

CHAPTER 9

Individual Religious Freedoms in American Indian Tribal Constitutional Law



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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 565 Indian nations within the geographic boundaries of the United States.² Tribal law refers to the internal laws of American Indian tribes, and includes each tribe's customary, constitutional, codified, common, decisional, and regulatory law. Several constituencies are closely focused on "individual rights" under tribal law.³ In tribal communities, people are highly interested in the legal institutions and rules that govern their lives, especially as many tribes are experiencing a period of great political, social, and economic change.⁴ In federal Indian law jurisprudence, the United States Supreme Court repeatedly expresses concern about whether individuals, especially non-Indians, will be treated fairly in tribal courts.⁵ For scholars, the question of individual rights under tribal law raises a number of issues including potential tension between

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individual rights and the collective interests and cultures of Indian tribes,⁶ the expectation of reservation residents that the law will protect their individual rights,⁷ and the meaning of tribal sovereignty in the contemporary era.⁸ For those outside the Indian law field, the American Indian context seems to inspire reflection on the broader question of individual rights under law.⁹

Much of the debate about individual Indian rights stems from the fact that the US Constitution, including its Bill of Rights, does not limit the powers of American Indian tribal governments.¹⁰ As the US Supreme Court has held, Indian tribes predate the Constitution and the Bill of Rights does not extend to internal tribal governance.¹¹ Yet Congress has broad legislative powers over tribes and, in 1968, Congress responded to concerns about individual rights in tribal communities by enacting the Indian Civil Rights Act (“ICRA”).¹² ICRA purports to extend a version of the Bill of Rights to Indian nations, attempting to accomplish by statute what the Constitution does not. Thus the ICRA plays a major role in a vibrant discussion now occurring among tribal citizens, judges, scholars, and others about the role of individual rights in tribal communities and beyond.¹³ This chapter contributes to the discussion by examining the specific area of individual religious freedoms.

More specifically, I explore, in the religious freedoms context, a scholarly viewpoint that the presence of individual rights in tribal settings problematically perpetuates the “assimilation” of American Indian peoples.¹⁴ In federal Indian law, “assimilation” refers to nineteenth and early twentieth century federal policy designed to eradicate tribal governments and cultures, replacing traditional community values through programs aimed to “civilize” and “Christianize” American Indians.¹⁵ Propounded through various federal statutes, orders, and regulations, assimilation programs such as the “allotment” of tribal lands, criminalization of tribal religious practices, assignment of Christian missionaries to reservation communities, and Indian boarding schools have now been widely discredited and firmly rejected as a matter of federal law.¹⁶ Yet vestiges of assimilation arguably remain. The federal government no longer tries to eradicate tribal governments, but continues to wield influence over tribal law through statutes including the Indian Reorganization Act of 1934, which provides for the adoption of federally approved tribal constitutions, and the ICRA, which encourages tribes to afford certain individual rights to persons under tribal jurisdiction.¹⁷

To supporters of tribal sovereignty, the imposition of individual rights on tribal government seems to further the assimilationist goals of past policy. Defining “individual rights” as “individual claims that preclude or limit collective pursuits—the type of rights enshrined in the United States Bill of Rights and central to liberal political theory,” Professor Carole Goldberg notes that such individual rights “can trump the interests of others, the good of society, and the will of the majority because they are understood to derive from moral principles independent of any social conceptions of the good.”¹⁸ Goldberg and other scholars find the privileging of individual rights over group rights threatening for Indian tribes, which are insufficiently protected even by an associational or contextual theory that would link individual autonomy with the culture or community where individual rights are

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practiced. The problem, for Goldberg, is that “grounding what is essentially a group rights claim on the rights of individual group members commits one to an individual rights critique of the group itself, a result that may tear at tribal cultures which do not privilege individual rights in the same way United States law does.”¹⁹ With the modern movement in favor of tribal self-determination and self-government closely connected to the revitalization of tribal cultures, individual rights may undermine tribal sovereignty.²⁰

The assimilation critique seems intuitively correct and applicable in the religion context. Whereas federal law provides for religious freedoms in terms of individual rights, tribes have traditionally practiced religions as a matter of collective responsibility to the natural world. Moreover, tribal leaders explicitly connect traditional tribal religions with contemporary tribal self-determination, as in the following testimony by a Lakota leader in federal litigation over a sacred site:

[Certain religious ceremonies] are vital to the health of our nation and to our self-determination as a Tribe. Those who use the butte to pray become stronger. They gain sacred knowledge from the spirits that helps us to preserve our Lakota culture and way of life. They become leaders. Without their knowledge and leadership, we cannot continue to determine our destiny.²¹

Despite this emphasis on the collective aspect of tribal religious practice, however, many tribal constitutions now contain religious freedoms provisions that resemble the First Amendment or ICRA’s free exercise clause, with their obvious emphasis on the individual aspect of religious freedoms.²² As a matter of federal constitutional law, the free exercise clause has been interpreted to protect an individual’s right to hold religious beliefs free from government compulsion.²³ Some commentators, perhaps most notably US Supreme Court Justice Brennan, have argued that, in this respect, the free exercise clause fits better with “Western” religions than it does with Native American religions:

While traditional Western religions view creation as the work of a deity who institutes natural laws which then govern the operation of physical nature, tribal religions regard creation as an on-going process in which they are morally and religiously obligated to participate....

In marked contrast to traditional Western religions, the belief systems of Native Americans do not rely on doctrines, creeds, or dogmas. Established or universal truths—the mainstay of Western religions—play no part in Indian faith. Ceremonies are communal efforts undertaken for specific purposes in accordance with instructions handed down from generation to generation.... Where dogma

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lies at the heart of Western religions, Native American faith is inextricably bound to the use of land. The site-specific nature of Indian religious practice derives from the Native American perception that land is itself a sacred, living being.²⁴

Brennan's quote comes from his dissenting opinion in *Lyng v. Northwest Indian Cemetery Protective Association* in which the majority of the Supreme Court held that the free exercise clause does not prevent the federal government from destroying an Indian sacred site located on federal public lands. Under *Lyng*, the practice of traditional tribal religions, with their emphasis on collective, intergenerational obligations between humans and the natural world, seems beyond the purview of the First Amendment.²⁵

The legal scholar and theologian Vine Deloria, Jr., once wrote: “[t]here is no salvation in tribal religions apart from the continuance of the tribe itself.”²⁶ Under this view, an individual rights model of religious freedom seems poorly suited to the American Indian context. The definition of “free exercise” in terms of individual rights to believe—versus collective responsibilities to steward the natural world through ceremony—may subvert tribal values and experiences. In *Lyng*, because no individual could show the harm (denial of a government benefit or imposition of a sanction) necessary to maintain a First Amendment claim, the Forest Service was legally permitted to destroy the sacred site, even if it would “virtually destroy” the religion of three tribes.²⁷ Religious freedoms modeled on this standard would seem antithetical to the survival of Indian religion and culture.

To a significant extent, then, I accept the validity of the assimilation critique as applied to the religious freedoms context: adopting a federally modeled free exercise clause may present tribal governments with serious challenges of cultural revitalization and self-government based on traditional norms. However, I also suggest that individual rights do not *necessarily* equal assimilation in the context of traditional American Indian religions.²⁸ Tribes might have their own indigenous traditions of individual religious expression and/or contemporary expectations of individual religious rights. They may have adopted constitutional or other law containing individual religious freedoms rights for a variety of reasons, some of which could still be apt today. They may be engaged in an ongoing process of reconciling modern law with traditional values, through legal developments that respect individual and collective interests. For all of these and other reasons, this chapter explores the possibility that, notwithstanding the important cautions of the assimilation critique, some tribes maintain and implement individual religious freedoms provisions in ways that actually affirm tribal culture and advance tribal sovereignty today.²⁹

Part I acknowledges that the topic of tribal religious freedoms is a sensitive one and describes the author's approach to these topics. Part II discusses the legal framework of American Indian religious freedoms in tribal settings, noting that precisely because the Constitution is not binding on Indian tribes, the Indian Civil Rights Act and tribal law are the key legal sources in such matters.³⁰ This section analyzes sev-

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eral examples of religious freedoms provisions found in tribal constitutions, describing the extent to which they reflect or depart from ICRA's free exercise language. Part III outlines scholarly concerns about individual rights under tribal law, especially the critique that individual rights threaten tribal norms and harm tribal sovereignty. It then evaluates the critique by reference to tribal constitutional provisions, case law, and other sources of information on tribal religious rights and responsibilities. As suggested above, this part argues that the assimilation critique is valid, if potentially overstated, in the tribal religious freedoms context. In Part IV, the article offers some thought about how tribes can, and do, effectuate religious freedoms in ways that protect both individual interests and tribal sovereignty. These include: (1) using tribal custom as a basis for interpreting positive law on individual religious rights, (2) maintaining separate institutions for the resolution of legal disputes about religion, and (3) engaging in constitutional reform to change religious rights provisions that are inconsistent with tribal values. In Part V, the chapter concludes with a detailed description of one tribal court's attempt to reconcile religious freedoms and tribal tradition in a dispute among Sun Dance practitioners, offering it as a poignant example of just how difficult and important these issues are.

PART I: WRITING ABOUT RELIGIOUS FREEDOM

Writing about religious freedom and American Indian religious practices presents a number of challenges for scholars.³¹ First, the English word *religion* may not fully capture tribal peoples' spiritual practices. 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."³² But across the many tribal cultures and languages, different understandings may be operative. For example, the Cherokee Nation offers the word *dinelvdodi* as a direct translation of the English word *religion*.³³ At the same time, the Cherokee word *eloh* or *elohi*, meaning "earth" or "world," has also been translated to mean "religion," and simultaneously means "history, culture, law, and land."³⁴

In many Native cultures, religion is inseparable from relationships and rituals, from stories and place.³⁵ 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."³⁶ 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.'"³⁷ For many indigenous peoples, a spiritual relationship with the land is a fundamental aspect of their identity as human beings. According to the Cheyenne scholar Henrietta Mann, for example, the Cheyenne word *Xamaa-vo'-estaneo'o*, which translates as "indigenous, aboriginal, or ordinary people," also evokes the sacred relationship that the people have with the land.³⁸ Within tribal communities, then, religious and spiritual life merits deep reflection not easily captured in scholarly discourse.

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American Indian religions have been poorly understood by outsiders.³⁹ Former Principal Chief of the Cherokee Nation Wilma Mankiller once argued that “stereotypes . . . particularly with regard to spirituality” persist “because of the dearth of accurate information about Native people.”⁴⁰ The hundreds of tribal religions and cultures are often lumped into generalities about Indian relationships with the natural world. But, on the other hand, when scholars try to move past stereotype and examine religion in specific tribal settings, they risk misunderstanding practices grounded in cultural traditions with which they may have inadequate familiarity.⁴¹ They also risk violating privacy norms that may dictate that religious and cultural traditions be kept confidential among members, clans, societies, or practitioners within the tribal community.⁴² Violation of these privacy norms and, at the worst extreme, appropriation of tribal religious ceremonies by outsiders, can have devastating effects for everyone involved.⁴³

In some tribal communities, contemporary privacy norms are a response to religious persecution. Historically, the United States and Christian organizations have undertaken practices designed to eradicate American Indian religious practices.⁴⁴ As the Tenth Circuit recognized recently:

[P]ast federal policy was to assimilate American Indians into United States culture, in part by deliberately suppressing, and even destroying, traditional tribal religions and culture in the 19th and early 20th centuries. The government provided direct and indirect support to Christian missionaries who sought to convert and civilize the Indians, and from the 1890's to 1930's, the government moved beyond promoting voluntary abandonment of tribal religions to, in some instances, affirmatively prohibiting those religions. 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, one of the ceremonies at issue in this case, was punishable by withholding 10 days' rations or 10 days' imprisonment. This and other laws disrupted and harmed Indian practices, but many, including the Sun Dance and others at issue in this case, survived.⁴⁵

Attitudes and practices have evolved considerably since the late nineteenth century. The American Indian Religious Freedom Act of 1978 states that “it shall be the policy of the federal government . . . to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions . . . including but not limited to access to sites, use, and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.”⁴⁶ Yet American Indian

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religious practitioners face contemporary challenges. As described above, the Supreme Court held in its 1988 *Lying* decision that the federal government's decision to build a road through an American Indian sacred site did not violate the First Amendment even if it would "virtually destroy" the Indian religion.⁴⁷ In 2009, the Ninth Circuit held that the federal government could desecrate an Indian sacred site notwithstanding the Religious Freedom Restoration Act's protection against government actions that "substantially burden" religious exercise.⁴⁸ Thus the discussion of contemporary individual religious freedom occurs against a continuing history of Indian religious oppression. Scholars 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 harmed by outside religions, governments, and citizens. In some communities, the struggle of tribal religions to survive against external threats may be more immediately pressing than questions of individual rights against tribal governments.⁴⁹

Despite all of these challenges, the topic of religious freedom is important to tribal citizens concerned with their own rights⁵⁰ and to tribal governments as they develop and reform their law and governing institutions.⁵¹ This chapter thus addresses the issue of religious freedoms, but with an awareness of the challenges described above.⁵² Where possible, it comments on the legal experiences of specific tribes and tries not to over-extrapolate. Instead of discussing details of tribal rituals or practices,⁵³ this piece focuses on the law, relying primarily on the published constitutions, codes, and judicial decisions of tribal nations. It cites and describes the works of anthropologists with attention to the limitations of those works, offering them as sources to the extent that they may ultimately be helpful to tribal lawmakers.⁵⁴ With respect to the historical backdrop, the chapter makes observations about instances where individual claims might threaten tribal cultural and religious revitalization efforts, and ultimately leaves to tribal leaders and members the decisions about where and how to draw the lines. This chapter 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.

