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INDIAN RELIGIOUS FREEDOM: TO LITIGATE OR LEGISLATE?

Louis Fisher*

For most of U.S. history, little was done at the national or state level to protect the religious practices of Indians. Initially they were to be "civilized," assimilated, and acculturated into American society. Later stages led to exclusion of most Indians from the east coast, the creation of additional reservations, and termination of federal responsibility for some tribes. There were few efforts by governmental institutions or private societies to safeguard and preserve the unique religious beliefs of Indian tribes. To the extent that religion played a part, it was to provide funds and assistance to convert Indians to Christianity. Only in recent decades has the national government taken steps to secure the religious heritage of Indians, and that initiative has come largely from the political branches, not the courts. Any expansion of Indian rights is most likely to come from statutes, presidential leadership, agency regulations, and the political process.

I. Propagating the Gospel

By the time of the American Revolution, religious missions to the Indians had been operating in America for more than a century.¹ The first Virginia charter of 1606 directed colonists to be active in "propagating of *Christian* Religion to such People . . . and may in time bring the Infidels and Savages, living in those parts, to human Civility."² The Charter of Massachusetts Bay in 1629 expressed the intention that the natives learn of "the Knowledg and Obedience of the onlie true God and Sauior of Mankinde, and the Christian Fayth."³

On February 5, 1776, the Continental Congress directed the commissioners of Indian affairs to select individuals who would live among the Indians "and instruct them in the Christian religion."⁴ In 1785, the Continental Congress

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1. R. PIERCE BEAVER, INTRODUCTION TO NATIVE AMERICAN CHURCH HISTORY (1983) [hereinafter BEAVER, INTRODUCTION]; R. Pierce Beaver, *Church, State, and the Indians: Indian Missions in the New Nation*, 4 J. CHURCH & STATE 11 (1962).

2. 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3784 (Francis Newton Thorpe ed., 1909) [hereinafter THORPE].

3. 3 *id.* at 1857.

4. 4 JOURNALS OF THE CONTINENTAL CONGRESS 111 (Worthington Chancey Ford ed. 1906)

set aside land for the Moravian Brethren or the Society of the United Brethren, for the purpose of "civilizing the Indians and promoting Christianity."⁵ Those values carried over to the administration of George Washington. His Secretary of War, Henry Knox, proposed on July 7, 1789 that missionaries "of excellent moral character" should be appointed to live among the Indians. Their duties ranged far beyond religious instruction. They would supply the implements of husbandry, the necessary stock for a farm, and serve as "their friends and fathers."⁶

In 1796, Congress passed legislation that set aside three tracts of land for the Society of United Brethren "for propagating the gospel among the heathen."⁷ In 1803, William Henry Harrison, as governor of the Indiana Territory, signed a treaty at Vincennes recognizing that the Kaskaskia tribe had been baptized and received into the Catholic Church. The treaty promised that the United States would provide one hundred dollars for the next seven years to support a Catholic priest. Another sum of three hundred dollars would help the tribe erect a church.⁸

The national government encouraged Indians to make a transition from a nomadic, hunter state to a settled agricultural existence. A message by President Thomas Jefferson to Congress on January 18, 1803, spoke of various measures needed for Indian tribes. The first: "To encourage them to abandon hunting, to apply to the raising stock, to agriculture, and domestic manufacture, and thereby prove to themselves that less land and labor will maintain them in this better than in their former mode of living."⁹ Yet it was Jefferson's initiative with the Louisiana Purchase, opening up a vast territory to the west, that prepared the way for the forced removal policy of the 1830s and 1840s.¹⁰ The theme of Indians tilling soil reappears in other presidential messages. In his first annual message to Congress on December 2, 1817, President James Monroe said that the hunter state, capable of existing only "in the vast uncultivated desert," would necessarily yield to denser populations. He was pleased that reservations of land to the tribes on Lake Erie had been made "with a view to individual ownership among them and to the cultivation of the soil by all."¹¹

In 1819, Congress enacted legislation "for the purpose of providing against the further decline and final extinction of the Indian tribes." In an effort to

[hereinafter JOURNALS].

5. 28 *id.* at 429-30 (1936); 34 *id.* at 485-87 (1937).

6. 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS 54 (1834) [hereinafter PAPERS: INDIAN AFFAIRS].

7. Act of June 1, 1796, ch. 46, § 5, 1 Stat. 490, 491.

8. 1 PAPERS: INDIAN AFFAIRS, *supra* note 6, at 687.

9. 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 352 (James D. Richardson ed., 1897-1925) [hereinafter RICHARDSON].

10. 1 *id.* at 257, 351.

11. 2 *id.* at 16.

introduce among the tribes "the habits and arts of civilization," the statute authorized the President to employ individuals to instruct Indians "in the mode of agriculture suited to their situation," and to teach their children in reading, writing, and arithmetic.¹² Congress pledged \$10,000 annually for this purpose. There was little legislative debate on what has come to be known as the "civilization fund."¹³ Although the statute and the legislative history make no mention of instructing Indians in the tenets of Christianity, that became a key objective. Monroe and his Secretary of War, John C. Calhoun, used the money to support the effort of missionaries and religious societies brought in to establish schools for Indian children.¹⁴

President John Quincy Adams told Congress in 1828 that "it was our policy and our duty to use our influence in converting to Christianity and in bringing within the pale of civilization." The national government tried to "bring them to the knowledge of religion and of letters." By appropriating their hunting grounds, government had an obligation to teach them "the arts of civilization and the doctrines of Christianity."¹⁵ Thomas L. McKenney, who served as superintendent of Indian trade and head of the Office of Indian Affairs, helped implement this policy from 1812 to 1830. Of Quaker background, he believed in the equality of the races and cited the Bible for support. It was his responsibility to manage missionary efforts for the Indians.¹⁶ The civilization fund lasted until 1873.

Religious missions demonstrated little interest or respect for Indian religious beliefs. Their attack on Indian religions "and their relegating of all his beliefs and ritual practices to the realm of superstition deprived the missionaries of use of the Indian spiritual values and ideas as bridges to the gospel and to acceptance of the Christian faith in terms meaningful to Indians."¹⁷ Although some missionaries understood this, it would not be until the 1930s that steps began to be taken to safeguard Indian religious beliefs and practices.

II. Indian Removal

Indians on the east coast gradually lost their lands. The Treaty of Hopewell in 1785 guaranteed the Cherokees their tribal lands, but persistent

12. Act of Mar. 3, 1819, ch. 85, 3 Stat. 516 (1819).

13. 34 ANNALS OF CONG. 546, 1426, 1427, 1431, 1435 (1819).

14. Margaret Connell Szasz & Carmelita Ryan, *American Indian Education*, in 4 HANDBOOK OF NORTH AMERICAN INDIANS 284-300 (William C. Sturtevant ed., 1988) [hereinafter HANDBOOK].

15. 2 RICHARDSON, *supra* note 9, at 415-16.

16. FRANCIS PAUL PRUCHA, THE GREAT FATHER 141-42, 148-51 (1995) [hereinafter PRUCHA, GREAT FATHER].

17. R. Pierce Beaver, *Protestant Churches and the Indians*, in 4 HANDBOOK, *supra* note 14, at 439; see also ROBERT F. BERKHOFFER, JR., SALVATION AND THE SAVAGE: AN ANALYSIS OF PROTESTANT MISSIONS AND AMERICAN INDIAN RESPONSE, 1787-1862 (1965).

encroachments by white settlers led to new agreements from 1791 to 1806, each time compensating the Cherokees for land that they had ceded to Georgia, Tennessee, and Kentucky. In 1816, the Cherokees ceded all their lands in South Carolina.¹⁸ Beginning in 1816, the governor of Tennessee recommended that the Cherokees be relocated west of the Mississippi; those that remained would be given 640 to 1000 acres to develop.¹⁹

In 1821, the Creeks in Georgia agreed to cede some land, and pressure was applied to the Cherokees to do the same. Other states and territories asked that Indians be removed from their lands.²⁰ A Monroe message to Congress in 1824 expressed the hope that "by the establishment of these tribes beyond the Mississippi, their improvement in civilization, their security, and happiness, would be promoted."²¹ By 1825, it appeared that whether Indians "liked it or not, or whether they had become civilized or not," they were to be moved.²² Monroe told the Senate in 1825 that the basis for the removal of the tribes within Georgia seemed "peculiarly strong."²³

Georgia precipitated a legal crisis by withdrawing rights from Cherokees and seizing their land. The Cherokees and church groups appealed to Congress to reverse Georgia, but no such remedial legislation emerged.²⁴ The American Board of Commissioners for Foreign Nations, which had sponsored missions to the Cherokees and the Choctaws, prepared a legal suit for the Cherokee Nation.²⁵ While this case was being heard, President Jackson persuaded Congress to pass the Removal Act of 1830, which called for the removal of Indians to west of the Mississippi River.²⁶ After Georgia and its judiciary put two American Board missionaries in prison, the Board took the case to the U.S. Supreme Court. William Wirt, who had served Presidents Monroe and Adams as Attorney General, argued the case for the Cherokees.

In 1831, the Court acknowledged that the Cherokee nation was a state with which the United States had dealt successively by treaty. However, it ruled that the Cherokees were not a "foreign state" and were not entitled to present the case as one of original jurisdiction. Whatever rights the Indians possessed regarding their lands, they were not legally positioned to ask the Court to prevent Georgia from exercising its legislative power. Because of the form

18. Donald Grinde, *Cherokee Removal and American Politics*, 8 INDIAN HISTORIAN 33, 33-34 (1975).

19. REGINALD HORSMAN, *THE ORIGINS OF INDIAN REMOVAL, 1815-1824*, at 6 (1970).

20. *Id.* at 12-15.

21. 41 ANNALS OF CONG. 462-63 (1824).

22. HORSMAN, *supra* note 19, at 17.

23. 2 PAPERS: INDIAN AFFAIRS, *supra* note 6, at 541.

24. Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 505-06 (1969).

25. BEAVER, INTRODUCTION, *supra* note 1, at 69.

26. Act of May 28, 1830, ch. 148, 4 Stat. 411.

in which the case had been submitted, the Court declined to reach the merits.²⁷

The dispute returned a year later, with the plaintiff this time being Samuel A. Worcester, one of the missionaries imprisoned by Georgia. In 1830, Georgia had passed legislation prohibiting white persons without a state license from residing in lands occupied by the Cherokees. Worcester, one of seven whites who defied the statute, was imprisoned along with Elizur Butler for four years of hard labor. He argued that he entered the Cherokee nation in the capacity of a missionary authorized by the American Board and the U.S. President, and that his prosecution by Georgia violated several U.S.-Cherokee treaties. Those treaty rights, he said, could not be interfered with by any state.

Speaking for the Court, Chief Justice John Marshall first determined that congressional statutes gave the Court jurisdiction to hear and decide the case. Furthermore, he said that the Indian nations "had always been considered as distinct, independent political communities, retaining their original natural rights, and the undisputed possessors of the soil, from time immemorial."²⁸ The single exception to that status was their exclusion from intercourse with other nations. The laws of Georgia could therefore have no force on the Cherokee Nation unless with the consent of the Cherokees and in conformity with treaties and congressional statutes. The law of Georgia under which Worcester was prosecuted "is consequently void, and the judgment a nullity." The acts of Georgia "are repugnant to the constitution, laws, and treaties of the United States."²⁹

Marshall was well aware that political institutions might not comply with his ruling. The Georgia legislature had passed a resolution warning that any attempt by the U.S. Supreme Court to reverse the Georgia Superior Court "will be held by this State as an unconstitutional and arbitrary interference in the administration of her criminal laws and will be treated as such."³⁰ After Marshall issued his decision, Georgia indeed ignored it and Jackson refused to use federal troops to enforce the court order. It is unlikely that Jackson said what is often attributed to him: "Well, John Marshall has made his decision, now let him enforce it."³¹ The judicial process never reached the point where it mandated Jackson to do anything.³² Wirt tried to get Congress to pass legislation that would force Jackson's hand, but was unsuccessful.³³

27. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

28. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

29. *Id.* at 561.

30. 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 754 (1937).

31. *Id.* at 759-64.

