D.C., during February and March 1993.

During this period, the circulated draft bill generated considerable discussion. Proposals for revising the bill were considered, and on May 25, 1993, Senator Inouye introduced the Native American Free Exercise of Religion Act (NAFERA).[87]

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81. Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified at 25 U.S.C. §§ 3001-3013 (Supp. IV 1992)).

82. *Id.*; *see* Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35 (1992).

83. *Hearings on the American Indian Religious Freedom Act—Part I: Oversight Hearing Before the Subcomm. on Native American Affairs of the House Comm. on Natural Resources*, 103d Cong., 1st Sess. (1993).

84. *AIRFA Oversight Hearing*, *supra* note 16.

85. *Oversight Hearing on the Need for Proposed Amendments to the American Indian Religious Freedom Act Before the Senate Select Comm. on Indian Affairs*, 103d Cong., 1st Sess. (1993).

86. *See generally id.* and *AIRFA Oversight Hearing*, *supra* note 16.

87. S. 1021, 103d Cong., 1st Sess. (1993).

NAFERA includes the following elements[88]:

A. *Protection of Sacred Sites*

- Requires notice to appropriate Indian tribes, Native Hawaiian organizations, and Native American traditional leaders of any federal or federally-assisted undertaking that might change the character or use of a sacred site.[89]
- Requires the federal agency to consult with any Indian tribe, Native Hawaiian organization, or Native American traditional leader, who indicates in writing that an undertaking or decision will impact a religious site, and to prepare a response, which must be incorporated into other required review documents.[90]
- Requires efforts to include Indian tribes, Native Hawaiian organizations, and Native American traditional leaders in federal land management planning procedures.[91]
- Provides special notice and consultation procedures in instances where an Indian tribe certifies that the tribe's religious tenets prohibit disclosure of information concerning their religious sites, beliefs, or practices.[92]
- Provides aggrieved parties with a legal cause of action against the federal and state governments where government land management decisions burden the exercise of Native American religious rights.[93]
- Recognizes tribal authority over federal or federally-assisted undertakings that impact Native American religious sites located on Indian land.[94]
- Requires that information on Native American religions introduced before a federal court or agency remain confidential.[95]
- Guarantees traditional practicioners access to Native American religious sites and the right to gather "natural substances or natural products for Native American religious purposes."[96]

88. Although the proposed language of NAFERA has constantly changed as this Article was written, these are the major elements of the legislation as this Article goes to press.

89. S. 1021, 103d Cong., 1st Sess. § 103 (1993).

90. *Id.* § 104.

91. *Id.* § 102.

92. *Id.* § 104(b).

93. *Id.* § 105. Except where there is a tribally certified secrecy requirement and a special test would therefore be applied, *see infra* note 152 and accompanying text, this cause of action would be based upon a two-tiered test. When the activity poses a substantial and realistic threat of undermining or frustrating a Native American religion or religious practice (the test recommended in the *Lyng* dissent, 485 U.S. 439, 474-75 (1988) (Brennan, J., dissenting)), the first tier of the test would require the federal government to show a compelling interest in the activity and to show that the course chosen is the least intrusive alternative (the traditional First Amendment test, discussed *supra* in text accompanying notes 20-21). When there is a lesser impact, the second tier of the test would require the government to simply show that it selected the least intrusive course of action to achieve its goals.

94. S. 1021, 103d Cong., 1st Sess. § 106 (1993).

95. *Id.* § 108.

96. *Id.* § 102(c)(1).

B. *Religious Use of Peyote*

- Prohibits the criminalization of the use, possession, or transportation of peyote by an Indian for ceremonial purposes in a Native American religion.[97]
- Prohibits discrimination or the imposition of a penalty on the basis of such use, possession, or transportation.[98]
- Allows the Drug Enforcement Administration and State of Texas (the only place where peyote is grown within the United States) to continue to regulate the distribution of peyote to Indian religious practitioners.[99]

C. *Prisoners' Religious Rights*

- Mandates access to traditional religious leaders, necessary items, and Native American religious facilities, excluding peyote and sacred sites, on a regular basis for Native American prisoners who practice a traditional religion, comparable to the access afforded those who practice Judeo-Christian religions.[100]
- Protects the religious-based wearing of long hair, unless a prison's legitimate security concerns cannot be met in a less restrictive manner.[101]
- Requires a commission, composed mostly of Native Americans, to conduct a survey of federal and state prisons to determine whether the treatment of Native American prisoners is adequate and to recommend regulations to implement the revised act.[102]

D. *Religious Use of Eagles and Other Animals and Plants*

- Reforms the existing Fish and Wildlife Service process for the distribution of dead eagles to Indian people for use in religious ceremonies.[103]
- Recognizes the right of tribal governments to administer the system on their own lands.[104]
- Mandates a study to evaluate the need for the expansion of the system to include other birds, animals, and plants that may have sacred value.[105]

E. *Other*

- Subjects other religious practices to the traditional First Amendment balancing test.[106]

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97. *Id.* § 202(a).
98. *Id.*
99. *Id.* § 202(b) and (c).
100. *Id.* § 301(a).
101. *Id.* § 301(a)(3).
102. *Id.* § 301(b).
103. *Id.* § 401.
104. *Id.* § 401(d).
105. *Id.* § 402.
106. *Id.* § 501(b)(1). This section of the act is similar to the provisions in the Religious Freedom Restoration Act (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (1993) (to be codified at 42 U.S.C. §§ 1988, 2000b to 2000bb-4, 5 U.S.C. § 504), which Congress enacted as a response to the virtual abolition of the First Amendment balancing test in the *Smith* decision (*see supra* notes 59-69 and accompanying text). RFRA provides that any governmental action that

- Disclaims any intent to diminish the rights of Indian tribes or the inherent right of Native American people to practice their religions.[107]

III
CONSTITUTIONALITY OF THE PROPOSED NATIVE AMERICAN FREE EXERCISE OF RELIGION ACT[108]

Opponents of this legislation have consistently charged that it would violate the Establishment Clause of the First Amendment to the Constitution. The last part of this Article is designed to address those concerns.

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infringes upon the practice of a religion can be pursued by the federal government only if the government's interest is compelling and there is no less restrictive means of furthering that compelling interest.