PART II: LEGAL SOURCES ON INDIAN RELIGIOUS FREEDOMS

The First Amendment

The First Amendment of the US Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."⁵⁵ As described above, however, the Constitution does not restrict the powers of tribal governments.⁵⁶ The Supreme Court explained in *Talton v. Mayes* that "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.⁵⁷ Two federal cases predating ICRA illustrate the development of this principle in the religious freedoms arena.

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In *Native American Church v. Navajo Tribal Council*, plaintiffs challenged a Navajo Nation ordinance criminalizing peyote on the reservation.⁵⁸ The Native American Church is an intertribal indigenous religion whose practitioners ingest peyote as a sacrament. 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.⁵⁹

The ordinance levied punishment of nine months' labor or a fine of \$100 against anyone convicted of sale, use, or possession of peyote.⁶⁰

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.⁶¹ The Tenth Circuit held that the federal courts lacked jurisdiction in the case because "the First Amendment applies only to Congress," and whereas the Fourteenth Amendment made it applicable to states, the same was not true of tribes.⁶² According to the court, tribes had a "higher status than that of states" and had surrendered to the United States only to the extent explicitly provided in a treaty or statute.⁶³ Although the Navajo plaintiffs could not sue in federal court, 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.⁶⁴

A second pre-ICRA case on the inapplicability of the First Amendment to tribal governments is *Toledo v. Pueblo de Jemez*.⁶⁵ The plaintiff tribal members claimed that because of their Protestant faith, the Pueblo government had denied them 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.⁶⁶ 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."⁶⁷ All of these transgressions had occurred, the Protestant members alleged, even though the Pueblo had legislative provisions ensuring the freedom of religion.⁶⁸

In *Toledo*, the plaintiffs sued 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."⁶⁹ 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: "[T]he 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."⁷⁰

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Following *Native American Church* and *Toledo*, tribal plaintiffs appeared to have little, if any, basis for bringing religious freedoms lawsuits against tribal governments in the federal courts.⁷¹ The only possibility alluded to by the courts was that Congress might enact some legislation authorizing such suits.⁷² Congress seemed to take some steps in that direction when it enacted the Indian Civil Rights Act of 1968.⁷³

The Indian Civil Rights Act

Often called the “Indian Bill of Rights,” ICRA provides that tribal governments may not intrude on certain individual civil rights.⁷⁴ Among the rights enumerated in the statute is ICRA’s equivalent of a free exercise clause: “No Indian tribe in exercising powers of self-government shall make or enforce any law prohibiting the free exercise of religion.”⁷⁵ ICRA does not, however, contain any equivalent of the establishment clause.⁷⁶ Legislative history suggests that Congress omitted an establishment clause “out of respect for the religious-based governments of the Pueblos of the southwest.”⁷⁷ For this reason, the rest of this chapter focuses largely on free exercise-type laws and claims.

For the most part, ICRA’s substantive provisions are not enforceable in federal courts. As the Supreme Court explained in *Santa Clara Pueblo v. Martinez*, ICRA does not waive tribal sovereign immunity, nor does it provide a federal cause of action for civil rights claims against tribal governments.⁷⁸ In fact, the only federal remedy ICRA provides is a habeas corpus petition for individuals held in custody by a tribal government.⁷⁹ This exception for habeas jurisdiction will not typically be helpful to individuals making religious freedoms claims, unless perhaps a tribe detains or banishes an individual for religious reasons or imposes a penalty that impedes his or her religious practice.⁸⁰

Moreover, the policy rationales articulated in *Martinez* are apt in the religion context. In *Martinez*, the Supreme Court described what it saw as ICRA’s goals of promoting both individual rights and tribal government.⁸¹ Because these goals are competing, Congress struck an appropriate balance between them by providing a federal remedy only where an individual’s physical liberty was at issue. Moreover, the tribal interest is heightened and the federal interest diminished in cases involving internal matters like tribal citizenship.⁸² As a practical matter, tribal legal institutions are more likely to have access to the kind of spiritual, cultural, and linguistic information that would allow them to decide religious freedoms cases.⁸³

Indeed, ICRA is often enforceable in tribal courts, either because a particular tribal court has held that the ICRA waives sovereign immunity and creates a cause of action in tribal court or because tribal statutory or constitutional provisions have done the same.⁸⁴ Many tribes allow suits against tribal officials for declaratory and injunctive relief with respect to claims under civil rights laws or the tribal constitution.⁸⁵ The upshot is that if tribal citizens want to sue tribal governments for intrusions into their religious freedoms, the most likely forum is tribal court.

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Tribal Constitutions

With this background in mind, we can now turn to the question of tribal law on religious freedoms and eventually to the question of whether the law advances assimilation, adaptation, or something else. In many cases, the tribal law is ICRA's free exercise provision, either adopted by the tribal constitution or applied as a federal statute. In other cases, tribes have statutory, decisional, regulatory, or customary law on religious freedom—or perhaps no law on religious freedom at all.

For purposes of narrowing the discussion somewhat, this section focuses on individual religious freedoms that are found in tribal *constitutions*, with some attention to the other sources of law. The chapter 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.⁸⁶ It groups these approaches into four categories: (1) constitutions with religious freedom language that references, incorporates, or tracks the ICRA; (2) constitutions that do not use ICRA but echo the principles of individual religious freedom found in the First Amendment; (3) constitutions with unique language on religion, clearly expressing distinct tribal values and norms (even if they also reference ICRA); and (4) constitutions that do not reference religion or related concepts at all.

The first group consists of tribal constitutions with religious freedom provisions that reference, incorporate, or track the language of the ICRA. Several of these constitutions expressly incorporate and set forth the ICRA. For example, the Crow Tribal 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."⁸⁷ Other tribal constitutions may have a section on the "Rights of Indians" or "Bill of Rights" 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 tribal government "shall not: (a) Make or enforce any law prohibiting the free exercise of religion."⁸⁸ Still other constitutions generally prohibit the tribal government from denying religious freedom and then expressly incorporate ICRA. For example the Constitution of the Skokomish Tribe provides: "The Skokomish Tribal Government shall not deny to any person within its jurisdiction freedom of . . . religion. . . . The tribe shall provide to all persons within its jurisdiction the rights guaranteed by the Indian Civil Rights Act of 1968."⁸⁹ Still other tribal constitutions expressly incorporate ICRA, without making separate mention of "religion" or "free exercise," as in the following example:

The Miami Tribe, in exercising its powers of self-government, shall not take any action which is in violation 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 chapter 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, res-

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olutions, 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.⁹⁰

The second group consists of tribal constitutions with religious freedoms provisions that do not reference, track, or incorporate the ICRA, but echo the general principles of the First Amendment. For example, the Big Lagoon Rancheria Constitution provides that: “no member shall be denied freedom of . . . religion . . . or other rights guaranteed by applicable federal law.”⁹¹ The Ute Indian Tribe of the Uintah and Ouray Reservation provides: “All members of the . . . Tribe . . . may enjoy, without hindrance, freedom of . . . worship.”⁹² One provision recurring in a number of constitutions, such as the Choctaw Nation of Oklahoma’s, is that “no religious test shall ever be required as a qualification to any office of public trust in this Nation.”⁹³ Others, such as that of the Muscogee Creek Tribe of Oklahoma, have a similar statement declaring that all citizens have the right to vote in tribal elections “regardless of religion, creed, or sex.”⁹⁴ Some of these latter provisions may involve establishment clause-type concerns.

The third group consists of 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 contain specific protections for their tribal ceremonies or rights associated with sacred places.⁹⁵ Of particular interest is the “Constitution of the Iroquois Nations or The Great Binding Law, Gayanashagowa.”⁹⁶ This constitution is traditional, given to the Iroquois people by the Peacemaker Dekanawidah, rather than one of modern vintage.⁹⁷ The Iroquois Constitution is notable in that these 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 that:

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.

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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 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.⁹⁸

The Iroquois Constitution 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 also means that individuals will be able to partake in the ceremonies. Viewed in this light, the constitution could be read as recognizing 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 though various other sections of the constitution outline the rights of people in the community, including "lords," "war chiefs," and people from "foreign nations," these rights are similarly framed in terms of collective duties and welfare, and in the context of the Great Law. This constitution seems to express the interconnected nature of people's rights and duties.⁹⁹

Tribal constitutions adopted more recently also explicate traditional religious and cultural values. The Land Policy and Constitution of the Yup'ik people of Bill Moore's Slough, for example, offers explicit statements on the collective nature of tribal rights and the relationship among land, tradition, and culture.¹⁰⁰

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

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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.

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.¹⁰¹

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

ARTICLE I

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

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

ARTICLE II

A) The Bill Moores Slough Elders Council shall pass no laws jeopardizing certain freedoms and rights deemed to be given our people by our peoples creator.

Amongst these freedoms and rights are:

The freedom to government by and for the people.

The right to speak ones Conscience.

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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 1968.¹⁰²

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;
- (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.¹⁰³

In such a context of intergenerational cultural and religious interests, kinship with others, and political sovereignty, the Poarch Creek Constitution affords its members "the right to exercise the tribal rights and privileges of members of the Poarch Band of Creek Indians."¹⁰⁴

Finally, there are tribal constitutions with no express provision on religion. The White Mountain Apache Constitution, for example, does not expressly mention religion but provides for "freedom of conscience."¹⁰⁵ Of course, some of these tribes may deal with religion in their legislative codes. The White Mountain Apache code offers extensive protection for sacred sites within the reservation.¹⁰⁶ The Colville Constitution does not mention religion, but the Colville Tribal Civil Rights Act contains a free exercise provision.¹⁰⁷

Still other tribes, like the Navajo Nation, do not have written constitutions. Tribes without written constitutions might have: (1) other written law, such as tribal codes or judicial decisions, on religion; (2) oral or customary law on religion; or, perhaps (3) no written or oral law on religion at all. In the Navajo Nation, for example, legal provisions on religion are found in the legislative code, the Fundamental Law of the Dine, and possibly in other sources as well.¹⁰⁸

PART III: CONSIDERING THE “ASSIMILATION CRITIQUE”

The above examples suggest at least four tribal constitutional approaches to the freedom of religion: (1) constitutions that reference, track, or incorporate ICRA; (2) constitutions that do not use ICRA but echo US 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.¹⁰⁹ This section considers possible ramifications of these approaches to individual religious freedom vis à vis scholarship critiquing individual rights in tribal law as a general matter.

In a recent article, 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.”¹¹⁰ Surveying leading scholars, she cites Robert Porter, who describes “the introduction of individual rights into tribal litigation” as “fatal to tribalistic norms” and “therefore damaging to tribal sovereignty.”¹¹¹ 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.”¹¹² Finally, Kevin Washburn has argued that “the introduction of individual rights into tribal justice systems tended to standardize the cultures of Indian nations.”¹¹³

Together these scholarly viewpoints represent what I call an “assimilation critique” of individual rights in tribal law. The assimilation critique suggests that individual rights are usually foreign and contrary to traditional tribal law and largely imposed on tribal communities by outside forces, especially the federal government. The imposition of US-styled rights is, in turn, harmful to Indian culture and sovereignty because it displaces or alters traditional tribal laws, values, and institutions. Taking the assimilation critique as a point of departure, this part of the chapter 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.

Individual Religious Freedoms as Representing and Effectuating Assimilation

The role of the federal government in drafting tribal constitutions. The above discussion reveals that some tribal constitutions repeat the principles, or even the very words, of the First Amendment or ICRA. On the one hand, tribes may have decided on their own to incorporate the substantive provisions of ICRA after

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it was passed. On the other hand, it is important to acknowledge that the federal government has long played a role in the development of tribal constitutions, a role set forth in the Indian Reorganization Act of 1934 (IRA).¹¹⁴ After a long period of federal opposition to tribal governments through the reservation and assimilation eras, the IRA allowed tribes to reorganize as modern governmental entities, with eligibility for enhanced federal funding.¹¹⁵ Tribes had the opportunity to accept or reject IRA constitutions by popular vote of the tribal citizenry. Those who voted in favor typically adopted a constitution or bylaws providing for governance by a tribal council that would manage tribal resources through a political or corporate entity.¹¹⁶

The IRA has been critiqued as imposing Anglo-American norms, institutions, and procedures on tribal communities.¹¹⁷ Indeed, many tribes had traditional governments still functioning at the time of the IRA—whereas other tribes maintained traditional norms and values that had only gone underground during the nineteenth and early twentieth centuries. The IRA seemed to supplant those traditional governments with Anglo-American style governments by encouraging tribes to adopt constitutions and through other measures.

Among other things, the Interior Department provided tribes with various models of substantive constitutional law during the IRA period.¹¹⁸ These included a “Basic Memorandum” of advice on adopting a constitution and, in some instances, a “Model Constitution” and/or “Outline of Tribal Constitution and Bylaws.”¹¹⁹ Yet recent scholarship on the papers of Felix Cohen, who served as associate solicitor of the Interior Department during the IRA era, also suggests that these documents may not have been widely distributed or intended to impose boilerplate language to the extent that scholars had previously argued.¹²⁰

With respect to religious freedom specifically, neither the generic Model Constitution nor the Outline of Tribal Constitution and Bylaws provided by the government to some tribes during the IRA era appears to contain any free exercise clause provision.¹²¹ Cohen’s *Basic Memorandum on Drafting of Tribal Constitutions* to tribes stated:

If it is thought desirable to include in the constitution a declaration of the rights of the people, the following provisions, taken from the constitution of the Choctaw Nation, adopted in 1890, may provide a helpful guide.

...

Section 3. That there shall be no establishment of religion by law. No preference shall ever be given to any religious sects, society, denomination, or mode of worship, and no religious test shall ever be allowed as a qualification to any public trust under his government.