32. *Id.* at 764-65; Burke, *supra* note 24, at 525-27; William F. Swindler, *Politics as Law: The Cherokee Cases*, 3 AM. INDIAN L. REV. 7, 16 (1975).

33. JILL NORGREN, *THE CHEROKEE CASES: THE CONFRONTATION OF LAW AND POLITICS* 123-24 (1996).

On the crucial issue of preserving national power over the states, Jackson looked to the Supreme Court as an ally. If Georgia could thumb its nose at the national government, so could other states. That is what South Carolina did on November 24, 1832, when its legislature passed the Nullification Ordinance, part of which attacked the jurisdiction of the U.S. Supreme Court and promised to treat any interference by the Court in state matters as a nullity. Jackson's proclamation of December 10 strongly repudiated South Carolina's position.³⁴ In a message to Congress on January 16, 1833, Jackson urged legislation giving federal courts additional authority to deal with the threat from South Carolina.³⁵ If South Carolina's challenge to federal judicial authority was unacceptable, so was Georgia's. In response to Jackson's stand, the governor of Georgia issued a pardon to the missionaries and released them from prison.³⁶

The removal of Indians was carried out at different times, with different tribes, and in different places over the next decade. Some Cherokees left early. The main move in 1838 involved about 17,000 who were forced into temporary stockades and then marched 800 miles west. Deaths from illness, inadequate food, exposure, and trauma might have reached as high as 8,000.³⁷ Many of the deaths occurred after they arrived in Indian Territory.³⁸ The Choctaws, Chickasaws, Creeks, and Seminoles also suffered huge losses during the removal. In 1843, the Secretary of War reported that 89,000 Indians had been moved west and 22,846 remained east of the Mississippi River.³⁹

III. Grant's Peace Policy

The forced removal of Indians disrupted the work of Protestant missionaries. American Indian missions "dwindled to dormancy."⁴⁰ However, chronic corruption within the Bureau of Indian Affairs prompted President Ulysses S. Grant to act. He appointed Ely S. Parker, a Seneca Indian, Commissioner of Indian Affairs and removed all but two of the former superintendents of Indian schools. He relied on Quakers, who had developed

34. 3 RICHARDSON, *supra* note 9, at 1203.

35. 3 *id.* at 1192-93.

36. WARREN, *supra* note 30, at 776.

37. NORGREN, *supra* note 33, at 143; see GRANT FOREMAN, *INDIAN REMOVAL: THE EMIGRATION OF THE FIVE CIVILIZED TRIBES OF INDIANS* (1932).

38. Russell Thornton, *The Demography of the Trail of Tears Period: A New Estimate of Cherokee Population Losses*, in WILLIAM L. ANDERSON, *CHEROKEE REMOVAL: BEFORE AND AFTER* (1991).

39. John K. Mahon, *Indian-United States Military Situation, 1775-1848*, in 4 HANDBOOK, *supra* note 14, at 160.

40. Robert Keller, *Christian Indian Missions and the American Frontier*, 5 AM. INDIAN J. 19, 21 (1979).

a strong trust among the Indians, to nominate superintendents and agents.⁴¹ In his first annual message on December 6, 1869, he reminded Congress that the management of Indian affairs had long been "a subject of embarrassment and expense." On the other hand, the Society of Friends was "well known as having succeeded in living in peace with the Indians in the early settlement of Pennsylvania," and had a reputation for "strict integrity and fair dealings." With that record in mind he asked them to manage some Indian reservations, and "the result has proven most satisfactory."⁴²

In 1869, Congress appropriated two million dollars to enable the President "to maintain the peace among and with the various tribes, bands, and parties of Indians." The statute authorized the President to create a board of commissioners, consisting of no more than ten persons, to exercise joint control with the Secretary of the Interior over the funds appropriated by the statute.⁴³ The Board of Indian Commissioners became known as the "church board" because its members were active laymen in the Presbyterian, Methodist, Congregational, Episcopal, Baptist, and Friends churches.⁴⁴ Board members soon discovered how little power they had. By 1880, the Orthodox Friends and the Reformed Church had withdrawn from the system.⁴⁵

The federal government entered into contracts with mission schools and paid them an annual amount for each student enrolled. Beginning in 1881, Roman Catholics became involved in administering Indian schools, and within a short time expanded its number of contract schools. By 1888, the Catholic Indian schools had become the principal beneficiaries of federal funds. Tension between Protestants and Catholics grew worse in 1888 after Benjamin Harrison defeated Grover Cleveland for President. One of Harrison's appointments in 1889 was Thomas J. Morgan, a Baptist minister, to the position of Commissioner of Indian Affairs. For Superintendent of Indian Schools he picked the Reverend Daniel Dorchester, a Methodist clergyman. Catholics, concerned about having two Protestant ministers in these positions, attacked both appointees. Dorchester in 1888 had published a book called *Romanism Versus the Public School System*, which called the Catholic school system "not only un-American but anti-American." Morgan had also made anti-Catholic statements. In 1888 he accused the Catholics of wanting to substitute their religious schools for the public school system.⁴⁶

Although Protestants had pressed their religious tenets on Indians for years, Congress now received complaints about the scope of Catholic instruction in

41. Beaver, *supra* note 17, at 443.

42. 9 RICHARDSON, *supra* note 9, at 3992-93.

43. Indian Appropriations Act of 1869, ch. 16, § 4, 16 Stat. 13, 40.

44. Beaver, *supra* note 17, at 443.

45. *Id.* at 449.

46. FRANCIS PAUL PRUCHA, *THE CHURCHES AND THE INDIAN SCHOOLS, 1888-1912*, at 10-13 (1979).

Indian schools. By 1888, several of the Protestant churches had decided that it would be better to run the Indian schools without federal funds.⁴⁷ The Indian appropriations act in 1897 stated it to be "the settled policy of the Government to hereafter make no appropriation whatever for education in any sectarian school." Two years later, the Indian appropriations act included what Congress called "the final appropriation for sectarian schools."⁴⁸ After congressional appropriations were eliminated, churches continued to operate Indian schools, sometimes by relying on tribal trust funds and treaty funds.⁴⁹

For almost a century, Indian tribes had been treated as foreign nations subject to the treaty-making power of the President and the Senate. However, the Constitution also empowers Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Partly because of corruption and mismanagement in the Office of Indian Affairs, the House of Representatives began to object to the Senate's prerogative in Indian affairs. In 1869, the Senate added funds to an appropriations bill to fulfill Indian treaties it had approved, but the House refused to grant the funds.⁵⁰ The House completed its reassertion two years later by enacting this language: "Provided, That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . ."⁵¹ The House now had coequal power with the Senate over Indian affairs.

Toward the end of the nineteenth century, a number of Indian religious practices were curbed. Indian children were taken from their families and placed in boarding schools for up to eight years, where they learned English, wore western-style clothing, and had their hair cut western-style. Anything Indian, including dress, language, and religious practices, were systematically eliminated. Indian funeral ceremonies were declared illegal, and the Sun Dance (requiring the individual to thrust a sharpened stick through his skin) was officially banned in 1881. Some government officials and army officers thought that every Indian dance was a war dance. Misapprehension about the "ghost dance," which promised Indians that they could meet their dead

47. 2 ANSON PHELPS STOKES, *CHURCH AND STATE IN THE UNITED STATES* 289 (1950).

48. Act of June 7, 1897, ch. 3, 30 Stat. 62, 79; Act of Mar. 1, 1899, ch. 324, 40 Stat. 924, 942; see also PETER J. RAHILL, *THE CATHOLIC INDIAN MISSIONS AND GRANT'S PEACE POLICY, 1870-1884* (1953).

49. R. Pierce Beaver, *The Churches and President Grant's Peace Policy*, 4 J. CHURCH & STATE 174, 189-90 (1962). In *Quick Bear v. Leupp*, 210 U.S. 50 (1908), the Supreme Court held that tribal and trust funds, used to compensate Indians for lands they had ceded to the United States, could be used to educate Indians in sectarian schools without violating the Establishment Clause. See also ELSIE MITCHELL RUSHMORE, *THE INDIAN POLICY DURING GRANT'S ADMINISTRATION* (1914).

50. FELIX COHEN'S *HANDBOOK OF FEDERAL INDIAN LAW* 66 (Univ. of N.M. photo. reprint 1971) (1942).

51. Indian Appropriations Act, ch. 120, § 1, 16 Stat. 544, 566 (1871).

relatives, led to tragedy. With Indians wearing ghost shirts painted with magic symbols and moving in a hypnotic state, whites feared a major Indian uprising. The massacre at Wounded Knee in 1890 killed two hundred or more Indians and twenty-nine whites.⁵²

Circulars issued by the Office of Indian Affairs from 1921 to 1923 expressed satisfaction that Indian dances were growing less frequent and had fewer "barbaric features," but noted that on a number of reservations "the native dance still has enough evil tendencies to furnish a retarding influence." The Sun Dance and similar dances were considered "Indian Offences" under departmental regulations, with "corrective penalties" provided. One of the circulars offered a number of recommendations, including "none take part in the dances or be present who are under 50 years of age."⁵³ Criticism was also directed at dances of supposed sexual excess, such as the Hopi snake dance.

IV. *The Stirrings of Reform*

Congress passed legislation in 1919 to grant citizenship to Indians who had served in the military services during World War I and had received, or would receive, an honorable discharge.⁵⁴ Five years later, Congress passed legislation giving citizenship to the remaining Indians. The statute reads: "all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: *Provided*, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property."⁵⁵ Few could miss the irony of granting U.S. citizenship to original Americans after it had been granted to American blacks and to women.

John Collier, executive secretary of the American Indian Defense Association, testified at House hearings in February 1923 in defense of Indian dances. In later writings he described the dances as religious in nature and entitled to protection along with other religions in America.⁵⁶ When Rep. Scott Leavitt (R.-Mont.) drafted legislation in 1926 to empower Indian superintendents to jail reservation Indians for six months without trial or review, under regulations drawn up by the Interior Department, Collier

52. David E. Witheridge, *No Freedom of Religion for American Indians*, 18 J. CHURCH & STATE 5, 14-15 (1976); DEE BROWN, BURY MY HEART AT WOUNDED KNEE (1971).

53. *The Denial of Indian Civil and Religious Rights*, 8 INDIAN HISTORIAN 43, 44 (1975); see also PRUCHA, GREAT FATHER, *supra* note 16, at 800-06.

54. Act of Nov. 6, 1919, ch. 95, 41 Stat. 350.

55. Act of June 2, 1924, ch. 233, 43 Stat. 253, 253. The Dawes Allotment Act of 1887 had granted citizenship to Indians who accepted an allotment of land and "adopted the habits of civilized life." Dawes Allotment Act of 1887, ch. 119, § 6, 24 Stat. 388, 390.

56. Kenneth Philp, *John Collier and the Crusade to Protect Indian Religious Freedom, 1920-26*, 1 J. ETHNIC STUDIES 22, 26-27 (1973).

successfully fought against the bill and prevented it from being reported out of committee.⁵⁷

In 1928, the Institute for Government Research published a comprehensive work entitled *The Problem of Indian Administration*. Referred to as "The Meriam Report" because of its technical director, Lewis Meriam, the study was highly critical of U.S. policy toward the Indians. With straightforward language, it noted the "common failure to study sympathetically and understandingly the Indians' own religions and ethics and to use what is good in them as the foundation upon which to build. . . . The attempt blindly to destroy the whole Indian religion may in effect be an attack on some of the very elements of religious belief which the missionary himself espouses and which he hopes the Indian will adopt."⁵⁸ The report criticized the boarding schools for deficiencies in diet, health conditions, overcrowding of dormitories, overly strict discipline, and a weakening of family life.⁵⁹

Collier became Commissioner of Indian Affairs in 1934 and remained in that position until 1945. He helped persuade Congress to repeal a number of obsolete laws that covered Indians.⁶⁰ These statutes dated back to the period from 1830 to 1850, when many Indians were considered hostile. For example, the statutes prohibited the sending or carrying of seditious messages and any correspondence with foreign nations to excite Indians to war.⁶¹ The repeal statute passed without debate.⁶²

The major piece of legislation was the Indian Reorganization Act of 1934,⁶³ which ended the land allotment provisions of the Dawes Severalty Act of 1887.⁶⁴ During its forty-seven years, the Dawes Act permitted the breaking up of tribal or reservation lands into individual allotments. The objective, expressed piecemeal in earlier treaties, was to give Indians the incentive to work an individual piece of property that they owned. This philosophy took its most comprehensive form with the Dawes Act.⁶⁵ After property had been allotted from a reservation, the Secretary of the Interior could negotiate with the tribe and purchase the remaining (or "surplus") land. As the process of allotment continued, the surplus lands were transferred to the whites. Thus, in 1881 the Indians held 155,632,312 acres in trust. That amount fell to 104,314,349 by 1890 and to 77,865,373 by 1900. Of the

57. *Id.* at 33-34.

