Territory, Wilderness, Property, and Reservation: Land and Religion in Native American Supreme Court Cases

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TERRITORY, WILDERNESS, PROPERTY, AND RESERVATION: LAND AND RELIGION IN NATIVE AMERICAN SUPREME COURT CASES

Kathleen Sands*

Abstract

In two trilogies of Supreme Court decisions, both involving Native Americans, land is a key metaphor, figuring variously as property, territory, wilderness, and reservation. The first trilogy, written by Chief Justice John Marshall, comprises Johnson v. M’Intosh (1823), Cherokee Nation v. Georgia (1831), and Worcester v. Georgia (1832). The second trilogy concerns Native American claims for religious freedom under the First Amendment and includes Bowen v. Roy (1986), Lyng v. Northwest Cemetery Protective Association (1988), and Employment Division of Oregon v. Smith (1990).

The Marshall cases attempted to legitimate the transformation of land from wilderness to territory and property, and in this sense, they appeared "secular." These cases also were "religious" in an important sense: they created a myth of origins that determined the polity’s relation to the land and people on which it was built. Of the religious freedom cases, only one was directly concerned with land, but all three were profoundly shaped by the Marshall trilogy and by judicial reasoning that linked land and religion. As these cases show, judicial events at the intersection of land and religion have been calamitous and, for Native Americans, full of violence and loss. Grounds for hope remain in one meaning of land — the “reservation” — deployed by Marshall in Worcester v. Georgia and artfully analyzed by Philip Frickey in 1993. Revivifying the concept of “reservation” promises constructive re-imaginations of both First Nations and religious freedom as unique, foundational political categories.

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I wonder if the ground has anything to say? I wonder if the
ground is listening to what is said? I wonder if the ground
would come alive and what is on it?

— We-ah Te-na-tee-many, 1855\(^1\)

Introduction

Might land have something to say to and about America? Something
about roots and foundations, possession and conquest, memory and hope?
This article will explore two trilogies of Supreme Court cases, both
involving Native Americans, in which land is a telling metaphor. The first
cases occurred between 1823 and 1832 as decisions written by Chief Justice
John Marshall.\(^2\) The Rehnquist Court decided the second set of cases
between 1986 and 1990, concerning Native American claims for religious
freedom under the First Amendment.\(^3\) In these six cases, land appears
variously as property, territory, wilderness, and reservation. The Marshall
trilogy attempted to delineate and legitimate the foundations of political
sovereignty.\(^4\) These cases prescribed the manner in which land could be

1. Document: Indian Council in the Valley of the Walla Walla, Lawrence Kip, 1855,
CTR. FOR COLUMBIA RIVER HISTORY, http://www.ccrh.org/comm/river/treaties/kipp.htm (last
2. See generally Johnson v. M’Intosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee
(1832).
While, technically, Bowen v. Roy was decided at the tail end of the Burger Court era, it was
Justice Burger’s presence alone that effected the distinction.
4. See George Jackson III, Chickasaw Nation v. United States and the Potential
Demise of the Indian Canon of Construction, 27 AM. INDIAN L. REV. 399, 403 (2002-2003);
Taiawagi Helton, Introduction to the IACHR Report on Indigenous and Tribal Peoples’
transformed from wilderness to territory and property. Because the Marshall cases were concerned with foundations, they were also “religious” in an important sense: they created a myth of origins that determined the polity’s relation to the land and people on which it was built. Of the religious freedom cases, only one was directly concerned with land. But all three were profoundly shaped by the Marshall trilogy and were shaped by judicial reasoning that linked land and religion. Looking backward, these cases tell us how land and religion were welded together in constitutional history. Looking forward, they recommend the metaphor of “reservation” as a promising way to reconceive both Native American sovereignty and the religion clauses.

Both religion and Native Americans hold unique status within the United States Constitution. Although religion is perilously hard to define, it does occupy a textual place of pride in the Constitution, where it is listed as the first item in the Bill of Rights. However it may be defined, “religion” and only “religion” is afforded the unique privilege of free exercise, and “religion” alone constrains government to eschew establishment. Indian tribes, too, are unique in the Constitution, singled out for mention as “Indians not taxed.” Native Americans are politically unique through a confluence of other factors as well, one of which is constitutional: in Article VI, treaties are said to become the “supreme law of the land.” Add to this the historical fact that the federal government made numerous treaties with Native peoples and the principle that treaties can be made only among sovereigns, and the result is a singular status. Native American tribes are

5. See, e.g., Katheleen R. Guzman, Give or Take an Acre: Property Norms and the Indian Land Consolidation Act, 85 IOWA L. REV. 595, 603 (2000) (“Johnson held that, via the British Crown, discovery conferred fee title, and, thus, transferability, upon the United States, subject only to tribal rights of use and occupancy which were extinguishable by federal conquest or purchase.”).
7. U.S. CONST. amend. I.
8. Id. art. 1, § 2; id. amend. 14, § 2.
9. Id. art. VI.
11. See, e.g., R. Spencer Clift, III, The Historical Development of American Indian Tribes; Their Recent Dramatic Commercial Advancement; and a Discussion of the Eligibility of Indian Tribes Under the Bankruptcy Code and Related Matters, 27 AM. INDIAN L. REV. 177, 183 (2002-2003) (“The advantage of recognizing tribal settlements as ‘nations’
effectively recognized as sovereign nations,\footnote{See, e.g., Robert J. Miller, Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling, 25 AM. INDIAN L. REV. 165, 190 (2000-2001) ("The modern day status of Indian tribes as sovereign governments is also largely based on the historical practice of the United States and the European nations dealing with tribes through treaty making."); Frank Shockey, "Invidious" American Indian Tribal Sovereignty: Morton v. Mancari contra Adarand Contractors, Inc., v. Pena, Rice v. Cayetano, and Other Recent Cases, 25 AM. INDIAN L. REV. 275, 288 (2000-2001) ("[T]he treaty explicitly recognized the national character of the Cherokees, and their right to self-government.").} relating directly to the federal government, which is supposed to be as bound by those treaties as by the Constitution itself. It was Chief Justice John Marshall who would define and limit the status of Indian Nations implied by this treaty relationship.\footnote{See April L. Seibert, Note, Who Defines Tribal Sovereignty? An Analysis of United States v. Lara, 28 AM. INDIAN L. REV. 393, 394 (2003-2004).} In addition, Chief Justice Marshall would also define a unique trustee relationship between the federal government and Native peoples. To the extent that it managed Native lands and affairs, the federal government was to do so with a view to the benefit of Native peoples.\footnote{See Derek C. Haskew, Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?, 24 AM. INDIAN L. REV. 21, 30-31 (1999-2000).}

The Burger Court, spanning from 1969 to 1986, clung to the idea that "religion" was a constitutionally unique category, distinct from "the secular," and as such required special accommodation\footnote{See, e.g., Sherbert v. Verner, 374 U.S. 398, 403 (1963); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).} and rigorous non-establishment.\footnote{See, e.g., Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (adding a third requirement — that of avoiding excessive government entanglement with religion — to the two pre-existing requirements that government action must be secular in its primary purpose and that it, in effect, must neither advance nor inhibit religion).} Under the Rehnquist Court, however, the constitutional status of both religion and Native Americans was set on a different trajectory — one more focused on formal equality through equal treatment rather than on accommodations premised on the unique constitutional status of religion or indigeneity. So, rather than evoking deferential treatment,
religious groups, beliefs, and motives tended to be treated "the same" as non-religious groups, beliefs, and motives. Similarly, rather than being treated as a group with a constitutionally unique status, Native Americans were increasingly treated the same as non-native citizens. Ultimately, this trajectory would mean that Native American religious claims would be handled more by the Fourteenth Amendment, pertaining to the rights of citizens as such, than by constitutional provisions relating specifically to religion or to Indian tribes.

But the connection between the judiciary’s treatment of Indian Nations and its treatment of religion is not just a parallel; it is also a series of intersections, crossings, and crashes. The best-known crossing, of course, is Employment Division of Oregon v. Smith, in which the loss of free exercise exemptions for Native American peyote users was at the same time a major, and perhaps the ultimate, diminishment of free exercise for all citizens. But the crossings began well before Smith, and in every case, they implicate land, whether in its literal or metaphorical sense.

Together, the story told by these two sets of cases is sad indeed, and for Native Americans, full of violence and loss. And although judicial events at these crossings have often been calamitous, I will suggest in conclusion

17. In a series of closely divided decisions, the Rehnquist Court (1986-2005) gradually lowered the Sherbert and Lemon standards. In free exercise jurisprudence, the nadir was Employment Division of Oregon v. Smith, 494 U.S. 872 (1990), superseded by statute as state in Sossamon v. Texas, 131 S. Ct. 1651 (2011), holding that the Free Exercise Clause does not require religious exemptions to facially neutral laws of general application, id. at 888-90. Over a series of cases, influential members of the Rehnquist Court came to view legal secularism, as it was understood in the Burger era, as implying a discriminatory and thus unconstitutional hostility toward religion.

The answer, for these Justices, was a church-state jurisprudence guided by the principle of equal treatment. So, for example, in 1994, in Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687 (1994), Justice O’Connor, concurring in part and concurring in the judgment, wrote that, to the extent that religious needs must constitutionally be accommodated, they should be accommodated "through laws that are neutral with regard to religion." Id. at 714 (O’Connor, J., concurring in part and concurring in the judgment). An "emphasis on equal treatment," she continued, is an "eminently sound approach." Id. at 715. Thus, Justice O’Connor concluded that "[t]he Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating against religion." Id. at 717. Similarly, in Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995), the Court ruled that denial of funds by a public university to a religious group evinced "a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." Id. at 846.

18. See infra notes 156-71, 173-83, 185-88, 192-95, 197, 199-203, 210, 213-21, and 224 and accompanying text.
that one meaning of land — the “reservation” — promises constructive re-imaginations of both Native rights and religious freedom.

I. The “Place” of Religion: Public Religion and Separationism

Prior to contact with Europeans, Native peoples had no word in their languages to describe religion. It was not that they lacked religion, but quite the contrary, that they did not classify religion as a separate realm. Instead, what Europeans called “religion” was for native people conterminous with culture and political economy. It embraced healing, planting, hunting, the sharing of resources and the government of community life. But while not segregated from the rest of life, Native religions still belong somewhere. That somewhere, first of all, is the earth.

Because the entire world is sacred, tribal religions find the spiritual realm on earth, rather than in a metaphysically separate sphere. At a more intense level, the sacred is encountered at the specific places — mountains, plains, lakes, and woods — where different tribal ancestors historically lived. Native American religions are thus local rather than portable, and collective rather than individualistic. They are the holistic life-ways of particular tribes, in certain geographical settings, rather than purely personal beliefs about metaphysical matters.

Christianity, on the other hand, has conceived itself as a universal religion, not bound to any one group or any one place. It is eminently portable and, in contrast to tribal religions, decidedly otherworldly. But in historical practice, Christianity, like other universalistic religions, has not settled for being “nowhere;” instead it has striven to be everywhere and to encompass everyone. For the non-Christian world, Christian universalism


has often translated to Christian imperialism. As the Marshall cases record, Christian imperialism created the Discovery Doctrine, which rationalized the conquest of Native peoples and their lands.24

In the Euro-American republic, Christian universalism expressed itself in what I will call American Public Religion.25 This religion has taken many forms, but for the purposes of this article, certain features are most salient. First, what I am calling American Public Religion is not perceived by the majority culture as a specific or “sectarian” religion. In fact, it may not be seen as religion at all, but simply as the American ethos. Public religion is one rather than many, generic rather than particular. It is felt to undergird public life, providing a common fund of values and virtues without which democracy cannot function. Finally, Public Religion goes without saying. It functions most effectively as a set of hegemonic assumptions, and breaks down when scrutinized and articulated.

The Christmas tree in the public square is a paradigmatic symbol of American Public Religion, as Constitutional Law scholar Stephen Feldman has shown.26 While recognizing that the Christmas tree refers to a specific religion (Christianity), many Americans view this and other similar displays as “nonsectarian,” “secular,” or simply “American.” Moreover, the Christmas tree and similar displays are closely allied with other dimensions of the majority American ethos, such as the nuclear family and consumer capitalism. While theoretically voluntary, the majority culture forces participation in Christmas through social conformity, while those who dissent are accused of making “war on Christmas.”27

25. Jon Meacham also uses the expression “Public Religion” to describe what he sees as the broad common beliefs shared by the Founders. See JON MEACHAM, AMERICAN GOSPEL: GOD, THE FOUNDRING FATHERS AND THE MAKING OF A NATION 22-27 (2007). For other helpful essays on public religion in the thought of the founders (including James Madison and Thomas Jefferson), see THE FOUNDERS ON GOD AND GOVERNMENT (Daniel L. Driesbach et al. eds., 2004). What I am calling “Public Religion” also bears some similarity to the phenomenon that Robert Bellah famously described as “American civil religion,” but it is not confined to explicitly religious (e.g., biblical) themes. See generally Robert N. Bellah, Civil Religion in America, 96 J. AM. ACAD. ARTS & SCI. 1 (1967).
27. The phrase “war on Christmas” was coined by FOX news commentator Bill O’Reilly in 2007.
In tandem with Public Religion, however, Euro-Americans also developed the notion of religion as a separate, private sphere of life. This notion of religion, which I will call the Separationist model, grew out of the Protestant Reformation. Protestant Reformers emphasized the personal, interior character of Christian faith and they challenged the Roman Catholic manner of uniting Church and State.\(^{28}\) For the three main branches of the Reformation (Lutheran, Calvinist, and Anglican), Church and State would remain deeply connected, albeit in new and sometimes more tolerant forms. The result, after a century of war, is that Europe was broken into regionally established forms of religion, based on the principle *cuius regio, eius religio* (whose the rule, his the religion).\(^{29}\) However, an initial movement in the direction of the Separationist model had been accomplished. Rather than only one true Church, as in medieval Catholicism, Christianity now existed in a variety of forms, each classed as a religion and each empowered to rule in its own region.\(^{30}\)

A fourth group, known as the Anabaptists or the Radical Reformers, went a step further, some calling for a complete separation of Church and State. It is these Radical Reformers, represented in the American colonies by figures like Quaker William Penn (founder of Pennsylvania) and Baptist Roger Williams (founder of Rhode Island), who provided the theological inspiration for what would become the American Separationist idea of religion.\(^{31}\) For Anabaptists, true Christianity demanded the highest level of personal faith and moral purity, which could not be sustained where all citizens were expected to belong to a politically established religion.\(^{32}\)


\(^{29}\) The principle *cuius regio, eius religio* was first applied at the Peace of Augsburg in 1555 to resolve conflicts between Lutherans and Catholics in the Holy Roman Empire, and again at the Peace of Westphalia in 1648 to resolve the Thirty Years War and the Eighty Years War.

\(^{30}\) *See generally* Benjamin Kaplan, *Divided by Faith: Religious Conflict and the Practice of Toleration in Early Modern Europe* (2010) (narrating the evolution of religious toleration in Europe as a result of the Protestant Reformation).


\(^{32}\) Not all Anabaptists believed in the separation of Church and State. Some were revolutionaries who attempted to institute a radically egalitarian, socialist Christian government on earth. *See generally* Hans-Jurgen Goertz, *Translated by Jocelyn*
Rather than being situated within the polity as its foundation, religion in the Separationist model is envisioned as outside the polity. In the influential metaphor of Roger Williams, which was later picked up by Thomas Jefferson, there must be “a wall of separation” between religion and government. Under the Separationist model, religions are varied rather than the same, a source of potential conflict rather than consensus. Understood in this way, religion becomes private and personal, centered on metaphysical beliefs, worship and prayer — in short, politically immaterial. As Jefferson said, “it does me no injury for my neighbour to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg.”

These models of religion — Public Religion and Separationist Religion — are obviously contradictory. Yet this has not diminished their historical efficacy. Public Religion is found in the Declaration of Independence (for example, the appeal to “nature and nature’s God”), in political speeches throughout American history, and it is the assumptive

Jaquiery, Thomas Muntzer: Apocalyptic Mystic and Revolutionary (2000) relating the life and thought of the most famous of the revolutionary Anabaptists.

33. In 1644, Roger Williams' wrote that
the church of the Jews under the Old Testament in the type, and the church of
the Christians under the New Testament in the antitype, were both separate
from the world, and that when they opened a gap in the hedge or wall of
separation between the Garden of the church and the wilderness of the world,
God broke down the wall itself, removed the candlestick, and made his garden
a wilderness, as at this day.

Roger Williams, Mr. Cotton's Letter Lately Printed, Examined and Answered, in On
Religious Liberty: Selections from the Works of Roger Williams 70 (James Calvin
Davis ed., 2008) [hereinafter Williams, Mr. Cotton's Letter]. Thomas Jefferson deployed
the same metaphor in 1802 when he wrote: “I contemplate with sovereign reverence that act
of the whole American people which declared that their legislature should 'make no law
respecting an establishment of religion, or prohibiting the free exercise thereof;' thus
building a wall of eternal separation between Church & State.” Letter from Thomas

34. See generally, James Madison, Federalist #10, arguing that religious factions play
the positive role of preventing any one religion from being able to seize control of
the government. The Federalist Papers, Edited by Clinton Rossiter, Penguin Putnam, 1961, 45-
52.

35. Thomas Jefferson, Notes on the State Of Virginia: Religion (1787), Electronic
images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=17&divisio
n=div1(last visited Apr. 9, 2012).