While RFRA addresses some Native American religious concerns, it does not appear to fully address their unique free exercise problems. For starters, its scope and application are uncertain. In testimony submitted to the House Judiciary Committee, Subcommittee on Civil and Constitutional Rights, in connection with the Subcommittee's hearing on RFRA, 26 Indian, environmental, religious, and human rights organizations, and three Indian tribes offered additional reasons why RFRA would not fully address Native American concerns:

1. The treaty relationship between Indian tribes and the United States government has led to a long-standing and complex political and legal relationship, accompanied by voluminous legislation dealing with all aspects of Indian life. *Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm.*, 102d Cong., 2d. Sess. 424 (1992) [hereinafter *RFRA Hearings*].

2. RFRA is a reactive bill motivated by a specific court decision. It relies upon litigation as a check on government power. However, because government policies so completely pervade Indian religious life, proactive legislation is needed to affirmatively change problematic federal and state procedures. The testimony noted that the *1979 AIRFA Report*, *supra* note 6, identified 522 specific examples of government policies that impact on Native American religious practices. *RFRA Hearings*, *supra*, at 425.

3. Traditional Indian religions are not written and not based on theology; rather, they are unwritten and dependent upon the ongoing practice of ceremonies and rituals. As a result, the usual First Amendment standards have been difficult to apply in the context of Native American religions. Therefore, Congress needs to develop standards that will address the unique needs of Native religions. *Id.* at 425-6.

4. Although existing provisions are piecemeal and leave enormous gaps in protection, there is considerable precedent for specific provisions addressing the religious needs of Native Americans. For example, there are statutes that address the ownership of, or access to, specific sacred sites. *See, e.g.*, 25 U.S.C. 640d-19 (1988), 16 U.S.C. 228i (1988 & Supp. IV 1992), 16 U.S.C. 410ii-4 (1988), 16 U.S.C. 543f (1988), 16 U.S.C. 460uu-47 (1988), 16 U.S.C. 410pp-6 (1988 & Supp. IV 1992). There are also statutes that address the religious and cultural use of animals. *See, e.g.*, 16 U.S.C. 668a (1988) and 16 U.S.C. 1371(b) (1988). *See generally RFRA Hearings, supra*, at 426.

107. S. 1021. 103d Cong., 1st Sess. § 601(2), (3) (1993).

108. The last part of this Article, which discusses the constitutionality of the bill, is based upon the broad parameters of the proposed legislation. The analysis does not address specific language in the bill, because the provisions of the draft bill being considered constantly changed during the time this Article was being written and will likely continue to change as the bill moves through Congress. However, the author has submitted as testimony before the Senate Committee on Indian Affairs a detailed analysis of the constitutionality of the specific provisions of the bill as introduced. *Hearings on S. 1021 Before the Senate Comm. on Indian Affairs*, 103d Cong., 1st Sess. (Sept. 10, 1993).

A. Legal Background

Establishment Clause jurisprudence is in a state of confusion, with a great deal of disagreement among the Supreme Court Justices. In fact, the Court has "emphasized [its] unwillingness to be confined to any single test or criterion" in the Establishment Clause area.[109]

That caveat aside, two basic tests have been applied in Establishment Clause jurisprudence. Where a statute discriminates among different religions, equal protection analysis has generally been applied. A concurring opinion in a 1970 case first suggested applying "an equal protection mode of analysis" to statutes which create a denominational preference.[110] This approach was first formally applied by the Supreme Court in 1982 in *Larson v. Valente*.[111]

Larson found unconstitutional a statute that imposed reporting requirements upon religious organizations that solicit more than 50 percent of their income from non-members. The Court held that the de facto denominational preference created by the statute was analogous to a suspect classification and that therefore "strict scrutiny" of the classification was required.[112] Thus, in order for a statute to survive constitutional attack, the distinctions must be justified by a compelling governmental interest,[113] and the governmental action must be narrowly tailored to further that interest. The statute in *Larson* failed the "narrowly tailored" requirement.[114] A number of cases since *Larson* have also used equal protection analysis when a statute appeared to create a denominational preference.[115] The Supreme Court has recognized the continued validity of this test in subsequent cases.[116]

Where laws relate to a religious subject matter rather than discriminate among religions, the Supreme Court, for at least the last twenty years, has generally analyzed such laws using the three-part test set forth in *Lemon v.*

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109. Lynch v. Donnelly, 465 U.S. 668, 679 (1984).

110. Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 696 (1970) (Harlan, J., concurring).

111. 456 U.S. 228, 252-53 (1982). This "equal protection mode of analysis" will hereinafter be referred to as the *Larson v. Valente* test.

112. *Id.* at 246.

113. *Id.* at 247.

114. *Id.* at 246-51.

115. *See* Rupert v. Director, United States Fish & Wildlife Serv., 957 F.2d 32, 34 (1st Cir. 1992) (applying equal protection analysis to a claim by a non-Indian "pastor" seeking eagle feathers for religious purposes); Olsen v. Drug Enforcement Admin., 878 F.2d 1458, 1463 n.5 (D.C. Cir. 1989) (finding convergence of Establishment Clause and equal protection rationales in evaluating claim that the exemption of the religious use of peyote from drug laws required a similar exemption for the sacramental use of marijuana), *cert. denied*, 495 U.S. 906 (1990); Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1217 (5th Cir. 1991) (using equal protection analysis to determine whether the exemption for religious peyote use by the Native American Church must be extended to religious use by a non-Indian religious organization).

116. *See, e.g.*, Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 694-95 (1989) and County of Allegheny v. ACLU, 492 U.S. 573, 608-09 (1989) (confirming the continued validity of the *Larson* analysis where a denominational preference is alleged).