58. INST. FOR GOV'T RESEARCH, *THE PROBLEM OF INDIAN ADMINISTRATION* 845-46 (Lewis Meriam et al. eds., 1928).

59. *Id.* at 11-14, 574-77.

60. Act of Mar. 26, 1934, ch. 89, 48 Stat. 467, 487.

61. S. REP. NO. 73-634 (1934).

62. 78 CONG. REC. 7271, 8222, 8351, 8361, 8447-48, 8607 (1934).

63. Ch. 576, 48 Stat. 984.

64. Ch. 119, 24 Stat. 390.

65. FRANCIS PAUL PRUCHA, *AMERICAN INDIAN POLICY IN CRISIS: CHRISTIAN REFORMERS AND THE INDIAN, 1865-1900*, at 227-55 (1976).

remaining acres in 1900, only 5,409,530 had been allotted.⁶⁶ The 1934 statute provided for the return of some surplus lands to tribal ownership.

Collier's draft bill contained a title on Indian education, stating the purpose and policy of Congress "to promote the study of Indian civilization, including Indian arts, crafts, skills, and traditions." That title, promising a step toward the protection of Indian religious liberty, was deleted from the bill.⁶⁷ In seeking funds for the sections of the bill that survived, Collier ran into resistance from the appropriations subcommittees and the Bureau of the Budget.⁶⁸ What he could not obtain in legislative authority or appropriations he tried to achieve by administrative action.⁶⁹ In 1934 he issued an order expressing the policy of the Indian Office regarding religion:

No interference with Indian religious life or ceremonial expression will hereafter be tolerated. . . . Violations of law or of the proprieties, if committed under the cloak of any religion, Indian or other, or any cultural tradition, Indian or other, are to be dealt with as such, but in no case shall punishment for statutory violations or for improprieties be so administered as to constitute an interference with, or to imply censorship over, the religious or cultural life, Indian or other.

The fullest constitutional liberty, in all matters affecting religion, conscience and culture, is insisted on for all Indians.⁷⁰

Federal interest in Indian affairs suffered a reverse in the late 1940s and 1950s. House hearings in 1947 focused on bills to "emancipate" Indians from the Bureau of Indian Affairs, and in that same year Acting Commissioner William Zimmerman was directed to testify concerning the elimination of BIA services.⁷¹ In March 1949, the Hoover Commission recommended that the Bureau of Indian Affairs be transferred from the Interior Department to a proposed new department — the Federal Security agency — which would handle Social Security and educational functions. Federal policy for Indians should look to "their complete integration into the mass of the population as full, tax-paying citizens." Pending the achievement of complete integration, "the administration of social programs for the Indians should be progressively transferred to State government."⁷² Other recommendations included transfer

66. *Id.* at 257.

67. Lawrence C. Kelly, *The Indian Reorganization Act: The Dream and the Reality*, in CONSTITUTIONALISM AND NATIVE AMERICANS, 1903-1968, at 134, 139 (John R. Wunder ed., 1996).

68. *Id.* at 306-07, 308.

69. *Id.* at 298-99.

70. 2 STOKES, *supra* note 47, at 452; see KENNETH R. PHILP, JOHN COLLIER'S CRUSADE FOR INDIAN REFORM, 1920-1954 (1977).

71. Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 146 (1977).

72. COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT,

of responsibility for medical services to local governments or to quasi-public bodies, and termination of tax exemption for Indian lands.⁷³ With these reforms implemented, "special Federal aid to State and local governments for Indian programs should end."⁷⁴ In a dissent, Vice Chairman Dean Acheson objected that the recommendations exceeded the commission's charter, especially the proposal "to assimilate the Indian and to turn him, his culture, and his means of livelihood over to State control."⁷⁵ Other dissents were written by commissioners James H. Rowe, Jr. and James Forrestal.⁷⁶

In 1952, the House adopted a resolution calling for a full and complete investigation of the BIA, with the goal of preparing legislation "designed to promote the earliest practicable termination of all Federal supervision and control over Indians."⁷⁷ At the end of the year, the House Committee on Interior and Insular Affairs issued a 1600-page report in response to the resolution, including discussion of some of the considerations needed to be taken into account before terminating federal supervision and control over the Indians. For example, legislation would be needed to confer civil and criminal jurisdiction over Indians upon State and local government authorities.⁷⁸

The Eisenhower administration agreed to shift some federal responsibilities to the states. Legislation enacted in 1953 (Public Law 280) conferred jurisdiction on California, Minnesota, Nebraska, Oregon, and Wisconsin with respect to criminal offenses and civil actions committed or arising on Indian reservations within those states.⁷⁹ Considering the importance of this legislation, one would expect vigorous debate and dissent, but the legislative history is almost barren. The measure went through the two chambers with minimal discussion.⁸⁰ Although Eisenhower said he had "grave doubts as to the wisdom of certain provisions" in the bill, he signed it. He stated that in the five states at issue, "the Indians have enthusiastically endorsed this bill." His objection concerned two sections of the bill that permitted other states to impose criminal and civil jurisdiction over Indian tribes within their borders, without requiring full consultation with the Indians or final approval by the federal government.⁸¹

Consistent with this legislation, Congress passed House Concurrent Resolution 108, stating the policy of Congress,

SOCIAL SECURITY AND EDUCATION, INDIAN AFFAIRS 65 (Mar. 1949).

73. *Id.* at 66.

74. *Id.* at 75.

75. *Id.* at 78.

76. *Id.* at 79-80.

77. 98 CONG. REC. 8788 (1952).

78. H. REP. NO. 82-2503, at 30 (1952).

79. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588.

80. H. REP. NO. 83-848 (1953); S. REP. NO. 83-699 (1953); 99 CONG. REC. 9962-63, 10,782-84, 10,928 (1953).

81. PUBLIC PAPERS OF THE PRESIDENTS, 1953, at 564-66.

as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship.⁸²

Similar to Public Law 280, the legislative history is practically non-existent.⁸³ The combined effect of the concurrent resolution, Public Law 280, and tribal termination bills is referred to as the policy of "termination."

The attempt by the federal government to disengage from Indian affairs and transfer responsibility to the states was never tenable. Through a combination of treaties, statutes, and formal and informal agreements, the federal government had made commitments — legal and moral — to the Indians. It could not, at some later date, wash its hands. President Nixon told Congress on July 8, 1970, that the "removal of Federal trusteeship responsibility has produced considerable disorientation among the affected Indians and has left them unable to relate to a myriad of Federal, State, and local assistance efforts. Their economic and social condition has often been worse after termination than it was before."⁸⁴

V. Protective Legislation

Beginning in 1962, Congress passed a number of bills to protect Indian religious freedom, covering such areas as eagle feathers, Indian civil rights, Taos religious shrines, an Indian religious freedom statute, the Klamath Indians, and the protection of Indian graves and funereal objects. Although these statutes gave greater recognition to Indian religions, they sometimes lacked enforcement provisions. During litigation on some of these statutory provisions, courts regularly advise plaintiffs to seek remedies not from judicial activism but from more explicit legislation enacted by Congress.

A. Eagle Feathers

One of the first Indian religious issues addressed by Congress concerned legislation to protect eagles. In 1940, Congress passed a law to protect the bald eagle, which the Continental Congress had adopted in 1782 as the national symbol. The bald eagle, representing the American ideal of freedom, was also threatened with extinction in the twentieth century. The 1940 statute prohibited the taking, possession, sale, purchase, export, or import of any bald eagle. It authorized the Secretary of the Interior to lift those prohibitions by

82. H.R. Con. Res. 108, 83d Cong., 67 Stat. B132, B132 (1953).

83. H. REP. NO. 83-841 (1953); S. REP. NO. 83-794 (1953); 99 CONG. REC. 9968, 10,815 (1953).

84. PUBLIC PAPERS OF THE PRESIDENTS, 1970, at 566.

issuing permits for certain purposes, but did not specify the religious use of Eagle feathers by Indians.⁸⁵ Nothing in the sparse legislative record referred to the need to protect Indian religious practices.⁸⁶

The issue returned in 1962. Congress learned that immature bald eagles, similar in appearance to golden eagles, were sometimes killed by persons who confused the two. Only in the fourth year does the bald eagle grow its characteristic white feathers on the head and neck. To protect the bald eagle, Congress extended similar protections to the golden eagle. The legislative history explains the importance of the eagle for many Indian tribes, particularly in the Southwest, that performed ceremonies of religious significance. The eagle, "by reason of its majestic, solitary, and mysterious nature, became an especial object of worship." Every tribe believed in eagle beings, such as the man-eagle who "lays aside his plumage" after flights in which he spreads devastation, and the hero who slays him "is carried to the house in the sky by eagles of several species, each one in turn bearing him higher."⁸⁷

The legislation authorized the Secretary of the Interior to issue regulations allowing exceptions for various reasons, including "the religious purposes of Indian tribes."⁸⁸ In defining the possession and use of eagles for religious purposes, a regulation issued in 1963 restricted permits to Indians "who are authentic, bona fide practitioners of such religion."⁸⁹ Current regulations require an applicant to be "an Indian who is authorized to participate in *bona fide* tribal religious ceremonies."⁹⁰

Litigation has clarified some issues. The Bald Eagle Protection Act does not allow Indians to make commercial sales of eagles or eagle parts. Not only is the sale of eagle parts incompatible with Indian religious beliefs, Indians deplore the sale of eagle parts as a matter of tribal custom and religion.⁹¹ The prosecution of Indians for selling eagle parts imposes no burden on an Indian's free exercise of religion.⁹² These cases did not involve an exchange among Indians of eagle parts for religious use. The people who bought the eagle feathers were non-Indians who made it clear that they had only a commercial interest in the items.⁹³

Indians prosecuted for shooting bald eagles sometimes cite treaties to justify their actions. If a treaty recognized the right of Indians to hunt and

85. Bald Eagle Protection Act, ch. 395, 54 Stat. 250 (1940).

86. H. REP. NO. 76-2104 (1940); 86 CONG. REC. 6446-47, 7006-07 (1940).

87. H. REP. NO. 87-1450, at 4 (1962).

88. Eagle Protection Act Amendments of 1962, Pub. L. No. 87-884, § 2, 76 Stat. 1246, 1246 (1962).

89. 28 Fed. Reg. 976, § 11.5 (1963).

90. 50 C.F.R. § 22.22 (c)(2) (2000).

91. *United States v. Top Sky*, 547 F.2d 486, 487 (9th Cir. 1976).

92. *Id.* at 488.

93. *United States v. Top Sky*, 547 F.2d 483, 485 (9th Cir. 1976).

fish within a tract of land, that right continues unless Congress abrogates or modifies it in a subsequent statute. In 1974, the Eighth Circuit held that nothing in the statutes or legislative histories extending protection to bald eagles and golden eagles affected Indian hunting rights on a reservation.⁹⁴ In 1980 the Ninth Circuit, guided in part by the Supreme Court's broad reading of the Eagle Protection Act,⁹⁵ ruled that the bald eagle statute *did* modify Indian treaty rights.⁹⁶ The conflict between these two circuits led to a Supreme Court ruling in 1986 that treaty rights were abrogated by the Eagle Protection Act.⁹⁷ This litigation involved the taking and selling of eagles for commercial purposes, not the religious use of eagle feathers. Other cases have explored the use of eagle feathers and parts for Indian religious ceremonies.⁹⁸

On April 29, 1994, President Clinton issued a memorandum concerning the distribution of eagle feathers for Indian religious purposes. He said that eagle feathers "hold a sacred place in Native American culture and religious practices," and that the administration had changed policy and procedures to "facilitate the collection and distribution of scarce eagle bodies and parts for this purpose."⁹⁹ He directed executive departments and agencies to work cooperatively with tribal governments to accommodate Native American religious practices "to the fullest extent under the law."¹⁰⁰

B. The Indian Civil Rights Act

In 1968, as part of an omnibus bill providing penalties for certain acts of violence or intimidation, Congress passed what is called the Indian Civil Rights Act.¹⁰¹ Actually, it reads more like a Bill of Rights. As will any bill of rights, the statute extends protections to individuals and imposes restrictions on government, in this case the tribal governments. Thus, no Indian tribe exercising powers of self-government shall "make or enforce any law prohibiting the free exercise of religion." Because some tribes have a theocratic foundation, an establishment of religion clause was not included. An Establishment Clause might have worked "to the disadvantage of tribal religion."¹⁰² Other First Amendment rights are listed, prohibiting the tribal

94. *United States v. White*, 508 F.2d 454 (8th Cir. 1974).

