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Considering Individual Religious Freedoms Under Tribal Constitutional Law

Kristen A. Carpenter*

Environment, culture, religion, and life are very much interrelated. Indeed, they are often one and the same. Water for example, is the lifeblood of the people. I recall taking a draft tribal water code for public input into the five villages Protection of the water spirits was a major concern throughout the reservation. And the water spirits were varied, depending whether the water source was a river, lake, or spring. I reported back to the attorneys and they laughed at my findings. However it was no laughing matter when an elderly Cheyenne with a rifle kept [a] drilling team from crossing his water spring. "Today is a good day to die," he said as he held his own hunting rifle before him. I defended him in tribal court the next morning and I cried with him when he told me how the water spirits sometimes came out and danced in the spring.¹

- Gail Small, Northern Cheyenne

As American Indian nations revitalize their legal systems, there is renewed interest in "tribal law," that is, the law of each of the Indian nations.² Today, there is a particular focus on the subject of "individual rights" under tribal law.³ In tribal contexts, people are highly interested in the legal institutions and rules that govern their lives, especially as many tribal communities are experiencing a period of great political, social, and economic change.⁴ At the national level, the Supreme Court repeatedly expresses concern about whether individuals, especially non-Indians, will be treated fairly in tribal court.⁵ For scholars, individual rights under tribal law raises a number of issues including the potential tension between individual rights and the collective interests and cultures of Indian tribes,⁶ the relationship between federal and tribal law as sources of individual rights,⁷ and the meaning of tribal sovereignty in the contemporary era.⁸ For those outside the Indian law field, the question of American Indians' individual rights in tribal settings seems to inspire reflection on the broader question of individual rights under law.⁹

This article attempts to contribute to the discussion about individual rights under tribal law by examining the specific area of individual religious freedoms. In particular, it explores, in the religious freedoms context, an emerging scholarly consensus that the presence of individual rights in tribal settings represents the

assimilation of tribal law, institutions, and peoples. After examining historical and contemporary sources on individual freedoms under tribal law, the article concedes that the scholarly critiques offer important cautions. It argues, however, that tribes may be able to implement constitutional provisions on individual religious freedoms in ways that enhance tribal communities and advance sovereignty.

Part I acknowledges the challenge of discussing American Indian religions in a legal article. Part II sets forth series of hypothetical scenarios meant to exemplify some of the individual religious freedoms claims that might arise in tribal settings. Part III discusses sources of law, including the federal First Amendment and Indian Civil Rights Act, to determine whether they support claims for individual religious freedoms brought by tribal members against tribal governments.¹⁰ Because, as this Part explains, such disputes are most likely to be decided by tribal courts applying tribal law, it ultimately focuses on religious freedoms provisions found in tribal constitutions. In Part IV, the article outlines scholarly concerns about individual rights under tribal law, especially the critique that individual rights effectuate the assimilation of American Indians and harm tribal sovereignty. It explores this critique, and responses to it, in light of the various examples of tribal constitutional religious freedoms provisions discussed in Part III. The article concludes in Part V with some thought about how tribes can, and do, effectuate religious freedoms in ways that protect both individual interests and tribal sovereignty.

I. WRITING ABOUT RELIGIOUS FREEDOM

Religious freedom and American Indian religious practices are sensitive subjects.¹¹ This is true for a number of reasons. First, the word “religion” may be a misnomer when we are talking about tribal peoples’ spiritual experiences. In its Western sense, “religion” means “the service and worship of God or the supernatural” or “a personal set or institutionalized system of religious attitudes, beliefs, and practices.”¹² But across the many tribal cultures and languages, different understandings may be operative. For example, the Cherokee Nation offers the word “*dinelvlodi*” as a direct translation of the English word “religion”.¹³ But according to Jace Weaver, a scholar of religious studies, there is another Cherokee word, “*eloh*,” that is “sometimes translated as ‘religion’” and also simultaneously means “‘history,’ ‘culture,’ ‘law,’ and ‘land.’”^{14 15}

In many Native cultures, religion is inseparable from relationships and rituals, from stories and place.¹⁶ In a Navajo setting, for example, it may be more appropriate to conceptualize an entire way of living in harmony with one’s surroundings, relatives, and circumstances - rather than a discrete “religion.”¹⁷ James Zion, former Solicitor to the Courts of the Navajo Nation, explains: “One of the fundamental principles of Navajo life is the phrase *sa’ah naaghai bik’eh hozho* which has been translated as ‘the

conditions for health and well-being are harmony within and connection to the physical/spiritual world.”¹⁸ So one problem is that even in talking about “religion,” we may be missing something from tribal contexts.

In addition to the semantic problem is the tendency to misrepresent or misappropriate tribal religions and sacred information. There exist among hundreds of tribes different religious practices and traditions, but they have been poorly understood.¹⁹ Former Cherokee Nation Principal Chief, Wilma Mankiller, argues that it is “because of the dearth of accurate information about Native people [that] stereotypes persist, particularly with regard to spirituality.”²⁰ But on the other hand, when scholars try to move beyond stereotypes and examine religion in specific tribal settings, they risk violating cultural privacy norms. Tribal religions may dictate that religious and cultural traditions be kept confidential among members, clans, societies or practitioners within the tribal community.²¹ In addition to internal privacy norms, some tribal religions have gone underground as a result of historical and contemporary threats.²²

Indeed, discussions about tribal religions and religious freedoms are inevitably shaped, in many ways, by American Indians’ history of religious persecution.²³ European monarchs and explorers, Christian organizations, and the United States government itself, have all undertaken specific and sustained practices designed to eradicate American Indian religious practices.²⁴ These have included U.S. army massacres of people engaged in religious dances, federal laws criminalizing Indian religious practices, federally funded programs assigning Christian missionaries to reservations, the removal of Indian children from their families to Christian boarding schools, and other programs tied closely to the federal project of conquering, colonizing, and assimilating American Indians.²⁵ As recently as 1988, the United States Supreme Court upheld the federal government’s decision to build a road through an American Indian sacred site even though it would “virtually destroy” the Indian religion.²⁶

Thus, the subject of contemporary individual religious freedom occurs against a backdrop of religious oppression and the larger project of colonization. Scholarly discussions must acknowledge that many traditional tribal religions are still vulnerable and the question of individual religious “freedom” may be highly charged in the context of communities that have been so harmed by outside religions, governments, and citizens. The struggle of tribal religions to survive against external threats may be more immediately pressing than questions of individual rights against tribal governments.²⁷

Yet, the topic of whether tribes have religious freedom is important to some tribal citizens who have brought claims asserting rights to religious freedom.²⁸ It also may be important to tribal governments as they develop and reform their law and governing institutions.²⁹ This article thus addresses the issue of religious freedoms, but

with an awareness of the challenges described above. Where possible, it comments on the legal experiences of specific tribes, and tries not to over-extrapolate. It avoids any information that the author knows to be private or confidential. Instead of discussing details of tribal ceremonies or practices, it focuses on the law, relying primarily on the published constitutions of tribal nations. With respect to the historical backdrop, the article makes observations about instances where individual claims might threaten tribal cultural and religious revitalization efforts, and ultimately leaves to tribal leaders and members the tribal-specific decisions about where and how to draw the lines. It uses the word “religion” in its common sense, to refer to major world religions like Christianity, and also to refer to the ceremonial practices, spiritual beliefs, and cultural lifeways of American Indians.

II. SOME HYPOTHETICAL RELIGIOUS FREEDOMS CASES

To suggest the type of cases where individual religious freedoms issues might manifest in tribal settings, this section presents a series of hypothetical stories having to do with a hypothetical tribe, the Winomee Indian Nation.³⁰

Hypothetical A³¹

A ceremonial rattle is about to be repatriated to the Winomee Indian Nation from a federally funded museum.³² The tribal Cultural Resources Commission draws up a repatriation plan, intending to restore the rattle to the traditional medicine society that historically took care of and used the rattle in ceremonies. But right before the rattle is to come home to the reservation, a leader in the local Native American Church (“NAC”), which has had a presence on the reservation for about fifty years now, petitions the Commission for shared custody of the rattle. The NAC leaders believe that the holy rattle has a place in their religion too. The Commission denies the request. Can the NAC leader sue the tribe for violating its religious freedom?

Hypothetical B

Amelia Sandstone is a member of the Winomee Indian Nation. In 2004, the Nation proposes to store nuclear waste on land within the reservation boundaries.³³ The proposed storage location adjoins land on the reservation that was historically considered sacred and where a small number of tribal members still go for private retreat, prayer, and ceremony. Amelia has brought her concerns to the tribal council.³⁴ The council members reject her concern, saying the land in question has not been an important ceremonial site in generations³⁵ and, in any event, the tribe desperately needs the fees the federal government will pay for storage. Amelia believes that the waste

will nevertheless contaminate and desecrate a sacred site. Can Amelia sue for violation of her religious freedoms?

Hypothetical C

Frankie Bear is a member of the Winomee Indian Nation. He grew up on the reservation, and then earned a B.A. and M.B.A. from top universities. He worked for a long time in corporate America, but moved back to the reservation several years ago and has enjoyed two successful terms on the tribal council. When the tribal chief decides not to seek re-election, Frankie wants to run for the position. But traditionally, only members of a certain Winomee religious society could serve as chief.³⁶ Frankie's family is not in that particular religious society. Even though he has complied with all other requirements, the Tribal Registrar of Elections refuses to put Frankie on the ballot, because he is not a member of the society.³⁷ Can Frankie sue the tribe for violating his individual religious freedom?

Hypothetical D

Anna Belmer is a member of the Winomee Indian nation. She is a devout Christian who believes very sincerely that traditional Winomee ceremonies are, at best, superstitious. Anna's daughter Sarah attends a tribally-run elementary school on the reservation.³⁸ In the spirit of cultural self-determination, the school starts to offer a "tribal language and culture class."³⁹ In it, the teacher shares information about traditional tribal ceremonies, stories, songs, and their meanings. Sarah comes home brimming with these lessons -- to the secret delight of her grandmother. But Sarah's mother is furious and believes that the tribe, through the school, is forcing traditional Winomee religion on her daughter. Can Anna sue the tribal council for violating her individual religious freedom?

III. THE LAW

The question is whether these individuals would have viable legal claims for violations of their religious freedoms. The minds of most Americans probably jump immediately to the deeply ingrained text and principles of the First Amendment⁴⁰ of the United States Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."⁴¹ Indeed, if the federal government or a state government committed the above-described acts, the individuals would probably have First Amendment claims.

In the first two hypotheticals, the individuals might sue under the Free Exercise Clause,⁴² arguing that the government, by denying access to the rattle or desecrating

the sacred site -- substantially infringed on their ability to practice their religion.⁴³ In the last two hypotheticals, involving religion as an eligibility requirement for tribal officials and the teaching of tribal religion in the schools, the individuals might have a claim under the First Amendment's Establishment Clause, an argument that the state imposed religious belief on them.⁴⁴

None of the hypothetical plaintiffs would necessarily win their cases. Indeed, the Supreme Court has narrowly interpreted the Free Exercise Clause often denying religious freedoms protections for American Indian religious practitioners.⁴⁵ But the general idea is that if federal or state action were involved, the above-described facts could give rise to actionable First Amendment claims. For several reasons, however, the hypothetical plaintiffs may not have actionable First Amendment claims against a tribal government. This section examines federal judicial decisions denying First Amendment relief to individual Indians claiming that their tribal governments had infringed on their religious freedoms, and then examines to what extent, if any, the Indian Civil Rights Act of 1968 affects the availability of such claims.

A. Applicability of the First Amendment to Indian Nations

As a general matter, the U.S. Constitution does not restrict the powers of tribal governments.⁴⁶ The Supreme Court explained in *Talton v. Mayes*, "the powers of local self-government enjoyed by [an Indian tribe] existed prior to the Constitution," and these powers are not subject to the limitations on the federal and state governments contained in the Constitution.⁴⁷ Several cases in the religious freedoms area illustrate this principle.

The Tenth Circuit case of *NAC v. Navajo Tribal Council* concerned a challenge to a Navajo Nation ordinance criminalizing peyote on the reservation.⁴⁸ The legislation provided:

Whereas . . . use [of peyote] is not connected with any Navajo religious practices and is contradiction to the traditional ceremonies of the Navajo people: therefore be it resolved that as far as the Navajo people are concerned peyote is harmful and foreign to our traditional way of life: be it further resolved that the introduction into the Navajo country of the use of peyote by the Navajo people be stamped out and appropriate action be taken by the Tribal Courts to enforce this action.⁴⁹

The ordinance levied punishment of nine months labor or a fine of \$100 against anyone convicted of sale, use or possession of Peyote.⁵⁰

Navajo members of the Native American Church sued to enjoin the anti-peyote ordinance on grounds that it violated freedom of religion under the First Amendment.⁵¹

They lost because the federal district court found the U.S. Constitution inapplicable to the Navajo Nation. The Court explained, "the First Amendment applies only to Congress," and while the Fourteenth Amendment made it applicable to states, the same was not true of tribes.⁵² The Court held that unless Congress specifically extended provisions of the Constitution by statute to tribes, they remained inapplicable.⁵³ This was true because tribes had a "higher status than that of states" and had surrendered to the U.S. only to the extent explicitly provided in a treaty or statute.⁵⁴ Even though the tribal laws clearly had some impact on the freedom of religion, the federal court had no jurisdiction to hear the case.