36. The Declaration of Independence para. 1 (U.S. 1776).

37. See generally Bellah, supra note 25 (analyzing the tradition of religious references
in American presidential speeches).
background of countless laws and policies. Yet it is the Separationist model that is inscribed in the Constitution, where religion is walled off as something unique, private, and deliberately depoliticized. Some have argued that only one of these religious models is true to the Framers' visions. Others argue the two models operate without serious contradiction because each plays a distinctive role. As this article will amplify, there is truth to each claim. Public Religion and Separationism, contradictory though they are, are interdependent aspects of American discourse on religion. Public Religion is unofficial but pervasive, and Separationism is official but of limited influence.

When it comes to a word like "religion," logical contradictions may have practical utility for the majority culture, which in the case of the United States, is Euro-Protestant Christianity. In contrast to minority cultures, this Euro-Protestant majority culture does not much need the religion clauses. The majority's interests and values are already embedded in public life, and this is not something that many wish to disestablish. Moreover, members of the majority have little need for free exercise accommodation. But when they do appeal to constitutional religious liberty, their religion is more

38. Steven K. Green offers an excellent history of the influence of majoritarian religion on American law and policy. Tracing practices such as Sabbath closing laws, religious oaths, and religion in schools, Green describes a gradual process of cultural, political, and legal disestablishment that took place over the course of the nineteenth century. This process, he contends, laid the groundwork for the twentieth century project of constitutional disestablishment. See generally STEVEN K. GREEN, THE SECOND DIESTABLISHMENT (2010).

However, the influence of majoritarian religion on American law and policy has hardly been eradicated. It remains evident, for example, in laws against adultery and other types of morals legislation. See Andrew D. Cohen, How the Establishment Clause Can Influence Substantive Due Process: Adultery Bans After Lawrence, 79 FORDHAM L. REV. 605, 609-11 (2010). As Gretchen Ruecker Hoog has documented, since the early 1980s, evangelical Christianity has aggressively attempted to re-establish itself in American law and public policy. Focal issues include support for school-sponsored prayer and tax funding of religious schools, opposition to LGBT rights, abortion, stem cell research, and, generally, the call for the restoration of "traditional values" and identification between patriotism and (evangelical) Christian faith. See generally Gretchen Ruecker Hoog, Comment, The Liberal University and Its Perpetuation of Evangelical Anti-Intellectualism, 33 SEATTLE U. L. REV. 689 (2010).

39. Martin Marty, for example, argues that public religion is for the sake of order, while Separationist religion for the sake of salvation, and both are necessary for the polity. MARTIN E. MARTY, RELIGION AND REPUBLIC: THE AMERICAN CIRCUMSTANCE 64-73 (1987). Another approach, held by Philip Hammond and others, is that only Separationism, not Public Religion, is true to the vision of the founders. See PHILIP HAMMOND ET AL., RELIGION ON TRIAL: HOW SUPREME COURT TRENDS THREATEN FREEDOM OF CONSCIENCE IN AMERICA 127-49 (2004).
easily cognizable as religion in the constitutional sense, so their likelihood of success is greater than that of religious minorities. Protestant Christianity, after all, can be historically defined in terms of distinctive metaphysical beliefs, styles of worship, church polity, and other sectarian variations having little relevance to public life.

For Protestant Christians, then, Public Religion and Separationist Religion often have made for a win-win situation. In contrast, Americans belonging to minority cultures may lose with respect both to Public Religion and the Separationist Religion. Public Religion tends to neglect or even negate their distinctive values and interests. When members of minority cultures apply for religious exemptions or accommodations, they are more likely to find that their religions are not recognized as such for purposes of free exercise.\(^{40}\)

For Native Americans, this lose-lose situation is profound and intractable. As tribal and local, their religions could not be assimilated into a Euro-American public ethos. But neither could they be assimilated to the Separationist model because, as holistic life-ways, Native religions cannot be separated from their politics, economics, or cultures. Together with their religions, tribes, and lands, Native Americans have been claimed as "territory," conquered as "wilderness," and dispossessed as "property."


Religions often center on what scholars call myths of origin — stories about how and why the world came into existence.\(^{41}\) A myth of origin creates a "world," but in the process may negate, absorb, or actively destroy

\(^{40}\) There are many examples of the judicial denial of constitutional legitimacy to non-Christian religions. One is the Court's declaration in an 1892 case that "this is a Christian nation." Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1892). Another is the assertion by Justice Joseph Story that the purpose of the religion clauses was "not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 701 (Ronald D. Rotunda & John E. Nowak eds., 1987).

Stephen Feldman makes a persuasive historical argument to the effect that the religion clauses rarely have succeeded in protecting non-Christian religious groups. He tracks in particular the entanglement of church-state jurisprudence with the history of anti-semitism. STEPHEN M. FELDMAN, PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE 8-9 (1997).

what came before.\textsuperscript{42} For the Euro-American polity, Native peoples were its pre-history and their lands the site of origin. Euro-American Public Religion, therefore, arose in significant part to legitimate the transformation of Native lands into Euro-American territory and property, and of Native peoples into subjects of the Euro-American polity.

Within Public Religion, the Constitution functions like a sacred text — that is, as a foundational text and ultimate authority. Like other sacred texts, the Constitution becomes efficacious by being retold, reinterpreted, and reenacted in the present.\textsuperscript{43} It fell to Chief Justice John Marshall and his Court to effectuate the Constitution in relation to Native peoples and lands. In so doing, Chief Justice Marshall struggled to legitimate the violence on which the Euro-American polity rests. This section will study two of those cases — \textit{Johnson v. M'Intosh} and \textit{Cherokee Nation v. Georgia}. Later, we will return to the third of the Marshall cases — \textit{Worcester v. Georgia} (1832) — to explore the more promising implications of “reservation” as a metaphor for land, sovereignty, and religion.

The mythic, foundational problem Chief Justice Marshall would face is evident in that the Constitution places Indian Nations both inside and outside the Euro-American polity. This paradox was embedded in Article VI of the Constitution. As noted, Article VI, by characterizing treaties as the “supreme law of the land,”\textsuperscript{44} effectively acknowledged the sovereignty of Indian nations. However, the larger point of Article VI is to state that the Constitution itself is the “supreme law of the land.”\textsuperscript{45} Although the primary meaning of “supreme” is that the Constitution is the “law of laws,” its geographical implications also were momentous. Rather than being simply the law of “the several states,” which is how the clause was initially formulated, ultimately the Constitution would have no territorial limits. It

\begin{footnotesize}
\begin{enumerate}
\item See MIRCEA ELIADE, THE MYTH OF THE ETERNAL RETURN 9, 11, 69, 75 (William R. Trask trans., 1954). According to Eliade, myths of origin symbolically bring a world (“our” world) into being. However, he observed, myths of origin also typically acknowledge that something existed “before” creation — e.g., the chaos that preceded cosmos, a primordial unity out of which various forms of life arise, or a paradisiacal existence that was disrupted by sin. In this way, myths of origin “explain” conquest, division, and loss. \textit{Id.} In my own view (not Eliade’s), this tends to legitimate injustice.
\item The analogy developed in this section, between the Constitution and religion via the notion of origins, is deeply indebted to Milner Ball. See generally Milner S. Ball, \textit{Stories of Origin and Constitutional Possibilities}, 87 MICH. L. REV. 2280 (1989).
\item U.S. CONST. art. VI.
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
would be "the supreme law of the land," mythically covering the continent from sea to shining sea.46

*Johnson v. M'Intosh* was the first case in which the mythic role of Native Americans was judicially fixed. At stake was the question of whether the tribes themselves could conduct the sale of Indian lands or whether only the federal government could broker such sales.47 The sales in question had occurred in the mid-1770s,48 before the Revolution, so the pertinent legal framework was British. And according to the British Proclamation of 1763, Indian lands could be directly sold only to the government, not to private individuals or companies.49 In this sense, it was unnecessary to reach the question of whether the Indians actually owned their land, with the main question being the validity of the British proclamation in the American colonies.50 But at the time of the *Johnson* case, the question of Indian ownership was the most salient issue for all parties involved — the Indians, the Euro-American disputants, and even for the judiciary itself.51 Hence, the case of *Johnson v. M'Intosh* resulted in a decision that said far more in dicta than was necessary to resolve the sole disputed issue. This decision was profoundly consequential both for Euro-Indian relations and for property law in the United States.52

The Plaintiffs contended that the Indians did own their land, and that their sale of it to the Wabash-Illinois land company (represented by

46. At the Constitutional Convention of 1787, the formulation referred to the Committee of Style and Arrangement read as follows: "This Constitution and the Laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the several States." *See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, AT 572* (rev. ed., Max Farrand ed., 1967). When the clause emerged from the Committee of Style and Arrangement, however, the Constitution had become "the supreme law of the land." *Id.* at 603.


48. *Id.* at 571.


shareholder Johnson) remained valid.\textsuperscript{53} In their opening argument by Daniel Webster, they contended that according to the law of civilized nations, the property rights of conquered nations are not abridged by conquest.\textsuperscript{54} Neither the (presumed) fact that Indians were savages nor the collective character of their ownership obviated this right. Webster cited Hugo Grotius to the effect that even conquered lands remained "the property of the first occupier, whether it be the King or the whole people."\textsuperscript{55} Whatever the precise nature of Indian title, plaintiffs contended the very fact that Indian lands had been bought was evidence that Indians indeed had owned those lands. The polity itself rested on this premise, they argued, because "all, or nearly all, the lands in the United States, is holden under purchases from the Indian nations."\textsuperscript{56} The only issue was whether these sales could be made to individuals or to the government alone,\textsuperscript{57} and plaintiffs maintained that sales to individuals were valid unless specifically prohibited by statute.\textsuperscript{58} Property, in this reasoning, had a logical and even historical priority over territory. First, land is owned privately and then, with the consent of the owners, becomes the territory of their chosen government.

After the Indians had sold some of their lands to the Wabash-Illinois Company, defendant M'Intosh had purchased some of those lands from the federal government.\textsuperscript{59} In his opinion, Marshall contended that, post-conquest, Indians held only a right of occupancy to their land, not a right of


Now in these cases there are two things to be pointed out, which are a double kind of occupancy that may take place; the one in the name of the Sovereign, or of a whole people, the other by individuals, converting into private estates the lands which they have so occupied. The latter kind of individual property proceeds rather from assignment than from free occupancy. Yet any places that have been taken possession of in the name of a sovereign, or of a whole people, though not portioned out amongst individuals, are not to be considered as waste lands, but as the property of the first occupier, whether it be the King, or a whole people.

\textit{Id.}

\textsuperscript{56} Johnson, 21 U.S. at 563.
\textsuperscript{57} Id. at 571-72.
\textsuperscript{58} See Kades, supra note 47, at 102-03.
\textsuperscript{59} Wilkins, supra note 45, at 161.
fee title ownership. The defense argument relied explicitly on the assertion that the Indians were "an inferior race of people, without the privileges of citizens." Here, the defense implicitly invoked the metaphor of wilderness, to describe both Indian land and the Indians themselves. Indians, they argued, remained "in a state of nature," neither owning land individually nor improving it by cultivation. This oft-repeated assertion, though counter-factual, was a cornerstone of the argument against Indian title. Since Native people did not want or need the land as private property, they could assert no ownership rights, nor could they be regarded as sovereign nations. The defense's argument thus ignored the implication of Article VI, which was favorable to Indians (that their treaties with the federal government implied their status as sovereign nations), while relying on the unfavorable implication of Article VI (that the federal government exerted sovereignty over the entire land mass, and therefore over Indian nations as well). With this reasoning, the America's lands were government territory before they could become private property. By virtue of the Discovery Doctrine, the lands of America rightfully belonged to whichever European power discovered them. "[T]he whole theory of their titles to lands in America rests upon the hypothesis that the Indians had no right of soil as sovereign, independent nations." From the Euro-American perspective, property was born as territory, owned by the conquering power and only then transferred to private individuals at the conqueror's discretion. Indians occupied this territory, but had no independent right to sell it.

In Johnson, Chief Justice Marshall offered, in effect, a different myth of origins than the one narrated by plaintiffs. The transformation of land into

60. *Johnson*, 21 U.S. at 587.
61. *Id.* at 576.
62. *Id.* at 569.
63. *Id.* at 566.
64. *Id.* at 567.
65. It was true, the defendants conceded, that Indians had been paid for their lands. However, this had been done only for the sake of keeping the peace, not because Indians had a right to payment. In short, the Wabash-Illinois land company did not rightfully own the lands in question because the Indian occupants had no rightful title to sell. *Id.* at 570.
66. *Id.* at 567.
private property had to be mediated by its prior transformation into territory, and the latter was something only the government could do. His opinion, a version of the Discovery Doctrine, was "that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession." In the Worcester decision, Chief Justice Marshall would emphasize the second to the last clause ("against all European nations"), but here he did not. Discovery gave to the conquering power more than a right over and against other European nations. It also gave the discoverer "absolute ultimate title" to the land, leaving the original inhabitants with only a "title of occupancy" — that is, a right to live on and use the land. This occupancy right could be extinguished only by the government, and could occur either through purchase or conquest. Euro-American citizens, therefore, could purchase Indian lands only through the government.

To justify the existing state of affairs, Chief Justice Marshall might have employed the Lockean version of natural law proposed by the defense; he might have claimed that Indians, because they (supposedly) had not "enclosed" and "improved" the land, had no natural right to ownership. But he hesitated to deploy this strategy of legitimation. "We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits." Although individuals may hold "private and speculative opinions" about the justice of these claims, Chief Justice Marshall found it disingenuousness to defend, as right, a state of affairs that had been established by sheer force.

With painful honesty, he observed that the Court itself — in other words, Marshall himself — relied on this a priori reality. "Conquest gives a title which the Courts of the conqueror cannot deny." "The title by conquest is acquired and maintained by force." By fact, if not by right, the nation rested on conquest. So, he concluded:

67. Id. at 573.
69. Johnson, 21 U.S. at 592.
70. Id. at 587.
71. Id. at 588.
72. Id.
73. Id.
74. Id. at 588-59.
75. Philip Frickey argued persuasively that in Johnson, Chief Justice Marshall was forced to acknowledge that with respect to Native Americans, the polity had been created by sheer force. Frickey argues that in Worcester, when Marshall was addressing a situation of
However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.  

For Chief Justice Marshall, then, the land of America became the territory of the United States through a founding act of conquest, and it became the property of U.S. citizens by prolonged domination of the indigenous inhabitants. Strikingly, he referred to this violent situation with the same expression that the Constitution uses to refer to itself — “the law of the land.” The Constitution and this state of violence are co-implicated; both are, in some sense, “the law of the land.”

While declining to deploy the available philosophical justification for conquest, Chief Justice Marshall did display sympathy with its theological justification. The Discovery Doctrine, he observed, was a religious claim as well as a matter of force. It was a pope who first articulated the doctrine, and it had been accepted by all European nations, Protestant and Catholic alike. As practiced by European nations and (in particular) by Great Britain, the Discovery Doctrine was religiously circumscribed. It “was confined to countries ‘then unknown to all Christian people’” and it permitted them to take lands “notwithstanding the occupancy of the natives, who were heathens, and, at the same time, admitting the prior title of any Christian people who may have made a previous discovery.”

Chief Justice Marshall himself apparently shared these theological premises. In an extra-judicial context, he had stated that “the American population is entirely Christian, & with us, Christianity & Religion are

(post-conquest) colonialism, he attempts to mitigate this relationship of force by subjecting it to principles of law. See generally Philip P. Frickey, Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law, 107 Harv. L. Rev. 381 (1993).

76. Johnson, 21 U.S. at 591.

77. In his Bull of Demarcation (1493), Pope Alexander VI divided the New World between Spain and Portugal. The chief purpose of all expeditions and conquests, stated the Bull, was “to induce the people who inhabit the foresaid islands and continents to embrace the Christian religion[.]” Samuel Edward Dawson, The Lines of Demarcation of Pope Alexander VI and the Treaty of Tordesillas A.D. 1493 And 1494, at 533 (1899), microformed on CIHM/ICMH Microfiche Series 1980 (Canadian Institute for Historical Microreproductions), available at http://ia600401.us.archive.org/2/items/cihm_02614/cihm_02614.pdf.

78. Johnson, 21 U.S. at 576-77.
identified." Moreover, in his remaining Native American cases, Marshall explicitly assumed that conversion of Indians to Christianity was a necessary and appropriate policy of the federal government.

It might be supposed that of these two lines of reasoning — one based in the theology of Christianity, the other based in the reality of violence — Marshall himself believed only the latter. In that case, what he did in the Johnson decision was not to create a public theology, but to unmask theology as an ideological cover-up for material interests. Another interpretation, truer to the genuine ambivalence of the text, is that Chief Justice Marshall did indeed voice a theology in this decision — a theology in which the depravity of nature means that law, rather than emerging "naturally," must be violently imposed. Civilization as such could be seen as a kind of law. And among civilized people, it is indeed true that "the conquered shall not be wantonly oppressed" and that "the rights of the conquered to property should remain unimpaired." But civilization — for Marshall of a piece with Christianization — lay at the heart of the matter. For these humane rules of conquest apply only when the conquered people can be incorporated into the society of the conqueror. For Chief Justice Marshall, as for his Euro-American contemporaries, this was presumed to require the incorporation of Native Americans into Christianity. While Christians among themselves may find nature ordered and law nascent within it, apart from Christianity what we have is not lawful nature but fallen nature — in other words, "wilderness." As Marshall put it:

"The tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence."