95. *Andrus v. Allard*, 444 U.S. 51 (1979).

96. *United States v. Fryberg*, 622 F.2d 1010 (9th Cir. 1980).

97. *United States v. Dion*, 476 U.S. 734 (1986), *rev'g* *United States v. Dion*, 752 F.2d 1261 (8th Cir. 1985).

98. *United States v. Abeyta*, 632 F. Supp. 1301 (D. N.M. 1986); *United States v. Dion*, 762 F.2d 674 (8th Cir. 1985); see John Geb, *Native American Culture: The Use of Feathers as a Protected Rights*, 2 AM. INDIAN L. REV. 105 (1974).

99. 59 Fed. Reg. 22,953 (1994).

100. *Id.*

101. Pub. L. No. 90-284, 82 Stat. 77 (1968).

102. Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. BAR FOUND. RES. J. 1, 132 (1987).

governments from abridging the freedom of speech or of the press, or the right of people peaceably to assemble and to petition for a redress of grievances. Indian tribes may not conduct unreasonable search and seizures, subject persons for the same offense to be twice put in jeopardy, compel persons in a criminal case to be a witness against themselves, take private property for a public use without just compensation, or take other actions injurious to individual rights.

Much of the statute is directed toward safeguards of criminal proceedings, such as the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with witnesses against you, to have compulsory process for obtaining witnesses in your favor, and to have the assistance of counsel. Other provisions prohibit excessive bail, excessive fines, cruel and unusual punishments, the denial of equal protection, deprivation of liberty or property without due process of law, bills of attainder, ex post facto laws, or the denial of a trial by jury of not less than six persons.¹⁰³ The statute directed the Secretary of the Interior to draft a model code to govern the administration of justice by courts of Indian offenses on Indian reservations. In drafting the code, the Secretary "shall consult with the Indians, Indian tribes, and interested agencies of the United States."

A bill establishing rights for individuals in their relations with Indian tribes passed the Senate on December 7, 1967, by voice vote.¹⁰⁴ The House took no action on that legislation, but on March 6, 1968, in a special message to Congress on the problems of the American Indian, President Lyndon B. Johnson urged Congress to enact a bill of rights for Indians.¹⁰⁵ Two days later the Senate passed the legislation by a vote of 81 to 0.¹⁰⁶ The House accepted the Senate language and it became law on April 11, 1968. Some members of the Indian community did not support the legislation. They worried that it would place an individual "against his or her society, in the traditional judicial system they favored, which was highly religious and required a fine sense of Indian customs."¹⁰⁷ Also, the statute gave Indians an opportunity to appeal to federal courts the decisions reached by tribal courts, undercutting to some extent the principle of Indian self-government.¹⁰⁸

103. Indian Civil Rights Act § 202, 82 Stat. at 77-78.

104. 113 CONG. REC. 35,471-77 (1967).

105. PUBLIC PAPERS OF THE PRESIDENTS, 1968-69, I, at 342.

106. 114 CONG. REC. 5835-38 (1968).

107. VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 128 (1983).

108. *Id.* at 131-36; THE INDIAN BILL OF RIGHTS, 1968 (John R. Wunder ed., 1996).

C. Taos Religious Shrines

In 1969, the House Committee on Interior and Insular Affairs reported legislation to grant to the Pueblo de Taos Indians in New Mexico trust title to approximately 48,000 acres of federally owned land that had been taken from the Indians in 1906, by presidential order, without payment of any compensation. Congress had passed legislation in 1933 to give the Pueblo a fifty-year special use permit to the area,¹⁰⁹ but the Taos Indians wanted a more permanent arrangement. Placing great significance on the land, they urged the government to return the title to the land rather than compensate them with money. The Indians argued that preservation of the area and placing limits on non-Indian use were essential in protecting religious interests and the sacredness of the land. The integrity of their religion required complete privacy.¹¹⁰ The most sacred shrine in the area is the Blue Lake.

To explain the successful enactment of legislation in 1970, one study emphasized that "nothing was more important than the persistent determination of the Taos people themselves."¹¹¹ Taos delegations traveled throughout the United States to promote their cause, enlisted the support of many individuals and organizations, and allowed a television documentary to be made at the Pueblo and at Blue Lake.¹¹²

On the choice between payment and conveying land, the committee concluded that "the equities are on the side of the Indians" and that the land should be restored to the Pueblo.¹¹³ The bill passed the House in 1969 by voice vote, with little opposition.¹¹⁴ On July 8, 1970, President Nixon "wholeheartedly" endorsed the legislation "as an important symbol of this government's responsiveness to the just grievances of the American Indians."¹¹⁵ Sen. George McGovern (D.-S.D.) put the emphasis more on religious liberty:

Mr. President, what is involved here is far more than simply a legal claim, important as that is. What really is involved here is a deeply spiritual and religious matter, which goes right to the heart of freedom of religion and freedom of conscience in our country, because the Blue Lake area which is in dispute, and which has been in dispute for so many years, is regarded as the

109. Act of May 31, 1953, ch. 45, § 4, 48 Stat. 108, 109 (1933).

110. H. REP. NO. 91-326, at 2 (1969).

111. John J. Bodine, *Blue Lake: A Struggle for Indian Rights*, 1 AM. INDIAN L. REV. 23, 24 (1973).

112. *Id.* at 28.

113. H. REP. NO. 91-326, at 3.

114. 115 CONG. REC. 24,871, 24,878-86 (1969).

115. PUBLIC PAPERS OF THE PRESIDENTS, 1970, at 569.

most sacred of all places by the Indian people, and particularly the Taos Pueblo Indians.¹¹⁶

After two days of debate, the Senate passed the bill by a vote of 70 to 12 and it became law.¹¹⁷

Other legislation by Congress during this period strengthened Indian autonomy. In 1975, Congress granted Indians greater participation in federal programs and increased educational assistance. The Indian Self-Determination Act recognized that prolonged federal domination of Indian service programs "has served to retard rather than enhance the progress of Indian people."¹¹⁸

D. American Indian Religious Freedom Act

In 1978, Congress passed a joint resolution expressing the principles of religious freedom for Indians. The resolution, called the American Indian Religious Freedom Act (AIRFA),¹¹⁹ begins by recognizing that freedom of religion is an "inherent right" for all people and "fundamental to the democratic structure of the United States." Moreover, the individual right to practice religion has produced "a rich variety of religious heritages in this country." Included within this culture are the religious practices of the American Indian, "such practices forming the basis of Indian identity and value systems." After citing the instances in which federal laws and practices had abridged and infringed on the religious freedom of American Indians, the legislation resolves that "henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."¹²⁰ Section 2 of the resolution provides that the President "shall direct" the various federal departments, agencies, and other instrumentalities to evaluate their policies and procedures, in consultation with native traditional religious leaders, in order to determine appropriate changes necessary to "preserve and protect Native American religious cultural rights and practices."

The resolution expresses only a general policy and lacks enforcement mechanisms. As the floor manager in the House said: "It has no teeth in it."¹²¹ Still, it demonstrates an awareness and sensitivity to Indian religious freedom that would not have been expressed by Congress (or any other

116. 116 CONG. REC. 39,331 (1970).

117. See S. REP. NO. 91-1345 (1970); 116 CONG. REC. 39,327-38, 39,586-610 (1970).

118. Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, § 2, 88 Stat. 2203, 2203 (1975).

119. Pub. L. No. 95-341, 92 Stat. 469 (1978).

120. *Id.*, 92 Stat. at 469.

121. 124 CONG. REC. 21,445 (statement of Rep. Udall).

branch of government) in previous years. The legislative history is quite brief. The resolution passed the Senate by voice vote and by a margin of 337 to 81 in the House.¹²² Two years later, the Tenth Circuit decided a case originally brought in 1974 but one that also cited the resolution. The complaint claimed that in impounding water to form Lake Powell on the Colorado River, the government had put some of the Navajo gods under water, denied the Navajo access to a prayer spot sacred to them, and by allowing tourists to visit the Rainbow Bridge permitted desecration of the site. Balancing the government's interest in assuring public access to natural attractions, the court denied that the free exercise of Indian religions had been infringed.¹²³

Similarly, in 1980 the Sixth Circuit ruled that the Cherokee Indians failed to show that their free exercise of religion would be infringed by a proposed dam that would flood a site sacred to the Cherokee religion. The plaintiffs cited AIRFA. The court noted that Congress, in an appropriations bill enacted in 1979, had directed the construction of the dam notwithstanding the Endangered Species Act "or any other law."¹²⁴ The record convinced the court that the dam affected not religious interests but rather cultural heritage and tradition, which are not protected by the Free Exercise Clause.

In a 1983 case, Navajo and Hopi tribes challenged a permit that would allow private interests to expand and develop a government-owned ski area in Arizona, claiming that it impaired their ability to gather sacred objects and to conduct religious ceremonies. The D.C. Circuit held that development of the area did not violate AIFRA or the National Historic Preservation Act. In reviewing the statutory language and legislative history of AIRFA, the court concluded that they do not indicate "the extent to which Congress intended that policy to override other land use considerations."¹²⁵ The court cited this statement by one of the bill's principal sponsors, Rep. Morris Udall (D.-Ariz.): "[I]t is not the intent of my bill to wipe out laws passed for the benefit of the general public or to confer special religious rights on Indians."¹²⁶ Prior to issuing the permit, the government held meetings with Indian religious practitioners and conducted public hearings on the Hopi and Navajo reservations, at which the practitioners testified.¹²⁷ Also in 1983, the Eighth Circuit reviewed a case brought by Indian spiritual leaders and religious practitioners, claiming that South Dakota, by restricting access to a site of traditional religious ceremonial grounds, had violated the Free Exercise Clause, AIRFA, and other statutes. The district court held that Indian interests

122. S. REP. NO. 95-709 (1978); H. REP. NO. 95-1308 (1978); 124 CONG. REC. 8365-66, 21,443-46, 21,450-52 (1978).

123. *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

124. *Sequoyah v. Tenn. Valley Auth.*, 620 F.2d 1159, 1161 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980).

125. *Wilson v. Block*, 708 F.2d 735, 746 (D.C. Cir. 1983).

126. *Id.*

127. *Id.* at 747.

had been outweighed by compelling state interests, and the Eighth Circuit agreed.¹²⁸

In 1988, the Supreme Court decided that the federal government did not violate the Free Exercise Clause by permitting timber harvesting and construction of a road through a portion of a national forest that has traditionally been used for Indian religious purposes. After a study commissioned by the Forest Service concluded that construction of the road would cause "serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples," the government selected a route that was removed as far as possible from the sites used by Indians for spiritual activities.¹²⁹ Indian organizations claimed that the Forest Service's decision violated the Free Exercise Clause and several statutes, including AIRFA. Although the Court recognized that the logging and road-building "could have devastating effects on traditional Indian religious practices," it denied the Indians' claim because "government simply could not operate if it were required to satisfy every citizen's religious needs and desires."¹³⁰ Writing for the majority, Justice O'Connor noted that the Constitution

does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent that it is feasible, is for the legislature and other institutions. Cf. *The Federalist* No. 10 (suggesting that the effects of religious factionalism are best restrained through competition among a multiplicity of religious sects.)¹³¹

O'Connor said that the dissenting Justices wanted the Court to referee disputes between the government and religious groups by deciding which public lands are "central" or "indispensable" to certain religions, and to weigh the value of religious beliefs that are threatened by a government program. Such an approach "would cast the Judiciary in a role that we were never intended to play."¹³²

E. Klamath Indians

Twice in the 1980s Congress passed legislation to recognize the rights of Klamath Indians in Oregon. In 1980, a private law set aside in special trust status certain lands in the Winema National Forest for Edison Chiloquin. As

128. *Crow v. Gullet*, 706 F.2d 856 (8th Cir. 1983).