In 1967, the Navajo tribal council ultimately decided to adopt a legislative provision in favor of the freedom of religion and specifically abolish the prohibition on peyote.⁵⁵ As Ann Beeson has pointed out, "the irony of this set of events seems incredible given the latest treatment of peyotism in the American courts."⁵⁶ Beeson refers, of course, to *Employment Division v. Smith*, in which the United States Supreme Court denied First Amendment relief to members of the Native American Church who were denied state unemployment benefits after being fired for taking sacramental peyote in contravention of state law.⁵⁷

While *NAC v. Navajo Nation* remains the leading federal case on the inapplicability of the First Amendment to tribal governments, another case also deserves mention. In *Toledo v. Pueblo de Jemez*,⁵⁸ tribal members who were Protestant sued their tribal government in federal district court alleging violations their religious freedom. The claims were that because of their Protestant faith, the government had denied these members the right to bury their dead in the community cemetery, the right to build a church on Pueblo land, the right to have missionaries, and the right to use a communal wheat threshing machine.⁵⁹ The plaintiffs further claimed that the Pueblo government had "threatened them with the loss of their birthrights, homes and personal property unless they accept the Catholic religion."⁶⁰ All of these transgressions had occurred, the Protestant members alleged, even though the Pueblo had legislative provisions ensuring the freedom of religion.⁶¹

Unlike the *NAC v. Navajo Nation* plaintiffs, the Pueblo plaintiffs brought their claim primarily under the Civil Rights Act providing for liability where any person acting under color of state or territorial law deprives another of "rights, privileges, or immunities secured by the Constitution and laws."⁶² The court found that the tribal government officials could not have acted under New Mexico law because the Pueblo was under the guardianship of the United States. Moreover, the court recognized "the Pueblos do not derive their governmental powers from the State of New Mexico . . . indeed . . . the powers of an Indian tribe do not spring from the United States although they are subject to the paramount authority of Congress."⁶³

Following *NAC* and *Toledo*, it appeared tribal plaintiffs had little, if any, basis for bringing religions freedoms lawsuits against tribal governments in the federal

courts. The only possibly alluded to by the courts was that Congress might enact some legislation authorizing such suits.⁶⁴ Congress seemed to take some steps in that direction when it enacted the Indian Civil Rights Act of 1968.

B. Religious Freedoms Under the ICRA

The Indian Civil Rights Act of 1968 extended to tribal governments a number of the U.S. Constitution's limitations on federal and state governments.⁶⁵ In part, legislators were responding to cases like *NAC* and *Toledo* where it appeared Americans Indians had little legal basis for securing individual rights against tribal governments.⁶⁶ But Congress was also acting out of a more general concern about the legitimacy and fairness of tribal courts, particularly, as some scholars have argued, with respect to non-Indians living on reservations.⁶⁷ Finally, Congress may have been moved by the growing interest in civil rights for racial minorities in the 1960's, although ICRA, unlike other civil rights legislation of the era, does not offer American Indians any protection against civil rights violations by state and federal actors.⁶⁸

Often described as the "Indian Bill of Rights," ICRA does not literally extend the federal Bill of Rights to tribal governments, but does include a number of very similar protections.⁶⁹ Most relevant for this article is ICRA's equivalent of a free exercise clause, stating: "No Indian tribe in exercising powers of self-government shall make or enforce any law prohibiting the free exercise of religion."⁷⁰ ICRA does not, however, contain any equivalent of the establishment clause.⁷¹ Congress omitted an establishment clause "out of respect for the religious-based governments of the Pueblos of the southwest."⁷²

At first glance, ICRA would seem provide a potential basis for individual free exercise claims (and other individual rights) against tribal governments.⁷³ But, as the Supreme Court explained in *Santa Clara Pueblo v. Martinez*, relief under ICRA is limited by its very narrow enforcement mechanism.⁷⁴ In *Santa Clara*, Julia Martinez challenged an ordinance of her tribe that denied membership and other rights to children of female members who married a nonmember of the tribe, while affording the same rights to children of male members who married a nonmember. Martinez sued in federal district court, alleging the membership ordinance violated ICRA's equal protection provisions.⁷⁵

The Supreme Court held that ICRA provided no basis for jurisdiction in the case. First, ICRA does not generally waive tribal sovereign immunity,⁷⁶ nor does it "authorize actions for declaratory or injunctive relief against either the tribe or its officers."⁷⁷ In fact, the only federal remedy ICRA provides is a habeas corpus petition to the federal court for individuals held in custody by a tribe.⁷⁸ As the Court observed in *Santa Clara*, Congress had "two distinct and competing purposes" in enacting ICRA: In addition to its objective of strengthening the position of individual tribal

members vis-a-vis the tribe, Congress also intended to promote the well-established federal policy of furthering Indian self-government.⁷⁹ These policy rationales are certainly applicable in the religious freedoms arena. To the extent that issues of religion go to the heart of tribal culture and lifeways, they certainly implicate self-government and sovereignty. As a practical matter, many judges outside of the tribal court system “may not be familiar with the role of religion in the tribal courtroom or in a tribal court decision.”⁸⁰

For all of these reasons, a federal or state court is unlikely to find jurisdiction to hear an individual’s religious freedom claim based on ICRA. Habeas jurisdiction will not typically be helpful to individuals making religious freedoms claims, unless perhaps a tribe takes the unlikely step of detaining or banishing members based on their religious affiliation.⁸¹ By contrast, as Professor Catherine Struve has demonstrated, the ICRA is often enforceable in tribal courts – either because a tribal court has held Indian Civil Rights Act waives sovereign immunity and creates a cause of action in tribal court, or because tribal statutory or constitutional provisions have done the same.⁸² Many tribes allow suits against tribal officials for declaratory and injunctive relief with respect to claims under civil rights laws or the tribal constitution.⁸³ Some tribal courts apply ICRA in a manner consistent with tribal law and custom, recognizing that “the ICRA grants to tribal members rights comparable to those contained in the Bill of Rights, [but] that the meaning and application of the ICRA is not determined by Anglo-American constitutional interpretations.”⁸⁴ In still other tribes, “tribal constitution or statutory law provides protections similar to the ICRA with the result that the tribal court may grant relief under the tribal-law provision without deciding whether relief is also available under the ICRA.”⁸⁵ Not all tribal courts have accepted the applicability of ICRA,⁸⁶ but “this question is often academic because many tribes have, to varying degrees, waived immunity from suit on civil rights claims.”⁸⁷

Thus an individual who seeks to lodge a religious freedoms claim against a tribal government is most likely to have her case heard if she brings it in tribal court.⁸⁸ The tribal court, in turn, is likely to apply tribal law to decide the claim – either alone or in conjunction with the ICRA. For these reasons, individual claimants will need to be knowledgeable about the available tribal law on religious freedom. The next section discusses some examples of religious freedoms provisions found in tribal constitutions.

C. Religious Freedoms under Tribal Constitutions

Indian tribes may provide for religious freedoms in their statutory, decisional, regulatory, or customary law. This section focuses individual religious freedoms appearing in tribal *constitutions*. This article does not attempt to survey each of the

several hundred tribes with written constitutions, but rather discusses several examples of tribal constitutional approaches to religious freedoms.⁸⁹ It groups these into four categories: (1) constitutions with religious freedoms language that references, incorporates, or tracks the ICRA, (2) constitutions that do not use ICRA but echo U.S. principles of individual religious freedom, (3) constitutions with unique language on religion, clearly expressing distinct tribal values and norms, and (4) constitutions that do not reference religion or related concepts at all.

In the first group are tribal constitutions with religious freedoms provisions that reference, incorporate, or track the language of the ICRA. Several of these *explicitly* incorporate and set forth the ICRA. For example, the Crow Tribe's constitution provides: "In accordance with Title II of the Indian Civil Rights Act of 1968 (82 Stat. 77), the Crow Tribe of Indians in exercising its powers of self-government shall not: (a) make or enforce any law prohibiting the full exercise of religion."⁹⁰ Other tribal constitutions have a section on the "Rights of Indians" that *tracks* the language of the Indian Civil Rights Act without referencing it explicitly. Tribal constitutions in this group, such as that of the Mississippi Choctaw Band of Indians, provide that the "Mississippi Band of Choctaw Indians, in exercising powers of self-government shall not: (a) Make or enforce any law prohibiting the free exercise of religion."⁹¹ Still another group references and incorporates the ICRA without restating the rights guaranteed therein. For example, the Cherokee Nation provides, "The appropriate protections guaranteed by the Indian Civil Rights Act of 1968 shall apply to members of the Cherokee Nation."⁹² The Miami Tribe's constitution sets forth:

The Miami Tribe, in exercising its powers of self-government, shall not take any action which is in violations of the laws of the United States as the same shall exist from time to time respecting civil rights and civil liberties of persons. This article shall not abridge the concept of self-government or the obligations of the members of the Miami Tribe to abide by this Constitution and the ordinances, resolutions, and other legally instituted actions of the Miami Tribe. The protections guaranteed by the Indian Civil Rights Act of 1968 (82 Stat. 78) shall apply to all members of the Miami Tribe.⁹³

Interestingly, while this constitution broadly protects individual civil rights, perhaps even those above and beyond ICRA's guarantees, it seems to balance these against tribal "self-government" and tribal members' "obligations."

In the second group are tribal constitutions with religious freedoms provisions that do not reference, incorporate, or track the ICRA, but still seem to echo the familiar language and principles of the federal First Amendment. For example, the Big Lagoon Rancheria Constitution provides: "no member shall be denied freedom of . . . religion .

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. . . or other rights guaranteed by applicable federal law.”⁹⁴ The Ute Indian Tribe of the Uintah and Ouray Reservation provides: “All members of the . . . Tribe . . . may enjoy, without hindrance, freedom of . . . worship.”⁹⁵ One special provision that recurs in a number of constitutions, such as the Choctaw Nation of Oklahoma, is that “no religious test shall ever be required as a qualification to any office of public trust in this Nation.”⁹⁶ Others such as the Muscogee Creek Tribe of Oklahoma, have a similar statement declaring all citizens have the right to vote in tribal elections “regardless of religion, creed, or sex.”⁹⁷

In the third group are tribal constitutions with unique language on religion, clearly expressing distinct tribal values and norms. Some of these speak in terms not only of *individual*, but also of *collective* rights and objectives. Some expressly reference not only religion but also Indian *tradition* and *culture*. Still others have very specific protections for their tribal ceremonies. The Yup’ik People of Bill Moore’s Slough, in the “Land Policy and Constitution of the People of Bill Moore’s Slough,” are very clear in their “Statement of Intent” about the collective nature of tribal rights and the relationship between land, tradition, and culture.⁹⁸

We the Yup’ik people of Bill Moore’s Slough being the original inhabitants of our land, having been placed here by our creator, to be the keepers of our land and having maintained this land as our creator intended us to keep it since the beginning, hereby declare our intent to continue managing it as we have always managed it in the past.

In the past as well as the present our land and the culture of our people have been intertwined to the point where it would not be possible to maintain our traditional values and lifestyle should our land be alienated, altered or otherwise changed from its traditional relationship with our people.

Therefore, it is our intent and the intent of this policy to maintain our land for all time forever for traditional uses.

Furthermore, while others may attempt to change or eliminate our culture by methods of separating our people from our land, let it be known that we will resist such attempts.

Let there be no misinterpretation nor ambiguities in this policy, it is a policy dedicated to the preservation of our traditional values, culture and lifestyle that we have maintained since the beginning.

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As a further point of clarification it is the position of Bill Moore's Slough that our people would not have survived as a people without maintaining our traditional relationship with the land. Therefore let this written land policy be considered by all parties concerned to be not only an integral part of the constitution of the people of Bill Moore's Slough but to be the primary law of our people and the basis for our cultural survival.⁹⁹

Having articulated the relationship between land, tradition, and survival, the Bill Moore's Slough Constitution then sets forth specific limitations on government and rights of individuals:

Article I

A) The Bill Moore's Slough Elders Council shall pass all resolutions and laws dealing with land issues in conformity with the Bill Moore's Slough Land Policy.

B) The Bill Moore's Slough Elders Council shall protect, preserve and defend the Bill Moore's Slough land, land policy and its people's traditional relationship with the land to the best of its ability.

Article II

A) The Bill Moore's Slough Elders Council shall pass no laws jeopardizing certain freedoms and rights deemed to be given our people by our people's creator. Amongst these freedoms and rights are: the freedom to government by and for the people; the right to speak ones Conscience; the right to an education relevant to ones way of life; freedom from want, hunger, pain and fear; the right to liberty; the right to be Yupik; all rights guaranteed by Federal law including but not limited to Title II of the Indian Civil Rights Act of 1968.¹⁰⁰

The Poarch Creek Constitution speaks in terms of *tribal* interest, connecting religion and community survival, explaining that the purpose of the tribal government is to:

(1) Continue forever, with the help of God our Creator, our unique identity as members of the Poarch Band of Creek Indians, and to Poarch identity from forces that threaten to diminish it;

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(2) Protect our inherent rights as members of a sovereign American Indian tribe;

(3) Promote our cultural and religious beliefs and to pass them in our own way to our children, grandchildren, and grandchildren's children forever;

(8) Insure that our people shall live in peace and harmony among ourselves and with all other people.¹⁰¹

It is in this context that the Poarch Creek Constitution then affords its members "the right to exercise the tribal rights and privileges of members of the Poarch Band of Creek Indians where not in conflict with other provisions of this Constitution, tribal laws and ordinances, or the laws of the United States."¹⁰²

Of particular interest is the "Constitution of the Iroquois Nations or The Great Binding Law, Gayanashagowa."¹⁰³ The Iroquois Constitution is notable in that the Constitutional *protections* seem to be for the religion itself, and the people have *responsibilities*. In a section called "Religious Ceremonies Protected," the Iroquois Constitution provides:

99. The rites and festivals of each nation shall remain undisturbed and shall continue as before because they were given by the people of old times as useful and necessary for the good of men.

100. It shall be the duty of the Lords of each brotherhood to confer at the approach of the time of the Midwinter Thanksgiving and to notify their people of the approaching festival. They shall hold a council over the matter and arrange its details and begin the Thanksgiving five days after the moon of Dis-ko-nah is new. The people shall assemble at the appointed place and the nephews shall notify the people of the time and place. From the beginning to the end the Lords shall preside over the Thanksgiving and address the people from time to time.

101. It shall be the duty of the appointed managers of the Thanksgiving festivals to do all that is needed for carrying out the duties of the occasions.