Chief Justice Marshall’s justification of state violence in Johnson would return to haunt him in 1831. Emboldened by the Chief Justice’s 1823 version of the Discovery Doctrine, the state of Georgia attempted to forcibly remove the Cherokee Nation from the external boundaries of the

80. Johnson, 21 U.S. at 589.
81. Id. at 590.
state. In 1828 and 1829, its legislature had passed laws incorporating Cherokee territory into Georgia and subjecting the Cherokee people to Georgia state law.\textsuperscript{82} Georgia’s action, although it challenged the federal government, was in keeping with a policy that the federal government began to push vigorously in the 1820s: the voluntary removal of all eastern Indians to the area west of the Mississippi River.\textsuperscript{83} 

With the Removal Act of 1830, this policy became federal law.\textsuperscript{84} The Removal Act was supposed to encourage the voluntary migration of Indian nations,\textsuperscript{85} but this occurred only slowly and sometimes not at all.\textsuperscript{86} Georgia had been relying on the removal policy. In 1802, when the state ceded its excess lands to the federal government, it had the understanding that the federal government would encourage the Cherokees to leave Georgia as soon as practicable.\textsuperscript{87} By the late 1820s, Georgia was aggrieved with the federal government for failing to secure the Cherokees’ voluntary emigration, and its anger intensified when gold was discovered on Cherokee land.\textsuperscript{88} It was in this context that Georgia had set about dissolving the Cherokee Nation through its own legislative measures.\textsuperscript{89} And by the late 1830s, the federal government too would impose removal by force, leading most infamously to the Trail of Tears on which thousands of Cherokees were to perish.\textsuperscript{90}

\textsuperscript{82} See Matthew L. Sundquist, Worcester v. Georgia: A Breakdown in the Separation of Powers, 35 Am. Indian L. Rev. 239, 240 (2010-2011). As the Cherokee bill to the Supreme Court also complained, Georgia had enforced this claim by hanging a Cherokee, Corn Tassels (a.k.a. George Tassels) for a crime (murder of another Cherokee inside Cherokee Territory) that ought to have remained under tribal jurisdiction. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 12-13 (1831).


\textsuperscript{84} Ch. 148, 4 Stat. 411.


\textsuperscript{86} James A. Casey, Note, Sovereignty by Sufferance: The Illusion of Indian Tribal Sovereignty, 79 Cornell L. Rev. 404, 411 (1994) (noting that “[v]oluntary removal was not expeditious”).

\textsuperscript{87} Earl M. Maltz, Brown and Tee-Hit-Ton, 29 Am. Indian L. Rev. 75, 87 (2004-2005).

\textsuperscript{88} See Sundquist, supra note 72, at 242.

\textsuperscript{89} See Shockey, supra note 12, at 279-80.

Chief Justice Marshall thought this removal policy inhumane and abhorred (in particular) Georgia’s imperious cruelty to the Cherokees. “If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined.” Ultimately, Chief Justice Marshall would refuse to rule on this case. For one thing, he worried that a ruling in this case might violate the political question doctrine. To intervene against the Georgia legislature, he wrote, “savours too much of the exercise of political power to be within the proper province of the judicial department.”

This particular compunction would evaporate in the Worcester case, but in the Cherokee case, the Chief Justice decided that the merits of the case would not be reached because of a prior question of standing. According to Article III, Section 2, only a foreign nation could sue a state in the Supreme Court. The decisive question became whether the Cherokees were a foreign nation in relation to the United States. Chief Justice Marshall’s response — that the Cherokees were in fact a nation, but a “domestic dependent” rather than a foreign nation — would seal the unique and anomalous position of Indian Nations as both inside and outside the constitutional order.

Cherokee Nation v. Georgia is the only case in the Marshall trilogy in which a First Nation made its own arguments, and those arguments evoked the rule of law. Raising the equivalent of natural law, the Cherokees argued that they had lived in the land from time immemorial, “deriving their title from the Great Spirit, who is the common father of the human family, and to whom the whole earth belongs.” They also reinterpreted the Discovery Doctrine as a lawful agreement among the European nations, rather than as a justification of force.

Understood as a matter of positive law, the Discovery Doctrine could not be binding upon the Indian nations who had never accepted it. Discovery conferred only a right of preemption — in other words, a right to buy the lands of a conquered region from its original inhabitants, should the inhabitants chose to sell. Preemption was a right that the conquering nation (for example, Great Britain) held over other European nations who had agreed to the doctrine for the sake of peace among themselves, not over

92. Id. at 20.
94. Cherokee Nation, 30 U.S. at 16.
95. Id. at 17.
96. Id. at 3.
Indian nations. It in no way negated the title of Indian Nations to their homelands, nor their right to sell those lands to whomever they chose. By natural law as well as the law of nations, plaintiffs argued, the Cherokee Nation truly owned its lands.\textsuperscript{97}

The Cherokees also held the United States to its own laws. The Georgia legislature had violated the federal Trade and Intercourse Act of 1802, which decreed that only the federal government, not state governments, could regulate Indian trade and manage Indian affairs.\textsuperscript{98} Finally, the United States, in failing to constrain Georgia, had violated its own supreme law: the Constitution.\textsuperscript{99} In particular, the United States had violated Article VI, which makes treaties the law of the land.\textsuperscript{100} According to its treaties with the federal government, and by the very act of making those treaties, the Cherokees were recognized as a sovereign nation, with a defined territory and a right to self-government. In the words of the Cherokee brief, they were “a foreign state, not owing allegiance to the United States, nor to any state of this union, nor to any prince, potentate or state, other than their own.”\textsuperscript{101} The Treaty of Holston (1791) was particularly pertinent to the removal crisis because it specifically provided that those Cherokees who choose to remain in their eastern territory “for the purpose of engaging in the pursuits of agricultural and civilized life” could rely “on the patronage, aid and good neighbourhood of the United States.”\textsuperscript{102}

In the \textit{Worcester} decision, Chief Justice Marshall would embrace this more lawful, rational version of the Discovery Doctrine laid out by the Cherokees, reversing what he had asserted in \textit{Johnson v. M'Intosh}. But in the Cherokee case, he was not yet prepared to do that. Instead, he asserted that the United States had no east-west geographical boundaries other than the continental landmass itself; from coast to coast, the republic’s territory was destined to be “everywhere.” “The Indian territory,” he wrote, “is admitted to compose a part of the United States . . . [and] they are considered as within the jurisdictional limits of the United States.”\textsuperscript{103}

\begin{flushright}
\textsuperscript{97} See id. at 16.
\textsuperscript{99} Id.
\textsuperscript{100} U.S. CONST. art. VI
\textsuperscript{101} Cherokee Nation, 30 U.S. at 3.
\textsuperscript{102} Id. at 5-6.
\textsuperscript{103} Id. at 17.
\end{flushright}
As frankly as in the Johnson case, the Chief Justice described this situation as the result of force. "They occupy a territory to which we assert a title independent of their will," with the Cherokees retaining only a "right of possession." So, while the United States would be everywhere, the Cherokees were destined to be nowhere. As Justice Johnson suggested in a separate opinion, the Indians were something like the Israelites in the desert, without property or territory, but still technically free to regulate their own members. By this reasoning, some of Chief Justice Marshall's associates argued, the Cherokees not only lacked status as a foreign nation; they were not nations in any legal sense. Chief Justice Marshall was not prepared to go that far, partly because as a committed federalist, he wanted to constrain the imperious Georgia. The Cherokee people were a nation, he insisted, but not a foreign nation.

It can be argued that the Chief Justice's version of the Discovery Doctrine, as a myth of violent origins, was the decisive reason for his denial of Cherokee standing as a foreign nation. Just as discovery, in Chief Justice Marshall's telling, was an act of sheer force over indigenous peoples, so the constitutional order forcibly transformed Native American lands into the territory of the federal government. This is why the Cherokee effort to hold the United States to its own supreme law — the Constitution — could not serve them.

The Cherokees pointed to Article VI to make the case that treaties implied sovereign nations and were as supreme as the Constitution itself.

104. Id.
105. Id. at 27 (Johnson, J., concurring).
106. See id. at 27-28 (Johnson, J., concurring).
107. Id. at 17 (majority opinion). In support of this mixed conclusion, Chief Justice Marshall turned to actions of the federal government through which Indian tribes were treated as distinct political entities.

The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.

Id. at 16. Marshall went on to argue, however, that the Constitution did not classify Indian tribes as foreign nations, for the Commerce clause authorized Congress "to regulate commerce with foreign nations, and among the several states and with Indian tribes." U.S. CONST. art. I, § 8. Had the founders understood Indian tribes as foreign nations, Marshall argued, they would not have been accorded a "distinct appellation." Cherokee Nation, 30 U.S. at 18.
But the supremacy Chief Justice Marshall had in mind was a different aspect of Article VI — the supremacy of the federal Constitution over all other contenders, be they states or Indian nations. When he asserted that the Cherokees were “in our territory,” he was informing Georgia that the Cherokee nation was part of federal territory, and not of state territory. For the Cherokees, this meant that the Constitution’s supremacy, far from affirming Indian sovereignty, radically truncated it. It also meant that the Constitution, rather than binding only the Euro-Americans who had consented to it, also bound Indians by force.

Even the limited sovereignty of Indian tribes as “domestic and dependent nations” appeared, in the Chief Justice’s imagination, destined to end. Although he underscored that existing Cherokee lands must not be taken by force, his choice of words (“when” not “if”)108 assumed that eventually they would cede the land voluntarily. The title of the United States to Cherokee land “must take effect in point of possession when their right of possession ceases.”109 In the interim, the Cherokee would live under what Chief Justice Marshall saw as the benign domination of the United States.

“Meanwhile,” he continued, “they are in a state of pupillage. Their relation[] to the United States resembles that of a ward to his guardian.”110 With these influential words, the Chief Justice gave judicial authority to the “Civilization Policy” that had been enacted into law by Congress in 1819 and that remained federal Indian policy throughout the nineteenth century and well into the twentieth. The aim of the government’s Indian policy was civilization leading to assimilation, and civilization was a package deal. It entailed conversion to Christianity, the private ownership and cultivation of land, and a host of other adaptations to Euro-American culture, such as English-only communication, Euro-American sex-gender roles, and the wearing of “citizen’s dress.”111

108. Cherokee Nation, 30 U.S. at 17 (“They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases.”) (emphasis added).
109. Id.
110. Id.
111. According to R. Pierce Beaver, the federal policy linking Christian conversion with “civilization” was first developed by Henry Knox, the Secretary of War under George Washington. See R. PIERCE BEAVER, CHURCH, STATE AND THE AMERICAN INDIANS: TWO AND A HALF CENTURIES OF PARTNERSHIP IN MISSIONS BETWEEN PROTESTANT CHURCHES AND GOVERNMENT 63-65 (1966). The Civilization Fund, established by act of Congress in 1819, permanently allocated funds (initially $10,000 per year) “to employ capable persons of good moral character, to instruct the Indians . . . .” Native American people were to be instructed in “the mode of agriculture, and of such mechanic arts are suited to the condition of the
As the plaintiffs pointed out, however, the Treaty of Holston (1819) had specifically promised the Cherokees that in return for embracing the civilization program, they would not be forced to leave their ancestral homelands.112 And in fact many of the Cherokees had become “civilized Christians” and had turned from hunting to agriculture.113 In addition, the Cherokee Nation had created for itself a constitution modeled on that of the United States.114 On the Euro-American side, however, racial prejudice could discount these adaptations.115 “Civilization” in any case was a double bind, because to succeed at it was to largely destroy the traditional lifeways of the Cherokees, as a tribal community belonging to a particular geographical place. Just as the domination by Euro-Americans was as

Indians[,]” and their children were to learn reading and writing (in English) and arithmetic. The education of Native Americans was to be carried out by persons “of good moral character” under the authority of the President. Although the legislation did not specify that the teachers should be missionaries, in fact the monies did go largely to missionaries, who already were involved with Indian education. Id. at 68-69.

According to Robert Berkofer, civilization (i.e., Europeanization) and Christianization were distinguished by the missionaries themselves, with some missionaries prioritizing the former and others the latter. In any case, both were aspects of the missionary goals. See Robert Berkofer, Salvation and the Savage: An Analysis of Protestant Missions and American Indian Response, 1787-1862, at 4-10 (1972).

112. Cherokee Nation, 30 U.S. at 5-6.
113. Id. at 6.
114. In Marshall’s words, the Cherokees had established a constitution and form of government, the leading features of which they have borrowed from that of the United States; dividing their government into three separate departments, legislative, executive and judicial.... They have established schools for the education of their children, and churches in which the Christian religion is taught; they have abandoned the hunter state, and become agriculturists, mechanics, and herdsmen; and, under provocations long continued and hard to be borne, they have observed, with fidelity, all their engagements by treaty with the United States. Under the promised “patronage and good neighbourhood” of the United States, a portion of the people of the nation have become civilized Christians and agriculturists; and the bill alleges that in these respects they are willing to submit to a comparison with their white brethren around them.

Cherokee Nation, 30 U.S. at 6.
115. As Justice Johnson put it in his concurring opinion:
Independently of the general influence of humanity, these people were restless, warlike, and signally cruel in their irruptions during the revolution. The policy, therefore, of enticing them to the arts of peace, and to those improvements which war might lay desolate, was obvious; and it was wise to prepare them for what was probably then contemplated, to wit, to incorporate them in time into our respective governments: a policy which their inveterate habits and deep seated enmity has altogether baffled.
Id. at 23-24 (Johnson, J., concurring).
religious as it was political, so was the injury on the Cherokee side. The land from which the Euro-American government wished to separate the Cherokees was, as the Chief Justice himself observed, "consecrate in their affections from having been immemorially the property and residence of their ancestors, and from containing now the graves of their fathers, relatives, and friends." To move west of the Mississippi would endanger both the spiritual and the physical survival of the Cherokees. It would be, in Chief Justice Marshall's paraphrase, "the grave not only of their civilization and Christianity, but of the nation itself."

III. Native Americans Under the Regime of Euro-American Public Religion

Chief Justice Marshall's decisions, though deeply telling in regard to American Public Religion, were not in his view related to the Free Exercise or Establishment Clauses. In fact, the religion clauses of the Constitution were barely operative at the time of the first Native American decisions. They were inoperative, most obviously, because it was not until the 1940s that they were incorporated to the states. But there also existed a less obvious and more pervasive reason for the dormancy of the religion clauses. American Public Religion, in the form Chief Justice Marshall knew it, remained relatively uncontested until the arrival of Catholics in the mid-nineteenth century.

Despite their inactivity, the religion clauses remained in the Constitution, outlining the official relationship between the United States and religion. In contrast to the unofficial Public Religion that Marshall assumed, the Constitution conceives religion not as public territory but as private property, segregated from the pervading public space. It was succinctly contained in the metaphor employed by James Madison when he wrote, "[A man] has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them."

116. Id. at 9 (majority opinion).
117. Id.
Religion in this imagery was personal business, the sovereign territory of the individual conscience on which government may not encroach. The property to which Madison referred was first of all the sovereign self — the man who owns and rules himself according to his unique and inviolable conscience. But property also referred to individually owned land. Literally, property was a condition of citizenship; and metaphorically, the territory of the citizen’s self-sovereignty. Viewed through this lens, government appears very different than through the lens of Public Religion. Here, government is strictly limited, and its authoritative source is individual conscience rather than a common faith.

Indians, on the other hand, appeared to lack property in the sense of individually owned land. To Chief Justice Marshall and his contemporaries, this absence of property amounted to an absence of both religion and civilization. Recall that wilderness was a key part of the Chief Justice’s reasoning in Johnson v. M’Intosh. Indian tribes had left their “country a wilderness,” and this legitimated the claim of Europeans to politically dominate and legally own Indian lands. Like wilderness, property is an ideological construct rather than a factual description, and its ideological provenance (which Chief Justice Marshall also assumed) was Christian. Wilderness referred to heathen people as well as uncultivated lands, while property evoked civilized people tending their private gardens. The wilderness/property dichotomy thus reflected the doctrine of a fallen, depraved nature in need of both Christian salvation and Euro-American government.

From the start, the image of wilderness also played a decisive role in church-state jurisprudence through Roger Williams’ metaphor of a wall separating the church from the “wilderness” beyond. Religion, cultivated within these walls, was metaphorically associated with property. For

122. Cogan writes: “Whereas the eighteenth century looked to property for guidance in determining a person’s fitness to vote, the nineteenth century turned to the soundness of a person’s mind.” Id. at 495. However, he concludes, evaluating the “inner self” remained a “difficult proposition.” Id. at 497. “So it was that the look within possessed a sad irony: Americans, for all their searching inward, could not, in the end, help but look outward.” Id. at 498.
124. For a full discussion of Williams’ view, see generally Timothy L. Hall, Separating Church and State: Roger Williams and Religious Liberty (1998).
Williams, the wilderness included both the Indians and the government.\(^{125}\) Jefferson, as is well known, had a far more favorable view of government and a far less favorable view of religion.\(^{126}\)

Neither the evangelical nor the enlightened strains of Separationism confined God or religion entirely within “the wall.” For Williams, the wilderness, while devoid of Christian revelation, nonetheless knew what Williams called the “Second Table” of the law (the last six of the Ten Commandments).\(^{127}\) These divine laws were laid upon all people and could be obeyed by all. Obedience to these commands, while not sufficient for salvation, was sufficient to make people governable. This implied, in Williams’ thought, a distinction between Christianization and civilization; the latter could be accomplished without the former. In fact, Williams pointedly observed that the indigenous people adhered to the Second Table as well or better than most Englishmen — a view perhaps related to his unusual regard for the land ownership rights of Native Americans.\(^{128}\)

\(^{125}\) See Williams, *Mr. Cotton’s Letter*, supra note 26, at 70 (discussing Williams’ view of the link between wilderness and government). Williams’ association between wilderness and Native Americans was best expressed by his discussion of their ability to survive “in this wild and howling land.” See Roger Williams, A Key into the Languages of America (1643), in 1 THE COMPLETE WRITINGS OF ROGER WILLIAMS 47 (Perry Miller ed., 2005).

