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A Rough and Narrow Path: Preserving Native American Religious Liberty in the Smith Era

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A ROUGH AND NARROW PATH: PRESERVING NATIVE AMERICAN RELIGIOUS LIBERTY IN THE *SMITH* ERA

*John Celichowski**

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To the casual observer, peyote is unremarkable even as a plant. "A species of small, spineless cactus found in a limited growth area, principally in present-day Mexico and the State of Texas,"[1] it would not appear to have the power to inspire a conversation over coffee, much less a constitutional debate. Similarly, the billions of grapes that fill vineyards or the ears of wheat that wave in countless fields throughout the world would not, in themselves, generate much excitement.

However, when those grapes become wine and that wheat becomes bread, and when a priest raises that bread and wine in front of an assembly of believers and echoes the words of Jesus, "[T]ake this, all of you, and eat it: this is my Body . . . take this, all of you, and drink from it: this is the cup of my blood . . . . ,"[2] they are far from ordinary for those who are gathered. In the same way, when the buttons harvested from the tops of peyote plants are dried and ceremonially smoked during a time of prayer

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1. ARLENE HIRSCHFELDER & PAULETTE MOLIN, THE ENCYCLOPEDIA OF NATIVE AMERICAN RELIGIONS 213 (1992).

2. EUCHARISTIC PRAYER II, THE SACRAMENTARY (ROMAN MISSAL) 549 (Catholic Book Publishing Co. 1985).

and song for another group of believers, peyote itself becomes a sacrament, "a means of divine grace . . . a sign or symbol of a spiritual reality."[3] In the Native American Church and among various tribes in North America, such peyote ceremonies are as sacred and ritualized as the Roman Catholic celebration of the Eucharist, even in its most ancient forms:

> The modern peyote ceremony is an all-night meeting in which participants sit inside a tipi or other structure facing a fire and a crescent-shaped altar. The ceremony consists basically of four parts: praying, singing, eating peyote, and quietly contemplating. Usually those who are present participate in all parts of the long and tiring ceremony, but it seems that most of the time an individual just sits quietly looking at the fire and the "father peyote" — and contemplating it. It is, however, a collective rite, and although in a sense the individuals are isolated from the other members in their own thoughts and prayers, they quickly respond when it is their turn to sing or drum. The prayers, songs, and quiet contemplation, coupled with the effects of peyote, frequently lead to personal revelations.[4]

> The records of the apostles or writings of the prophets are read for as long as time allows. Then, when the reader has finished, the president in a discourse admonishes [us] to imitate these good things. Then we all stand up together and offer prayers; and as we said before, when we have finished praying, bread and wine and water are brought up, the president likewise offers prayers and thanksgivings to the best of his ability, and the people assent, saying the amen; and there is a distribution, and everyone participates in [the elements] over which thanks have been given; and they are sent through the deacons to those who are not present.[5]

Most people would be shocked if a priest and his parishioners celebrating an open air mass in Washington, D.C. were arrested and prosecuted for violating the district statute which prohibits the drinking of alcoholic beverages in public places[6] because they served and consumed wine, a

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3. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 1029 (10th ed. 1997).

4. EDWARD F. ANDERSON, PEYOTE: THE DIVINE CACTUS 49 (2d ed. 1996).

5. ST. JUSTIN MARTYR, FIRST APOLOGY 67.3-5 (n.d.) (Ronald C.D. Jasper & Geoffrey J. Cuming, trans.), *quoted in* EDWARD FOLEY, FROM AGE TO AGE 27 (1991).

6. D.C. STAT. ANN. § 25-128(a)(1) (1999). The statute states, in part, "No person in the District of Columbia shall drink or possess, in an opened container, any alcoholic beverage in any of the following places . . . . In any street, alley, park, or parking." *Id.* Violators can be imprisoned for up to 90 days and/or fined $100. *See id.* § 25-128(e).

routine practice in any Catholic Church in which people receive communion from the cup as well as from the paten or ciborium.[7] When the Supreme Court of the United States issued its ruling in *Employment Division v. Smith*[8] ten years ago, however, there was some fear — implied in the dissent of one justice[9] — that such actions were possible in light of the Court's decision to uphold the State of Oregon's denial of unemployment compensation benefits to two privately employed substance abuse counselors for violating state criminal law by their use of peyote in rituals of the Native American Church.

In *Smith*, the Court held the state's passage and enforcement of a neutral law of general applicability, which incidentally burdened the respondents' ability to practice their religion, did not violate their rights under the Free Exercise Clause of the First Amendment.[10] In addition to a vigorous concurrence[11] and dissent,[12] there was an outcry by constitutional scholars[13] and advocates for Native Americans' religious freedom.[14]

Critics of *Smith*, and even members of the Court who concurred in the judgment, asserted that the Court was abandoning the "compelling interest" test adopted in *Sherbert v. Verner*,[15] *Wisconsin v. Yoder*,[16] and other Free

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7. The paten and ciborium are vessels used in the Roman Catholic liturgy to hold the eucharistic bread.

8. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990).

9. *Id.* at 914 n.6. In this footnote of his dissent, Justice Blackmun noted:

> In this respect, respondents' use of peyote seems closely analogous to the sacramental use of wine by the Roman Catholic Church. During prohibition, the federal government exempted such use of wine from its general ban on possession and use of alcohol . . . . However compelling the government's then general interest in prohibiting the use of alcohol may have been, it could not plausibly have asserted an interest sufficiently compelling to outweigh Catholics' right to take communion.

Id.

10. *See id.* at 878-79.

11. *See id.* at 891-907 (J. O'Connor, concurring in the judgment). "In my view, today's holding dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our nation's fundamental commitment to individual religious liberty." *Id.* at 891.

12. *See id.* at 907-21 (J. Blackmun, dissenting). "[The court's holding] effectuates a wholesale overturning of settled law concerning the religion clauses of our constitution." *Id.* at 908.

13. *See, e.g.*, Jesse H. Choper, *The Rise and Decline of the Constitutional Protection of Religious Liberty*, 70 NEB. L. REV. 651 (1991); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, *cited in* DAVID GETCHES ET AL., FEDERAL INDIAN LAW 778 (1998).

14. *See, e.g.*, John Rhodes, *An American Tradition: The Religious Persecution of Native Americans*, 52 MONT. L. REV. 13 (1991).

15. *See* 374 U.S. 398 (1963) (holding that state violated the right to free exercise of petitioner, a Seventh-Day Adventist, when it denied her unemployment compensation after she was terminated from her job and was unable to obtain other employment because of her refusal

Exercise cases. In her concurrence, Justice O'Connor, while acknowledging that the right to free exercise is not absolute, maintained that "[w]e have respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest."[17] Justice Scalia, however, contended in the opinion of the Court that the "compelling interest" test was not being abandoned but merely restricted.[18]

While the outcome in *Smith* surprised many, it was not unforeseeable given the Court's decisions in several other Free Exercise cases over the previous five years. Like *Smith*, two of these cases involved American Indian[19] religious beliefs and practices. In *Bowen v. Roy*,[20] the Court upheld the right of federal government to insist that recipients of welfare and food stamp benefits be identified by social security numbers, despite the insistence of an Abenaki father that compliance with the requirement would rob his child's spirit.

In *Lyng v. Northwest Indian Cemetery Protective Ass'n*,[21] the Court upheld the right of the federal government to permit construction of a road and harvesting of timber on a portion national forest land that had long been used for religious purposes by members of three tribes. While the Court conceded that allowing such activities would have a destructive effect on the ability of the Indians to practice their religion, the Court maintained that its jurisprudential hands were tied:

> The Constitution simply does not provide a principle that could justify upholding respondents' legal claims. However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires . . . . The First Amendment must apply to all

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to work on Saturday, the Adventist sabbath, where the state failed to establish a compelling interest to justify the policy).

16. *See* 406 U.S. 205 (1972) (holding that state compulsory education law requiring children to attend school until age 16 violated the Free Exercise and substantive Due Process rights of respondent, a member of the Old Order Amish sect, where the state could not show a compelling interest in keeping children in school beyond the eighth grade level permitted by the Amish).

17. *Smith*, 494 U.S. at 894.

18. *Id.* at 883 ("We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation.")

19. Throughout this article, the terms "Native American" and "Indian" will be used interchangeably and will refer to those American citizens who descend from the indigenous peoples of this hemisphere and who may or may not be members of federally recognized tribes, bands, clans or similar groups.

20. 476 U.S. 693 (1986).

21. 485 U.S. 439 (1988).

> citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion. The Constitution does not, and the 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 left for the legislatures and other institutions.[22]

In the five years leading up to *Smith*, the Court also rejected the Free Exercise claims of a Jewish military chaplain disciplined for wearing a yarmulke in violation of the uniform dress code[23] and Muslim prisoners who were prevented by prison work regulations from participating in religious services on Fridays (the Islamic sabbath).[24] Taken together, the Court's holdings in these cases represented an increasing deference to the power of governments to enact neutral laws or regulations of general applicability that had the effect of burdening, and possibly even crippling, the abilities of religious minorities to freely practice their faiths.

Although *Smith* represented more of an evolutionary rather than a revolutionary step in Free Exercise jurisprudence — indeed, its core principle of permitting a neutral law of general applicability to "trump" a Free Exercise claim was over a century old[25] — it occasioned a broad wave of criticism that included legal scholars and "such unlikely allies as the National Association of Evangelicals, the Mormon Church, and the American Civil Liberties Union."[26] What troubled many, particularly advocates for minority religions, was the Court's reliance on the political process to equitably address their Free Exercise claims.[27] Henrietta Mann, a Cheyenne and professor of Native American studies at the University of Montana, lamented the decision as an injustice that would fall most heavily on American Indians, who had historically served as the proverbial canary

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22. *Id.* at 452.