129. *Lyng v. Northwest Indian Cemetery Prot. Assn.*, 485 U.S. 439, 442-43 (1988).

130. *Id.* at 451, 452.

131. *Id.* at 452.

132. *Id.* at 458.

part of the "termination" policy in the 1950s, federal supervision over Klamath Indian property came to an end. Adult members of the tribe were given the option of holding their interests in common under Oregon law or converting the interests to cash. In a 1958 election, approximately 77% of the tribal members voted to sell their property. Edison Chiloquin wanted to retain his interests in the land. As a result of the election, 631,000 acres were sold to a private corporation (91,000 acres), the Department of the Interior (15,000), and the Department of Agriculture (525,000).¹³³

In 1969, a majority of the remaining members of the tribe elected to terminate the trust. Legislation in 1973 directed the Secretary of Agriculture to acquire 135,000 acres of land to be added to the Winema National Forest.¹³⁴ Purchase of the land resulted in the disbursement of \$270,000 to each Indian beneficiary. Chiloquin, who had helped create the "Committee to Save the Remaining Klamath Indian Lands," refused to accept the money. Instead, he wanted land to establish a village founded on traditional values and the preservation of Indian culture, ways, and spiritual beliefs. To underscore his determination, he built a tipi in the forest, became a squatter, and kept a sacred council fire lit.

The purpose of the private bill for Chiloquin was to avoid, as Sen. Mark Hatfield (R.-Or.) said, "confrontation and all other kinds of unpleasanties of trying to expel this man from the lands that are his ancestral home."¹³⁵ The bill specifies that the land set aside for Chiloquin "shall not be inconsistent with its cultural, historical, and archeological character." If the land were used by Chiloquin or his heirs for other than "traditional Indian purposes," it would revert to the United States to protect archeological, cultural, and traditional values associated with the property.¹³⁶

There remained some unfinished business with the Klamaths, long recognized by the federal government as an Indian tribe. However, in 1954, as part of the termination policy, Congress passed legislation terminating federal supervision over the tribe and putting an end to federal services to tribal members. The Termination Act gave members a choice of either withdrawing from the tribe and taking their share of the sale of land in cash, or remaining with the tribe and keeping their share in trust.¹³⁷ In reporting legislation in 1986, the House Committee on Interior and Insular Affairs said that the government had never properly asked tribal members whether they were in favor of the 1954 bill. In fact, the tribe had voted to send a slate of

133. Background on the Edison Chiloquin Bill comes from H. REP. NO. 96-1406 (1980). See also GARRETT EPPS, *TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL* 49-52 (2001).

134. Act of Aug. 16, 1973, Pub. L. No. 93-104, 87 Stat. 349.

135. 126 CONG. REC. 30,379 (1980).

136. Priv. L. No. 96-68, 94 Stat. 3613 (1980).

137. Act of Aug. 13, 1954, 68 Stat. at 719.

delegates to Congress to state their opposition to the bill.¹³⁸ Legislation in 1986 restored federal recognition of the Klamath Indian Tribe. Rights and privileges that may have been lost because of the 1954 statute were restored. Any federal services and benefits given to Indian tribes recognized by the federal government are also to be given to the Klamath Indians.¹³⁹

F. Indian Graves and Funereal Objects

Native Americans, believing that they have a spiritual connection with ancestral remains, have had little success in litigating disputes about development of Indian burial grounds, removal of gravestones by developers, or malicious disturbance of Indian tombs or graves.¹⁴⁰ While it can be said that "only recently" have Native Americans "felt they were in a position to bring a white government to court,"¹⁴¹ the more effective avenue has been to bring white government to Congress.

In 1989, Congress passed legislation to establish the National Museum of the American Indian within the Smithsonian Institution. Part of the statute required the Secretary of the Smithsonian Institution, in consultation and cooperation with traditional Indian religious leaders and government officials of Indian tribes, to inventory the Indian human remains and Indian funerary objects in the possession or control of the Smithsonian Institution, and to return to the descendants or tribes the human remains and associated funerary objects that can be associated with the descendants and tribes.¹⁴²

The following year, Congress passed the Native American Graves Protection and Repatriation Act.¹⁴³ In reporting the bill, the House Committee on Interior and Insular Affairs explained its purpose: "to protect Native American burial sites and the removal of human remains, funerary objects, sacred objects, and objects of cultural patrimony on Federal, Indian and Native Hawaiian lands."¹⁴⁴ Persons who excavate or do archeological work on federal lands would have to receive a permit. If any human remains or funerary objects were discovered, and it is known which tribe is closely related to them, that tribe is given the opportunity to reclaim the remains or objects. If they decide not to take possession, the Secretary of the Interior will determine the disposition after consulting with Native American, scientific and

138. H. REP. NO. 99-630, at 3.

139. Act of Aug. 27, 1986, Pub. L. No. 99-398, 100 Stat. 849 (1986). For floor debate, see 132 CONG. REC. 13,753-55, 21,775-76 (1986).

140. *Wana the Bear v. Community Const., Inc.*, 180 Cal. Rptr. 423 (Ct. App. 1982); *State v. Glass*, 273 N.E.2d 893 (Ohio 1971); *Newman v. State*, 174 So.2d 479 (Fla. 1965); *Carter v. City of Zanesville*, 52 N.E. 126 (Ohio 1898).

141. June Camille Bush Raines, *One Is Missing: Native American Graves Protection and Repatriation Act: An Overview and Analysis*, 17 AM. INDIAN L. REV. 639, 646 (1992).

142. Act of Nov. 28, 1989, Pub. L. No. 101-185, § 11, 103 Stat. 1336, 1343 (1989).

143. Pub. L. No. 101-601, 104 Stat. 3048 (1990).

144. H. REP. NO. 101-877, at 8 (1990).

museum groups. In previous years, Indian tribes had tried to have the human remains and funerary objects of their ancestors returned to them. During consideration of the legislation, some Indian representatives testified that the spirits of their ancestors would not rest until they had been returned to their homeland.¹⁴⁵

The bill passed the House under suspension of the rules, a procedure usually adopted for uncontroversial legislation with strong bipartisan support.¹⁴⁶ It requires a two-thirds majority. Rep. Ben Nighthorse Campbell (D.-Colo.), whose father was Northern Cheyenne, discussed an order by the Surgeon General in 1868 to have Army field officers send him Indian skeletons. The purpose of the study was to determine whether the Indian was inferior to the white man, because of a smaller cranium, and to show that the Indian was not capable of being a landowner.¹⁴⁷ Indian tribes wanted to recover these and other remains. The bill passed the Senate by voice vote, with little debate.¹⁴⁸ Differences between the two chambers were resolved with little difficulty.¹⁴⁹ As enacted, the bill provides for criminal penalties for those engaged in illegal trafficking in Indian human remains and cultural items.¹⁵⁰

VI. Religious Use of Peyote

Indians have had a few victories in state court in using peyote during religious ceremonies, but most judicial rulings have gone against them, including the highly disputed decision by the Supreme Court in *Employment Division v. Smith*.¹⁵¹ Support for peyote use has come from the regular political process: federal agency regulations, testimony by executive officials, Justice Department opinions, state legislation, and congressional statutes.

A. Peyotism

The peyote religion among Indian tribes in the United States begins at the end of the nineteenth century, although its use by Indians in other territories dates back 10,000 years. Peyote grows in small buttons at the top of a spineless cactus. With its hallucinogenic properties, peyote offers a supernatural alternative to other religions by establishing an intermediate spirit (peyote, Jesus, or both) and a Supreme Being (the Great Spirit or God).¹⁵²

145. *Id.* at 13.

146. 136 CONG. REC. 31,941 (1990).

147. *Id.* at 31,937.

148. *Id.* at 34,061-62.

149. *Id.* at 35,677-81, 36,814-15.

150. Native American Graves Protection and Repatriation Act § 4, 104 Stat. at 3052.

151. 494 U.S. 872 (1990).

152. George de Verges, *Peyote and the Native American Church*, 2 AM. INDIAN L. REV. 71 (1974); H. REP. NO. 103-675, at 3 (1994); see also OMER C. STEWART, PEYOTE RELIGION: A

As practiced by the Native American Church (NAC), the drug is considered a sacrament (like bread and wine) and an object of worship. Prayers are devoted to peyote just as prayers are devoted to the Holy Ghost. By ingesting peyote, members of the NAC say they enter into direct contact with God. Peyote is not injurious to the Indian religious user, is not addictive or habit forming, and is often helpful in controlling alcoholism and alcohol abuse among Indian people.¹⁵³

Initially, the states responded to peyote by forbidding its use. In 1899, Oklahoma prohibited use of the mescal bean but repealed the law in 1908.¹⁵⁴ Other states enacted legislation to prohibit the use of peyote: Colorado, Nevada, and Utah in 1917, Kansas in 1920, Arizona, Montana, North Dakota, and South Dakota in 1923, Iowa in 1924, New Mexico and Wyoming in 1929, and Texas in 1937.¹⁵⁵ This legislation had little application for peyote used on Indian reservations, where states had no jurisdiction. Enforcement could come on state property or state highways. In 1926, the Supreme Court of Montana held that under some circumstances the state could enforce the state law prohibiting peyote against an Indian who uses it within a reservation.¹⁵⁶

Congress had prohibited the sale of intoxicating drinks to Indians in 1897.¹⁵⁷ In 1918, the House Committee on Indian Affairs reported legislation to prohibit the sale of peyote to Indians. The committee, accepting the recommendation of the Indian Bureau and relying on published articles, described peyote as "poison" and referred to "night orgies in a close [sic] tent polluted with foul air."¹⁵⁸ The bureau recognized that peyote was used by Indians "as a substitute for intoxicating liquors," but instead of using that evidence to support the use of peyote, the committee argued that substitution was a ground to prohibit it.¹⁵⁹ The reason behind this position is that action on the peyote bill was caught up in the national campaign for prohibition in general, eventually leading to ratification of the Eighteenth Amendment in 1919. Curiously, the committee report includes an encyclopedia article that accurately describes peyote as "producing a pleasant dreaminess without, however, overmastering the will power," and states that peyote "effectively checks tendencies toward alcoholism."¹⁶⁰

HISTORY (1987).

153. H. REP. NO. 103-675, at 3.

154. Omer C. Stewart, *Peyote and the Law*, in CHRISTOPHER VECSEY, *HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM* 60 (1991).

155. de Verges, *supra* note 152, at 77 n.14.

156. *State v. Big Sheep*, 242 P. 1067 (Mont. 1926).

157. Act of Jan. 30, 1897, ch. 109, 29 Stat. 506.

158. H. REP. NO. 65-560, at 26 (1918).

159. *Id.* at 2.

160. *Id.* at 11.