\(^{126}\) Like Williams, Jefferson was a strong critic of ecclesiastical corruption (denouncing “the impious presumption of legislators and rulers, civil as well as ecclesiastical” who are merely “fallible and uninspired men”) and an equally strong proponent of religious freedom. See Thomas Jefferson, The Virginia Act for Establishing Religious Freedom (1779), RELIGIOUS FREEDOM LIBR., UNIV. OF VA., http://religiousfreedom.lib.virginia.edu/sacred/vaact.html (last visited Apr. 10, 2012). But Jefferson was far more heterodox, rejecting key doctrines of Christianity, such as the original sin, the divinity of Christ, and the Trinity. See EDWIN S. GAUSTAD, SWORN ON THE ALTAR OF GOD: A RELIGIOUS BIOGRAPHY OF THOMAS JEFFERSON 136, 206 (1996). While Williams imagined civil government as a “wilderness” that could be capably managed by the reprobate, see Williams, *Mr. Cotton’s Letter*, supra note 26, at 70, for Jefferson, civil government was a rational enterprise, which is why he was so eager to develop an educated citizenry, see GAUSTAD, supra, at 147-80.

\(^{127}\) Roger Williams, The Bloody Tenent of Persecution for the Cause of Conscience, in DAVIS, supra note 26, at 116. These moral laws, Williams believed, were available even to “natural and unregenerate men” and were sufficient for civil government. As a primary illustration of this point, Williams opined that “the wildest Indians in America ought (and in their own kind and several degrees do) to agree upon some form of government, some more civil compact in towns and etc., some less.” And that “[T]heir civil and earthly governments be as lawful and true as any governments in the world . . . .” Id. at 131, 133.

\(^{128}\) Williams’ advocacy for Native land ownership was among the reasons for his conflict with the leaders of Massachusetts and his eventual banishment. See Jeffrey Glover, Wunnaumwáyean: Roger Williams, English Credibility, and the Colonial Land Market, 41 EARLY AM. LIT. 429, 432-34 (2006). Upon arriving in Rhode Island, he bought land directly
For Jefferson too, the un-walled regions of America had a double meaning: sometimes he imagined them as wild, sometimes as governed by natural law. Natural law came to mind when Jefferson was thinking of relations among Europeans. But when thinking of indigenous Americans, Jefferson, like his cousin John Marshall, would revert to images of wilderness. In the Declaration of Independence, addressing the other European nations and in particular Great Britain, he famously invoked “the Laws of Nature and Nature’s God.” Later in the same document, when he referred to the Indian lands not yet under Euro-American control, nature suddenly appears Godless; it is inhabited by “the merciless Indian savages.” Human nature itself, then, was riven by a tension between lawfulness and wildness.

This dual assessment of human nature characterized both Jefferson’s thinking about Native Americans and his Indian policy as President. According to Anthony Wallace, Jefferson vigorously rejected the theory that Native Americans were of inferior intelligence to whites. Instead, Jefferson espied in Native people what he took to be the universal human capacities for reason and morality, albeit at a lower stage of development. Nonetheless, Wallace shows that Jefferson was unable to see indigenous religions as anything but “superstitious nonsense” and believed that these religions, along with Indian cultures as a whole, were destined to end. Despite his remarkably heterodox theology, President Jefferson would continue the policy (begun by Henry Knox during the Washington administration) of lending federal support to Christian missionaries who were given the task of “civilizing” the Indians. Not coincidentally, the cultural disappearance of Native Americans was a precondition of what

from the Narragansetts — a purchase obliquely noted and explained away as anomalous by Marshall in Johnson v. M’Intosh, 21 U.S. (8 Wheat.) 543, 601-02 (1823).

129. The Declaration of Independence para. 1 (U.S. 1776).

130. Id. para. 29.


132. Id. at 95-96.

133. Id. at 110.

134. According to Anthony Wallace, Jefferson believed that Indian cultures were destined to end, which is why he (Jefferson) busily engaged in the collection of Indian artifacts. See id. at 75-107. But Jefferson did not regard Indian religions as worthy of the name, and therefore had little interest in them. In Notes on Virginia, as Wallace mentions, Jefferson “has nothing to say about [Indian] religious beliefs and rituals, which of course he would be apt to dismiss as superstitious nonsense in any case.” Id. at 122.

135. Id. at 168-69.
Wallace showed was Jefferson’s overriding interest, which was the acquisition of Indian lands.\footnote{136}{See id. at 205, 206-40.}

But while Euro-Protestant religious sensibilities controlled life on both sides of the “wall,” on neither side were Native American religions recognized as such or protected from government intrusion. The apparent absence of private property among native people signaled a wildness that needed taming by Euro-American government and Christian missionaries. As Governor Morris had commented during the Constitutional Convention of 1787, “Men do not enter into Society to preserve their Lives or Liberty — the Savages possesses both in perfection — they unite in Society for the Protection of Property.”\footnote{137}{Notes of Rufus King in the Federal Convention of 1787 (July 5th), Yale Law School, The Avalon Project: Documents in Law, History and Diplomacy, http://avalon.law.yale.edu/18th_century/king.asp (last visited Apr. 10, 2012).} As early as 1776, Congress had resolved to place Christian ministers among the Indians, both for purposes of conversion and to encourage agriculture and other “civil arts.”\footnote{138}{Justice MacLean, in his concurring opinion in \textit{Worcester v. Georgia}, quoted the government’s 1776 commission of missionaries as follows: \begin{quote} In April 1776, it was “resolved, that the commissioners of Indian affairs in the middle department, or any one of them, be desired to employ, for reasonable salaries, a minister of the gospel, to reside among the Delaware Indians, and instruct them in the Christian religion; a school master, to teach their youth reading, writing, and arithmetic; also, a blacksmith, to do the work of the Indians.” \end{quote} \textit{Worcester v. Georgia}, 31 U.S. (6 Pet.) 515, 574 (1832) (M’Lean, J., concurring).} In 1779, President Washington ordered Indian commissioners to arrange for Christian missionaries to work with Native peoples, and subsequent presidents followed suit.\footnote{139}{See Louis Fisher, \textit{Indian Religious Freedom: To Litigate or Legislature?}, 26 Am. Indian L. Rev. 1, 1-3 (2001-2002).} By the late eighteenth century, many Christian denominations in the United States had missionary societies specifically devoted to Native Americans.\footnote{140}{See Beaver, supra note 101, at 60-61.} In 1819, Congress formalized its support for the missionaries’ policies by setting up a “Civilization Fund” that would help support Christian missions to the Indians.\footnote{141}{The Civilization Act did not require that the agents of civilization be missionaries; it did authorize the President to hire for this purpose “persons of good moral character,” a phrase understood to refer particularly to missionaries. Missionary societies were in fact the only organizations engaged in Indian work at the time of the Act, so it seems to have been written with them in mind, and upon the passage of the Act it was missionaries among whom its directives were circulated. See id. at 68. As cited by Marshall in \textit{Worcester}, the Civilization Act provided:}
created what was termed the "Peace Policy," which advanced the same ends even more aggressively, and was both administered and implemented by Christian missionaries.\textsuperscript{142} In all these initiatives, conversion to Christianity and acceptance of the private ownership of land were intertwining aspects of the civilization process. In 1818, this was floridly expressed by a committee of the House of Representatives in support of the Civilization Policy:

'Put into the hands of their children the primer and the hoe, and they will naturally, in time, take hold of the plow; and, as their minds become enlightened and expand, the Bible will be their book, and they will grow in the habits of morality and industry,

that, for the purpose of providing against the further decline and final extinction of the Indian tribes adjoining to the frontier settlements of the United States, and for introducing among them the habits and arts of civilization, the president of the United States shall be, and he is hereby authorized, in every case where he shall judge improvement in the habits and condition of such Indians practicable, and that the means of instruction can be introduced with their own consent, to employ capable persons, of good moral character, to instruct them in the mode of agriculture suited to their situation; and for teaching their children in reading, writing and arithmetic; and for performing such other duties as may be enjoined, according to such instructions and rules as the president may give and prescribe for the regulation of their conduct in the discharge of their duties.

\textit{Worcester,} 31 U.S. at 557.

142. None of this is to deny that the motives of the missionaries, though constrained by ethnocentrism, were humanitarian, or to gainsay their efforts to protect Native peoples from the worst depredations of Euro-Americans. On the government’s side, too, the support of missions involved humanitarian as well as opportunistic motives. Missionaries were not chosen for this work simply because of their religious credentials. It was expected that missionaries would be people of moral integrity, and in particular that they would be unlikely to have designs on Indian lands. \textit{See Beaver, supra} note 101, at 62-64. Missionaries also were perceived as the most experienced and equipped candidates for work with Indians. Well before the Revolutionary War, they had been working with Indians, and within the next decades, many Christian denominations created the administrative apparatus (e.g., missionary societies) to do the job. Moreover, conversion to Christianity was not as coercive in the early republic as it became in the course of the nineteenth century. Henry Knox, for example, actually forbade the proselytization of Indians who had not already converted. For an excellent account of the missions up until the 1860s, see \textit{id.} at 66. Finally, it is important to note that not all government officials supported the civilization policy. For example, Lewis Cass, architect of the Removal Policy, argued that Indians had to be "reformed" before they could be "civilized." \textit{See John R. Wunder, "Retained by the People:" A History of American Indians and the Bill of Rights} 23 (1994).
leave the chase to those whose minds are less cultivated, and become useful members of society.143

These government-supported conversion efforts, because they were tacitly understood as Public Religion, did not raise Establishment concerns. Indeed, the missions to Native Americans received their first government sanction and support in the same period that constitutional principles of non-establishment and religious liberty were being crafted. So it is particularly strange to recall that resistance to government funding for Christian ministers catalyzed the emergence of the religion clauses. In the late 1770s, a bill for the support of Christian ministers was proposed to the Virginia legislature, and was fiercely and famously opposed by Jefferson in his "The Virginia Act for Establishing Religious Freedom" (1779) and then by Madison in his "Memorial and Remonstrance" (1785).144 These documents articulated the principles that Madison and Jefferson would later craft into the religion clauses of the Constitution.145

When establishment issues were finally raised about the Indian missions, the issue was not whether it was constitutionally permissible to force Christianity on Indians. Instead, the establishment issue was pressed by Euro-American Nativists, who denounced Catholicism and espoused Protestantism as American Public Religion.146 After the wave of Catholic

143. BEAVER, supra note 101, at 67-68.
145. For an excellent analysis of how religion clauses were (or, more accurately, were not) applied to Indian missionaries, see Allison M. Dussias, Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases, 49 STAN. L. REV. 773 (1997).
146. These Nativist concerns reached the Supreme Court in Quick Bear v. Leupp, 210 U.S. 50 (1908). Quick Bear, a Protestant and a Sioux, was supported by the (Euro-American) Indian Rights Association (IRA). See id. at 55. The IRA objected to use of “government” funding (i.e., tribal trust and treaty funds that were managed by the federal government) to support a Catholic school at the Rosebud Sioux Reservation in South Dakota. Behind Quick Bear lay the congressional Act of June 7, 1897, ch. 3, 30 Stat. 62, 79, which prohibited the use of government funds for the support of “sectarian schools.” It was this law that, according to Quick Bear and the IRA, had been violated by the use of tribal funds to support Catholic missionary work on Indian land. Quick Bear, 210 U.S. at 52.

But the drive to deny funding to Catholic schools was hardly new when it arose in relation to American Indians. In fact, it had been launched in the eastern United States during the 1870s by Protestant Nativists, who viewed “nonsectarian” Protestantism as a pillar of national identity, and Catholicism as “sectarian” and un-American. See STEVEN K. GREEN,
immigration to the Eastern United States, a battle arose over the use of the (Protestant) King James Bible in public schools. In response, the Catholics established their own schools using the (Catholic) Douay-Rheims Bible and requested public funding for those schools. Protestant Nativists countered by sharply distinguishing “non-sectarian” (read: Protestant) from “sectarian” (read: Catholic) religion. “Non-sectarian” religion, Nativists argued, was essential for the formation of citizens, and government not only may, but also must, support it. “Sectarian” religion, on the other hand, must be strictly “separated” from the state.

In the last decades of the nineteenth century, the struggle was repeated farther west, in the context of Indian work. By that time, Catholic missionaries had gained increasingly more government contracts for Indian schools. Protestant Nativists, some of whom (e.g., Thomas Morgan) held elevated roles in Indian affairs, argued that Catholics were unequal to the task of “Americanizing” Indians. Nativists perceived Catholics not only as un-American, but also as anti-American. Like Indians, Catholics were thought to be prone to superstition, ritualism, irrationality, and a collectivism that undermined their capacity to think and act as individual


147. The Blaine Amendment (proposed first in 1874 and again in 1876) would have applied the Establishment Clause to the states and prohibited the use of government funds for “sectarian” religion. Although the Amendment failed at the federal level, “by 1890, twenty-nine states had adopted constitutional language in keeping with the spirit of Blaine’s Amendment.” See Ian Bartram, The Political Origins of Secular Public Education: The New York School Controversy, 1840-1842, 3 N.Y.U. J.L. & LIBERTY 267, 329 (2008). On the relationship between Protestant-Catholic tensions and school conflicts, see PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 287-334 (2002), and Bartram, supra.

148. Because they viewed Protestantism as American and as nonsectarian, Nativists felt that while the government must vigorously separate itself from Catholicism, Protestantism both could and should be effectively established. An excellent illustration is this 1845 statement by the American Republican party:

Our sole objective is to form a barrier high and eternal as the Andes, which shall forever separate the Church from the State. While we regard the religion of the Bible as the only legitimate element of civilized society, and the single basis of all good government, we are greatly opposed to the introduction of sectarian dogmas into the science of our civil institutions, or the incorporation of Church creeds into the political compact of our government. We believe that the Holy Bible, without sectarian note or comment, to be a most proper and necessary book, as well for our children as ourselves, and we are determined that they shall not be deprived of it, either in or out of school.

HAMBURGER, supra note 137, at 228-29.
citizens. From this conflict arose the first Supreme Court case bearing on Native American religious liberty, *Quick Bear v. Leupp*. The decision favored Native American religious liberty, but only in a very narrow sense. The Court held that to deny government contracts to Catholic reservation schools would unduly restrict the religious liberty of Native Americans. In other words, religious liberty at this point guaranteed only the right of Native peoples to choose among forms of Christianity; it did not extend to the practice of Native religions themselves.

In fact, during the same period that Catholics gained this cramped version of religious liberty for Native Americans, federal Indian policy enacted its most draconian measures against Native American religions. Strikingly, the suppression of Native religions went hand-in-hand with the breakup of tribal territories and governments. In the Dawes Era (1887-1934), also known as the Allotment and Assimilation Period, tribal lands were allotted to individual Native American head of household. As a consequence, about two-thirds of Indian lands ended up in the hands of whites, and many tribal governments were dissolved. These land policies were integrally linked to the second aim of the Dawes period — the

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150. Quick Bear lost, and the Supreme Court’s reasoning was that to deny funding to Catholics was to deny religious freedom. The Court held that “we cannot concede the proposition that Indians cannot be allowed to use their own money to educate their children in the schools of their own choice because the government is necessarily undenominational, as it cannot make any law respecting an establishment of religion or prohibiting the free exercise thereof.” *Quick Bear v. Leupp*, 210 U.S. 50, 81-82 (1908).

151. Prucha, supra note 139, at 252-53. Curiously enough, this period also was significant in regard to another land metaphor we have been tracing — wilderness — for it was the period in which national parks were first created and designated as sacrosanct “wilderness” areas. In an interesting book on this topic, Spence argues that wilderness now began to mean land devoid of humans, who could enter it only as “visitors” and who also were obligated to leave. These newly established wilderness areas became an important part of Euro-American public religion, functioning as national shrines and pilgrimage sites. Native Americans, however, had to be removed to preserve this newly defined “wilderness.” Mark David Spence, *Dispossessing the Wilderness: Indian Removal and the Making of the National Parks* 3-4 (1999).


assimilation of Indians into Anglo-American culture.\textsuperscript{154} In the Dawes era, assimilation took on especially aggressive aspects, including the forced placement of Indian children into English-only boarding schools,\textsuperscript{155} and the criminalization of Native American ceremonies (the latter of which resulted in the Wounded Knee massacre of 1898).\textsuperscript{156} Native Americans who renounced (or appeared to renounce) their spiritual traditions and who accepted private land allotments, could now finally become citizens\textsuperscript{157} — and so, for the first time, claim free exercise and other constitutional rights. But in gaining those freedoms on Euro-American terms, Indians lost religious and political freedom on their own terms.

Through allotment and other means, such as military service, most Indians had gained citizenship individually by the early twentieth century. But only in 1924 were Native Americans as a group made citizens of the United States.\textsuperscript{158} Only then, therefore, could Native Americans as such claim constitutional protections equal to those of non-Native Americans. "Religion" was particularly significant among those rights, since for Native Americans it referred to integral life-ways having far-reaching implications for the communal survival and wellbeing of tribes. The religious persecution of the Dawes era was replaced during what was called the Indian New Deal (1934-1954), with special protections for native spiritual traditions.\textsuperscript{159} At that point, then, freedom of religion became available to Native Americans through two different avenues. As individuals, they were now entitled to the same citizenship rights as all other Americans. As a group, they were now receiving special protections in the context of their unique "ward-guardian" relationship with the federal government.

\textit{IV. The Native American Religious Freedom Cases}

Not long after constitutional rights became applicable to Native Americans, the religion clauses themselves sat up and drew breath. In 1940

\textsuperscript{154} Guzman, \textit{supra} note 5, at 597 n.4.