23. *See* Goldman v. Weinberger, 475 U.S. 503 (1986).

24. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).

25. *See* Reynolds v. United States, 98 U.S. 145 (1879) (upholding conviction of Mormon petitioner for violating federal ban on polygamous marriage over his Free Exercise claim, where congressional authority to pass laws of general application regulating religiously motivated *conduct*, as opposed to religious belief, was not limited by the First Amendment).

26. STEVEN GOLDBERG, SEDUCED BY SCIENCE: HOW AMERICAN RELIGION HAS LOST ITS WAY 79 (1999).

27. *See* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 890 (1990). In his opinion for the court, Justice Scalia noted:

> It may fairly be said that leaving accommodation to the political process will place at relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

Id.

in the coal mine, warning the nation when the civil rights of minority groups were imperiled.[28]

II. A Congressional Response to Smith: The Rise and Fall of the Religious Liberty Restoration Act

In an attempt to address these concerns, Congress passed and President Clinton signed the Religious Freedom Restoration Act of 1993 (RFRA).[29] The primary purpose of RFRA was to revive the *Sherbert* and *Yoder* compelling interest/least restrictive means test as the standard for evaluating Free Exercise claims against neutral laws of general applicability.[30] In addition, it gave plaintiffs a specific cause of action to pursue claims against federal, state and local governments and their officials.[31]

Less than four years after it was enacted, however, the use of RFRA to challenge the actions of state and local governments was declared unconstitutional by the Supreme Court of the United States in *City of Boerne v. Flores*.[32] The plaintiff in this case, the archbishop of San Antonio, Texas, had used the statute to challenge the actions of a local zoning board pursuant to a historical preservation ordinance that denied a Roman Catholic parish the permits needed to expand the church to accommodate a growing number of members. The Court held that RFRA violated basic constitutional principles of separation of powers and federalism.[33]

The Court found that Congress, in relying on the enforcement provision in Section 5 of the Fourteenth Amendment[34] as the underlying authority for RFRA, violated separation of powers. The Court held that congressional power under the Fourteenth Amendment was remedial and not substantive.[35] "Legislation which alters the meaning of the Free Exercise

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28. *See* Minority Religious Practices: Where Does the State Draw the Line? 14, 16 (Symposium, "Religious Liberty in America: Crossroads or Crisis?," Mar. 16-17, 1993, Arlington, Va.).

29. 42 U.S.C. § 2000bb (1994).

30. *See id.* § 2000bb-1(b) ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person — (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.").

31. *See id.* § 2000bb-1(c) (providing for judicial relief for those whose Free Exercise rights have been burdened in violation of the statute, as well as standing pursuant to the general rules of standing under U.S. CONST. art. III); *id.* § 2000b-2(1) (defining "government" to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the united states, a state, or a subdivision of a state").

32. 521 U.S. 507 (1997).

33. *Id.* at 534-36.

34. U.S. CONST. amend. xiv, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

35. *Boerne*, 521 U.S. at 527 ("Any suggestion that Congress has a substantive, non-remedial

Clause," the Court maintained, "cannot be said to be enforcing the clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."[36]

In addition, the Court found that requiring a state to meet the compelling interest/least restrictive means test, what it termed "the most demanding test known to constitutional law," represented "a considerable congressional intrusion into the states' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."[37] The Court found that the sweeping scope of RFRA far exceeded the constitutional violations it purported to remedy, not merely restoring but expanding the pre-*Smith* status quo by imposing the least restrictive means on governmental actions that even incidentally burden the exercise of religious beliefs.[38]

III. RFRA Resurrected? — The Religious Liberty Protection Act of 1999

Less than two years after *Boerne*, there was a renewed congressional attempt to statutorily restore the compelling interest/least restrictive means test. After an initial effort during the 105th Congress passed the House Judiciary Committee's Subcommittee on the Constitution but failed to advance further, Rep. Charles Canady (R.-Fla.) introduced House Bill 1691, the Religious Liberty Protection Act of 1999 (RLPA, or the Bill) in the early months of the 106th session.[39] Within two months, the Bill passed the House of Representatives by an overwhelming margin, 306-118.[40] The Bill is currently before the Senate.[41]

The core purpose of RLPA was identical to that of RFRA: to restore the compelling interest/least restrictive means test as the standard for assessing the permissibility of governmental programs and activities, even those of general applicability that substantially burden a person's free exercise of religion.[42] It attempted to do this, however, in ways that were intended to

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power under the Fourteenth Amendment is not supported by our case law.").

36. *Id.* at 519.

37. *Id.* at 534.

38. *Id.* at 534-35.

39. H.R. REP. NO. 106-219, at 4 (1999).

40. *See* CONG. REC. H5608 (July 15, 1999).

41. S. 2081 (introduced Feb. 22, 2000).

42. *See* H.R. 1691, 106th Cong. § 2(b) (1999) ("A government may substantially burden a person's religious exercise if the government demonstrates that application of the burden to the person — (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."); *see also* H.R. REP. NO. 106-219, at 13 ("While the means used by [RLPA] are different from those used by RFRA, the ends of each act are the same: to restore the requirement that courts examine substantial government burdens on the exercise of religion to determine whether the offending state action is the 'least restrictive' means of furthering a 'compelling' governmental interest.").

avoid the defects that caused RFRA to be held unconstitutional in *Boerne*. Interestingly, it also continued to rely on a congressional power that the Court in *Boerne* explicitly found insufficient to enable RFRA to withstand constitutional scrutiny.

The bill broadly defined "religious exercise" as

> any exercise of religion, whether or not compelled by, or central to a system of religious belief, and includes (a) the use, building, or conversion of real property by a person or entity intending that property for religious exercise; and (b) any conduct protected as exercise of religion under the First Amendment to the Constitution.[43]

In its effort to restore the *Sherbert* test, RLPA explicitly relied on two established sources of congressional authority, the "power of the purse" and the authority to regulate various forms of commerce. First, it declared that, unless a government met the compelling interest/least restrictive standard by carrying its evidentiary burden and the burden of persuasion[44] (after claimants establish a prima facie case of religious discrimination),[45] it cannot "substantially burden a person's religious exercise — (1) in a program or activity, operated by the government, that receives federal financial assistance . . . ."[46] Second, it required application of the same standard "in any case in which the substantial burden on the person's religious exercise affects, or in which a removal of that substantial burden would affect, commerce with foreign nations, among the several states, or with Indian tribes."[47]

In their report, the Bill's proponents on the House Judiciary Committee suggested that RLPA's reliance on congressional powers under the Commerce Clause was primarily intended to provide the "jurisdictional element" required to sustain any cause of action pursuant to it.[48] They conceded that religious exercise was not itself commerce but asserted that many aspects of that exercise implicated commerce.[49]

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43. *Id.* § 8(1).

44. *See id.* § 8(5) (defining "demonstrates" as meeting "the burdens of going forward with the evidence and of persuasion").

45. H.R. REP. NO. 106-219, at 24.

46. *Id.* § 2(a)(1).

47. *Id.* § 2(a)(2); *see* U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

48. H.R. REP. NO. 106-219, at 28 ("Section 2(a)(2) applies the general rule to cases in which the substantial burden affects commerce, or removal of the burden would affect commerce. This so-called jurisdictional element must be proved in each case as an element of the cause of action.").

49. *Id.* ("This subsection does not treat religious exercise itself as commerce, but it recognizes that the exercise of religion sometimes requires commercial transactions, such as the construction of churches, the hiring of employees, or the purchase of supplies and equipment.

Another way in which RLPA attempted to directly address the constitutional deficiencies in RFRA cited by the Court in *Boerne* was through a subsection[50] that specifically addresses the issue of land use regulation and burdens on Free Exercise that was featured in that case.[51] As an initial matter, the Bill broadly defined "land use regulation."[52] In response to what the house judiciary committee, citing numerous cases, perceived to be a widespread problem of discrimination,[53] RLPA's land use provisions included:

(1) a requirement that a government apply the compelling interest/least restrictive means test to any instance in which governmental authorities apply or implement a (system of) regulation(s) or exemption(s) involving individualized assessments that substantially burdens Free Exercise;[54]

(2) a prohibition against various forms of religious discrimination in land use regulations;[55] and

(3) the use of full faith and credit and preemption to maximize claimants' opportunities to make and sustain successful challenges to the decisions of land use regulators on Free Exercise grounds.[56]

Where the burden or removal of the burden on religious exercise affects one of these commercial transactions, the act applies.").

50. *see* H.R. 1691, 106th Cong. § 3(b) (1999); *see also id.* § 8(3) (defining "land use regulation").

51. *See* City of Boerne v. Flores, 521 U.S. 507, 511 (1997).

52. *See* H.R. 1691 § 8(3) (defining "land use regulation" as "a law or decision by a government that limits or restricts a private person's uses or development of land, or of structures affixed to land, where the law or decision applies to one or more particular parcels of land or to land within one or more designated geographical zones, and where the private person has an ownership, leasehold, easement, servitude, or other property interest in the regulated land, or a contract or option to acquire such an interest.").

53. *See generally* H.R. REP. NO. 106-219, at 18-24 (noting that land use regulation and the discretionary power of local authorities have often frustrated the efforts of religious communities to establish or further develop their places of worship).

54. *See* H.R. 1691 § 3(b)(1)(A) ("Where, in applying or implementing any land use regulation or exemption, or system of land use regulations or exemptions, a government has the authority to make individualized assessment of the proposed uses to which real property would be put, the government may not impose a substantial burden on a person's religious exercise, unless the government demonstrates that application of the burden to the person is in furtherance of compelling interest and is the least restrictive means of furthering that compelling governmental interest.").