Section 4. That no human authority out in any case whatever control or interfere with rights of conscience in matters of religion.¹²²

Thus, tribes would have had this guidance in favor of freedom of conscience and against the establishment of religion as they prepared IRA constitutions. And

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tribes would have also had the federal First Amendment as a model. By providing such models and encouraging tribes to adopt constitutions, the government may well have influenced tribes to adopt religious freedoms provisions based on norms and provisions of federal law. Yet the IRA period also marked federal attention to traditional tribal religions. As Charles Wilkinson has written, Commission of Indian Affairs John Collier took measures to protect the Sun Dance and other ceremonies, issuing the order that “no interference with Indian religious life or ceremonial expression will hereafter be tolerated.”¹²³

In addition to government’s involvement in some substantive aspects of IRA constitutions, the IRA also provided a process for adopting and ratifying constitutions. The IRA contemplates that the secretary of the Interior shall “call and hold” the election, provide “technical assistance,” and “review the final draft of the constitution and bylaws, or amendments thereto to determine if any provision therein is contrary to applicable laws.”¹²⁴ The secretary shall then “notify the tribe, in writing, whether and in what manner the Secretary has found the proposed constitution and bylaws or amendments thereto to be contrary to applicable laws.”¹²⁵ After the election, the secretary shall approve of the constitution chosen by the tribe, unless he or she finds it contrary to applicable laws.¹²⁶ To some extent, this process continues to influence tribes’ constitutions today,¹²⁷ especially by requiring that the secretary of the Interior approve tribal constitutions.¹²⁸

Unlike the recent works on the IRA described above, there is, to my knowledge, less scholarship studying the role of the federal government in tribal constitutional adoption and amendment following ICRA. I would agree with Professor Goldberg that “tribal protection for individual rights became considerably more prevalent after Congress passed the Indian Civil Rights Act in 1968,”¹²⁹ but I do not know if this growth was the result of independent tribal decision making, influence by the federal government, or some combination of these.

For a future project, it might be revealing to study the extent to which the secretary has employed this approval power to encourage tribes to insert ICRA language into their constitutions. At least one tribe has recently rejected this requirement of secretarial approval—adopting a new constitution that also strikes references to the ICRA that had been present in the tribe’s earlier constitution.¹³⁰ Whether through secretarial approval or other mechanisms, the federal government seems to have had some influence on tribes’ decisions to incorporate ICRA into their constitutions—a conjecture that would benefit from additional investigation. More generally, it is safe to say that the federal government has historically had a role in modeling and approving tribal constitutions, and this role may have led some tribes to adopt individual religious freedoms resembling federal law.¹³¹

Substantive law and assimilation. Whether as a result of independent tribal decision making, federal influence, or some combination thereof, many tribal constitutions now contain language from the First Amendment, ICRA, or other federal law on religion. From a substantive perspective, these provisions may express a

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view of religion that is too narrow—or just a bad fit—for tribal worldviews and cultures. As discussed earlier, in *Lyng*, the Court held that the First Amendment did not prevent the federal government from destroying a sacred site.¹³² The Court explained that the First Amendment only prohibited government actions that “coerced belief.”¹³³ It did not protect specific practices or limit the government’s right to develop its land.¹³⁴ Then in *Employment Division v. Smith*, the US Supreme Court upheld a state statute denying unemployment benefits to an employee and member of the Native American Church who had been terminated for peyote use.¹³⁵ 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.¹³⁶

Thus a tribal law modeled on the First Amendment—or on ICRA’s language closely resembling the free exercise clause—might not protect religions that are place-based or require certain ritual activities.¹³⁷ The particular outcome in any given case would depend on the tribal court’s interpretation and application of the religious freedom provision.¹³⁸ A tribal court may very well depart from the narrow conception of free exercise propounded by the Supreme Court in *Smith* and *Lyng*—and choose instead to interpret an ICRA-like provision consistent with tribal norms.¹³⁹ On the other hand, scholars have documented the tendency of some tribal courts to follow relevant federal and state law, even when it conflicts with tribal custom.¹⁴⁰ Examples of tribal court cases representing each of these modes of interpretation are discussed below.¹⁴¹

Additionally, with their focus on individual rights, tribal constitutions modeled on federal law may ignore the duties of tribal people and the collective nature of their religious experiences.¹⁴² In fact, neither the 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.¹⁴³

The very survival of Indian cultures and religions is about the duty of some individuals more than it is about their liberties. Effectively linking collective responsibility to individual freedom, Suagee explains, “[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.”¹⁴⁴

Many examples exist of tribal people’s collective duties to maintain and practice religion for the benefit of the entire community. Some of these examples come from classic anthropological literature.¹⁴⁵ Ruth Underhill writes of Hopi religion:

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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.¹⁴⁶

Underhill explains that the hunting ceremonies of Plains Indians were undertaken to ensure food for the people and to maintain humans' relationship with the natural world. Individuals had duties not only to each other, but also 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.¹⁴⁷

Underhill also describes the Sun Dance of the Plains people as occurring “for the general welfare” of the people.¹⁴⁸

Contemporary accounts of Indian religious practices also reflect their collective and relational qualities. In the *Lyng* case, the district court described Yurok, Karuk, and Tolowa practices as follows:

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.¹⁴⁹

These ceremonies and dances provided the “World Renewal” essential to the tribes' religious belief system,¹⁵⁰ making the Supreme Court's ultimate decision not to protect them in *Lyng* particularly difficult to understand.¹⁵¹

Some contemporary indigenous leaders describe ceremonies that not only require cooperative behavior, but also have as their primary purpose and effect the renewal of relationships. The late Wilma Mankiller explained, “The Creator provided us with ceremonies to remind us of our place in the universe and our responsibilities as human beings.”¹⁵² 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 previ-

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ous 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.¹⁵³

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.¹⁵⁴

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, the assertion of individual rights may threaten the fabric of tribal life—or just seem beside the point.

Tribal constitutions modeled on ICRA or the free exercise clause may also 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.¹⁵⁵ These programs, occurring alongside the broader project of colonization, threatened the very existence of tribes.¹⁵⁶ 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.¹⁵⁷

Tribal procedures, institutions, and assimilation. Finally, to the extent that tribes allow individuals to bring religious freedoms claims into tribal courts, this decision may be inconsistent with tribal procedural and institutional norms and practices. In some communities, religious issues may be handled by elders, clan leaders, or religious societies.¹⁵⁸ 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. Several cases discussed below, from the Cheyenne–Arapaho Tribal Court, reflect this problem.¹⁵⁹ Even if tribal court jurisdiction is appropriate, 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 having full understanding of religious issues.¹⁶⁰

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This problem is particularly fraught given that many tribal courts originated through the federal government's installation of reservation courts staffed by federal agents to bring law and order to Indian country. According to one recent tribal court opinion, the Code of Federal Regulation courts were created in the 1880s "as tools of assimilation to bring non-Indian education and discipline to help 'civilize' reservation communities."¹⁶¹ Some of these courts were charged with carrying out federal regulations sanctioning Indian religious practices. Indeed, CFR courts may have been "little more than social control mechanisms that resulted in the destruction of tribal religion and traditional culture."¹⁶² In some communities, these courts or their descendants are the ones now called on to interpret ICRA and its religious freedoms provisions.

Of course, tribal courts have been completely transformed in the contemporary period and now act as institutions of self-government.¹⁶³ Questions of judicial qualification and cultural competency may be addressed through judicial selection processes or training programs. Yet tribal courts are usually still adversarial in nature—casting parties in oppositional roles, fomenting argument, and deciding a "winner" and "loser."¹⁶⁴ Moreover, in some communities, even the most traditional judge may not be authorized to make decisions about religious matters. Tribal life may be better served by respecting the traditional structures of dispute resolution and allowing religious or cultural leaders to resolve religious or cultural disputes in a way that maintains community norms.¹⁶⁵

In all of these ways, wholesale adoption of ICRA or the First Amendment could reflect or facilitate an assimilationist agenda, ultimately reframing the struggle for sovereignty away from maintenance of a kinship-based way of life and toward the acquisition of Western-defined rights.¹⁶⁶

Non-Assimilationist Explanations for Tribal Constitutional Provisions on Individual Religious Freedoms

In contrast to the discussion above, this section considers the possibility that tribal constitutions with individual religious freedoms provisions may be animated by principles and practices other than assimilation.¹⁶⁷ 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.'¹⁶⁸ This respect for individualism exists alongside the "obligations and duties toward one's kin . . . necessary for the proper order of Hopi or Zuni society."¹⁶⁹ The Navajo tribe holds 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."¹⁷⁰

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. Whereas tribes should not be bound to the practices of any partic-

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ular point in history,¹⁷¹ “[t]radition plays a very important role” [in contemporary questions of Indian governance] since it lays out values and presents social and cultural justifications.”¹⁷² Therefore, it may helpful to situate contemporary individual religious freedoms against several examples from earlier anthropological and ethnographic studies.

Karl N. Llewellyn and E. Adamson Hoebel’s *The Cheyenne Way* presents in the form of case studies certain data on Cheyenne lawmaking from 1821 to 1880.¹⁷³ In a case called *The Tribal Ostracism and Reinstatement of Sticks Everything Under His Belt*, Llewellyn and Hoebel recount the story of an individual who declared, “I am hunting for myself,” ostensibly breaking tribal rules against individual hunting.¹⁷⁴ According to Llewellyn and Hoebel, the tribal chiefs met to decide how to handle Sticks Everything Under His Belt, ruling that “no one could help [him] in any way, no one could give him smoke, no one could talk to him.”¹⁷⁵ Anyone who violated this ruling would have to give a Sun Dance.¹⁷⁶ 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.”¹⁷⁷ The chiefs agreed and Sticks Everything Under His Belt promised to abide by tribal rules. Before the Sun Dance took place, a young man named Black Horse asked the chiefs if he could “sacrifice himself” alone up in the hills.¹⁷⁸ The chiefs sent Black Horse to the brother-in-law who pledged the Sun Dance, saying he should decide whether to grant Black Horse’s request. The Sun Dance pledger initially denied the request saying, “you know my rule is that all must be there.”¹⁷⁹ But Black Horse made his case for doing the ceremony his own way: “[B]rother-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.”¹⁸⁰ The pledger still demurred, saying the chiefs had agreed that everyone must act together. When Black Horse suggested that the pledger handle the situation by making “everyone . . . swing from the pole,” the pledger finally said: “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.”¹⁸¹

On the one hand, this account may not perfectly represent traditional Cheyenne religious practices, especially given the challenges of linguistic and cultural interpretation that surely characterized Llewellyn and Hoebel’s work. Yet the story might indicate room for individual expression (or even “individual rights”) in instances where the individual abides by “tribal procedures.” When Sticks Everything Under His Belt unilaterally declared his intent to hunt for himself, he became “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.¹⁸² It appears that the tribe was able to accommodate Black Horse’s individual interests in a way that preserved tribal order and harmony. 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.”¹⁸³

Another example comes from the Dakota ethnographer Ella Cara Deloria, who wrote extensively about her Dakota people, emphasizing above all else the rela-

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tional 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.”¹⁸⁴ These rules are enforced by social norms and expectations, as well as by a group of “magistrates.”¹⁸⁵ Spirituality infuses all aspects of the story. 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 . . . offered, in tears.”¹⁸⁶

But even in this culture of relatives, kinship, and communal ceremony, Deloria describes individual interactions with the sacred. In her fictional 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?”¹⁸⁷

Despite this doubt about her “right” to make an offering, Bluebird does her best to follow what “everyone knew” about spiritual matters.¹⁸⁸ She goes off on her own, except for the sick baby, and makes a prayer, attempting 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.”¹⁸⁹ 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.¹⁹⁰

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

From these examples, it appears that some tribes traditionally provided space for individual religious expressions and interests within the duty-bound, relational nature of the tribal community. The late Vine Deloria, Jr., the leading contemporary scholar writing at the intersection of Indian religion and law (and Ella Deloria’s nephew), more explicitly addresses the complex nature of individual expression in the tribal community.¹⁹¹ Deloria dismisses “the concept of an individual alone in the tribal religious sense” as “ridiculous,” given the “interdependence of people” in tribal life.¹⁹² But Deloria nonetheless accepts that “Indian tribal religions have an individual dimension.”¹⁹³ He points to the individual experience in vision quests,

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dreams, and naming ceremonies, the designation of certain individuals to become keepers of medicine bundles or leaders in the tribal religion.¹⁹⁴

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.”¹⁹⁵ 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.”¹⁹⁶

Individuals’ interests in religion may also arise when new religions appear in, or come to, tribal communities. Well-known examples include Handsome Lake bringing a new religion to the Seneca,¹⁹⁷ the arrival of the Ghost Dance on the Plains,¹⁹⁸ and the spread of the Native American Church.¹⁹⁹ 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 the old, religion. Perhaps more research into these historical events could serve as a basis for examining religious freedom in indigenous communities. The openness of some Indians towards Christian missionaries, and Indians’ surprise about the missionaries’ own closed-mindedness, suggests that some Indians tolerated people who practiced religions different from their own.²⁰⁰

The idea that Indians may 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 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.²⁰¹

LaDonna Harris tells about her Comanche family’s 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

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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.²⁰²

These examples suggest that some individuals and families in tribal communities have the freedom to practice Christian and other religions, even as they continue to practice traditional tribal religions.²⁰³ This tolerance for Christian practices and beliefs exists even though several women interviewed in Mankiller's book acknowledge the harmful, divisive, and assimilative history of Christianity in tribal communities,²⁰⁴ and some express a strong preference for tribal traditions.²⁰⁵ 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."²⁰⁶

From these and other descriptions, some tribal religious traditions would seem to allow for individual freedom and expression,²⁰⁷ while emphasizing communal duties and experiences.²⁰⁸ 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."²⁰⁹

Even the express incorporation of ICRA or the First Amendment may represent the always changing nature and dynamism—not just the assimilation—of tribes. First of all, as suggested above, some tribes have long-standing value in favor of individual freedoms, limited when the exercise of individual rights would harm the group.²¹⁰ But, even if individual legal freedom is a relatively new concept, it makes sense for tribal people to evolve as all people do. In early America, religious freedom meant the right to be a Puritan, free from persecution by the Church of England; today it gives rise to our national tolerance for everything from Buddhism to Santeria.²¹¹ Tribal people have, over time, shown a similarly capacity to adopt new ideas, whether religious as in the above examples or otherwise, and to incorporate them into tribal culture.