\textsuperscript{158} \textit{Id.} at 84.

and 1947 respectively, the Supreme Court incorporated the Free Exercise and Establishment Clauses to the States. In 1947, in Everson v. Board of Education, the “wall” metaphor resurfaced in Supreme Court dicta, and with it, the implication that government should not merely disestablish, but rigorously separate itself from religion.\(^{160}\) Although the wall metaphor was most closely bound to establishment jurisprudence, it signaled a strong separationism that affected free exercise as well. While government, imagined as “beyond the wall,” was being scrubbed of religious bias, the inverse also became true. Within the “wall,” religion was to be more scrupulously protected. Under the influence of Separationism, free exercise began to enjoy its highest level of protection, culminating in the Sherbert test of 1963.\(^{161}\) Under Sherbert, government could not place a “substantial infringement” on religion unless it had a compelling interest in doing so.\(^{162}\)

It was in this context that the three Native American free exercise cases were to arrive and ultimately fail in the Supreme Court. The failures, I have suggested, were telling in relation both to the Constitution’s view of religion and to the political standing of Native Americans. In these three cases one can trace the gradual reduction of both the religion clauses and the judicial response to Native Americans to matters of mere “equality.”

Only one of these cases — the Lyng case of 1988 — was about land. All three cases, however, challenged the territorial dominion of Euro-American Public Religion, and in all three it was found that Native religious claims could not be protected under the Separationist model of religion as private property. These religious liberty cases are vivid evidence that the notions of religion as private property and as public territory, although logically contradictory, are politically effective for majoritarian interests against the interests of Native Americans.

In Bowen v. Roy, Abenaki Indian Stephen Roy filed suit on behalf of his daughter, Little Bird of the Snow, who was eligible for food stamps and ADFC benefits. Federal law required that a social security number be assigned to children receiving these benefits. But Roy, upon instruction by an Abenaki chief, came to believe that use of a unique number would “rob” his daughter’s spirit. He refused to both secure a social security number for his daughter and write it on the pertinent forms, whereupon Little Bird was

\[^{160}\text{See Everson v. Bd. of Educ., 330 U.S. 1, 16-18 (1947). The wall of separation metaphor had also appeared earlier in Reynolds v. United States, 98 U.S. 145, 164 (1878), but it was after Everson v. Board of Education that the metaphor became, for a time, canonical.}\]

\[^{161}\text{Sherbert v. Verner, 374 U.S. 398, 403 (1963).}\]

\[^{162}\text{Id. at 406.}\]
denied benefits. Roy then brought suit against the government, arguing that his free exercise had been violated and requesting an individual religious exemption from the requirement that he write down a social security number for his daughter. In addition, Roy issued a much broader claim: he wanted to enjoin the government itself from using a social security number for his daughter. As it turned out, the government already had assigned the child a number. It was therefore theoretically possible for the government to use the number for administrative purposes, even without Roy’s cooperation. Unfortunately for Roy, neither claim was upheld by the Court in its plurality opinion. Only three justices supported his request for an individual exemption.

In contrast to the judicial view of Native Americans as “heathen,” which had characterized the legal treatment of Native religions until the 1930s, the Roy Court accepted the plaintiff’s beliefs as legitimately religious in nature. But the critical point is that with this less normative and judgmental definition of “religion” came a crabbed conception of free exercise. Compared to the deferential standard earlier enunciated in Sherbert, Roy ushered in a new legal regime in which the scope of free exercise protections to which religion was constitutionally entitled suddenly shrank. While agreeing that for Roy social security numbers were a genuinely religious issue, Justice Burger insisted that for the government, they were not. It was as if Roy were making “a sincere religious objection to the size or color of the Government’s filing cabinets.” The Free Exercise Clause “simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.”

Obviously, this reasoning rested heavily on a Separationist model in which religion is conceived as a narrowly delineated part of life, rather than

164. Id.
165. Id. at 697.
166. Chief Justice Warren Burger wrote the plurality’s decision in Roy. Only one Justice, Bryon White, supported both Roy’s broader request (that the government itself not use the Social Security Number) and his narrower request for an individual exemption. See id. at 733 (White, J., dissenting). Eight justices rejected Roy’s broader request, and five of these also rejected the narrower request. However, two of the justices who rejected the exemption request did so because they thought the issue moot and/or not ripe. A minority opinion supporting the exemption request was written by Justice O’Connor. See id. at 724-33 (O’Connor, J., concuring in part and dissenting in part).
167. Id. at 700 (plurality opinion).
168. Id. at 699.
the whole of a cultural world. The Court placed Roy's beliefs on one side of the line and on the other, file cabinets, social security cabinets, and other presumably secular things. In effect, the Court held that, for free exercise purposes, religion is a matter of personal beliefs that cannot make public truth claims or affect public reality. But Roy, like most religious believers, was making an actual truth claim — that his daughter would be spiritually harmed by the assignment to her of a social security number. So for him, what the Court offered was meaningless — a right to believe that his daughter would be harmed, but not the actual power to prevent the harm from occurring.

While the Court's bewilderment at Roy's request is understandable, it failed to acknowledge that government does "conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." Indeed, government does so inevitably, because laws involve beliefs and assumptions that inevitably bear on religion — including beliefs about what is and is not "religious." So from Roy's perspective, the public sphere was not religiously neutral. Instead, it embodied beliefs, and created a reality, directly contrary to his. From the viewpoint of the majority, the public sphere doesn't look like "Publick Religion." On the contrary, it looks like reality, like truth. In judicial parlance, the public sphere seems secular or neutral. Under this guise, Public Religion can determine public reality, leaving private religion only a right to private belief.

This assumption that government is religiously neutral also explains Chief Justice Burger's rejection of Roy's free exercise claim. Religious exemptions, the Chief Justice argued, are not constitutionally required as long as the law is not intended to discriminate against religion (is "facially neutral" and uniformly applied). "[G]iven the diversity of beliefs in our pluralistic society . . . some incidental neutral restraints on the free exercise of religion are inescapable." Since any policy might create "an indirect and incidental burden" on someone's religious belief, the Free Exercise Clause does not protect someone from having to choose between "a public benefit" (such as AFDC) and a religious belief. The right of free exercise, Chief Justice Burger reasoned, means only that the law cannot directly force the violation of a religious belief, or directly penalize religiously mandated behavior. Unless intended "to discriminate against particular

169. Id.
170. Id. at 707.
171. Id. at 712.
172. Id. at 706.
religious beliefs or against religion in general," a law burdening religion needed only to serve a legitimate (rather than compelling) interest.\textsuperscript{173}

In this respect, the \textit{Roy} case foreshadowed the downward trend noted earlier. In the waning days of the Burger Court, and throughout the Rehnquist years, free exercise shrinks from an affirmative freedom (discrimination in favor of religion) to a mere protection against intentional, negative discrimination. The \textit{Roy} plurality read \textit{Sherbert} as promising something much less than special protections for religion. Instead, it interpreted \textit{Sherbert} only to mean that when a law or policy included "a mechanism for individualized exemptions," it would have to consider exemptions for religious as well as non-religious reasons.\textsuperscript{174} In other words, government could not discriminate against religion. This was a far cry from conferring upon religion any special constitutional status requiring accommodation. As Justice O'Connor put it, Chief Justice Burger's low standard of free exercise "relegate[d] a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already provides."\textsuperscript{175}

The second Native American religious freedom case to reach the Supreme Court also presented a conceptual challenge that the Separationist model could not meet. In \textit{Lyng v. Northwest Cemetery Protective Association}, Native Americans objected on free exercise grounds to a road (called the G-O road) that the Forest Service proposed to build in the Chimney Rock area of Six Rivers National Forest. The G-O road would have traversed an area known as the high country, sacred to the Tolowa, Karak, and Yoruk tribes.\textsuperscript{176} Writing for the majority, Justice O'Connor concluded that the Native American respondents in \textit{Lyng} were asking for too much. More than a religious accommodation or exemption, Native respondents were asking the government "to do its own thing differently."\textsuperscript{177} Like Chief Justice Burger in \textit{Bowen v. Roy}, Justice

\textsuperscript{173} \textit{Id.} at 707-08.
\textsuperscript{174} \textit{Id.} at 707.
\textsuperscript{175} \textit{Id.} at 727.
\textsuperscript{177} \textit{Id.} at 453 ("The Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred, and a law prohibiting the Indian respondents from visiting the Chimney Rock area would raise a different set of constitutional questions. Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, \textit{its} land."). Justice O'Connor applied the same rule she had recommended in \textit{Bowen} — a higher standard than that which had actually prevailed in Chief Justice Burger's plurality opinion. Beyond not criminalizing or penalizing religious expression, she argued, government should

https://digitalcommons.law.ou.edu/ailr/vol36/iss2/1
O’Connor read Sherbert in a manner unfavorable to the Native American’s free exercise claim. From Sherbert, she quoted this dictum: “[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.”

But recall that Sherbert also decreed that government could place a “substantial burden” on religious liberty only if government could demonstrate a compelling interest in doing so. Justice Brennan, in his Lyng dissent, contended that the phrase, “substantial burden” referred to the impact of government actions on religion. Since the Court recognized that the G-O road could effectively destroy these Native religions, Justice Brennan contended that it was ludicrous to claim that their religion would not be substantially burdened.

Justice O’Connor countered that the phrase “substantial burden” pertains to the form, rather than the effect, of government action. The key word in the Free Exercise Clause, she contended, is “prohibit.” But while government may not “prohibit” religion, it may inhibit some religious expressions. In both Roy and Lyng, Justice O’Connor acknowledged, government acted in ways that interfered with religious expression. However, “[i]n neither case . . . would the affected individuals be coerced by the Government’s action into violating their religious beliefs; nor would either governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.” To demand more was tantamount to demanding that the government actually helps people practice their religions.

Justice O’Connor did not acknowledge that government, in practice, assists the religious practices of Euro-Christians, whose beliefs are already embedded in public norms. Government, in other words, routinely mistakes religious hegemony for religious neutrality. In Roy, government actions reflected the belief that a social security number could not really harm Little Bird. In Lyng, the Forest Service acted on the belief that land is

not even force a person to choose between following a religious belief and gaining a government benefit (such as food stamps or AFDC). See id. at 449.

178. Id. at 451 (quoting Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)).
179. Sherbert, 374 U.S. at 403 (majority opinion).
180. Lyng, 485 U.S. at 467 (Brennan, J., dissenting).
181. Id. (Brennan, J., dissenting).
182. Id. at 451.
183. Id. at 449.
not a living, sacred thing and therefore cannot be desecrated by a road. Both the Lyng majority and the Roy plurality presumed, rather than examined, the government's claim to religious neutrality. 184 From that standpoint, it seemed that only Native Americans, not the government, held unverifiable "religious" beliefs about such matters as land and social security numbers.

So, while the Lyng majority accorded Native Americans the right to believe anything they want about land, 185 those beliefs would not affect legal realities. Otherwise, Justice O'Connor reasoned, free exercise would entitle Native Americans to claim as much land as they believed was sacred, and to exclude other religious claimants from the same land. 186 In Justice O'Connor's words, "No disrespect for these practices is implied when one notes that such beliefs could easily require de facto beneficial ownership of some rather spacious tracts of public property." 187 And again, "Whatever rights the Indians may have to the use of the area . . . do not divest the Government of its right to use what is, after all, its land." 188

Recalling the Marshall cases, however, it must be said that the high country had not always been government property or even government territory. Nor, indeed, had any of the lands now constituting the United States. That history was strangely echoed in Justice O'Connor's distinction between the (Native American) "use" of the land and the (government's) "ownership" of it — terms Chief Justice Marshall had chiseled into law in Johnson. Chief Justice Marshall's judicial act of dispossession, a century and a half before Lyng, established Indian lands not only as government territory but also as government property. And it had been accomplished

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184. For example, in rejecting Justice Brennan's claim that the impact of the G-O road on Indian religion should be considered, Justice O'Connor argued that such a judgment would have attempted inappropriately to assess religious truth claims: "This Court cannot determine the truth of the underlying beliefs that led to the religious objections here or in Roy, and accordingly cannot weigh the adverse effects on the appellees in Roy and compare them with the adverse effects on the Indian respondents." Id. at 449-50 (citation omitted).

185. The Court also affirmed that religious freedom includes the dimension of worship, and therefore commended the Forest Service for attempting to preserve an area around sites used for Native American rituals. However, these concessions on the Forest Service parts were seen as voluntary accommodations, not as required by the Free Exercise clause. Id. at 454.

186. Id. at 452-53 ("Nothing in the principle for which they contend, however, would distinguish this case from another lawsuit in which they (or similarly situated religious objectors) might seek to exclude all human activity but their own from sacred areas of the public lands.").

187. Id. at 453.

188. Id.
through the adoption of a particular version of the Discovery Doctrine, the religious roots of which Chief Justice Marshall had frankly explicated.

On both the Indian and the Euro-American side, then, fundamental beliefs and values were at stake — beliefs and values concerning the meaning and sacredness of land, the relationship of humans to land, and the origins and moral legitimacy of various claims to land. As Justice Brennan observed, the *Lyng* case was "yet another stress point in the longstanding conflict between two disparate cultures — the dominant Western culture, which views land in terms of ownership and use, and that of Native Americans, in which concepts of private property are not only alien, but contrary to a belief system that holds land sacred."¹⁸⁹

The same point had been made by the Theodoratus Commission, the group appointed by the United States Forest Service to study the *Lyng* case. Even the presumptively secular views of land held by the Forest Service and the Court had religious roots. The Theodoratus reported: "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."¹⁹⁰

These opposing beliefs about land also imply opposing views of religion. Unlike the metaphysical beliefs of Christianity, Native religions can be undermined by actions that injure nature.¹⁹¹ As Justice Brennan wrote, "Where dogma lies at the heart of Western religions, Native American faith is inextricably bound to the use of land."¹⁹² And, again in contrast to Christianity, Native religions are site-specific; they cannot be picked up and taken somewhere else.¹⁹³ Neither religion nor land, on Native terms, is fungible — they cannot be liquidated into cash or exchanged for other goods.¹⁹⁴

¹⁸⁹. *Id.* at 473 (Brennan, J., dissenting).
¹⁹⁰. *Id.* at 460 (Brennan, J., dissenting) (citing U.S. FEDERAL AGENCIES TASK FORCE, AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT 11 (1979) (Task Force Report)).
¹⁹³. *Id.* at 468 (Brennan, J., dissenting) ("And of course respondents here do not even have the option, however unattractive it might be, of migrating to more hospitable locales; the site-specific nature of their belief system renders it non-transportable.").
¹⁹⁴. *Id.* at 461 (Brennan, J., dissenting) ("Within this belief system, therefore, land is not fungible . . . ").
But religion, conceived in this way, cannot be contained in the Separationist model. As the Theodoratus Report put it, religion is not a discrete sphere for Native peoples, and separating the religious from the cultural, social, or political aspects of life "forces Indian concepts into non-Indian categories." We could go farther and say that the co-extensiveness between religion and life-world for Native Americans exposes that Euro-American polity is founded on a life-world of its own, a life-world incompatible with Native worlds. This again signals the contradiction between the two Euro-American models of religion. Although the Constitution constructs religion as separate from the public world, it also relies on a shared Public Religion, in which religious differences are politically and economically insignificant.

As already noted, for Euro-Christians, this contradiction is beneficial. If they are comfortable with the range of accommodations offered by the Free Exercise Clause (and usually they are), it is because they are equally comfortable with the norms that construct and govern the public sphere. The situation of minority religions is just the opposite. For Native Americans, religious beliefs center on land, and therefore defy the ideas of territory and property upon which the constitutional order as a whole rests.

But on the Native side of these cases, too, contradictory models of religion were also in play. The difference was that Native people, unlike Euro-Americans, could not make these contradictions functional. By appealing to the Free Exercise Clause, Native Americans invoked the Separationist notion of religion as something unique and clearly distinguishable from the secular. On the other hand, by claiming liberty to enact a holistic life-world (e.g., to treat land itself as sacred), they were appealing to a very different notion of religion, akin to Euro-American Public Religion. In other words, Native Americans were simultaneously requesting the accommodations available within the constitutional system, and asking for a different system.

A final contradiction was at work in Lyng, and indeed in all three free exercise cases. Native Americans came to the Court both as American citizens demanding ordinary constitutional rights and as a legally unique group. For the Lyng respondents, this created a particular problem. Insofar as they appealed to free exercise rights shared with all other citizens, Native

195. Id. at 459 (citation omitted).
claims upon sacred lands could be countered by non-Native American religious claims to the same lands. For example, New Age rock climbers have claimed a religious freedom to use Native American sacred sites on the same occasions (e.g., the summer solstice) when Indian rituals are performed.\textsuperscript{197} From the moral and historical standpoints, of course, there is an incommensurability between Native and non-Native claims. But from the vantage point of the First Amendment, religious claims must be commensurable. It does not matter, or should not matter, whether a religion is ancient or new, or whether its practitioners are privileged or oppressed, native or non-native.