55. *See id.* § 3(b)(1)(B), (C), (D) ("(B) No government shall impose or implement a land use regulation in a manner that does not treat religious assemblies or institutions on equal terms with nonreligious assemblies or institutions. (C) No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination. (D) No government with zoning authority shall unreasonably exclude from the jurisdiction over which it has authority, or unreasonably limit within that jurisdiction, assemblies or institutions principally devoted to religious exercise.").

56. *See id.* § 3(b)(2), (3) ("(2) Adjudication of a claim of a violation of the Free Exercise Clause of this subsection in a non-federal forum shall be entitled to full faith and credit in a federal court only if the claimant had a full and fair adjudication of that claim in the non-federal

RLPA provided those asserting Free Exercise claims with a cause of action and defense, as well as ability to make claims for attorneys fees.[57] It limited such claims by prisoners,[58] but gave the federal government authority to sue to enforce compliance.[59] In addition, the Bill contained terms that: reiterated the existing prohibition against governmental burdens on religious belief;[60] expressly denied Free Exercise claims under RLPA against religious organizations;[61] maintained neutrality regarding governmental funding of religious organizations or activities and the application of existing law regarding the permissibility of conditions on the receipt of such funding;[62] but acknowledged that compliance with RLPA may require governmental expenditures.[63]

A subsection of the Bill gave governments the ability to "avoid the preemptive force" of any of its provisions by: (1) changing a policy that substantially burdens Free Exercise; (2) providing a religious exemption to that policy; or (3) "any other means that eliminates the substantial burden."[64] Another subsection required that RLPA "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by its terms and the Constitution."[65]

In light of RFRA's invalidation in *Boerne*, RLPA's drafters included a severability provision that, in the event of another adverse constitutional adjudication, would have allowed the surviving provisions to remain in force.[66] They also included a section that explicitly denied application of RLPA to any interpretation or construction of the other prong of the First Amendment's guarantee of religious liberty, the Establishment Clause.[67]

In sum, the Religious Liberty Protection Act of 1999, relying on broad congressional authority under the Commerce and Spending Clauses of the

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forum. (3) Nothing in this subsection shall preempt State law that is equally or more protective of religious exercise.").

57. *See id.* § 4(a) (cause of action); *id.* § 4(b) (attorney's fees).

58. *See id.* § 4(c) (subjecting RLPA suits by prisoners to the limiting provisions of the Prison Litigation Reform Act of 1995, 42 U.S.C.A. § 1997e, as amended).

59. *See id.* § 4(d) (permitting the united states to sue for injunctive or declaratory relief to enforce compliance with the act).

60. *See id.* § 5(a).

61. *See id.* § 5(b).

62. *See id.* § 5(c)-(d).

63. *See id.* § 5(c).

64. *Id.* § 5(e).

65. *Id.* § 5(g).

66. *See id.* § 5(h) ("If any provision of this Act or of an amendment made by this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provision to any other person or circumstance shall not be affected.").

67. *See id.* § 6 ("Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the first amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the 'Establishment Clause'.").

Constitution, attempted to raise RFRA and, more critically, the compelling interest/least restrictive means test, from constitutional death. It promises to provide those who wished to attack governmental actions or any program or activity receiving federal funds on Free Exercise grounds, particularly those who wished to attack land use regulations, with a statutory cause of action and the ability to obtain the legal assistance necessary to press their claims.

IV. The Dubious Future of RLPA: Prospects and Problems

Had it ever become law, however, RLPA was likely to meet the same fate as its predecessor, RFRA. Like RFRA, it suffered from serious constitutional defects that are likely to cause it to be invalidated by the Supreme Court. In addition, while RLPA's attempts to specifically attack the problem of land use regulation were well intended, it remains possible to address the same problems under existing law. As such, it was not a very promising staff on which Free Exercise claimants, including and especially Native Americans, can lean for vindication.

Unlike its predecessor, RLPA relied on an additional constitutional authority which, like the Fourteenth Amendment,[68] has at times been interpreted broadly by the Court: the Commerce Clause.[69] For roughly half of this century, the Court permitted Congress to rely on the Commerce Clause to create legislation governing a fairly wide swath of American life, including the wages and hours of workers,[70] the production of farmers,[71] the regulation of strip mining,[72] and equal access to public accommodations.[73]

Like the application of RFRA at issue in *Boerne*, the application of RLPA, with its identical and sweeping imposition of what the Court in

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68. *See* City of Boerne v. Flores, 521 U.S. 507, 517-18 (1997) (noting the broad, though not unlimited, powers Congress has under Section 5 of the Fourteenth Amendment to pass laws enforcing constitutional rights, even where it may intrude in areas of legislation previously reserved to the states).

69. *See* U.S. CONST. art. I, § 8, cl. 3 (granting congress the power, inter alia, "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

70. *See* United States v. Darby, 312 U.S. 100 (1941) (upholding minimum wage and maximum hour provisions of the Fair Labor Standards Act of 1938).

71. *See* Wickard v. Filburn, 317 U.S. 111 (1942) (upholding provisions of the Agricultural Adjustment Act which penalized respondent for exceeding production quota set by the Department of Agriculture).

72. *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) (upholding, under a rational basis standard, the Surface Mining Control and Reclamation Act of 1977 and congressional authority to regulate activities on private lands within state borders).

73. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (upholding provisions in title II of the Civil Rights Act of 1964 banning discrimination based on "race, color, religion, or national origin" in public accommodations).

Boerne termed "the most demanding test known to constitutional law"[74] would have raised significant federalism concerns. This is not a matter of little concern for Native Americans. While *Boerne* left RFRA's application to the actions of the federal government intact (e.g., on a reservation or on lands that are managed by the National Forest Service), it should be recalled that roughly half of the Native Americans in the United States do not live on or near a reservation.[75] Like other citizens, this group is subject to the jurisdictions of the state and local governments where they reside.

The consequences of imposing a strict scrutiny standard of review and a compelling interest/least restrictive means test on the acts of states and their subsidiary units of government would, the Court in *Boerne* asserted, have far-reaching and debilitating effects on federalism:

> Laws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise. . . . Even assuming RFRA would be interpreted in effect to mandate some lesser test, say, one equivalent to intermediate scrutiny, the statute nevertheless would require searching judicial scrutiny of state law with the attendant likelihood of invalidation. This is a considerable intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens.[76]

In more recent cases such as *New York v. United States*[77] and *Printz v. United States*,[78] the Court has shown an increased willingness to proscribe the extent to which Congress can compel state enforcement of federal regulatory laws. In *New York*, the Court held that the "take title" provision of the low-level radioactive policy amendments act exceeded congressional powers under the Spending and Commerce Clauses (the same authorities on which Congress relied in RLPA) where they had the effect of coercing the states to choose between "either accepting ownership of waste or regulating according to the instructions of congress," both of which compelled the state to "regulate according to one federal instruction," thus "infringing upon the core of state sovereignty reserved by the Tenth Amendment."[79]

Printz involved a challenge to provisions of the Brady Handgun Violence Prevention Act that required state chief law enforcement officers

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74. City of Boerne v. Flores, 521 U.S. 507, 534 (1997).
75. GETCHES ET AL., *supra* note 13.
76. *Boerne*, 521 U.S. at 534.
77. 505 U.S. 144 (1992).
78. 521 U.S. 898 (1997).
79. *See* New York v. United States, 505 U.S. at 174-77.

to conduct criminal background checks on prospective handgun purchasers.[80] In holding that the provisions violated the Tenth Amendment, the Court found that the act had the effect of conscripting state officers to administer a federal regulatory program and concluded:

> We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States' officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command that the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policy-making is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.[81]

It is hard to imagine that the Court would be much more enthusiastic about a federal law that intentionally intruded on a traditional area of state and local authority such as land use regulation by imposing a level of constitutional scrutiny that the Court itself has already stated is unnecessary if those regulations are generally applicable, facially neutral regarding religion, and rationally related to a legitimate governmental purpose.[82] Indeed, a defining element of the Rehnquist Court's jurisprudence, most recently demonstrated in *United States v. Morrison*,[83] has been its vigilance in proscribing the limits of congressional authority to legislate and regulate in areas it considers more properly left to the states.[84]

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80. *Printz*, 521 U.S. at 902.

81. *Id.* at 935.

82. *See Boerne*, 521 U.S. at 535 ("It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs.").

83. 529 U.S. 598 (2000) (upholding dismissal of petitioner Brzonkala's claims under the Violence Against Women Act, 42 U.S.C. § 13981, against petitioners who allegedly raped her, and holding that the act, which provided a federal civil remedy for gender-motivated violence, was an unconstitutional use of congressional authority under both the commerce clause (for failure to establish that gender-motivated violence had a sufficiently substantial effect on interstate commerce) and § 5 of the Fourteenth Amendment (because it was not directed at remedying discriminatory conduct by the state or state actors)).

84. *See generally* Steve France, *Laying the Groundwork*, A.B.A. J., May 2000, at 40, 40-42.

RLPA's reliance on congressional authority under the spending clause[85] was also problematic. Under the Court's holding in *South Dakota v. Dole*,[86] Congress can attach conditions to the receipt of federal funds by states, as long as those conditions are: (1) "in pursuit of the general welfare;" (2) imposed and stated "unambiguously;" (3) related "to the federal interest in particular national projects or programs;" and (4) not independently barred by "other constitutional provisions."[87]

Curiously, while RLPA explicitly applied to any governmental program or activity that received federal funding or where a burden on Free Exercise or its removal affects Commerce[88] — thus fulfilling the second *Dole* condition — it clearly stated: "Nothing in this section shall be construed to authorize the United States to deny or withhold Federal financial assistance as a remedy for a violation of this act."[89] Further, RLPA's rules of construction did not allow any of its provisions to "authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance."[90] Consequently, it appeared to simultaneously proffer a *Dole* rationale and then render it irrelevant.