The recognized festivals of Thanksgiving shall be the Midwinter Thanksgiving, the Maple or Sugar-making Thanksgiving, the Raspberry Thanksgiving, the Strawberry Thanksgiving, the Cornplanting

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Thanksgiving, the Corn Hoeing Thanksgiving, the Little Festival of Green Corn, the Great Festival of Ripe Corn and the complete Thanksgiving for the Harvest.

Each nation's festivals shall be held in their Long Houses.

102. When the Thanksgiving for the Green Corn comes the special managers, both the men and women, shall give it careful attention and do their duties properly.

103. When the Ripe Corn Thanksgiving is celebrated the Lords of the Nation must give it the same attention as they give to the Midwinter Thanksgiving.

104. Whenever any man proves himself by his good life and his knowledge of good things, naturally fitted as a teacher of good things, he shall be recognized by the Lords as a teacher of peace and religion and the people shall hear him.¹⁰⁴

The Iroquois Constitution, given to the people by Dekanawidah,¹⁰⁵ makes clear that the people must fulfill duties to ensure the perpetuation of the ceremonies. Indirectly, of course, the duty of the people to protect the ceremonies ensures there will be ceremonies in which individuals can participate. Viewed in this light, the constitution could be read to provide an individual right to religious practice, but the more obvious focus of the provisions on festivals and ceremonial events seems to be on responsibilities. And while various other sections of the constitution outline rights of the people, including "lords," "war chiefs," and people from "foreign nations," these are similarly framed in terms of collective duties and welfare, and in the context of the Great Law. To understand this constitution more fully, we would need to see it in practice and consult with tribal leaders and members about its meaning. But, on its face, this constitution expresses the interconnected nature of people's rights and duties.¹⁰⁶

Finally, there are tribal constitutions without any express provision on religion. Some of these, however, such as the White Mountain Apache Constitution, refer to a "freedom of conscience" that may encompass religious belief.¹⁰⁷ Moreover, some tribes deal with religious issues in their legislative codes. The Colville Constitution, for example, has no provision on religion, but the Colville Tribal Civil Rights Act contains a free exercise provision.¹⁰⁸ The White Mountain Apache code offers extensive protection for sacred sites within the reservation.¹⁰⁹

Still other tribes, like the Navajo Nation, do not have written constitutions, like the Navajo Nation. Tribes without written constitutions might have (a) other written law, such as tribal codes, on religion, (b) oral or customary law on religion, or (c) no written or oral law on religion at all.

IV. CONSIDERING THE ASSIMILATION CRITIQUE

The above examples suggest at least four tribal constitutional approaches to the freedom of religion: (1) constitutions that track or incorporate ICRA, (2) constitutions that do not use ICRA but echo U.S. principles of individual religious freedom, (3) constitutions with unique language on religion, clearly expressing distinct tribal values and norms, and (4) constitutions that do not reference religion or related concepts at all.¹¹⁰ Here this article considers possible ramifications of these approaches.

In a recent article, Professor Carole Goldberg points out that “[m]ost contemporary scholars concerned with what may be called tribal revitalization - the strengthening of political and cultural sovereignty for Native nations - treat individual rights as an impediment to achieving that objective, not a positive tool.”¹¹¹ Surveying leading scholars, she cites Professor Robert Porter who describes “the introduction of individual rights into tribal litigation” as “fatal to tribalistic norms” and “therefore damaging to tribal sovereignty.”¹¹² Similarly Vine Deloria and Clifford Lytle argue “that individual rights requirements imposed on Indian nations transpose societies which understand themselves ‘as a complex of responsibilities and duties’ into societies ‘based on rights against [the] government and [eliminate] any sense of responsibility that the people might have felt for one another.’”¹¹³ Finally, Goldberg points out, Professor Kevin Washburn has argued that “the introduction of individual rights into tribal justice systems tended to standardize the cultures of Indian nations.”¹¹⁴

Certainly Goldberg and the other scholars are onto something – particularly with respect to the tribal constitutions that repeat the principles, or even the very words, of the Indian Civil Rights Act and federal First Amendment. Given the federal government’s historical involvement in the adoption of some tribal constitutions, particularly through legislation such as the Indian Reorganization Act of 1924 and the Indian Civil Rights Act of 1968, it is hard to deny the possibility that many tribes’ individual religious freedoms provisions were initially imposed by the federal government.¹¹⁵ Today, such provisions may displace tribal values in favor of Anglo-American norms, have a homogenizing effect on tribal government, and ultimately harm tribal sovereignty. It is somewhat challenging to test the scholars on these points because there are few readily accessible tribal court opinions applying individual religious freedoms provisions.¹¹⁶ However, by relying on judicial decisions and secondary sources, this part of the article will first explore ways in which tribal

constitutions with individual religious freedoms may indeed represent assimilation and be harmful to tribal sovereignty. It will then consider alternative explanations and ramifications for the presence of individual religious freedoms in tribal constitutions.

A. Individual Religious Freedoms as Representing and Effectuating Assimilation

This section will consider the possibility that individual religious freedoms may represent and effectuate assimilation in several ways. First, the United States' versions of individual religious freedom embodied in ICRA and the First Amendment may be too narrow, or just a bad fit, for tribal worldviews and cultures. As discussed earlier, the U.S. Supreme Court has, in several cases, denied First Amendment relief to American Indian religious practitioners seeking protection against acts by the federal government. In *Employment Div. v. Smith*, the Supreme Court upheld a state statute denying unemployment benefits to an employee and member of Native American Church terminated for peyote use.¹¹⁷ The Court found no violation of the federal Free Exercise Clause because the law was facially neutral and generally applicable, even though the law effectively punished Smith for practicing his religion.¹¹⁸ Then in *Lyng v. Northwest Indian Cemetery Protective Ass'n*,¹¹⁹ the court held the First Amendment did not prevent the federal government from bulldozing, timber harvesting, and building a road through a sacred site. The Court explained that the First Amendment only prohibited government actions that "coerced belief."¹²⁰ It did not protect specific practices. Moreover, the First Amendment could not stop the government from doing what it wanted with "its land."¹²¹ In *Lyng*, therefore, there was no free exercise violation even though the government action would "virtually destroy" the Indians' religion.¹²²

Thus, the federal First Amendment does not seem to protect religions that are place-based or require certain ritual activities – limitations that are very problematic for Indian religious practitioners.¹²³ To return to the hypotheticals, a tribal constitutional provision modeled on the First Amendment might not stop the Winomee Tribe from storing nuclear waste on a sacred site within the reservation as in Hypothetical A. Of course, this would depend on the tribal court's interpretation and application of the religious freedom provision. A tribal court may very well depart from the narrow conception of Free Exercise propounded by the Supreme Court, and choose instead to interpret an ICRA-like provision consistent with tribal norms,¹²⁴ as discussed further below. On the other hand, scholars have documented the tendency of some tribal courts to follow relevant federal or state law, even when it conflicts with tribal custom.¹²⁵

A second potentially assimilative effect of constitutional religious freedoms provisions is that with their focus *individual rights*, they may ignore the *duties* of tribal people and the *collective* nature of their religious experiences.¹²⁶ In fact, neither the

Considering Individual Religious Freedoms

ICRA nor the federal Free Exercise clause has any statement of individuals' religious or cultural duties to each other at all. In tribal contexts, this omission may be problematic. As Dean Suagee has written:

Carrying on traditional tribal traditions is more than the freedom to choose, more than the right to "enjoy" one's culture. The culture and religion must be passed down through the generations or the culture and religion cannot survive, and this means that some people in each generation are obligated to perform certain roles.¹²⁷

The very survival of Indian cultures and religions is about the duty of some individuals "to act out of responsibility to their cultures, their peoples" more than it is about "the freedom of individuals to choose to believe."¹²⁸ Similarly, Vine Deloria has argued, "[t]here is no salvation in tribal religions apart from the continuance of the tribe itself."¹²⁹ Effectively linking collective responsibility with individual freedom, Suagee succinctly explains that "[i]f some people do not accept responsibility for carrying on the culture and religion, others will not have the freedom to choose the tribal religion because it will no longer exist."¹³⁰

There are many examples of tribal people's collective duties to maintain and practice religious for the benefit of the entire community. Some of these come from classic anthropological literature that, while often lacking an indigenous perspective, offers some potentially useful information.¹³¹ Ruth Underhill writes of Hopi religion:

No individual need seek a vision. His welfare was wrapped up with the welfare of the village and that was assured by the calendric round of ceremonies. Even the priest need not seek individual power. Power had been given to his clan or, perhaps, to the ruling family in his clan, long ago. What he had to do was to carry through the rites without error and to lead an upright life, free from quarreling or breach of taboo.¹³²

On the hunting ceremonies of Plains' Indians, Underhill explains that these were undertaken to ensure food for the people and maintenance of humans' relationship with the natural world. Individuals had duties not only to each other, but to the animals and plants:

"Hunting is a holy occupation," said the Naskapi. So was the gathering of plants, the cutting of trees, even the digging of clay. For these Nature Persons had long ago offered their "flesh" for Indian use – but on certain conditions. Every step in obtaining the flesh must be taken with care and ceremony, or the gift would be withdrawn.¹³³

Underhill also describes the Sun Dance of the Plains' people as occurring "for the general welfare" of the people.¹³⁴

Contemporary accounts of Indian religious practices also reflect their collective and relational qualities. Writing about religious practices of Northern California Indians, one district court explained:

The religious power these individuals acquire in the high country lends meaning to these tribal ceremonies, thereby enhancing the spiritual welfare of the entire tribal community. Medicine women in the tribes travel to the high country to pray, to obtain spiritual power, and to gather medicines. They then return to the tribe to administer to the sick the healing power gained in the high country through ceremonies such as the Brush and Kick Dances.¹³⁵

These ceremonies and dances provided the 'World Renewal' essential to the tribes' religious belief system,¹³⁶ making the Supreme Court's ultimate decision not to protect them in *Lyng* particularly hard to understand.¹³⁷

Some contemporary indigenous leaders describe ceremonies that not only require cooperative behavior, but have as their primary purpose and effect the renewal of relationships. As Wilma Mankiller explains, "The Creator provided us with ceremonies to remind us of our place in the universe and our responsibilities as human beings."¹³⁸ With respect to Cherokee practices, she recounts:

Each year one Cherokee ceremony in a series was conducted in each settlement for the explicit purpose of rekindling relationships, requesting forgiveness for inappropriate conduct during the previous year, and cleansing the minds of Cherokee people of any negative thoughts towards each other The primary goal of prayer is to promote a sense of oneness and unity.¹³⁹

A number of tribes emphasize the collective, relational nature of religion in their laws. The Iroquois Constitution described above offers a detailed example. In other tribes, legislation fills the same purpose. For example, a Navajo Nation Resolution provides:

This religion, Beauty Way of Life, holds this land sacred and that we, the Navajo People, must always care for it. Through this sacred covenant, this sacred ancestral homeland is the home and hogan of all Navajo people. Further, if the Navajo left their homelands, all prayers and religion would be ineffective and lost forever.¹⁴⁰

In still other tribes, these principles may be enforced through unwritten customary law, the expectations and teachings of families, clans, and societies. In any of these settings where a key purpose of the religion or spiritual practice is to achieve harmony for the community, it may be that the assertion individual rights threatens the fabric of tribal life – or just seems beside the point.

A third application of the assimilation critique is that the ICRA and Free Exercise Clause may fail to reflect the history of suppression of Indian religions. As described above in Part I, religious and governmental institutions collaborated to Christianize and civilize Indians from contact through the better part of the Twentieth Century.¹⁴¹ These programs, occurring alongside the broader project of colonization, threatened the very existence of tribes.¹⁴² This history means that today, the survival of tribes might hinge more on the collective recovery and revitalization of Indian religions -- including the maintenance of a land base, the instruction of young people in ritual duties and tribal language, and the repatriation of sacred items -- than on the right to maintain an individual belief system.¹⁴³ Moreover, some Indian communities may remain vulnerable to the powerful influence of outside religious institutions. In Hypothetical C, the individual who wants to be tribal chief would personally benefit from a First Amendment lawsuit to put him on the ballot, and the tribe might even benefit from his political, corporate, and academic expertise. But these benefits might be achieved by sacrificing the tribe's need for a *cultural* leader at this stage of the revitalization process.

A fourth point is that providing for religious freedoms claims against a tribal government may be inconsistent with tribal institutions and structures. Perhaps religious issues are meant to be handled by elders, clan mothers, or religious society leaders.¹⁴⁴ Providing a basis for a legal claim in tribal court might undermine these traditional bases of authority and decision-making, and vest power in a body that is not experienced or able to handle spiritual matters. In the hypothetical with the sacred rattle, one can imagine the challenge for tribal judges who may not be fluent speakers of the tribal language, well-versed in tribal custom, or enjoy access to the generations of community knowledge necessary to fully understand or decide the issue.

While questions of qualifications could sometimes be addressed through judicial selection processes or training programs, tribal courts are usually still adversarial in nature – casting parties in oppositional roles, fomenting argument, and deciding a “winner” and “loser.”¹⁴⁵ Particularly when it comes to religious matters, the fabric of tribal life may be better served by respecting the traditional structures of dispute resolution and the religious or cultural leaders able to resolve religious or cultural disputes in a way that maintains community norms.¹⁴⁶

Finally, the sheer symbolism of adopting the ICRA or First Amendment wholesale may undermine the revitalization of tribal law and societies. At the most

extreme end, one scholar has argued that tribal people might reframe the struggle for sovereignty away from maintenance of a kinship-based way of life and towards the acquisition of Western-defined rights.¹⁴⁷ Contemporary stories of tribes “disenrolling” long-time tribal members, perhaps out of a desire to limit distribution of economic development proceeds, would seem to be an example.¹⁴⁸ In addition to harming individual and tribal members, reliance on Anglo-American rights could have institutional effects as well. The importance of tribal courts is articulated partly in terms of their specialized knowledge of tribal customary law and culture.¹⁴⁹ If tribal law and culture becomes less distinctive, some might argue that state or federal courts could just as easily apply Anglo-American legal principles, thereby diminishing the perceived need for tribal courts.¹⁵⁰

There are probably additional ways in which importing the ICRA or Free Exercise Clause might be evidence of assimilation and ultimately bad for tribal sovereignty. But the article next turns to a few reasons why the existence of individual religious freedoms might not be evidence of assimilation and/or bad for tribal sovereignty.