There were, however, federal laws and regulations uniquely available to Native American religious liberty by the time these cases were argued. Most pertinent was the American Indian Religious Freedom Act (AIRFA) of 1978.\textsuperscript{198} Indians invoked AIRFA in the \textit{Roy} case, and more forcefully in \textit{Lyng}, but in both cases, the Act proved ineffectual. First, AIRFA has no enforcement provisions; it was simply a Joint Congressional Resolution, rather than a proper statute. Moreover, it was unclear whether AIRFA intended to provide anything special for Native Americans. Neither Chief Justice Burger in \textit{Roy}, nor Justice O'Connor in \textit{Lyng},\textsuperscript{199} thought that it did. The resolution’s sponsor, Senator Morris Udall, agreed, stating that AIRFA would not “confer special religious rights on Indians,” nor “change any existing State or Federal law.”\textsuperscript{200} According to Senator Udall, the Joint Resolution simply expressed a Congressional commitment (and a “toothless” commitment at that) to guarantee that “the basic right of the Indian people to exercise their traditional religious practices is not infringed without a clear decision on the part of the Congress or the administrators that such religious practices must yield to some higher consideration.”\textsuperscript{201}

On the other hand, AIRFA did call for special Congressional oversight of Native American religious freedom.\textsuperscript{202} And the very fact that Congress can create legislation pertaining uniquely to Native Americans results from the unique political relationship between Indians and the federal government —

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\textsuperscript{199} \textit{Lyng}, 485 U.S. at 455. Justice Burger interpreted AIRFA minimally; to him it was intended only to reiterate that Native Americans share with non-Natives a constitutional right of Free Exercise. Bowen \textit{v.} Roy, 476 U.S. 693, 700 (1986).
\textsuperscript{200} \textit{Lyng}, 485 U.S. at 455.
\textsuperscript{201} Id.
\textsuperscript{202} See id. at 471 (Brennan, J., dissenting).
\end{flushright}
the relationship that Chief Justice Marshall had so influentially described as that between a ward and guardian. 203 In any case, it was not the unique implications of AIFRA for Native Americans, but their presumed equality with other Americans, that was decisive in both Lyng and Roy. This reduction to equality did not bode well for Native Americans.

In Employment Division of Oregon v. Smith, the two streams of this narrative — the judicial treatment of Native Americans, and the judicial treatment of religion — ran together and took a decisive turn. In Smith, not only was the Native American Church denied protection, the high standard of free exercise that had dominated the Court since the wall metaphor was re-introduced in the 1940s came crashing down. As a result, religion lost much of its uniqueness as a First Amendment category. Rather than requiring that religion be treated in a distinctive way, free exercise came to mean nearly the opposite: that people should neither suffer discrimination nor enjoy unique privileges on account of religion. In parallel fashion, Smith made clear that, for Native Americans, “equality” — that is, religious liberty on the same footing as non-Native people — was an empty right. After Smith, neither religion in general, nor Native American religion in particular, would be constitutionally cordoned off from majoritarian politics. 204 Rather than remaining “properties of peculiar value,” 205 each would be fully territorialized by a public ethos that, as I have argued, amounts to a Public Religion.

Employment Division of Oregon v. Smith concerned two members of the Native American Church (NAC), whose central ritual involves the ingestion of peyote. Alfred Smith and Galen Black 206 both worked for a private drug rehabilitation agency in Oregon. They found no tension between their sacramental use of peyote and their work against substance abuse, since in the NAC, sacramental peyote is believed to cure drug and alcohol addiction. But the rehabilitation agency thought otherwise, so Smith and Black were fired. When they applied for unemployment compensation, the state of Oregon denied their claims on grounds that they had been fired with “good cause” — specifically, that they had broken a criminal law. 207

205. See MADISON, supra note 120.
206. Id. at 874. Alfred Smith was a Klamath Indian; Galen Black was non-Native. See CAROLYN N. LONG, RELIGIOUS FREEDOM AND INDIAN RIGHTS: THE CASE OF OREGON V. SMITH ix (2000).
207. Ironically, however, neither Smith nor Black were prosecuted for these criminal acts. Smith, 494 U.S. at 911 (Blackmun, J., dissenting).
Peyote use was illegal under Oregon’s anti-drug law, and the state legislature had not chosen to exempt the sacramental use of peyote. Smith and Black then brought suit against Oregon, arguing that its refusal to create the religious exemption violated their free exercise rights. When the case arrived at the Supreme Court, the key question was whether the federal Constitution required Oregon to create a religious exemption for peyote use. If Oregon was not so required, then the freedom of the NAC to practice its religion without criminal prosecution would rest on the will of the majority culture as expressed in the legislative process.

For Native Americans in this as in other cases, the significance of territory, property, and boundaries was more than metaphorical. Of first and fundamental significance was the territorial jurisdiction of the federal government and its claim to title over Indian lands. These claims, affirmed in Johnson v. M’Intosh, provided some “excuse, if not justification,” for the fact that Native Americans had become subject to Euro-American law in the first place. Closely related to the territorial claims of the federal government were the jurisdictional claims that states have tried to assert over Indian land and people. That was the conundrum that Chief Justice Marshall attempted to resolve in Cherokee Nation v. Georgia. By defining Indian territories as “domestic dependent nations” and Indian peoples as “wards” and “pupils” of the federal government, he had granted the federal government unique powers over Indian lands and Indian peoples. In so doing, he had also hoped to severely limit the powers of states in regard to Indian affairs.

Even in its own time, sadly, Cherokee Nation v. Georgia had not quieted the jurisdictional claims of states. Despite Chief Justice Marshall’s federalist stance in that case and in the Worcester case which soon followed, Georgia (thanks to the support of President Jackson) was able to force the Cherokees out of what Georgia regarded as its territory. By the time of the Smith case, the boundaries between federal, state, and tribal jurisdictions over Indian lands and people had been drawn and redrawn many times. But at the federal level, at least, Native American

208. Id. at 876 (majority opinion).
209. Id. at 874.
210. See id. at 888-89.
213. See Shockey, supra note 12, at 289.
sacramental peyote had definitely been exempted from the anti-drug statute of 1970.\textsuperscript{215} Although Oregon’s drug law was modeled on this federal law, the state chose not to reproduce this exemption.\textsuperscript{216} In this sense, the Smith case re-activated the old border conflict between federal and state jurisdiction over Indians. And the Rehnquist Court, with its preference for new federalism (i.e., states’ rights) over the original conception of federalism advanced by Chief Justice Marshall, would be more deferential to the claims of states than Marshall had been.

Since the special status of Indians was unavailing so far as Oregon’s drug laws were concerned, the case brought by Smith and Black did not hinge on whether Native Americans would be treated uniquely. Instead, they simply asked that their religion, like those of all American citizens, be protected from government intrusion. Unlike Roy and Lyng, which seemed to demand that the government conduct its own business in a different manner, Smith and Black asked only that they as peyote users be individually exempt from the law on grounds of free exercise.\textsuperscript{217} Indeed,  

\textsuperscript{215} U.S.C. § 1162 (2006); 25 U.S.C. §§ 1321-1326 (2006); 28 U.S.C. § 1360 (2006)). Public Law 280 significantly reduced the power of tribal courts by giving states jurisdiction over most felonies and misdemeanors committed on reservations, with the exception of several “major offenses,” which (when committed by Native Americans on reservations) remain under federal jurisdiction. Public Law 280 was mandatory in some states and voluntary (on the states’ part) in others. Although a number of states have retroceded their Public Law 280 jurisdiction, Native American reservations still remain subject to three sovereigns, depending on the circumstances — tribal, state and federal. See generally Vanessa J. Jimenez & Soo C. Song, Concurrent Tribal and State Jurisdiction Under Public Law 280, 47 AM. U. L. REV. 1627 (1998); John J Harte, Validity of a State Court’s Exercise of Concurrent Jurisdiction over Civil Actions Arising in Indian Country: Application of the Indian Abstinence Doctrine in State Court, 21 AM. INDIAN L. REV. 63 (1997). This tripartite sovereignty was affirmed by the Rehnquist Court in Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 188 (1989). Public Law 280 also had some bearing on Employment Division of Oregon v. Smith. Oregon was claiming that peyote religion is not entitled to Free Exercise exemptions, and due to Public Law 280, the state arguably had jurisdiction on Indian reservations. Respondents argued that by the logic of this position, the state would be able to outlaw Peyote religion even on reservations, where Native religions and cultures are promised federal protection. Brief for Respondents, Emp’t Div. of Or. v. Smith, 494 U.S. 872 (1990) (No. 88-1213), 1989 WL 1126850 at *41.

\textsuperscript{216} The federal peyote exemption first appeared in the Comprehensive Drug Abuse and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970). There, peyote was listed as a Schedule 1 drug (highest potential for abuse) but an exemption was created for “the nondrug use of peyote in bona fide religious ceremonies of the Native American Church[,]” 21 C.F.R. § 1307.31 (1971).

\textsuperscript{217} See 21 C.F.R. § 1307.31. Oregon has no similar law.
from its formation in 1918, the Native American Church was designed specifically to shape peyotism into a religion that would be entitled to free exercise rights.\(^{218}\) As a result, the Native American Church conformed much more closely than had *Roy* or *Lyng* to the idea of religion presumed by the Founders. As practiced by the NAC, Peyotism was designed to be portable, interior, morally conventional, and deeply influenced by Christianity.\(^{219}\)

While *Smith* did not hinge on whether Native Americans would be treated uniquely by the legal system, it did hinge on whether religion would be treated uniquely. It hinged, in other words, on whether religion would be treated as a singular source of exemptions and accommodations, which is precisely what the Free Exercise Clause textually requires. Remarkably, the answer was “no.” Writing for the majority, Justice Scalia opined that religious practitioners were not entitled to exemptions from a “generally applicable law,” particularly a criminal law.\(^{220}\) As long as the law in question was not created with the intention of discriminating against a religious group, religious motives for criminal activity were no different than any other motives. In fact, Justice Scalia argued, effective free exercise claims had never been more than claims against religious discrimination. In instances where the Free Exercise Clause seemed to


\(^{219}\) For an insiders’ description of the Native American Church, see generally *One Nation Under God: The Triumph of the Native American Church* (Huston Smith & Reuben Snake eds., 1996).

The conventionality of peyote religion (in relation to Euro-American norms) can best be understood by comparison to prophetic revitalization movements among Native Americans, of which the most famous (but far from the only) was the Ghost Dance. David Aberle, in an important study of Native American peyotism, classified it among what he termed the “redemptive” type of religious movement (aimed primarily at interior change) and contrasted in with what he called the “transformative” type of religious movement (which aims at large-scale social change). See David F. Aberle, *The Peyote Religion Among the Navajo* 315-52 (1966). One political scientist, Carolyn Smith, in her study of *Employment Division of Oregon v. Smith*, went so far as to effectively deny the name of religion to what Aberle called the “transformative” movements. She refers to the Ghost Dance and similar prophetic religions simply as “militant movements” and reserves the word “religion” for Native American peyotism. See *Long*, supra note 195, at 9. On Native American prophetic religions, see generally Joel W. Martin, *Before and Beyond the Sioux Ghost Dance: Native American Prophetic Movements and the Study of Religion*, 59 J. Am. Acad. Religion 677 (1991), and Lee Irwin, *Freedom, Law, and Prophecy: A Brief History of Native American Religious Resistance*, 21 Am. Indian Q. 35 (1997).

\(^{220}\) *Smith*, 494 U.S. at 884.
confer more than that, he argued, this had occurred only because it was combined with other constitutional rights, such as freedom of speech or freedom of association.\textsuperscript{221}

The \textit{Smith} majority rejected a distinction that had been crucial in the \textit{Roy} and \textit{Lyng} decisions — the distinction between an individual exemption and a challenge to the legal order as a whole. In \textit{Smith}, that difference no longer was relevant. To make an individual exempt from a generally applicable law was to undermine the law itself. This analytical move caused an abandonment of the \textit{Sherbert} standard, as most had understood it.\textsuperscript{222} Under \textit{Sherbert}, Justice Scalia observed, any government regulation could “significantly burden” somebody’s religious expression, and therefore be subject to strict scrutiny. Application of the \textit{Sherbert} test to cases like \textit{Smith} “would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.”\textsuperscript{223} Even if a law could survive strict scrutiny — and Justice O’Connor, defending the \textit{Sherbert} standard, argued that Oregon’s drug law could — Justice Scalia’s point was that the burden on the courts and legislatures would be intolerable.\textsuperscript{224}

Accommodation of religion, Justice Scalia argued, therefore should be left largely to the political process, the only alternative being “a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.”\textsuperscript{225} As Justice O’Connor had pointed out in \textit{Roy}, and as she did again in her separate \textit{Smith} opinion, the Free Exercise Clause virtually

\textsuperscript{221} \textit{Id.} at 881. Justice Scalia characterized this combination of Free Exercise with other constitutional rights a “hybrid situation.” \textit{Id.} at 882.

\textsuperscript{222} Justice Scalia argued that the \textit{Sherbert} standard was of very limited applicability, pertaining only to programs like unemployment insurance that include a mechanism for case-by-case assessment. In his reading, \textit{Sherbert} itself was basically a non-discrimination provision; it meant that if a government program offered individualized exemptions or accommodations, religious reasons for requesting those exemptions should not be treated less favorably than other reasons. Note that in this reasoning, Justice Scalia reiterates and cites part of Justice Burger’s reasoning in \textit{Bowen v. Roy}. \textit{See id.} at 884.

\textsuperscript{223} \textit{Id.} at 888.

\textsuperscript{224} \textit{See id.} at 889 n.5 (“[C]ourts would constantly be in the business of determining whether the ‘severe impact’ of various laws on religious practice . . . or the ‘constitutional[ ] significance’ of the ‘burden on the specific plaintiffs’ . . . suffices to permit us to confer an exemption.”).

\textsuperscript{225} \textit{Id.} at 890.
disappears in this interpretation, replaced either by other items in the Bill of Rights or by the Equal Protection Clause of the Fourteenth Amendment. 226

Perhaps the most striking feature of this decision was that the Smith majority turned on its head the assumptions of Roy and Lyng about what constituted religious liberty. In the earlier cases, the Court had assumed quite reasonably that the worst thing the government could do to a religious practitioner was to criminalize a religious obligation. Freedom from criminal prosecution was therefore the minimal standard of free exercise. As Justice O'Connor put it, government does not have to help you follow your religion, but, absent a compelling interest, it may not "prohibit" you from following your religion. 227

But the Smith majority, examining the question from the standpoint of the ruling majority rather than the persecuted minority, drew precisely the opposite conclusion: that the most unreasonable and indeed impossible demand religious people could make on government was to be exempt from criminal laws. 228 Taking the Smith logic to the obvious next step, one cannot help but raise a troubling question. If the government can criminally prosecute you for following your religion, why could government not inhibit religious expression in less coercive ways? And if so, what becomes of free exercise?

The devastating implications of the Smith decision illuminate perfectly the intractable contradiction at the heart of church-state jurisprudence. Criminal laws, after all, presumably embody the norms that the majority views as essential to the wellbeing of society. But religion in its constitutional sense also embodies inviolable norms, what the Founders

226. Id. at 894 (O'Connor, J., concurring) ("Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice. If the First Amendment is to have any vitality, it ought not to be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice."). Justice O'Connor also stated, "We have in any event recognized that the Free Exercise Clause protects values distinct from those protected by the Equal Protection Clause. As the language of the Clause itself makes clear, an individual's free exercise of religion is a preferred constitutional activity." Id. at 901-02 (O'Connor, J., concurring) (citation omitted).

227. Id. at 898-99 (O'Connor, J., concurring).

228. Id. at 885 (majority opinion). Consistent with her opinions in Bowen and Lyng, Justice O'Connor objected strenuously to the Smith majority's acceptance of criminal restrictions on Free Exercise, not however contending with the paradox discussed below. "A neutral criminal law prohibiting conduct that a State may legitimately regulate is, if anything, more burdensome than a neutral civil statute placing legitimate conditions on the award of a state benefit." Id. at 888-89 (O'Connor, J., concurring).
understood to be the inviolable norms of conscience. From the standpoint of individual citizens, norms of this type must not be codified as law or, if so codified, must provide generously for conscientious dissent. From the standpoint of the polity, however, the exact opposite must result: norms with this sort of essential, inviolable quality should be enforced as law.

Until the mid-twentieth century, this contradiction was managed by what I have called Public Religion, a set of hegemonic norms that were presumed neutral because the values they uphold appeared to the majority to go without saying. Public Religion usually was not perceived by the Court as coercive, or indeed as "religion" at all. Consequently, it rarely drew First Amendment scrutiny. At the same time, "religion" for constitutional purposes could be articulated as a quite limited realm of exemptions, accommodations, and government restraints. Under these circumstances, free exercise did not threaten the power of the majority to legislate. Nor did the Establishment Clause undermine majoritarian assumptions, such as the propriety of devotional Bible use in public schools, 229 denying atheists the right to hold public offices, 230 or suppressing the "pagan" and "superstitious" rituals of American Indians.

But by the late twentieth century, things had changed. Increasing religious diversity, together with the rigorous application of the religion clauses, had exposed the non-neutrality of these public norms. They could no longer be assumed without explanation. As Justice O'Connor put it:

There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion. 231

Oregon's peyote laws illustrated this point vividly, for in the context of the American and European colonial history before it, the suppression of peyote was hardly religiously neutral. In fact, it often was a specifically religious form of persecution in the sense that Euro-Christians viewed peyotism as "heresy," "heathenism," or "superstition" and attempted to suppress it for that reason. The first European records of peyotism in the New World come from the Spanish Inquisition, which issued a decree

against the practice in 1620.\textsuperscript{232} In the American republic, federally supported missionaries played a central role in discouraging peyote religion and in supporting state-level, anti-peyote laws.\textsuperscript{233}

By the late nineteenth century, when peyotism took on a large-scale pan-Indian movement,\textsuperscript{234} the period of missionary control had ended, and ostensibly secularized agencies, such as the Bureau of Indian Affairs, were in charge of such matters. But in 1883, in the context of its most extensive effort to wipe out Native religions, the BIA prohibited peyotism,\textsuperscript{235} along with "heathenish and barbaric" practices, such as the Sun Dance and the Ghost Dance.\textsuperscript{236} In some states, peyote could be legally used by Euro-Americans for medicinal purposes, while remaining illegal only for Native Americans — in other words, illegal only when used for religious purposes.\textsuperscript{237}

It was in response to this long and well-known history of religious persecution that the Bureau of Indian Affairs began to protect peyotism and other Indian religious practices in 1934, under the leadership of John Collier.\textsuperscript{238} By this time, it was anthropologists rather than missionaries who were the most influential Euro-American players in Indian affairs. And just as the missionaries had objected to peyotism on religious grounds, so there


\textsuperscript{235} Peyote was prohibited due to its inclusion in the class of prohibited "intoxicants," but it is fair to say that in the Dawes period, these prohibitions were part of a deliberate effort to destroy traditional Native religion and culture. See Omer C. Stewart, Peyote Religion: A History 128-47 (1987).