Even if RLPA's federal funding exceptions had not swallowed its rule, its Spending Clause authority would have failed to meet the fourth prong of the *Dole* standard. The Bill suffered from the same fundamental separation of powers problem that afflicted RFRA. Its primary purpose was to statutorily prescribe not merely the enforcement but the *substance* of a constitutional right. As if they could not take the Supreme Court's "no" in *Boerne* for an answer,[91] RLPA's proponents again relied in part on congressional powers to enforce constitutional rights under Section 5 of the Fourteenth Amendment.[92] Congress would do well, however, to recall the counsel of the Court in *Boerne*:

> 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

85. *See* U.S. CONST. art. I, § 8, cl. 1.

86. 483 U.S. 203 (1987) (holding that 20 U.S.C. § 158, which directed the secretary of transportation to withhold five percent of federal highway funds otherwise due a state if that state permitted the purchase or public possession of alcoholic beverages by any person under age 21, neither violated the Twenty-First Amendment nor congressional authority under the spending clause, where the Twenty-First Amendment merely banned *direct* federal regulation of drinking ages and Congress had the authority to attach conditions to the states' receipt of federal funds).

87. *Id.* at 207-08.

88. *See* H.R. 1691, 106th Cong. § 2(a)(1), (2) (1999).

89. *Id.* § 2(c).

90. *Id.* § 5(d)(1).

91. *See supra* note 36.

92. *See* H.R. REP. NO. 106-219, at 17-18, 24-25 (1999).

> 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* (emphasis supplied).[93]

Another area of potential problems for RLPA was its provision specifically addressing land use regulation.[94] RLPA's proponents correctly pointed out that (at least in general), "religions are practiced by communities of believers," and the ability of communities to assemble for worship is therefore a core element of the right of Free Exercise.[95] They asserted that many zoning regulations acted as obstacles to communities of faith that wished to build or expand facilities. These included:

(1) regulations that limited church[96] construction to areas zoned residential, creating practical and financial difficulties in obtaining necessary space;

(2) regulations that required churches to obtain special use permits or barred them from building or establishing themselves in areas zoned for commercial activity;

(3) regulations that were so broadly and vaguely worded that they gave local officials and boards excessive discretion, which too often included the discretion to exercise their religious prejudices, particularly against those who belong to minority religions.[97]

The first two of these problems appear to be more of a function of history, politics and fiscal policy than anti-religious bigotry. Many zoning laws were written in an era when people attended churches immediately in their neighborhoods, long before the automobile, cultural changes and suburban sprawl facilitated the growth of "mega churches" (i.e., those with tens of thousands of members) or metropolitan congregations (those that draw the majority of their membership from outside of the areas in which they are located). Historically, churches were often zoned into residential areas to make it easier for people to walk to services and help congregations to fulfill their roles as loci of community (and often ethnic or racial) cohesion and social activity.

The financial motive for both the regulations limiting church construction to residential areas and restricting or even prohibiting in areas zoned commercial is very simple: churches do not pay property taxes, and many smaller towns and suburbs are concerned that an influx of churches —

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93. City of Boerne v. Flores, 521 U.S. 507, 535-36 (1997) (citing Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 177 (1803)).

94. *See* H.R. 1691 § 3(b).

95. H.R. REP. NO. 106-219, at 18.

96. Unless otherwise specified, the term "church" is used here generically and encompasses mosques, temples, synagogues, and other houses of worship.

97. *See* H.R. REP. NO. 106-219, at 18-20.

populated by people who live elsewhere — will drive down the property tax revenues on which they rely to support their schools, provide police and fire protection and other services. Such declines in revenues can force local officials to choose between the politically unpalatable options of cutting valued governmental services or raising property taxes. As these considerations demonstrate, the challenges faced by churches that want to build, expand or relocate in residential or commercial areas may be more generally the result of zoning laws that have failed to catch up with changing demographic and social patterns and political calculations than with religious bigotry.

The third problem raised by RLPA's proponents — vaguely worded regulations that give too much discretionary power to officials and bodies that make zoning and similar decisions — is potentially more problematic. They contend that the "virtually unlimited discretion" exercised by local land use regulators creates a system of double standards which discriminates against churches in general and creates particular difficulties for minority religious groups, who may not have the financial resources to afford protracted legal challenges to those decisions.[98] In sum, the problem is this: "land use regulation is commonly administered through individualized processes not controlled by neutral and generally applicable rules. The standards in individualized land use regulations are often vague, discretionary and subjective."[99]

On that last point, it seems that RLPA's advocates overstated their case. If, as they alleged, the problem is really a failure to have neutral and generally applicable laws, then *Smith* does not apply and those who wish to challenge such regulations on Free Exercise grounds are presumably free to insist on application of the compelling interest/least restrictive means test *without* relying on RLPA.

If the discretionary acts of land use regulators are really discriminatory acts, there are already existing laws and precedents through which they may be attacked. Where, as RLPA's supporters found, religious discrimination may also be a surrogate for racial or ethnic discrimination,[100] it can be attacked on other grounds (e.g., equal protection). Further, the Court has also addressed this issue in a case that it decided several years ago, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah.*[101] A review of this case demonstrates that it may also be

98. *Id.* at 20.

99. *Id.* at 24.

100. *See id.* at 23 n.111 (noting, inter alia, a witness' report of a case in which the mayor instructed his city manager to deny a land use permit to a church because, "we don't want spics in this town").

101. 508 U.S. 520 (1993).

used to challenge land use regulations that may discriminate against religious groups.

The case involved a community of practitioners of Santeria, a religion which developed during the era of the slave trade in the Caribbean and fuses elements of the religion of Yoruba people of West Africa and Roman Catholicism.[102] In 1987, the Church of the Lukumi Babalu Aye (church), which was formed in 1973, leased land in Hialeah, a city located in south Florida, and announced plans to build a place for worship, along with a school, cultural center and museum, all designed to "bring the practice of the Santeria faith, including the ritual of animal sacrifice, into the open."[103]

The reaction by many people in Hialeah was swift and negative. It prompted an emergency meeting of the city council and resulted in actions ranging from the passage of a resolution that registered not only a "concern" but also the intent of the city to ban "any and all acts of any religious groups which are inconsistent with public morals, peace or safety,"[104] to a series of ordinances incorporating provisions of Florida statutes prohibiting animal cruelty[105] and defining "sacrifice"[106] and "slaughter"[107] in manners clearly directed at Santeria practices that members of the faith believed were absolutely essential.[108]

Faced with public hostility and the prospect of having their religious practices subject to criminal prosecution, the church and its priest filed suit in federal court, claiming, inter alia, that the actions of the city and its officials violated their rights under the Free Exercise Clause of the

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102. *See id.* at 524 ("When thousands of members of the Yoruba people were brought as slaves from Western Africa to Cuba, their traditional African religion absorbed significant elements of Roman Catholicism. The resulting syncretion, or fusion, is Santeria, 'the way of the saints.' The Cuban Yoruba express their devotion to spirits, called rishas, through the iconography of the Catholic saints, Catholic symbols are often present at Santeria rites, and Santeria devotees attend the Catholic sacraments . . . . The Santeria faith teaches that every individual has a destiny from God, a destiny fulfilled with the aid and energy of the orisha. The basis of the Santeria religion is the nurture of a person relation with the orishas, and one of the principal forms of devotion is an animal sacrifice.").

103. *Id.* at 525, 526.

104. *Id.* at 526 (quoting Resolution 87-66).

105. *See id.* at 526-27 (citing and quoting provisions of FLA. STAT. ch. 828 (1987)).

106. *See id.* at 527-28 ("Ordinance 87-52 defined 'sacrifice' as 'to unnecessarily kill, torment, torture or mutilate an animal in a public or private ceremony not for the primary purpose of food consumption,' and prohibited owning or possession of an animal 'intending to use such animal for food purposes.' . . . The ordinance contained an exemption for slaughtering by 'licensed establishment[s]' of animals 'specifically raised for food purposes.'").

107. *See id.* at 528 ("The final ordinance, 87-72, defined 'slaughter' as 'the killing of animals for food' and prohibited slaughter outside of areas zoned for slaughterhouse use.").

108. *See id.* at 525 ("According to Santeria teaching, the orishas are powerful but not immortal. They depend for survival on the sacrifice.").

Constitution.[109] The district court ruled in favor of the defendants, concluding that the effects of the ordinances on the church and its members were merely "incidental to their secular purpose and effect."[110] The Court found that the city's actions were justified by four compelling interests: (1) prevention of a health risk; (2) avoidance of emotional trauma to children who would witness the sacrifice; (3) prevention of animal cruelty; and, (4) restriction of animal slaughter to designated areas.[111] In a one-paragraph per curiam opinion, the United States Court of Appeals for the Eleventh Circuit affirmed.

The Supreme Court of the United States, however, reversed the lower courts and found that "the challenged laws had an impermissible object; and in all events the principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs."[112] Even if the laws at issue were facially neutral insofar as terms such as "sacrifice" and "ritual" had arguably secular as well as religious meanings, the Court maintained that "the Free Exercise Clause protects against governmental hostility which is masked, as well as overt."[113] It found that the various ordinances constituted a "religious gerrymander," that is, they created burdens that singularly fell on adherents to Santeria and their practices but exempted others.[114]

The Court pointed out that, under *Smith*, when laws and regulations represent a system of "individualized governmental assessment for the reasons for the relevant conduct"[115] and allow for the granting of individualized exemptions, governments may not refuse to grant such exemptions for religiously motivated conduct in the absence of a compelling

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109. *See id.* at 528.

110. *Id.* at 529 (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 723 F. Supp. 1467, 1484 (S.D. Fla. 1989)).

111. *See id.* at 529-30.

112. *Id.* at 524.

113. *Id.* at 534.