Kurtzman.[117] To find an act constitutional under that test, (1) there must be a secular legislative purpose, (2) the principal or primary effect of the legislation must neither advance nor inhibit religion, and (3) the act must not create excessive entanglement between government and religion.[118]

This three-part test has been questioned by several Supreme Court Justices. Recently, in *Lee v. Weisman*,[119] four Justices endorsed the test,[120] four Justices advocated replacing the current test with a coercion test,[121] and Justice Kennedy, who issued the opinion of the Court, believed that it was not necessary to determine the continued validity of the *Lemon* test to decide the case at hand, although he had previously questioned its validity.[122]

B. Constitutionality of the Proposed Legislation

1. Sacred Sites

Where a federal undertaking may have an impact upon a sacred site, the proposed legislation would impose procedural requirements upon government agencies and provide traditional Native American practitioners with a legal cause of action.[123]

In analyzing the constitutionality of this proposal, it is first necessary to determine whether the legislation discriminates among religions. If so, the *Larson v. Valente* test would need to be applied to determine the constitutionality of the proposal.[124] If not, the *Lemon v. Kurtzman* test applies.[125]

It is probable that a court would find that the proposed legislation "facially differentiates among religions" and that, therefore, the *Larson v. Valente* test would apply. Nonetheless, a strong argument can be made that this legislation simply treats unique religions uniquely and does not create a denominational preference. There appear to be no other religions in the United States that are similarly situated with Native American religions. Traditional Indian religions are the only religions in America (1) whose means of worship are inextricably connected with sites in the natural world,[126] (2) whose places

117. 403 U.S. 602 (1971).

118. *Id.* at 612-13. A variation of the first two parts of this test has also been applied in recent cases where the Court has inquired whether a given practice or piece of legislation "endorses" religion. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. at 592-93.

119. 112 S.Ct. 2649 (1992).

120. *Id.* at 2661-76. The four Justices were Blackmun, O'Connor, Souter, and Stevens.

121. *Id.* at 2676-86. The four Justices were Scalia, Thomas, White, and Chief Justice Rehnquist. Not only do they believe that there is no basis in the First Amendment for the *Lemon v. Kurtzman* test, but they also feel that it is contrary to our constitutional tradition.

122. *Id.* at 2655. Justice Kennedy had earlier questioned the continuing viability of *Lemon v. Kurtzman* when concurring in part and dissenting in part in County of Allegheny v. ACLU, 492 U.S. at 655 (Kennedy, J., concurring in part and dissenting in part).

123. *See supra* text accompanying notes 89-96.

124. *See supra* text accompanying notes 111-16.

125. *See supra* text accompanying notes 117-22.

126. For a discussion of the relationship between physical sites in the natural world and Native American religious practice, see *supra* text accompanying note 15.

of worship are under government control,[127] (3) whose religious practices predate the adoption of the Establishment Clause, and (4) whose religions have been subjected to a long history of government oppression and suppression.[128] If any other religion meets these criteria, then arguably the legislation discriminates among religions. However, it is extremely unlikely that any other religions have had their practice subjected to similar governmental infringements.

Since it is uncertain whether the *Larson v. Valente* test or *Lemon v. Kurtzman* test would apply, I will analyze the constitutionality of NAFERA under both tests.

a. The Larson v. Valente *test*

If the *Larson v. Valente* test is applied, the first question is whether its application should be altered in view of the special relationship between Indian people and the Federal government. The United States Constitution empowers Congress "[t]o regulate Commerce . . . with the Indian tribes."[129] Moreover, Federal common law has recognized that "Indian nations" are "distinct . . . political communities, retaining their natural rights . . . ."[130] Indian tribes "possess[ ] attributes of sovereignty over both their members and their territory."[131]

As a result of these constitutional and common law principles, there is a two hundred year old special relationship between Indian tribes and the federal government, involving the negotiation of scores of treaties, the development of the trust relationship doctrine under which the government has a fiduciary duty in its dealings with Indian tribes, and federal legislation dealing with Indians that fills an entire chapter of the United States Code.[132]

Pursuant to the trust relationship, the federal government is responsible for protecting and fostering Indian societies, cultures, and communities.[133] This special relationship applies to all federal agencies and to federal action both within and without Indian reservations.[134] In *Morton v. Mancari*,[135] the United States Supreme Court recognized the unique legal status of Indian

127. *See supra* notes 15-16 and sources cited therein.

128. *See supra* notes 3-6 and accompanying text.

129. U.S. CONST. art. I, § 8, cl. 3.

130. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1839).

131. United States v. Mazurie, 419 U.S. 544, 557 (1975).

132. Chapter 25 of the United States Code is entitled "Indians." *See generally* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (rev. ed. 1982).

133. COHEN, *supra* note 132, at 220-21; *see also, e.g.*, Rupert v. Director, United States Fish & Wildlife Serv., 957 F.2d 32, 34-35 (1st Cir. 1992) (recognizing a legitimate governmental interest in protecting Native American religion and culture).

134. *See, e.g.*, Nance v. EPA, 645 F.2d 701, 711 (9th Cir. 1981) (recognizing that any federal government action, including regulations promulgated by the EPA, is subject to the fiduciary relationship existing between the federal government and Indian tribes), *cert. denied*, 454 U.S. 1081 (1981); Pyramid Lake Paiute Tribe v. Navy, 898 F.2d 1410, 1420 (9th Cir. 1990) (recognizing the fiduciary duty owed to Indian tribes by the Secretary of the Navy in regard to management of lands owned by the Navy).

135. 417 U.S. 535 (1974).

tribes under federal law and the power of Congress to legislate on behalf of Indian people. The Court, in the context of an equal protection challenge to a federal law providing for preferential Indian hiring for certain federal jobs, held that legislation that singles out Indians for special treatment and that "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians . . . will not be disturbed."[136]

In recognition of this historic trust relationship between the Indians and the federal government, the First Circuit Court of Appeals recently expressed the opinion that the *Larson v. Valente* test should be applied differently in the context of legislation addressing Indian religious concerns. In *Rupert v. Director, United States Fish and Wildlife Service*,[137] the court applied the *Larson v. Valente* test in considering the constitutionality of an Indian religious exemption from the Bald Eagle Protection Act.[138] Although, typically a religious denominational preference should be treated as a suspect classification and strict scrutiny should be applied, the *Rupert* court noted that cases such as *Morton v. Mancari*[139] have held that, for equal protection purposes, laws that benefit Indian people are not based upon a suspect classification.[140] Therefore, the Indian religious exemption in the Bald Eagle Protection Act is an exception to the general rule that a religious classification is a suspect classification.[141] Thus, the court reasoned, the appropriate test for analyzing the Indian religious exemption should be the "rational basis" test used in equal protection jurisprudence when a classification is not based upon a suspect category[142] and not the "strict scrutiny" test applied in *Larson v. Valente*.[143] This test simply requires that the legislation bear a "rational relationship" to legitimate government objectives.