\textsuperscript{236} See Fisher, supra note 130, at 8-9.

\textsuperscript{237} For a description of the Inquisition's effort to suppress peyote beginning in 1620 and continuing through most of the 18th century, see Stewart, supra note 224, at 20-30. When the U.S. government began its own campaign against peyote use, that campaign was initially directed solely against Native Americans. For example, the first law criminalizing the possession and sale of peyote, which was passed in the Oklahoma Territory in 1899, was concerned solely with the transfer of peyote only to "allotted Indians." No such prohibition was extended to non-Indians. In the same period, federal agents began to prohibit peyote use on Indian reservations. See id. at 131.

\textsuperscript{238} See James Botsford & Walter B. Echo-Hawk, The Legal Tango: The Native American Church v. the United States of America, in One Nation Under God, supra note 208, at 128.
was often a religious dimension to the support for peyotists among their new academic and professional advocates. Figures like John Collier and ethnographer James Mooney were not only interested in protecting and studying the religious practices of Native Americans, they were also personally attracted to Native American religions.  

These were the historical antecedents of the peyote exemption in the federal drug control law, which Oregon had deliberately excluded from its own anti-drug legislation. In view of this history, it was astonishing that the state could present its drug law as simply “neutral” with respect to religion, and more astonishing still that the Supreme Court would accept this characterization. But with the Smith decision, government neutrality was no longer simply assumed; it was aggressively and counterfactually asserted. By requiring only that laws not deliberately discriminate against a religion, the government was effectively encouraged to deliberately forget about minority religions, or in the case of Native Americans, to feign ignorance about something it had known for a long time.

The Native American Church had shattered that illusion of neutrality by demonstrating that government actions had directly prohibited a religious practice. At that point, the judicial argument had to shift ground, arguing that religious exemptions had become simply impracticable. As Justice Scalia put it, the danger of anarchy “increases in direct proportion to the society’s diversity of religious beliefs, and its determination to coerce or suppress none of them.”  

Under those circumstances, and “precisely because we value and protect that religious divergence,” the polity “cannot afford the luxury” of applying the highest standard of scrutiny to all government actions that might burden somebody’s religion. As the Supreme Court’s definition of religion becomes more capacious and less...

239. John Collier, a social worker, found modern Euro-American life wanting and looked to Native American traditions for spiritual renewal. In 1920, upon visiting Pueblo country (which he dubbed “the Red Atlantis”) he concluded that the Pueblo had “the fundamental secret of human life,” a medicine for his own “sick” times. See Berkhofer, supra note 101, at 179. Ethnographer James Mooney, who was instrumental in the founding of the Native American Church, believed deeply in the spiritual value of peyotism and other American Indian traditions, such as the Ghost Dance. According to his biographer, L.G. Moses, Mooney participated in many peyote. For Mooney’s role in the formation of the Native American Church, see Jay C. Fikes, Appendix: A Brief History of the Native American Church, in ONE NATION UNDER GOD, supra note 208, at 169. For Mooney’s involvement in peyotism, see L.G. MOSES, THE INDIAN MAN: A BIOGRAPHY OF JAMES MOONEY 179-205 (1984) (especially page 188).


241. Id.
normative, then, its standard for the *free exercise* of religion shrinks toward the vanishing point.

It would not be accurate, however, to end our study of these cases with the implication that their outcomes resulted only in injustice and were motivated only by majoritarian insensitivity or plain bad will. Certainly, these free exercise cases — like the Marshall cases before them — were built on profound historical injustices to Indians, and certainly the decisions in those cases helped legitimate and sometimes advance those injustices. But the story was never that simple, as Stuart Banner argues. 242

Nineteenth century Native Americans were more than victims in their dealings with Euro-Americans. They attempted to negotiate the best deals possible in constrained circumstances, and they appealed to rules of law that were accepted by their adversaries. 243 As Banner also argues, Euro-Americans did not simply take Indian lands by force, but typically used their own legal and economic systems — albeit in opportunistic and sometimes cynical ways — to acquire those lands. 244 The same applies to the free exercise cases. Native Americans in these cases simultaneously invoked the legal system and challenged it. They both asked to be treated differently than non-Native citizens and to be treated the same. This was done not because of hypocrisy or poor logic, but rather to deploy all possible strategies in the hope that one would work.

Similarly, the negative outcomes of these free exercise cases involved more than injustice (although certainly there was plenty of injustice in the history behind these cases) and faulty judicial reasoning (though there may have been much of that as well). The profound contradictions inherent in America’s discourse of religion, which these cases brought so vividly to light, are *irresolvable* in the existing conceptual frameworks. The *Lyng* Court was correct, for example, to say that in theory, there was no limit to how much public land might be considered sacred to Native Americans. They were also right to note that non-Native Americans could make conflicting religious claims upon the same lands. The *Roy* Court was right to fear that administrative procedures could not possibly be set up in such a way as to cohere with every possible religious belief system. And the *Smith* Court was accurate to say that once religious diversity is fully recognized, there is no way to limit or manage the possible range of free exercise.

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243. *Id.* at 49-84.
244. *Id.* at 11-48.
Moreover, religious diversity does indeed erode the Separationist notion of religion, and with it, both of the religion clauses. As the category of religion expands, it becomes more and more clear that anything can be a religious issue — from social security numbers, to the use of hallucinogenic drugs, to the building of roads. To these Native American examples we could add headscarves, animal slaughter, the number and gender of persons one can marry, the teaching of Darwinism, and any number of other issues. And if anything can become a religious issue, then there is no bright line between what is and what is not religion. In other words, religion is amorphous and assumes a different role depending on the context and culture in which it is practiced. Yet it is the very word, “religion,” upon which the Free Exercise and Establishment Clauses depend.

V. Concluding Reservations: Religion and the Ground of Government

In the aftermath of the Smith decision, free exercise exemptions to generally applicable, facially neutral laws no longer are constitutionally required. Instead, the more salient question became whether legislatures may permit such exemptions without running afoul of the Establishment Clause. Since Smith, the Supreme Court has been less occupied with free exercise simpliciter than with cases “in the joints,” concerning religious exemptions which, while not compelled by the Free Exercise Clause, may violate the Establishment Clause.

For Native American religions, the decline of free exercise cases implies that it is more promising to rely on their unique treaty and trust relationships with the federal government than on constitutional rights shared with non-natives. At the moment, Native American religious freedoms (like other Native American rights) are more effectively sought by dealing with Congress than with the judiciary. As Louis Fisher writes, rights are better sought by legislating than by litigating.

It is true, of course, that the trust (“guardian-ward”) relationship has entrained some extremely negative meanings and consequences for Native

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245. Smith, 494 U.S. at 890 ("But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts.") (emphasis added).
247. See generally Fisher, supra note 130.
people.\textsuperscript{248} On the positive side, however, the trust relationship enables the federal legislature to create unique protections for Native religions and cultures. And that is precisely what happened after the \textit{Smith} decision. Peyotism and other Native religious traditions have been placed under federal protection by a series of laws, resolutions, and executive orders.\textsuperscript{249} But the trust relationship alone is insufficient because it forces Native American's to rely on the goodwill of the federal government in establishing their rights.\textsuperscript{250}

Beyond being wards of the federal government, Indian nations must be treated as sovereigns, and that sovereignty must be conceived far more robustly than hitherto. This deeper question, the question of sovereignty, can be addressed only through the other main aspect of Native uniqueness — their treaty relationships with the federal government. It is to the treaty aspect of Native uniqueness, therefore, that we will shortly return.

Non-Native Americans, too, have found that since the \textit{Smith} decision, their religious liberties have been protected more energetically by Congress than by the Court. In 1993, Congress passed the Religious Freedom Restoration Act (RFRA),\textsuperscript{251} which attempted to re-institute the \textit{Sherbert


   Notwithstanding any other provision of law, the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion is lawful, and shall not be prohibited by the United States or any State. No Indian shall be penalized or discriminated against on the basis of such use, possession or transportation, including, but not limited to, denial of otherwise applicable benefits under public assistance programs.


\textsuperscript{250} See Thompson, supra note 242, at 425 ("Despite the advantages, there are several serious disadvantages to the trust relationship. First, federal control over trust lands and resources necessarily prevents the tribes and its members from making decisions affecting their future. Second, a degree of paternalism inheres in the federal trust responsibility, which may influence federal action in a manner inconsistent with the tribes' wishes.").

standard for all federal and state laws. The Supreme Court in City of Boerne v. Flores overturned RFRA as applied to states, on grounds that the federal government, while it can regulate its own actions, cannot interpret the substantive meaning of the Constitution. At the federal level, then, RFRA remains good law, and has been upheld as such by the Court. But from the judicial point of view, it sets a higher standard of free exercise than is constitutionally required. Since the Boerne case, many states have instituted RFRA of their own. In short, where there is a high standard of religious liberty in the United States today, it is due more to legislatures than to courts.

But for non-natives as for Native Americans, religious liberty should not rely on the legislative branch alone. To do is to supplant a guaranteed freedom with a precarious concession. Moreover, “religion” is a matter of origins — i.e., the basic assumptions, values, and worldview of a people. As Marshall conceded in the Johnson case, our national origins were created by violence and often have been maintained through domination. But, for better or worse, those origins are not “finished;” they are continually re-read and re-enacted.

The religion clauses offer principles for doing so in a deliberative and democratic manner, and the questions they raise are precisely of this “original” or foundational sort. What exactly are the purposes and limits of government? What is the range and meaning of personal liberty? Which norms are so crucial to public life that they must be in some sense “established,” and which are so crucial to moral integrity that they must not be established? What is the role of sub-political communities within the polity? How much power can/must these communities have to envision and enact distinct life-ways? These are among the most “original” or fundamental of political questions. The religion clauses do not resolve

254. Id. at 536.
255. See generally Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006). This case applies RFRA as federal law in favor of a religious group that made sacramental use of a substance (hoasca) containing a chemical whose use is prohibited by federal law. Id.
these questions, but they do force us to confront these questions, and they provide constitutional principles and parameters with which to frame the answers.

However, the religion clauses cannot function when religion is treated simply as a suspect classification rather than as a topic bound by unique constitutional principles. On the other hand, as the Native American cases vividly illustrate, religion is a moving target. The list of religions grows and changes over time, and even the religions on the list cannot easily agree on what the word means. Nor is the line between the religious and the secular fixed. Indeed, the line may not really exist, given that to define the secular is a “religious” decision — in other words, a decision about what does and doesn’t comprise the sacred. To revitalize democratic deliberation about religion, therefore, we do need to re-imagine religion. But to do so, we need metaphors other than territory (with its implication of domination) or property (with its implication of individual ownership). Returning to the third Marshall case, Worcester v. Georgia, I will suggest that reservation is such a metaphor.258

The word reservation comes from a judicial doctrine of treaty interpretation that was called the “reserved rights doctrine.”259 This doctrine was fully spelled out by the Court in the early twentieth century,260 but first laid down in Chief Justice Marshall’s Worcester decision.261 Reservation referred to the lands retained by Native Americans and within which they could exercise sovereignty.262 In time, however,


259. Frickey, supra note 65, at 402.


261. Frickey, supra note 65, at 401-02.

262. Interpreting the 1785 Treaty of Hopewell, which had established the Cherokee reservation at issue in Worcester v. Georgia, Chief Justice Marshall contended that the Cherokees, in agreeing to the Treaty, were only agreeing to conditions related to trade. He stated:

Is it credible, that [the Cherokees] could have considered themselves as surrendering to the United States, the right to dictate their future cessions, and the terms on which they should be made; or to compel their submission to the violence of disorderly and licentious intruders? It is equally inconceivable that they could have supposed themselves, by a phrase thus slipped into an article, on another and more interesting subject, to have divested themselves of the right of self government on subjects not connected with trade.
reservations became places in which Native peoples were virtually incarcerated.\textsuperscript{263} To return to another familiar metaphor, we could say that Native people ended up on the wrong side of the "wall" that separated the reservation from the Euro-American polity. Native Americans, as Chief Justice Marshall concluded in \textit{Worcester v. Georgia}, would have understood the land treaties as grants from themselves to the United States, rather than the other way around. In other words, Indians would have understood themselves as retaining everything they did not specifically cede.\textsuperscript{264}

But the Euro-American government (sometimes at the federal level, and sometimes at the state level too) grew to perceive the entire continental landmass as its own territory.\textsuperscript{265} Rather than understanding Native Americans to retain everything that they had not specifically given away to the government, the government preferred to imagine that Native people had given away everything not specifically allocated to them.\textsuperscript{266} The meaning of reservation, in other words, was turned inside out. For Indian Nations, this shift of meaning was literally disastrous in terms of real property. It meant the loss of nearly everything.\textsuperscript{267} On a spiritual level, the

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\textsuperscript{263} The virtual equivalency between reservation life and incarceration in the late nineteenth century was noted ruefully by U.S. Court of Claims in 1898.

These Indians, indeed, in 1878 occupied an anomalous position, unknown to the common or the civil law or to any system of municipal law. They were neither citizens nor aliens; they were neither free persons nor slaves; they were the wards of the nation, and yet, on a reservation under a military guard, were little else than prisoners of war while war did not exist.

Conners v. United States, 33 Ct. Cl. 317, 323 (1898).

\textsuperscript{264} \textit{Worcester}, 31 U.S. at 552-53.

\textsuperscript{265} \textit{See supra} note 38 (discussing transformation of the Supremacy Clause during the Continental Congress to imply federal jurisdiction over the entire continental landmass) and \textit{supra} note 203 (discussing the expansion over state jurisdictional claims over Indian territories).

\textsuperscript{266} This was, of course, the position taken by Georgia in \textit{Worcester v. Georgia}, 31 U.S. at 552-53. It was also the view of Marshall's colleagues Justices Johnson and Baldwin, who had argued in \textit{Cherokee Nation v. Georgia} that the Cherokees retained no sovereignty whatsoever. \textit{See Cherokee Nation v. Georgia}, 30 U.S. (5 Pet.) 1, 20-50 (1831).

\textsuperscript{267} The more benign and principled theory of treaty interpreted adumbrated by Marshall in \textit{Worcester v. Georgia} was immediately rendered powerless by President Andrew Jackson, who is famously reputed to have said "John Marshall has made his decision; now let him enforce it." \textit{See} \textbf{WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE TEN WORST INDIAN LAW CASES EVER DECIDED} 110 (2010). This disregard for treaties and for the underlying principle of Native sovereignty enabled the Removal Policy and the loss of most Indian lands east of the Mississippi River. On the government's disregard for treaties, see

https://digitalcommons.law.ou.edu/ailr/vol36/iss2/1
relationship of Native people to the land, and thus to the heart of their religion, was severely injured.268

The facts of the case were as follows. Samuel Worcester, a white man, had been arrested and convicted by the state of Georgia for having entered Cherokee territory without a state permit and without having taken a required oath of loyalty to the state. Georgia issued these charges pursuant to the laws it had passed in 1828 and 1829, after gold was discovered in Cherokee territory. Georgia claimed absolute territorial control over Cherokee lands that lay within the state’s external boundaries and attempted to dissolve the Cherokee’s own government so the state could force the Cherokees from their lands.269 The underlying issue, then, was the same as that raised by the Cherokees a year before, in their own suit, Cherokee Nation v. Georgia.270 Ironically, the injustice that Chief Justice Marshall could not address on behalf of the Cherokees themselves (given, in his view, their status as “domestic, dependent nations”) was eagerly redressed when the Worcester case gave him the opportunity.

Georgia contended that in treaties (primarily the Hopewell Treaty of 1785 and the Holston Treaty of 1791), the Cherokees had given away their land, retaining only their “hunting grounds.”271 Moreover, Georgia argued, in agreeing to allow the federal government to manage “all their affairs,” the Cherokees had surrendered their sovereignty.272 Worcester countered with three arguments, one statutory and the other two constitutional. He argued that Georgia, with the laws of 1828 and 1829, violated an 1802 act of Congress that arrogated to the federal government alone the power to regulate “trade and intercourse with the Indian tribes, and to preserve peace on the frontiers.”273 On the constitutional plane, Worcester pointed out that the Constitution gives Congress, not the states, the power to regulate

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268. For the spiritual damage inflicted by the loss of land, see Kidwell et al., supra note 23, at 129-48; Deloria, God is Red, supra note 23, at 291-92.

269. See Worcester, 31 U.S. at 537-42; Frickey, supra note 64, at 393; Sundquist, supra note 71, at 240-42.

270. See Shockey, supra note 12, at 287.


273. Id. at 537-40.
relations with Indians. Most importantly, *Worcester* pointed to the sovereignty of the Cherokee Nation over its own territory, as implied by its treaties’ relationship with the federal government.

Public Religion played a central role for the plaintiff, since Samuel Worcester was “a duly authorised missionary of the American Board of Commissioners for Foreign Missions, under the authority of the president of the United States.” As his brief correctly observed, Worcester’s presence in Cherokee territory belonged to a longstanding tradition of federally funded missions to the Indians. As noted, this policy had been formalized through the Civilization Act of 1819, in which Congress created a fund to support “persons of good character” (in effect, Christian missionaries) to live with Indians and advance their level of “civilization.” These missionaries would be under the direct authority of the executive branch. Again, this was rationalized through the image of wilderness. Native people were “sons of the forest” in need of benevolent taming by Euro-Christians.