114. *See id.* at 534-38. Regarding the city's incorporation of the Florida animal cruelty statute, for example,

> killings for religious reasons are deemed unnecessary, whereas most other killings fall outside the prohibition. The city, on what seems to be a per se basis, deems hunting, slaughter of animals for food, eradication of insects and pests, and euthanasia as necessary . . . . Respondent's application of the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons . . . . Thus religious practice is being singled out for discriminatory treatment.

Id. at 537-38.

115. *Id.* at 537 (quoting Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 884 (1990)).

interest.[116] In addition, governments may not, as the City of Hialeah did with its "necessity" test regarding animal killings, prohibit conduct that is religiously motivated while granting exemptions for that same conduct has more secular motivations.[117]

Interestingly, in testing whether the city's ordinances were neutral in their objectives, the Court also utilized an equal protection form of analysis.[118] The object of the laws could be determined from both direct and circumstantial evidence, including: (1) the historical background of the governmental decision at issue; (2) the chronology of events leading to that decision; and, (3) the legislative or administrative history of the decision, "including contemporaneous statements made by the members of the decision-making body."[119] Utilizing such sources, the Court found ample evidence of hostility toward the church and Santeria.[120]

The Court also found that the City of Hialeah ordinances not only failed the neutrality test but were also not generally applicable because, as already noted,[121] they were underinclusive by failing to proscribe other, secularly motivated forms of conduct that endangered their proffered governmental interests.[122] The Court concluded:

> Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling.[123]

Church of the Lukumi Babalu Aye provides plaintiffs wishing to challenge land use regulations on Free Exercise grounds a useful framework by which to litigate their claims. The House Judiciary Committee's report supporting RLPA, for example, noted:

> [an] attorney specializing in land use litigation testified that it is not uncommon for ordinances to establish standards for houses of worship differing from those applicable to other

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116. *See id.*

117. *See id.*

118. *See id.* at 540 (citing use of such analysis in the Establishment Clause context in Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

119. *See id.* (citing Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266, 267-68 (1977)).

120. *See id.* at 541. For example, at a meeting of the Hialeah city council, the body's president openly asked, "What can we do to prevent the church from opening?" The chaplain of the police department referred to Santeria as "foolishness," "an abomination to the Lord," and a form of demon worship.

121. *See supra* note 114.

122. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 536-38.

123. *Id.* at 546-47.

> places of assembly, such as (whether there) are conditional uses or not permitted in any zone . . . . [A survey showed that] uses such as banquet halls, clubs, community centers, funeral parlors, fraternal organizations, health clubs, gyms, places of amusement, recreation centers, lodges, libraries, museums, municipal buildings, meeting halls, and theaters are often permitted as of right where churches require a special use permit, or permitted on special use permit where churches are wholly excluded.[124]

Where double standards exist, churches can challenge such ordinances and the consequent decisions of bodies regulating land use by asserting the secular objects of such regulations fail to meet *Church of the Lukumi Babalu Aye's* standards of not merely facial but practical neutrality and general applicability under an equal protection analysis. For example, if a zoning board claims that churches are denied special use permits to locate in particular areas because it has a compelling interest in preserving the local tax base but it maintains a practice of granting such permits to other tax-exempt organizations (e.g., charitable organizations), such disparate treatment could be successfully challenged, particularly if there is evidence of animus toward churches in general, toward a particular denomination or church,[125] or because of its racial or ethnic makeup.[126]

Despite what even its detractors concede is not only a worthy goal but an imperative in the fight for the preservation of religious liberty against the coercive powers of government,[127] RLPA was not the means by which that end was likely to be achieved. Had RLPA become law, it was likely to face serious constitutional challenges and ultimately the same fate as its infirm predecessor, RFRA. It may not have been necessary to overcome the very

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124. H.R. REP. NO. 106-219, at 19, 20 (1999).

125. *See, e.g., id.* at 23 ("The subcommittee [on the Constitution] also received testimony of overt religious bigotry in zoning hearings. One witness described a hearing in which 'an objector turned to the people in the audience wearing skull caps and said, 'Hitler should have killed more of you . . . .' Another witness discussed a case involving the application for a permit by the Family Christian Center, where a neighbor implored, 'Let's keep these god-damned Pentecostals out of here.'").

126. *See, e.g., id.* at 23 n.111 ("Wayne, New Jersey denied a permit to a black church, after one official opposed the permit on the ground that the city would soon look like Patterson, a predominately African-American city nearby . . . Clifton, New Jersey denied permits for a black mosque four times, offering parking concerns as the reason, then approved a white church nearby that raised the very same parking issues.").

127. *See id.* at 40 ("Legislation restoring [the compelling interest/least restrictive means test and] this appropriate balance between the rights of individuals and minority religions, including the religions of racial and ethnic minorities with different beliefs, on the one hand, and the prerogatives of the majority on the other, should remain at the top of the legislative agenda.").

problems it purported to address. Ultimately, it may have complicated and hindered, rather than vindicated, Free Exercise claims.

V. Making Free Exercise Claims in the Shadows of Smith and Boerne

Despite *Smith*, the proscription of RFRA and the likely demise of RLPA (had it been enacted), Native Americans still have several options available for asserting and having courts sustain claims against governmental conduct that substantially burdens their right to free exercise of their religion. They may still assert constitutional claims under certain circumstances, rely on statutory protections, and also use their growing political power to influence legislative bodies to more fully accommodate their religious practices.

Just as one can lament the Court's holding in *Smith* as "a wholesale overturning of settled law concerning the Religion Clauses of our Constitution"[128] or as "a product of the overreaction to the serious problems the country's drug crisis has generated,"[129] one also can note the limits of the decision. *Smith* applies only in cases involving the enforcement of neutral laws of general applicability.[130]

As the Court demonstrated in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[131] laws that evince not only an effect but also an intent to discriminate against religious practices can still be successfully challenged on Free Exercise grounds. Establishing such intent, of course, can be a considerable challenge. To do so demands a thorough examination of the statutory language, legislative history, and other background of the enactment at issue.

In *Church of the Lukumi Babalu Aye*, the petitioners were able to point to the challenged ordinance's use of the words "sacrifice" and "ritual" as suggesting that it was drafted to proscribe particular religious practices and not particular conduct irrespective of its (lack of) religious purpose.[132] The Court found that, while this evidence was not in itself dispositive but merely probative, it buttressed other evidence of intentional discrimination on the record, including other ordinances providing exceptions for other religious groups engaging in essentially the same conduct the ordinance at issue

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128. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 908 (1990) (Blackmun, J., dissenting).

129. *Id.*

130. *Id.* at 874 ("This case requires us to decide whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its *general criminal prohibition* on the use of that drug, and thus permits the state to deny unemployment benefits to persons dismissed from their jobs because of religiously inspired use." (emphasis supplied)).

131. 508 U.S. 520 (1993).

132. *Id.* at 534.

sought to proscribe, as well as manifestations of public hostility against *Santeria* and its adherents at public hearings.

One of the notable aspects of the *Church of the Lukumi Babalu Aye* case was the role that prejudice and other forms of ignorance played in the disparate treatment of the devotees of a minority religion. American Indians who practice the native religions of their ancestors face a similar lack of appreciation, if not outright hostility. This is evident, for example, in the area of land use regulation. While the belief in a sacred place and the practice of pilgrimage is common to many religions,[133] Native Americans have the distinction — and the curse — of having all of their sacred sites located in U.S. territory and thus subject to domestic land regulations. In addition, as Justice Brennan noted in his dissent in *Lyng*:

> A pervasive feature of [the Native American] lifestyle is the individual's relationship with the natural world . . . . Tribal religions regard creation as an ongoing process in which they are morally and religiously obligated to participate . . . . Where dogma lies at the heart of Western religions, Native American faith is inextricably bound to the use of the land. *The site-specific nature of Indian religious practice derives from the Native American perception that the land is itself a sacred, living being* (emphasis supplied).[134]

Courts considering the Free Exercise claims of Native Americans and other religious minority litigants should pay heed to the example set out in *Church of the Lukumi Babalu Aye*, and carefully evaluate their practices to discern whether facially neutral laws are really neutral in practice. They should examine whether the general applicability and, if relevant, the failure of those laws to grant exemptions for religious practice are founded more on ignorance than on justice.

While *Church of the Lukumi Babalu Aye* holds out some hope for religious minorities whose practices are limited by governmental action, it will not be a panacea. A brief survey of relatively recent case law reveals that the bulk of Native American Free Exercise claims have involved at least facially neutral laws and regulations of general applicability that have, nevertheless, had a disparate impact on their religious practices. These *Smith*-class cases include disputes over land use,[135] prison grooming and

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133. Examples of such customs include the Roman Catholic pilgrimages to Rome, Lourdes, Jerusalem, etc., or the *hajj* to Mecca — one of the five pillars of Islamic observance.

134. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 460-61 (1988) (Brennan, J., dissenting).

135. *See, e.g., id.*; *see also* Crow v. Gullet, 706 F.2d 856 (8th Cir. 1983); Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980) (holding that federal land management policies and practices in Rainbow Bridge National Monument area and Glen Canyon Dam and Reservoir areas did not violate rights to free exercise of Indian claimants, who alleged, inter alia, that those

dress regulations,[136] and welfare regulations.[137] This survey, and a consideration of five of the cases following it, illustrate the sobering reality that the First Amendment claims of Native Americans have not been accorded great deference in either the pre- or post-*Smith* periods. In truth, there has never really been a "golden era" of Native American religious liberty.