The Fifth Circuit Court of Appeals in *Peyote Way Church of God v. Thornburgh* addressed a similar issue when it was faced with the question of whether a religious peyote use exception limited to Indians was unconstitutional.[144] Unlike *Rupert*, the *Peyote Way* court did not specifically apply a rational basis test. Rather, it held that, under an "equal protection mode of analysis," the exemption was constitutional without specifying the test it was using.[145] The Court's reasoning suggests the use of a less stringent test, however. It stated:

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136. *Id.* at 554-55.

137. 957 F.2d 32 (1st Cir. 1992).

138. 16 U.S.C. § 668 (1988).

139. 417 U.S. 535 (1974).

140. 957 F.2d at 34-35.

141. *Id.* at 34.

142. In *Rupert*, the court ruled that the classification was political and therefore not suspect. *Id.* at 1216. Classification based on race is an example of suspect classification. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967).

143. 456 U.S. 228 (1982). *See supra* text accompanying notes 111-16 for a discussion of *Larson*.

144. 922 F.2d 1210 (5th Cir. 1991).

145. *Id.* at 1217.

> The unique guardian-ward relationship between the federal government and Native American tribes precludes the degree of separation of church and state ordinarily required by the First Amendment. The federal government cannot at once fulfill its constitutional role as protector of tribal Native Americans and apply conventional separatist understandings of the establishment clause to that same relationship.
>
> . . . the [religious] exemption represents the government's protection of the culture of quasi-sovereign Native American tribes and as such, does not represent an establishment of religion in contravention of the First Amendment.[146]

Thus, both of the Circuit Courts of Appeal that recently considered the constitutionality of legislation accommodating the free exercise of Indian religions found that the usual Establishment Clause tests must be modified. In essence, although the analytical means by which they reached their conclusion were different, both courts ultimately applied a test that was virtually identical to the *Morton v. Mancari* test.[147] In a real sense, it could be said that these cases lead to the conclusion that, notwithstanding the Establishment Clause, the religious subject matter of the legislation does not change the typical mode of analysis applied to legislation that draws Indian versus non-Indian distinctions.

If so, the NAFERA sacred sites title is clearly constitutional since it is "rationally related" to the federal government's "unique obligation" toward Indian people. In short, (1) there is a special and unique historical, cultural, and spiritual relationship between Indian people and certain lands, (2) those lands are threatened through government action and inaction, (3) Indian people formerly possessed these sites and did not knowingly relinquish the right to use them when they "transferred" these lands to the government,[148] (4) the failure to protect those lands has a devastating and unequal effect upon the ability of Native Americans to freely exercise their traditional religions, and (5) there is a direct connection between this failure to protect sacred sites and the well-being of Indian people and tribes in general. Given the historical and continuing governmental interference with an essential component of Native

146. *Id.*

147. *Id. See also* United States v. Warner, 595 F. Supp. 595, 600 (D.N.D. 1984) (specifically applying *Morton v. Mancari*, 417 U.S. 535 (1974), in a case factually similar to Peyote Way Church of God v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991)).

148. *Cf.* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 676 (1979) (" 'treaty must . . . be construed . . . in the sense in which [the words] would naturally be understood by the Indians.' ") (quoting Jones v. Meehan, 175 U.S. 1, 11 (1899)); United States v. Winans, 198 U.S. 371, 381 (1905) ("the treaty was not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted"); United States v. Adair, 723 F.2d 1394, 1413 (9th Cir. 1983) (holding that a tribe retained its water rights) ("[W]hen a tribe and the Government negotiate a treaty, the tribe retains all rights not expressly ceded to the Government in the treaty so long as the rights retained are consistent with the tribe's sovereign dependent rights.").

American religions in the form of the continuing administration of sacred sites by the federal government, legislation that creates a mechanism by which government decision-making can better balance the free exercise of Native American religions against other valid governmental interests is clearly rationally related to legitimate government objectives and hence constitutional.

However, even if strict scrutiny is applied, the constitutional result remains the same. Strict scrutiny requires that the government demonstrate a compelling interest in the legislation and that there be a close fit between the legislation and the compelling governmental interest. The historic relationship between the federal government and Indian people, previously discussed, provides a compelling governmental interest sufficient to justify the enactment of NAFERA.[149] Moreover, one can prudently assert that any preference for Native American religions that the legislation may create is justifiable because it redresses two centuries of discriminatory treatment of those religions, much as laws that create preferential statutory rights for women and members of minority groups have been held to be a legitimate means for redressing past discrimination.[150]

Furthermore, the proposed legislation, in general, is narrowly tailored to deal specifically with government-placed obstacles to the free exercise of Indian religions.[151] Congress has identified a problem: governmental agencies involved in land regulation and development of sites held sacred by Native Americans are not adequately considering the impact upon the religious free exercise of Native Americans who practice traditional religions. In response to this problem, Congress is mandating procedures to ensure full consideration of the impact of governmental activities on sacred sites. Activities that affect sacred sites must pass the traditional First Amendment balancing test. These remedies appear measured and specifically addressed to the problems identified. If the proposed legislation were to mandate complete exclusion of the public from all Native American religious sites, or to provide an absolute veto to Native American practitioners over federal projects, one could conclude that there was not a narrow fit between the legislation and the legitimate goal of the government to accommodate the free exercise of Native American religions. However, the draft legislation does not sweep so broadly. The restriction upon government activity is not absolute. The government must show that it has a compelling interest in pursuing an undertaking *and* that it has chosen the least intrusive means to achieve its goal only once the plaintiff has

149. *See supra* text accompanying notes 129-46.

150. *See* Daniel K. Inouye, *Discrimination and Native American Religious Rights*, 23 U. WEST L.A. L. REV. 3, 9-10, 12-14 (1992); *see also, e.g.*, Califano v. Webster, 430 U.S. 313 (1977) (upholding a gender preference based upon a finding that Congress's intent was to redress past discrimination).