The House passed the committee-reported bill to prohibit the sale of intoxicating liquor, Indian hemp, or peyote to any Indian. An amendment to permit the sale of peyote when used for religious purposes was rejected, and the bill as a whole passed.¹⁶¹ The Senate took no action on this House bill. Instead, it debated an amendment to prohibit the introduction of peyote into Indian territories. The amendment was rejected on a point of order because it constituted general legislation on an appropriations bill.¹⁶²

The religious use of peyote was also opposed by some tribal leaders, who considered it a threat to their authority.¹⁶³ In 1962, the D.C. Circuit affirmed the action of the Secretary of the Interior in approving a resolution adopted by the Navajo Tribal Council, banning the sale, use, or possession of peyote. NAC had challenged the resolution, considering peyote as indispensable for their religious ceremonies, but the Navajo Tribal Council regarded peyote as not connected with "any Navajo religious practice" and harmful and foreign to the Navajo traditional way of life.¹⁶⁴

B. Reform Movement

Montana in 1957 and New Mexico in 1959 amended their narcotic laws to provide that the prohibition against narcotics "shall not apply to the possession, sale or gift of peyote for religious sacramental purposes by a bona fide religious organization incorporated under the laws of the state."¹⁶⁵ In 1959, the Tenth Circuit decided a case brought by NAC, which sought an injunction against an ordinance adopted by the Navajo tribal council making it an offense to introduce peyote into Navajo country. The Navajos entered the house of an NAC member while he conducted religious ceremonies, and without a search warrant searched the premises and arrested several people. The NAC claimed that the ordinance was void because it violated the church's rights and the rights of its members under the First, Fourth, and Fifth Amendments of the U.S. Constitution. The court held that in the absence of a constitutional provision or a congressional statute making the Bill of Rights applicable to Indian nations, federal courts lacked jurisdiction over tribal laws or regulations.¹⁶⁶

In 1960, an Arizona trial court ruled against the state in a case involving a Navajo woman arrested for illegal possession of peyote. The court held that her religious interests outweighed whatever governmental interest the state could present. The judge wrote that the use of peyote was "essential to the existence of the peyote religion. Without it, the practice of the religion would

161. *Id.* at 11113-15.

162. 56 CONG. REC. 4129-33 (1918).

163. de Verges, *supra* note 152, at 72.

164. *Oliver v. Udall*, 306 F.2d 819, 821 (D.C. Cir. 1962).

165. *People v. Woody*, 394 P.2d 813, 819 (Cal. 1964).

166. *Native Am. Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959).

be effectively prevented."¹⁶⁷ The state appealed, but the Arizona Supreme Court affirmed the holding of the trial judge.¹⁶⁸

Several years later, in 1964, the California Supreme Court reached a similar result in *People v. Woody*. State police arrested a group of Navajos who used peyote during a religious ceremony and they were convicted under a state statute that prohibited the unauthorized possession of peyote. The court ruled that since the defendants used peyote "in a bona fide pursuit of a religious faith," and since there was no compelling state interest to override that use, application of the statute in this instance violated the First Amendment. Although the First Amendment was not applicable to Indian nations (and would not be until 1968), it applied to the states.¹⁶⁹ The court explained that peyote serves a sacramental purpose similar to bread and wine in certain Christian churches, but "it is more than a sacrament. Peyote constitutes in itself an object of worship; prayers are directed to it much as prayers are devoted to the Holy Ghost. On the other hand, to use peyote for nonreligious purposes is sacrilegious."¹⁷⁰

Although the California Supreme Court accepted the religious use of peyote in *Woody*, two years later a California trial court rejected an individual's argument that he had a religious right to plant, cultivate, and smoke marijuana. He was not a member of any organized religion. What he called religion was his "own personal philosophy and way of life," unlike the religious practices of the Native American Church and the established use of peyote as a sacrament.¹⁷¹ In 1969, a California appellate court upheld the conviction of someone who said he used marijuana "for meditative communication with the Supreme Being." The court found no similarity between the use of marijuana in this case and the NAC's use of peyote as an object of worship.¹⁷²

In 1966, the North Carolina Supreme Court decided another kind of peyote case. Someone who called himself a "Peyotist with Buddhist leanings" and a member of the Neo-American Church (unrelated to the Native American Church) claimed that his use of peyote and marijuana was protected by the First Amendment. The Neo-American Church was incorporated in California in 1965, its head is Chief Boo Hoo, and the members (Boo Hoos) join the organization to take psychedelic drugs as sacramental foods and "manifestations of the Grace of God."¹⁷³ Although there was some doubt that

167. CAROLYN N. LONG, RELIGIOUS FREEDOM AND INDIAN RIGHTS 18 (2000).

168. Neither decision in this case, *Arizona v. Attakai*, Criminal No. 4098, Coconino County, was reported, but it is cited in *Woody*, 394 P.2d at 813 n.5.

169. *Woody*, 394 P.2d at 815.

170. *Id.* at 817; see also *In re Grady*, 394 P.2d 728 (Cal. 1964) (insisting that the religious use of peyote must be honest and bona fide).

171. *People v. Mitchell*, 52 Cal. Rptr. 884, 887-88 (1966).

172. *People v. Collins*, 78 Cal. Rptr. 151 (1969).

173. *United States v. Kuch*, 288 F. Supp. 439, 443 (D.D.C. 1968).

this member of the Neo-American Church used drugs solely for religious purposes, the court held that the First Amendment did not protect even sincere users. Religious beliefs are protected, but not religious acts that "constitute threats to the public safety, morals, peace and order."¹⁷⁴

Other cases decided during this period also went against the use of drugs for supposedly religious reasons. In 1968, a federal court rejected the argument of a Neo-American Church member who claimed that her ingestion of marijuana and LSD was required for a religious experience. The court held that the statutes under which she was indicted were rational, constitutional, and served a substantial government interest. Her case involved more than the personal use of drugs; she was also indicted for unlawful sale and delivery.¹⁷⁵

These cases in the 1960s were decided either by state courts or lower federal courts. The case that went to the Supreme Court and received nationwide attention concerned Timothy Leary, who championed the use of drugs as a psychedelic, mystical, and religious experience. The Fifth Circuit affirmed his conviction against his claim of a First Amendment right to free exercise of religion. Like some of the cases already discussed, Leary was not charged with merely using marijuana. He was convicted of transporting and concealing the drug. His daughter Susan, age 18, was also convicted under the transportation and concealment charges. He testified that he was aware that his failure to pay a transfer tax for the marijuana violated federal law.¹⁷⁶ The court rejected any similarity between his actions and the use of peyote upheld in *Woody*.¹⁷⁷ Unlike the California law that prohibited the religious use of peyote, the court ruled that Congress had a compelling governmental interest in passing laws against marijuana.

Leary's conviction was reversed by the Supreme Court because of issues concerning self-incrimination under the Fifth Amendment and questions of due process. His religious freedom argument was not at issue, nor was there any question about the compelling need of the national government to control marijuana. The Court closed by saying: "[n]othing in what we hold today implies any constitutional disability in Congress to deal with the marihuana traffic by other means."¹⁷⁸

None of these cases challenged *Woody's* support for Indians using peyote in a religious ceremony conducted by the NAC. In 1972, when that identical issue was before an appellate court in Arizona, the court upheld the use of peyote in a religious ceremony (a wedding) convened by the Native American Church. Peyotism, said the court, "is not a twentieth century cult nor a fad

174. *State v. Bullard*, 148 S.E.2d 565, 569 (N.C. 1966).

175. *United States v. Kuch*, 288 F. Supp. 439 (D.D.C. 1968).

176. *Leary v. United States*, 383 F.2d 851, 856 n.7 (5th Cir. 1967).

177. *Id.* at 861.

178. *Leary v. United States*, 395 U.S. 6, 54 (1969).

subject to extinction at a whim."¹⁷⁹ Like the California court in *Woody*, the court held that Arizona had failed to show a compelling state interest in prohibiting the use of peyote as part of a religious ceremony. The trial record showed that peyote is not a narcotic and is not a habit-forming substance.¹⁸⁰ The appellate court remarked: "The fact that the use of peyote will not result in addiction is crucial because the State would have a great interest in protecting its citizens from drug abuse."¹⁸¹ In deciding a peyote case in 1974, the Ninth Circuit agreed with much in *Woody* without actually embracing it as federal law.¹⁸²

Going against these cases was an Oregon decision in 1975. The state police, after arresting an individual for failure to have a driver's license, discovered peyote during a search. Convicted of unlawfully possessing mescaline, or peyote, he was not given an opportunity to present evidence of his religious beliefs or his membership in the Native American Church. The Court of Appeals of Oregon affirmed his conviction.¹⁸³

In 1977, an Oklahoma appellate court reviewed an Indian's conviction for possessing peyote. When arrested, he had a string of peyote buttons around his neck and other peyote buttons wrapped and tied in a handkerchief inside his pocket. At trial, he testified that he was a member of the Otoe Tribe, the Ponca Tribe and the NAC. He admitted to possessing peyote, but said it was used for religious ceremonies and not for illicit drug purposes. The past president of the NAC of Oklahoma testified that it was permissible for members to carry peyote as a religious symbol. Several people told the trial court that the defendant was a member of the NAC. The appellate court ruled (1) that the defendant was a member of the church, (2) his possession of peyote "was and is protected," and (3) the state had failed to show a compelling interest in preventing NAC members from possessing and transporting peyote within the state.¹⁸⁴

C. Federal Controls

Federal actions during this period also seemed to secure the religious use of peyote by NAC members. Congress passed a drug abuse act in 1965, leaving to the administration broad discretion in making exemptions for depressant or stimulant drugs. The House bill had provided the NAC with a specific exemption for peyote, but the Senate — and the enacted bill — left

179. *State v. Whittingham*, 504 P.2d 950, 952 (Ariz. 1973).

180. *Id.* at 954.

181. *Id.*

182. *Golden Eagle v. Johnson*, 493 F.2d 1179, 1183 (9th Cir. 1974).

183. *State v. Soto*, 537 P.2d 142 (Ore. 1975), *cert. denied*, 424 U.S. 955 (1976); see John T. Doyle, *Dubious Intrusions — Peyote, Drug Laws, and Religious Freedom*, 8 AM. INDIAN L. REV. 79 (1980).

184. *Whitehorn v. State*, 561 P.2d 539, 547 (Okla. 1977); see Robert Johnston, *Whitehorn v. State: Peyote and Religious Freedom in Oklahoma*, 5 AM. INDIAN L. REV. 229 (1977).

that issue to administrative regulation.¹⁸⁵ The following year, the Commissioner of Food and Drugs listed a number of drugs that had a depressant effect on the central nervous system, including mescaline and its salts and peyote. The notice in the Federal Register explains that the listing of peyote "does not apply to non-drug use in bona fide religious ceremonies of the Native American Church; however, persons supplying the product to the Church are required to register and maintain appropriate records of receipts and disbursements of the article."¹⁸⁶

In 1978, the Drug Enforcement Administration (DEA) of the Justice Department issued a notice to discuss implementation of a federal regulation that specifically exempted NAC members from the registration requirement — under the Controlled Substances Act — for the use of peyote in bona fide religious ceremonies.¹⁸⁷ The purpose of the notice was not to rescind or reduce the exemption, but rather to discuss the difficulty of identifying bona fide church members and to search for ways of preventing unauthorized persons from taking advantage of the exemption. In 1981, the Office of Legal Counsel (OLC) of the Justice Department released an opinion expressing its view that the DEA regulation exempting peyote use in connection with NAC religious ceremonies accurately reflected congressional intent.¹⁸⁸

The special exemption for NAC members has been challenged by other churches that want to use peyote in their religious ceremonies. The Church of the Awakening, a non-Indian religious body, asked a federal court to add its name in the Code of Federal Regulations along with the NAC. In 1972; the Ninth Circuit acknowledged that the federal regulation was arbitrary in classifying the NAC one way and other churches another way, but said it would be equally arbitrary to place the NAC and the Church of the Awakening in one category and all other churches in another.¹⁸⁹ In 1984, the Fifth Circuit received another challenge to the special exemption, this time from the Peyote Way Church of God. The court remanded the case to the district court to determine whether the federal regulation denied religious freedom to the Peyote Way Church.¹⁹⁰ When the case returned, the Fifth Circuit upheld the special exemption for the NAC on the grounds that Congress had been given extraordinary authority over Indian matters and the special exemption was rationally related to the legitimate governmental objective of preserving Indian culture.¹⁹¹

185. 111 CONG. REC. 14,608 (1965); Drug Abuse Control Amendments of 1965, Pub. L. No. 89-74, 79 Stat. 226.

186. 31 Fed. Reg. 4679 (1966). The peyote exception for the NAC currently appears in 21 C.F.R. § 1307.31 (2001).

187. 43 Fed. Reg. 56,106 (1978).

188. 5 Op. Off. Legal Counsel 403 (1981).

189. *Kennedy v. Bureau of Narcotics & Dangerous Drugs*, 459 F.2d 415 (9th Cir. 1972).