B. Non-Assimilationist Explanations for, and Ramifications of, Tribal Constitutional Provisions on Individual Religious Freedoms¹⁵¹

This section considers the possibility that tribal constitutions with individual religious freedoms provisions may be animated by principles and practices *other* than assimilation. First, some tribes may have long-standing values in favor of individual rights generally. Among the Hopi and Zuni, for example, “there is a strong belief that adult individuals are ultimately free to act as they see fit and are not to be judged by other humans for their actions.... In Hopi, this respect for individual freedom is expressed by the phrase, ‘*Pi um pi*’ or ‘it’s up to you.’”¹⁵² This respect for individualism exists alongside the “obligations and duties toward one’s kin ... necessary for the proper order of Hopi or Zuni society.”¹⁵³ In the Navajo tribe, there is a core value that “no one and no institution has the privilege to interfere with individual action unless it causes an injury to another or the group.”¹⁵⁴

The above examples have to do with individual freedoms generally. But it is also possible that tribes historically accommodated or even encouraged individuals’ *religious* freedom. While tribes should not be bound to the practices of any particular point in history,¹⁵⁵ “[t]radition plays a very important role” [in contemporary questions of Indian governance] since it lays out values and presents social and cultural justifications.”¹⁵⁶ Therefore it may helpful to situate contemporary individual religious freedoms against several examples from ethnographic and historical sources. The discussion relying on these sources is not meant to replace careful study of tribes’ own laws, but rather to inspire tribal-specific research of this nature. Tribal members and

leaders will need to assess for themselves the extent of individual religious freedoms under traditional and contemporary tribal legal systems.

Karl N. Llewellyn and E. Adamson Hoebel's *The Cheyenne Way* presents in the form of case studies certain data on Cheyenne lawmaking from 1820-1880.¹⁵⁷ In a case called *The Tribal Ostracism and Reinstatement of Sticks Everything Under His Belt*, Llewellyn and Hoebel recount the story of Sticks Everything Under His Belt who declared, "I am hunting for myself," thereby breaking tribal rules against individual hunting.¹⁵⁸ The tribal chiefs met to decide how to handle Sticks Everything Under His Belt and ruled that "no one could help [him] in any way, no one could give him smoke, no one could talk to him."¹⁵⁹ Anyone who violated this ruling would have to give a Sun Dance.¹⁶⁰ After some years passed, a brother-in-law "took pity" on Sticks Everything Under His Belt and pledged a Sun Dance "to bring him back in."¹⁶¹ The chiefs agreed and Sticks Everything Under His Belt promised to abide by tribal rules. When it came time to have the Sun Dance, a young man named Black Horse who was ashamed to show his usually handsome face because he had a growth on it, asked the chiefs if he could "sacrifice himself" alone up in the hills.¹⁶² The chiefs sent Black Horse to the brother-in-law who pledged the Sun Dance, saying it was his decision. The Sun Dance pledger initially denied the request saying, "you know my rule is that all must be there."¹⁶³ But Black Horse made his case for doing the ceremony his own way: "Well, brother-in-law, won't it be all right if I set up a pole on the hill and hang myself to it through my breasts? I shall hang there for the duration of the dance."¹⁶⁴ The pledger still demurred, saying the chiefs had agreed everyone must act together. When Black Horse suggested that the pledger handle the situation by making "everyone . . . swing from the pole," the pledger finally compromised, saying, "No, that was not mentioned in the meeting. If you want to swing from the pole, that is all right, but no one else has to unless he wishes to."¹⁶⁵

The case is interesting because the Sun Dance was ordered as a remedy to bring wholeness and repair to this community where one individual had acted in a deviant manner. Even against this backdrop, and the leaders' clearly stated concern that everyone be bound by tribal rules, the Sun Dance pledger had the authority and flexibility to allow another individual to fulfill the ceremony in his own way (perhaps because of a determination that it would not harm the group).¹⁶⁶ The story is instructive also because it seems to indicate room for individual rights so long as individuals abide by tribal procedures. Sticks Everything Under His Belt had unilaterally declared his intent to hunt for himself, thereby declaring himself "a man out of the tribe." But, by contrast, Black Horse presented his individualized request first to the "head chiefs" and then to the Sun Dance pledger, ultimately securing permission in a way sanctioned by the tribe.¹⁶⁷ If this story can be read to implicate Black Horse's individual religious freedoms, it appears that the tribe was able to accommodate his individual interests in a way that preserved tribal order and harmony.

As Llewellyn and Hoebel conclude, "When they had the Sun Dance everyone had a good time. Black Horse was the only one on the pole, and there were so many in the lodge that there was not room enough for all to dance."¹⁶⁸

Another example comes from the Dakota ethnographer, Ella Cara Deloria, who wrote extensively about her Dakota people, emphasizing above all else the relational nature of tribal life: "One must obey kinship rules: one must be a good relative. No Dakota who has participated in that life will dispute that. In the last analysis every other consideration was secondary – property, personal ambition, glory, good times, and life itself."¹⁶⁹ These rules are enforced by social norms and expectations, as well as a group of "magistrates."¹⁷⁰ Spirituality infuses all aspects of the story, and Deloria writes movingly of the Dakota Sun Dance that "might vary in minor details from band to band, but in essentials was all the same For there was brought together, into one great religious event, the fulfillment of all the vows that men in their distress had made in the preceding year; there were also the corporate prayer's for the tribe's well-being were offered, in tears."¹⁷¹

But even in this culture of relatives, kinship, and communal ceremony, Deloria describes individual interactions with the sacred. In her fictionalized, though ethnographically rich work, *Waterlily*, she recounts the experience of Bluebird whose daughter is dying. Bluebird engages in her own private ceremony to save the baby:

She knew she must make some sacrificial offerings. Fumbling in her haste, she muttered to herself, "Is that right? Alas, what do I know about it? Those who know tell of the Something Holy – Taku Wakan – that has supreme power, but I never understood. It is so remote. What right have I?"¹⁷²

Despite this doubt about her "right" to make in an offering, Bluebird does her best to follow what "everyone knew" about spiritual matters.¹⁷³ She goes off, decidedly on her own except for the sick baby, and makes a prayer. Deloria describes painstakingly Bluebird's attempts to go to the correct place and make the correct offering. Finally she finishes the private ceremony and steps back: "Right or wrong, that was her prayer. Overwhelmed by her daring, she stood motionless, waiting – for what, she did not know. Presently someone said in her ear quite clearly, 'Hao!' It was the Dakota word of approval and consent."¹⁷⁴ Immediately the baby is healed, and Bluebird knows the Great Spirit has heard her. She prays to her relatives and takes the baby back to camp.¹⁷⁵

This example suggests not that individual religious freedoms ever trumped collective duties and experiences in Dakota life, but that in Ella Deloria's view, there were times where individual religious experiences were necessary (and perhaps tolerated), even if the individual was not sure he or she was following the rules.

The above examples suggest that some tribes historically provided space for individual religious freedoms and interests, within the duty-bound, relational nature of the tribal community. Vine Deloria, Jr., the leading scholar writing at the intersection of Indian religion and law (and Ella Deloria's nephew), captures the complex nature of individual expression in the tribal community.¹⁷⁶ Deloria dismisses "the concept of an individual alone in the tribal religious sense" as "ridiculous," given the "interdependence of people" in tribal life.¹⁷⁷ But Deloria nonetheless accepts that "Indian tribal religions have an individual dimension."¹⁷⁸ He points to the individual experience in vision quests, dreams, and naming ceremonies, the designation of certain individuals to become keepers of medicine bundles or leaders in the tribal religion.¹⁷⁹

For Indians, this individual experience has always been linked to the tribal community - in sharp contrast, Deloria argues, to Christianity which has "the individual as the primary focal point and his or her relationship with the deity as her or her primary concern."¹⁸⁰ In Deloria's view, Indian religions traditionally "supported the individual in his or her community context, because they were community religions and not dependent on abstracting a hypothetical individual from his or her community context. One could say that the tribal religions created the tribal community, which in turn made a place for every tribal individual."¹⁸¹

Individuals' interests in religious freedom or choice may also arise when new religions arise in, or come to, tribal communities. Well-known examples include Handsome Lake bringing a new religion to the Senecas,¹⁸² the arrival of the Ghost Dance on the Plains,¹⁸³ and the spread of the Native American Church.¹⁸⁴ When these religions reached tribal people, there were probably some conversations and struggles about whether it was acceptable for members to practice the new, as opposed to old, religion. Perhaps more research into these historical events could serve as a basis for examining tolerance of religious freedom in indigenous communities. Certainly the openness of some Indians towards Christian missionaries, and the Indians' surprise about the missionaries' own closed-mindedness, suggests that some Indians tolerated peoples who practiced religions different from their own.¹⁸⁵

The idea that Indians have mechanisms for accepting various religions and individuals' choices about them seems to be reflected in contemporary experience. Similarly, Former Principal Chief of the Cherokee Nation Wilma Mankiller writes about "traditionally minded" Indian women who practice both Christianity and tribal religions. The late Cherokee elder Florence Soap, for example, recounted how she experienced both types of religion:

I started going to church when I was about thirteen years old. We went to church a lot. We used trails in the woods to walk to and from church . . . As Christians we are taught to love everybody because God wants us to love each other. When I was well, I would go to the hospital and

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sit with people or cook for people. God taught me that. We also went to Cherokee Stomp Dances and we used traditional Cherokee medicine. My mother-in-law, Molly Soap, taught me a lot about medicine. I used to help her gather medicine in the woods. She was a good woman and a good healer who lived to be more than 110 years of age.¹⁸⁶

LaDonna Harris tells about her Comanche grandparents' experiences with religious freedom:

My grandfather took me and my grandmother to church, and he would sit outside because he did not accept church teachings. He would sit outside and wait for us. That evening he would be singing peyote songs. He was a powerful man who could cure certain kinds of illnesses with his Indian medicine . . . When I asked him if it bothered him that the church preached against the Native American Church and peyote, he said no one should try to take away anyone else's religious beliefs. He said it would be harmful to everyone involved to try to take away the religious beliefs of others.¹⁸⁷

These women acknowledge the harmful, divisive, and assimilative history of Christianity in tribal communities.¹⁸⁸ Some express a strong preference for tribal traditions.¹⁸⁹ However, at the same time, they are able to draw from, understand, and tolerate Christianity and other religions.¹⁹⁰ For some, it is the tribal religion itself that facilitates such tolerance. Linda Arandayo describes: "I've had to wrestle with the concept of Christianity and what churches and religions did to our people, but then Christ's messages are not violent. I finally made peace with all that. When my family comes back to Oklahoma for the Green Corn Ceremony at Hillabee Stomp Grounds, we take medicine together . . . We let go of all negative things, get well together, and get into a good relationship with the world."¹⁹¹

While each tribe has its own values, a commonality seems to be that tribal religious traditions emphasize communal duties and experiences,¹⁹² but also allow for individual freedom and expression.¹⁹³ As LaDonna Harris explains, "One of the things I respect about Comanche spirituality is there is no hierarchy or rigid structure. There are common beliefs, including that of a Creator, but each individual finds his or her own way to that place."¹⁹⁴ This principle would seem to reflect a basis for individual religious freedoms.

Even the express incorporation of ICRA or the First Amendment may represent the always changing nature and dynamism--not just the assimilation--of tribes. How can this be possible? First of all, as suggested above, some tribes have long-standing value in favor of individual freedoms, limited only when the exercise of individual

rights would harm the group.¹⁹⁵ But, even if individual legal freedom is a relatively new concept, it makes sense for tribal people to evolve as all people do. When the Framers adopted the United States Constitution, the freedom of religion meant the right to be a Puritan, free from persecution by the Church of England; it soon came to mean the right to practice various kinds of Christianity; and today, it ostensibly means the right to practice anything from Buddhism to Santeria. The fact that our understanding of the freedom of religion has evolved and been affected by outside influences does not make us less "American;" it just makes us changing Americans.

Tribal people have long had the experience of acquiring something new and making it their own, whether a material item or intangible concept. For Kiowa people maybe it was the horse, for Anishinabe women perhaps it was imported beads, for Cherokees maybe it was the idea of written language.¹⁹⁶ It is possible that Indians, like all peoples can recognize something useful from the outside, seize it, and remake it in their own image. Perhaps the same can be true of the concept of individual religious freedom.