151. It is difficult to definitively analyze whether a given piece of legislation is narrowly tailored in all respects without analyzing the specific provisions. For the reasons stated *supra* in note 108, the analysis in this Article does not treat the specific provisions of S. 1021. Thus, its conclusions are valid in terms of the general approach advocated in the legislation, but I do not purport to draw conclusions as to every specific provisior. in the bill.

shown that there is either a substantial and realistic threat that a federal or federally assisted action will undermine a Native American religious practice or that the religion in question has strict secrecy provisions pertaining to the specific impact of the federal action, internal sanctions for enforcing these provisions, and an Indian tribe certifies to that effect.[152] In all other instances where the plaintiff has made a showing that religious sites may be affected, the government need show only that it chose the least intrusive alternative.[153] Once the government meets the test, it may go forward with the activity. Thus, the legislation is narrowly crafted to rebalance the equation that informs land management decisions to give Native American concerns more weight, thereby protecting Native American religions from unnecessary governmental interference, without making Native American concerns dispositive.

b. The Lemon v. Kurtzman *test*

If the *Lemon v. Kurtzman* test were applied,[154] a court should similarly conclude, on the basis of considerable precedent, that the sacred sites title of NAFERA is constitutional. The first prong of that test, that the legislation must have a secular purpose, is easily met. As discussed earlier, the special relationship between Indian tribes and the United States provides a legitimate secular purpose for this legislation.[155]

Furthermore, legislation has been found to have a secular purpose when the government removes obstacles that keep individuals from practicing their religion freely or that inhibit the organizational activities of that religion.[156] This is true even if the legislation provides protections greater than those required by the Free Exercise Clause of the First Amendment, since the government can accommodate religious freedom beyond the minimum requirements of the Free Exercise Clause.[157] Thus, for example, while the Free Exercise Clause does not require the government to exempt religious organizations from employment laws prohibiting discrimination on the basis of religion, the government may nonetheless constitutionally choose to advance free exercise principles by providing such an exemption by statute.[158] Since NAFERA prevents the government from placing undue obstacles in the path of traditional Indian religious practitioners who seek to exercise their religions at *their own*

152. S. 1021, 103d Cong., 1st Sess. § 105 (1993). The least intrusive alternative test is modified in application when the tribally-certified secrecy provision is applicable. *Id.* § 104(b)(2).

153. *Id.* § 105(a)(3).

154. For a discussion of the *Lemon v. Kurtzman* test, *see supra* text accompanying notes 115-120.

155. *See supra* notes 129-46 & 149 and accompanying text.

156. Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 335-37 (1987).

157. *See, e.g., id.* at 334 (" 'the limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.' ") (quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 673 (1970)); Hobbie v. Unemployment Appeal Comm'n of Fla., 480 U.S. 136, 144-45 (1987).

158. Corporation of Presiding Bishop v. Amos, 483 U.S. at 338.

sacred sites, NAFERA can be said to further free exercise principles by accommodating the needs of those practitioners. This is a valid secular purpose.

In terms of the second prong of the *Lemon v. Kurtzman* test—whether the legislation's primary effect is religious—the Supreme Court held in *Amos* that the government must advance religion through active involvement, such as financial assistance, in order for the impact to be primary.[159] The government, in this instance, is not affirmatively promoting Native American religions through financial assistance or endorsement, nor is it requiring citizen participation. It is simply prohibiting government activity that, in effect, places obstacles in the path of Native American religious freedom.

Moreover, some decisions have indicated that where religious concerns are only part of a larger scheme recognizing various secular interests in the same subject matter, courts may conclude that legislation does not impermissibly advance or promote religion.[160] One could view NAFERA as simply mandating the inclusion of religious use as an additional factor to be weighed in land use decisions, along with other factors that affect land use, which are already considered by the government pursuant to other laws, such as environmental and historic preservation concerns.[161] Indeed, the legal test included in NAFERA itself provides a balancing test between religious and nonreligious interests.[162] For all of these reasons, this legislation is primarily secular. The legislation does not unconstitutionally advance or promote tribal religion.[163]

Finally, the third prong of the *Lemon v. Kurtzman* test forbids excessive

159. *Id.* at 337.

160. *See, e.g.*, Board of Educ. v. Mergens, 496 U.S. 226, 248-49 (1990) (preventing discrimination against religion in the provision of a public benefit is "undeniably secular"); Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 672-73 (1970) (finding it significant that the property tax exemption was extended to other nonprofit quasi-public corporations in addition to religious institutions). *But see* Texas Monthly v. Bullock, 489 U.S. 1, 36-40 (1989) (Scalia, J., dissenting) (specifically rejecting rationale that religious exemption in *Walz* was premised upon the extension of property tax relief to other nonprofit entities).

161. *See, e.g.*, National Environmental Policy Act, 42 U.S.C. §§ 4321-4370a (1988); National Historic Preservation Act, 16 U.S.C. § 470 to 470w-6 (1988); Archeological Resources Protection Act, 16 U.S.C. § 470aa-470*ll* (1988); Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1784 (1988).

162. S. 1021, 103d Cong., 1st Sess. § 105 (1993).

163. As previously discussed, *see supra* note 118, the Court has seemingly used an "endorsement" test in lieu of (or perhaps in furtherance of) *Lemon v. Kurtzman* in a number of cases. This test was originally formulated by Justice O'Connor in a concurring opinion in Lynch v. Donnelly, 465 U.S. 668, 691-93 (1984) (O'Connor, J., concurring). In Justice O'Connor's concurring opinion in the *Amos* case, she criticized the Court's holding that government must be advancing religion itself for a statute to have a principal effect of advancing religion, arguing that this could justify almost any religiously-based legislation. 483 U.S. at 347-348. Rather, utilizing her "endorsement" test, she argued that the test should be whether some "identifiable burden" is lifted by the legislation that hits certain religious people or organizations harder than others. *Id.* Clearly this "modification" of the *Amos* test would also be satisfied by NAFERA. Likewise, in Texas Monthly v. Bullock, 489 U.S. 1 (1989), probably the broadest reading of the Establishment Clause prohibitions in recent years, the Court recognized that legislation "designed to alleviate government intrusion that might significantly deter adherents of a particular sect" would be constitutional. *Id.* at 18 n.8. Lyng v. Northwest Indian

entanglement between government and religion. The government is already inescapably intertwined with Native American traditional religious use of sacred sites, due to its acquisition and management of those sites, its activities affecting those sites, and various existing laws. This involvement is pre-existing and is not caused by this legislation. Rather, this legislation recognizes the pervasive impact of the government upon Native American religions and the omnipresent role the government assumes in the lives of Indian people.[164] The proposed legislation provides governing standards for activities affecting sacred sites in a manner least intrusive upon Native American religion. Thus, the legislation does not create excessive entanglement.[165]

In short, NAFERA passes the *Lemon v. Kurtzman* test. In view of this conclusion, there is little question that the legislation would meet the more forgiving "coercion" standard which was suggested by four Justices[166] in *Lee v. Weismann*.[167]

Thus, the sacred sites title of NAFERA, analyzed generally, passes constitutional muster under the Establishment Clause. In *Lyng*, the United States Supreme Court in fact suggested that legislative accommodation of the religious needs of traditional Indian religious practitioners was possible, stating that "[t]he Government's rights to the use of its own land . . . need not and should not discourage it from accommodating religious practices like those

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Cemetery Protective Ass'n, 485 U.S. 439 (1988), described the impact of development on sacred sites in just that way. *Id.* at 451.