Case (Year)	*Challenged Law/Regulation*	*Prevailing Party*
Top Sky (1976)[138]	species protection	government
Sequoyah (1980)[139]	land, water use	government
Badoni (1980)[140]	land use	government
Wilson (1983)[141]	land use	government
Crow (1983)[142]	land use	government
Means (1985)[143]	land use	Native Americans
Standing Deer (1987)[144]	prison (dress)	government
Lyng (1987)[145]	land use	government
Smith (1990)[146]	criminal (drugs)	government
Iron Eyes v. Henry (1990)[147]	prison (grooming)	government
Native Village of Tanana (1991)[148]	land use (hunting)	government

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policies resulted in the drowning of their gods and denial of access to their sacred places).

136. *See, e.g.*, Iron Eyes v. Henry, 907 F.2d 810 (8th Cir. 1990); *see also* Standing Deer v. Carlson, 831 F.2d 1525 (9th Cir. 1987).

137. *See, e.g.*, Bowen v. Roy, 476 U.S. 693 (1986).

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

139. Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159 (6th Cir. 1980) (affirming dismissal of suit brought by Cherokee Indians to enjoin impoundment of reservoir, against the tribe's claim that the land to be flooded was sacred to their religion, where the tribe failed to produce evidence that the land at issue was central or indispensable to their religious practices).

140. Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980) (affirming summary judgment for defendants in suit brought by individual Indians and tribal groups, against their claim that impounding water to form Lake Powell and allowing tourists to visit the Rainbow Bridge National Monument violated their rights to free exercise).

141. Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983) (holding that U.S. Forest Service decision permitting private interests to develop and expand government-owned ski area in the San Francisco Peaks in the Coconino National Forest did not violate rights of Navajo and Hopi tribes under the First Amendment or the American Indian Religious Freedom Act, where they retained access to the peaks and the ability to conduct ceremonies and gather sacred objects).

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

143. United States v. Means, 627 F. Supp. 247 (W.D. S.D. 1985) (ordering federal government to issue special use permit allowing indians to use portion of Black Hills for religious camp where governmental decision initially denying the permit was arbitrary and capricious and burdened their rights to free exercise of religion under the First Amendment).

144. Standing Deer v. Carlson, 831 F.2d 1525 (9th Cir. 1987).

145. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

146. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990).

147. Iron Eyes v. Henry, 907 F.2d 810 (8th Cir. 1990).

148. Native Village of Tanana v. Cowper, 945 F.2d 409 (9th Cir. 1991) (upholding Alaska

Case (Year)	Challenged Law/Regulation	Prevailing Party
Hamilton (1996)[149]	prison (grooming)	government
Hugs (1997)[150]	species protection	government
Miccosukee Tribe (1997)[151]	land/water use	government
Kickapoo Traditional Tribe (1999)[152]	public health (autopsy)	government

At the outset of this analysis, it must be conceded that not every Free Exercise claim is legitimate. In *United States v. Top Sky*,[153] for example, a father and son who were members of the Chippewa-Cree Tribe appealed their convictions for violating provisions of the Bald Eagle Protection Act[154] for selling eagle parts and feathers to undercover federal officers posing as agents for East Coast collectors.[155] Among the grounds for their appeal was the claim that the act unconstitutionally burdened their free exercise of religion, with the son maintaining that such exchanges among Indians were not considered commercial in nature but rather were part of their religious practices.[156]

The Court, however, found that since the laws were criminal in nature and thus generally applicable, the commercial sale of eagle feathers was in fact condemned by the Native American church, and the government had established a permit system to provide exemptions for the use of eagle feathers and parts for religious use, the appellants had no standing to assert their Free Exercise claims.[157] While the right to religious liberty is precious, it cannot serve as a cover for criminal activity.

It is quite safe to state, however, that bogus religious claims like those proffered in *Top Sky* are the exception rather than the rule. In most cases, the

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hunting regulations restricting killing of moose out of season against claim of Tanana chiefs that, inter alia, the regulations violated their Free Exercise rights).

149. Hamilton v. Schiro, 74 F.3d 1545 (8th Cir. 1996) (reversing district court injunction and upholding prison regulations that limited Indian inmate's hair length and denied him access to sweat lodge against his claim that such actions violated his rights under the Free Exercise Clause and RFRA).

150. United States v. Hugs, 109 F.3d 1375 (9th Cir. 1997) (affirming convictions of Native American defendants for violations of the Bald and Golden Eagle Protection Act against their claims that, inter alia, the act violated their Free Exercise rights under the First Amendment and RFRA, where the act was the least restrictive means of serving a compelling governmental interest).

151. Miccosukee Tribe of Indians v. United States, 980 F. Supp. 448 (S.D. Fla. 1997) (holding that alleged refusal of Army Corps of Engineers and various federal agencies to alleviate flooding on three parcels of land belonging to Miccosukee Tribe did not, inter alia, infringe its right to free exercise of religion).

152. Kickapoo Traditional Tribe v. Chacon, 46 F. Supp. 2d 644 (W.D. Tex. 1999).

153. 547 F.2d 483 (9th Cir. 1976).

154. *See* 16 U.S.C. § 668 (1994).

155. *See Top Sky*, 547 F.2d at 484.

156. *See id.* at 485.

157. *See id.* at 484, 485, 488.

religious claims of Native Americans are far more serious, often contrasting the religious interests and understandings of the majority with those of minorities.

In *Crow v. Gullet*[158] the competing interests at issue were the recreational aspirations of the general public and the religious devotions of members of the Lakota and Tsistsistas Nations. A geological formation that was a traditional religious site for the tribes had been purchased by the State of South Dakota and developed into a park and campground with appurtenant roads, parking lots, machine shop and walkways.[159] The state required all visitors to purchase a permit in order to camp, but it gave those camping for ceremonial reasons a free ten-day permit.[160]

The tribes brought suit in federal court, claiming that the development and regulated use of the park violated their rights not only under the Free Exercise Clause but also under the American Indian Religious Freedom Act of 1978 (AIRFA),[161] as well as provisions of international law.[162] They claimed that the actions of the state and its officers, as well as the resultant development and recreational traffic, diminished the spiritual value of their ceremonial site and thus impeded their ability to perform their religious rites without disruption.[163]

The United States Court of Appeals for the Eighth Circuit affirmed the decision of the district court granting the defendants' motion for summary judgment.[164] The Eighth Circuit held that the tribes' Free Exercise interests were "outweighed by compelling state interests in preserving the environment and the resource from further decay and erosion, in protecting the health, safety and welfare of park visitors and in improving public access to this unique geological and historical landmark [Bear Butte]."[165] It also found that

158. 706 F.2d 856 (8th Cir. 1983).

159. *See id.* at 857.

160. *See id.*

161. 42 U.S.C. § 1996 (1994).

162. *See Crow*, 706 F.2d at 857. The court cited the Universal Declaration of Human Rights, U.N.G.A. Res. 217, art. 18 (Dec. 10, 1948) ("Everyone has the freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with other and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.") and the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, art. 18 (Dec. 16, 1966) (ratified by U.S., June 8, 1992) ("(1) [incorporates art. 18 of the universal declaration verbatim]. (2) No one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice. (3) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. (4) The states parties to this covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.").

163. *See Crow*, 706 F.2d at 858.

164. *See id.* at 858-59.

165. *Id.* at 858.

the tribes' statutory and international law claims "did not establish any legal rights or causes of action beyond the First Amendment."[166]

Crow v. Gullet demonstrates that the mere application of a compelling interest test does not necessarily mean an increased likelihood of vindication for Native American Free Exercise claimants. It also reveals the limitations of using international declarations and treaties; in practice, they function at best as secondary authority. It should be noted that, at the time *Crow* was litigated, one of the treaties upon which the plaintiffs relied had not yet been ratified. When it finally was, it contained reservations and conditions that essentially affirmed the courts' decisions about the limitation on causes of action.[167]

If the prospects of success for Indian Free Exercise claimants are daunting in the free world, the two cases that follow reveal that they are even more so in the bowels of the corrections system. In *Standing Deer v. Carlson*,[168] a group of Indian inmates at a federal prison in California challenged regulations that banned them from wearing headgear, including religious headbands, in the prison dining room.[169] They claimed that the regulations violated their rights under the First Amendment and AIRFA by: (1) forcing them to take off their headbands, which they claimed were articles of clothing of religious significance; (2) not providing an exception for such religious use; and, (3) not consulting with them prior to the implementation of a policy that would have a negative impact on their religious practices.[170]

Prison officials defended their actions by asserting that they were necessary to maintain prison discipline, to address inmate complaints about unsanitary conditions in the dining room, and to avoid potentially dangerous confrontations over dirty headbands or the inspections required to ensure that they were free of contraband.[171] They also noted that, since its implementation, the regulation had been uniformly enforced.[172]

In affirming the trial court's decision to grant the defendants' motion for summary judgment, the United States Court of Appeals for the Ninth Circuit found that neither the First Amendment nor AIRFA were violated by the prison regulation. The court applied the rational basis test articulated by the Supreme Court of the United States in *O'Lone v. Estate of Shabazz*: "[w]hen

166. *Id.*

167. *See supra* note 162; *see also U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights*, 138 CONG. REC. S4781 (1991) (conditioning the Senate's advice and consent subject on a proviso that, "nothing in this covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the constitution of the United States as interpreted by the United States").

168. 831 F.2d 1525 (9th Cir. 1987).

169. *See id.* at 1526.

170. *See id.* at 1527.