Admittedly, Indians have often times not had a meaningful choice about what to take from the outside. Examples include the arrivals of European disease and Christianity itself. In many instances, it is impossible to deny the assimilative effects of outside influences, such as the market economy and English language. Such experiences have left tribes vulnerable, and individual choices to engage in non-tribal religions may challenge tribal communities. In some tribes, the concept of individual religious freedoms may seem particularly alien.¹⁹⁷ Thus there is a possibility that importing religious freedoms from Anglo-American law could, at its most extreme, represent a neocolonial approach to tribal lawmaking, bringing the assimilationist process right into tribal legal systems.¹⁹⁸

It is, nevertheless, at least worth considering that when American Indians have borrowed individual freedom of religion from the ICRA or Free Exercise Clause, they have managed to make it their own, in an act of dynamic sovereignty.¹⁹⁹ Indeed, there are a number of reasons, not fully attributable to assimilation, why a tribe might want an individual religious freedom provision in its constitution.²⁰⁰ A tribal government might ascertain that its members expect individual religious freedom and the tribal government is stable enough to provide it.²⁰¹ The tribe may decide that it is important for the tribal legal system to have readily observable indicia of democratic principles,²⁰² particularly in an era where the Supreme Court is restricting the jurisdiction of tribal courts over concerns (whether grounded in reality or not) about the treatment of non-Indian litigants.²⁰³ In some cases, the modern rise to power of the tribal council may necessitate protections for individual members that were not required when tribal government was less centralized.²⁰⁴ In others, customary law and institutions may have been irretrievably lost, leaving tribes with the need for law to fill

in the gaps. Perhaps a tribe needs to assure religious freedoms (or duties) in response to particularized events in the history of the tribe.²⁰⁵

In the final analysis, the particular reason for adopting individual religious freedoms may be relatively unimportant – so long as the tribe has been able to make a meaningful decision for itself. As tribal law experts Justin Richland and Sarah Deer have argued:

A tribal nation can choose to adopt a nontraditional legal principle as part of their tribal law (perhaps because it most closely matches the ways in which at least some members live their lives), and this does not necessarily violate their sovereign authority. In fact, it is the very essence of the sovereignty of any nation to choose what legal principles--traditional or nontraditional--they wish to incorporate into their law.²⁰⁶

Whichever form of religious freedom provision appears in a tribal constitution--and even if it was originally imposed by the federal government--tribes can take steps now to ensure that the application of such provisions reflects tribal norms and enhances tribal sovereignty. One mechanism is to use tribal custom as an interpretive guide when tribal courts interpret their constitutional provisions on religious freedoms.²⁰⁷ While there are challenges associated with the use of customary law, including "questions of authenticity, legitimacy, and essentialism,"²⁰⁸ tribes can rely on a growing body of scholarship discussing customary law.²⁰⁹ They can also turn to tribal court decisions applying it. The Navajo Nation Supreme Court, in particular, has been a leader in interpreting its legislative code consistent with Navajo customary or common law.²¹⁰ In *Navajo Nation v. Crockett*, for example, the Navajo Nation Supreme Court reviewed a freedom of speech claim in the context of Navajo custom and tradition.²¹¹ The court observed:

[Navajo common law] provides that an individual has a fundamental right to express his or her mind by way of the spoken word or actions. As a matter of Navajo tradition and custom, people speak with caution and respect, choosing their words carefully to avoid harm to others. This is nothing more than freedom with responsibility, a fundamental Navajo traditional principle.²¹²

In other cases, the Navajo Nation Supreme Court has articulated the importance of interpreting its laws through the lens of tribal custom.²¹³

As a sovereign Indian nation that is constantly developing, the Navajo Nation must be forever cautious about state or foreign law infringing on Navajo Nation sovereignty. The Navajo Nation must control and develop its own legal system because the concept of justice has its source in the fabric of each individual society. The concept of justice, what it means for any group of people, cannot be separated from the total beliefs, ideas, and customs of that group of people.²¹⁴

Under similar reasoning, a tribal court could interpret a constitutional provision on religious freedoms consistent with tribal values and custom--instead of under the U.S. Supreme Court's restrictive reasoning in *Lyng* or *Smith*.

In at least one case, *Hoover v. Colville Confederated Tribes*,²¹⁵ a tribal court has offered expansive protection to the tribal citizens' religious interests in lands. The tribal constitution at issue contains no express provision on individual religious freedoms, and individual religious freedoms are protected in the Tribal Civil Rights Act.²¹⁶ *Hoover* arises under the tribal regulatory code which the court interprets to protect lands with ceremonial importance.

In *Hoover*, the Colville Court of Appeals upheld an injunction restraining a non-Indian from developing property in "Hellsgate Reserve" within the reservation.²¹⁷ The individual had failed to comply with the Tribes' Land Use Ordinance and his proposed development threatened to harm tribal religious interests. Thus, the case turned on the authority of the tribe to regulate non-Indian fee land.²¹⁸ The trial court had found the proposed land development, by harming tribal religious and ceremonial practices, would have a direct effect on the "health and welfare of the tribe."²¹⁹

Plants and animals preserved through comprehensive management in the reserve are not only a source of food, but also play a vital and irreplaceable role in the cultural and religious life of Colville people. Annual medicine dances, root feasts, and ceremonies of the Longhouse religion all incorporate natural foods such as deer and elk meat and the roots and berries found in the Hellsgate Reserve. The ceremonies play an integral role in the current well being and future survival of Colville people, both individually and as a tribal entity . . . It is well known in Indian Country that spirituality is a constant presence within Indian tribes. Meetings and gatherings all begin with prayers of gratitude to the Creator. The culture, the religion, the ceremonies - all contribute to the spiritual health of a tribe. To approve a planned development detrimental to any of these things is to diminish the spiritual health of the Tribes and its members. The spiritual health of the American Indian is bound with the earth. Their identity as a people becomes invisible in

the city, away from nature. It is the land and the animals which renew and sustain their vigor and spiritual health.²²⁰

Moreover, the trial court had found, "highly persuasive [evidence] that the encroachment of human habitation would have a detrimental effect on the animals, plants, and herbs used for sustenance, medicinal, and ceremonial purposes - the continued existence of which is vital to the spiritual health of the Tribes and their members."²²¹ Therefore, the appellate court upheld the injunction preventing the land development.²²²

Hoover offers several possible lessons. Proponents of the assimilation critique might argue that *Hoover* only proves their point: the fact that it is *not* a case brought under an individual constitutional rights model allows the court to conceive broadly of the interests of the entire tribal community.²²³ On the other hand, the court explicitly recognizes individual interests in religious practice, explaining that "the ceremonies play an integral role in the current well being and future survival of Colville people, both *individually* and as a tribal entity."²²⁴ Above all, *Hoover* reveals a tribal court going beyond a *Lyng*-like approach and, instead, using tribal custom to recognize and protect the relationship between land, ceremonies, and living beings. This is not a tribal court confined to Anglo-American notions of justice.

A second mechanism for implementing individual religious freedoms in a way that resists assimilation is to maintain institutions apart from tribal courts, such as elders' councils and clan-based decision makers.²²⁵ In one example, a Cheyenne Arapahoe tribal court declined jurisdiction in a religious freedoms case, deferring instead to the people and laws that traditionally governed such matters:

After issuing some initial orders which led to potentially violent confrontations between the parties and tribal police, the District Court of the Cheyenne Arapaho Tribes declined to exercise jurisdiction to decide the rightful possession of sacred ceremonial items. The court held that civil rights must be interpreted in the light of centuries of customs and traditions, in ordering that the right of possession be decided by Cheyenne tribal members, chiefs, and headsmen in traditional dispute resolution procedures.²²⁶

Similarly, "disputes involving cultural beliefs and a failure to comply with custom are the subject matter for bodies such as the Peacemaker Court in the Navajo and Seneca Nations, the Court of Elders in the Sitka Community Association and the Northwest Intertribal Court System."²²⁷ To implement individual religious freedoms in a way that comports with tribal custom, tribes can work to ensure that traditional decision-making bodies retain decision-making authority over disputes involving religion and culture.

Considering Individual Religious Freedoms

A third approach would be for tribal lawmakers and citizens to engage in constitutional reform²²⁸ with the specific and conscious goal of providing for religious freedom in a way that avoids assimilation.²²⁹ Some of the tribal constitutions discussed above may be helpful as models in the reform process. A tribe could follow the Bill Moore's Yupik constitution and *supplement* boilerplate ICRA or free exercise language with statement of tribal religious duties and broader context for the realization of such rights. Alternatively, it could *strike* such language in favor of providing only culturally-specific language, as the Iroquois constitution does. If external or internal challenges to the tribal religion persist, a tribal constitution could be reformed to include specific language addressing specific threats to the tribal religion. The Salt River Pima-Maricopa Constitution, for example, has special provisions about missionaries:

The liberty of conscience secured by the provisions of this constitution and bylaws shall not be construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the Salt River Pima-Maricopa Indian Community. Persons who are not members of the Salt River Pima- Maricopa Indian Community may not act as missionaries or ministers of religion within the boundaries of the Salt River Pima-Maricopa Indian Community except upon proof satisfactory to the community council that they are of good moral character and that their presence within the reservation will not disturb peace and good order.²³⁰

The Fort Mojave Constitution also provides against outside threats: "Members shall continue undisturbed in their customs, culture, and their religious beliefs, including, but not limited to, the customs, ceremonial dancing and singing, and no one shall interfere with these practices, recognizing that we have been a people and shall continue to be a people whose way of life has been different."²³¹ Such substantive provisions could also be enhanced by procedural reforms to ensure that jurisdiction over religious matters rests in the appropriate forum.²³²

This section has described just three ways--using tribal custom as an interpretive force, maintaining traditional dispute resolution mechanisms, and engaging in constitutional reform--for tribes to implement individual religious freedoms in ways that resist assimilation and enhance tribal sovereignty. In the final analysis, tribes will decide for themselves whether these or other approaches work for them.²³³

V. CONCLUSION

Many indigenous peoples believe that spirituality is the key to their survival as distinct peoples, and, for this reason, the law must treat tribal religious issues carefully.²³⁴ For the most part, religious freedoms cases arising on reservations will be decided by tribal courts applying tribal law, either exclusively or in conjunction with the ICRA. Today's tribal constitutions offer a number of different types of religious freedoms provisions, ranging from language that parrots federal law to more culturally distinctive, tribal-specific protections. At the same time, scholars express concerns about the appearance of any individual rights in tribal constitutions. This article agrees that the assimilation critique of individual civil rights is applicable in the religious freedoms area and that the critique offers important cautions for tribal citizens, judges, and lawmakers. Nevertheless, it remains possible that, through conscious development and application of their laws, tribes can provide individual religious freedoms in ways that reflect tribal norms and enhance sovereignty.

Notes

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1. See Wilma Mankiller, *Every Day is a Good Day, Reflections by Contemporary Indigenous Women*, 24 (2004) (quoting Gail Small, Northern Cheyenne).
 2. See, e.g., JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 248 (2004). For purposes of this article, "tribal law" refers collectively to the internal laws of each American Indian tribe, and includes each tribe's customary, constitutional, codified, common, decisional, and regulatory law. In reality, each tribe has its own "tribal law." There are over 500 federally recognized Indian tribes and therefore, over 500 different bodies of tribal law. (The list of federally recognized tribes is published at 65 Fed. Reg. 13,298 (Mar. 13, 2000)). This article ultimately focuses only on tribes' "constitutional law," looking at a number of specific examples of tribal constitutional religious freedoms provisions.
 3. See Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L. J. 889, 889 (2003) (and sources cited therein). See generally Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465 (1998). As described in Part IV, this article relies significantly on Professor Goldberg's synthesis of scholarship on individual rights under tribal law.
 4. See, e.g., ERIC LEMONT, ED., VALUABLE REFORMS: FIRST HAND ACCOUNTS OF AN EMERGING

- AMERICAN INDIAN CONSTITUTIONALISM (forthcoming University of Texas Press). See also Robert B. Porter, *Strengthening Tribal Sovereignty Through Government Reform: What Are the Issues?*, 7 KAN. J.L. & PUB. POL'Y 72 (1997).
5. See, e.g., *Nevada v. Hicks*, 533 U.S. 353, 383-84 (2001) (Souter, J., Kennedy, J., and Thomas, J., concurring); *Duro v. Reina*, 495 U.S. 676, 692-94 (1990); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).
 6. See, e.g., Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 277-79 (1997) (on individual versus community concerns in dispute resolution systems). See generally Angela R. Riley, *Recovering Collectivity: Group Rights To Intellectual Property In Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175 (2000) (discussing the tension between individual and collective rights in the protection of indigenous culture); Donna J. Goldsmith, *Individual vs. Collective Rights: The Indian Child Welfare Act*, 13 HARV. WOMEN'S L.J. 1(1990) (on the tension between individual and collective rights in Indian child custody matters).
 7. See VINE DELORIA, JR., WE TALK, YOU LISTEN: NEW TRIBES, NEW TURF 150- 51 (1970) (On Indians' interest in individual rights, Vine Deloria points not just to tribal law, but to U.S. Constitutional law, arguing that, "[T]he major complaints [by Indian people] have been that the United States has failed to protect treaty rights of the tribes and that individual Indians have suffered accordingly. Indian tribes have a vested interest in maintaining the Constitutional framework, because tribal rights derive from this document and individuals receive from tribal rights the identity and status they seek as individuals.")
 8. See generally Goldberg, *supra* note 3.
 9. Feminist legal scholars, for example, express concern about women's individual rights to property, membership, and political participation in tribal communities. See, e.g., Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989), Catharine Mackinnon, *Whose Culture? A Case Note on Martinez v. Santa Clara Pueblo* (1983), in FEMINISM UNMODIFIED 63 (1987). Similarly, intellectual and cultural property scholars query whether the protection of American Indian cultural property will harm individual Indians' rights of expression and autonomy. See, e.g., Madhavi Sunder, *Intellectual Property and Identity Politics: Playing With Fire*, 4 J. GENDER RACE & JUST. 69, 92 (2000); see generally William J. Hapiuk, Jr., Note, *Of Kitch and Kachinas: A Critical Analysis of the Indian Arts and Crafts Act of 1990*, 53 STAN. L. REV. 1009 (2001).
 10. This article does not consider in any detail the scope of tribal court jurisdiction in cases involving non-Indians' religious freedoms claims arising on the reservation. In civil litigation, generally, tribal courts are often willing to hear cases brought by non-Indians. The federal courts, however, have sometimes found a lack of tribal court jurisdiction where the defendant is non-Indian. See, e.g., *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (tribal court lacks jurisdiction over personal injury action arising on the reservation, brought by lifelong non-member resident against non-Indian company doing business on the reservation); *Nevada v. Hicks*, 533 U.S. 353 (tribal court lacks jurisdiction over claims brought by tribal member against non-Indian state game wardens executing warrant on reservation). In cases where the tribal government is the defendant, an Indian or non-Indian plaintiff will need to show that the tribe has waived its sovereign immunity from suit. See Kaign Smith, Jr., *Civil Rights and Tribal Employment*, 47-APR Fed. Law. 34 (2002) (on claims of employees against tribal