164. *See supra* text accompanying notes 129-46 (discussing the special relationship between Indian tribes and the federal government). Arguably, the excessive entanglement prong of the *Lemon v. Kurtzman* test should not apply in the context of an Indian religious freedom case. The special relationship between the United States and Indian tribes has led to a level of government involvement in the lives of Indian people far above the level of government involvement in the lives of other citizens. In crafting the entanglement portion of the tripartite test, the *Lemon v. Kurtzman* Court certainly did not contemplate a preexisting relationship between the religious practitioners and the government of the type created by the special relationship.

165. Sections 104(b) and 105(b) of the bill, S. 1021, 103d Cong., 1st Sess. (1993), which provide for tribal certification of a religiously-based secrecy requirement, could be viewed as creating excessive entanglement if tribal certification were triggered by a religious practitioner or a religious entity. *See* Larkin v. Grendel's Den, 459 U.S. 116 (1981) (holding statute that vested "veto" power over liquor licensing in churches unconstitutional as a violation of the Free Exercise Clause). However, since tribal certification may only be initiated by a tribal government, the bill merely recognizes the special expertise of tribal governments in these issues. Given the special political relationship between tribal governments and the federal government, it is well within the power of Congress to require the federal government to respect the decisions of tribal authorities and even to modify its actions in response to those decisions. *Cf.* 25 U.S.C. 1915(c) (1988) (requiring federal or state agencies or courts to apply the placement preferences of an Indian child's tribe in the case of the adoption or foster care placement of an Indian child); United States v. Mazurie, 419 U.S. 544, 556-58 (1975) (holding federal recognition of tribal authority to regulate liquor sales on the reservation constitutional in light of the inherent tribal authority over, and interest in, such matters). Indeed, Congress has incorporated tribal governments into a variety of federal regulatory mechanisms affecting the management and use of property. *See, e.g.*, Clean Air Act, 42 U.S.C. 7410(o) (Supp. III 1991); Safe Drinking Water Act, 42 U.S.C. 300j-11 (1988); Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. 9626 (1988).

166. *See supra* note 121 and accompanying text.

167. *See supra* notes 119-22 and accompanying text for a discussion of *Lee v. Weissman*.

engaged in by the Indian respondents."[168]

c. Application to the States

To the extent that the bill would apply to state governments, its constitutionality must be analyzed in terms of the Fourteenth Amendment. The Fourteenth Amendment prohibits any state from abridging the "privileges and immunities of citizens of the United States" or depriving any person the right to due process of law or equal protection of the laws.[169] Most of the Bill of Rights, including the First Amendment's Free Exercise of Religion Clause, has been made applicable to the states by the Fourteenth Amendment.[170] Section 5 of the Amendment gives Congress the authority to "enforce, by appropriate legislation" the provisions of the Amendment.[171]

In *Katzenbach v. Morgan*,[172] the Supreme Court held that section 5 is a broad grant of authority to Congress that empowers it to enforce the provisions of the Fourteenth Amendment by any necessary and proper means. An enactment imposed upon the states is constitutional when it is designed to advance the protection of rights within the letter and spirit of the Constitution and is plainly adapted to achieve that end.[173]

In *Katzenbach*, the Court considered the constitutionality of a provision in the Voting Rights Act of 1965[174] that forbids states from denying the vote to certain persons who were unable to read or write English.[175] The Supreme Court had previously held that state-imposed literacy tests did not violate the Constitution.[176] Based upon this holding, the plaintiffs in *Katzenbach* asserted that Congress had no authority to forbid the states from imposing a literacy requirement.[177] The Court in *Katzenbach* rejected this argument and upheld the statute, holding that Congress may go beyond the minimal requirements of the Constitution and provide greater protection for the constitutional rights of citizens against state action, even if the failure to provide those protections would not rise to the level of a constitutional violation in and of itself.[178]

As previously noted, the Court has similarly recognized Congress's power to exceed minimal constitutional requirements in order to protect the free exercise of religion.[179] Thus, it is permissible, under *Katzenbach*, for Con-

168. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 454 (1988).
169. U.S. CONST. amend. XIV, § 1.
170. *E.g.*, Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (holding that the Fourteenth Amendment prohibits any state legislature from depriving an individual of her rights guaranteed by the First Amendment).
171. U.S. CONST. amend. XIV, § 5.
172. 384 U.S. 641 (1966).
173. *Id.* at 650-51.
174. 42 U.S.C. § 1973b(e).
175. *Katzenbach*, 384 U.S. at 643.
176. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).
177. *Katzenbach*, 384 U.S. at 643-44, 649.
178. *Katzenbach*, 384 U.S. at 647-51.
179. *See supra* note 157 and accompanying text.

gress to impose requirements on the states through the Fourteenth Amendment beyond the minimum requirements of the Free Exercise Clause in order to protect the practice of religion from undue government interference.

2. *Sacramental Use of Peyote*

Section 202 of NAFERA proscribes states from prohibiting sacramental peyote use.[180] This proscription is similarly permitted under *Katzenbach v. Morgan*,[181] *Walz v. Tax Commission of New York*,[182] and their progeny. In protecting the ceremonial use of peyote, Congress would be acting within its delegated authority under the Fourteenth Amendment to do all that is necessary and proper to enforce the Free Exercise Clause and to protect citizens adequately from state interference with their exercise of religion. The only significant constitutional questions presented by this part of NAFERA would be whether the exemption improperly favors Native American sacramental peyote use over either non-Native American sacramental peyote use or non-religious peyote use.