190. *Peyote Way Church of God, Inc. v. Smith*, 742 F.2d 193 (5th Cir. 1984).

191. *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1216 (5th Cir. 1991).

In 1979, a federal district court in New York read the peyote exception differently. In addition to the NAC, it ruled that the exception covered the Native American Church of New York, which is not affiliated with the NAC and only a few of its roughly one thousand members are Indians. Also, the Native American Church of New York expresses a belief that all psychedelic drugs, including LSD and marijuana, are deities.¹⁹² The district court concluded that the exemption for peyote is available to any bona fide religious organization that uses peyote for sacramental purposes and regards peyote as a deity.¹⁹³

D. The Case of Al Smith and Galen Black

Alfred Smith, a Klamath Indian and member of the NAC, served as a counselor for alcoholics since 1971. He worked for ADAPT (Alcohol and Drug Abuse Prevention and Treatment) from August 25, 1982, until his discharge on March 5, 1984. ADAPT required counselors to abstain from alcohol and mind-altering drugs and warned Smith that he could be discharged for using peyote, even if part of a religious ceremony. After ingesting peyote during a weekend service conducted by the NAC, Smith was fired and subsequently denied unemployment benefits because of the drug use.¹⁹⁴

In 1986, the Supreme Court of Oregon held that the denial of benefits did not violate state constitutional provisions regarding freedom of worship and religious opinion, but it did violate the free exercise clause of the First Amendment of the U.S. Constitution.¹⁹⁵ It relied on the standards announced in 1963 by the U.S. Supreme Court in *Sherbert v. Verner*: the person claiming the free exercise right must show that the application of law "significantly burdens" the free exercise of religion, and the state must show that the constraint on religious activity is the "least restrictive" means of achieving a "compelling" state interest.¹⁹⁶ A companion case involved Galen Black, a non-Indian who belonged to the NAC. He was also denied unemployment benefits after being fired for ingesting peyote during a religious ceremony.

Under Oregon law, the possession of peyote was a crime. Unemployment benefits could be denied when an employee was discharged for misconduct, in this case by ingesting peyote. Although the state defended the law as part of its general policy against drug use, the Oregon Supreme Court held that the state had not shown that the financial stability of the unemployment insurance

192. *Native Am. Church v. United States*, 468 F. Supp. 1247, 1248 (S.D.N.Y. 1979), *aff'd*, 633 F.2d 205 (2d Cir. 1980).

193. *Id.* at 1251.

194. *Smith v. Employment Div., Dep't of Human Res.*, 721 P.2d 445, 445-46 (Or. 1986).

195. *Id.* at 446-49.

196. *Id.* at 449.

fund would be "imperiled by claimants applying for religious exemptions if this claimant receives benefits."¹⁹⁷

Dave Frohnmayer, Attorney General of Oregon, took the case to the U.S. Supreme Court. In 1988, the Court vacated the Oregon ruling and returned the case with the request that the Oregon Supreme Court decide whether the religious use of peyote was legal in that state. The U.S. Supreme Court pointed out that the results reached in *Sherbert* and other unemployment benefits cases "might well have been different if the employees had been discharged for engaging in criminal conduct."¹⁹⁸

The Oregon Supreme Court reaffirmed its earlier ruling by holding that the First Amendment entitled Smith and Black to their unemployment benefits. The state court pointed out that when Congress passed the Drug Abuse Control Amendments of 1965, for the purpose of bringing peyote under federal control, it expected the implementing regulation to exempt the religious use of peyote. In 1970 and 1978, Congress passed additional legislation offering support for the peyote religion.¹⁹⁹ As anticipated by Congress, the implementing regulation issued in 1971 stated that the listing of peyote as a controlled substance "does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church."²⁰⁰ The Oregon Supreme Court therefore sought guidance from a range of judicial and nonjudicial sources: its own state constitutional heritage, rulings from the U.S. Supreme Court, constitutional judgments from Congress, and legislation from other states that provided some type of exemption for the sacramental use of peyote.²⁰¹

Frohnmayer defended the state's interest in controlling drugs. Few regulatory areas, he said, invoke governmental interests in public health and safety "with force equal to that of drug use." Few drugs trigger that interest "with strength equal to that of hallucinogens, such as peyote."²⁰² Although some state courts had held that the federal Free Exercise Clause protects the use of peyote by NAC members, Frohnmayer pointed to contrary rulings by the Oregon courts.²⁰³

197. *Id.* at 451.

198. *Employment Div., Dep't of Human Res. v. Smith*, 485 U.S. 660, 671 (1988).

199. *Smith v. Employment Div., Dep't of Human Res.*, 763 P.2d 146, 149 (Or. 1988).

200. 21 C.F.R. § 1307.31 (2001).

201. *Smith*, 763 P.2d at 148 n.2.

202. Petition for Writ of Certiorari to the Supreme Court of the State of Oregon, *Smith v. Employment Div., Dep't of Human Res.*, 763 P.2d 146, 149 (Or. 1988), in 196 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 426 (Philip B. Kurland & Gerhard Casper eds., 1991) [hereinafter LANDMARK BRIEFS].

203. Brief for Petitioners, in 196 LANDMARK BRIEFS, *supra* note 202, at 478 n.26 (citing *State v. Soto*, 537 P.2d 142 (Or. 1975), *cert. denied*, 424 U.S. 955 (1976) (upholding the prohibition of mescaline even for religious purposes)).

In 1990, the U.S. Supreme Court held that the Free Exercise Clause permits a state to prohibit sacramental peyote use and to deny unemployment benefits to persons discharged for such use. In *Employment Division v. Smith*, delivered by Justice Scalia, the Court ruled that state law may prohibit the possession and use of a drug even if it incidentally prohibits a religious practice, provided that the state law is neutral and generally applicable to all individuals.²⁰⁴ Under this test, there was no need for the state to show a compelling interest or to use the least restrictive means. The issue of abandoning the compelling interest test was not before the Court. It was neither argued nor briefed. Scalia acknowledged that his test would place religious minorities at the mercy of the political process, but discriminatory treatment was an "unavoidable consequence of democratic government."²⁰⁵ In fact, discriminatory treatment is often the consequence of judicial rulings, with remedies coming from democratic institutions.

E. Legislative Remedies

With the judiciary offering no relief, interest groups turned their attention to legislative remedies in Congress and Oregon. A bill introduced in Congress in 1990, the Religious Freedom Restoration Act (RFRA),²⁰⁶ was drafted to reinstate the *Sherbert* standard for protecting religious liberties. Congressman Stephen Solarz took the lead in crafting the bill, working in concert with the National Council of Churches and other religious groups. It was agreed that the objective should be to restore *Sherbert* and there should be no focus on the sacramental use of peyote. Otherwise, the legislation would become known as "a drug bill."²⁰⁷

The effect of Scalia's decision in *Smith* was already being felt in the lower courts. When a Laotian immigrant died and a medical examiner insisted on performing an autopsy, the individual's parents protested on religious grounds (animism) that autopsies were abhorrent mutilations of the body that prevented the spirit from being set free. In January 1990, before Scalia's ruling, a district judge sustained their position, but after Scalia's decision the judge announced with "deep regret" that the Supreme Court's opinion forced him to deny their claim.²⁰⁸ Other restrictions on religious liberty flowed from Scalia's decision.²⁰⁹

While Congress considered this proposal, the Oregon legislature repaired some of the damage of the U.S. Supreme Court's decision by enacting a bill

204. *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990).

205. *Id.* at 890.

206. The bill was passed in 1993 as Pub. L. No. 103-141, 107 Stat. 1488.

207. LONG, *supra* note 167, at 213.

208. *Yang v. Sturner*, 750 F. Supp. 558 (D.R.I. 1990); *You Vang Yang v. Sturner*, 28 F. Supp. 845 (D.R.I. 1990).

209. Ruth Marcus, *Reins on Religious Freedom? Broad Coalition Protects Impact of High Court Ruling*, WASH. POST, Mar. 9, 1991, at A1.

that protects the sacramental use of peyote by the Native American Church. The state bill was sponsored by Rep. Jim Edmunson and assigned to the judiciary committee on which he served.²¹⁰ Al Smith testified in favor of the bill, advising the committee that the "drug we have to worry about is alcohol."²¹¹ Frohnmayer's office took no position on the bill.²¹² As enacted in 1991, the bill states that in any prosecution for the manufacture, possession, or delivery of peyote, it is an affirmative defense that the peyote is being used or is intended for use (1) in connection with the good faith practice of a religious belief, (2) as directly associated with a religious practice, and (3) in a manner that is not dangerous to the health of the user or others who are in the proximity of the user.²¹³

After the introduction of RFRA in 1990, a broad coalition of religious and civil liberties groups worked closely to overturn *Smith*. Congressional hearings in 1992 explored the authority of Congress to enact legislation to overturn the Supreme Court on constitutional issues. Congressman Henry Hyde, a senior member of the House Judiciary Committee, argued that Congress had no authority to enact RFRA: "Congress is institutionally unable to restore a prior interpretation of the first amendment once the Supreme Court has rejected that interpretation. We are a legislature, not the Court."²¹⁴

Yet throughout its history, Congress has often countermanded the Court on constitutional issues. Scholars and lobbyists at the hearings testified strongly that Congress had a right and a duty to act when the Court endangers fundamental freedoms. Robert Dugan, Jr., representing the National Association of Evangelicals, said that the Supreme Court, intended to be a guardian of constitutional freedoms, has "deprived us of our birthright as Americans" and emptied the Free Exercise Clause of its meaning. The system of checks and balances, he said, empowered Congress "to overrule the Court by restoring the compelling interest test."²¹⁵ Dallin H. Oaks, from the Mormon Church, regarded the statutory restoration of the compelling interest standard as "both a legitimate and a necessary response by the legislative branch to the degradation of religious freedom resulting from the *Smith* case."²¹⁶ Nadine Strossen of the ACLU appealed to Congress to act:

[T]he Supreme Court has cast us back into the good graces of this legislature, and it does depend on you, our elected representatives,

210. *Legislator Will Introduce Bill to Protect Peyote's Sacred Use*, EUGENE REGISTER GUARD, Apr. 20, 1990, at 5B.

211. *Panel Listens to Peyote Testimony*, STATESMAN J. (Salem, Or.), Apr. 6, 1991, at D1.

212. EPPS, *supra* note 133, at 235.

213. 1991 Oregon Laws ch. 329, § 1 (codified at OREGON REV. STAT. 475.992, § 5 (1995)).

214. *Religious Freedom Restoration Act of 1991: Hearings Before the House Committee on the Judiciary*, 102d Cong. 7 (1992).

215. *Id.* at 10, 14.

216. *Id.* at 25.

to restore to all of us the religious freedom that should be protected by the Constitution but that the U.S. Supreme Court has refused to protect that way. Please restore our religious liberty through legislation.²¹⁷

Progress continued in the Senate, where one witness at hearings called *Smith* "the Dred Scott of first amendment law."²¹⁸ Stalled for two years, RFRA began to move in 1993 when the House Judiciary Committee, voting 35-0, ordered the measure reported. The bill was designed to create a "statutory right" to require the compelling governmental interest test in cases in which the free exercise of religion has been burdened by a law of general applicability.²¹⁹ For constitutional authority to pass the bill, the committee pointed to Section 5 of the Fourteenth Amendment and the Necessary and Proper Clause embodied in Article I, Section 8. Congress could provide "statutory protection for a constitutional value when the Supreme Court has been unwilling to assert its authority."²²⁰ The House bill did not mandate that all states permit the ceremonial use of peyote; it merely subjected any prohibition to the compelling interest test.²²¹ The bill passed the House under suspension of the rules, which requires a two-thirds majority.²²²

The Senate Judiciary Committee, by a vote of 15-1, reported RFRA for floor consideration,²²³ and the bill passed 97-3.²²⁴ As enacted, RFRA provided that governments may substantially burden a person's religious exercise only if they demonstrate a compelling interest and use the least restrictive means of furthering that interest. The term "government" applied to any branch, department, agency, instrumentality, or official at the federal, state, and local level.²²⁵

A year after enacting RFRA, Congress passed legislation to permit the use of peyote by Native Americans during religious ceremonies.²²⁶ As Sen. Paul Wellstone (D-Minn.) remarked, leaving the definition of standards for religious freedom "up to the judiciary has not proven very effective for native American religions."²²⁷ Patrick H. Lefthand, a member of the Kootenai tribe,

217. *Id.* at 64-65.