- government owned businesses). *See generally* DAVID H. GETCHES, CHARLES F. WILKINSON, AND ROBERT A. WILLIAMS, JR., CASES AND MATERIALS ON FEDERAL INDIAN LAW, 405-410, 607-649 (2005) (on sovereign immunity and scope of tribal adjudicatory authority). These issues could be considered in a follow-up piece, but the focus of the present argument is on cases brought by tribal members.
11. *See* VINE DELORIA, JR., GOD IS RED 67 (1992). *See generally* Inés Hernandez-Avila, *Mediations of the Spirit: Native American Religious Traditions and the Ethics of Representation*, Lee Irwin, ed., NATIVE AMERICAN SPIRITUALITY (2000).
 12. Merriam Webster's Dictionary, 10th ed. at 988.
 13. *See, e.g.*, Cherokee Nation of Oklahoma, Lexicon Page, at <http://www.cherokee.org/Culture/LexiconPage.asp?ID=5269>.
 14. JACE WEAVER, OTHER WORDS: AMERICAN INDIAN LITERATURE, LAW, AND CULTURE 301 (2001).
 15. *Id.*
 16. *See* MANKILLER, *supra* note 1, at 11-16.
 17. *See generally* Barre Toelken, *The Demands of Harmony*, I BECOME A PART OF IT: SACRED DIMENSIONS IN NATIVE AMERICAN LIFE 59-71 (1989).
 18. James W. Zion, *Navajo Therapeutic Jurisprudence*, 18 Touro L. Rev. 563, 603-04 (2002).
 19. *See* CHARLES E. LITTLE, SACRED LANDS OF INDIAN AMERICA 133 (2001).
 20. MANKILLER, *supra* note 1, at 13.
 21. *See* LITTLE, *supra* note 19, at 133.
 22. *Compare* Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299, 319-21 (2002) (on "claims aris[ing] from the acts of non-Indians who appropriate tribal rituals or songs for New-Age religions.").
 23. *See generally* John Rhodes, *An American Tradition: The Religious Persecution of Native Americans*, 52 MONT. L. REV. 13 (1991). *See* Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 787-805 (1997) (recounting various acts by federal government and religious institutions, often acting together, that suppressed Indian religions). *See* *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 447-49 (1988) (federal government's decision to build a road and harvest timber on sacred site did not violate American Indians' free exercise clause rights because government action would not coerce belief and government had a right to use its lands). *See also* *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) (state statute denying unemployment benefits to employee and member of Native American Church terminated for sacramental peyote use did not violate his free exercise clause rights because the law was facially neutral and generally applicable).
 24. *See generally* Rhodes, *supra* note 23.
 25. *See* Dussias, *supra* note 23, at 787-805 (recounting various acts by federal government and religious institutions, often acting together, that suppressed Indian religions).
 26. *See* *Lyng*, 485 U.S. 439, 447-49 (1988) (federal government's decision to build a road and harvest timber on sacred site did not violate American Indians' free exercise clause rights because government action would not coerce belief and government had a right to use its lands). *See also* *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) (state statute denying unemployment benefits to employee and member of Native

- American Church terminated for sacramental peyote use did not violate his free exercise clause rights because the law was facially neutral and generally applicable).
27. Accordingly, I have focused in other projects on the legal struggles of tribes, vis à vis the federal government and non-Indian citizens, to access and maintain their sacred sites located off reservations. *See, e.g.*, Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061 (2005);
28. *See, e.g.*, Native American Church v. Navajo Tribal Council, 272 F.2d 131 (1959) (tribal religious practitioners who were members of Native American Church sue tribal government to enjoin anti-peyote legislation); Toledo v. Jemez Pueblo, 119 F.Supp. 429 (D.N.M. 1954) (tribal members who were Protestant sued the tribal government for various acts allegedly violating their religious freedom).
29. *See, e.g.*, LEMONT, *supra* note 4. *See also* Porter, *supra* note 4, at 72.
30. The Winomees are a purely fictional tribe not meant to resemble any actual tribe. Also, while the hypotheticals are meant to prompt thought about actual real-life scenarios, they are admittedly stylized to highlight potential *disputes*. As the Article discusses later, the workings of tribal communities may tend to mediate against such disputes arising in the stark and extreme ways postulated here.
31. Thanks to Samantha House for suggesting the idea behind this hypothetical.
32. The Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (1991), requires federal agencies and federally-funded museums to inventory, and ultimately return to Indian tribes, certain culturally significant items and human remains. *See* Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 213 (2000). *See generally* Devon A. Mihesuah, REPATRIATION READER: WHO OWNS AMERICAN INDIAN REMAINS (2000) (on the history and application of NAGPRA).
33. *See generally* Alex Tallchief Skibine, *High Level Nuclear Waste on Indian Reservations: Pushing the Sovereignty Envelope to the Edge?*, 21 J. LAND RESOURCES & ENVTL. L. 287 (2001). *See also* DELORIA, *supra* note 11, at 240-253 (on contemporary revitalization of traditional Indian religions).
34. On the role of modern tribal councils in such disputes, *see, e.g.*, Deloria, *supra* note 11, at 246 ("Traditional Indians of [the Navajo and Hopi] tribes are fighting desperately against any additional strip-mining of [reservation] lands. Tribal councils are continuing to lease the lands for development to encourage employment and to make possible more tribal programs for the rehabilitation of tribal members).
35. *Compare* BRIAN EDWARD BROWN, RELIGION, LAW, AND THE LAND, 24 (1999) (when medicine people and other members of the Eastern Band of Cherokees sued to stop the flooding and development of a sacred site, Cherokee Nation of Oklahoma Principal Chief Ross Swimmer testified that the sites were "important to the cultural history of the Cherokee Nation, but ... not a part of its religion.") (discussing Sequoyah v. Tennessee Valley Authority, 480 F.Supp. 608 (E.D.Tenn. 1979), *aff'd*, 620 F.2d 1159 (1980), *cert. denied*, 449 U.S. 953 (1980)).
36. *Compare* BRUCE ELLIOT JOHANSEN, ED., THE ENCYCLOPEDIA OF NATIVE AMERICAN LEGAL TRADITION, 260 (1998) (describing that some Pueblos are governed by a *cacique*, or religious leader).
37. *Compare* Rough Rock Community School v. Navajo Nation, 7 Navajo Rptr. 168, 22 Indian L. Rep. 6162 (Navajo S.Ct. 1995) (striking qualification provision in school board election code

- for vagueness and failure to meet Navajo common law procedural requirement of *ashjoni adoolnil*, or making things clear by talking them out).
38. See DELORIA, *supra* note 11, at 246 (“A substantial portion of every tribe remains solidly Christian by having attended mission schools. They grew up during a time when any mention of tribal religious beliefs was forbidden, and they have been taught that Indian values and beliefs are superstitions and pagan beliefs that must be surrendered before they can be truly civilized today.”). But see MANKILLER, *supra* note 1, at 27, 33 (describing contemporary American Indians who reconcile Christianity or other world religions with traditional Indian practices).
39. The Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450(a)-450(n) (2000), (1976) promotes tribal self-determination by giving tribes more control over federally funded programs, including reservation schools. See also Michelle Nijhuis, *Tribal immersion schools rescue language and culture*, THE CHRISTIAN SCIENCE MONITOR, June 11, 2002, available at, <http://www.csmonitor.com/2002/0611/p11s01-legn.html>.
40. To the extent this Article discusses the First Amendment, it looks only at religious freedom, and does not discuss the free speech aspect. See generally Matthew L.M. Fletcher, *Theoretical Restrictions on the Sharing of Indigenous Biological Knowledge: Implications for Freedom of Speech in Tribal Law*, 14 KAN. J.L. & PUB.POL’Y 525 (2005).
41. U.S. CONST. amend. I.
42. Classic cases broadly applying the free exercise clause include *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (state’s compulsory school attendance rule violated free exercise clause rights of Amish people) and *Sherbert v. Verner*, 374 U.S. 398 (1963), (state’s refusal of unemployment compensation to a Seventh-day Adventist who was unavailable for work on Saturdays violated individual’s free exercise clause rights). For more recent Supreme Court formulations of the free exercise clause, see *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (city ordinances banning ritual slaughter of animals violated free exercise clause rights of Santeria practitioners, where the ordinances were not neutral or of general applicability and the government’s interests did not justify the restriction on religion).
43. In Hypothetical A, the plaintiff might also have an establishment clause claim. For an analysis of the establishment clause test, see *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).
44. See *Lemon*, 403 U.S. at 612-13 (state programs supporting parochial schools violated establishment clause under three-part test evaluating extent to which state action (1) has a secular purpose, (2) advances or inhibits religion, and (3) fosters an excessive entanglement with religion.)
45. *Lyng*, 485 U.S. at 448-49 (federal government’s decision to build a road and harvest timber on sacred site did not violate American Indians’ free exercise clause rights because government action would not coerce belief and government had a right to use its lands); *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 891-903 (1990) (state statute denying unemployment benefits to employee and member of Native American Church terminated for sacramental peyote use did not violate his free exercise clause rights because the law was facially neutral and generally applicable). For a recent history of the Supreme Court’s Free Exercise jurisprudence, see Benjami Pi-wei Liu, *A Prisoner’s Right to Religious Diet Beyond the Free Exercise Clause*, 51 UCLA L. REV. 1151, 1194-98 (2004).
46. See Robert Odawi Porter, *The Inapplicability of American Law to the Indian Nations*, 89 IOWA L. REV. 1596 (2004) (“It is a fundamental premise of American law dealing with the Indian nations in the United States that the U.S. Constitution does not apply to regulate the conduct of

- Indian tribal governments”).
47. *Talton v. Mayes*, 163 U.S. at 381-82 (1895) (right to grand jury under the 5th Amendment inapplicable in capital case before Cherokee Nation court).
48. *See Native American Church of North America v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959)
49. Omer Stewart, *Peyote Religion* 296 (1987).
50. *See id.*
51. *See NAC*, 272 F.2d at 132.
52. *Id.* at 134.
53. *Id.*
54. *Id.*
55. *See Ann E. Beeson, Dances with Justice: Peyotism in the Courts*, 41 EMORY L.J. 1121, 1140 (1992).
56. *Id.*
57. *See id.* at 1140, 1167-72 (citing *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)).
58. *Toledo v. Pueblo de Jemez*, 119 F.Supp. 429 (D.N.M. 1954).
59. *Id.* at 430.
60. *Id.*
61. *Id.*
62. *Id.* at 431(citing 8 U.S.C.A. § 43 (later 42 U.S.C.A. § 1983). There were also “some general allegations” not directly addressed by the court, growing out of the First Amendment and Treaty of Guadalupe Hidalgo.
63. *Id.* at 432.
64. If Congress has the power to enact such legislation, it derives from its much critiqued but often-accepted “plenary power” over Indian nations. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (“tribal sovereignty . . . is subject to the superior and plenary control of Congress”); *United States v. Wheeler*, 435 U.S. 313, 319 (1978) (it is an “undisputed fact that Congress has plenary authority to legislate for Indian tribes in all matters”). *See Porter, supra* note 46, at 1599 (critiquing the plenary power doctrine on grounds that “Indigenous nations and peoples are not subject to American law as a matter of their own law and that organic Indigenous laws and treaties should be fully incorporated into any analysis assessing the source and scope of tribal governmental powers”). *See also* Robert Laurence, *Learning to Live with the Plenary Power of Congress over the Indian Nations: An Essay in Reaction to Professor Williams' 'Algebra,'* 30 ARIZ. L. REV. 413 (1988); Robert A. Williams, Jr., *Learning Not To Live With Eurocentric Myopia: A Reply to Professor Lawrence's 'Learning to Live With the Plenary Power of Congress Over the Indian Nations'*, 30 ARIZ. L. REV. 439 (1988).
65. *See* 25 U.S.C. §§ 1301-1303 (2004).
66. *See* Robert Berry, *Civil Liberties Restraints on Tribal Sovereignty After the Indian Civil Rights Act of 1968*, 1 J.L. & POL’Y 1, 16-17 (1993) (reviewing pre-ICRA cases).
67. *See* Richland & Deer, *supra* note 2.
68. *Id.*
69. *Johnson v. Lower Elwha Tribal Community of Lower Elwha Indian Reservation*, 484 F.2d 200, 203 (9th Cir. 1973) (describing ICRA as “patterned in part on” the Bill of Rights).