Drawing a distinction between the sacramental and recreational use of peyote is clearly constitutionally permissible. In terms of secular use, there is no constitutionally-based right that would override the general prohibition of peyote use and possession. In the case of religious use, however, there is a constitutionally-based right, namely, the First Amendment right to free exercise of religion. Congress might rationally choose to protect and accommodate peyote use that is related to religious freedom without choosing to legalize its use generally. Moreover, Congress might legitimately view circumscribed, ceremonial use as posing less of a threat to the public safety than would a universal, secular right to use peyote.[183]

The special relationship between Indians and the federal government provides grounds for a distinction between Indian and non-Indian sacramental use.[184] Indeed, the Fifth Circuit Court of Appeals recently so held in *Peyote Way Church of God v. Thornburgh*.[185] That case involved a challenge to a federal regulation and a Texas statute exempting the bona fide sacramental use of peyote by Native American Church members from otherwise applicable criminal drug laws. The Peyote Way Church of God, an organization consisting mostly of non-Indians, asserted that the Constitution requires that the exemption be made available to them as well. The court denied their claim and

180. S. 1021, 103d Cong., 1st Sess. § 202 (1993).

181. 384 U.S. 641 (1966).

182. 397 U.S. 664 (1970).

183. *Cf.* Olsen v. Drug Enforcement Admin., 878 F.2d 1458, 1463 (D.C. Cir. 1989) (denying a religious organization exemption from the drug enforcement laws for its use of marijuana noting that the religious use of peyote, in circumscribed ceremonies, differed greatly in its impact on public safety from the continuous use of marijuana espoused by that religious organization).

184. *See supra* notes 129-46 & 149 and accompanying text.

185. 922 F.2d 1210, 1216 (5th Cir. 1991); *accord* United States v. Warner, 595 F. Supp. 595 (D. N.D. 1984).

held that the regulation and law drew a constitutionally permissible distinction. It explained, in part, as follows:

> [I]n determining whether the [Native American Church] is similarly situated to other religions, we will not ignore the fact that "tribes remain quasi-sovereign nations which by government structure, *culture*, and source of sovereignty are in many ways foreign to the constitutional institutions of the federal and state governments."[186]

In addition, it should be noted that sacramental peyote use in Native American religions preceded the enactment of virtually all drug laws which prohibit peyote use in general.[187] These Native American religions are almost certainly the only religions currently using peyote for sacramental purposes that existed prior to the general prohibition. In *New Orleans v. Dukes*,[188] the Supreme Court applied the rational basis test to an economic regulation and upheld the constitutionality of a "grandfather clause" in that regulation. This would seem to be precedent for the constitutionality of an Indian-only peyote provision, if the rational basis test is applied to the regulation of peyote use. As shown in *Rupert v. Director, United States Fish and Wildlife Service*, courts are likely to apply the rational basis level of scrutiny to this provision of NAFERA.[189] Thus, NAFERA's proposed sacramental peyote use provision might also be seen as the constitutionally-permissible inclusion of a savings, or grandfather, clause in otherwise valid criminal laws of neutral application.

Accordingly, because of the unique historical and legal basis for such a provision, Congress may limit a peyote use exemption to Indians using peyote for religious purposes without violating the Constitution. Indeed, in a *Lee v. Weisman* concurring opinion, Justice Souter (in an opinion joined by Justices O'Connor and Stevens) indicated that he would uphold the constitutionality of a religious use peyote exemption for Native Americans, stating that "in freeing the Native American Church from federal laws forbidding peyote use . . . the government conveys no endorsement of peyote rituals, the Church or religion as such; it simply respects the centrality of peyote to the lives of certain Americans."[190]

3. *Prisoners' Rights*

NAFERA requires access to traditional Native American religions equal to that afforded other religions.[191] It has force and effect only if there is actual discrimination against Native Americans in the exercise of their religions.

186. 992 F.2d at 1217 (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71 (1970)); *see also supra* text accompanying note 146.

187. *See supra* text accompanying notes 48-49.

188. 427 U.S. 297, 306 (1976).

189. 957 F.2d 32 (1st Cir. 1992). *See supra* notes 137-43 for a discussion of *Rupert*. If strict scrutiny were to be applied, however, it is unclear whether the existence of pre-existing use alone would be sufficient to allow such a distinction.

190. *Lee v. Weisman*, 112 S. Ct. 2649, 2677 (1992) (Souter, J., concurring).

191. S. 1021, 103d Cong., 1st Sess. § 301 (1993).

There are fundamental differences between Native religions and Western religions, which are the predominant religions among prisoners. Tribal religions are not theological in the sense of incorporating a set of established truths about God and God's relationship with humanity (as are Western religions). Rather, tribal religions serve to perpetuate a set of rituals and ceremonies, which must be conducted in accordance with the instructions given in the original revelation of each particular ceremony or ritual. It is through the conduct of these ceremonies that a relationship with God is maintained and spiritual "information" is obtained.[192]

Given this difference between Western and tribal religions, it is not enough simply to permit Native American prisoners to use a non-denominational chapel to practice their religions or to permit religious gatherings but deny access to the materials needed for the ceremony. Such a limitation upon the means of worship might very well result in the absence of a meaningful opportunity to practice a Native American religion. Native American religions can only be practiced by the celebration of certain ceremonies in a particular way. For example, some Native religious ceremonies require the use of a sweat lodge.[193] The spiritual ceremonies conducted in a sweat lodge simply cannot occur in an all-faiths chapel.[194] Gathering together to share certain theological beliefs or ideas would not constitute the practice of the religion.

In enacting NAFERA, Congress employs its expertise in Indian affairs to ensure that the unique needs of Indian religions are considered in a manner that ensures substantive equality, rather than simply formalistic equality. The intent of the prisoners' rights portion of the bill is, in essence, to provide a method for implementing an already-existing legal requirement of equal protection. Providing standards for measuring and ensuring equal treatment does not constitute a religious preference, as it does not advantage Native religions. It simply places Native religions on an equal plane with Judeo-Christian religions in terms of what is required to actually practice those religions. As such, these provisions are clearly constitutional.