Admittedly, in some tribes, however, the concept of individual religions freedoms, or even religion separate from other aspects of tribal life, may seem particularly alien.²¹² But it is at least worth considering that even when American Indians have borrowed individual freedom of religion from the ICRA or the free exercise clause, they have managed to make it their own, in an act of dynamic sovereignty.²¹³ Indeed, there are a number of reasons, not fully attributable to assimilation, why a

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tribe might want an individual religious freedom provision in its constitution.²¹⁴ Tribal members may demand what they see as basic civil rights including religious freedoms.²¹⁵ The tribal government may decide that it is important for the tribal legal system to have readily observable indicia of democratic principles,²¹⁶ particularly in an era where the Supreme Court is restricting the jurisdiction of tribal courts over concerns about the treatment of non-Indian litigants.²¹⁷ In some cases, the modern rise to power of the tribal council may necessitate protections for members' religious and cultural interests that were not required when tribal government was less centralized.²¹⁸ In other cases, 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 provide religious freedoms (or duties) in response to particularized events in the history of the tribe.²¹⁹

Most important is that tribes' legal systems are functional and meaningful today. As tribal law scholars 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.²²⁰

In the next section, I offer some ideas about how tribes might approach individual religious freedoms in the context of tribal sovereignty—and then reviews recent tribal court decisions that have dealt with these issues.

Addressing the Assimilation Critique in Tribal Law Practice

Whatever 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, or the traditionally accepted law of the tribe, as an interpretive guide when tribal courts interpret modern constitutional provisions on religious freedoms. Though challenges are associated with the use of customary law, including “questions of authenticity, legitimacy, and essentialism,”²²¹ tribes can rely on a growing body of jurisprudence and scholarship discussing customary law.²²² Most notably, Matthew Fletcher has authored a series of articles on tribal customary law providing guidance on the challenges of identifying customary law, deciding when and how to apply it, and evaluating the ramifications of such decisions.²²³

Addressing the challenges associated with customary law is worthwhile, at least in some tribes' view. The Navajo Nation Supreme Court has articulated the act of relying on tribal law and custom as a sovereignty-enhancing measure:²²⁴

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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.²²⁵

Under similar reasoning, a tribal court could interpret a constitutional provision on religious freedoms consistent with the tribal custom—instead of under the US Supreme Court’s restrictive approach in First Amendment cases. Compare two examples.

In *Townsend v. Port Gamble S’Klallam Housing Authority*, the tribal court of appeals rejected a tribal citizen’s claim that the tribe had violated her religious freedom when it evicted her from tribal housing on the ground that her religious drumming constituted a nuisance.²²⁶ In reviewing the tribal citizen’s ICRA claim, the court explicitly “looked . . . for guidance” to the US Supreme Court’s First Amendment jurisprudence (because, the court said, it could find no tribal court decisions on point). Thus the tribal court adopted from federal case law the principle that “freedom of religion does not provide anyone with the right to conduct a true nuisance.”²²⁷ Next, the court considered the tribal constitution’s provision: “members of the Community shall enjoy without hindrance, freedom of worship, . . . speech, . . . assembly, and association.”²²⁸ Holding that this constitutional right was “not absolute,” the court held that the individual’s religious freedom must yield to the tribe’s interest in regulations that “protect the health, safety, and welfare of the community and its members,” particularly where the appellant had had an opportunity to comply with the regulation before she was evicted.²²⁹

Without more information about religion, culture, and community in the Port Gamble S’Klallam tribe, knowing whether the *Townsend* case is considered consistent with tribal values or not isn’t possible. It is plain from the opinion, however, that the court used federal law to interpret the religious freedoms provisions of ICRA and the tribal constitution. For this reason, it is interesting to contrast *Townsend* with cases that appeal more obviously to tribal custom on religious matters. For example, in *Garcia v. Greendeer-Lee*, the Ho-Chunk Supreme Court rejected a tribal employee’s religious freedom challenge to the tribe’s “Waksig Wagsa Leave Policy.” The policy gave paid leave for employees attending traditional tribal religious events but did not cover the plaintiff’s activities as a Jehovah’s Witness.²³⁰ As Matthew Fletcher writes about the *Garcia* case:

The interesting portion of the opinion came in a concurring opinion of the court’s chief justice . . . [i]nterpreting the phrase, Waksig Wagsa, to mean “Indian Ways,” and noting that the purpose of the

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leave policy was to “provide a means in which enrolled Tribal member employees can practice religion, culture and tradition . . . without the threat of losing a job or losing pay.” Finding that the practice of these “Indian Ways” is both “the essence of tribal sovereignty” and “the backbone of cultural support that makes us distinctly Ho-Chunk,” the chief justice had no problem rejecting the constitutional challenge. Here, the chief judge viewed tribal member religious activities as fundamental to the survival of the tribe and its sovereignty, surely a compelling governmental interest.²³¹

The Ho-Chunk Constitution provides that the tribal government “shall not make or enforce any law prohibiting the free exercise of religion,”²³² thus tracking the First Amendment and ICRA. Yet the *Garcia* case demonstrates the Ho-Chunk Supreme Court’s willingness to use tribal custom and language as an interpretive device, with express attention to the sovereignty-enhancing aspects of its decision.

Tribal court jurisprudence also reveals a growing body of cases wherein courts use tribal custom on religion and spirituality as a basis for deciding land use and other property disputes.²³³ Admittedly, these are not cases where an individual tribal citizen has claimed a religious freedom right under ICRA or the First Amendment. Nevertheless, they are interesting examples of tribal court decisions relying on customary law with a substantive religious or spiritual component (versus customary law with a procedural or jurisdictional component as discussed in later cases).

In *Hoover v. Colville Confederated Tribes*,²³⁴ for example, informed by tribal custom, the Colville Court of Appeals offered expansive protection of tribal citizens’ religious interests in lands. This case arose under the tribal regulatory code, which the court interpreted to protect lands with ceremonial importance against development by a non-Indian that threatened to harm tribal religious interests. The case thus turned on the authority of the tribe to regulate non-Indian fee land.²³⁵ The trial court had found that the proposed land development would have a direct effect on the “health and welfare of the tribe,” by harming tribal religious and ceremonial practices:²³⁶

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,

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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.²³⁷

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.”²³⁸ Therefore, the appellate court upheld the injunction preventing the land development.²³⁹

The *Hoover* court explicitly recognized 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.”²⁴⁰ Proponents of the assimilation critique might argue that *Hoover* only proves their point: the fact that it (unlike *Townsend*) 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. The Colville Constitution, as described above, contains no express provision on religion, recognizing individual religious freedoms in the Tribal Civil Rights Act, a provision that is not cited in the *Hoover* opinion.²⁴¹ But, most importantly for this discussion, *Hoover* reveals a tribal court going beyond a *Lyng*-like approach and, instead, using tribal custom to recognize and protect the relationship among land, ceremonies, and living beings. This is not a tribal court confined to Anglo-American notions of justice in the application of religious principles to contemporary disputes.

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. The Ho-Chunk Tribe, for example, has a “traditional court,” with decision makers selected by the clans and proceedings conducted primarily in Ho-Chunk, which hears matters implicating culture and serves as a resource on customary law.²⁴² In some tribes, deference to such dispute resolution entities may be required in matters involving cultural and religious questions. For example, Gloria Valencia-Weber has found that “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.”²⁴³ 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.

Consider, for example, *Elk Horn Society v. Red Hat*, in which four traditional societies asked the Cheyenne-Arapaho court to rule in a dispute over possession of

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the Sacred Arrows and other items used in rituals of the Cheyenne people.²⁴⁴ At first, the trial court issued an order requiring the return of the items to the Arrow Keeper and directing the tribal police to offer peaceful assistance in the restoration of the items.²⁴⁵ When fighting erupted between the disputants, a number of tribal members contacted the court about resolving the situation according to traditional procedures. Thus, after issuing a stay order to prevent any more conflict, the Cheyenne-Arapaho District Court issued a new ruling that “the Tribal Court cannot decide who the Arrow Keeper is.”²⁴⁶ Instead, it left this question “to the Headmen, Chiefs, and the Cheyenne tribal members themselves . . . in accordance with traditional practice and procedure.”²⁴⁷ The record does not indicate what ultimately happened to the Sacred Arrows in this case.²⁴⁸

A third approach would be for tribal lawmakers and citizens to engage in constitutional reform with the specific and conscious goal of providing for religious freedom in a way that reflects tribal values.²⁴⁹ As mentioned briefly above, the Cherokee Nation of Oklahoma, after an extensive process of constitutional reform beginning in 1999,²⁵⁰ adopted a new constitution that omitted reference to ICRA. The 1975 constitution had a general “Bill of Rights,” including the statement that: “The appropriate protections guaranteed by the Indian Civil Rights Act of 1968 shall apply to all members of the Cherokee Nation.”²⁵¹ By contrast, the 1999 constitution specifically enumerates certain rights including due process, equal protection, rights to counsel, jury trial, and “the free exercise of religion.”²⁵² On the one hand, religious freedoms do not seem to have been a primary concern in the 1999 constitutional reform process.²⁵³ On the other hand, one participant in the Cherokee Constitutional Convention explained:

I'd like to stress that enumerating our own Bill of Rights as opposed to just by implication taking the Indian Civil Rights Act, will allow us to develop our own notions of due process and protection, which I think is important for any sovereign people who are concerned with individual rights.²⁵⁴

Indeed, the Cherokee Nation's Constitutions of 1827 and 1839 had both provided a “free exercise” clause not completely unlike the one adopted in the 1999 constitution—suggesting an historical (and certainly pre-IRA or pre-ICRA) concept of religious freedom.²⁵⁵ More broadly, other aspects of the Cherokees' 1999 constitution clearly reflect a move away from federal influence—most notably, the 1999 constitution no longer contains the requirement of approval by the secretary of the Interior found in the 1975 constitution.²⁵⁶

Though constitutional reform must be specific to the tribe, some of the constitutions discussed above provide models that could be adapted to the particular culture, religion, and other community norms. A tribe could follow the Bill Moore's Slough Yupik constitution and supplement boilerplate ICRA or free exercise language with a statement of its own tribal-specific religious duties and broader context for the realization of such rights. A tribal constitution could specifically

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reference certain religious practices. The Fort Mojave Constitution provides, for example that “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.”²⁵⁷ 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, requiring them to be either tribal members or to present “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.”²⁵⁸

As part of the reform process, any constitutional provisions for substantive religious rights and duties could be enhanced by procedural reforms that ensure that jurisdiction over religious matters rests in the appropriate forum.²⁵⁹ In other communities, it may be perfectly consistent with tribal norms to keep ICRA or ICRA-like religious freedoms provisions and to lodge jurisdiction in the tribal court.

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.²⁶⁰

REALITY CHECK

On September 11, 2003, a group of Northern Arapaho ceremonial elders from Wyoming sued several traditional Southern Arapaho chiefs in the Cheyenne-Arapaho tribal court of Oklahoma to prevent the Southern Arapahos from conducting a Sun Dance in Oklahoma. The case came to be known as *Redman v. Birdsheed*.²⁶¹ The Northern Arapaho plaintiffs claimed that the Southern Arapaho defendants had announced their intent to conduct the Sun Dance without complying with “the proper traditional way to seek permission and properly hold an Arapaho ceremony.”²⁶² The Northern Arapahos from Wyoming filed their case in the Cheyenne-Arapaho tribal court located in Oklahoma, where four years of litigation ensued.

The case pitting certain Northern Arapahos against certain Southern Arapahos reflects, in some respects, historical events involving the tribe. Traditionally, the Arapaho people lived on the plains of present-day Colorado and Wyoming, with a distinction between the Northern and Southern bands tracing back to the mid-nineteenth century. After experiencing hostilities from the United States and its citizens, including violations of the Treaty of Fort Laramie of 1851 and the Sand Creek Massacre of 1864, the Arapaho people were largely removed from Colorado and other traditional lands.²⁶³ Since approximately 1867 the Southern Arapaho have

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resided in Oklahoma, alongside the Southern Cheyenne, with whom they formed the joint federally recognized Cheyenne–Arapahoe Tribe of Oklahoma in 1937.²⁶⁴ Since 1878, the Northern Arapaho have resided alongside the separately recognized Shoshone Tribe on the Wind River Reservation in Wyoming.²⁶⁵

The Arapaho people have long been practitioners of the Sun Dance, a multiday ritual involving prayer and sacrifice for the community.²⁶⁶ In the years leading up to the *Redman v. Birdshead* case, the Arapaho Sun Dance had occurred regularly on the Northern Arapaho reservation, under the direction of the plaintiffs, with Southern Arapahos often attending. In 2003, Southern Arapaho Saul Birdshead announced his intent to conduct a Sun Dance in Oklahoma by sending a letter to the chairman of the Cheyenne–Arapaho Tribes, informing him and the tribal council of his vow and asking for their help. His letter indicated he thought this was the proper way to ask for support.²⁶⁷ But the Northern Arapaho ceremonial elders said that the defendants had to seek *their* permission. The Northern Arapaho plaintiffs further charged that the Southern Arapahos had “lost” their Sun Dance in the 1930s after sharing their tradition with the white anthropologist George Dorsey. According to the plaintiffs, “the people with the authority to conduct the ceremonies died out from violating the secrecy of the ceremonies.”²⁶⁸ To make matters worse, the Southern Arapahos were now relying on the same anthropologist’s books as a source of “proper Arapaho ways,” at least according to a letter that one individual had submitted to the tribal newspaper.²⁶⁹

After the allegations came to light, the Northern Arapaho and Cheyenne–Arapaho business committees each passed (slightly different) resolutions barring the Sun Dance proposed by the Southern Arapaho individuals until they complied with “the traditional ways” of seeking permission and holding the ceremony.²⁷⁰ But when it looked like Southern Arapaho individuals were going ahead with their plans anyway, the Cheyenne–Arapaho tribal court granted a temporary restraining order to prohibit the Sun Dance.²⁷¹ The Southern Arapaho defendants challenged the temporary restraining order on grounds that the tribal court lacked jurisdiction to decide “these traditional type matters.”²⁷² Finding that the dispute “related to the centuries old spiritual matters of the Arapaho,” the court agreed, holding:

[T]he case at hand . . . deals with a matter not addressed in any written way, at least as to the tribal codes and laws. Thus, this Court lacks jurisdiction to decide this case. . . . The Court notes that there is a proper procedure to spiritual matters, and the parties are directed to submit this matter for the property traditional way of resolving these types of disputes.²⁷³

Urging the parties to “comply with the proper traditional ways,” the court said it would “give recognition and ‘full faith and credit’ to the decisions of the traditional leaders in this dispute.”²⁷⁴ But despite the court’s clear rejection of jurisdiction and many admonitions to take the matter to the traditional leaders, the case of *Redman v. Birdshead* did not end with the 2003 decision.