171. *See id.*

172. *See id.* at 1526-27.

a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[173] The court cited several factors used to determine whether a challenged regulation satisfied the test:

> (1) whether the regulation had a logical connection to the penological interests invoked to justify it;
>
> (2) whether the prisoners remained free to participate in other religious activities;
>
> (3) whether accommodating the prisoners' asserted rights would have adverse affects on the institution; and
>
> (4) whether ready alternatives that fully accommodated the prisoners' rights could be implemented with a *de minimis* impact on valid penological interests.[174]

The Ninth Circuit concluded that the reasons of safety, discipline, and order proffered by prison officials satisfied the first three of these factors.[175] It also found that the inmate-plaintiffs failed to point to "an obvious, easy alternative" that would satisfy the last factor.[176] As in *Crow*, the court also found that AIRFA did not provide the plaintiffs with a cause of action.[177] In addition, the statute did not require prison officials to consult with Indian inmates before drafting or implementing regulations that might have an adverse impact on their religious practices; rather, it merely directed them "to familiarize themselves with Native American religious values in order to avoid unwarranted and unintended interference with traditional native religious practices."[178]

The other prison case considered here, *Iron Eyes v. Henry*,[179] generally followed the same pattern and disposition as *Standing Deer*. *Iron Eyes*, however, has some distinctive and disturbing elements that deserve additional consideration. The case involved a member of the Standing Rock Tribe of Sioux, who, while serving time in a Missouri facility, challenged prison grooming regulations that required "prisoners to wear their hair above their shirt collars."[180] Pursuant to that regulation, prison officials twice cut his hair, once while he was shackled and handcuffed in disciplinary segregation for refusing to comply.[181]

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173. *Id.* at 1528 (quoting O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987)).
174. *Id.* (citing Turner v. Safley, 482 U.S. 78, 89-91 (1987)).
175. *See id.* at 1528-29.
176. *See id.* at 1529.
177. *See id.* at 1529-30.
178. *Id.*
179. 907 F.2d 810 (8th Cir. 1990).
180. *See id.* at 811.
181. *See id.* at 811-12.

Iron Eyes claimed that haircuts — which he had had only five times in twenty-seven years (including the two times in prison) — violated a traditional practice of his religion by compelling him to commit an offense against the Creator and thus violated his right to free exercise under the First Amendment.[182] In affirming the lower court's decision granting the defendants' motion for summary judgment, the United States Court of Appeals for the Eighth Circuit found that the grooming regulations were neutral and rationally related to legitimate penological objectives: the preservation of prison discipline; administrative efficiency; the prevention of the smuggling of contraband; and, the facilitation of prisoner identification.[183]

While the result in *Iron Eyes* may not be remarkable, some of the facts of the case bear further exposition. Missouri prison regulations did provide for an exemption from the grooming regulations for Native Americans, and Iron Eyes had applied for it but was denied.[184] The Eighth Circuit majority noted that two other Native American inmates at the same facility had applied for the exemption and, like Iron Eyes, their claims were denied.[185] As the dissent pointed out, *no* prisoner at that facility had *ever* been granted the exemption.[186]

What was more striking about this case was both the district and the appellate courts' apparent disregard for indications in the record that Iron Eyes was far more than a victim of a neutral and generally applicable regulation. The plaintiff's pro se complaint set forth allegations of rank prejudice against him because of his heritage and religion:

> I tried to explain to Maj. Harris that I am a full-blooded Native American Indian and Maj. Harris told me that I was not an Indian as there are no Indians in his prison and that I was really a white boy trying to get over on him . . . . Well, Dan Henry (assistant superintendent), Maj. Harris, and Capt. Rosenburg and the guards all took my leg shackles and handcuffs real hard and held me down and this inmate barber named Earl Wells came over and cut my hair into a raggedy mess. that is when they all started laughing and Maj. Harris said that now I could get some white religion . . . . I have filed many grievances about it but they tell me that I am not a nigger and that if I was I could have anything I want from the place because of the court.[187]

182. *See id.* at 811.
183. *See id.* at 814-16.
184. *See id.* at 812.
185. *See id.* at 816.
186. *See id.*
187. *Id.*

It appears from *Iron Eyes* that the courts defined "neutrality" in extremely broad terms.

The most recent of the cases considered here, *Kickapoo Traditional Tribe v. Chacon*,[188] concerned a law that fits a much more conventional definition of neutrality. Like all the other governmental actions considered here, it was upheld against the Free Exercise claims of Native American plaintiffs. The issue was whether the tribe could, on Free Exercise grounds, enjoin the State of Texas and Martha Chacon, a justice of the peace, from disinterring the body of a tribal member in order to conduct an autopsy.[189]

The case arose from the sudden death of Norma Rodriguez in Eagle Pass, Texas. When Chacon arrived at the scene of the death, the sheriff's deputies informed her Rodriguez was a known abuser of inhalants; they suspected that she died from spray paint poisoning.[190] Meanwhile, the victim's grieving mother claimed that somebody killed her daughter.[191] Faced with a lack of solid evidence to support either scenario, Chacon requested an autopsy.[192] Almost immediately, however, she was besieged with calls from tribal members opposing the procedure; and the tribe's chief instructed the funeral director in charge of the body that no such procedure was to be performed.[193]

After another meeting with the mother of the victim — who did not oppose the autopsy and continued to insist that her daughter was murdered — as well as members of the tribe who proffered alleged evidence that the victim had indeed died of paint poisoning, Chacon remained convinced of the need for an autopsy. She persisted in seeking to obtain it even after a call from the tribe's attorney explaining why the tribe's religious beliefs did not permit it.[194] Before the procedure could be performed, however, tribal members took the body of the victim from the funeral home and buried it on tribal land.[195]

Chacon then ordered that the body of the victim be exhumed and the autopsy performed, but the tribe filed suit to prevent those actions and obtained a temporary restraining order from a state court to that effect.[196] The tribe claimed that permitting the exhumation and autopsy would violate both their Free Exercise rights, as well as the Native Graves Protection and Repatriation Act (NAGPRA).[197] Because of the federal questions involved,

188. 46 F. Supp. 2d 644 (W.D. Tex. 1999).
189. *See id.* at 645.
190. *See id.* at 646.
191. *See id.*
192. *See id.*
193. *See id.* at 646-47.
194. *See id.* at 647.
195. *See id.*
196. *See id.*
197. *Id.*; *see* Native Graves Protection and Repatriation Act of 1990, Pub. L. No. 101-601,

the state removed the action to federal court, seeking an order vacating the temporary restraining order.[198]

The court granted the defendants' motion and vacated the temporary injunction, thus permitting the disinterment and autopsy to go forward. The court rejected the tribe's NAGPRA claims, finding that the law "was not meant to apply to a recently buried corpse which is of no particular cultural or anthropological interest"[199] and was "inapplicable to a recently buried corpse that state authorities seek to exhume to determine the cause of death in connection with an inquest."[200]

The court was similarly not persuaded by the tribe's claim that permitting these procedures would interfere with their deeply held religious beliefs and practices and thus violate the Free Exercise Clause.[201] After acknowledging the invalidation of RFRA vis-à-vis the actions of states in *Boerne* and applying the *Smith* test,[202] the court concluded that the state law permitting justices of the peace to order inquests, exhumations and autopsies[203] was a neutral law of general applicability and, absent any evidence that Chacon's actions were motivated by anti-religious bias, did not violated the First Amendment.[204]

While the result of *Kickapoo Traditional Tribe* may be unremarkable in light of other courts' treatments of Native American Free Exercise claims, the court's opinion does contain a coda that is notable for its depth of sensitivity. Judge Garcia wrote:

> A history of recognition of and respect for Native American burial traditions sadly does not exist in this country. Instead, the development of our nation's laws regarding the handling and burial of the dead have reflected the Anglican customs and practices imported from England, the source of our common law, and not those of other cultures . . . . These laws are often drafted to provide little or no flexibility to accommodate the diverse

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104 Stat. 3048 (codified at 25 U.S.C. §§ 3001-3013 (1994)).

198. *See Kickapoo Traditional Tribe*, 46 F. Supp. 2d at 648.

199. *Id.* at 650.

200. *Id.* at 651.

201. *See id.* ("[I]t is the tribe's practice to bury deceased members before noon of the day following death. It is also the tribe's belief that the scarring of the body caused by an autopsy and the disruption of a grave damages the spirit and can have an adverse effect on the decedent's family.").

202. *See id.* at 653.

203. *Id.*; *see* TEX. CODE CRIM. P. ANN. art. 49, subch. a (Vernon Supp. 1999).

204. *See id.* at 654 ("In these circumstances, the court must conclude that article 49, on its face and in its implementation in this case, is a facially neutral law of general application. While it substantially impacts the tribe's First Amendment right to free exercise of religion, that impact does not rise to the level of a First Amendment violation.").

> traditions of persons adhering to Native American, Orthodox Jew, Hmong or other religions.[205]

In noting that other states had drafted laws requiring officials to consider the views of relatives in weighing the necessity of an autopsy, Judge Garcia suggested that "Texas, with its large and culturally diverse population, might consider enacting a similar statute."[206] However, he conceded that such a decision was "within the complete discretion of the state legislature."[207]

Faced with the limited potential of successfully litigating attacks on facially neutral and generally applicable laws that evince a legitimate governmental objective but have the effect of limiting their ability to freely exercise their native religions, American Indian claimants have sometimes found that they can better preserve those interests through legislation. Indeed, in noting exemptions for sacramental peyote use in statutes otherwise criminalizing the use of the drug, the Court in *Smith*, perhaps with an air of hope, suggested that "a society that believes in the negative protection afforded to religious belief can be expected to be solicitous of that value in its legislation as well."[208] In criticizing the "counsels of doom" by religious critics of the *Smith* decision, Professor Steven Goldberg noted:

> The truly remarkable thing about *Smith* is that after it was decided, the democratically elected Oregon Legislature showed more sympathy than the court had to religious practice. Although Native Americans make up a small percentage of the voters in Oregon, the legislature created an exception from its ban on peyote use for use in religious rituals, thus joining many states and the federal government, which had done exactly the same thing.[209]

As Professor Goldberg's analysis suggests, there is some evidence that legislatures will, if sufficiently educated and sensitized, create laws that will be sensitive to the Free Exercise claims and spiritual needs of Indians who practice their native religions. An example of such responsiveness is NAGPRA, which was cited in *Kickapoo Traditional Tribe*.[210] In general, the act:

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205. *Id.*

206. *id.* at 654-55.