NAFERA does, however, advantage Native American prisoners over others in one area, by specifically allowing Native American prisoners, and no others, to wear their hair long for religious reasons.[195] Non-Indians, such as Orthodox Jews or Sikhs, may likewise have religious grooming standards.[196] This differential treatment can be defended only with reference to the unique relationship between Indian people and the federal government, which permits

192. *See, e.g.*, AIRFA REPORT, *supra* note 6, at 8-12.

193. *See supra* text accompanying note 68.

194. *See, e.g.*, HIRSCHFELDER & MOLIN, *supra* note 15, at 287.

195. S. 1021, 103d Cong., 1st Sess. § 301(a)(3).

196. *See, e.g.*, Scott v. Mississippi Dep't of Corrections, 961 F.2d 77 (5th Cir. 1992) (Rastafarians); Friedman v. Arizona, 912 F.2d 328 (9th Cir. 1990) (Orthodox Jews), *cert. denied sub nom.*, Naftel v. Arizona, 498 U.S. 1100 (1991); Swift v. Lewis, 901 F.2d 730 (9th Cir. 1991) (Christian sect); Wright v. Raines, 457 F. Supp. 1082 (D. Kan. 1978) (Sikh).

the government to enact laws that apply exclusively to Indian people.[197]

Of note, the test in NAFERA mirrors the *Teterud v. Burns*[198] standard, itself an application of the Free Exercise Clause balancing test that was applied to prisoners by the courts before the Supreme Court's decision in *O'Lone v. Estate of Shabaaz*.[199] Now that the Religious Freedom Restoration Act[200] has been enacted, courts will likely return to applying a standard similar to the *Teterud* standard for all prisoners, largely obviating the need for the section of NAFERA permitting Native American prisoners to wear their hair long.

4. Eagle Feathers and Parts

NAFERA provides for better implementation of the existing federal law that recognizes an Indian religious exception to laws prohibiting possession of bald or golden eagles.[201] That law, as implemented by regulation, allows for the possession of eagles for religious purposes only through a permit system.[202] The only substantive change to the law would be to recognize tribal authority over dead eagles discovered on tribal land, provided that the tribe complied with certain procedural and reporting requirements.

The First Circuit recently considered the constitutionality of the existing provision in *Rupert v. Director, United States Fish and Wildlife Service*.[203] As discussed previously, the Court applied the *Larson v. Valente* test. Based upon the "unique legal status" of Native Americans and "Congress' historical obligation to respect Native American sovereignty and protect Native American culture," the court found that the federal government could rightfully limit its exemption to bona fide religious possession of eagles by Indians.[204] It found that the exception met both the rational basis and strict scrutiny tests.[205]

197. *See supra* text accompanying notes 129-46 & 149. Were the other provisions pertaining to prisoners viewed as providing an advantage to Native American prisoners practicing traditional religions, the special relationship might likewise serve as the basis for upholding those provisions.

198. 522 F.2d 357 (8th Cir. 1975) (holding that where the wearing of long hair is a tenet of an Indian religion, sincerely held by the inmate, prohibition of the wearing of long hair is permissible only if the legitimate institutional needs of the prison cannot be served by viable, less restrictive means).

199. 482 U.S. 342 (1987).

200. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (to be codified at 42 U.S.C. §§ 1988, 2000b to 2000bb-4, 5 U.S.C. § 504); *see also supra* note 106.

201. S. 1021, 103d Cong., 1st Sess. § 401 (1993).

202. 16 U.S.C. § 668a (1988); 50 C.F.R. §§ 22.1-22.32 (1992).

203. 957 F.2d 32 (1st Cir. 1992); *see supra* notes 137-43 and accompanying text.

204. *Id.* at 34-36. As is the case with the sacramental use of peyote provisions, S. 1021, 103d Cong., 1st Sess. § 202 (1993), the religious exemption in the Bald Eagle Protection Act, 16 U.S.C. § 668a (1988), as well as in NAFERA, could be considered a "savings" clause in an otherwise valid law of general applicability. *See supra* text accompanying note 184. Traditional Indian religious practitioners were almost certainly the only persons utilizing eagles for religious purposes at the time of the passage of the Bald Eagle Protection Act in 1940. Bald Eagle Protection Act, ch. 278, 54 Stat. 250-51 (1940) (codified as amended at 16 U.S.C. §§ 668-668d (1988 & Supp. IV 1992).

205. *Id.* at 35-36.

In addition, although the Supreme Court has never directly addressed this constitutional issue, the Court discussed the religious use of eagles by Indians in *United States v. Dion*.[206] In that case, the Court held that the Bald Eagle Protection Act[207] was intended to abrogate certain Indian treaties, which would have allowed for the commercial hunting of eagles. In so doing, the Court specifically reserved the question of whether there was a First Amendment right to hunt eagles for religious use.[208] Given its reluctance to even decide whether the First Amendment *required* the protection of a religious right to hunt *live* eagles without federal regulation under certain circumstances, the Court would almost certainly uphold Congressional authority to *allow* a permit system to distribute *dead* eagles by the government.

Finally, the section recognizing tribal authority over eagles on Indian land[209] raises no Establishment Clause issues as it is squarely based on the special relationship between the tribes and the United States government.[210] As previously noted, the federal government has incorporated tribal governments into federal regulatory mechanisms in a variety of circumstances, including environmental statutes.[211]

Thus, this part of the proposed legislation is a clearly permissible accommodation of the free exercise of religion. Its limitation to Native Americans is again justified by the special relationship between Indian people and the federal government.

CONCLUSION

There is a compelling need for legislation to protect the religious freedom of Native Americans. Native American religious practitioners have long been discouraged, and occasionally prohibited, from practicing their religions. The continuing obstacles to religious freedom are contrary to the fundamental principles upon which this nation is based.

The Native American Freedom of Religion Act is designed to protect sacred sites, the sacramental use of peyote, the right of Native American prisoners to exercise their religions, and the right of religious practitioners to use eagles for their religious ceremonies. Where appropriate, the legislation carefully balances these rights of free exercise against other legitimate government concerns. In terms of the general remedies it provides, the legislation is constitutional. It is my hope that Congress will see fit to rapidly enact this critically important legislation in the 103d Congress.

206. 476 U.S. 734 (1986).
207. 16 U.S.C. § 668.
208. 476 U.S. at 736 n.3.
209. S. 1021, 103d Cong., 1st Sess. § 401(d) (1993).
210. *See supra* text accompanying notes 129-46 & 149.
211. *See supra* note 162.