In 2005, the Northern Arapaho plaintiffs again sued in the Cheyenne–Arapaho

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tribal court to prevent the defendants from running “Arapaho ceremonials” in Oklahoma, arguing that the individuals had not sought authorization in the traditional manner and that the only proper location for Arapaho ceremonies was Wyoming.²⁷⁵ Whereas the substantive issue was the same, the emphasis of the court’s legal analysis had changed from the previous cases. This time, the court separated the case into its “spiritual aspects” and its “legal aspects.”²⁷⁶ On the former point, the court reiterated its earlier view that “the Court is no place for determining traditional aspects of ceremonies.”²⁷⁷ Indeed, the Arapaho had unwritten law on spiritual matters, along with “police, prosecutors, and judges of the unwritten law.”²⁷⁸ These were the entities with jurisdiction over the spiritual matter. On the legal issue, however, the court found the tribal court “may, consistent with the 1975 Constitution and the Indian Civil Rights Act, enforce a Resolution of the Cheyenne-Arapaho Business Committee.”²⁷⁹ The court therefore upheld as “good law” the tribal resolution prohibiting the defendants “from proceedings with, holding, condoning . . . Arapaho ceremonies until they proceeded with such in a traditional manner,” and issued a permanent injunction to enforce it. The court further held that the Southern Arapaho defendants would have to sue the tribe directly on their Indian Civil Rights Act and freedom of religion claims.

Despite issuing the permanent injunction, the court voiced a “word of concern,” as follows:

Traditions of tribes vary. With some tribes I am familiar with, if a ceremony is “lost” then some tribes see it as gone forever and not to be restored or bad things will occur to the people. Other tribes say that only those with proper authority may revive the ceremony, and that it must be done in a certain way. I do not know the situation with the Arapaho (Southern and Northern) people, but please do not take this lightly.

Also, it is certain that the Arapaho have been separated in the neighborhood of 140 years. It is also certain that being separated can create the need for change or cause differences to occur between those separated. But the change was not created by the tribes, but rather by the United States government. That is to say, there is only a Southern and a Northern Arapaho because the United States put one group on a reservation in the South and the other on a reservation in the North. This means they are separate in terms of how the United States deals with them; thus there are governmentally distinct. This is a different idea than whether they are culturally, traditionally distinct. I would believe that at one point they were all the same people.²⁸⁰

Redman v. Birdshead did not end with the court’s permanent injunction order in 2005. In 2006, the Southern Arapaho defendants “began to erect an offerings

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lodge in preparation for an Arapaho Sun Dance in Oklahoma” and the Northern Arapaho plaintiffs sued for “contempt relief,” claiming the defendants were violating the court’s earlier injunction.²⁸¹ By this point, the tribal law landscape had changed in some important respects. The recently renamed “Cheyenne and Arapaho Tribes” of Oklahoma had adopted a new constitution that year. It contained a free exercise clause, prohibiting the tribe from making or enforcing “any law which infringes upon the religious or cultural beliefs or prohibits the free exercise clause thereof.”²⁸² But, at the same time, the new constitution expressly prohibited the tribal courts from exercising “jurisdiction over traditional matters such as the conduct of ceremonies.”²⁸³

Analyzing the case under the new constitution, the trial court of the Cheyenne-Arapaho Tribes vacated the 2005 permanent injunction, which had been based on the Resolution of Business Committee of the Cheyenne-Arapaho Tribes prohibiting the defendants from conducting any ceremony “purporting” to be a traditional Arapaho Sun Dance.²⁸⁴ In the court’s view, the resolution clearly violated the free exercise clause found in Article I, Section 1(a) of the new Constitution of the Cheyenne and Arapaho Tribes.²⁸⁵ Second, the court held, “it is clear the Court would not have jurisdiction over this matter” because the claim was about tribal members attempting to “conduct” a Sun Dance and Article VIII, Section 5(c) forbade the tribal courts from exercising jurisdiction “over traditional religious matters such as the conduct of ceremonies.”²⁸⁶ For these reasons, the Court vacated the injunction and refused to hear the contempt claims or otherwise exercise jurisdiction over the case.

Whether these holdings, and indeed the provisions of the constitution itself, are reconcilable is a difficult question. The trial court offered some reflections in dicta. First, it expressed deference to the “will of the Cheyenne-Arapaho people who overwhelmingly approved” the new constitution.²⁸⁷ At the same time, the court was concerned about the free exercise clause:

Whether you agree with Birdhead and Spottedwolf or agree with the manner in which they went about a Sun Dance is irrelevant under the new Constitution; the new Constitution protects them more than the Tribes. This law [the Business Council’s resolution] does prohibit free exercise of religion and must be found unconstitutional. . . . Hopefully, the drafters of the new Constitution thought about all this and the possibilities when they put this before the people for a vote. Hopefully, the people of the Cheyenne-Arapaho Tribes thought about this before voting.

The court reiterated its position, now confirmed by the constitution, that it was not the place for such disputes. The court expressed its hope that any further proceedings would be handled by “others with the traditional power of judge and jury” and that their decisions would be respected. Such respect was critical, the court concluded, to save tradition and avoid “bad things and times coming upon the Tribes and its people.”²⁸⁸

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The case of *Redman v. Birdshead* is a poignant one.²⁸⁹ It features many of the dynamics discussed in this chapter—an ancient and still vital tribal religion, a tribe and religion that have been persecuted by the United States, religious interference by outsiders (including an anthropologist), apparent attempts by some tribal members to revive a religious practice, and resistance by elders responsible for maintaining the traditional religion—all meeting in a legal proceeding where ICRA had been expressly adopted in the tribal constitution but where everyone knew that traditional custom remained a powerful force.²⁹⁰ Faced with this confluence of religion and law, the Cheyenne-Arapaho tribal court tried to defer to traditional dispute resolution; it tried to use custom as an interpretive device; and it tried to respect tribal legislation and a constitutional reform process that took place in the middle of the case. Only members of the Northern and Southern Arapaho tribes will know if the resolution of *Redman v. Birdshead* was a satisfactory one, but it is clear from the case that the issues were of critical importance to everyone involved.

CONCLUSION

Many indigenous peoples believe that spirituality is the key to their survival as distinct peoples.²⁹¹ For this reason, the law must treat religious matters carefully. Today, religious freedoms cases arising on reservations will be decided by tribal courts applying tribal law, either exclusively or in conjunction with the ICRA. Tribal constitutions offer a number of different types of religious freedoms provisions, ranging from language that incorporates 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. I agree that the assimilation critique of individual civil rights is applicable in the religious freedoms area and that it offers important cautions for tribal judges and lawmakers. Nevertheless, as I have suggested, tribes may have a variety of reasons for maintaining laws on individual religious freedoms and may be able to implement such laws in ways that reflect tribal values and enhance sovereignty. In such cases, individual rights may not trump collective interests as they would in the classic liberal tradition. Instead, in tribal communities, the relevant questions are often whether and how to reconcile individual and collective religious interests.²⁹² Given the importance of religion and spirituality to American Indian people, this area of law will likely see many developments in the coming years.

NOTES

This chapter is a revised and updated version of my article *Considering Individual Religious Freedoms under Tribal Constitutional Law*, 14 Kan. J.L. & Pub. Pol’y 561 (2005). With thanks to Samantha Greendeer and Kate Williams-Shuck for their research assistance.

1. See WILMA MANKILLER, EVERY DAY IS A GOOD DAY, REFLECTIONS BY CONTEMPORARY INDIGENOUS WOMEN 24 (2004) (quoting Gail Small, Northern Cheyenne).

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2. See generally MATTHEW L.M. FLETCHER, *AMERICAN INDIAN TRIBAL LAW* (2011); JUSTIN B. RICHLAND & SARAH DEER, *INTRODUCTION TO TRIBAL LEGAL STUDIES* (2004). As of 2010, there were 565 federally recognized Indian tribes. See Department of the Interior, Bureau of Indian Affairs, *Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs*, Federal Register, Vol. 75, No. 190, Friday, Oct 1, 2010, available at <http://www.bia.gov/idc/groups/xofa/documents/document/idc012038.pdf> (listing 564) and Federal Register, Vol. 75, No. 207, Wed., Oct 3, 2010, available at <http://www.bia.gov/idc/groups/xraca/documents/text/idc012025.pdf> (adding the Shinnecock Tribe).

3. See Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 *IDAHO L. REV.* 465 (1998) and sources cited *infra* notes 4–9.

4. See generally ERIC LEMONT, ED., *AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS* (2006); 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); 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.* (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) (“[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 Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 *CAL. L. REV.* 799 (2007) (considering individual Indian rights vis à vis traditions of liberal democracy and tribal sovereignty).

9. Feminist legal scholars, for example, have engaged in robust conversation 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) and Catharine MacKinnon, *Whose Culture? A Case Note on Martinez v. Santa Clara Pueblo* (1983), in *FEMINISM UNMODIFIED* 63 (1987); see also Gloria Valencia-Weber, *Three Stories in One: The Story of Santa Clara Pueblo v. Martinez*, in *INDIAN LAW STORIES* 451 (2011) (updating the debate from an indigenous perspective). 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 (2000); 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. See *Talton v. Mayes*, 163 U.S. 376, 381–82 (1895) (right to grand jury under the Fifth Amendment inapplicable in capital case before Cherokee Nation court).

11. See *id.*; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (rejecting individual equal protection claim against tribal government absent statutory provision of cause of action and waiver of sovereign immunity).

12. Indian Civil Rights Act of 1968, Pub. L. 90–284, Apr. 11, 1968, 82 Stat. 77–80, codified at 25 U.S.C. §§ 1301–1303.

13. See, e.g., Angela R. Riley, *Good (Native) Governance*, 107 *COLUM. L. REV.* 1049 (2007) (considering individual and collective Indian rights in the context of tribal governing practices) and sources cited in notes 7–14).

14. See Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 *ARIZ. ST. L.J.* 889 (2003) (and sources cited therein that are described in greater detail below).

15. See DAVID H. GETCHES, ROBERT A. WILLIAMS, JR., CHARLES F. WILKINSON AND MATTHEW L.M. FLETCHER, *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 141–152 (6th ed. 2011) (detailing federal statutes and policies comprising the allotment and assimilation era from 1871–1928).

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16. See, e.g., Kristen A. Carpenter, *Contextualizing the Losses of Allotment Through Literature*, 82 N. DAKOTA L. REV. 605 (2006); 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 (1997).

17. See *infra* notes 114–29.

18. See Goldberg, *supra* note 14, at 889–90.

19. *Id.* at 890.

20. See Riley, *supra* note 8, at 830–49.

21. See *Bear Lodge Multiple Use Assn v. Babbit*, 175 F.3d 814, 817 (10th Cir. 1999).

22. See 25 U.S.C. § 1302.

23. See *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 448 (1988) (“the Free Exercise Clause ‘affords an individual protection from certain forms of government compulsion. . . .’” (quoting *Bowen v. Roy*, 476 U.S. 693 (1986))).

24. *Lyng*, 485 U.S. at 459–60 (Brennan, J. dissenting) (internal quotations omitted). Brennan’s complaint about the poor fit between the free exercise clause and Native American religions is, of course, a contested point. Some scholars claim that “non-Christian religious outsiders,” including Jews, Muslims, and American Indians “have difficulty convincing the Court that their religious convictions are sincere and meaningful.” 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). Still others argue that religious practitioners in *general* receive “very little Constitutional protection” from the modern Supreme Court. See, e.g., Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. L. REV. 55, 60 (2006).

25. By “traditional tribal religions,” I refer to the spiritual and cultural practices arising out of indigenous communities (e.g., the Cherokee Stomp Dance or Iroquois Longhouse Religion), as contrasted with religions that originated elsewhere (e.g., Christianity). While commonly used among scholars and in Indian communities (See, e.g., Vine Deloria, Jr., *Religion and the Modern American Indian*, in *FOR THIS LAND: WRITINGS ON RELIGION IN AMERICA* 123 (1999) (describing Indians who maintain a “traditional religious life”), the term *traditional* is imprecise and open to interpretation. See, e.g., George Tinker, *Review Essay of James Treat, Around the Sacred Fire: Native Religious Activism in the Red Power Era: A Narrative Map of the Indian Ecumenical Conference* (2003), 20 WICAZO SA REVIEW 203, 204–05 (2005) (discussing the “contested” nature of the term *traditional* in Indian religious and other matters). Moreover, there are many examples of syncretic religions, such as the Native American Church, the Indian Shaker Church, the Handsome Lake Religion, and others that embrace “traditional” indigenous and “Christian” elements.