Under the Civilization Policy, missionary and government aims with respect to Indians were congruent. Like the missionaries, the federal government believed that Native people needed moral training, and that Christianization was obviously the best way to accomplish this. Like the government, missionaries hoped that Christian conversion would pacify Native Americans and thereby ensure the safety of Euro-Americans. Both the government and the missionaries linked Christianity with Euro-American cultural habits, in particular the private ownership and cultivation of land.

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274. *Id.* at 559 (“The correct exposition of this article is rendered unnecessary by the adoption of our existing constitution. That instrument confers on Congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indian[s].”).

275. *Id.* (“The constitution, by declaring treaties . . . to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and, consequently, admits their rank among those powers who are capable of making treaties.”).

276. *Id.* at 538.

277. *Id.*

278. *Id.* at 557.

279. See *Beaver*, *supra* note 101, at 67-68. The image of wilderness appeared also in Justice M’Lean’s comments on the Civilization, in his concurring opinion. *Worcester*, 31 U.S. at 588 (M’Lean, J., concurring) (“The humane policy of the government towards these children of the wilderness must afford pleasure to every benevolent feeling; and if the efforts made have not proved as successful as was anticipated, still much has been done.”).
Given that the tribal relationship to land lies at the heart of Native spirituality, this commodification of land also decimated tribal religion. Politically, the ending of tribal land ownership entailed the disappearance of Indian nations as such. All of this was intended by both the government and the missionaries. To put it bluntly but accurately, the cultural death of Native peoples was viewed as the condition for their physical survival.280

In the years since 1819, however, another federal policy was being introduced — the removal of Eastern Indians to the areas west of the Mississippi.281 Like the Civilization policy, the Removal Policy was rationalized as a way of protecting and improving Indian life.282 Initially, this was to be done through treaty agreements; ultimately (and in the case of the Cherokees) it would be done by violent force.283 Georgia’s conflict with the Cherokees flared up in the context of this policy shift from civilization to removal.284

Whatever humanitarian motives for removal may have been asserted, the material interests of Euro-Americans in this new policy were plain to see. It provided land for the ever-increasing white population to the East, extension of Euro-American political control, and access to material resources on Indian lands285 — for example, the gold of the Cherokees. And while missionary work could be viewed as humane, forced removal was transparently cruel. In fact, as R. Pierce Beaver reported, it was the introduction of the Removal Policy that caused the first serious friction

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280. M’Lean stated explicitly that both the civilization program and Indian sovereignty were intended to be temporary:

The exercise of the power of self-government by the Indians, within a state, is undoubtedly contemplated to be temporary. This is shown by the settled policy of the government, in the extinguishment of their title, and especially by the compact with the state of Georgia. It is a question, not of abstract right, but of public policy. I do not mean to say, that the same moral rule which should regulate the affairs of private life, should not be regarded by communities or nations. But, a sound national policy does require that the Indian tribes within our states should exchange their territories, upon equitable principles, or, eventually, consent to become amalgamated in our political communities.


284. See Carpenter, supra note 10, at 119; Sundquist, supra note 71, at 240-42.

285. See Berger, supra note 147, at 7.
between the federal government and the missionaries, most notably Samuel Worcester.\textsuperscript{286} Nonetheless, Removal was ideologically consistent with the assumption underlying the Civilization Policy — that Native American cultures were destined to end.

Chief Justice Marshall supported the Civilization policy of which Worcester was an agent, characterizing it as "an act for promoting those humane designs of civilizing the neighbouring Indians, which had long been cherished by the executive."\textsuperscript{287} But he regarded Removal as profoundly inhumane, as he'd made clear the year before in *Cherokee Nation v. Georgia*\textsuperscript{288} In other words, Chief Justice Marshall regarded the Removal Policy as inconsistent with the Civilization Policy, despite that both policies ultimately aimed to bring an end to Native cultures. While the Chief Justice anticipated the same outcome in the long term, in the shorter term he understood civilization as the alternative to removal. If Indians became civilized, he believed, they should not have to move.\textsuperscript{289} And the Cherokees, in fact, had become "civilized." As Chief Justice Marshall pointed out, they had set up a constitutional government, taken up farming, and many had converted to Christianity.\textsuperscript{290}

Uncomfortably for the Chief Justice, however, Removal was also consistent with the Discovery Doctrine as he had formulated it in *Johnson*. In *Johnson*, recall, Chief Justice Marshall had claimed that "discovery" gave the conquering nation the right to "extinguish [] Indian title,"\textsuperscript{291} and this pre-emptive claim to land would become the foundation of the

\textsuperscript{286} According to Beaver, the Removal Policy created the first tension between missionaries and the government, although most missionaries accepted the Removal Policy and some (e.g., Baptist Isaac McCoy) actively collaborated with its adoption. See Beaver, *supra* note 101, at 85-121. However, Samuel Worcester was among the missionaries who resisted the policy. But even Worcester was to change his mind, in view of events that transpired after his case was won. In defiance of John Marshall's order, the federal government made clear its resolve to remove the Cherokees by force and Georgia continued to place white soldiers and miners in Cherokee territory. Faced with the physical threat of forcible removal, and the moral threat of contact with badly behaving whites, the Cherokee could not be safe in Georgia, Worcester sadly accepted the policy. For Worcester's and other responses to the Removal Policy, see Ronald N. Satz, *American Indian Policy in the Jacksonian Era* 39-63 (1975) (especially page 55).


\textsuperscript{288} See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15 (1831).

\textsuperscript{289} Referring to the Civilization Act, Marshall wrote: "This act furnishes strong additional evidence of a settled purpose to fix the Indians in their country by giving them security at home." *Worcester*, 31 U.S. at 557.

\textsuperscript{290} *Cherokee Nation*, 30 U.S. at 6.

\textsuperscript{291} Johnson v. Mc'Intosh, 21 U.S. (8 Wheat.) 543, 587 (1823).
Removal Policy too. Moreover, the Marshall of Johnson noted, albeit with a tone of opprobrium, that the Discovery Doctrine was at root theological. It was because Europeans were Christians that they could assert that political and cultural conquest was actually in the interest of the land and its inhabitants. Although the claim to title that grew out of this theological doctrine was “extravagant,” the Marshall of Johnson had underlined that it had in effect come true; it was now the very “law of the land.” In Johnson, then, the law of the land was founded on Christianity, although imposed by force alone.

Chief Justice Marshall’s rejection of the Removal Policy amounted to a change in his public theology, specifically an attempt to remediate its originative violence. In Worcester, the Chief Justice again called the European claim to title “extravagant.” But now, rather than adding that this extravagant claim was nonetheless the law of the land, he called it “extravagant and absurd.” In fact, the Marshall of Worcester claims that the idea that Euro-American territory and property would cover the landmass from east to west, including the lands of the Indians, “did not enter the mind of any man.” This was an extraordinary claim, since in his Johnson decision, the idea seemed not only to have entered Marshall’s own mind, but for a time settled there.

In an unacknowledged but radical revision of his prior Discovery Doctrine, Chief Justice Marshall now adopted a more lawful and limited version, akin to that proposed by the Cherokees the year before. Discovery, he stated, was an agreement that European nations had made with each other, and they had made it only “because it was the interest of all.” It now only meant that the conquering nation held the exclusive right to

292. See id. at 572-73.
293. Id. at 591.
295. Id. at 544-45 (“The extravagant and absurd idea, that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man.”).
296. See, e.g., Johnson, 21 U.S. at 586 (“The ceded territory was occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted.”). Frickey argues that there may be less inconsistency than appears between Johnson v. McIntosh and Worcester because in the earlier case, Marshall’s primary concern was not with Native American claims to their own lands, but with the narrower question of how non-Natives could purchase Indian lands. See Frickey, supra note 66, at 389-90.
purchase the conquered lands from its inhabitants; but it "could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man."298 However, there remained an important element of force: Indian nations could sell their land only to the conquering government. This one constraint, "imposed by irresistible power," was "the single exception" to a lawful relation between Indians and the federal government.299

Once conquest was complete, a more lawful and less violent relationship had to be established. This applied also to the Christianization process. Although the Discovery Doctrine had forcibly assumed Christian ideology, Chief Justice Marshall argued that in the present, post-conquest situation, Christianity had to behave differently with Indians. In the present, he argued, conversion to Christianity must be "accomplished by conciliatory conduct and good example; not by extermination."300

The key shift in the Chief Justice's public theology was an implicit theory of "reserved rights," which as I've suggested, bears both on Native American rights and on the constitutional substance of religion. In respect to land, Chief Justice Marshall traced the idea of reservation to the British crown, which in 1769, proclaimed that any lands not specifically ceded by Indians to the crown were to be understood as reserved for the Indians themselves.301 The Chief Justice applied the same theory to treaties between the Indians and the federal government.

298. Id.
299. Id. at 559.
   This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.
Id. at 544.
300. Id. at 546.
301. Id. at 548 ("The proclamation issued by the king of Great Britain, in 1763, soon after the ratification of the articles of peace, forbids the governors of any of the colonies to grant warrants of survey, or pass patents upon any lands whatever, which, not having been ceded to, or purchased by, us (the king), as aforesaid, are reserved to the said Indians, or any of them. The proclamation proceeds: 'and we do further declare it to be our royal will and pleasure, for the present, as aforesaid, to reserve, under our sovereignty, protection, and
As Philip Frickey has shown, this involved a generous, even tortuous interpretation of certain words, particularly "allocated" and "hunting grounds," as these appeared in the treaty of Holston, article four.\textsuperscript{302} For the Cherokees, Chief Justice Marshall contended, "hunting grounds" would have been indistinguishable from land as such, since hunting was their primary relationship to land. Therefore in retaining their "hunting grounds," the Cherokees would not have understood themselves to be left only with the right to "use" rather than to own the land in question.\textsuperscript{303} And where the treaty spoke of lands "allotted" to the Cherokees, the Cherokees would not have understood this to imply that the federal government now possessed everything not specifically retained by the Cherokees. Instead, the Cherokees would have assumed precisely the opposite — that it was they who retained the fullness of their territory and sovereignty, of which they ceded a part to the U.S. government.\textsuperscript{304}

Chief Justice Marshall justified his generous interpretive strategy partly with reference to the fact that the Cherokees were not literate and likely did not pick up the nuances and risks of the treaty language.\textsuperscript{305} Moreover, the Chief Justice argued that treaties must never be read in a way that negated the sovereignty of the weaker party. Citing Vattel, Marshall asserted this principle as belonging to "the settled . . . law of nations."\textsuperscript{306} Because Indian

dominion, for the use of the said Indians, all the lands and territories lying to the westward of the sources of the rivers which fall into the sea, from the west and northwest as aforesaid: and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of any of the lands above reserved, without our special leave and license for that purpose first obtained."

\textsuperscript{302} See Frickey, supra note 66, at 398-406.

\textsuperscript{303} Worcester, 31 U.S. at 553 ("So with respect to the words 'hunting grounds.' Hunting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other. It could not, however, be supposed, that any intention existed of restricting the full use of the lands they reserved.")

\textsuperscript{304} Id. at 552-53 ("It is reasonable to suppose, that the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language, should distinguish the word 'allotted' from the words 'marked out.' The actual subject of contract was the dividing line between the two nations, and their attention may very well be supposed to have been confined to that subject. When, in fact, they were ceding lands to the United States, and describing the extent of their cession, it may very well be supposed that they might not understand the term employed, as indicating that, instead of granting, they were receiving lands.")

\textsuperscript{305} Id.

\textsuperscript{306} Id. at 560-61 ("The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence-its right to self government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the
nations were the weaker party (and also, no doubt, because of the federal government’s trust relationship with them), any ambiguities in the treaty language must be interpreted in the best interests of the Indians.\textsuperscript{307} Philip Frickey draws from this an additional, but persuasive conclusion: Marshall handled Indian treaties as constitutive documents.\textsuperscript{308}

Belonging to the “supreme law of the land,” treaties between Indian nations and the government were akin to the constitutional government itself. Just as the federal Constitution could be understood as a sort of treaty among sovereign states, each of which (according to the Tenth Amendment) “reserved” every right and power that it did not specifically cede, so the treaties between Indian Nations and the federal government could be understood as an agreement among sovereigns, each of which retained everything not specifically ceded to the other.\textsuperscript{309} Apart from the imposed constraint of selling land only to the federal government, Chief Justice Marshall wrote, Indian nations “had always been considered as distinct, independent political communities, retaining their original natural rights.”\textsuperscript{310} By declaring treaties to be the supreme law of the land, he argued, the Constitution not only binds the federal government to the terms of its Indian treaties but, more importantly, admits that Indian nations “rank among those powers who are capable of making treaties.”\textsuperscript{311} In regard to

protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. ‘Tributary and feudatory states,’ says Vattel, ‘do not thereby cease to be sovereign and independent states, so long as self government and sovereign and independent authority are left in the administration of the state.’ At the present day, more than one state may be considered as holding its right of self-government under the guarantee and protection of one or more allies.”


308. Frickey, \textit{supra} note 66, at 408-11. This, he suggests, provides a “systematic and attractive” way of interpreting Native American treaties. \textit{Id.} at 406.

309. Frickey argues that Marshall recognized with some discomfort that at the point of conquest, relations between the government and the Indians were founded on sheer force. \textit{See id.} at 408. However, Frickey argues, the Marshall of \textit{Worcester} was attempting to conceive a post-conquest arrangement in which relations with Indians, while still colonial, would be founded on law. A treaty (in this case, the 1785 Treaty of Hopewell) between an Indian Nation and the United States became “the piece of positive law that reflected the constitutive relationship between two sovereigns.” \textit{Id.} By conceiving the treaty as a constitutive document, Frickey argued, Marshall could interpret the Treaty of Hopewell to accord with its “spirit” (the premise of sovereignty). \textit{Id.} at 412.


311. \textit{Id.}
Georgia, this meant that its laws of 1828 and 1829, attempting to dissolve the Cherokee nation, were unconstitutional, in violation of “the supreme law of the land.”312

“Reservation,” then, meant something more than a tract of land, however broadly bounded. More than the literal “breadth” of geographical sovereignty, reservation also implies the metaphorical “depth” of self-sovereignty — whether of individuals, of states, or of nations — as the foundation of political authority. For Indian nations, this self-sovereignty is signaled by the constitutional status of treaties as the supreme law of the land.313 For all citizens, native and non-native alike, the phrase “We the People”314 signals the same point. These words, deliberately chosen by the Framers in lieu of direct reference to God,315 indicate that the ultimate authority of the constitutional order — its “sacred ground” — is the power of self-determination that inheres in each citizen. Political authority is not a limited commodity rationed out by government. Instead, political authority comes from the depthless wellspring of self-determination. This, in the Constitution, appears to be the point of contact between law and the absolute or infinite. It is self-sovereignty that is principally unlimited, and government that is to be limited — indeed, absolutely limited.

Based on the history of these two trilogies of cases, it seems clear that Native American rights are better protected through their unique status as sovereign nations, than through minority protections. Religion, too, I’ve argued is also better understood as a unique constitutional category than as a “suspect categorization” that may not (for better or worse) be treated in a distinctive manner. But what exactly is religion, in a constitutional sense?

312. Id. at 571 (“No one can deny, that the constitution of the United States is the supreme law of the land; and consequently, no act of any state legislature, or of congress, which is repugnant to it, can be of any validity.”); id. at 561 (“The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.”).

313. Marshall’s view of Indian treaties was affirmed in United States v. Winans, 198 U.S. 371 (1905), where the Court ruled that treaties were not grants of rights to Native Americans from the government, but grants of rights from Native Americans to the government. Id. at 381.


315. That the Founders’ omission of reference to God was deliberate can be inferred from the fact that it was a dramatic break with precedent (e.g., the 1781 Articles of Confederation), argues Susan Jacoby. See Susan Jacoby, Freethinkers: A History of American Secularism 28-29 (2004).
Besides the arbitrary and changing list of religions, and beyond the artificial distinction between the religious and the secular, how can religion be meaningfully described for constitutional purposes?

This is not the place to offer a detailed answer to this question, but two suggestions at least emerge from this issue. First, for constitutional purposes, religion must be defined with respect to other constitutional principles, rather than with respect to a list of religions or definitions of religion extrinsic to the Constitution. Second, the principle of reserved rights (rights “retained by the people”) spelled out in the Ninth Amendment,\(^{316}\) illuminates what is unique and distinctive about the religion clauses. As the depthless “reservation” from which political order and authority spring, religious liberty points to the ground beneath the constitutional foundation. It is the site where the polity opens to the most profound, ever-present, and ever-changing questions about its purposes, scope, and legitimacy.

In an important sense, then, religious liberty is an extra-constitutional (or perhaps meta-constitutional) issue. To a degree, all constitutional principles partake of this quality, for unless they live primarily in the polity as a whole (reaching the judiciary only at crisis point), they hardly live at all. But with respect to the religion clauses, this extra-constitutional quality implies something more. In contrast to any other constitutional principles, this first item on the Bill of Rights points to the most profound questions with which democratic deliberation must concern itself. “Religion,” and the constitutional questions it raises, pulls us back to our political origins, to seek that which lies before and beyond law. Returning to this origin as a place to dig for the questions, rather than a place to bury them, perhaps the ground will speak to us again.

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\(^{316}\) U.S. CONST. amend. IV. Elsewhere, I have argued that religion for constitutional purposes might be reconceived as an amalgam of freedom of conscience (for the framers, identified with religion), freedom of speech/expression, and freedom of association (both intimate and expressive association. The principle of reserved rights, emphasized in this article, is not meant to supplant this proposed amalgam, but to indicate the sense in which religious liberty is foundational and, in this sense, extra-constitutional. See generally Sands, Property of Peculiar Value, supra note 19.