70. 25 U.S.C. §§ 1302. The full list of protections is:

No Indian tribe in exercising powers of self-government shall make or enforce any law prohibiting the free exercise of religion or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances; violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized; subject any person for the same offense to be twice put in jeopardy; compel any person in any criminal case to be a witness against himself; take any private property for a public use without just compensation; deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense; require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and [or] a fine of \$ 5,000, or both; deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law; pass any bill of attainder or ex post facto law; or deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

71. Carol Tebben, *Trifederalism In The Aftermath Of Teague: The Interaction Of State And Tribal Courts In Wisconsin*, 26 AM. INDIAN L. REV. 177, 188 (2001-2002). *See also* Janis v. Wilson, 385 F.Supp. 1143 (D.S.D. 1974), *remanded on other grounds* 521 F.2d 724 (by omitting certain clauses of Bill of Rights, and by modifying the clauses that were finally incorporated into the ICRA, Congress recognized as legitimate the tribal interest in maintaining traditional practices that conflict with constitutional concepts of personal freedom developed in a different social context).
72. RICHLAND & DEER, *supra* note 2, at 248.
73. Thomson v. State of New York, 487 F.Supp. 212, 229 (N.D.N.Y. 1979) (the purpose of ICRA is to prohibit tribal governments from violating the individual civil rights of tribal members).
74. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).
75. *Id.* at 49.
76. *Id.* at 59 ("In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit.").
77. *Id.* at 72.
78. 25 U.S.C. § 1303 ("The privilege of the writ of habeas corpus shall be available to any person,

- in a court of the United States, to test the legality of his detention by order of an Indian tribe.").
79. *Santa Clara*, 436 U.S. at 62. *See also* Means v. Wilson, 383 F.Supp. 378. *aff'd* in part, *rev'd* in part on other grounds, 533 F.2d 833, *cert. denied*, 424 U.S. 958 (purpose of ICRA is to "enhance civil liberties of individual Indians without unduly undermining Indian self-government and cultural autonomy").
80. Tebben, *supra* note 71, at 188
81. Following *Santa Clara Pueblo*, litigants need to allege facts supporting a habeas petition. *See, e.g.,* Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874 (2nd Cir. 1996) (orders by tribal council members purporting to banish tribal members from reservation were "criminal sanctions" sufficient to permit jurisdiction under ICRA's habeas corpus provision). *Compare* Shenandoah v. Halbritter, 366 F.3d 89 (2nd Cir. 2004) (dismissing action for habeas corpus relief under ICRA where complaint alleged that tribe's housing ordinance was used to retaliate against the residents for their resistance against tribal leadership).
82. Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L.J. 137 (2004). *See also* RICHLAND & DEER, *supra* note 2, at 260.
83. *See* Struve, *supra* note 82 at 157.
84. RICHLAND & DEER, *supra* note 2, at 269-70 ("The northwestern tribal appellate courts have generally recognized that the ICRA is not intended to interfere with tribal traditions and institutions.").
85. *See* Struve, *supra* note 82, at 157.
86. *See* Goldberg, *supra* note 3, at 899 (The highest court of the Hopi tribe "has taken the position that the Indian Civil Rights Act is not necessarily binding law".)
87. Struve, *supra* note 82, at 157.
88. Moreover, even if federal review may ultimately be available in a case arising on a reservation, litigants are typically required to exhaust tribal remedies, *see* Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 855-856 (1985) (the Supreme Court seems to be rethinking the mandatory nature of the exhaustion rule with respect to non-Indian parties); *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) (describing exhaustion as a "prudential rule").
89. For a survey of civil rights provisions appearing in 220 tribal constitutions see Elmer R. Rusco, *Civil Liberties Guarantees Under Tribal Law: A Survey of Civil Rights Provisions in Tribal Constitutions*, 14 AM. INDIAN L. REV. 269, 276-78 (1990).
90. Crow Tribal Constitution, art. XI, § 4 (2002), *available at* http://www.tribalresourcecenter.org/ccfolder/crow_const.htm.
91. Constitution and Bylaws of the Mississippi Band of Choctaw Indians, art. X, § 1, *available at* http://www.tribalresourcecenter.org/ccfolder/mississippi_choctaw_const.htm (last visited Nov. 17, 2004).
92. Constitution of the Cherokee Nation of Oklahoma, art. II, § 1 (1975), *available at* http://www.tribalresourcecenter.org/ccfolder/choerokee_const.htm#a2. More fully this constitution provides: "The judicial process of the Cherokee Nation shall be open to every member of the Cherokee Nation. Speedy and certain remedy shall be afforded under the terms of this Constitution for every wrong and injury to person, property or reputation wherein said remedy does not conflict with the laws of the United States. The Council shall prescribe the procedures pertinent thereto. The appropriate protections guaranteed by the Indian Civil Rights Act of 1968 shall apply to all members of the Cherokee Nation."

93. Constitution of the Miami Tribe of Oklahoma, art. VII (1995), *available at* <http://doc.narf.org/nill/Constitutions/miamiconst/miamiconst.htm#artvii>.
94. Constitution of the Big Lagoon Rancheria, art. IV (1985), *available at* <http://doc.narf.org/nill/Constitutions/lagoonconst/biglagconst.htm#art4>.
95. Constitution and By-Laws of the Ute Indian Tribe of the Uintah and Ouray Reservation, art. VII, § 3 (1937), *available at* <http://doc.narf.org/nill/Constitutions/uteconst/uteconst.htm#Bill>.
96. Constitution of the Choctaw Nation of Oklahoma, *supra* note 99.
97. Constitution of the Muscogee Creek Nation, art. IV, § 2, *available at* <http://thorpe.ou.edu/constitution/muscogee/index.html>
98. *See* Land Policy and Constitution of the People of Bill Moore's Slough (1988), *available at* <http://thorpe.ou.edu/constitution/billmoores/index.html>.
99. *Id.* at Preamble.
100. *Id.* at Art I, II.
101. Constitution of the Poarch Band of Creek Indians, Preamble, (Adopted June 1, 1985), *available at* <http://doc.narf.org/nill/Constitutions/poarchconstitution/poarchconsttoc.htm>
102. *Id.* at art. II.
103. Constitution of the Iroquois Nations, *available at* http://www.tribalresourcecenter.org/ccfolder/iroquois_const.htm.
104. *Id.* at para. 99-104.
105. *See id.* at para. 1 ("I am Dekanawidah and with the Five Nations' Confederate Lords I plant the Tree of Great Peace. I plant it in your territory, Adodarhoh, and the Onondaga Nation, in the territory of you who are Firekeepers. I name the tree the Tree of the Great Long Leaves. Under the shade of this Tree of the Great Peace we spread the soft white feathery down of the globe thistle as seats for you, Adodarhoh, and your cousin Lords. We place you upon those seats, spread soft with the feathery down of the globe thistle, there beneath the shade of the spreading branches of the Tree of Peace. There shall you sit and watch the Council Fire of the Confederacy of the Five Nations, and all the affairs of the Five Nations shall be transacted at this place before you, Adodarhoh, and your cousin Lords, by the Confederate Lords of the Five Nations.").
106. Similarly Rusco's study describes:

A number of provisions on religious freedom obviously were written specifically for the situation of the tribe. For example, several refer to traditional Native religious beliefs or practices. For example, the constitution of the Miccosukee Tribe states that "[t]he members of the tribe shall continue undisturbed in their religious beliefs and nothing in this constitution and bylaws will authorize either the General Council or the Business Council to interfere with these traditional religious practices according to their custom." . . . While these two provisions dealing with religious freedom refer only to traditional tribal beliefs, several other specific provisions stating freedom of religion guarantee religious diversity. For example, the constitution of the Pueblo of Laguna states, "All religious denominations shall have freedom of worship in the Pueblo of Laguna, and each member of the Pueblo shall respect the other members' religious beliefs." The constitution of the Alabama-Quassarte Tribal Town states that "no member shall be treated differently

because he does or does not believe in or take part in any religion or religious custom." The constitution of the Cocopah Tribe says that "the members of the tribe shall continue undisturbed in their religious beliefs and nothing in this Constitution will authorize the Tribal Council to interfere with religious practices."

Rusco, *supra* note 89, at 276-78.

107. Constitution of the White Mountain Apache Tribe of the Fort Apache Indian Reservation Arizona, art. V, *available at* <http://thorpe.ou.edu/codes/wmtnapache/Constitution.html> (last visited Nov. 17, 2004).
108. RICHLAND & DEER, *supra* note 2, at 265 (citing Colville Tribal Civil Rights Act, Ch. I-5, adopted Feb. 4, 1988, resolution 1988-76, certified Feb. 16, 1988).
109. See WHITE MOUNTAIN APACHE GOVERNMENT CODE, ch. 8, PRESERVATION OF RELIGIOUS SITES (1991) (designating religious sites within the White Mountain Apache Reservation for the use of practitioners of the traditional religion and providing civil and criminal penalties for desecration, including traditional Apache punishment), *available at* http://www.tribalresourcecenter.org/ccfolder/wht_mtn_apache_tribalcode_government.html (last visited June 23, 2004).
110. Again, for a broader survey of constitutional civil rights provisions, including detailed analysis of religious freedoms, *see* Rusco, *supra* note 89, at 275-76.
111. *See* Goldberg, *supra* note 3, at 889.
112. *Id.* (citing Porter, *supra* note 4, at 278).
113. *Id.* (citing Vine Deloria, Jr., & Clifford M. Lytle, *The Nations Within: The past and Future of American Indian Sovereignty* 213 (1984)).
114. *Id.* (citing Professor Kevin Washburn, Remarks at the Arizona State University College of Law Goldwater Lecture on American Institutions (Feb. 20, 2003)).
115. The history and development of tribal constitutions is beyond the scope of this article. For an historical overview, *see id.*, at 892-99. An interesting follow-up project might examine whether and how the historical origins and circumstances of the adoption of a particular tribal constitutional religious freedom provision seems to affect the way in which it is implemented today.
116. While tribal court opinions are not as widely circulated or available as state and federal court opinions, *see* Nell Jessup Newtom, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 294-95 (1998), they are available through several electronic databases, in print sources such as the Indian Law Reporter, and by requesting copies from tribal courts. That said, this article relies only on tribal court opinions available electronically, primarily the National Tribal Justice Resource Center's searchable database of tribal court opinions, *available at*, <http://www.tribalresourcecenter.org/legal/opfolder/default.asp>. It is possible that this article misses tribal court decisions on individual religious freedoms that may be available through other resources.
117. *Employment Div., Dep't of Human Res. Of Or. V. Smith*, 494 U.S. 872 (1990).
118. *Id.*
119. *See Lyng*, 485 U.S. at 447-49.
120. *Id.* at 450-51.
121. *Id.* at 453.

122. *Id.* at 451.
123. See WEAVER, *supra* note 14, at 180. Some scholars claim the First Amendment has difficulty protecting *any* non-Christian religion. See, e.g., Stephen M. Feldman, *Religious Minorities and The First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222, 253 (2003) (“non-Christian religious outsiders,” including Jews, Muslims, and American Indians “have difficulty convincing the Court that their religious convictions are sincere and meaningful”).
124. See GETCHES ET AL., *supra* note 10, at 439 (“Under Navajo tribal code, Navajo customary or common law must be applied by Navajo courts where not prohibited by federal law.”).
125. See Russell Lawrence Barsh, *Putting the Tribe in Tribal Courts: Possible? Desirable?*, 8 KAN.J.L. & PUB. POL’Y 74 (1999).
126. See DELORIA, *supra* note 11, at 194 (“When we turn from Christian religious beliefs to Indian tribal beliefs . . . , the contrast is remarkable. [Indian] [r]eligion is not conceived as a personal relationship between the deity and each individual. It is rather a covenant between a particular god and a particular community.”).
127. Dean B. Suagee, *The Cultural Heritage of American Indian Tribes and the Preservation of Biological Diversity*, 31 ARIZ. ST. L. J. 483, 510 (1999).
128. *Id.*
129. See DELORIA, *supra* note 11, at 194.
130. Suagee, *supra* note 127, at 510.
131. This Article follows the approach of RICHLAND & DEER, *supra* note 2, at xviii whose INTRODUCTION TO TRIBAL LEGAL STUDIES focuses on tribal law but refers to some “reports or accounts from non-Indian anthropologists or historians. We realize that these accounts may not always be consistent with the beliefs . . . of Native peoples. We include them as a starting point for discussing traditional [lawmaking]. We encourage readers . . . to read critically and form independent analysis of the passages.”).
132. Ruth M. Underhill, *Red Man’s Religion*, 209-10 (1965).
133. *Id.* at 116.
134. *Id.* at 142.
135. See *Northwest Indian Cemetery Protective Ass’n v. Peterson*, 565 F. Supp. 586, 591-92 (N.D. Cal. 1983).
136. *Id.* at 592.
137. See *Lyng*, 485 U.S. at 458.
138. MANKILLER, *supra* note 1, at 15.
139. *Id.* at 16-17.
140. Navajo Nation Council Resolution CD-107-94 (Dec. 13, 1994).
141. See, e.g., *Bear Lodge Multiple Use Ass’n v. Babbitt*, 175 F.3d 814, 819 (10th Cir. 1999) (“By the late 19th Century federal attempts to replace traditional Indian religions with Christianity grew violent. In 1890 for example, the United States Calvary shot and killed 300 unarmed Sioux men, women and children en route to an Indian religious ceremony called the Ghost Dance In 1892, Congress outlawed the practice of traditional Indian religious rituals on reservation land. Engaging in the Sun Dance . . . was punishable by withholding 10 days’ rations or 10 days’ imprisonment.”). See generally Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 787-805 (1997) (recounting various acts

- by federal government and religious institutions, often acting together, that suppressed Indian religions); John Rhodes, *An American Tradition: The Religious Persecution of Native Americans*, 52 MONT. L. REV. 13 (1991) (same).
142. See, e.g., Lorie M. Graham, "The Past Never Vanishes:" A Contextual Critique of the Existing Indian Family Doctrine, 23 AM. INDIAN L. REV. 1, 10-18 (1998) (on the federal government's and missionaries' attempts to Christianize Indian children by removing them from their homes and installing them in federal boarding schools where they had religious and other instruction designed to "Kill the Indian and Save the Man."). Another notable, and frankly named, federal policy was the government's "Termination" program. See DONALD L. FIXICO, TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY, 1945-1960 (1968).
143. See, e.g., Mark A. Michaels, *Indigenous Ethics and Alien Laws: Native Traditions and the United States Legal System*, 66 FORDHAM L. REV. 1565, 1571 (1998) ("Because Native religions depend on the oral tradition for their transmission, the death of a language often means the death of a religion. Stories and ceremonies are at the core of most, if not all, Native religions, and these stories and ceremonies lose their context and meaning when translated. This connection between language and ceremony was made explicit in a communiqué written by the Traditional Circle of Indian Elders, a group that represents a number of different North American Nations: "[L]ong instruction and discipline are necessary before ceremonies and healing can be done. These procedures are always in the Native tongue; there are no exceptions. . . ."); MANKILLER, *supra* note 1, at 37 ("You have to be able to speak Cherokee to be a Cherokee medicine person. How can you say the right words if you can't speak Cherokee?") (quoting Florence Soap).
144. See RICHLAND & DEER, *supra* note 2, at 313-322 (on traditional dispute resolution forums).
145. See generally Porter, *supra* note 4 (on the incompatibility of adversarial Anglo-American legal institutions and with indigenous societies and traditions).
146. Compare RICHLAND & DEER, *supra* note 2, at 323-331 (describing how Navajo Peacemaker Court - while not necessarily a venue for bringing religious disputes - serves as an alternative to tribal courts, fostering Navajo values and the restoration of relationships).
147. Compare Eric Cheyfitz, *The Colonial Double Bind: Sovereignty and Civil Rights in Indian Country*, 5 U. PA. J. CONST. L. 223, 239-40 (2003) (tracing the "subversion of traditional sovereignty by a tribal sovereignty generated within the colonial context that leads grassroots groups such as the . . . Navajos in the *Manybeads* case to invoke a language of individual rights (in this case the right to freedom of religion) in order to assert their traditional sovereignty.").
148. See generally Brendan Ludwick, *The Scope of Federal Authority over Tribal Membership Disputes and the Problem of Disenrollment*, 51- FED. LAW. 37 (2004).
149. See Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225 (1994).
150. The fallacy of such logic may become obvious if we were to consider telling Massachusetts that its legal problems could be just as easily resolved by Connecticut courts, given the relative similarity of the states' substantive law. The jurisdiction of both state and tribal courts should be based on concepts of territorial sovereignty.
151. Goldberg considers a similar but slightly different set of responses to the assimilation critique. See Goldberg, *supra* note 3, at 910-929 (considering the contentions that (1) "individual rights are fully consistent with tribal cultures;" (2) "individual rights must be protected in order for