26. See VINE DELORIA, JR., *GOD IS RED* 194 (1992).

27. *Lyng*, 485 U.S. at 451.

28. Professor Goldberg describes a number of nuances and counterpoints to her argument, noting for example that scholars such as Will Kymlicka and Aviam Soifer “advance a creative vision of individual rights as a basis for supporting and protecting the sovereignty of Indian nations.” See Goldberg, *supra* note 14, at 890.

29. For a series of works theorizing the connection between American Indian spirituality and political sovereignty, see GEORGE E. “TINK” TINKER, *AMERICAN INDIAN LIBERATION: A THEOLOGY OF SOVEREIGNTY* (2008); GEORGE E. “TINK” TINKER, *SPIRIT AND RESISTANCE: POLITICAL THEOLOGY AND AMERICAN INDIAN LIBERATION* (2004); and CLARA SUE KIDWELL, HOMER NOLEY, AND GEORGE E. “TINK” TINKER, *A NATIVE AMERICAN THEOLOGY* (2001).

30. Most of the cases discussed in this chapter involve an individual tribal member’s religious freedoms claims vis à vis a tribal government. Of course, nonmembers may also bring lawsuits in tribal court. See, e.g. Bethany Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 AZ. ST. L. J. 1047, 1067 (2005) (“For many nonmember plaintiffs, tribal court is the only option”). Whether the plaintiff is a member or nonmember, the question of jurisdiction will depend on whether the tribal government has waived its sovereign immunity.

31. See generally Inés Hernandez-Avila, *Mediations of the Spirit: Native American Religious Traditions and the Ethics of Representation*, in *NATIVE AMERICAN SPIRITUALITY* 11–36 (2000).

32. MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 988 (10th ed. 1998).

33. *Dikaneisdi (Word List)*, CHEROKEE NATION, <http://www.cherokee.org/Culture/Dikaneisdi.aspx?Tab=Culture> (last visited March 2, 2011).

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34. JACE WEAVER, *OTHER WORDS: AMERICAN INDIAN LITERATURE, LAW, AND CULTURE* 301 (2001). See also VIRGINIA M. SOBRAL AND HOWARD L. MEREDITH, EDs., *AJALAGI NUSDV NVGOHV ELOHI: CHEROKEE VISION OF ELOHI* (1997) (translated by Wesley Proctor) (book-length bilingual treatment of the Cherokee concept of “*elohi*”).

35. See MANKILLER, *supra* note 1, at 11–16.

36. See generally Barre Toelken, *The Demands of Harmony*, in *I BECOME A PART OF IT: SACRED DIMENSIONS IN NATIVE AMERICAN LIFE* 59–71 (1989).

37. James W. Zion, *Navajo Therapeutic Jurisprudence*, 18 *TOURO L. REV.* 563, 603–04 (2002).

38. Henrietta Mann, *Earth Mother and Prayerful Children: Sacred Sites and Religious Freedom*, in *NATIVE VOICES: AMERICAN INDIAN IDENTITY AND RESISTANCE* 194–209 (2003).

39. See CHARLES E. LITTLE, *SACRED LANDS OF INDIAN AMERICA* 133 (2001).

40. MANKILLER, *supra* note 1, at 13.

41. Compare Marcy C. Churchill, *Purity and Pollution, Unearthing an Oppositional Paradigm in the Study of Cherokee Religious Traditions*, *supra* note 31, at 212–13 (describing some of the ways that scholars’ inaccurate presumptions about Cherokee origins may lead to questionable conclusions about religious and cultural matters); TINKER, *SPIRIT AND RESISTANCE*, *supra* note 29, at 79–87 (criticizing book on Lakota spirituality).

42. See Christopher Ronwani:te Jocks, *Spirituality for Sale, Sacred Knowledge in the Consumer Age*, *supra* note 31, at 61–77 (reflecting on “what is or not to be shared with outsiders, in relation to traditional thought and practice” with specific grounding in Iroquois Longhouse ceremonies and stories).

43. See, e.g., *Sweat lodge deaths investigated as homicides*, CNN.COM, October 15, 2009, <http://www.cnn.com/2009/US/10/15/arizona.sweat.lodge/index.html> and ‘Sweatbox’ victims were attending ‘Spiritual Warrior’ program, CNN.COM, October 10, 2009, <http://www.cnn.com/2009/US/10/10/sweat.lodge.deaths/index.html> (news articles describing death of two individuals and injuries to dozens of others partaking in a “sweat lodge” led by non-Indian “self-help author” James Ray as part of a “spiritual warrior” program with apparent inspiration from “Native American” traditions).

44. See Dussias, *supra* note 16, at 787–805 (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); GEORGE E. TINKER, *MISSIONARY CONQUEST: THE GOSPEL AND NATIVE AMERICAN CULTURAL GENOCIDE* (1993).

45. See *Bear Lodge*, 175 F.3d at 817 (internal quotations and citations omitted).

46. See American Indian Religious Freedom Act, Public Law 95–341, August 11, 1978, 92 Stat 469, codified at 42 U.S.C. § 1996 and 1996a.

47. See *Lyng*, 485 U.S. at 447–49 (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). 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).

48. See *Navajo Nation v. United States Forest Service*, 535 F.3d 1058 (9th Cir. en banc 2008), *cert. denied* 129 S.Ct. 2763 (2009).

49. Accordingly, much of my scholarship focuses on challenges to tribal religious freedom, especially in the sacred sites context. 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); Kristen A. Carpenter, *Old Ground and New Directions at Sacred Sites on the Western Landscape*, 83 *DENV. UNIV. L. REV.* 981 (2006); Kristen A. Carpenter, *The Interests of “Peoples” in the Cooperative Management of Sacred Sites*, 42 *TULSA L. REV.* 37 (2006); Kristen A. Carpenter, *Real Property and Peoplehood*, 27 *STAN. ENV. L.J.* 313 (2008); Kristen A. Carpenter, *In Defense of Property*, 118 *YALE L.J.* 1022 (2009) (with S. Katyal & A. Riley). See also 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”).

50. See, e.g., *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (1959) (tribal religious practitioners who were members of the Native American Church sue tribal government to enjoin anti-peyote legislation); *Toledo v. Pueblo de Jemez*, 119 F.Supp. 429 (D.N.M. 1954) (tribal members who were Protestant

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sued the tribal government for various acts allegedly violating their religious freedom).

51. See generally LEMONT, *supra* note 4; Porter, *supra* note 4.

52. See, e.g., Michelene E. Pensatubbee, *Religious Studies on the Margins: Decolonizing our Minds*, *supra* note 38, at 209–22 (discussing the state of academic studies pertaining to Native religious traditions).

53. See, e.g., Richard A. Grounds, *Yuchi Travels: Up and Down the Academic “Road to Disappearance,”* *supra* note 38, 306–10 (noting that he would not publicly disclose certain Yuchi cultural or religious traditions).

54. See, e.g., THOMAS BIOLSI AND LARRY J. ZIMMERMAN, *INDIANS AND ANTHROPOLOGISTS: VINE DELORIA, JR., AND THE CRITIQUE OF ANTHROPOLOGY* (1997) (on the relationship between Indians and anthropologists).

55. U.S. CONST. amend. I.

56. See Robert Odawi Porter, *The Inapplicability of American Law to the Indian Nations*, 89 IOWA L. REV. 1596, 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”).

57. Talton, 163 U.S. at 381–82 (the right to a grand jury under the Fifth Amendment is inapplicable in capital cases before the Cherokee Nation court).

58. See *Native American Church of North America v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959).

59. OMER STEWART, *PEYOTE RELIGION: A HISTORY* 296 (1987).

60. See *id.*

61. See *Native American Church*, 272 F.2d at 132.

62. *Id.* at 134.

63. *Id.*

64. See Ann E. Beeson, *Dances with Justice: Peyotism in the Courts*, 41 EMORY L.J. 1121, 1140 (1992). As Beeson has pointed out, “the irony of this set of events seems incredible given the . . . treatment of peyotism in the American courts.”

65. *Toledo v. Pueblo de Jemez*, 119 F.Supp. 429 (D.N.M. 1954).

66. *Id.* at 430.

67. *Id.*

68. *Id.*

69. *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.

70. *Id.* at 432.

71. 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).

72. 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) (“Congress has plenary authority to legislate for Indian tribes in all matters”). Compare Porter, *supra* note 56, 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”).

73. See *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).

74. See 25 U.S.C. §§ 1301–1303. See also *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).

75. 25 U.S.C. §§ 1302. The full list of protections is:

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion or abridging the free-

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dom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) 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;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) 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;

(7) 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;

(8) 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;

(9) pass any bill of attainder or ex post facto law; or

(10) 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.

76. 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).

77. RICHLAND & DEER, *supra* note 2, at 248. *See also* BRUCE ELLIOT JOHANSEN, ED., THE ENCYCLOPEDIA OF NATIVE AMERICAN LEGAL TRADITION, 260 (1998) (some Pueblos are governed by a religious leader). *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).

78. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

79. 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”).

80. *Compare* 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” providing sufficient basis for jurisdiction under ICRA’s habeas corpus provision), with *Shenandoah v. Halbritter*, 366 F.3d 89 (2nd Cir. 2004) (allegation that tribe’s housing ordinance was used to retaliate against residents who resisted tribal leadership was insufficient for habeas jurisdiction under ICRA).

81. *Santa Clara*, 436 U.S. at 62. *See also* Means v. Wilson, 383 F.Supp. 378 (D.S.D. 1974) (purpose of ICRA is to “enhance civil liberties of individual Indians without unduly undermining Indian self-government and cultural autonomy”), *aff’d* in part, *rev’d* in part on other grounds, 533 F.2d 833 (8th Cir.(S.D.) 1975), *cert. denied*, 424 U.S. 958 (1976).

82. *See* *Martinez*, 436 U.S. at 72, n. 32 (“A tribe’s right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community. . . . Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters”).

83. *See* Tebben, *supra* note 76, at 188.

84. *See* Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L.J. 137 (2004). *See also* RICHLAND & DEER, *supra* note 2, at 260. *Compare* Goldberg, *supra* note 14, at 899 (The highest court of the Hopi tribe “has taken the position that the Indian Civil Rights Act is not necessarily binding law”).

85. *See* Struve, *supra* note 84, at 157.

86. For a broader 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

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AM. INDIAN L. REV. 269, 276–78 (1990). In addition to Rusco's article, I reviewed roughly one hundred tribal constitutions available on the Web sites of some individual tribes and on the following online resources: *The National Indian Law Library's Online Collection of Tribal Codes and Constitutions*, NARF.ORG, <http://www.narf.org/nill/triballaw/onlinedocs.htm>; *Native American Constitution and Law Digitization Project*, U. OF OKLAHOMA, <http://madison.law.ou.edu/const.html>; *The Tribal Court Clearinghouse*, TRIBAL L. AND POL. INST., <http://www.tribal-institute.org/lists/constitutions.htm>. I did not review constitutions existing only in print nor attempt to find online tribal constitutions outside the databases listed above. Thus my chapter does not offer an exhaustive survey of tribal religious freedoms provisions nor does it offer any general conclusions supported by statistical data. Rather I discuss certain *examples* of tribal constitutional approaches to religious freedoms as potentially illuminating to what I see as a tribe-specific inquiry into the dynamics of assimilation and sovereignty vis à vis individual rights. A more complete survey would attempt to examine all of the available tribal constitutions and legislative codes, as well as customary, decisional, and regulatory law, on tribal religious freedoms.

87. CROW TRIBAL CONST., art. XI, § 4 (2002), available at http://www.tribalresourcecenter.org/ccfolder/crow_const.htm.

88. CONST. AND BYLAWS OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS, art. X, § 1, available at http://www.tribalresourcecenter.org/ccfolder/mississippi_choctaw_const.htm.

89. CONST. OF THE SKOKOMISH INDIAN TRIBE, art. IX, available at <http://doc.narf.org/nill/Constitutions/skoconst/skokomishconst.htm#const9>.

90. CONST. OF THE MIAMI TRIBE OF OKLAHOMA, art. VII (1995), available at <http://doc.narf.org/nill/Constitutions/miamiconst/miamiconst.htm#artvii>.

91. CONST. OF THE BIG LAGOON RANCHERIA, art. IV (1985), available at <http://doc.narf.org/nill/Constitutions/lagoonconst/biglagconst.htm#art4>.

92. CONST. 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>.

93. CONST. OF THE CHOCTAW NATION OF OKLAHOMA, art. IV, § 2 (1983), available at <http://doc.narf.org/nill/Constitutions/choctawconst/choctawconst.htm#a4>. See *infra* notes 111–128 for a discussion of similar language originating from the Indian Reorganization Act and federal models for tribal constitutions emerging in the 1930s.

94. CONST. OF THE MUSCOGEE CREEK NATION, art. IV, § 2 (1995), available at <http://thorpe.ou.edu/constitution/muscogee/index.html>

95. Compare CONST. OF THE WAMPANOAG TRIBE OF GAY HEAD (Aquinnah), art. III, § 3 (b) (1995), available at <http://thorpe.ou.edu/constitution/wampanoag/index.html> (“[T]he tribal council shall . . . ensure that tribal members have free access to the clay in the cliffs on an equal basis provided that such access is subject to reasonable regulation in order to protect and preserve the resource”). See also Wampanoag Tribe of Gay Head Web site http://www.wampanoagtribe.net/Pages/Wampanoag_Way/aquinnah (on significance of The Aquinnah Cliffs) and http://www.wampanoagtribe.net/Pages/Wampanoag_Way/other (providing information for “visitors” including “It is prohibited to take clay from the Aquinnah Cliffs, climb on them, or otherwise disturb the Cliffs in any way”).