207. *Id.* at 655.

208. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 890 (1990) (citing statutes in Arizona, Colorado and New Mexico excepting sacramental peyote use from the application of generally applicable drug laws).

209. GOLDBERG, *supra* note 26, at 81-82 (citing OR. REV. STAT. § 475.992(5) (1995); *Smith*, 494 U.S. at 906 (O'Connor, J., concurring in the judgment and noting, inter alia, the federal exception for sacramental peyote use in 42 U.S.C. § 1996a).

210. *See* 25 U.S.C.A. §§ 3001-3013 (West Supp. 1999).

> prohibits trade, transport or sale of Native American human remains and directs federal agencies and museums to take inventory of any Native American or Native Hawaiian remains, and if identifiable, the agency is to return them to the tribal descendants . . . . The act prohibits remains and objects from being considered archeological resources, prohibits disturbing sites without tribal consent, and imposes penalties for unauthorized excavation, removal, damage or destruction.[211]

Although a federal court in upholding the constitutionality of NAGPRA and Indian claims pursuant to its provisions has acknowledged the statute's explicit interest in preserving the "cultural patrimony,"[212] it is significant that the statute also explicitly protects "funery objects" and "sacred objects."[213] These statutory provisions suggest a realization of something else about Native American religion that is not always apparent to legislators or judges from other cultures, particularly those that have more "mainstream" religious affiliations and/or have become more assimilated into an increasingly secularized American culture.

> Much Indian religious life does not include the existence of a church, periodic meetings, ritual, and identifiable dogma. Instead, there is a pervasive quality to Indian religion which gives all aspects of Indian life and society a spiritual significance. In pursuit of traditional Indian religion, an Indian may feel compelled to relate to nature and to others in a particular way. Judicial understanding and protection of Indian religion are hindered by a general unfamiliarity with Indian spiritual life, and perhaps even intolerance for religious beliefs and practices not succinctly defined by ancient writings or a central authority familiar to european developed religious traditions.[214]

At a time when the vindication of the free exercise rights of Native Americans may increasingly fall on legislative rather than judicial shoulders, it is also important to remember that mere claims of sensitivity and good intentions are insufficient to protect those rights. A case in point is the American Indian Religious Freedom Act of 1978.[215] AIRFA declares that it

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211. GETCHES ET AL., *supra* note 13, at 788-89.

212. *See* United States v. Corrow, 119 F.3d 796 (10th Cir.), *cert. denied*, 522 U.S. 1133 (1997) (upholding conviction of appellant under NAGPRA for transporting yei b'chei ceremonial adornments against his claim that the statute was unconstitutionally vague).

213. *See* 25 U.S.C.A. § 3002(a)(1), (2) (1994) (providing that the "ownership or control of native american cultural items excavated or discovered on federal or tribal lands after november 16, 1990" be in the lineal descendants or, generally, the tribe).

214. GETCHES ET AL., *supra* note 13, at 779.

215. Pub. L. No. 95-341, 92 Stat. 469 (codified in part at 42 U.S.C. § 1996 (1994)).

shall be federal policy "to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise the traditional religions . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."[216]

As was demonstrated in *Crow v. Gullet*,[217] however, the act is little more than a congressional expression of *noblesse oblige*. It requires no more than general compliance with the requirements of the First Amendment.[218] It gives Native Americans no additional rights[219] and does not provide them with a cause of action.[220]

In the Court's opinion in *Lyng*, Justice O'Connor found that the act's ultimate impotence was not merely a matter of judicial interpretation but of legislative intent:

> Nowhere in the law is there so much as a hint of any intent to create a cause of action or any judicially enforceable right. What is obvious from the face of the statute is confirmed by numerous indications in the legislative history. The sponsor of the bill that became AIRFA, Representative Udall called it "a Sense of Congress Joint Resolution," aimed at ensuring that "the basic right of the Indian people to exercise their traditional religious practices is not infringed without a clear decision on the part of Congress or the administrators that such religious practices must yield to some higher considerations." Representative Udall emphasized that the bill would not "confer special religious rights on Indians," would "not change any existing state or federal law," and in fact "has no teeth in it."[221]

Unfortunately, what the preceding pages suggest is that in practice the Free Exercise Clause of the First Amendment has too often proved to be similarly toothless when it comes to protecting the religious freedom of Native Americans.

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

217. 706 F.2d 856 (8th Cir. 1983).

218. *See* 42 U.S.C.A. § 1996 note of decision 1 (West 1994) (stating that "[t]his section requires no more than compliance with dictates of the Freedom of Religion clause of" the First Amendment) (citing Crow v. Gullet, 541 F. Supp. 785 (1982)).

219. *See id.* § 1997 note of decision 2 ("American Indian Religious Freedom Act was meant to insure that American Indians were given protection guaranteed under First Amendment and was not intended to grant them rights in excess of those guarantees.") (citing Attakai v. United States, 746 F. Supp. 1395 (D. Ariz. 1990)).

220. *See id.* § 1996 note of decision 4 (citing Lockhart v. Kenops, 927 F.2d 1028 (10th Cir.), *cert. denied*, 112 S. Ct. 186 (1991), and Manybeads v. United States, 730 F. Supp. 1515 (D. Ariz. 1989)).

221. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 455 (1988) (quoting 124 CONG. REC. 21444, 21444-21445 (1978)).

VI. Conclusion

As the Revolutionary War neared its conclusion and the British were abandoning their efforts to hold on to their soon-to-be former colonies, American commissioners rode into villages in the country of the Shawnee Indians and declared them conquered subjects. In response to this declaration, a Shawnee reportedly replied, "God gave us this country . . . it is all ours," but he was essentially ignored.[222] Historian Thomas Fleming notes that

> this attitude led to another series of bloody encounters — until the Congress recommended in 1787 that its representatives drop their "language of superiority and command" and deal with the Indians "more on a footing of equality." Thereafter the American government attempted to follow this policy. But the tidal wave of Americans moving westward had no enthusiasm for it. Again and again the settlers' hunger for land rendered treaties null and void. In their view the Indians had joined the wrong side in the Revolution, and they had no right to equal treatment.[223]

This survey of the judicial and legislative treatment of the Free Exercise interests of Native Americans raises the question of whether, after two centuries, we as a nation have really shed this prejudice not merely in sentiment but in practice. That *Smith* may not have dealt a devastating blow to the ability of American Indians to freely practice their native religious beliefs is due more to the general disrespect that has been accorded those beliefs than to the import of that particular case. The potential help that the Religious Freedom Restoration Act may have provided to vindicate the religious rights of American Indians was significantly limited by *Boerne*, and the Religious Liberty Protection Act was not likely to pass constitutional muster if it ever became law. Legislation presents a potential avenue for buttressing the Free Exercise interests of Native Americans, but as the American Indian Religious Freedom Act shows, that path is also likely to prove rough and narrow.

The late Justice Blackmun passionately argued in his *Smith* dissent: "I do not believe that the Founders thought their dearly bought freedom from religious persecution a "luxury," but an essential element of liberty — and they could not have thought religious intolerance "unavoidable," for they drafted the religion clauses precisely in order to avoid that intolerance."[224] What the Founders intended in crafting the first amendment is certainly a critical element in discerning the scope and extent of religious liberty in the United States. Just as important, however, is an even more fundamental question, one which confronts

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222. *See* THOMAS FLEMING, LIBERTY! THE AMERICAN REVOLUTION 294 (1997).

223. *Id.*

224. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 909 (1990).

us as truly today as it confronted them over two centuries ago: who, and whose interests, will be enfolded in that protective embrace?

Addendum

On September 22, 2000, President Clinton signed into law the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).[225] Like the Religious Liberty Protection Act (RLPA) analyzed in this article, a central purpose of RLUIPA is to restore the use of the compelling interest/least restrictive means test as the standard for challenging state and local governmental land use regulation that substantially burdens religious exercise,[226] even where that burden arises from laws of general applicability.[227] It also does the same for persons residing in or confined to institutions, including prisons.[228] As with RLPA, Congress has substantially rested the applicability of this new law in the Commerce Clause.[229]

The legislative history of RLUIPA is notable for the remarkable swiftness with which it moved from its introduction in the Senate to its enactment: about ten weeks.[230] In introducing the bill for consideration in the House of Representatives, Rep. Charles Canady (R.-Fla.) said: "The legislation uses the recognized constitutional authority of the Congress to protect one of the most fundamental aspects of religious freedom, the right to gather and worship, and to protect the religious exercise of a class of people particularly vulnerable to governmental regulation, and that is institutionalized persons."[231]

Given the defects of RLPA already noted in this article and the precedents established by the Supreme Court of the United States in cases like *Employment Division v. Smith*, *City of Boerne v. Flores*, and *O'Lone v. Estate of Shabazz*, it remains to be seen whether RLUIPA will be able to withstand constitutional challenge, deliver on Congress' aspirations, and become an effective weapon for American Indians and others to vindicate their rights guaranteed under the Free Exercise Clause of the First Amendment.

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225. Pub. L. No. 106-274 (2000).

226. *See id.* § 2(a).

227. *See id.* § 2(a)(2)(A), (B).

228. *See id.* § 3.

229. *See id.* §§ 2(a)(2)(b), 3(b)(2).

230. *See Bill Summary & Status for the 106th Congress, S. 2869* <http://thomas.loc.gov/cgi-bill/bdquery/z?d106:SN02869:@@@X (visited Oct. 7, 2000) (noting that the bill was introduced in the Senate on July 13 and was signed by the President on September 22, 2000).

231. 146 CONG. REC. H7190-91 (July 27, 2000).