- tribal governments to secure economic growth and respect from non-Indian governments; (3) "native nations need individual rights to protect them from congressional attacks on their sovereignty and culture").
152. RICHLAND & DEER, *supra* note 2, at 239.
153. *Id.*
154. *See id.* at 240 (quoting James W. Zion in *Civil Rights in Navajo Common Law* on the Navajo concept of "individualism").
155. *See, e.g.,* Kristen A. Carpenter and Ray Halbritter, *Beyond the Ethnic Umbrella and the Buffalo: Some Thoughts on American Indian Tribes and Gaming*, 5 GAMING LAW REVIEW 311 (2001) (co-authored with Ray Halbritter).
156. Rebecca Tsosie, Introduction: Symposium on Cultural Sovereignty, 34 Ariz. St. L.J. 1, 7 (2002) (quoting Dr. Duane Champagne).
157. KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY* (1941).
158. *See id.* at 9.
159. *Id.* at 10.
160. *Id.*
161. *Id.*
162. *See id.* at 11.
163. *Id.*
164. *Id.* at 11-12.
165. *Id.* at 12.
166. *Compare* RICHLAND & DEER, *supra* note 2, at 240 (quoting James W. Zion in *Civil Rights in Navajo Common Law*, "I suggest that the core of the Navajo concept of civil rights lies in the maxim, "It's up to him." It states a base Navajo value of individualism whereby no one and no institution has the privilege to interfere with individual action unless it causes injury to another or group.").
167. LLEWELLYN & HOEBEL, *supra* note 157, at 9-12.
168. *Id.* at 12.
169. *See* ELLA CARA DELORIA, *WATERLILY X* (1988). Deloria wrote in the 1940's but *Waterlily* was not published until after her death.
170. *Id.* at 3.
171. *See id.* at 113.
172. *Id.* at 17.
173. *Id.*
174. *Id.* at 18.
175. *Id.*
176. Vine Deloria, Jr. (b. 1933) and Ella Cara Deloria (b. 1889) were both born into a prominent Dakota family in which various relatives were leaders in traditional religion and Christianity. Their ancestor Saswe was a medicine man, while both of their fathers were clergymen in the Episcopal Church. Ella Deloria graduated from Colombia University and worked with the famed anthropologist Franz Boas. She published a number of books, in English and Dakota. Vine Deloria, Jr., graduated from Iowa State University, Lutheran School of Theology, University of Colorado School of Law. He directed the National Congress of American Indians and served as a professor of law, history, religious studies, and political science at the University of Colorado. *See* VINE DELORIA, JR., *SINGING FOR A SPIRIT: A PORTRAIT OF THE*

- DAKOTA SIOUX (2000) (on the family's spiritual experiences and legacy).
177. DELORIA, *supra* note 11, at 195.
178. *Id.* at 196.
179. *Id.* at 196-97.
180. *Id.* at 198.
181. *Id.* at 197.
182. See Robert B. Porter, *Decolonizing Indigenous Governance: Observations on Restoring Greater Faith and Legitimacy in the Government of the Seneca Nation*, 8 KAN. J.L. & PUB. POL'Y 97 (1999) (A major event in Seneca history occurred in 1799, when Handsome Lake, the half-brother of the Seneca War Chief Cornplanter, had the first of a series of visions that not only described the sorry condition of Seneca society at the time but also proscribed religious and secular solutions. Handsome Lake was to have subsequent visions, which eventually formed the basis of a social gospel and a new religion, the Gaiwiio.) Porter argues that the Handsome Lake religion was itself an assimilationist force among Senecas, importing Quaker and federal values, and disrupting traditional kinship patterns. *Id.*
183. A contemporaneous (though somewhat controversial by present-day standards) account can be found in JAMES MOONEY, *THE GHOST-DANCE RELIGION AND THE SIOUX OUTBREAK OF 1890* (1896) (reprinted 1973).
184. See generally STEWART, *supra* note 56.
185. DELORIA, *supra* note 11.
186. See MANKILLER, *supra* note 1, at 37 (quoting Florence Soap).
187. *Id.* at 26-27 (quoting LaDonna Harris).
188. See *id.* at 27 ("Some of the missionaries would come and preach in a way that was designed to make us question our identity. The message was that if we gave up music, dance, and our identity and then went to church, they might accept us. But they never accepted us.") (quoting LaDonna Harris); *id.* at 30 ("Various Christian groups divided up the reservations . . . Christianity really disrupted the kinship unit.") (quoting Beatrice Medicine).
189. See *id.* at 35 ("I realized my own culture had more [than Christianity] to offer me as a human being and as a woman. I learned that our Earth and all its elements are living entities to be celebrated and honored.") (quoting Joanne Shenandoah).
190. See *id.* at 27.
191. *Id.*
192. *Id.* at 33 ("The emphasis is on the collective, for no one medicine person could emit the power that the participating collective puts forth.")
193. See *id.* at 33 ("Spirituality is a very private matter" that need not be demonstrated outwardly to others). Navajo law goes so far as to confer property rights over one's religious materials. See *In re Estate of Apachee*, 4 Nav. R. 178 (Navajo 1983) ("The court classifies property as follows: A man is standing in an imaginary circle, and he has all his possessions - everything he calls life. They are (1) his wife and children, (2) his religion (including its paraphernalia, mountain dust, bundles, etc.) (3) his land, (4) his livestock and (5) his jewelry, including money.").
194. MANKILLER, *supra* note 1, at 26.
195. See, e.g., James W. Zion, *Civil Rights in Navajo Common Law*, in RICHLAND & DEER, *supra* note 67, at 240 (on the Navajo concept of "individualism").
196. Those familiar with American Indian literature might remember Kiowa author N.Scott

- Momaday's stories about the horse in *THE WAY TO RAINY MOUNTAIN* (1969), Ojibwe author Louise Erdrich's beading scenes in *THE ANTELOPE WIFE* (1998), and Cherokee author Diane Glancy's use of Cherokee syllabary in *PUSHING THE BEAR* (1996).
197. G. Peter Jemison, *The Journey*, 7 ST. THOMAS L. REV. 433, 435 (1995) ("Our religion and our government are entwined as one; we do not separate them and we do not call it religion. Rather it is an Indian way of life that encompasses everything that we do.").
198. Thanks to Carey Vicente for suggesting this point about ongoing tribal vulnerability, especially to Christianity, and the importance of evaluating "individual freedom" against this reality.
199. Compare Angela R. Riley, *"Straight Stealing": Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 118-23 (2005) (urging tribes to protect cultural property by enacting tribal laws that reflect tribal custom in an act of "living sovereignty").
200. See generally RICHLAND & DEER, *supra* note 2, at 283-288 (on the challenges of making law meaningful in tribal communities today).
201. See *id.* at 284-285 (on the dangers of "reviv[ing] an aspect of the tribe's unique legal heritage" while ignoring "contemporary norms, structures, and practices"); compare Goldberg, *supra* note 3, at 934 ("The project of tribal revitalization cannot begin with denial of the cultural changes and growing expectations regarding individual rights that have taken place within Indian country.").
202. See Sandra Day O'Connor, *Lessons From the Third Sovereign*, 33 TULSA L.J. 1, 2 (1997) ("To fulfill their role as an essential branch of tribal government, the tribal courts must provide a forum that commands the respect of both the tribal community and the non-tribal community including courts, governments, and litigants. To do so, tribal courts need to be perceived as both fair and principled.").
203. See, e.g., *Nevada v. Hicks*, 533 U.S. 353, 383-84 (2001) (Kennedy, Souter & Thomas, JJ., concurring) (about the "special nature" of tribal courts and potential effects on non-Indian parties). As Carole Goldberg rightly suggests, pandering to such concerns may only further the assimilationist goal of introducing Western-style courts to tribal communities. See Goldberg, *supra* note 3, at 897-98.
204. See DELORIA *supra* note 11 (on the Hopi and Navajo tribal councils).
205. In Ann Beeson's version of the facts underlying *NAC v. Navajo Nation*, the Navajo tribal council's enactment of the anti-peyote legislation was an act of resistance against John Collier, the head of the Bureau of Indian Affairs at the time. Collier was pushing restrictions on sheep grazing, an unpopular position with the Navajos, and also supporting of the peyote users. See Ann E. Beeson, *Dances with Justice: Peyotism in the Courts*, 41 EMORY L.J. 1121, 1139 (1992). Beeson's work suggests the council's later decision to lift the peyote ban and provide religious freedom should be examined in a broad historical context, querying what kind of religious freedoms were available before, during, and after the peyote ban--rather than assuming freedom of religion is merely a modern "import".
206. See RICHLAND & DEER, *supra* note 2, at 286.
207. See *id.* at 283-300 (on "bringing custom into the [tribal] courtroom"). But see Goldberg, *supra* note 3, at 896-97 ("Despite the many differences among tribal cultures, and the assertions by tribal courts that they were not bound to mimic non-Indian law, tribal court interpretations of due process were remarkably similar to one another, as well as to non-Indian readings of the requirement.").
208. See Elizabeth E. Joh, *Custom, Tribal Court Practice, and Popular Justice*, 25 AM. INDIAN L.

- REV. 117, 120 (2001).
209. See *id.*; Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts*, 46 AM. J. COMP. L. 287, 287 (1998) Joseph A. Myers & Elbridge Coochise, *Development of Tribal Courts: Past, Present, and Future*, 79 JUDICATURE 147, 147 (1995); Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N. M. L. Rev. 225, 226 (1994).
210. The courts of the Navajo Nation seem to lead the way in infusing their decisions with Navajo custom and common law. See Barsh, *supra* note 124, at 74
211. Navajo Nation v. Crockett, 7 Navajo Rptr. 237, 24 Indian L. Rep. 6027 (Navajo S.Ct. 1996).
212. *Id.*
213. *Id.*
214. See, e.g., In Re Validation of Marriage of Loretta Francisco, 6 Navajo Rptr. 134, 16 Indian L. Rep 6113 (1989).
215. *Hoover v. Colville Confederated Tribes*, 3 CTCR 43, 6 CCAR 16, available at, <http://www.tribal-institute.org/opinions/2002.NACC.0000004.htm>.
216. See *supra* note 108 and accompanying text.
217. See *Hoover*, 3 CTCR 43.
218. *Id.* The question of tribal authority over non-members, though beyond the scope of this Article, is decided under the test enunciated by the Supreme Court in *Montana v. United States*, 450 U.S. 544, 565 (1981) (“A tribe may regulate . . . the activities of non-members who enter consensual relations with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements . . . a tribe may . . . exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”)
219. *Hoover*, 3 CTCR 43 (citing *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201 (9th Cir. 2001)).
220. *Id.*
221. *Id.*
222. *Id.*
223. The juxtaposition of *Hoover* and *Lyng* also suggests that in addition to interpreting tribal constitutional provisions consistent with tribal custom, constitutional religious freedoms provisions may be *supplemented* by land use and other codes that protect sacred lands and resources.
224. *Hoover*, 3 CTCR 43, 6 CCAR 16 (emphasis added).
225. The Ho-Chunk Tribe, for example, has a “traditional court” with decisionmakers selected by the clans and proceedings conducted primarily in Ho-Chunk, that hears matters implicating culture and also serves as a resource on customary law. See Mary Jo B. Hunter, *Tribal Court Opinions: Justice And Legitimacy*, 8 KAN. J.L. & PUB. POL’Y 142 (1999). See also Ho-Chunk Tribe at <http://www.ho-chunknation.com/government.htm> (providing the tribal constitution, court system, and boards and committees of the nation).
226. Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 496-97 (1998).
227. Valencia-Weber, *supra* note 208, at 251-52.
228. Many tribes are engaged in constitutional reform. See, e.g., Eric Lemont, *Overcoming the Politics of Reform: The Story of the Cherokee Nation of Oklahoma Constitutional Convention*, 28 AM. INDIAN L. REV. 1 (2003-2004) and sources described *supra* note 30.

229. See RICHLAND & DEER, *supra* note 2, at 286 ("If, at a later time, members of the tribe come to power that have a more traditional outlook, they might change the law to reflect that interest. This, too, would be just another expression of the same sovereignty. Traditions themselves are not necessarily static; they evolve and change over time.")
230. See Rusco, *supra* note 89, at 277-78.
231. FORT MOJAVE CONST., art. V, § 2 (cited in RICHLAND AND DEER, *supra* note 2, at 264).
232. See *supra* notes 224-46 and accompanying text.
233. Compare Goldberg, *supra* note 3, at 914 ("As former Navajo Nation President Peterson Zah remarked, Indian peoples should be asked what an individual right is for them, and should have time to conduct a 'dialogue' regarding the meaning of such rights, so that each tribal community can mold individual rights to suit its own cultural framework.").
234. See MANKILLER, *supra* note 1, at 27-28 ("Spirituality has sustained indigenous peoples since time immemorial. With the incursions into and eventual takeover of our traditional homelands by foreign interlopers, it has been the key to our very survival as a people.").