96. CONST. OF THE IROQUOIS NATIONS, available at <http://www.indigenouspeople.net/iroqcon.htm>.

97. 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”). Sources commonly situate Dekanawidah between 1450 and 1525. Professor Porter indicates, in a substantial discussion of Iroquois or Haudenosaunee law, that the Iroquois Confederacy was formed through the Five Nations' acceptance of the Gayanashagowa “some time before Columbus.” See Robert B. Porter, *Building a New Longhouse: The Case for Government Reform Within the Six Nations of the Haudenosaunee*, 46 BUFF. L. REV. 805, 810 (1998).

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98. CONST. OF THE IROQUOIS NATIONS at para. 99–104.

99. 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 86, at 276–78.

100. See LAND POLICY AND CONSTITUTION OF THE PEOPLE OF BILL MOORE'S SLOUGH (1988), available at <http://thorpe.ou.edu/constitution/billmoores/index.html>. (This chapter follows the somewhat irregular use of possessives in the Bill Moores Slough Constitution.) While too long to reprint here, the Yurok Tribe's Constitution has extensive and detailed provisions on traditional religion and culture. See *Constitution of the Yurok Tribe* (1993), available at <http://www.yuroktribe.org/government/councilsupport/documents/Constitution.pdf>.

101. LAND POLICY AND CONSTITUTION OF THE PEOPLE OF BILL MOORE'S SLOUGH at Preamble.

102. *Id.* at Art I, II.

103. CONST. OF THE POARCH BAND OF CREEK INDIANS, pmbl. (Adopted June 1, 1985), available at <http://doc.narf.org/nill/Constitutions/poarchconstitution/poarchconsttoc.htm>.

104. *Id.* at art. II.

105. CONST. OF THE WHITE MOUNTAIN APACHE TRIBE OF THE FORT APACHE INDIAN RESERVATION ARIZONA, art.V (1993) available at <http://thorpe.ou.edu/codes/wmtnapache/Constitution.html>.

106. See WHITE MOUNTAIN APACHE GOV'T 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.

107. RICHLAND & DEER, *supra* note 2, at 265 (citing Colville Tribal Civil Rights Act, Ch. 1–5 (adopted Feb. 4, 1988, resolution 1988–76, certified Feb. 16, 1988)).

108. See, e.g., The Navajo Nation Bill of Rights, 1 N.N. C., Sec 4 (free exercise and establishment clauses), available at <http://www.navajocourts.org/Harmonization/NavBillRights.htm>; The Fundamental Law of the Dine (religion and spiritual provisions throughout), available at <http://www.navajocourts.org/dine.htm>.

109. Again, for a broader survey of constitutional civil rights provisions, including detailed analysis of religious freedoms, see Rusco, *supra* note 86, at 275–76.

110. See Goldberg, *supra* note 14, at 889.

111. *Id.* (citing Robert B. Porter, *Strengthening Tribal Sovereignty through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 278 (1997)).

112. Goldberg, *supra* note 14, at 889 (citing VINE DELORIA, JR., & CLIFFORD M. LYTLE, *THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY* 213 (1984) (internal quotations and changes omitted)).

113. Goldberg, *supra* note 14, at 889 (citing Professor Kevin Washburn, Remarks at the Arizona State University College of Law Goldwater Lecture on American Institutions (Feb. 20, 2003)).

114. For an historical overview, see Goldberg, *supra* note 14, at 892–99.

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115. See CHARLES WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* 60–62 (2005).

116. See GETCHES ET AL., *supra* note 15, at 189–194 (excerpting Comment, Tribal Self-Government and the Indian Reorganization Act of 1934, 70 MICH. L. REV. 955, 955–79 (1972)). Initially 181 tribes voted to accept, and 71 tribes voted to reject, the IRA. At the end of twelve years, there were 161 tribes with constitutions and 131 with corporate charters.

117. See GETCHES ET AL., *supra* note, 15 at 195–97 (describing Hopi experiences with the IRA); see also Stephen Cornell and Joseph P. Kalt, *Where Does Economic Development Really Come From? Constitutional Rule Among the Contemporary Sioux and Apache*, 33 ECON. INQUIRY 402 (1995); Joseph P. Kalt, *The Role of Constitutions in Native Nation Building: Laying a Firm Foundation*, in MIRIAM JORGENSEN, ED., *REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT* (2007).

118. See FELIX S. COHEN, *ON THE DRAFTING OF TRIBAL CONSTITUTIONS* (David E. Wilkins, ed., 2006); DALIA TSUK MITCHELL, *ARCHITECT OF JUSTICE, FELIX S. COHEN AND THE FOUNDING OF AMERICAN LEGAL PLURALISM* (2007).

119. COHEN *supra* note 118, at xxvi–xxvii.

120. See *id.* at xxvi–xxvii (Cohen was “opposed to sending out canned constitutions” to tribes and he made clear his view “that constitutions must be worked out in the first place by the Indians in the field”).

121. See *id.* at 173–82.

122. See *id.* at 76–78.

123. See WILKINSON, *supra* note 115, at 60.

124. 25 U.S.C.A 476 (c).

125. 25 U.S.C.A 476 (c)(3).

126. 25 U.S.C.A 476(d).

127. Compare Kirsty Gover, *Comparative Tribal Constitutionalism: Membership Governance In Australia, Canada, New Zealand, And The United States*, 35 LAW & SOC. INQUIRY 689, 708 (2010) (“About half of US tribes are organized under the IRA and are required by the act to gain the approval of the secretary of the interior for new constitutions and constitutional amendments, but the review power is only rarely used. . . . The secretarial review power is controversial and its scope remains unclear”).

128. See 25 U.S.C.A sec. 476(a)

Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when—

(1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and

(2) approved by the Secretary pursuant to subsection (d) of this section.

See also ROBERT T. ANDERSON, BETHANY BERGER, PHILIP P. TRICKEY & SARAH KRAKOFF, *AMERICAN INDIAN LAW: CASES AND COMMENTARY* 137–40 (2008) (reprinting the 1936 constitution and bylaws of the Hopi Tribe, including art. VI’s provision that the Hopi Constitution shall be ratified by a majority of the adult voters of the tribe “at a referendum called for the purpose by the Secretary of the Interior” and then “submitted to the Secretary of the Interior, and if approved, shall take effect from the date of approval”).

129. Goldberg, *supra* note 14, at 895.

130. See, e.g., *In re Status of the 1999 Constitution*, 9 Okla. Trib. 392 (Cherokee Sup. Ct. 2006) (describing the Cherokee Nation’s 1975 Constitution requiring approval by the secretary of the Interior and its 1999 constitution not requiring such approval). This decision and the two Cherokee constitutions are described in greater detail below; see *infra* notes 249–56.

131. See Goldberg, *supra* note 14, at 892 (“A combination of heavy pressure from federal laws and administration, inculcation of non-Indian values through federally supported missionaries and boarding schools, and a desire by tribes to fend off jurisdictional challenges likely explains how these individual rights protections developed in tribal law”).

132. See *Lyng*, 485 U.S. at 447–49. See also Amy Bowers and Kristen A. Carpenter, *The Story of Lyng v. Northwest Indian Cemetery Association: Challenging the Narrative of Conquest*, in *INDIAN LAW STORIES* (2010).

133. *Lyng*, 485 U.S. at 450–51.

134. *Id.* at 451.

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135. See *Smith*, 494 U.S. at 890. See also GARRETT EPPS, *TO AN UNKNOWN GOD, RELIGIOUS FREEDOM ON TRIAL* (2001) and CAROLYN N. LONG, *RELIGIOUS FREEDOM AND INDIAN RIGHTS: THE CASE OF OREGON V. SMITH* (2000) (both analyzing the *Smith* case).

136. See *Smith*, 494 U.S. at 890.

137. See WEAVER, *supra* note 34, at 180.

138. See *infra* notes 226–48, 261–90 and accompanying text discussing tribal court cases interpreting individual religious freedoms laws.

139. See GETCHES ET AL., *supra* note 15, at 412 (describing that tribal courts face the task of “blending the old with the new”).

140. See generally Russel Lawrence Barsh, *Putting the Tribe in Tribal Courts: Possible? Desirable?*, 8 KAN. J.L. & PUB. POL’Y 74 (1999); Goldberg, *supra* note 14, 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”). Matthew Fletcher has theorized that tribal courts are likely to apply the internal, customary law of the tribe (“intratribal law”) to matters involving tribal members, especially those matters growing out of an “indigenous legal construct”—and to apply law resembling or borrowed from state and federal sources (“intertribal law”) to matters involving nonmembers, especially those matters growing out of an “Anglo-American legal construct.” Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 HOUS. L. REV. 701, 718–32 (2006). It would be interesting, in a subsequent article, to evaluate this theory in the context of religious freedoms cases.

141. See *infra* notes 226–48 and accompanying text (discussing *Townsend* and *Garcia* cases).

142. See DELORIA, *GOD IS RED*, *supra* note 26, 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”).

143. Dean B. Suagee, *The Cultural Heritage of American Indian Tribes and the Preservation of Biological Diversity*, 31 ARIZ. ST. L. J. 483, 510 (1999).

144. *Id.*

145. Compare RICHLAND & DEER, *supra* note 2, at xviii (“We realize that . . . accounts [by non-Indian historian and anthropologists] 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”).

146. RUTH M. UNDERHILL, *RED MAN’S RELIGION* 209–10 (1965). Ruth Underhill’s methodology has been the subject of some critical commentary, including that of Native “informants” and “interpreters” who worked with her. See, e.g., SUSAN BERRY BRILL DE RAMÍREZ, *NATIVE AMERICAN LIFE-HISTORY NARRATIVES, COLONIAL AND POST-COLONIAL NAVAJO ETHNOGRAPHY* 75 (2007).

147. UNDERHILL, *supra* note 146, at 116.

148. *Id.* at 142.

149. See *Northwest Indian Cemetery Protective Ass’n v. Peterson*, 565 F.Supp. 586, 591–92 (N.D. Cal. 1983).

150. *Id.* at 592.

151. See *Lyng*, 485 U.S. at 458.

152. MANKILLER, *supra* note 1, at 15.

153. *Id.* at 16–17.

154. Navajo Nation Council Resolution CD-107-94 (Dec. 13, 1994).

155. See generally Dussias, *supra* note 16. See also *Bear Lodge*, 175 F.3d at 819.

156. 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) (describing assimilationist programs).

157. 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”); See MANKILLER, *supra* note 1, at 37 (“You have to be able to speak Cherokee to be a

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Cherokee medicine person. How can you say the right words if you can't speak Cherokee?") (quoting Florence Soap).

158. See RICHLAND & DEER, *supra* note 2, at 313–22 (on traditional dispute resolution forums).

159. See *infra* notes 244–48 and 261–90 (discussing the cases).

160. Compare Matthew L.M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence*, 13 MICH. J. RACE & L. 57, 82 (2007) (describing the challenges of utilizing customary law in tribal court decision making).

161. See *Thlopthlocco Tribal Town v. Tomah*, 8 Okla. Trib. 451, 2004 WL 5744828 (Muscogee 2004).

162. *Id.* See also Bowers and Carpenter, *supra* note 128 at 500 (describing role of Courts of Indian Offenses in late-nineteenth-century religious suppression).

163. See GETCHES ET AL., *supra* note 15, at 408–26.

164. See generally Porter, *supra* note 56 (on the incompatibility of adversarial Anglo-American legal institutions and with indigenous societies and traditions).

165. Compare RICHLAND & DEER, *supra* note 2, at 323–31 (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).

166. 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”).

167. Compare Goldberg, *supra* note 14, at 910–29 (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”).

168. RICHLAND & DEER, *supra* note 2, at 239.

169. *Id.*

170. *Id.* at 240 (quoting James W. Zion in *Civil Rights in Navajo Common Law*, 50 U. KAN. L. REV. 523 (2001), on the Navajo concept of “individualism”).

171. 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).

172. Rebecca Tsosie, *Introduction: Symposium on Cultural Sovereignty*, 34 ARIZ. ST. L.J. 1, 7 (2002) (quoting Duane Champagne, *Challenges to Native Nation Building in the 21st Century*, 34 ARIZ. ST. L.J. 47, 50 (2002)).

173. KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY* (1941). I acknowledge, as others have, that this source is somewhat problematic but try to draw useful points from it.

174. *Id.* at 9.

175. *Id.* at 10.

176. *Id.*

177. *Id.*

178. See *id.* at 11.

179. *Id.*

180. *Id.* at 11–12.

181. *Id.* at 12.

182. See *id.* at 9–12.

183. *Id.* at 12.

184. See ELLA CARA DELORIA, *WATERLILY* x (1988). Deloria wrote in the 1940s and *Waterlily* was published after her death.

185. *Id.* at 3.

186. See *id.* at 113.

187. *Id.* at 17.

188. *Id.*

189. *Id.* at 18.

190. *Id.*

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191. Vine Deloria, Jr. (b. 1933) and Ella Cara Deloria (b. 1889) were members of the same prominent Dakota Family in which several members were leaders in traditional spirituality 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).

192. DELORIA, *GOD IS RED*, *supra* note 26, at 195.

193. *Id.* at 196.

194. *Id.* at 196–97. Compare Melissa A. Pflug, *Pimadaziwin: Contemporary Rituals in Odawa Community*, in Irwin, *supra* note 31, at 127 (suggesting a distinction between “personal prayer” and “communal ceremonies”).

195. DELORIA, *GOD IS RED*, *supra* note 26, at 198.

196. *Id.* at 197.

197. 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). Porter describes the major event in Seneca history when Handsome Lake, the half-brother of the Seneca War Chief Cornplanter, had in 1799 the first of a series of visions setting forth religious and secular solutions for problems in Seneca society at the time. Handsome Lake's subsequent visions 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.

198. 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).