218. *Religious Freedom Restoration Act of 1991: Hearing Before the Senate Committee on the Judiciary*, 102d Cong. 42 (1992) (statement of Oliver S. Thomas, general counsel, Baptist Joint Committee on Public Affairs).

219. H. REP. NO. 103-88, at 1-2 (1993).

220. *Id.* at 9.

221. *Id.* at 7.

222. 139 CONG. REC. 9680-87 (1993).

223. S. REP. NO. 103-11, at 2 (1993).

224. 139 CONG. REC. at 26,416.

225. Religious Freedom Restoration Act of 1993 § 5, 107 Stat. at 1488.

226. American Indian Religious Freedom Act Amendments of 1994, Pub. L. No. 103-344, 108 Stat. 3125.

227. 139 CONG. REC. 10,971 (1993) (statement of Sen. Wellstone).

told the Senate Committee on Indian Affairs that the Supreme Court decided that "our religion did not deserve the same protection afforded to all Americans who practice Judeo-Christian religions," and urged Congress to pass legislation "to ensure the continuation and vitality of Indian communities."²²⁸

The peyote bill that became law in 1994 originally attempted to redress a number of Supreme Court decisions that gave short shrift to Indian religious rights. In addition to *Smith*, the bill responded to the Court's decision in 1988 that denied protection of an Indian religious site on public land.²²⁹ Senate hearings disclosed that RFRA "fails to clearly address the fundamental issue of native access to sacred sites."²³⁰ Sen. Daniel Inouye (D.-Haw.), sponsor of the legislation, explained that the bill would provide "protection of native American sacred sites and puts into place a mechanism for resolving disputes."²³¹ Sen. Mark Hatfield (R.-Or.) said it was important that the 1988 decision "not be allowed to continue to deny native American input into Government actions that might affect historically sacred sites."²³² This part of the legislation was never enacted. However, President Clinton issued an executive order in 1996 to direct executive branch agencies to (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites.²³³

DEA officials testified that the religious use of peyote by Indians has nothing to do with the vast and violent traffic in illegal narcotics in the United States. The DEA was also unaware of the diversion of peyote to any illicit market.²³⁴ The bill enacted in 1994 specifically recognizes that "for many Indian people, the traditional ceremonial use of the peyote cactus as a religious sacrament has for centuries been integral to a way of life, and significant in perpetuating Indian tribes and cultures."²³⁵ The statute also notes that the Supreme Court's decision in *Smith* did not protect Indian practitioners who used peyote in Indian religious ceremonies.²³⁶

228. *Native American Free Exercise of Religious Freedom Act: Hearing Before the Senate Comm. on Indian Affairs*, 103d Cong. 98-99 (1993).

229. *Lyng v. Northwest Indian Cemetery Protection Ass'n*, 485 U.S. 439 (1988).

230. 139 CONG. REC. 10,971 (1993) (statement of Sen. Wellstone).

231. *Id.* at 10,963.

232. *Id.* at 10,970.

233. Exec. Order 13,007, 61 Fed. Reg. 26,771 (1996).

234. H. REP. NO. 103-675, at 4 (1994).

235. American Indian Religious Freedom Act Amendments of 1994 § 2, 108 Stat. at 3125 (amending the American Indian Religious Freedom act of 1978 by adding section 3(a)(1)).

236. *Id.* § 3(a)(4).

F. Constitutional Review of RFRA

Early in 1995, a district court in Texas held RFRA to be unconstitutional on the grounds that it violated the doctrine of separation of powers by "intruding on the power and duty of the judiciary."²³⁷ That decision was overturned a year later by the Fifth Circuit. The executive and legislative branches, said the appellate court, "also have both the right and duty to interpret the constitution."²³⁸ The Fifth Circuit referred to a section from *Smith* where Justice Scalia seemed to invite other branches to protect rights left unguarded by the courts.²³⁹ In that sense, RFRA was consistent with Scalia's appeal to nonjudicial bodies to enhance rights and liberties beyond the minimum levels established by courts. Other courts also upheld the constitutionality of RFRA.²⁴⁰

In 1997, the Supreme Court ruled that Congress exceeded the scope of its enforcement power under Section 5 of the Fourteenth Amendment in enacting RFRA.²⁴¹ In many ways, Congress had asked for a black eye by attempting to reimpose a constitutional standard (*Sherbert v. Verner*) that the Court had specifically rejected in *Smith*.²⁴² The Court could not sit still and have Congress ram *Sherbert* down its throat. But the reasoning and premises in the decision are superficial, unpersuasive, and internally inconsistent. They invite continued challenges and legislative activity. Although the Court strongly hinted that it has the last and final word in deciding the meaning of the Constitution, it in fact left the door wide open for future congressional action.²⁴³

237. *Flores v. City of Boerne*, 877 F. Supp. 355, 357 (W.D. Tex. 1995).

238. *Flores v. City of Boerne, Tex.*, 73 F.3d 1352, 1356 (5th Cir. 1996).

239. *Id.* at 1362 ("Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.") (quoting *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990)).

240. *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 470 (D.C. Cir. 1996); *Abordo v. Hawaii*, 902 F. Supp. 1220 (D. Hawaii 1995); *Sasnett v. Dep't of Corrections*, 891 F. Supp. 1305 (W.D. Wis. 1995), *aff'd*, *Sasnett v. Sullivan*, 91 F.3d 1018 (7th Cir. 1996); *Belgard v. Hawaii*, 883 F. Supp. 510 (D. Hawaii 1995). In 1996, a district court in Maryland held that RFRA usurped the Supreme Court's authority to determine the scope and meaning of the First Amendment and violated the separation of powers. *Keeler v. Mayor & City Council of Cumberland*, 928 F. Supp. 591 (D. Md. 1996).

241. *Boerne v. Flores*, 521 U.S. 507 (1997).

242. See Neal Devins, *How Not to Challenge the Court*, 39 WM. & MARY L. REV. 645 (1998).

243. For a critique of *Boerne*, see Louis Fisher, *Nonjudicial Safeguards for Religious Liberty*, 70 U. CIN. L. REV. 1, 56-61 (2001).

The Court warned about the risks of congressional action. "If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.'"²⁴⁴ There is no intelligible distinction between what Congress does by statute and what the Court does by caselaw in changing the meaning of the Fourteenth Amendment. Both are done outside the amendment process. The Court inserted some unintended humor with this grave admonition: "Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V."²⁴⁵ The same result flows from Court decisions that reflect shifting judicial majorities or changes in the way that a Justice analyzes an issue. As Professor Michael McConnell has written, "'shifting legislative majorities' have no greater and no less capacity than shifting *judicial* majorities to 'circumvent' the amendment process of Article V."²⁴⁶ Two days before the Court invalidated RFRA, it overruled a decision from 1985 that had limited federal assistance to parochial schools.²⁴⁷

The Court concluded with the suggestion that constitutional interpretation is a judicial monopoly. "Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is."²⁴⁸ Nothing in two hundred years of constitutional practice and construction supports such a static formulation. The Court closes its eyes to what is plainly conspicuous in American history: the reality and capacity of all three branches and the general public to participate in shaping constitutional values, either before or after judicial rulings.

A separate question concerned the constitutionality of RFRA as applied not to the states but to the federal government. In 1998, the Eighth Circuit held that RFRA was constitutional as applied to federal law, it did not violate the separation of powers doctrine, and it did not violate the Establishment Clause.²⁴⁹ In 2001, the Tenth Circuit ruled that RFRA was a legitimate congressional action under Article I to govern the conduct of federal prison officials.²⁵⁰

244. *Boerne*, 521 U.S. at 529.

245. *Id.*

246. Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 174 (1997).

247. *Agostini v. Felton*, 524 U.S. 402 (1997), *rev'g* *Aguilar v. Felton*, 473 U.S. 402 (1985).

248. *Boerne*, 521 U.S. at 535-36.

249. *In re Young*, 141 F.3d 854 (8th Cir. 1998), *cert. denied, sub nom. Christians v. Crystal Evangelical Free Church*, 525 U.S. 811 (1998).

250. *Kikumura v. Hurley*, 242 F.3d 950 (10th Cir. 2001).

Following *Boerne*, the House Judiciary Committee held hearings to consider alternative legislation. Rep. Robert Scott (D.-Va.) said that RFRA could be reconfigured by relying on the Interstate Commerce Clause or the Spending Clause.²⁵¹ The Senate Judiciary Committee held hearings in 1997 to explore the legislative options available to Congress.²⁵² The following year, Sen. Orrin Hatch (R.-Utah) introduced the Religious Liberty Protection Act (RLPA) to respond to *Boerne*. He relied primarily on the commerce and spending powers.²⁵³ A similar bill, which passed the House the following year, was supported by ninety-two religious and civil liberty groups, including Protestant, Catholic, Jewish, Muslim, and Native American organizations.²⁵⁴ The bill stated that a government shall not "substantially burden" a person's religious exercise (1) in a program or activity, operated by a government, that receives Federal financial assistance or (2) in any case in which the substantial burden on religious exercise affects commerce with foreign nations, among the states, or with Indian tribes.²⁵⁵ With *Smith* in mind, the bill provided that this principle applies "even if the burden results from a rule of general applicability."²⁵⁶ Finally, the bill permitted government to substantially burden a person's religious exercise if the government can demonstrate that the burden furthers a compelling governmental interest and is the least restrictive means to further that interest.²⁵⁷ The bill passed the House by a vote of 306-118.²⁵⁸

By the time the bill cleared both chambers in 2000, it had been restricted to provide two kinds of protections. First, it offers religious groups protection in land-use disputes, such as zoning issues (the kind that triggered *Boerne*). Second, the statute makes it easier for prisoners and other persons confined in state-run institutions to practice their faith. The statute applies to any organization that receives federal money, including state and local prisons that get federal construction and maintenance funds. Finally, the statute relies on congressional power over interstate commerce, because construction materials are shipped between states for the renovation of buildings owned by religious organizations.²⁵⁹

251. *Protecting Religious Freedom After Boerne v. Flores: Hearing Before the House Comm. on the Judiciary*, 105th Cong. 2 (1997).

252. *Congress' Constitutional Role in Protecting Religious Liberty: Hearings Before the Senate Comm. on the Judiciary*, 105th Cong. (1997).

253. 144 CONG. REC. S5791 (daily ed. June 9, 1998).

254. 145 CONG. REC. H5583 (daily ed. July 15, 1999).

255. *Id.* at H5584.

256. *Id.*

257. *Id.*

258. *Id.* at H5608.

259. Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803.

VII. Conclusions

The public's broad involvement in basic constitutional questions of religious liberty underscores why it is impracticable and misleading, on both political and legal grounds, to look automatically (and optimistically) to the courts for the protection of minority rights. The Indians found victory not in courtrooms but in legislative chambers. They prevailed because they were effective in working with many other interest groups in safeguarding rights that were unobtainable from the courts. They prevailed because their case was sound and they persisted in the face of many setbacks. The statutory rights they won, both from Congress and state legislatures, are far more secure than any favorable judicial ruling they might have received.

Beyond the issue of peyote, Congress has passed many pieces of legislation to protect Indian religious freedom. The judiciary has sometimes played a significant role, but most of the initiative and momentum comes from Indian groups and other organizations that apply pressure to political institutions: Congress, the President, federal agencies, and the states. Religious liberty for Indians has been secured by the regular political process, not by judicial rulings.

A review of judicial holdings on Indian religious liberties reveals a few victories and many, many defeats. Indians have brought their religious grievances to the Supreme Court repeatedly, coming up empty on every occasion. What they were unable to achieve through litigation they were often able to achieve through legislation, such as the religious use of peyote and various claims for sacred sites. To draw attention to cases in which courts do not protect the rights of religious minorities is not meant to criticize the judiciary. The American system works quite well when courts limit their reach and decline to manufacture new rights. Other political institutions, both at the national and state level, have greater legitimacy and competence to step in and right a wrong. Rather than expect courts to always deliver a remedy, it is healthier to have that task shared with democratic institutions.