199. See generally STEWART, *supra* note 59.

200. See DELORIA, *GOD IS RED*, *supra* note 26.

201. See MANKILLER, *supra* note 1, at 37 (quoting Florence Soap).

202. *Id.* at 26–27 (quoting LaDonna Harris).

203. See *id.* at 27.

204. 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).

205. 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).

206. *Id.*

207. See *id.* at 33 (“Spirituality is a very private matter” that need not be demonstrated outwardly to others). Navajo law recognizes property rights in 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”).

208. See MANKILLER, *supra* note 1, at 33 (“The emphasis is on the collective, for no one medicine person could emit the power that the participating collective puts forth”).

209. See *id.* at 26.

210. See, e.g., James W. Zion, *Civil Rights in Navajo Common Law*, in RICHLAND & DEER, *supra* note 2, at 240 (on the Navajo concept of “individualism”).

211. See generally NOAH FELDMAN, *DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM AND WHAT WE SHOULD DO ABOUT IT* (2006) (situating current religious disputes in American religious freedoms history).

212. See G. Peter Jemison, *The Journey*, 7 ST. THOMAS L. REV. 433, 435 (1995) (“Our [Seneca] religion and

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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”).

213. 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”).

214. See generally RICHLAND & DEER, *supra* note 2, at 283–88 (on the challenges of making law meaningful in tribal communities today).

215. See Goldberg, *supra* note 14, 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”).

216. 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”).

217. See, e.g., *Nevada v. Hicks*, 533 U.S. 353, 383–84 (2001) (Kennedy J., Souter, J., and Thomas, S. concurring) (discussing the “special nature” of tribal courts and potential effects on non-Indian parties).

218. See DELORIA, *GOD IS RED*, *supra* note 26, 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”).

219. According to Ann Beeson, 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 was also supportive of the peyote users. See Beeson, *supra* note 64, at 1139 (1992). Viewed in this light, 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.”

220. See RICHLAND & DEER, *supra* note 2, at 286.

221. See Elizabeth E. Joh, *Custom, Tribal Court Practice, and Popular Justice*, 25 AM. INDIAN L. REV. 117, 120 (2001).

222. See 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).

223. See Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 Hous. L. REV. 701 (2006); Matthew L.M. Fletcher, *Looking to the East: the Stories of Modern Indian People and the Development of Tribal Law*, 5 SEATTLE J. FOR SOC. JUST. 1 (2006); Matthew L.M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence*, 13 MICH. J. RACE & L. 57 (2007); Matthew L.M. Fletcher, *The Supreme Court’s Legal Culture War Against Tribal Law*, 2 INTERCULTURAL HUM. RTS. L. REV. 93 (2006).

224. See, e.g., *In re Validation of Marriage of Loretta Francisco*, 6 NAV. REP. 134, 16 Indian L. Rep 6113 (1989).

225. *Id.*

226. *Townsend v. Port Gamble S’Klallam Housing Authority*, 6 NICS App. 179 (citing *Braunfield v. Brown*, 366 U.S. 599, 605 (1961) (state may prohibit retailers from operating on Sunday even if this disadvantages Jewish retailers whose religion also requires them to close on Saturday)).

227. *Id.*

228. *Id.*

229. *Id.*

230. *Garcia v. Greendeer-Lee*, 30 Indian L. Rep. 6097 (Ho-Chunk Sup. Ct. 2003).

231. Matthew L.M. Fletcher, *Resisting Congress Free Speech and Tribal Law*, THE INDIAN CIVIL RIGHTS ACT AT FORTY (2012).

232. See THE CONSTITUTION OF THE HO-CHUNK NATION, Art. 10, Sec 1., available at, <http://www.ho-chunknation.com/?PageId=294>.

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233. See *Hoover v. Colville Confederated Tribes*, 3 CTCR 43, 6 CCAR 16, (2002), available at <http://www.tribal-institute.org/opinions/2002.NACC.0000004.htm>. See also *Hoopa Valley Tribe v. Bugenig*, 5 NICS App. 37 (Hoopa Valley Tribal Court of Appeals 1998) (affirming tribe's authority to prohibit logging in an areas designated by the tribal council as a "buffer zone" around a sacred site). Additionally Justin Richland's recent book on Hopi jurisprudence describes various ways in which concepts like tradition and evidence about ceremonial obligations and clan relationships affect property disputes. See JUSTIN B. RICHLAND, *ARGUING WITH TRADITION: THE LANGUAGE OF LAW IN HOPI TRIBAL COURT* 56–57, 71–72 (2008).

234. *Hoover*, 3 CTCR 43 (2002).

235. *Id.* The question of tribal authority over nonmembers, though beyond the scope of this chapter, is largely governed by *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").

236. *Hoover*, 3 CTCR 43 (2002) (citing *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201 (9th Cir. 2001)).

237. *Id.*

238. *Id.*

239. *Id.*

240. See *Hoover*, 3 CTCR 43 (2002) (emphasis added).

241. See *id.*

242. See Mary Jo B. Hunter, *Tribal Court Opinions: Justice and Legitimacy*, 8-WTR KAN. J.L. & PUB. POL'Y 142 (1999). See also *Government*, HO-CHUNK NATION, <http://www.ho-chunknation.com/?PageId=3> (describing tribal constitution, court system, and boards and committees of the nation).

243. Valencia-Weber, *supra* note 217, at 251–52.

244. See *Elk Horn Society v. Red Hat*, 3 Okla. Trib. 327 (1990).

245. See *id.*

246. See *In re The Sacred Arrows*, 3 Okla. Trib. 332 (1990). See also McCarthy, *supra* note 3, at 496–97 (describing the cases).

247. *In re The Sacred Arrows*, 3 Okla. Trib. at 338 (1990). I do not know the ultimate fate of the Sacred Arrows following this opinion.

248. Compare WILLIAM WAYNE RED HAT, JR., *CHEYENNE KEEPER OF THE ARROWS* (2008).

249. 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").

250. See 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); D. Jay Hannah, *The 1999 Constitution Convention of the Cherokee Nation*, 35 ARIZ. ST. L.J. 1 (2003).

251. CONST. OF THE CHEROKEE NATION OF OKLA. of 1975, available at, <http://thorpe.ou.edu/constitution/chokeee/index.html>.

252. CONST. OF THE CHEROKEE NATION (1999) (approved by the Cherokee citizens and Election Council in 2003, ruled effective and ordered implemented by the Cherokee Nation Judicial Appeals Tribunal in 2006), available at http://www.cherokee.org/Docs/TribalGovernment/Executive/CCC/2003_CN_CONSTITUTION.pdf.

253. There were some comments about religion submitted by tribal citizens in the "Pre-Convention" testimonial phase. See, e.g., Letter of Robert McCoy Wood to Constitutional Convention Commission, Cherokee Nation (Nov. 4, 1998), available at <http://www.cherokee.org/docs/tribalgovernment/executive/CCC/Written.htm> (suggesting an elders' board be established in the new constitution to advise the principal chief on religious and cultural matters including repatriation). This suggestion does not appear to have been adopted.

254. Cherokee Nation Constitution Convention, Transcript of Proceedings, Volume 1 (February 27, 1999), available at <http://www.cherokee.org/Docs/TribalGovernment/Executive/CCC/vol2.htm> (Comments of

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Mr. Hoskin, Jr.) (“I’d like to stress that enumerating our own Bill of Rights as opposed to just by implication taking the Indian Civil Rights Act, will allow us to develop our own notions of due process and protection, which I think is important for any sovereign people who are concerned with individual rights”). This portion of the transcript contains substantive debate about various individual rights proposed in the new constitution.

255. CHEROKEE CONSTITUTION of 1827, art. VI, § 3 (“The free exercise of religious worship and serving God without distinction shall forever be allowed within this Nation, provided that this liberty of conscience, shall not be so construed, as to excuse acts of licentiousness, or Justify practices inconsistent with the peace and safety of this Nation”) (note: sources vary for the 1827 constitution and in some, the enumeration of articles and sections differs); CONSTITUTION OF THE CHEROKEE NATION of 1839, Art. VI, § 2 (same). Of course many have argued that the Cherokees’ 1827 constitution was enacted as a means of showing the outside world that the tribe was “civilized.” For various views of “traditional” Cherokee religion, *see, e.g.*, JAMES MOONEY, MYTHS OF THE CHEROKEES AND SACRED FORMULAS OF THE CHEROKEES (reprinted in 2007); FRED GEARING, PRIESTS AND WARRIORS: SOCIAL STRUCTURES FOR CHEROKEE POLITICS IN THE 18TH CENTURY (1962); and JACK FREDERICK KILPATRICK AND ANNA GRITTS KILPATRICK, FRIENDS OF THUNDER: FOLKTALES OF THE OKLAHOMA CHEROKEES (1995). *See also* RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT (1975) (discussing the evolution of Cherokee traditional laws).

256. *See In re Status of the 1999 Constitution*, 9 Okla. Trib. 392 (Cherokee Sup. Ct., 2006).

257. FORT MOJAVE CONST., art. V, § 2 (cited in RICHLAND & DEER, *supra* note 2, at 264).

258. *See* Rusco, *supra* note 86, at 277–78.

259. *See infra* note 286 (and accompanying text) (describing that the new constitution of the Cheyenne and Arapaho tribes prohibits tribal courts from exercising jurisdiction over traditional religious matters).

260. *Compare* Goldberg, *supra* note 14, 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”).

261. *Redman v. Birdshead*, 9 Okla. Trib. 660 (Chey.-Arap. D.Ct., 2003).

262. *Id.*

263. For just one example of many historical works on the Arapaho people, *see, e.g.*, VIRGINIA COLE TRENHOLM, THE ARAPAHOS, OUR PEOPLE (1970).

264. *See* Cheyenne and Arapaho Tribes of Oklahoma Web site, at <http://www.c-a-tribes.org/government>.

265. *See* Northern Arapaho Tribe Web site, at <http://www.northernarapaho.com> *See also* *United States v. Shoshone Tribe of Indians*, 304 U.S. 111 (1938).

266. The Sun Dance is a religious activity often kept private from outsiders and scholarly research on it is controversial, as discussed below in the *Redman* case itself. *See also* THE ARAPAHO PROJECT, available at <http://www.colorado.edu/csilw/arapahoproject/dancemusic/sacred1.htm>.

267. *See Redman v. Birdshead*, 9 Okla. Trib. 660 (2003).

268. *Redman v. Birdshead*, 9 Okla. Trib. 114 (Chey.-Arap. D.Ct. 2005).

269. *Redman v. Birdshead*, 9 Okla. Trib. 660 (2003). The court made a lengthy statement on this point *vis à vis* what it saw as the defendants’ inconsistent use of “tradition” in the case:

I agree this is a matter related to the centuries old spiritual ways of the Arapaho. Defendants have stated the same in their pleadings. So why does Defendant Spottedwolf state in a letter to the editor in the *Watonga* paper that Defendant Birdshead turned him on to the proper Arapaho ways in books written by a white anthropologist, George Dorsey, in the early 1900s? Traditions are usually passed down orally from generation to generation. We do not usually get our customs and traditions from white anthropologists. Why? Because custom and tradition, especially our spiritual ways, were to be protected from outsiders. So when white anthropologists came to our reservations we gave them stories to get rid of them. The stories we gave them rarely had the truth in them, and when they did they had selected truth in order to protect our ways. We see this even today as people, many times anthropologists, attempt to exploit tribal cultures for profit or some other benefit. This certainly makes Defendants’ argument interesting that the tribal court cannot be involved in this matter, but a white anthropologist is the one who knows the Arapaho way.

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Id.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Redman v. Birdshead*, 9 Okla. Trib. 660 (2003).

274. *Id.* (“The spiritual ways of the tribe are the very essence of the tribe. This deals with the ultimate judge, our Creator, and should not be taken lightly by anyone. Things occur when we do not follow ‘our’ ways and do things outside of the proper traditional ways. We must maintain balance and harmony”).

275. *Redman v. Birdshead*, 9 Okla. Trib. 114 (2005).

276. *Id.*

277. *Id.* (“Sometimes the Court has no option but to decide a matter. The problem is that western legal law casts its shadow on what is traditional. In this particular case, there is no reason for the Court to decide anything with relation to the spiritual aspect of this case, because there are tribal governments which have taken action, and it is this action on which the Court can proceed”).

278. *Id.*

279. *Id.*

280. *Redman v. Birdshead*, 9 Okla. Trib. 114 (2005).

281. *See Redman v. Birdshead*, 9 Okla. Trib. 495 (Chey.-Arap. Tr. Ct., 2006).

282. *Id.* (citing CONST. OF THE CHEYENNE-ARAPAHO TRIBES, art. I, § 1(a)).

283. *Id.* (citing CONST. OF THE CHEYENNE-ARAPAHO TRIBES, art. VIII, §5(c)).

284. *See Redman*, 9 Okla. Trib. 495 (2006).

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. For news coverage, see Anthony Lane, *Lengthy dispute underlies Sun Dance conflict*, CASPER STAR-TRIBUNE, July 15, 2006, available at http://trib.com/news/state-and-regional/article_36cd5fbc-9628-5004-b462-da2476ecba81.html.

290. While the *Redman* case was filed in the Cheyenne-Arapaho court system (in Oklahoma), the Northern Arapaho (in Wyoming) also have religious freedom legislation which amplifies some of these dynamics and makes particular note of the federal government’s historic ban on the Sun Dance. *See Tribal Codes, Northern Arapaho Tribe, Title 13 Religious Freedom*, available at <http://www.northernarapaho.com/code/religious-freedom>.

291. *See, e.g., 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”).

292. Compare Mark Rosen, *Evaluating Tribal Courts’ Interpretations of the Indian Civil Rights Act*, in THE INDIAN CIVIL RIGHTS ACT AT FORTY (2012) (exploring “cultural syncretism of Anglo and tribal values” in tribal court interpretations of ICRA).